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IN THE SUPREME COURT OF IOWA

No. 21–0696

LS POWER MIDCONTINENT, LLC and
SOUTHWEST TRANSMISSION, LLC,

Appellants,

vs.

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

Appellees,

MIDAMERICAN ENERGY COMPANY and
ITC MIDWEST, LLC,

Intervenors–Appellees.

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

STATE APPELLEES' FINAL BRIEF

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

DAVID M. RANSCHT
BENJAMIN FLICKINGER
Assistant Attorneys General
1305 E. Walnut St., 2nd Floor
Des Moines, Iowa 50319
(515) 281-7175
david.ranscht@ag.iowa.gov
ben.flickinger@ag.iowa.gov

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ISSUES PRESENTED

I. Does a plaintiff possess standing to challenge legislation addressing electric transmission projects when no specific electric transmission project is planned, announced, or underway?

Important cases:
Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470 (Iowa 2004)
Godfrey v. State, 752 N.W.2d 413 (Iowa 2008)
Rush v. Reynolds, No. 19–1109, 2020 WL 825953 (Iowa Ct. App. Feb. 19, 2020)
LSP Transmission Holdings, LLC v. Fed. Energy Regulatory Comm'n, 700 F. App'x 1 (D.C. Cir. 2017) (per curiam)

II. Even if anticipated future competitive effect confers standing, is a lawsuit ripe before that anticipated competitive effect materializes?

Important cases:
Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470 (Iowa 2004)
Gospel Assembly Church v. Iowa Dep't of Revenue, 368 N.W.2d 158 (Iowa 1985)
Covington v. Reynolds, No. 19–1197, 2020 WL 4514691 (Iowa Ct. App. Aug. 5, 2020)

III. When a district court grants a motion to dismiss and thus does not reach any other issues, should an appellate court decide the merits of the unaddressed issues?

Important cases:
Iowa-Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n, 347 N.W.2d 423 (Iowa 1984)
Berent v. City of Iowa City, 738 N.W.2d 193 (Iowa 2007)

ROUTING STATEMENT

The district court concluded Appellants LS Power Midcontinent, LLC and Southwest Transmission, LLC (collectively "LS Power") lack standing. Principles of standing are well established and reflect the Court's preference to "refuse to decide disputes presented in a lawsuit when the party asserting an issue is not properly situated to seek an adjudication." *Godfrey v. State*, 752 N.W.2d 413, 417 (Iowa 2008). Therefore, on the question whether LS Power has standing and, alternatively, whether the Court should waive standing, the State Appellees recommend transfer to the court of appeals. *See* Iowa R. App. P. 6.1101(3)(*a*); *Rush v. Reynolds*, No. 19-1109, 2020 WL 825953, at *13 (Iowa Ct. App. Feb. 19, 2020) ("[N]o Iowa appellate case has ever waived traditional standing requirements because of an issue of great public importance.").

STATEMENT OF THE CASE

Iowa Code section 478.16 addresses part of the process for construction, ownership, and maintenance of future electric transmission lines or projects in Iowa. The process involves multiple levels of oversight and regulation and includes both the state-level Iowa Utilities Board (IUB) and the Federal Energy Regulatory Commission (FERC).

However, for this specific appeal, the exact interplay between the various parts of the regulatory framework for electric transmission projects is not dispositive. Rather, the issue on appeal is whether LS Power has standing to bring this lawsuit at all.

LS Power "is a transmission company that would like to compete with . . . incumbent transmission companies to build [transmission] projects." *MISO Transmission Owners v. Fed. Energy Regulatory Comm'n*, 819 F.3d 329, 335 (7th Cir. 2016). However, LS Power contends section 478.16 will prevent it from building a future electric transmission project in Iowa because the statute grants incumbent electric transmission owners a right of first refusal (ROFR) for new projects that connect to existing

facilities. Accordingly, LS Power seeks to invalidate section 478.16 by attacking the 2020 session law that enacted it.

LS Power raised three constitutional grounds on which it asked the district court to invalidate section 478.16: the single-subject clause found in article III, section 29 of the Iowa Constitution; the related title clause also found in article III, section 29; and the equality clause found in article I, section 6. LS Power also sought a temporary injunction blocking the enforcement or operation of section 478.16 while the litigation proceeded.

However, the district court did not reach the constitutional merits. Instead, it granted the State Appellees' motion to dismiss and found LS Power lacked standing because any injury caused by the substantive operation of section 478.16 was speculative and hypothetical. The district court found no indication that "a specific project is planned, when such a project may arise, or that Plaintiffs have been denied such a project." (Dist. Ct. Ruling at 3.) It therefore did not reach the request for injunction. The conclusion that LS Power lacks standing—and not the wisdom of the underlying statute—is what the Court must now review on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Approximately a decade ago, FERC issued "Order 1000," which one court characterized as overhauling FERC's "rules governing the planning and development of electric transmission." *LSP Transmission Holdings, LLC v. Fed. Energy Regulatory Comm'n (LSP I)*, 700 F. App'x 1, 1–2 (D.C. Cir. 2017) (per curiam); *see generally Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011). Order 1000 eliminated federal ROFRs, which in context provided the "rights to have a first crack at constructing an electricity transmission project." *MISO Transmission Owners*, 819 F.3d at 331; *see also LSP Transmission Holdings, LLC v. Sieben (LSP II)*, 954 F.3d 1018, 1023 (8th Cir. 2020) (noting that before Order 1000, a federal ROFR meant "incumbents held priority status in choosing to construct new electric transmission lines"). But although Order 1000 eliminated *federal* ROFRs, it anticipated *state* ROFRs and was expressly intended not "to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission

facilities." Order 1000, ¶ 227, 76 Fed. Reg. at 49,880; *see also MISO Transmission Owners*, 819 F.3d at 336. Accordingly, "in response to Order 1000," several states "enacted a state statutory ROFR" to restore or continue the state of affairs preceding Order 1000. *LSP II*, 954 F.3d at 1024. The Iowa legislature enacted a ROFR in Iowa Code section 478.16.[1]

Other participants in this appeal—LS Power; intervenors MidAmerican Energy Company and ITC Midwest, LLC; and even amici Resale Power Group of Iowa and MISO Transmission Customers—provide additional context, background, and detail about the process and framework for electric transmission project planning, approval, and regulation. Understanding the deeper

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[1] Other states with statutory ROFRs for electric transmission projects include Alabama, Indiana, Minnesota, Nebraska, North Dakota, Oklahoma, South Dakota, and Texas. *See* Ala. Code § 37-4-150(d); Ind. Code § 8-1-38-9; Minn. Stat. § 216B.246, subdiv. 2; Neb. Rev. Stat. § 70-1028; N.D. Cent. Code § 49-03-02(2); Okla. Stat. tit. 17, § 292; S.D. Codified Laws § 49-32-20; Tex. Util. Code § 37.056(e)–(g). Two of those statutes have survived different constitutional challenges brought in the corresponding states. *See LSP II*, 954 F.3d at 1022–23 (rejecting a dormant commerce clause challenge to Minnesota's statutory ROFR); *NextEra Energy Capital Holdings, Inc. v. Walker*, No. 19-CV-626-LY, 2020 WL 3580149, at *8 (W.D. Tex. Feb. 26, 2020) (dismissing a dormant commerce clause challenge to Texas's statutory ROFR).

background and context is assuredly helpful, but this case nevertheless boils down to the substantive operation of section 478.16. That section establishes that "[a]n incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction . . . and which connects to an electric transmission facility owned by the incumbent." Iowa Code § 478.16(2); *see also id.* § 478.16(1)(*c*) (defining "incumbent electric transmission owner"). If an electric transmission line is approved for construction, an incumbent electric transmission owner has ninety days to give written notice to IUB whether it intends "to construct, own, and maintain the electric transmission line." *Id.* § 478.16(3). If the incumbent declines to construct the new line—in other words, does not exercise its statutory ROFR—IUB "may determine whether another person may construct the electric transmission line." *Id.*

LS Power filed this lawsuit challenging section 478.16 a few months after the statute's passage. (LS Power Br. at 38.) LS Power sought to invalidate the law on three constitutional grounds, two

procedural (the claims under article III, section 29 of the Iowa Constitution) and one substantive (the claim under article I, section 6). (Petition ¶¶ 36–53, Appendix [App.] at 0015–17.) The procedural claims alleged unconstitutional defects in the legislative process leading to the enactment. (Petition ¶¶ 36–45, App. 0015–16.) The substantive claim alleged differential treatment, without a rational basis, caused by the operation of section 478.16. (Petition ¶¶ 48–53, App. 0017.) LS Power asked the district court to declare section 478.16 unconstitutional and enjoin its publication, operation, and enforcement. (Petition at 8–9, App. 0016–17.)

However, LS Power sued more defendants than just the State. It also sued IUB; Geri Huser, the IUB Chair; and Glen Dickinson and Leslie Hickey, who are employed in the Legislative Services Agency (LSA).[2] IUB, and by extension Huser, administer chapter 478, including section 478.16. *See* Iowa Code § 478.1(1) (requiring electric transmission operators to procure a franchise "from the utilities board within the utilities division of the department of

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[2] For simplicity, this brief refers to all Defendants collectively as "the State."

commerce"). (Petition ¶ 2, Appendix [App.] at 0009.) Against IUB and Huser, LS Power sought to enjoin (1) enforcement of the statute, (2) any application of the statute in franchise proceedings, and (3) future rulemaking implementing the statute. (LS Power Br. in Support of Temporary Injunction at 37, App. 0058.) *See id.* §§ 478.16(3) (providing that new electric transmission projects "shall follow the applicable franchise requirements"), 478.16(7) (requiring IUB to adopt rules to implement the statute).

LSA is responsible for codifying and publishing the Iowa Code. (Petition ¶¶ 4–5.) *See* Iowa Code §§ 2B.12–.13 (setting forth required contents of each Iowa Code edition, as well as editorial powers and duties). Against Dickinson and Hickey, LS Power sought "an injunction to cease and desist in publication." (LS Power Resistance to Motion to Dismiss at 35, App. 0272.)[3]

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[3] As a practical matter, Dickinson and Hickey are now unnecessary defendants given the district court's ruling and the passage of time. The district court did not issue any injunction, and since that time, codification and publication occurred as planned. Thus, the only request for relief against Dickinson and Hickey is now moot. The State raised this point in its response to LS Power's motion to reconsider (State Response to Plaintiffs' Motion to Reconsider, ¶ 10), but the district court understandably did not address it.

After LS Power filed its petition and accomplished service, motion practice began. First, LS Power filed a motion seeking an emergency temporary injunction against (1) the Code publication process; (2) any future action by IUB, and (3) section 478.16 itself. (LS Power Motion for Temporary Injunction, App. 0020.) Three days later, the State moved to dismiss. (State Motion to Dismiss, App. 0201–22.) The State contended LS Power lacked standing because it pled only hypothetical and speculative injuries, and alternatively contended LS Power's claims were not ripe because no specific Iowa electric transmission project (that would be subject to the ROFR) had been identified. (State Motion to Dismiss at 2–3, App. 0202–03.)

While those motions were pending, two companies—MidAmerican Energy Company and ITC Midwest, LLC—sought to intervene as Defendants and join the motion to dismiss. The district court granted both applications to intervene and set a separate hearing on the dueling motion for injunction (by LS Power) and motion to dismiss (by the State). (1/11/21 Intervention Order, App. 0848; 1/21/21 Order Setting Hearing.) Following that later

hearing, the district court granted the motion to dismiss, finding LS Power lacked standing. (Dist. Ct. Ruling at 3, App. 1002.) The district court relied on *LSP I*, where a federal court found a plaintiff lacked standing when it "identified no specific project" that had been approved *and* awarded to an incumbent. *LSP I*, 700 F. App'x at 2. (Dist. Ct. Ruling at 2–3, App. 1001–02.) And the district court further concluded an allegedly insufficient "ability to participate in the legislative process and to marshal public opposition" to the ROFR were generalized grievances that do not separately confer standing. (Dist. Ct. Ruling at 3, App. 1002.) Because those rulings were dispositive, the court did not reach "the remaining issues," such as other grounds for dismissal and LS Power's request for a temporary injunction. (Dist. Ct. Ruling at 3, App. 1002.)

LS Power moved for reconsideration, asking the district court both to reconsider its ruling and to address the great-public-importance exception to standing. *See Godfrey*, 752 N.W.2d at 425–28 (acknowledging a great-public-importance exception could exist, but not applying that exception). The district court denied that

motion (and a motion for leave to amend the petition that LS Power also filed). (4/23/21 Order, App. 1031.) LS Power appealed.

ARGUMENT

I. A hypothetical future electric transmission project is not imminent enough to confer standing now.

Error Preservation: LS Power preserved error on the question of standing because it filed a resistance to the motion to dismiss and the district court ruled on standing. *See DuTrac Cmty. Credit Union v. Hefel*, 893 N.W.2d 282, 293 (Iowa 2017) ("For error to be preserved on an issue, it must be both raised and decided by the district court.").

Standard of Review: The Court reviews "questions of standing . . . for correction of errors at law." *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 787 (Iowa 2021).

Argument Summary: LS Power's claimed injury is purely anticipatory, hypothetical, and speculative. LS Power asks the Court to assume future announcements, events, and electric transmission projects will occur exactly as LS Power worries, or even predicts, that they will occur. But that uncertainty is dispositive, because "simply anticipating some wrong or injury is

not enough for standing." *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 872 (Iowa 2005) (cleaned up). The Court should affirm.

A. LS Power's fears about the statute's effect may never materialize—which means there is no imminent, non-speculative injury.

"Courts have traditionally been cautious in exercising their authority to decide disputes." *Godfrey*, 752 N.W.2d at 417. They generally "refuse to decide disputes presented in a lawsuit when the party asserting an issue is not properly situated to seek an adjudication." *Id.* A party that is properly situated has standing. *See id.* Standing is required for single-subject and title challenges under article III, section 29 of the Iowa Constitution, and challenges brought by litigants who lack standing cannot proceed. *See id.* at 416 ("This appeal involves a claim by a litigant that the Iowa legislature violated the single-subject rule of the Iowa Constitution. . . . The district court concluded the litigant had no standing to assert the claim and dismissed the action without addressing the merits. On appeal, we affirm the judgment of the district court."); *Rush*, 2020 WL 825953, at *5; *Duff v. Reynolds*, No. 19–1789, 2020 WL 825983, at *3 (Iowa Ct. App. Feb. 19, 2020).

When evaluating standing, the Court's "task is not to judge the merits of the plaintiff's contentions," but "to determine whether these plaintiffs are the proper parties to bring the action." *Alons*, 698 N.W.2d at 870. "In short, the focus is on the party, not the claim." *Id.* at 864; *see also Lewis Consol. Sch. Dist. v. Johnston*, 256 Iowa 236, 242, 127 N.W.2d 118, 122 (1964) ("[N]o one may question the constitutionality of a statute unless he can show that he is injured by it."). The legal merit of the claim is irrelevant. *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). And if a claimed injury is speculative, hypothetical, and anticipatory, it "is not sufficient for standing." *Alons*, 698 N.W.2d at 870.

These principles mean that significant portions of LS Power's brief are beside the point. For example, the fact that a piece of legislation passed in "the dead of night" (LS Power Br. at 21) or "the dark of night" (LS Power Br. at 34)—or for that matter, early in the morning, over lunch, or even on a Tuesday rather than a Wednesday—is not relevant to the standing inquiry. Neither are LS Power's purported shortcomings in, and lamentations about, the

legislative process resulting in section 478.16. (LS Power Br. at 34, 37.)

First, any complaint about the legislative process leaving insufficient time for public input, persuasive lobbying, or additional legislative debate is a generalized grievance that does not confer standing. *See Alons*, 698 N.W.2d at 874 (concluding when a claimed injury "affects only the generalized interest of all citizens," that injury "is abstract in nature and not sufficient for standing"). Second, to the extent LS Power asserts the purported constitutional single-subject or title violation is *itself* an injury, that too is a generalized grievance. *See Godfrey*, 752 N.W.2d at 424 ("[T]he general vindication of the public interest in seeing that the legislature acts in conformity with the constitution . . . . is an admirable interest, but not one that is alone sufficient to establish the personal injury required for standing."); *cf. Clark v. Iowa State Commerce Comm'n*, 286 N.W.2d 208, 211 (Iowa 1979) (holding that plaintiffs who challenged a franchise granted for a transmission line lacked standing when they challenged the franchise "regardless of damage to themselves because they allege it was

illegally granted"). Third, and relatedly, focusing on the details of the legislative process for LS Power's claims under article III, section 29 incorrectly blends the standing inquiry with the merits of the claims. As one recent appellate decision addressing a single-subject claim noted, "[t]he issue of standing is wholly distinct from the merits." *Rush*, 2020 WL 825953, at *3.

That leaves LS Power's contention that the statute's substantive *operation* causes cognizable injury. But even that isn't enough—because whatever effects the statute has are not actual or imminent yet. The district court did not rule that LS Power's injury must be complete rather than likely (LS Power Br. at 22)—only that LS Power's pleadings did not demonstrate the injury asserted *was* imminently likely. And the district court was correct.

Standing law in Iowa "follow[s] a two-prong approach." *Iowa Citizens*, 962 N.W.2d at 790. "[A] complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." *Citizens for Responsible Choices*, 686 N.W.2d at 475. Standing may be "a self-imposed rule of restraint," *Hawkeye Bancorp. v. Iowa Coll. Aid Comm'n*, 360 N.W.2d 798, 802 (Iowa

1985), "[b]ut that doesn't make the standing requirement any less real." *Iowa Citizens*, 962 N.W.2d at 790. And the second prong—which requires a plaintiff to be "injuriously affected"—incorporates federal law that in turn requires the injury to be actual or imminent. *See id.* "A 'speculative chain of possibilities' is not enough." *Id.* at 791 n.2 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013)). Rather, the injury must be "certainly impending." *Clapper*, 568 U.S. at 401–02.

LS Power's asserted competitive injury is not certainly impending and raises only a speculative chain of possibilities.[4] LS Power has not identified any *specific* electric transmission project that is announced, underway, or imminent. It has merely asserted that additional electric transmission projects are "estimated" (Petition ¶ 31, App. 0014) to arise; that the relevant organizations are exploring *potential*, *future* solutions to meet electric

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[4] LS Power's assertion that Iowa does not apply federal imminence standards (LS Power Br. at 46 n.4) is mistaken. The Court "has interpreted the 'injuriously affected' prong of standing as incorporating the [federal] three-part [standing] test." *Iowa Citizens*, 962 N.W.2d at 790. And the Court expressly quoted *Clapper* in stating that speculative chains of possibility are "not enough." *Id.* at 791 n.2.

transmission needs, without settling on a specific project to build or proposal to make (LS Power Br. at 32–33); and that the State's electric transmission needs may necessitate an additional project in the next few years (LS Power Br. at 33). But the indeterminate nature of these discussions, plans, encouragements, or whatever other term is appropriate also means they are not sufficiently imminent to confer standing on LS Power. Even if the standard is "likelihood of injury," *see Hawkeye Bancorp.*, 360 N.W.2d at 802, LS Power still hasn't shown likelihood. It has only shown a theoretical and anticipatory "someday" injury, which does not confer standing. *See Godfrey*, 752 N.W.2d at 423 (concluding a plaintiff lacked "any immediacy to support standing" because there was "nothing to show that the future injury is not merely theoretical"); *Alons*, 698 N.W.2d at 870 ("[T]he injury the plaintiffs claim is anticipatory, which . . . is not sufficient for standing.").

LS Power's own contentions demonstrate why the purported competitive harm is only a "someday" injury. Below, LS Power asserted a new transmission project was "expected as soon as 2021." (LS Power Resistance to Motion to Dismiss Br. at 4.) That didn't

happen by March 2021 (when the district court issued its ruling), but LS Power then contended in its motion to reconsider that an April 2021 industry presentation demonstrated a specific project would be approved or announced (as opposed to merely proposed or suggested) as soon as October 2021. (Mtn. to Reconsider Br. at 12–13.) October has now come and gone,[5] but the goalposts keep moving; now LS Power asks the Court to take judicial notice that a planning authority will *recommend* projects "in March 2022." (LS Power Br. at 32–33.) The Court should not take judicial notice, but even if it does, future recommendations still aren't actual or imminent injuries because even "recommended" projects may not ever come to fruition.

"Judicial notice may be taken on appeal," *State v. Washington*, 832 N.W.2d 650, 655 (Iowa 2013), but electric transmission planning authorities' stated intentions are inappropriate for

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[5] During the briefing phase of this appeal, the State sought, and LS Power did not object to, a 14-day extension for submission of the State's proof brief. To be clear, LS Power's professional courtesy and consent to an extension does not concede lack of imminence. But it *is* notable that the events LS Power predicted would happen in October 2021 did not occur, whether measured against the original due date or the extended one.

appellate judicial notice under the circumstances presented here. Typically, the Court takes judicial notice on appeal of government or court records, or of generally known facts under Iowa Rule of Evidence 5.201(*b*)(1)—not facts emanating from documents issued by private organizations under Rule 5.201(*b*)(2). *See, e.g.*, *League of United Latin Am. Citizens v. Pate*, 950 N.W.2d 204, 207 (Iowa 2020) (per curiam) (taking judicial notice of "the standard statewide absentee ballot request form"); *Jacobs v. Iowa Dep't of Transp.*, 887 N.W.2d 590, 597 n.4 (Iowa 2016) (taking judicial notice of court forms); *Homan v. Branstad*, 864 N.W.2d 321, 323 & n.1 (Iowa 2015) (taking judicial notice of a government task force report); *Murphy v. Smith*, 269 N.W. 748, 749 (Iowa 1936) (taking judicial notice that extremely poor economic conditions occurred during the Great Depression). Further, LS Power brings constitutional claims, and the Court has cautioned against taking "judicial notice of any facts that might control constitutional adjudication." *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 813 (Iowa 1983) (cleaned up).

But even if the Court takes judicial notice of intended project recommendations several months from now, those still aren't actual

or imminent enough to constitute cognizable injury for LS Power now—nor do they impart cognizable injury as of October 2020, when LS Power filed this lawsuit.[6] *Citizens for Responsible Choices* illustrates the point. There, the plaintiff organization challenged the issuance of revenue bonds, and contended "its members will be damaged by the project that the revenue bonds will make possible." *Citizens for Responsible Choices*, 686 N.W.2d at 475. However, the Court concluded any injury would not come from the bonds themselves, but "as a result of a project that is financed by the bonds." *Id.* Even if a project seemed likely—and perhaps was the point of issuing the bonds in the first place—there was no nexus for standing until a project actually arose. *See id.* Likewise here, there is no nexus for standing until an electric transmission project actually arises, no matter what section 478.16 makes possible.

[6] The documents LS Power filed outside the pleadings with its resistance to the State's motion to dismiss do not show cognizable injury either. LS Power contends the district court erroneously disregarded these documents (LS Power Br. at 44), but the district court did not indicate it was disregarding them. Rather, the district court ruled there was no allegation a *specific* project was planned (Dist. Ct. Ruling at 3, App. 1002), which suggests the court in fact did consider the additional documents, but still concluded they didn't demonstrate an imminent injury.

Two recent appellate decisions specifically addressing single-subject and title claims under article III, section 29 of the Iowa Constitution confirm that LS Power lacks standing at this point no matter how firmly LS Power believes the future of electric transmission in Iowa will occur exactly as it predicts. First, in *Rush*, the plaintiffs expected and predicted that a law adding a ninth appointed member to the state judicial nominating commission meant, in practical effect, that appointed commissioners would "vote together and 'extinguish' the votes of all elected members." *Rush*, 2020 WL 825953, at *5. However, that expectation was still conjectural and hypothetical—and therefore insufficient for standing—no matter how confident the plaintiffs were in their prediction. *See id.*

Second, in *Duff*, a prospective judicial applicant asserted an imminent future injury when he "intend[ed] to apply for open [judicial] positions in the future but [wa]s discouraged because of politicization" in the nominating process. *Duff*, 2020 WL 825983, at *3. That claim "concerning his future plans" was purely speculative and revealed no injury in fact. *Id.* Further, the fact

that Duff had applied for judicial vacancies in the past demonstrated his ability and intent to apply for future vacancies that, although somewhat undetermined, would undoubtedly occur at some point. *See id.*; *see also* Iowa Constitution, art. V, section 18 (authorizing the legislature to "prescribe mandatory retirement for judges . . . at a specified age"); Iowa Code § 602.1610(1) (setting mandatory retirement ages for judicial officers). But that still wasn't enough. *See Duff*, 2020 WL 825983, at *3. *Duff* rejects a position similar to the one LS Power takes here: that it is cognizably injured by being discouraged or prevented from participating in the Iowa market based on a statute, despite taking past steps to be recognized as competitive in the process. *See id.* Similarly, as one federal court put it, even if a plaintiff takes preparatory steps demonstrating "a general interest in the market," a competitive harm is "too remote and conjectural to support" standing if there is no indication that the plaintiff is ready "to participate in a *specific* bidding process," yet is "prevented in doing so by the alleged benefits provided" to others. *MGM Resorts Int'l v. Malloy*, 861 F.3d 40, 48 (2d Cir. 2017) (emphasis added).

For another analogy, consider the context of casino licensing discussed in *Kopecky v. Iowa Racing & Gaming Commission*, 891 N.W.2d 439, 441 (Iowa 2017). There, an organization applied for a license to build a new casino it had designed and proposed, but "the Commission denied the organization's application." *Id.* That meant that despite significant planning—including renderings of where the casino would be located, what it would look like, and what amenities it might include—the proposed project never got off the ground. But perhaps a potential plaintiff existed who believed the casino, or the process of constructing it, would have caused injury. That plaintiff would not have standing to sue unless and until the Commission approved the license application and the proposal came to life (or started to); almost any injury based only on the submitted proposal would be purely speculative. Similarly, this lawsuit claiming LS Power will be imminently injured by a project that, even if proposed or recommended, may never occur, is just as premature as a lawsuit challenging proposed redrawn districts based only on LSA's submitted plan, before any legislative vote on that proposal. *See* Iowa Code § 42.3(1)(*a*) (requiring LSA to

submit proposed reapportionment or redistricting plans which are subject to subsequent legislative votes); *see also In re Legislative Districting of General Assembly*, 193 N.W.2d 784, 787 (Iowa 1972) (addressing litigation over redistricting after the General Assembly indeed "enacted a legislative reapportionment plan").

As with casino planning and redistricting planning, a proposal or recommendation is an important step in the process for electric transmission projects—but as with hypothetical plaintiffs in those other contexts, the proposal alone is not actual or imminent enough to confer standing on LS Power here, even if it is otherwise appropriate for judicial notice on appeal.[7]

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[7] Some other courts—including one in the energy transmission context—have reached similar conclusions about mere proposals or recommendations. *See, e.g.*, *Occidental Permian Ltd. v. Fed. Energy Regulatory Comm'n*, 673 F.3d 1024, 1026 (D.C. Cir. 2012) (finding an energy transmission plaintiff lacked standing, in part because "connecting utilities have yet to secure siting and planning approvals"); *N.Y. Reg'l Interconnect, Inc. v. Fed. Energy Regulatory Comm'n*, 634 F.3d 581, 587 (D.C. Cir. 2011) (finding no standing with no "active application for a transmission project" in the relevant service area); *Volusia Cty. Sch. Bd. v. Volusia Home Builders Ass'n*, 946 So. 2d 1084, 1091 (Fla. Dist. Ct. App. 2006) (finding a plaintiff lacked standing based on a mere recommendation because "[t]he recommendation's impact remained speculative until the County Council adopted" a formal ordinance accepting it).

Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444 (Iowa 2013), does not compel a different result. In *Horsfield Materials*, the Court held Horsfield had standing to raise due process and equal protection claims based on its "ongoing exclusion" from a municipal "list of preapproved suppliers." *Id.* at 457. The ongoing exclusion created a disadvantage that conferred standing even though Horsfield did not establish lost profits "associated with a particular project." *Id.* But crucially, Horsfield had *already been excluded* from a particular project by the time it filed suit; the city council had "awarded the project to Portzen Construction," another company, two months before Horsfield's petition—and Horsfield "never bid on the . . . project" because it was not a preapproved supplier. *Id.* at 450–51.

That's what is missing here. Even if "past lost business" creates a cognizable competitive harm under *Horsfield Materials* and *Iowa Bankers Association v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 444 (Iowa 1983), LS Power hasn't shown any past lost opportunities that flowed from section 478.16. Consistent with *Horsfield Materials*, demonstrating standing would not require LS

Power to show that it *would have won* a competitive bidding process for a specific project, *see Horsfield Materials*, 834 N.W.2d at 457, but only that there was (or is) a specific project to bid on. Without such a project either in the past (which would match *Horsfield Materials*), or in the works and beyond the brainstorming and recommendation stage, *future* lost business is speculative and anticipatory no matter how sure LS Power is that section 478.16 will lead to incumbent transmission companies exercising the ROFR. *Horsfield Materials* is distinguishable and does not mean LS Power has standing.

The district court's ruling also does not require LS Power to wait until harm is fully complete rather than imminent. (*See* LS Power Br. at 58.) Under section 478.16, an incumbent has 90 days after "an electric transmission line has been approved for construction in a federally registered planning authority transmission plan" to "give written notice to [IUB] regarding whether the incumbent" intends to exercise its ROFR. Iowa Code § 478.16(3). If a project is in fact approved, a lawsuit filed within that 90-day period would occur before the harm was "complete,"

because it could be filed before any incumbent even exercised a ROFR. However, that lawsuit would (likely) allege much more imminent harm than this one does—because a specific project was actually approved. And if an incumbent decided to exercise its ROFR yet gave notice in fewer than 90 days, a lawsuit could still be filed after the notice but before franchise proceedings made significant progress. Furthermore, LS Power might be able to participate *in* those franchise proceedings, and perhaps even seek judicial review if IUB granted a franchise—all before construction really began. *See Clark*, 286 N.W.2d at 209 (noting that an earlier challenge to a transmission line franchise "directed the utility to 'begin again' before building its proposed line). In short, the district court's ruling does not prevent LS Power from challenging the statute until it's too late; once a transmission project actually arises, LS Power will have adequate opportunity to sue or object.

A comparison to other ROFR challenges litigated in federal courts even further illustrates that LS Power's asserted injuries are hypothetical and speculative. Iowa's standing doctrine "parallels the federal doctrine," *Godfrey*, 752 N.W.2d at 418 , and so federal

cases are persuasive here. *See Alons*, 698 N.W.2d at 869 (considering "federal authority persuasive on the standing issue").

In *LSP II*, the plaintiffs filed suit *after* FERC approved "the Huntley-Wilmarth line," a specific "345 kilovolt electric transmission line," and *after* other transmission companies exercised their respective ROFRs. *LSP II*, 954 F.3d at 1025. Likewise, a challenge to Texas's statutory ROFR involved a specific project: "the Hartburg-Sabine Junction Transmission Project," a "500 kilovolt transmission line and substation facilities . . . within Orange and Newton Counties in East Texas." *NextEra Energy Capital Holdings, Inc. v. Walker*, No. 19-CV-626-LY, 2020 WL 3580149, at *3 (W.D. Tex. Feb. 26, 2020). Additionally, one plaintiff in *NextEra* had *actually been selected* to build the project but asserted the ROFR statute prevented it from obtaining the appropriate state regulator's approval. *See id.* Thus, the plaintiffs' standing in both cases was evident: an actual, concrete, specific transmission project was both (1) in the works—approved or begun rather than merely suggested or proposed—and (2) subject to a state ROFR.

By contrast, in *LSP I*, the plaintiff lacked standing because it "suffered no injury-in-fact." *LSP I*, 700 F. App'x at 2. It "identified no specific project . . . approved for regional cost allocation" that was both subject to a state ROFR *and* that had been awarded to an incumbent because of the ROFR. *Id.* The plaintiff's indication that it "might someday wish to build" a project was "only conjectural" and not enough for standing. *See id.* (quoting *N.Y. Reg'l Interconnect, Inc. v. Fed. Energy Regulatory Comm'n*, 634 F.3d 581, 587–88 (D.C. Cir. 2011)).

This case is materially analogous to *LSP I*. LS Power does not identify any specific electric transmission project in Iowa that has been approved, announced, or begun. *See id.* Likewise, LS Power does not identify any specific instances in which it will certainly be excluded from Iowa operations because an incumbent will certainly exercise its statutory ROFR. *See id.* LS Power merely guesses that a series of events might occur—a transmission project located in Iowa might be approved, and it might be subject to section 478.16, and the incumbent might exercise its statutory ROFR. That chain of purported harm "stacks speculation upon hypothetical upon

speculation, which does not establish an 'actual or imminent' injury." *N.Y. Reg'l Interconnect*, 634 F.3d at 587. Or, put another way, "for a competitive harm to confer standing, there must be some actual competition underway that the 'uneven playing field' distorts." *MGM Resorts*, 861 F.3d at 51. But here, there isn't.

Without an actual transmission project approved or underway, any harm LS Power alleges is not yet imminent:

> Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

Int'l Longshoremen's & Warehousemen's Union v. Boyd, 347 U.S. 222, 223–24, 74 S. Ct. 447, 448 (1954). Section 478.16's provisions have "not been set in motion against" LS Power, "because an occasion for doing so ha[s] not arisen." *Id.* Until an occasion arises, the ROFR is only a "hypothetical situation" and presents "too

remote and abstract an inquiry for the proper exercise of the judicial function." *Id.* at 224, 74 S. Ct. at 448. LS Power lacks standing, and the Court should affirm the district court's decision reaching the same conclusion.[8]

B. Despite its theoretical possibility, no Iowa court has found an issue of great public importance and waived standing—and regardless, the exception turns on legal issues of importance rather than the facts of a particular case.

While the "doctrine of standing . . . is not so rigid that an exception to the injury requirement could not be recognized for citizens who seek to resolve certain questions of great public importance and interest in our system of government," *Godfrey*, 752

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[8] It does not matter that "[t]he purpose of a declaratory judgment is to determine rights in advance." *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 312 (Iowa 1998). LS Power relies on this language from *Bormann* to suggest that the case must move forward simply because LS Power sought declaratory judgment. (LS Power Br. at 47 n.5.) But even without *incurred* loss—past tense—there must still "be no uncertainty that the loss will occur." *Id.* at 313. That's precisely where LS Power's lawsuit falters. Put another way, even in declaratory judgment actions, "a justiciable controversy must exist," meaning "the issue is concrete." *Bechtel v. City of Des Moines*, 225 N.W.2d 326, 330–31 (Iowa 1975). If the issue is not concrete, "the court [is] justified in dismissing the petition as merely advisory in character." *Id.* at 331; *accord Iowa Citizens*, 962 N.W.2d at 791 (drawing a connection between standing and the Court's unwillingness to issue advisory opinions).

N.W.2d at 425, no Iowa appellate court has waived standing in a single-subject clause or title clause case—indicating that the single-subject clause and title clause are not questions of great public importance. *See George v. Schultz*, No. 11–0691, 2011 WL 6077561, at *2 (Iowa Ct. App. Dec. 7, 2011) (noting that although the Court "has recognized the possibility of a 'great public importance' exception to standing in Iowa, it has never found an issue of sufficient public import to apply the exception"); *see also Rush*, 2020 WL 825953, at *14 (concluding a case raising single-subject and title claims was "not the case in which we should first find an issue of such great public importance as to waive traditional standing requirements"). Any exception to standing is and should be narrow, and the Court should be especially reluctant to invoke it. *See Sears v. Hull*, 961 P.2d 1013, 1019 (Ariz. 1998) ("The paucity of cases in which we have waived the standing requirement demonstrates both our reluctance to do so and the narrowness of this exception.").

This isn't the case to apply the great-public-importance exception for the first time. For example, it does not matter that this case is slightly different because *Godfrey* involved a single-

subject claim without an accompanying title claim. *See Godfrey*, 752 N.W.2d at 427 ("Importantly, Godfrey does not challenge the title requirement of article III, section 29.") In *Rush*, the Court rejected a similar argument that simply appending a title claim automatically unlocks a public-importance waiver of standing. *Rush*, 2020 WL 825953, at *10 ("*Godfrey* does not say the plaintiff would have succeeded in obtaining a waiver of standing if she had simply pled the case differently.").[9]

Further, *Godfrey* cautioned that the Court is "especially hesitant to act when asked to resolve disputes that require [it] to decide whether an act taken by one of the other branches of government was unconstitutional." *Godfrey*, 752 N.W.2d at 427. That measured hesitance meant that a claim under article III, section 29 was "not important enough to require judicial

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[9] On the issue of an appended title claim, two dissenting justices in *Godfrey* criticized the majority for "holding that the title clause . . . trumps the single-subject clause," thereby creating a dichotomy that the dissenting justices viewed as "neither principled nor workable." *Godfrey*, 752 N.W.2d at 429 (Wiggins, J., dissenting). However, the principled and workable answer to that purported quandary is easy: rather than waiving standing based on whether a plaintiff raises both types of challenges under article III, section 29, simply require standing for both types of claims.

intervention into the internal affairs of the legislative branch." *Id.* at 428. Too frequently proceeding with cases under the public-importance exception would risk the Court "assuming 'a position of authority' over the acts of another branch of government." *Id.* at 425 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574, 112 S. Ct. 2130, 2143 (1992)). The same principle applies here. When plaintiffs lack standing and must rely on an exception to standing to proceed, the Court must carefully "consider whether to avoid becoming embroiled in a case by exercising a waiver of standing requirements to reach an issue that might be better left to the political environment." *Rush*, 2020 WL 825953, at *13.

Most importantly, however, LS Power is incorrect that the underlying subject matter of ROFRs—as distinct from the *legal claims* under the Iowa Constitution—can constitute an issue of great public importance under the exception. (LS Power Br. at 63–64.) When considering whether to waive standing, the proper inquiry is not the underlying policy or its effect on Iowa, but the rarity and importance of the contested *legal* issue. *Godfrey* discussed the inquiry in terms of the legal issue raised (article III,

section 29), not the underlying policy (availability of workers' compensation benefits for successive injuries). *See Godfrey*, 752 N.W.2d at 417, 427–28. And it ultimately decided "the *constitutional* issue presented" did not justify waiving standing. *Id.* at 428 (emphasis added). Thus, the policy arguments for and against ROFRs are irrelevant—both in deciding whether this case presents an issue of great public importance *and*, should the case get that far, in deciding whether section 478.16 or the process of its enactment complied with the constitution.

With the proper recognition that the underlying policy is irrelevant, the legal issues in this case are neither rare nor extraordinary enough to qualify as issues of great public importance sufficient to justify a waiver of standing requirements. Cases challenging statutes under article III, section 29 of the Iowa Constitution have arisen throughout Iowa's history. In the first hundred years after the 1857 Constitution, "about ninety cases [came] before the . . . Court in which the validity of a statutory provision [was] assailed for noncompliance" with article III, section 29—an average of just under one per year. William Yost, Note,

Before a Bill Becomes a Law—Constitutional Form, 8 Drake L. Rev. 66, 67 (1958). Since then, litigants have continued to raise challenges under article III, section 29 periodically. The presence of multiple lawsuits raising claims under article III, section 29 in the past few years—two of which were decided by the court of appeals in 2020—demonstrates that the issue continues to arise and does not need a waiver of standing so that an oft-forgotten or never-explored subject finally gets some airtime.

As a fallback position, LS Power suggests that the single-subject clause and title clause are not *always* issues of great public importance, but they are in this case because the legislature's purported violations were, in LS Power's view, flagrant. (LS Power Br. at 73.) But this proposal is unworkable. To begin, it's unclear whether there exist adequate and judicially manageable standards by which to measure how "flagrantly" a legislature purportedly acted, and therefore whether the exception to standing applies. For example, recognizing that each case's facts may be slightly different, "flagrant" action might depend on when in the session a bill or amendment is introduced; the time that elapses between

introduction and passage; the bill to which an amendment is added; the subject of particular legislation and any relevant controversy or preexisting societal debate surrounding that subject; or other factors entirely. These matters of degree do not lend themselves well to predictable and consistent application—but an exception to a well-established doctrine like standing should be narrow, and subject to principled application, rather than open-ended and squishy. *Cf. De Stefano v. Apts. Downtown, Inc.*, 879 N.W.2d 155, 178 (Iowa 2016) (criticizing a line of "squishy cases" that, in the landlord-tenant context, do not adequately explain "[w]hether and under what conditions" one factor outweighs another and do not explore "precise requirements" for application of a rule set forth in them).

More importantly, however, the suggestion that the specific details of the legislative process in a given case can or should inform whether article III, section 29 is an issue of great public importance (LS Power Br. at 73) is incompatible with the law of standing because it presupposes the conclusion that a violation occurred. The great-public-importance inquiry *must* rise or fall solely on the

legal issue in play, because considering other details risks the Court incorrectly blending (1) the merits of a claim with (2) standing to raise the claim. Of course, "standing does not depend on the legal merits" of plaintiffs' claims. *Citizens for Responsible Choices*, 686 N.W.2d at 475. The court of appeals wrestled with this precise issue in *Rush*, and it refused to consider the plaintiffs' argument that a statutory amendment had improperly attempted to amend the constitution through legislation, "because that issue goes to the merits of the action rather than to whether plaintiffs have standing." *Rush*, 2020 WL 825953, at *4. And, emphasizing just how separate the inquiries are, the court of appeals additionally explained that "[t]he issue of standing is *wholly distinct*"—not just different from, but entirely separate from—"the merits of the underlying claims." *Id.* at *3. Just as standing and the merits are distinct, so too are the merits distinct from the threshold determination whether to *waive* standing.

Relatedly, a single-subject claim does not carry utmost importance (for waiver-of-standing purposes) simply because of its constitutional dimension. *See George*, 2011 WL 6077561, at *3. The

plaintiffs in *George* asserted that government action occurred in violation of the constitution: specifically, the requirement in article V, section 17 of the Iowa Constitution that judges standing for retention appear "on a separate ballot." Like LS Power here, the plaintiffs in *George* argued "the words of the constitution are mandatory, but the constitution does not protect itself, so they should be allowed to." *Id.* at *2. However, even though the "separate ballot" language of article V, section 17 had been rarely (if ever) litigated, and even though declining to apply the exception meant that some justices would be unable to serve after their term of office ended, the court of appeals declined to apply the exception. *See id.* at *3. It concluded the exception is properly deployed only when declining to apply it would result in a constitutional crisis. *See id.*

Declining to apply the exception here after finding LS Power lacks standing would not result in a constitutional crisis. It would leave open a challenge to the ROFR statute on equal protection grounds if LS Power eventually demonstrates standing; and it would leave open any future single-subject challenge to any future

piece of legislation—regardless of its "effective date" versus the codification date (LS Power Br. at 73)[10]—by a person with proper standing to raise it. The potential loss of a claim under article III, section 29 may occur, but is not a reason to waive standing; rather, it is an "inescapable conclusion" of the codification window itself. *State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001).

There is yet another reason not to apply the great-public-importance exception in this case: it's a poor vehicle in which to do so. One reason to apply the exception would be to provide guidance

[10] LS Power hypothesizes that the legislature might declare a bill effective only after codification, hoping to insulate it completely from any timely challenge under article III, section 29. (LS Power Br. at 73.) But courts can still adjudicate challenges brought before the effective date, *if* the plaintiff can show an imminent, non-speculative injury that will happen when the statute becomes effective. For example, a loan provider could bring a declaratory judgment action regarding a new statute when it sought a legal opinion from the Attorney General "[a]fter the new legislation was enacted, but before its effective date," and then disagreed with the Attorney General's opinion. *Anderson Fin. Servs., LLC v. Miller*, 769 N.W.2d 575, 577 (Iowa 2009). The plaintiff in *Anderson Financial* demonstrated an imminent injury because it had preexisting loan agreements that the new statute might affect, if the new statute applied to them. *See id.* at 576. By contrast, LS Power merely foresees a potential injury "around the corner," which "falls short of showing an imminent injury." *Sweeney v. Raoul*, 990 F.3d 555, 560 (7th Cir. 2021).

on an important but rarely-invoked subject or clause. But if it is important to address an article III, section 29 claim on the merits—and LS Power suggests it is crucial because the Court has not done so in over two decades (LS Power Br. at 72)—there is *still* no need to do so in this specific case. Also pending before this Court is *Planned Parenthood of the Heartland, Inc. v. Reynolds*, No. 21–0856, where standing is not contested, where the district court ruled on the single-subject merits rather than on a threshold question, where appellate briefing is closer to completion, *and* where several amici weighed in with additional perspectives on and analysis of article III, section 29. Those factors make that case, and not this one, the better vehicle in which to explore article III, section 29 on the merits. It also means there is no need to waive standing for LS Power in this case[11] or for single-subject and title challenges

[11] LS Power's suggestion that if it doesn't have standing, nobody does (LS Power Br. at 71) is a red herring. The assumption that if a specific set of challengers "have no standing to sue, no one has standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S. Ct. 2925, 2935 (1974). It's not a reason to waive standing either. *See Rush*, 2020 WL 825953, at *13 (rejecting single-subject plaintiffs' assertion that the great-public-importance exception applied because "no other relief [wa]s available" to them).

generally—because *Planned Parenthood* shows that plaintiffs can and do raise challenges under article III, section 29 where standing is not contested.

Furthermore, the public interest exception to mootness and a public-importance exception to standing are not interchangeable. Each case upon which LS Power relies in discussing the mootness exception (LS Power Br. at 65 n.6) involves plaintiffs who *possessed standing* but whose injuries dissipated after time passed. In other words, a public interest exception is essentially the judiciary acknowledging its own delay, which is inherent in the deliberative nature of the judicial function. By contrast, in this case, a lack of standing is in no way judicially caused or imposed.

Furthermore, the "injury" in item veto cases that may justify a public-interest mootness exception is *not* a "procedural process" injury. (LS Power Br. at 65 n.6.) Rather, the injury that confers standing in item veto cases is an intrusion upon the separation of powers itself, because "the item veto power grants the governor a limited legislative function." *Rants v. Vilsack*, 684 N.W.2d 193, 202 (Iowa 2004). When legislators challenge an item veto, they

challenge the governor's intrusion into the legislature's power to appropriate state funds. That intrusion can be a cognizable injury, because the governor's item veto can nullify a legislator's vote by striking a provision that earned majority support in the legislature. *See id.* at 198 ("[T]he effect of the Governor's item vetoes was to eliminate the Legislature's economic development priorities while preserving the Governor's economic development priorities . . . ."); *Colton v. Branstad*, 372 N.W.2d 184, 186 (Iowa 1985) (noting legislators bringing an item veto challenge asserted the governor injured them by usurping the legislature's appropriations function). Likewise, legislators can have standing to challenge a veto in some other circumstances because an *untimely* veto might nullify a legislator's vote he or she cast in favor of a measure that passed. *See Redmond v. Ray*, 268 N.W.2d 849, 851 (Iowa 1978) (discussing legislators' contention that the governor improperly and belatedly attempted to veto a bill that had already become law).

In other words, public-interest mootness exceptions make sense in the veto context because item veto cases address the foundational separation of powers between branches of

government. But to apply a similar exception in the single-subject context is circular, because the standing requirement *itself* "is deeply rooted in the separation-of-powers doctrine." *Godfrey*, 752 N.W.2d at 425. A public-interest mootness exception preserves the primacy of the separation of powers. A broadly-applied public-importance exception to standing does not. The Court should not equate them.

In short, the Court should not apply the great-public-importance exception to standing in this case for two reasons. First, the legal issue raised (as opposed to the policy wisdom of a statutory ROFR) doesn't qualify for the exception. Second, another case raising the same legal issue (without the threshold standing question) is already before this Court and obviates any need to apply an exception here.

II. Apart from standing, the ripeness doctrine also justifies dismissal.

<u>Error Preservation</u>: The district court ruled only on standing. (Dist. Ct. Ruling at 3, App. 1001.) However, the State's motion to dismiss also raised ripeness. (State Motion to Dismiss at 2–3, App. 0202–03.) "If any ground asserted in a motion to dismiss is valid, a

ruling sustaining the motion will be affirmed on appeal, even though other reasons were relied on by the district court." *Fitzpatrick v. State*, 439 N.W.2d 663, 665 (Iowa 1989).

Argument: It is "not certain that the projects w[ill] take place." *Citizens for Responsible Choices*, 686 N.W.2d at 473. LS Power's claims are not ripe until they do take place. Accordingly, ripeness is an independent reason why LS Power's petition cannot move forward at this time. *See id.* at 474–75 (affirming dismissal of a lawsuit on both ripeness and standing grounds).

Ripeness and standing are somewhat similar. "Both doctrines address the imminence issue, using the same focus on contingencies that may render the risk of harm too slight." *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 810 F.3d 827, 830 (D.C. Cir. 2016); *see also Kline v. SouthGate Prop. Mgmt., LLC*, 895 N.W.2d 429, 436 n.3 (Iowa 2017) (noting a standing argument was "alternatively pressed" under a ripeness theory, but resolving both standing and ripeness together). Nevertheless, the similarity does not mean "that the doctrines are twins. Both have many distinctive facets, some even bearing on imminence of harm." *R.J. Reynolds*, 810 F.3d

at 830. But the crucial principle is that if a claim is not ripe, "a court is without jurisdiction to hear the claim and must dismiss it." *Iowa Coal Mining Co. v. Monroe Cty.*, 555 N.W.2d 418, 432 (Iowa 1996).

The ripeness doctrine prevents courts "from entangling themselves in abstract disagreements over administrative policies" by avoiding premature adjudication, and also protects agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Gospel Assembly Church v. Iowa Dep't of Revenue*, 368 N.W.2d 158, 160 (Iowa 1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49, 87 S. Ct. 1507, 1515 (1967)). When determining whether a claim is ripe, the basic question is "whether the facts alleged show there is a substantial controversy between parties having adverse legal interests *of sufficient immediacy and reality* to warrant [relief]." *Katz Inv. Co. v. Lynch*, 242 Iowa 640, 648, 47 N.W.2d 800, 805 (1951) (emphasis added); *accord Citizens for Responsible Choices*, 686 N.W.2d at 474.

This case does not meet those standards. LS Power's claims are premature and unripe because there is no substantial controversy of sufficient immediacy and reality between the parties. LS Power has not alleged it has been denied the opportunity to build any specific transmission lines in Iowa, prevented from contracting to build any specific transmission lines in Iowa, or otherwise been negatively and concretely impacted (beyond the statute's anticipated effect) with respect to any specific project within Iowa. Indeed, this case is materially analogous to *Covington v. Reynolds*, where the Iowa Court of Appeals rejected, on ripeness grounds, a similar constitutional challenge to a statute administered by a different state agency—the Iowa Department of Human services. *See Covington v. Reynolds*, No. 19–1197, 2020 WL 4514691, at *3 (Iowa Ct. App. Aug. 5, 2020). *Covington* described in detail why the challenge—which sought to invalidate a provision about Medicaid funding for gender-affirming surgical procedures—was not ripe:

> [Plaintiffs] have not requested Medicaid pre-authorization, their Medicaid providers have not evaluated the request, and no notice of decision had been issued. The district court determined that until

> their Medicaid providers deny them coverage, the controversy is purely abstract because they have not been adversely affected in a concrete way. We agree. Although the [statutory] amendment is clearly calculated to allow Medicaid providers to deny gender-affirming surgical procedures to transgender Iowans, nothing prohibits Medicaid providers from allowing such a claim. Thus, any dispute is speculative until a denial occurs and the matter is not ripe for adjudication.

Id. The same principles apply here. LS Power does not identify any specific electric transmission project in Iowa that is concretely planned (or underway) and that might be (or is) subject to section 478.16. *See id.* Until that happens, LS has "not been adversely affected in a concrete way" and "the controversy is purely abstract." *Id.* Similarly, just as it was possible in *Covington* (but seemed unlikely) that Medicaid providers would *allow* coverage, even if it appears unlikely that an incumbent would decline to exercise its statutory ROFR, nothing prohibits an incumbent from doing so—in which case, LS Power would suffer no harm at all. *See id.* No matter what section 478.16 appears to be "clearly calculated" to accomplish, any dispute is speculative until a project actually arises and an incumbent transmission provider actually exercises the ROFR. *See id.*

Citizens for Responsible Choices further illustrates that LS Power's claims are not ripe. There, the plaintiffs contended their lawsuit was ripe because the projects they claimed would injure them were "well on their way" to becoming reality. *Citizens for Responsible Choices*, 686 N.W.2d at 473. The plaintiffs argued that because "application for public funding has been made, and partial public financing has already been obtained," the projects were imminent enough to make their lawsuit ripe. *See id.* But even then—after more tangible steps toward the projects than exist with respect to transmission projects here—the Court still concluded the dispute was not ripe. *See id.* at 474–75. Even though the cities in question had formally applied to the state for financial assistance and stated they planned to issue revenue bonds, there was "no justiciable controversy prior to the final decision . . . to issue" them. *Id.* at 474.

The plaintiffs additionally asserted they "should not be required to await" further actions, because they believed those actions were highly likely to occur and because they feared losing the ability to challenge the actions by waiting. *Id.* at 474. But the

Court concluded the plaintiffs' fears about losing the ability to make a challenge did "not alter the contingent status of the . . . proposal." *Id.* "Unless and until" a project actually occurred, there was "no justiciable controversy." *Id.* at 475.

The same is true here. LS Power contends it should not be required to await concrete actions or announcements about transmission projects for two reasons: first, because it asserts incumbents are likely to exercise the ROFR once a project is approved (LS Power Br. at 31–32); and second, because it fears losing the ability to raise two of its claims (LS Power Br. at 58) after additional time passes. Neither thing means that LS Power's claims are ripe, however. Just as in *Covington*, where the dispute was speculative when denial of coverage had not occurred (but seemed probable), the dispute here is speculative until an incumbent exercises a ROFR, even though it might seem probable that one will. *See Covington*, 2020 WL 4514691, at *3. And just as in *Citizens for Responsible Choices*, these contentions, even if they eventually turn out to be correct, fundamentally do not alter the *current* contingent and indeterminate status of what specific

transmission projects might arise, and when. *See Citizens for Responsible Choices*, 686 N.W.2d at 474–75.

One specific aspect of LS Power's requests for relief—its contention that the Court must prevent IUB from undertaking any rulemaking to implement section 478.16 (LS Power Br. at 76)—is a microcosm of why the case is premature and not yet ripe. First, any rulemaking depends entirely on the statute itself, because "a rule adopted by an agency must be within the scope of powers delegated to it by statute." *Iowa-Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n (Iowa-Illinois I)*, 334 N.W.2d 748, 752 (Iowa 1983). Thus, an injunction is not even necessary; IUB could not promulgate rules if a court eventually enjoins section 478.16, because the injunction would *also* suspend the provision directing IUB to promulgate rules in the first place. *See* Iowa Code § 478.16(7); *see also id.* § 17A.23(3) (providing agencies have only the authority conferred by statute); *id.* § 17A.19(10)(*b*) (authorizing a court to grant relief from agency action that was beyond the agency's authority). Furthermore, if IUB began promulgating rules before any decision about the statute's validity, *those rules* could be subject to judicial review

themselves, potentially on constitutional grounds. *See id.* § 17A.19(10)(*a*) (authorizing courts to grant relief from agency action that is unconstitutional). But more importantly, without knowing what rules IUB proposes, there is no reason to block them prematurely. *Cf. R.J. Reynolds*, 810 F.3d at 830 (concluding a plaintiff lacked standing, in part because it was "unclear whether the [agency] will issue a final rule, and what it would say"). For example, IUB could promulgate a rule explaining it will host or require competitive processes for electric transmission projects unless a statute requires otherwise. That's a rule LS Power would likely *want*—but instead it insists that all IUB action must immediately halt, sight unseen, with no room to see what IUB proposes. This request appears to rest on Murphy's Law rather than actual law; it assumes that if an option LS Power does not like is available to IUB, IUB will automatically take it.

But that's not the case with IUB, and it's not the case with the overall lawsuit either. Statewide transmission needs may change. Specific project recommendations, suggestions, or proposals could change too. By the time the Court decides this appeal, perhaps the

legislature might even repeal section 478.16. All of this is hypothetical, of course, but that's exactly the point: no matter how likely LS Power believes particular results to be, there's not enough *certainty* at this stage to make this case ripe for adjudication. *See Gospel Assembly Church*, 368 N.W.2d at 160–61 (concluding an issue was not ripe when the pleadings and record did not demonstrate "the certainty required to justify judicial intervention at this time").

Courts must address two factors to determine ripeness: whether the issues are sufficiently focused, and whether the parties would suffer hardship by postponing judicial action. *See Iowa Coal*, 555 N.W.2d at 432. Where the hardship of a plaintiff "biding its time" is insubstantial, a case is not ripe. *Texas v. United States*, 523 U.S. 296, 302, 118 S. Ct. 1257, 1260 (1998). Potentially losing the ability to raise a particular claim in a particular way at a particular time is not hardship, however, either in general or in the specific constitutional context of this case.

In *Citizens for Responsible Choices*, the plaintiffs asserted they should not be required to wait for more concrete action before

pursuing their claims, because if they waited, they would not be able to challenge those future actions through an established objection process. *See Citizens for Responsible Choices*, 686 N.W.2d at 474. Nevertheless, the Court concluded the potential inability to make a future challenge in a preferred manner did not make the dispute ripe. *See id.*[12]

In the specific context of single-subject and title challenges under article III, section 29 of the Iowa Constitution, there exists "a window of time measured from the date legislation is passed

[12] Importantly, unlike the plaintiffs in *Citizens for Responsible Choices* who were foreclosed from a future challenge because they were "ineligible to file objections" under a relevant statute, *Citizens for Responsible Choices*, 686 N.W.2d at 474, here LS Power *would* be eligible to, for example, seek judicial review of future agency action by the Iowa Utilities Board, as long as LS Power could show it was "aggrieved or adversely affected." Iowa Code § 17A.19; *see Polk Cty. v. Iowa State Appeal Bd.*, 330 N.W.2d 267, 273 (Iowa 1983) (elaborating the "test for aggrievement" under chapter 17A); *Clark*, 286 N.W.2d at 209 (deciding an appeal that involved objections and challenges to the State Commerce Commission—the Iowa Utilities Board's predecessor—granting a franchise for "the construction of a 345,000-volt transmission line"). Further, a challenge to a FERC action regarding a specific transmission project—such as an approval of a relevant tariff—might be available through federal review procedures. *See MISO Transmission Owners*, 819 F.3d at 336–37 (noting a challenge to FERC's approval of a tariff honoring ROFRs).

until such legislation is codified." *State v. Mabry*, 460 N.W.2d 472, 475 (Iowa 1990). Codification, once it occurs, "cuts off a right of constitutional challenge." *Tabor v. State*, 519 N.W.2d 378, 380 (Iowa 1994). This may mean some statutes do not face a constitutional challenge. *See Kolbet*, 638 N.W.2d at 661 (enforcing the codification window even though it can be "entirely fortuitous" in some circumstances). Although the passage of time may mean challenges under article III, section 29 are lost, that consequence is an "inescapable conclusion" of the codification window. *Id.* It is a bright-line rule, to be sure, but the Court has rejected litigants' contentions that it was unfair (or in other words, created a hardship) to foreclose them from making a claim under article III, section 29. *See id.*; *Mabry*, 460 N.W.2d at 475 (noting once the codification window closes, future challenges are "barred even though . . . litigants may claim they were in no position to make such a challenge before the codification"). Therefore, LS Power's worry that it might lose the ability to raise claims under article III, section 29 of the Iowa Constitution to challenge section 478.16 is not a "hardship" either.

Relatedly, affirming dismissal here, whether on standing grounds or ripeness grounds, would not mean the Court is condoning any specific legislative action; nor would it mean the Court is neutralizing or ignoring article III, section 29. The Court often cautions that its opinions are not broad green lights. *See, e.g.*, *Estate of Gray v. Baldi*, 880 N.W.2d 451, 459 (Iowa 2016) (discouraging readers from scouring "this opinion's interstices for implied sentiments"); *Ostergren v. Iowa Dist. Ct.*, 863 N.W.2d 294, 300 (Iowa 2015) (discouraging idiosyncratic local court rules despite concluding a district court had authority to issue a particular administrative order); *Elview Constr. Co. v. N. Scott Cmty. Sch. Dist.*, 373 N.W.2d 138, 141, 145–46 (Iowa 1985) (concluding one plaintiff lacked standing, and therefore affirming dismissal, but still noting the Court did "not condone the actions of the defendant school board"). Moreover, affirming dismissal wouldn't leave LS Power—or for that matter, "all electricity ratepayers" (LS Power Br. at 72) without any remedy; it would simply mean that the remedy is electoral rather than judicial. *See Rush*, 2020 WL 825953, at *13 (concluding plaintiffs' assertions about violations of

article III, section 29 "might be better left to the political environment" when the plaintiffs themselves lacked standing).

If LS Power suffers a concrete injury and the claims ripen, LS Power may be able to seek relief in various venues—perhaps through judicial review of some action by the Iowa Utilities Board—like rulemaking or a franchise proceeding—or through a challenge to some FERC action. *See LSP I*, 700 F. App'x at 1 (stating a challenge to a FERC action or approval would be available if and when a concrete injury occurs); *see also Gospel Assembly Church*, 368 N.W.2d at 161 (concluding an issue was not yet ripe when future occurrences "would be subject to judicial contest" at that time). But until then, this lawsuit can't proceed, and the Court should affirm on this alternative ripeness ground.

III. Because the district court did not reach LS Power's request for an injunction, this Court should not grant one for the first time on appeal.

Because it granted the motion to dismiss on standing grounds, the district court did not reach other issues, including LS Power's request for a multi-faceted injunction. (Dist. Ct. Ruling at 3, App. 0203.) On appeal, LS Power asks the Court not just to remand for

further proceedings, but for the Court affirmatively to *issue* an injunction for the first time after considering the merits of, and likelihood of success on, LS Power's constitutional claims. (LS Power Br. at 75.)

The Court should not do so. It is a court of review, not first view. *See Benskin, Inc. v. W. Bank*, 952 N.W.2d 292, 307 (Iowa 2020); *accord Plowman v. Ft. Madison Cmty. Hosp.*, 896 N.W.2d 393, 413 (Iowa 2017). And generally, it does "not decide an issue the district court did not decide first." *UE Local 893/IUP v. State*, 928 N.W.2d 51, 60 (Iowa 2019).

Even if the Court concludes LS Power has standing, it should only remand for further proceedings before the district court. Decades ago, the Court established—in the electric utility context, no less—that a reversal on standing grounds usually does not allow the appellate court to reach the merits:

> Because the record at the time of the court's ruling sufficiently demonstrated Planners' standing, we conclude that the district court erred in dismissing Planners' petition.
>
> Anticipating the possibility of this holding, the commission urges us to decide the merits of Planners' contentions presented to but not ruled on by the district

> court. If we were to do so, we would not be performing our review function; we would be deciding issues that were not decided by the district court. This would be contrary to our function as a court of review. The only question presented for our review on Planners' appeal is the district court decision dismissing the petition for want of standing. Having determined that the district court erred in dismissing the petition, we reverse and remand on Planners' appeal to permit the district court to decide the case on the merits.

Iowa-Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n (Iowa-Illinois II), 347 N.W.2d 423, 427 (Iowa 1984) (citations omitted); *cf. Junkins v. Branstad*, 421 N.W.2d 130, 135–36 (Iowa 1988) (concluding a case was not moot but declining to reach the merits because the district court did not do so). *Iowa-Illinois II* is merely another recognition that the standing inquiry evaluates the "right of access to the district court, not the merits." *Richards v. Iowa Dep't of Revenue & Fin.*, 454 N.W.2d 573, 574 (Iowa 1990).

Iowa-Illinois II is directly applicable here. The only question presented for review on LS Power's appeal is "the district court decision dismissing the petition for want of standing." *Iowa-Illinois II*, 347 N.W.2d at 427. If the Court were to address the injunction request for the first time on appeal, it "would be deciding issues that were not decided by the district court," which is "contrary to [its]

function as a court of review." *Id.* The merits are simply not in play on appeal. "Because the trial court did not consider the question on the merits there is nothing further for [appellate] review." *Rush v. Ray*, 332 N.W.2d 325, 328 (Iowa 1983).

Berent v. City of Iowa City, 738 N.W.2d 193, 206 & n.1 (Iowa 2007) does not justify issuing an injunction for the first time on appeal. *Berent* only involved a request for declaratory judgment about the validity of a proposed amendment to a municipal charter. *See id.* at 196 ("Citizens challenged the City's refusal [to present amendments to voters] in district court. The City, alternatively, sought a declaration that the proposed amendments were unlawful."). In other words, the dispute was not about (as it is here) whether a law already in existence should be struck down. In addition, the *Berent* Court reached the merits only after expressly noting that "difficult issues of constitutional law [we]re not involved." *Id.* at 206.

Here, by contrast, "issues of constitutional law" expressly *are* involved. *Id.* And if those issues "are not briefed and argued" on appeal, the Court has "no choice but to remand them for district

court determination." *Barnes v. Iowa Dep't of Transp.*, 385 N.W.2d 260, 263 (Iowa 1986). That means *Iowa-Illinois II*, not *Berent*, is the relevant precedent. If the Court concludes LS Power has standing, remand alone is the proper remedy. *See Iowa-Illinois II*, 347 N.W.2d at 427; *accord Dickey v. Iowa Ethics & Campaign Disclosure Bd.*, 943 N.W.2d 34, 57 (Iowa 2020) (Appel, J., dissenting) (asserting a litigant possessed standing but nevertheless agreeing "the legal merit of his claim should be determined by the district court in the first instance").

CONCLUSION

"LSP has identified no specific project that [is] . . . approved for regional cost allocation," that is subject to section 478.16's ROFR, *and* that was "awarded to the incumbent because the incumbent has exercised that right." *LSP I*, 700 F. App'x at 2. Without those things, LS Power lacks standing in this case. Transmission projects that aren't past the brainstorming stage aren't imminent. The Court should affirm.

REQUEST FOR ORAL ARGUMENT

The State requests oral argument.

Respectfully submitted,

THOMAS J. MILLER
ATTORNEY GENERAL OF IOWA

/s/ David M. Ranscht
DAVID M. RANSCHT

/s/ Benjamin Flickinger
BENJAMIN FLICKINGER
Assistant Attorneys General
1305 E. Walnut St., 2nd Floor
Des Moines, Iowa 50319
(515) 281-7175
(515) 281-4209 (fax)
david.ranscht@ag.iowa.gov
ben.flickinger@ag.iowa.gov

CERTIFICATE OF COST

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/s/ *David M. Ranscht*
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 and contains 12,209 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *David M. Ranscht*
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

I, David M. Ranscht, hereby certify that on the 30th day of December, 2021, I, or a person acting on my behalf, filed this Final Brief and served it on counsel of record to this appeal with via EDMS.

/s/ *David M. Ranscht*
Assistant Attorney General