IN THE SUPREME COURT OF IOWA
No. 21–0696

LS POWER MIDCONTINENT, LLC and
SOUTHWEST TRANSMISSION, LLC,

Appellants,

vs.

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

Appellees,

MIDAMERICAN ENERGY COMPANY and
ITC MIDWEST, LLC,

Intervenors–Appellees.

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

STATE APPELLEES' RESISTANCE TO APPLICATION FOR FURTHER REVIEW (COURT OF APPEALS DECISION DATE: JULY 8, 2022)

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STATEMENT OPPOSING FURTHER REVIEW

The Court should deny further review. Several decisions in recent years have explored and enunciated standing principles. *See Klein v. Iowa Pub. Info. Bd.*, 968 N.W.2d 220, 234-35 (Iowa 2021); *Iowa Citizens for Cmty. Improvement v. State*, 962 N.W.2d 780, 790-94 (Iowa 2021); *Dickey v. Iowa Ethics & Campaign Disclosure Bd.*, 943 N.W.2d 34, 37-41 (Iowa 2020). There is no need to do so again in this case—especially because the application for further review rests on several fundamentally faulty premises.

FACTUAL AND PROCEDURAL BACKGROUND

In 2011, the Federal Energy Regulatory Commission (FERC) issued "Order 1000," which altered FERC's "rules governing the planning and development of electric transmission." *LSP Transmission Holdings, LLC v. Fed. Energy Regulatory Comm'n (LSP I)*, 700 F. App'x 1, 1–2 (D.C. Cir. 2017) (per curiam); *see generally Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011). Order 1000 eliminated federal rights of first refusal (ROFRs), which in context

provided "priority status in choosing to construct new electric transmission lines." *LSP Transmission Holdings, LLC v. Sieben (LSP II)*, 954 F.3d 1018, 1023 (8th Cir. 2020). But although Order 1000 eliminated *federal* ROFRs, it anticipated *state* ROFRs and did not limit, preempt, or affect them. *See* Order 1000, ¶ 227, 76 Fed. Reg. at 49,880. Accordingly, "in response to Order 1000," several states "enacted a state statutory ROFR" to restore or continue the state of affairs preceding Order 1000. *LSP II*, 954 F.3d at 1024. The Iowa legislature enacted a ROFR in Iowa Code section 478.16.[1]

The statute establishes that "[a]n incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction . . . and which connects to an electric transmission

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

facility owned by the incumbent." Iowa Code § 478.16(2); *see also id.* § 478.16(1)(*c*) (defining "incumbent electric transmission owner"). If an electric transmission line is approved for construction, an incumbent electric transmission owner has ninety days to give written notice to the Iowa Utilities Board (IUB) whether it intends "to construct, own, and maintain the electric transmission line." *Id.* § 478.16(3). If the incumbent declines to construct the new line—in other words, does not exercise its statutory ROFR—IUB "may determine whether another person may construct the electric transmission line." *Id.*

Appellants LS Power Midcontinent, LLC and Southwest Transmission, LLC (collectively, LS Power) filed this lawsuit challenging section 478.16 in October 2020. The State filed a motion to dismiss, contending LS Power lacked standing because it pled only hypothetical and speculative injuries given that no new electric transmission project had yet been approved, nor had any proposed project been finalized. The district court and court of appeals both agreed. And now, the Court should deny further review.

ARGUMENT

I. The Court should deny further review because the application rests on several faulty premises.

A. Standing is measured from the time of filing, not any time new information surfaces.

Standing is measured at the time the litigation starts. But the application for further review mistakenly collapses past, present, and future to a singularity. (Application at 12-15, 17, 23-24, 36.) LS Power asserts projects are now imminent, but that's not the relevant timeframe. LS Power sued in October 2020, so the question is whether LS Power was "excluded from competing" (Application at 8) for a project back then; "lost their opportunity to compete" (Application at 12) for projects back then; and whether the relevant participants in the electric transmission process *were* "poised to approve" projects (Application at 17) back then—not whether they are now. And from the viewpoint in October 2020, there was no imminent project beyond the brainstorming stage because the mere existence of section 478.16 didn't cause harm "without reference to a particular site-specific action." *Sierra Club v. Robertson*, 28 F.3d 753, 758 (8th Cir. 1994). That's true no matter what LS Power predicted and no matter whether that prediction

eventually came true years later. *See Park v. Forest Serv.*, 205 F.3d 1034, 1037 (8th Cir. 2000) (evaluating whether a plaintiff demonstrated a "real and immediate threat" of injury "at the time she filed her suit in 1996," and refusing to consider subsequent evidence that the future harm the plaintiff predicted indeed occurred in 1997 and thereafter).

Put more bluntly, it strains credulity to consider an event to be imminent in October 2020 when it may not or did not occur until 2022—just as a listener might double-take upon hearing first year law students, who just started their first classes of the fall semester, talk about their "imminent" graduation. "[S]imply anticipating some wrong or injury is not enough for standing." *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 872 (Iowa 2005) (cleaned up). A plaintiff may not "use evidence of what happened after the commencement of the suit to make th[e] showing" required to demonstrate standing. *Park*, 205 F.3d at 1037. LS Power's application for further review rests in significant part on facts arising after the commencement of the suit, and so the Court should deny review.

B. The court of appeals did not create any conflict with this Court's decisions, and harm from other states is not fairly traceable to these defendants.

The application for further review does not squarely state which decision of this Court purportedly conflicts with the court of appeals' decision below. *See* Iowa R. App. P. 6.1103(1)(*c*)(3) (stating further review applicants "must cite to the case in conflict" if relying on that ground to support the further review application). Instead, the most the application asserts expressly is that the court of appeals entered a decision "contrary to the implications" (Application at 33) of *Godfrey v. State*, 752 N.W.2d 413 (Iowa 2008). But divining implied sentiments from an opinion's interstices is often a fool's errand. *Cf. Estate of Gray v. Baldi*, 880 N.W.2d 451, 459 (Iowa 2016). LS Power's failure to identify a squarely conflicting decision speaks volumes.

Nor is there any conflict in the decisions LS Power cites without expressly calling them conflicting. Cases holding a future injury was likely were buttressed by findings of *past* injury. *See Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 450 (Iowa 2013) (noting a previous municipal contract was awarded "to

Portzen Construction," and the plaintiff company "never bid on" that project because it was not a preapproved supplier); *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 603 (Iowa 2012) (noting a plaintiff alleged it already had "lost revenue from customers"); *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 444–45 (Iowa 1983) (concluding "past lost business" was sufficient "to demonstrate a special, injurious effect to [a] competitive interest" moving forward). In these cases, the past injury established sufficiently imminent and likely future injury of similar character, even though harm wasn't continually occurring. *See Hawkeye Foodservice*, 812 N.W.2d at 607 ("The allegation of a loss of business in the past is sufficiently concrete to support a claim of imminent harm . . . .").

But here—and this is another faulty premise from which LS Power's application suffers—LS Power cannot identify past injury except by asserting that other laws *like* section 478.16 (not section 478.16 itself) have caused it, or its related companies or subsidiaries, injury in other jurisdictions. (Application at 25–26.) This ignores a fundamental tenet of standing: a plaintiff must show

an injury "is fairly traceable to *the defendants'* conduct." *Iowa Citizens*, 962 N.W.2d at 790 (quoting the federal test) (emphasis added); *see also id.* (recognizing the Court "has interpreted the 'injuriously affected' prong of standing as incorporating" the federal three part test under state law). There can be no dispute that these defendants—the State of Iowa, IUB, and other State employees or officials—had nothing to do with injuries LS Power may have suffered in other states. They didn't pass or enforce Minnesota's ROFR statute, for example. *See LSP II*, 954 F.3d at 1024. So, whatever injury LS Power claims from other jurisdictions is not fairly traceable to these Iowa defendants. In other words, LS Power is simply wrong that past injuries elsewhere can confer standing in Iowa to challenge (and seek to invalidate) an Iowa law that only applies within the state's borders.

At bottom, the court of appeals did not hold that injury must be complete *rather* than likely—only that a past injury increases the likelihood that a pled future injury is imminent, as *Hawkeye Foodservice* concluded. *See Hawkeye Foodservice*, 812 N.W.2d at 606 ("An injury is more likely to be imminent, and therefore

sufficient to support standing, if the plaintiff alleges that it has 'actually lost business in the past as a result of' improper governmental action." (quoting *Iowa Bankers*, 335 N.W.2d at 444)). Without the past injury, the imminence of a pled future injury decreases—and may be insufficient for standing, as it is here. Put another way, LS Power's contentions come up short based on timing, not on some dichotomy between completed and anticipated harm. But even if that dichotomy mattered, "simply anticipating some wrong or injury is not enough for standing." *Alons*, 698 N.W.2d at 872 (cleaned up). The court of appeals' conclusion was consistent with *Alons* and *Hawkeye Foodservice*. Further review should be denied.

C. The details of the legislative process and the statute's effect on the public are irrelevant, and article III, section 29 retains future vitality even though this particular challenge cannot proceed.

Several issues the application raises are either red herrings or are simply incorrect. For example, section 478.16's effect on all Iowans or all electricity consumers (Application at 9, 27-29, 32-33) is irrelevant, both to the standing inquiry and the application of the great-public-importance exception. A generalized grievance

affecting the public as a whole isn't a judicially cognizable injury, much less a reason to grant further review. *See Alons*, 698 N.W.2d at 868-69. And LS Power does not offer a workable framework for separating those public injuries which are too general to confer standing from those public injuries which are *so* general that they justify a waiver of standing requirements under the great-public-importance exception (as the application contends exists here).

Moreover, the inquiry for the great-public-importance exception examines the legal issue, not the underlying policy or its effect on the state. *Godfrey*, which acknowledged an exception could exist without applying one, discussed it in terms of the legal issue raised (article III, section 29 of the Iowa Constitution), not the underlying policy (availability of workers' compensation benefits for successive injuries). *See Godfrey*, 752 N.W.2d at 417, 427-28. And it ultimately decided "the *constitutional* issue presented" did not justify waiving standing. *Id.* at 428 (emphasis added). Thus, section 478.16's policy effect is irrelevant.

The details of the legislative process are also not a reason to grant further review. The circumstances of a bill's passage are "not

directly relevant to whether the legislation violated the single-subject rule." *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 975 N.W.2d 710, 727 (Iowa 2022). The merits of a single-subject claim—if the claim clears the significant threshold issue of standing first—depend on the bill's text, "not the process of its enactment," and the "constitution does not prohibit the legislature from burning the midnight oil or passing significant legislation with relatively little public debate." *Id.* at 728. So, LS Power's focus on legislative details (Application at 32-33) matters not.

The practical effect of denying further review would not have negative consequences for article III, section 29 either. The Court has already acknowledged—and rejected—litigants' worry about losing the ability to bring claims under article III, section 29. *See State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001). It may be "entirely fortuitous" or even unfair, but the limited window to bring claims "is an inescapable conclusion" of the single-subject doctrine the Court applies. *Id.*

Furthermore, there is no danger of all legislation becoming forever unreviewable under article III, section 29 through artful

legislative drafting. (Application at 20.) Courts can adjudicate article III, section 29 challenges brought before a law becomes effective, if the plaintiff can show an imminent, non-speculative injury that will happen, like a switch flipping, right when the statute takes effect.

For example, perhaps a law would change the permissible interest rates for a loan on July 1, and thereby affect preexisting loan agreements immediately as the calendar turned. *See Anderson Fin. Servs., LLC v. Miller*, 769 N.W.2d 575, 576 (Iowa 2009). Or perhaps a new law would impose a waiting period for an already-scheduled medical procedure, causing extra travel and expense. *See Planned Parenthood*, 975 N.W.2d at 719 (noting a plaintiff suing before a bill was even *signed* made these exact arguments—and the case proceeded without a finding the plaintiff lacked standing). Even the example LS Power relies on (Application at 20) shows the difference: a rule would *immediately* alter plaintiffs' behavior as soon as it took effect, because not following the rule would subject them to a remedial directive on a future date certain. *See Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier*

Safety Admin., 656 F.3d 580, 585-86 (7th Cir. 2011). The law's operation is the determining factor, and here there was no certainty about when future action would occur—unlike those other examples. Therefore, even though *this* challenge under article III, section 29 of the Iowa Constitution cannot move forward, not every challenge brought before the statute's effective date (no matter when the legislature sets it) is doomed. And so, there is no need to grant further review, because article III, section 29 won't be "toothless" (Application at 20); it'll still have plenty of teeth.

Notably, denying further review won't foreclose all challenges to section 478.16, including from LS Power. One route—article III, section 29—may close, but several others, which have been discussed throughout the case and acknowledged by the court of appeals, remain open. *LS Power Midcontinent, LLC v. State*, No. 21-0696, 2022 WL 2533177, at *6 n.12 (Iowa Ct. App. July 8, 2022). Because they remain open, there is no need to grant further review.

CONCLUSION

The Court should deny further review.

Respectfully submitted,

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CERTIFICATE OF COST

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/s/ *David M. Ranscht*
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this Resistance has been prepared in a proportionally spaced typeface using Century Schoolbook in size 14 and contains 2,470 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *David M. Ranscht*
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CERTIFICATE OF FILING AND SERVICE

I, David M. Ranscht, hereby certify that on the 29th day of July, 2022, I, or a person acting on my behalf, filed this Resistance and served it on counsel of record to this appeal with via EDMS.

/s/ *David M. Ranscht*
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