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 Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

KEVIN L. PATRICK
SCOTT C. MILLER
Patrick, Miller, Kropf, & Noto, P.C.
730 East Durant Ave.
Suite 200
Aspen, CO 81611

CLYDE A. MUCHMORE
HARVEY D. ELLIS
L. MARK WALKER
Crowe & Dunlevy
20 North Broadway
Suite 1800
Oklahoma City, OK 73102

CHARLES A. ROTHFELD
Counsel of Record
TIMOTHY S. BISHOP
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Red River Compact, which allocates to each of the signatory States an "equal share" of the water in a specified subbasin, preempts discriminatory Oklahoma laws that prevent certain signatory States from obtaining their equal share of that water.

2. Whether Congress's approval of Compact language providing that the Compact shall not "be deemed * * * to interfere" with each State's "appropriation, use, and control of water * * * not inconsistent with its obligations under this Compact" manifests an unmistakably clear congressional consent to discriminatory state laws.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court of appeals were appellant Tarrant Regional Water District, a Texas state agency; and appellees Ford Drummond, Ed Fite, Rudolf John Herrmann, Jack W. Keely, Kenneth K. Knowles, Linda Lambert, Jess Mark Nichols, Richard Sevenoaks, and Joseph E. Taron in their official capacities as members of the Oklahoma Water Resources Board and the Oklahoma Water Conservation Storage Commission.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 656 F.3d 1222. The district court's orders granting respondents' motion for summary judgment (Pet. App. 53a-74a) and motion to dismiss (Pet. App. 75a-83a) are available, respectively, at 2010 WL 2817220 and 2009 WL 3922803.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2011. A timely petition for rehearing was denied on October 21, 2011. Pet. App. 85a. This Court granted a timely petition for certiorari on January 4, 2013. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compact Clause of Article I, Section 10 of the U.S. Constitution provides, in relevant part: "No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State * * *."

The Supremacy Clause of Article VI of the U.S. Constitution provides, in relevant part: "This Constitution, and 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."

The Commerce Clause of Article I, Section 8 of the U.S. Constitution provides, in relevant part: "The Congress shall have power * * * To regulate com-

merce with foreign nations, and among the several States, and with the Indian tribes."

The Red River Compact (Pub. L. No. 96-564, 94 Stat. 3305 (1980)), is reproduced at 1JA7-51. Relevant portions of the Oklahoma Statutes Annotated are reproduced at 1JA87-97.

STATEMENT

The Red River Compact expressly allocates most of the water it apportions to the States in which that water is located. But in one defined geographic region, the Compact allocates "equal rights to the use" of specified water to *each* of the Compact's four signatory States—Arkansas, Louisiana, Oklahoma, and Texas—without reference to state lines; in that region, "no state is entitled to more than 25 percent of the water." That is so even though more than half of the water within the region (including the entire bed of the Red River itself) lies in Oklahoma, while only a small fraction is located in Texas and *none* is located in Louisiana.

Oklahoma, however, has enacted a panoply of expressly discriminatory state laws that, in practical effect, prevent Texas from obtaining the "equal rights to the use" of the specified water that it is entitled to under the Compact. Petitioner Tarrant Regional Water District (Tarrant) accordingly filed suit to obtain this equal share of water for Texas residents, arguing that Oklahoma's water embargo is both preempted by the Red River Compact and unconstitutional under the dormant Commerce Clause. Tarrant seeks declaratory and injunctive relief to prevent Oklahoma from enforcing its discriminatory water laws. But the Tenth Circuit rejected the challenge, reading the Compact to entitle each signatory

State to use or access only 25% of the equally apportioned water *in its state*—a bargain that, on the face of it, makes no sense at all. At the same time, the court of appeals believed that boilerplate language in the Compact and ambiguous elements of its legislative history express an "unmistakably clear" congressional intent to allow the signatory States to discriminate against interstate commerce.

That decision should not stand. It rewrites an interstate compact that was painstakingly negotiated over the course of more than two decades, disregarding the Compact's express language, coherent structure, and central purpose. It also misapplies the "clear statement" rule governing abrogation of the dormant Commerce Clause that this Court has held vital to prevent Balkanization among the States. This Court should apply the Compact according to its plain terms and set aside the judgment below.

A. The Red River Compact

1. The Red River is a major tributary of the Mississippi River watershed. It drops from the Texas Panhandle, flowing 1,300 miles southeast through Texas, Oklahoma, Arkansas, and Louisiana. S. Rep. No. 84-1030, at 2 (1955) ("1955 S. Rep."). The river's south vegetation line (which does not touch the watercourse) marks the boundary between Oklahoma and Texas east of the Texas Panhandle. Red River Boundary Compact, Pub. L. No. 106-288, 114 Stat. 919 (2000). See also *United States* v. *Texas*, 162 U.S. 1, 26-27 (1896) (construing the Treaty of 1819 between the United States and Spain). The river then flows into Arkansas and from there into Louisiana, emptying into the Atchafalaya and Mississippi Rivers 300 miles north of Head of Passes, Louisiana in the Mississippi Delta. Pet. App. 52a; 1955 S. Rep. 2.

Throughout the first half of the twentieth century, numerous disputes arose among Arkansas, Louisiana, Oklahoma, and Texas over use and allocation of the water of the Red River Basin. See generally M.A. Chapman, *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin*, 38 Okla. L. Rev. 1 (1985). These disagreements were "not surprising" in light of the massive interstate span of the basin and the States' "diverse problems." *Red River Compact and Caddo Lake Compact: Hearing on H.R. 7205 and H.R. 7206 before the House Subcomm. on Administrative Law & Governmental Relations of the Comm. on the Judiciary*, 96th Cong., 2d Sess. 3 (1980) ("1980 Hearing"). In response, Congress in 1955 authorized the States "to negotiate and enter into a compact providing for an equitable apportionment among them of the waters of the Red river and its tributaries." Pub. L. No. 84-346, 69 Stat. 654, 654 (1955).

The ensuing negotiations among the four States took more than two decades, finally culminating in an agreement in 1978. 1980 Hearing 3. The Red River Compact was ratified by each State's legislature and was approved by Congress in 1980. See Pub. L. No. 96-564, 94 Stat. 3305 (1980). The disputes between Texas and Oklahoma preceding consummation of the Compact had been especially "long-standing" and required "hard compromises." 1980 Hearing 3.

2. A "principal purpose[]" of the Red River Compact was "to promote interstate comity and remove causes of controversy" by determining a fair and equitable "distribution of the [basin's] interstate water" among the signatory States. S. Rep. No. 96-964, at 1 (1980). The Compact accomplishes that

purpose by dividing the Red River Basin into five "reaches" and those reaches into respective subbasins. 1JA13, 18, 22, 32, 36, (§ 2.12 & Arts. IV-VII). The water in each subbasin is then allocated to one or more of the compacting States. This case concerns water in Reach II, Subbasin 5.[1]

Reach II, which "was the most difficult portion of the Compact to negotiate" (1JA27), is divided into five subbasins: four "upstream" subbasins that all flow into a fifth subbasin containing the main channel and tributaries of the Red River along the eastern half of Texas's border with Oklahoma and Arkansas. 1980 Sen. Rep. 2. See App., *infra* (map).

The Compact expressly apportions the water of each of the four upstream subbasins to the State in which the water is located. Thus, the water of Subbasin 1, which lies "wholly in Oklahoma," is apportioned to that State, which is granted "unrestricted use" of that water. 1JA22 (§ 5.01). Similarly, the water of Subbasins 2 and 4, which lies "wholly in Texas," is apportioned to Texas, which is granted "unrestricted use" of *that* water. 1JA23-24 (§§ 5.02(b), 5.04(b)). Subbasin 3 spans territory in both Oklahoma and Arkansas; the Compact grants "free and unrestricted use of the water of this subbasin" to those two States "within their respective [boundaries]," subject to downstream flow requirements not relevant here. *Ibid.* (§ 5.03(b)).

3. Subbasin 5, which contains the mainstem of the Red River, runs latitudinally through the middle

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[1] Tarrant's lawsuit also sought a permit to appropriate water from Reach I, Subbasin 2. The arguments concerning that subbasin are not before this Court.

of Reach II and spans territory in Arkansas, Oklahoma, and Texas. See App., *infra* (map). The Red River itself is not a suitable source of potable water along this stretch of its course because "salt springs and seeps arising from salt-saturated underlying formations contribute large quantities of briny water" to the River, "rendering the water unusable for most purposes." Chapman, *supra*, at 7. See also 1980 Hearing 6 (the "Red River main stem flows cannot be used for [most] purposes" due to natural "chloride contamination"). Accordingly, the primary water sources within Reach II that "are suitable for domestic and industrial use" (*ibid.*) are the major *freshwater tributaries* to the Red River.

The four upstream subbasins of Reach II are separated from Subbasin 5 by reference not to state lines, but to the "existing, authorized or proposed last downstream major damsites" along the major freshwater tributaries to the Red River, as they flow from the four upstream subbasins into Subbasin 5. 1JA22-24 (§§ 5.01(a), 5.02(a), 5.03(b), 5.04(a)). By keying the boundary of Subbasin 5 to dam sites in this way, the Compact's drafters ensured that any reservoirs located along the freshwater tributaries to the Red River within Reach II would fall within the upstream subbasins, and all water upstream of those reservoirs would be available for the unrestricted use of the State in which it is located.[2]

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[2] Because the dams themselves mark the boundary between Subbasin 5 and the upstream subbasins, and because water impounded by a dam necessarily floods land *upstream* of the dam, reservoirs at the border of Subbasin 5 necessarily fall within the upstream subbasins. Most of the water *in* those federal reservoirs, however, is considered "designated water" (1JA17 (§ 3.01(k)), which is not allocated by the Compact

In contrast, Louisiana, which is downstream of Arkansas, Oklahoma, and Texas, "has no reservoir sites of significant size" within the Red River Basin and thus (unlike the upstream States) "[can]not store water in times of high flows to meet future needs." 1JA27. To address that problem and the "opposing points of view" it generated, "the upstream states agree[d] to cooperate in assuring a reliable flow" of water to Louisiana in the main channel of the Red River at the Arkansas-Louisiana border, where the River crosses from Reach II, Subbasin 5 into Reach V. *Ibid*.[3]

The drafters accomplished this in three ways. *First*, Section 8.01 of the Compact grants Louisiana "free and unrestricted use" of all water that passes from Reach II, Subbasin 5 into Reach V, including the water of "the mainstem Red River." 1JA38.

Second—in contrast to the unilateral control that the Compact grants to Arkansas, Oklahoma, and Texas over in-state water in the four upstream subbasins of Reach II and to Louisiana over water in Reach V—the Compact provides that once water from a freshwater tributary in an upstream subbasin flows past the last major dam site into Subbasin 5, *all four* signatory States are entitled to a portion of

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(1JA10 (§ 2.02)). Water in excess of the federal designated capacity is considered "undesignated water" (1JA16-17 (§ 3.01(*l*)) that may be allocated by the Compact.

[3] By the time the Red River passes into Louisiana, upstream freshwater tributaries have diluted its salinity by nearly one half (S. Baldys, III, & D. K. Hamilton, *Assessment of Selected Water-Quality Data Collected in the Lower Red River (Main Stem) Basin, Texas, 1997-98*, Tbl. 2, http://tinyurl.com/Tarrant10), making it suitable for most residential and industrial uses.

that water. 1JA25 (§ 5.05(b)(3)). In particular, the Compact allocates to the signatory States

> *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.

Ibid. (§ 5.05(b)(1)) (emphasis added).

Finally, the Compact requires the three upstream States to administer water use (that is, to regulate and control it) so as to allow water in Subbasin 5 to pass, unused, into Louisiana during the rare times of low flow. Thus, during the 4% of the time (1JA30) that the flow of the River is less than 3,000 cubic feet per second (CFS) but greater than 1,000 CFS at the Arkansas-Louisiana border, the Compact requires "the States of Arkansas, Oklahoma, and Texas [to] allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent" of the water "originating in" and "flowing into subbasin 5." 1JA25 (§ 5.05(b)(2)). And during the 0.2% of the time (1JA30) that the flow is less than 1,000 CFS, the upstream States must allow *all* water "originating in" or "flowing into" Subbasin 5 to flow downstream to Louisiana. 1JA25 (§ 5.05(b)(3)). The Compact does not, however, require the "upstream states" with control over the first four subbasins in Reach II "to make releases from storage or to pass water from [the upstream] subbasins in order to

maintain the flow" of the Red River within Subbasin 5. 1JA30. See 1JA25 (§ 5.05(b)(2)).[4]

4. Although the Compact entitles each State to an "equal share" of Subbasin 5 water, an equal amount of that water is not physically located in each State: Whereas a majority of Subbasin 5's water is located in Oklahoma, far less than 25% is located in Texas, and *none* is located in Louisiana.[5] What is more, Subbasin 5 water in Texas is found largely in intermittent streams and dry arroyos that fill temporarily with water during the rainy seasons. CA App. 733, 1300-1301. Such sources of water are neither substantial nor reliable enough for large-scale municipal water projects.

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[4] The Compact accounts further for the "unusual" circumstance (Chapman, *supra*, at 96) in which the flow of the Red River is below 526 CFS at the Oklahoma-Arkansas border, yet above 3,000 CFS at the Arkansas-Louisiana border. See 1JA26 (§ 5.05(c)). That provision is not relevant here and, to our knowledge, has never been invoked.

[5] A 1970 engineering report submitted to the Compact's negotiating commission reported the average flows of the Red River and all of its tributaries into Subbasin 5 over a thirty-year span from the 1930s through the 1960s. See *Report of the Engineering Advisory Comm. to the Red River Compact Comm'n* (June 1970). Summing the flows of the freshwater tributaries running from Subbasins 2 and 4 in Texas into Subbasin 5, and dividing that sum by the sum of all tributaries flowing into Subbasin 5, indicates that, in 1970, just 16% of the freshwater flowing into Subbasin 5 was located in Texas. See *id.* at II-13–14, II-20, II-27–28, II-33–34, II-36. When the main channel of the Red River is taken into account, that number drops to 11%. *Ibid.* Oklahoma's share was 59%, including the main channel. *Ibid.* Petitioner has sought leave to lodge the 1970 report with the Clerk.

Consistent with Subbasin 5's status as a single geographic unit straddling state lines, provisions of the Red River Compact authorize the signatory States to cross state lines to obtain their apportioned share of water. Section 2.05(d) declares specifically that "[e]ach Signatory State shall have the right" to "[u]se the bed and banks of the Red River and its tributaries to convey stored water, imported or exported water, and water apportioned according to this Compact." 1JA11. Because the bed and banks of the Red River lie wholly within Oklahoma along its border with Texas, the Compact necessarily grants each State "the right" to enter Oklahoma to convey apportioned water. Section 2.05(c) additionally authorizes each State to "[c]onstruct reservoir storage capacity" for the "storage of water which is either imported or is to be exported if such storage does not adversely affect the delivery of water apportioned to any other Signatory State." *Ibid.*

5. General provisions of the Red River Compact further detail what the Compact's allocations mean. Section 2.01 provides that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state." 1JA10. It provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state," but makes clear that "such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." *Ibid.* And, using generic language that appears in almost every interstate water compact, Section 2.10(a) provides that "[n]othing in this compact shall be deemed" to "[i]nterfere with or impair the right" of "any Signatory State to regulate within its boundaries the appropriation, use, and control of water," provided that its exercise of that right is "not in-

consistent with its obligations under this Compact." 1JA12.

B. Federal reservoirs within Reach II

At the same time that the signatory States began negotiating the terms of the Red River Compact, Oklahoma's congressional delegation was pursuing federal legislation to authorize the expansion or construction of several federal reservoirs in what would become Reach II, Subbasin 1. These included the Sardis and Tuskahoma federal reservoirs on the Kiamichi River, and an expansion of Hugo Lake, formed downstream on the Kiamichi by Hugo Lake Dam at the border of Subbasins 1 and 5.

The places in and purposes for which federal reservoir water may be put to use are established by recommendation of the Chief of the Army Corps of Engineers and codified by "subsequent specific authorization of the Congress by an authorization Act." 43 U.S.C. § 390. A federal reservoir project will not be authorized unless its benefits, including "present or anticipated future demand or need for municipal * * * water," exceed its costs. 43 U.S.C. § 390b(b). And when a federal water project is authorized for multiple purposes and places, the cost-benefit analysis must "be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction." *Ibid.*

At the time the reservoirs in Oklahoma were under consideration, Oklahoma's anticipated future water demands did not alone justify the cost of their construction. Thus, Oklahoma legislators represented that the demands of north Texas (and specifically the area served by Tarrant) should be taken into

account to justify Congress's authorization and subsequent funding of the projects. See, *e.g.*, *Hearings before a Subcomm. of the Sen. Comm. on Public Works*, 84th Cong., 2d Sess. (1956).

Relying upon those additional demands for water in North Texas, the Chief of Engineers modified the cost-benefit ratio and submitted a report to Congress recommending that the Hugo Lake reservoir be authorized to include water supply storage, and that the Sardis and Tuskahoma federal reservoirs be constructed, to meet anticipated future demand throughout "the central Oklahoma-north Texas region." S. Doc. No. 145, at 15, *Report of the District Engineer* ¶ 5(b)(2), 87th Cong. (Sept. 24, 1962), 1JA108. The supplement to the report found specifically that "[t]he metropolitan centers of Oklahoma City, Dallas, and Fort Worth * * * are going to need additional water supplies to sustain the anticipated growth" and that "the reservoirs in the Kiamichi River Basin could provide the water supply for these metropolitan areas." S. Doc. 145, Supplement A, *Summary of Findings*, at 204. Congress ultimately approved the Chief's recommendations in the Flood Control Act of 1962, Pub. L. No. 87-874, tit. II, 76 Stat. 1173, in which it "authorized" projects "substantially in accordance with the recommendations of the Chief of Engineers in Senate Document Numbered 145." 76 Stat. at 1187.

The only way for Texas to access water impounded by the Hugo, Sardis, and Tuskahoma dams in Oklahoma is to appropriate the water *from within Oklahoma*, either from the federal reservoirs or in Reach II, Subbasin 5 after water is released into the Kiamichi River from those reservoirs, before the

Kiamichi meets the main channel of the Red River. That water does not otherwise flow into Texas.

C. Tarrant's proposal to appropriate water from Oklahoma

1. In cooperation with other North Texas water suppliers, Tarrant provides water through its wholesale customers to more than six million residents of North Central Texas. Tarrant is charged with developing additional water resources to meet the current and future demands of the region. As Texas explained to this Court, Tarrant is "an entity created under Texas law * * * to obtain water" for Texas residents and is authorized to invoke, and obtain water pursuant to, "Texas's water rights under the Red River Compact." Texas Cert. Amicus Br. 1-2.

Tarrant is in dire need of new sources of water. CA App. 86. By 2060, the population of Dallas-Fort Worth—already the fourth largest metropolitan area in the country, contributing approximately 3% of the Nation's GDP (U.S. Bureau of Economic Analysis, *Survey of Current Business* (Oct. 2011), http://tinyurl.com/tarrant22 (see Table 5))—is projected to double, and Tarrant's demand alone will exceed supply by more than 400,000 acre-feet per year. CA App. 86.[6] "Without additional water supplies," over the next several decades Texas will face a "nearly unimaginable" water deficit that will "cost Texas businesses and workers up to $116 billion." Manny Fernandez, *As Texas Bakes in a Long Drought, Water Becomes a Focus for Legislators*, N.Y. Times (Jan. 12, 2013), http://tinyurl.com/tarrant9. See also Texas

[6] An acre-foot is the volume of one acre of surface area to a depth of one foot and is the equivalent of approximately 325,000 gallons.

Water Development Board, *Water for Texas: 2012 State Water Plan* 183, http://tinyurl.com/tarrant16.

In addition to those long-range needs, Tarrant faces an imminent water shortage as a result of extreme drought. CA App. 804-805. Media coverage has described the drought as "catastrophic," costing Texas more than $5 billion in recent agricultural losses. Kate Galbraith, *Catastrophic Drought in Texas Causes Global Economic Ripples*, N.Y. Times (Oct. 30, 2011), http://tinyurl.com/tarrant6.

Oklahoma, by contrast, sits in the heart of the Mississippi River watershed and is, in the words of respondent Oklahoma Water Resources Board (OWRB), "blessed with an abundance of water." *2012 Oklahoma Comprehensive Water Plan*, Executive Report 3, http://tinyurl.com/tarrant15. Because Oklahoma contains water-rich territory north of the Red River, its share of Reach II has not been affected by the recent drought as directly as has Texas's share. Indeed, OWRB estimates that the entire State of Oklahoma currently uses less than two million acre feet per year of stream water. *Id.* at Executive Report 4. Another *34 million acre-feet* of unused water flows out of Oklahoma annually, bound for the Gulf of Mexico. CA App. 112-113, 367-368, 805-806. From the southeast part of Oklahoma alone, more than twelve times the volume of Tarrant's entire projected 2060 shortfall is discharged, unused, into the Gulf of Mexico each year. *Id.* at 90. And the OWRB has acknowledged that "the average annual flow of the six major river basins in southeastern Oklahoma is 6,363,628 acre-feet," which is enough to supply the entire State of Oklahoma three times over. 2JA364. That is the equivalent of nearly one half of the entire flow of the Colorado River, which supplies nearly all

the water used by the Colorado Springs, Denver, Phoenix, Tucson, Las Vegas, Los Angeles *and* San Diego areas. See U.S. Geological Survey, *Climatic Fluctuations, Drought, and Flow in the Colorado River Basin*, Fig. 3 & accompanying text, http://tinyurl.com/tarrant23.

2. Tarrant has identified Reach II, Subbasin 5 water apportioned by the Compact to Texas—but located in Oklahoma, a short distance north of its border with Texas—as the most practical source of water for addressing North Texas's immediate and long-term needs. In the permit application underlying this lawsuit, Tarrant proposes taking 310,000 acre-feet of Texas's share of Reach II, Subbasin 5 water from the Kiamichi River, below the Hugo Lake Dam, immediately above where the Kiamichi discharges into the Red River. See App., *infra* (map). The proposal involves placing pumps in the Kiamichi and running underground pipelines to existing reservoirs serving Tarrant and other regional water suppliers. Because the plan uses existing reservoir infrastructure and does not involve pumping water vast distances to a higher elevation, it has a substantially smaller environmental impact than Tarrant's other options.[7]

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[7] Alternatives to drawing water from Oklahoma would involve obtaining water from sources to the south and east of the Metroplex and pumping the water up several hundred feet of elevation over hundreds of miles. These alternatives—which include taking water from Toledo Bend Reservoir on the Louisiana Border or developing a new lake known as Marvin-Nichols—are substantially more expensive than the Oklahoma project (*Water for Texas: 2012 State Water Plan* 48, 253-254, http://tinyurl.com/tarrant16) and involve far greater environmental impacts, requiring both new infrastructure and massive electricity usage.

Oklahoma law requires any entity (including any "state or federal governmental agency" like Tarrant) that "intend[s] to acquire the right to the beneficial use of any water" in Oklahoma to apply to the OWRB for "a permit to appropriate" before "commencing any construction" or "taking [any water] from any constructed works." Okla. Stat. tit. 82, § 105.9. In conformity with Compact § 2.10(a), which recognizes the "power of [each] 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" (1JA12), Tarrant accordingly filed an application for a permit to appropriate surface water from the Kiamichi River. Pet. App. 55a; CA App. 805-806, 811. By stipulation of the parties, OWRB will take no official action on any of Tarrant's permit applications until this litigation is concluded.

D. Oklahoma's water embargo

Notwithstanding Oklahoma's enormous water reserves and Texas's right to a 25% share of Reach II, Subbasin 5 water, Oklahoma has enacted a panoply of laws that, taken together, prohibit OWRB from issuing permits for the appropriation of water for out-of-state use.[8] These discriminatory laws categorically prevent an out-of-state user like Tarrant from obtaining water anywhere in Oklahoma.

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[8] Prior to this lawsuit, Oklahoma had in force an outright statutory prohibition on exports of water for out-of-state use. See Okla. Stat. tit. 82, § 1B (2009 Supp.); Okla. Stat. tit. 74, § 1221.A (2009 Supp.). The moratorium expired in 2009, during the pendency of this action, and was replaced with the collection of discriminatory statutes discussed in text.

Oklahoma Attorney General opinion. The Attorney General of Oklahoma has opined, in an official directive to OWRB's executive director (1JA112-119), that the Oklahoma legislature would never allow "such a valuable resource as water [to] become bound, without compensation, to use by an out-of-state user"; therefore, according to the Attorney General, no "out-of-state user is a proper permit applicant before the Oklahoma Water Resources Board." *Tarrant Reg'l Water Dist.* v. *Sevenoaks*, 545 F.3d 906, 909 (10th Cir. 2008) (quoting Okla. Att'y Gen. Op. No. 77-274 (1978)). As the Tenth Circuit recognized in an earlier appeal in this case, OWRB is "required to follow [the] attorney general's opinion until a court determines otherwise." *Tarrant*, 545 F.3d at 909 n.2 (citing *Hendrick* v. *Walters*, 865 P.2d 1232, 1243 (Okla. 1993)). No intervening judicial decision has "relieve[d] OWRB officers from compliance with the attorney general's opinion." *Ibid*.

Oklahoma's express public policy against water exportation. It is Oklahoma's express policy that "[w]ater use within Oklahoma * * * be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state." Okla. Stat. tit. 82, § 1086.1(A)(3), 1JA96. Because out-of-state use of water necessarily precludes in-state use of that water for any purpose, *any* permit to appropriate water for out-of-state use is "to the detriment" of Oklahomans. In acting on applications for permits to appropriate, OWRB is statutorily required to "effectuat[e]" this policy. *Id*. § 1086.2, 1JA96-97.

Impractical and discriminatory time restrictions. Any permit that OWRB issues to an out-of-state water user must include a time restriction that, as a practical matter, is a categorical bar to major municipal proposals like Tarrant's. In particular, surface water appropriated for out-of-state use must be "put to beneficial use within a period of less than seven years." Okla. Stat. tit. 82, § 105.16(A), 1JA94. That means that Tarrant would have just seven years to begin delivering its *entire* annual allotment of water under the permit. That time limit effectively makes Oklahoma water unavailable to Tarrant, which plans a water project that would require at least fifteen years of planning and construction. The same time restriction does not apply to permits that "promote the optimal beneficial use of water in the state." *Id.* § 105.16(B), 1JA94-95.

Facial discrimination. To the extent the permitting scheme allows OWRB to issue out-of-state permits at all, its standards are facially discriminatory. Oklahoma's permitting scheme establishes an express preference for in-state uses over "[u]se[s] of water outside the state." Okla. Stat. tit. 82, § 105.12A, 1JA93. In passing on an application for out-of-state use, OWRB must, for example, "evaluate whether the water that is the subject of the application could feasibly be transported to alleviate water shortages in the State of Oklahoma" instead. *Id.* § 105.12(A)(5), 1JA91. All permits for out-of-state water use are subject to review at least as often as every 10 years (and could be reviewed more frequently), at which time OWRB is empowered to impose additional conditions (including total divestiture) on the permitted out-of-state uses. *Id.* § 105.12(F), 1JA92. Permits for in-state use are not subject to the

same review requirement, which is incompatible with effective municipal water supply planning.

The practical upshot of this statutory scheme is a categorical prohibition against permits to appropriate Oklahoma surface water for use in another State. OWRB is legally obligated to reject Tarrant's application under the Oklahoma Attorney General's opinion and Oklahoma Statutes, title 82, section 1086.2. The law further requires that, even if Tarrant were issued a permit, because it is an out-of-state water user it must put the water to use within seven years (*id.* § 105.16) and is subject to divestiture at any time (*id.* § 105.12(F))—infeasible conditions given the enormous commitments of resources and time necessary to execute a project of the size that Tarrant proposes. And apart from the outright embargo, Oklahoma law expressly favors in-state water users, whose interests must be given top priority under Oklahoma Statutes, title 82, sections 105.12 and 105.16.

E. The decisions below

At the same time that Tarrant filed its permit applications, it brought this suit against OWRB alleging that (1) the Red River Compact preempts the Oklahoma statutes that prevent Tarrant from appropriating Texas's share of Subbasin 5 from within Oklahoma; and (2) Oklahoma's water embargo laws violate the dormant Commerce Clause by discriminatorily restricting interstate commerce in water.

1. Tarrant's complaint indicates that it intends to comply fully with the generally applicable requirements for obtaining a permit to appropriate water in Oklahoma and does not seek a court order requiring OWRB to issue a permit on any particular terms. Instead, it requests a declaratory judgment and injunc-

tive relief preventing Oklahoma from enforcing its anti-export laws as an element of the OWRB's permit decisionmaking process. See Am. Compl. Prayer for Relief ¶ A, 1JA172 (seeking a judgment declaring "the invalidity" of "Oklahoma's Anti-Export Laws" and that "no adverse action may be taken against Plaintiff's Applications or efforts to purchase or export water in Oklahoma based solely upon the fact that Plaintiff is a nonresident of Oklahoma or seeks to deliver or use the appropriated water outside of Oklahoma"); *id.* ¶ B, 1JA172-173 (seeking "a permanent injunction forbidding Defendants * * * from enforcing the Anti-Export Laws or abiding by Oklahoma Attorney General Opinion No. 77-274").

The district court granted summary judgment to respondents. Pet. App. 53a-74a. With respect to Tarrant's preemption claim, it reasoned simply that "there is no necessary conflict between the [Compact] and the state laws plaintiff challenges" because the Compact "explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact." Pet. App. 70a.

Addressing the dormant Commerce Clause, the court focused not only on "the language of the [Compact]" but also on its "nature" and "purpose." Pet. App. 66a-67a. Although acknowledging that "[t]he language of the RRC does not explicitly say 'states can limit or stop the out-of-state shipment of water' nor does it make any explicit reference to the Commerce Clause," the court concluded that "the essence" of the Compact "is inherently inconsistent with the standards that would *otherwise* apply based on dormant Commerce Clause analysis." *Ibid.* Because, in the district court's view, "the superseding effect" of the Compact was to give "residents of one

state a preferred right of access, over out-of-state consumers, to natural resources located within its borders," Congress's approval of the Compact "*necessarily* constituted its consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny." *Id.* at 67a-68a.

2. The Tenth Circuit affirmed. Pet. App. 1a-52a. With respect to preemption, the court evidently realized that state powers may not be exercised in a manner inconsistent with the terms of the Compact. But it believed that the "equal rights to the use of" water in Reach II, Subbasin 5 guaranteed by Section 5.05(b)(1) of the Compact, when read in the context of the minimum flow provisions that appear elsewhere in Section 5.05, merely ensures that "an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas." Pet. App. 36a. In particular, the court opined that the provision "secures Louisiana's interests indirectly by ensuring that that the three upstream states will not take more than 25 percent each of the excess water, allowing the remaining 25 percent to flow downstream to Louisiana." *Id.* at 38a. On this view, "'[e]qual rights to the use of' 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." *Id.* at 42a-43a (emphasis added).

Once minimum downstream flow requirements are met, the court concluded, Section 5.05 does not entitle a "Texas user" to "take Texas's share of that water from a tributary located in Oklahoma," even though Texas's share is not available to it from sources in Texas. Pet. App. 40a; see *id.* at 44a n.3 (finding immaterial whether Texas could obtain 25

percent of subbasin 5 water from in-state sources). In reaching that conclusion, the court was influenced by the presumption against preemption, which it deemed "particularly strong in this case." *Id.* at 34a; see *id.* at 35a-36a. Having read the Compact in this way, the court held that it does not conflict with the discriminatory Oklahoma law.

In addressing the dormant Commerce Clause issue, the court recognized that the "standard for determining Congress's intent to consent to state statutes" that otherwise would violate the Clause is the rigorous one set out in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), and *South-Central Timber* v. *Wunnicke*, 467 U.S. 82 (1984), which requires that congressional consent be "expressly stated" or otherwise "unmistakably clear." Pet. App. 19a-20a. But the court held that "the broad language" of the Compact provides the necessary "clear statement of congressional authorization of state regulation." *Id.* at 24a.

The court reasoned that "the Compact provisions using words and phrases such as 'unrestricted use,' 'control,' 'in any manner,' 'freely administer,' and 'nothing shall be deemed to interfere' give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water." Pet. App. 27a. Relying in part on the Compact's "Interpretive Comments"—which "the Compact's Negotiating Committee wrote" so "future readers might be apprised of the intent" of the drafting committee (*id.* at 4a)—the court determined that these scattered provisions, "[t]aken together," satisfy the clear statement standard of *Sporhase* and *Wunnicke*. *Id.* at 24a-25a, 27a-28a.

SUMMARY OF THE ARGUMENT

I. The Red River Compact guarantees Texas "equal rights to the use of" specified water. In its holding below, however, the Tenth Circuit held that the Compact does not mean what it plainly says, and that Texas may not in fact obtain its equal share of that water. For several reasons, that holding is insupportable.

First, a compact, like a statute, must be interpreted in accordance with its plain terms. And here, the Compact's language is unambiguous. It apportions the excess water of Reach II, Subbasin 5 without reference to state lines, instead granting each of the four signatory States "equal rights to the use" of all water "originating in subbasin 5" or "flowing into subbasin 5," with "no state entitled to more than 25 percent of the excess water." That language could not be clearer: Each of the four States has equal rights to use of the water, no matter where in the subbasin that water is located. In contrast, the drafters expressly and repeatedly allocated water by reference to state lines *elsewhere* in the Compact—which shows that the omission of state borders from the allocation of Subbasin 5 water was not accidental. And the Compact expressly allows signatory States to construct storage, import and export water apportioned under the Compact, and use the bed and banks of the Red River to transfer water across state lines, which also reflects the drafters' understanding that other States could enter Oklahoma for that purpose.

Second, the Tenth Circuit's reading does more than depart from the Compact's plain terms; it makes no sense at all. The Compact allocates Louisiana a 25% share of excess Subbasin 5 water,

although no portion of Subbasin 5 is within Louisiana. If the signatory States may use only the portion of Subbasin 5 water that lies within their borders, as the Tenth Circuit held and respondents argue, the treatment of Louisiana becomes nonsensical. And it is no answer to this point to suggest, as did the Tenth Circuit, that the Compact was designed simply to allow for an uninterrupted downstream flow of water to Louisiana from the three upstream States during times of low flow. Had that been the singular goal of Section 5.05, there would have been no reason to create a separate Subbasin 5 at all.

Third, if there were any doubt on that score, extrinsic evidence would confirm that the Compact's drafters intended that each State be entitled to an equal share of Subbasin 5 water. Thus, the Compact's drafting history shows that the States considered, and *rejected*, limiting access to Reach II, Subbasin 5 water by state lines. Other elements of the history show that the drafters both knew that Texas could not access an equal share of Subbasin 5 water from within its own borders and assumed the States would have cross-border access to water in Subbasin 5. And federal reservoir projects located just upstream from Subbasin 5 were sought (by Texas *and* Oklahoma), and authorized by Congress while the Compact was being negotiated, on the express guarantee that the water generated by those projects would be available for use in Texas. Texas water users can benefit from those reservoirs only by obtaining water from within Oklahoma.

II. Oklahoma's discriminatory water legislation, which would preclude Texas users from obtaining water located in but not apportioned to Oklahoma, also cannot survive scrutiny under the Commerce

Clause. That legislation, which discriminates on its face against out-of-state water users, is virtually *per se* unconstitutional. Although recognizing that principle, the Tenth Circuit thought that Congress authorized Oklahoma's legislation by approving the Compact. But such authorization is found only when Congress expressly announces its approval for discriminatory state laws. The provisions of the Compact invoked by the court of appeals, however, say nothing whatsoever about the Commerce Clause or state authority to discriminate against interstate commerce. It is immaterial that some provisions of the Compact generally defer to state water law; as this Court has recognized, such general language must be understood as deferring only to *valid* state law, an ingredient of which is conformity with the requirements of the Commerce Clause.

ARGUMENT

I. THE RED RIVER COMPACT PREEMPTS STATE LAW THAT PREVENTS TEXAS FROM OBTAINING ITS SHARE OF SUBBASIN 5 WATER FROM OKLAHOMA.

"A compact is a contract" or a "bargained-for exchange between its signatories." *Kansas* v. *Colorado*, 533 U.S. 1, 20 (2001) (citing *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987)). But to take effect, an interstate compact must be approved by Congress, which "transforms [the] compact into a law of the United States." *Virginia* v. *Maryland*, 540 U.S. 56, 66 (2003) (quoting *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998)). Thus, "an interstate compact is not just a contract," but also "a federal statute enacted by Congress." *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2312 (2010). And any state law that "stands as an obstacle to the accomplishment and execution of

the full purposes and objectives" of a federal law is "preempted." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). See also *Del. River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U.S. 419, 433-434 (1940) (state law "ha[s] no force" when inconsistent with the "terms" of a "Compact").

The plain language of the Red River Compact therefore resolves this case. The Compact provides that the four signatory States have "equal rights to the use" of, and that no State is "entitled to more than 25 percent" of, the water in Reach II, Subbasin 5. 1JA25 (§ 5.05(b)(1)). Oklahoma's water export embargo, which is preventing Texas from accessing its full, 25% share of Subbasin 5 water, is a manifest obstacle to the accomplishment of that purpose. And if there were any doubt on that point, the extrinsic evidence would resolve it in Tarrant's favor. On the basis of preemption alone, the judgment below should be reversed.

A. The plain language of the Compact authorizes Texas to cross state lines to obtain its equal share of Subbasin 5 water.

An interstate compact, like any other "legal document," must be "construed and applied in accordance with its terms." *Texas*, 482 U.S. at 128. "Just as if a court were addressing a federal statute," therefore, "the first and last order of business of a court addressing an approved interstate compact is interpreting the compact." *New Jersey*, 523 U.S. at 811 (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 567-568 (1983)). And the Court "must presume" that the Compact "says * * * what it means and means * * * what it says." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Here, the Compact's language is

unambiguous and controlling: Texas may access its share of Subbasin 5 water in Oklahoma.

1. The Compact apportions Reach II, Subbasin 5 water without a word about state lines. Instead, it delineates Subbasin 5 by reference to the "last downstream major damsites" along the major tributaries to the Red River within all three upstream States, creating a single subbasin that includes territory in Arkansas, Oklahoma, and Texas. 1JA22-24 (§§ 5.01-(a), 5.02(a), 5.03(b), 5.04(a)). And when the flow of the Red River at the Arkansas-Louisiana border is 3,000 CFS or greater, the Compact gives those three States *and* Louisiana "*equal rights* to the use" of all water "originating in subbasin 5" or "flowing into subbasin 5," on the condition that "no state is entitled to more than *25 percent* of the [excess] water." 1JA25 (§ 505(b)(1)) (emphasis added). The Compact places no geographic limitation on the signatories' exercise of those equal rights or their "entitle-[ments]" to "25 percent" of the water. *Ibid*.

The plain meaning of those words is clear: Arkansas, Louisiana, Oklahoma, and Texas have "equal rights" to the use of all water "originating in subbasin 5" or "flowing into subbasin 5," *regardless where in the subbasin the water is located or where it originated*. If the drafters "had intended" to impose state-line limits on the allocation of Subbasin 5 water, they would have "sa[id] so in simple language" (*Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 251 (1985)) and with "far more clarity" (*Montana* v. *Wyoming*, 131 S. Ct. 1765, 1778 (2011)). The "most natural interpretation" of Section 5.05(b)(1)'s "silence" concerning state lines is that the drafters "did not intend to [allocate water by state

lines] in that section." *Mims* v. *Arrow Fin. Serv., LLC*, 132 S. Ct. 740, 750 (2012).

2. That conclusion is confirmed by language used elsewhere in the Compact. There, the Compact's drafters repeatedly and expressly *did* allocate water by reference to state lines. Reach V, for example, is defined as "the mainstem Red River and all of its tributaries lying wholly within the State of Louisiana," and unrestricted use of that water is allocated to Louisiana. 1JA38 (§ 8.01). Similarly, two of the four upstream subbasins in Reach II include only those "streams and their tributaries" that lie "wholly in" either Oklahoma or Texas; the water in each subbasin is allocated to those two States, respectively. 1JA22-23 (§§ 5.01(a), 5.02(a)).

In other instances, the drafters apportioned the water of subbasins that traverse state lines by express reference to state borders. Reach II, Subbasin 3, for example, includes territory in both Oklahoma and Arkansas. 1JA23-24 (§ 5.03). But the drafters did not intend Oklahoma and Arkansas to share Subbasin 3 water equally. Thus, the Compact grants "free and unrestricted use of the water of this subbasin" to Oklahoma and Arkansas "*within their respective states*." 1JA23 (§ 5.03(b)) (emphasis added). Similarly, Reach III, Subbasin 3 traverses the Texas-Louisiana boundary. 1JA33 (§ 6.03). The drafters, again, did not intend an equal allocation, providing that "Texas and Louisiana *within their respective boundaries* shall each have the unrestricted use of the water of this subbasin." *Ibid.* (§ 6.03(b)) (emphasis added).

Against this background, it is plain that, when the Compact's drafters "considered it appropriate" to allocate water using state boundaries, they used

"concise language directed to that end." *Mountain States*, 472 U.S. at 251. But they declined to do so when allocating the water of Reach II, Subbasin 5. That approach must be regarded as intentional: The interpretation of a legal document "is a holistic endeavor" and the meaning of a written provision is "clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). Accordingly, "[i]n ascertaining the plain meaning of [a] statute," courts "must look" not only "to the particular statutory language at issue," but also "the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). See *United States* v. *Atl. Research Corp.*, 551 U.S. 215, 221 (2007) ("Statutes must be 'read as a whole.'"). And "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). That principle governs here.

That conclusion also is consistent with other sections of the Compact providing expressly for cross-border transfers of water. Section 2.05(c), for example, allows the signatory States to construct storage facilities for water that is to be transported, so long as the delivery will not have an adverse impact on another State's apportionment. 1JA11. And Section 2.05(d) provides that the signatory States may "[u]se the bed and banks of the Red River and its tributaries to convey * * * water apportioned according to this Compact." *Ibid.* As we have explained, the bed and banks of the Red River, which lie north of the south vegetation line, are wholly within Oklahoma along that State's border with Texas. Section 2.05(d)

thus not only contemplates that "water apportioned according to this Compact" may be "convey[ed]" across state lines, but authorizes entry into Oklahoma for that purpose.

3.a. Of course, the court of appeals disagreed. In holding that the Compact gives Texas no right to acquire Subbasin 5 water outside its own boundaries, it opined that the words "'[e]qual rights to the use of' 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." Pet. App. 42a-43a (emphasis added). That is wrong for two reasons.

First, the court of appeals' interpretation simply ignores the Compact's actual language. In ordinary usage, "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subasin5" can*not* be read to mean "opportunity to use up to 25 percent of excess water in its state." There is no denying that Subbasin 5 is defined as a single geographic unit and apportions water without reference to state lines. There is thus no textual basis for reading the Compact's grant of "equal rights" to the excess Subbasin 5 water as meaning that each signatory State is limited "to 25 percent of [such] water *in its state*" (Pet. App. 43a). And the absence of an express state-line limitation from Section 5.05(b)(1) hardly can be deemed accidental. As we have noted, other sections of the Compact make clear that, when the drafters meant to allocate the water of multistate subbasins by reference to state lines, they did so expressly. See 1JA23-24, 33-45 (§§ 5.03(b), 6.03(b)). That is enough, in itself, to refute the Tenth Circuit's interpretation: It is fundamental that the courts may not, in the guise of interpretation, "read absent

terms into" or otherwise "rewrite" an "agreement among sovereign States." *Alabama*, 130 S. Ct. at 2312-2313 (citing *Texas*, 462 U.S. at 564).

Second, the Tenth Circuit's interpretation fails to account for the fact that Louisiana—although allocated a 25% share of excess Subbasin 5 water—has *no* such water within its State. The court's conclusion that the Compact authorizes each State to use only "25 percent of the excess water *in its state*" (Pet. App. 43a (emphasis added)) thus renders Louisiana's allotment meaningless. But the allocation "cannot be meaningless, else [it] would not have been [made]." *United States* v. *Butler*, 297 U.S. 1, 65 (1936).

It is no answer to say, as did the Tenth Circuit, that "[Section] 5.05(b)(1) secures Louisiana's interests" in Subbasin 5 water "indirectly by ensuring that the three upstream states will not take more than 25 percent of the excess water, allowing the remaining 25 percent to flow downstream to Louisiana." Pet. App. 38a. If that were what the drafters had wanted to accomplish—to ensure that Louisiana received some quantity of water downstream, in Reach V—allocating the water to Louisiana *upstream*, in Reach II, Subbasin 5 would have been a very strange way to do it.

In fact, when the drafters intended to ensure downstream delivery elsewhere, they said so simply and expressly. For example, the drafters allocated all of Reach IV, Subbasin 2 to Arkansas. But that subbasin—like Reach II, Subbasin 5—lies immediately upstream of Louisiana, and the drafters wanted to ensure that some percentage of its water would be preserved for downstream use by Louisiana. Thus, Section 7.02(b) apportions that water exclusively to Arkansas but requires Arkansas to allow "forty (40)

percent of the total weekly runoff originating above the state boundary to flow into Louisiana." 1JA37. The drafters did *not* apportion to Louisiana a share of the water upstream in Arkansas, on the unspoken assumption that the allocation simply would "flow downstream," unused by Arkansas, "to Louisiana" for Louisiana's "indirect[]" benefit. Pet. App. 38a.

Indeed, the point is made clear by the drafters' treatment of Reach II, Subbasin 5 itself. Like Section 7.02(b), Section 5.05(b)(2)—which governs Subbasin 5 during times of low flow—provides that, when the river's flow is below 3,000 CFS at the Arkansas-Louisiana boundary, the three upstream States must allow 40% of all Subbasin 5 water "to flow into the Red River for delivery to the State of Louisiana." 1JA25.

But that very notably is *not* the language that drafters used to allocate Subbasin 5 water during times of *high* flow. The Compact does not say that when the flow of the River is above 3,000 CFS, the three upstream States must allow 25% of Subbasin 5 water "to flow into the Red River for delivery to the State of Louisiana," as the Tenth Circuit would have it. On the contrary, it provides that *all four* States "have equal rights to the use" of the water "originating in" and "flowing into subbasin 5." 1JA25 (§ 5.05-(b)(1)). That language plainly allocates equal shares of Subbasin 5 water *in* Subbasin 5. And there would have been no reason to allocate Louisiana's share *upstream*, in Subbasin 5, unless the drafters intended for Louisiana to be able to *access* its share of the water there. The Compact therefore necessarily authorizes the States to cross state lines to obtain their shares of Subbasin 5 waters. That is especially so because the drafters also were aware that the distribution of Subbasin 5 water is dramatically uneven

among the three upstream States, and that Texas could not possibly access an equal portion of the subbasin's excess flows within its own borders, either. See *supra*, at 9 n.5. The Tenth Circuit's contrary reading "does not follow from the text and would drastically redefine" Section 5.05(b)(1). *Montana*, 131 S. Ct. at 1778.

b. Respondents' slightly different reading of the Compact fares no better than the Tenth Circuit's. As they see it, the words "allocate" and "state," taken together, connote a state-boundary limitation. Thus, they say, "[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. That reading suffers from the same two problems that are inherent in the court of appeals' interpretation.

First, respondents' approach similarly adds words that the drafters omitted from the Compact. Section 5.05(b)(1) simply does not say that "the signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5 *within their respective boundaries*." See 1JA25. That the Compact "allocates" water to the signatory States does not provide the missing words. The word "allocate" means "to apportion" or, more specifically, "to deal out (something limited in supply) according to an allowance schedule." *Webster's Third New International Dictionary* 57 (1986). Nothing in the ordinary meaning of that word suggests that an agreement that "allocates" water among States cannot "apportion" or "deal out" to Texas water located in Oklahoma, especially water located in a region spanning three States

and allocated without reference to its State of origin. By insisting that Section 5.05 contains an unspoken state-boundary limitation, respondents therefore seek (and the Tenth Circuit granted) "not a construction of [the Compact], but, in effect, an enlargement of it by the court." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926). And "[t]o supply omissions transcends the judicial function." *Ibid.* See also, *e.g.*, *Bilski* v. *Kappos*, 130 S. Ct. 3218, 3226 (2010).

Second, respondents' approach—like the Tenth Circuit's—fails to grapple with the allocation of Subbasin 5 water to Louisiana. Respondents say Section 5.05(b)(1) authorizes each signatory State to use only that excess Subbasin 5 water that is "within the state," and then only in an amount that does not "exceed an amount equal to what is used by other states." Opp. 31. But Louisiana does not have *any* Subbasin 5 water "within the state"; as soon as Reach II, Subbasin 5 crosses the border into Reach V it becomes Reach V water, apportioned exclusively to Louisiana. 1JA38 (§ 8.01). Taken literally, respondents' reading would preclude any State from using any Subbasin 5 water at all. That makes no sense—and "[a]bsurd results are to be avoided." *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011) (quoting *United States* v. *Wilson*, 503 U.S. 329, 334 (1992)).

B. Respondents' and the court of appeals' readings of the Compact ignore the structure and purpose of Reach II.

The design and purpose of Reach II confirm that the Compact apportions Subbasin 5 water without regard for state lines.

1. As we have explained (*supra* at 7-8), the water of each of the four upstream subbasins of Reach II is

apportioned to the State within which that water is located. The States therefore enjoy "unrestricted use" of the water "within their respective states" in the upstream subbasins. 1JA22-24 (§§ 5.01-5.04). The four upstream subbasins are separated from Subbasin 5 by reference, in turn, not to state borders, but instead to the "existing, authorized or proposed last downstream major damsites" along the major freshwater tributaries to the Red River, as they flow from the four upstream subbasins into Subbasin 5. *Ibid.* (§§ 5.01(a), 5.02(a), 5.03(b), 5.04(a)).

The definition of Subbasin 5's boundaries by reference to the last downstream dam sites along the major freshwater tributaries to the Red River accomplishes two crucial objectives: equal sharing of benefits when water is plentiful and equal sharing of burdens when it is not. It does this in two ways.

First, Section 5.05 ensures that, because reservoirs necessarily form upstream of the dams that create them, any reservoirs located along the Red River's major tributaries fall within the *upstream* subbasins, over which the upstream States have "unrestricted" control. The upstream States are therefore able to store whatever water they need for their own uses, allowing only surplus water to flow (unused) from the upstream subbasins into Subbasin 5. As relevant here, for example, the only water from Subbasin 1 that flows down the Kiamichi River into Subbasin 5 necessarily is surplus water that Oklahoma allows to flow past Hugo Dam, where Oklahoma can impound any upstream water it requires for its own use.

The upshot is that Subbasin 5 consists only of surplus water released from upstream reservoirs that the upstream States intend *not* to use. That ex-

plains the States' willingness to share Subbasin 5 water equally during times of high flow, regardless of state lines. By allowing the water to pass into Subbasin 5, the upstream States (primarily Oklahoma) are expressing an intent not to retain exclusive use of the water. Thus, "[w]hen the flow is high, * * * all states are free to use whatever amount of [Subbasin 5] water they can put to beneficial use," subject to the 25% cap. 1JA29-30.

Second, the provision ensures that the three upstream States guarantee downstream flow to Louisiana *equally* and that no State bears a disproportionate burden during low flows. It does so by providing that the upstream States are not obligated to "release stored water" from their upstream reservoirs (1JA25 (§ 5.05(b)(2))) to meet the downstream flow requirements to Louisiana.[9] Instead, the downstream flow is guaranteed exclusively from the shared, surplus water of Subbasin 5. As a consequence, the upstream States contribute only what they allow to flow into Subbasin 5, and no upstream State is made to release its own stored water for Louisiana's sake during drought.

2. Respondents' and the Tenth Circuit's interpretations of Section 5.05(b)(1) turn that arrangement on its head. Most fundamentally, the Compact's drafters would have had no reason to create a separate Subbasin 5 had they not intended to allow the States

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[9] The court of appeals thought that the upstream States' right to retain stored water even in times of low flow "reinforces the [Compact's] emphasis on state control." Pet. App. 38a. That may be so, but an "emphasis on state control" over stored water in the *upstream* subbasins hardly suggests that the Compact's drafters meant by implication to allocate downstream water in Subbasin 5 according to state lines.

equal shares of Subbasin 5 water during times of high flow. Instead, the drafters could have divided Reach II into the first four subbasins alone (extending each downstream into the territory that is now Subbasin 5) and simply required the upstream States to guarantee a downstream flow to Louisiana from the water "within their respective states." That is not the arrangement the States agreed to—but it is, in effect, how the Tenth Circuit read the Compact, treating it as though it subdivided Subbasin 5 into three units corresponding to the state lines of Arkansas, Oklahoma, and Texas.

Beyond that, no practical purpose would be served by limiting each upstream State "to 25 percent of [excess] water in its state," as the Tenth Circuit suggests. Pet. App. 42a. If, for example, Oklahoma municipalities need additional sources of water, there would be no reason for any of them to appropriate water from an Oklahoma tributary *in Subbasin 5* (where respondents' and the Tenth Circuit's equal-rights "limitation" would apply), when those municipalities could just as easily appropriate the same water a few miles upstream *in Subbasin 1* (where the limitation would *not* apply) before it flowed into Subbasin 5. It is hard to imagine why the drafters would have placed a cap on the upstream States' right to use Subbasin 5 water within their own boundaries, while at the same time providing such an obvious means of circumventing that limitation. But it is easy to see why they would have capped the amount that could be taken from Subbasin 5 if each State were authorized to share equally in the excess.

Finally, the Tenth Circuit was simply wrong to conclude that the *sole* purpose of Subbasin 5 is "to

ensure that an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas." Pet. App. 36a, 39a. As the government recognized in its certiorari-stage brief (at 14), Subbasin 5 "does more than ensure that downstream states receive adequate water during low flow periods"; it *also* "apportions the subbasin's excess water when the flow *exceeds* 3000 cubic feet per second" (which it does 96% of the time), and it does so in equal, 25% shares. See also 2JA47 (meeting minutes showing that Section 5.05 gives both "[a]ssurance of a minimum flow" and "an equitable [apportionment] of the free [surplus] water"). The Tenth Circuit simply ignored that express purpose.

C. Neither deference to state water law nor the presumption against preemption has any application here.

In nevertheless finding that Texas cannot access its share of Subbasin 5 water in any other State, the court of appeals did not believe its approach compelled by the Compact language. Instead, it regarded the Compact as ambiguous, acknowledging that "[i]t may be possible to identify a different interpretation" of the Compact's "equal rights" language "so that it conflicts with the Oklahoma state water laws." Pet. App. 42a-43a. But, the court reasoned, the Compact's "pronounced deference to, not displacement of, state water laws" in Sections 2.01 and 2.10(a) (*id.* at 35a, 41a), together with "the presumption against preemption" (*id.* at 41a), weighed against such an interpretation. That analysis is wrong on its own terms, wholly apart from its inconsistency with the Compact's plain text.

1. In the Tenth Circuit's view, the Compact's boilerplate language concerning deference to state

water law "is evidence of Congress's consent to, not preemption of, state water regulations." Pet. App. 35a. The court found two provisions in particular "to caution against reading preemption into the Compact's other provisions" (*ibid.*): Section 2.01, which provides that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state" (1JA10); and Section 2.10(a), which 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" (1JA12). Those provisions, the Tenth Circuit explained, "call for pronounced deference to, not displacement of, state water laws." Pet. App. 41a.

That conclusion gets matters backwards. In discussing Sections 2.01 and 2.10(a), the court of appeals disregarded two crucial caveats: Section 2.01 says plainly that a State's authority to regulate water rights and uses "*shall be subject to the availability of water in accordance with the apportionments made by this Compact*" (1JA10 (emphasis added)); and Section 2.10(a)'s non-interference language similarly preserves only those state laws that are "*not inconsistent with [the signatory States'] obligations under this Compact*" (1JA12 (emphasis added)).

Those conditions make all the difference. Oklahoma's invocation of Sections 2.01 and 2.10(a) simply begs the question whether enforcement of the embargo would conflict with "the apportionments made by this Compact" (§ 2.01) or Oklahoma's "obligations under this Compact" (§ 2.10(a)). Tarrant has argued all along that the embargo *does* conflict with the Compact's apportionment of Subbasin 5 water and Oklahoma's obligation under the Compact to allow

Tarrant to enter Oklahoma to access Texas's share. The Compact's free-administration and non-interference provisions, qualified as they are, do nothing to suggest that courts should disfavor finding such conflicts when they genuinely arise.

Remarkably, the Tenth Circuit recognized all of this, noting that the Compact's "qualifi[cation]" of Section 2.10(a) simply "begs the question of how § 5.05(b)(1) should be read." Pet. App. 42a. That is exactly right. But the court of appeals failed to take the next step by acknowledging that Sections 2.01 and 2.10(a) therefore *have no bearing whatever* on the question whether Oklahoma's water embargo is preempted by the Compact. That was error.

2. The Tenth Circuit found substantial support for its reading of the Compact's terms not only in Sections 2.01 and 2.10(a), but also in the presumption against preemption. Pet. App. 34a, 40a-43a. In the court's view, this case implicates a "field" of law "in which Congress has legislated," but "which the States have traditionally occupied"; thus, any preemption analysis must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 34a. And the court of appeals thought this presumption to be "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.

The error in that approach is also obvious. The presumption against preemption derives from "respect for the States as independent sovereigns in our federal system" and "assume[s] that 'Congress does not cavalierly pre-empt'" state law. *Wyeth* v. *Levine*,

555 U.S. 555, 565 n.3 (2009). But unlike a typical federal statute or regulation, an interstate compact is not imposed on the States by Congress. It is, instead, the product of two or more States exercising their sovereign prerogative to negotiate a collaborative solution to a common problem. Finding that congressional approval of such an agreement displaces contrary state laws does not derogate state sovereignty; it respects it. As the United States explained in its certiorari-stage brief (at 12), it is precisely the point of interstate compacts that they "embod[y] a number of compromises and mutual concessions of rights and authority that the respective States might otherwise claim." Respect for *those* compromises requires enforcing the plain language of interstate compacts as agreed to by the States themselves, without the distorting influence of a presumption against preemption.

D. Extrinsic evidence demonstrates that the drafters intended for Texas to access Subbasin 5 water within Oklahoma.

The touchstone in any compact interpretation case is "the intent of the compacting parties." *New Jersey*, 523 U.S. at 810. See also *Montana*, 131 S. Ct. at 1771 n.4 (courts must "interpret [a] Compact according to the intent of the parties"). Here, the Compact's plain text unambiguously expresses the signatory States' intent to authorize Texas water users to enter Oklahoma to obtain Texas's equal share of Reach II, Subbasin 5 water. But if there were any doubt on that score, it would be "appropriate to look to extrinsic evidence of the negotiation history of the Compact in order to interpret" compact terms that are "ambiguous." *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991). That evidence shows clearly that

the Compact means what it says: Each State is entitled to an equal share of *all* Subbasin 5 water.

1. To begin with, the Court may be "aided in [its] interpretation [of the Compact] by considering * * * predecessor" drafts and comparing them with the "language [that] was [actually] adopted." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001). As a general matter, when the drafters of a document "decline[] to insert" language "despite having at one time considered doing so," the omission is deemed to reflect a deliberate judgment not to include the rejected language. *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364, 374 (2008).

Here, the Compact's drafting history demonstrates that the States considered, and rejected, limiting access to Reach II, Subbasin 5 water by state lines. The February 1966 draft, for example, allocated "[u]nassigned" Reach II water (which in later drafts would be defined as excess Subbasin 5 water) according to state borders: It gave (1) Oklahoma "the unrestricted right to divert and use" 50% of the Little River "*in that State*"; (2) Arkansas "the unrestricted right to divert and use" the Little River "*in Arkansas* above Millwood Dam"; and (3) Texas the "the unrestricted right to divert and use" the Sulfur River "*in Texas*." Approved Draft of the Red River Compact at 15 (Feb. 21, 1966) (emphasis added).[10] It also provided that certain percentages of Reach II water in excess of a 400 CFS downstream flow "may be diverted and used [by Oklahoma and Texas] *in their respective States*." *Ibid.* (emphasis added).

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[10] Petitioner has sought leave to lodge the 1966 draft of the Compact with the Clerk.

But the "in their respective States" language did not survive the negotiation process. It was stricken from the agreement by late 1975 (2JA224-249), and, of course, it is nowhere to be seen in the version of Section 5.05(b)(1) that was finally agreed to by the States and approved by Congress. See 1JA25. That "strongly militates against a judgment that [the States] intended a result" that they actively considered and "expressly declined to enact." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

2. Other aspects of the Compact history indicate that the drafters assumed that signatory States would have cross-boundary access to water within Subbasin 5. In one instance, Oklahoma's representative at the April 1965 Compact Commission meeting observed, in discussing the excess "free water" from the main channel of the Red River, that "Texas could come clear down to the Louisiana line to pick up their water." 2JA47. The "Louisiana line" on the Red River is shared with Arkansas, well past Texas's own border with that State. Consistent with the view that Texas could take its share of excess water outside its own borders, an Oklahoma engineer at the same meeting contemplated that Texas could "retain" or "deplete" an equal share of the "free water releases" from "the Boggy and the Kiamichi *in Oklahoma*." 2JA71 (emphasis added). And a Texas engineer later observed that Texas could take its share of water "below existing Federal reservoirs" at "Millwood and Texarkana." 2JA73. Millwood Dam is at the division point for Subbasin 5 in Arkansas; for Texas to take water below Millwood, it necessarily would have to enter Arkansas. See App., *infra* (map). Yet no objections to that observation were noted in the minutes.

3. It is clear the drafters understood that the percentage-based allocations of the "excess" water in Reach II referred, not to a percentage of the water within the States' respective lines (as the Tenth Circuit seemed to conclude), but to a percentage of the *entire* amount of excess water above the minimum flow, *regardless* of state lines. At the conclusion of the April 1965 meeting, the commissioners agreed that the allocations of excess Subbasin 5 water would "be stated as a percentage *for* each state," not a percentage of such water *in* each State. 2JA86-87 (emphasis added). Consistent with that view, the 1983 engineering worksheet states that "[e]ach State's Entitlement [to Subbasin 5 water] equals 25% of the algebraic sum of" the total of *all* the States' runoff and undesignated flow "minus 3,000 CFS." Engineering Advisory Committee Worksheet at 2 (Aug. 3, 1983) (emphasis added).[11]

Other evidence shows that the drafters were well aware that Texas would not be able to access a 25% allocation of the entire flow over 3,000 CFS within its own borders. A 1970 engineering report submitted to the Compact's negotiating commission establishes that, at the time of the drafting, a majority of the water flowing into Subbasin 5 was located in Oklahoma; far less than 25% was located in Texas. See *supra*, at 9 n.5. There accordingly is no denying that the drafters understood that cross-border transfers would be necessary for Texas to access its full share.

4. Finally, legislation authorizing federal reservoirs in Oklahoma within Reach II, Subbasin 1

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[11] Petitioner has sought leave to lodge the 1983 worksheet, which was prepared by the Engineering Committee to the Red River Compact Commission, with the Clerk.

enacted during the Compact negotiations provides further, and related, support for the conclusion that Texas may obtain water from Oklahoma.

Subbasin 1 is located wholly in Oklahoma and Oklahoma is granted unrestricted use of water in that subbasin. Nevertheless, as we have observed (at 11-12), the reservoir projects in Subbasin 1 *in Oklahoma* were approved as sources of water *for Texas*. At the time that the Hugo, Sardis, and Tuskahoma federal reservoirs along the Kiamichi River in Subbasin 1 were under consideration, Oklahoma's anticipated future water demands did not justify the cost of their construction. Thus, at the same time that the signatory States were negotiating the terms of the Red River Compact, Oklahoma legislators represented to the Army Corps of Engineers that the demands of north Texas (and specifically the Dallas-Fort Worth metropolitan area) should be taken into account to justify Congress's authorization and subsequent funding of the projects. See *supra*, at 12.

The Corps recommended to Congress that the projects be approved on precisely that basis: to meet anticipated future demand throughout "the central Oklahoma-north Texas region," expressly including the metropolitan area served by Tarrant. 1JA108. Congress approved that recommendation in the Flood Control Act of 1962, Pub. L. No. 87-874, tit. II, 76 Stat. 1173. The Compact's drafters would have regarded those expectations as binding: A federal reservoir project will not be authorized unless its benefits, including "present or anticipated future demand or need for municipal" water, exceed its costs (43 U.S.C. § 390b(b)); and when a project is authorized for multiple purposes, the cost-benefit analysis must "be determined on the basis that all authorized pur-

poses served by the project shall share equitably in the benefits of multiple purpose construction." *Ibid.*[12]

This history, as well as the restrictive scope of Subbasin 1, strongly supports our view that "the intent of the compacting parties" (*New Jersey*, 523 U.S. at 810) was to permit Texas to obtain its share of the water generated by the Oklahoma reservoirs out of *Subbasin 5* water in Oklahoma. The drafters would have understood that there would have been no way for Texas users, whose interests were essential to securing funding for the Hugo, Sardis, and Tuskahoma federal reservoirs in the first place, otherwise to benefit from those reservoirs. Because the water of Subbasin 1 is "apportioned" to Oklahoma, which enjoys "unrestricted use thereof" (1JA22 (§ 5.01(b))), the drafters could not have expected Texas users to divert undesignated water released from the federal reservoirs along the Kiamichi River in Subbasin 1. The drafters thus necessarily intended Texas to benefit from those federal projects by accessing the water that flowed downstream from the reservoirs along the Kiamichi River into Subbasin 5.

* * *

Against this legal and historical backdrop, there is no question that Tarrant is authorized by Section 5.05(b)(1) to enter Oklahoma to access Texas's apportioned equal share of Subbasin 5 water in that State.

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[12] The Compact drafters were keenly aware of those considerations. As Major General Ellsworth Davis of the Army Corps of Engineers admonished the States' representatives at the 34th meeting of the Compact Commission, the States had "no alternative but to obey—to conform to the Federal purposes for which the reservoir[s] [were] built" and could not "get[] away with changing the Federally-authorized purposes of a Federal project." 2JA51.

And because Oklahoma's discriminatory permitting scheme "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Compact, it is "preempted." *AT&T Mobility*, 131 S. Ct. at 1753.

II. OKLAHOMA'S DISCRIMINATORY WATER PERMITTING SCHEME VIOLATES THE DORMANT COMMERCE CLAUSE.

Even if this Court were to disagree with our reading of the Red River Compact and instead adopt the Tenth Circuit's or respondents' interpretation, the judgment below still could not stand. Under the Tenth Circuit's approach, a substantial amount of Reach II, Subbasin 5 water located in Oklahoma is not apportioned to *any* State and therefore is available to permit applicants like Tarrant.[13] As to that water, traditional dormant Commerce Clause principles undoubtedly apply.

A. The Red River Compact does not manifest unmistakably clear congressional intent to permit interstate discrimination.

1. Under the Commerce Clause, a "challenged law [that] discriminates against interstate com-

[13] As we have noted, the Tenth Circuit and respondents read Section 5.05(b)(1) to apportion to each State up to 25% of the excess Subbasin 5 water located within the State's boundaries, or all the excess water located within the State's boundaries up to 25% of the total excess throughout the subbasin. Because a majority of Subbasin 5 water is located in Oklahoma, either reading means that a substantial amount the water located in Oklahoma is unallocated. This case presents no question regarding water that actually *is* allocated to Oklahoma, which Tarrant does not seek to appropriate in the underlying petition at issue here.

merce" for the "forbidden purpose" of favoring local interests over foreign ones "is virtually *per se* invalid." *Dep't of Rev. of Ky.* v. *Davis*, 553 U.S. 328, 338 (2008). And although Congress may expressly permit the States to discriminate against interstate commerce, it "must manifest its unambiguous intent before a federal statute will be read to permit" discriminatory state laws that otherwise would conflict with the negative implications of the Commerce Clause. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992). Such intent is most often "expressly stated" (*Sporhase* v. *Neb. ex rel. Douglas*, 458 U.S. 941, 960 (1982)) and, in all events, "must be *unmistakably clear*" (*South-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added)).

This principle applies with full force to cross-border water disputes. Thus, in *Sporhase* the Court struck down on Commerce Clause grounds "a Nebraska statutory restriction on the withdrawal of ground water" that was substantially similar to the restriction on surface water at issue here: It prohibited, without a proper permit, the extraction of water for the purpose of transporting it across state lines for use in another State. 458 U.S. at 943-944. The permitting scheme "operate[d] as an explicit barrier to commerce" in water between Nebraska and its adjoining States. *Id.* at 957. Nebraska defended its law by pointing to dozens of broadly applicable federal water statutes and "a number of interstate compacts dealing with water that have been approved by Congress," which it argued to show that Congress "authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water." *Id.* at 958.

But the Court rejected Nebraska's argument that such broad statutory language represented authorization "to impose otherwise impermissible burdens on interstate commerce in ground water." *Sporhase*, 458 U.S. at 958. "Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 959-960. To the contrary, the Court explained, "[t]he negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred." *Id.* at 960. The cited statutes and interstate compacts accordingly did not "constitute[] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce" and "do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Id.* at 959-960.

2.a. The Tenth Circuit's decision below cannot be squared with that principle. In the court's view, four provisions of the Red River Compact manifest unmistakably clear congressional approval of Oklahoma's water embargo:

- Section 1.01(a), which says that a "principal purpose[] of this Compact" is to "govern[] the use, control and distribution of the interstate water of the Red River and its tributaries";
- Section 2.01, which says that each 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, * * * subject to the availability of water

in accordance with the apportionments made by this Compact";

- Section 2.10(a), which says 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"; and
- the general language of Section 5.05, which, in the Tenth Circuit's view, "confers authority to the states to regulate water use within their respective boundaries" (Pet. App. 26a).

On the face of it, none of that language comes close to the sort of unmistakably clear congressional statement necessary to insulate Oklahoma's water embargo from Commerce Clause challenge.[14]

Section 1.01(a) (1JA9), which comprises the Compact's preamble, merely recognizes that the Compact's "purpose" is "to govern the 'use, control and distribution' of the compacted water." Pet. App. 27a. Nothing in that perfunctory language alludes to the Commerce Clause or state discrimination at all, let alone remotely "indicates [Congress's] consideration [and] desire to alter the limits of state power

[14] The court also pointed to Section 4.02(b), which grants Oklahoma "free and unrestricted use" of the water of Reach I, Subbasin 2 (1JA19). Tarrant does not press before this Court any claim to appropriate water from Reach I, Subbasin 2. Needless to say, the Compact's "free and unrestricted use" language relating to *other* subbasins cannot reflect a congressional intent to waive Commerce Clause restrictions that apply to Subbasin 5.

otherwise imposed by the Commerce Clause." *Public Util. Comm'n*, 345 U.S. at 304.

Sections 2.01 and 2.10(a) (1JA10, 12) do not strengthen respondents' case. Each simply expresses generic deference to state water law. This Court has said repeatedly that "deference to state water law" does not "indicate that Congress wished to remove federal constitutional constraints on such state laws"; instead, that language must be understood as deferring only to "*valid* state law," an "ingredient[]" of which is conformity with "[t]he negative implications of the Commerce Clause." *Sporhase*, 458 U.S. at 959-960.[15] See also *Wyoming*, 502 U.S. at 458 (similar). Such language "does not "constitute[] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on Commerce." *Sporhase*, 458 U.S. at 960.

And Section 5.05 (1JA24-26) does not fill the gap. As we have explained, 5.05(b)(1) unambiguously allocates the excess water of Subbasin 5 without respect to state boundaries and has nothing to do with waiving Commerce Clause restrictions. The Tenth Circuit—although ultimately rejecting that understanding of the language—acknowledged that our reading of Section 5.05 was a "possible" one. Pet. App. 43a. The court nevertheless thought that the ambiguity it perceived in Section 5.05 made the dor-

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[15] The Tenth Circuit attempted to distinguish *Sporhase* on the ground that the water at issue there was not itself covered by an interstate compact containing the deference-to-state-law language. Pet. App. 27a. But the court offered no explanation why that observation has any bearing on whether Congress, in approving the Red River Compact, expressed a clear intent to displace the dormant Commerce Clause.

mant Commerce Clause question "more complex." Pet. App. 26a. But, in fact, that ambiguity (if it existed) would itself answer the Commerce Clause question: Ambiguous statutory terms *cannot* be "unmistakably clear." *Wunnicke*, 467 U.S. at 91.

b. Perhaps recognizing that Sections 1.01(a), 2.01, 2.10(a), and 5.05 do not suffice to express clear congressional consent taken alone, the Tenth Circuit read those provisions "[t]aken together," and with "the Compact as a whole," to "echo[] and reinforce" the notion that the States have "broad regulatory authority" over apportioned water, which the court believed consistent with congressional permission to discriminate. Pet. App. 25a, 27a. But that is precisely the kind of gestalt approach that this Court's holdings forbid. As the Court explained in *Wunnicke*, "[t]he fact that the state policy * * * appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient idicium of congressional intent." 467 U.S. at 92. And it is fundamental that when Congress has not stated an unmistakably clear intent "to sustain state legislation from attack under the Commerce Clause, [the courts] have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982) (citing *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946)). Yet in relying on the vague notion that the Compact confers "broad legislative authority" over apportioned water, that is precisely what the Tenth Circuit did.

3. The Tenth Circuit committed one final error in its treatment of the Commerce Clause question: It relied on extra-textual material—the Compact's in-

terpretive comments—to infer congressional intent from text that the court of appeals acknowledged is *not* unmistakably clear in its own right. The court admitted that some Compact language "might suggest no more than preservation of existing state laws without protecting them from dormant Commerce Clause attack," but found that "the Compact's Interpretive Comments refute [that] suggestion" and "confirm" that Congress gave supposedly clear consent to Oklahoma's discriminatory water-permitting scheme. Pet. App. 25a. The court's resort to the interpretive comments was misguided for two reasons.

First, that the court felt it necessary to consult the interpretive comments at all to determine the meaning of the Compact's text necessarily demonstrates that the text is *not* unmistakably clear. As the Court has said in other clear-statement-rule contexts, extra-textual material like "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; the unequivocal expression of [congressional intent] that we insist upon is an expression *in the statutory text*." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (emphasis added) (waiver of the United States' sovereign immunity). Accordingly, "[i]f Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; [and] if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the [clear statement] rule" will "not be met." *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989) (waiver of Eleventh Amendment immunity).

Just so here. If Congress's consent to Oklahoma's discriminatory permitting scheme were unmistakably clear, recourse to the interpretive comments

would be unnecessary; if its consent were *not* unmistakably clear (as the Tenth Circuit appears to have acknowledged), recourse to the interpretive comments would be futile. See *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994) (O'Connor, J., concurring) ("isolated references" in the legislative history "do not satisfy [the Court's] requirement of an explicit statutory authorization" to depart from the dormant Commerce Clause). Thus, when the court of appeals recognized that some Compact language "might suggest no more than preservation of existing state laws without protecting them from dormant Commerce Clause attack" (Pet. App. 25a), that should have been an end to the matter—language susceptible to more than one interpretation cannot be "unmistakably clear."

Second, the court's reliance on the interpretive comments is wrong on its own terms. According to the Tenth Circuit, the comments declare that "each state is free to continue its existing internal water administration, or modify it in any manner it deems appropriate"; some of the discriminatory Oklahoma statutes "predate the signing and ratification of the Compact and would have been familiar to the Compact's drafters"; and "[a]ccordingly, when Congress ratified the Compact and granted to each state the power to 'freely administer' the water, it gave congressional consent to the [pre-water-embargo] statutes at issue here." Pet. App. 25a-26a. But even assuming that Congress had been aware of the interpretive comments' statement that each signatory State could continue its existing regulations, it again would have regarded "[t]he negative implications of the Commerce Clause" to be "ingredients of the *valid* state law to which [it] had deferred." *Sporhase*, 458

U.S. at 960. Nothing here authorizes the blatant state discrimination reflected in Oklahoma's laws

B. Oklahoma's water permit scheme discriminates for the purpose of discrimination.

Without the benefit of a clear statement from Congress authorizing Oklahoma to discriminate against out-of-state water users, Oklahoma's permitting scheme violates the dormant Commerce Clause. Oklahoma's discriminatory permitting scheme effectively prohibits the appropriation of surface water in Oklahoma for use in another State—which is, of course, precisely what it was designed to do. OWRB is legally obligated to reject Tarrant's application under the Oklahoma Attorney General's opinion (Pet. App. 97a) and Oklahoma Statutes, title 82, section 1086.2. Even if Tarrant were issued a permit, the full annual amount of water allocated by the permit would have to be put to use within seven years (Okla. Stat. tit. 82, § 105.16) and would be subject to divestiture at any time (*id.* § 105.12(F)), impractical conditions not applicable to in-state water permit-holders. Beyond that, Oklahoma law expressly favors in-state water users, whose interests get top priority under Oklahoma Statutes, title 82, sections 105.12 and 105.16.

Oklahoma's water permitting scheme thus "discriminates against interstate commerce" for the "forbidden purpose" of favoring local interests over foreign ones; it is "*per se* invalid" and should be declared unenforceable. *Davis*, 553 U.S. at 338.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KEVIN L. PATRICK
SCOTT C. MILLER
Patrick, Miller, Kropf, & Noto, P.C.
730 East Durant Ave.
Suite 200
Aspen, CO 81611

CLYDE A. MUCHMORE
HARVEY D. ELLIS
L. MARK WALKER
Crowe & Dunlevy
20 North Broadway
Suite 1800
Oklahoma City, OK 73102

CHARLES A. ROTHFELD
Counsel of Record
TIMOTHY S. BISHOP
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

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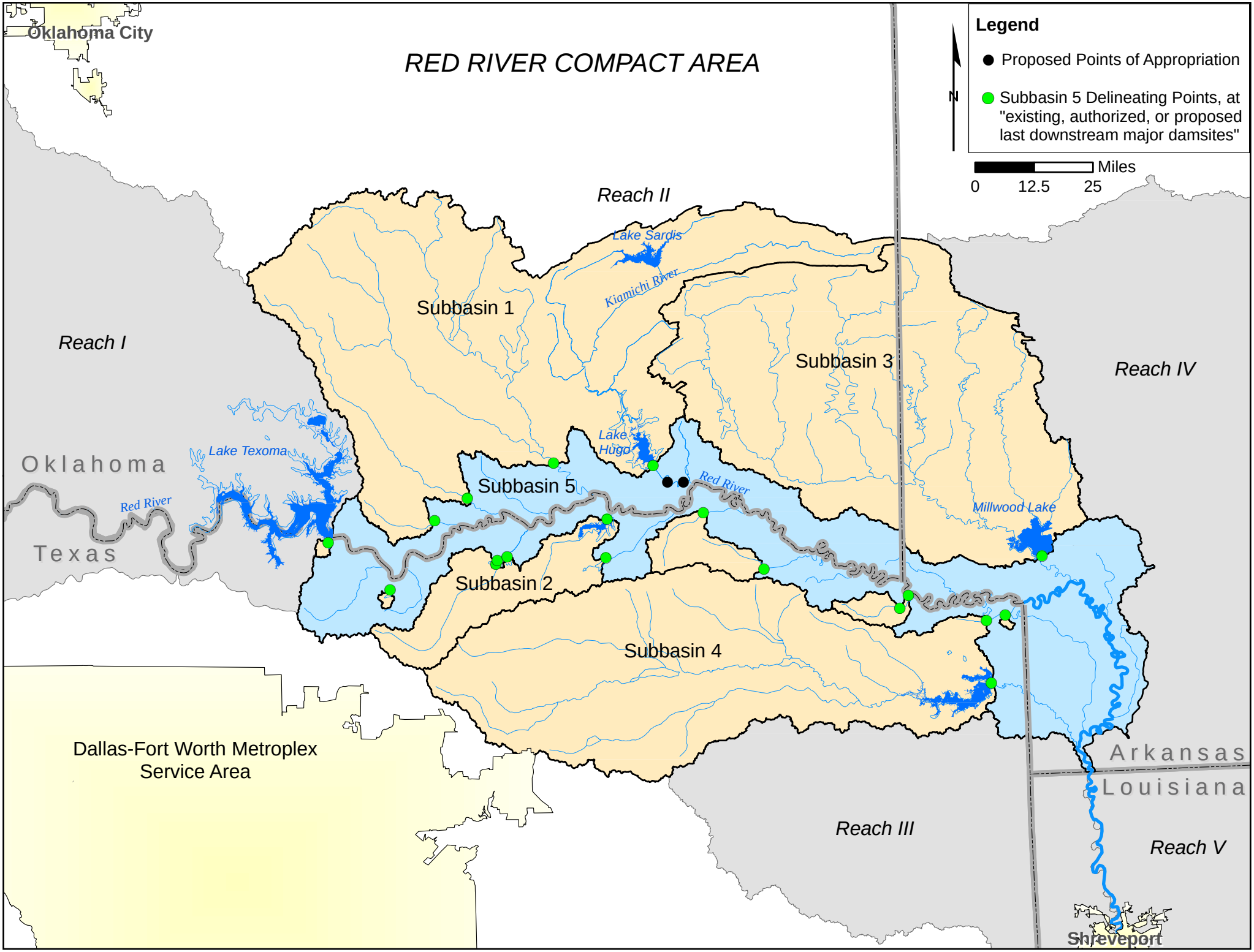
APPENDIX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Kiamichi River
Lake Hugo
Lake Texoma
Red River
Red River
Millwood Lake
Oklahoma
Texas
Arkansas
Louisiana
Dallas-Fort Worth Metroplex Service Area
Shreveport