No. ______

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At the behest of electric transmission companies with an existing physical presence in the state, the Minnesota legislature granted those in-state incumbents a right of first refusal to construct any new transmission lines in Minnesota that connect to the interstate grid. That law not only expressly discriminates in favor of companies with an in-state presence, but does so with respect to a distinctly interstate market. Indeed, the costs of Minnesota's protectionism are not even borne exclusively by Minnesota residents, but are spread to customers in 14 other states. The resulting facial discrimination in an interstate market violates even the narrowest conception of the Commerce Clause. The court below nevertheless upheld the law as nondiscriminatory because the law benefitted in-state incumbents without regard to whether they were headquartered or chartered elsewhere and involved police-power regulation of electricity markets. That decision conflicts with this Court's precedent, decisions of other circuits, and any sensible construction of the Commerce Clause.

The question presented is:

Whether a state law that grants an express preference to entities with an existing in-state presence to build facilities serving a distinctly interstate market discriminates against interstate commerce, notwithstanding that a few of the preferred in-state incumbents are headquartered elsewhere.

PARTIES TO THE PROCEEDING

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.

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

CORPORATE DISCLOSURE STATEMENT

Petitioner LSP Transmission Holdings, LLC is an indirect subsidiary of LS Power Associates, L.P., which is managed by LS Power Development, its general partner. No publicly held company holds a 10% or greater ownership interest in LSP Transmission Holdings, LLC.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. District Court for the District of Minnesota and the U.S. Court of Appeals for the Eighth Circuit:

- *LSP Transmission Holdings, LLC v. Lange*, No. 17-4490 (D. Minn. 2018);
- *LSP Transmission Holdings, LLC v. Sieben*, No. 18-2559 (8th Cir. 2020).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The decision below holds that a state law that expressly reserves lucrative opportunities in interstate markets for entities with an existing physical presence "in this state" does not discriminate against interstate commerce. That text-defying conclusion is patently incorrect under decades of this Court's Commerce Clause precedent, and it conflicts with decisions of other circuits and any sensible construction of the Commerce Clause. The law here is as expressly discriminatory as the law this Court just invalidated in *Tennessee Wine & Spirits Retailers Association v. Thomas*, 139 S.Ct. 2449 (2019), and the state does not even have a Twenty-first Amendment defense or any other basis to try to justify its express protectionism here.

There is nothing subtle about the favoritism to in-state entities in the Minnesota law at issue in this case. The law grants a right of first refusal over certain new transmission projects to "incumbents," which the law defines as entities that already own transmission facilities "in this state." Nor is there anything subtle about the distinctly interstate nature of the market Minnesota has reserved for incumbents. By its terms, the first-refusal right applies only to transmission projects approved by "a federally registered planning authority" to expand the interstate transmission grid. Making matters worse, under the federally approved tariffs of the federally regulated authorities that operate the interstate grid, the costs of the new transmission projects that Minnesota has reserved to its in-state incumbents are paid for by residents of multiple states. Under settled

Commerce Clause principles that this Court just reaffirmed, Minnesota's facially discriminatory law triggers a rule of virtually *per se* invalidity.

But not in the Eighth Circuit. The decision below not only upheld Minnesota's law, but deemed it non-discriminatory. It did so only by embracing positions that this Court and other circuits have squarely rejected. The court first concluded that the law is not discriminatory because some of the favored incumbents are headquartered elsewhere. But time and again, this Court has condemned protectionist preferences for companies with an in-state presence regardless of where they were headquartered, and at least two circuits have rejected efforts to justify favoritism for in-state incumbents on the ground that some were headquartered somewhere else. The Eighth Circuit then suggested that Minnesota's police power over the siting and permitting of transmission facilities gives it *carte blanche* to favor in-state incumbents. But this Court has repeatedly held that when it comes to interstate and wholesale markets, states have no license to discriminate. Thus, under this Court's precedents, Minnesota's blatantly discriminatory effort to reserve transmission projects approved by "a federally registered planning authority" to incumbents with facilities "in this state" is blatantly unconstitutional.

The decision below is as consequential as it is erroneous, as evidenced by the United States' participation in both courts below. The nation is in the midst of a massive expansion of clean energy that will require billions of dollars of investment in new interstate transmission lines to facilitate these new energy sources. Incumbent transmission owners across the country are actively lobbying state legislatures, predominantly in states rich in new clean energy resources like wind, to block out-of-state competitors from even *trying* to demonstrate that they are best suited to construct and operate these new facilities, and they are having considerable success in doing so. Indeed, Minnesota's law has already caused a $150 million transmission project to expand the interstate grid to be awarded to two hand-picked in-state incumbents, with no consideration whatsoever of who would actually be the most efficient provider. Most of the costs of this protectionism are not borne by Minnesota consumers, but spread to consumers in 14 other states, several of which have followed suit with discriminatory laws of their own. The Court should intervene now to stop this race to the bottom and to bring the Eighth Circuit into line with the decisions of this Court and others.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 954 F.3d 1018 and reproduced at App.1-21. The district court's opinion is reported at 329 F.Supp.3d 695 and reproduced at App.24-49.

JURISDICTION

The Eighth Circuit issued its decision on March 25, 2020, and denied a timely petition for rehearing en banc on June 8, 2020. On March 19, 2020, the Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix. Most relevantly, Minn. Stat. §216B.246, Subd. 2, reproduced at App.50, 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."

STATEMENT OF THE CASE

A. Factual and Legal Background

1. Electricity involves a three-step process of generation, transmission, and distribution. First, electricity is generated at power plants, wind farms, solar farms, and other generation facilities. Second, that electricity is conveyed to local distribution stations on a system of high-voltage "transmission lines," which are either strung between tall metal towers or buried underground. These transmission lines, along with towers, switch yards, substations, and related equipment are referred to collectively as "transmission facilities." Third, once the electricity reaches local distribution stations, it is converted to a lower voltage and distributed to consumers over "distribution lines."

Traditionally, "most state energy markets were vertically integrated monopolies—i.e., one entity, often a state utility, controlled electricity generation, transmission, and sale to retail consumers." *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288, 1292

(2016). Over time, however, an interstate market for electricity developed, with resource-rich states generating electricity to sell at wholesale for transmission across state lines to local retail distributors. From the outset, this Court recognized limits on the ability of individual states to regulate this interstate wholesale market. *See, e.g.*, *Attleboro Pub. Utilities Comm'n v. Attleboro Steam Co.*, 273 U.S. 83 (1927).

In 1935, Congress enacted the Federal Power Act ("FPA") to regulate this burgeoning interstate market. *New York v. FERC*, 535 U.S. 1, 6 (2002). The FPA largely left to the states matters they had traditionally regulated, such as retail distribution and the *intra*state transmission of electricity. 16 U.S.C. §824(b)(1). But the FPA gives FERC (formerly the Federal Power Commission) exclusive jurisdiction over the *inter*state transmission of and wholesale market for electricity. *Id.* Congress later authorized FERC to "divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy." *Id.* §824a(a).

While states continue to retain some regulatory powers over transmission and generation facilities located within their borders even when those facilities are used in *inter*state commerce, this Court has repeatedly made clear that those powers are constrained by the Commerce Clause. Indeed, this Court has invalidated state energy regulations that discriminated against interstate commerce even when states argued that the regulations were necessary to their local retail markets. *See, e.g.*, *Wyoming v.*

Oklahoma, 502 U.S. 437, 454-59 (1992) (invalidating Oklahoma law that required coal-fired electric utilities to burn coal mixture containing at least 10% Oklahoma-mined coal); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (invalidating New Hampshire law that required hydroelectric generators to obtain state approval to transmit energy out of state).

2. Over time, more independent generators emerged to compete with vertically integrated utilities, and interconnected interstate electric systems became increasingly prevalent and economical. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 49-50 (D.C. Cir. 2014). In the face of this competition, local retail utilities attempted to preserve their monopolies by using their control over transmission lines to refuse to deliver wholesale energy produced by competing generators or to make their transmission lines available to competitors "only on inferior terms." *Id.* As a result, independent generators struggled to compete, even when they were producing energy more efficiently.

In response, FERC enacted a series of orders to promote the development of competitive interstate markets. In 1996, FERC ordered any facility that connects to an interstate grid to unbundle its generation and transmission services and to allow access to its transmission facilities on a non-discriminatory basis. *See* 75 FERC ¶61,080 (1996). In 1999, FERC followed up with Order No. 2000, which encouraged owners of transmission facilities serving interstate commerce to collectively cede operation of their transmission systems to "independent system operators" or "regional transmission organizations" (collectively, "ISOs"). *See* 89 FERC ¶61,285 (1999). ISOs are non-government agencies vested with authority to operate and plan the expansion of interstate transmission grids on a regional and interregional basis. CA.App.5 ¶15; *see MISO Transmission Owners v. FERC*, 819 F.3d 329, 331 (7th Cir. 2016).

The ISO for the Midwest is the Midcontinent Independent System Operator, Inc. ("MISO"). MISO's 50-plus transmission-owner members currently own more than 49,000 miles of transmission lines spanning 15 states and parts of Canada. CA.App.5 ¶16. While states within the MISO region retain their traditional authority over siting, routing, and permitting of new transmission facilities, it is MISO, not the states, that decides whether to approve the construction of new transmission facilities to serve the MISO grid. If any public utility or independent transmission owner wants to build new transmission facilities within MISO, it must seek and obtain MISO's approval.

3. Until 2011, many FERC-approved ISO tariffs (including MISO's) contained right-of-first-refusal provisions. These provisions gave owners of existing transmission facilities the exclusive right to construct new transmission facilities in their service areas. This right of first refusal for incumbent transmission owners applied even if the proposal for a new transmission facility had been submitted to the ISO by a non-incumbent transmission owner, and even if the non-incumbent could construct and maintain the new facility more efficiently than the incumbent. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 72-77. In practice, these

provisions allowed incumbents to wait for non-incumbents to identify promising opportunities for new transmission facilities and then exercise their rights of first refusal to construct and operate those facilities without having to compete. *Id.*

In 2011, FERC issued Order No. 1000, which required ISOs to eliminate right-of-first-refusal provisions for regional transmission facilities from their FERC-approved tariffs and agreements and ordered new transmission projects be competitively and regionally planned by entities like MISO. *See* 136 FERC ¶61,051 (2011). FERC found that "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." *Id.* at 82. FERC further concluded that right-of-first-refusal provisions discourage non-incumbents from investing in transmission because a non-incumbent would not want to risk the significant investment necessary to develop a proposal if it would have to hand the project over to an incumbent once the project is approved. *Id.* FERC therefore concluded that right-of-first-refusal provisions undermine the identification and evaluation of more efficient and cost-effective solutions to regional transmission needs and deprive customers of the benefits and savings that competition produces. *Id.* at 81-86.

Unsurprisingly, incumbent transmission owners objected to the elimination of their rights of first refusal. *See, e.g.*, *id.* at 76-77. In resolving the lawsuits that followed, the D.C. Circuit affirmed

FERC's authority to order the removal of right-of-first-refusal provisions from ISO tariffs, concluding that substantial evidence supported FERC's findings that "rights of first refusal … made the transmission market inefficient, that transmission facilities would therefore be developed at higher-than-necessary cost, and that those amplified costs would be passed on to transmission customers." *S.C. Pub. Serv. Auth.*, 762 F.3d at 76-77. The Seventh Circuit later upheld FERC's abrogation of the right of first refusal in the MISO Transmission Owners Agreement, finding that the transmission owners had "made no effort to show that the right is in the public interest." *MISO Transmission Owners*, 819 F.3d at 333, *cert denied*, 137 S.Ct. 1223 (2017). The D.C. Circuit reached the same conclusion in similar litigation concerning other ISOs. *See, e.g.*, *Emera Maine v. FERC*, 854 F.3d 662 (D.C. Cir. 2017); *Okla. Gas & Elec. Co. v. FERC*, 827 F.3d 75 (D.C. Cir. 2016).

After FERC issued Order No. 1000, MISO revised its tariff to remove rights of first refusal. App.5. MISO also created a competitive solicitation process designed to select the optimal developer for regionally cost-allocated projects. *See* 136 FERC ¶61,051 at 3. Two types of projects currently qualify for competitive bidding under MISO's tariff. The costs for one type of project are allocated system-wide, meaning that all MISO participants (*i.e.*, all 15 participating states and, in some circumstances, Manitoba) share each project's costs. CA.App.14 ¶42. For the other type of project, the costs are distributed to the principal areas benefitted by the project, which often span multiple states. *See* CA.App.15 ¶43.

4. In the wake of Order No. 1000, incumbent utilities and transmission companies dissatisfied with the loss of their federal first-refusal rights began lobbying states to enact their own right-of-first-refusal statutes to shield them from competition with out-of-state developers for regionally approved transmission projects for the interstate grid. Minnesota was one of the first states to oblige, along with other wind-rich states South Dakota, Nebraska, and North Dakota. In early 2012, legislation was introduced in the Minnesota House and Senate to "establish[] a right of first refusal for Minnesota utilities and electric transmission owners regarding the construction and ownership of electric transmission lines connecting to their own facilities." CA.App.16-17 ¶¶50-51.

The senator who introduced the bill described it as a direct response to Order No. 1000 and its elimination of "a federally recognized right of first refusal." CA.App.34. A representative from Xcel Energy, the largest incumbent transmission line owner in Minnesota, *see* CA.App.22 at ¶67, testified in support of the bill and argued that it was necessary to keep transmission lines in the hands of purportedly more responsive in-state companies and to restore the "status quo" from before Order No. 1000. CA.App.34-36. A representative from Missouri River Energy Services, another incumbent transmission owner, described the bill as giving "Minnesota utilities … the first opportunity to invest in federal regionally planned transmission projects," CA.App.37, and urged the Senate Committee not "to encourage third party transmission owners to buy and build transmission service in Minnesota." CA.App.36.

The bill was passed by the Senate and House, and it was signed into law on April 18, 2012. Codified as Minn. Stat. §216B.246, the statute states:

> 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 (emphasis added). The statute defines "incumbent electric transmission owner" as:

> [A]ny public utility that owns, operates, and maintains an electric transmission line *in this state*; any generation and transmission cooperative electric association; any municipal power agency; any power district; any municipal utility; or any … entit[y] … engaged in the business of owning, operating, maintaining, or controlling *in this state* equipment or facilities for furnishing electric transmission service in Minnesota.

Minn. Stat. §216B.246, Subd. 1(c); Minn. Stat. §216B.02, Subd. 10 (emphases added).

By its terms, the statute discriminates in favor of in-state entities, and it does so with respect to a distinctly interstate market. The statute preserves opportunities for "incumbents," defined as entities that have existing transmission facilities "in this state." And it does so specifically for "transmission line[s] … approved for construction in a federally registered" ISO's transmission plan—*i.e.*, lines that are part of the interstate grid, and for which costs are allocated among multiple states, not just Minnesota. Indeed, the right to first refusal is triggered by MISO's approval of a regional transmission project. Minn. Stat. §216B.246, Subd. 3(a). If the incumbent exercises its first-refusal right within 90 days of MISO approval of a project, it locks out all would-be competitors.

After Minnesota and other MISO states enacted right-of-first-refusal statutes, MISO revised its tariff in light of these state-created rights. App.5-6. FERC initially rejected that revision, but upon rehearing, it concluded that the revision was not prohibited by Order No. 1000 because it "merely acknowledges" state and local laws. 150 FERC ¶61,037, 61,173 (2015). Notably, however, FERC's chairman filed a concurring opinion cautioning that "[s]tate laws that discriminate against interstate commerce—that protect or favor in-state enterprise at the expense of out-of-state competition—may run afoul of the dormant commerce clause." *Id.* at 61,195. He further observed that "[t]he Commission's order today does not determine the constitutionality of any particular state right-of-first-refusal law," and that "[t]hat determination, if it is made, lies with a different forum, whether state or federal court." *Id.*

B. Procedural History

1. Petitioner LSP Transmission is an independent transmission company that owns and operates more than 660 miles of transmission lines in five states and is in the process of developing transmission projects in several additional states across the country. Since Order No. 1000 and the development of competitive

processes to build regional transmission lines, LSP has been a highly successful competitor because of its ability to offer binding cost caps and multiple other cost-reduction factors beneficial to ratepayers. CA.App.12-13 ¶35. To date, LSP has been selected to build transmission projects by a majority of the ISOs across the country, including winning the first competitive solicitation in MISO. But now, just as the need for new interstate transmission lines to facilitate new clean energy sources is reaching its peak, LSP is foreclosed from competing for MISO-approved transmission projects in Minnesota because of the right-of-first-refusal law.

For example, in 2016, MISO approved the Huntley-Wilmarth transmission line project in southern Minnesota. The project's costs are allocated across several states in the MISO region, including to consumers in Iowa, Wisconsin, the Dakotas, and Montana, and it normally would have been subject to MISO's competitive solicitation process. CA.App.23 ¶71. But because of Minnesota's right-of-first-refusal statute, MISO determined that the project was not eligible for competitive bidding. CA.App.23 ¶71. Instead, the incumbents on either end of the new line submitted notices of their intent to construct, own, and maintain the Huntley-Wilmarth line, and that was that. App.7.

2. LSP filed this lawsuit against state defendants challenging the constitutionality of Minnesota's right-of-first-refusal statute under the Commerce Clause. Respondents ITC Midwest, LLC, and Northern States Power Company d/b/a Xcel Energy—the two incumbents who invoked the law to secure the

Huntley-Wilmarth project—intervened as defendants, and all defendants moved to dismiss.

The United States submitted a statement of interest supporting LSP. In the government's view, Minnesota's right-of-first-refusal law "fails both the antidiscrimination test and the undue burden test because it raises entry barriers, segments the interstate market in developing transmission lines, favors in-state incumbents, and causes substantial anticompetitive effects in interstate commerce." Dkt.70 at 10. The government further noted that "the federal government has not authorized or approved" Minnesota's discriminatory law. *Id.*

The district court granted the motions to dismiss. App.25. The court relied on two separate grounds in dismissing LSP's arguments that the Minnesota law impermissibly discriminates against interstate commerce. First, the court ruled that this Court's decision in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), "forecloses [LSP's] allegation that Minn. Stat. §216B.246 overtly discriminates against out-of-state transmission developers." App.43. Second, even setting *Tracy* aside, the court ruled that the distinction the statute draws between entities with an in-state presence and those without does not discriminate against interstate commerce because it favors those with an in-state presence "regardless of whether they are [headquartered] in-state or out-of-state." App.44. The court further held that the statute survived *Pike* balancing as a matter of law and thus that discovery was unnecessary.

3. LSP appealed. The United States again participated, filing an amicus brief explaining that

"*Tracy* did not establish a categorical rule shielding all electricity-related regulation from dormant Commerce Clause scrutiny" and that "[t]he unique factors present in *Tracy* do not arise here." US.Br.11-12. The government further explained that the district court erred by giving "undue weight to where companies were headquartered." US.Br.7-9. The government reiterated that neither Congress nor FERC has approved state right-of-first-refusal laws. US.Br.15-16

The Iowa Department of Justice Office of Consumer Advocate also filed an amicus brief explaining how Minnesota's statute increases costs to Iowa consumers. First, "the right of first refusal can directly increase project costs by decreasing competition in the construction process." Iowa.Br.3. Second, whereas competitive bidders often shield ratepayers from the risks of cost overruns, incumbent utilities with rights of first refusal generally do not do so. Iowa.Br.4. And because the costs of regional transmission projects are "shared by customers … across the MISO footprint," these cost increases are borne by consumers in Iowa and across the Midwest. Iowa.Br.2.

The Eighth Circuit affirmed. The court first opined that the law does not discriminate against out-of-state companies facially or in its effects because it draws distinctions based on incumbency rather than on where companies are headquartered. App.11-15, 18-19. The court expressly "disagree[d]" with LSP's argument that defining "incumbent" to require an in-state presence is facially discriminatory, instead concluding that what matters is whether the law discriminates between companies that "are Minnesota-based" and those "based elsewhere." App.13-15. Although the court acknowledged that other circuits have rejected the notion that the Commerce Clause is limited to discrimination against companies headquartered or chartered out of state, it declared those cases "distinguishable because they do not consider state regulation of certain matters relevant to transmission planning and expansion." App.14 n.6.

The court next suggested that Minnesota's law is immune from Commerce Clause scrutiny because Minnesota has police power over the siting, permitting, and construction of transmission lines. App.17-18. The court never explained the source of this immunity or how it would be compatible with this Court's decisions invalidating expressly discriminatory state laws enacted pursuant to states' undoubted police power over in-state power generation. Nevertheless, the court repeatedly stated that the right-of-first-refusal law does not violate the Commerce Clause because it was enacted pursuant to the state's police power to regulate "siting, permitting, and constructing transmission lines." App.17-18; *see also, e.g.*, App.14 n.6, 15, 18-19.

Finally, notwithstanding that LSP's complaint was dismissed before discovery, the court held that LSP's discriminatory purpose and *Pike* balancing claims failed on the "record" before it. App.17-18, 21. The court acknowledged that there is a factual dispute over the law's purpose but concluded that the legislature could not have had a discriminatory purpose because five of the 16 entities with the in-state presence necessary to qualify as incumbents are headquartered outside of Minnesota, and because "state police power includes regulating utilities." App.17. As for *Pike* balancing, the panel found no undue burden because "this record does not establish that the cumulative effect of state ROFR laws would eliminate competition in the market completely." App.21.

REASONS FOR GRANTING THE PETITION

The decision below upholds a blatantly protectionist law that explicitly discriminates in favor of entities with an existing in-state presence with respect to opportunities in a distinctly interstate market. The discrimination could not be more obvious on the face of the statute: Minnesota's law expressly gives companies with an existing presence "in this state" a right of first refusal to build new transmission lines authorized by a "federally registered planning authority" to connect to the interstate grid. There is nothing subtle about the protectionism for those with an existing presence "in this state." Making matters worse, because the law targets projects authorized by the "federally registered planning authority," the costs of this protectionist law are borne not solely by Minnesotans with a voice in the political process, but by electricity consumers throughout the 15-state region.

Such a flagrantly discriminatory effort to benefit local interests to the detriment of out-of-state interests is virtually *per se* invalid under the Commerce Clause. Indeed, the law here is, if anything, more obviously discriminatory than the law this Court invalidated in *Tennessee Wine*, and

Minnesota cannot even point to the Twenty-first Amendment or anything else to try to justify its express discrimination.

Instead of invalidating Minnesota's law, the court below reached the indefensible conclusion that the law is not even discriminatory. The Eighth Circuit first embraced the patently incorrect proposition that the Commerce Clause is indifferent to discrimination in favor of incumbents with an existing in-state presence as long as some of those incumbents are headquartered elsewhere. That proposition conflicts with the decisions of other circuits and any sensible construction of the Commerce Clause. As this case amply demonstrates, a company with existing in-state assets and employees is perfectly positioned to lobby for protectionist legislation, regardless of where it is headquartered or chartered. The court of appeals also embraced the equally remarkable proposition that the state's "police power" over the siting and permitting of transmission facilities somehow immunized its express discrimination concerning who can build a new project approved by a "federally registered planning authority" for the *interstate* transmission grid. That notion conflicts with this Court's decisions and common sense. Whatever authority a state may have to favor incumbents with respect to purely local retail utility matters, express discrimination with respect to the interstate grid is plainly verboten.

The decision below is not just obviously wrong and out of step with decisions of this Court and other circuits; it is enormously consequential. Minnesota's law has already foreclosed out-of-state entities from even *trying* to compete for a $150 million transmission project, but that is just the tip of an iceberg given the ongoing expansion of clean-energy resources. As one would expect, surrounding states have been quick to emulate Minnesota's effort to force out-of-state customers to subsidize protectionism. Five such state laws have been enacted within the Eighth Circuit alone, the most recent of which passed mere months after this decision issued, and several states in other circuits have followed suit. The Court should grant certiorari to stop this race to the bottom and to enforce the Commerce Clause's prohibition on explicit efforts to reserve opportunities in a distinctly interstate market for entities "in this state."

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

Just this past year, this Court "reiterate[d] that the Commerce Clause by its own force restricts state protectionism." *Tenn. Wine*, 139 S.Ct. at 2461. Applying that principle, the Court has long held that a state law that discriminates against interstate commerce on its face or in its effects is "virtually *per se* invalid"; it "must be invalidated unless … it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99-101 (1994). In this context, "discrimination" simply means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

Under a straightforward application of those principles, Minnesota's right-of-first-refusal statute plainly discriminates against out-of-state interests on its face. Minnesota defines an "incumbent electric transmission owner" as an entity that "owns, operates, and maintains an electric transmission line *in this state*." Minn. Stat. §216B.246, Subd. 1(c) (emphasis added). The state thus explicitly differentiates among electric transmission entities based on whether, and indeed to what extent, they have an existing in-state presence. Moreover, the state reserves lucrative benefits in a distinctly *interstate* market—*i.e.*, the opportunity to build new transmission projects in Minnesota authorized by a "federally registered planning authority"—to entities that satisfy that in-state presence requirement. Minn. Stat. §216B.246, Subd. 2. If MISO approves a new transmission line located in Minnesota to serve the interstate grid, an entity with an in-state presence will have an automatic right to preclude companies that lack an in-state presence from competing for the opportunity to construct and maintain that line, even if those would-be competitors could do so more effectively and cost-efficiently. Solely because they do not *already* own transmission facilities in Minnesota, out-of-state companies in the business of constructing transmission lines cannot even *try* to prove through participation in a competitive procurement process that they would provide better value to the consumers that these lines are being built to serve.

That is blatant facial discrimination against out-of-state interests. *See, e.g.*, *Granholm*, 544 U.S. at 474 (holding unconstitutional state law that "grants in-state wineries access to the State's consumers on preferential terms"). Indeed, the only comparably blatant discrimination against out-of-state entities this Court has seen in recent years has been in the context of alcohol regulation, where the Twenty-first Amendment at least provided an arguable justification for such obvious protectionism.

In fact, despite the absence of any Twenty-first Amendment justification or comparable defense, the discrimination here is even more pronounced than in the Tennessee law that the Court just held "plainly favors Tennesseans over nonresidents" in violation of the Commerce Clause. *Tenn. Wine*, 139 S.Ct. at 2462. Tennessee's law required companies that wanted to own or operate a liquor store to first establish an in-state presence. The Court found it obvious that the law "could not be sustained" under ordinary Commerce Clause principles. *Id.* at 2474. If Tennessee had limited new liquor licenses to companies that *already* held existing Tennessee liquor licenses, instead of Tennessee residents, the protectionism in favor of existing in-state enterprises would have been even more targeted, and the discrimination against out-of-state entities even more obvious. That is exactly what Minnesota has done here: Its right-of-first-refusal law prevents companies from even competing for the right to construct new interstate transmission facilities in Minnesota unless they already have transmission facilities "in this state."

The Eighth Circuit nonetheless upheld Minnesota's law—not on the theory that it is the rare law that survives the rule of virtually *per se* invalidity, but on the theory that it does not discriminate against out-of-state interests in the first place. Each of the reasons the court offered for reaching that remarkable conclusion is irreconcilable with this Court's precedent and decisions from other circuits.

A. The Eighth Circuit's View That Discrimination in Favor of Incumbents "In This State" Is Not Discriminatory if Some Incumbents Are Headquartered Elsewhere Contradicts Decades of Precedent.

The Eighth Circuit deemed Minnesota's law non-discriminatory because its incumbency protection "applies evenhandedly to all [incumbents], regardless of whether they are Minnesota-based entities or based elsewhere." App.15. In other words, the court believed that it is permissible to facially discriminate in favor of entities with an existing *presence* "in this state," so long as a state extends the preference to in-state incumbents without regard to where they are *headquartered*. By that logic, the state could reserve local markets to companies that already employ Minnesota workers, or already pay Minnesota taxes (and likely already have Minnesota lobbyists), and the Commerce Clause would have nothing to say about it. That claim is irreconcilable with this Court's precedent, conflicts with decisions of other circuits, and fundamentally misperceives the purpose of the Commerce Clause's anti-discrimination principle.

1. This Court's cases have long squarely foreclosed the notion that discrimination does not count for Commerce Clause purposes unless it is based on where a company is headquartered or chartered. Indeed, the Court has routinely found discrimination on the basis of in-state presence sufficient to trigger to the rule of virtually *per se* invalidity. In *Granholm*,

for example, the Court considered a New York law that allowed in-state wineries to ship wine directly to consumers but prohibited out-of-state wineries from doing the same. *Granholm*, 544 U.S. 460. New York's law, like Minnesota's, required an in-state presence, but imposed that requirement even-handedly on entities headquartered in-state or elsewhere. New York defended its law by pointing out that it allowed out-of-state wineries to ship directly to consumers if they first opened a distribution facility within the state (a step considerably easier than purchasing an in-state transmission facility). In other words, New York argued that its law was permissible because it facially discriminated based on whether a winery had an in-state presence rather than on whether the winery was based in New York. The Court rejected that argument, explaining that it "does nothing to eliminate the discriminatory nature of New York's regulations," for it was the "restrictive *in-state presence* requirement" that violated the Commerce Clause. *Id.* at 474-75 (emphasis added).

Likewise, in other cases invalidating laws that facially discriminated in favor of in-state interests, the Court has not been concerned about where the owners of the favored in-state interests were headquartered or chartered. In *Wyoming v. Oklahoma*, the Court saw no need to ask whether the owners of the in-state coal mines whose coal Oklahoma preferenced were based in Wyoming. *See* 502 U.S. at 454-59. And in *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 352 (1951), the Court did not ask whether any of the favored in-city pasteurizers were owned by companies based in Chicago. Madison's facial discrimination based on physical location near Madison was enough.

Nor has the location of a company's headquarters governed when the Court assessed the discriminatory effects of a facially neutral law. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), the Court did not ask whether the owners of the in-state dairy farms who benefitted from the law were Massachusetts citizens or companies. And in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), the Court did not ask whether the owners of registered-in-state big rigs who benefited from the law were based somewhere other than Pennsylvania. Instead, it was enough that the state laws had the effect of discriminating on the basis of in-state presence. In short, this Court's cases uniformly reflect the rule "discrimination *based on the extent of local operations* is itself enough to establish the kind of local protectionism" that is virtually *per se* invalid. *Lewis v. BT Inv. Mgrs., Inc.*, 447 U.S. 27, 42 n.9 (1980) (emphasis added).

That rule makes sense given that a 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. One of the motivating concerns behind the Commerce Clause was that local industry would convince state legislatures to enact protectionist legislation—as was common under the Articles of Confederation—to the detriment of the national market and out-of-state competitors. The framers deemed a federal solution necessary because those kinds of harms to out-of-state interests are "unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid*

Waste Mgmt. Auth., 550 U.S. 330, 345 (2007). As this case well illustrates, an in-state company's ability to obtain protectionist legislation turns on its in-state presence and attendant access to in-state lawmakers, not on where the company is headquartered or chartered. Regardless of where it is headquartered, an incumbent transmission owner in Minnesota has an active business operation in Minnesota, employs Minnesotans, and pays Minnesota taxes. All of those in-state operations and constituencies give an in-state incumbent a firm base from which to lobby Minnesota lawmakers to reserve markets for in-state entities that already contribute to the local economy. Discrimination in favor of such local entities and against those without a presence "in this state" is the precise evil the Commerce Clause guards against.

2. Consistent with that understanding, other circuits have squarely rejected the argument that the Commerce Clause is concerned only with discrimination on the basis of where companies are headquartered or chartered. In *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), for example, the First Circuit considered a facially neutral regulatory regime that made it more difficult for new entrants, as opposed to incumbents, to open a pharmacy in Puerto Rico. *Id.* at 56.[1] The court found the regulation discriminatory even though "a few of the existing pharmacies … are owned by out-of-Commonwealth interests." *Id.* at 58. It explained that treating

[1] The First Circuit has concluded that "Puerto Rico is subject to the constraints of the dormant Commerce Clause doctrine in the same fashion as the states." *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F. 2d 1, 7 (1st Cir. 1992).

companies with an in-state presence as out-of-state merely because of the location of their corporate headquarters "would be tantamount to saying that a favored group must be *entirely* in-state for a law to have a discriminatory effect on commerce," a proposition for which it knew of "no authority." *Id.*

The Eleventh Circuit ruled likewise in *Florida Transportation Services v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012). That case concerned the process for permitting stevedores at the Port of Miami. *Id.* at 1234. In practice, "the sole factor that determined whether the Port Director would grant a stevedore application was … whether the applicant already had a permit at the Port." *Id.* at 1257. Thus, much like permits to build transmission lines in Minnesota, stevedore permits were awarded only to companies with an existing in-state presence. The county defended itself by making the same argument Minnesota made here—*i.e.*, that it was not discriminating against interstate commerce because some of the incumbents were headquartered or incorporated out of state. *Id.* at 1259. And the Eleventh Circuit rejected that argument, holding that "a state or municipality's dormant Commerce Clause liability [does not] turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place or where its political influence lies." *Id.*

Indeed, neither the Eighth Circuit nor the state identified any case that held that a law that *facially* discriminated on the basis of in-state presence nonetheless did not qualify as discriminatory because some of the in-state beneficiaries were headquartered elsewhere. The Eighth Circuit offered nothing in support of that reasoning, and the best case the state had to offer is a Fourth Circuit case dealing with a discriminatory *effects* claim. *See Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016). It is far from clear that the Fourth Circuit actually embraced the Eighth Circuit's wooden headquarters-are-all-that-matters view when it rejected the notion that "incumbency bias" is necessarily a "proxy for in-state status." *Id.* at 154-55. But to the extent *Colon Health* supports the proposition that where a company is headquartered is the only relevant metric for measuring discrimination, it only deepens the conflict with this Court's cases and with the First and Eleventh Circuits.

The Eighth Circuit's decision is all the more inexplicable because the overwhelming majority of favored incumbents *are* headquartered in Minnesota. App.18. Of the 16 entities with an in-state presence, 11 have headquarters in Minnesota, and the four largest of those 11 own a combined 79% of the transmission assets in the state. CA.App.22-23 ¶67. Laws have the effect of discriminating against interstate commerce when the majority of the benefits inure to in-state entities. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 579-81 (1997). Because Minnesota's law exclusively benefits companies with an existing in-state presence and overwhelmingly benefits companies headquartered in state, the Eighth Circuit's headquartered-focused analysis is as baffling as it is mistaken and is in direct conflict with decisions of this Court and the circuits that properly apply the Commerce Clause.[2]

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 suggesting that ordinary Commerce Clause doctrine does not govern here because Minnesota's right-of-first-refusal law was enacted pursuant to the state's police power over "siting, permitting, and constructing transmission lines." App.17; *see also, e.g.*, App.14 n.6, 15, 18-19. That suggestion is plainly mistaken and just as plainly distorted the Eighth Circuit's entire analysis. No one ever suggested that the Minnesota legislature somehow lacked the *authority* to enact the challenged legislation. Instead, the argument from the beginning was simply that Minnesota's discriminatory law is precluded by the U.S. Constitution. Thus, the observation that Minnesota enacted the law under its police power begins, rather than ends, the Commerce Clause analysis. Moreover, whatever authority a state may have to reserve

[2] Equally baffling is the Eighth Circuit's footnoted effort to disclaim a need to definitely decide whether a company with an in-state presence but headquartered elsewhere is a Minnesota company for Commerce Clause purposes. App.15 n.7. As best one can tell, the court appeared to be drawing a distinction between laws that reserve opportunities for incumbents (which it viewed as categorically non-discriminatory) and laws that reserve opportunities for companies with some other kind of in-state presence regardless of where they were headquartered. That, or the court just thought that laws regulating transmission are somehow different. *But see infra* Part II.

aspects of its *intrastate* electricity markets for incumbents, that authority is wholly absent when it comes to the *interstate* markets. Here, Minnesota's law targets a distinctly interstate market—projects authorized by a "federally registered planning authority"—and reserves them to incumbents already operating "in this state." That law is blatantly discriminatory, and nothing in Minnesota's police powers or anything else shields it from Commerce Clause scrutiny.

1. As an initial matter, to the extent the Eighth Circuit meant to suggest that a state law survives Commerce Clause scrutiny so long as it is an exercise of the police power, that sweeping proposition is a non-starter. This Court explained decades ago that the Commerce Clause is a *limitation* on the police power: "No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984); *see also Lewis*, 447 U.S. at 38-39. Thus, a finding that a state law is not ultra vires or beyond the power of the state legislature (under the state constitution) merely sets the stage for meaningful Commerce Clause analysis. There was no doubt, especially in light of the Twenty-first Amendment, that Tennessee had ample power to regulate alcohol sales. But a law reserving those sales to in-state residents still violated the federal Constitution. *See Tenn. Wine*, 139 S.Ct. at 2461. The same analysis controls here.

To the extent the Eighth Circuit created a special immunity from Commerce Clause scrutiny for state laws involving "siting, permitting, and constructing transmission lines," App.17, that conclusion fares no better. There is no exception to the Commerce Clause for state regulation of energy markets, especially when it comes to interstate markets. As this Court has explained, while "[t]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states," the "production and transmission of energy is an activity particularly likely to affect more than one State"—especially when a state chooses, as Minnesota has, to meet its energy needs by connecting to the interstate grid. *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). States thus have no more power to favor in-state interests in interstate energy markets than in any other context.

This Court has squarely held as much in the analogous context of power generation. As with transmission facilities, states have siting, permitting, and other regulatory powers over generation facilities located within their boundaries. Yet the Court has repeatedly subjected state regulation of generation facilities that sell electricity at wholesale to Commerce Clause scrutiny and invalidated discriminatory regulation. *See, e.g.*, *Wyoming*, 502 U.S. at 454-59 (invalidating Oklahoma law requiring coal-fired electric utilities to burn coal mixture containing at least 10% Oklahoma-mined coal); *New England Power*, 455 U.S. at 339 (invalidating New Hampshire law requiring hydroelectric generators to obtain state approval to transmit energy out of state); *see also* US.Br.11-12 ("The Court has not hesitated to invalidate state electricity regulations that discriminated against or burdened interstate commerce in markets different from, but adjacent to, retail electricity."). In short, no one disputes that the state has the power to impose permitting and other regulatory requirements on those who build or operate transmission lines in Minnesota. But limiting those opportunities to in-state interests is not among the options open to Minnesota or any other state.

2. In the courts below, the state attempted to contend otherwise based on this Court's decision in *General Motors Corp. v. Tracy*. But the Eighth Circuit expressly disclaimed any reliance on *Tracy*, and with good reason, as *Tracy* at most suggests that states have greater latitude in regulating traditional retail-serving utilities operating entirely intrastate. Whatever the precise bounds of *Tracy*, it provides no support or immunity for expressly discriminatory laws aimed at distinctly interstate markets, like transmission projects approved by a "federally registered planning authority" to expand an interstate grid.

Tracy was a case about an Ohio sales tax exemption that applied to retail heating gas sales by local utilities, but not to retail gas sales by independent marketers. In other words, the case involved only the differential regulation of retail gas sales to a captive market. Because the nation's retail gas markets, like its retail electricity markets, had historically been served by local monopolies, the Court concluded that by reserving exclusive authority over retail sales to the states, Congress recognized and preserved "the States' interest in protecting the captive market from the effects of competition." *Tracy*, 519 U.S. at 306. Ohio's sales tax exemption for gas purchased from a local monopoly distributor thus did not run afoul of the Commerce Clause, for it was a direct effort to protect the local retail distribution monopolies that the FPA authorized states to preserve.

Tracy does not have any bearing on this case, which involves an avowed effort to preserve a distinctly *interstate* market for entities with a pre-existing presence "in this state." Minnesota's right-of-first-refusal law does not regulate the retail sale of electricity (whether by vertically integrated utilities or otherwise), or any other market in which Congress has sanctioned a historical tradition of state-authorized monopolies. It regulates a quintessentially *interstate* market that has long been subject to *federal* control: high-voltage transmission lines that connect to an interstate grid that is overseen by FERC (not Minnesota), and is subject to the operational control of MISO (not Minnesota). Indeed, the Minnesota law makes this explicit by granting a preference exclusively for projects approved by a "federally registered planning authority." *Tracy* thus has nothing to do with this case; the relevant precedents are this Court's decisions making clear that discriminatory laws targeting interstate energy markets are unconstitutional.

Those cases have invalidated state discrimination in interstate and wholesale markets even when the state claims it is necessary to the effective regulation of retail markets. In *Wyoming v. Oklahoma*, for instance, Oklahoma argued that its law requiring that coal-fired electric utilities burn at least 10% Oklahoma-mined coal was immune from Commerce Clause scrutiny because it had determined that using Oklahoma-mined coal would be an "effective and helpful way[] of ensuring lower local utility rates." 502 U.S. at 457. This Court rejected the argument, explaining that "[e]ven if the Act is accepted as part of the State's rate-regulating authority, we cannot accept the submission that it is exempt from scrutiny under the Commerce Clause." *Id.* at 458; *see also New England Power*, 455 U.S. at 339. Nowhere in *Tracy* did the Court even hint that it was disturbing or discarding decades of Commerce Clause jurisprudence that make clear that states have no license to discriminate when it comes to interstate markets.

In short, whatever powers the FPA may reserve to states when they are regulating the local distribution of electricity or gas to captive retail customers, or to states that (unlike Minnesota) have chosen to preserve the vertical-integration model, state efforts to reserve interstate markets to in-state incumbents strike at the heart of the Commerce Clause. Not even the Twenty-first Amendment can save such express discrimination, and nothing identified by the state or the courts below is remotely up to the task. By declaring the Commerce Clause irrelevant simply because "state police power includes regulating utilities," App.17-18, the decision below creates a sweeping and dangerous exception to the rule that "the Commerce Clause by its own force restricts state protectionism." *Tenn. Wine*, 139 S.Ct. at 2461.

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

The Eighth Circuit's decision is both profoundly wrong and profoundly consequential. It gives a green light not only to all manner of laws that discriminate on the basis of in-state presence, but to protectionist laws that will fatally undermine competition and the benefits it brings to the nation's electricity grids. One need look no further than Minnesota to see that. As a direct result of Minnesota's law, a $150 million interstate transmission project that will be paid for primarily by Iowans is currently being built by Minnesota's preferred in-state entities, completely bypassing a competitive selection process that would have reduced the project's costs and secured additional benefits for consumers across several states.

This kind of discrimination cannot be fixed through the state political process, for when "the burden of state regulation falls on interests outside the state," that burden "is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945). To the contrary, this case is a perfect illustration of how entities with existing Minnesota facilities, Minnesota employees, and Minnesota lobbyists can procure legislation to shield incumbents from outside competition. And here, even the long-term hope that Minnesota consumers would eventually tire of paying the costs of reduced competition is inoperative. The increased costs of regional projects subject to Minnesota's right-of-first-refusal provision will be paid for in large part by consumers in 14 other states—consumers who lack political recourse either to demand the law's repeal or to elect new legislators willing to take that step. Instead, the only recourse these states have is to enact reciprocally protectionist laws, precipitating the exact kind of race to the bottom that the Commerce Clause was designed to prevent.

That is no hypothetical concern. Several other states within the Eighth Circuit have now passed their own protectionist right-of-first-refusal laws. *See* Neb. Rev. Stat. §70-1028; N.D. Cent. Code §49-03-02.2; S.D. Codified Laws §49-32-20. Most recently, Iowa—one of the states whose consumers are most directly harmed by Minnesota's law, *see* Iowa.Br.3-5—enacted its own right-of-first refusal law shortly after the Eighth Circuit approved Minnesota's law. *See* Iowa H.F. 2653, Div. XXXIII (2020) (to be codified at Iowa Code §478.16). And while these laws have been particularly prevalent in the Eighth Circuit, they have spread to other areas as well. *See* Tex. Utils. Code §37.056(e)-(f); 17 Okla. Stat. §292; Ala. Code § 37-4-150(e); Ind. Code §8-1-38-9(a)-(b); *see also NextEra Energy Capital Holdings v. D'Andrea*, No. 20-50160 (5th Cir.) (considering a comparable Texas law).

This Court should intervene before this race to the bottom goes any further. Iowa's Consumer Advocate recognized that Minnesota's law was forcing Iowa consumers to pay for Minnesota's protectionism. Iowa.Br.3. Its plea was ignored by the Eighth Circuit, and the Iowa legislature passed its own right-of-first-refusal law shortly after the court's decision issued. The Commerce Clause is designed to prevent this ifyou-can't-beat-them-join-them dynamic, which undermines the national marketplace and jeopardizes the effectiveness of the federal planning process. As the United States pointed out in the district court, Minnesota's law "raises entry barriers, segments the interstate market in developing transmission lines, favors in-state incumbents, and causes substantial anticompetitive effects in interstate commerce." Dkt.70 at 10. Those concerns were all dismissed by the decision below, which seemed to treat the regulation of transmission as a Commerce-Clause-free zone, where even the most blatant discrimination in favor of in-state interests is permissible.

The signal the decision below sends could not come at a worse time. The nation's power-generation mix is in the midst of rapid change, with massive investments in natural gas, wind, and solar displacing conventional power generation. *See* North American Electrical Reliability Corporation, *2019 Long-Term Reliability Assessment* 6, 16-27 (Dec. 2019); *S.C. Pub. Serv. Auth.*, 762 F.3d at 89. At the heart of this transition are wind-energy-driven interstate transmission projects that state first-refusal laws prevent non-incumbent transmission companies from competing to construct. These developments "make it even more critical to … ensure that the more efficient or cost-effective projects come to fruition." 136 FERC ¶61,051 at 14. In other words, the rapid changes in the generation market have necessitated rapid improvements to the transmission grid, making this a critical moment in the development of the energy infrastructure that will serve the nation for the next several decades. The importance of this moment is precisely why incumbent transmission owners have seen so much value in lobbying state legislatures for protection from competition, precisely why state legislatures acted so quickly to accede to their protectionist demands, and precisely why this Court's intervention is necessary.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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