No. _____

In the

Supreme Court of the United States

ENERGY & ENVIRONMENT LEGAL INSTITUTE, *et al*,

Petitioners,

v.

JOSHUA EPEL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

DAVID W. SCHNARE*
MICHAEL D. PEPSON
CHAIM MANDELBAUM
MATTHEW D. HARDIN
FREE MARKET ENVIRONMENTAL LAW CLINIC
722 12th St. NW, 4th Floor
Washington, D.C. 20005
(571) 243-7975
Schnare@FMELawClinic.org

Counsel for Petitioners
* Counsel of Record

QUESTIONS PRESENTED

Colorado's Renewable Energy Standard (RES): (i) bars electricity generators from accessing an ever-increasing portion of the western interstate market for electricity by necessarily requiring out-of-state commerce to be conducted according to in-state terms; (ii) requires out-of-state electricity generators to use a production method that complies with Colorado law; (iii) applies Colorado law to electricity generated in other States but which never enters Colorado and in some cases cannot; (iv) refuses to credit out-of-state generation as "renewable" despite being defined as renewable in the states within which it is generated; (v) denies access to the Colorado set-aside by "non-renewable" generation, even though other states allow such generation access to the entire interstate electricity market. The Tenth Circuit decision below begins with the recognition that the Colorado RES is an extraterritorial regulation, but applied a novel, narrow application of this Court's precedent, refusing to strike the RES as unconstitutional because "it isn't a price control statute." Other Circuits refuse to limit the prohibition of extraterritorial regulation only to price affirmation and control statutes. The circuits are hopelessly divided over this recurring issue.

Petitioners present the following questions:

1. Did the Tenth Circuit err in concluding that the federal Constitution's bar against extraterritorial State legislative or regulatory acts involving interstate commerce is limited to price-affirmation and price-control statutes?

2. May Colorado prohibit the introduction within her territory of electricity of wholesome quality acquired in other states, regardless of price or means of manufacture?

LIST OF PARTIES

Petitioners, the Energy & Environmental Legal Institute and Rod Lueck, were the appellants in the court below. Respondents, Joshua Epel, James Tarpey and Pamela Patton, in their official capacity as Commissioners of the Colorado Public Utilities Commission, were appellees in the court below. Intervenors Environment Colorado, Conservation Colorado Education Fund, Sierra Club, the Wilderness Society, the Solar Energy Industries Association, and the Interwest Energy Alliance, were intervenor-appellees in the court below.

CORPORATE DISCLOSURE STATEMENT

The Energy & Environment Legal Institute is a 501(c)(3) non-profit public charity. It has no parent corporation. It issues no stock. No publicly held company has any ownership interest in the Institute. Mr. Lueck is a citizen of the State of Colorado. He is the owner and President of Techmate (dba C5 Solutions for Broker Dealers). The company is not a party to this matter.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF PARTIES iii
CORPORATE DISCLOSURE STATEMENT iii
TABLE OF CONTENTS iv
TABLE OF CITED AUTHORITIES vi
OPINION BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 1
INTRODUCTION 2
STATEMENT OF THE CASE 5
A. The Colorado Renewable Energy Statute 5
B. Colorado's Extraterritorial Reach 8
C. Colorado Controls Foreign Electricity Generation 10
D. Procedural Posture of the Case 15
E. The Constitutional Basis for Prohibition of Extraterritorial State Regulation 18
1. Structure of the Constitution 21
2. Full Faith and Credit Clause 23
3. Due Process Clause 24
4. The Commerce Clause 27
F. The Tenth Circuit Proceeding 30
REASONS FOR ALLOWANCE OF THE WRIT 33

A. An Unsettled question of federal law 34
B. A Split in the Circuits 37
1. Circuits in Conflict..... 37
2. Circuits not in conflict 38
3. Circuits in Conflict with themselves..... 39
C. The Need for an Exercise in Supervisory Power 42
CONCLUSION..... 44
APPENDIX A: *Energy & Environment Legal Institute v. Joshua Epel et al.* 793 F.3d 1169 (10th Cir. 2015) 1a
APPENDIX B: *Energy & Environment Legal Institute v. Joshua Epel et al.*, 43 F. Supp. 3d 1171 (D. Co. 2014) 19a
APPENDIX C: *Energy & Environment Legal Institute v. Joshua Epel et al.*, 2014 U.S. Dist. LEXIS 60567 (D. Co. 2014) 48a
APPENDIX D: *Energy & Environment Legal Institute v. Joshua Epel et al.* Civil Action No. 11-cv-00859-WJM-BNB (Order)..... 76a
APPENDIX E: *Colorado Revised Statute Title 40, § 2-124*..... 80a

TABLE OF CITED AUTHORITIES

CASES

ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999).. 39
Am. Booksellers Found. v. Dean, 342 F.3d 96 (2d Cir. Vt. 2003) 38
American Beverage Assoc. v. Rick Snyder, 700 F.3d 796 (6th Cir. 2013)..... 24, 29, 38
Association des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937 (2013) 41
Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) 33, 39, 42
BMW of N. Am. v. Gore, 517 U.S. 559 (1996) ... 18, 19, 20, 33
Bonaparte v. Tax Court, 104 U.S. 592 (1881) ... 18, 21, 23
Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932) 24
C&A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994) .....passim
Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787 (2015) 25, 4
Denver S. Pac. Ry. v. City of Englewood, 62 Colo. 229 (1916) 10
Edgar v. Mite Corp., 457 U.S. 624 (1982) .....passim
Edgar v. MITE Corp., 457 U.S. 624 (1982)..... 29
Energy & Environment Legal Institute v. Joshua Epel, 43 F. Supp. 3d 1171 (D. Co. 2014)..... 1
Energy & Environment Legal Institute v. Joshua Epel, et al., 793 F.3d 1169 (10th Cir. 2015) 1
FERC v. Mississippi, 456 U.S. 742 (1982) 9
Granholm v. Heald, 544 U.S. 460 (2005) 30, 32, 33, 36
Greater L.A. Agency on Deafness, Inc. v. CNN, Inc., 742 F.3d 414 (9th Cir. Cal. 2014) 41

Highland Utils. Co. v. Pub. Utils. Comm'n, 97 Colo. 1 (1935) 10
IMS Health Inc. v. Mills, 616 F.3d 7 (1st Cir. Me. 2010) 20, 23, 38, 7
In re Consumers Power Company, 6 N.R.C. 892 (N.R.C. 1977) 10
KT & G Corp. v. Att'y Gen. of Okla., 535 F.3d 1114 (10th Cir. 2008) 30, 5
Midwest Title Loans, Inc. v. Ripley, 2009 U.S. Dist. LEXIS 30261 (S.D. Ind. Apr. 3, 2009) 38
Missouri v. Harris, 58 F. Supp. 3d 1059 (E.D. Cal. 2014) 42
Morley-Murphy Co. v. Zenith Elecs. Corp., 142 F.3d 373 (7th Cir. Wis. 1998) 26
National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995) 37, 34
New York v. FERC, 535 U.S. 1 (2002) 9
North Dakota v. Swanson, 2012 U.S. Dist. LEXIS 141070, (D. Minn. Sept. 30, 2012) 10
Pennoyer v. Neff, 95 U. S. 714 (1878) 21, 27, 28, 30
Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) .....passim
Psinet, Inc. v. Chapman, 362 F.3d 227 (4th Cir. Va. 2004) 38
Quik Payday, Inc. v. Stork, 549 F.3d 1302 (10th Cir. Kan. 2008) 39, 10, 36
Quill Corp. v. N.D., 504 U.S. 298 (1992) 25
Rocky Mt. Farmers Union 41
Rocky Mt. Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. Cal. 2013) 40
Rocky Mt. Farmers Union v. Corey, 740 F.3d 507 (9th Cir. 2014) 40
Sam Francis Found. v. Christies, Inc., 784 F.3d 1320 (9th Cir. Cal. 2015) 42

San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 21
Shaffer v. Heitner, 433 U.S. 186 (1977) .....passim
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) 4, 33
State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003)) 19, 20
Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910) 22

STATUTES

Colorado Rev. Stat. tit. 40, § 2-104(1)(a)..... 7
Colorado Rev. Stat. tit. 40, § 2-124 2
2-124(1)(a) 2, 12, 24, 53
2-124(1)(a)(II)..... 12
2-124(1)(c)(I)..... 2, 6
2-124(1)(c)(V) 2, 24, 53
2-124(1)(c)(V.5)..... 2, 24
2-124(1)(d) 7, 13
28 U.S.C. § 2202..... 15
29 U.S.C. § 1254(1) 1
Utah Code § 54-17-601(10)(a)(vi) 12

OTHER AUTHORITIES

The Federalist No. 22 (Alexander Hamilton) 21
The Federalist No. 42 (James Madison) 21, 23, 26
The Federalist No. 45 (James Madison) 21
The Federalist No. 51 (James Madison) 21
The Federalist No. 7 (Alexander Hamilton) 21

RULES

4 C.C.R. § 723-3- 3652(y) 8
4 C.C.R. 723-3.3659(a) 7

TREATISES

James W. Coleman, *Importing Energy, Exporting Regulation*, 83 Fordham L. Rev. 1357 (2014) 31
Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation,* 84 Notre Dame L. Rev. 1057, 1062 (2009)..... 19
Regan, Donald H. *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev., 1865-913, 1887 (1987). 19, 24, 7
Willis L.M. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1592 (1978)..... 25

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1, cl. 8 2
U.S. Const. amend. V..... 1
U.S. Const. art. 1, § 8, cl. 3..... 1
U.S. Const. art. 4, § 1, cl. 1..... 1

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Energy & Environment Legal Institute v. Joshua Epel, et al.*, 793 F.3d 1169 (10th Cir. 2015) and reproduced in the appendix hereto ("App.") at 1a. The Tenth Circuit affirmed the May 9, 2014 decision of the United States District Court for the District of Colorado, reported at 43 F. Supp. 3d 1171 (D. Co. 2014), and reproduced at App. 26a. *See* Appendices A & B.

STATEMENT OF JURISDICTION

The Tenth Circuit's rendered its opinion on July 13, 2015. This Court's jurisdiction is invoked under 29 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Article 1, Section 8, Clause 3 of the Constitution provides in relevant part that Congress shall have power "to regulate Commerce . . . among the several states."

Article 4, Section 1, Clause 1 of the Constitution provides in relevant part that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State."

The Fifth Amendment to the Constitution provides in relevant part that "[n]o person shall be . . . deprived

of life, liberty, or property, without due process of law."

The Fourteenth Amendment to the Constitution, Section 1, Clause 3, provides in relevant part that "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Amendment 37 (2004) to the Colorado Revised Statutes, codified at C.R.S.§40-2-124(1)(c)(I), (V)&(V.5), requires "each qualifying retail utility to generate, or cause to be generated, electricity from eligible energy resources in [designated] minimum amounts." The definitions of "eligible energy resources that can be used to meet the standards" are codified at C.R.S.§40-2-124(1)(a). The provisions of C.R.S.§40-2-124 are lengthy and, therefore, set out in Appendix E (App. 79a), pursuant to Supreme Court Rule 14.1(f).

INTRODUCTION

This dispute involves a Colorado statute that imposes Renewable Energy Standards ("RES"). Colorado's RES sets aside a portion of the interstate market for electricity and limits who may participate in that submarket to those who generate electricity using means that qualify as renewable energy under the Colorado statute. The District Court found that the practical effect of the RES is to restrict the means companies may use to access this set-aside, regardless of where the company operates or whether the

electricity actually generated even enters Colorado. The District Court also found that when the RES forces Colorado-qualified renewable generation to occur in other states, this forces non-Colorado-qualified generation off of the grid, even though the "actual electricity … may never enter Colorado." Colorado did not dispute either of these findings.

In the decision below, the 10th Circuit also recognized that the RES has extraterritorial effect. *See*, App. A at 11-12a. Appellants argued that this extraterritorial regulation is barred by the Constitution and also under long-standing "dormant Commerce Clause" precedent. The 10th Circuit disagreed.

Of the three ways a state statute can "violate" the "dormant Commerce Clause," only one rests firmly on textual prohibitions found in the Constitution itself – the bar on extraterritorial regulation.

This Court has a long-established prohibition of extraterritorial regulation for cases sounding in interstate commerce. In *Baldwin*, this Court ruled that one state has no power to project its legislation into another state. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1939). In *Healy*, it held that the Constitution "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst.*, 491 U.S.

324, 336 (1989), quoting and citing to *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43 (1982). *Edgar* further explains (and prohibits):

> a state law where the "practical effect of such regulation is to control [conduct] beyond the boundaries of the state . . . ." The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."

Id., *citing to Shaffer v. Heitner*, 433 U.S. 186, 197 (1977); *and*, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775 (1945). In *Brown-Forman* this Court held that a state may not force a merchant to seek regulatory approval in one State before undertaking a transaction in another; may not project its legislation into other states; and may not control conduct beyond the boundaries of the State. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986).

This Court and many Circuits' Court of Appeals have applied the *Baldwin – Edgar – Brown-Forman – Healy* jurisprudence to a broad array of events, including state statutes that: controlled prices; required price affirmations; regulated train lengths; required disclosure of repainted cars, required specific

types of mudguards on trucks, regulated postings on the Internet; regulating stock offers; required trash recycling; limited the interstate shipment of wine; regulated beverage labels; limited sales of fine art in foreign states; enforced collegiate sports rules; and regulated car dealerships.

Although the 10th Circuit recognized that the Colorado RES is extraterritorial regulation, it restricted the *Baldwin – Edgar – Brown-Forman – Healy* precedent exclusively to price control and price affirmation cases. As discussed *infra*, several other Circuits refuse to limit the bar on extraterritorial regulation only to price affirmation and control statutes. Because the circuits are hopelessly divided over this recurring issue; and because recent decisions of this Court regarding application of *Baldwin* have created some ambiguity as to the reach of the prohibition on extraterritorial regulation, this Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. The Colorado Renewable Energy Statute

In 2004, Colorado voters passed Amendment 37. The Legislative Declaration of Intent of the Amendment states that "Colorado's renewable energy resources are currently underutilized" and that, to "attract new businesses and jobs, promote development of rural economies, … [and] diversify Colorado's energy resources," Colorado should

"develop and utilize renewable energy resources to the maximum practicable extent." (10th Cir. Aplt.App.-183 *and see id.* at 177.) Amendment 37 was codified in 2005 at C.R.S. §40-2-124. Since its adoption, the Colorado Legislature has amended the statute three times to increase the Renewables Quota and to add different kinds of electricity generation within its definition of renewable energy.

"The centerpiece of the statute is its Renewable Energy Mandate…." (10th Cir. Aplt.App.-173, ¶8.) The statute expressly requires Colorado "qualified retail utilities" to "*generate, or to cause to be generated*," electricity from Colorado-approved renewable sources in specified minimum amounts. C.R.S. §40-2-124(1)(c)(I),(V)&(V.5); C.R.S. §40-2-124(3)&(4). The statute thereby facially establishes a Renewables Quota and forces Colorado utilities to *cause* electricity generation to occur using Colorado-approved production methods, regardless of where it is generated. By 2020, the statute sets aside 30% of electricity supplied by investor-owned utilities to be obtained from Colorado-qualified (and approved) renewable sources. C.R.S. §40-2-124(1)(c)(I)(E). Other kinds of retail utilities must meet slightly smaller quotas.

The District Court held and the 10th Circuit acknowledged that the Renewables Quota is a "set aside for renewable energy." App. A at 2a, *and* App. B at 58a. It does not "treat energy generated outside the

state of Colorado different than energy produced within the state of Colorado." (ECF-219 at 20.) Instead, "[t]he distinction drawn…is between renewable and non-renewable energy…." App. B at 73a.

The statute specifies the methods of Colorado-qualified renewable-energy generation that utilities must use to comply with the Renewables Quota. C.R.S.§40-2-104(1)(a). These include certain types of recycled energy and energy generated from "renewable energy sources," a defined term. *See id.* Utilities must comply with the Renewables Quota by either generating or buying renewable power directly, or by purchasing Renewable Energy Credits ("RECs"). C.R.S. §40-2-124(1)(d). The Quota and the definitions of renewable energy jointly constitute the Colorado Renewable Energy Standards ("RES").

The statute and its associated regulations implement the RES through a system of tradable Colorado Renewable Energy Credits ("C-RECs"), and a related accounting system that records the generation and ownership of the C-RECs as they are used to comply with the RES. C.R.S. §40-2-124(1)(d); 4C.C.R.§723-3.3659(a).

C-RECs are not energy or electricity. Solely the creature of Colorado law, C-RECs are "created" when a certain amount of electricity is generated using a Colorado-qualified method of generation. 4 C.C.R.

§723-3- 3652(y) (defining them as a "contractual right to…non-energy attributes…directly attributable to a specific amount of electric energy generated from a renewable energy resource" and stating that "[o]ne [C-REC] results from one megawatt-hour of electric energy generated from a renewable energy resource" as defined by the Colorado RES).

C-RECs are Colorado's way of regulating the means and methods of electricity production, regardless of where it occurs and irrespective of where the electricity is used. But because Colorado-qualified C-RECs can only be created by Colorado-qualified renewable-energy generation, these certificates have the practical effects of causing Colorado-qualified renewable-energy generation to occur, displacing non-Colorado-qualified electricity generation, both renewable and non-renewable in kind.

B. Colorado's Extraterritorial Reach

The reach of the Colorado RES is nationwide and international. The RES regulates electricity injected into and delivered through an interstate electricity grid.

All Colorado retail electrical service is integrated and pooled through the Western Interconnection, an interstate grid. (10th Cir. Aplt.App.-73 ¶¶50-52; & *id.* p.112, ¶¶50-52.)

The Western Interconnection pools electricity and serves 11 western States and two foreign Nations.

These include Colorado, Wyoming, Montana, Idaho, Washington, Oregon, California, Nevada, Utah, New Mexico, Arizona; British Columbia and Alberta (Canada); and, Baja California (Mexico). (10th Cir. Aplt.App.-45; *id.* p.141.) The District Court ruled that "[E]lectrical grids are inherently interstate commerce…." *See* App. C at 87a. The parties agree that all retail electricity serving Colorado is in interstate commerce.[1] (10th Cir. Aplt.App.-163 ¶7; *id.* p.203 ¶7.)

Colorado is a net importer of electricity, and energy that is generated in other states is used in Colorado and that there are not enough C-RECs generated in Colorado to satisfy the Quota. (10th Cir. Aplt.App.-160; *id.* p.164, ¶8; *id.* p.203 ¶8.)

The parties agree that physical electricity generated by renewable sources and supplied to the grid is indistinguishable from the physical electricity generated by nonrenewable sources and supplied to

---

[1] *See New York v. FERC*, 535 U.S. 1, 7 (2002) ("[A]ny electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce."); *FERC v. Mississippi*, 456 U.S. 742, 757 (1982) ("It is difficult to conceive of a more basic element of interstate commerce than electric energy…. No State relies solely on its own resources in this respect.").

the grid.[2] (10th Cir. Aplt.App.-164, ¶9; *id.* p.203, ¶9; *see id.* p.44, ¶12.)

C. Colorado Controls Foreign Electricity Generation

The Appellees in this case, the members of the Colorado Public Utility Commission ("PUC"), wield exclusive regulatory powers over all public utilities within Colorado. C.R.S. §40-2-101; *and see*, *Denver S. Pac. Ry. v. City of Englewood*, 62 Colo. 229, 161 P. 151, (1916), appeal dismissed, 248 U.S. 294, 39 S. Ct. 100 (1919); *Highland Utils. Co. v. Pub. Utils. Comm'n*, 97 Colo. 1, 46 P.2d 80 (1935). They determine whether or not a public utility may service the public. The power to ascertain and determine whether or not a public utility should or should not continue service to the public is possessed solely by the PUC, subject to review by the courts of the action of the commission. *Id.* Their authority ends at the border of the State.

---

[2] "Once electricity is generated and injected into the power grid, it is a fungible commodity and there are 'no qualitative differences based on the source from, or method by, which the electricity has been generated.'" *North Dakota v. Swanson*, 2012 U.S. Dist. LEXIS 141070, *15 (D. Minn. Sept. 30, 2012). "No one disputes that electricity is fungible; a user cannot distinguish between electricity generated by a nuclear power plant and that generated by a facility which burns a fossil fuel." *In re Consumers Power Company*, 6 N.R.C. 892, *138 (N.R.C. 1977). This is also true for electricity generated by other sources.

Every state has a similar authority with similar geo-jurisdictional limitations.

The Colorado PUC decides what forms of electric generation may be supplied to the interstate electric grid within Colorado, and which of it is considered renewable. It has no authority to control what may be supplied to the grid in other states nor what they must consider renewable. That authority belongs to the other states.

Electricity cannot be effectively traced from the point of generation and supplied to the point of consumption. (10th Cir. Aplt.App.-46, ¶¶23.) Like the Internet, the transmission of electricity over the Western Interconnection grid does not recognize state (or national) boundaries. The purchase of wholesale electricity is nothing more than a transfer of money and does not, and cannot, mean that the power purchased by the retail utility was produced by the source receiving the retail utility's money. 10th Cir. Aplt.App.46-47, ¶23. The Western Interconnection does not match buyers to sellers, it only ensures that the supply on the grid exactly matches the demand. Once electricity enters the grid, it is indistinguishable from the rest of the electricity in the grid. *Id.*

Colorado's C-REC definitions serve as the vehicle through which Colorado projects its favored methods of renewable-energy generation into other states. The C-REC definitions require out-of-state renewable-

energy generators to seek Colorado's approval as a condition of accessing Colorado's RES-created renewable-energy submarket. (10th Cir. Aplt.App.-165,167, ¶¶17,25; *id.* p.204-05, ¶¶17,25.) This has the practical effect of regulating out-of-state electricity-generation practices unrelated to any physical attributes of the tangible good being imported into Colorado.

Thirty states and the District of Columbia have mandatory renewable energy standards, each with different renewables requirements. (10th Cir. Aplt.App-274.) The Colorado C-REC definitions are inconsistent with those of other States (10th Cir. Aplt.App.-149), thereby, as a practical matter, operating to deny out-of-state renewable-energy generators access to the Colorado Renewables Quota market unless and until they do business according to Colorado's terms. (10th Cir. Aplt.App-167, ¶25; *Id.*p.205, ¶25.)

The following examples demonstrate the RES's extraterritorial effect on other States' RECs and renewable-energy markets.

Coal mine methane created through a coal degassing operation as a fuel for electricity generation is available and used as a renewable-energy resource

in Utah.[3] But this type of coal mine methane cannot be used to comply with Colorado's RES, as only "naturally escaping" methane can be used for this purpose. *See* C.R.S. §40-2-124(1)(a)(II).

RECs approved by other states, such as ocean thermal and ocean wave generation and hydropower with a nameplate capacity greater than 30 megawatts, as approved in California, cannot be used to comply with Colorado's Renewables Quota. (Aplt.App-167, ¶25; *id.*p.205, ¶25.)

Federally approved RECs from hydroelectricity generation units with nameplate capacity greater than 30 megawatts, such as WAPA large dams, are sold to Colorado utilities (Aplt.App-166, ¶24; *id.*p.205. ¶24) but do not qualify for C-RECs and may not be used to meet the Colorado RES Quotas. *See* C.R.S. §40-2-124(1)(d).

There is no difference between electricity generated using methods that create Colorado-approved C-RECs and those that do not. (Aplt.App-140; *id.*p.164, ¶9; *id.*p.203, ¶9.) Colorado's RES regime simply regulates out-of-state conduct.

Another aspect of C-RECs' extraterritorial effect is its creation of a low-level trade war among the states. Because Utah methane mine gas RECs do not quality

---

[3] Utah Code § 54-17-601(10)(a)(vi).

as C-RECs, Colorado beats back the competition and favors Colorado mine operators over those operating in Utah.

Colorado eliminates competition with California renewable energy companies in the same way. Colorado has no opportunity to use ocean thermal and ocean wave generation within its borders. By eliminating competition from those sources, Colorado favors other forms of Colorado-qualified renewable energy, some of which is generated within the state. The hydro-generation definitions demonstrate an even stronger example of the low-level trade war. California defined as renewable those new dams with a maximum capacity of 35 megawatts. In response, Colorado defined as renewable only those dams with a capacity of less than 30 megawatts. Because only the latter qualifies for C-RECs, Colorado favors in-state generation over virtually identical foreign generation, again stealing the march on out-of-state competition through its extraterritorial regulatory effect.

Because foreign companies cannot access the Colorado set-aside until Colorado determines that their electricity qualifies for C-RECs and because Colorado will not accept other State's RECs, Colorado extends its policies and law beyond its own borders. The 10th Circuit acknowledges this extraterritorial effect, using it as the starting point for their analysis of the law.

D. Procedural Posture of the Case

On April 4, 2011, E&ELegal brought this action in the U.S. District Court for the District of Colorado seeking a declaration that Colorado's Renewable Energy Standard ("RES") statute, Colo.Rev.Stat.§40-2-124, constitutes prohibited extraterritorial regulation and otherwise violates the dormant Commerce Clause of the federal Constitution; and sought appropriate injunctive relief under 28U.S.C.§2202. (ECF-1)[4].

Two years after the case was filed, and recognizing that its statute included facial violations of the dormant Commerce Clause due to in-state preferences, the Colorado Legislature passed significant revisions to the RES that mooted some claims. In response, E&ELegal was forced to file a Second Amended Complaint. ECF-156-1. It is this second amended complaint that is before the Court.

In light of the Amended Complaint, the litigation process began anew. The Chief Magistrate Judge of the District issued a scheduling order on June 17, 2013. Under the District Court Judge's "Practice Standards", the parties were required to file any

---

[4] ECF refers to the Electronic Court Filing system in the U.S. District Court for the District of Colorado, filed under civil case 1:11-cv-0859. ECF-1 refers to Docket Entry 1 on the District Court Docket Sheet.

"Early Motion for Partial Summary Judgment" (hereinafter "Early Motion") "30 days after entry of the initial scheduling order." The scheduling order thus allowed for these "early motions" as well as a second round of dispositive motions for summary judgment after completion of discovery.

Each side filed early motions for summary judgment. As described by the Chief Magistrate Judge, these consisted of:

> "(1) Plaintiffs' Early Motion for Partial Summary Judgment [Doc. # 180, filed 8/30/2013] which argued that the Colorado Renewable Energy Standard, section 40-2-124, C.R.S. (the "Colorado RES"), is unconstitutional because it violates the dormant Commerce Clause; (2) Defendants and Defendant-Intervenors' Early Motion for Summary Judgment on Claims 1 and 2 [Doc. # 186, filed 9/30/2013] which is the mirror image of the Plaintiffs' Early Motion and argues that the defendants/intervenors are entitled to summary judgment dismissing the plaintiffs' first and second claims because the Colorado RES does not violate the Commerce Clause and is not unconstitutional; and (3) Defendants' Early Motion for Summary Judgment on Plaintiffs' Lack of Standing [Doc. # 188, filed 9/30/2013] arguing that the plaintiffs lack standing to assert their claims and that there is no justiciable case or

> controversy as required by Article III of the Constitution.

The Chief Magistrate Judge continued,

> The parties insist that resolution of the Early Motions will materially impact how the litigation proceeds and the focus of the parties going forward. They urge the entry of an order postponing the dispositive motion deadline and the final pretrial conference until the Early Motions are decided.

See ECF-213. The Magistrate Judge vacated the dispositive motion deadline. Notably, as a result, almost none of the 19 expert and expert rebuttal reports totaling 665 pages of dense information, and thousands of discovery documents also likely to be entered into evidence, ever came before the District Court. Further, neither party had the opportunity, and did not ask the court, to conduct a *Pike* balancing.

Facing inclusion on the District Court's semi-annual Civil Justice Reform Act report, and without benefit of a hearing, the District Court issued its decisions on the Early Motions, denying E&ELegal's extraterritoriality motion and granting Defendants' mirror image motion; while denying in relevant part Defendants' jurisdictional motion and thus granting E&ELegal standing (for the second time).

The District Court went further, however. Despite having no motion seeking a *Pike* balancing and without any relevant evidence before it, the District

Court conducted an ersatz balancing and held that this favored Colorado. In so doing, the court terminated the entire case. Refusing to entertain Appellants' complaint that the District Court did not have the *Pike* question before it, the 10th Circuit also ignored the Magistrate Judge's efforts to streamline the case and allow for a second round of motions in which the parties would be able to make their *Pike* arguments and offer relevant evidence. The result was a narrowing of the case exclusively to the question of extraterritorial regulation.

The only question remaining in this case is as to whether Colorado's RES is constitutionally infirm extraterritorial regulation.

E. The Constitutional Basis for Prohibition of Extraterritorial State Regulation

Appellants argue that the Colorado RES is unconstitutional because it has prohibited extraterritorial reach. Where state laws control extraterritorial conduct, this Court has deemed them *per se* invalid.[5] Where this extraterritorial reach directly harms interstate commerce, some courts have improperly pigeon-holed these cases as exclusively within the realm of the "dormant" Commerce Clause.

---

[5] *Bonaparte v. Tax Court*, 104 U.S. 592 (1881); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) *and Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935).

The 10th Circuit decision below falls into this conceptual trap and because of that fatal error, improperly restricts application of this Court's extraterritorial jurisprudence, a jurisprudence that stems not from the Commerce Clause but from the structure of our system as a whole.

As Professor Regan explains, "the extra-territoriality principle should not be regarded as grounded in any particular clause of the Constitution, it should be regarded as an inference from the structure of our system as a whole."[6] This Court's decisions reflect the independent, free-standing nature of the extraterritorial principle: "*Gore* and *Campbell* suggest that a more general extraterritoriality prohibition lurks somewhere in the Constitution, having nothing to do with the dormant Commerce Clause."[7] In *Gore*, this Court specifically distinguished "the maintenance of a national

---

[6] See, Regan, Donald H. "Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation." 85 Mich. L. Rev., 1865-913, 1887 (1987).

[7] Katherine Florey, "State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation." 84 Notre Dame L. Rev. 1057, 1062 (2009), (citing to, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003)).

economic union unfettered by state-imposed limitations on interstate commerce" from "the autonomy of the individual States within their respective spheres."[8] Rather than rely on the "dormant" Commerce Clause, *Gore* relied on the free-standing prohibition of extraterritorial regulation, disallowing a state statute from "infringing on the policy choices of other States."[9] More recently, this Court reiterated the free-standing principle prohibiting extraterritorial regulation in *Campbell*: "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders."[10] Even courts that consider extraterritorial regulation as it applies to the dormant Commerce Clause to have narrow applicability, these courts acknowledge that free-standing extraterritorial principles must be applied within the dormant Commerce Clause arena, not because of it.[11]

---

[8] *BMW of North America, Inc. v. Gore*, 517 U.S. at 571-72.

[9] *Id.*

[10] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 422.

[11] *IMS Health Inc. v. Mills*, 616 F.3d 7, 30 (1st Cir. Me. 2010) (The Supreme Court invalidates "statutes that 'force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.' *Healy,* 491 U.S. at 337; *see*

The Colorado RES violates not only the dormant Commerce Clause, but is a classic example of an extraterritorial regulation that independently violates the system as a whole, including the Full Faith and Credit clause and the Due Process Clause.

1. Structure of the Constitution

The Framers of our union fully recognized the potential for extraterritorial regulation and eschewed it as improvident. Federalist 7, Federalist 22 *and* Federalist 42 ("the law of one State [would] be preposterously rendered paramount to the law of another, within the jurisdiction of the other [absent a superintending authority].") Moreover, the Framers recognized that the federal courts would "ultimately" have to adjudicate and limit extraterritorial regulation. Federalist 39, Federalist 42 (describing "[t]he necessity of a superintending authority over the reciprocal trade of confederated States."), *and see* Federalist 45 and 51.

For more than a century and a third, this Court has acknowledged prohibition of extraterritorial regulation. *See*, *Pennoyer v. Neff,* 95 U. S. 714 (1878) ("no State can exercise direct jurisdiction and authority over persons or property without its

---

also Edgar v. MITE Corp., 457 U.S. at 627, 642-43 (plurality opinion).").

territory"); *and see*, *Bonaparte v. Tax Court* 104 U.S. at 594, ("No state can legislate except with reference to its own jurisdiction"); *and more recently, San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546, (1985) ("The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be *equally* free to engage in any activity that their citizens choose for the common weal") (*emphasis added*).

Although a freestanding Constitutional principle, the prohibition of extraterritorial regulation is implicit rather than explicit and rises out of the Constitution in several clauses. It is enforceable through each of those clauses singly or in combination. It is not bound exclusively to the Commerce Clause and cases involving interstate commerce are not absolved of honoring other Constitutional rights. *See*, *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 37-38 (1910):

> "It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination

> to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land.

And see, *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) ("[the ordinance] would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other States.") In the instant matter, Colorado sought to export its policies, requiring foreign parties to obtain Colorado's approval of their electricity generation methods before being allowed to sell C-RECs into the Colorado marketplace. This violates three independent Constitutional rights.

2. Full Faith and Credit Clause

Bonaparte identifies the point at which Colorado must submit to the wishes of a foreign state, prohibiting the reach of the Colorado's statutory definitions of what constitutes renewable energy. *Bonaparte v. Tax Court*, 104 U.S. at 595. ("the states are left free to extend the comity which is sought, or not, as they please."); *and see*, Federalist 42.

This Court peremptorily strikes "statutes that 'force an out-of-state merchant to seek regulatory approval in one State before undertaking a

transaction in another.'"[12]

It is not that Colorado must give full faith and credit to, for example, California's definition of renewable energy. It is that Colorado tramples Californians opportunity to compete in the interstate market for electricity under. This removes some power from California's Public Utility Commission and as such fails to give full faith and credit to California's laws. Citing to Justice Brandeis, Regan explains, "the full faith and credit clause presupposes the extraterritoriality principle."[13] Thus, if the Court wishes to place the extra-territoriality jurisprudence at the feet of a specific clause within the Constitution, it may credit the full faith and credit clause, but in so doing it is also crediting the federalism structure of our system as a whole and as reflected in the various Constitutional clauses.[14]

3. Due Process Clause

---

[12] *IMS Health Inc. v. Mills*, 616 F.3d 7, 30, (1st Cir. Me. 2010), *citing to*, *Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989); see also *Edgar v. MITE Corp.*, 457 U.S.624, 627, 642-43 (plurality opinion).

[13] Regan, *supra* note 6, at 1894, citing to *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 156 (1932) ("Later cases have seriously undermined the precise holding *of Bradford,* which upheld the full faith and credit claim, but nothing in later cases casts doubt on the proposition quoted in the text.")

[14] *Id.* at 1987.

Am. Bev. Ass'n v. Snyder,[15] although sounding under the "dormant" Commerce Clause, specifically notes the outcome would be the same by simply applying a due process analysis to the facts.[16]

> "Eliminating extraterritoriality as a freestanding Commerce Clause prohibition also would not eliminate the role of territory in constitutional law. Territorial limits on lawmaking underlie, indeed animate, many other constitutional imperatives. The most powerful of these, due process, limits a State's power to extend its law outside its borders."

Id.

Due process requires fairness. Reese proposed a two-part test under the Due Process Clause to assess the permissibility of legislative jurisdiction in a particular situation: whether the act in question "would be fair to the parties and also consistent with

---

[15] 735 F.3d 362, 380 (6th Cir. Mich. 2013) (concurring opinion).

[16] Nor is this application of the extraterritoriality principle through both the Commerce Clause and the Due Process clause in a matter involving interstate commerce unusual. *See*, *Quill Corp. v. N.D.*, 504 U.S. 298, 305 (1992). ("'Due process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems . . . . To some extent they overlap.") (*internal citations omitted.*); *and see*, *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1791 (2015).

the needs of the federal ... system."[17] This is consistent with the Framers' intentions. *See* Federalist 42 (extraterritorial effects are harmful not because they are "impolitic" so much as that they are "unfair" within the intended federal union.) This applies specifically to the Colorado statute and has been recognized in "dormant" Commerce Clause cases as well. California entities have no opportunity to participate in the policy or elective processes in Colorado and thus a Colorado statute that limits the opportunities of California entities is unfair because Californians don't have the substantial contacts necessary to create fairness. *See*, *e.g.*, *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013), *quoting Helvering v. Gerhardt*, 304 U.S. 405, 415 (1938) ("the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, [they are] without representation.").

The unfairness to foreign entities is especially acute where the regulations imposed on foreign entities are written by a Public Utility Commission engaged in a low-level trade war with competitor states and who are thus averse to seriously considering the petitions of the forum state's own competitors. *See*, *e.g.*, *Morley-Murphy Co. v. Zenith*

---

[17] Willis L.M. Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1592 (1978).

Elecs. Corp., 142 F.3d 373, 379 (7th Cir. Wis. 1998) ("any state that has chosen a policy more *laissez faire* than Wisconsin's would have its choices stymied, because the state that has chosen more regulation could always trump its deregulated neighbor.") And, indeed, Utah, California and 26 other states have had their definitions of renewable energy trumped by Colorado.

4. The Commerce Clause

This Court's long-established extraterritorial dormant Commerce Clause jurisprudence controls this case, but has been put at issue by the 10th Circuit decision below. The rules the 10th Circuit rejects are straight forward.

The rule that one state has no power to project its legislation into another state (*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. at 521) embodies the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres. *Healy v. Beer Inst.*, 491 U.S. at 335-36 (*citing* to the plurality in *Edgar* that relies on *Shaffer v. Heitner*, 433 U.S. 186 (U.S. 1977) ("any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power"; *in turn quoting Pennoyer v. Neff, 95 U. S.* at 722 "that

no State can exercise direct jurisdiction and authority over persons or property without its territory.")[18]

To protect our system of federalism, the "Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst.*, 491 U.S. at 336. Therefore, a state may not directly regulate interstate commerce. "Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." *Brown-Forman Distillers*, 476 U.S. at 582; *and see*, *Healy v. Beer*, 491 U.S. at 337. A state also "may not project its legislation into other states," and it may not control conduct beyond the boundaries of the State. *Brown-Forman Distillers*, 476 U.S. at 582.

---

[18] Some courts attempt to erase the *Edgar–Healy* extraterritoriality jurisprudence, arguing that these reflected pluralities rather than majority decisions. In *Edgar* (1981), Justices Burger, White, O'Connor and Stevens concurred with the extraterritoriality section of the decision while Justices Marshall and Brennan did not reach the issue. In *Healy* (1989), however, Justices Brennan and Marshall endorsed the extraterritoriality principle explained in *Edgar*, relying on the *Pennoyer–Shaffer–Brown-Forman* formulation of the extra-territorial rules on which *Edgar* is grounded, thus providing a clear majority of the *Edgar* court for the foundational dormant Commerce Clause prohibition of extraterritorial regulation.

Further, denial of access to a local market violates the Commerce Clause. *C&A Carbone v. Town of Clarkstown*, 511 U.S. at 393. Such extraterritorial regulation categorically violates the dormant Commerce Clause. *See Healy*, 491 U.S. at 336 (invalid *per se* if practical effect is extraterritorial).

Strict scrutiny applies to any State attempt to "control conduct beyond the boundary of the state," *id.* at 336-37. *Healy* follows by eight years this Court's decision in *Edgar* which held that "The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *Edgar v. MITE Corp.*, 457 U.S. at 642. State laws that attempt to "control conduct beyond the boundary of the state" are invalid, regardless of whether this extraterritorial reach was intended. *Healy*, 491 U.S. at 336-337. There is no *de minimis* exception and there are no defenses to an extraterritorial dormant Commerce Clause violation.[19] The offending statute is simply struck.

---

[19] *See Am. Beverage Assoc. v. Snyder*, 700 F.3d 796, 810 (6th Cir. 2013) (no defenses to extraterritoriality violation). Unlike other forms of dormant Commerce Clause violations, *see generally Quik Payday, Inc. v. Stork*, 549 F.3d at 1307, such as where a State law "discriminates" against out-of-state businesses, there are no defenses to this form of dormant Commerce Clause violation. *Healy*, 491 U.S. at 336-37. State statutes that exceed a state's

See, *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) ("[the ordinance] would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other States."). This Court cited to *Carbone* for this proposition as recently as 2005. *Granholm v. Heald*, 544 U.S. 460, 472-73 (2005).

Because the RES regulates extraterritorially through its REC definitions and Renewables Quota, it is "invalid *per se*." *KT & G Corp. v. Att'y Gen. of Okla.*, 535 F.3d 1114, 1143 (10th Cir. 2008).

F. The Tenth Circuit Proceeding

The court below began with a recognition that the Colorado RES constitutes extraterritorial regulation. *See* App. A at 39a. The gravamen of its decision is rejection of the *Healy* extraterritorial rule that automatically finds unconstitutional statutes with the practical effect of "control[ling] conduct beyond the boundaries of the State." App. A at 42a. The 10th

---

"regulatory jurisdiction," even if nondiscriminatory, are *per se* unconstitutional. *See id.* at 336. For example, in *Heydinger*, 2014 U.S. Dist. LEXIS 53888, the court invalidated a Minnesota statute that had the practical effect of regulating out-of-state electricity generation because it "violates the extraterritoriality doctrine and is *per se* invalid" and therefore did "not address whether the statute is discriminatory or fails a *Pike* analysis," *id.* at *48.

Circuit argues it may reject the *Healy* formulation as mere dicta that does no more than reflect a plurality of this Court. The decision makes no reference to *Edgar*, *Pennoyer*, or *Shaffer*, upon which *Healy* is grounded and discounts *Brown-Forman* as applying only in the context of price control and price affirmation statutes, despite *Healy* relying on *Brown-Forman*, which specifically cites to *Baldwin* for its bar on not only price controls but non-price regulatory reach[20]. Professor Coleman predicts this 10th Circuit outcome and explains its inherent errors, stating: "regulations are extraterritorial and thus invalid [] when, as in *Baldwin*, the regulation is *targeted* at out-of-state decisions." James W. Coleman, *Importing Energy, Exporting Regulation*, 83 Fordham L. Rev. 1357 (2014)1384-85 n. 169.

Nor does the court below acknowledge the *Healy* dissent that, like the plurality, endorses *Baldwin* as applying to non-price control circumstances. *Healy v. Beer*, 491 U.S. dissent at 346 ("The Court rightly held that this sort of a regulation violated the *Commerce Clause* because it 'set a barrier to traffic between one state and another as effective as if customs duties . . .

---

[20] *Brown-Forman Distillers*, 476 U.S. at 580 ("Our inquiry, then, must center on whether New York's affirmation law regulates commerce in other States.")

had been laid upon the thing transported.'", *citing to Baldwin*)

As explained above (*supra*, note 18), Justices Burger, White, Stevens, Marshall, O'Connor and Brennan, a majority of the *Healy* court, have endorsed the *Edgar* formulation against extraterritoriality, either in *Edgar* or *Healy*. In addition, Justices Kennedy, Scalia, Souter, Ginsburg, and Breyer endorsed the *Edgar* formulation when citing to *Carbone* in *Granholm.* Further, the court below failed to recognize this Court's endorsement of the *Healy* rule in *Walsh*.[21] And, careful examination of *Healy* reveals that the dissent endorses the extraterritorial rule where the evidence shows mandatory regulatory compliance in a foreign state[22], as is before this Court in the instant case. The *Healy* dissent was grounded on a lack of evidence of extraterritorial reach, not a repudiation of the *Baldwin–Edgar* prohibition against extraterritorial reach.

---

[21] *Pharm. Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 669, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003) (in which this Court pointedly referred to the prohibition on extraterritorial regulation as "[t]he rule that was applied in *Baldwin* and *Healy*").

[22] *Healy v. Beer*, 491 U.S. dissent at 347-48 (allowing extraterritorial reach as long as it places the foreign competitor "under no legal obligation" to comply).

The court below also discounted this Court's extraterritoriality jurisprudence sounding in interstate commerce, claiming in error that this Court struck extraterritorial state laws only three times. In fact, this Court has produced a lengthy line of cases that prohibited extraterritorial regulation and that did not involve any form of price control or price affirmation.[23] Nor did the court below recognize that twenty-two (22) appellate court decisions have prohibited extraterritorial regulations that do not involve price controls or affirmations, all of them relying on *Baldwin*, *Brown-Forman* and *Healy*.

Instead, the court below restricted the *Healy* formulation to only the "dormant" Commerce Clause and only to price control and price affirmation cases.

REASONS FOR ALLOWANCE OF THE WRIT

Unlike other petitions for certiorari asking this Court to clarify the extraterritoriality jurisprudence, the 10th Circuit has carefully, narrowly and specifically set this case up for Supreme Court review,

---

[23] *See*, *Shafer v. Farmers Grain Co., 268 U.S. 189, 199* (1925); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 779-84 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Shaffer v. Heitner, 433 U.S. 186, 197 (1977)*; *Edgar v. Mite Corp.*, 457 U.S. 624, 641-43 (1982); *BMW of N. Am. v. Gore*, 517 U.S. 599 (1996); *C&A Carbone v. Town of Clarkstown*, 511 U.S. 383, 393 (1994); *Granholm v. Heald*, 544 U.S. 460, 473 (2005).

stating "only the final, *Baldwin*, test is at issue." App. A. at 6a. This issue has come to this Court repeatedly in cert petitions and will continue to unless the Court grants cert here and resolves these issues. Appellants offer three reasons for allowance of the writ reflecting Rule 10 (a) and (c).

A. An Unsettled question of federal law

This Court has established a line of jurisprudence it describes as "price-affirmation" cases. *See Healy v. Beer* 491 U.S. at 342-43. In Section V of *Healy*, a plurality concluded that price affirmation statutes are no different than any other kind of binding affirmation statute. Further, the plurality concluded that where the affirmation is binding, "as noted . . . in *Brown-Forman*, this extraterritorial effect violates the *Commerce Clause*, a plurality opinion articulated in *Edgar* which stands behind both *Brown-Forman* and *Healy*.

Because six justices that participated in both *Edgar* and *Healy* concluded that the Constitution prohibits extraterritorial regulation that has the practical effect of controlling conduct beyond the boundaries of the State, arguably this effectively establishes as controlling law the extraterritoriality principle for any form of "dormant" Commerce Clause violation. The *Brown-Forman*, *Edgar* and *Healy* plurality opinions are not, however, stand-alone majority "opinions of the Court," and did not need to

reach the extraterritoriality issue. As a result, some courts of appeal, including the court below, refuse to apply the extraterritorial principle that was laid out in *Baldwin*, *Edgar, Brown-Forman* and *Healy* to anything other than a price control or affirmation case.

Notably, in 1994, this Court cited to *Baldwin* in *C&A Carbone v. Town of Clarkstown*[24], striking an extraterritorial regulation having nothing to do with any form of affirmation, holding the ordinance "would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other States."

In 2003, however, this Court inadvertently muddied the waters, stating:

> unlike price control or price affirmation statutes, the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices. The rule that was applied in *Baldwin*

---

[24] 511 U.S. 383 (1994).

> and *Healy* accordingly is not applicable to this case.

Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. at 669 (*internal citations omitted*). The Court was explaining that because there was no form of price affirmation in the Maine law at issue and no other form of extraterritorial reach at issue, either, the *Baldwin* line of cases does not apply. That notwithstanding, some appellate courts have seized on this Court's apparent linkage of *Baldwin* and *Healy* to price affirmation cases as an excuse to limit *Baldwin* and *Healy* only to price affirmation cases.

The waters remain muddied despite the 2005 decision in *Granholm v. Heald* that cited to *Baldwin* in a case involving the interstate market in wine and did not involve price control or affirmation. Thus, the questions remain: is the prohibition of extraterritorial regulations that limit interstate commerce restricted exclusively to price affirmation cases; and, is a state without power to prohibit the introduction within her territory of goods of wholesome quality acquired in other states, regardless of price or means of manufacture?

This case cleanly and narrowly presents this issue, one in which The Court of Appeals for the 10th Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and

has decided an important federal question in a way that conflicts with relevant decisions of this Court

B. A Split in the Circuits

The court below concluded that the prohibition of extraterritorial regulation of interstate commerce applies exclusively to price control or affirmation statutes: "only price control or price affirmation statutes that link in-state prices with those charged elsewhere and discriminate against out-of-staters are considered by the Court so obviously inimical to interstate commerce that we will forgo that more searching inquiry in favor of *Baldwin*'s shortcut." App. A at 50a-51a.

The 10th Circuit's limitation of extraterritoriality jurisprudence is in direct conflict with four other circuits and is not in conflict, at least in part, with two others.

1. Circuits in Conflict

The 7th Circuit has applied the extraterritoriality principle broadly, specifically rejecting a limitation of the principle only to price control or price affirmation statutes. *See*, *National Solid Wastes Management Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995) ("Although cases like *Healy* and *Brown-Forman* involved price affirmation statutes, the principles set forth in these decisions are not limited to that context."). Notably, however well cited *Meyer* is, the 7th Circuit eschewed application of *Edgar* in 2003. *Alliant Energy Corp. v.*

Bie, 330 F.3d 904 (7th Cir. Wis. 2003) ("the language, appearing in part V-A of Justice White's opinion, did not draw support from a majority of the Court and is therefore not the opinion of the Court."). An examination of post-2003 district court cases in the 7th circuit indicates, however, only the *Meyer* precedent is in effect. *See, e.g., Midwest Title Loans, Inc. v. Ripley*, 2009 U.S. Dist. LEXIS 30261 (S.D. Ind. Apr. 3, 2009).

In 2010 and again in 2013, the 6th Circuit agreed with the 7th Circuit, adopting the extraterritoriality principle in *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628 (6th Cir. 2010). ("a state regulation that controls extraterritorial conduct is per se invalid.") 622 F.3d at 645. The key inquiry is whether the regulation would control conduct occurring wholly outside the state's boundaries. *Id.* at 645-46. *And see*, *Am. Bev. Ass'n v. Snyder*, 735 F.3d 362, 379-380, (6th Cir. Mich. 2013) ("Michigan is forcing states to comply with its legislation in order to conduct business within its state, which creates an impermissible extraterritorial effect and is in violation of the Supreme Court's precedent stated in *Brown-Forman* and *Healy*."). The 2nd and 4th Circuits join the 6th and 7th Circuits. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. Vt. 2003); *Psinet, Inc. v. Chapman*, 362 F.3d 227, 239, (4th Cir. Va. 2004).

2. Circuits not in conflict

The 1st Circuit agrees, at least in part, with the 10th Circuit decision below. It concedes that the 7th Circuit's holding is correct and the doctrine "remains viable." *IMS Health Inc. v. Mills*, 616 F.3d 7, 29 n.27 (1st Cir. 2010). It splits, however with regard as to where the extraterritoriality principle applies, applying the *Baldwin, Edgar, Brown-Forman, Healy* rule only to two kinds of cases, (i) "price-affirmation statutes that force regulated entities to certify that the in-state price they charge for a good is no higher than the price they charge out of state"; and, (ii) statutes that force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Id.* at 30. The decision offers no principled basis for this anomalous approach.

3. Circuits in Conflict with themselves

It should be noted, as the court below did not, the 10th Circuit has previously held that the extraterritoriality principle applies to more than price control and affirmation statutes. *See*, *ACLU v. Johnson*, 194 F.3d 1149, 1160-1161 (10th Cir. 1999) ("Statute regulating Internet regulates extra-territorially 'an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause.'"); *and see*, *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1307 (10th Cir. Kan. 2008) ("[T]hird, a statute will be invalid per se if it has the practical effect of extraterritorial control of commerce occurring

entirely outside the boundaries of the state in question."). The 10th Circuit failed to address its earlier, conflicting decisions, choosing not to make reference to *Johnson, ACLU* or other decisions that the decision in the instant case apparently overturns.

This kind of internal inconsistency is even more rampant in the 9th Circuit and reflects a very sharp division within the 9th Circuit judiciary. *See*, *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1103 (9th Cir. Cal. 2013) ("States may not mandate compliance with their preferred policies in wholly out-of-state transactions, but they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants." *Citing to Walsh*). Compare this with the seven judge dissent in Rocky Mt. Farmers Union v. Corey, 740 F.3d 507 (9th Cir. 2014):

> [W]hether California's scheme is characterized as providing incentives" or establishing mandates," it has the practical effect of regulating interstate commerce. And, under the dormant Commerce Clause, [t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."
>
> * * *
>
> "The very purpose of the dormant Commerce Clause is to ensure that [r]ivalries among the States are . . . kept to a minimum, and a

> proliferation of trade zones is prevented." Until the majority's ruling, the dormant Commerce Clause guarded against such economic fragmentation. *See Baldwin*, 294 U.S. at 524 (explaining that a state may not condition importation upon proof of a satisfactory wage scale in factory or shop"). Now, the dormant Commerce Clause has been rendered toothless in our circuit, and we stand in open defiance of controlling Supreme Court precedent

Id. at 518-19 (*internal citations omitted.*) The *Rocky Mt. Farmers Union* decision was buttressed by *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (2013) ("the Court has held that *Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product.")

With these fresh 2013 decisions before the Circuit, a 2014 9th Circuit panel changed course again. *See*, *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414, 432-433 (9th Cir. Cal. 2014) ("The dormant Commerce Clause forbids a state from regulating commerce 'that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" (*citing* to *Healy*)).

And, in 2015, the 9th Circuit seemingly walked away from *Rocky Mt. Farmers Union*, applying *Baldwin* to a matter involving art and having nothing to do with price controls or affirmations:

> [O]ur cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following proposition[]: . . . the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.

Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1322-24 (9th Cir. Cal. 2015).

The circuit courts are in great need of "an exercise of this Court's supervisory power." Rule 10(a).

C. The Need for an Exercise in Supervisory Power

A split in the circuits surely requires an exercise in the supervisory powers of the Supreme Court, but there is more. California has exported its regulatory agenda nationwide. As the instant case demonstrates, so too does Colorado. Whether the issue is fuel standards, renewable energy generation, *pate foi gras*, or the size of cages used to confine egg-laying chickens[25], there is an escalating "low-level trade war" that is taking advantage of the confusion with regard to applicability of the extraterritorial principle as applied to interstate commerce. In

---

[25] *Missouri v. Harris*, 58 F. Supp. 3d 1059 (E.D. Cal. 2014).

Missouri v Harris, the state of Missouri offered the following analogy:

> [I]magine that the State of Missouri decides to enact legislation that requires all grapes to be harvested by people with Bachelor's degrees or greater in horticulture or viticulture and, in addition to that, passes a law that says you can't sell the product of a grape unless it was harvested by someone with a Bachelor's degree or a Master's degree in Missouri.
>
> So if you had a California farmer or a California wine producer who sells a third of its wine into Missouri . . . what does that person do? Do they -- they have several options. They can reduce their production . . . [t]hey can lower all of their prices . . . [o]r they can acquiesce to Missouri's regulations.
>
> The problem there is because they cannot -- they have no way -- that vintner has no way of challenging Missouri law in a political process, the only thing they can do is urge their own legislature to retaliate

Id. at 1069. Under the decision of the court below, Missouri would be allowed to legislate in that manner.

We offer another analogy, one that is being contemplated in several state legislatures – one that is decidedly more visceral. Imagine Kentucky enacts a statute defining a "person" as including any "viable fetus," which is a fetus capable of being viable outside the womb;

and in addition to that, passes a law that prohibits the sale of "day after" abortifacients within the state unless they are produced by employees covered with a health care program that specifically incorporates and protects the right to life of a Kentucky-defined "viable fetus". Under the 10th Circuit decision below, Kentucky could export its "viable fetus" protections across the nation.

Until this Court sorts out the reach of the extraterritorial principle as it applies under the "dormant" Commerce Clause, the Full Faith and Credit Clause and the Due Process Clause, the states will be emboldened to accelerate export of their policies onto their sister states and escalate their low-level trade wars.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

DAVID W. SCHNARE*
MICHAEL D. PEPSON
CHAIM MANDELBAUM
MATTHEW D. HARDIN
FREE MARKET ENVIRONMENTAL LAW CLINIC
9033 Brook ford Rd.
Burke, VA 22015
571-243-7975
Attorneys for Petitioners.

* *Counsel of Record*