No. 11-889

In The
Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF OF AMICUS CURIAE UPPER TRINITY REGIONAL WATER DISTRICT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEVEN K. BALMAN
Counsel of Record
G. STEVEN STIDHAM
PATRICK O. WADDEL
SNEED LANG HERROLD PC
1 West Third Street, Suite 1700
Tulsa, Oklahoma 74103-3522
sbalman@sneedlangherrold.com
(918) 588-1313

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. The Oklahoma Anti-Export Law Violates The Dormant Commerce Clause	8
A. The Tenth Circuit Rewrote The Red River Compact	10
1. Section 2.01	10
2. Section 2.10	12
3. Section 1.01	14
B. Interstate Compacts Are The Preferred Method Of Allocating Interstate Waters	17
II. The Oklahoma Anti-Export Law Violates The Supremacy Clause	19
A. Interstate Water Apportionment Is Not An Area Of Longstanding State Regulation	20
1. Field Preemption	20
2. *California v. United States*	22
B. The Provisions Of The Red River Compact Do Not Call For "Pronounced Deference" To State Water Laws	22
C. The Tenth Circuit Misreads Section 5.05(b)(1) Of The Red River Compact	23

TABLE OF CONTENTS – Continued

Page

D. The Tenth Circuit Should Not Have Considered The "Interpretive Comments" To The Red River Compact...... 25

CONCLUSION.. 28

TABLE OF AUTHORITIES

Page

CASES

Affiliated FM Ins. v. Owens-Corning Fiberglas Corp., 16 F.3d 684 (6th Cir. 1994) 11

Arizona v. California, 373 U.S. 546 (1963) 9

California v. United States, 438 U.S. 645 (1978) 22

Chisom v. Roemer, 501 U.S. 380 (1991) 27

Colorado v. New Mexico, 459 U.S. 176 (1982) 18, 19, 20

Erie Railroad v. Tomkins, 304 U.S. 64 (1938) 20

Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88 (1992) 20

Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980) 27

Heydon's Case, 76 Eng. Rep. 637 (Ex. 1584) 15

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 23

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 6

Kansas v. Colorado, 206 U.S. 46 (1907) 17, 18

Montana v. Wyoming, ___ U.S. ___, 131 S.Ct. 1765 (2011) 9

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) 9

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 6

PLIVA, Inc. v. Mensing, ___ U.S. ___, 131 S.Ct. 2567 (2011) 21

TABLE OF AUTHORITIES – Continued

Page

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 21

Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 27

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 5, 6

Tarrant Regional Water District v. Herrmann, 656 F.3d 1222 (10th Cir. 2011) .... *passim*

Tennessee Gas Pipeline v. FERC, 17 F.3d 98 (5th Cir. 1994) 11

Texas v. New Mexico, 462 U.S. 554 (1983) 9

Texas v. New Mexico, 482 U.S. 124 (1987) 9

United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority, 550 U.S. 330 (2007) 6

United States v. Public Utils. Comm'n of Cal., 345 U.S. 295 (1953) 27

Virginia v. Maryland, 540 U.S. 56 (2003) 17

Williams v. United States, 458 U.S. 279 (1982) 28

Wyeth v. Levine, 555 U.S. 555 (2009) 21, 23

STATUTES

Okla. Stat. Ann. Tit. 82, § 1B 4

Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980) .... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

A. Dan Tarlock, *Law of Water Rights and Resources* § 10:28 (2010) ....*passim*

Alexander M. Bickel, *The Least Dangerous Branch* 9 (1962)...19

Antonin Scalia, *A Matter of Interpretation* (1997)...10, 27

Charles J. Meyers, *The Colorado River*, 19 Stan. L. Rev. 1 (1966)...17

E. Allan Farnsworth, *Contracts* (4th ed. 2004)...10, 11, 12, 15, 16

Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 5.3.1 (2d ed. 2002)......8, 19, 20, 21, 23

Joseph M. Perillo, *Calamari And Perillo On Contracts* § 3.13 (5th ed. 2003).............11, 12, 14, 16

Karl N. Llewellyn, *Remarks On The Theory Of Appellate Decision And The Rules Or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950) 10

Nicholas Andrew, *Interstate Water Transfers and the Red River Shootout*, 41 Tex. Envtl. L.J. 181 (2011)...2, 4

Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Update* (2011)...............3

Oklahoma Water Resources Board, *Status Report to the Office of the Governor* (2002)...................3

TABLE OF AUTHORITIES – Continued

Page

Restatement (Second) of Contracts (1981)

§§ 200-204 16

§ 202(1) 14

STATEMENT OF INTEREST

The Upper Trinity Regional Water District ("Upper Trinity") – like Tarrant Regional Water District, the Petitioner in the captioned case ("Tarrant") – wants to acquire water from the Oklahoma portion of the Red River Basin.[1] *See* Petition for a Writ of Certiorari filed by Tarrant on January 19, 2012 (the "Petition") at 5.

The Red River forms the border between Oklahoma and Texas. Oklahoma, Texas, Arkansas and Louisiana signed an interstate agreement apportioning water from the Red River Basin. That agreement – the Red River Compact – was approved by Congress in 1980, Pub. L. No. 96-564, 94 Stat. 3305 (1980), and has the status of federal law.

A conservation district located in North Texas, Upper Trinity was created by the State of Texas in 1989. The purpose of Upper Trinity is to provide towns, cities and utilities in its service area with a reliable long-term water supply.

This case has a direct bearing on Upper Trinity's ability to fulfill its purpose. Upper Trinity has filed applications with the Oklahoma Water Resources

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties have consented to the filing of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

Board for permits to obtain water from the Kiamichi River and Boggy Creek basins and from Lake Texoma – all areas of the Red River Basin located in Oklahoma. The Board – using the same water-allocation criteria challenged in the case below – has held the Upper Trinity applications in abeyance and refused to grant permission to acquire its apportionment of water from Oklahoma.

The Water Shortage In North Texas

Upper Trinity provides water to Denton County and two other North Texas counties. Its service area is part of the Dallas-Fort Worth Metropolitan Area. In years to come, Upper Trinity's needs are expected to increase:

> The Dallas-Fort Worth Metropolitan Area's growth is putting a strain on the availability of current water supplies in North Texas. Even with state-of-the-art water recycling and a dramatic shift in the efficiency of consumer water use, this area appears headed toward insufficient water supplies in mere decades as the population's projected growth numbers continue to climb. As a result, various water districts, utilities and municipalities are engaging in a large-scale competition to grab up all available water rights within a cost-effective distance.

Nicholas Andrew, *Interstate Water Transfers and the Red River Shootout*, 41 Tex. Envtl. L.J. 181, 181 (2011) ("Andrew").

The Dallas-Fort Worth Metropolitan Area is the fourth largest in the country. The population of the Dallas-Fort Worth Metropolitan Area is projected to double by 2060. Demand for water will substantially exceed supply.

The Water Surplus In Oklahoma

The water districts of North Texas have identified Oklahoma as a practical long-term source of water. Oklahoma is located in the Mississippi River watershed and has substantial water resources. The Oklahoma Water Resources Board estimates that only 1.87 million acre-feet per year of stream water is currently used in Oklahoma. Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan Update* at 64 (2011).

Another 34 million acre-feet of unused water flows out of Oklahoma annually, toward the Gulf of Mexico. The Oklahoma Water Resources Board has stated that "the average annual flow of the six major river basins in southeastern Oklahoma is 6,363,628 acre-feet." *Status Report to the Office of the Governor* (2002). That is enough water to supply the entire State of Oklahoma three times over.

The Oklahoma Anti-Export Law

Oklahoma regulations effectively prohibit the export of water to other states. "[T]he underlying legal framework is 'unapologetically protectionist'." Petition at 3. In 2004, the Oklahoma Legislature

"mandated a complete prohibition on the sale of water outside the state pending a comprehensive state-wide water study. . . ." Andrew, 41 Tex. Envtl. L.J. at 182 & n. 8, *citing* Okla. Stat. Ann. Tit. 82, § 1B. The Oklahoma Legislature amended the prohibition statute in 2008 – during the pendency of litigation – "specifically to forbid Oklahoma water districts from issuing out-of-state export permits without the express approval of the Oklahoma legislature." Andrew, 41 Tex. Envtl. L.J. at 182 & n. 9.[2] *See* Petition at 7-10 (describing the Oklahoma water embargo statutes). The Oklahoma statutes have been called an "anti-export law," *id.* at 202 & n. 147, and are collectively referred to herein as the "Oklahoma anti-export law."

Oklahoma claims plenary jurisdiction to regulate the waters of the State of Oklahoma, including the waters of the Red River Basin within the state-line.[3] That claim is repugnant to federal law. Section 2.07 of the Red River Compact provides:

> **Nothing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those**

[2] New legislation would only permit out-of-state export permits authorized by popular vote of the people of Oklahoma, that is, by referendum.

[3] The Attorney General of the State of Oklahoma commenced an original action in the Supreme Court of Oklahoma on February 10, 2012, to establish that the State of Oklahoma has regulatory control of all waters within its boundaries (including without limitation interstate waters apportioned by the Red River Compact).

claiming under its authority, in, over and to water of the Red River Basin.

(emphasis added). Section 2.07 grants the United States plenary jurisdiction over the water of the Red River Basin.[4]

SUMMARY OF ARGUMENT

The Dormant Commerce Clause

Tarrant poses two questions. *See* Petition at ii. Tarrant's first question is: Does the Oklahoma anti-export law violate the dormant Commerce Clause *because* the Red River Compact does not authorize such a state law? Or did Congress somehow authorize the State of Oklahoma to enact the Oklahoma anti-export law when it (*i.e.*, Congress) approved the Red River Compact?

Water is an article of interstate commerce. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953-54 (1982). "Congress has the power to apportion interstate rivers. The Commerce Clause is a complete source of congressional authority to allocate an interstate river to further federal interests." A. Dan Tarlock, *Law of Water Rights and Resources* § 10:28

[4] "Water of the Red River Basin" is defined in Section 3.01(d) of the Red River Compact to include "tributaries." "Tributaries" include both "intrastate" and "interstate" tributaries of the Red River. *Id.* § 3.01(e-g).

at 10-49 & n. 1 (2010) (hereinafter, "Tarlock"). "It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause." *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979).

The Oklahoma anti-export law discriminates against out-of-state importers of Oklahoma water. "Discrimination" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 550 U.S. 330, 338 (2007). Because the Oklahoma anti-export law is motivated by "simple economic protectionism," it is subject to a "virtually *per se* rule of invalidity." *Id.*, *quoting Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). *See Sporhase*, 458 U.S. at 957-59; Tarlock § 10:29 at 10-53.

The United States Court of Appeals for the Tenth Circuit held that Congress, by approving the Red River Compact, authorized Oklahoma to enact the Oklahoma anti-export law without violating the dormant Commerce Clause. *See Tarrant Regional Water District v. Herrmann*, 656 F.3d 1222, 1237-39 (10th Cir. 2011).

The Tenth Circuit misreads the Red River Compact. An interstate compact is a contract, and must be read as such. The Tenth Circuit fails to give effect and meaning to all the terms of the Compact. The Tenth Circuit effectively "rewrites" the Compact by

inventing a state "plenary power" to regulate water. *See* Petition at 19-20 and 27.

One last point: Absent an interstate compact, the equitable apportionment of interstate water in the Red River Basin would be a matter of federal common law.

Supremacy Clause

Tarrant's second question is: Does the Red River Compact preempt the Oklahoma anti-export law? Petition at ii. The Compact expressly provides for the equitable apportionment of interstate water in the Red River Basin. The Oklahoma anti-export law defeats that purpose, and is preempted by federal law – the Compact.

Federal law occupies the field of interstate water regulation. There has been a federal common law of the "equitable apportionment" of interstate water for over a century. *See* Argument – Part I.B., *infra*. As a result, the Compact preempts the Oklahoma anti-export law under the doctrine of "field preemption."

In the alternative, the Compact preempts the Oklahoma anti-export law under the doctrine of "express preemption." The express language of the Compact limits state water regulation to a secondary, subordinate *intrastate* role. And, of course, Section 2.07 of the Compact makes it clear that nothing in the Compact shall be deemed to "impair or affect the

powers, rights, or obligations" of the United States "in, over, and to water of the Red River Basin."[5]

Among other things, the Tenth Circuit opinion holds that the Compact does *not* preempt the Oklahoma anti-export law because the legislative history – the "Interpretive Comments" of the drafters of the Compact – does not indicate that the drafters of the Compact intended it to preempt state law. *See Tarrant*, 685 F.3d at 1245. Significantly, the drafters of the Compact were not members of Congress.

The absence of legislative history does not indicate a Congressional intent (or lack of intent) to preempt a statute. *See* Argument – Part II.D., *infra* (discussing the Conan Doyle theory of statutory interpretation).

ARGUMENT

I. The Oklahoma Anti-Export Law Violates The Dormant Commerce Clause

The "dormant" Commerce Clause is the implied, unexercised, reserve power of Congress to regulate interstate commerce. "The *dormant commerce clause* is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce." Erwin Chemerinsky, *Constitutional Law:*

[5] The Tenth Circuit's *Tarrant* opinion does not acknowledge, quote or discuss Section 2.07 of the Red River Compact.

Principles and Policies § 5.3.1 at 401 (2d ed. 2002) (hereinafter, "Chemerinsky").

Congress clearly has the power to apportion water from multistate river basins. Tarlock § 10:28 at 10-49 & n. 1 ("Congress has the power to apportion interstate rivers"), *citing Arizona v. California*, 373 U.S. 546, 597-98 (1963). Congress used that power when it approved the Red River Compact. Tarlock § 10:28 at 10-49 to 10-50 & n. 6, *citing Texas v. New Mexico*, 462 U.S. 554, 564, 567-68 (1983).

According to the Tenth Circuit, Congress did not prohibit the enactment of the Oklahoma anti-export law when it approved the Red River Compact. *See Tarrant*, 656 F.3d at 1237-39. Congress can consent to a state regulation of interstate commerce that would otherwise violate the dormant Commerce Clause. "Congressional consent can transform otherwise unconstitutional state action into permissible state action." *Tarrant*, 656 F.3d at 1233-34.

The Tenth Circuit states that an interstate compact "remains a legal document that must be construed and applied in accordance with its terms." *Tarrant*, 656 F.3d at 1237, *quoting Texas v. New Mexico*, 482 U.S. 124, 128 (1987). "A compact is, after all, a contract." *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting), *quoted in* Tarlock § 10:24 at 10-38 & n. 8. "As with all contracts," compacts must be interpreted "according to the intent of the parties, here the signatory States." *Montana v. Wyoming*, ___ U.S. ___, 131 S.Ct. 1765, 1771 n. 4 (2011), *quoted in* Petition at 34.

> A contract or agreement is
>
> to be read as a whole and an interpretation that gives effect to every part of the agreement is favored over one that makes some part of it mere surplusage.

E. Allan Farnsworth, *Contracts* § 7.11 at 458 & nn. 12-13 (4th ed. 2004) (footnotes omitted) (hereinafter, "Farnsworth"). "Every word and clause must be given effect." Karl N. Llewellyn, *Remarks On The Theory Of Appellate Decision And The Rules Or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395, 401 (1950), *cited in* Antonin Scalia, *A Matter of Interpretation*, 26 n. 32 (1997) (hereinafter, "Scalia").

A. The Tenth Circuit Rewrote The Red River Compact

The Tenth Circuit analyzed the Red River Compact and determined that Congress authorized Oklahoma to enact the Oklahoma anti-export law. *Tarrant*, 656 F.3d at 1237-39. To reach that result, the Tenth Circuit had to "rewrite" the Red River Compact.

1. Section 2.01

The Tenth Circuit does not follow ordinary rules of construction: The Tenth Circuit construes Section 2.01 of the Red River Compact, but does not quote the relevant part of Section 2.01. It does not account for and give effect to all of the words in Section 2.01.

"A writing must be interpreted as a whole and no part should be ignored." Joseph M. Perillo, *Calamari And Perillo On Contracts* § 3.13 at 159 & n. 9 (5th ed. 2003) (hereinafter, "Calamari & Perillo"), *citing Tennessee Gas Pipeline v. FERC*, 17 F.3d 98, 102-03 (5th Cir. 1994); *Affiliated FM Ins. v. Owens-Corning Fiberglas Corp.*, 16 F.3d 684, 686 (6th Cir. 1994); Farnsworth § 7.11 at 458 & nn. 12-13.

Section 2.01 provides:

> Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state, **but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact**.

(emphasis added).

The Tenth Circuit does not quote or discuss the portion of Section 2.01 that appears in bold print.[6] That language permits states to "administer water rights and uses . . . **subject to** the availability of water in accordance with the apportionments made

---

[6] To be more precise, the Tenth Circuit does not quote or discuss the bold print language from Section 2.01 in its "Consent Analysis." *See Tarrant*, 656 F.3d at 1237-39. Earlier, in its review of the trial court's order, the Tenth Circuit quoted the bold print language but did not attribute meaning to the language. *Id.* at 1236.

by this Compact" (emphasis added). The state's rights to regulate water are subordinate to the federal apportionment of that water.

Significantly, the Tenth Circuit is incorrect when it suggests that Section 2.01 "recognizes **plenary state authority** over water use . . . **using unqualified terms**." *Tarrant*, 656 F.3d at 1237 (emphasis added). The words "subject to" in Section 2.01 are *qualifying terms*. The very idea of "plenary state authority" is completely inconsistent with Section 2.07 of the Red River Compact:

> Nothing in this Compact shall be deemed to impair . . . the powers . . . of the United States . . . in, over and to water of the Red River Basin.

2. Section 2.10

According to the Tenth Circuit, "Section 2.10 echoes and reinforces § 2.01's expansive acknowledgement of state discretion. . . ." *Tarrant*, 656 F.3d at 1237. It would be more correct to say that Section 2.10 "echoes and reinforces" the *restrictions* and *qualifications* on state discretion set forth in Section 2.01.

The Tenth Circuit does not quote the relevant parts of Section 2.10, and does not give effect to all the words therein. *See* Calamari & Perillo § 3.13 at 159 & n. 9; Farnsworth § 7.11 at 458 & nn. 12-13. Section 2.10 provides in pertinent part:

Nothing in this Compact shall be deemed to:

(a) Interfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, **not inconsistent with its obligations under this Compact**;

(b) Repeal or prevent the enactment of any legislation or the enforcement of any requirement by any Signatory State imposing any additional conditions or restrictions to further lessen or prevent the pollution or natural deterioration of water within its jurisdiction; **provided nothing contained in this paragraph shall alter any provisions of this Compact dealing with the apportionment of water or the rights thereto**. . . .

(emphasis added).

The Tenth Circuit does not quote or discuss the portion of Section 2.10 that appears in bold print.[7] That language permits state regulations "not inconsistent with" the state's obligations under the Red River Compact. The state's rights to regulate water are subordinate to the federal apportionment of that

[7] *See Tarrant*, 656 F.3d at 1237-39 ("Consent Analysis"). Later, in its discussion of the Supremacy Clause issue, the Tenth Circuit quoted the bold print language from Section 2.10 but did not attribute meaning to the language. *Id.* at 1242-43 and 1246.

water. *See* Red River Compact § 2.07 ("Nothing in this Compact shall be deemed to impair . . . the powers . . . of the United States. . . .").

3. Section 1.01

The Tenth Circuit states that

> [t]he Compact states its purpose to govern the "use, control and distribution" of the compacted water. *See id.* § 1.01(a). . . . Section 1.01(a) . . . manifests the wide scope of state authority. The word "control" is unqualified and, along with the words "use" and "distribution" and the Compact sections that follow, indicates that each Signatory State is authorized to regulate the appropriation and transport of apportioned water and that such authorized regulation is not limited to particular purposes.

Tarrant, 656 F.3d at 1238-39.

Contracts should be interpreted in light of their purpose:

> The goal of interpretation is to determine the common intention of the parties – if they had one. . . . The principal purpose of the parties is of particular importance in determining meaning.

Calamari & Perillo § 3.13 at 158 & nn. 2, 4. "[I]f the principal purpose of the parties is ascertainable it is given great weight." Restatement (Second) of Contracts § 202(1) (1981) (hereinafter, the "Restatement"),

quoted in Farnsworth § 7.10 at 454 & n. 16. "Such purpose interpretation has a secure place in the field of statutory interpretation, where it stems from *Heydon's Case*."[8] Farnsworth at 454-55 & n. 17.

Unfortunately, the Tenth Circuit does not correctly identify the purpose of the Red River Compact. The Tenth Circuit does not quote the relevant part of Section 1.01, and does not give effect to all the words therein. Section 1.01 provides in pertinent part:

> The **principal purposes** of this Compact are:
>
> (a) **To promote interstate comity and remove causes of controversy between each of the affected states by governing** the use, control and distribution **of the interstate water of the Red River and its tributaries;**
>
> (b) **To provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries;** . . .
>
> (e) **To provide a basis for state or joint state planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof.**

(emphasis added).

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[8] 76 Eng. Rep. 637 (Ex. 1584) (Coke, J.) (first case to use the "mischief rule").

The Tenth Circuit does not quote or discuss Sections 1.01(b) or 1.01(e) of the Red River Compact. Those sections spell out the purpose of the Compact is "[t]o provide an *equitable apportionment* among the Signatory States of the water of the Red River and its tributaries" and to allow for planning and action by ascertaining and identifying "*each state's share in the interstate water of the Red River Basin and the apportionment thereof*" (emphasis added). The purpose of the Red River Compact is to impose *federal* regulation and control upon the water in the Red River Basin.

Federal "equitable apportionment" of interstate water is the real purpose of the Red River Compact. *See* Red River Compact – Preamble and §§ 1.01(b) and 2.07.[9]

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[9] When the intent and meaning of a contract can be determined from the four corners of the contract, it is not appropriate to rely upon intrinsic evidence to determine intent and meaning. *See* Farnsworth § 7.12 at 464 & n. 13 ("four corners" rule); Calamari & Perillo § 3.10 at 151 & nn. 1-2 ("Plain Meaning Rule"); Restatement §§ 200-204. As a consequence, the Tenth Circuit's reliance upon "Interpretive Comments" (*i.e.*, legislative history) was inappropriate. *See* Argument – Part II.D., *infra* (questioning the Tenth Circuit's reliance upon legislative history).

The Tenth Circuit also fails to consider Sections 2.08, 2.09 and 2.11 of the Red River Compact. Those provisions all are inconsistent with the Tenth Circuit theory that Oklahoma retains plenary power to regulate Red River Basin water.

B. Interstate Compacts Are The Preferred Method Of Allocating Interstate Waters

In the absence of an interstate compact, this Court would have the responsibility for equitably apportioning the water in the Red River Basin. *See* Tarlock §§ 10:3 and 10:4. Under the doctrine of equitable apportionment, "[e]ach state has an equal right to use the flow of an interstate stream. *Id.* § 10:4 at 10-4 & n. 2-1. *See Kansas v. Colorado*, 206 U.S. 46 (1907); *Virginia v. Maryland*, 540 U.S. 56 (2003) (cited and discussed in Tarlock).

"Interstate compacts are said to be the preferred method of allocating interstate waters." Tarlock § 10:24 at 10-36 & n. 1, *citing*, *inter alia*, Charles J. Meyers, *The Colorado River*, 19 Stan. L. Rev. 1, 48-50 (1966). Interstate water compacts exist to protect states from discrimination and overreaching by other states:

> Interstate compacts are negotiated to guarantee individual states a share of unallocated water by protecting the state against another state putting the water to use first and acquiring an "equity" under the law of equitable apportionment.

Tarlock § 10:35 at 10-61.

Significantly, the Court has exercised the power of equitable apportionment of interstate streams since 1907. Tarlock § 10:4 at 10-3 & n. 1, *citing Kansas v. Colorado*, 206 U.S. 46 (1907). A leading treatise summarizes the Court's holding as follows:

> Kansas sued Colorado to enjoin Colorado's upstream diversions along the Arkansas River and argued that Colorado could not use the river under the natural flow theory of riparian rights; Colorado responded that territorial sovereignty gave it the right to deplete the entire flow of the stream. Kansas' complaint was dismissed without prejudice, but the Court announced a sharing rule for future cases. **Each state has an equal right to use the flow of an interstate stream.**

Tarlock at 10-3 to 10-4 & nn. 2-2.1 (footnotes omitted; emphasis added).

The rule announced in *Kansas v. Colorado* – the "equal share" rule – is the general rule adopted in the Compact. *See* Red River Compact – Preamble and § 5.05(b)(1).

The Court's power of equitable apportionment is a federal common law power. The Court explained that power in *Colorado v. New Mexico*, 459 U.S. 176 (1982):

> Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream. . . .
>
> The laws of the contending States concerning intrastate water disputes are an important consideration governing equitable apportionment. . . . **But state law is not controlling.** Rather, the just apportionment of interstate waters is a question of federal law

> that depends "upon a consideration of the pertinent laws of the contending States and *all other relevant facts*." *Connecticut v. Massachusetts*, 282 U.S., at 670-71, 51 S.Ct., at 289 (emphasis added).

459 U.S. at 183-84 (bold emphasis added).

II. The Oklahoma Anti-Export Law Violates The Supremacy Clause

"It is perfectly evident that the purpose of the [Supremacy Clause] is to make federal authority supreme over state." Alexander M. Bickel, *The Least Dangerous Branch* 9 (1962). When federal laws conflict with state laws, federal laws preempt state laws. *See* Chemerinsky at 4.

The Red River Compact was approved by Congress, and is federal law for the purposes of the Supremacy Clause. As shown in Part I., *supra*, the Red River Compact expressly permits state regulation that does not conflict with the Compact's federal water apportionment regime. As a consequence, the Red River Compact expressly preempts state law that does so conflict. As a general rule, the United States has plenary authority to regulate the waters of the Red River Basin. *See* Red River Compact § 2.07. Because the Oklahoma anti-export law clearly conflicts with the federal Compact, *e.g.*, Petition at 9 & n. 3, 14 & n. 5, 26 & n. 13, the Red River Compact preempts the Oklahoma anti-export law.

A. Interstate Water Apportionment Is Not An Area Of Longstanding State Regulation

The Tenth Circuit asserts that preemption is "disfavored in this area of longstanding state regulation of water." *Tarrant*, 656 F.3d at 1245. In actuality, the equitable apportionment of interstate water is a matter entrusted to the federal courts. It is well-settled that "there is no federal general common law." *Erie Railroad v. Tomkins*, 304 U.S. 64, 78 (1938). There is, however, a specialized federal common law of equitable apportionment of interstate waters. *See* Argument – Part I.B., *supra*. That body of federal common law has existed for over 100 years. *Id.* "[S]tate law is not controlling." *Colorado v. New Mexico*, 459 U.S. at 184 (quoted in Argument – Part I.B., *supra*).

1. Field Preemption

In its *Tarrant* opinion, the Tenth Circuit recognizes three types of federal preemption:

(a) express preemption;

(b) implied field preemption; and

(c) implied conflict preemption.

656 F.3d at 1241. *See* Chemerinsky § 5.2.1 at 376-78, *quoting Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (to the same effect).

The Tenth Circuit characterizes the instant case as a potential "implied conflict preemption" case, but

concludes that there is no conflict and, accordingly, no preemption. *Tarrant*, 656 F.3d at 1241-45.

As explained above, federal regulation of interstate waters has been pervasive and longstanding. Because the federal government has "take[n] unto itself all regulatory authority" in the field of interstate water apportionment, this would seem to be a *field preemption* case, rather than a *conflict preemption* case. *Tarrant*, 656 F.3d at 1241, *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See* Chemerinsky § 5.2.3 at 384-91.

The Tenth Circuit recognizes a presumption that federal law will *not* preempt state law under the Supremacy Clause – a presumption against preemption. *See Tarrant*, 656 F.3d at 1242. The presumption applies in "implied conflict preemption" cases. *Id.* If Upper Trinity is correct, and this is a "field preemption" case, there is no presumption against preemption. *See Wyeth v. Levine*, 555 U.S. 555, 565-67 & n. 3 (2009); *Tarrant*, 656 F.3d at 1242.[10]

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[10] There was no discussion of the presumption against preemption in the recent case of *PLIVA, Inc. v. Mensing*, ___ U.S. ___, 131 S.Ct. 2567 (2011). *Mensing* was an "impossibility" case. *Id.* at 2577. This case is also an "impossibility" case. The Oklahoma water embargo makes it impossible to apportion water in the manner contemplated and required by the Red River Compact. *See* Petition at 9 n. 3 ("Despite the [Red River] Compact's apportionment to Texas of an equal share of the water in reach II, subbasin 5, Oklahoma argues that all water located in the State belongs to Oklahoma for its exclusive in-state use")

(Continued on following page)

2. *California v. United States*

The Tenth Circuit asserts that water law is a "matter [ ] of longstanding state regulation" and quotes an excerpt from *California v. United States*, 438 U.S. 645 (1978), regarding

> the consistent thread of purposeful and continued deference to state water law by Congress.

438 U.S. at 653, *quoted in Tarrant*, 656 F.3d at 1242.

California v. United States was a reclamation case, not an equitable apportionment case. No interstate waters were involved. Applying the Reclamation Act of 1902, the Court ultimately held that a state may impose any condition on control, appropriation use or distribution of water in a federal reclamation project which is not inconsistent with clear congressional directives respecting the project. *Id.* at 679. *California v. United States* is inapposite.

B. The Provisions Of The Red River Compact Do Not Call For "Pronounced Deference" To State Water Laws

The Tenth Circuit erroneously asserts that the provisions of the Red River Compact "generally call for pronounced deference to, not displacement of, state water laws." *Tarrant*, 656 F.3d at 1245. As shown in

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and 33-34 ("The presumption against preemption does not apply to interstate compacts.").

Part I.A. of the Argument, *supra*, the Red River Compact expressly provides that state regulatory power is conditioned upon, subject to and subordinate to federal law (*i.e.*, the Compact). *See* Red River Compact §§ 1.01, 2.01, 2.07 & 2.10.

The express language of the Red River Compact describes the potential for an inconsistency or conflict, and expressly imposes a rule of priority and preference for federal law. This case is an *express preemption* case, rather than an *implied conflict* case. *See* Chemerinsky § 5.2.2 at 380-81, *citing Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (Federal Meat Inspection Act preempted state law). There is no presumption against preemption in an express preemption case. *Wyeth*, 555 U.S. at 565-66 & n. 3; *Tarrant*, 656 F.3d at 1242.

C. The Tenth Circuit Misreads Section 5.05(b)(1) Of The Red River Compact

The Tenth Circuit asserts that Section 5.05(b)(1) of the Compact "can reasonably be read to foreclose Tarrant's interpretation [*i.e.*, Tarrant's interpretation of the Compact as preempting Oklahoma's anti-export law]." With respect, that is not a very ambitious claim. It implies that Section 5.05 can also reasonably be read to *support* Tarrant's interpretation.

Section 5.05(b)(1) adopts the conventional federal common law rule of equitable apportionment – "equal rights." *See* Argument – Part I.B., *supra*; Tarlock

§ 10:4 at 10-4 & n. 2-1 ("Each state has an equal right to use the flow of an interstate stream."). That rule is consistent with Tarrant's Supremacy Clause argument: The Oklahoma anti-export law is inconsistent with the equal apportionment rule of Section 5.05(b)(1) of the Compact and is preempted.

The Tenth Circuit admits that Section 5.05(b)(1) can be read in the manner proposed by Tarrant – that the phrase "Signatory States shall have equal rights to the use of . . . " can mean "share and share alike." *Tarrant*, 656 F.3d at 1246.

> It may be possible to identify a different interpretation of this phrase [*i.e.*, "equal rights to the use of"] so that it conflicts with the Oklahoma state water laws, but simply finding a possible alternative take [sic] on the meaning of federal law does not establish preemption.

Id.

Under the Tarrant-Upper Trinity theory, the word "equal rights" means "equal rights." *See* Petition at 28-32. Under the Tenth Circuit's theory, the word "equal rights" means "the same opportunity and entitlement to use up to 25 percent of the excess water *in its state* and *under its state laws*." 656 F.3d at 1246 (emphasis added). With respect, the Tenth Circuit's theory misreads the Compact.

The part of the Red River Basin that is apportioned by Section 5.05(b)(1) – reach II, subbasin 5 – is a multi-state area. If the Signatory States had

intended to apportion on the basis of state lines, they could have done that. They apportioned *other areas* within the Compact on the basis of state lines. *See* Petition at 32, *citing* Sections 5.03(b) and 6.03(b) of the Compact. *See also* Section 4.02(b) of the Compact (allocating "free and unrestricted use of the water in reach I, subbasin 2 to Oklahoma) (described in Petition at 6). The Tenth Circuit's theory reforms and "rewrites" the Compact.[11]

D. The Tenth Circuit Should Not Have Considered The "Interpretive Comments" To The Red River Compact

The Tenth Circuit used the "Interpretive Comments" of the drafters of the Red River Compact to interpret the Compact. *Tarrant*, 656 F.3d at 1238. The Tenth Circuit explained the "Interpretive Comments" as follows:

> To aid in the understanding of the Compact, the Compact's Negotiating Committee wrote Interpretive Comments so that future readers "might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact.

656 F.3d at 1228.

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[11] The United States regulates the Red River Basin, including interstate tributaries and intrastate tributaries. *See* note 6, *supra*.

There is no evidence that the "Interpretive Comments" – written, as they were, by the *drafters* of the Red River Compact – represent the view of the members of Congress who approved that Compact. The Interpretive Comments are irrelevant: They shed no light on the question whether Congress intended the actual text of the Red River Compact to preempt (or not to preempt) state law.

To be sure, Interpretive Comments are a form of legislative history. Similar to Congressional committee reports and to the statements of witnesses at Congressional hearings, they are the comments of interested bystanders. They are not as probative as remarks made by Senators and Representatives during floor debate.

Even floor debate would be of limited probative value. Justice Jackson observed:

> I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that **weird endeavor**. That process seems to me not interpretation of a statute but creation of a statute.

United States v. Public Utils. Comm'n of Cal., 345 U.S. 295, 319 (1953) (emphasis added) (Jackson, J., concurring), *quoted in* Scalia at 30-31 & n. 42.

The Tenth Circuit says "nothing in the Interpretive Comments to the Compact supports Tarrant's interpretation [*i.e.*, Tarrant's argument that the Oklahoma anti-export law violates the Supremacy Clause]. *Tarrant*, 685 F.3d at 1245.

The silence of the legislative history may be likened to the "curious incident" of the dog that did not bark in the classic Sherlock Holmes story, "Silver Blaze." *Chisom v. Roemer*, 501 U.S. 380, 396 n. 23 (1991). *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

The Court has "forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past." *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting), *citing Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

The Tenth Circuit should have applied "the statute [*i.e.*, the approved text of the Red River Compact], not legislative history, and certainly not *the absence of legislative history*." *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting) (emphasis added). "Statutes are the law though sleeping dogs lie." *Id.*, *citing Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-96, n. 13 (1985);

Williams v. United States, 458 U.S. 279, 294-95 (1982) (Marshall, J., dissenting).

The Tenth Circuit's reliance upon the absence of "legislative history" regarding the preemption issue is a particularly "weird endeavor." The drafters are not members of Congress. They have no "say" in whether or not the Compact will preempt state legislation. The silence of the drafter is not a "curious incident." The "absence of legislative history" is not a legitimate reason for a federal court to set aside and ignore an interstate compact.

CONCLUSION

Upper Trinity respectfully submits that the Petition for a Writ of Certiorari filed by Tarrant should be granted.

Respectfully submitted,

STEVEN K. BALMAN
Counsel of Record
G. STEVEN STIDHAM
PATRICK O. WADDEL
SNEED LANG HERROLD PC
1 West Third Street, Suite 1700
Tulsa, Oklahoma 74103-3522
sbalman@sneedlangherrold.com
(918) 588-1313

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