IN THE IOWA SUPREME COURT

Supreme Court No. 21-0696

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

vs.

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

and

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

PETITION FOR REHEARING TO SUPREME COURT BY INTERVENOR-APPELLEES ITC MIDWEST LLC AND MID-AMERICAN ENERGY COMPANY

DECISION DATE: MARCH 24, 2023

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STATEMENT OF ISSUE

I. THE COURT'S RULING ON ISSUANCE OF A TEMPORARY INJUNCTION SHOULD BE VACATED AND REMANDED TO THE DISTRICT COURT.

Iowa R. App. P. 6.1205.

Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022).

Thomas ex rel. Baker v. Gen. Motors Corp., 522 U.S. 222 (1998).

State v. Hanes, 981 N.W.2d 454 (Iowa 2022).

Berent v. City of Iowa City, 738 N.W.2d 193 (Iowa 2007).

Kleman v. Charles City Police Dep't, 373 N.W.2d 90 (Iowa 1985).

ARGUMENT

I. INTRODUCTION

On March 24, 2023, this Court—a court of last review—issued a temporary injunction based on significant constitutional claims without the benefit of any lower court decision. Neither the district court nor the court of appeals substantively reached these issues. Moreover, the Court issued the temporary injunction without a fully developed record of the facts necessary to evaluate the assertions put before the Court.

Pursuant to Iowa Rule of Appellate Procedure 6.1205, Intervenor-Appellees ITC Midwest LLC ("ITC Midwest") and MidAmerican Energy Company ("MidAmerican") therefore bring this Petition for Rehearing which sets forth "with particularity the points of law or fact" the Court's March 24, 2023 Opinion "overlooked or misapprehended." Intervenor-Appellees ask that the Court grant rehearing to remand the request for injunctive relief back to the district court for adjudication.

II. THE COURT SHOULD HAVE DECLINED TO ISSUE INJUNCTIVE RELIEF BASED ON CONSTITUTIONAL CLAIMS ON AN OUTDATED AND INCOMPLETE RECORD.

A. The Case Before the Court Was Limited to Standing and Did Not Address the Constitutional Claims.

The Court's Opinion states that "appellate briefing squarely addressed the injunction issue" and that "the State and ITC Midwest chose not to brief

the injunction issue on appeal." (Op. at 26.) As set forth below, the statement is inconsistent with the procedural development of the case.

First, neither the district court nor the court of appeals rendered any decision on constitutionality, and thus there is no substantive decision for this reviewing court to review. Without a lower court merits decision, the Court does not reach the question of whether an injunction should issue. Iowa follows the United States Supreme Court precedent in determining whether issues have been appropriately raised on appeal. *See Shivvers v. Mueller*, 340 N.W.2d 586, 588 (Iowa 1983) (adopting United States Supreme Court's rule on defining issues within scope of appeal). The United States Supreme Court does not address constitutional claims that have *not* been adjudicated by lower courts:

> "[W]e are a court of review, not of first view." The courts below did not reach Arteaga-Martinez's constitutional claims because they agreed with him that the statute required a bond hearing. We leave them for the lower courts to consider in the first instance.

Johnson v. Arteaga-Martinez, 142 S. Ct. 1827, 1835 (June 13, 2022) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)); *see also, e.g.*, *United States v. Washington*, 142 S. Ct. 1976, 1983 (June 21, 2022) ("But it is not our practice to interpret statutes in the first instance[.]"); *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) ("[W]hen we reverse on a threshold question, we typically remand for resolution of any

claims the lower courts' error prevented them from addressing." (Citation omitted)).

This Court has consistently adhered to this practice. As recently as November 2022, the Court explained that "[i]t is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *State v. Hanes*, 981 N.W.2d 454, 460 (Iowa 2022) (quoting *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)). The Court echoed the United States Supreme Court's explanation that "[a] supreme court is 'a court of review, not of first view.'" *Id*. As this Court explained, this process is important because it "ensures that there will be a district court ruling to review," "provides the district court an opportunity to correct the error," and provides the parties notice of the need to "fill any gaps in the record" relevant to the issue. *Id.* As a result, it made perfect sense for parties to not fully brief the merits beyond the issue of standing.

Second, consistent with that standard procedure, LS Power Midcontinent, LLC, and Southwest Transmission, LLC, (collectively "LSP"), elected not to raise either the constitutional claims or its request for injunctive relief in its Application for Further Review. Instead, LSP properly limited its application for discretionary review before this Court to three errors from the

lower court decision, each of which related solely to *standing*: whether the court of appeals erred by (1) finding no standing based on future harm; (2) declining to apply the "public importance exception" to standing, and (3) declining to take judicial notice of certain facts relevant to standing. (Appl. for Further Review (July 19, 2022) at 2.) LSP also brought a Motion to Stay Proceedings. (Appellant's Mot. for Emerg. Inj. (July 18, 2022).) That Motion was denied in a single justice decision, and LSP chose not to appeal that denial. (Order Den. Mot. for Emerg. Inj. (July 25, 2022).)

In short, the temporary injunction based on LSP's constitutional claims was not "squarely raised" because it was not decided by a lower court, nor was it presented by LSP as an issue for review by this Court. As a result, the Court lacked full development and full briefing on the constitutional claims, applicable precedent, and facts relevant to the elements of an injunction.

B. The Court Lacked a Full Record to Decide Constitutional Claims.

The Court also lacked a current, complete record to determine the likelihood of success prong of the injunction based on a constitutional rationale. The Opinion states that "[t]he constitutional claims turn on questions of law that do not require further development of an evidentiary record to evaluate LSP's likelihood of success on the merits on its constitutional claims under article III, section 29 of the Iowa Constitution."

(Op. at 26.) Thus, the Court deemed the record to be "adequate" to decide the issue. (*Id.*) However, the Court's analysis cited numerous factual representations made by LSP for which a full and complete record is lacking—representations on which no discovery was taken and which were never fully tested below because the case was dismissed at the outset of the proceedings on standing.

The Court is mindful when addressing constitutional claims to steer "clear of 'constitutional shoals'" whenever possible. *See Good v. Iowa Dep't of Hum. Servs.*, 924 N.W.2d 853, 863 (Iowa 2019) (citation omitted). As the Court has recognized, care must be taken not to reach constitutional questions unless necessary. *Id.* Indeed, on the rare occasion the Court has made an exception and decided an issue of first view, it has done so only on the express condition that "difficult issues of constitutional law are not involved" and the issue is fully briefed. *Berent v. City of Iowa City*, 738 N.W.2d 193, 206 & n.1 (Iowa 2007).

Here, the Court did not have the benefit of full briefing or a materially complete record, and as a result, errors of omission and misapprehension appear within the Court's constitutional analysis. The Opinion itself bears this out in that it cites information only presented by the latest amicus to join the appeal; the information is not found elsewhere in the record. (Op. at 34-

35.) This appeared, most significantly, in the Court's analysis of the balance of harms.[1]

As the Court is aware, the analysis of the balance of harms is a necessary, non-discretionary, element of a temporary-injunction decision. While trial courts have significant discretion in deciding injunctions, that discretion ends if the Court lacks sufficient evidence "on which it may ascertain the circumstances confronting the parties and balance the harm that a temporary injunction may prevent against the harm that may result from its issuance." *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 96 (Iowa 1985).

The record before the Court on potential harms and consequences of an injunction was significantly out of date (the last substantive filings by the parties were made seven months before the oral argument) and, therefore, materially incomplete. The specific harm LSP and the Court relied on was raised for the first time on appeal and the other parties necessarily lacked the opportunity to develop a record in response. (Op. at 24-25 (referring to Brief for Resale Power Group of Iowa as Amicus Curiae Supporting Appellants at

[1] The parties were also unable to present a complete factual record related to the Court's constitutional claim analysis, including the policy reasons that underly the longstanding use of Rights of First Refusal (ROFRs) in both federal and state policymaking, as well as material facts about the legislative history behind H.F. 2643.

24-29; Brief for NextEra Energy Transmission, LLC as Amicus Curiae Supporting Appellants at 17-20).) Regardless, while LSP's articulation of its alleged harm in this case changed materially over the course of the appeal, LSP repeatedly asserted that its harm would be complete on July 25, 2022. (*E.g.*, Appellant's Mot. for Emerg. Inj. (July 18, 2022) ¶ 18.). As a result of the lack of record, the Court overlooked or misapprehended the following material facts:

- **Harm to LSP.** The Court held that "LSP faces irreparable harm through the loss of opportunity to land multi-million-dollar electric transmission projects in Iowa." (Op. 35.) The record lacks evidence, however, of an actual, concrete *future* harm. *See, e.g.*, *Campbell Soup Co. v. ConAgra*, *Inc.*, 977 F.2d 86, 92 (3d Cir. 1992) (explaining that "immediate irreparable harm" cannot exist where the harm alleged is already past). According to LSP, the imminent harm it suffered occurred *before* issuance of the Court's decision. Specifically, LSP has admitted that "[t]he impending MISO Board approval on July 25, 2022, sounds the death knell for LS Power's opportunity to compete . . . ." (Appellant's Mot. for Emerg. Inj. (July 18, 2022) ¶ 18.) Past harm does not serve as a basis for injunctive relief, and the record as to any future harm is undeveloped in the record.

- **Balance of Harm to Others.** As to the potential harms to other parties if an injunction issues, the Court lacked the record to analyze the risks and harm that could arise from its issuance of an injunction. The injunction inherently raises complex regulatory and legal issues and may slow the development of much needed electric transmission facilities. It is also likely to cause both state and federal authorities to expend additional public resources in state and federal courts to resolve the issues.

As to the harm to Intervenors, the Court concluded there is none because projects are "years away." (Op. at 36.) This is inherently inconsistent with the finding of imminent harm to LSP, demonstrating the lack of a concrete evidentiary record on the issue of potential harm.

- **Harm to the Public Interest.** The Court found public harm based on the statement that its injunction would prevent an "increase [in] the cost of electricity for Iowans." (Op. at 37.) The Court lacked a factual record to support this conclusory assertion. Unlike many other industries, the development of public utility facilities is highly regulated. For example, electricity costs must pass muster as reasonable and prudent before being charged to Iowa ratepayers. Iowa Code § 476.6. The Federal Energy Regulatory Commission ("FERC") provides additional oversight and has sole authority over the tariffed rates of transmission providers. 16 U.S.C.

§§ 824(b), 824d.[2] Moreover, there are more than just costs at stake when determining who should build essential services like electric facilities—unregulated competition does not always serve the public as lack of reliability or service poses significant stakes for public well-being and safety. Thus, the "least cost" service is not necessarily the best result in terms of the overall public interest.

Indeed, ROFRs have long had a role in federal and state energy policy precisely because they serve legitimate policy interests. *See, e.g.*, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051, at ¶ 7 (2011). Most recently, the FERC proposed to authorize a federal ROFR for jointly-owned projects approved by a regional transmission authority. *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028, at ¶ 350 (April 21, 2022). The FERC reasoned that the removal of the federal ROFR for purposes of

[2] This federal oversight of interstate transmission is also why, to the extent the Court entered an injunction, it was proper to word it in a forward-looking manner enjoining the State's future enforcement of the ROFR. As to projects already awarded and for which substantial investments have already been made, those decisions are made by the Midcontinent Independent System Operator ("MISO") -- who LSP chose not to name in this case -- and involve interpretations of the MISO tariff. Exclusive jurisdiction over the MISO tariff lies with the FERC and cannot be collaterally attacked here.

encouraging investment in regional transmission "may in fact be inadvertently *discouraging* investment in and development of regional transmission facilities to some extent." *Id.* (emphasis added). The record in that case also included studies from economists that the expansion of competitive bidding had "failed to show benefits." *See, e.g.*, DATA Coalition, *Competitive Transmission: Experience To-Date Shows Order No. 1000 Solicitations Fail to Show Benefits*, Concentric Energy Advisors (2022).[3] This type of information would be fully developed if the district court was allowed to consider the temporary injunction.

Here, the Court lacked a record demonstrating how its decision may impact actual cost, the development of needed electrical facilities, the quality and reliability of those facilities, and the efficiencies in repairing facilities or restoring interrupted service after events like derechos or ice storms.

III. THE DETERMINATION ON INJUNCTIVE RELIEF SHOULD BE REMANDED TO THE DISTRICT COURT.

This Court's decision to issue a temporary injunction on first view, rather than to remand for consideration by the district court, also raises unusual procedural issues. The Supreme Court rarely issues injunctive relief

[3] Available at https://ceadvisors.com/wp-content/uploads/2022/08/Competitive-Transmission-Experience-To-Date-Shows-Order-No.-1000-Solicitations-Fail-to-Show-Benefits.pdf

itself. Despite an extensive search, Intervenors identified just two published decisions wherein the Supreme Court itself issued an injunction, neither from modern times. In 1971, the Court enjoined a party from operation of a grain elevator. *Johnson v. Pattison*, 185 N.W.2d 790, 799 (Iowa 1971). Previously, in 1931, the Court enjoined an individual from the unlicensed practice of medicine after allowing the attorneys for the parties to elect whether the Supreme Court or district court should issue an injunction. *State v. Baker*, 235 N.W. 313, 318 (Iowa 1931).

Much more common is for this Court to remand the issue of an injunction, and for good reason: the issuance of an injunction by this Court poses some logistical difficulties. As the United States Supreme Court has observed, "injunctions are ordinarily enforced by the enjoining court, not by a surrogate tribunal." *Thomas ex rel. Baker v. Gen. Motors Corp.*, 522 U.S. 222, 240 (1998); *see also, e.g.*, 42 Am. Jur. 2d *Injunctions* § 297 (explaining this is true across jurisdictions). Although Supreme Court jurisdiction over a case typically ceases upon the issuance of the procedendo transferring it back to the lower court, an injunction issued by this Court is not subject to the same procedure. *See, e.g.*, Iowa R. App. P. 6.1208(1). The result–jurisdiction over a single case lying in two fora–is inefficient, confusing, and presents the potential for inconsistent treatment of the issues.

Thus, remanding the decision on the temporary injunction back to the district court serves multiple jurisprudential purposes: (1) it ensures any decision on these significant constitutional claims occurs on the basis of a record that has been fully and fairly developed; and (2) it allows the case to proceed entirely in a district court that is structurally suited to the evidentiary development necessary to undertake that task and allows that court to address all interrelated issues until reaching a final resolution.

CONCLUSION

Given the inadequate record development on the constitutional issues, and consistent with traditional Supreme Court practice, the Court should grant rehearing to remand the motion for injunctive relief back to the district court for adjudication.

Respectfully submitted this 7th day of April, 2023.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.1103(4) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font in Microsoft Word 2010 and contains 2685 words, excluding the parts of the brief exempted from the type-volume requirements by Iowa R. App. P. 6.903(1)(*g*)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically served on the Clerk of the Supreme Court using the Electronic Document Management System on April 7, 2023, which will serve a notice of electronic filing to all registered counsel of record.

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