No. 20-641

In The Supreme Court of the United States

LSP TRANSMISSION HOLDINGS, LLC,

Petitioner,

v.

KATIE SIEBEN, DAN M. LIPSCHULTZ, MATTHEW SCHUERGER, JOHN TUMA, VALERIE MEANS, STEVE KELLEY, ITC MIDWEST LLC, NORTHERN STATES POWER COMPANY d/b/a XCEL ENERGY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS KATIE SIEBEN, DAN M. LIPSCHULTZ, MATTHEW SCHUERGER, JOHN TUMA, VALERIE MEANS, AND STEVE KELLEY

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QUESTION PRESENTED

Historically, when regulators approve a new electric transmission line that will connect to a local utility's facility, that utility builds the line. Until 2011, the Federal Energy Regulatory Commission (FERC) had a policy consistent with this historical practice. Utilities and other transmission owners had a right of first refusal to build new transmission lines that connect to their facilities. This was known as the federal ROFR. When FERC eliminated the federal ROFR in 2011, it preserved the rights of states to establish their own ROFR laws that mirror the former federal policy. Minnesota is one of several states that enacted a ROFR statute that gives incumbent utilities and transmission owners a right of first refusal to build new transmission lines that connect to their facilities. Minn. Stat. § 216B.246. The primary purpose of Minnesota's ROFR statute was to preserve the status quo and avoid the uncertainty of a new process for selecting who will build electric transmission in the state, where electricity has been reliable and affordable.

The question presented is:

1. Whether a state statute, Minn. Stat. § 216B.246, granting incumbent electric transmission owners a right of first refusal to build transmission lines that connect to their existing facilities, violates the dormant Commerce Clause.

PARTIES TO THE PROCEEDINGS

Petitioner LSP Transmission Holdings, LLC was the plaintiff-appellant below.

Respondents Katie Sieben, Dan M. Lipschultz, Matthew Schuerger, John Tuma, Valerie Means, and Steve Kelley were defendants-appellees below. These Respondents are sued in their official capacities as Commissioners of the Minnesota Public Utilities Commission and the Commissioner of the Minnesota Department of Commerce. Since this matter was submitted below, Joseph Sullivan has replaced Dan M. Lipschultz as Vice Chair of the Public Utilities Commission, and Grace Arnold has been named the temporary Commissioner of Commerce in place of Steve Kelley. Pursuant to Rule 35, their substitution as parties is automatic.

Respondents ITC Midwest LLC and Northern States Power Company d/b/a Xcel Energy were intervenors-appellees below.

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INTRODUCTION

For more than a century, utilities have built the approved electric transmission lines that connect to their facilities in their service areas. Until 2011, the Federal Energy Regulatory Commission (FERC) had a federal policy in line with this historical practice. Utilities and other transmission owners had a right of first refusal, or ROFR, to build new transmission lines that connect to their facilities. Pet. App. 3. FERC eliminated the federal ROFR in 2011, in FERC Order No. 1000. *Id.* at 3-4. FERC, however, made clear it was not preempting states' abilities to enact their own ROFR laws. *Id.* at 28.

Minnesota is one of several states that has enacted a ROFR statute for building transmission lines. Minnesota's statute mirrors the federal ROFR policy by giving incumbent utilities and other transmission owners a right of first refusal to build new transmission lines that connect to their existing facilities. Minn. Stat. § 216B.246. The primary purpose of the law was "to preserve the status quo and avoid the uncertainty of a new process for electric transmission development in Minnesota after the Federal ROFR was eliminated." Pet. App. 30 n. 5.

After Minnesota enacted its ROFR law, LSP Transmission Holdings challenged the ROFR law in three forums. First, LSP asked FERC to ensure that transmission builders are selected based on a competitive bidding process and not a state ROFR law. FERC rejected LSP's complaint. Pet. App. 6. Second, LSP

appealed FERC's decision to the Seventh Circuit Court of Appeals, which upheld the agency. *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016). Third, after losing at FERC and the Seventh Circuit, LSP brought this dormant Commerce Clause challenge to the Minnesota ROFR statute. LSP alleged the statute discriminates against interstate commerce by favoring local utilities over out-of-state transmission companies. Pet. App. 7.

The district court dismissed the lawsuit, and the Eighth Circuit Court of Appeals affirmed. The Eighth Circuit held the law was facially neutral and not discriminatory. The record showed Minnesota did not enact the law for protectionist reasons but rather to maintain a "longstanding, successful regulatory approach for selecting the owners and operators of transmission lines." Pet. App. 17. The court also emphasized FERC's heavy regulatory involvement, the agency's acknowledgment of state authority in this area, and its decision to allow the continued use of ROFR processes, through state ROFR laws, for the selection of transmission builders. *Id.* at 15, 17-18.

Petitioner's arguments for certiorari fail for three reasons. First, there is no split among the lower courts. LSP admits that "several states in other circuits" have ROFR laws for transmission lines, like Minnesota's. Pet. 19. The Eighth Circuit, though, is the first appellate court to address whether these ROFR laws violate the dormant Commerce Clause. LSP provides no convincing reason why the issue cannot percolate in the federal courts longer. Second, the federal agency with

specialized knowledge and experience in electricity regulation, FERC, has already rejected these same arguments. If FERC were concerned that state ROFR processes jeopardize transmission planning, it could end them. It has chosen not to, and the courts should honor that choice. Third, the Eighth Circuit's opinion is consistent with this Court's relevant precedent.

STATEMENT OF THE CASE

I. Federal and State Regulation of Electricity Transmission.

Electricity is provided to consumers in three steps: (1) electricity is generated at power plants; (2) transmitted on an integrated system through large transmission lines; and (3) distributed to consumers through smaller distribution lines. Pet. App. 25. This case involves the regulation of electricity transmission in Minnesota.

FERC has jurisdiction over the interstate transmission of electric energy and wholesale transactions. 16 U.S.C. § 824(b)(1). The states retain jurisdiction over the retail sale of electric energy, as well as the "local distribution" and "transmission of electric energy in intrastate commerce." *Id.* States' jurisdiction includes the approval or denial of permits for the siting and construction of electric transmission facilities. Pet. App. 2.

In Minnesota, electric service is provided by monopolies. Electric utilities are assigned to retail service areas, "in order to encourage the development of coordinated statewide electric service at retail, to eliminate or avoid unnecessary duplication of electric utility facilities, and to promote economical, efficient, and adequate electric service to the public." Minn. Stat. § 216B.37. Within its service territory, an electric utility has a monopoly. It has "the exclusive right to provide electric service at retail to each and every present and future customer in its assigned area and no [other] electric utility shall render or extend electric service at retail." Minn. Stat. § 216B.40. The Minnesota Public Utilities Commission sets "just and reasonable" retail rates for public utilities, ensuring each provides "safe, adequate, efficient, and reasonable service," and "make[s] adequate infrastructure investments." Minn. Stat. §§ 216B.03–.04, and .79.

Regionally, FERC-approved nongovernmental entities, known as independent system operators (ISOs), oversee the operation and expansion of transmission grids. Pet. App. 3. Each ISO issues a tariff that establishes the terms under which its members build and operate transmission facilities within the portion of the national grid managed by the ISO. *Id*. ISO tariffs are subject to FERC approval. *Id*. Minnesota's electric utilities are covered by the Midcontinent Independent System Operator (MISO). *Id.* at 5.

II. FERC Order No. 1000.

Until 2011, if MISO approved construction of a new transmission line, the MISO member that distributed electricity in the area where the facility would be built had a federal ROFR to build the line. Pet. App. 3-4. The federal ROFR existed pursuant to the terms of the organizing MISO members' transmission agreement and MISO's tariff. *Id*. Such ROFRs were common among ISOs.

In 2011, FERC eliminated the federal ROFR. Specifically, FERC Order No. 1000 required ISOs to "eliminate provisions in Commission-jurisdictional tariffs and agreements that establish a federal right of first refusal for an incumbent transmission provider with respect to transmission facilities selected in a regional transmission plan for purposes of cost allocation." 136 FERC ¶ 61,051 at PP 284, 313 (2011), 2011 WL 2956837, at *91, *101. FERC supported this decision by citing "the benefits of competition in transmission development, and associated potential savings." *Id.* at P 285, 2011 WL 2956837, at *91.

FERC, though, explained that it was not preempting states from enacting their own ROFR laws: "However, we note that 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." *Id.* at P 227, 2011 WL 2956837, at *72.

III. Minnesota's ROFR Law.

After FERC eliminated federal ROFRs, there was uncertainty about how the selection process would work and whether a competitive bidding process would result in inexperienced low-bid winners for transmission projects. FERC itself acknowledged concerns that, in a competitive bidding process before an ISO, a company could win a bid for a new transmission project, even if it lacked the expertise to build reliable electric transmission. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 79 (D.C. Cir. 2014) (FERC recognized that "some non-incumbents might not be up to the task" of building reliable transmission and there was a "risk that the nonincumbents' poor performance would harm incumbents.").

To avoid the risks and uncertainty of a competitive bidding process, several states, including Minnesota, enacted state ROFR laws that preserved the ROFR process for selecting transmission builders. *See* Ala. Code § 37-4-150(e); Ind. Code § 8-1-38-9(a)-(b); Neb. Rev. Stat. § 70-1028; N.D. Cent. Code § 49-03-02.2; 17 O.K. Stat. § 292; S.D. Codified Laws § 49-32-20.

Minnesota's law mirrors the federal ROFR policy by granting a ROFR to incumbent electric transmission owners. Specifically, the statute provides: "An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent

electric transmission owner." Minn. Stat. § 216B.246, subd. 2. If an incumbent chooses not to build planned transmission that connects to its facility, the Minnesota Public Utilities Commission may order the incumbent to build the transmission, or the Commission may select another entity to build the line. *Id.* § 216B.246, subd. 3.

The primary purpose of the law was to preserve the status quo and avoid the uncertainty of a new process for electric transmission development in Minnesota, after FERC eliminated the federal ROFR. This purpose is reflected in comments by one of the bill's authors, during the senate committee hearing on the bill: "Our regulated system has served Minnesota well, and our system is reliable and our rates are fairly competitive. . . . If we choose not to pass this legislation, we are moving into the world of the unknown versus we have a very known process right now, members." Pet. App. 30 n. 5.

It is undisputed that electric transmission in Minnesota is reliable and consumer rates are low. Rather than risk unreliable transmission, the Minnesota ROFR law preserves the status quo for selecting transmission builders in Minnesota.

IV. FERC Allows MISO To Assign Transmission Projects Based on State ROFR Laws.

MISO is the regional system operator who oversees transmission projects that cover Minnesota. After FERC eliminated the federal ROFR, MISO removed

the federal ROFR provisions from its tariff. Pet. App. 6. At the same time, MISO added language establishing that it will assign transmission projects based on state ROFR laws. *Id.* If a transmission project calls for new transmission lines in Minnesota, MISO will select the transmission builder based on Minnesota's ROFR law. *Id.*

FERC approved MISO's decision to abide by state ROFR laws when selecting transmission builders. 147 FERC ¶ 61,127 (2014), 2014 WL 1997986. While FERC stated that it was not restoring the federal ROFR, it made clear that it would not prohibit the selection of transmission builders based on state ROFR laws:

> We continue to require the elimination of federal rights of first refusal from Commission-jurisdictional tariffs or agreements, but that is not the issue here. Rather, the issue is whether it is appropriate for the Commission to prohibit MISO from recognizing state and local laws and regulations when deciding whether MISO will hold a competitive solicitation for a transmission facility selected in the regional transmission plan for purposes of cost allocation. On balance, we conclude that the Commission should not prohibit MISO from recognizing state and local laws and regulations as a threshold issue.

Id. at P 149, 2014 WL 1997986, at *40.

FERC found that state ROFR laws do not make the regional transmission process ineffective: "We recognize that, even if a transmission project is subject to

a state right of first refusal, the regional transmission planning process still results in the selection for planning and cost allocation purposes of transmission projects that are more efficient or cost-effective than would have been developed but for such processes." *Id.* at P 157, 2014 WL 1997986, at *43.

FERC denied LSP's petition for rehearing on the ROFR issue. 150 FERC ¶ 61,037 at P 25 (2015), 2015 WL 285969, at *7. LSP sought judicial review, "complain[ing] about FERC's having decided to allow MISO to include in its tariff a provision that allows it to honor rights of first refusal created by state and local law." *MISO Transmission Owners*, 819 F.3d at 336. The Seventh Circuit held that FERC's desire "to avoid intrusion on the traditional role of the States in regulating the siting and construction of transmission facilities . . . was a proper goal," and dismissed LSP's challenge. *Id.* (internal quotation omitted).

V. Procedural History.

After LSP's arguments against state ROFR laws failed before FERC and the Seventh Circuit, LSP filed this lawsuit, claiming that Minnesota's ROFR law violates the dormant Commerce Clause. LSP sued the Commissioners of the Minnesota Public Utilities Commission and the Department of Commerce, in their official capacities. Northern States Power Co., doing business as Xcel Energy, and ITC Midwest LLC intervened as defendants. All defendants moved to dismiss the Complaint.

The district court granted the motions to dismiss. The court explained that the ROFR law was justified "to avoid any jeopardy or disruption to the service of electricity to the state electricity consumers and to allow for the provision of a reliable supply of electricity." Pet. App. 42.

A unanimous panel for the Eighth Circuit Court of Appeals affirmed. The court held that the law was facially neutral and not enacted for a discriminatory purpose, but instead to maintain a "longstanding, successful regulatory approach for selecting the owners and operators of transmission lines." *Id.* at 17. The court also emphasized FERC's heavy regulatory oversight of the ROFR issue, the agency's acknowledgment of state authority in this area, and its decision to allow ROFR processes for the selection of transmission builders to continue. *Id.* at 15, 17-18.

REASONS FOR DENYING THE PETITION

Petitioner's bases for certiorari fail for three reasons. First, there is no split among the circuit courts. Second, the Court should defer to the expertise of FERC, which heavily regulates the selection of transmission builders and has repeatedly weighed in on ROFR laws and policies. FERC has approved the use of state ROFR laws for the selection of transmission builders and has indicated that they do not jeopardize transmission planning. Third, the decision below is consistent with this Court's precedent.

I. There Is No Split Among the Circuit Courts.

The Eighth Circuit is the first appeals court to address whether state electric transmission ROFR laws violate the dormant Commerce Clause. LSP admits that many other states, including several in other circuits, have similar ROFR laws. Pet. 19. LSP, though, provides no convincing reason why this Court should intervene now, before the issue percolates further in federal courts.

While there is currently a pending dormant Commerce Clause challenge before the Fifth Circuit Court of Appeals on Texas's preference for incumbent electric transmission providers, it cannot produce a circuit split on the ROFR issue because the Texas statute is not a ROFR statute. *NextEra Energy Capital Holdings, Inc. v. Paxton*, No. 20-50160 (5th Cir.). Texas's statute completely blocks out-of-state transmission providers. It mandates that the state's utilities commission can only grant a certificate to build new transmission lines that connect to an existing facility "to the owner of that existing facility," who can designate another entity to build the lines only if that entity "is currently certificated by the commission" or is a "municipally owned utility." Tex. Util. Code § 37.056(e), (g). Under the statute, there is no ROFR for incumbents and no opportunity for an out-of-state transmission builder to enter the Texas market.

By contrast, Minnesota's law contains a ROFR and allows out-of-state transmission companies to enter the market if the ROFR is not exercised. The

Eighth Circuit noted this aspect of the ROFR law: The "record does not establish that the cumulative effect of state ROFR laws would eliminate competition in the market completely. Incumbents are not obligated to exercise their ROFRs, and some incumbents may not be obligated by their states' public utilities or service commissions to build federally-approved transmission lines." Pet. App. 21. In addition, a new transmission company can compete to build transmission lines in Minnesota if the incumbent with the ROFR cannot meet its burden to receive a certificate of need from the Minnesota Public Utilities Commission. *See* Minn. Stat. § 216B.246, subd. 3; Pet. App. 51.

In Texas, the district court found that the Texas law "does not discriminate and is without a discriminatory purpose against out-of-state transmission-line providers in part because it was enacted to avoid jeopardy or disruption to the service of electricity to Texas electricity consumers and to allow for the provision of a reliable supply of electricity to those consumers." *NextEra Energy Capital Holdings, Inc. v. Walker*, No. 19-CV-626, 2020 WL 3580149, at *5 (W.D. Tex. Feb. 26, 2020). Regardless of how the Fifth Circuit rules, there will not be a circuit split on the ROFR issue, because the Texas law is not a ROFR law.

II. FERC Heavily Regulates ROFR Processes and Has Explained That They Do Not Jeopardize Regional Transmission Planning.

LSP asks this Court to grant cert because the proliferation of state ROFR laws "undermines the national marketplace and jeopardizes the effectiveness of the federal planning process" for transmission. Pet. 36. The problem with this argument is that FERC, the expert agency that heavily regulates this area, does not agree. FERC has rejected LSP's arguments and allowed ROFR processes for the selection of transmission builders to continue through the application of state ROFR laws. If FERC were concerned, it could prohibit the use of state ROFR laws in the selection of transmission builders. It has repeatedly chosen not to do so.

LSP made the same types of arguments it is making to this Court to FERC, when it asked the agency to eliminate the use of state ROFR laws under the MISO tariff. FERC rejected LSP's request and explained that state ROFR laws do not make the regional transmission process ineffective: "even if a transmission project is subject to a state right of first refusal, the regional transmission planning process still results in the selection for planning and cost allocation purposes of transmission projects that are more efficient or cost-effective than would have been developed but for such processes." 147 FERC ¶ 61,127 at P 157 (2014), 2014 WL 1997986, at *43.

When LSP asked FERC to strike this finding, FERC instead reaffirmed it. 150 FERC ¶ 61,037 at P 33 (2015), 2015 WL 285969, at *11 ("Similarly, we disagree with LS Power that the Commission should strike, as unsupported, its finding that 'even if a transmission project is subject to a state right of first refusal. . . .' "). FERC confirmed that "it is appropriate for MISO to recognize state or local laws or regulations as a threshold matter in the regional transmission planning process." *Id.* at P 25.

FERC is far better positioned than the judiciary to assess the risks and benefits of a ROFR process for transmission builders. FERC has the authority to mandate or eliminate ROFR processes. FERC has the power to require ROFR processes for the selection of transmission builders, as it did before Order No. 1000. And, it has the power to eliminate ROFR processes, by refusing to approve ISO tariffs that select transmission builders based on state ROFR laws, as LSP asked it to. There is no reason for this Court to intervene, when any alteration to the rules for something as critical as electric transmission is best left to FERC. *Cf. South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101 (Roberts, C.J., dissenting) ("Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress."); *see also Arcadia v. Ohio Power Co.*, 498 U.S. 73, 88 (1990) (Congress entrusted "FERC as the agency with the proper technical expertise required to regulate energy transmission.").

LSP's argument that Minnesota's law passes costs to consumers in other states is also misleading, Pet. 34-35, because it ignores FERC's and MISO's role in approving regional cost sharing and allocation. The ROFR law does not cause regional cost-sharing. It establishes that, as a matter of state law, the builder of new transmission projects that are part of the regional planning process will be selected based on a right of first refusal. Costs for these regional transmission projects are shared in the region based on the MISO tariff, which is reviewed and approved by FERC. *See* Pet. App. 4 n. 2. If FERC did not want regional cost-sharing for these projects or did not want ROFR processes to continue pursuant to the tariff, it could end them. It has chosen not to.

III. The Eighth Circuit's Decision Is Consistent with This Court's Precedent.

The Eighth Circuit's decision is consistent with this Court's relevant opinions in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), and *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008). LSP cites to a host of other cases that mostly involve purely protectionist measures for local alcohol and dairy industries. Those cases are distinguishable because Minnesota's law was enacted to preserve a well-working policy, under the heavy oversight of a federal agency. In addition, LSP's arguments about how the Eighth Circuit analyzed incumbency advantages and state police powers do not fairly represent the court's

holding. The decision below is consistent with existing precedent.

A. The Decision Below Is Consistent With *Tracy* and *Davis*.

Although the Eighth Circuit did not expressly base its decision on *Tracy*, the principles announced in *Tracy* underlie much of the Eighth Circuit's reasoning and support the decision below. *Tracy* counsels in favor of not disturbing a state law, if judicial intervention would inject uncertainty and risk into the provision of energy to consumers, particularly when other federal branches of government are better suited to intervene if needed. The Eighth Circuit's opinion is in line with this principle.

Tracy involved an Ohio law that exempted state-regulated natural gas utilities from sales and use taxes. *Tracy*, 519 U.S. at 281–83. General Motors, which had purchased natural gas from out-of-state marketers whose sales were subject to the taxes, objected that the exemption for the local utilities discriminated against interstate commerce. *Id.* at 297–98. The Court rejected the challenge and offered three policy reasons for not intervening. First, when reviewing laws relating to the delivery of energy, courts have "an obligation to proceed cautiously." *Id.* at 304. Second, courts "lack the expertness and the institutional resources necessary to predict the effects of judicial intervention" invalidating these kinds of laws. *Id.* Third,

if intervention is necessary, other federal branches are better suited to intervene. *Id.*

The same reasoning applies here. When FERC eliminated the federal ROFR, there was uncertainty about the effects of moving from a ROFR process for selecting transmission builders to a competitive bidding process. FERC itself recognized that non-incumbents capable of winning a competitive bidding process might lack the expertise and resources to build reliable transmission. Specifically, FERC recognized that "some non-incumbents might not be up to the task" and there was a "risk that the nonincumbents' poor performance would harm incumbents." *S.C. Pub. Serv. Auth.*, 762 F.3d at 79. While FERC took steps to minimize these risks, there was no guarantee that abandoning a ROFR process for a competitive bidding process would produce equally reliable transmission.

The Minnesota legislature chose to avoid the uncertain effects from the elimination of the ROFR by codifying the status quo, which indisputably had produced reliable transmission at affordable rates in Minnesota. If a court were to strike down Minnesota's ROFR law, it would inject uncertainty and risk into Minnesota's electric energy market. The Minnesota legislature passed the ROFR law to avoid these risks, and *Tracy* unequivocally counsels against judicial intervention that might create such risks. *Tracy*, 519 U.S. at 304-305, 309.

Tracy also counsels courts to leave intervention to other branches of the federal government that might

be better positioned. Here, FERC is better positioned than the federal judiciary to assess whether federal intervention is necessary to eliminate or alter state ROFR laws. The Eighth Circuit recognized FERC's expertise in this matter and observed that "FERC has left such control to state authority and has not deemed that state ROFR laws use highly ineffective means to accomplish the interests of states." Pet. App. 17-18 (internal quotation marks omitted).

LSP wrongly argues that "*Tracy* at most suggests that states have greater latitude in regulating traditional retail serving utilities operating entirely intrastate." Pet. 31. This limited reading of *Tracy* can't be true for a straightforward reason: *Tracy* involved a dormant Commerce Clause challenge to a state law that favored in-state energy providers over out-of-state providers. It was not a case involving entirely intrastate matters. It was a failed dormant Commerce Clause challenge alleging interstate discrimination because of state law barriers to out-of-state companies.

While the specific facts in *Tracy* are distinguishable, the case unquestionably counsels judicial caution when overturning a state law that would introduce uncertainty and risk regarding the provision of energy to consumers, particularly when other federal branches of government are better able to intervene if needed. *Tracy*, 519 U.S. at 304. That principle applies with equal force here.

The Eighth Circuit's opinion is also consistent with *Davis*. That case involved a Kentucky tax scheme that favored the state's own bonds by exempting them from interest on state income taxes. *Id.* at 331-32. The scheme had been common among states for about a century. *Id.* The dissent would have invalidated the scheme based on "the virtues of the free market." *Id.* at 356. However, the majority declined the "invitation to the adventurism of overturning a traditional local taxing practice." *Id.* Quoting Justice Holmes, the Court stated: "[T]he fact that the system has been in force for a very long time is of itself a strong reason . . . for leaving any improvement that may be desired to the legislature." *Id.* at 357 (quoting *Paddell v. City of New York*, 211 U.S. 446, 448 (1908)).

Here, the ROFR statute preserves a longstanding status quo – utilities build the new transmission lines that connect to their facilities. The primary purpose of the law was not protectionist but to preserve the status quo. Pet. App. 30 n. 5. The Eighth Circuit recognized Minnesota's prerogative to "maintain its longstanding, successful regulatory approach for selecting the owners and operators of transmission lines." Pet. App. 17. It rejected the notion that courts should intervene to deny states this longstanding prerogative, consistent with *Davis*.

B. LSP Cites Cases that Do Not Involve State Laws that Preserve Well-Working Processes Under Heavy Federal Oversight.

LSP relies on several cases that involved purely protectionist measures to insulate in-state interests, usually alcohol or dairy industries, from interstate competition. This case is distinguishable for a couple key reasons. First, the purpose of the state law was not protectionism. It was to preserve a system of electricity transmission that had worked well to produce reliable electricity for consumers in Minnesota. Second, none of LSP's cases involve a state adopting a public policy that mirrors a former federal policy, under the heavy oversight of the expert federal agency in charge of that policy.

LSP relies primarily on *Tennessee Wine*, where the Court invalidated durational-residency requirements to operate retail liquor stores in Tennessee. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019). The problem with the Tennessee law was that it, unlike Minnesota's law, contained "purely protectionist measures with no bona fide relation to public health or safety." *Id.* at 2462 n. 5. While insulating in-state liquor interests from competition is not a valid state interest, preserving a well-working system for electric transmission system is.

The statutory language in *Tennessee Wine* is also distinguishable. The statute in *Tennessee Wine* required any person or company wishing to own a retail

liquor store to reside in the state. By contrast, Minnesota's law has no residency requirement, and many owners of transmission lines in Minnesota are not headquartered in Minnesota. Pet. App. 13. Furthermore, while no federal agency had blessed in-state residency requirements for liquor stores, FERC allows the use of state ROFR processes for selecting electric transmission builders.

LSP's reliance on *Granholm*, *Dean Milk*, and *West Lynn Creamery* are similarly misplaced. *Granholm v. Heald*, 544 U.S. 460 (2005); *Dean Milk. Co. v. Madison*, 340 U.S. 349 (1951); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). Those cases involved laws whose purely protectionist purposes were evident from the design of the statutes. Minnesota's law is not such a law. Rather, the "primary purpose of Minn. Stat. § 216B.246 was to preserve the status quo and avoid the uncertainty of a new process for electric transmission development in Minnesota after the Federal ROFR was eliminated." Pet. App. 30 n. 5.

LSP's attempt to paint the ROFR law as another rank protectionist measure, like those alcohol and dairy laws, ignores the legislative history and the importance of electric transmission to consumers. States have a valid interest in preserving a known system that has worked well to reliably transmit electricity, a far more complex market than alcohol or dairy markets. This law is not about ensuring that Minnesotans drink more Minnesotan wine or milk. It is about ensuring that Minnesotans continue to receive reliable electricity to their homes. It is a valid exercise of the state's

prerogative to preserve the status quo, avoid uncertainty, and keep intact a reliable system of electric transmission for Minnesota.

C. LSP's Arguments on Incumbency and State Police Powers Misrepresent the Eighth Circuit's Opinion.

LSP argues that the Eighth Circuit incorrectly held that discrimination in favor of incumbents never violates the dormant Commerce Clause, if some incumbents are headquartered elsewhere. Pet. 22. This misrepresents what the Eighth Circuit actually held.

The Eighth Circuit discussed the fact that the incumbency advantage discriminated against both Minnesota and out-of-state companies that might want to enter the Minnesota transmission market. Pet. App. 14-15. But it did not hold that this fact – that the law impacted in-state and out-of-state entities alike – was the end of the dormant Commerce Clause analysis. The court recognized that, "[i]n some instances, laws that restrain both intrastate and interstate commerce may be discriminatory." *Id.* at 15. But it concluded that "[t]his is not such an instance." *Id.*

The court distinguished this case from one where an incumbency advantage could be discriminatory, because here "FERC continues to acknowledge longstanding state authority over" transmission, and Minnesota's ROFR law is a valid way to structure a transmission market under this longstanding authority. *Id.* (quoting *Exxon Corp. v. Governor of Md.*, 437

U.S. 117, 127 (1978) ("We cannot . . . accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a . . . market.")).

LSP's claim that the Eighth Circuit created a novel police power immunity from the dormant Commerce Clause is even more misguided. Pet. 28-30. Under the Eighth Circuit's analysis, the presence of the police power did not immunize the state law from review. The police power supported the fact that there are valid state interests in electric transmission, and, in this case, Minnesota enacted its statute based on those valid interests. The Eighth Circuit noted that "state police power includes regulating utilities" and, for transmission, "FERC has left such control to state authority and has not deemed that state ROFR laws use highly ineffective means to accomplish the interests of states." Pet. App. 17. From here, the court found no evidence of a "discriminatory purpose" in Minnesota's choice to preserve ROFR processes for selecting transmission builders. *Id.* at 18. If the Eighth Circuit had found a purely protectionist purpose, instead of a valid state purpose, the analysis would have been different.

CONCLUSION

For all these reasons, this Court should deny the Petition.

Respectfully submitted,

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