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**

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

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## STATEMENT OF INTEREST

The Upper Trinity Regional Water District ("Upper Trinity") – like the Petitioners in the captioned case – is a potential consumer of water from Oklahoma, surface water within the coverage area of the Red River Compact.[1]

Upper Trinity is a political subdivision of Texas. A conservation district located in North Texas – in Denton County, Collin County and Dallas County – 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.[2]

Upper Trinity is composed of twenty-five member entities: twenty-one Texas cities and towns, one utility authority and three special districts. In addition, Denton County appoints two representatives to the Upper Trinity board. There are no Oklahoma

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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.

[2] Upper Trinity provides water, wastewater, solid waste and storm water (watershed protection) services to its members, and other utility and municipal customers, on a wholesale basis. Among other things, Upper Trinity treats potable and non-potable water and wastewater, and collects household hazardous waste.

member entities in Upper Trinity, or represented on its board.

This case has a direct bearing on Upper Trinity's ability to fulfill its mission and purpose. Upper Trinity needs water from Oklahoma. Upper Trinity has filed applications with the Oklahoma Water Resources Board for permits to obtain appropriations of water from Oklahoma. In general, Upper Trinity wants to obtain water from the source referenced in the Petition for Writ of Certiorari (the "Petition"). In particular, Upper Trinity has submitted applications for permits to obtain water from the Kiamichi River and Boggy Creek basins and from Lake Texoma. The Oklahoma Water Resources Board – using the same water-allocation criteria challenged in the case below – has held the Upper Trinity applications in abeyance and refused to grant Upper Trinity permission to obtain or acquire water from Oklahoma.

**The Water Shortage In North Texas**

Upper Trinity provides water to communities and customers in Denton County and parts of two other North Texas counties. Its service area is part of the Dallas-Fort Worth Metropolitan Area. Upper Trinity's communities and customers need to import water from Oklahoma. In particular, they need the water that is the subject of the Petition – water that is allocated by the Water Resources Board of the State of Oklahoma, and subject to the Red River Compact. *See* Petition at 4.

In years to come, Upper Trinity's need for water is expected to increase. Other North Texas water districts are similarly situated:

> 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").[3]

The Dallas-Fort Worth Metropolitan Area is the fourth largest in the country. Estimates indicate that the population of the Dallas-Fort Worth Metropolitan

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[3] *See* Janice Francis-Smith, Water Wars: Can Oklahoma quench Texas' thirst without getting parched?, Oklahoma City Journal Record, Apr. 29, 2008, available at http://findarticles.com/p/articles/mi_qn4182/is_20080429/ai_n25370946/; Tim Talley, North Texas eyes Oklahoma water, Fort Worth Star-Telegram, Feb. 11, 2011, available at http://www.star-telegram.com/2011/02/11/2841939/north-texas-eyes-oklahoma-water.html (*cited in* 41 Tex. Envtl. L.J. 181, 181-82 at nn. 1, 4).

Area will double by 2060, and that the demand for water will substantially exceed supply.

### The Water Surplus In Oklahoma

The water districts of North Texas have identified Oklahoma as one of the most practical long-term sources 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).[4]

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 State of Oklahoma has adopted regulations and policies that effectively prohibit the sale of water to entities in other states. "[T]he underlying legal

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[4] An "acre-foot" is the volume of water "that would cover one acre to a depth of one foot." Merriam-Webster's Collegiate Dictionary 11 (10th ed. 1999). An acre-foot is equal to 43,560 cubic feet, or approximately 325,000 gallons.

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. The Oklahoma statute is called an "anti-export law." *Id.* at 202 & n. 147.

### Upper Trinity Is A Political Subdivision Of The State Of Texas

Upper Trinity is a political subdivision of the State of Texas. It was created by a Texas statute. It is not, however, the same sort of political subdivision as the Petitioners. Two of the Petitioners – the City of Hugo, Oklahoma and the City of Irving, Texas – are municipal corporations; Upper Trinity is a regional water district. Significantly, two of the Petitioners – the City of Hugo and the Hugo Municipal Authority – are subdivisions of the State of Oklahoma. Upper Trinity is a subdivision of the State of Texas.

## SUMMARY OF ARGUMENT

In the opinion below, *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011), the United States Court of

Appeals for the Tenth Circuit held (i) that Oklahoma political subdivisions lacked standing to assert dormant Commerce Clause claims against their parent state, Oklahoma, because they could not identify a violation of a separate federal statutory right; and (ii) that a Texas political subdivision lacked standing to assert a dormant Commerce Clause claim against the State of Oklahoma, because it executed a contract with an Oklahoma political subdivision, 656 F.3d at 1255-65; Petition at 20. The *Nichols* dissent proposes a more permissive rule regarding standing. 656 F.3d at 1265-77.

The Petition focuses primarily on the holding in *Nichols*, on the finer points of the doctrine of political subdivision standing, and on the three-way conflict among the circuits with respect to that doctrine. *See* Petition at I (Question Presented), 8-14 and 20-22. The Petition focuses on the two Oklahoma entities and their claims against their parent state.

This amicus curiae brief does not focus on the holding of *Nichols*, or the nuances of the doctrine of political subdivision standing. This brief examines a hypothetical case proposed by the *Nichols* majority: An entity from State A has standing to assert a dormant Commerce Clause claim against State B if it can prove the three requirements of the traditional doctrine of standing (harm-in-fact, causation, and redressability). The out-of-state entity can satisfy those elements by making a direct application to obtain water from the in-state water resources board,

instead of relying on a contract with an in-state political subdivision.

Because the Petitioners are concerned primarily with the holding in the case below, the Petition does not examine or discuss the hypothetical case described by the Tenth Circuit majority in detail. As shown herein, the facts of the hypothetical case posed by the *Nichols* majority precisely match the facts of the Upper Trinity situation. The Upper Trinity facts show how a political subdivision can have standing to assert a dormant Commerce Clause against a state.

The principal objective of this brief is to show that the law is in disarray and requires the Court's attention. A second, important objective is to show that Upper Trinity and other similarly situated water districts have standing to sue the State of Oklahoma under both the narrow rule adopted by the *Nichols* majority *and* the broader, more permissive rule urged by the dissent.

## ARGUMENT

### I. The Political Subdivision Standing Doctrine Only Applies To Suits Against A Parent State

The case below is mainly about Oklahoma entities. The City of Hugo is an Oklahoma municipality. The Hugo Municipal Authority is an Oklahoma Public Water Trust for the benefit of the City of Hugo. Admittedly, the City of Irving is a Texas municipality,

but Irving is only one of three Petitioners. In contrast, Upper Trinity is a Texas entity.

*Nichols* deals primarily with the doctrine of poitical subdivision standing. Under that doctrine, "federal courts lack jurisdiction over certain controversies between political subdivisions and their parent states." *Nichols*, 656 F.3d at 1254. Under the doctrine, state agencies (*e.g.*, the Oklahoma Water Resources Board) are deemed to be the equivalent of states. The doctrine also applies to suits against state officials acting in their official capacities. *Id.* at n. 3, *citing Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989).

The doctrine of political subdivision standing finds its classic expression in *City of Trenton v. New Jersey*, 262 U.S. 182, 183-84 (1923). In *Trenton*, the Court held that a city did not have standing to challenge its parent state's right to impose a fee for diverting water, under the Contract and Due Process Clauses. The Court explained that political subdivisions are created by the state merely for convenience of administration. *Id.* at 184-85. *See Nichols*, 656 F.3d at 1255 (discussing *Trenton*). *And see* Petition at 15 (questioning whether "the subdivision *is* the State for all purposes") (emphasis in original) and 16 describing *Trenton* as an old-fashioned "merits" decision rather than a modern "standing" decision).[5]

[5] The political subdivision standing doctrine is not an abolute bar to claims by political subdivisions against parent

(Continued on following page)

As explained and applied by the *Nichols* majority, the political subdivision standing doctrine bars two of three Petitioners from suing their parent state – the State of Oklahoma. The political subdivision standing doctrine apparently grows out of the principle, articulated by Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), "that the Constitution does not interfere in the internal organization of states." *Nichols*, 656 F.3d at 1265 n. 1 (10th Cir. 2011) (Matheson, J., dissenting), *quoting Rogers v. Brockette*, 588 F.2d 1057, 1069 (5th Cir. 1979). As a consequence, the political subdivision standing doctrine takes center stage in the Petition. The notion that the City of Irving – a Texas entity – "independently had standing under an ordinary Article III analysis" is "a point not pressed in [the] petition." Petition at 6.[6]

The dissent in *Nichols* makes the independent standing point clearly and forcefully. The City of Irving, a political subdivision of Texas, "faces no political subdivision standing bar." *Nichols*, 656 F.3d at 1275. "Irving, unlike Hugo, is suing not its parent state, but another state. The political subdivision

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states. *See Nichols*, 656 F.3d at 1256-63, *discussing*, *inter alia*, *Gomillion v. Lightfoot*, 364 U.S. 329, 344 (1960). Much of *Nichols* and most of the Petition are devoted to the exceptions to the doctrine. Those exceptions are not considered in this brief.

[6] *See* Petition at 22 n. 2 ("Petitioners have not pressed in this Court the separate question whether Irving has standing to sue independent of Hugo's standing to sue.").

standing doctrine has no applicability in such circumstance." *Id.* at 1263 (majority opinion).

Upper Trinity is in the same situation and circumstance as the City of Irving. Like Irving, Upper Trinity could be forced to sue another state – the State of Oklahoma. As a consequence, Upper Trinity is almost entirely and exclusively concerned with the "point not pressed" by the Petitioners – the standing of a political subdivision of State A to sue State B.

## II. Out-Of-State Entities Must Satisfy The Requirements Of Traditional Standing Doctrine, Not Political Subdivision Standing Doctrine

Even though the political subdivision standing doctrine does not apply, an out-of-state entity "must still meet the traditional standing requirements." 656 F.3d at 1263. There are three such requirements:

(1) injury-in-fact;

(2) causation; and

(3) redressability.

*Bennett v. Spear*, 520 U.S. 154, 162 (1997). This is the "irreducible constitutional minimum," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

### A. Injury-In-Fact And Causation

In the case below, Irving based its claim for injury "solely on the contract between it and Hugo for

the sale of water." 656 F.3d at 1263. "Irving never alleged that it [*i.e.*, Irving] had any pending applications for water permits which would be affected by the challenged laws. . . ." *Id.* at 1264.

The distinction drawn by the majority between claims based on contracts and claims based on direct applications is significant. Unlike Irving, Upper Trinity applied directly to the Oklahoma Water Resources Board – an agency of the State of Oklahoma – for permits to obtain water. Upper Trinity is not relying upon, or acting indirectly through, a political subdivision of the State of Oklahoma. The Upper Trinity applications have been placed in abeyance because Upper Trinity is an out-of-state entity. As a consequence, Upper Trinity clearly satisfies the first two requirements of traditional standing – injury-in-fact and causation.

This distinction between direct and indirect applications to obtain water is recognized and fully explained by the majority in *Nichols*. "[P]olitical subdivisions of one state may sue another state under the dormant Commerce Clause" when their claims are not "premised on a contract with a political subdivision of the defendant state." 656 F.3d at 1264, *citing* two cases: [1] *City of El Paso v. Reynolds*, 563 F. Supp. 379, 381 (D.N.M. 1983) (city in Texas sought water permit directly from permitting authority of New Mexico and also contracted for the purchase of water from a private New Mexico company); and [2] *City of Altus v. Carr*, 255 F. Supp. 828, 831 (W.D. Tex.

1966) (city in Oklahoma contracted for purchase of water from private landowners in Texas).

### B. Redressability

The final requirement – the third prong of traditional standing doctrine – is redressability. To satisfy the redressability requirement, "a party must show that a favorable court judgment is likely to relieve the party's injury." *Nichols*, 656 F.3d at 1264, *citing Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 892 (10th Cir. 2011). The majority opinion's discussion of the redressability requirement is particularly instructive:

> This court previously considered the standing of a commercial timber company to challenge an agency preservation plan which prevented the sale of timber rights in a particular area. *Wyo. Sawmills, Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1246-47 (10th Cir. 2004). The timber company's standing ultimately failed because "the federal agency has complete discretion as to whether to offer the opportunity sought by the plaintiff, and accordingly, the courts do not have the power to grant the only relief that would rectify the alleged injury." *Id.* at 1249.

656 F.3d at 1264.

There are two problems. *First*, there is a general logical problem. The majority's reasoning is specious. The majority says that (a) discrimination on an improper, unconstitutional basis will be allowed and tolerated because (b) discrimination on a permissible,

constitutional basis cannot be absolutely relieved or rectified. It is enough that "a successful dormant Commerce Clause challenge" to these Oklahoma statutes "will remove a *major barrier* to [the Texas subdivision's] plan to use [Oklahoma's] water." 656 F.3d at 1275 (dissent) (emphasis added). Removing a "major barrier" to the acquisition of water would *exactly* redress the *constitutional* wrong. *Lujan*, 504 U.S. at 560-61. *See* Petition at 16-17 (discussing redressability).

It is enough that "a favorable court decision is *likely* to remedy the injury." Erwin Chemerinsky, Federal Jurisdiction § 2.3.3 at 75 (5th ed. 2007) (emphasis added). *See Lujan*, 504 U.S. at 561 ("[I]t must be 'likely', as opposed to merely 'speculative', that the injury will be 'redressed by a favorable decision' "), *quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 38, 43 (1976). Certainty is not possible with respect to redressability, and should not be required.

*Second*, there is a significant practical and doctrinal problem. The majority cannot discuss the issue of redressability without revisiting the doctrine of political subdivision standing and once again examining its limitations. After citing *City of El Paso v. Reynolds* and *City of Altus v. Carr*, the majority admitted that the injuries in *Reynolds* and *Carr* were redressable.

> [W]ere a court to declare the challenged state laws in those cases [*i.e.*, *Reynolds* and *Carr*] unconstitutional, plaintiffs' injuries would be

> redressed because the defendants would be prohibited from applying the unconstitutional law to the application of private entities and *out-of-state municipalities*.

656 F.3d at 1264-65 (majority opinion) (emphasis added).

This point requires emphasis: The *Nichols* majority recognized the practical, doctrinal problem. In its discussion of the requirement of redressability, the majority held that the actual injury suffered by Irving was not redressable, but opined that the hypothetical injury suffered by an "out-of-state" municipality would be redressable. The majority said "[t]he case here is *very different*" from a case involving out-of-state municipalities. 656 F.3d at 1265 (emphasis added).

The actual facts in *Nichols* were "very different" from the hypothetical case propounded by the majority. Interestingly, the hypothetical case precisely matches the Upper Trinity facts. Under the rule announced by the *Nichols* majority, Upper Trinity would have standing to assert a dormant Commerce Clause claim against the State of Oklahoma.

## III. The Dissent's Perspective: The Distinctions Drawn By The Majority Should Not Determine Standing

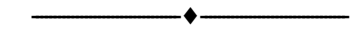
The dissent in *Nichols* raises an important question. Should the direct submission of an application by the out-of-state entity determine that entity's standing

to sue? Arguably, standing should not turn on the fact that Irving sought to purchase Oklahoma water *indirectly*, through Hugo, rather than *directly*, by applying to the Oklahoma Water Resources Board. The dissent makes two interesting observations:

*First*, "Irving has as much stake in the application [to purchase water] as Hugo does by virtue of their contract." 656 F.3d at 1276.

*Second*, Irving has standing for the same reason that the plaintiff in *Carr* has standing. In *Carr*, an Oklahoma municipality claimed that a Texas law banning the export of Texas water violated the dormant Commerce Clause. The Oklahoma municipality contracted to buy water from a private landowner in Texas. Irving contracted with a municipality. "That difference does not diminish *Altus* [*i.e.*, *Carr*] as supporting Irving's Article III standing." 656 F.3d at 1276 (dissent).

If the Court adopts the dissent's rule and reasoning, Upper Trinity and similarly situated water districts will clearly have standing to sue the State of Oklahoma. Upper Trinity has a greater stake in the Oklahoma Water Resource Board application process than Irving does, because it has submitted applications directly for permission to obtain or acquire water. As a consequence, if the analysis in this brief is correct, Upper Trinity and similarly situated water districts are in an enviable position. They could have standing to sue under either the majority or the dissent theory.



## CONCLUSION

Upper Trinity respectfully submits that the Petition for a Writ of Certiorari filed by the City of Hugo, the Hugo Municipal Authority and the City of Irving should be granted. The law of political subdivision standing is in disarray. In addition to offering a chance to address the questions raised in the Petition, the case provides an opportunity to clarify traditional standing doctrine and explain how an out-of-state political subdivision can challenge a discriminatory state law under the dormant Commerce Clause. That opportunity is important to North Texas, a region facing a major water shortage. It is also important to Oklahoma, a state with a surplus of surface water, and a statutory and regulatory regime that effectively prohibits the sale of that water.

Respectfully submitted,

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