IN THE IOWA SUPREME COURT

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

LS POWER MIDCONTINENT, LLC and SOUTHWEST TRANSMISSION, LLC,
Plaintiffs-Appellants,

vs.

STATE OF IOWA, IOWA UTILITIES BOARD, GERI D. HUSER, GLEN DICKINSON and LESLIE HICKEY,
Defendants-Appellees,

and

MIDAMERICAN ENERGY COMPANY and ITC MIDWEST LLC,
Intervenor-Appellees.

DECISION BY THE COURT OF APPEALS
JULY 8, 2022

INTERVENOR-APPELLEES MIDAMERICAN ENERGY COMPANY AND ITC MIDWEST LLC'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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Whiting v. AARP, 637 F.3d 355 (D.C. Cir. 2011)

STATEMENT OF FACTS

Facts adequate to support the well-reasoned decision of the court of appeals are contained therein, but the argument below sparingly cites a few additional facts to provide the Court with further context in deciding whether further review is appropriate.

ARGUMENT

I. FURTHER REVIEW SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S PRECEDENTS.

"Further review by the supreme court is not a matter of right, but of judicial discretion. An application for further review will not be granted in normal circumstances." Iowa R. App. P. 6.1103(1)(b).

The decision of the court of appeals lacks the sort of character that warrants further review. *See id.* The court of appeals methodically reviewed the evidence LS Power had presented, carefully determined whether judicial notice of additional evidence was appropriate, and dutifully applied precedents of this Court to properly conclude LS Power lacked standing. *See* Iowa R. App. P. 6.1103(1)(b)(1). In doing so, the court did not decide any substantial constitutional or other question but rather applied well-established legal principles to conclude the threshold issue of standing was determinative. *See* r. 6.1103(1)(b)(2)–(4). The Court should decline further review.

A. The Court of Appeals Correctly Applied This Court's Precedents to Conclude that LS Power Lacked Traditional Standing.

Whether LS Power had traditional standing to bring its claims boils down to one question: Could LS Power, at the time it filed the petition, satisfy the injury prong of this Court's two-pronged standing test by showing it was "injuriously affected" by H.F. 2643? The court of appeals correctly determined the answer is no.

The "injuriously affected" prong of Iowa standing incorporates requirements from the three-part federal standing test of *Lujan v. Defenders of Wildlife*:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. 555, 560 (1992) (citations, internal quotations, and alterations omitted). The harm LS Power alleged to its competitive interests and economic advantage was not enough of an "injury in fact" at the time the

case was initiated to confer standing under this Court's controlling precedents.[1]

The facts truly relevant to determining whether LS Power could satisfy the injury prong of our standing test are not themselves disputed.[2] As the court of appeals observed, LS Power could not show it had lost the chance to bid on any specific project due to the passage of H.F. 2643, or that any particular identifiable project was planned for the future. Op. at 11–12. Nor could LS Power show it had ever bid on an Iowa transmission project prior to the passage of H.F. 2643, because no one ever had.[3]

The very concept of standing hinges on timing — standing is "the requisite personal interest that must exist ***at the commencement of the litigation***." *Klein v. Iowa Pub. Info. Bd.*, 968 N.W.2d 220, 234 n.9 (Iowa 2021) (quoting *Baker v. City of Iowa City*, 750 N.W.2d 93, 97 (Iowa 2008)). At the time LS Power filed the petition, it could not show — or even plead — the requisite facts to allege an injury-in-fact as opposed to an injury that

[1] LS Power did not pursue appellate review of the district court determination that its alleged injuries based on its alleged inability to participate in the legislative process were too general to confer standing, so we do not address them here. *See* Op. at 11–12 n.9.

[2] While LS Power alleges additional facts should have been judicially noticed by the court of appeals, for reasons explained below those facts were irrelevant and the court of appeals correctly declined to consider them.

[3] Between FERC's Order 1000 and the passage of H.F. 2643, no electric transmission project in Iowa was *ever* built based on a competitive bidding process.

was hypothetical, remote, and speculative. LS Power could not plead that a single contract had been bid or awarded since H.F. 2643 passed, much less show it lost business it otherwise would have had. *See Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 606 (Iowa 2012). In fact, LS Power could not identify *any* company that had lost any business due to the passage of H.F. 2643. *See Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 444 (Iowa 1983). No potential transmission projects existed at the time of the petition, nor was a timeline for any potential project known. *See* Op. at 8. A hypothetical future project was not, as required under the *Lujan* factors, "concrete," "particularized," "actual," or "imminent."

LS Power argues the decision of the court of appeals will make its harm unreviewable. But that is not accurate: only ***certain causes of action*** LS Power has chosen to assert would become unreviewable — the alleged ***harm*** to LS Power's competitive interests could still be redressed, and LS Power's substantive attack on the economic regulation in H.F. 2643 could still proceed. While the decision of the court of appeals would extinguish LS Power's ability to pursue its single-subject and title challenges, that inescapable consequence of the *Mabry* doctrine has long been recognized — and accepted — by this Court. *See State v. Mabry*, 460 N.W.2d 472, 475

(Iowa 1990) (confirming "an article III, section 29 challenge is barred" after legislation is codified "even though future litigants may claim they were in no position to make such a challenge before the codification"); *State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001) (recognizing that under the *Mabry* doctrine "the window of opportunity for challenging a statute on this ground is entirely fortuitous"). Moreover, LS Power has ***many*** other legal avenues available by which to vindicate their alleged injuries.[4,5]

Finally, LS Power argues the court of appeals erred by applying "arbitrary restrictions" in assessing whether its past harms conferred it with standing in this case. Appl. at 25. But the restrictions LS Power refers to are otherwise known as traceability and redressability — and this Court long ago recognized and recently reaffirmed that "traceability and redressability are a part of standing in Iowa." *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 791 (Iowa 2021); *Alons v. Iowa Dist. Ct. for Woodbury Cnty.*, 698 N.W.2d 858, 867 (Iowa 2005). The court of appeals

[4] The State extensively addressed the many other legal avenues available to LS Power in resisting the motion for an emergency injunction recently denied by Court. *See* State's Resist. to Mot. for Temp. Injunction at 6–10. Because this document postdates the creation of the Appendix on appeal, Appellees cite it here merely for the convenience of the Court and do not intend to incorporate it by reference. *See* Iowa R. App. P. 6.1103(2).

[5] However unlikely to succeed on the merits those avenues may be, as the legislation requires only a rational basis to be upheld. *See*, *e.g.*, *Qwest Corp. v. Iowa St. Bd. of Tax Review*, 829 N.W.2d 550, 558 (Iowa 2013).

thus appropriately declined to find standing on the basis of prior "similar or analogous" injury caused by ***different legislation*** enacted by a ***different legislature*** in a ***different jurisdiction***. *See* Appl. at 25–26. The court considering such past injury merely because LS Power experienced it "in the relevant market" would have constituted a *drastic* departure from existing doctrine — and clear error under prior decisions of this Court.

The court of appeals appropriately determined LS Power lacked standing in precisely the manner called for by this Court's precedents. Further review of its determination would therefore serve no purpose.

B. The Court of Appeals Correctly Determined the Exceedingly Narrow, As-Yet Hypothetical Great-Public-Importance Exception to Standing Does Not Apply.

Neither this Court nor the court of appeals has ever applied the great-public-importance exception to waive the injury requirement of standing recognized in *Godfrey v. State*, 752 N.W.2d 413 (Iowa 2008). *Rush v. Reynolds*, 946 N.W.2d 543 (Table), 2020 WL 825953 at *13 (Iowa Ct. App. 2020), *further review denied* (March 15, 2020). That's because this exception to standing requirements applies "only when the issue is of utmost importance and the constitutional protections are most needed." *Godfrey*, 752 N.W.2d at 425, 427.

As the court of appeals correctly noted, LS Power's own private competitive financial interests are "the core of what is at issue" in this case. That court therefore correctly determined LS Power failed to show the "level of public importance necessary for the inaugural invocation of this narrow public importance exception" to traditional standing. Op. at 17.

LS Power asserts this case is the vehicle for recognizing the great-public-importance doctrine because it concerns electricity transmission. But the nature of single-subject claims dictates otherwise under this Court's precedents. As this Court recently explained, the text and history of article III, section 29 counsel that "the legislature should be given considerable deference" in evaluating single-subject challenges. *Planned Parenthood v. Reynolds*, 975 N.W.2d 710, 723 (Iowa 2022). In fact, this Court has found single-subject violations just three times, and each case involved "a lengthy piece of legislation that contained a stray, out-of-place item." *Id.* Amendments "affecting many different areas of the Iowa Code" in a single bill are not a problem. *Id.* Nor is the legislature prohibited "from burning the midnight oil or passing significant legislation with relatively little public debate, as they often do at the end of a legislative session." *Id.* In short, despite LS Power's assertions to the contrary, nothing about the nature of the bill at issue here or the circumstances of its passage was out of the ordinary.

See, e.g., *generally Planned Parenthood*, 975 N.W.2d 710; *Rush*, 2020 WL 825953; *see also* W. Charles Smithson Aff., App. 998–99 (explaining based on experience as the current Secretary of the Iowa Senate and the Former Chief Clerk of the Iowa House that there "was nothing uncommon or unusual with the passage of House File 2642").

LS Power asserts that not applying the great-public-importance exception in this case "would place Iowa out of step with the majority of jurisdictions to consider the issue." Appl. at 33–34 & n.8. That assertion fails to comprehend both the particular contexts of the cases cited to support it and the particularities of Iowa standing doctrine, as "our doctrine of self-imposed judicial restraint" is "deeply rooted in the separation-of-powers doctrine and the concept that the branch of government with the ultimate responsibility to decide the constitutionality of the actions of the other two branches of government should only exercise that power sparingly and in a manner that does not unnecessarily interfere with the policy and executory functions of the two other properly elected branches of government." *Godfrey*, 752 N.W.2d at 425.

Nearly every case LS Power cites from another state on this point is inapposite. When squarely faced with the question, the Utah Supreme Court *forcefully declined* to recognize a public-importance exception to that state's

statutory standing requirement. *McKitrick v. Gibson*, 496 P.3d 147, 156 (Utah 2021) (disavowing past dicta), *abrogating in part Cedar Mountain Env't, Inc. v. Tooele Cnty.*, 214 P.3d 95 (Utah 2009), *and by extension Gregory v. Shurtleff*, 299 P.3d 1098, 1108 (Utah 2013). The California Supreme Court did not purport to apply a public-importance exception to standing in *Harbor v. Deukmejian* — it merely observed that invocation of that state's single-subject rule *by the Governor on appeal and in defense to a veto challenge* concerned an issue of "great public importance." 742 P.2d 1290, 1299–1300 (Cal. 1987) (*en banc*). Unlike this Court, Missouri courts recognize *"taxpayer standing"* on the theory that *all* taxpayers have a "*legally protectable interest in the proper use and expenditure of tax dollars* . . . . to ensure that government officials conform to the law." *Lebeau v. Comm'rs of Franklin Cnty.*, 422 S.W.3d 284, 288 (Mo. 2014). As a result, no exception for public importance was required or applied in *Lebeau*. Finally, though the Oklahoma Supreme Court grants discretionary standing "in cases presenting issues of great public importance," it does so *liberally* and considers such discretion to be particularly appropriate where a case involves "*competing policy considerations and lively conflict* between antagonistic demands." *Hunsucker v. Fallin*, 408 P.3d 599, 602 (Okla. 2017) (emphasis added). Plainly, the jurisprudential frameworks and bodies

of precedent applied in these cases differ radically from those applicable to standing determinations by Iowa courts, as demonstrated by *Godfrey* and *Rush*.

Finally, the court of appeals made no determination that article III, section 29 claims "never merit a standing exception," as LS Power implies. Appl. at 33. The court merely declined to recognize a great-public-importance exception to standing on the facts ***of this case***. Declining to apply an exception that had never before been applied was not inconsistent with *Godfrey* merely because LS Power's single-subject challenge was accompanied by a title challenge and allegations of logrolling. Rather, as the court of appeals explained in *Rush*, in which the plaintiff also alleged logrolling and a title violation:

> The announcements in *Godfrey* are persuasive authority that a violation of the title requirement along with the claimed violation of the single-subject rule ***could*** constitute an issue of great public importance, and, in such circumstance, standing could be waived or an exception to the standing requirement be recognized. But Godfrey does ***not*** say the plaintiff would have succeeded in obtaining a waiver of standing if she had simply pled the case differently. The holding is limited to the record and claims the supreme court had before it.

Rush, 2020 WL 825953946 at *10 (emphasis added).

The court of appeals was correct not to apply the great-public-importance exception to traditional standing for the first time in this case.

For the same reasons this Court denied further review of *Rush*, it should decline further review here.

C. The Court of Appeals Appropriately Declined to Take Judicial Notice of Irrelevant Facts.

Courts generally "must decide the merits of a motion to dismiss based on the facts alleged in the petition, not the facts alleged by the moving party or facts that may be developed in an evidentiary hearing." *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124, 127 (Iowa 2016). A loophole to this general rule applies to facts of which a court takes judicial notice. *See Riediger v. Marrland Dev. Corp.*, 253 N.W.2d 915, 916 (Iowa 1977).

LS Power's argument that the court of appeals erred in declining to take judicial notice boils down to one incorrect assertion — that taking judicial notice was "mandatory" merely because LS Power requested it and no party disputed the cited materials were authentic. But because the materials were plainly irrelevant to whether LS Power had standing when it filed the petition, the court of appeals rightly declined to judicially notice them.

When an "appellant was without standing to bring the action in the first instance," subsequent evidence does not "relate back" to the commencement of the action to retroactively confer standing. *Bronner v. Exch. State Bank*, 455 N.W.2d 289, 290–91 (Iowa Ct. App. 1990). It

follows that what LS Power sought to have judicially noticed by the court of appeals — "information" about upcoming projects that ***came into existence subsequent to the commencement of this action*** — could not possibly have been relevant to determining whether LS Power had standing. Nor is it clear the "information" LS Power sought to have judicially noticed offered anything more than speculation, as is evident from its evolution over the course of this appeal.[6] *See* Op. at 34.

"Only relevant evidence is admissible." *State v. Buelow*, 951 N.W.2d 879, 885 (Iowa 2020). Indeed, relevance is an explicit prerequisite to admissibility under Iowa Rule of Evidence 5.402. Taken together, the evidentiary rules governing relevance and judicial notice yield an undeniable conclusion — that courts ***may properly decline*** to take judicial notice of ***irrelevant*** evidence, despite the seemingly mandatory language in subsection 5.201(c)(2).[7] Federal courts applying the substantially identical corresponding federal rules agree.[8,9] *See* 21B Fed. Prac. & Proc. Evid. §

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[6] The changing nature of the "information" LS Power sought to have noticed suggests LS Power failed to meet even the threshold requirement for judicial notice — a judicially noticeable fact. *See* Iowa R. Evid. 5.201(b)(1).

[7] *See, e.g.*, 29 Am. Jur. 2d Evidence § 25 (explaining that "although a court may judicially notice a variety of matters, only relevant material may be noticed").

[8] Iowa Rule of Evidence 5.201 is presently identical to Federal Rule of Evidence 201, and prior to recent restyling amendments remained substantively so. *See generally* 7 Iowa Practice Series, Evidence § 5.201:1;

5104 (2d ed.) (observing that "the few federal cases considering the issue have insisted that noticed facts be relevant"). "Courts are not required to take judicial notice of irrelevant materials." *Hargis v. Access Cap. Funding, LLC*, 674 F.3d 783, 793 (8th Cir. 2012).

In deciding not to judicially notice irrelevant material, the court of appeals merely logically applied the rules of evidence. That determination lacked the character of one for which further review may be warranted, and this Court should decline to further review it.

Iowa Supreme Ct. Order, *In re Adoption of the Nonsubstantive Restyling of the Iowa Rules of Evidence*, https://www.iowacourts.gov/iowa-courts/supreme-court/orders/archive/2016/ (Iowa Sept. 28, 2016). This Court therefore treats federal authority as particularly persuasive in interpreting it. *See, e.g.*, *Rhoades v. State*, 848 N.W.2d 22, 31 (Iowa 2014).

[9] *See also, e.g.*, *Midamines SPRL Ltd. v. KBC Bank NV*, 601 F. App'x 43, 46 (2d Cir. 2015); *Riley v. Wells Fargo Bank, N.A.*, 715 F. App'x 413, 415 (5th Cir. 2018); *United States v. Houston*, 110 F. App'x 536, 545 (6th Cir. 2004); *Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010); *Meador v. Pleasant Valley State Prison*, 312 F. App'x 954, 956 n.29 (9th Cir. 2009); *Zabriskie v. Lewis*, 507 F.2d 546, 553 (10th Cir. 1974) (*abrogated in part on other grounds*); *BRE Mariner Marco Town Ctr., LLC v. Zoom Tan, Inc.*, 682 F. App'x 744, 748 n.3 (11th Cir. 2017); *Whiting v. AARP*, 637 F.3d 355, 364 (D.C. Cir. 2011).

CONCLUSION

LS Power simply disagrees with the court of appeals' application of this Court's existing precedent. The Court should therefore deny further review.

Respectfully submitted this 29th day of July, 2022.

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REQUEST FOR ORAL SUBMISSION

While Intervenor-Appellees ITC Midwest and MidAmerican Energy Company do not believe further review is appropriate, should the Supreme Court grant further review Intervenor-Appellees respectfully request oral submission.

Respectfully submitted this 29th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.1103(4) because it has been prepared in a proportionally spaced typeface using 14 point Times New Roman font in Microsoft Word 2010 and contains 3,392 words, excluding the parts of the brief exempted from the type-volume requirements by Iowa R. App. P. 6.903(1)(g)(1).

Respectfully submitted this 29th day of July, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically served on the Clerk of the Supreme Court using the Electronic Document Management System on July 29th, 2022, which will serve a notice of electronic filing to all registered counsel of record.

Respectfully submitted this 29th day of July, 2022.

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