ELECTRONICALLY FILED JAN 03, 2022 CLERK OF SUPREME COURT

BEFORE THE IOWA SUPREME COURT

No. 21-0696

LS POWER MIDCONTINENT, LLC and SOUTHWEST TRANSMISSION, LLC,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees,

and

MIDAMERICAN ENERGY COMPANY and ITC MIDWEST, LLC,

Intervenors.

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

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ARGUMENT

LS Power Midcontinent, LLC and Southwest Transmission, LLC ("LSP") bring a declaratory judgment action based on Constitutional violations after Iowa's legislature—in the dark of night and with no opportunity for public notice—buried a right of first refusal ("ROFR") excluding LSP from regionally approved electric transmission projects in Iowa in an unrelated appropriations measure. This immediately placed LSP in an inferior position by cutting off competition and stating that an "incumbent transmission owner" automatically has the right to construct, own, and maintain any new lines approved by regional transmission organizations ("RTO"). Iowa Code § 478.16. LSP, and other nonincumbent developers, were the specific target of Iowa Code section 478.16.

"The purpose of a declaratory judgment is to determine rights in advance." *Bormann v. Cnty. Bd. of Supervisors*, 584 N.W.2d 309, 312 (Iowa 1998); *see also* Iowa R. Civ. P. 1.1102. Although a justiciable controversy must exist, "[t]he essential difference between such an action and the usual action is that no actual wrong

need have been committed or loss incurred to sustain declaratory judgment relief." *Id.* Courts follow a "reasonably liberal construction" of declaratory actions, and "relief should be granted unless no useful purpose may be accomplished thereby." *Wesselink v. State Dep't of Health*, 80 N.W.2d 484, 488 (Iowa 1957).

The State Defendants' and Intervenors' (collectively, "Appellees") position that LSP does not have standing until the law has deprived LSP of a specific project vitiates Article III, section 29. An Article III, section 29 challenge filed after codification is too late. *Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 586 N.W.2d 374, 376 (Iowa 1998). Now, when LSP filed an action *before* codification, Appellees wanted this Court to hold it is too early. Under Appellees' view of the law, even targets of an act that inevitably will harm them are barred from the courthouse doors.

Standing is meant to ensure "litigants are true adversaries," "people most concerned with an issue are in fact the litigants of the issue," and "that a real concrete case exists." *Godfrey v. State*, 752 N.W.2d 413, 425-26 (Iowa 2008). LSP meets that standard. LSP was a direct target of the improperly adopted Iowa Code section

478.16 and exactly the party that Article III, section 29 was enacted to protect. Thus, LSP must be allowed to proceed on its claims.

I. LSP SATISFIES INJURY IN FACT.

Standing is a two-pronged approach, where a litigant must show (1) a specific personal or legal interest in the litigation and (2) injury in fact. *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 452 (Iowa 2013). Appellees concede LSP has a personal interest at stake. (App. 1002). This confines the Court's inquiry to the second prong: whether LSP has alleged a non-speculative, imminent harm. *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 790 (Iowa 2021). The district court erred in holding LSP lacked injury in fact.

A. Iowa Projects Are Likely.

Appellees overstate LSP's burden. ITC Midwest, LLC's ("ITC") hyperbolic statement that LSP asks this Court to "entirely throw out the longstanding requirement that there be some 'specificity' and some 'imminence' to harms alleged" is inaccurate. Rather, it is Appellees who attempt to artificially heighten appropriate standards applied.

Notwithstanding that the law was specifically intended to deprive LSP of all future project opportunities, Appellees imply a potential project must be unquestionable for standing and any "uncertainty is dispositive." (State Br. at 21). Iowa courts repeatedly affirm, "[o]nly a likelihood or possibility of injury need be shown. A party need not demonstrate injury will accrue with certainty, or has already accrued." *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 444 (Iowa 1983); *see also Godfrey*, 752 N.W.2d at 423; *Hawkeye Bancorp v. Iowa Coll. Aid Comm'n*, 360 N.W.2d 798, 801-02 (Iowa 1985). Even under federal standards, it need not be "literally certain" that harms LSP identifies will occur, but rather substantially likely. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). If it were not likely there would have been no need for legislation in the dark of night at all.

Appellees minimize the likelihood of Iowa projects. Projects for MISO's region, including Iowa, are approved at least biennially in a MISO Transmission Expansion Plan ("MTEP"). (App. 470) (explaining planning milestones). MTEP approval is the final step.

Prior to approval, projects are identified, in-depth reliability analyses are conducted and FERC filings are made. (App. 583-598). Upon MTEP approval, eligible projects are referred for competition. Projects that would otherwise be competitive, but due to a state ROFR are not, *are removed from competition* and designated to the law's preferred developer.[1] (App. 447, 563, 756). MTEP approval is merely the final step in *consummating* the harm imminent from the moment the ROFR was put in place.

In October 2020, LSP pled harm, estimating significant grid expansion in Iowa and pointing to planning underway for projects. (App. 14-15). It submitted evidentiary support, including MISO's October 2020 planning outlook, which specifically identified a $252 million transmission addition. (App. 151-155). By pointing to MTEP and SPP-MISO planning, LSP identified specific Iowa projects planned, expected and likely to be approved.

[1] Developers designated by MISO to construct MTEP projects may take advantage of regional cost allocation, recovering an attractive rate of return from the region's consumers for the project's life—often forty to fifty years. (App. 809-810).

These are not the "someday" projects Appellees claim.[2] MISO's updated planning map released December 7, 2021, lists several Iowa transmission projects for Tranche 1 as likely.[3] MISO has already undertaken or largely completed reliability analyses for these projects. The only remaining step is MTEP approval and then competition (or not). *Id.* In the MISO-SPP seam study,[4] an Iowa solution—the *same one* identified by LSP in October 2020—has moved forward, having already passed cost ratio analyses and technical review. The study's final report will be issued in 2022.[5]

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[2] *Crawford v. Hinds Cnty. Bd. of Supervisors*, 1 F.4th 371, 377 (5th Cir. 2021) (Ho J., concurring) (acknowledging evidence to confirm existence of threat identified when filed suit may be submitted).

[3] MISO, *Reliability Imperative: Long Range Transmission Planning*, https://cdn.misoenergy.org/20211207%20System%20Planning%20Committee%20of%20the%20BOD%20Item%2005%20Reliability%20Imperative%20LRTP608458.pdf (Dec. 7, 2021).

[4] MISO, *SPP-MISO Joint Targeted Interconnection Queue Study*, https://cdn.misoenergy.org/20211207%20System%20Planning%20Committee%20of%20the%20BOD%20Item%2006%20SPP-MISO%20JTIQ%20Study608459.pdf (Dec. 7, 2021).

[5] Iowa Rule of Civil Procedure 5.201(b) allows notice to be taken of facts "not subject to reasonable dispute" that "[c]an be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." An RTO's statements regarding its own planning processes are not subject to reasonable dispute. *See also Benton Cnty. Wind Farm LLC v. Duke Energy Ind., Inc.*, 843 F.3d

These harms also are not hypothetical. LSP's injuries occur when the project is assigned to the State, and RTO competition is lost. These harms occur by operation of the statute *regardless* of whether an incumbent exercises its ROFR. *See City of Kennett, Miss. v. E.P.A.*, 887 F.3d 424, 432 (8th Cir. 2018) ("To say that the permit will comply with the TMDL is not 'conjectural.'"). Suggesting LSP could file within the window after approval, but before an ROFR is exercised, ignores this harm and ignores the required timing under Article III, section 29. And "the possibility that [Iowa] … could promulgate a new [ROFR law] … before [a project] does not prohibit [LSP] from challenging it." *See id.*

B. Iowa Projects Are Imminent.

Appellees also mischaracterize imminence, implying unless a *specific* project has been approved or will be approved in some defined timeframe, it is insufficient. Imminence is an "elastic" concept. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992). Its meaning "depends on the particular circumstances," and "[i]t could

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298, 307 (7th Cir. 2016) (Posner, J., concurring) (approving judicial notice of how MISO structures its bidding process).

hardly be thought that [State] action likely to cause harm cannot be challenged until it is too late." *Adams v. Watson*, 10 F.3d 915, 924 (Iowa 1993) (quoting *Rental Housing Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388, 390 (1st Cir. 1977)).

There is "a window of time measured from the date the legislation is passed until such legislation is codified" that "legislation may be challenged as violative of article III, section 29." *State v. Mabry*, 460 N.W.2d 472, 473 (Iowa 1990). Imminence must be viewed considering this limited window. The Seventh Circuit Court of Appeals, addressing a 60-day jurisdictional statute, highlights the danger of holding otherwise:

> If the Agency's theory were correct, any final rule could be insulated from a pre-enforcement challenge by the simple expedient of setting an effective date 61 or more days after the rule was entered; ripeness would always stand as a bar to a petition.

Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin., 656 F.3d 580, 587 (7th Cir. 2011). Had LSP waited, it would have been too late.

Imminence also must be viewed in light of injuries LSP alleges. When injury is opportunity to compete, future harm is

imminent even absent a specific project if a party (1) regularly bids on contracts in the relevant market, (2) is able and ready to bid and (3) sometime in the "relatively near future" projects will arise. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211-12 (1995); *see also Horsfield Materials*, 834 N.W.2d at 457. Where governmental action will cause competitive injury, future injury in fact is viewed as "obvious," even if latent, where a benefit is bestowed on a direct competitor. *Adams*, 10 F.3d at 922-23 (collecting competitive injury cases). And past lost business may help establish imminence. *See Hawkeye Foodservice Distrib. v. Iowa Educators Corp.*, 812 N.W.2d 600, 606 (Iowa 2012); *Iowa Bankers Ass'n v. Iowa Union Dep't*, 335 N.W.2d at 439, 444 (Iowa 1983).

Appellees attempt to distinguish Iowa cases applying these standards. They note in *Horsfield*, *Hawkeye* and *Iowa Bankers* prior opportunities or business were lost. But one need look no further than cases Appellees cite to see LSP <u>has</u> been injured by state ROFRs. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020) (noting Huntley-Wilmarth line assigned without competition based on state ROFR); (App. 810).

Though Appellees try to restrict harm only to Iowa, that limitation is nowhere in Iowa caselaw. In fact, in *Iowa Bankers Association*, the court found standing to challenge a practice bestowing benefits on a plaintiff's competitor when under a prior statute the plaintiff had lost business. 335 N.W.2d at 439. Here, LSP submitted evidence the exact *same* practice, in the *same* competitive market (MISO), has caused LSP past injury. (App. 810). LSP has bid on projects in MISO and SPP in the past, and incumbents are direct competitors for those projects. (App. 808).

Nor is it relevant planning processes have been extended. Planning processes for multi-million dollar projects take time to complete. In *Adarand*, harm from opportunity to bid was imminent when it would occur in a year. *Adarand Constructors*, 515 U.S. at 211-12. Competitive advantages "may take months or even years to materialize," but are still imminent. (LSP Br. at 57-59).

Appellees' foray into unpublished caselaw and hypothetical scenarios is similarly unhelpful. In neither *Rush* nor *Duff* did plaintiffs allege competitive harm, nor were they foreclosed from participating in competitive processes. *Rush*, 2020 WL 825953, at

*5; *Duff*, 2020 WL 825983, at *3 (Iowa Ct. App. Feb. 19, 2020). Appellees further cite *Kopecky v. Iowa Racing and Gaming Commission*, 891 N.W.2d 439 (Iowa 2017) and *In re Legislative Districting Authority*, 193 N.W.2d 784 (Iowa 1972) to suggest, regardless of how much planning has been done on a proposal, absent actual approval no standing exists. Yet *Kopecky* and *In re Legislative Districting Authority* do not even mention, much less discuss, standing. The State's analysis is speculative.

Actual caselaw demonstrates the danger of speculation—the Court *has* found projects imminent prior to final approval, and *has* allowed challenges prior to final passage. In *Brueggeman v. Osceola County*, the Iowa Court of Appeals found standing prior to an ordinance's passage. 2017 WL 2464072, at *5 (Iowa Ct. App. June 7, 2017). Where the county announced plans to create a TIF district and undertook action to further its "overall plan," the ordinance passing was "likely, as opposed to merely speculative." *Id.*; *see also Sierra Club Iowa Chapter v. Iowa Dep't of Transp.*, 832 N.W.2d 636, 648 (Iowa 2013) (finding a justiciable controversy for project in agency's "five-year plan" despite contingencies); *Berent v. City of*

Iowa City, 738 N.W.2d 193, 203 (Iowa 2007) (finding challenge to proposed ballot measures prior to passage ripe).

C. A Principled Approach to the Public Interest Exception, Rather Than All or Nothing Application, Is Appropriate.

LSP's initial brief offered a workable framework for the public interest exception, evaluating (1) the issue presented and (2) the appropriateness of parties.[6] LSP's proposed analysis honors standing's underlying rationales recognized in *Godfrey*: separation of powers, assuring litigants are true adversaries and ensuring a concrete case exists to enable the Court to weigh a decision's consequences. 752 N.W.2d at 425. Injury would be waived only when "the issue is of the utmost importance and constitutional protections are the most needed." *Id.* at 427.

Appellees focus solely on the issue presented. Their proposed analysis asks this Court to determine issues of the "utmost importance" without the benefit of legislative context or factual allegations. (State's Br. at 46-47). They argue for a categorical

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[6] *See, e.g., Trs. for Alaska v. State*, 736 P.2d 324, 329-30 (Alaska 1987); *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988); *Gregory v. Shurtleff*, 299 P.3d 1098, 1108-09 (Utah 2013).

determination, divorced from any particular facts: *Does a single subject, title, or equal protection claim implicate public importance? Check yes or no.* They then go a step further and say for Article III, section 29 challenges, the answer always is "no." This analysis is flawed, and applying the public importance exception remains appropriate.

1. Context Matters When Evaluating Public Interest.

Appellees' siloed, rigid approach is impractical. First, it contradicts cases on which they rely. In *Godfrey*, this Court looked behind the claims presented to the circumstances at issue. *Id.* Although the Court found the public interest exception inapplicable, it did so only after recognizing "the absence of an allegation or claim by Godfrey that implicat[es] fraud, surprise, personal or private gain, or other such evils inconsistent with the democratic legislative process." *Id.* It found important legislative history enumerating whether Article III, section 29's purposes were thwarted:

> Moreover, there is no allegation that the provisions were purposely placed into one bill to engage in logrolling. In fact, House File 2581 was a joint effort by the executive

> and legislative branches to reenact legislation determined by the third branch of the government to have failed in its prior enactment, and the General Assembly gathered for a special extraordinary session with the understanding of the scope of the session as outlined by the governor. These circumstances minimize our need to interfere with the affairs of another branch of government.

Id.; *see also Rush*, 2020 WL 825953, at *12-13 (declining to apply the public interest exception only after noting lack of "factual allegations" of fraud and "consider[ing] the context" of legislative history). Here facts exist that *do* implicate surprise and evils inconsistent with the legislative process.

By considering the circumstances, these courts did not improperly evaluate the dispute's merits as State Defendants suggest, but instead evaluated the "issue presented" to determine whether "constitutional protections are the most needed." *See Godfrey*, 752 N.W.2d at 427. "Standing cannot be considered in a vacuum" and "to determine whether a claim is within the competence of the judiciary to handle, it is appropriate to understand what the claim is." *Iowa Citizens for Cmty. Improvement*, 962 N.W.2d at 787 n.1.

Beyond contradicting precedent, Appellees' approach elevates form over substance. If the Court determines an equal protection challenge implicates public importance in one case, are <u>*all*</u> equal protection challenges automatically issues of public importance? Appellees' request that the Court do nothing but look at the legal claim presented would make it so. As *Godfrey* recognized, however, courts "do not respond to all [constitutional] violations the same, or even provide a remedy for every violation." 752 N.W.2d at 428. Rigid, categorical rules are inappropriate when the "very nature of the public importance exception to the general standing requirement resists a formulaic approach, as each case must turn on 'the competing policy concerns'" underlying standing. *ATC S., Inc. v. Charleston Cnty.*, 669 S.E.2d 337, 341 (S.C. 2008). Where factual allegations and legislative history show the constitution's underlying aims were frustrated is where protections are most needed and judicial intervention warranted. Context matters.

Nor are Appellees correct it is irrelevant that the ROFR was the policy passed. Transmission of electric energy is in the public interest. 16 U.S.C. § 824(a). Additionally, while the wisdom of the

ROFR is not before the Court, the ROFR's anticompetitive purpose animates whether this case is of great public importance under Article I, section 6, whose purpose is to address special status bestowed upon similarly situated individuals. *See State v. Santee*, 82 N.W. 445, 446-47 (Iowa 1900).

Article III, section 29's intent to allow "issues presented by each bill [to] be better grasped and more intelligently discussed" is particularly salient "when the subject matter is inherently controversial." *Plain Loc. Sch. Dist. Bd. of Educ. v. Dewine*, 486 F. Supp. 3d 1173, 1201 (S.D. Ohio 2020) (quoting *Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999)); *see also Long v. Bd. of Supervisors of Benton Cnty.*, 142 N.W.2d 378, 382 (Iowa 1966). Tucking a hotly-debated matter, that failed to advance previously, into a non-controversial measure (or a must-pass budget bill) bears hallmarks of impermissible logrolling. [7]

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[7] "Disunity of subject matter is the only requirement—no extrinsic evidence of logrolling is required to find a statute violates the one-subject rule." *Plain Loc. Sch. Dist. Bd. of Educ.*, 486 F. Supp. at 1205-06. But legislative history can elucidate additional evidence of logrolling. *Id.*; *Defs. of Wildlife v. Ventura*, 632 N.W.2d 707, 714 (Minn. Ct. App. 2001).

2. LSP's Claims Exhibit Constitutional Protections are Most Needed.

Passing the ROFR in H.F. 2643 on June 14, 2020 was exactly such "tricks in legislation" and "mischiefs" Article III, section 29 intends to prevent. *Chi. Rock Island Pac. Ry. Co. v. Streepy*, 224 N.W. 41, 43 (Iowa 1929).

First, Article III, section 29 aims to "force each legislative proposal to stand on its own merits" and prevent "undesirable riders." *Godfrey*, 752 N.W.2d at 426. Here a provision whose predecessors failed—twice—to pass on their own merits was tucked into a much-needed appropriations bill in the eleventh hour, in an everything-but-the-kitchen sink amendment so legislators had no opportunity to vote on the stand-alone measure.

Second, Article III, section 29 intends to prevent fraud and surprise from being visited upon legislators. *Taylor*, 557 N.W.2d at 525; *Long*, 142 N.W.2d at 378. Here legislators regarded the ROFR as "dead" prior to being blindsided in the twilight hour, and numerous legislators revealed confusion during debate about the ROFR's scope and effect. (App. 63, 72, 74, 159).

Third, Article III, section 29 was designed to keep the citizens of Iowa reasonably informed of subjects under legislative consideration so they might participate in the democratic process. *Mabry*, 460 N.W.2d at 473. The ROFR was coiled up in the folds of a bill unveiled at 1:35 a.m. on the final day of the legislative session and passed just twelve hours later, with even frequent flyers on transmission issues such as LSP caught off-guard. (App. 283).

Arguments the ROFR did *not* thwart Article III, section 29's purposes are specious. MidAmerican suggests notice because H.F. 2643 went through a "full" committee process. The Senate appropriations committee met for a grand total of ten minutes at 5:00 p.m. on June 13, 2020, eight hours <u>*before*</u> the ROFR was added. (App. 946). Although several lobbyists filed statements "for" or "against" H.F. 2643, MidAmerican fails to inform the Court that <u>***no***</u> parties were able to do so before it passed in the Senate and 24 filed only *after* it passed both chambers. (App. 234-237). There was virtually no opportunity—even informally—for the public to meet with legislators and make their views known.

The ROFR was anything but uncontroversial. Incumbents, interested in the substantial profits that result from not having to compete, lodged *numerous* challenges to Order No. 1000 at FERC and the Seventh and D.C. Circuit Courts of Appeal, but ultimately federal competition prevailed. *See MISO Transmission Owners v. F.E.R.C.*, 819 F.3d 329 (7th Cir. 2016); *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41 (D.C. Cir. 2014); *Okla. Gas & Elec. Co. v. F.E.R.C.*, 827 F.3d 75 (D.C. Cir. 2016). FERC expressly stated ROFRs "severely harm" the public interest. *ISO New England Inc.*, 143 FERC ¶ 61150, 2013 WL 2189868 (May 17, 2013). The Department of Justice weighed in that Order 1000 declining to intrude on state law did ***not*** "approve[] the use of state right-of-first-refusal[s]." Br. for the United States of Am. As Amicus Curiae in Support of Neither Party, Vacatur, and Remand, *LSP Transmission Holdings, LLC v. Lange*, at *16 (filed Oct, 19, 2018). Savings from competition are as much as 20–30%. The Brattle Group, *Cost Savings Offered by Competition in Electric Transmission*,

https://brattlefiles.blob.core.windows.net/files/15987_brattle_comp

etitive_transmission_report_final_with_data_tables_04-09-2019.pdf (April 2019).

Iowa's standing doctrine was not intended to prevent deciding "critical public issues of the day." *Godfrey*, 752 N.W.2d at 425. True enough that LSP cannot say for certain whether the ROFR would have met a similar fate if posed as a stand-alone measure, but what *is* certain is that the ROFR was introduced using the very mischiefs Article III, section 29 was designed to prevent.

3. Separation of Powers Does Not Counsel Foregoing Judicial Action.

Finally, this Court cannot hesitate to declare the public importance implicated due to separation of powers. Iowa's constitution employs a system of "checks and balances," where each branch may exert control over another in constitutional matters. Iowa Const., Art. III, § 1; *see Redmond v. Ray*, 268 N.W.2d 849, 858 (Iowa 1978).

Article III, section 29 presents an indispensable check on legislative power. Constitutional restrictions on the legislative process were "adopted throughout the nineteenth century in response to state legislative abuses," including "[l]ast-minute

consideration of important measures, logrolling, mixed substantive provisions in omnibus bills, low visibility, and hasty enactment of important, sometimes corrupt, legislation." Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. Pitt. L. Rev. 797, 798 (1987).

Article III, section 29 of Iowa's Constitution, for its part, survived two constitutional conventions. W. Blair Lord, The Debates of the Constitutional Convention of the State of Iowa, 530-31 (Vol. I Jan. 19, 1857). A proposal to remove it from the second iteration failed—Article III, section 29 was a necessary check on legislative power, albeit a broad one. *Id.* Violations not only undermine this intent, they intrude on the executive branch's ability to exercise *its* powers, including through veto. *See, e.g., Nova Health Sys. v. Edmonson*, 233 P.3d 380, 381 n.6 (Okla. 2010).

"Where the legislature has passed a bill and the governor has signed it, we cannot assume that either of those branches are appropriate parties to whom to entrust the prosecution of a claim." *Gregory*, 299 P.3d 1108-09 (citation omitted). When it is clear

Article III, section 29 was violated, the Court "must not hesitate to proclaim the supremacy of the Constitution." *W. Int'l v. Kirkpatrick*, 396 N.W.2d 359, 366 (Iowa 1986) (citation omitted). When evils Article III, section 29 guards against are not present, refusing a public interest exception reflects proper legislative deference. Refusing when such evils *are* present is not deference, it is permitting unconstitutional conduct.

II. LSP'S CLAIMS ARE RIPE.

LSP's claims are ripe. To determine whether a declaratory judgment is ripe, the Court must search for "an antagonistic assertion and denial of a right." *Wesselink*, 80 N.W.2d at 487. The 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 a declaratory judgment." *Id.* Courts apply two factors: "(1) are there relevant issues sufficiently focused to permit judicial resolution without further factual development and (2) would the parties suffer any hardship by postponing judicial action?" *Sierra Club Iowa Chapter*, 832 N.W.2d at 648.

When a question is "purely legal" and would not "benefit from further factual development," it is fit for judicial resolution. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 867 (8th Cir. 2013) (applying similar federal ripeness test analysis); *Neb. Pub. Power Dist. v. MidAm. Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000).

LSP's challenges are legal, constitutional questions. Although discovery might uncover additional evidence, relevant facts already occurred. As the Missouri Supreme Court recognized, "Because the resolution of the constitutional issue depends entirely on facts that occurred before [legislation] was passed, the facts necessary to adjudicate the underlying factual claim are fully developed." *Mo. Health Care Ass'n v. Attorney Gen. of the State of Mo.*, 953 S.W.2d 617, 621-22 (Mo. 1997); *see also Kan. Nat'l Educ. Ass'n v. State*, 387 P.3d 795, 802-03 (Kan. 2017) ("The one-subject rule violation KNEA asserts is a pure question of law. No additional facts need to arise or be developed for the court to resolve it."). No matter when a specific project is approved, the problems with the statute and underlying legislation remain identical. *See*

Mealy v. Nash Finch Co., 2014 WL 468007, at *5 (Iowa Ct. App. Feb. 5, 2014). The court will not be aided by further delay.

Withholding adjudication only works a significant hardship on LSP. If dismissed, LSP's single-subject and title challenges are barred, as the legislation containing the ROFR is codified. *Iowa Dep't of Transp.*, 586 N.W.2d at 376. Nor can any later agency action afford the relief LSP seeks—a declaration the state ROFR is unconstitutional. *See Salsbury Labs. v. Iowa Dep't of Env't Quality*, 276 N.W.2d 830, 836 (Iowa 1979).

State Defendants assert the loss of a claim really isn't <u>*that*</u> bad and is not a hardship. (State Def. Br. at 60, 64). They cite *State v. Kolbet*, 638 N.W.2d 553 (Iowa 2001) and *Citizens for Responsible Choices v. Shenandoah*, 686 N.W.2d 470 (Iowa 2004) in support. But *Kolbet*, while acknowledging the "window of opportunity for challenging a statute" may be "entirely fortuitous," did not hold codification could not be considered when evaluating ripeness. 638 N.W.2d at 661. And in *Citizens for Responsible Choices*, the court's dismissal meant plaintiffs lost the ability to file objections prior to

a project's approval, not their *entire* statutory claims. 686 N.W.2d 475.

That is not so for LSP's single-subject and title challenges. "[D]ismissing [LSP's] claims as unripe would effectively foreclose the possibility of relief—a hardship and inequity of the highest order." *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 111 (2d Cir. 2013). When waiting to sue would waive a party's claim, ripeness may consider this is a factor. *State v. Backes*, 601 N.W.2d 374, 375 (Iowa Ct. App. 1999); *see also Jacobs Tech. Inc. v. U.S.*, 131 Fed. Cl. 430, 447 (Fed. Cl. 2017) (recognizing hardship where, if review withheld, claim became untimely); *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d at 111.

"Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Blanchette v. Conn. Gen. Ins. Corp.*, 419 U.S. 102, 143 (1974); *see also Backes*, 601 N.W.2d at 375. "We do not require the parties to operate beneath the sword

of Damocles until the threatened harm actually befalls them." *Iowa League of Cities*, 711 F.3d at 867. That no specific project is approved does not vitiate that the statute will "inevitably" operate to LSP's detriment.

The ROFR's inevitable operation distinguishes it from *Covington v. Reynolds ex rel. State*, an unpublished Iowa Court of Appeals opinion, where legislation *allowed* but did not mandate Medicaid providers deny coverage for gender-affirming surgery, and the Court of Appeals found the claim unripe. 2020 WL 4514691, at *3 (Iowa Ct. App. Aug. 5, 2020). The ROFR permits no discretion, and thus, no question of injury exists.

"The Declaratory Judgment Act necessarily deals with present rights, but it is a present right to have a judicial assurance that advantages will be enjoyed or liabilities escaped in the future." *Katz Inv. Co. v. Lynch*, 47 N.W.2d 800, 805 (Iowa 1951). LSP's rights are injured by the ROFR and their claims ripe for resolution. *See Lewis Consol. Sch. Dist. of Cass Cnty. v. Johnston*, 127 N.W.2d 118, 122 (Iowa 1964).

III. THIS COURT CAN, AND SHOULD, ISSUE AN INJUNCTION.

LSP urges the Court to address this dispute's merits. "Where the district court [did] not reach[] certain issues because they were deemed unnecessary to the decision," an appellate court may "in the interest of sound judicial administration" decide issues that are fully briefed. *See Barnes v. Iowa Dep't of Transp.*, 385 N.W.2d 260, 263 (Iowa 1986). Addressing issues is particularly appropriate when they are reviewed de novo and "the factual record is complete." *SZ Enter., LLC v. Iowa Utilities Bd.*, 850 N.W.2d 441, 470 n.8 (Iowa 2014). This doctrine applies to constitutional and other issues alike. *See Barnes*, 385 N.W.2d at 263 (addressing equal protection claim); *see also State v. Lyle*, 854 N.W.2d 378, 383 (Iowa 2014); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 350 (Iowa 2013).

All parties briefed the injunction's propriety in the District Court and two appellees address it on appeal; the Court should resolve it here. At a minimum, the Court should temporarily enjoin the action pending review at the District Court. *See* Iowa R. App. P. 6.1001. Because irreparable injury and lack of remedy are

addressed above in response to Appellees' standing arguments, LSP focuses on likely success on the merits. *See* Iowa R. Civ. P. 1.1502; *Cmty. State Bank, Nat'l Ass'n v. Cmty. State Bank*, 758 N.W.2d 520, 528 (Iowa 2008).

A. H.F. 2643, Containing the ROFR, Violates the Single-Subject Clause.

The ROFR's violation <u>*is*</u> clear, plain and palpable. *Long*, 142 N.W.2d at 381-82. Appellees do little to argue it is not, with MidAmerican suggesting, almost as an aside, H.F. 2643's subject is "legal and regulatory responsibilities." As LSP's opening brief addressed, if this Court gives any meaning to the single-subject clause, "legal and regulatory responsibilities"—a category that could encompass nearly all legislation—cannot pass muster. (LSP Br. at 80-81).

Even if "legal and regulatory responsibilities" was a valid subject, not all H.F. 2643's topics relate to it "either logically or in popular understanding." *Giles v. State*, 511 N.W.2d 622, 625 (Iowa 1994). Appropriations are primarily legislative, not legal or regulatory, functions. Many of H.F. 2643's appropriations contain *no* corresponding "legal" or "regulatory" responsibilities. *See, e.g.,*

(App. 87, 109-110, 120) (appropriating to legislative agencies, county hospital funding, and nonpublic school enrollment with no duties attached). H.F. 2643 also contains numerous substantive measures, with no appropriation *or* legal duty. (*See, e.g.*, App. 110-111, 127, 133) (repealing applicability of hemp regulations, making code corrections, and setting forth ROFR).[8] Such a tortured connection among H.F. 2643's topics does not satisfy the single-subject requirement. *See Taylor*, 557 N.W.2d at 526 (finding weapons law unrelated to "juvenile justice" because "*any* weapons law could have an impact on juveniles").

B. H.F. 2643's Title Provided No Fair Notice of the ROFR.

As stated in LSP's first brief, the phrase "legal and regulatory responsibilities" does not provide notice of the ROFR. (LSP Br. at 83-84). The ROFR is *not* a legal or regulatory responsibility—it is a substantive right. *See* Iowa Code § 478.16(3). *No one* "reading

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[8] MidAmerican's citation to *Bair* misses the mark. *Bair* approved *taxing* and *police powers* in substantive legislation to promote economic incentives, not policy (and code corrections) within an appropriations bill. *Miller v. Bair*, 444 N.W.2d 487, 490 (Iowa 1989).

the title of [H.F.2643] could reasonably assume that the reader would be apprised" of the ROFR, electric transmission or even utilities generally. *State v. Iowa Dist. Ct.*, 410 N.W.2d 684, 688 (Iowa 1987); *see W. Int'l*, 396 N.W.2d at 365 (holding title stating act was bill "altering current practices" provided no fair notice of practices changed).

Burlington Summit Apartments v. Manolato, 7 N.W.2d 26, 28 (Iowa 1942), is instructive. In *Manolato*, the title stated it was

> An Act in relation to the housing of the people … by regulating the light and ventilation, sanitation, fire protection, maintenance, alteration and improvement of dwellings; … to establish administrative requirements and to establish remedies and fix penalties for the violation thereof.

Id. at 18. The title referenced the housing code as the "broad subject of the act" and "penalties for violation thereof," fairly encompassing rent being denied for violations. *See id.* Here, although "regulatory responsibilities" is mentioned, nothing in the title indicates any relation to electric transmission lines. *Id.*; *see also Rush*, 2020 WL 825953, at *12 (stating title "Regulatory Responsibilities" was a "vague categorical description that do[es] not disclose specific subject matters of various divisions of the bill").

C. There is No Realistically Conceivable Reason Supporting Differential Treatment of Non-Incumbent Entities in the ROFR.

LSP is also likely to succeed on its Article I, section 6 challenge. Appellees cannot defend the ROFR by arguing incumbents are not similar to non-incumbents because one owns in-state transmission and the other does not. (ITC Br. at 30-31). Such a tautology was rejected by this Court in *Varnum v. Brien*:

> In considering whether two classes are similarly situated, a court cannot simply look at the trait used by the legislature to define a classification under a statute and conclude a person without that trait is not similarly situated to persons with the trait….

763 N.W.2d 862, 883 (Iowa 2009). Instead, analyzing whether groups are similarly situated must occur "with respect to the purposes of the law." *Id.*

Examining incumbent and non-incumbent entities with respect to the law's purpose, there is no meaningful distinction. *Id.* Absent the ROFR, incumbent and non-incumbent entities are subject to the *exact same* permitting processes and oversight requirements before the IUB. *See* Iowa Code ch. 478. They are subject to the *exact same* IUB and FERC safety, reliability and maintenance standards. *See* Iowa Code ch. 478; 18 C.F.R. § 39.2;

Iowa Code § 478.19; Iowa Admin. Code r. 199-11.9, 199-25. They are also subject to the same rigorous RTO process to become "qualified." (App. 277, 438, 575-599).

With respect to the ROFR's purpose of wholesale electric transmission project regulation, LSP and other non-incumbents are "similarly situated in every important respect," but for their incumbency status. *Varnum*, 763 N.W.2d at 884. Because this circular distinction cannot defeat equal protection analysis, Appellees' arguments fail. *See id.*; *see also LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 860 (Iowa 2015) (cautioning against "making intricate distinctions between purported classes of similarly situated individuals").

Appellees' second similarly-situated argument fares no better. ITC suggests by distinguishing between incumbents and non-incumbents, the ROFR intended to classify between rate-regulated utilities and non-rate-regulated utilities. (ITC Br. at 31-32). It points to out-of-state cases holding rate-regulated utilities are not similar to independent transmission entities under the Commerce Clause.

Iowa rational basis analysis is more stringent. *See Racing Assoc. of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 9 (Iowa 2004) [hereinafter "RACI"] (noting rational basis standard "is not a toothless one" (citation omitted)). Critically, classification between rate-regulated and other utilities is **not** the ROFR's distinction. The ROFR prefers all incumbent providers—including cooperatives, independent transmission companies, and municipal corporations. *See* Iowa Code § 478.16(1)(c). For example, ITC, an independent transmission owner with no retail customers just like LSP, is benefitted.[9] Because ITC's proposed classification is severely over-inclusive and not tied to the purpose advanced, the statute cannot withstand rational basis review. *RACI*, 675 N.W.2d at 7-8.

[9] ITC posits it is not similarly situated to LSP because it went through an IUB approval process. (ITC Br. at 30-31). The "similarly situated" inquiry does not evaluate individual distinctions from one party and another. *See Varnum*, 763 N.W.2d at 882. If LSP chose to purchase assets of a public utility, as ITC did, it would have to go through the *exact same approval process*, regardless of whether the ROFR is in operation. *See* Iowa Code §§ 476.76, .77. It is not tied to the law's purpose.

Nor do Appellees advance a plausible policy reason for the ROFR. To be plausible, an explanation must be credible, not specious, and have a factual basis. *Id.* Although no "proof" need be proffered, there must be some legislative facts available that could rationally have been considered true by governmental decisionmakers. *Id.* at 9 & n.4. The relationship between the classification and its goal also cannot be "so attenuated as to render the distinction arbitrary or irrational." *Id.* at 7.

Although ITC hypothesizes the legislature perhaps feared service disruptions or wanted to continue the status quo, and MidAmerican suggests the legislature wanted quicker responsiveness, more than a "superficial analysis" of these purported justifications cause them to fall flat. (ITC Br. at 32-33; MidAm. Br. at 15); *see RACI*, 675 N.W.2d at 7 n.3 & 4. Considering stringent requirements to be designated as "qualified" with an RTO, nothing suggests non-incumbent entities selected to build and maintain transmission are less reliable. (*See* App. 447, 563, 756).[10]

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[10] MidAmerican also posits "concern" exists within "the industry" that non-incumbent transmission developer entities are not adequately structured or capitalized. No citation is provided for

Unlike cases where "quality control" was a conceivable goal, any concerns here about quality are unsupported. *See Horsfield Materials, Inc.*, 834 N.W.2d at 459.

Similarly, no facts suggest the legislature sought to preserve the "status quo." No ROFR was in place for nearly a decade following Order No. 1000. Nor is it realistically conceivable the legislature wanted to benefit from "quick resolution" of reliability issues. RTO tariffs *already* exempt local projects needed quickly or for reliability reasons from competitive processes. (App. 564, 994-997) (MISO's Baseline Reliability Projects, needed solely for reliability, ineligible for competition); *see also* (App. 574-576, 994-997 (projects needed within three years ineligible for competition). And when selecting a qualified developer in competitive processes, MISO evaluates response time for emergency outages. (App. 593-594).

Appellees' failure to come forward with any plausible policy justification that is realistically conceivable underscores its true

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this assertion, nor is it true. MISO and SPP competitive processes expressly consider qualified developers' financial condition when deciding to award a project. (App. 583-598, 694).

purpose: an anti-competitive measure to insulate a favored group (incumbents) from having to compete. Even under the rational basis test, "the legislature is not entitled to pick out a group it disfavors, declare that group to be different, and then impose a special … burden on the unfavored group." *RACI*, 675 N.W.2d at 16. The ROFR must be invalidated.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

This Reply Brief complies with the typeface requirements and length limitation of Iowa Rules of Appellate Procedure 6.902(1)(*e*)(1) and 6.903(1)(*g*)(1) because this Reply Brief has been prepared in a proportionally spaced typeface using Century Schoolbook 14 pt. and contains 6511 words, excluding the parts of the Reply Brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

/s/ Shannon Olson

CERTIFICATE OF SERVICE

I hereby certify on the 3rd day of January, 2022, I electronically filed the foregoing Appellants' Reply Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following parties. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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