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ARTICLES

The Dormant Commerce Clause’s Extraterritoriality Doctrine and Renewable Portfolio Standards

By Davis Yoffe

A comparison of two cases concerning the Dormant Commerce Clause’s applicability to Renewable Portfolio Standards.

Recently, two federal circuit courts, hearing challenges to laws in Colorado and Minnesota, reached conflicting decisions on important issues of state clean energy law.¹ These decisions create uncertainty about the viability of Renewable Portfolio Standards (“RPS”), laws that mandate electricity suppliers produce a certain percent of electricity from non-carbon sources by a given date.² Thirty states and the District of Columbia have implemented RPSs.³ RPSs may require out-of-state power plants to generate electricity in a certain way (with renewables), and as electrons are essentially untraceable, where the electricity actually goes is unknowable. The Supreme Court generally considers extraterritorial application of a state’s law unconstitutional under the Dormant Commerce Clause (“DCC”). In the two recent cases, the Tenth Circuit Court of Appeals upheld Colorado’s RPS, and a divided Eighth Circuit panel found a Minnesota RPS law unconstitutional, with one judge concluding the law ran afoul of the DCC. The final resolution to these and numerous other Commerce Clause challenges is uncertain, complicating long-term energy planning. To handle this legal ambiguity, Congress should remove the uncertainty around RPSs. Congress, which has the power to allow activities otherwise disallowed under the Commerce Clause, could authorize states to regulate in-state electricity consumption, so long as the states’ regulations aim to reduce carbon production.

The Extraterritoriality Doctrine

The Constitution grants Congress authority over interstate commerce,⁴ and as a negative implication of that authority, the states cannot enact laws “that discriminate or unduly burden

¹ These circuits are just the first to hear these type of challenges to state clean energy policies. There are at least seventeen lawsuits challenging state laws for violating the Commerce Clause at various stages of disposition. State Cases, STATEPOWERPROJECT.ORG, https://statepowerproject.org/states/ (last visited June 13, 2016); see also, e.g., Pacificorp v. Wash. Util. & Transp. Comm’n, No. 46009-20II, 2016 Wash. App. LEXIS 859, at *27–33 (Wash. Ct. App. Apr. 27, 2016) (rejecting a DCC challenge to a cost recovery allocation).
⁴ U.S. CONST. art. 1, § 8, cl. 3 (“[Congress shall have the power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).
interstate commerce.”\textsuperscript{5} The negative implication, the DCC, “is driven by concern about economic protectionism [i.e.,] regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”\textsuperscript{6}

The Supreme Court developed three tests to determine when a law impermissibly discriminates or burdens interstate commerce.\textsuperscript{7} One of these, the Extraterritoriality Doctrine, “the most dormant in dormant clause jurisprudence,”\textsuperscript{8} states that a law is per se invalid if it “directly controls commerce occurring wholly outside the boundaries of a State . . . [or when] the practical effect of the regulation is to control conduct beyond the boundaries of the State.”\textsuperscript{9}

The most common state laws that conflict with the Extraterritoriality Doctrine are laws concerning price restrictions tied to out-of-state prices.\textsuperscript{10} For example, the leading case concerned a law that fixed milk’s minimum in-state price and forbade the sale of milk purchased out-of-state at a lower price.\textsuperscript{11} More recent cases invalidated laws mandating that a product’s in-state price can be no higher than the price charged out-of-state.\textsuperscript{12} The Supreme Court declared each law unconstitutional because “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.”\textsuperscript{13}

The Extraterritoriality Doctrine and RPSs

\textsuperscript{5} Quill Corp v. North Dakota, 504 U.S. 298, 312 (1992); see also LAWRENCE H. TRIBE, AMERICAN CONSTITUTION LAW 1030 (3d ed. 2000) (“[T]he Supreme Court has construed the Commerce Clause as incorporating an implicit restraint on state power even in the absence of congressional action . . . .”).

\textsuperscript{6} United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345 (2007).

\textsuperscript{7} These tests are the Pike Balancing Test, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), where a facially neutral state law can be struck down for being “an undue burden on interstate commerce”; the City of Philadelphia Test, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), where a law that “clearly discriminates” against out-of-staters is “per se invalid and can only survive if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism”; and the Extraterritoriality Doctrine explained in this article. See, e.g., Energy & Env’t Legal Inst. v. Épel, 793 F.3d 1169, 1171–72 (10th Cir. 2015).

\textsuperscript{8} Épel, 793 F.3d at 1170.

\textsuperscript{9} Healy v. Beer Institute, 491 U.S. 324, 336 (1989).

\textsuperscript{10} TRIBE, supra note 5, at 1074.


\textsuperscript{13} Id. at 336 (quoting Edgar v. Mite, 457 U.S. 624, 642–43 (1982)); see also BMW v. Gore, 517 U.S. 559, 571 (1996) (“[I]t is clear that no single State could . . . even impose its own policy choice on neighboring States, . . . [because] one State’s power to impose burdens on the interstate market . . . [is] constrained by the need to respect the interests of other States.” (citing Healy, 491 U.S. at 335–36)); see also BMW v. Gore, 517 U.S. at 572 n.16 (“It would be impossible to permit the statutes of [a State] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.” (quoting New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) (alterations in the original)).

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The controversy ultimately stems from the electrical grid's character. The grid is designed so “that power producers do not know and cannot control who consumes the energy that they generate, and consumers are likewise unable to know the source of the power that they consume.”14 “While generators may have contracts with buyers, electrons are not bound by contract, but instead obey the laws of physics, following the path of least resistance.”15 As a result, challengers to RPSs argue that the states are attempting to require out-of-state producers to use a certain level of renewables—and at least some of the electricity produced will never go to the regulating state—and therefore are regulating out-of-state commerce.

In *Energy & Environment Legal Institute v. Epel*,16 the Colorado RPS case, the Tenth Circuit became the first circuit court to hear an Extraterritoriality Doctrine challenge to an RPS. Energy and Environment Legal Institute argued that the RPS regulated out-of-state conduct, as it required Colorado retail utilities to purchase specific types of state-approved renewables or purchase tradable credits from out-of-state suppliers, although only a portion of the out-of-state renewable energy produced would flow to Colorado.17 The court recognized that the Colorado RPS applied extraterritorially.18 However, the court added a gloss onto the usual Extraterritoriality Doctrine analysis: its holding stated that the relevant Supreme Court cases all dealt with price setting and not a product's quality.19 Colorado's RPS dictated only that a certain amount of electricity sold in state be from renewables, and said nothing about prices.20 Therefore, the Tenth Circuit held that the RPS did not violate the Extraterritoriality Doctrine.21

In contrast, in *Heydinger v. North Dakota*,22 the Eighth Circuit struck down a Minnesota law that barred the importation of energy from new, out-of-state facilities that would increase Minnesota's carbon emissions.23 A divided panel of the Eighth Circuit found Minnesota's law unconstitutional, but only one judge, Judge Loken, agreed with the lower court that the law violated the Extraterritoriality Doctrine.24 Judge Loken specifically disagreed with *Epel*, saying that the Extraterritoriality Doctrine applies to more than price setting.25 As “electrons flow freely without regard to state borders,” “when a non-Minnesota generating utility injects electricity into the . . . grid to meet its commitments to non-Minnesota customers, it cannot ensure that those

16 *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015), cert. denied, 136 S. Ct. 595 (2015).
17 Id. at 1170–71.
18 Id. at 1174.
20 *Epel*, 793 F.3d at 1173–74.
21 Id. at 1174–75.
23 Id. at *1.
24 Id. at *2--*19.
25 Id. at *12--*14.

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electrons will not flow into and be consumed in Minnesota.”26 Minnesota’s law would apply to electricity producers in the regional grid, no matter where the electricity ultimately ended up, a clear violation of the Extraterritoriality Doctrine.27 The other judges disagreed with Judge Loken’s DCC analysis, but found that the law was unconstitutional on other grounds and concurred in judgment.28

A Congressional Solution

Adverse legal decisions regarding RPSs leave their future unclear. A solution to this problem is straightforward, but requires Congress to act. The Dormant Commerce Clause is just that, dormant. When a federal statute authorizes a state to legislate in a way that otherwise would not be allowed, that action is no longer constitutionally impermissible.29 Allowing states to set their own standards for in-state consumption of electricity should have bipartisan appeal. It allows states to reduce greenhouse gas emissions, a top Democratic priority.30 For Republicans, granting more authority to states is in-line with their stated goals of allowing local and state governments to innovate to solve problems.31 Consequently, Congress should grant the states the authority to regulate in-state consumption and remove the constitutional cloud around RPSs.

* * * * *

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26 Id. at *15.
27 Id. at *16.
28 Id. at *19–*30 (Murphy, J., and Colloton, J., concurring separately in judgment). Judge Murphy chose to take Judge Loken's analysis to its logical conclusion—since it is impossible to regulate an electron's movement in the grid, a sounder way of reading the statute would be as a regulation not of electricity itself but of only power purchasing contracts, in which one of the parties is located within the state. Id. at *19–*25 (Murphy, J. concurring in judgment). However, he reasoned that the Federal Power Act preempted the law. Id. at *19, *25–*27. Judge Colloton disagreed with even considering the DCC challenge, because she argued the Federal Power Act and the Clean Air Act preempted the Minnesota statute and it was unnecessary to consider the DCC challenge. Id. at *27–*30 (Colloton, J., concurring in judgment).
31 See, e.g., We Believe in America: 2012 Republican Platform 11, GOP.COM, https://www.gop.com/platform/ (last visited June 17, 2016) (“Our States are the laboratories of democracy from which the people propel our nation forward, solving local and State problems through local and State innovations.”).

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The Modern Environmental Lawyer

By Dahlia Sattar

A discussion of the role of corporate environmental attorneys.

Long gone are the days when one’s head went askew at the idea of an environmental lawyer; not only are those in the professional practice of law conversant, the environmental movement has exponentially flourished in the last two decades, making “environmental lawyer” a household name. The 1960s and 1970s saw an outpouring of concern for the environment and the legal implications necessary to propel the movement. By the 1980s, the question of regulatory reform was front-and-center; a reevaluation of the burden of proof was necessary. It readily was placed on those opposing environmental degradation.¹ The 1990s saw an overall mentality shift toward corporations and the environment. As J. William Futrell so aptly put it in his 1994 symposium on environmental and legal ethics, a new form of environmental management formalized in the private sector.² Environmental management, as we well know today, is an integrated part of business practice. Although not all businesses are subject to strict regulations, most still find significance in presenting a good “face” toward environmental concerns.

The corporate environmental attorney of the twenty-first century has a substantial task at hand: (1) zealously represent a corporation; (2) do so while abiding by laws most notably regulating the securities industries; and (3) adhere to the American Bar Association’s Model Rules of Professional Conduct (hereinafter the “Model Rules,” while no longer newly adopted still a topic of debate). Thus, the new environmental lawyer may be more similar to a criminal lawyer than ever before.

The Sarbanes-Oxley Act of 2002, at the heart an effort to restore investor confidence in a shaky U.S. market, put a spotlight on environmental attorneys in the corporate arena.³ Counsel must be able to review

*competitive conditions* in the business involved including, where material, the identity of the particular markets in which the [business] competes . . . [and] *appropriate disclosure* . . . as to the material effects that compliance with Federal, State, and local provisions . . . regulating the discharge of materials in the environment, or otherwise relating to the protection of the environment, may have *upon the capital expenditures, earnings and competitive position* of [the business].⁴

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² J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 LOY. L.A. L. REV. 825 (1994), available at [http://digitalcommons.lmu.edu/iir/vol27/iss3/5](http://digitalcommons.lmu.edu/iir/vol27/iss3/5). It should be noted that this change in mindset was also in part due to the unwanted open-ended liability as a result of heavy litigation and affiliated high costs of doing business.
³ Kristen L. Stewart & Jeffrey W. Acre, *The Sarbanes-Oxley Act of 2002: Implications for Environmental Counsel*, [http://www.klgates.com/files/Publication/db7e0a8d-0a24-45e6-8e80-70a74b0ae906/Presentation/PublicationAttachment/af1eaab9-e8c3-4a4a-ae9a-13df1a0d2e/SOX_Article.pdf](http://www.klgates.com/files/Publication/db7e0a8d-0a24-45e6-8e80-70a74b0ae906/Presentation/PublicationAttachment/af1eaab9-e8c3-4a4a-ae9a-13df1a0d2e/SOX_Article.pdf).
⁴ 17 C.F.R. § 229.103(c)(x)(xii) (Regulation S-K, Item 101(c)(x) and (xii)) (emphasis added).

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Thus, an environmental counsel’s competency goes far beyond that of one piece of the puzzle; it involves a unique mixture of science, law, and policy.

Environmental lawyers must clearly identify their client, whether corporate or otherwise; it is important that they are cognizant of Rule 1.2(b) of the Model Rules, which states in large part that representation “does not constitute an endorsement of the client’s political, economic, social, or moral views or activities.” Preceding this, environmental lawyers more readily assumed the views of clients; therefore those conservationists were unlikely to work in corporate law or for those clients perceived as the “wrong-doers.” And so too a corporate client’s interest do not necessarily always conflict with that of the public interest—in fact now they often overlap.6

Now, much like the criminal lawyer, those in the practice of environmental law are better-suited to represent their client zealously if they are informed on both sides. This idea is not novel; in 1984, John French III in his article addressing much of the same that this article intends to address in present day, argued that “true maturity . . . will not be reached until a practitioner generally feels competent representing either side of an issue.”7 Arguably, the present day environmental attorney is readily suited to represent both sides analogous to the long-held belief that the best prosecutors make the best defense attorneys. Environmental law is a complex system of regulations, which relies heavily on self-reporting of those regulated and in turn heavily on lawyers’ administration of the environmental legal system.8 Competence, according to Model Rule 1.1, requires an attorney to have the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”9 A lawyer who can understand both sides, regardless of his/her ethical viewpoint, is the one who can accurately advise, especially in such a complex arena.

The practice of environmental law has significantly changed over the last few decades. It is no longer simply about regulating that which is apparent but rather about self-regulation of all players.10 The question of whether a good environmental lawyer need be a staunch environmentalist is no longer the crux of the matter. Perhaps, now, we have a better understanding of the ethical playing field, which at best causes us to question still the Precautionary Principle,11 and at worst causes us to justify that which has been largely

5 MODEL RULES OF PROF’L CONDUCT R. 1.2 (2016) (“Scope of Representation & Allocation of Authority Between Client & Lawyer”).
8 Futrell, supra note 2, at 835.
10 For example, those concerns falling within the purview of larger legislation like the National Environmental Protection Act (“NEPA”), the Comprehensive Environmental Response, Compensation, and Liability Act of 1983 (“CERCLA”), and the like.
11 The Precautionary Principle largely has two definitions. The first, spawning from the Rio Declaration, 1992 United Nations Conference on Environment and Development (Agenda 21), stating: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.” The second, based on the idea that

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determined as unethical practice. Thus, the modern environmental lawyer finds herself/himself in a predicament that can only be analogized to that of a criminal attorney—if you do not believe in stealing, should you never defend the accused?

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State Chemical Regulation May Soon Be “Paused”

By Amanda Urban

An outline of key changes to the preemption scheme of the Toxic Substances Control Act.

This past June, the Frank R. Lautenberg Chemical Safety Act, an amendment to the Toxic Substances Control Act (“TSCA”), changed both federal and state chemical regulation.¹ The new law could have a big impact on industry because it allows the EPA to collect fees from manufacturers and processors of chemicals, prohibit a chemical from entering the marketplace, and require businesses to substantiate certain Confidential Business Information claims.²

Among the more controversial sections of the TSCA are provisions outlining the EPA’s authority to preempt state laws and regulations pertaining to the chemicals it reviews under TSCA. Most of the preemption provisions existed previously, but with the Lautenberg Act’s changes, preemption is likely to occur more frequently. Importantly, the Act imposed an affirmative duty on the EPA to review chemicals within set deadlines and prohibited the EPA from considering the cost to industry as it had previously.³ Hence, for the first time, stakeholders are interested in understanding the complex preemption scheme of TSCA.

Among the more black and white portions of the preemption scheme is a grandfather clause for state or local chemical restrictions in effect before April 22, 2016, and state laws enacted before August 31, 2003. The latter date is to protect California’s Proposition 65, governing corporate disclosure of chemicals.⁴ Other preemption exemptions in the Lautenberg Act include state information collection and reporting laws and state laws addressing air, water, or waste regulation through delegated federal authority.⁵ For example, a state law restricting emissions may affect chemicals indirectly, but presuming that the state did not create the law to address chemical safety, it would not be preempted. State laws regarding chemical uses that are outside the scope of TSCA altogether are not preempted—for example, chemicals regulated by the Food and Drug Administration—such as cosmetics and food additives—as well as those chemicals regulated by the EPA under the Federal Insecticide, Fungal, and Rodenticide Act—such as pesticides.⁶

For state regulation that does not meet any of the above exceptions, preemption will depend on the scope and stage of the EPA’s evaluation of the chemical at issue. When the EPA decides to assess a new chemical, the agency must publish a description of the scope of its risk evaluation. In other words, the EPA must explain what chemical it is evaluating, for which of the chemical’s uses or conditions, and for what potential risks. Upon publication, state regulatory authority is paused, or temporarily preempted.

³ 15 U.S.C. § 2605(b)(4). Compare Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991) (striking down the EPA’s asbestos ban promulgated under the previous version of the TCSA because the regulation was not the least burdensome restriction).
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However, temporary preemption does not apply to the first ten chemicals that the EPA evaluates nor to EPA work plan chemicals for which a manufacturer of the chemical requested the evaluation. Additionally, the temporary preemption only reaches state regulation that is within the EPA’s published scope of risk evaluation for the particular chemical. The state is acting within the published scope if it addresses “hazards, exposures, risks, and uses or conditions of use of such chemical substances included in the scope of the risk evaluation.”

Temporary preemption remains in effect until the EPA publishes its risk evaluation, unless the state applies successfully for a waiver based on peer-reviewed science. If the EPA finds that the chemical does not present an unreasonable risk, then preemption becomes long-term or permanent. States may not place any new restrictions on that chemical, and any current restrictions are preempted, unless the state successfully applies for a waiver based on compelling conditions relating to health or environment. If the EPA finds that the chemical presents an unreasonable risk, then the agency lifts the temporary preemption, temporarily. States may restrict the chemical’s use or conditions, but only until the EPA publishes regulations for the chemical. Then, state laws are permanently preempted, unless they fall within one of the many exemptions discussed above.

Overall, the Lautenberg Act's preemption scheme begets inconsistency in chemical regulation. Many unknowns exist under the preemption exemptions, such as what chemical conditions are similar enough to be within the EPA's scope of risk evaluation, and what does it looks like for a state regulation to address water quality, but not chemical safety. Litigation over these and other questions may not be far off considering that the EPA already published risk evaluation determinations for four new chemicals under the new statute. Thus, state regulation is preempted for those chemicals, and any legal challenges to the EPA's determinations and preemption are ripe.

Amanda Urban was a fellow with the International Institute of Law and Environment in Spain, and will clerk with Justice Markman of the Michigan Supreme Court in August. The author would like to thank Jane Montgomery for her mentorship and inspiration in drafting this piece.
Groundwater and the public trust in California
By Alexandra Campbell-Ferrari

Groundwater extractions that affect public trust uses of navigable waters fall within the California State Water Resources Control Board’s authority.

With the enactment of the Sustainable Groundwater Management Act (“SGMA”) in 2014, it is important to understand how existing authorities to regulate groundwater use relate to newly designated authorities under the SGMA. In early August 2016, the California Trial Court held that under the public trust doctrine the California State Water Resources Control Board (“the Board”) has the authority to regulate groundwater extractions that affect public trust uses of navigable waters when the groundwater is hydrologically connected to a navigable river.

The Board’s authority over groundwater under the public trust doctrine is very limited. California is a trustee of the navigable waters of the state under the public trust doctrine. The state’s role as trustee is administered through the Board, which has been authorized by statute to administrate the water resources of the state. The Board’s authority over groundwater under the public trust doctrine depends on the groundwater’s connection to navigable waters. Therefore, the Board has authority over only those groundwaters hydrologically connected to a navigable river and consequently those groundwaters whose use can affect the public’s right to use the navigable waters.

The County argued that the SGMA had explicitly identified when the Board could regulate groundwater leaving no room for other doctrines to add to that list. The court held that the SGMA had not occupied the field, leaving the authority granted through common law doctrines in place. The authorities granted through the SGMA and the public trust doctrine could coexist given that there was no conflict and that neither fully occupied the field. Therefore, the Board could protect navigable waters by regulating groundwater use that affects the public’s right to use navigable waters.

The purpose of the SGMA is “to preserve the security of water rights in the state” by facilitating sustainable groundwater management. The Act requires local agencies to establish Groundwater Sustainable Agencies (GSAs). GSAs in high- and medium-priority basins are required to draft groundwater sustainability plans by 2022 and achieve sustainability by 2040. The SGMA does not modify existing rights, but rather seeks to protect existing rights by empowering the best positioned authorities to sustainably manage groundwater resources.

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3 Id at 15.
4 Id at 13.
5 Id.

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It will be interesting to watch how states will exercise these authorities and how these exercises will affect groundwater use.

* * * * *

Alexandra Campbell-Ferrari is the co-founder and executive director for the Center for Water Security and Cooperation in Washington, DC. She currently serves as the co-chair of the ABA YLD Environmental, Energy and Resources Law Committee.
**RECENT LEGAL DEVELOPMENTS**

1. The Seventh Circuit Court of Appeals upheld the U.S. Department of Energy’s use of the Social Cost of Carbon in its analysis of energy efficiency standards for commercial refrigeration equipment.¹

2. President Barrack Obama signed into law the Frank R. Lautenberg Chemical Safety for the 21st Century Act to reform the Toxic Substances Control Act (“TSCA”).²

3. The Council on Environmental Quality (“CEQ”) released final guidance for federal agencies on how to consider the impacts of their actions on global climate change in their National Environmental Policy Act (“NEPA”) reviews.³

**NEWS AND ANNOUNCEMENTS**

**Solicitation for Articles for Fall Newsletter**

The Fall Newsletter will have an Environmental Justice theme. If you are interested in writing an article that falls within this theme, please submit an article by September 16, to creicher55@gmail.com or acampbellferrari@gmail.com. We will publish our Fall Newsletter in October 2016.

¹ Zero Zone, Inc., v. DOE, Nos. 14-2147, 14-2159, 14-2334 (7th Cir. Aug. 8, 2016).

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