Energy & Environment Legal Institute v. Epel: The Tenth Circuit Upholds Colorado RES Under Uncommon Dormant Commerce Clause Principle

I. OVERVIEW

In 2004, Colorado voters passed Colorado's Renewable Energy Standard (RES).[1] This standard, codified in Colorado's Revised Statutes in 2005,[2] requires "electricity generators to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources."[3] Specifically, Colorado's RES defines "eligible energy resources" as "recycled energy and renewable energy resources."[4] Eventually, the RES will also raise the percentage of electricity sold from renewable energy sources "over time."[5]

Plaintiffs, Rod Lueck and Energy and Environment Legal Institute (EELI),[6] challenged Colorado's RES mandate, alleging that the mandate

1. Energy & Env't Legal Inst. v. Epel, 43 F. Supp. 3d 1171, 1174 (D. Colo. 2014).
2. COLO. REV. STAT. § 40-2-124(1)(c)(I)(D) (2015).
3. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1170 (10th Cir. 2015), *petition for cert. filed* (U.S. Oct. 14, 2015) (No. 15-471).
4. COLO. REV. STAT. § 40-2-124(1)(a).
5. *Epel*, 793 F.3d at 1170; *see also* COLO. REV. STAT. § 40-2-124(1)(c)(I)(E) (requiring "[t]hirty percent of . . . retail electricity sales in Colorado for the years 2020 and thereafter" be produced from eligible energy sources).
6. Energy and Environment Legal Institute, formerly known as The American Tradition Institute, "is a non-profit organization which describes itself as being dedicated to the advancement of rational, free-market solutions to land, energy, and environmental challenges in the United States." *Epel*, 43 F. Supp. 3d at 1174 (citing Plaintiff's Second Amended Complaint

violated the Dormant Commerce Clause doctrine.[7] EELI alleged that because Colorado citizens consume their energy "from an interconnected grid serving eleven states and portions of Canada and Mexico," the RES injures out-of-state coal producers that sell to out-of-state utilities that feed power into the grid.[8] The United States District Court for the District of Colorado granted summary judgment for the defendants and rejected EELI's claim that injunctive relief should be granted against defendants because Colorado's RES violates the Dormant Commerce Clause.[9]

EELI appealed one of its Dormant Commerce Clause arguments to the United States Court of Appeals for the Tenth Circuit, alleging that Colorado's RES mandate violates the "extraterritoriality" principle of the Dormant Commerce Clause.[10] The Tenth Circuit *held* that Colorado's RES did not violate the Dormant Commerce Clause under the extraterritoriality principle because Colorado's RES mandate (1) was not a price control statute, (2) did not link Colorado utility prices to prices paid out of state, and (3) did not discriminate against out-of-state businesses. *Energy & Environmental Legal Institute v. Epel*, 793 F.3d 1169, 1174, 1177 (10th Cir. 2015).

II. BACKGROUND

The Dormant Commerce Clause is a judicially created doctrine that stems from an inferential reading of Congress's commerce power.[11] Article I, Section 8, Clause 3 of the United States Constitution grants Congress the power "[t]o regulate commerce . . . among the several states."[12] Courts have inferred that because the power to regulate commerce is inherently a congressional power, states may not regulate interstate commerce.[13] The Dormant Commerce Clause doctrine has been read to principally reason that if Congress has regulated an area of commerce that a state or local law regulates, then Congress's federal statute would preempt the state statute.[14] Whether the judiciary has the

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for Injunctive and Declaratory Relief at 3, *Epel*, 43 F. Supp. 3d 1171 (No. 11-cv-00859-WJM-BNB).

7. *See Epel*, 793 F.3d at 1170.
8. *Id.* at 1171.
9. *Epel*, 43 F. Supp. 3d at 1184.
10. *Epel*, 793 F.3d at 1172; *see* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).
11. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 430 (4th ed. 2011).
12. U.S. CONST. art. I, § 8, cl. 3.
13. CHEMERINSKY, *supra* note 11, at 430.
14. *See id.*

authority to strike down a state or local statute that excessively burdens interstate commerce absent federal regulation is the central issue with regard to the Dormant Commerce Clause.[15]

Generally, two tests are used to strike down a state law that excessively burdens interstate commerce. One is the discrimination test, which determines whether a state or local law discriminates against out-of-state entities.[16] Another is the Pike balancing test that determines whether benefits to a state outweigh burdens the statute places on interstate commerce.[17] However, the extraterritoriality principle of *Baldwin v. F.A.F. Seelig, Inc.*, provides a third, less commonly used means of striking state and local law under the Dormant Commerce Clause.[18] This test invalidates a state law that regulates commerce that exists wholly out of state.[19]

A. Discrimination Test

The discrimination test discerns whether a state statute discriminates against interstate commerce, first determining whether the statute discriminates against out-of-state entities on its face.[20] For example, in *City of Philadelphia v. New Jersey*, the United States Supreme Court reviewed a New Jersey law that prevented waste that "originated or was collected" outside of New Jersey from being disposed of in New Jersey landfills.[21] The Supreme Court reasoned that the law "[o]n its face" created a barrier to interstate commerce by isolating New Jersey's landfills from interstate trade.[22] Moreover, as summarized by Nowak and Rotunda, the Court reasoned that "discriminat[ing] against out-of-state garbage [was] *not the least restrictive* means" of promoting a legitimate state interest.[23] Thus, the statute violated the Dormant Commerce Clause.[24]

As the court in *City of Philadelphia* noted, once a court determines that a statute discriminates against interstate commerce, the court will

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15. *See id.* at 432.

16. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978); CHEMERINSKY, *supra* note 11, at 442.

17. Pike v. Bruce Church, 397 U.S. 137 (1970).

18. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015).

19. Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989).

20. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007).

21. *City of Philadelphia*, 437 U.S. at 618-19 (citation omitted).

22. *See id.* at 628.

23. JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 169 (4th ed. 2010).

24. *City of Philadelphia*, 437 U.S. at 629.

then determine whether the statute is the least discriminatory means of advancing a legitimate state interest.[25] For example, in *Hughes v. Oklahoma* the Supreme Court reviewed an Oklahoma law that prevented seined minnows captured in Oklahoma from being transported out of state.[26] The Court determined the law was facially discriminatory because the statute "overtly block[ed] the flow of interstate commerce at [the] State's borders" on its face.[27] Oklahoma defended the statute, arguing that despite its discriminatory effect, it prevented an "inordinate" number of minnows from being removed from state waters.[28] The Court recognized that conservation of wildlife was a legitimate state interest "similar to the States' interests in protecting the health and safety of their citizens."[29] However, the statute still failed the test because the Court reasoned that the state selected the most discriminatory means available to advance its interest and provided examples of less discriminatory measures the state could have taken to protect its interest.[30]

B. Pike Balancing Test

The Pike balancing test evaluates the benefits received by the state statute against the burdens the statute places on interstate commerce.[31] In *Pike v. Bruce Church*, the Supreme Court reviewed an Arizona statute that required cantaloupes grown and sold in Arizona to be packaged "in regular compact arrangement in closed standard containers approved by the supervisor."[32] The statute created a quality standard for cantaloupes farmed in Arizona; however, if enforced, the statute would have forced plaintiffs to build a packing facility in Arizona rather than use their packaging facility thirty-one miles away in California.[33] The Court recognized that Arizona had a legitimate interest in protecting Arizona citizens from unfit goods; however, the cantaloupes grown by plaintiffs were "of exceptionally high quality."[34] The Court reasoned that although Arizona's statute did concern a legitimate state interest, it did not

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25. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).
26. *Id.* at 323 (citation omitted).
27. *See id.* at 337 (second alteration in original) (quoting *City of Philadelphia*, 437 U.S. at 624).
28. *Id.* at 337.
29. *Id.*
30. *Id.* at 337-38.
31. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).
32. *Id.* at 138 (citation omitted).
33. *Id.* at 139-40.
34. *Id.* at 144.

outweigh the substantial burden placed on plaintiffs' interstate resources; thus, the statute violated the Dormant Commerce Clause.[35]

C. Extraterritoriality Principle

The extraterritoriality principle invalidates a state or local statute that regulates commerce existing wholly out of state.[36] In *Baldwin*, the Court reviewed a New York law that prevented in-state sales of milk where the milk was purchased from out-of-state producers at a lower price than what dealers were required by statute to pay New York milk producers.[37] The statute effectively insulated in-state milk producers from competing on price with out-of-state producers.[38] New York defended this statute, arguing that the statute "impose[s] a higher standard of quality and thereby promote[s] health."[39] The Court rejected this argument, reasoning that regulating the price that dealers could pay out-of-state producers was not related to the quality of the milk produced out of state.[40] Moreover, the Court reasoned that if New York had established that milk produced out of state was hazardous, then a statute should have directly addressed the particular hazard rather than create a price "parity" with other states.[41] The Court invalidated the New York statute because it created an undue burden on interstate commerce by regulating prices paid out of state—conduct that was wholly extraterritorial.[42]

Baldwin's progeny has further explained the focus of the extraterritoriality principle.[43] For example, in *Healy v. Beer Institute, Inc.*, the Court reviewed a Connecticut law that required out-of-state beer shippers "to affirm" that their prices were not higher than prices of the same product "sold in the bordering States of Massachusetts, New York, and Rhode Island."[44] The Court in *Healy* reviewed the extraterritoriality principle, finding that the extraterritoriality principle is primarily concerned with determining "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[45]

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35. *See id.* at 146.
36. *See* CHEMERINSKY, *supra* note 11, at 453.
37. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 519 (1935).
38. *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1172 (10th Cir. 2015).
39. *Baldwin*, 294 U.S. at 524.
40. *Id.*
41. *Id.*
42. *Id.* at 528.
43. *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989) (citing Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).
44. *Id.* at 326.
45. *Id.* at 336 (citing *Brown-Forman*, 476 U.S. at 579).

When the Connecticut statute was combined with beer pricing statutes in the bordering states, the Connecticut statute effectively controlled out-of-state beer prices.[46] Thus, the Court found that this violated the extraterritoriality principle and was unconstitutional under the Commerce Clause.[47]

The argument that *Baldwin*'s extraterritoriality principle is a per se violation of the Dormant Commerce Clause was argued before the United States Court of Appeals for the Second Circuit in *Freedom Holdings, Inc. v. Spitzer*.[48] In *Freedom Holdings*, the court reviewed New York's contraband statute that prohibited the sale of cigarettes made by manufacturers out of compliance with New York's Escrow Statute.[49] In their brief, plaintiffs argued, inter alia, that New York's contraband statute created "artificially high prices" by "'inflat[ing]' the prices charged by cigarette manufacturers to purchasers in sales transactions that occur wholly outside the State of New York."[50] Furthermore, plaintiffs argued that regulation of wholly extraterritorial conduct should render the contraband statute "*per se* invalid under the dormant Commerce Clause."[51] The Court rejected this argument, reasoning that although the extraterritoriality principle acts as a near per se violation, this could not be a per se violation of the Dormant Commerce Clause because the contraband statute did not regulate extraterritorial commerce as contemplated by *Healy*.[52]

III. THE COURT'S DECISION

In the noted case, the Tenth Circuit affirmed the district court's ruling granting the defendant's motion for summary judgment against EELI's claim that Colorado's RES mandate violated *Baldwin*'s extraterritoriality principle.[53] The court rejected EELI's argument that *Baldwin* applied because EELI did not allege that Colorado's RES disproportionately harmed out-of-state business as contemplated by *Baldwin*.[54] The court also affirmed the district court's denial of EELI's request to defer its ruling until additional discovery could take place.[55]

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46. *Id.* at 337.
47. *See id.*
48. Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 219 (2d Cir. 2004).
49. *Id.* at 214.
50. *Id.* at 220 (citation omitted).
51. *Id.*
52. *See id.* (quoting Healy v. Beer Inst., Inc., 491 U.S. 324, 332, 336-37 (1989)).
53. *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1175, 1177 (10th Cir. 2015).
54. *See id.* at 1173-74.
55. *See id.* at 1177.

A. Court's Reluctance To Apply Baldwin *'s Extraterritoriality Principle*

The court began its Dormant Commerce Clause analysis by addressing Colorado's RES mandate which "requires electricity generators to ensure that 20% of the electricity they sell to Colorado consumers comes from renewable sources."[56] The court noted that Dormant Commerce Clause violations can be determined either through the Pike balancing test or the discrimination test.[57] The court further noted that violating *Baldwin*'s extraterritoriality principle results in a near per se violation of the Dormant Commerce Clause.[58] However, rather than appeal all of the district court's ruling on all of their alleged Dormant Commerce Clause violations, EELI only appealed its extraterritoriality principle argument, contending that Colorado's RES mandate violated *Baldwin*'s extraterritoriality principle.[59]

"*Baldwin*'s extraterritoriality principle may be the least understood of the Court's three strands of dormant commerce clause jurisprudence."[60] The extraterritoriality principle has only been used by courts to strike down state laws three times.[61] The court reasoned that *Baldwin*'s progeny could be synthesized into a rule that invalidates a state or local statute that includes "(1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses."[62]

The court then recognized that *Baldwin*'s progeny may not actually be "a distinct line of dormant commerce clause jurisprudence at all."[63] To support this position, the court reasoned that *Baldwin* was primarily "concern[ed] with preventing discrimination against out-of-state rivals or consumers."[64] Furthermore, the court found that *Baldwin*'s line of reasoning was not overwhelmingly different than the discrimination rule as applied in *City of Philadelphia*, partially because "*Baldwin* was decided before the anti-discrimination rule solidified."[65] When *Healy* was decided, *Baldwin*'s extraterritoriality principle was applied under

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56. *Id.* at 1170.

57. *Id.* at 1171 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1988)) (citing City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)).

58. *Id.* at 1172 (citing KT & G. Corp. v. Attorney Gen. of Okla., 535 F.3d 1114, 1143 (10th Cir. 2008)).

59. *Id.*

60. *Id.*

61. *Id.* (citing IMS Health, Inc. v. Mills, 616 F.3d 7, 29 n.27 (1st Cir. 2010)).

62. *Id.* at 1173.

63. *Id.*

64. *Id.*

65. *Id.*

limited circumstances and was unnecessary because the discrimination test was already established.[66] This was also demonstrated in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, where the Supreme Court applied *Baldwin* together with cases decided by the discrimination test.[67] In the noted case, the court declined to further analyze whether *Baldwin*'s extraterritoriality principle was in fact different than the discrimination test and instead held that Colorado's RES mandate (1) was not a price control or affirmation statute, (2) did not link Colorado state prices to out-of-state prices, and (3) "[did] not discriminate against out-of-staters."[68]

The court reasoned that Colorado's mandate "isn't a price control statute" because there is no price regulated by Colorado's mandate, which simply requires that 20% of electricity sold to Colorado consumers must come from "eligible energy resources"; moreover, because the mandate was not a price control or affirmation statute, the electricity sold to Colorado consumers was not linked at all to the price of electricity sold in other states; thus, the statute did not discriminate against out-of-state entities.[69] EELI did not "even seriously" suggest that Colorado's mandate accomplished any of these effects as contemplated by *Baldwin*'s extraterritoriality principle.[70] However, as the court noted, simply because Colorado's RES mandate was not a price control statute, that did not preclude the mandate from scrutiny under the Pike balancing test or the discrimination test.[71] However, because EELI did not appeal the district court's ruling on the Pike balancing issue, nor the discrimination issue, the court declined to decide the case on issues that EELI did not appeal.[72] Instead, the court continued analyzing price control statutes, reasoning that nonprice regulations have never "trigger[ed] near-automatic condemnation under *Baldwin*," although nonprice regulations do affect price in and outside of the state.[73] The reason nonprice statutes do not "trigger near-automatic condemnation"—that is, they are not near per se violations of the Dormant Commerce Clause—is because they do not blatantly regulate out-of-state prices or discriminate against out-of-state producers.[74]

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66. *See id.* (citing *Healy*, 491 U.S. at 335-41).
67. *Id.*
68. *See id.*
69. *Id.*
70. *See id.*
71. *Id.*
72. *Id.* at 1172.
73. *Id.* at 1173.
74. *Id.* at 1173-74.

The court supported the decision not to apply *Baldwin*'s near per se test—the extraterritoriality principle—by elaborating on its earlier antitrust discussion.[75] Antitrust jurisprudence, like the Dormant Commerce Clause, has both balancing tests and per se violations.[76] The fundamental policy justification for antitrust per se violations is promoting judicial economy by not unnecessarily addressing what the alleged net competitive effect the alleged violation has on the market.[77] The parallel drawn between antitrust jurisprudence and the Dormant Commerce Clause acted as a backdrop for the court's decision not to apply a per se rule against Colorado's RES mandate.[78] Antitrust per se violations are "clearly invidious" and do not require courts to further discern the actual competitive effects of the agreement under the rule of reason test.[79] Essentially, a price-fixing agreement that a court finds "clearly invidious" is invalidated as "*per se* anticompetitive" and thus provides courts with a "shortcut."[80] *Baldwin*'s extraterritoriality principle acts as a near per se "shortcut" similar to per se antitrust violations.[81] However, Colorado's RES mandate did not include any price control or price affirmation provision that linked Colorado's prices to prices charged out of state.[82] Thus, the court reasoned that the mandate was not "clearly invidious" and did not warrant applying "*Baldwin*'s shortcut."[83]

B. The Court Affirms the District Court's Denial To Defer Its Ruling

EELI also appealed the district court's ruling that denied EELI's "affidavit pursuant to [Federal Rule of Civil Procedure] 56(d) asking the court to defer its ruling until that additional discovery could take place."[84] EELI argued that the district court prematurely granted summary judgment for the defendants, thus leaving EELI "without sufficient time to prepare."[85] EELI filed its affidavit requesting additional time for discovery in October 2013, but discovery did not close until January 2014 and the ruling on the defendant's motion for summary judgment

75. *Id.* at 1174.
76. *Id.* at 1172.
77. *See id.* (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8-9 (1979)).
78. *See id.* at 1174.
79. *See id.*
80. *Id.*
81. *See id.* at 1172, 1174.
82. *See id.* at 1174.
83. *Id.*
84. *Id.* at 1175.
85. *Id.*

occurred in May 2014.[86] Because EELI never explained why additional discovery was necessary, there was no reason for the district court "to defer [its] ruling."[87] Thus, the Tenth Circuit affirmed the district court's ruling, finding that the court did not abuse its discretion.[88]

IV. ANALYSIS

The Tenth Circuit's decision in the noted case sets precedent on the constitutionality of state renewable energy standards. However, this precedent largely exists because of a flawed appellate strategy that future proponents against state renewable energy standards will not likely use. In the noted case, the court could not explain why EELI did not appeal all of the district courts' rulings, and believed that assessing Colorado's RES mandate under the Pike balancing test or the discrimination test may "be interesting questions."[89] Because the court reasoned that Colorado's RES mandate did not discriminate against out-of-state energy producers as part of their extraterritoriality analysis, EELI likely would have lost an argument against Colorado's RES mandate under the discrimination test. However, whether Colorado's RES mandate violates the Dormant Commerce Clause under the Pike balancing test is an altogether different analysis.

Under *Pike*, when a plaintiff claims a state statute violates the Dormant Commerce Clause, the plaintiff bears the burden of proof and must demonstrate that the legitimate state interest does not outweigh the burden placed on interstate commerce.[90] Colorado's legitimate state interest promotes renewable energy consumption because renewable energy is important to "Colorado's welfare and development, and its use has a profound impact on the economy and environment."[91]

If Colorado's legitimate state interest is protecting Colorado from electricity production health hazards, then Colorado's RES mandate may not be a weighty state interest because the harm of electricity produced out of state may not harm Coloradans at all. For example, in *Southern Pacific Co. v. Arizona* the Supreme Court reviewed an Arizona statute that prohibited trains longer than fourteen passenger cars or seventy

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86. *Id.* at 1176.

87. *Id.* (quoting Energy & Env't Legal Inst. v. Epel, 43 F. Supp. 3d 1171, 1178 (D. Colo. 2014)).

88. *Id.* at 1176-77.

89. *Id.* at 1172.

90. *See* NOWAK & ROTUNDA, *supra* note 23, at 169.

91. *See* Plaintiff's Second Amended Complaint for Injunctive Relief, *supra* note 6, at 17 (quoting COLO. REV. STAT. § 40-2-124 (2015)).

freight cars from travelling through the state.[92] Arizona defended the statute, arguing that protecting Arizona against train accidents was a legitimate state safety interest.[93] However, the statute also burdened long-haul shipping because in order to comply with the regulation, long haul shippers had to stop outside Arizona and break apart their trains.[94] Obviously this was a financial burden for shippers, but it was also a logistical burden because freight yards on the border of Arizona, in New Mexico, could not handle the increased shipping traffic.[95] Moreover, Arizona did not prove that this statute lessened the danger of an accident occurring in state.[96] Thus, because the statute created more dangers than it eliminated, without demonstrating a legitimate state safety interest, while creating "a substantial extraterritorial effect," it violated the Dormant Commerce Clause.[97]

Colorado has a legitimate interest in protecting the health and safety of its citizens, but protecting Colorado citizens from harmful effects of electricity production may not be a legitimate safety interest, similar to Arizona's train statute in *Southern Pacific*.[98] Colorado's RES is an electricity production standard, requiring 20% of electricity sold by electricity producers to be produced by renewable sources. Because EELI failed to explain what additional discovery they needed in their pretrial affidavit, EELI never claimed what exact benefit the Colorado RES creates against the burden on interstate commerce it imposes.[99] If EELI argued that Colorado's RES was not a legitimate state interest because the mandate could not demonstrate how Colorado citizens were injured because of nonrenewable electricity produced out of state, EELI may have met their initial burden under *Pike* by alleging that Colorado's RES mandate does not protect a legitimate state interest. Moreover, EELI never demonstrated how Colorado's RES burdened interstate commerce. If EELI conducted discovery and argued that Colorado's RES places a large burden on the interstate electricity grid that feeds into Colorado, EELI may have demonstrated that Colorado's RES excessively burdens the states connected to that grid. Thus, because of EELI's

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92. S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 779 (1945) (citation omitted).
93. *See id.* at 775.
94. *Id.* at 774.
95. *See id.*
96. *See id.* at 775.
97. NOWAK & ROTUNDA, *supra* note 23, at 182.
98. *See S. Pac. Co.*, 325 U.S. at 775-76.
99. *See* Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1176 (10th Cir. 2015); *see also* Plaintiff's Second Amended Complaint for Injunctive and Declaratory Relief, *supra* note 6, at 21-22.

pretrial pleading misstep, the Tenth Circuit could not decide whether Colorado's RES is a legitimate state interest and whether renewable energy standards burden interstate commerce.

V. CONCLUSION

For the moment, this is a victory for state renewable energy standards. The Tenth Circuit's ruling, holding that renewable energy standards do not violate *Baldwin*'s extraterritoriality principle, is powerful because this could extend to the discrimination tests—finding that renewable energy standards do not discriminate between in-state and out-of-state energy producers and do not link prices to wholly out-of-state conduct and therefore do not violate the Dormant Commerce Clause. However, because renewable energy standards, like Colorado's RES, require that a certain percentage of energy be produced through renewable sources, electricity producers may have an argument that states do not have a legitimate state interest in protecting their citizens from electricity produced out of state. This argument could lead to an interesting discussion under *Pike*, forcing courts to consider what legitimate interest a state has in developing a renewable energy standard, and whether that interest outweighs the burden placed on interstate commerce.

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