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BEFORE THE IOWA SUPREME COURT

No. 24-0641

LS POWER MIDCONTINENT, LLC and SOUTHWEST TRANSMISSION, LLC,

Plaintiffs-Appellees,

vs.

THE STATE OF IOWA, IOWA UTILITIES BOARD, and ERIK M. HELLAND,

Defendants-Appellants,

and

MIDAMERICAN ENERGY COMPANY and ITC MIDWEST, LLC,

Intervenors/Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
OF POLK COUNTY
HON. COLEMAN MCALLISTER

PLAINTIFFS-APPELLEES' BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 3

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 11

ROUTING STATEMENT 12

NATURE OF THE CASE 12

STATEMENT OF THE FACTS 18

ARGUMENT 24

I. AN INJUNCTION CAN UNWIND UNCONSTITUTIONAL ACTS AND PREVENT ONGOING HARM. 27

II. NO FEDERAL PREEMPTION APPLIES TO ISSUES HERE. 37

A. There Is No Field Preemption 39

B. There Is No Conflict Preemption. 45

III. LSP WAS NOT REQUIRED TO GET AN UNCONSTITUTIONAL ACT STRUCK AND THEN START OVER AGAIN TO STRIKE DOWN REGULATIONS PROMULGATED THEREUNDER. 54

IV. THE BALANCE OF HARMS/INJUNCTION ELEMENTS DO NOT PREVENT CORRECTING UNCONSTITUTIONAL CONDUCT. 57

V. EXERCISING DISCRETION TO REJECT A BELATED AMICUS BRIEF REPEATING ARGUMENTS ALREADY MADE DOES NOT SUPPORT REVERSAL. 65

CONCLUSION 68

REQUEST FOR ORAL ARGUMENT 69

CERTIFICATE OF COMPLIANCE 70

CERTIFICATE OF SERVICE 71

TABLE OF AUTHORITIES

CASES Page

Ackerman v. Lauver,
242 N.W.2d 342 (Iowa 1976).. 67

Akin v. Mo. Gaming Comm'n,
956 S.W.2d 261 (Mo. 1997).. 64

Albany Bank & Tr. Co. v. Exxon Mobil Corp.,
310 F.3d 969 (7th Cir. 2002).. 34

Ameren Servs. Co. v. FERC,
893 F.3d 786 (D.C. Cir. 2018).. 46, 60, 67

Assoc. Gas Distr. v. FERC,
824 F.2d 981 (D.C. Cir. 1987), *modified*, 89 P.U.R.4th 273
(F.E.R.C. 1987).. 61

Brodkey v. Sioux City,
229 Iowa 1291, 291 N.W. 171 (1940).. 28

Burnett v. Smith,
990 N.W.2d 289 (Iowa 2023), *reh'g denied* (May 23, 2023)................. 59

Interest of C.Z.,
956 N.W.2d 113 (Iowa 2021).. 66

Central States Theatre Corp. v. Sar,
245 Iowa 1254, 66 N.W.2d 450 (1954).................................... 28, 29, 58

Chauvin v. State Farm Fire & Cas. Co.,
No. CV 05-6454, 2006 WL 8456312 (E.D. La. Sept. 18,
2006).. 67

Chitwood v. Lanning,
218 Iowa 1256, 257 N.W. 345 (1934).. 24

Cipollone v. Liggett Grp., Inc.,
505 U.S. 504 (1992).. 39

City of Des Moines v. Iowa Dep't of Transp.,
911 N.W.2d 431 (Iowa 2018).. 56

City of Okoboji v. Parks,
830 N.W.2d 300 (Iowa 2013).. 27

Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.,
950 F. Supp. 357 (D.D.C. 1996)... 35

Davis v. Bennett,
400 F.2d 279 (8th Cir. 1968) 49

Dep't of Gen. Servs., Iowa v. R.M. Boggs Co., Inc.,
336 N.W.2d 408 (Iowa 1983) 26

Duncan v. City of Des Moines,
222 Iowa 218, 268 N.W. 547 (1936).. 60

Energy Michigan, Inc. v. Scripps,
658 F. Supp. 3d 511 (E.D. Mich. 2023) 67

Entergy Arkansas, LLC v. FERC,
40 F.4th 689 (D.C. Cir. 2022).. 67

Ervin & Assocs., Inc. v. Dunlap,
33 F. Supp. 2d 1 (D.D.C. 1997)... 30

Express One Int'l, Inc. v. U.S. Postal Serv.,
814 F. Supp. 93 (D.D.C. 1992).. 35

Graham v. Henry,
456 N.W.2d 364 (Iowa 1990)... 34

Gray v. Gray,
128 N.E.2d 602, 6 Ill.App.2d 571 (Ill. App. 1955) 26

Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota LLC,
843 F.3d 325 (8th Cir. 2016) 48

Grovijohn v. Virjon, Inc.,
643 N.W.2d 200 (Iowa 2002)... 38

Hagge v. Iowa Dep't of Revenue & Fin.,
504 N.W.2d 448 (Iowa 1993)... 26, 59

Iowa Dep't of Rev. v. Iowa Merit Emp't Comm'n,
243 N.W.2d 610 (Iowa 1976)... 56

Iowa Med. Soc'y v. Iowa Bd. of Nursing,
831 N.W.2d 826 (Iowa 2013)... 56

Jenkins v. Entergy Corp.,
187 S.W.3d 785 (Tex. App. 2006) 39

John W. Danforth Co. v. Veterans Admin.,
461 F. Supp. 1062 (W.D.N.Y. 1978).. 35

Kansas Power & Light Co. v. FERC,
891 F.2d 939 (D.C. Cir. 1989)... 61

Koenigs v. Mitchell Cty. Bd. of Supers.,
659 N.W.2d 589 (Iowa 2003)... 28, 58

Kragnes v. City of Des Moines,
714 N.W.2d 632 (Iowa 2006).. 28, 33, 34, 59, 64

Lafler v. Cooper,
566 U.S. 156 (2012)... 33

Livingood v. City of Des Moines,
991 N.W.2d 733 (Iowa 2023)... 37

Love v. Atchison, T. & S.F. Ry. Co.,
185 F. 321 (8th Cir. 1911) 35, 59

LS Power Midcontinent, LLC v. State,
986 N.W.2d 595 (Iowa Ct. App. 2022), *vacated*, 988
N.W.2d 316 (Iowa 2023) 13

LS Power Midcontinent, LLC v. State, 988 N.W.2d 316 (Iowa
2023), *reh'g denied* (Apr. 26, 2023)... 13

LSP Transmission Holdings II, LLC v. FERC,
45 F.4th 979 (D.C. Cir. 2022).. 67

LSP Transmission Holdings, LLC v. Lange,
No. 18-2559, 2019 WL 202511 (8th Cir. Jan. 10, 2019) 37

Lysenko v. Jensen,
No. 07-1282, 2008 WL 2746323 (Iowa Ct. App. Jul. 16,
2008) 34, 36

Lysenko v. Jensen,
No. 10-0270, 2010 WL 4108826 (Iowa Ct. App. Oct. 20,
2010) 34

Marbury v. Madison,
5 U.S. 137 (1803)... 24, 25

McKee v. Isle of Capri Casinos, Inc.,
864 N.W.2d 518 (Iowa 2015)... 28

McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul. of Fla., 496 U.S. 18 (1990) 33

Mid-Am. Pipeline Co. v. Iowa State Commerce Comm'n, 253 Iowa 1143, 114 N.W.2d 622 (1962) 36, 47, 56

Midcoast Interstate Transmission, Inc. v. FERC, 198 F.3d 960 (D.C. Cir. 2000) 60

MISO Transmission Owners v. FERC, 819 F.3d 329 (7th Cir. 2016) 64

Missouri Landowners All. v. Pub. Serv. Comm'n, 593 S.W.3d 632 (Mo. Ct. App. 2019) 43

Missouri River Energy Servs. v. FERC, 918 F.3d 954 (D.C. Cir. 2019) 67

Montgomery v. La., 577 U.S. 190 (2016) 33, 34

Motor Club of Iowa v. Dep't of Transp., 251 N.W.2d 510 (Iowa 1977) 57

National Benefit Association v. Murphy, 269 N.W. 15 (Iowa 1936) 65

NextEra Energy Cap. Holdings, Inc. v. Lake, 48 F.4th 306 (5th Cir. 2022) 42, 51, 52, 63

Nishnabotna Valley Rural Elec. Co-op. v. Iowa Power & Light Co., 161 N.W.2d 348 (Iowa 1968) 56

Norton v. Shelby Cty., 118 U.S. 425 (1886) 29

Nw. Requirements Utilities v. FERC, 798 F.3d 796 (9th Cir. 2015) 60

O'Donnell Const. Co. v. D.C., 963 F.2d 420 (D.C. Cir. 1992) 34

Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085 (S.D. Iowa 2020) 34, 36

Pan Am. Petroleum Corp. v. Superior Ct. of Del. In & For New Castle Cnty., 366 U.S. 656 (1961) 44

Pharm. Rsch. & Manufacturers of Am. v. McClain,
95 F.4th 1136 (8th Cir. 2024) 39

Piedmont Envt'l Council v. FERC,
558 F.3d 304 (4th Cir. 2009) 42

Porter v. Lee,
328 U.S. 246 (1946) 35, 59

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,
36 U.S. 420 (1837) 24

In re Reliability Plans of Elec. Utilities for 2017-2021,
505 Mich. 97, 949 N.W.2d 73 (2020) 67

Rodgers v. Mabelvale Extension Road Imp. Dist. No. 5 of Saline Cty.,
103 F.2d 844 (8th Cir. 1939) 29

Rosendahl Levy v. Iowa State Highway Comm'n,
171 N.W.2d 530 (Iowa 1969) 34

S.C. Pub. Serv. Auth. v. Fed. Energy Regulatory Comm'n,
762 F.3d 41 (D.D.C. 2014)., *cert. denied*, 144 S. Ct. 485 (2023) 42

Sear v. Clayton Cnty. Zoning Bd. of Adjustment,
590 N.W.2d 512 (Iowa 1999) 58

Sec. Sav. Bank of Valley Junction v. Connell,
200 N.W. 8 (1924) 29, 45, 64

State v. Schlenker,
112 Iowa 642, 84 N.W. 698 (1900) 24

State v. Shackford,
952 N.W.2d 141 (Iowa 2020) 57

State v. Taylor,
557 N.W.2d 523 (Iowa 1996) 29

State v. Thompson,
326 N.W.2d 335 (Iowa 1982) 66

State v. Wright,
961 N.W.2d 396 (Iowa 2021) 44

Stoner McCray Sys. v. City of Des Moines,
247 Iowa 1313, 78 N.W.2d 843 (1956) 28

Talbott v. City of Des Moines,
218 Iowa 1397, 257 N.W. 393 (1934) 29

Tindal v. Norman,
427 N.W.2d 871 (Iowa 1988) 57

Trout v. State,
231 S.W.3d 140 (Mo. 2007) 35

Union Pacific R.R. Co. v. Drainage Dist. 67 Bd. of Trustees,
974 N.W.2d 78 (Iowa 2022) 28, 54, 58

United States v. Bailey,
571 F.3d 791 (8th Cir. 2009) 34

W. Int'l v. Kirkpatrick,
396 N.W.2d 359 (Iowa 1986) 25

Wilson v. Liberty Mut. Grp.,
666 N.W.2d 163 (Iowa 2003) 33

Zimmer v. Vander Waal,
780 N.W.2d 730 (Iowa 2010) 28

Statutes

16 U.S.C. § 824 (West) 40, 41

2020 Iowa Acts ch. 1121 19

Iowa Administrative Code rule 199-11.14 .... 21, 55, 57

Iowa Code § 478.2 63

Iowa Code Section 478.16 ... 12, 14, 15, 16, 19, 20, 21, 22, 23, 39, 40, 45, 54, 55, 57, 60, 63, 64

Iowa Constitution Article III, section 29 .... 12, 20, 24, 25, 29, 56, 65

Iowa R. App. P. 6.903 54

Iowa R. App. P. 6.906 .... 66, 68

Other Authorities

Citizens Energy Corp., 157 FERC ¶ 61,150 (2016) 49

FERC Order No. 1000 .... 37, 42, 62, 67

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utilities Recovery of Stranded Costs by Pub. Utilities & Transmitting Utilities, 81 FERC ¶ 61,248 (1997) 40

88th G.A., Reg. Sess. 840 (June 14, 2020) 18

ITC Midwest, LLC, 185 FERC ¶ 61,123 (2023) 48, 49

Madison-Ottumwa-Skunk River Transmission Project Commencement of Variance Analysis, MISO (May 30, 2024), https://cdn.misoenergy.org/Madison%20-%20Ottumwa%20-%20Skunk%20River%20Variance%20 Analysis%20Public%20Notice%20633078.pdf 52

Midcontinent Indep. Sys. Operator, Inc., 182 FERC ¶ 61,175 (2023) 47, 48, 52

Midcontinent Indep. Sys. Operator, Inc., 184 FERC ¶ 61,020 (2023) 47, 52

Midcontinent Indep. Sys. Operator, Inc. ORDER REJECTING PROPOSED TARIFF REVISIONS, 167 FERC ¶ 61,258 (2019) 67

Midcontinent Indep. Syst. Operator, Inc. Republic Transmission, LLC, 184 FERC ¶ 61,040 (2023) 49

Midwest Independent Transmission System Operator, 150 FERC ¶ 61,037 (2015) 41, 49

MISO Tariff Module A, § 1.A 38, 39, 53

N.Y. Power Auth., 185 FERC ¶ 61,102 (2023) 49

NextEra Energy Transmission Sw., LLC, 180 FERC ¶ 61,032 (2022) 49

Northwest Pipeline Corp., Docket No. CP89-1343-001, 53 F.E.R.C. ¶ 61,012 (1990) 61, 62

Orient-Denny-Fairport Transmission Project Commencement of Variance Analysis, MISO (May 30, 2024), https://cdn.misoenergy.org/Orient%20-%20Denny%20-%20Fairport%20Variance%20 Analysis%20Public%20Notice633081.pdf 53

Pioneer Transmission, LLC,
126 FERC ¶ 61,281 (2009) 49, 50

Portland Gen. Elec. Co.,
72 FERC ¶ 61,009 (1995) 44

Selected Developer Agr. §§ 11.1–11.2 46

Skunk River-Ipava Transmission Project Commencement of Variance Analysis, MISO (May 30, 2024), https://cdn.misoenergy.org/Skunk%20River%20-%20Ipava%20Variance%20Analysis%20Public%20Notice633080.pdf 53

Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842, 49,885-86 (2011) 38

Webster-Franklin-Marshalltown-Morgan Valley Transmission Project Commencement of Variance Analysis, MISO (May 30, 2024), https://cdn.misoenergy.org/Webster%20-%20Franklin%20-%20Marshalltown%20-%20Morgan%20Valley%20Variance%20Analysis%20Public%20Notice633079.pdf 53

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. DOES AN IOWA COURT HAVE POWER TO REMEDY ONGOING EFFECTS OF AN UNCONSTITUTIONAL ACT?

II. DOES FEDERAL LAW PREEMPT DECISIONS ON SITING AND CONSTRUCTION OF ELECTRICAL UTILITIES DESPITE THESE ISSUES BEING EXPRESSLY RESERVED TO THE STATE?

III. MUST A REGULATION PROMULGATED TO IMPLEMENT AN UNCONSTITUTIONAL ACT IN VIOLATION OF ARTICLE III, SECTION 29 BE CHALLENGED IN AN INDEPENDENT ADMINISTRATIVE PROCEEDING?

IV. DID THE COURT IGNORE STANDARDS FOR GRANTING AN INJUNCTION?

V. SHOULD A DECISION BE OVERTURNED DUE TO REJECTION OF AN IMPERMISSIBLE, BELATED AMICUS BRIEF?

ROUTING STATEMENT

The Iowa Supreme Court should retain this appeal pursuant to Iowa Rule of Appellate Procedure 6.1101(2) because this case involves substantial questions regarding remedying harm from an impermissible, unconstitutional act, fundamental issues of broad public importance and how this Court properly vindicates respect for our Constitution.

NATURE OF THE CASE

Much of this case's history is known to this Court from a prior appeal. It will be repeated only briefly.

Iowa Code Section 478.16 granted the incumbent electricity transmission company the right to seize new electricity transmission projects without facing competition. Appellees LS Power Midcontinent, LLC, and Southwest Transmission, LLC (collectively "LSP") filed suit on October 14, 2020, challenging Section 478.16's enactment as violating Iowa Constitution Article III, section 29. D0001, Pet. at 7-8 (10/14/2020). LSP immediately sought a preliminary injunction to prevent Section 478.16's harm to LSP and on the consuming public. D0007, M. Prelim. Inj. (11/13/2020).

On November 16, 2020, Appellants moved to dismiss. D0009, State M. Dismiss (11/16/2020). Thereafter, MidAmerican Energy Company and ITC Midwest, LLC (the "Intervenors") intervened. D0013, MidAm Pet. Intervention (11/17/2020); D0010, ITC Pet. Intervention (11/17/2020). On March 25, 2021, the district court granted the motion to dismiss finding LSP lacked standing to challenge the new legislation that blocked them from bidding against existing Iowa operators on electric transmission projects. D0052, Dismiss. Order at 4 (3/25/2021). The district court also denied LSP's preliminary injunction motion. D0052 at 4. On April 9, 2021, LS Power moved to reconsider. D0055, LSP M. Reconsider (4/9/2021). The district court denied that motion. D0064, Order Deny. M. Reconsider (4/23/2021). On May 20, 2021, LSP appealed. D0065, LSP Not. Appeal (5/20/2021). After it appealed, LSP moved for a temporary injunction before the Iowa Court of Appeals on May 27, 2022. 21-0696, LSP M. Temp. Inj. (5/27/2022). The Court of Appeals affirmed the district court's dismissal and denied the temporary injunction motion. *LS Power Midcontinent, LLC v. State*, 986 N.W.2d 595 (Iowa Ct. App. 2022), *vacated*, 988 N.W.2d

316 (Iowa 2023), *reh'g denied* (Apr. 26, 2023). LSP moved for emergency injunctive relief pending further review on July 18, 2022 seeking to address potential approval and assignment of projects. 21-0696, LSP M. Emerg. Inj. (7/18/2022). This Court denied the emergency injunction on July 25, 2022. 21-0696, Order Deny. Emerg. Inj. (7/25/2022). "As planned, on July 25, MISO approved its 'Tranche 1' package of eighteen new transmission projects in its Midwest Subregion." *LS Power*, 988 N.W.2d at 329.

Then, in *LS Power Midcontinent, LLC*, 988 N.W.2d 316, this Court reversed, finding LSP had standing. This Court also granted "a temporary injunction staying enforcement of section 478.16 pending resolution of this case," *id.* at 340, finding LSP likely to succeed on the merits, irreparable harm from the loss of opportunity to land multi-million-dollar electric transmission projects, the balance of harms favored LSP, and public interest favored a preliminary injunction. On April 7, 2023, Appellants sought rehearing,[1] which was denied. 21-0696, ITC and MidAm

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[1] Appellants continue to misrepresent the record to claim it was LSP that sought reconsideration. It was not.

Pet. Rehearing (4/7/2023); 21-0696, State Pet. Rehearing (4/7/2023); 21-0696, Order Denying Pet. Rehearing (4/26/2023).

After remand to the district court, LSP sought summary judgment on June 2, 2023, on the inherently legal question of whether Section 478.16's passage violated Article III, section 29's title and single subject clauses. *LS Power*, 988 N.W.2d at 333 (holding questions herein "turn on questions of law that do not require further development of an evidentiary record…."); D0086, LSP MSJ (6/2/2023). LSP sought a permanent injunction to protect it and the consuming public from the deleterious effects of unconstitutionally enacted Section 478.16. The State and Intervenors not only resisted LSP's motion but also sought summary judgment. D0111, State MSJ and Resist. MSJ (8/4/2023); D0113, ITC MSJ (8/4/2023); D0115, ITC Resist. MSJ (8/4/2023); D0118, MidAm Resist. MSJ (8/4/2023); MidAm MSJ Joinder (8/4/2023). Oral argument occurred on September 29, 2023. D0128, Court Rep. Memo. (9/29/2023). At that hearing, the Court asked the parties to submit thoughts and proposals on remedies, which were submitted on October 6, 2023. D0131, LSP Prop. Remedy

(10/6/2023); D0132, ITC Prop. Remedy (10/6/2023); D0133, State Prop. Remedy (10/6/2023); D0129 and D0130, MidAm Not. Prop. Remedy (10/6/2023).[2]

On December 4, 2023, Judge McAllister for the district court denied the State's and Intervenors' summary judgment motions, granted LSP's motion and granted a permanent injunction "to correct [the court's] earlier error and prevent substantial injury and damage to [LSP]," "grant[] [LSP] long delayed justice" and "serve the public interest." D0136, S.J. Ruling (12/4/2023). Specifically, "Intervenors MidAmerican Energy Company and ITC Midwest LLC [we]re permanently enjoined from taking any additional action, or relying on prior actions, related to any and all electric transmission line projects in Iowa that were claimed pursuant to, under, or in reliance on Iowa Code § 478.16."[3] D0136 at 21-22. Contrary to what Appellants suggest, by the Order's very terms,

[2] MidAmerican filed the proposed remedy language as a proposed order, therefore, it was not included in the docket and has no docket number.

[3] The district court similarly enjoined the Iowa Utilities Board from taking additional action, or relying on prior actions, related to projects claimed under Section 478.16. D0136 at 21.

projects not "claimed pursuant to, under, or in reliance on" the unconstitutional act were unaffected. D0136 at 22.

On December 19, 2023, Appellants moved to reconsider. D0141, MidAm M. Reconsider (12/19/2023); D0143, ITC M. Reconsider (12/19/2023); D0139, State M. Reconsider (12/19/2023). On January 16, 2024, LSP resisted. D0149, Resist. M. Reconsider (1/16/2024). By court order, Intervenors replied on February 2, 2024 and briefing on the motions to reconsider closed. D0150, MidAm M. Reconsider Reply (2/2/2024); D0151, ITC M. Reconsider Reply (2/2/2024). On February 6, 2024, despite having been well aware throughout, (D0155, LSP Resist. M. Leave at 2 (2/21/2024)), Midcontinent Independent System Operator, Inc. ("MISO") sought leave to file a belated amicus brief to support the motions to reconsider. D0154, MISO M. Leave (2/6/2024). The district court gave the parties the opportunity to address the propriety of MISO's belated filing. D0152, Order MISO Resp. Deadline (2/7/2024). Responsive filings occurred on February 21, 2024. D0156, MidAm Resp. MISO Brf. (2/21/2024); D0157, ITC Resp. MISO Brf. (2/21/2024). On March 19, 2024, the district court denied the

State's and Intervenors' motions to reconsider and rejected MISO's belated filing. D0159, Ruling M. Reconsider and M. Leave (3/19/2024). This appeal followed.

STATEMENT OF THE FACTS

Having heard a prior appeal, this Court knows the facts, which are also a matter of public record. At approximately 1:35 a.m. on June 14, 2020, the 2020 legislative session's last day, an omnibus amendment was introduced to an appropriations bill. D0001 at 3; S. Journal, 88th G.A., Reg. Sess. 840 (June 14, 2020), *Senate Video HF 2643 - Continuing Approps*, Iowa Legislature, at 01:32:02–01:36:24 AM (June 14, 2020), at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20200613085856120&dt=2020-06-14&offset=59814&bill=HF%202643&status=r; *see also* (Attachment to D0007, Exh. 2 at 2 (11/13/2020)). The amended appropriations bill was over fifty pages long—containing thirty-four divisions—a "potpourri of various unrelated subjects." *LS Power*, 988 N.W.2d at 325; Attachment to D0007, Exh. 10 at 3-53 (11/13/20200). The act "combine[d] numerous disparate subjects."

LS Power, 988 N.W.2d at 337. "To capture the broad range of subjects" therein, "the bill bore a remarkably general title: '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.'" *LS Power*, 988 N.W.2d at 325 (citing 2020 Iowa Acts ch. 1121); D0007, Exh. 10 at 3. Within the June 14, 2020 amendments was what became Section 478.16. "No part of the title g[a]ve[] notice of that provision." *Id.* at 335.

Section 478.16 gave incumbent electric transmission owners what imprecisely has been described as a Right of First Refusal or ROFR. Section 478.16, however, "does not require bid matching; instead, the incumbent transmission owner is automatically entitled to take on a transmission project if it so chooses." *Id.* at 324. When properly introduced before June 14, 2020, the ROFR never garnered enough support to become Iowa law. D0001 at 3; *LS Power Midcontinent, LLC*, 988 N.W.2d at 325. This is unsurprising as "[t]he provision is quintessentially crony

capitalism" that "will impose higher costs on Iowans." *LS Power Midcontinent, LLC*, 988 N.W.2d at 338. Reflecting its deleterious effects, no Iowa Legislature since June 14, 2020 has passed the ROFR.

The entities collectively described as LSP are non-incumbent electric transmission entities that invested time and resources to be eligible to compete for projects approved by federally registered planning authorities. D0001 at 6-7. Upon being excluded from Iowa competition, LSP promptly sued, challenging the ROFR, seeking a declaration its enactment violated the Iowa Constitution's single-subject and title clauses (Article III, Section 29) and arguing it was facially invalid under the privileges and immunities clause (Article I, Section 6). LSP also sought an injunction to prohibit the ROFR's enforcement. D0001 at 9-10.

At this point, no party, including the State, disputes that Section 478.16's dark-of-night enactment trod upon both the Constitution's single subject and title clauses, overriding the transparency in governance our Constitution demands. Nor does any party disagree that Section 478.16 must be enjoined as to all

future projects. Broadly speaking, the remaining disputes for this appeal are (1) whether entities that lobbied for Section 478.16 passage[4] may profit from the unconstitutional act while harming the consuming public and LSP, and (2) whether an administrative regulation solely meant to implement unconstitutional Section 478.16 may be enjoined. The district court's intent to stop ongoing harm is clear:

> [T]o prevent injury to Plaintiffs and return to the status quo prior to Iowa Code § 478.16's and Iowa Administrative Code rule 199-11.14's enactment, the Iowa Utilities Board is permanently enjoined from taking any additional action, or relying in prior actions, related to any and all electric transmission line projects in Iowa that were claimed pursuant to, under, or in reliance on Iowa Code § 478.16 and/or Iowa Administrative Code rule 199-11.14. Such projects include LRTP-7 (Webster-Franklin-Marshalltown-Morgan Valley), LRTP-8 (Beverly-Sub 92). LRTP-9 (Orient-Denny-Fairport), LRTP-12 (Madison-Ottumwa-Skunk River) and LRTP-13 (Skunk River–Ipava).

D0136 at 21. The court's language mirrors Intervenors' words when, while this case was pending, they chose to affirmatively and expressly take projects under the unconstitutional act for which

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[4] Attachment to D0015, Exh. A at 3-4 (11/17/2020); "*LS Power Midcontinent, LLC*, 988 N.W.2d at 327 n.3 ("MidAmerican Energy Company registered in favor of the bill, as did ITC Midwest.").

they lobbied. The Intervenors' words confirm they took these projects relying on the unconstitutional act:

> MidAmerican Energy Company ("MidAmerican"), ITC Midwest, LLC ("ITC Midwest") and Cedar Falls Utilities ("CFU"), **pursuant to Iowa Code § 478.16(3)** and 199 IAC 11.14(3), **respectfully submit this notice of intent to construct, own, and maintain transmission lines to the Iowa Utilities Board ("Board")**. On July 25, 2022, the Midcontinent Independent System Operator, Inc. ("MISO"), a federally registered planning authority, approved the MISO Transmission Expansion Plan 2021 ("MTEP21") Addendum: Long Range Transmission Planning ("LRTP") Tranche 1 Portfolio, which includes projects designated as LRTP-7 (Webster-Franklin-Marshalltown-Morgan Valley), LRTP-8 (Beverly-Sub 92). LRTP-9 (Orient-Denny-Fairport), LRTP-12 (Madison-Ottumwa-Skunk River) and LRTP-13 (Skunk River–Ipava) which are located in whole or in part in the State of Iowa.

Attachment to D0087, LSP MSJ App. at 650 (6/2/2023) (emphasis added).

Intervenors repeatedly imply MISO somehow compelled them to take these projects. ITC states that these projects were "assigned" to it. ITC Br. at 9, 13, 21-22, 26-27, 29, 35-36, 43. MidAmerican describes "MISO's decisions." MidAm Br. at 27. Intervenors, however, were not mere passive recipients acting at the government's, or even MISO's, behest. Instead, Intervenors

actively took these projects "pursuant to Iowa Code § 478.16(3)." What's more, they did so on October 14, 2022 knowing full well this constitutional challenge was pending. D0087, LSP MSJ App. at 650. MidAmerican apparently continued pursuing these projects after this Court entered its injunction and denied MidAmerican's motion to reconsider. D0140, MidAm Brf. M. Reconsider at 9 (12/19/2023). The projects at issue are the same this Court identified in noting Section 478.16's harm and granting a temporary injunction. *LS Power*, 988 N.W.2d at 333.

This case now is largely limited to a simple question. When Intervenors seized projects under a statute they knew was challenged as unconstitutional, do they get to keep what they took or may the judiciary, in its role enforcing the Constitution, prevent harm when the Act ultimately is found to have been unconstitutionally enacted? After previously insisting a remedy would be available regardless of delay, Appellants now insist addressing this harm is impossible and a constitutional violation must go unremedied. They are mistaken.

ARGUMENT

This case involves principles as lofty as they are fundamental. Crucial to our constitutional system of government is that the Constitution protects our most cherished rights. Thus, the legislature exercises law-making power, but only "within the prescribed limits of the constitution." *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 573–74 (1837); *Chitwood v. Lanning*, 218 Iowa 1256, 257 N.W. 345, 346 (1934) (holding the Legislature only may act "[w]ithin the limits permitted by the Constitution"). "The police power of the state ... is subject to the constitution, and cannot be used as a cloak under which to disregard constitutional rights or restrictions." *State v. Schlenker*, 112 Iowa 642, 84 N.W. 698, 699 (1900).

It now is undisputed that the 2020 Legislature transgressed constitutional guardrails by violating Article III, section 29. The question remaining is, "If [LSP] has a right, and that right has been violated, do the laws of this country afford [it] a remedy?" *Marbury v. Madison*, 5 U.S. 137, 162 (1803). This question was both asked and answered long ago: "The very essence of civil liberty certainly

consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* at 163. Without dispute, LSP faced injury. "[T]he State's ROFR enactment directly injured LSP as a specific bidder denied access to transmission projects, and redress is potentially available because Iowa courts may enjoin unconstitutional legislation." *LS Power Midcontinent, LLC*, 988 N.W.2d at 330–31. "When it is clear that [article III, section 29] of the Constitution has been disregarded, we must not hesitate to proclaim the supremacy of the Constitution." *W. Int'l v. Kirkpatrick*, 396 N.W.2d 359, 366 (Iowa 1986) (substitution in original).

It also is important in preserving the sanctity of our judicial process that delay not become an avenue to victory. The point is particularly compelling where a party insists no harm will occur from delay, only to then claim, when it loses, it gets to retain profit and inflict harm arising solely from litigation delay it occasioned defending what always was unconstitutional. "'Justice delayed is justice denied,' and regardless of the antiquity of the problem and

the difficulties it presents, *the courts and the bar must do everything possible to solve it*." *Dep't of Gen. Servs., Iowa v. R.M. Boggs Co., Inc.*, 336 N.W.2d 408, 410 (Iowa 1983) (emphasis added by this Court in quoting *Gray v. Gray,* 128 N.E.2d 602, 606, 6 Ill.App.2d 571 (Ill. App. 1955)). Any other result renders illusory the prospect of relief from a court for wrongs inflicted. Thus, when "the state … exacted … an unconstitutional … scheme," it must afford "meaningful … relief." *Hagge v. Iowa Dep't of Revenue & Fin.*, 504 N.W.2d 448, 452 (Iowa 1993).

Appellants present several arguments seeking to keep what Intervenors took under a void law. They claim injunctions only are prospective and, despite ongoing harm, this Court is powerless to remedy it. They argue equity does not allow anything to be unwound, or even stopped. They also claim federal energy law precludes following state law. In particular, they claim, despite expressly disfavoring ROFRs, the Federal Energy Regulatory Commission ("FERC") somehow insists they be honored even when struck down. Appellants also claim the district court incorrectly applied injunction standards. The State then claims regulations

promulgated pursuant to a void provision somehow survive death of the unconstitutional statute, thus allowing the implementing regulation to inflict continuing harm. Finally, ITC claims the district court's ruling should be reversed because it did not accept an amicus brief filed after judgment already was entered. These arguments all fail.

I. AN INJUNCTION CAN UNWIND UNCONSTITUTIONAL ACTS AND PREVENT ONGOING HARM.

Error Preservation & Standard of Review: Appellants contend the portion of the permanent injunction restraining the State and Intervenors from furthering projects seized under an unconstitutional law is impermissibly retroactive. Appellants preserved this argument for appeal.

LSP disagrees, however, with the standard/scope of review Appellants propose. Generally, the Court "review[s] the district court's order issuing a permanent injunction de novo." *City of Okoboji v. Parks*, 830 N.W.2d 300, 304 (Iowa 2013). That relief in this case, however, was decided on summary judgment. "The proper scope of review of a case in equity resulting in summary

judgment is for correction of errors of law." *Koenigs v. Mitchell Cty. Bd. of Supers.*, 659 N.W.2d 589, 592 (Iowa 2003); *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 525 (Iowa 2015); *see Zimmer v. Vander Waal*, 780 N.W.2d 730, 732 (Iowa 2010) ("When no genuine issue of material fact exists, our job is to determine whether the district court correctly applied the law."). This includes where injunctive relief was granted on summary judgment. *Union Pacific R.R. Co. v. Drainage Dist. 67 Bd. of Trustees*, 974 N.W.2d 78, 82 (Iowa 2022); *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 636–37 (Iowa 2006). Thus, the appropriate review is for correction of errors of law.

Argument: Few judicial acts are more important than stopping unconstitutional conduct. *Stoner McCray Sys. v. City of Des Moines*, 247 Iowa 1313, 1324, 78 N.W.2d 843, 850-51 (1956) (holding it proper to enjoin unconstitutional law); *Central States Theatre Corp. v. Sar*, 245 Iowa 1254, 1267–68, 66 N.W.2d 450, 457-58 (1954) (holding permanent injunction proper to restrain enforcing unconstitutional law); *Brodkey v. Sioux City*, 229 Iowa 1291, 291 N.W. 171, 176 (1940) (holding, if law is unconstitutional,

district court should enjoin it). "We have long recognized that we may enjoin 'an unconstitutional statute or ordinance to prevent irreparable injury to the business and property of the plaintiff.'" *LS Power*, 988 N.W.2d at 338; *Central States Theatre Corp.*, 66 N.W.2d at 458.

Unconstitutional acts are void *ab initio*. *State v. Taylor*, 557 N.W.2d 523, 527 (Iowa 1996) (holding act violating Iowa Constitution article III, section 29 "is void and unenforceable"); *Sec. Sav. Bank of Valley Junction v. Connell*, 200 N.W. 8, 10 (1924); *see Talbott v. City of Des Moines*, 218 Iowa 1397, 257 N.W. 393, 395 (1934). "[A]n unconstitutional legislative act … 'is not a law; **it confers <u>no</u> right**; it imposes no duties; **it affords <u>no</u> protection**; it creates no office; it is, in legal contemplation, as inoperative **as though it had <u>never</u> been passed**.'" *Sec. Sav. Bank of Valley Junction*, 200 N.W. at 10 (emphasis added) (quoting *Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886)) ("Rights cannot be built up under it." (internal quotation omitted)); *LS Power*, 988 N.W.2d at 339 (holding Intervenors "have no right to protection from an unconstitutional statute"); *Rodgers v. Mabelvale Extension Road*

Imp. Dist. No. 5 of Saline Cty., 103 F.2d 844, 847 (8th Cir. 1939) (holding law unconstitutional and "[i]t therefore conferred no rights, created no authority in anyone, and justified no acts performed under it").

> Ervin asks that the Court declare the contracts void *ab initio*, meaning "from the beginning; from the instant of the act; at the outset." Webster's Dictionary 3 (3d Ed.1961). The practical effect of such a declaration is that HUD will have to reprocure the services covered by the contracts, a remedy that the government concedes is appropriate.

Ervin & Assocs., Inc. v. Dunlap, 33 F. Supp. 2d 1, 13 (D.D.C. 1997). Yet Appellants insist they must be allowed to proceed as if what always was void somehow was valid. Contrary to Appellants' claim, however, the judiciary is not powerless to protect parties.

Appellants' argument that it is too late to provide any remedy for ongoing harm caused by the provision for which they lobbied represents an abrupt about-face. As this Court noted, those seeking to avoid judgment "consistently argued new projects [we]re years away." *LS Power Midcontinent, LLC*, 988 N.W.2d at 339; *e.g.*, D0069, Tr. Hrg. M. Dismiss and M. Temp. Inj. at 45:18-21 ("It is entirely remote and speculative that there will be a biddable project

come out of the current planning process or the one after that.”). Nodding to their claim, this Court noted granting a preliminary injunction, as it did, would cause no harm if those opposing it were to be believed. *Id.*

Appellants, however, went much further. Recognizing the State's ongoing role in transmission siting, Appellants insisted LSP always could secure an injunction later—including after a project was approved. 21-0696, ITC Revised Final Brief at 27 (12/3/2021) (“even if [a project] were approved during the pendency of the litigation, while the project proceeded through the state franchise process under Iowa Code chapter 478, **Petitioners would have adequate opportunity to seek an injunction at that time.**” (emphasis added)). The State emphasized the same:

> **As *Clark* shows, the Supreme Court has the ability to tell the board “Start again,** you did not comply with the statute, **you did not comply with the law.**” Here, the argument would be, in the franchise proceedings or judicial review thereof, this franchise was granted based on a statute that is unconstitutional because it violates Article 1 Section 6. This is the statute that caused this franchise to go here, we need to start again without that presumption. **That remedy is available and, indeed, is adequate.**

6/15/22 Oral Argument at 29:40-30:39 (emphasis added) at https://www.youtube.com/watch?v=KOi1eAn4R0c. Recognizing the state's paramount role in issues here, the State, joined by Intervenors, was clear: "[i]f the projects are approved … judicial review of those franchise proceedings could result in the proposed line or project going back to the drawing board before it is constructed." 21-0696, State Resist. M. Emerg. Inj. at 11 (7/21/2022). Despite prior assurances to the contrary, Intervenors now insist they get to keep what they took—Constitution be darned! Indeed, they insist, despite numerous future steps and state approvals being required before any project could proceed, the State somehow lost any power to stop them.[5]

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[5] Appellants continue their curious argument that, because LSP argued irreparable harm would result from denying a preliminary injunction, that harm is now irreparable and cannot be remedied. Irreparable harm, of course, routinely is considered in addressing a temporary injunction. *LS Power Midcontinent*, 988 N.W.2d at 338. Under Appellants' analysis, if a preliminary injunction is denied, then, a permanent injunction never can be granted because the harm became irreparable. The preliminary review would become the final review never to be revisited. Such is not the law. Further, this Court *granted* a temporary injunction. It is hard to understand the claim LSP must lose because it persuaded this Court it was at risk of irreparable harm that this Court then addressed through a temporary injunction. *LS Power Midcontinent*, 988 N.W.2d at 338.

One of the judiciary's critical roles in ensuring respect for the law is to stop harm from unconstitutional acts and undo their effects. *See, e.g., Montgomery v. La.*, 577 U.S. 190, 204 (2016) (holding a "penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional.... To conclude otherwise would undercut the Constitution's substantive guarantees."). A "remedy must 'neutralize the taint' of a constitutional violation." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Only by so doing is government constrained to operate within constitutional boundaries. Thus, this Court confirmed "meaningful backward-looking relief" is proper to correct constitutional violations. *Kragnes*, 810 N.W.2d 492, 511 (Iowa 2012); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul. of Fla.*, 496 U.S. 18, 31 (1990) ("the Due Process Clause ... obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional

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To the extent Appellants persist in arguing LSP did not gain a temporary injunction, judicial estoppel cannot apply as it only applies to a prevailing party. *Wilson v. Liberty Mut. Grp.*, 666 N.W.2d 163, 166 (Iowa 2003).

deprivation.”). Equity routinely corrects past acts, whether through ordering tax refunds,[6] returning property to its original grade;[7] restoring wetlands,[8] entering an injunction to remove obstructions diverting water,[9] ordering cleanups of prior spills,[10] setting aside fraudulent conveyances,[11] redoing sentencing,[12] or recreating a dissolved swim team.[13]

What Appellants claim is forbidden is, in fact, routine. “[A]gencies are routinely enjoined to redo the bidding process, in order to vindicate the disappointed bidder’s right to a legally valid procurement process.” *O’Donnell Const. Co. v. D.C.*, 963 F.2d 420,

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[6] *E.g.*, *Kragnes*, 810 N.W.2d at 512.

[7] *Lysenko v. Jensen*, No. 10-0270, 2010 WL 4108826, at *6 (Iowa Ct. App. Oct. 20, 2010); *Lysenko v. Jensen*, No. 07-1282, 2008 WL 2746323, at *3 (Iowa Ct. App. Jul. 16, 2008).

[8] *E.g.*, *United States v. Bailey*, 571 F.3d 791, 805 (8th Cir. 2009).

[9] *Rosendahl Levy v. Iowa State Highway Comm'n*, 171 N.W.2d 530, 538 (Iowa 1969); *Lysenko*, 2008 WL 2746323, at *3.

[10] *E.g.*, *Albany Bank & Tr. Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 973 (7th Cir. 2002).

[11] *E.g.*, *Graham v. Henry*, 456 N.W.2d 364, 366 (Iowa 1990).

[12] *Montgomery*, 577 U.S. at 204.

[13] *Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1104 (S.D. Iowa 2020).

429 (D.C. Cir. 1992); *Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.*, 950 F. Supp. 357, 363 (D.D.C. 1996) (same); *see Express One Int'l, Inc. v. U.S. Postal Serv.*, 814 F. Supp. 93, 102–03 (D.D.C. 1992); *John W. Danforth Co. v. Veterans Admin.*, 461 F. Supp. 1062, 1072–73 (W.D.N.Y. 1978). "Solely prospective application of a decision is the exception not the norm because it involves judicial enforcement of a statute after the statute has been found to violate the Constitution and to be void and without effect *ab initio*." *Trout v. State*, 231 S.W.3d 140, 148 (Mo. 2007). Courts have authority, and indeed a "duty," to restore the status quo through an injunction to prevent injury after a constitutional violation. *Love v. Atchison, T. & S.F. Ry. Co.*, 185 F. 321, 333 (8th Cir. 1911). This is particularly true "where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined…." *Porter v. Lee*, 328 U.S. 246, 251 (1946). Contrary to Appellants' contention, the status quo would not be after Intervenors seized projects or under the unconstitutional law. Rather, the injunction is to protect and restore the "status which existed before the unconstitutional acts…" *Love*, 185 F. at 333;

Ohlensehlen, 509 F. Supp. 3d at 1104; *Lysenko*, 2008 WL 2746323, at *3. As *Mid-America Pipeline* established, "there is no doubt" LSP is entitled to an injunction to stop unconstitutionally secured projects moving forward. *Mid-Am. Pipeline Co. v. Iowa State Commerce Comm'n*, 253 Iowa 1143, 1145, 114 N.W.2d 622, 623 (1962).

Indeed, this Court already recognized its power to cure the harm here, when, after identifying the specific projects at issue and noting MISO approved the projects, the Court held LSP's loss of opportunity to bid on those projects was the injury it sought to prevent. *LS Power*, 988 N.W.2d at 329, 331–33, 338. The Court explained, "[i]t is plain to see that LSP's injury is traceable to the defendant State's actions and that a favorable decision will redress that injury." *LS Power*, 988 N.W.2d at 332. This Court's intent was both proper and clear: "[B]locking the ROFR's enforcement would allow LSP to take the field." *LS Power*, 988 N.W.2d at 332. To suggest LSP remain blocked from the field due to an unconstitutional act does not enforce our Constitution or compel respect for our State's highest law.

II. NO FEDERAL PREEMPTION APPLIES TO ISSUES HERE.

Error Preservation & Standard of Review: Next, Appellants argue federal law preempts Iowa's efforts to enforce its own Constitution.[14] Appellants did not plead this affirmative defense. D0011, ITC Answer (11/17/2020); D0015, MidAm Answer (11/17/2020); D0106, State Answer (7/7/2023); *see Livingood v. City of Des Moines*, 991 N.W.2d 733, 747 (Iowa 2023). As part of their preemption argument, Appellants contend federal law deprived the

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[14] Appellants' preemption argument was largely absent from briefing before the district court ruled, likely because Intervenors, again, previously argued the opposite. ITC told FERC it saw no preemption. FERC Order 1000, 76 Fed. Reg. at 49,858 ("commenters such as ITC Companies … argue that the proposals do not preempt state jurisdiction over siting decisions."); *see* ITC Midwest LLC Response Brief, *LSP Transmission Holdings, LLC v. Lange*, No. 18-2559, 2019 WL 202511, at 6-8 (8th Cir. Jan. 10, 2019). MidAmerican cited *LSP Transmission Holdings, LLC v. Sieben*, indicating "FERC left such control to the states and continues to recognize the important role states play in regulating the siting, permitting, and construction of transmission lines as transmission needs are planned and expanded." 21-0696, MidAm Final Brief at 11 (12/21/2021); ITC Revised Final Brief at 9 n.3, 14 n.7 ("Since issuing Order 1000, FERC has repeatedly reaffirmed its deference to state policy decisions regarding the construction and ownership of transmission facilities."); Intervenors-Appellees Joint Resist. M. Temp. Inj. at 3-4 (6/10/2022) ("Order 1000 … did not limit, preempt, or otherwise affect state or local laws or regulations.").

district court of subject matter jurisdiction. Appellants, largely Intervenors, raised this argument before the district court, primarily when moving to reconsider. The district court addressed the preemption argument on a motion to reconsider its summary judgment ruling. "The scope of review on a motion for summary judgment is for correction of errors at law." *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 202 (Iowa 2002).

Argument: Appellants argue, somehow, federal law compels projects to go forward without competition despite federal law favoring competition.[15] The incumbent preference law exception to competition is for "**duly promulgated** applicable … state and local laws…." MISO Tariff Module A, § 1.A (defining "Applicable Laws and Regulations" (emphasis added)) (Attachment to D0119, LSP MSJ Supp. App. at 47 (9/8/2023)); *see id.* at Attachment FF, § VIII.A

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[15] FERC made clear, "[f]ailure to [remove ROFRs in tariffs and agreements] would leave in place practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective solutions to regional transmission needs, which in turn can result in rates for Commission-jurisdictional services that are unjust and unreasonable…." *Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842, 49,885-86 (2011).

(requiring competitive bidding) (D0087, LSP MSJ App. at 327); *id.* at Attachment FF, § VII.A.1 (providing exception to competitive bidding for "Applicable Laws and Regulations granting such a right of first refusal") (D0087, LSP MSJ App. at 327). It is uncontested that Section 478.16 was not "duly promulgated," but was unconstitutionally enacted.

Appellants appear to claim both field and conflict preemption. Neither applies. Further, Appellants contend federal law deprived the district court of subject matter jurisdiction. It did not.

A. There Is No Field Preemption.

"When a federal regulatory scheme occupies the field because of its pervasive nature, leaving no room for state action, field preemption applies." *Pharm. Rsch. & Manufacturers of Am. v. McClain*, 95 F.4th 1136, 1143 (8th Cir. 2024). The law must be so expansive and clear there is no room for state regulation. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

"It is clear that FERC jurisdiction is not exclusive or preemptive in all circumstances." *Jenkins v. Entergy Corp.*, 187 S.W.3d 785, 803 (Tex. App. 2006). It "is likewise clear that [FERC]'s

jurisdiction to consider disputes arising under jurisdictional tariffs does not as a matter of law preclude state courts from also entertaining such disputes in the appropriate circumstances." Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utilities Recovery of Stranded Costs by Pub. Utilities & Transmitting Utilities, 81 FERC ¶ 61,248, 62,081 (1997). Here, there plainly is "room for state action" as "The Iowa Utilities Board (IUB)[16] regulates the siting and construction of electric transmission lines in our state pursuant to Iowa Code chapter 478." *LS Power Midcontinent*, 988 N.W.2d at 323. By Code, preemption in this area "extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C.A. § 824 (West). Plainly, if Section 478.16 ever could have been proper, this area ***is*** "subject to regulation by the States."

[16] The Iowa Utilities Board ("IUB") is now the Iowa Utilities Commission ("IUC").

The IUC's very existence emphasizes the state's role.[17] *Midwest Independent Transmission System Operator*, 150 FERC ¶ 61,037, at ¶¶ 19, 26-31 (2015) ("we expect states will provide input regarding their state or local laws or regulations" and reiterating "'our expectation is that state regulators should play a strong role and that public utility transmission providers will consult closely with state regulators *to ensure that their respective transmission planning processes are consistent with state requirements*'" (emphasis added)). The Fifth Circuit Court of Appeals, addressing whether a ROFR could require redoing a contract with a regional transmission organization, was clear federal law does <u>not</u> occupy the field and states properly regulate:

> Order 1000 is consistent with the Federal Power Act in leaving room for state regulation. *Elec. Supply Ass'n*, 136 S. Ct. at 780 (observing that the Act "makes federal and state powers 'complementary' and 'comprehensive'"). States may, for example, oversee "facilities used for the generation of electric[ity,] ... local distribution or only for the transmission of electric[ity] in intrastate commerce." 16 U.S.C. § 824(b)(1). States also have "authority over the location and construction of electrical transmission lines." *Ill. Com. Comm'n*, 721

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[17] Indeed, the State itself emphasizes the IUC's power to regulate siting/construction and authority to determine whether franchising for such projects is granted. State Br. at 13–14.

> F.3d at 773; *see also Piedmont Envt'l Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) ("The states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electrical transmission facilities.").

NextEra Energy Cap. Holdings, Inc. v. Lake, 48 F.4th 306, 312–13 (5th Cir. 2022).

FERC Order No. 1000 confirms states retain control noting, "nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." FERC Order 1000, 76 Fed. Reg. at 49,880. "Despite its many reforms, Order 1000 took 'great pains to avoid intrusion on the traditional role of the States.' So even if the prohibition created 'opportunities for nonincumbents, such developers must still comply with state law.'" *NextEra Energy Cap. Holdings, Inc.*, 48 F.4th at 312 (citing *S.C. Pub. Serv. Auth. v. Fed. Energy Regulatory Comm'n*, 762 F.3d 41, 76 (D.D.C. 2014)., *cert. denied*, 144 S. Ct. 485 (2023). MidAmerican emphasized in this case that any project remains "subject to the state requirements":

> MISO's process is a *planning* process, not a *programming* process – MISO neither implements nor compels the implementation of recommended transmission projects. Project implementation is left to developers and owners to undertake and complete, **subject to the state requirements discussed herein**.

21-0696, MidAm Final Brief at 20 (emphasis added).[18] State "authority to grant a [certificate of convenience and need] for construction of transmission lines is … not preempted by federal law. Only its authority to regulate the rates of wholesale interstate transmission service is preempted by federal law." *Missouri Landowners All. v. Pub. Serv. Comm'n*, 593 S.W.3d 632, 646 (Mo. Ct. App. 2019).[19]

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[18] 21-0696, MidAm Final Brief at 11 ("FERC left such control to the states and continues to recognize the important role states play in regulating the siting, permitting, and construction of transmission lines as transmission needs are planned and expanded."); 21-0696, ITC Revised Final Brief at 9 n.3, 14 n.7 ("Since issuing Order 1000, FERC has repeatedly reaffirmed its deference to state policy decisions regarding the construction and ownership of transmission facilities."); 21-0696, Intervenors-Appellees Joint Resist. to M. Temp. Inj. at 3-4 ("Order 1000 … did not limit, preempt, or otherwise affect state or local laws or regulations.").

[19] Cases upon which Appellants rely to claim preemption are rate cases and, thus, inapplicable here.

Further, issues that "fall[] within the special knowledge of the courts of" Iowa are not preempted. *Portland Gen. Elec. Co.*, 72 FERC ¶ 61,009, 61,021–22 (1995). It is hard to imagine what falls more within the special knowledge of Iowa courts than Iowa's Constitution. *State v. Wright*, 961 N.W.2d 396, 402 (Iowa 2021) (holding it is this Court's "duty to independently interpret the Iowa Constitution"). Indeed, far from having exclusive jurisdiction to determine and apply Iowa law, as Intervenors claim, FERC *declines* to hear such state law disputes as outside its purview. *Portland Gen. Elec. Co.*, 72 FERC at ¶ 61,021 (declining to exercise jurisdiction over a matter of state law because it is outside FERC's "special expertise"); *cf. Pan Am. Petroleum Corp. v. Superior Ct. of Del. In & For New Castle Cnty.*, 366 U.S. 656, 665–66 (1961) ("it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute"). Thus, field preemption cannot apply and does not deprive the court of jurisdiction.

B. There Is No Conflict Preemption.

Ultimately, Appellants primarily contend that, despite them expressly and affirmatively taking projects under unconstitutional Section 478.16, federal law now prevents correcting this harm. *But see LS Power*, 988 N.W.2d at 339 (holding Intervenors "have no right to protection from an unconstitutional statute"); *Sec. Sav. Bank of Valley Junction*, 200 N.W. at 10 (holding unconstitutional law is void and provides no rights or protections). Intervenors argue, somehow, MISO's tariff requires Intervenors to move projects they seized forward—no matter what this Court says—and MISO, a private, unelected body, somehow preempted state law, even when Congress did not. Intervenors argue, if they do not move forward on the projects they claimed, they break federal law. This is simply false.

To be clear, MISO expressly disclaimed any requirement Intervenors proceed with projects absent favorable resolution of any court proceeding:

> The affected Transmission Owner(s), Selected Developer(s), or other designated entity(ies), shall make a good faith effort to design, certify, and build the designated facilities to fulfill the approved MTEP.

> However, in the event that an MTEP Appendix A project approved by the Transmission Provider Board is being challenged through the dispute resolution procedures under this Tariff **or in court proceedings, the obligation of the Transmission Owners**, or other designated entity(ies), **to build that specific project (subject to required approvals) is waived until the approved project emerges from the dispute resolution procedures.**

MISO Tariff Attachment FF Section VI.C (emphasis added) (D0087, LSP MSJ App. at 321-322); *see also id.* at Section VIII.G (D0087, LSP MSJ App. at 414).[20] Similarly, the MISO Transmission Owners Agreement ("TOA") provides the obligation to use "due

[20] MISO's Selected Developer Agreement also recognizes "court or agency ordered injunctions" are a force majeure event relieving developers of obligations to continue projects. MISO Tariff Attachment FF, Appendix 1, Selected Developer Agr. §§ 11.1–11.2 ("Except for the payments of monies, a party shall not be considered to be in Default with respect to any obligation hereunder if … the party experiences a Force Majeure Event as defined in this Agreement…."); *see id.* at art. 12 ("No Default shall exist where failure to discharge an obligation, other than the payment of money, is the result of a Force Majeure Event as defined in this Agreement…."); *see Ameren Servs. Co. v. FERC*, 893 F.3d 786, 795 (D.C. Cir. 2018) (noting MISO's own tariffs and rules "allow the displacement of approved regional projects"). Although Intervenors did not appear to have executed a Selected Developer Agreement for the projects at issue because they did not go through the selected developer competitive bidding process, the agreement still reflects MISO's understanding that state courts ***<u>can</u>*** and ***<u>may</u>*** enjoin projects.

diligence to construct transmission facilities directed by MISO" is "subject to such siting, permitting, and environmental constraints as may be imposed by state, local, and federal laws and regulations, and subject to the receipt of any necessary federal or state regulatory approvals." MISO TOA, art. 4, § I(C), https://cdn.misoenergy.org/MISO%20TOA%20(for%20posting)47071.pdf (last visited Jan. 3, 2024). Not only does MISO not somehow override state power, it expressly defers to it.[21] When state law changes, MISO, under its tariff, can reassign projects and has done so. MISO Tariff Attachment FF, §§ IX.C.4, IX.E.3 (D0087, LSP MSJ App. at 421-22, 430-31); *Midcontinent Indep. Sys. Operator, Inc.*, 184 FERC ¶ 61,020, at ¶¶ 2, 18, 23 (2023); *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, ¶¶ 3–6, 14, 45–48, 71 (2023). The Eighth Circuit Court of Appeals hold interpretation of tariffs properly

[21] Nothing in MISO's tariff or the TOA prohibits the IUC from withholding necessary approvals nor prevents the Court from enjoining IUC from enforcing an unconstitutional law. *Mid-Am. Pipeline Co.*, 114 N.W.2d at 624.

involves *state* law. *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota LLC*, 843 F.3d 325, 332–33 (8th Cir. 2016).

Indeed, recognizing it might be forced to abandon projects *because of* ***this*** *lawsuit*, ITC sought FERC protection from that risk. FERC granted ITC's request for abandoned plant incentive protection and upheld its decision on rehearing. *Id.* at ¶ 43; *ITC Midwest, LLC*, 185 FERC ¶ 61,123, at ¶ 32 (2023). Far from indicating this suit could not impact Intervenors' continued development of the projects, FERC expressly identified ***this*** litigation as an event that ***could*** stop ITC from completing projects. *ITC Midwest, LLC*, 185 FERC ¶ 61,123, at ¶¶ 35, 37. FERC stated, "[t]he merits decision on the constitutionality of the Iowa ROFR Statute, the timing of the merits decision, the effect of any appeals, and the effect of all of the above on ITC Midwest's rights to own, develop, and construct the Project remain uncertain and are beyond ITC Midwest's control." *Id.* at ¶ 35. FERC emphasized state court litigation ***can*** impact projects, recognizing, "all applicants in these proceedings are faced with a risk that developments in state law could cast doubt on their respective rights to develop the project."

Id. at ¶ 37. Such protections are common.[22] FERC and MISO are not arbiters of state law. *Midwest Independent Transmission System Operator*, 150 FERC ¶ 61,037, at ¶¶ 19, 26-31 (2015). Rather, Iowa's courts enforce Iowa's Constitution. *Davis v. Bennett*,

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[22] *Midcontinent Indep. Syst. Operator, Inc. Republic Transmission, LLC*, 184 FERC ¶ 61,040, ¶¶16, 20 (2023) (granting abandoned plant incentive where new state ROFR law created risk that incumbents would challenge nonincumbent's right to project that could lead to project's cancellation); *NextEra Energy Transmission Sw., LLC*, 180 FERC ¶ 61,032, at ¶¶ 1, 8, 18 (2022) (granting incentive where there was risk incumbents would lobby for state ROFR law and then challenge nonincumbent's right to project, preventing it from obtaining required regulatory approval or permits). FERC has granted incentives for other projects where state judicial or administrative proceedings could prevent projects from continuing. *See, e.g., N.Y. Power Auth.*, 185 FERC ¶ 61,102, at ¶¶ 20, 24 (2023) (granting incentive where applicant faced alleged "factors beyond its control that could impact whether the Project will ultimately be built including legal challenges and changes in legislative or executive leadership in New York"); *Citizens Energy Corp.*, 157 FERC ¶ 61,150, at ¶ 38-39 (2016) (finding risks of "opposition to the Project, such as routing, siting or environmental legal challenges"); *Pioneer Transmission, LLC*, 126 FERC ¶ 61,281, 62,600 (2009) ("We find that Pioneer faces significant risks and challenges in developing the project…. Pioneer will have to initiate eminent domain proceedings in the circuit court for each county traversed by the project that may result in inconsistent circuit court rulings and appeals.").

400 F.2d 279, 281 (8th Cir. 1968) (holding federal courts must defer to state courts on meaning of state's constitution).[23]

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[23] ITC argues projects only can be reassigned for 365 days. By its express language, however, the alleged 365-day RFP requirement only applies to "Competitive Transmission Facilities." *Id.* The MISO tariff defines a "Competitive Transmission Facility" as a "Competitive Substation Facility or Competitive Transmission Line Facility." MISO Tariff Module A at 25. D0119, LSP MSJ Supp. App. 62, 63. A "Competitive Substation Facility" is defined as:

> A transmission substation facility contained within an Eligible Project **that is subject to the Competitive Developer Selection Process in accordance with Section VIII.A of Attachment FF of the Tariff.**

MISO Tariff Module A at 24 (D0119, LSP MSJ Supp. App. 62) (emphasis added). Similarly, "Competitive Transmission Line Facility" is defined as:

> A transmission line facility contained within an Eligible Project **that is subject to the Competitive Developer Selection Process in accordance with Section VIII.A of Attachment FF of the Tariff**.

MISO Tariff Module A at 25 (D0119, LSP MSJ Supp. App. 63) (emphasis added). Because the projects at issue were claimed under ROFR *without* competition, they were not subject to the "Competitive Developer Selection Process":

> The process utilized to **solicit Proposals**, **evaluate Proposals**, and **designating a Selected Proposal and Selected Developer(s) pursuant to Section VIII of Attachment FF of the Tariff**.

MISO Tariff Module A at 24 (D0119, LSP MSJ Supp. App. 62); MISO Tariff Attachment FF, § VIII.A (stating projects claimed under section VIII.A.1 ("State or Local Rights of First Refusal") are excepted from Competitive Developer Selection Process) (D0087, LSP MSJ App. at 327). The alleged 365-day RFP requirement does not apply to the projects at issue.

Again, the Fifth Circuit Court of Appeals rejected Appellants' position. *NextEra Energy Cap. Holdings* involved a state ROFR law passed _after_ projects were awarded. 48 F.4th at 310. The Court of Appeals, although concluding the Constitution's Commerce Clause may preclude such protectionist state laws, found federal statutes did _not_ prevent reassigning contracts precisely because _state_ law governs this area. *Id.* at 312–13, 328–29. The court held projects always were subject to state utilities board oversight and control, just as here, and transmission companies should assume the law could change and projects be reassigned. *Id.* "[P]arties contract with an expectation of possible regulation. That is especially true in highly regulated industries like power. That history of regulation put NextEra on notice that Texas could enact additional regulations affecting its two projects." *Id.* at 328. When state approvals are necessary, they can be denied based on state law and projects MISO already awarded can be stopped.

> SB 1938 did not interfere with an existing contractual right of NextEra's. Both of NextEra's contracts required it "to secure any necessary" certificates of convenience and necessity to build the Hartburg-Sabine Line or purchase the Jacksonville-Overton Line. Yet [Public Utility Commission of Texas] never issued them.

> Consequently, NextEra did not have a concrete, vested right that the law could impair.

Id. at 329. The fact the state changed its law on ROFRs was exactly such a change that allowed the process to start anew as Appellants previously insisted in this very case. *Id.*

Further, under its tariff, MISO can perform variance analysis and reassign projects when an incumbent transmission owner cannot complete a project, including where: (1) the incumbent cannot secure necessary state approvals, permits, rights of way, etc.; (2) the incumbent notifies MISO it cannot proceed; or (3) where the incumbent must abandon the project. MISO Tariff Attachment FF, §§ IX.C.4, IX.E.3 (D0087, LSP MSJ App. at 421-22, 430-31); *see Midcontinent Indep. Sys. Operator, Inc.*, 184 FERC ¶ 61,020, at ¶¶ 2, 18, 23 (2023); *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,175, at ¶¶ 3–6, 12, 14, 45–48, 71 (2023). In fact, MISO initiated that exact process in May 2024 **for the very projects at issue here**.[24] *Madison-Ottumwa-Skunk River Transmission Project*

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[24] MidAmerican incorrectly protests variance analysis is impossible—yet fails to explain why and how it was, in fact, initiated. Variance analysis applies to all "Eligible Projects," which the Tariff defines as "any Market Efficiency Projects ('MEP') and

Commencement of Variance Analysis, MISO (May 30, 2024), https://cdn.misoenergy.org/Madison%20-%20Ottumwa%20-%20Skunk%20River%20Variance%20Analysis%20Public%20Notice%20633078.pdf; *Skunk River-Ipava Transmission Project Commencement of Variance Analysis*, MISO (May 30, 2024), https://cdn.misoenergy.org/Skunk%20River%20-%20Ipava%20Variance%20Analysis%20Public%20Notice633080.pdf; *Webster-Franklin-Marshalltown-Morgan Valley Transmission Project Commencement of Variance Analysis*, MISO (May 30, 2024), https://cdn.misoenergy.org/Webster%20-%20Franklin%20-%20Marshalltown%20-%20Morgan%20Valley%20Variance%20Analysis%20Public%20Notice633079.pdf; *Orient-Denny-Fairport Transmission Project*

Multi-Value Projects ('MVP') approved by the Transmission Provider's Board after December 1, 2015 **<u>regardless of whether</u>** such project is subject to the Transmission Provider's Competitive Developer Selection Process." MISO Tariff Module A, § 1.A (emphasis added) (D0119, LSP MSJ Supp. App. at 87) (emphasis added); MISO Tariff Attachment FF, § IX.A (D0087, LSP MSJ App. at 417). Further, contrary to Intervenors' claims, variance analysis can result in projects being taken from incumbents. MISO Tariff Attachment FF, §§ IX.C.4, IX.E.3 (D0087, LSP MSJ App. at 421–22, 430–31) (stating variance analysis may be implemented if an incumbent is unable to complete a facility).

Commencement of Variance Analysis, MISO (May 30, 2024), https://cdn.misoenergy.org/Orient%20-%20Denny%20-%20Fairport%20Variance%20Analysis%20Public%20Notice633081.pdf. In so doing, MISO recognized the district court's injunction. These projects are not stopped from moving forward through competitive bidding by anything other than Appellants' continued efforts at delay. Thus, preemption cannot apply, and the district court had jurisdiction to enjoin Appellants.

III. LSP WAS NOT REQUIRED TO GET AN UNCONSTITUTIONAL ACT STRUCK AND THEN START OVER AGAIN TO STRIKE DOWN REGULATIONS PROMULGATED THEREUNDER.

Error Preservation & Standard of Review: The State contends the district court erred enjoining an administrative rule that's sole purpose was implementing the unconstitutional Iowa Code section 478.16. The State preserved this argument for appeal. Although the State fails to include "[a] statement addressing the scope and standard of appellate review" for this argument section, Iowa R. App. P. 6.903(2)(a)(8)(2), because this issue was decided on summary judgment, the Court's review is for correction of errors of law. *Union Pacific R.R. Co.*, 974 N.W.2d at 82.

Argument: The State insists administrative regulations enacted to implement an unconstitutional act survive that act being struck down and claim LSP must ask the agency to stop enforcing the unconstitutional act before a court's order eliminating the law can be effective. This Court says the exact opposite.

Iowa Administrative Code rule 199-11.14 was enacted to implement the unconstitutional section 478.16. Iowa Admin. Code r. 199-11.14(1) ("The purpose of this rule is to implement the requirements of Iowa Code section 478.16."). It serves no other purpose. The State has no interest in enforcing an unconstitutional law or regulation. *LS Power*, 988 N.W.2d at 339. The court always has authority to enjoin unconstitutional laws. *LS Power*, 988 N.W.2d at 331. Yet the State argues rule 199-11.14 survives section 478.16 being declared unconstitutional and LSP must start again before the IUC and ask it also to determine it could not act under the void *ab initio* section 478.16. This contradicts what the State previously said: "[I]n the event the Court strikes down the underlying legislation, any rules implementing the legislation would be *ultra vires* at that point and no longer enforceable as a

matter of law. In practical effect, they would be inert." D0019, State Resp. to M. Temp. Inj. at 4 (11/23/2020) (citing *City of Des Moines v. Iowa Dep't of Transp.*, 911 N.W.2d 431, 449-50 (Iowa 2018); *Iowa Med. Soc'y v. Iowa Bd. of Nursing*, 831 N.W.2d 826, 837 (Iowa 2013)).

The State was correct the first time. IUC has no authority to create a ROFR independent of the legislature. *Iowa Dep't of Rev. v. Iowa Merit Emp't Comm'n*, 243 N.W.2d 610, 613 (Iowa 1976)); *Nishnabotna Valley Rural Elec. Co-op. v. Iowa Power & Light Co.*, 161 N.W.2d 348, 352 (Iowa 1968). Nor can IUC implement an unconstitutional statute through an administrative rule. *Mid-Am. Pipeline Co.*, 114 N.W.2d at 624 (holding agency "has no right to put into effect unconstitutional provisions of a statute"); *see LS Power*, 988 N.W.2d at 339. When the statute on which a regulation was based fails under Article III, section 29, so does the regulation, and LSP need not keep jumping through additional hoops to vindicate its position—particularly when Appellants continue using delay to seek advantage:

> Here, the plaintiff challenges the facial constitutional validity of the statute under which the defendant was

> proceeding. We have said that, because agencies cannot decide issues of statutory validity, administrative remedies are inadequate within the meaning of section 17A.19(1) when such a statutory challenge is made. Accordingly, the exhaustion doctrine does not bar plaintiff's action.

Tindal v. Norman, 427 N.W.2d 871, 871-72 (Iowa 1988). "To rule otherwise would in effect say [LSP] needed to take a duplicative second" action even though there is apparently no dispute that rule 199-11.14 must fail. *State v. Shackford*, 952 N.W.2d 141, 145 (Iowa 2020). "That wouldn't make sense." *Id.* Because section 478.16 is unconstitutional and void, rule 199-11.14 is *ultra vires*. "An agency's rules, if ultra vires in their entirety, are unquestionably void." *Motor Club of Iowa v. Dep't of Transp.*, 251 N.W.2d 510, 518 (Iowa 1977). The district court therefore properly enjoined the rule.

IV. THE BALANCE OF HARMS/INJUNCTION ELEMENTS DO NOT PREVENT CORRECTING UNCONSTITUTIONAL CONDUCT.

Error Preservation & Standard of Review: The Intervenors contend the district court did not correctly apply injunction factors. The Intervenors preserved this issue for appeal. Because the permanent injunction was decided on summary judgment, "[t]he proper scope of review … is for correction of errors

at law." *Koenigs*, 659 N.W.2d at 592; *Union Pacific R.R. Co.*, 974 N.W.2d at 82.

Argument: Appellants further argue LSP did not satisfy the elements for a permanent injunction. "The party seeking the injunction must establish: (1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available." *Sear v. Clayton Cnty. Zoning Bd. of Adjustment*, 590 N.W.2d 512, 515 (Iowa 1999).

As this Court recognized, LSP suffered an invasion of a right and substantial injury occurred. "LSP faces irreparable harm through the loss of opportunity to land multi-million-dollar electric transmission projects in Iowa." *LS Power*, 988 N.W.2d at 338. "That the enforcement of the unconstitutional statutes referred to herein is a serious denial of plaintiff's property rights and would amount to a destruction of its business seems too clear to require further demonstration." *Central States Theatre Corp.*, 66 N.W.2d at 458. Nor is there any adequate remedy available outside an injunction preventing the harm. No damages exist for

constitutional torts. *Burnett v. Smith*, 990 N.W.2d 289, 307 (Iowa 2023), *reh'g denied* (May 23, 2023). Indeed, this Court previously observed, "Neither the State nor the Intervenors argue LSP has an adequate remedy at law through a cause of action for money damages on projects where it was wrongfully prevented from bidding." *LS Power*, 988 N.W.2d at 338. The three elements for an injunction are easily met.

Because the elements for an injunction were satisfied, Appellants suggest somehow public policy countenances violating our constitution. Not so.[25] Our Constitution reflects the most fundamental public policies and "equity cannot override the clear commands of" our Constitution. *Kragnes*, 810 N.W.2d at 512 (quoting *Hagge*, 504 N.W.2d at 452). Appellants complain about delay. Expedience does not allow overriding the Constitution.

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[25] Intervenors also appear to contend the permanent injunction was improper because it allegedly punished them for seizing projects during the appeal's pendency. The injunction was not punishment. Rather, the district court, sitting in equity, sought to remedy its own error and prevent harm from a constitutional violation. The Intervenors, having knowingly taken the risk when they seized the projects, cannot credibly complain when they are prevented from devouring the fruit of the poisonous tree. *See Porter*, 328 U.S. at 251; *Love*, 185 F. at 333.

Duncan v. City of Des Moines, 222 Iowa 218, 268 N.W. 547, 552 (1936). Further, any delay in this case was wholly occasioned by Appellants' attempts to hold onto unconstitutionally obtained projects. MISO began the variance analysis, and this matter could move forward rapidly but for motion after motion and delay after delay by parties seeking to take advantage of what always was unconstitutional.

Intervenors also appear to confuse their interests with the public interest. "For the past several decades, the Federal Energy Regulatory Commission ... has issued orders requiring RTOs ... to adopt practices meant to encourage competition in the market for electricity." *Ameren Servs. Co.*, 893 F.3d at 789. As has been noted to this Court, failing to enjoin section 478.16 injures the public by "decreas[ing] competition and thereby increas[ing] the cost of electricity for Iowans." *LS Power*, 988 N.W.2d at 339. FERC and numerous courts recognize the harm. *Nw. Requirements Utilities v. FERC*, 798 F.3d 796, 809 (9th Cir. 2015) ("consumers of energy plainly stand to benefit from open access and increased competition in energy markets"); *Midcoast Interstate Transmission, Inc. v.*

FERC, 198 F.3d 960, 968 (D.C. Cir. 2000) ("FERC was entitled to rely on the general economic theory that the introduction of competition to the market will benefit consumers."); *Kansas Power & Light Co. v. FERC*, 891 F.2d 939, 940 (D.C. Cir. 1989) (recognizing benefits of competition in energy delivery); *Assoc. Gas Distr. v. FERC*, 824 F.2d 981, 994 (D.C. Cir. 1987), *modified*, 89 P.U.R.4th 273 (F.E.R.C. 1987) ("competition from other gas sellers (producers or traders) will give consumers the benefit of a competitive wellhead market"); *Northwest Pipeline Corp.,* 51 F.E.R.C. at 61, 912 ("the benefits which will accrue to the public as a result of competition in the natural gas industry outweigh any adverse impacts on particular parties"):

> The Commission is concerned that the existence of federal rights of first refusal may be leading to rates for jurisdictional transmission service that are unjust and unreasonable.... Just as it is not in the economic self-interest of public utility transmission providers to expand transmission capacity to allow access to competing suppliers, it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities, even if proposals submitted by new entrants would result in a more efficient or cost-effective solution to the region's needs.

FERC Order 1000, 76 Fed. Reg. at 49,886; *see Northwest Pipeline Corp.*, Docket No. CP89-1343-001, 53 F.E.R.C. ¶ 61,012, 61,052 (1990) (concluding competition benefits the public). What FERC recognized as "unjust and unreasonable" hardly can be argued to benefit the public.[26]

At the district court, Intervenor ITC inadvertently made perhaps the most compelling admission why public interest favors an injunction. ITC argued it will lose the $10,000,000 it allegedly invested in projects if an injunction causes competitive bidding. Yet, ITC only loses its investment if, indeed, its bid proves ***not*** to be most beneficial for ratepayers. In other words, ITC assumed it can't win if it must compete—meaning the public loses by leaving the project with ITC. Likewise, before *this* Court, MidAmerican urges it secured easements for projects in question and will be harmed if it cannot use them. MidAm Br. at 37-38. Again, the easements only lose value to MidAmerican if its bid proves less

[26] ITC argues the injunction will render the electrical grid unreliable. ITC has a peculiar view that competition somehow is deleterious to quality. There is no such evidence. Further, should a bid not be superior, it need not be accepted. Quality is a benefit of competition, not a harm.

beneficial to the public than what another provider offers. Yet, MidAmerican's argument is even more troubling. MidAmerican apparently secured those easements ***after*** his Court found LSP likely to prevail on the merits and enjoined Section 478.16. (D0087, LSP MSJ App. at 670-71) (requesting IUC schedule public informational meetings in the affected counties in May and June 2023, after the injunction issued); Iowa Code § 478.2(4) (West) (prohibiting negotiating or purchasing easements for a transmission project under Chapter 478.16 "prior to the informational meeting"). Proceeding in the face of an injunction informing it the law is likely to be found unconstitutional surely does not cause public policy to tilt in MidAmerican's favor.

Intervenors do not have a vested right in these projects with which the court cannot interfere. *NextEra Energy Capital Holdings, Inc.*, 48 F.4th at 329. Intervenors knew Section 478.16 was challenged when they chose to seize and pursue projects without bidding. D0087, LSP MSJ App. at 650. MidAmerican knew there was an injunction and LSP was likely to prevail when it took easements. The balance of harms does not somehow favor those

who choose to proceed in such circumstances. *Kragnes*, 810 N.W.2d at 512. "The failure of [Intervenors and the State] to respond differently after [they were] on notice of [LSP's] claim does not mitigate in favor of depriving" LSP or the consuming public of a remedy. *Id.*; *see Akin v. Mo. Gaming Comm'n*, 956 S.W.2d 261, 265 (Mo. 1997). MidAmerican (and ITC) is "a big boy; it took a risk; the risk materialized…." *MISO Transmission Owners v. FERC*, 819 F.3d 329, 335 (7th Cir. 2016). "[A]brogation of the right of first refusal in the MISO Transmission Owners Agreement was lawful." *Id.* Intervenors' knowing choice cannot allow a constitutional violation to go unremedied or the consuming public to be prejudiced. "[E]quity cannot override the clear commands of the" Constitution. *Kragnes*, 810 N.W.2d at 512.

Intervenors further argue the permanent injunction was vague and overly broad. Not so. The district court correctly and unambiguously limited the injunction's scope to those projects Intervenors claimed under Section 478.16. D0136 at 21-22. The Court was wholly justified in restraining ongoing harm caused by an unconstitutional statute. *Sec. Sav. Bank of Valley Junction*, 200

N.W. at 10. ITC misreads *National Benefit Association v. Murphy*, 269 N.W. 15 (Iowa 1936), to indicate the Court cannot issue an injunction to remedy harm from an article III, section 29 violation. Obviously, this Court disagreed because it entered an injunction in this case. *LS Power*, 988 N.W.2d at 331, 338, 340 ("Iowa courts may enjoin unconstitutional legislation"). As ITC concedes, no injunction was sought in *Murphy*, which was an action at law <u>not</u> in equity, 269 N.W. at 16, thus the court could not rule on the scope of injunctive relief available to remedy an article III, section 29 violation. Unlike the district court in *Murphy*, the district court did not usurp the IUC's authority, but instead restrained the parties before it from continuing the effects of an unconstitutional act, as was proper.

V. EXERCISING DISCRETION TO REJECT A BELATED AMICUS BRIEF REPEATING ARGUMENTS ALREADY MADE DOES NOT SUPPORT REVERSAL.

Error Preservation & Standard of Review: Finally, ITC contends the district court erred denying MISO leave to file a belated amicus brief in support of the motions to reconsider. Although the district court correctly held it had no legal authority

to allow an amicus brief at the trial court level, to the extent it did, the decision whether to permit an amicus filing was within the district court's discretion. "Some matters are left to the discretion of the trial court and are not wholly reviewable on appeal; we only consider whether that discretion has been abused." *State v. Thompson*, 326 N.W.2d 335, 337 (Iowa 1982).

Argument: A case stands or falls on its merits. Yet, ITC argues the district court should be reversed for not accepting an amicus brief filed long after the court ruled and even after the deadline for motions to reconsider.[27] ITC was allowed to make any argument it wished. It is unclear why it thinks it has standing to

[27] The district court correctly determined nothing in the Rules of Civil Procedure permits an amicus brief at the district court. *See Interest of C.Z.*, 956 N.W.2d 113, 121 (Iowa 2021) (holding "there is no regularized amicus practice at the trial court level"). Even if the Rules permitted amicus participation, looking to the Appellate Rules, it is clear MISO's motion was untimely. MISO did not seek permission to file an amicus brief until after summary judgment was entered and briefing on motions to reconsider submitted. The Appellate Rules prohibit amicus briefs in support of applications for further review and petitions for rehearing, which are analogous to motions to reconsider at the district court. Iowa R. App. P. 6.906(2), (3). Further, under the Appellate Rules, any amicus brief was due within seven days of the motion it sought to support. Iowa R. App. P. 6.906(1). MISO did not move to file its brief until 49 days after Intervenors moved to reconsider. D0154 at 5.

object that a third party was not granted a belated amicus brief. *Ackerman v. Lauver*, 242 N.W.2d 342, 347 (Iowa 1976) (holding party did not have a right to seek reversal based on other party's arguments). Either the appeal succeeds on the merits, or it does not. Not accepting a belated brief is no basis to reject a correct ruling. Further, and most simply, "the Court is not required to consider amicus briefs." *Chauvin v. State Farm Fire & Cas. Co.*, No. CV 05-6454, 2006 WL 8456312, at *4 (E.D. La. Sept. 18, 2006). "[T]he extent to which the Court considers an amicus brief … can not constitute legal error." *Id.*[28] Additionally, ITC argues the brief

[28] Intervenors repeatedly cite MISO's rejected brief as if it has precedential value. They also act as though MISO is FERC. A brief is not precedent, and MISO is not FERC. FERC submitted _no_ brief and routinely disagrees with MISO. *LSP Transmission Holdings II, LLC v. FERC*, 45 F.4th 979, 986 (D.C. Cir. 2022) ("FERC rejected MISO's first two proposals."); *Missouri River Energy Servs. v. FERC*, 918 F.3d 954, 959 (D.C. Cir. 2019) ("FERC rejected MISO's proposal…."); *Energy Michigan, Inc. v. Scripps*, 658 F. Supp. 3d 511, 538 (E.D. Mich. 2023) ("FERC issued an order rejecting MISO's proposal"); *In re Reliability Plans of Elec. Utilities for 2017-2021*, 505 Mich. 97, 115, 949 N.W.2d 73, 84 (2020) ("The FERC rejected MISO's tariff."). This includes disagreeing with MISO regarding FERC Order No. 1000 that eliminated federal ROFRs. *Entergy Arkansas, LLC v. FERC*, 40 F.4th 689, 701 (D.C. Cir. 2022); *Ameren Servs. Co.*, 893 F.3d at 792 ("The Commission denied MISO's compliance filing on the ground that it did not comply with Order 1000's cost-allocation provisions."); *Midcontinent Indep. Sys.*

should have been accepted because it only made the same arguments the State, ITC and MidAmerican made (ITC Br. at 55), calling into question what harm ITC sees. If ITC is correct that MISO's amicus brief merely "reiterate[d] the arguments of the party whose position the brief supports," the district court was correct to deny it. Iowa R. App. P. 6.906(5)(b)(1). The same is true of MISO's amicus brief on appeal. *Id.*

CONCLUSION

For all the reasons stated herein, for all reasons stated by the district court, and for all reasons stated by this Court previously in this case, the district court's ruling was proper and should be affirmed.

Operator, Inc. ORDER REJECTING PROPOSED TARIFF REVISIONS, 167 FERC ¶ 61,258 (2019) ("we reject the MISO Regional Filings because Filing Parties have not shown that the proposed cost allocation method for Local Economic Projects is just and reasonable."). Further, MISO purports to speak for consumers, when consumers previously weighed in to say the exact opposite. MISO speaks for neither FERC nor consumers. Nor are they arbiters of state law—as FERC made clear.

REQUEST FOR ORAL ARGUMENT

Appellees do not believe oral argument is necessary, but, should argument be held, respectfully request to be heard orally upon the submission of this appeal.

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CERTIFICATE OF COMPLIANCE

This 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 Brief has been prepared in a proportionally spaced typeface using Century Schoolbook 14 pt. and contains 11,242 words, excluding the parts of the Brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

/s/ Michael R. Reck

CERTIFICATE OF SERVICE

I hereby certify on the 26th day of August, 2024, I electronically filed the foregoing Appellees' 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 party. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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