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**

## RESPONDENTS' SUPPLEMENTAL BRIEF


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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

## SUPPLEMENTAL BRIEF

Petitioner, Tarrant Regional Water District, seeks to enjoin the Oklahoma Water Resources Board ("OWRB") from applying any Oklahoma law that might limit out-of-state water use. Petitioner applied for a permit to divert water into Texas from Oklahoma's Kiamichi River, located in Reach II, Subbasin 5 of the Red River Compact ("Compact")—a region of Oklahoma that currently is suffering extreme drought. The water in Reach II, Subbasin 5 crosses Oklahoma, Texas, and Arkansas. Under Section 5.05(b)(1) of the Compact, Oklahoma, Texas, Arkansas, and Louisiana "shall have equal rights to the use of" certain surface water in Reach II, 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." Compact § 5.05(b)(1).

Before the OWRB could consider petitioner's application, petitioner challenged numerous Oklahoma laws as preempted by Section 5.05(b)(1) and as violating the dormant Commerce Clause. Both lower courts unanimously and correctly rejected those arguments.

The United States' equivocal brief just underscores why this case does not merit further review. The government identifies no circuit split on either question presented, no implicated federal interest, and no possibility that the decision could affect anyone beyond the parties here. U.S. Br. 17, 20-21. And the government correctly concludes that the petition's primary question under the dormant Commerce Clause is not worthy of review. *Id*. 16-17.

The government nonetheless recommends that the Court decide whether a unanimous Tenth Circuit panel correctly held that Section 5.05(b)(1) does not preempt Oklahoma's water laws. In the government's view, Section 5.05(b)(1) could be read to grant Texas the right to enter into Oklahoma and take water across state lines. The government is candid that this extraordinary intrusion on state sovereignty depends on "extrinsic evidence" outside the record, *id*. 13, and on "additional issues that would have to be resolved[] in this case or other proceedings," *id*. 10. And, even if Section 5.05(b)(1) allowed Texas to take water from Oklahoma under certain circumstances, the Compact still "would not directly entitle petitioner to [the] permanent appropriation [of water from Oklahoma]" that it seeks. *Id*. 20. The government's recommendation of a limited grant is difficult to reconcile with its description of the multiple vehicle problems this case poses.

The Court should decline review on both questions presented rather than proceeding on an incomplete record to resolve issues of state and federal law that might not even impact petitioner's water needs.

## I. The Dormant Commerce Clause Question Does Not Warrant Review

The United States correctly recommends against granting certiorari on the dormant Commerce Clause question. *Id*. 16-17.

A. Although the government takes no position on the merits, the Tenth Circuit's decision is correct. The court carefully distinguished petitioner's principal authority, *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), which held that congressional statements deferring to state law in other, unrelated

water compacts did not insulate state laws regulating un-compacted groundwater from dormant Commerce Clause attack. *Id.* 958-60. As the Tenth Circuit explained, this case is distinguishable because the water at issue in *Sporhase* was not regulated pursuant to an interstate compact, Pet. App. 23a, while here "the water is subject to the Red River Compact, and the issue is whether the Compact insulates Oklahoma's statutes from dormant Commerce Clause challenge," *id.*

The *Sporhase* dissent correctly observed that each state has the "traditional authority . . . over resources within its boundaries which are essential not only to the well-being but often to the very lives of its citizens." 458 U.S. at 963 (Rehnquist, J., dissenting). Moreover, "'[c]ommerce' cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used*." *Id*. The applicability of the dormant Commerce Clause is even more attenuated to natural resources allocated under an interstate compact. States, after all, enter into such compacts to preserve their access to water and to exclude others. In all events, assuming that States need clear congressional authorization to regulate in-state use of natural resources, the Tenth Circuit found the requisite authorization in the "broad language of [twelve] key Compact provisions." Pet. App. 24a.

B. The Tenth Circuit's holding does not implicate any other compact—and the United States does not suggest otherwise. The court held that twelve Compact provisions collectively demonstrated Congress's clear consent to state laws that protect in-state use of water allocated under the Compact. Pet. App. 27a-28a. The court pointed to Section 2.01,

which permits Oklahoma to "use the water allocated to it by this Compact *in any manner* deemed beneficial" and to "*freely administer* water rights and uses in accordance with [its] laws." *Id*. 24a-25a (emphases added). The court relied on multiple provisions guaranteeing States "free and unrestricted use of the water" allocated under the Compact. *Id*. 26a (citing §§ 4.02(b), 4.03(b), 5.01(b), 5.02(b), 5.04(b), 6.04(b), 7.01(b), and 8.01). And the court discussed Section 2.10(a), which provides, "[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." *Id*. 25a-26a.

Almost no other interstate water compact contains such broad statements permitting unrestricted state administration of water rights. Only *one* of the sixteen compacts cited by petitioner, Pet. 25 n.12, contains similar language to Section 2.01: the 1954 Sabine River Compact between Texas and Louisiana. 68 Stat. 690 (1954), art. V(k). Petitioner never mentions *nine* other compacts governing water in the West that contain no such language.[1] Language similar to the Compact's guarantee of "free and unrestricted use" appears in only *four* of the compacts petitioner cites. Sabine River Compact, art. IV; Arkansas River Basin Compact, Kansas-Oklahoma, 80 Stat. 1409 (1966), arts. V, VI; Kansas-Nebraska Big

[1] Amended Bear River Compact, 72 Stat. 38 (1958); Belle Fourche River Compact, 58 Stat. 94 (1944); Amended Costilla Creek Compact, 77 Stat. 350 (1963); Klamath River Basin Compact, 71 Stat. 497 (1957); La Plata River Compact, 43 Stat. 796 (1925); Rio Grande Compact, 53 Stat. 785 (1939); South Platte River Compact, 44 Stat. 195 (1926); Upper Niobrara River Compact, 83 Stat. 86 (1969); Yellowstone River Compact, 65 Stat. 663 (1951).

Blue River Compact, 86 Stat. 193 (1972), §§ 5.2, 5.3; Canadian River Compact, 66 Stat. 74 (1952), arts. IV(a), IV(b), V, VI.

The petition thus incorrectly frames this case as nationally important on the theory that almost all Western water compacts "contain[] the same boilerplate language that the Tenth Circuit found to insulate the Red River Compact from Commerce Clause scrutiny." Pet. 25. Although petitioner focuses on Section 2.10, *id.*, the Tenth Circuit gave no greater weight to this provision than the eleven others it analyzed. Nor is Section 2.10 "boilerplate." Not every compact cited in the petition includes Section 2.10's non-interference language. *See* Republican River Compact, 57 Stat. 86 (1943). And *none* of the nine Western water compacts petitioner failed to cite contains such language.

C. This case also is a bad vehicle to resolve the Commerce Clause question. The Commerce Clause analysis turns, at least in part, on the meaning of Section 5.05(b)(1), which the Tenth Circuit relied upon to find a clear statement of congressional intent to preserve state water use laws under the Commerce Clause. As discussed below, there are multiple vehicle problems in resolving Section 5.05's meaning. Those vehicle problems extend *a fortiori* to the Court's Commerce Clause analysis.

Furthermore, the fact that this case does not arise under the Court's original jurisdiction counsels against review, not in favor. *See* U.S. Br. 17-18. The Court ordinarily is the first and only forum to review disputes between States over interstate compacts because of the Court's original and exclusive jurisdiction over such matters. The Compact, however, gave district courts concurrent jurisdiction, Compact

§ 13.03, and two federal courts accordingly have reviewed and rejected petitioner's arguments. We are aware of no case in the past fifty years in which this Court has exercised its *certiorari* jurisdiction to review a lower court's interpretation of a water compact. *See, e.g.*, *Intake Water Co. v. Yellowstone River Compact Comm'n*, 476 U.S. 1163 (1986) (denying certiorari). The need to review such disputes dissipates when lower courts "provide[d] an appropriate forum in which the issues tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam).

Nor do the "potential[]" "practical consequences" for the Tarrant Regional Water district, U.S. Br. 17, justify review. The Tenth Circuit's decision hardly consigns Fort Worth to drought or prevents petitioner from pursuing the many alternative water sources it seeks. Opp. 35-37. The decision just requires petitioner to continue working to overcome political challenges that have so far prevented petitioner from securing water sources within Texas.

Finally, a decision from this Court might be irrelevant, because petitioner has prematurely challenged laws that might never be applied to deny petitioner's request. The OWRB can deny permits on several independent grounds. *See* Okla. Stat. tit. 82 § 105.14; Okla. Admin. Code 785:20-5-7. For instance, the OWRB could deny petitioner's permit for failing to establish a "present or future need for the water" in light of "all stream water sources" and groundwater potentially available to petitioner. Okla. Stat. tit. 82 § 105.12(A)(2). Or the OWRB could deny the permit if it interferes with projected current and future needs of users within the "stream system wherein the water originates." *Id.* § 105.12(A)(4). On

that point, the United States is conspicuously silent about the historic drought Oklahoma is suffering, in which 90 percent of the state—including the Kiamichi River region—is under "extreme drought conditions." U.S. Drought Monitor (Dec. 4, 2012), http://droughtmonitor.unl.edu/DM_state.htm?OK,S. That reality undermines the government's sole basis for supporting certiorari—a policy basis—that Fort Worth is a large city looking for new water sources outside Texas.

## II. The Preemption Question Does Not Warrant Review

In the government's view, the Tenth Circuit may have misread Section 5.05(b)(1)'s preemptive effect. U.S. Br. 10. The government asserts that *if* "certain circumstances" apply, Section 5.05(b)(1) might entitle Texas to divert up to 25 percent of all "excess" water from any Reach II, Subbasin 5 sources in Oklahoma or Arkansas. *Id*. 12. *If* additional circumstances apply, petitioner *might* also have a right to the particular water it seeks. *Id.* 21. And *if* the Oklahoma laws would prevent petitioner from exercising Texas's right of access, only then would those laws be preempted. *Id.* 16. This Court cannot give a definitive interpretation of a Compact provision that depends on unsettled questions of law and fact.

A. The Tenth Circuit's decision is manifestly correct. Section 5.05(b)(1) guarantees each state "equal rights to the use of" Reach II, Subbasin 5 water within its borders. Pet. App. 36a-40a. Nothing in Section 5.05(b)(1)'s text suggests "equal rights" includes the unprecedented right to cross state borders and seize water in another State. We are aware of no instance in which any State has *ever* invoked an interstate compact to divert water from

another State's territory absent express authorization. *Cf. Sporhase*, 458 U.S. at 963 (Rehnquist, J., dissenting).

The Tenth Circuit properly concluded that Section 5.05(b)(1) does not implicitly authorize such an extraordinary intrusion. Analyzing all the provisions in Section 5.05—rather than just the singular phrase "equal rights" that petitioner relies upon, Pet. 27—the Tenth Circuit correctly interpreted Section 5.05(b)(1) to reflect the "principle that the upstream states [Oklahoma, Texas, and Arkansas] control the water within their boundaries, provided they meet their minimum flow obligations to downstream states and do not take more than an equal share of the excess water." Pet. App. 39a. The Tenth Circuit held that "[t]o suggest that § 5.05(b)(1) gives appropriators such as [petitioner] license to come into Oklahoma and appropriate water for use in Texas in contravention of Oklahoma law runs counter to the purpose of the Compact, the purpose of § 5.05(b)(1), and the presumption against preemption when there is no clear conflict between state and federal law and the state law applies to a matter of historic state concern." *Id*. 43a.

That holding raises no broader issues of preemption. The United States argues that the Tenth Circuit "improperly applied a presumption against preemption to determine whether the challenged Oklahoma statutes conflict with" Section 5.05(b)(1). U.S. Br. 11. The government identifies no circuit conflict on this issue—probably because no court has ever adopted the government's position that a generalized "presumption against preemption" is inapplicable to interstate compacts, which are, after all, federal laws. *Id.* 12. Nor did the Tenth Circuit's

holding turn on a generalized presumption. The court applied a fact-based presumption based on the Compact provisions "call[ing] for pronounced deference to, not displacement of, state water laws." Pet. App. 40a. The court held that petitioner's reading of Section 5.05(b)(1) was unreasonable "when § 5.05(b)(1) is read in conjunction with the Compact as a whole." *Id*. The court only then noted, in the alternative, that "even if [petitioner's inferences] were reasonable," they "run afoul of the presumption against preemption." *Id*.

Section 5.05(b)(1)'s meaning affects no other compact and has never before been in doubt. Beyond this case, no court has construed this provision. The district court and Tenth Circuit agreed Section 5.05(b)(1) limits the maximum amount of water Oklahoma, Texas, and Arkansas can draw upstream, and rejected petitioner's contrary reading. *Id*. 28a-29a, 40a-43a, 70a. No Tenth Circuit judge thought *en banc* review was warranted. *Id*. 85a. And no other interstate compact has a provision like Section 5.05(b)(1).

Nor has Section 5.05(b)(1)'s meaning ever seemed unclear to the States. No State in the Compact's 32-year history has claimed a right to divert water from another State's territory under this Compact. No State has suggested that its "equal rights" under Section 5.05(b)(1) were impaired. In fact, the Texas Red River Compact Commission confirmed that Texas received all its water under the Compact from 2005-09. C.A. Defs. App. 29-34, 56-63. If the interpretation of Section 5.05(b)(1) "implicates important state interests protected by an interstate compact," U.S. Br. 17, the States involved have been indifferent to asserting them.

B. This case, in all events, is a poor vehicle to decide Section 5.05(b)(1)'s meaning. The government's interpretation admittedly turns on a "factual context for the Compact [that] may not be fully developed in some respects." *Id*. 10. That concession should be fatal to certiorari.

The government argues that Section 5.05(b)(1) might let Texas take out-of-state water only if Texas could not access its full "share" in-state, and faults the Tenth Circuit for "refus[ing] to consider" this "factual question." *Id*. 21. But blame rests squarely on petitioner. When the Tenth Circuit ordered supplemental briefing on whether petitioner "made a showing that the State of Texas is receiving less than its share of water under §5.05," petitioner replied that it "has neither alleged nor presented evidence regarding Texas' current use or receipt of water under the Compact, since that is not an element of [its] claim for relief." C.A. Tarrant Suppl. Br. 1.

The government further proposes that Section 5.05(b)(1) might allow petitioner to take water from Oklahoma only if Texas's interests outweighed "the competing interests of water users in Oklahoma and other compacting States" and "environmental and other restrictions." U.S. Br. 21. The United States then wonders whether Section 5.05(b)(1) might allow petitioner to choose where in Oklahoma to take Texas's "share," if Texas-side tributaries of the Red River were too intermittent or the main stem too salty. *Id.* 13 n.7. These conjectures turn on extrinsic facts and would convert Section 5.05(b)(1) into a free-for-all, multi-factor test at war with the easily administrable framework the States intended. *See* Opp. 2.

Moreover, even were the United States and petitioner correct that Section 5.05(b)(1) entitles Texas to access Oklahoma water under some circumstances, Section 5.05(b)(1) still might not preempt the Oklahoma laws petitioner challenges. Petitioner has made an implied preemption argument, asserting that Oklahoma's laws conflict with, or would frustrate the purposes of, Section 5.05(b)(1) because the Oklahoma laws purportedly impose "an absolute embargo on the export of water from the State for out-of-state use." Pet. 7, 27-28; U.S. Br. 10.

The problem with this position is that the laws petitioner challenges might not be applied to petitioner's permit application at all—and would thus not impede petitioner's ability to access water in Oklahoma. Preemption requires that state laws actually conflict with, or impede, federal laws; if the state laws are inapplicable, *a fortiori* there is no preemption. And the applicability of Oklahoma's laws is an open question. Petitioner does not even identify all state laws it challenges, instead giving examples of the "Oklahoma scheme" it thinks might be applied to its application. Pet. Reply 1; Pet. 7-9. Many of petitioner's examples are inapplicable on their face. For instance, petitioner challenges laws that limit contracts for the sale of water for out-of-state use, *see* Okla. Stat. tit. 82 §§ 1085.2(2), 1324.10(B), but does not seek such a contract.

Other Oklahoma laws, too, may be inapplicable. Many Oklahoma laws limiting out-of-state water use were enacted in 2009 when Oklahoma "substantially overhauled the water permit application process," Pet. App. 9a, and have yet to be construed. For instance, this Court would have to determine how

the OWRB would "evaluate" whether the water petitioner seeks "could feasibly be transported to alleviate water shortages" in Oklahoma. Okla. Stat. tit. 82 § 105.12(A)(5). Where, as here, "[t]here is a basic uncertainty about what the law means and how it will be enforced . . . it would be inappropriate to assume" the challenged state laws "will be construed in a way that creates a conflict with federal law." *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012). This Court accordingly should decline to consider an issue of implied preemption on a host of unresolved contingencies that are necessary to fully decide this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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