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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondents' opposition briefs are most notable for what they do not (and cannot) deny. Respondents do not deny that Minnesota's law grants an express preference to incumbent transmission owners with an existing in-state presence. That is, after all, precisely what the *right* of first refusal entails; it is the antithesis of competition. Respondents do not deny that Minnesota grants that in-state preference in an *interstate* market. And respondents do not deny that Minnesota's protectionist law increases the costs of new transmission projects yet passes the increased costs on to residents of *other* states. Under settled Commerce Clause principles, that is enough to doom the law, which triggers a rule of virtual *per se* invalidity, and to place the decision below—which perceived no discrimination at all—in direct conflict with cases from this Court and other circuits.

Respondents cannot even agree on how to minimize that conflict. While the state denies that the Eighth Circuit placed dispositive weight on the fact that some favored in-state incumbents are headquartered elsewhere, the industry respondents admit that reality and fully embrace that nonsensical rule, while failing to square it with this Court's cases. The state also denies that the Eighth Circuit relied on the state's *police* power, but in the same breath invokes the state's "traditional authority" over transmission facilities. But there is no transmission-facility or energy-sector exception to the Commerce Clause. Indeed, it is telling that both respondents invoke this Court's decision in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), even though the Eighth

Circuit expressly disclaimed any reliance on *Tracy*, App.11. *Tracy* has no application to efforts to favor in-state incumbents in an *interstate* market, but the felt need of respondents to invoke *Tracy* underscores both the inadequacy of the Eighth Circuit's reasoning and the tendency of that decision to confuse coherent Commerce Clause analysis in the energy sector.

Respondents devote surprising attention to suggesting that FERC tolerates state ROFR laws, while essentially ignoring that the United States filed briefs in both courts below questioning the constitutionality of Minnesota's protectionist law. Respondents manage to distort FERC's position while hopelessly conflating preemption and Commerce Clause analysis. A facially discriminatory law like Minnesota's violates the Commerce Clause whether or not it is also preempted.

Finally, respondents do not dispute the gravity of the question presented. The opportunity to compete to construct, own, and maintain billions of dollars in interstate transmission lines is no small matter—as evidenced by the fact that incumbents (including the industry respondents) continue to vigorously lobby state legislatures (often successfully) for protectionist right-of-first-refusal laws. Respondents urge this Court to let that protectionist race hit rock bottom before intervening—which is hardly a surprise given that they are the architects and beneficiaries of those protectionist policies. But the stakes are too high, the urgency too pronounced, and the error below too obvious for this Court not to intervene.

I. The Decision Below Is Wildly Out Of Step With Decisions From This Court And Others.

A. The Eighth Circuit's Misguided Headquarters-Based Rule Contradicts Decades of Precedent.

According to the decision below, a state is free to facially discriminate in favor of entities with an in-state presence, so long as some of the in-state beneficiaries are headquartered elsewhere. App.15. That rule cannot be reconciled with decades of this Court's cases, Pet.22-25, with decisions from other circuits, Pet.25-28, or with the reality that a corporation with a substantial in-state physical presence has local constituencies and access to in-state lawmakers without regard to where it is headquartered. Indeed, the state does not even try to reconcile the headquarters-*über-alles* rule it successfully pressed below with any of the decisions discussed in the petition (most of which it ignores). MN.Br.22.

Industry respondents, for their part, enthusiastically embrace that rule. Ind.Br.31. But they utterly fail to reconcile it with this Court's cases, as they acknowledge that this Court has repeatedly invalidated laws that drew distinctions based on in-state presence without regard to where the favored parties were headquartered. Ind.Br.24; *see, e.g.*, *Granholm v. Heald*, 544 U.S. 460 (2005); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); Pet.22-24. They insist that there is no conflict because those cases did not discuss where the affected entities were headquartered. Ind.Br.24-25. But that is precisely the point. This Court's repeated omission of any

discussion of where favored in-state entities are headquartered is not a product of a collective failure to "issue spot." Rather, it underscores that the issue is irrelevant, because the Commerce Clause is offended by discrimination on the basis of in-state presence, full stop.

Respondents try to distinguish *Granholm* on the ground that Minnesota does not deny sellers of *electricity* non-discriminatory access to the transmission lines that it reserves to in-state incumbents. Ind.Br.22-23. That is cold comfort for *transmission providers* like LSP, who seek to compete on equal terms in the separate market to design, build, and own regional transmission projects—which is LSP's sole business. Respondents' argument is also a *non sequitur*, for it has nothing to do with the reality that *Granholm*'s analysis did not turn on where the favored companies were headquartered. If it had, then New York's law would have survived, because (like Minnesota's law) it "applie[d] evenhandedly to all entities, regardless of whether they [were New York]-based entities or based elsewhere." App.15. Instead, this Court held that the law's "restrictive in-state presence requirement" violated the Commerce Clause without even examining whether some favored in-state wineries were owned by corporations headquartered elsewhere. 544 U.S. at 474-75.

As to *Dean Milk*, respondents note only that transmission facilities in Minnesota have to be built in Minnesota. Ind.Br.23. But that truism does not excuse Minnesota's discriminatory method for deciding *who* may build and operate them. Indeed, efforts to reserve in-state opportunities to in-state

entities and efforts to keep out-of-state products from entering the state are just two sides of the same coin. The Commerce Clause prohibits both, and this Court has not hesitated to condemn the former. *See, e.g.*, *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391 (1994). Respondents try to dismiss petitioner's remaining cases as "inapposite," Ind.Br.21, but the distinctions they draw are illusory. The problem with the laws in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), and *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), is not that the preferences for in-state products reflected misguided chauvinism, but that they protected local interests from competition. Thus, if where a favored entity is headquartered were really relevant to whether that entity is "local," then that should have mattered just as much there as respondents insist it matters here.

Respondents fare no better in attempting to reconcile the decision below with decisions from the First and Eleventh Circuits rejecting arguments that discrimination based on in-state presence is permissible as long as some of the in-state beneficiaries are headquartered elsewhere. Pet.25-26. Respondents note that neither case involved a facially discriminatory law, but how that helps them is a mystery. Both courts explicitly rejected the Eighth Circuit's headquarters-are-all-that-matters rule, and facially discriminatory laws are more, not less, problematic under the Commerce Clause.[1]

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[1] Industry respondents wrongly suggest that the petition argues only that Minnesota's law is facially discriminatory. Ind.Br.30 n.5. The petition also argues that the law is

Respondents' attempt to justify that rule are equally flawed. They brand as "topsy-turvy" the notion that a company headquartered outside of Minnesota could be considered in-state for Commerce Clause purposes. Ind.Br.34. But their feigned befuddlement is hard to take seriously when Minnesota's law was introduced at their insistence, supported by their testimony, and enacted thanks to their connections with state legislators and other decision-makers. Pre-existing in-state presence is precisely what gives rise to both an interest in protection from outside competition and the political clout to procure protectionist legislation. As both this Court and other circuits have recognized, it would be truly topsy-turvy to ignore that based on where a company happens to locate its headquarters building.

B. The Eighth Circuit's Novel Exception to Commerce Clause Scrutiny for Laws Regulating Electric Transmission Finds No Support in Law or Logic.

The Eighth Circuit erred just as profoundly by refusing to apply ordinary Commerce Clause doctrine because Minnesota's right-of-first-refusal law was enacted pursuant to the state's "traditional authority" over "siting, permitting, and constructing transmission lines." Pet.28. Of course, every state law subject to Commerce Clause analysis is presumed to be a product of the state's police powers, and yet is just as plainly verboten under the federal Constitution if it discriminates against interstate commerce. Unable to

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discriminatory in its effects, as the vast majority of favored incumbents *are* headquartered in Minnesota. Pet.27-28.

defend a police-power exception to the prohibition on such discrimination, respondents insist that the Eighth Circuit invoked Minnesota's police power only as part of its discriminatory-*purpose* analysis. Ind.Br.27 n.3; MN.Br.23. That is simply not true. The decision below includes helpful headings clarifying which argument the court was addressing at any given time, and the court plainly invoked its flawed "police power" reasoning in the "Facial Discrimination" section. *See* App.11.

Respondents attempt to cast that reasoning as consistent with this Court's decision in *Tracy*. But as they are forced to concede, MN.Br.16, the Eighth Circuit went out of its way to disclaim any reliance on *Tracy*, App.11. Respondents' felt need to invoke *Tracy* anyway illustrates both the indefensibility of the Eighth Circuit's actual reasoning and *Tracy*'s status as the last redoubt for defenders of protectionist legislation in the energy sector.

But *Tracy* provides no cover for efforts to discriminate in the *interstate* energy markets, and the fact that some courts (including the district court here) read *Tracy* to broadly insulate the energy sector from meaningful Commerce Clause analysis only underscores the need for this Court's review. Respondents claim that *Tracy*'s "core insight" is that courts should not apply the Commerce Clause to state laws that "address important public services," Ind.Br.25, 27, or "relat[e] to the delivery of energy." MN.Br.16. But those descriptions improperly extend *Tracy* well beyond its narrow compass. *Tracy* is limited to direct regulation of captive retail markets historically served by local monopolies. *See* Pet.31-33.

Minnesota's law does not regulate the retail sale of electricity to a captive market, or any other market in which Congress has sanctioned a historical tradition of state-authorized monopolies. It regulates a quintessentially *interstate* market that Congress long ago gave *FERC* authority to regulate: the transmission of electricity across state lines. *Id.*

Respondents invoke *Tracy*'s observation that courts "lack the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating these kinds of laws." MN.Br.16; *see* Ind.Br.27-28. But even setting aside that this case does not involve the same "kind of law" as *Tracy*, as the United States noted below in critiquing the district court's reliance on *Tracy*, respondents "present no economic argument that a captive market for retail sales of electricity will be harmed if outsiders were allowed to develop transmission facilities." CA8.US.Br.13. Indeed, most states do not have a right-of-first-refusal law, and "Minnesota makes no argument that those states have jeopardized their capacity to serve retail markets." *Id.* Nothing in *Tracy* purported to overrule or even modify this Court's precedents invalidating discriminatory state efforts to preserve interstate energy markets for in-state entities. To the extent some lower courts have accepted invitations to read *Tracy* that broadly, it only enhances the need for plenary review.

II. Respondents' Efforts To Invoke FERC And Defend The Result They Procured On Alternative Grounds Are Unfounded.

Perhaps the best indication of how irreconcilable the Eighth Circuit's decision is with settled Commerce

Clause jurisprudence is how little effort the state makes to defend it as nondiscriminatory. Instead, the state takes the curious tack of arguing only that the discrimination is justified—*i.e.*, that its law should survive because it "was enacted to preserve a well-working policy." MN.Br.15; *see id.* at 19 ("The primary purpose of the law was not protectionist but to preserve the status quo."); *id.* at 21 (distinguishing cases that had "purely protectionist purposes"). Not only is that wrong as a factual matter; it is entirely beside the point. The Eighth Circuit did not hold that Minnesota's law is the rare one that survives the virtually *per se* rule of invalidity. It held that the law is not discriminatory *at all*. Minnesota barely defends that indefensible reasoning, seemingly recognizing that a right-of-first-refusal law is discriminatory to its core.

Perhaps for that reason, the state emphasizes that FERC used to impose a federal right-of-first-refusal rule and declined to forbid state right-of-first-refusal laws when it scrapped the federal rule as anti-competitive and counter-productive. But respondents' efforts to invoke FERC not only hopelessly conflate preemption principles and Commerce Clause prohibitions, but conveniently ignore that the United States voluntarily participated in both courts below—and urged the district court to invalidate Minnesota's law as incompatible with the Commerce Clause. *See* Dist.Ct.Dkt.70. While Congress can authorize discriminatory state laws, the United States made clear beyond cavil below that "the federal government has not authorized or approved" Minnesota's law. Pet.14-15. Thus, even if FERC actually favored state right-of-first-refusal laws, or was even neutral about

them, that would not save those laws from Commerce Clause scrutiny—a point that Commissioner Bay went out of his way to emphasize. *See* 150 FERC ¶61,037 (2015) (Bay, Comm'r, concurring).

In all events, respondents' claim that FERC has blessed laws like Minnesota's is revisionist history. In reality, FERC views state right-of-first-refusal laws exactly as it viewed the identical right-of-first-refusal laws that FERC banned from ISO tariffs: as barriers to the identification and evaluation of efficient and cost-effective solutions to regional transmission needs. Pet.7-8.[2] As the government explained below, "concern for the health of the electric transmission system should disfavor leaving in place a right of first refusal law that favors incumbents." Dist.Ct.Dkt.70 at 18; *see also* Wellinghoff.Br.6 ("Minnesota's law and others like it undermine the competition that the FPA and Order No. 1000 sought to promote.").

The state claims that "FERC found that state [right-of-first-refusal] laws do not make the regional transmission process ineffective." MN.Br.8-9 (citing 147 FERC ¶61,127 (2014)). In reality, the cited passage says the opposite: It laments the negative effects of such state laws, but offers the silver lining that things are still marginally better with Order No.

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[2] The state touts that its law "mirrors" those now-defunct provisions. MN.Br.1. But the federal government has the ability to regulate interstate markets under the Commerce Clause in ways that states do not. Whatever FERC's justification for allowing right-of-first-refusal provisions before Order No. 1000, it was not protecting in-state entities. That Minnesota enacted its law after FERC determined that it was unnecessary for proper regulation of the interstate grid reinforces that protectionism underlies Minnesota's action.

1000 because of the Order's *other* reforms to the regional transmission planning process. *See* 147 FERC ¶61,633 at ¶154.

To be sure, FERC did not expressly preempt state right-of-first-refusal laws in Order No. 1000. But this Court has repeatedly made clear that declining to preempt state law does not authorize states to violate the Commerce Clause. *See Wyoming*, 502 U.S. at 458. The more relevant point is that FERC indisputably views right-of-first-refusal laws as detrimental to competition, the interstate grid, and consumers. FERC found it "critical" to "act now" to eliminate right-of-first-refusal provisions from ISO tariffs, 136 FERC ¶61,051 at ¶¶46, 81 (2011), and this Court's intervention to prevent states from nullifying FERC's efforts is no less critical. In all events, to the extent the Court has any lingering doubts about where the federal government stands despite the two briefs the United States filed below, the Court can call for the views of the Solicitor General. But the notion that either FERC or the federal government more broadly welcomes expressly discriminatory laws that raise costs in an interstate market and force out-of-state consumers to foot the bill is fanciful.

III. This Highly Consequential Constitutional Question Merits This Court's Review.

Respondents do not dispute the gravity of the question presented. Nor could they, as their own efforts to procure laws like Minnesota's underscore the obvious value of the opportunity to construct and operate billions of dollars of new interstate transmission lines. Respondents likewise do not dispute that state right-of-first-refusal laws increase

the costs of new transmission by eliminating competition while forcing ratepayers in neighboring states that have to share those (inflated) costs. *See, e.g.*, Consumer.Br.25. That not only eliminates the one possible political check on such protectionist legislation (namely, that in-state consumers will get tired of paying for the costs of protection), but also incentivizes incumbents in neighboring states to lobby for their own protectionist laws, accelerating the race to the bottom.

Respondents do not deny that this is exactly what is transpiring, but they attempt to convert that merits vice into a certiorari-stage virtue by suggesting that this Court deny review now while other courts address these proliferating laws. But there is no reason to wait for this protectionist race to hit rock bottom.[3] These laws (and the decision below) already conflict with this Court's cases and decisions of other circuits condemning even less obviously protectionist measures. This Court should not wait to bring the Eighth Circuit into line with decisions of this Court and others, and to prevent states from interfering with the orderly expansion of the interstate grid.

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[3] In the same breath that they urge percolation, respondents insist that the Fifth Circuit's forthcoming decision in *NextEra Energy Capital Holdings, Inc. v. D'Andrea*, No. 20-50160, "cannot produce a circuit split" because the Texas law there gives incumbents not just a first-refusal right but exclusivity. But while the difference is likely only theoretical (given the nature of the opportunity, few, if any, in-state incumbents will ever decline their right of first refusal), the degree of the in-state preference, while arguably relevant under *Pike* balancing, *see* App.21, does not dictate whether a preference is discriminatory.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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