No. 11-852

In the Supreme Court of the United States

CITY OF HUGO, OKLAHOMA, ET AL.,

Petitioners,

v.

TOM BUCHANAN, ET AL.

Respondents.

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

MOTION OF TARRANT REGIONAL WATER DISTRICT FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF TARRANT REGIONAL WATER DISTRICT FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b), Tarrant Regional Water District ("Tarrant") respectfully moves for leave to file the attached brief as *amicus curiae*. Petitioner has consented to Tarrant's filing of a brief, and written consent has been filed with the Clerk of the Court. Tarrant has provided notice to respondents' counsel of Tarrant's intent to file a brief, but respondents have withheld consent.

Tarrant is a political subdivision of the State of Texas servicing the potable water needs of nearly two million people throughout northern Texas. It is party to three Interlocal Cooperation Agreements, whose signatories together provide nearly all of the potable water supplied in the Dallas-Fort Worth metropolitan area, the Nation's fourth largest. Tarrant's organizational charter requires it to develop and maintain water supplies and to mitigate flooding within its eleven-county service area. Like most special purpose districts, Tarrant's interests and goals are local in scope and, on occasion, conflict with the broader interests of its parent State.

Tarrant and other north Texas water providers (including petitioner Irving, Texas) face imminent and long-term water shortages within their service areas. Oklahoma, by contrast, is rich in water resources. In an average year, it discharges 36 million acre-feet (equivalent to 11.7 trillion gallons) of unused stream water into various tributaries bound for the Gulf of Mexico. It consumes a miniscule fraction of that amount—just 1.87 million acre feet of surface

water—each year. Oklahoma Water Resources Board, *Oklahoma Water Facts*, Jan. 13, 2010, http://-tinyurl.com/cqdqtq; Oklahoma Water Resources Board, *Oklahoma Comprehensive Water Plan*, *Physical Water Supply Availability Report*, Table 3-21 (Nov. 2011), http://tinyurl.com/7rwv2sd. Despite this massive overabundance of water, Oklahoma has enacted a series of laws that function as an effective embargo on the exportation of water from Oklahoma for use in any other State. See, *e.g.*, Okla. Stat. tit. 82, §§ 105.9, 105.12, 105.12A, 105.16(B), 1085.2(2), 1085.22, 1086.1(A)(3), 1086.2.

Tarrant increasingly is looking to sources outside its and Texas's borders for future water supplies to meet growing demands. In parallel litigation also currently pending before this Court (see *Tarrant Water Reg'l Water Dist.* v. *Herrmann*, No. 11-889), Tarrant seeks to have Oklahoma's water embargo declared unconstitutional, on grounds that it both violates the dormant Commerce Clause and is preempted by the Red River Compact, an interstate agreement between Texas, Oklahoma, Arkansas, and Louisiana. See Pub. L. No. 96-564, 94 Stat. 3305 (1980). The questions presented in No. 11-889 are immediately subsequent to the issues presented for review in this case.

Tarrant's unique perspective on this lawsuit will assist the Court in its disposition of the petition. Because Tarrant has a direct interest, not only in the broader vindication of the right of political subdivisions to bring suit to challenge the constitutionality of their parent States' laws, but also in the outcome of the underlying merits, its views will provide a fuller context within which to understand the broader implications of the Tenth Circuit's decision below.

Respectfully submitted.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES, RULES AND REGULATIONS

MISCELLANEOUS

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF TARRANT REGIONAL WATER DISTRICT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The interest of Tarrant Regional Water District ("Tarrant") is set forth in the preceding motion for leave to file this brief.[1]

ARGUMENT

I. The Petition Presents an Issue of National and Regional Importance Warranting this Court's Review.

A. Proper resolution of the question presented is of vital importance to political subdivisions across the Nation.

The Tenth Circuit describes the basis of the political-subdivision standing doctrine as stemming from the notion that political subdivisions, as creations of the State, possess no independent identity from the State and "are created by the state merely for convenience of administration." *City of Hugo* v. *Nichols*, 656 F.3d 1251, 1255 (10th Cir. 2011). This antiquated view ignores the reality of modern relationships between States and municipalities and special districts, and is certain to lead to unworkable results in light of the enormously important and entirely *in-*

[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 received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. Counsel for respondents have declined consent to file this brief.

dependent responsibilities most political subdivisions have to large population bases.

In the past fifty years, the population of the nation has more than doubled.[2] Population growth has led to increased reliance and pressure on public services, public utilities, and urban planning. To meet this demand, the United States now is overlaid by a complex fabric of regional planning authorities, councils of government, hospital districts, ambulance districts, college districts, watershed districts, water districts, and sanitation districts, to name but a few. Thus multitude of special purpose districts, all created under authority of their respective States, have been charged with providing for the unique special needs of their constituents.[3] *See* George W. Liebmann, *The New American Local Government*, 34 Urb. Law. 93, 111 (2002). Indeed, most State services are provided by these local governmental entities rather than the States themselves.

Petitioner Hugo Municipal Authority, a public water trust for the benefit of the City of Hugo, is charged, like Tarrant, with managing water resources for the particularized demands and needs of its own service area. See Hugo Mun. Auth. Water

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[2] In 1950, the population of the United States was 151 million; by 2010 the population had grown to 308 million. Between 1950 and 2000, the percentage of the population living in urban areas increased by almost 20%. See U.S. Census Bureau, *Population and Housing Unit Counts* (1993), http://tinyurl.com/deenfb; U.S. Census Bureau, *Census 2000 Summary File 1, Matrix H1 and H3* (2000), http://tinyurl.com/7gkv2fh.

[3] There were 37,381 special districts in the United States in 2007. U.S. Census Bureau, *Local Governments and Public School Systems by Type and State: 2007*, http://tinyurl.com/7pgtoy6.

Trust Act, Hugo Mun. Code Appx. 4; Tex. Water Code Ann. §§ 51.071, 55.037. Like Tarrant's, its governing board is elected by and from local constituents to meet local needs. Cf. *Rogers* v. *Brockette*, 588 F.2d 1057, 1065-1066 (5th Cir. 1979) (management and control over public water trusts generally lies with locally-elected boards). Its interests are local and the duties owed by the elected officials are pledged to the individual constituents, not the State as a whole.

With respect to water management in particular, centralized state agencies ordinarily play a minimal role, instead allocating nearly all responsibility for water management to local governmental entities. This arrangement is sensible: States are not water users; they do not divert, treat, or deliver water; and they do not have ownership interests in the water within their borders. See *Sporhase* v. *Nebraska*, 458 U.S. 941, 950-952 (1982); *Tarrant Reg'l Water Dist.* v. *Sevenoaks*, 545 F.3d 906, 913 (10th Cir. 2008). Local water management entities, in turn, often compete with other local water districts and municipalities, leading to controversies that sometimes place the local entities at odds with their parent States.[4]

In many States, the right to acquire and hold water is guaranteed and may not be abridged by the

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[4] In 2010, for example, there were 1,215 cases filed within the special Water Courts of Colorado, a vast number of them by political subdivisions seeking to develop water for their own separate uses or to protect their existing water rights. Colorado State Judicial Branch, *Annual Statistical Report*, *Fiscal Year 2010*, Table 33, http://tinyurl.com/7ro34du. The State of Colorado was adverse to the local entities in hundreds of these cases. Colorado State Attorney General's Office, *Colorado Dept. of Law, Annual Report* 25 (2010), http://tinyurl.com/7jkkoa8.

State (*e.g.*, Colo. Const. art. XVI, § 6), and a water right is a real property interest. See *Franco-Am. Charolaise, Ltd.* v. *Okla. Water Res. Bd.*, 855 P.2d 568, 580-581 (Okla. 1990)); Se. Colo. *Water Conservancy Dist.* v. *Twin Lakes Assocs.*, 770 P.2d 1231, 1239 (Colo. 1989) (en banc); *In re Adjudication of Water Rights of Upper Guadalupe Segment of Guadalupe River Basin*, 642 S.W.2d 438, 445 (Tex. 1982). Regional water districts thus typically *own* the water they manage. See, *e.g.*, Colo. Rev. Stat. § 32-4-406(1)(f) ("Any [water and sanitation] district has the * * * power[] [t]o purchase, trade, exchange, acquire, buy, sell, and otherwise dispose of and encumber real and personal property, water, water rights, water works and plants, and any interest therein, including leases and easements."). In other words, political subdivisions ordinarily have *independent* property rights in the water they manage on behalf of their constituents.

A State's power to influence, direct, or control the policies and actions of local water districts is essentially nil. See, *e.g.*, *Tarrant*, 545 F.3d at 913. For example, special districts have authority to levy separate taxes on their constituents without any intervention permitted, much less required, by the State. Liebmann, *supra*, 34 Urb. Law. at 112-113. Many of these entities collect their own taxes, fees, and revenues; the State has no legal interest in these revenues and may not dictate their use or allocation. This approach, again, is sensible: state legislatures have little knowledge or understanding of the localized issues and realities facing these local governments or the services they provide.

Finally, the interests of any given local entity and the constituents that it serves are not always

aligned with the interests of the State, especially where the political majority is concentrated elsewhere geographically.[5] This often explains, for example, why municipalities that lack the facilities, staff, or budget to provide services to their constituents under a voluntary federal program nevertheless are forced to participate in the program by remote state legislatures. See *Rogers*, 588 F.2d at 1059.

In sum, local governments, special purpose districts, and related entities frequently are charged with and perform functions entirely independent of their home States. This undeniable division of identity and interest is more than sufficient to establish Article III standing. That is especially so given that States—in furtherance of their own, separate agendas—often enact policies and impose requirements that undercut local municipalities' abilities to discharge their duties and meet their obligations to the constituents they serve. The political subdivision standing rule, a Court-created doctrine, should be updated to account for this reality and the growing importance and independence of political subdivisions throughout the States of this Nation.

B. Proper resolution of the question presented is crucial to the development of large, water-starved municipalities.

Water is a unique resource of vital importance to the Nation. While the political-subdivision standing doctrine's effect on local utility trusts and special purpose districts is applicable to nearly every form of

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[5] Such is the case here. The political majority is concentrated in and around Oklahoma City, while the City of Hugo is located in southeast Oklahoma in the basin of origin for the water at issue, closer to Dallas-Fort Worth than Oklahoma City.

public service or utility, the need for this Court's immediate intervention is highlighted by the special importance of water in this case. This appeal involves a challenge to a series of Oklahoma laws and policies that prohibit the sale or exportation of surface water for use in another State. Irving is a willing purchaser of water, and Hugo a willing seller; indeed, petitioners here have entered into a contract for the sale of water and transfer of that water from Oklahoma to satisfy demands in Texas.

The Dallas-Fort Worth metropolitan area is the fourth largest metropolitan area in the United States. U.S. Census Bureau, *Estimates of Population Change for Metropolitan Statistical Areas and Rankings: July 1, 2008 to July 1, 2009* (Mar. 2010), http://tinyurl.com/7jz8azs. The U.S. Census Bureau ranks it as the fastest growing urban center in the United States, growing by 25% from 2000 to 2009. Les Christie, *Dallas: Fastest Growing U.S. City*, CNNMoney.com, June 22, 2010, http://tinyurl.com/-2fbg25y. The State of Texas has become the second most populous State (behind only California), primarily as a result of growth in Dallas-Fort Worth, which sits just forty miles from the Oklahoma border. U.S. Census Bureau, *State Population Projections*, http://tinyurl.com/y8fdb4x. The Dallas-Fort Worth metropolitan area thus serves as a major economic hub for commerce in Arkansas, Louisiana, Oklahoma and Texas. Robert W. Gilmer, *The Face of Texas Jobs, People, Business, Change, Federal Reserve Bank of Dallas*, http://tinyurl.com/7sdnxy4. Its economy is the sixth largest contributor to the Nation's GDP (U.S. Dept. of Commerce, Bureau of Economic Analysis, *News Release: GDP by Metropolitan Area, Advance 2010, & Revised 2007-2009*, Sept. 13, 2011, http://tinyurl.com/m3c7zk).

A reliable, long-term water supply is essential to ensuring continued economic growth throughout the region. Without assured water supplies, families and businesses alike are less likely to move to northern Texas, and its historic growth is certain to falter, with resulting ripple effects throughout the national economy. In fact, it is estimated that if municipal suppliers are unable to meet the projected increases in water demands as the result of a *single* one-year drought, North Texas alone would lose one million residents and nearly 700,000 jobs over the next 50 years, at a cost to the regional economy of over $160 billion. See Region C Water Planning Group, *2006 Region C Water Plan*, at ES.7 (2006), http://tinyurl.-com/77gyc8p. If the Tenth Circuit's decisions in this case and *Tarrant Regional Water District* v. *Herrmann*, No. 11-889, are allowed to stand, the region's future water supply will be placed in precisely the sort of peril that will make a single-year shortfall all too likely.

Such an extreme outcome would be just as bad for Oklahoma as for Texas. The economies of north Texas and southern Oklahoma function, in fact, as a single urban-economic unit. William S. Spears School of Business, *Multi-regional Input-Out Model for the Dallas & Oklahoma City Metro. Areas*, at 4-5, 7-8, 23 (Jan. 19, 2010), http://tinyurl.com/7nnj7fe. Residents of southern Oklahoma frequently work and shop in Texas communities, while residents of northern Texas enjoy the tourism and recreational activities available throughout southern Oklahoma. Thus Hugo, as an independent municipal entity, has a palpable interest in ensuring that Irving and Tarrant are able to meet their water needs.

II. This Court Should Correct the Tenth Circuit's Erroneous Interpretation of the Political Subdivision Standing Doctrine.

In the Tenth Circuit's view, a political subdivision may enforce federal statutory claims against its parent State only under the Supremacy Clause (a "structural" right), any may not seek to enforce "substantive" constitutional claims. *City of Hugo*, 656 F.3d at 1257-1258. Thus, according to the court, petitioners lack standing because the dormant Commerce Clause protects substantive rights "guaranteed to individuals," and not collective or structural rights enforceable by municipalities. *Id.* at 1262.

That is wrong as a matter of both history and practice. The origins of the Commerce Clause are most readily traced to the Constitutional Convention of 1787 and the Federalist Papers. The economic backdrop for the Convention was dire: "The American Revolution dramatically altered the regulation of the internal and external commerce of the colonies * * * [and] harmed the entire economy." Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 Harv. J.L. & Pub. Pol'y 849, 855 (2002). Recognizing that the States would resort to protectionist practices to preserve their fragile and weakened economies, Alexander Hamilton warned that "'[a] unity of commercial'" practices "'can only result from a unity of government.'" *Id*. at 856 (quoting The Federalist No. 11, at 58 (Alexander Hamilton) (Clinton Rossiter ed., 1999)). Seeing the urgent necessity for a united approach to preserve commerce and avoid protectionism, the Framers drafted the Commerce Clause as a grant to Congress of authority to regulate trade and preserve order between the States by creation of "a

national free market." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 469 (1992). See also *Dennis* v. *Higgins*, 498 U.S. 439, 454 (1991) ("the Framers of the Commerce Clause had economic union as their goal"). The Commerce Clause thus establishes the supremacy of federal law over interstate economic matters and a policy against protectionist state regulation.

Viewed in this light, there can be little doubt that the dormant Commerce Clause protects *structural* rights by striking a particular balance of power between the federal government and States over interstate commerce. See, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring) ("the dormant Commerce Clause" is an inference "from the constitutional structure as a limitation on the power of the States"). Even the Tenth Circuit has recognized as much: "the dormant Commerce Clause is an implied structural restraint on state power." *EnergySolutions, LLC* v. *Utah*, 625 F.3d 1261, 1277 (10th Cir. 2010). Neither the Commerce Clause nor its negative implications were intended "to protect individual rights" (*City of Hugo*, 656 F.3d at 1256 (internal quotation marks omitted)) alone. There accordingly is no principled basis for distinguishing between claims under the Supremacy Clause, on the one hand, and the dormant Commerce Clause claim in this case, on the other.

The Tenth Circuit's limitation of political subdivision standing exclusively to Supremacy Clause claims ignores the very purpose of the Commerce Clause. Its ruling, if left standing, will deny municipalities and special purpose districts redress to challenge a State's unconstitutional overreach of power in restricting interstate commerce, even where that overreach threatens the economic welfare of the mu-

nicipality's own constituents. Under the circumstances like those presented here, the State could continue with impunity to discriminate unconstitutionally against interstate commerce, simply because the party injured is a political subdivision. Indeed, the result is a catch-22: because individual constituents lack a property interest in municipal water supplies, they will be unable to challenge the offending laws themselves. Such an absurd result cannot stand.

The outmoded notion that a political subdivision is merely "a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted to it" (*City of Trenton* v. *New Jersey*, 262 U.S. 182, 185-186 (1923)) no longer holds water. Where state legislation flouts local community interests in a manner that violates the structure of the Constitution, local governments assuredly have Article III standing to bring suit to protect the interests of their citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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