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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' brief is strikingly candid in one respect: It recognizes that respondents' position cannot be squared with the plain language of the Compact. Respondents thus urge the Court to read into the Compact language that the drafters considered and *omitted* because, respondents intuit, the drafters must have thought the missing words "too obvious" for "elaboration." As for language the Compact *does* use, respondents urge the Court to ignore it as "superfluous." Resp. Br. 39. Respondents' ultimate position, accordingly, is that the Court should not attribute "talismanic significance" to the operative language of the Compact. Resp. Br. 41.

To say the least, that is a peculiar approach to the interpretation of any written instrument, let alone one that was crafted over twenty-four years of painstaking negotiations. But it is no mystery why respondents urge the Court to look at everything *but* the Compact's language. As the United States confirms, respondents' approach—under which Texas' "equal right[] to the use" of excess Subbasin 5 water does not actually entitle Texas to an equal share of that water—cannot be squared with the Compact's plain text, structure, negotiating history, or common sense. It therefore should be rejected.

A. Respondents' approach is inconsistent with the Compact's plain text.

1. Respondents offer their current reading of the Compact for the first time in their merits brief to this Court. They have abandoned their prior view that Section 5.05(b)(1) allows each signatory State to use the excess water "within its borders" up to the "amount equal to what is used by other states." Opp.

31. They also no longer defend the court of appeals' somewhat different view that Section 5.05(b)(1) authorizes each State to "use up to 25 percent of the excess water [located] in its state." Pet. App. 43a. Instead, respondents now claim (at 34-35) that Section 5.05(b)(1) gives "each State an *equal opportunity* to make beneficial use of [all] 'excess' water *in their State*." (Emphasis added). That reading is no better than their earlier ones.

In two independent respects, respondents' reading deviates from what the Compact says. *First*, the formulation that respondents offer ("equal *opportunity*") would mean that the drafters gave each State no more than a "chance" to use Subbasin 5's surplus when "circumstances" permit. See *Webster's Third New International Dictionary* 1583 (1986). The drafters, however, gave the States "equal *rights*" to the surplus water, connoting a "legally enforceable claim" or an "interest" that "is due to" the States by "legal guarantee," regardless of circumstance. *Black's Law Dictionary* 1436 (9th ed. 2009). Under ordinary usage, "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5" (what the Compact actually says) simply does not mean "equal opportunity to use the excess water in your State" (what respondents wish it said).

Second, as this last point suggests, respondents' reading of Section 5.05(b)(1) inserts a state-line qualifier that the drafters omitted. But it is fundamental that the Court will not "read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were [it] to rewrite an agreement among sovereign States, to which the political branches consented." *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2312-2313 (2010).

Instead, the Court must enforce the Compact according to its "express terms." *Id.* at 2313. Here, that principle requires rejecting respondents' efforts to rewrite the Compact.

Third, respondents say that Section 5.05(b)(1) language providing that "no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second" "imposes a cap on water use, not a guarantee of an equal share of water." Resp. Br. 34-35; see also *id.* at 37. We agree. It is, instead, the "equal rights" language that grants equal *entitlement* to the waters of Subbasin 5; the "25 percent" language makes clear that, in exercising its "equal rights" to the common pool of water, no State may take more than a one-quarter *share*. That the "25 percent language," taken alone, imposes a "cap" rather than gives a "guarantee" (Resp. Br. 35) is therefore immaterial. As the United States explains (at 19), "*coupled with*" the "equal rights" provision, "[t]he 25% limitation indicates that a purpose of Section 5.05(b)(1) is to allocate to each of the four States an equal one-fourth *share* of the excess water in Reach II, Subbasin 5." (Emphasis added).

2. Respondents' answer to the Compact's language is that the Court should simply ignore it. When an interstate compact allocates water among States, they say, the "notion that States divert water [only] within their [own] borders" and not from the territory of any other State is so "obvious" (Resp. Br. 25, 39) that a state-line limitation must be "assumed" (Resp. Br. 9, 11, 42). In fact, not only are border limitations "too obvious * * * to require elaboration in every provision," but they are wholly "superfluous" when they *are* stated. Resp. Br. 39. According to respondents, therefore, a compact that

includes state-line limitations in some provisions but not in others does so "arbitrarily." Resp. Br. 25.

Needless to say, respondents' unorthodox approach spurns the fundamental rule that an interstate compact, like any other "legal document," must be "construed and applied in accordance with its terms." *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987). See Pet. Br. 26-27. Because "[t]he preeminent canon of statutory interpretation" is the presumption "that [the] legislature says in a statute what it means and means in a statute what it says," the Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd.* v. *United States*, 541 U.S. 176, 183 (2004). Against this background, two related principles demonstrate that the Compact unambiguously allocates Subbasin 5 water without regard to state lines.

First, when a document includes express terms in one section but omits those terms from another, it is presumed that the drafters "act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). See also *Virginia* v. *Maryland*, 540 U.S. 56, 66-67 (2003). As we showed in our opening brief (at 28-29), that is just what the Compact's drafters did, expressly imposing state-line limitations on some allocations but not on others. Thus, "[t]he parties' inclusion of a state-boundary restriction or requirement in other allocation provisions suggests that no similar restriction was intended for Reach II, Subbasin 5." U.S. Br. 19. That is not to give "talismanic significance to words mentioning borders" (Resp. Br. 41); it is to give them their plain meaning.

Moreover, far from being arbitrary, the drafters acted advisedly when imposing state-line limitations on some, but not on other, Compact provisions. Thus, for example, the *omission* of the limitation from 5.05(b)(2) recognized that users appropriating water across state lines under Section 5.05(b)(1) may continue to do so during times of intermediate flow under (b)(2). It also ensures that when a Texas water user appropriating a portion of Texas's share of Subbasin 5 water from within Oklahoma curtails its use under 5.05(b)(2), that curtailment is credited to Texas. (A state-line limitation in Section 5.05(b)(2) would otherwise mean that Oklahoma were credited for the Texas user's curtailment.) The *inclusion* of the limitation in Section 5.05(b)(3), by contrast, requires each upstream State to ensure that all Subbasin 5 water users within its boundaries curtail their use *entirely*, in which circumstance accounting is irrelevant.[1]

As we explained in our principal brief (at 35-36), moreover, the drafters' decision not to impose a state-line limitation on the States' "equal rights to the use" of excess Subbasin 5 water makes perfect sense. Unlike other subbasins expressly subject to state-line limits, Subbasin 5 consists only of surplus water that the upstream States intend not to use and

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[1] Respondents observe (at 40) that, according to the interpretive comments (1JA30) "the upstream states" must, under (b)(2), allow water to pass "within subbasin 5 within each state." But the words "within each state" simply describe where the water is located; they do not mean that the curtailments made by each States' users must occur in the user's own state.

thus are willing to share.[2] And because Subbasin 5 is relatively narrow (just 10-20 miles wide along the great majority of its length), with abundant water supply, allowance for cross-border transfers was hardly an open-ended invitation to take water from anywhere within the upstream States. Moreover, because downstream flow to Louisiana is guaranteed exclusively from the surplus water of Subbasin 5, not the upstream subbasins, the border-free apportionment ensures that no State bears a disproportionate obligation to Louisiana during low flows.

Second, an equally "cardinal principle of statutory construction" is that statutes should be interpreted, where possible, not to render any language "superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Yet respondents expressly declare (at 39) that much of the Compact's language *is* "superfluous." If respondents were right that the drafters simply "understood" (Resp. Br. 18) and "assumed" (Resp. Br. 9, 11, 42) that state-border limitations would apply to all allocations of water—that is, if such limitations were so "obvious" (Resp. Br. 25, 39) that they needed no articulation—the numerous express state-border limitations that the drafters actually placed in the Compact would serve no purpose at all. *E.g.*, 1JA23 (§ 5.03(b)), 1JA25

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[2] Respondents note (at 43) that because excess Subbasin 5 water includes rainfall "originating" in Subbasin 5, not *all* excess water is unused surplus from the upstream subbasins. But rainfall originating in Subbasin 5 is trivial compared with the volume of water flowing into the subbasin. Respondents' only support for their contrary assertion (*ibid.*) is a reference to the monthly flows (not rainfall) of the Clear Boggy Creek, an Oklahoma tributary located wholly in Subbasin 1 (not Subbasin 5).

(§ 5.05(b)(3)), 1JA33 (§ 6.03(b)). It is an insufficient response to this point to posit that the Compact's drafters were simply absent-minded.

B. Respondents' reading cannot be squared with Subbasin 5's structure and purpose.

We explained in our principal brief (at 5-9, 34-37) why the purpose and structure of Reach II and its five subbasins also supports our reading of the Compact. In particular, we showed (at 36-37) that respondents' alternative reading of the Compact would make Subbasin 5 essentially pointless. Respondents offer no response.

We also explained (at 31-33) why any interpretation of Section 5.05(b)(1) that imposes an unspoken state-line limitation on Subbasin 5 would make nonsense of the allocation of excess subbasin water to Louisiana, which, under respondents' territorial approach, has no right to Subbasin 5 water at all.

Respondents answer (at 42-43) that "Louisiana receives Subbasin 5 waters once they flow into Reach V, which is allocated to Louisiana." But that again ignores the Compact's language. Section 5.05(b) expressly allocates equal shares of the "[w]ater *within this subbasin*" to all four States, including Louisiana. 1JA25 (emphasis added). The Compact *separately* grants Louisiana "unrestricted use" of water in Reach V (1JA38 (§ 8.01)), and establishes downstream flow thresholds to assure that sufficient water enters Reach V. In light of that arrangement, it would be a very odd use of language for the drafters to give Louisiana an equal share of water "within this subbasin [5]" if what they had really meant to do was reserve that water for Louisiana's use only after

it no longer *is* "within this subbasin" and instead had entered Reach V.

C. This case is not about the surrender of Oklahoma's sovereignty.

Rather than rely on the Compact's language, respondents and their *amici* appeal principally to "core" principles of "State sovereignty." Resp. Br. 29. Respondents thus assert that "[c]ontrol over waters and land within a State's borders are quintessential elements of State sovereignty" and that "[t]he Compact should not be read to disturb those foundational principles absent express language confirming the States' intent to do so." *Ibid.* See also Br. of Colo. 4-9. That contention substitutes a newly discovered presumption in favor of "sovereignty" for the Tenth Circuit's presumption against preemption, which respondents do not defend. For three reasons, however, respondents' substitute argument is equally wrong.

First, whether or not a presumption against "disturbing" state sovereignty were sensible in other circumstances, it has no application to the interpretation of an interstate compact. As noted in our principal brief (at 40-41) and demonstrated by the United States (at 16-17), the text of a compact itself is the product of the States' exercise of their core sovereign prerogatives. By disregarding the plain terms of the bargain that the States *actually* struck, it is respondents' approach—which, in practice, amounts to a presumption that all interstate water compacts allocate to each signatory State all the water within its respective borders—that disrespects state sovereignty. Reading the Compact to preempt Oklahoma's water export embargo does not treat Oklahoma as having "blithely abdicat[ed]" its "core sovereign powers over the use and administration of in-state water"

(Resp. Br. 29); it simply holds Oklahoma to its agreement. We made that self-evident point before (Pet. Br. 40-41), but respondents offer no response.

Second, our interpretation does not, in any event, abrogate any sovereign prerogative of Oklahoma. A State's "regulat[ion] within its boundaries [of] the appropriation, use, and control of water" (1JA12 (§ 2.10(a)) may well be a traditional state function. But Oklahoma's regulatory authority over the appropriation and use of water within its borders remains intact under our reading of the Compact. As we repeatedly have acknowledged (*e.g.*, Pet. Br. 19), the Compact does not give Texas regulatory authority in Oklahoma; anyone seeking to appropriate water in Oklahoma, *including Tarrant*, must apply to OWRB, obtain a permit, and abide by the terms of the permit and any generally-applicable and nondiscriminatory Oklahoma water-use laws. Where rights-of-way are necessary for pipeline construction, easements will have to be purchased from private landowners or otherwise obtained by exercising eminent domain pursuant to *Oklahoma* law. Okla. Stat. tit. 82, § 105.3 (granting "the right of eminent domain to acquire right-of-way for the storage or conveyance of waters for beneficial use").[3]

Finally, respondents express skepticism that the Compact could be read to authorize other States

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[3] We recognize that Arkansas and Louisiana, as well as the Chickasaw and Choctaw Nations, have filed briefs repeating the same sovereignty theme. But their position is, to put it bluntly, mercenary: They are water-rich and will benefit if Texas (which is water-poor but economically dominant) has to buy water from them, rather than accessing its Subbasin 5 share in Oklahoma. *Amici* have tried to sell water to Tarrant in the past. *E.g.*, 2JA381.

to "invade" Oklahoma's "territory." Resp. Br. 1. Although we would not describe the Compact in such sanguinary terms, the Compact's language in fact does exactly that. Section 2.05(d) expressly permits the other three signatory States to "[u]se the bed and banks of the Red River and its tributaries to convey stored water." 1JA11. The bed and banks of the Red River are in Oklahoma; they are not in Texas. Respondents dismiss this reality with the observation (at 42) that Section 2.05(d) merely "lets States use the Red and its tributaries like a highway, for the sole purpose of *transporting* allocated water." But Texas water users cannot use "the bed and banks of the Red River" as a "highway," or for any other purpose, without *entering* Oklahoma. If that means that Oklahoma has "abdicat[ed its] core sovereign powers" (Resp. Br. 29), the abdication was a voluntary one on Oklahoma's part. See also 1JA11 (§ 2.05(c)) (providing for "storage of water which is either imported or is to be exported").

D. Tarrant's interpretation of the Compact would not impose any new or unusual administrative burdens.

Respondents argue as a fall-back that our reading of Section 5.05(b)(1) would be unworkable, burdensome, and expensive. But their contentions on that score misconstrue the Compact and misrepresent the basics of water administration.

First, respondents are wrong that permitting Texas to take water from Oklahoma "would create a jurisdictional nightmare" because it would be unclear whether the OWRB, a Texas permitting authority, or a combination of both would be responsible for passing on Tarrant's application. Resp. Br. 32. Tarrant's

permit application is subject to approval by the OWRB alone. See Pet. Br. 19.

Second, respondents argue (at 33) that, if permitting responsibility fell to Oklahoma, the OWRB "would face a difficult bind" because it "would not know how much of Texas's 25% 'share' Texans already used." Thus, they hypothesize (*ibid.*), giving a Texas water user a permit to appropriate "could be facilitating a Compact violation" and would require "continual updates from Texas as to how much Subbasin 5 water Texans already used."

There is no reason, however, to think that approval of a *Texas* water user's permit would be any more likely to "facilitate[e] a Compact violation" than would approval of an *Oklahoma* water user's permit. Respondents acknowledge (at 35) that none of the Compact States (including Oklahoma) knows how much it "receives or diverts relative to the total," and that the 25% "cap" (which applies equally to all four States) is enforced "only if a State calls for an accounting." If Tarrant received a permit from OWRB, Oklahoma would no more have to keep track of Texas's Subbasin 5 diversions than it would of its own. Respondents are therefore wrong when they claim (at 38) that, under our reading of Section 5.05(b)(1), "each State would have to monitor extensive data at enormous expense." It is certainly *possible* that a State may someday deem an accounting "necessary" (1JA13 (§ 2.11)), but that is so no matter how this Court reads Section 5.05(b)(1). Respondents ultimately admit as much. Resp. Br. 42.

In any event, an accounting would *not* be "infeasible." Resp. Br. 38. Coordinated accounting would be straightforward, requiring online monitoring of stream gages (see Water Control Data System, Tulsa

District, http://tinyurl.com/Tarrant28 (follow link to "Real-time Gage Data for All Stations")), tracking cumulative diversions permitted by each State (using standard permit records), and providing periodic updates to the Red River Compact Commission. It is commonplace for compact commissions throughout the West to oversee such accountings, without imposing "enormous expense." Resp. Br. 38. *E.g.*, Republican River Compact Admin., *Accounting Procedures & Reporting Requirements* (2002), http://tinyurl.com/-Tarrant25.

Finally, respondents assert (at 40-41) that, under our interpretation of the Compact, the "the 3,000 cfs threshold is an on-off switch for borders," and that Tarrant's right to access Texas's share of Subbasin 5 water in Oklahoma "would flicker in and out of existence with a gage reading" as the flow at the Louisiana border fluctuated. That, too, is mistaken.

As we note above (at 9), Tarrant (and every other Texas Subbasin 5 water user) must comply with Sections 5.05(b)(2) and (b)(3) by curtailing water use during times of low flow; the conditions for such curtailment would be detailed by permit. But that is true regardless whether those water users access Texas's share of the Subbasin 5 surplus on the Texas side of the border or the Oklahoma side. The 3,000 cfs threshold has no bearing on the places *where* a water user may appropriate Subbasin 5 water; it is relevant only to the separate question of *when* it may. And on that score, Tarrant has never claimed the right to a "permanent" or inflexible allocation of 310,000 acre-feet per year. See Resp. Br. 28. Tarrant's water right will entitle it to divert *up to* 310,000 acre-feet of the *available* water from the Kiamichi River each year, and will entitle Oklahoma to

require Tarrant to curtail its diversion in full or in part as required by the Compact.[4]

E. The drafting history and course of performance favors Tarrant's reading of the Compact.

Because the Compact is unambiguous, resort to extrinsic evidence is unnecessary. But if that were not so, the evidence strongly favors Tarrant.

1. Respondents acknowledge (at 45-46) that early drafts of the Compact expressly allocated the water of several subbasins, including what later became Reach II, Subbasin 5, according to state lines. They also concede that such language was later *stricken* from Section 5.05(b)(1). Respondents puzzlingly conclude (at 46) that these "revisions" removing the express state-line limitations from Section 5.05(b)(1) are helpful to them. The opposite is true: When the evidence shows that the drafters "considered and rejected" particular language, the courts are not free to re-insert it; the rejection instead must be deemed "deliberate." *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 378 n.13 (2000). That is especially so in this case, where the drafters considered and *retained* the same language elsewhere in the Compact.[5]

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[4] That said, curtailment of major diversions is commonly performed by remote control, meaning—ironically—that curtailments often *do* take place at the a flip of a switch.

[5] Respondents note (at 13) that an early draft of the Compact granted the States "free and unrestricted use" of Subbasin 5 water, which they say "necessarily meant use *within their borders*" because "multiple States cannot have 'free and unrestricted use' of the same water" at the same time. That is incorrect. Multiple herdsmen can simultaneously have free and unrestricted use of "a pasture open to

2. We explained in our opening brief (at 12, 44-46) that the construction of federal "reservoirs in the Kiamichi River Basin" *in Oklahoma* was authorized to provide the water supply *for North Texas*. See S. Doc. No. 145, at 15, 204.[6] We also demonstrated that federal dam authorizing legislation was at the forefront of the Compact drafters' minds. Pet. Br. 46 n.12. Respondents nevertheless say (at 48-49) that our reference to that history is inconsistent with the Compact's allocation of Subbasin 1 water to Oklahoma, and does not otherwise indicate Subbasin 5 was a "consolation prize." That misses the point, which is that Oklahoma and Texas were contemplating, and the federal government *affirmatively authorized*, cross-border transfers of water during the same period that the Compact was being negotiated. Our reading of the Compact is consistent with that history; respondents' is not. And it is the Corps, not Oklahoma, that controls releases from federal dams that flow into Subbasin 5. See 33 C.F.R. § 222.5.

3. We also noted (at 9 & n.5) that engineering reports from the drafting process demonstrate that the drafters knew that Texas could not access its 25% share of Subbasin 5 water within its own bor-

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all" (Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243, 1244 (1968)); so, too, multiple States can simultaneously have free and unrestricted use of a common pool of water open to all. As respondents acknowledge (at 46), the drafters solved the anticipated tragedy-of-the-commons problem, *not* by imposing a state-line limitation, but by imposing a 25% cap. In any event, "free and unrestricted use" is not the language that the drafters ultimately adopted.

[6] Respondents and their *amici* suggest otherwise. See Resp. Br. 6, 49; Br. of Okla. City 9-11. But they fail to mention that the Public Health Service studies they cite were *rejected* by the Corps in Senate Document 145 (at 26).

ders. Respondents assert vaguely (at 48) that they "dispute those calculations" and that their own "calculations show that Texas's share of 'excess' Subbasin 5 water is at least 29%." Respondents tellingly decline to explain the data underlying that implausible figure, citing just one page of the engineering report concerning a creek located within Reach II, *Subbasin 1*.[7] Regardless, respondents' own arithmetic proves our broader point: The drafters understood that Subbasin 5's excess is not distributed geographically among all four States in perfect 25% shares, meaning that at least one State necessarily would have to cross state lines to access its full share.[8]

4. Oklahoma points to other interstate water compacts (at 30-31), claiming that "[n]o interstate water compact allows one State to divert water from another State absent express language authorizing cross-border diversions." That is demonstrably false. Article V of the Upper Niobrara River Compact (83 Stat. 86 (1969)), for example, provides that "[t]here shall be no restrictions on the use of the surface wa-

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[7] Respondents claim elsewhere (at 15) that "Texas contain[s] 34% of the watershed." That misleading reference is to Texas's share of the *surface area* of Subbasin 5 and has nothing to do with the amount of water available.

[8] What is more, unless such border crossings were permissible, water originating in a State with more than 25% of the total could not be used by anyone, because (as respondents recognize), the Compact caps each State's use at 25%. That would be inconsistent with the Compact's goal (also recognized by respondents (at 52)) of allocating *all* the water of the Red River and its tributaries. Respondents' answer is that the "water would not be 'unallocated' if some 'excess' water flowed unused to downstream States." *Ibid*. But it is a very strange interpretation that treats water as "allocated" to a State that is directed not to use it.

ters of the Upper Niobrara River by Wyoming." Yet very little of the Upper Niobrara River is located in Wyoming; most of the river is located in Nebraska. The compact thus authorizes Wyoming—without an express cross-border provision—to enter Nebraska to make use of that river's water. The Rio Grande Compact (53 Stat. 785 (1939)) also lacks detailed cross-border provisions. Yet Texas's El Paso County Water Improvement District No. 1 diverts water apportioned by that compact to Texas from a location in New Mexico. See *Far West Texas Water Plan* 3-12, 3-13 (Jan. 2011), http://tinyurl.com/Tarrant30.

And regardless of what *other* compacts may say, other sections of the *Red River Compact* demonstrate that the drafters did not consider express cross-border diversion language necessary. For example, the Compact apportions "the flow from the mainstem of the Red River" along the length of the Texas-Oklahoma border upstream of Lake Texoma in equal shares, "fifty (50) percent to Oklahoma and fifty (50) percent to Texas." 1JA19 (§ 4.04(a), (b)). Yet the main channel of the Red River lies wholly in Oklahoma. For Section 4.04 to make any sense, therefore, Texas must be able to enter Oklahoma to access its 50% share, even without any express authorization for such entry.

5. Respondents describe (at 49-50) the States' course of performance as "the dog that did not bark for thirty years." But even if the Compact could sensibly be analogized to a thirty-year-old dog, respondents' factual description is demonstrably false.

Respondents first assert (at 50) that the States have never "acknowledge[d] in their water plans" a right to access Subbasin 5 water across state lines. In fact, Texas's water plan has, since at least 1992,

identified "interstate diversion of surface water" (from locations including "southeastern Oklahoma") under "existing or future interstate compact agreements" as a preferred source for meeting future water demand. *Water for Texas: Today and Tomorrow* 35 (1992), http://tinyurl.com/Tarrant24.

Respondents also suggest Texas repeatedly has attempted "to *buy* the same water [it] now claim[s] by right." Resp. Br. 2. That is wrong. The water that Texas proposed buying from Oklahoma in the early 2000s would have been debited from *Oklahoma's* share of Subbasin 5 water. 2JA366. And there were compelling business reasons that explained Tarrant's general willingness to purchase Oklahoma's water rather than taking the water allocated to Texas—chief among them that *Oklahoma* would have assumed responsibility for permitting, funding, and constructing all infrastructure, and for acquiring rights-of-way necessary to deliver the water to the Texas state line (2JA372), saving Tarrant and its fellow water suppliers from having to shoulder those massive burdens themselves.[9]

Respondents take equally significant liberties with the record when they say (at 50-51) that "Texas reports confirmed repeatedly that Texas was receiving all waters allocated to it." Respondents cite no "Texas reports" for that claim, instead cross-referenc-

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[9] Respondents' reference (at 7-8) to Texas's tentative assessment of taking water from Arkansas in the 1970s is even further afield. That was not a purchase proposal, and the great majority of subject water was located outside the Red River Basin. The small percentage that was located in the basin was in Reach II, Subbasin 3, allocated to Arkansas. *See An Assessment of Surface Water Supplies of Arkansas* 2-3 (1976), http://tinyurl.com/ArkAssess.

ing a page of their own brief that misdescribes deposition testimony from this litigation. That testimony demonstrates only that Texas water users holding permits for the use of Subbasin 5 water within Texas have not experienced any "shortages" of the water *their permits* authorize them to use. 1JA144-145. That says nothing about whether Texas, as a whole, is receiving its full share of Subbasin 5 water.[10]

F. The relief that Tarrant seeks can and should be granted without further factual development in the district court.

The United States agrees (at 17) that the plain "text of the Compact does not contain a state-boundary restriction on a State's ability to use the excess water in Reach II, Subbasin 5," and (at 23) that "the language of the Compact suggests that state laws concerning the administration of water rights would be preempted to the extent those laws would prevent another State from accessing its allocated share." The government suggests, however, that "such laws would not necessarily be preempted if they were enforced against a compacting State that was capable of accessing its share of water from within its own borders." U.S. Br. 23-24. We disagree with that latter suggestion.

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[10] Respondents also point to the compliance rules (at 17-19, 32, 38, 50), which they say make no mention of cross-border appropriations. Of course, the rules also make no mention of state-line limitations. Regardless, no State has ever called for an accounting to enforce those rules, which "add conditions nowhere apparent on the face of § 5.05(b)(1)." Resp. Br. 38 n.15, 50. It is thus questionable whether the compliance rules are due any consideration.

The Compact's meaning in this regard is settled by its plain language. Nothing in the Compact's promise of "equal rights to the use of" excess water "originating in" and "flowing into subbasin 5" (1JA25) indicates that the States' equal rights must, if possible, first be exhausted within the using State's boundaries. The United States does not suggest otherwise; it points to nothing in the Compact's text that even arguably establishes such a territorial requirement. The factual questions raised by the government concerning the amount of Subbasin 5 water accessible in Texas and the salinity of that water therefore need not be resolved to settle the Compact's meaning.[11]

Rather than looking to the Compact's terms, the government posits (at 24) that, "if a State had access to its 25% share of water from within its borders but endeavored to take all or part of its share from within another State, that could prevent *the other State* from accessing *its* equal share of Reach II, Subbasin 5 water." But if all four States may access their shares of Subbasin 5 water anywhere within the subbasin (as we submit), a State's decision to access water in one location within Subbasin 5 has no bearing on the other States' entitlement or ability to access water elsewhere in the subbasin. Thus, even supposing that Texas could access its full 25% share within its own borders, the Compact *still* would enti-

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[11] Nor is a remand is necessary to address the "other respects" in which, the United States says, "the record with respect to Section 5.05(b)(1) was not fully developed in the proceedings below." U.S. Br. 27. Where compact language is unambiguous, recourse to extrinsic evidence is unnecessary. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991).

tle Texas water users to access Texas's share of Subbasin 5 water anywhere within Subbasin 5.

Nor would Texas's decision to access a portion of its Subbasin 5 allotment in Oklahoma frustrate Oklahoma's authority "to freely administer water rights and regulate use and control of water within *its* borders." U.S. Br. 24. Tarrant stands on equal footing with any other permit applicant to OWRB, and Tarrant's use of water under any permit that it may ultimately receive would be subject to Oklahoma's power "to regulate within its boundaries the appropriation, use, and control of water," so long as those regulations are "not inconsistent with its obligations under this Compact" (§ 2.10(a)) or "the apportionments made by this Compact" (§ 2.01)).

That said, we agree with the United States that a reversal of the ruling below "would not directly entitle petitioner to a permanent appropriation of 310,000 acre feet per year of surface water from Reach II, Subbasin 5." U.S. Br. 29-30. The sole question before the Court is whether Oklahoma's discriminatory water laws are enforceable against Tarrant. If the Court rules for Tarrant on that question, we agree that specific fact questions bearing on the availability of a permit would remain. *Id.* at 13. But those issues would be resolved, in the first instance, by the OWRB in its review of Tarrant's permit application. They are matters entirely separate from the question whether Oklahoma's water embargo is preempted by the Compact or otherwise invalid under the Commerce Clause. As to *those* issues, no further fact development is necessary.

G. The dormant Commerce Clause provides an alternative basis for reversal.

If the Court decides that the Red River Compact preempts Oklahoma's discriminatory water permitting scheme, it should reverse the Tenth Circuit on that basis alone and need not reach the Commerce Clause question.[12] And if the Court determines that the water at issue here is allocated to Oklahoma, it also need not decide the Commerce Clause issue; Tarrant has never asserted a claim to Oklahoma's apportioned share of Subbasin 5 water.

But if the Court somehow determines that the Compact does not have preemptive effect even though it allocates the subject water to Texas or that some Subbasin 5 water is not allocated to any State, Oklahoma's embargo will preclude the export of that water from the State. In those circumstances, the Court can and should reverse on the basis that Oklahoma's discriminatory permitting scheme violates that dormant Commerce Clause.

In arguing to the contrary, respondents do not deny that Oklahoma's permitting scheme is facially discriminatory. Instead, they assert (at 55) that the dormant Commerce Clause "does not apply" here because "[p]ermits granting the right to appropriate water do not involve economic activity." That is a bewildering claim. In fact, the appropriation and dis-

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[12] Respondents imply (at 21) that we waived the preemption argument below. That is wrong. In the lower courts, Tarrant did not state an affirmative claim to water under the Compact; instead, it sought a declaration that Oklahoma's water embargo is *preempted by* the Compact. That preemption claim is the first and principal count of Tarrant's district court complaint.

tribution of water across state lines is an "archtypical example of commerce among the several States." *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 953 (1982). Oklahoma's refusal to grant an "initial" right to appropriate surface water to anyone who proposes to use the water of out-of-state manifestly *does* "limit the commercial market for water rights" (Resp. Br. 56) by determining, in a facially discriminatory way, who may hold such rights in the first place. The "purpose" of the embargo is undeniably "to confine [water] to the use of the inhabitants of a state," and thereby to ensure the "commercial * * * welfare of the state" at the expense of neighboring States. *West* v. *Kan. Natural Gas Co.*, 221 U.S. 229, 255 (1911). A clearer example of discrimination against interstate commerce would be difficult to conceive.

Respondents also contend (at 54) that, "[i]f the Compact's general language is clear enough to insulate water *apportioned* to Oklahoma from scrutiny, the Compact insulates hypothetically unused 'excess' Subbasin 5 water" as well. (Emphasis added). But that is surely wrong; Compact language that grants Oklahoma use of *up to* 25% of a particular pool of water plainly *precludes* Oklahoma from restricting the use of any more than that 25% share. Thus, on respondents' strained reading, anything over 25% within Oklahoma is necessarily not apportioned to *any* State. Oklahoma's protectionism regarding water allocated to Texas, or not exclusively allocated and therefore open to use by all, accordingly cannot stand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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