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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner submits this brief to address matters raised by the United States in its brief urging the Court to grant certiorari in this case. We are in complete agreement with the views expressed by the government and here briefly supplement several points made by the United States.

First, and most fundamentally, the government's submission confirms that review is warranted. The United States demonstrates that the Tenth Circuit misinterpreted the Red River Compact, and that this Court's intervention is appropriate to settle a dispute about the meaning of an agreement between States that governs a matter of enormous practical importance. U.S. Br. 11-16. As to this latter point, the real-world impact of the decision below on millions of people cannot be overstated. The United States correctly notes that the Tenth Circuit's holding "has potentially great practical consequences for the availability of water in a major urban area in Texas" (*id.* at 17) and "could have a major impact on petitioner's operations for decades to come." *Id.* at 18. The State of Texas likewise demonstrated that, if not set aside, the ruling below will stifle region-wide economic development, employment, and productivity, while causing significant adverse environmental effects. Texas Br. 5-6. See also Pet. 3-4, 24-25. For the reasons explained by the United States, these considerations warrant review by this Court.

That conclusion is bolstered by a consideration not directly addressed by the United States: The decision below endorsed an approach that could have broad and harmful implications for the interpreta-

tion of interstate water compacts across the Nation. We showed in the petition that many such compacts contain equitable apportionment provisions similar to the one at issue here. Pet. Reply Br. 9-10. And, as the government demonstrates, the Tenth Circuit improperly held that the interpretation of such compacts must be governed by a "presumption against preemption." U.S. Br. 11-12. If not set aside, that rule necessarily will distort the meaning intended by many compacting states. For this reason as well, the decision below is one of considerable and continuing importance that should be reviewed by this Court.

Second, the United States observes that, "[o]nce 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." U.S. Br. 16. We agree with this observation. The Court could resolve the portion of the dispute currently before it simply by holding that the understanding of the Compact offered by petitioner and supported by the United States is correct—that is, by holding that the Compact allocates an equal share of the water in subbasin 5 to each of the compacting States and (at least in some circumstances) authorizes one of those States to obtain its share from water located in another State. On this reading, "it is the Compact that prohibits respondents from enforcing state laws that would bar such access." *Id.* at 17.[1]

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[1] Respondents are wrong in contending that Oklahoma law "might never be applied to deny petitioner's [permit] request." Resp. Supp. Br. 6; see *id.* at 11-12. The United States correctly notes that the question here is whether "respondents may enforce state laws that effectively prohibit petitioner from diverting any water in Reach II, Subbasin 5." U.S. Br. 10. In fact, the

We note, however, that enforcement of these Oklahoma laws *also* is barred by the Commerce Clause and that, accordingly, the Commerce Clause question presented in the petition is properly in the case. We showed in the petition (at 14-24) that Oklahoma's discriminatory statutes would have the effect of precluding out-of-state users from obtaining *any* water originating in the State; that this discrimination is barred by the Commerce Clause; and that the Tenth Circuit erred in holding that Congress authorized this discrimination when it approved the Compact. The United States has not expressed disagreement with any of these points and, notwithstanding respondents' statement to the contrary, has not "recommended[ed] against granting certiorari on the dormant Commerce Clause question." Resp. Supp. Br. 2; compare U.S. Br. 16-17, 22 ("[t]he petition for a writ of certiorari should be granted"). For this reason, although the Court can resolve the case through application of the Compact alone, it should not limit the grant of certiorari to exclude the Commerce Clause question presented in the petition.[2]

Tenth Circuit below expressly acknowledged the discriminatory nature of Oklahoma's regime (see Pet. App. 5a, 30a), and previously recognized that "a fair reading of the statutes at issue demonstrates that the OWRB is arguably precluded from granting [petitioner's] application. [Petitioner] has thus shown it faces an appreciable threat of injury sufficient to invoke federal jurisdiction." *Tarrant Reg'l Water Dist.* v. *Sevenoaks*, 545 F.3d 906, 910 (10th Cir. 2008).

[2] We understand the United States to reason that petitioner is seeking to obtain only water apportioned to Texas under the Compact and that accepting petitioner's reading of the Compact's allocation provisions therefore is necessary for petitioner to prevail on any theory. We agree with that reasoning, but also note that there are circumstances in which the Commerce Clause nevertheless could continue to play a role in the resolu-

Finally, the United States is correct in noting that, once the meaning of the Compact is settled, additional steps will be necessary to determine the precise amount of water to which Texas is entitled and the terms of any permit obtained by petitioner to divert that water from sources in Oklahoma. See U.S. Br. 20-22. Indeed, petitioner noted that very point below, expressly acknowledging before the lower courts that it seeks in this litigation, not the award of a permit to obtain a specific quantity of water from Oklahoma, but a determination that Oklahoma must allow Texas access to its apportioned share of subbasin 5 water. Those courts responded by holding that the Compact gives Texas no entitlement to the disputed water *at all*. See U.S. Br. 21 (the question whether Texas could access its equal share of Subbasin 5 water from within its boundaries is one "the lower courts refused to consider"). Whether that determination was correct—the question now before this Court—must be settled as a threshold matter before the remaining issues identified by the United States are resolved.

For this reason, the leitmotif of respondents' supplemental brief—its repeated contention that the United States acknowledges "multiple vehicle problems" in the case by noting that final resolution of petitioner's entitlement to a permit will require further proceedings (Resp. Supp. Br. 2; see *id.* at 7, 9, 10-11)—is wrong. The initial question of law that

tion of the case. For one, the Compact might be read (incorrectly, in our view) to allocate an equal share of reach II, subbasin 5 water to Texas but not to grant Texas an entitlement to enter Oklahoma to obtain that water. Cf. Pet. App. 40a-41a. If the Compact were (mis)read to allocate subbasin 5 water to Texas but not to affirmatively authorize entry into Oklahoma to get it, the Commerce Clause would come into play.

must be settled here is whether the Compact entitles Texas to its apportioned "equal" share of subbasin 5 water.[3] If this Court grants review and holds that it does, the further and different questions noted by the United States about the particulars of petitioner's permits could be answered, in the first instance, by the Oklahoma and Texas permitting authorities that will act on petitioner's permit applications. When that is done, we are fully confident that reversal of the decision below by this Court will in fact ultimately result in petitioner obtaining the water currently in dispute. See No. 10-6184, *Tarrant Regional Water Dist.* v. *Herrmann* (10th Cir.), oral arg. Tr. 32, 46 (offer of proof).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Respondents are simply incorrect in asserting that "the Texas Red River Compact Commission confirmed that Texas received all its water under the Compact from 2005-09." Resp. Supp. Br. 9. Respondents are misdescribing the deposition testimony of a single Compact Commissioner, who said only that certain Texas permittees had received all the water to which they were entitled under Texas permits that have no bearing on this case. See Pl. CA10 Br. 5-6 & n.11. Respondents use similar sleight-of-hand in contending that "blame rests squarely on petitioner" for the absence of record evidence on "'Texas' current use or receipt of water under the Compact.'" Resp. Supp. Br. 10. The question here is not how much Compact water Texas *currently* uses; it is whether Texas is entitled to the *additional* water petitioner seeks for future use. The Tenth Circuit expressly refused to consider factual questions that might bear on that issue "because [it] h[e]ld that [Compact] § 5.05(b)(1) does not allocate water located in Oklahoma to Texas *regardless of what amount of water Tarrant and other Texas users can appropriate in Texas*." Pet. App. 44a n.3 (emphasis added). See U.S. Br. 13. That legal holding is challenged here.

Respectfully submitted.

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