No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
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

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Civil Litigation

JONATHAN F. MITCHELL
Solicitor General

DANICA L. MILIOS
Deputy Solicitor General

EVAN S. GREENE
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL

P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1845
evan.greene@oag.state.tx.us

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Rules

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The State of Texas has a substantial interest in the Court granting the petition and reversing the Tenth Circuit's judgment. Petitioner, Tarrant Regional Water District, is an entity created under Texas law that is duly authorized to acquire water from sources outside of Texas. The Tenth Circuit's judgment thwarts Tarrant's ability to obtain water supplies within the Oklahoma portion of the Red River Basin that Texas has "equal rights" to use under the Red River Compact. Texas has an interest in ensuring that Oklahoma is not permitted to undermine its compact commitments by force of its own protectionist water legislation.

DISCUSSION

I. THE TENTH CIRCUIT'S DECISION DEPRIVES TARRANT OF CRITICAL WATER RIGHTS AND THREATENS TO WASTE MASSIVE AMOUNTS OF WATER.

There is perhaps no natural resource more critical to a population's survival than water. People depend on water for daily life, production of food, and support of industry. In light of this pressing need, the States have, for decades, negotiated water compacts to define and control the equitable allocation of water that traverses shared borders. The Red River Compact is

---

1. Pursuant to Supreme Court Rule 37.2(a), the State of Texas provided counsel of record for all parties with timely notice of the intent to file this brief. Consent of the parties is not required for the States to file an amicus brief. SUP. CT. R. 37.4

one such compact joined by the States of Arkansas, Louisiana, Oklahoma, and Texas.

1. Tarrant is one of the largest raw-water suppliers in the State of Texas. It provides water to more than 1.7 million people in the North Central Texas area and serves more than 30 wholesale customers, including the cities of Fort Worth, Arlington, and Mansfield, as well as the Trinity River Authority.[2] As such, Tarrant is one of the primary beneficiaries of Texas's water rights under the Red River Compact.

Under the plain terms of the Compact, Texas is entitled to enjoy, among other things, "equal rights to the use of" certain water in Reach II, Subbasin 5, which traverses Oklahoma, Texas, and Arkansas. Pet. App. at 88-89 (Compact, § 5.05(a)-(b)(1)). Nonetheless, the Tenth Circuit has concluded that Oklahoma may impose its discriminatory laws to prevent Texas appropriators like Tarrant from acquiring Texas's rightful share of water from the subbasin, simply because the water is located within the physical boundaries of Oklahoma. If allowed to stand, Tarrant and other North Texas appropriators stand to lose billions of gallons of water every year that they desperately need—and have a right to use under the Compact.[3]

---

2. Tarrant Regional Water District Website, About Us, http://www.trwd.com/overview.aspx.

3. As explained by Tarrant, its demand for water will exceed supply by more than 400,000 acre-feet (approximately 130 billion gallons) per year by 2060. *See* Pet. at 3.

Indeed, every gallon of water matters. Tarrant (and three other large water providers) provide 85 percent of the water used in Texas's Region C.[4] Region C is heavily urbanized, with 81 percent of the population living in cities with populations in excess of 20,000 people.[5] The two most populous counties in Region C, Dallas and Tarrant, have 65 percent of the region's population.[6] The region has and will continue to experience explosive population growth in the upcoming decades.[7] As of the 2000 Census, the population of Region C was 5,254,722, comprising 25.2 percent of Texas's total population.[8] The estimated population as of 2008 was 6,347,000, an increase of 21

---

4. TEX. WATER DEV. BD., 2011 Region C Water Plan at ES.4, *available at* http://www.twdb.state.tx.us/wrpi/rwp/3rdround/2011RWP.asp (From link, click on Region C, PDFs, Main Report, Executive Summary).

5. *Id.* at ES.3.

6. *Id.* Region C is home to the Dallas-Fort Worth Metroplex, which is the fourth largest metropolitan area in the United States. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, *News Release: GDP by Metropolitan Area, Advance 2010, and Revised 2007-2009*, Sept. 13, 2011, http://www.bea.gov/newsreleases/regional/gdp_metro/2011b/gdp_metro0211b.htm; *see also* AM. FACT FINDER, U.S. CENSUS BUREAU, *Population and Housing Occupancy Status: 2010 - United States,* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_NSRD_GCTPL2.US24PR&prodType=table.

7. 2011 Region C Water Plan, *supra* note 4, at ES.3-4.

8. *Id.* at ES.3.

percent.[9] The Region C planning group projects that by 2030, the area's population will increase to over 9 million, and to over 13 million by 2060.[10]

This increase in population comes with a predictable increase in demand for water. The Region C planning group anticipates that demand for water will increase from its current level of approximately 1.75 million acre-feet per year to 2.4 million acre-feet per year in 2030, and 3.3 million acre-feet by 2060.[11]

Compounding the natural challenges that arise from population growth is the Texas drought. Year 2011 ranks as the worst one-year drought in Texas's history.[12] And weather experts predict that the current drought will persist at least into 2012, and possibly for the next decade.[13]

Plainly, Tarrant and its fellow North Texas appropriators have their work cut out for them. They must acquire increasing supplies of water to support a rapidly expanding population under dire natural

---

9. *Id.*

10. *Id.* at ES.4.

11. *Id.* at ES.5.

12. TEX. WATER DEV. BD., *Water for Texas 2012 State Water Plan* at 14, *available at* http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf.

13. *Id.* at 155 (citing posting of John Nielsen-Gammon to Climate Abyss blog, http://blog.chron.com/climateabyss/2011/09/the-drought-of-record-was-made-to-be-broken (Sept. 22, 2011, 16:57 CTS)).

circumstances. The possibility of failure is quite real, and it would come at a severe price: By 2060, if water demands in Region C are not met, projected annual income will be reduced by over $49 billion. Over $3 billion in state and local business taxes will be lost. And in excess of 546,000 jobs will be lost, leading to an inevitable decline in population of 796,606 people.[14]

2. To make matters worse, Oklahoma has no use for the water at issue. The Oklahoma Water Resources Board ("OWRB") openly acknowledges that Oklahoma possesses water in abundant supply, and that the amount of water sought by Tarrant "would not affect present or future needs in central Oklahoma."[15] In the words of the OWRB:

> [T]he six major river basins in southeast Oklahoma produce, in an average year, more than three times the amount of water than the entire State of Oklahoma uses annually for all purposes . . . . The flows of the six river basins could support three cities the size of New York City in southeast Oklahoma and have sufficient water supplies left over for other purposes.[16]

---

14. *Id.* at 184, Table 6.5.

15. OKLA. WATER RES. BD., *Status Report to the Governor, Joint State/Tribal Water Compact and Water Marketing Proposals, Southeast Oklahoma Water Resources Development Plan* at 30, http://www.owrb.ok.gov (From link, click on legislative, Southeast Oklahoma Water Development Plan, Report).

16. *Id.* at 27.

No wonder, then, that both sides of this litigation have long recognized that it makes sense from both an economic and a resource standpoint[17] for Oklahoma to allow North Texas appropriators access to Oklahoma water in quantities that could help solve North Texas's water shortages through at least 2060 (without harm to Oklahoma).[18]

But instead of allowing Tarrant access to water that Texas is rightfully entitled to use under the Red River Compact, Oklahoma enacted discriminatory laws preventing that access. The result of Oklahoma's economic protectionism is the ongoing flow of billions of gallons of water, unused, into the Gulf of Mexico.

3. The Tenth Circuit's decision upholding Oklahoma's protectionist laws destroys Tarrant's ability to acquire necessary water from one of the most economically sensible and environmentally appropriate resources available—putting at risk for insufficient water one of the most populous and productive areas of the country. The potentially devastating and long-lasting consequences of this decision justify the Court's

---

17. TEX. WATER DEV. BD., 2011 Region C Water Plan at App. P., *available at* http://www.twdb.state.tx.us/wrpi/rwp/3rdround/2011RWP.asp (From link, click on Region C, PDFs, Appendices, Appendix P) (identifying water from Oklahoma as a highly stable, affordable, and environmentally friendly resource).

18. Status Report to the Governor, *supra* note 15, at 25-30. *See also* 2011 Region C Water Plan, *supra* note 4, at ES.10 (Table ES.1), 4E.3-4 (From link, click on Region C, PDFs, Main Report, Chapter 4E).

swift intervention now, even in the absence of a division of opinion among the circuit courts of appeals. *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 505-506 (2007). There is nothing to be gained by waiting for more percolation in the courts of appeals. Quite the contrary, the Court should act now to discourage other State parties to the Red River Compact (or one of the other many such agreements among other States) from retaliating with similarly protectionist legislation.

II. THE TENTH CIRCUIT EMPLOYED AN IMPROPER PRESUMPTION AGAINST PREEMPTION IN UPHOLDING OKLAHOMA'S PROTECTIONIST WATER STATUTES AGAINST TEXAS'S SUPERIOR "RIGHT[] TO THE USE OF" WATER LOCATED ANYWHERE WITHIN REACH II, SUBBASIN 5 OF THE RED RIVER COMPACT.

In addition to the practical reality that the Tenth Circuit's judgment will deprive North Texans of readily available water, it is also wrong in both its interpretation of the Compact and in its use of a supposed presumption against preemption to uphold Oklahoma's discriminatory water laws.

This Court is the ultimate arbiter of interstate-compact disputes. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) (The Court "must have final power to pass upon the meaning and validity of compacts."). Whether the Red River Compact conflicts with—and therefore preempts—Oklahoma's challenged water-permitting scheme boils down to a question of compact interpretation. *Cf. Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-11

(1938) (Court may determine the effect of an interstate compact even where the contracting States are not parties to the suit).

Relying upon a presumption against implied preemption of state laws, the Tenth Circuit determined that Section 5.05(b)(1) of the Compact could be squared with Oklahoma's challenged statutes by narrowly construing each Signatory State's "equal rights to the use of" water located in Reach II, Subbasin 5 of the Compact to include only water from within each State's own physical boundaries—even though Subbasin 5 traverses state lines. The court's reliance upon the presumption was misplaced. Because the presumption against preemption is designed to preserve the States' ability to legislate alongside Congress, *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009), it should not be applied in the context of interpreting the meaning of an interstate compact that was negotiated by several States themselves.

Under the plain terms of Section 5.05(b)(1), Texas enjoys "equal rights" to use water that originates or flows into Subbasin 5. Moreover, during ordinary flow conditions, Section 5.05(b)(1) expressly "entitle[s]" each Signatory State to use up to 25% of Subbasin 5 water (in excess of 3000 cubic feet per second) without respect to state borders. Pet. App. at 88-89. In other words, the Compact provides Texas with the right to appropriate its equitable share of water from anywhere within the subbasin—including that portion of the subbasin that sits within Oklahoma—so long as Texas does not exceed its 25% allotment.

Tarrant's ability to appropriate Texas's share of Subbasin 5 water from within the physical boundaries of Oklahoma is undisputedly impeded by Oklahoma's discriminatory laws, which effectively prohibit out-of-state appropriators from obtaining water from within Oklahoma. The Court's review is necessary to ensure that States may not freely violate their compact obligations under the cover of their own legislation.

A. The Compact Must Be Read According to Its Plain Terms—Not with a Presumption Against Preemption of Conflicting State Laws.

1. An interstate compact approved by Congress is federal law. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). At the same time, a compact is a type of contract that is construed according to ordinary principles of contract law. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *see also Kansas v. Colorado*, 533 U.S. 1, 20-21 (2001) (O'Connor, J., concurring in part and dissenting in part). The primary goal of contract interpretation is to effectuate the contracting parties' intent. *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-71 (1984). That is accomplished by adhering to and enforcing the "plain terms" of the contract. *Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011); *see also New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008) ("Interstate compacts, like treaties, are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the

purposes of the high contracting parties.'") (citing *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)).

Faced with Tarrant's Supremacy Clause challenge to Oklahoma's water-permitting scheme, the Tenth Circuit disregarded these cardinal tools of compact construction and instead interpreted the Red River Compact under the distorting effect of a "presumption against implied conflict preemption." *See* Pet. App. at 34-35, 40-41, 43.

2. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Consistent with the express command of the Supremacy Clause, state laws that conflict with federal law are "without effect." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (citation omitted). That bedrock and seemingly straightforward principle of constitutional law is far easier to recite than to apply. Indeed, the standard used to determine whether federal law actually conflicts with state law is itself unclear.

In the absence of an express preemption clause, the Court generally has employed a presumption against implied conflict preemption, under which federal law is construed to avoid a conflict with state law to the extent possible. *See, e.g., Wyeth*, 555 U.S. at 565. On the other hand, the Court also has held that the presumption against implied conflict preemption should not be used to interpret the "substantive . . . *meaning*" of federal law—at least when there is no doubt that the law is intended to preempt state laws.

Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 743-44 (1996) (the "meaning" of a federal statute is a separate question from "whether" it is preemptive) (emphasis in original); *see also Cuomo v. The Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2733 (2009) (Thomas, J., concurring in part and dissenting in part) (The act of statutory construction "may clarify the pre-emptive scope of enacted federal law . . . .").

In the Court's most recent treatment of conflict preemption, the majority did not apply any presumption against implied preemption in determining that Minnesota's and Louisiana's failure-to-warn laws conflicted with—and were therefore preempted by—federal drug-labeling regulations applicable to generic drugs. *See PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577-78 (2011). Writing for a four-justice plurality, Justice Thomas went further, expounding that courts "should not strain to find ways to reconcile federal law with seemingly conflicting state law," but should instead "look no further than 'the ordinary meanin[g]' of federal law" without "distort[ing] federal law to accommodate conflicting state law." *Id.* at 2580 (citations omitted); *but see id.* at 2583 (Sotomayor, J., dissenting) ("[A] plurality of the Court tosses aside our repeated admonition that courts should hesitate to conclude that Congress intended to pre-empt state laws governing health and safety.").

3. Despite the underlying uncertainty over the proper tool of construction for interpreting federal statutes and regulations in a typical conflict-preemption analysis, the presumption against

preemption should not have been applied in this case, where the federal law at issue is an interstate compact. The Court utilizes the presumption out of "respect for the States as 'independent sovereigns in our federal system,'" under the assumption that Congress does not "cavalierly" intend to eliminate the States' ability to enact and enforce their laws. *Wyeth*, 555 U.S. at 565 n.3 (citation omitted). But it makes little sense to apply the presumption when interpreting an interstate compact that was negotiated, drafted, and executed by a group of States. Employing the presumption effectively favors one State's interpretation of the compact over the objective meaning of its terms, and in turn, will often deprive non-breaching States of bargained-for compact benefits under the guise of respecting their sovereignty. Not surprisingly, the Court long ago recognized that States may not unilaterally determine the effect of their compact obligations by force of their own laws:

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State.

West Virginia ex rel. Dyer, 341 U.S. at 28; *see also Hinderlider*, 304 U.S. at 106 ("Whether the apportionment of the water of an interstate stream be made by compact . . . with the consent of Congress or by a decree of this Court, the apportionment is binding

upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."); *Kentucky v. Indiana*, 281 U.S. 163, 176-77 (1930) (States cannot determine their rights under an interstate compact "inter sese," but instead, the Court "must pass upon every question essential to such a determination, although local legislation . . . may be involved.") (citation omitted).

At bottom, the Tenth Circuit was able to salvage Oklahoma's challenged water statutes only by subverting the other Signatory States' rights under the Compact. Assuming the presumption against implied preemption survived *PLIVA*, its usage should be confined to the context of reconciling federal statutes and regulations with potentially conflicting state laws.

4. Moreover, the Tenth Circuit overlooked the fact that the Signatory States had specifically anticipated the potential for conflict between the Compact and state laws, and expressly stated in two places that the Compact must prevail in all such instances. First, Section 2.01 of the Compact states:

> Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state [and] 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*.

Pet. App. at 86 (emphasis added). Section 2.10(a) then states:

> Nothing 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*.

Pet. App. at 87 (emphasis added).

Although the Tenth Circuit cited portions of these provisions to support its conclusion that Congress and the Signatory States intended to preserve the States' ability to regulate the usage and control of water within their boundaries, *see* Pet. App. at 33, 35, the court omitted and failed to account for the overriding effect of the italicized language. The cited provisions make unmistakably clear that, although the Signatory States are generally permitted to administer water rights within their borders, they may not legislate around their commitments under the Compact. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-72 (2000) (a "saving" clause preserving the operation of state law does not bar or affect the ordinary working of conflict preemption principles).

There is simply no basis for employing a presumption against implied preemption when the Signatory States explicitly provided that the Compact is intended to prevail in any potential conflict with state law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (preemptive "purpose" is "the ultimate touchstone" in every preemption case) (citation

omitted). Instead of endeavoring to reconcile the Compact with Oklahoma law, the Tenth Circuit should have aimed to give effect to the plain meaning of the Compact's text. *See Smiley*, 517 U.S. at 744 ("What *is* at issue here is simply the meaning of a provision that does not . . . deal with pre-emption [itself], and hence does not bring into play the considerations" warranting usage of a presumption against preemption.).

B. Oklahoma's Discrimination Against Texas Water Appropriators Conflicts with Section 5.05(b)(1) of the Compact.

1. Oklahoma's challenged water permitting statutes cannot be squared with the plain command of Section 5.05(b)(1) of the Compact. That section declares that 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," and provided that "no state is *entitled* to more than twenty-five percent (25%) of the water in excess of 3,000 cubic feet per second." Pet. App. at 88-89 (emphasis added).[19]

Unlike other subbasins established by the Compact, Subbasin 5 is *not* defined by state boundaries, and traverses parts of Oklahoma, Texas, and Arkansas. Pet. App. at 88-89; *see also* Pet. App. at 36. And crucially, unlike water allotments established for other subbasins that do traverse state lines, Section

---

19. The Red River meets these minimum flow conditions over 95% of the time. CA App.435.

5.05(b)(1) does *not* limit the Signatory States' "equal rights to the use of" water within Subbasin 5 to usage from within each state's respective borders. *Compare* Pet. App. at 88-89 (Compact § 5.05(b)(1)), *with id.* at 88 (Compact § 5.03(b)) (Oklahoma and Arkansas "shall have free and unrestricted use of the water of this subbasin *within their respective states* . . . .") (emphasis added); *id.* at 90 (Compact § 6.03(b)) ("Texas and Louisiana *within their respective boundaries* shall each have the unrestricted use of the water of this subbasin . . . .") (emphasis added).

Instead, Section 5.05(b)(1) provides all four Signatory States with "equal rights to the use of runoff originating in . . . and undesignated water flowing into" any part of Subbasin 5, without reference to state lines. The differing terminology used throughout the Compact is presumptively meaningful. *See New Jersey*, 552 U.S. at 615-16; *cf. Miller v. Robertson*, 266 U.S. 243, 251 (1924) (intention of parties to an agreement should be gathered from the whole instrument); NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES & STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

2. Under its plain terms, and particularly when compared to other sections of the Compact, Section 5.05(b)(1) both provides each Signatory State with "equal rights" to use water from anywhere within Subbasin 5, and "entitle[s]" each State to use up to 25% of the water in excess of 3000 cubic feet per second.

Consequently, if Texas water appropriators wish to acquire and use Texas's share of Subbasin 5 water from within another Signatory State—either because Texas cannot feasibly obtain its share of Subbasin 5 water from within its own borders, or because it simply makes economic or environmental sense for Texas to acquire its share from without the State—Texans have the right to do so under the Compact, provided that they do not exceed Texas's 25% allotment. Indeed, Oklahomans are not permitted to use more than Oklahoma's own 25% share of Subbasin 5 water before the water crosses out of Oklahoma. Accordingly, Oklahoma has no legal basis to prevent Texas from appropriating its fair share of Subbasin 5 water from within Oklahoma.

However, by establishing a series of legal obstacles that effectively prevent out-of-state water consumers from obtaining water from within Oklahoma, *see* Pet. at 7-10, Oklahoma's challenged laws conflict with and burden Texas's rights under Section 5.05(b)(1) of the Compact. Simply put, each Signatory State is entitled to a specified amount of Subbasin 5 water under the Compact, and Oklahoma law prevents Texans from obtaining that water from within Oklahoma. While Oklahoma is entitled to regulate and administer water rights within its boundaries, it may not prevent Tarrant from obtaining Texas's rightful share of Subbasin 5 water from within Oklahoma. Pet. App. at 86-87(Compact §§ 2.01, 2.10(a)).

Although the Tenth Circuit rightly concluded that Section 5.05, as a whole, is designed to "ensure that an equitable share of water from the subbasin reaches the

states downstream from Oklahoma and Texas," Pet. App. at 36, the court overlooked the remainder of the rights established by the section in its effort to accommodate the challenged Oklahoma laws. Sections 5.05(b)(2)-(3) do require the upstream States to allow certain amounts of water to flow to Louisiana under low-flow conditions. But nothing changes the fact that the Signatory States also are entitled to enjoy their equal share of Subbasin 5 water from anywhere within the subbasin under ordinary flow conditions.

3. In sum, because Oklahoma's discriminatory water-permitting statutes cannot be reconciled with Section 5.05(b)(1) of the Compact, they must "give way" to the Compact as a matter of law. *PLIVA*, 131 S. Ct. at 2577. Given the potential for confusion over the applicability of the presumption against implied preemption in the context of an interstate-compact dispute, the machinations the Tenth Circuits' decision could invite, and the unquestionable importance of the water rights at stake, the Court should grant review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for
Civil Litigation

JONATHAN F. MITCHELL
Solicitor General

DANICA L. MILIOS
Deputy Solicitor General

EVAN S. GREENE
Assistant Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY
GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1845

COUNSEL FOR AMICUS CURIAE

February 21, 2012