

No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT, PETITIONER

v.

RUDOLF JOHN HERRMANN, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Red River Compact (the Compact) apportions the water in the Red River Basin between the States of Arkansas, Louisiana, Oklahoma, and Texas. Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305. To accomplish that apportionment, the Compact divides the Red River Basin into five reaches, and it further divides each reach into subbasins. Compact § 2.12, 94 Stat. 3307; Art. IV-VIII, 94 Stat. 3308-3315. For the water in Reach II, Subbasin 5, the Compact provides:

The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

§ 5.05(b)(1), 94 Stat. 3311. The questions presented are as follows:

1. Whether Section 5.05(b)(1) of the Compact allows petitioner to divert water included in Texas's apportionment of Reach II, Subbasin 5 from within Oklahoma, thereby superseding Oklahoma statutes that would prohibit Texas water users from accessing that water.

2. Whether the dormant Commerce Clause prohibits respondents from enforcing Oklahoma statutes that would prevent petitioner from accessing Texas's apportionment of Reach II, Subbasin 5 water from within Oklahoma.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The Red River flows from west to east across the north Texas panhandle, forms the boundary between Oklahoma and Texas¹ and then between Arkansas and Texas, then flows through Arkansas and finally into Louisiana where it joins the Atchafalaya and Mississippi Rivers. See Pet. App. 52a. In 1955, Congress granted permission to Arkansas, Louisiana, Oklahoma, and Texas to negotiate an agreement apportioning the water in

¹ The border between Texas and Oklahoma is at the river's south bank. See *United States v. Texas*, 162 U.S. 90-91 (1896).

the Red River Basin among those States. Act of Aug. 11, 1955, ch. 784, 69 Stat. 654. In 1978, the States entered into the Red River Compact (the Compact), which Congress approved in 1980. Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305. One purpose of the Compact is to “provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries.” § 1.01(b), 94 Stat. 3305. To accomplish that apportionment, the Compact divides the Red River Basin into five reaches, and it further divides each reach into subbasins. § 2.12, 94 Stat. 3307; Art. IV-VIII, 94 Stat. 3308-3315. The water in each subbasin is allocated to one or more of the compacting States. Art. IV-VIII, 94 Stat. 3308-3315.

Section 2.01 of the Compact provides that “[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state.” § 2.01, 94 Stat. 3306. That section further provides that “[e]ach 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.” *Ibid.* Section 2.10(a) of the Compact provides that “[n]othing in this Compact shall be deemed to * * * [i]nterfere 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.” § 2.10(a), 94 Stat. 3306-3307.

2. a. Petitioner is a Texas state agency that provides water to north central Texas, including Fort Worth, Arlington, and Mansfield. Pet. App. 4a. In 2007, in an effort to procure water for the growing needs of its service area, petitioner applied to the Oklahoma Water Re-

sources Board (OWRB) for permits to appropriate water at three locations in Oklahoma.² At issue in this case is petitioner's application for a permit to appropriate 310,000 acre feet per year of surface water from the Kiamichi River, an Oklahoma tributary of the Red River that is partially located within Reach II, Subbasin 5. Pet. 10.³

The Compact defines Reach II, Subbasin 5 as "th[e] portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II." § 5.05(a), 94 Stat. 3311. That geographic area includes portions of Arkansas, Oklahoma, and Texas. Pet. App. 36a, 52a.

The water in Reach II, Subbasin 5 is apportioned as follows:

The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second.

² Oklahoma law provides that anyone "intending to acquire the right to the beneficial use of any water" located in Oklahoma, including any "state or federal governmental agency, or subdivision thereof," must apply to OWRB for a permit. Okla. Stat. Ann. tit. 82, § 105.9 (West 1990).

³ The main stem of the Red River is highly saline and thus is not useful as a potable water source. Petitioner therefore sought permission to divert water from the Kiamichi River, a freshwater tributary, just above where it discharges into the main stem of the Red River. No. 5:07-cv-00045-HE, Docket entry No. 6, at 3, 6 (Jan. 11, 2007).

§ 5.05(b)(1), 94 Stat. 3311. When the Red River’s flow is below 3,000 cubic feet per second at the Arkansas-Louisiana boundary, Arkansas, Oklahoma, and Texas must “allow to flow into the Red River for delivery to * * * Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5.” § 5.05(b)(2), 94 Stat. 3311. When the flow at the Arkansas-Louisiana boundary falls below 1,000 cubic feet per second, Arkansas, Oklahoma, and Texas must “allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing in subbasin 5 within their respective states to flow into the Red River.” § 5.05(b)(3), 94 Stat. 3311-3312. When the flow at Index, Arkansas is below 526 cubic feet per second, Oklahoma and Texas must “allow a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 within their respective states to flow into the Red River.” § 5.05(c), 94 Stat. 3312.⁴

b. On the same day that petitioner filed its permit application, petitioner sued the members of the OWRB, respondents here, in federal district court in Oklahoma.⁵

⁴ Petitioner’s other two permit applications sought permission to appropriate water from Beaver Creek and Cache Creek, which are Oklahoma tributaries of the Red River in Reach I, Subbasin 2. Pet. 10. Under the Compact, Oklahoma has “free and unrestricted use” of the water in that subbasin. § 4.02(b), 94 Stat. 3309. Petitioner does not seek review of the court of appeals’ affirmance of summary judgment for respondent on those claims. Pet. App. 26a.

⁵ Section 13.03 of the Compact provides that “[t]he United States District Courts shall have original jurisdiction (concurrent with that of the Supreme Court of the United States, and concurrent with that of any other Federal or state court, in matters in which the Supreme Court, or other court has original jurisdiction) of any case or controversy involving the application or construction of this Compact.”

Petitioner sought declaratory and injunctive relief barring respondents from applying certain Oklahoma statutes that govern the appropriation and use of water to bar petitioner from diverting water in Oklahoma. Pet. App. 2a. Specifically, petitioner challenged now-expired statutes that were enacted in 2004 and placed a five-year moratorium on the export of water from Oklahoma. See Okla. Stat. Ann. tit. 82, § 1B(A), tit. 74, § 1221.A (West Supp. 2012); Pet. App. 7a. Petitioner also challenged a statute that prohibits the OWRB from making any contract “conveying the title or use of any waters of” Oklahoma for sale or use in another State “unless such contract be specifically authorized by an act of the Oklahoma legislature,” *id.* 82, § 1085.2(2) (West 1990); and another that provides an exception to the general requirement that permitted water be put to beneficial use within seven years only if the proposed use “will promote the optimal beneficial use of water in [Oklahoma],” *id.* § 105.16(B) (West Supp. 1993). Petitioner alleged that the Oklahoma statutes place impermissible burdens on interstate commerce in violation of the Commerce Clause and are preempted by the Compact’s grant of “equal rights” to the use of Reach II, Subbasin 5 water to all four compacting States. Pet. App. 6a. By stipulation of the parties, respondents will take no action on petitioner’s permit applications until this litigation concludes. Pet. 10.

Respondents moved to dismiss the complaint on grounds of ripeness, Eleventh Amendment immunity, abstention principles, and failure to join Louisiana and Arkansas as parties. Pet. App. 8a. The district court denied the motion, *Tarrant Reg’l Water Dist. v. Herr-*

§ 13.03, 94 Stat. 3319. That jurisdiction “shall include, but not be limited to, suits between Signatory States.” *Ibid.*

mann, No. CIV-07-0045-HE, 2007 WL 3226812 (W.D. Okla. Oct. 29, 2007), and the court of appeals affirmed. *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906 (10th Cir. 2008).

c. Petitioner then amended its complaint to challenge additional Oklahoma laws that were enacted after the complaint was filed. Petitioner challenged a new requirement that the OWRB must consider whether water that is the subject of a permit application “could feasibly be transported to alleviate water shortages in the State of Oklahoma” (Okla. Stat. Ann. tit. 82, § 105.12(A)(5) (West Supp. 2012)); a requirement that the OWRB may not issue permits to out-of-state water users if that use would “[i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact” (*id.* § 105.12A(B)); a periodic permit-review scheme applicable only to out-of-state water users (*id.* § 105.12(F)); and a legislative-approval requirement for out-of-state water users before the OWRB may grant a permit for “water apportioned to [Oklahoma] under an interstate compact” (*id.* § 105.12A(D)). Pet. App. 9a-10a.

3. The district court granted summary judgment for respondents. Pet. App. 53a-74a.

a. The court rejected petitioner’s argument that the Oklahoma statutes, by placing restrictions on out-of-state applicants for Oklahoma water permits, violate the Commerce Clause. Pet. App. 61a-69a. The court concluded that although the dormant Commerce Clause is “ordinarily directed to preventing protectionist state measures designed to secure an economic or other advantage for the state or its citizens,” “approval of the [Compact] by Congress * * * constituted its consent to a legal scheme different from that which would oth-

erwise survive Commerce Clause scrutiny.” *Id.* at 67a, 68a.

b. The court further rejected petitioner’s argument that the Oklahoma statutes are preempted by Section 5.05(b)(1) of the Compact. Pet. App. 70a. The court stated that “[i]n light of the foregoing discussion as to Congress’ intent in the context of a Commerce Clause claim, the court can discern no basis upon which the [Compact] could be a basis for preemption.” *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-52a.

a. The court rejected petitioner’s dormant Commerce Clause argument. Pet. App. 15a-28a. The court acknowledged this Court’s holding in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), that a Nebraska law restricting the interstate transfer of groundwater violated the Commerce Clause. Pet. App. 24a. The court stated that a protectionist state law restricting commerce in water would withstand Commerce Clause scrutiny only if Congress’s consent to the state law is “expressly stated” or otherwise “unmistakably clear.” *Id.* at 19a-20a (citing *Sporhase, supra*, and *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82 (1984)). The court concluded that the Compact contained such a clear statement. *Id.* at 24a.

The court explained that by ratifying Section 2.01’s statement that “Oklahoma may ‘freely administer’ appropriated water and use it ‘in any manner’ the state deems beneficial, Congress conferred broad regulatory authority on the state using unqualified terms.” Pet. App. 24a-25a; see also *id.* at 25a-26a (citing Compact § 2.10(a), 94 Stat. 3306-3307). The court concluded that, “[t]aken together, the Compact provisions * * * give the Oklahoma Legislature wide latitude to regulate in-

terstate commerce in its state's apportioned water." *Id.* at 27a.

b. The court of appeals also rejected petitioner's argument that Section 5.05(b)(1) of the Compact preempts Oklahoma statutes that restrict Texas water users from diverting Reach II, Subbasin 5 water in Oklahoma. Pet. App. 28a-45a. The court stated that it was "especially reluctant to find preemption in matters of longstanding state regulation," and that "[t]he presumption against preemption is particularly strong in this case because history reveals 'the consistent thread of purposeful and continued deference to state water law by Congress.'" *Id.* at 34a-35a (quoting *California v. United States*, 438 U.S. 645, 653 (1978)).

The court explained that the Compact's general provisions "demonstrate pronounced federal deference to state water law." See Pet. App. 35a (citing Compact §§ 2.01 and 2.10(a), 94 Stat. 3306-3307). Against that background, the court concluded that Section 5.05(b)(1) of the Compact, when "read in context" with the provisions in Section 5.05(b)(2)-(3) and (c) protecting Louisiana and Arkansas during periods of low flow (see p. 4, *supra*), did not contemplate that Texas (or petitioner) could divert in Oklahoma any of the Subbasin 5 water allocated to Texas. In particular, the court noted that Section 5.05(b)(3) and (c) of the Compact require upstream states to allow certain quantities of water "within their respective states" to flow into the Red River to maintain downstream flow requirements. *Id.* at 37a, 39a. The court concluded that, "[t]aken together, the provisions of [Section] 5.05 stand for the principle that the upstream states control the water within their boundaries, provided they meet their minimum flow ob-

ligations to downstream states and do not take more than an equal share of the excess water.” *Id.* at 39a.

The court reasoned that Section 5.05(b)(1) itself “does not say that a Texas user is entitled to take Texas’s share of th[e] water from a tributary located in Oklahoma[,] [a]nd it does not say that the OWRB is precluded from applying Oklahoma water laws to a[n] application to divert water in Oklahoma for use in Texas.” Pet. App. 40a. The court explained that although those inferences might be plausible “based on the language of [Section] 5.05(b)(1) alone,” the inferences are not reasonable when Section 5.05(b)(1) is read in conjunction with the Compact as a whole, especially in light of the presumption against preemption. *Ibid.*

The court found support for its reading of Section 5.05(b)(1) in the interpretive comments provided by the compact drafters’ Legal Advisory Committee. Pet. C.A. App. 417-450.⁶ The interpretive comments state that, in Reach II, Subbasin 5, “the upstream states cooperate in assuring reliable flows to Arkansas and Louisiana,” and that “[t]his is accomplished by keying the upstream states’ obligation to the flow at the Arkansas-Louisiana boundary.” *Id.* at 434-435. In the court’s view, “[t]he Interpretive Comments do not identify another purpose for [Section] 5.05 and do not suggest any intent to preempt state law.” Pet. App. 39a.

The court therefore concluded that the language in Section 5.05(b)(1) affording each State “equal rights to the use of” the excess water in Reach II, Subbasin 5

⁶ The Legal Advisory Committee wrote interpretive comments “so that members of the respective legislatures, congressional committees, Federal agencies, and subsequent compact administrators might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact.” Pet. C.A. App. 419.

“can reasonably be read to mean that each signatory state has the same opportunity and entitlement to use up to 25 percent of the excess water *in its state* and under its state laws,” but not to divert any water outside its own borders. Pet. App. 42a-43a (emphasis added).

DISCUSSION

The question whether respondents may enforce state laws that effectively prohibit petitioner from diverting any water in Reach II, Subbasin 5 of the Red River Basin in Oklahoma for use in Texas turns on an interpretation of the Compact and its preemptive effect. No presumption against preemption should apply in interpreting a compact among States that apportions a common resource. Although the record concerning the factual context for the Compact may not be fully developed in some respects, as the case comes to this Court, the better reading of the Compact is that a State may divert a portion of its share of Reach II, Subbasin 5 water from outside of its boundaries, at least when necessary to exercise its “equal right[.]” to excess water in that subbasin. Because of the important interests at stake and the practical impact that the court of appeals’ decision apparently would have on water planning in a major urban area in Texas, the Court should grant certiorari to resolve that specific issue. There are, however, additional issues that would have to be resolved, in this case or in other proceedings, to determine whether petitioner may divert a portion of Texas’s share of Reach II, Subbasin 5 water from within Oklahoma, and, if so, the nature and scope of the protection afforded by the Compact.

A. The Court of Appeals Erred In Holding That Section 5.05(b)(1) Of The Compact Would Never Entitle Petitioner To Access Reach II, Subbasin 5 Water In Oklahoma

1. As an initial matter, the court of appeals improperly applied a presumption against preemption to determine whether the challenged Oklahoma statutes conflict with, and therefore are displaced by, Section 5.05(b)(1) of the Compact. See Pet. App. 29a, 34a, 40a, 41a, 43a. This Court has applied a presumption against preemption when a controversy concerns whether a given state authority conflicts with the existence of federal governmental authority. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518-519 (1992); *Hillsborough Cnty v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). The Court has explained that a presumption applies in those circumstances “because respect for the States as ‘independent sovereigns in our federal system’ leads us to assume that ‘Congress does not cavalierly pre-empt’” state law. *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (quoting *Lohr*, 518 U.S. at 485).

A presumption against preemption should not be applied to disputes over whether a state law conflicts with an interstate compact. An interstate compact approved by Congress is a federal law, see *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), but it is not a federal law imposed by Congress on the States. The compact is instead a collaborative effort among States to formulate a solution to a common problem, which is later given the status of federal law when the agreement is presented by the compacting States and approved by Congress. Accordingly, the Court has recognized that a compact is “a contract * * * that must be construed and applied in ac-

cordance with its terms.” *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (citation omitted). Such a compact ordinarily embodies a number of compromises and mutual cessions of rights and authority that the respective States might otherwise claim. A generalized presumption against preemption is out of place in determining whether the rights or regulatory authority of one signatory State on a particular issue have been given up or displaced by the compact.

2. Under the record developed in this case, and without the application of a presumption against preemption, the better reading of Section 5.05(b)(1) of the Compact is that a State, at least in certain circumstances, may access water from its allocated share of Reach II, Subbasin 5 outside of the State’s boundaries.

Section 5.05(b)(1) of the Compact provides that when the flow of the Red River at the Arkansas-Louisiana border is 3,000 cubic feet per second or more, “[t]he Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, * * * provided no state is entitled to more than 25 percent of the [excess] water.” § 5.05(b)(1), 94 Stat. 3311. Subbasin 5 encompasses parts of three States, see § 5.05(a), 94 Stat. 3311, and the provision makes no reference to state boundaries in its description of those States’ “equal rights” to use water in the subbasin. § 5.05(b)(1), 94 Stat. 3311.

By contrast, in other Compact provisions that divide the water of a subbasin between States, the Compact does provide a geographic limitation on a State’s ability to access its allocated share of water. For example, the Compact divides Reach II, Subbasin 3 between Oklahoma and Arkansas and provides that “[t]he States of Oklahoma and Arkansas shall have free and unrestricted

use of the water of this subbasin *within their respective states*,” subject to certain downstream flow requirements. § 5.03(b), 94 Stat. 3310 (emphasis added). Similarly, the Compact divides Reach III, Subbasin 3 between Texas and Louisiana and provides that “Texas and Louisiana *within their respective boundaries* shall each have the unrestricted use of the water of this subbasin,” subject to certain other requirements. § 6.03(b), 94 Stat. 3313 (emphasis added). Section 5.05(b)(1) contains no similar state-boundary restriction.

The Compact’s limitation of each State’s allocated share to “[no] more than 25 percent of the [excess] water” is also significant. § 5.05(b)(1), 94 Stat. 3311. If it were the case that one or more States could not access a 25 percent share of the excess water in Reach II, Subbasin 5 from within their boundaries, that would be relevant extrinsic evidence supporting an interpretation that a State may divert its share of water from outside of its boundaries. Petitioner argued to the courts below that Texas could not fully access its share of Reach II, Subbasin 5 water from within the State because “the part of Texas located in Reach II, Subbasin 5 contains primarily intermittent streams and dry arroyos yielding a small fraction of the total water flowing in Subbasin 5.” Pet. App. 41a (internal quotation marks and citation omitted). The lower courts did not allow petitioner to present evidence on that point, see *id.* at 44a n.3, but Section 5.05(b)(1)’s guarantee of equal rights to the water in Reach II, Subbasin 5 would be thwarted if a State could not access its equal share from within its boundaries, yet was barred from diverting any of that share in another State.⁷

⁷ Although the main stem of the Red River passes through or borders each State, it does not follow that each State could divert its

3. a. The court of appeals concluded that the purpose of Section 5.05(b) is simply “to ensure that an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas.” Pet. App. 36a. The court also read the interpretive comments to indicate that Section 5.05(b) is designed to ensure adequate downstream flow and nothing more. *Id.* at 39a. That is incorrect.

Section 5.05(b) does more than ensure that downstream states receive adequate water during low-flow periods. Although Section 5.05(b)(2)-(3) and (c) establish downstream flow requirements, Section 5.05(b)(1) apportions the subbasin’s excess water when the flow *exceeds* 3000 cubic feet per second. The interpretive comments identify that purpose by explaining that “[w]hen the flow is high, * * * all states are free to use whatever amount of water they can put to beneficial

share of Reach II, Subbasin 5 water from within its boundaries. Along Texas’s border with Oklahoma, the bed of the river is in Oklahoma. See n.1, *supra*. Under the court of appeals’ interpretation of the Compact, petitioner could not divert water from the river’s main stem. Furthermore, the water in the main stem is highly saline and thus not useful as a potable water source. That issue was known to the States when they entered into the Compact. The interpretive comments note that “[n]atural salt pollution in the Red River Basin is * * * seriously detrimental to all states.” Pet. C.A. App. 447. Furthermore, the U.S. Army Corps of Engineers stated in a hearing on the Compact that “[t]he Red River main stem flows cannot be used for many purposes due to the chloride contamination from natural and manmade sources,” but that “[g]enerally most tributary flows are suitable for domestic and industrial use with normal treatment.” *Red River Compact and Caddo Lake Compact: Hearing on H.R. 7205 and H.R. 7206 Before the House Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary*, 96th Cong. 2d Sess. 6 (1980) (statement of Colonel Alan L. Laubscher, Assistant Director of Civil Works, U.S. Army Corps of Engineers).

use,” and that “[i]f the states have competing uses and the amount of water in excess of 3000 [cubic feet per second] cannot satisfy all such uses, each state will honor the other’s right to 25% of the excess flow.” Pet. C.A. App. 435. The court of appeals’ conclusion that Section 5.05(b) is concerned only with downstream delivery requirements is further refuted by another portion of the comments “emphasiz[ing] that * * * periods of low flow on the mainstem are relatively rare,” and that “[f]lows less than 3000 [cubic feet per second] have [historically] occurred only 4.2% of the time.” *Ibid.*

b. The court of appeals also identified several “[g]eneral [p]rovisions” of the Compact that in its view “demonstrate pronounced federal deference to state water law,” and concluded that “[t]he Compact’s general policy is to give the Compact states unrestricted authority to regulate their apportioned water.” Pet. App. 35a. The Compact’s general provisions do not support a conclusion that Oklahoma may bar Texas water users from accessing any portion of *Texas’s* share of Reach II, Subbasin 5 water in Oklahoma.

The general provisions of the Compact make clear that a State’s regulation of water use within its boundaries must be consistent with the allocations made under the Compact. Section 2.01 provides that “[e]ach 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.*” § 2.01, 94 Stat. 3306 (emphasis added). Similarly, Section 2.10(a) provides that “[n]othing in this Compact shall be deemed to * * * [i]nterfere 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.*” § 2.10(a), 94 Stat. 3306-3307 (emphasis added). The interpretive comments repeat that limitation. See Pet. C.A. App. 422 (“*Subject to the general constraints of water availability and the apportionment of the Compact, each state is free to continue its existing internal water administration, or to modify it in any manner it deems appropriate.*”) (emphasis added).

Under those general provisions of the Compact, the States retain authority to enforce state water laws within their boundaries, but they may not enforce those laws if doing so would prevent another State from receiving and putting to beneficial use its allocated share of water. In those circumstances, the state laws would conflict with the Compact’s terms and frustrate the accomplishment of its purposes. See *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941).

B. The Court Of Appeals’ Commerce Clause Holding Was Unnecessary

At this stage, the parties’ dispute requires nothing more than an interpretation of the Compact and its preemptive force. Once the question of whether the Compact enables a State to access any portion of its share of Reach II, Subbasin 5 water from outside of its boundaries is resolved, the Commerce Clause has no role to play. Petitioner is asserting a right only to access water that, under its interpretation of the Compact, is allocated to Texas. Petitioner is not asserting a right to access water that is allocated to Oklahoma. See Pet. 20 n.9, 21. The court of appeals’ dormant Commerce Clause holding was based on its conclusion that the water petitioner sought to access was water allocated to Oklahoma under the Compact. See Pet. App. 27a (“Tak-

en together, the Compact provisions * * * give the Oklahoma Legislature wide latitude to regulate interstate commerce *in its state's apportioned water.*").

If petitioner is correct that Texas water users may not be altogether barred from accessing Texas's allocated share of Reach II, Subbasin 5 water in Oklahoma, at least in some circumstances, then it is the Compact that prohibits respondents from enforcing state laws that would bar such access, not the Commerce Clause. See pp. 11-16, *supra*. Petitioner is not asserting a right to access water allocated to Oklahoma under the Compact.

C. The Issue Is Important

Although there is not a circuit conflict on the issues presented, this case implicates important state interests protected by an interstate compact, and the court of appeals' decision has potentially great practical consequences for the availability of water in a major urban area in Texas. Those concerns justify this Court's review.

1. This Court's original and exclusive jurisdiction over controversies between States, see U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a), "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact," *Texas v. New Mexico*, 462 U.S. 554, 567 (1983). See, *e.g.*, *New Jersey v. New York*, 523 U.S. 767, 773-774 (1998); *Kansas v. Colorado*, 514 U.S. 673 (1995); *Virginia v. West Virginia*, 206 U.S. 290, 317-319 (1907). In claiming that respondents are depriving Texas water users of Texas's ability to use its lawful share of water of an interstate river, petitioner asserts a substantial sovereign interest of Texas that would fall squarely within what is ordinarily the exclusive jurisdiction of this Court had the suit been brought by Texas itself against Oklahoma. See, *e.g.*, *Texas v.*

New Mexico, 462 U.S. at 567; *Arizona v. California*, 373 U.S. 546 (1963); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 298 U.S. 573 (1936); *Kansas v. Colorado*, 185 U.S. 125 (1902).

Unlike other interstate compacts, the Red River Compact grants jurisdiction to the federal district courts, “concurrent with that of the Supreme Court of the United States * * * in matters in which the Supreme Court * * * has original jurisdiction,” over “any case or controversy involving the application or construction of this Compact,” including (but not limited to) a suit between States. § 13.03, 94 Stat. 3319. This Court is therefore not the exclusive forum for resolving disputes under the Compact, even among the compacting States themselves. That consideration, however, should not weigh against review in this case, because petitioner properly invoked the district court’s jurisdiction and the court of appeals’ decision could prevent Texas water users from accessing in Oklahoma any portion of their State’s allocated share of water.

Petitioner provides water to over two million residents of north central Texas. Pet. 3. Petitioner projects that that population will double by 2060 and that the demand for water will exceed supply by more than 400,000 acre feet per year by that time. *Ibid.* Whether petitioner can obtain a portion of Texas’s share of Reach II, Subbasin 5 water from within Oklahoma could have a major impact on petitioner’s operations for decades to come. Under these circumstances, this Court’s review is warranted. See Sup. Ct. R. 10(c) (certiorari is warranted when “a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court”).

2. Respondents contend (Br. in Opp. 16, 17-18) that the Compact should not be interpreted without the participation of the States themselves. That contention is not a basis for denying review here. The Tenth Circuit has already interpreted the Compact without the compacting States themselves as parties, and the question is whether that interpretation should be permitted to stand. This Court has previously resolved disputes over the interpretation of a Compact without the involvement of the compacting States. See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-111 (1938).

Furthermore, the State of Texas has filed an amicus brief stating that petitioner “is an entity created under Texas law that is duly authorized to acquire water from sources outside of Texas,” Texas Amicus Br. 1, expressing Texas’s interpretation of the Compact, and urging the Court to grant review. Respondents are state officials who are represented by the Oklahoma Attorney General’s Office. In these circumstances, the absence of Oklahoma and Texas as formal parties should not present an obstacle to this Court’s review of the questions presented.

Although respondents maintain (Br. in Opp. 16) that the Tenth Circuit’s legal rulings would not bind the States, that is unclear at least with respect to Oklahoma, given its Attorney General’s representation of state officials in the case. Cf. *Heckman v. United States*, 224 U.S. 413, 444-446 (1912). The decision would in any event be controlling precedent in a suit brought by Texas or another entity in a district court in the Tenth Circuit. And of course the Tenth Circuit’s ruling prevents petitioner itself from accessing water in Oklahoma.

3. Although the specific question of Compact interpretation presented in the petition thus can appropriately be resolved by the Court in this case, there are many other issues that could bear on whether petitioner ultimately could obtain a permit to divert water from the Kiamichi River in Oklahoma. For example, although Section 5.05(b)(1) may allow Texas water users to access some portion of Texas's allocated share of Reach II, Subbasin 5 water in Oklahoma, that ability would not directly entitle petitioner to a permanent appropriation of 310,000 acre feet per year of surface water from Reach II, Subbasin 5, as petitioner has sought in its permit application filed with respondents. Texas is not entitled to a fixed quantity of water under the Compact; it is entitled to use 25 percent of the excess water in the subbasin, and that quantity will change every year. § 5.05(b)(1), 94 Stat. 3311.

There could also be factual and legal questions regarding how much water is available at any given time for the compacting States to divide equally among themselves. The United States is currently involved in litigation over the asserted rights of the Choctaw and Chickasaw Nations to water within their historic treaty territory, which includes areas encompassed by Reach II, Subbasin 5 and other subbasins flowing into Subbasin 5. See *Oklahoma Water Res. Bd v. United States et al.*, No. 5:12-cv-00275-W (W.D. Okla.). The Compact expressly states that “[n]othing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin.” § 2.07, 94 Stat. 3306. Accordingly, water rights of the Tribes may be relevant to the amount of excess water available.

Moreover, assuming that the Compact does not permit Oklahoma to completely foreclose Texas from diverting any portion of its allocated water within Oklahoma, there would be a further question whether the Compact entitles each State to divert Reach II, Subbasin 5 water out-of-state as a matter of course, or whether a State may be entitled to do so only when it cannot obtain full access to its equal share of water from within its own boundaries. Depending on how the Compact is interpreted in this respect, the factual question of whether Texas can access its equal share of water within its boundaries, a question the lower courts refused to consider, Pet. App. 44a n.3, may be relevant to whether the Compact allows petitioner to divert Reach II, Subbasin 5 water in Oklahoma. The competing interests of water users in Oklahoma and other compacting States in diverting water from a particular point within the subbasin, in addition to environmental and other restrictions, may also be relevant to whether a particular out-of-state diversion should be allowed.

Accordingly, if the Court grants certiorari and holds that Oklahoma may not categorically foreclose access in Oklahoma to Texas's allocated share of Reach II, Subbasin 5 water, further proceedings would be required either on remand in this case or in other proceedings, perhaps involving additional parties (*e.g.*, in a suit between or among compacting States), to address these additional issues to the extent they are relevant. Alternatively, after considering the matter, the Court may elect to address certain legal issues—*e.g.*, rejecting application of the presumption against preemption and the court of appeals' misreading of the general Compact provisions concerning the States' administration of water rights—and then remand to the district court for

consideration of whether Texas may access its share of Reach II, Subbasin 5 water in Oklahoma, taking into account any relevant legal and factual issues concerning the extent of Texas's ability to obtain Subbasin 5 water within its boundaries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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