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-Appellees.

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

APPELLANTS' APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED

I. Did the Court of Appeals Err in Concluding a Party Who Is Targeted by Legislation Fails to Have Standing for Future Harm Because Harm in the State of Iowa Has Not Already Occurred?

II. Did the Court of Appeals Err When It Declined to Apply a Public Importance Exception When Evidence of Logrolling, Fraud, Surprise and Private Gain Are Present?

III. Did the Court of Appeals Err, or Abuse Its Discretion, by Refusing to Take Judicial Notice of Matters That Were Not Subject to Reasonable Dispute and Were Provided to the Court?

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STATEMENT SUPPORTING FURTHER REVIEW

This case presents a threshold question of whether a party excluded from competing for certain business in Iowa, by operation of a law passed in violation of Iowa's constitution, has standing to challenge the statute excluding it. The Court of Appeals, holding it did not, imposed an irrationally stringent standard as to standing, concluding that unless a party or its competitors already lost business *in Iowa* because of the statute, traditional standing was not satisfied.

Yet, Iowa law requires injury in fact to be *likely* and *imminent*, not certain and already passed. *See Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 445 (Iowa 1983). By requiring harm be complete before a party has standing, the Court of Appeals created a loophole for constitutional claims like those alleged here—single-subject and title challenges. *See* Iowa Const. Art. III, § 29. Because these challenges are time-barred upon the law's codification, the Court of Appeals' draconian standing interpretation allows the legislature an out: postpone the effective date until after codification and forever insulate it from challenge.

Constitutional violations should not be fit with an escape valve, particularly when the constitutional provisions at issue are intended as a check on legislative power.

Next, the Court of Appeals erred by holding the public interest exception did not apply despite blatant evidence of single-subject and title violations and notwithstanding the impact on every utility customer in Iowa. Finally, while holding that harm to LS Power was not imminent, the Court of Appeals refused to take judicial notice of facts indicating such harm was imminent, with projects subject to the anticompetitive law being approved on July 25, 2022.

Further review is appropriate under all four grounds in Iowa Rule of Appellate Procedure 6.1103(b), particularly subparts (b)(1) and (b)(4). The Court of Appeals' decision misapplies this Court's standing doctrine and is "in conflict with [] decision[s] of this court," Iowa R. App. P. 6.1103(b)(1). Moreover, the decision involves important questions of law that "ha[ve] not been, but should be, settled by this Court," including application of the public importance exception. *Id.* (b)(2). Finally, the decision presents an issue of broad public importance that the Supreme Court should

ultimately determine, with violations of Iowa's constitution left unremedied and harming electric consumers across Iowa. Iowa R. App. P. 6.1103(b)(3) and (4).

STATEMENT OF FACTS

On June 14, 2020, Iowa's legislature included in an omnibus appropriations bill Iowa Code section 478.16, granting "incumbent electric transmission owners" a "right of first refusal" (ROFR) for certain electric transmission projects. Prior to the law, qualified entities could compete for these multimillion-dollar transmission projects through Midcontinent Independent System Operator ("MISO") and Southwest Power Pool ("SPP"), two Federal Energy Regulatory Commission-approved regional transmission organizations ("RTOs") responsible for transmission planning and development in the Midwest, including in Iowa. (App. 275).

Under the ROFR, an "incumbent transmission owner" has the right to construct, own and maintain an electric transmission line approved by a federally registered planning authority and connected to the incumbent's facility. *Id.* § (2). An incumbent transmission owner is an entity "who, as of July 1, 2020, own[ed]

and maintain[ed] an electric transmission line" in Iowa. *Id.* § (1)(b). Only if the incumbent entity declines the project is another entity eligible. *Id.* § (3). Then the Iowa Utilities Board could select another entity to construct the project, but RTO competitive processes are foregone.

"[I]n practice, the incumbent utilities [are] likely to exercise" their ROFR. (App. 280); *Okla. Gas & Elec. Co. v. Fed. Energy Regul. Comm'n*, 827 F.3d 75, 76 (D.C. Cir. 2016). Thus, Iowa Code section 478.16 effectively ossifies the electric transmission market in Iowa, excluding LS Power.

Iowa Code section 478.16 was proposed on the legislative session's final day, around 1:35 a.m., as part of H.F. 2643. (App. 11); S. Journal, 88th G.A., Reg. Sess. 840 (June 14, 2020). Despite not being an appropriation, it was nestled within a fifty-page omnibus amendment to the fiscal appropriations bill. *Id.* The bill was a "junk drawer" of legislation. In addition to the ROFR, it contained such discordant topics as code corrections (Division XV), returns on search warrants (Division XXVIII), amendments to procedures for requesting and verifying absentee ballots (Division

XXXI) and Boards of Regents hiring attorneys (Division XXXIII). H.F. 2643's title read,

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

The title remained the identical both before and after the ROFR's addition.

On October 14, 2020, prior to codification of the law, LS Power, two non-incumbent entities that lost their opportunity to compete for Iowa projects as a result of the law, challenged the ROFR under the Iowa Constitution's single-subject and title clauses (Article III, Section 29) and privileges and immunities clause (Article I, Section 6). LS Power sought preliminary injunction, warning that approval of millions of dollars of Iowa transmission projects loomed. (App. 17-18).

Projects for MISO's region, including Iowa, are approved at least biennially by MISO's Board of Directors in a MISO Transmission Expansion Plan ("MTEP"). (App. 514). Prior to project approval, projects are identified, in-depth reliability

analyses are conducted, and any required FERC filings are made. (App. 583-598). After MISO Board approval, eligible projects proceed to competition where qualified entities engage in a highly competitive, RTO-facilitated selection process. (App. 613-29, 701-08). But when a state-level ROFR exists, MISO and SPP's tariffs mandate they defer to the state law, and upon approval, *automatically assign* any eligible project to the incumbent. (App. 279, 446, 564, 756).

It was clear before the district court that transmission approval in Iowa was imminent. MISO-SPP joint planning processes were underway to plan for additional transmission at the seam between the RTOs in Iowa. (App. 14). MISO's 2020 Long Range Transmission Planning ("LRTP") Initiative stated, "significant transmission planning needs will exist in Iowa" and discussed a potential $252 million solution referred to as the Raun-Takemah line. (App. 152-55). LS Power not only cited to ongoing planning in its Petition and filings (App. 14, 152-55, 199-200), but also submitted a declaration, stating,

> Active efforts are underway for planning and cost allocation on the next wave of projects in both MISO and

> SPP—projects that will total billions of dollars. It is likely the MISO and SPP Boards will order much of this transmission in 2021 and 2022, including awarding some of it in Iowa.

(App. 279). Indeed, if new transmission in Iowa was not expected, there would have been no reason to logroll the ROFR law at the literal last minute into an appropriations bill.

Nonetheless, on March 25, 2021, the district court dismissed LS Power's claims, finding LS Power failed to established injury in fact. Despite numerous sources confirming near-term transmission in Iowa, the court decided, until LS Power could point to a *specific* approved project, it could not allege injury.

On May 20, 2021, LS Power timely appealed. During appeal, planning referenced in LS Power's Petition forged ahead. MISO's maps continued to include Iowa projects, and expected project approval dates grew closer. LS Power requested the Court take judicial notice of these developments. (Appellants' Br. at 33; Reply Br. at 22). Appellees nevertheless continued to deny projects were anything more than speculative.

When, as a result of the very same planning processes LS Power cited in its Petition, approval became immediate—and

nearly *two billion dollars* and *nine* Iowa projects were slated for July 25, 2022 approval—LS Power moved for emergency temporary injunction. LS Power supplied publicly available filings made to FERC, MISO publications and MISO's proposed MTEP addendum, each publicly available and listing Iowa projects.[1] Additionally, LS Power informed the Court the Raun project had advanced, with an estimated cost of $144 million and approval date expected in early 2023.[2]

On July 8, 2022, the Court of Appeals affirmed the district court's holding. Further review is appropriate for the reasons described below.

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[1] The following specific lines in Iowa are up for approval: (1) Webster – Franklin ($135 million); (2) Franklin – Marshalltown ($310 million); (3) Marshalltown – Morgan Valley ($221 million); (4) Beverly – Sub92 ($203 million); (5) Madison – Ottumwa ($378.5 million); (6) Ottumwa – Skunk River ($248 million); and (7) Skunk River – Denmark ($102.5 million). In addition, lines will go from the Denmark to Iowa border ($123 million) and from Orient to the Iowa border ($208 million). MISO, *MTEP21 2nd Draft Addendum Appendix A* (May 26, 2022), https://www.misoenergy.org/planning/planning/mtep21/.

[2] SPP-MISO Joint Targeted Interconnection Queue Study, Executive Report, at 6 (March 2022), https://www.spp.org/documents/66725/jtiq%20report.pdf.

ARGUMENT

The question here is simple: Has LS Power demonstrated it faces concrete, imminent injury sufficient to confer standing to bring a challenge under the Iowa Constitution? The Court of Appeals imposed an overly restrictive reading of Iowa's standing doctrine to exclude LS Power from the court system and prevent constitutional challenge to H.F. 2643. In so doing, the Court of Appeals allowed the legislature to blatantly shirk Iowa's constitution and provided a blueprint for how the legislature could continue doing so in the future.

The Court of Appeals highlighted LS Power's case is "unique" in Iowa public importance jurisprudence. (Slip Op. 17). Where prior cases failed to show evidence of logrolling, surprise or fraud (Slip Op. 17), the ROFR's dead-of-night passage exhibited 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.2d 41, 43 (Iowa 1929). Yet, even while seemingly acknowledging such facts, the Court still denied LS Power redress.

I. The Court of Appeals Erred by Holding LS Power Does Not Have Standing.

The Court of Appeals erred in concluding LS Power did not have traditional standing. LS Power established (1) regional authorities are poised to approve electric transmission projects in Iowa, for which LS Power is qualified to compete; (2) due to Iowa Code section 478.16, LS Power's competitors have a right of refusal that gives them automatic right to the projects—without competition; and (3) LS Power has lost business due to similar ROFRs in the MISO region. LS Power *is* injured by the ROFR. Rather than being on an even playing field, the ROFR benches LS Power, placing it on the "outside looking in" for Iowa's transmission market. *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 457 (Iowa 2013).

Nonetheless, the Court of Appeals determined LS Power failed to show injury-in-fact. (Slip Op. 15). Despite being a "non-incumbent transmission line company subject to the new ROFR," unless LS Power could show harm *already* occurred, by the *exact* statute at issue and *within* the bounds of Iowa, standing was not satisfied. (Slip Op. 13). The imposition of additional, arbitrary

standards to establish standing prevented LS Power—a party with a clear interest in this case and likely injury—from seeking redress.

A. The Court of Appeals' Decision Requires LS Power to Wait Until It Is Too Late.

The Court of Appeals' decision ignores the context of this case: LS Power brings single-subject and title challenges under Article III, section 29 of the Iowa Constitution. The demands of this section—"Every act shall embrace but one subject, and matters properly connected therewith; which shall be expressed in the title"—present indispensable checks on legislative power. But an Article III, section 29 challenge filed after legislation is codified is too late, as codification "cures" any defects in its passage. *Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 586 N.W.2d 374, 376 (Iowa 1998).

As such, LS Power brought its suit at the only time it could—before H.F. 2643 was codified. Had LS Power waited to file, it would have been too late. By applying a stringent standing approach to hold LS Power filed too early, the Court of Appeals made LS Power's harm unreviewable. The Court of Appeals shrugs off this consequence, stating, "LSP cannot point us to any case law indicating standing can be bypassed simply for the sake of allowing

a single-subject claim to progress," even if it means "LSP will miss the window to challenge H.F. 2643."[3]

The Court of Appeals misconstrues LS Power's position. The Court need not waive standing. For standing, "[o]nly a likelihood or possibility of injury need be shown." *Iowa Bankers Ass'n*, 335 N.W.2d at 455. Although an injury is required to be imminent, 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 hardly be thought that [State] action likely to cause harm cannot be challenged until it is too late." *Adams v. Watson*, 10 F.3d at 922 (1st Cir. 1993). "The need for an ample competitor standing doctrine … is obvious," particularly when unconstitutional government action "would be insulated from judicial review." *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1109 (9th Cir. 2020).

[3] As described below, *several* states addressing single-subject challenges waive standing, finding such claims are of public importance.

If a party does not have standing until after it is harmed, the legislature can simply declare the bill effective after codification, and the law will forever escape Article III, section 29 review. The Seventh Circuit Court of Appeals, addressing a 60-day jurisdictional statute, highlights the danger:

> 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).

The Court of Appeals' holding renders Article III, section 29 a "futile limitation[] on government power." John Dimanno, *Beyond Taxpayers' Suits: Public Interest Standing and the States*, 41 Conn. L. Rev. 639, 664 (2008). But this Court recently recognized in *Planned Parenthood of the Heartland v. Reynolds ex rel. State* that Article III, section 29 is not "merely aspirational." 2022 WL 2182983, at *13 (Iowa June 17, 2022). The meaning of "imminence" and "likely" cannot be such that they render this constitutional provision toothless. *See id.*

B. The Court of Appeals Required Injury Be Complete, Rather Than Likely.

The Court of Appeals overlooked LS Power's requested relief: The purpose of LS Power's action was to *avoid* future harm—that is why it sought declaratory judgment and injunction. *Bormann v. Cnty. Bd. of Supervisors*, 584 N.W.2d 309, 312 (Iowa 1998) ("The essential difference between [declaratory actions] and the usual action is that no actual wrong need have been committed or loss incurred to sustain … relief."). To have standing, "[a] party need not demonstrate injury will accrue with certainty, *or has already accrued*." *Iowa Bankers Ass'n*, 335 N.W.2d at 455 (emphasis added). Courts do not "require the parties to operate beneath the sword of Damocles until the threatened harm actually befalls them." *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 867 (8th Cir. 2013).

The Court of Appeals did *not* find LS Power's injury was too remote to be imminent. If it had, such a decision would have conflicted with numerous cases affirming imminence of competitive

harm despite longer than the year-and-a-half period here.[4] Rather, by requiring LS Power wait to bring suit until a project is actually "approved or assigned," the Court of Appeals required harm be complete. (Slip Op. 13). This is far worse. Under the Court's holding, it does not matter whether injury occurs next year, next month or even next Monday (which is now accurate since projects will be approved as of July 25). Unless and until a project is "lost or barricaded away from LSP," LS Power cannot seek relief. (Slip Op. 13). The Court of Appeals' decision effectively abolishes the availability of preliminary relief for competitive harm.

C. The Court of Appeals' Newfound Injury Limitations Are Not Rooted in Iowa or Federal Precedent.

The Court of Appeals' newly crafted limitations on competitive injury find no support in Iowa precedent. LS Power alleged two types of injury: (1) lost opportunity to compete; and (2) competitive, economic injury. Each provides independent standing grounds.

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[4] *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211-12 (1995) (likely within next year); *Bras v. Cal. Pub. Utilities Commc'n*, 59 F.3d 869, 874 (9th Cir. 1995) (likely in three years).

1. LS Power Established Imminent Loss of Its Opportunity to Compete.

When "a government practice has put [the plaintiff] in a separate category from certain other suppliers," the "injury" is not the "lo[st] profits associated with a particular project," but the erection of a barrier "that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." *Horsfield Materials*, 834 N.W.2d at 457. Such injuries are imminent when a party (1) regularly competes for contracts in the surrounding area, (2) is able and ready to compete and (3) projects are likely to arise "sometime in the relatively near future." *Adarand Constructors, Inc.*, 515 U.S. at 211-12; *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 667 (1995); *Horsfield Materials*, 834 N.W.2d at 457.

LS Power is licensed to do business in Iowa. (App. 9). Both LS Power Appellants are "qualified" to compete for projects approved by MISO and SPP related to Iowa (App. 14-15, 808) and spent thousands to obtain such status. (App. 741). Additionally, LS Power has previously competed for such projects, with affiliates submitting proposals in every MISO and SPP competitive

solicitations since 2016. (App. 13, 808). LS Power has established standing by its lost opportunity to compete.

2. LS Power Established Competitive, Economic Harm.

LS Power also alleged competitor standing, permitting a plaintiff to satisfy injury in fact where they are "likely to suffer economic injury as a result of [government action] that changes market conditions." *Clinton v. City of N.Y.*, 524 U.S. 417, 432-33 (1998); *see also Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 606 (Iowa 2012). When parties are direct competitors and government action "removes or eases only the competitive burdens on the plaintiff's *rivals*," even "unadorned allegations" of latent economic injury suffice. *Adams*, 10 F.3d at 922. Imminence rests on the well-founded economic principle that "increased competition leads to actual injury." *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 861 F.3d 944, 950-51 (9th Cir. 2017); *see also Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1178 (8th Cir. 2021).

LS Power competes with incumbent entities in MISO and SPP for projects. (App. 280). Competitive projects awarded through

MISO and SPP allow designated providers to use cost-allocation frameworks to recoup costs of construction—up to hundreds of millions of dollars—at a designated rate of return. (App. 809-10). Iowa's ROFR, granting near-monopoly status to incumbents, plainly alters LS Power's competitive position in the marketplace, causing LS Power concrete, economic harm. *Id.*

3. Past Competition, to the Extent Relevant, is Not Determinative.

The Court of Appeals found determinative that neither LS Power nor its competitors have suffered lost business due to Iowa's ROFR. Such an approach finds no support in Iowa caselaw. Although past harm may be considered in evaluating future harm, the arbitrary restrictions the Court of Appeals crafts—harm must occur as a result of the exact statute challenged (rather than a similar practice) and cannot occur outside Iowa—are not in Iowa's holdings. *See, e.g., Iowa Bankers' Association,* 335 N.W.2d at 441 (considering similar harm based on prior experience in a pre-enactment challenge).

To the extent past harm is relevant, it is a harm unencumbered by state lines or limited to the statute passed. And

LS Power has suffered it. A state-level ROFR in Minnesota precluded MISO from hosting a competitive process for the Huntley-Wilmarth line. *See* (Slip Op. 13); *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1025 (8th Cir. 2020). This prior "similar or analogous" injury does not lose its value merely because it occurred in a contiguous state. Projects at issue are *regionally* planned and, without a state-ROFR, are *regionally* competed. (App. 12). LS Power has suffered past injury in the relevant market.

Injury in fact's purpose is to ensure a party has a "sufficient stake in an otherwise justiciable controversy" to obtain judicial resolution. *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780 (Iowa 2021). LS Power satisfies this test. This Court should accept further review and reverse the Court of Appeals' holding.

II. The Court of Appeals Erred by Concluding LS Power's Claims Are Not of Great Public Importance.

The Court of Appeals also erred in its conclusion that LS Power's claims did not meet the public importance exception to standing. As this Court noted in *Godfrey v. State*, 752 N.W.2d 413,

425 (Iowa 2008), Iowa's self-imposed standing restraint "was not created to keep [courts] from deciding critical public issues of the day." For parties who seek to resolve "certain questions of great public importance and interest in our system of government," an exception to standing that "conforms to the underlying rationale for the doctrine should be recognized." *Id.* When a claim is of "utmost importance and the constitutional protections are the most needed," separation of powers must give way to judicial review. *Id.* at 427.

LS Power's claims, which implicate Iowa's energy future and exhibit the very harms Article III, section 29 was designed to prevent, satisfy this standard. As the direct target of the legislation and party deprived of the opportunity to compete by the ROFR, LS Power is a true adversary before the Court. *Id.* at 425. It has the "interest necessary to effectively assist the court in developing and reviewing relevant legal and factual questions," and is the *only* party who can bring an Article III, section 29's claims due to the timeliness requirement. *Gregory v. Shurtleff*, 299 P.3d at 1098, 1109 (Utah 2013); *see also Exira Cmty. Sch. Dist. v. State*, 512

N.W.2d 787, 790 (Iowa 1994) (availability of other parties to contest considered).

Additionally, a "concrete case exists to enable the court to feel, sense, and properly weigh the actual consequences of the decision." *Godfrey*, 752 N.W.2d at 425. The constitutional violations at issue, including relevant facts establishing them, occurred with the legislation's passing. *See Mo. Health Care Ass'n v. Atty. Gen. of the State of Mo.*, 953 S.W.2d 617, 621-22 (Mo. 1997) ("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."); *see also Kan. Nat'l Educ. Ass'n v. State*, 387 P.3d 795, 802-03 (Kan. 2017).

Moreover, there is no doubt the effects of the ROFR are going to be felt by LS Power. Two billion dollars in transmission within Iowa is scheduled to be approved on July 25, 2022, with more anticipated next year.[5] To say that after projects approval

[5] *See supra*, at fn. 2-3.

competition will be foregone is not conjectural—it is exactly what the statute mandates.

Sidestepping these facts, the Court of Appeals held despite the "public implications" of the ROFR, LS Power did not "show the level of public interest necessary" for the waiver, because "at the core of what is at issue is LSP's competitive interests." (Slip Op. 17).

The Court of Appeals erred. The filing of two amicus briefs—including one by Resale Power Group of Iowa ("RPGI") on behalf of 24 municipal utilities, one electric cooperative association and one private utility—belies the conclusion that *only* LS Power's interests are at issue. As detailed by RPGI, "final resolution of this matter could have tremendous impact on electric utility transmission costs across Iowa." (RPGI Amicus, at 6-7). Indeed, competitive processes can cut consumer costs by up to 20 to 30 percent (App. 809), savings which are not available when a ROFR is present.

As recently as April 2022, FERC affirmed unconditional ROFRs (such as Iowa Code § 478.16) "remain[] unjust and unreasonable" given the likelihood they "prevent the realization of

more cost efficient or cost-effective transmission solutions."[6] Both FERC and the D.C. Circuit Court of Appeals have issued and opinions stating ROFRs specifically not in the public interest. *ISO New England Inc.*, 143 FERC ¶ 61150, 2013 WL 2189868 (May 17, 2013); *Emera Maine Fed. Energy Regul. Comm'n*, 854 F.3d 552, 667 (D.C. Cir. 2017). While the wisdom of the ROFR is not before the Court, if allowed to stand, it is *the public*—here, Iowa ratepayers—who foot the bill for transmission costs above competitive levels.

Most important, while this case's competitive interests are weighty, they are not the only ones at stake; the Court of Appeals' opinion gives short shift to the constitutional interests implicated. Article III, section 29 serves three purposes:

> First, it prevents logrolling. Logrolling occurs when unfavorable legislation rides in with more favorable legislation. Second, it facilitates the legislative process by preventing surprise when legislators are not informed. Finally, it keeps the citizens of the state fairly informed of the subjects the legislature is considering.

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[6] *Building for the Future Through Electric Regional Transmission Planning & Cost Allocation & Generator Interconnection*, Docket No. RM21-17-000, Notice of Proposed Rulemaking, 179 FERC 351 (FERC, April 21, 2022).

Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State, 21-0856, 2022 WL 2182983, at *12 (Iowa June 17, 2022) (quoting *State v. Mabry*, 460 N.W.2d 472, 473 (Iowa 1990).

H.F. 2643, the legislation containing the ROFR, thwarts all three. The Court of Appeals acknowledged that unlike other cases such as *Godfrey* and *Rush* where logrolling was absent, the ROFR *twice* failed to pass on its own merit as a stand-alone measure. (Slip Op. 17) (citing *Godfrey*, 752 N.W.2d at 425; *Rush v. Reynolds*, 2020 WL 825953, at *13 (Iowa Ct. App. Feb. 19, 2020).[7] Only when appended to a much-needed appropriations bill, filed on the final day of session and as part of a fifty-page omnibus amendment, could the measure pass. *See Simmons-Harris v. Goff*, 711 N.E.2d 203, 216 (Ohio 1999) (noting dangers of riders are particularly acute in end-of-session budget bill); *State v. Acevedo*, 899 P.2d 31, 33 (Wash. Ct. App. 1995) (same).

[7] *See also* H-8340, 87th G.A., Reg. Sess. (Iowa 2018) (in prior session, amending S.F. 2311 to remove an ROFR from energy bill before passing in the House); H.S.B. 540, 88th G.A., Reg. Sess. (as introduced in subcommittee Jan. 22, 2020) (study bill containing ROFR failing to be scheduled for hearing).

While *Godfrey* and *Rush* presented no facts implicating "fraud, surprise, [or] personal or private gain" (*Godfrey*, 752 N.W.2d at 427), here debate suggests legislators were taken aback by the ROFR's inclusion and failed to grasp its scope and effect. (App. 63, 72-74). The bill's sponsor, when asked, erroneously represented the ROFR's history (stating it passed on the House floor when it in fact did not); erroneously represented the ROFR's effect (stating it allowed price matching when it in fact does not); and could not say what interest drafted the legislation. (App. 72, 74-75); *compare Planned Parenthood of the Heartland*, 2022 WL 2182983, at *12 ("No legislator contends they did not understand the contents of H.F. 594 or were misled as to what they were voting on."), *with* (App. 63-64, 158-59). This case exhibits exactly what *Godfrey* and other cases declining to apply the exception lacked.

If allowed to stand, the Court of Appeals' rejection of LS Power's claims is tantamount to a conclusion that no single subject or title violation—regardless of how egregious and no matter the topic—*ever* merits the public importance exception. But if not the transmission of electric energy impacting every ratepayer in Iowa,

what topic is sufficient? Both state and federal statutes recognize the transmission of electric energy is a matter of *public* concern. 16 U.S.C. § 824(a); *see also* Iowa Code § 478.1; *cf. id.* § 476.3.

And if not challenging the flagrant violation of constitutional mandates intended to be a check on legislative power, where are constitutional protections most needed? This Court has affirmed a violation of the single-subject clause when substantive changes are "woven into" a code corrections bill; here, H.F. 2643 contains code corrections, substantive policy and appropriations all rolled into one. *See Giles v. State*, 511 N.W.2d 622 (Iowa 1994).

Perhaps it is the case that—contrary to the implications of *Godfrey*—Article III, section 29 violations never merit a standing exception, even when adorned by logrolling, surprise and fraud. But if that is the case, such a determination should come from *this* Court, not the Court of Appeals. Particularly when it would place Iowa out of step with the majority of jurisdictions to consider the issue.[8] As the Utah Supreme Court recognized, single-subject and

[8] *Gregory*, 299 P.3d at 1108-09; *see also Hunsucker v. Fallin*, 408 P.3d 599, 602-03 (Okla. 2017); *Lebeau v. Comm'rs of Franklin Cnty.*,

title challenges are a "fundamental stricture of legislative power articulated in our constitution." *Gregory*, 299 P.3d at 1108-09. Giving parties a mechanism to enforce them is "of particular importance because these provisions are designed to assist the citizens [of the State] by providing legislative accountability and transparency." *Lebeau*, 422 S.W.3d at 289.

This Court should grant further review and apply the public importance exception.

III. The Court of Appeals Erred in Declining to Take Judicial Notice.

Finally, the Court of Appeals erred in declining to take judicial notice of upcoming Iowa transmission projects. Iowa Rule of Civil Procedure 5.201 provides judicial notice is appropriate when an adjudicative fact "is not subject to reasonable dispute" because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Id.* (b)(2). Judicial notice applies to any stage of the proceeding, including

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422 S.W.3d 284, 289 (Mo. 2014); *Sloan v. Wilkins*, 608 S.E.2d 579, 584 (S.C. 2005), *abrogated on other grounds by Am. Petroleum Inst. v. S.C. Dep't of Rev.*, 677 S.E.2d 16 (S.C. 2009); *Harbor v. Deukmejian*, 742 P.2d 1290, 1300 (Cal. 1987).

appeal. *Id.* (d). The court "may" take judicial notice on its own, but "must take judicial notice if a party requests it and the court is supplied with the necessary information." *Id.* (c)(2).

The Court of Appeals did *not* find that LS Power's proffered updates regarding Iowa projects were subject to reasonable dispute or could not be determined from sources whose accuracy could not be questioned. (Slip Op. 8). No party disputed cited materials were authentic or that MISO had made the filings and publications described. *See MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 934 (8th Cir. 2004). Nor did the Court of Appeals determine LS Power failed to supply necessary information. *In the Matter of Lisse*, 905 F.3d 495, 497 (7th Cir. 2018) ("The right place to propose judicial notice, once a case is in the court of appeals, is in a brief."). Instead, the Court of Appeals determined "[t]here is no limitation in Iowa case law on taking judicial notice from a private entity" (such as MISO), but declined to do so "given the constitutional questions this case presents" and the fact the information was not presented to the district court. (Slip Op. 9).

"Judicial notice of a subject matter is mandatory if requested by a party and the court is supplied with necessary information to satisfy the requirements of Rule 5.201(b)." Tom C. Riley & Peter C. Riley, 8 Iowa Prac., Civil Litigation Handbook § 22:18 (Sept. 2021). Though this Court has not yet had occasion to address the rule's language on appeal, use of the word "must" denotes a lack of discretion. *See id.*; *see also Iowa Supreme Court Disciplinary Bd. v. Atty. Doe No. 819*, 894 N.W.2d 1, 5 (Iowa 2016).

Because LS Power supplied the Court with the necessary information and requested notice, the Court erred in disregarding the evidence. *State v. Washington*, 832 N.W.2d 650 (Iowa 2013), and *City of Council Bluffs v. Cain*, 342 N.W.2d 810 (Iowa 1983) are not to the contrary. There, a party requested the court take notice of facts relevant to constitutional questions, while in this case, LS Power's requests facts related to standing.

Even if discretionary, where the information consists of new developments LS Power never had the opportunity to present and materials directly undermine Appellees' consistent position Iowa projects are speculative, hypothetical and not forthcoming, the

equities favor judicial notice. *Eagan Economic Dev. Auth. v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010) (determining an appellate court has "inherent power to look beyond the record where the orderly administration of justice commends it"); *see also N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 111 n.8 (2d Cir. 2014) (where new information "go[es] to the heart of the contested issue" and inconsistent with opposing party's claims, judicial notice may be taken of new developments).[9]

CONCLUSION

By holding LS Power "swung before the pitch," the Court ignored that had LS Power waited to bring its claims, it would have struck out before approaching the plate. For reasons set forth above, the Court should grant this Application for Further Review, reverse the rulings of the District Court and Court of Appeals and ensure that constitutional rights do not go unremedied.

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[9] *See also e.g., In re Alexander*, 239 B.R. 911, 913 (Bankr. App. 8th Cir. 1999), *aff'd*, 236 F.3d 431 (8th Cir. 2001); *Werner v. Werner*, 267 F.3d 288, 294-95 (3d Cir. 2001).

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CERTIFICATE OF COMPLIANCE

This Application for Further Review complies with the typeface requirements and length limitation of Iowa Rule of Appellate Procedure 6.1103(4) because this Application has been prepared in a proportionally spaced typeface using Century Schoolbook 14 pt. and contains 5559 words, excluding the parts of the Application exempted by Iowa Rule of Appellate Procedure 6.1103(4).

/s/ Shannon Olson

CERTIFICATE OF SERVICE

I hereby certify on the 18th day of January, 2022, I electronically filed the foregoing Appellants' Application for Further Review 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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