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Employers Resource Management Co. v. Ronk Respondent's Brief Dckt. 44511

IN THE SUPREME COURT OF THE STATE OF IDAHO

EMPLOYERS RESOURCE MANAGEMENT COMPANY, an Idaho Corporation, Plaintiff-Appellant, v. MEGAN RONK, in her capacity as Director of the IDAHO DEPARTMENT OF COMMERCE, Defendant-Respondent.	)	**Supreme Court No. 44511**

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada
Case No. CV OC 1605467

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Honorable Samuel A. Hoagland, District Judge, presiding

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STATEMENT OF THE CASE

I. Nature of the Case

Idaho is one of many states to incentivize the creation of private-sector jobs. The state has done this through its Reimbursement Incentive Act, which makes refundable tax credits available to businesses in any industry with a competitive project that adds a minimum of new, full-time, nonseasonal jobs (depending on whether the location is urban or rural), that pay an average wage that equals or exceeds the wage for the county where the business is located. The Director of the Idaho Department of Commerce reviews applications and refers applications that establish eligibility to the Idaho Economic Advisory Council for its review and decision.

The Appellant, Employers Resource Management Company—ERMC, as it will be called—sued Idaho Commerce Director Megan Ronk, challenging the entire program as unconstitutional. The Reimbursement Incentive Act does not actually do anything to ERMC: It does not extract any money from the company or require the company to do anything. ERMC did not even ever apply for a credit. Instead, ERMC based its claim of injury—which is necessary to establish standing to sue—on the grant of a tax credit to one of ERMC's competitors. The argument went that because the competitor received a tax credit, ERMC would have to upgrade its resources and work harder to keep its employees and do other things to keep up. So, ERMC argued, it had standing to protect its competitive interests under the so-called "competitor standing" rule adopted from federal courts. The problem with this is, as the district court found, that a bare claim of increased competition is insufficient to establish standing.

Martin v. Camas County, 150 Idaho 508, 248 P.3d 1243 (2011). So the district court dismissed the case.

II. Factual and Procedural Background

The program at issue in this case, established under the Idaho Reimbursement Incentive Act, makes refundable tax credits available to businesses in any industry with a competitive project that adds a minimum number of new, full-time, nonseasonal jobs (depending on whether the location is rural or urban) paying an average wage that equals or exceeds the wage for the county where the business is located. *See* Idaho Code § 67-4738(11), (12). The credit is available to both existing Idaho businesses and new Idaho businesses. A successful applicant may receive a refundable tax credit for up to 15 years and up to 30% of the new revenue Idaho receives from the company's corporate income tax, payroll taxes, and sales and use tax attributable to a new project. The Idaho Department of Commerce administers the program. Idaho Code § 67-4740.

A business seeking the credit must apply. Idaho Code § 67-4739. Among the many requirements an applicant must satisfy is that a business must demonstrate community support. *Id.* at (1)(c). This means that the applicable local government unit must demonstrate "active support of the applicant" including a contribution of money, fee waivers, in-kind services, providing infrastructure, or a combination of these things. Idaho Code § 67-4738(5). A letter of commitment by the local governing board must accompany the community match. *Id.*

As part of her review process, the Commerce director and her office conduct an in-depth economic analysis of the project and its application material. This includes analysis of both the

benefits and potential detriments to the state or existing industries in the state. *See* Idaho Code § 67-4741(c) After the Commerce director reviews the application and if she determines that the applicant has established eligibility for the credit, the director submits the application and her recommended term and percentage of refund to the Economic Advisory Council for its review. Idaho Code § 67-4739(2). The Council may approve or reject the project; and, it may ask for additional information to aid its review. *Id.* If the Council approves the application and the director's recommended terms, the applicant business and the Commerce Department enter into an agreement specifying the terms of the credit, including the duration of the credit, the forecasted amount of new tax revenue the project will generate, and the percentage of tax revenues that will be reimbursed to the project. Idaho Code § 67-4740.

The tax credit under the Reimbursement Incentive Act is a performance-based credit. Each year, every business that has entered into an agreement with the Commerce Department for a tax credit must provide a detailed report demonstrating compliance with its agreement and the other requirements. Idaho Code § 67-4741. If on review, the Commerce Department determines the applicant's information is inadequate to justify the tax credit, the Commerce Department may seek further information, or deny the credit. *Id.* at (2). If the Commerce Department determines the information provided by the applicant justifies a tax credit, the Commerce Department issues the tax credit authorization and provides a copy of the authorization to the Idaho State Tax Commission. *Id.* at (3). The applicant then claims the credit on its tax return. The Commerce Department must file a report annually with the Governor and Legislature detailing the Commerce Department's success, with specific economic metrics. Idaho Code § 67-4742.

ERMC sued Idaho Commerce Director Megan Ronk in Ada County in March 2016. R. p. 5. In its complaint, ERMC complained that under the Act, taxpayers "will suffer irreparable harm" if the Commerce Department continues to be able to grant tax credits (R. p. 11), and that the grant of a tax credit to one of ERMC's competitors gave the competitor an "unfair economic advantage," which, ERMC claimed, would allow the competitor to "lure [ERMC'S] employees away . . . ." R. p. 7. Director Ronk moved to dismiss. She argued that there is no general taxpayer standing in Idaho, *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993), so ERMC could not pursue its claim as a taxpayer or on behalf of taxpayers. And the claim of increased competition was foreclosed by *Martin v. Camas County*, where the Court said that it "has never held that increased competition alone is sufficient to confer standing." 150 Idaho at 514, 248 P.3d at 1249.

Once presented with Director Ronk's motion, ERMC sought leave to amend its complaint. It retained its claim that the program gave competitors an unfair economic advantage over it, and that Idaho taxpayers would suffer, but it added some new allegations of injury: It claimed that the competitor was an internet-based company, and so ERMC had to buy "internet competitive software" to keep up. R. p. 41. And, since the competitor's tax credit is determined in part based on the number of employees it hires, ERMC "expects" that the competitor will seek to lure its "key employees" away. *Id.* ERMC "anticipate[s] the need to protect its existing Idaho business since [the competitor] can afford to undercut [ERMC's] pricing . . . ." R. p. 42. So, ERMC claimed, it "will incur expenses in advertising and marketing expenses to retain its clients." *Id.*

More generally, ERMC complained that the program "reward[s] the cannibalization of existing Idaho businesses," "distort[s] the Idaho labor market" by "incentivizing [ERMC] and other existing Idaho businesses to relocate their principal offices" to states with similar tax incentives, "penalize[es] Idaho companies with established business in 'niche' markets," and "pit[s] Counties and Municipalities against each other . . . ." *Id.*

Based on the tax credit to ERMC's competitor, ERMC argued it just could not compete. R. p. 30. ERMC argued that these allegations established that it would suffer certain and imminent harm to its competitive interests in the market and that the harm it would suffer was unique to it. *Id.* The district court rejected these contentions, ruling that ERMC did not have a protectable interest in its competitive position in the marketplace (R. p. 81), and that the harm it alleged it would suffer was "abstract and speculative," not distinct and palpable. R. p. 82. The district court's judgment issued on August 15, 2016, and the appeal from that judgment followed.

ISSUES PRESENTED

The sole issue on appeal is whether ERMC has standing to challenge the constitutionality of the Idaho Reimbursement Incentive Act when its sole allegations of harm are speculative, ill-defined, and self-inflicted and where it cannot show distinct and palpable injury to a protectable legal interest.

STANDARD OF REVIEW

The district court decided Director Ronk's motion under Idaho Rule of Civil Procedure 12(b)(6). So, the Court's task is to look solely to the pleadings to determine whether a claim for

relief has been stated. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). When the motion is, as Director Ronk's motion was, a motion to dismiss for lack of standing, the Court will examine whether ERMC has sufficiently alleged the requisite elements of standing in their complaint to survive the motion to dismiss. *Id.*

ARGUMENT

DISMISSAL WAS PROPER BECAUSE ERMC FAILED TO ESTABLISH STANDING TO CHALLENGE THE IDAHO REIMBURSEMENT INCENTIVE ACT

I. To demonstrate standing, a plaintiff must establish that it has suffered or will suffer distinct and palpable actual or imminent injury-in-fact to a protectable legal interest; that the injury is fairly traceable to the challenged conduct; and that a favorable judgment will redress the injury.

A necessary component of a valid claim is standing. Standing relates to the broader concept of justiciability. Justiciability is concerned with identifying "appropriate or suitable occasions for adjudication by a court." *State v. Philip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015). To that end, courts have devised mechanisms to ensure that they decide actual controversies between actual legal adversaries having actual stakes in the cases they are presented with. *See Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989). In other words, justiciability rules exist to prevent plaintiffs or parties from pulling courts into disputes that are best left for other forums or for the other two branches of government.

Standing focuses on harm to the plaintiff, not on the issues the party wants decided. *Id.* To show standing, and thus to survive a motion to dismiss, a plaintiff must "allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will

prevent or redress the claimed injury." *Id.* at 641, 778 P.2d at 763. The plaintiff's injury must be "peculiar or personal that is different than that suffered by any other member of the public." *Selkirk-Priest Basin Ass'n v. State*, 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996). There is more to the injury requirement than "the defendant harmed me"; standing necessitates a "showing of 'distinct palpable injury' and 'fairly traceable causal connection between the claimed injury and the challenged conduct.'" *Young v. City of Ketchum*, 137 Idaho at 104, 44 P.3d at 1159. And the alleged injury must be *real*—that is, it must be concrete and particularized and actual or imminent, and cannot be conjectural or hypothetical. *State v. Philip Morris, Inc.*, 158 Idaho at 882, 354 P.3d at 195. Vague possibilities of some injury are not enough: "standing can never be assumed based on a merely hypothetical injury." *Id.* And it is not enough to merely allege harm. As this Court has said, "when standing is challenged, mere allegations are not sufficient, and the party invoking the court's jurisdiction must demonstrate facts supporting this allegation." *Id.*

Idaho has adopted the federal justiciability standards, which are grounded in the constitution. *ABC Agra, LLC v. Critical Access Group, Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014). Under the U.S. Supreme Court's standards for justiciability, standing requirements must be "especially rigorous" when courts are asked to conduct constitutional review of the actions of co-equal branches of government. *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). Additionally, the harm must be to a legally protected interest. *Berry v. City of Little Rock*, 904 F.Supp. 940 (E.D. Ark. 1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

II. ERMC's alleged harm is conjectural and is not fairly traceable to the Reimbursement Incentive Act.

ERMC hangs its standing argument on the claim that the grant of a tax credit to its competitor will increase competition in the market where ERMC participates. That increased competition, the company says, has forced, and it thinks will force, the company to do things to meet this competition. It alleges it has had to buy some software and "expects" that it will have to do certain things to keep its employees from moving to the competitor. It "anticipates" that the competitor will be able to "undercut" its pricing, and so it will have to protect its existing business by advertising and marketing. Thus, it says, it has standing as a competitor to protect itself from government action that increases competition. These claims do nothing to meaningfully distinguish this case from *Martin v. Camas County*. There, the Court rejected the plaintiff developer's argument that a county's rezone of other properties to the same designation as his properties would increase the supply of available lots and thereby reduce the value of his. It was not enough, the Court said, that the rezoning would increase the number of lots; the developer "failed to show that he has suffered or is likely to suffer any injury" and that he was "merely speculat[ing] that increased competition will decrease the future value of his property." 150 Idaho at 515, 248 P.3d at 1250.

Just as the developer in *Martin* failed to show that the increase in the supply of building lots (and the attendant competition for buyers) would cause him any harm, here, too, ERMC has merely guessed at what the tax credit to another company will do to its business. It simply "expects" it will have to work to keep its present employees. It "anticipates" that it will have to

work harder to market itself to keep its existing business. But none of those things is certain or imminent.

This is not enough. ERMC argues that status as a competitor and its alleged harm are enough, but applying the competitor standing label to a claim does not obviate its need to show actual or imminent concrete injury. Competitor standing falls under the injury-in-fact prong. Its habitat is largely the D.C. Circuit, which is the primary enclave for litigation challenging things the federal government does. *See* John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376-77 (2006). And lots of these challenges involve highly regulated industries regulated by an alphabet soup of agencies—the EPA, FERC, the NLRB, the FAA, and the FCC, to name a few—under highly complex and detailed rules. These agencies may set rates, establish criteria for participation in a market, or otherwise manage the small details of participating in a particular industry. Spawning from challenges to federal agency conduct by competitors alleging that the agency that controls so much of the market, the D.C. Circuit postulates that companies have a protectable interest in their position in the marketplace and that "economic actors 'suffer [an] injury in fact when agencies lift restrictions on their competitors or otherwise allow increased competition' against them." *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (*quoting La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)). The theory is that a business's protectable position in the marketplace is assumed to be injured when government action that increases competition is certain and imminent.

And a party's obligation to show injury-in-fact is not absolved simply because the

plaintiff may be a competitor of another company affected by the challenged conduct. The increase in competition must be "imminent." *See Sherley*, 610 F.3d at 73-74 (increase in competition was "imminent"; *La. Energy & Power Auth.*, 141 F.3d at 367 (same). The D.C. Circuit has declined, for example, to find competitor standing where there was only "some vague probability" of increased competition and "a still lower probability" of injury from that competition. *DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001). And the concreteness requirement remains. The less imminent the injury is, the more difficult time a plaintiff has showing concreteness. The U.S. Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury are not sufficient.'" *Clapper v. Amnesty International*, 133 S. Ct. 1138, 1147 (2013) (*quoting Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Vague notions of expecting to do some things and anticipating the need to do others is ill-defined, so it is even more difficult to demonstrate concrete or imminent harm. Besides, there are already several tax and other incentives available to businesses that may have some role in how companies do business and compete in their various markets.[1] There are simply too many forces at work to credit fuzzy claims based on expectations and anticipations to find standing.

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[1] A summary of some of these incentives is available here: https://commercestorage.blob.core.windows.net/media/Default/Documents/Incentives_One-sheet_FINAL_condensed.pdf. And Idaho's tax code contains several tax credits that businesses may take advantage of. *See* Idaho Code §§ 63-3029B (tax credit for capital investment); -3029D (qualified equipment utilizing postconsumer waste or postindustrial waste); -3029G (research activities); -3029I (investment in broadband equipment); -3029J (incentive income tax investment credit); -3029EE (new employees); -4403 (capital investment); -4405 (tax credit for new jobs).

National Tank Truck Carriers v. Lewis, 550 F. Supp. 113 (D.D.C. 1982), provides an example. There, the federal Transportation Department lowered the amount of insurance that tank truck carriers had to maintain. The plaintiff, an organization representing tank truck carriers, claimed that lower insurance levels would foster a poor safety record for the industry, thereby increasing the price carriers would have to pay for insurance. 550 F. Supp. at 116. The court found the organization's claim of harm to be "impossible to ascertain" a prediction of how differences in insurance coverage would affect future premiums. *Id.* And here, it is impossible to predict much of anything about how ERMC's business will be affected by a tax credit given to another company.

ERMC attempts to distinguish its complaint from *Martin*, and says its case is more like *Coeur d'Alene Tribe v. Denney*, 2015 WL 7421342, No. 43169 (Idaho Nov. 20, 2015). That case actually demonstrates the incorrectness of ERMC's position. There, the Court, following *Martin*, said that while the Tribe had an interest in its gaming activities, an increase in gaming opportunities by others was not, by itself, sufficient to show standing. 2015 WL 7421342 at *3.

Part of the difficulty ERMC faces in establishing standing is that it is not the object of the government action. ERMC challenges the government's treatment of someone else, rather than government conduct that does anything directly (if at all) to it. The U.S. Supreme Court has made clear that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. at 562. This is because, in such a case, "[t]he existence of one or more of the essential elements of standing 'depends on the unfettered

choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume to either control or predict . . . ." *Id.* (*quoting ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Op. of Kennedy, J.)). So, for example, the D.C. Circuit has denied standing where "the plaintiff seeks to change the defendant's behavior *only as a means* to alter the conduct of a third party, not before the court, who is the direct source of the plaintiff's injury." *Common Cause v. Dep't of Energy*, 702 F.2d 245, 251 (D.C. Cir. 1983). Having failed to allege, much less demonstrate, actual or imminent concrete or certain harm, ERMC has failed an essential element of standing.

Plaintiffs challenging the tax treatment of competitors have no easier go at demonstrating standing. The problem is in showing both imminence and concreteness; it lies in the nature of challenges to government treatment of someone else, and the contingent and speculative nature of the harm flowing from that treatment. An example of this is *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145 (D.C. Cir. 1977). There, for-profit private travel agents earned their living primarily on commissions gained from selling transportation and travel-related services in the States and abroad. *Id.* at 148. The plaintiff travel agents in the case challenged the tax-exempt status of income from tax-exempt 501(c)(3) companies selling transportation and travel-related services—in direct competition with the travel agents. *Id.* Just like ERMC, the travel agents complained that their injury arose from the Internal Revenue Service's "creation of an unfair competitive atmosphere . . . ." *Id.* at 149. But that was not good enough to demonstrate standing. It was "too speculative." *Id.*

And in *Fulani v. Brady*, 935 F.2d 1324 (D.C. Cir. 1991), the D.C. Circuit denied standing

to a political candidate excluded from debates hosted by a non-profit organization who sought to challenge the organization's tax treatment. The plaintiff rooted her challenge in competitor standing, but the court found her claim of injury too contingent to satisfy standing requirements. The court noted that the plaintiff was "challenging the actions of the IRS only as a means of affecting the behavior of the [tax exempt debate-hosting organization]." The IRS actions "caused her alleged injury only due to other intervening causal factors, including the FEC's regulations, the [debate-hosting organization's] actions, and the anticipated behavior of other debate participants." *Id.* 1330-31. *See also Allen v. Wright*, 468 U.S. 737 (1984) (parents of African-American children could not challenge IRS regulations governing tax-exempt status of private schools; claimed injury that exempt schools could draw white students, thus perpetuating racial segregation, was "entirely speculative"). *National Tank Truck Carriers v. Lewis*, 550 F. Supp. 113 (D.D.C. 1982).

But ERMC's case has another problem. It has attempted to manufacture standing through self-inflicted harm. The injury-in-fact requirement cannot be satisfied by self-inflicted harm. *See Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1157 n.8 (10th Cir. 2005); *Petro-Chem Processing, Inc. v. Envtl. Prot. Agency*, 866 F.2d 433, 438 (D.C. Cir. 1989); *Clapper v. Amnesty International*, 133 S. Ct. at 1152-53. Self-inflicted harm done in anticipatory response to government conduct of which a plaintiff is not the object, breaks the causal chain necessary to show standing. Because ERMC has simply alleged a general "unfair advantage," its own expected conduct based on that alleged unfair advantage deprives the government conduct of any causal connection to ERMC's alleged harm. In *Clapper v. Amnesty International*, for example,

the plaintiffs claimed that they had incurred costs based on a fear of being surveilled by a surveillance statute they challenged. But they lacked standing to challenge the statutory surveillance program because absent a "threat of certainly impending interception under § 1881a [the surveillance statute at issue], the costs that they have incurred to avoid surveillance are simply the product of their fear of surveillance," and that fear was "insufficient to create standing." 133 S. Ct. at 1152 (*citing Laird v. Tatum*, 408 U.S. 1 (1972)). Under the rationale in *Clapper v. Amnesty International*, the steps ERMC itself says it has taken or anticipates it will have to take are insufficient to establish standing.

III. The competitor standing theory cannot overcome alleged harm that is conjectural and is not fairly traceable to the challenged law.

The foregoing demonstrates that mere status as a competitor, and government action that may increase competition, is insufficient, by itself, to establish standing. ERMC's statement of the competitor standing rule and the cases it cites do not help its position. Take first *Clinton v. City of New York*, 524 U.S. 417 (1998). The potato growers there would have lost a tax credit if the President's line-item veto effectively eliminating the credit had stood. ERMC suggests that the potato growers had competitor standing "to challenge the President's cancellation of a tax benefit that put [the potato growers] at a disadvantage with its competitors." Brief for Appellant, p. 13. But what ERMC misses is that the statute *gave* the growers something that the line-item veto would have *taken away*. Standing there is fairly straightforward; the plaintiff was the object of the challenged governmental conduct. Indeed, the tax credit was a "bargaining chip" for parties like the potato growers to use in acquiring assets; "[b]y depriving them of their statutory

bargaining chip, the cancellation [of the tax credit] inflicted a sufficient likelihood of economic injury to establish standing under our precedents." *Id.* at 432. But the ERMC here is not the object of the governmental action that it is challenging

Sherley v. Sebelius is of no help to ERMC either. There, the National Institutes of Health issued guidelines pursuant to presidential order that expanded the scope of stem-cell research projects that could be funded by the National Institutes of Health. 610 F.3d at 70-71. A group of physicians challenged that order as unlawful under the Administrative Procedure Act. Thus, the NIH guidelines permitted new entrants into a market for fixed resources; plaintiff physicians would face imminent increased competition for access to this limited, fixed amount of NIH funding. This intensified competition, though, was a *certainty*. *Id.* at 74. Importantly, the government in *Sherley* lifted regulatory restrictions that drew more competitors into a market with limited funds to disperse. Here, of course, the Reimbursement Incentive Act merely makes money available to a business that meets the standards set out in the statute. And ERMC fails to allege any facts relating to actual competition. Again, its only allegations are that it may have to do certain things to compete. But ERMC fails to even allege what the market is, its share, and how, precisely, the tax credit—rather than all the other market factors—would injure ERMC's competitive position in the market. It is therefore far from a certainty—indeed, it is purely speculative—whether ERMC will be injured and how the grant of a tax credit to one competitor will harm it.

ERMC's case is also unlike *U.S. Telecom Association v. Federal Communications Commission*, 295 F.3d 1326 (D.C. Cir. 2002). There, telecom providers challenged the FCC's

order that another telecom provider was a common carrier under the Telecommunications Act and therefore eligible for a subsidy for which the petitioners were not. The common carrier classification and its attendant subsidy allowed the competitor to sell telecom services at a lower cost than the petitioners. *Id.* at 1331. It was in the context of this differential treatment of two classes of providers—one eligible for a subsidy, one not—that the D.C. Circuit found injury to competitive interests sufficient to establish standing. Here, of course, ERMC is eligible to apply for the tax credit if it does the things the statute requires. It has simply chosen not to.

The D.C. Circuit's finding of standing in *U.S. Telecom Association* was aided by affidavits submitted by the petitioners showing that they had lost out on contracts and that the subsidy flowing from the common carrier classification left them "unable to compete for new customers . . . ." *Id.*[2] Even if such showing of harm was relevant in this case or could be made, ERMC has not alleged anything other than speculative guesses at what it *may* have to do to maintain a competitive position in the marketplace. It has not alleged loss of sales, contracts, clients, or an inability to secure new contracts. ERMC is more like the developer in *Martin*, the travel agents in *American Society of Travel Agents*, the candidate in *Fulani*, the parents in *Allen v. Wright*, and the energy company in *DEK Energy*. This is not a situation where ERMC and the competitor play under different sets of rules. ERMC is fully eligible to do the things necessary to be eligible for the tax credit, apply for it, and benefit from it. This is not a case where a

[2] The affidavits were submitted after oral argument in the D.C. Circuit, *id.* at 1330, not on summary judgment, as Plaintiff suggests. *See* Brief for Appellant, p. 15. The case was a petition for review of the FCC order, which means there was no district court and no motion for summary judgment. *See* 28 U.S.C. § 2342(1) (courts of appeals have exclusive jurisdiction to determine validity of final orders of the FCC).

competitor has been given a clearer path that ERMC cannot seek to join. And this is not a case where a regulatory body has expanded the class of businesses that may participate in a given market.

CONCLUSION

The district court's judgment should be affirmed.

DATED this 3rd day of February 2017.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
Carl J. Withroe
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, 2017, I caused to be served a true and correct copy of the foregoing by the following method to:

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