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

REPLY BRIEF FOR PETITIONER

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Because respondents fundamentally misstate the arguments advanced in the petition, we begin by reiterating the issues in this case. *First*, as the court of appeals itself acknowledged, Oklahoma's statutes expressly discriminate against out-of-state users of water: "these statutes require the OWRB to treat permits for in-state and out-of-state water use differently." Pet. App. 5a. Respondents' confusing and carefully worded description of Oklahoma law (Opp. 7-9) does not deny that Oklahoma's regime—which bars out-of-state use of water originating in Oklahoma absent both a showing that the water cannot be used in Oklahoma and (for water apportioned to Oklahoma by the Compact) prior approval by the Oklahoma legislature—has the practical effect of making it impossible for out-of-state applicants like Tarrant to obtain water from Oklahoma. See Pet. 7-9.[1]

Second, as we show in the petition, the Oklahoma scheme is invalid for two reasons. It is inconsis-

[1] As we showed in the petition (at 8), the statutory requirements that the OWRB permit long-term water appropriations only when doing so "will promote the optimal beneficial use of water in" Oklahoma, and that it consider whether water sought for out-of-state use "could feasibly be transported to alleviate water shortages in the State of Oklahoma," effectively preclude the export of water from Oklahoma. Respondents complain (Opp. 7-8) that many of the other provisions we cited in the petition are immaterial here. But our point is that Tarrant has no choice except to obtain a permit under Oklahoma's restrictive permitting scheme. Thus, as the court of appeals recognized, "[i]f Tarrant is correct that the Compact gave it a right to appropriate water in Reach II, Subbasin 5, the Oklahoma statutes would burden that right because they treat in-state and out-of-state water use differently." Pet. App. 30a.

tent with the Commerce Clause because it requires the OWRB to use criteria that discriminate against out-of-state interests when acting on applications to appropriate water in Oklahoma, even though the Red River Compact does not authorize that discrimination with the clarity necessary to overcome Commerce Clause strictures (indeed, it does not authorize the discrimination *at all*). See Pet. 14-24. And the Oklahoma regime is preempted by the plain terms of the Compact, which expressly allocate to Texas the water that is in dispute in this case. See Pet. 27-34.

Third, the issues in this case have immense practical importance. We explained in the petition that the holding below denies an essential resource to millions of people in Texas, which will cause significant disruption and greatly impede economic growth. Pet. 24-27. The State of Texas confirms in its *amicus* brief supporting the petition that the Tenth Circuit's holding "put[s] at risk for insufficient water one of the most populous and productive areas of the country," with "potentially devastating and long-lasting consequences." Texas Br. 6. Respondents make no answer at all to this point.

Against this background, the arguments that respondents do advance are insubstantial. Oklahoma law expressly discriminates against other States; disregards the clear language of the Compact; has been vigorously protested by Texas; and "destroys Tarrant's ability to acquire necessary water from one of the most economically sensible and environmentally appropriate resources available." Texas Br. 6. Further review of the decision below is imperative.

A. Respondents misunderstand the dormant Commerce Clause argument.

1. At the outset, respondents flatly misstate our Commerce Clause argument. We do not contend, as respondents repeatedly would have it, that the Compact *itself* violates the Commerce Clause. See Opp. 10, 12, 23-26. Our actual contention, instead, is that *Oklahoma's statutes* violate the Clause because they discriminate against out-of-state interests and have not been authorized by Congress with the clarity required by this Court's decisions. See Pet. 15-24.

Unlike respondents, the Tenth Circuit understood and addressed our argument, holding that the Compact "insulates Oklahoma's statutes from dormant Commerce Clause challenge" (Pet. App. 23a)—and that ambiguity on this score in the Compact's language may be resolved by reference to its legislative history. Pet. App. 25a-26a. But as we showed in the petition, that holding departs from the rule repeatedly stated by this Court and applied by other courts of appeals: congressional authorization of state laws that burden interstate commerce must be "unambiguous" (*Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992)) and "unmistakably clear" (*S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984)). As we also demonstrated at some length in the petition (at 19-24), the language of the Compact is neither. Respondents have nothing to say in response.

2. Respondents also ignore a related point made in the petition: that the holding below is likely to have repercussions throughout the Nation because the boilerplate language relied upon by the Tenth Circuit to authorize Oklahoma's discrimination appears in numerous compacts governing the allocation

of water among States. See Pet. 25 & n.12; see also *Amicus* Br. of Cities of Hugo and Irving 13-14 & nn. 14, 15.[2] Respondents instead assert that the Tenth Circuit held only that "compacts apportion and allocate water among states in perpetuity," which they describe as a "[]settled" proposition incapable of "disrupt[ing] the national body politic." Opp. 13-16. But while the proposition stated by respondents may well be settled, it is *not* the issue resolved by the Tenth Circuit in this case. The question presented *here* and decided below is whether the Red River Compact contains a clear statement of Congress's consent to Oklahoma's protectionist water regime. See, *e.g.*, Pet. App. 3a (first issue addressed by the Tenth Circuit is: "did Congress authorize the Compact states to protect their apportionments of water through measures that otherwise might violate the dormant Commerce Clause?"). On *that* subject, respondents have nothing to say.[3]

B. Respondents' argument assumes away the preemption issue.

1. Respondents fare no better in their defense of the Tenth Circuit's preemption ruling. The Compact

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[2] Respondents assert (incorrectly, as we show below) that the Compact language granting the signatory States "equal rights" to the water in reach II, subbasin 5 is "unique" (Opp. 10, 17), but they do not deny that the different and generic language relied upon by the Tenth Circuit to authorize Oklahoma's discrimination appears in numerous compacts across the country.

[3] Indeed, respondents themselves demonstrate the perils entailed by resort to legislative history. Citing the Compact's interpretive comments, they assert (Opp. 33-34) that "the Compact distinguishes between the role of the 'state' * * * and 'its diverters.'" But that simply is not so: neither the word "diverter," nor any similar distinction, appears in the Compact itself.

establishes reach II, subbasin 5 as an interstate region that spans the borders of Texas, Oklahoma, and Arkansas. See Pet. App. 52a (map). The Compact provides that "[w]ater within this subbasin is allocated as follows: (1) the Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5," with no State "entitled to more than 25 percent of the water in excess" of certain minimum downstream flow requirements. Compact § 5.05(b); see also Opp. 33 (citing the interpretive comments for the proposition that each State has a "right to 25% of the excess flow" in subbasin 5). The meaning of these words is wholly unambiguous: Each State is entitled to an *equal* share, up to 25%, of the excess water in subbasin 5.

Oklahoma's discriminatory rules undeniably "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" (*AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011)) of that provision. It must be assumed that Texas cannot obtain an equal share of reach 2, subbasin 5 water from sources in Texas. See Pet. App. 44a n.3. By preventing Texas from accessing subbasin 5 water in Oklahoma, the state laws challenged here thus prevent Texas from obtaining the equal share of subbasin 5 water allocated to it by the Compact.[4] As we showed in the petition (at 27-34), the Tenth Circuit's contrary reading disregarded the Compact's plain terms and manifest intent.

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[4] The court of appeals recognized that "some [Oklahoma] statutes are in tension with Tarrant's reading of the Compact." Pet. App. 44a n.2.

2. Respondents' answers on this point are obscure. *First*, respondents assert that "there can be no other meaning when the Compact 'allocate[s]' the use of water to a particular 'state' than that it is for that state's exclusive in-state use." Opp. 30-31. But the Compact, by its plain terms, does *not* allocate all reach 2, subbasin 5 water located *in* Oklahoma *to* Oklahoma; it allocates that water "as follows," and what follows is that "the Signatory States shall have *equal rights* to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5." Compact § 5.05(b)(1) (emphasis added). Nothing in this language even remotely says that subbasin 5 water is allocated exclusively to the State in which it is found.[5]

Second, and similarly, respondents assert that "[t]he phrase 'equal rights' simply means that within this subbasin, each state can authorize the use of water within the state, but, ultimately, its use cannot exceed an amount equal to what is used by other states." Opp. 31. But the plain fact of the matter is that the Compact says nothing of the sort. The statement that each of the signatory States shall have "equal rights to the use of" a particular quantity of water located in a particular place (defined without reference to state borders) cannot plausibly

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[5] Respondents' reliance on the Compact's interpretive comments in support of their reading is mystifying. As the portion of the comments quoted by respondents itself demonstrates, these materials simply show that the signatory States agreed to assure a minimum flow to Arkansas and Louisiana and that "'each *state* will honor the other's *right* to 25% of the excess flow'"—an observation that supports *our* reading of the Compact. Opp. 33 (quoting C.A. Pl. App. 434-435 (emphasis added by respondents)).

be understood as another way of saying that each State controls the use of all waters within *its* borders. Were there any doubt on this point—and it is hard to see how there could be, given the clarity of the Compact's language—it would be resolved by the contrast with other provisions of the Compact that, unlike Compact § 5.05(b)(1), *do* impose state-boundary limitations on the allocation of water. See Pet. 32 (citing Compact §§ 5.03(b), 6.03(b)).[6]

And respondents ignore the common sense of the matter. The Compact's guarantee to Texas of an "equal" share of subbasin 5 water would amount to precious little if Texas were limited, as respondents claim, to the subbasin 5 water located in Texas; within its borders, Texas has access to only "a small fraction" of the subbasin 5 water to which it is entitled. Pet. App. 41a. It would be a strange bargain indeed for Texas to negotiate for an "equal right[] to the use" of water that it knew it could never obtain.[7]

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[6] Respondents note that other compacts make express provision for water to be diverted from one state to another and suggest that the omission of such language from the Red River Compact means that Texas can have no entitlement to water located in Oklahoma. Opp. 18-20. But "[a] compact is a contract," not a statute. *Kansas* v. *Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part). And it is reasonable to expect compacting states to use (and experiment with) different language, even to accomplish the same ends. It is *not* reasonable, however, to expect the drafters of a compact to use inconsistent language in different sections of the *same compact* to convey a single meaning.

[7] Respondents' suggestion that the words "equal rights" mean that "each state can authorize the use of [subbasin 5] water within the state" but "cannot exceed an amount equal to what is used by other states" (Opp. 31) is, for the same reason, ridiculous. By its terms, the argument would mean that the signatory

C. Respondents provide no other reason for denying review.

None of respondents' other arguments provides any basis for denying the petition.

1. Respondents contend that this case is unsuitable for review because none of the "four signatories to the Compact" is a "part[y] to the litigation" (Opp. 11), and that the Court should await a suit that "the Compacting States [themselves] consider" sufficiently important to "require[] resolution by this Court." Opp. 16. But as Texas makes clear in its *amicus* brief before this Court, Tarrant is "an entity created under Texas law * * * to acquire water" for Texas residents; it is one of several local water districts authorized to invoke and enforce "Texas's water rights under the Red River Compact." Texas Br. 1-2. That is why this suit was brought by Tarrant (which actually manages water in Texas) and not by Texas's governor or attorney general (who do not), against the OWRB, which issues permits for the appropriation of water in Oklahoma and is here represented by Oklahoma's attorney general. As for respondents' assertion that the Compacting States "would like to weigh in on Tarrant's arguments" (Opp. 11), Texas has done precisely that, asserting its "substantial interest in the Court granting the petition and reversing the Tenth Circuit's judgment." Texas Br. 1.[8]

States agreed to use no more subbasin 5 water than the small amount available to Texas from sources within its borders. Indeed, it evidently would mean that the States agreed not to use *any* subbasin 5 water at all because there is no subbasin 5 water located in Louisiana.

[8] Respondents misrepresent the evidence in asserting (Opp. 6) that "Texas has not complained of any shortage of water allocated to it by the Compact." In fact, the deposition testimony

2. Respondents also are wrong in contending, without citation, that Tarrant has changed its position on key points in the litigation. Their suggestion (Opp. 28) that Tarrant "vehemently argued [below] that the Compact apportioned no water to any Compacting State" is silly; Tarrant's sole purpose in bringing this litigation was to establish that the Compact apportions subbasin 5 water "equally" between the signatory States, a point that is evident from the decisions of both the court of appeals and the district court. And that Tarrant resisted joinder of Arkansas and Louisiana as indispensable parties to this suit (because they did not face a risk of multiple inconsistent judgments) hardly means that it denied that this dispute is "a case of great significance." Opp. 11.[9]

3. Finally, respondents suggest at various points that the preemption question presented in the petition is a "narrow" one "of no national significance" (Opp. 12) because the language that we say preempts Oklahoma's protectionist laws occurs "in no other compact" (Opp. 10, 17). In fact, that assertion is factually incorrect: Most interstate water compacts *do* contain similar equitable apportionment provisions. See *Amicus* Br. of Cities of Hugo and Irving 18; see also *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1770,

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cited by respondents shows only that certain Texas permittees had received all of the water to which they were entitled under separate *Texas permits* that have no bearing on this case.

[9] Respondents likewise are wrong in asserting that this litigation could have been resolved by the Red River Compact Commission. Opp. 11-12. In fact, the district court declined to defer to the Commission because "it is unclear whether the Commission's authority even arguably extends to adjudicating disputes like those involved here." Pet. App. 60a.

1779 (2011) (citing compacts that apportion a "set quantity" of available water "by percentage"). The Tenth Circuit's preemption analysis therefore does have broad implications for the interpretation of interstate water compacts throughout the Nation. But even if that were not so, respondents' brief itself demonstrates that this Court's special responsibility to settle the meaning of agreements between States has led it to grant review repeatedly in similar cases, "so as to clarify the quantity of water apportioned to each Compacting State." Opp. 13 (citing cases). It should do so here as well.

Moreover, respondents do not deny that the need for intervention by the Court is especially acute in this case because the dispute here involves issues of the greatest practical importance. The Tenth Circuit's decision allows Oklahoma to deny Tarrant the water that is desperately needed by millions of consumers. The significance of that ruling cannot be overstated: The Tenth Circuit's decision risks "halting further economic growth and development" throughout North Texas. *Amicus* Br. of NTMWD 5. The need for intervention by this Court is clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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