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 a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FORMER FERC CHAIRMAN JON B. WELLINGHOFF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MICHAEL H. MCGINLEY
Counsel of Record
JUSTIN M. ROMEO
ERIC D. HAGEMAN
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
michael.mcginley@dechert.com
(202) 261-3300

Counsel for Amicus Curiae

DECEMBER 10, 2020

QUESTION PRESENTED

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

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Decision Below Ignores The Fundamental And Important Separation Between State And Federal Regulation Of The Nation's Electrical Grid 3

II. This Case Presents An Issue Of Serious National Importance 6

A. Right of First Refusal Laws are Both Harmful to Consumers and Unnecessary to Ensure A Reliable Supply 6

B. Minnesota's Law Causes Interstate Harm 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 8
Brown & Williamson Tobacco Corp. v. Pataki,
320 F.3d 200 (2d Cir. 2003)..................................9
Gulf States Util. Co. v. Fed. Power Comm'n,
411 U.S. 747 (1973) 4
H.P. Hood & Sons, Inc. v. Du Mond,
336 U.S. 525 (1949) 8
Hughes v. Oklahoma,
441 U.S. 322 (1979) 10
Nat'l Elec. Mfrs' Ass'n v. Sorrell,
272 F.3d 104 (2d Cir. 2001)............................9, 10
New Energy Co. v. Limbach,
486 U.S. 269 (1988) 8
New York v. FERC
535 U.S. 1 (2002) 4
Pub. Utilities Comm'n v. Attleboro Steam & Elec. Co.,
273 U.S. 83 (1927) 3
S. Cent. Timber Dev., Inc. v. Wunnicke,
467 U.S. 82 (1984) 10
S. Pac. Co. v. Ariz. Ex rel. Sullivan,
325 U.S. 761 (1945) 9
S.C. State Highway Dep't v. Barnwell Bros.,
303 U.S. 177 (1938) 8

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245 (2d Cir. 2001) 10

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 8

Statutes

16 U.S.C. § 824(b) 4

16 U.S.C. §§ 824d(a)-(b) 4

Minn. Stat. §216B.246 5

Minn. Stat. §216B.246, Subd. 1(c) 7

Minn. Stat. §216B.02, Subd. 10 7

Other Authorities

Midcontinent Independent System Operator, Inc., *Competitive Transmission Administration*, *available at* https://bit.ly/2VWwEpO 7

Transmission Owning & Operating Pub. Utils., Order No. 1000, 136 FERC ¶ 61 (July 21, 2011) ... 4, 5, 7

INTEREST OF *AMICUS CURIAE*[1]

Jon B. Wellinghoff served on the Federal Energy Regulatory Commission ("FERC") for more than seven years, first as a commissioner appointed by President George W. Bush in 2006, and later as the agency's Chairman, elevated to that role by President Barack Obama in 2009. In total, Mr. Wellinghoff has more than 40 years of experience in federal, state and local energy policy, regulation, and market development.

Mr. Wellinghoff submits this brief because the case presents an issue of vital importance to the Nation's electrical transmission grid and to consumers. Should the Minnesota right of first refusal rule be permitted to stand, the pool of competitors for building new transmission facilities will be artificially limited. As a result, consumers—not only those within Minnesota, but also those in surrounding states—will be harmed. Yet other states will be powerless to avoid the negative effects of Minnesota's protectionism. In addition, because he was the Chairman of FERC when the agency issued Order No. 1000, Mr. Wellinghoff is well positioned to advise the Court on the important issues at play and how the decision below negatively impacts the fundamental separation between state and federal authority over power transmission.

---

[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* and his counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus curiae* to file this brief. All parties consented to the filing of the brief.

SUMMARY OF ARGUMENT

Congress passed the Federal Power Act in 1935 to establish a scheme whereby the federal government regulates the transmission and sale of electricity in interstate commerce. FERC exercised that authority when, in 2011, it withdrew the right of first refusal previously held by already active providers of transmission services. Specifically, Order No. 1000 was adopted to ensure that the cost to consumers for transmission services is based on just and reasonable rates, not unduly discriminatory or preferential treatment to incumbents. But a successful lobbying effort at the state level quickly led to the enactment of state right of first refusal laws, like the Minnesota law at issue here, which seek to end-run around Order No. 1000 and enshrine a protectionist regime.

The Minnesota rule at issue here, and others like it, flagrantly discriminate against interstate commerce. That discrimination not only violates the Constitution, but it harms consumers both in Minnesota and in nearby states, where those consumers are without political recourse against such protectionism. Worse yet, the harm has no corresponding benefits. Instead, these laws increase rates for consumers by awarding contracts without any consideration whatsoever for cost efficiency. And these laws are not necessary to ensure reliability under the existing federal regulatory scheme.

Both harms point to the hallmark of state laws that violate the Commerce Clause: an effort to shift the burden of regulation from the legislating state to its neighbors. This Court should grant certiorari to stop this growing trend of harmful and unconstitutional protectionism.

ARGUMENT

I. The Decision Below Ignores The Fundamental And Important Separation Between State And Federal Regulation Of The Nation's Electrical Grid.

The history of the Federal Power Act ("FPA") reflects Congress' legislative choice that FERC, not individual states, should regulate interstate electricity transactions. In executing that charge, FERC promulgated Order No. 1000, which abolished anticompetitive, protectionist right of first refusal provisions in independent system operator ("ISO") tariffs. By enacting their own right of first refusal laws, states like Minnesota are seeking to undermine Order No. 1000 and thus to thwart the anti-protectionist, pro-competition policy embodied in the Federal Power Act and FERC's Order No. 1000.

One of Congress' primary goals in enacting the FPA was to federalize the regulation of interstate electricity, in part to accommodate the constitutional limits on states' power to regulate this field. As this Court explained in *New York v. FERC*, Congress enacted the FPA in 1935, after this Court had repeatedly recognized that the Commerce Clause prohibits protectionist regulation of interstate public-utility transactions. 535 U.S. 1, 6 (2002); *see also, e.g.*, *Pub. Utilities Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). For example, in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, the Court held that the Commerce Clause prohibited both Rhode Island and Massachusetts from regulating the rates at which a Rhode Island plant sold electricity to a Massachusetts company. 273 U.S. 83. Instead, the transaction was subject to regulation only "by the exercise of the power vested

in Congress." *Id.* at 90. This holding "creat[ed] what has become known as the '*Attleboro* gap.'" *New York*, 535 U.S. at 6.

The enactment of the FPA closed the *Attleboro* gap. *Id.* It gave FERC's predecessor, the Federal Power Commission, authority to regulate the transmission and sale of electricity in interstate commerce. *Id.* (citing *Gulf States Util. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 758 (1973)). In particular, 16 U.S.C. § 824(b) grants FERC jurisdiction to regulate "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." Elsewhere, the FPA grants FERC authority to prohibit and correct "unreasonable rates and undue discrimination 'with respect to any transmission or sale subject to the jurisdiction of the Commission.'" *New York*, 535 U.S. at 7 (quoting 16 U.S.C. §§ 824d(a)–(b)). Since the FPA's enactment, this Court has explicitly rejected the argument that the FPA's language and legislative history "show[] a congressional intent to safeguard pre-existing state regulation of the delivery of electricity." *Id.* at 17. Instead, the FPA's grant of regulatory authority to FERC is "clear and specific," to the exclusion of states' prerogatives. *Id.* at 22.

Acting pursuant to Congress' broad grant of power under the FPA, FERC promulgated Order No. 1000, which requires ISOs to eliminate right of first refusal provisions as applied to transmission lines that are part of interstate grids and are paid for by consumers in multiple states. *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, ¶¶ 260, 266, 342–44 (July 21, 2011).

FERC's decision was supported in part by its finding that those laws stymie competition, especially given the extraordinary investment necessary for non-incumbent competitors to develop a proposal and compete with incumbents. *Id.* ¶ 256. FERC found that such harm to competition would increase the costs of electricity and thus yield consumer rates that were not just and reasonable, as the FPA requires. *Id.* ¶ 228–30.

Order No. 1000 struck a blow against laws favoring "incumbent" producers. But those producers wasted no time in launching an expansive effort to achieve through state legislation what they lost through FERC's faithful administration of the FPA. Within a year of Order No. 1000's effective date, the Minnesota legislature, at the behest of Minnesota's largest incumbent suppliers, enacted Minn. Stat. § 216B.246. And many other states have followed suit.

In addition to discriminating flagrantly against out-of-state interests, the Minnesota law effects an end-run around Order No. 1000 and the authority Congress gave FERC—authority that never belonged to the states in the first place. Order No. 1000 was issued—during *amicus curiae*'s tenure as FERC Chairman—with the express purpose of ensuring that the cost to consumers for transmission services are provided at just and reasonable rates and on a basis that is not unduly discriminatory or preferential. The Minnesota law, and others like it, accomplish precisely the opposite, by granting a discriminatory preference to "incumbent" companies that stifles competition and thus increases rates.

The Eighth Circuit's decision upholding the law fundamentally misapprehends this modern federal-

state division of regulatory authority. By emphasizing the general police power of states, the Eighth Circuit entirely misses the point: once a state chooses to be served by the interstate transmission grid, they cede control over the operation of those transmission lines, while retaining only a limited category of rights, including over siting and approval. And the limited power they retain does not serve as a license to erect a protectionist regime for awarding new transmission projects. A facile reliance on the police power does not override the bedrock principles of the Commerce Clause, the Federal Power Act, and Order No. 1000.

II. This Case Presents An Issue Of Serious National Importance.

A. Right of First Refusal Laws are Both Harmful to Consumers and Unnecessary to Ensure A Reliable Supply.

By blatantly discriminating against interstate commerce, Minnesota's law and others like it undermine the competition that the FPA and Order No. 1000 sought to promote. And the harm to consumers has already been quite stark: As the Petition explains, the net result of the Minnesota law has been that "a $150 million transmission project to expand the interstate grid [was] awarded to two hand-picked in-state incumbents, with no consideration whatsoever of who would actually be the most efficient provider." Pet.3. The cost of this protectionism will largely be borne by consumers outside of Minnesota. And the laws are not remotely necessary to provide Minnesota consumers "with adequate and reliable services at reasonable rates,"

as the lower court suggested. *See* Pet.App.17 (citations omitted)

First, the Minnesota law on its face includes no consideration of cost efficiency when awarding transmission projects. *See* Minn. Stat. §216B.246, Subd. 2. By both artificially limiting competition and eschewing any consideration of cost efficiency, the law thus undermines the central purposes of the FPA and Rule No. 1000. While the State may attempt to defend its law by pointing to its control over retail electricity and local utilities, the law's preferential treatment extends well beyond those entities. Specifically, the preferential treatment goes to independent transmission owners that neither serve retail customers nor operate part of the local transmission grid. *See* Minn. Stat. §216B.246, Subd. 1(c) (broadly defining "Incumbent electric transmission owner"); §216B.02, Subd. 10 (broadly defining "transmission company").

Second, the existing federal regulatory framework already provides ample protection for reliability of new transmission projects. Order No. 1000 expressly references the importance of reliability standards in new transmission projects. *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, ¶ 2 (July 21, 2011). And the independent system operator for the Midwest, MISO, has a "Competitive Developer Selection Process," which does not merely award new projects to the low-bidder. Instead, MISO evaluates developers on principles including "Cost, Certainty, Specificity and Risk." *See* Midcontinent Independent System Operator, Inc., *Competitive Transmission Administration*, *available at* https://bit.ly/2VWwEpO.

Without the Minnesota law, transmission projects would be awarded based on a comprehensive and competitive bidding process. With the Minnesota law, projects are awarded to hand-picked "incumbent" entities in a manner that affirmatively *harms* efficiency and competition.

B. Minnesota's Law Causes Interstate Harm.

Minnesota's law harms its own citizens by ossifying competition for interstate infrastructure projects within Minnesota, thereby increasing rates paid by Minnesota consumers. But the law also harms consumers in *other* states by increasing *their* rates, as well. And it plainly harms out-of-state industry competitors such as Petitioner by locking them out of the market (except in the unlikely scenario that all incumbents failed to exercise their right of first refusal). Both harms point to the hallmark of a Commerce Clause violation: shifting the burden of regulation from the legislating state to its neighbors.

The Supreme Court has repeatedly emphasized that the Commerce Clause prohibits regulations whose purpose or effect is to shift the cost of regulation onto out-of-state entities. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270–273 (1984); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534–535 (1949)); *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938) (collecting authorities and commenting that regulations impinge on the Commerce Clause when their "purpose or effect is to gain for those within the state an advantage at the expense of those without,

or to burden those out of the state without any corresponding advantage to those within").

Minnesota's right of first refusal law violates this principle in at least two ways. *First*, it favors incumbent, in-state interests at the direct expense of out-of-state producers. It does so obviously and facially, by granting incumbent producers an unambiguous right to block out-of-state competition and by drastically increasing the burden on would-be competitors to bid against incumbent interests. Indeed, the very purpose of the law was to institute that protectionist regime.

Second, through its protection of in-state interests, the law will inevitably result in decreased competition and higher rates for consumers in Minnesota and the fourteen other states within MISO's grid. And those out-of-state consumers have no recourse against Minnesota's legislature. *Cf. S. Pac. Co. v. Ariz. Ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945) ("[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." (citations omitted)). Because the costs of Minnesota's protectionism will not fall solely on Minnesotan consumers, but instead will be felt by "residents of other political jurisdictions," the Minnesota legislature "will not bear the true political costs of [its] decisions." *Nat'l Elec. Mfrs' Ass'n v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001) (citations omitted). Thus, Minnesota's law "shifts the costs of regulation onto other states, permitting in-state lawmakers to avoid the costs of their political decisions." *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir.

2003) (citing *Sorrell*, 272 F.3d at 108; *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 261 (2d Cir. 2001)). This shift harms out-of-state industry and consumers, to the benefit only of incumbent, Minnesota industry participants.

That is a classic Commerce Cause problem. Left unchecked, Minnesota's protectionism—and the protectionism the Eighth Circuit's opinion allows elsewhere within its jurisdiction—will enable "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *S. Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)). Because Minnesota's law violates the basic principles of this Court's Commerce Clause jurisprudence and undermines federal policy by decreasing competition and rate efficiency, the Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to grant certiorari and reverse.

Respectfully submitted,

MICHAEL H. MCGINLEY
Counsel of Record
JUSTIN M. ROMEO
ERIC D. HAGEMAN
DECHERT LLP
1900 K Street, NW
Washington, DC 20006
michael.mcginley@dechert.com
(202) 261-3300

Counsel for Amicus Curiae

DECEMBER 10, 2020