No.

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

KEVIN L. PATRICK
SCOTT C. MILLER
Patrick, Miller & Kropf 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

This Court has held on numerous occasions that a State may not discriminate against interstate commerce in water absent an "expressly stated" or "unmistakably clear" congressional intent to immunize the relevant state laws from dormant Commerce Clause scrutiny. See *Sporhase* v. *Neb. ex rel. Douglas*, 458 U.S. 941 (1982); *So.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82 (1984). The questions presented here, which are of vital importance to arid regions of the United States that depend on interstate imports of water and interstate compacts governing access to water, are as follows:

1. Whether Congress's approval of an interstate water compact that grants the contracting States "equal rights" to certain surface water and—using language present in almost all such compacts—provides 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 unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water.

2. Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled by the compact.

PARTIES TO THE PROCEEDING 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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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tarrant Regional Water District, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-52a) is reported at 656 F.3d 1222. The district court's orders granting respondents' motion for summary judgment (App., *infra*, 53a-74a) and motion to dismiss (App., *infra*, 75a-83a) are available 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. App., *infra*, 85a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of Article I, Section 8 of the U.S. Constitution provides, in relevant part, that "The Congress shall have power * * * To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The Compact Clause of Article I, Section 10 of the U.S. Constitution provides, in relevant part, that "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, that "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."

Relevant portions of the Red River Compact (Pub. L. No. 96-564, 94 Stat. 3305 (1980)), are reproduced at App., *infra*, 86a-91a.

Relevant portions of the Oklahoma Statutes Annotated are reproduced at App., *infra*, 92a-96a.

STATEMENT

The question in this case is whether the Red River Compact—an interstate agreement between Texas, Oklahoma, Arkansas, and Louisiana that was intended to assure "equitable apportionment" of water among the signatory States—authorizes Oklahoma to discriminate against Texas consumers in the allocation of water, in a manner that otherwise would violate the Commerce Clause. The Tenth Circuit held that it does, pointing to general language in the Compact that gives the signatory States authority over the water allocated to them within their borders. As a consequence, Oklahoma is using avowedly protectionist rules to prohibit the transfer of water to petitioner Tarrant Regional Water District ("Tarrant"), a political subdivision of the State of Texas responsible for supplying water to nearly two million people.

This holding is wrong in two fundamental respects: it departs from this Court's emphatic direction that congressional intent to waive the requirements of the dormant Commerce Clause must be stated expressly and unambiguously; and it misreads the plain language of the Compact, which allocates

an equal portion of the disputed water to Texas and thereby preempts inconsistent Oklahoma law.

The Tenth Circuit's holding is of enormous significance. It will encourage protectionist legislation by States that participate in the dozens of interstate water compacts that use language indistinguishable from that of the Red River Compact, creating uncertainty about the long-standing network of interstate agreements that governs the allocation of water throughout much of the Nation. More broadly, it undermines the "clear statement" rule governing congressional abrogation of the dormant Commerce Clause that this Court has held vital to prevent economic Balkanization among the States. Most immediately, it denies millions of Texas consumers water that they desperately need and were allocated by the Compact. Review by this Court accordingly is imperative.

A. Texas's water needs and Oklahoma's water reserves

Tarrant is in dire need of new sources of water to serve the nearly two million people that it serves in north central Texas, including in the cities of Fort Worth, Arlington, and Mansfield. CA App. 86. Tarrant's long-term planning shows that by 2060 the population of Dallas-Fort Worth, the fourth largest metropolitan area in the country, will have doubled, and Tarrant's demand for water will exceed supply by more than 400,000 acre-feet per year.[1] *Ibid.* In addition to these long-range needs, Tarrant also

[1] 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.

faces an imminent water shortage as a result of drought. *Id*. at 804-805.

As Texas explained in its amicus brief below, Tarrant is "authorized under Texas law" to satisfy these needs by obtaining water supplies "inside and outside of Texas," including by "acquir[ing] water to which Texas has an equal right of use under the Red River Compact." Am. Br. of Texas at 1, *Tarrant Reg'l Water Dist.*, 656 F.3d 1222 (10th Cir. 2011) (No. 10-6184), 2010 WL 4163578. Tarrant has identified water sources within Oklahoma as the most practical means of addressing both its immediate and long-term needs. CA App. 804-805.

Oklahoma sits within the core of the Mississippi River watershed and has substantial water resources. The Oklahoma Water Resources Board (OWRB) estimates that only 1.87 million acre feet per year of stream water is currently used in Oklahoma (OWRB, *Oklahoma Comprehensive Water Plan Update* at 64 (2011)); 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. In the southeast part of Oklahoma alone, more than twelve times the volume of water that Tarrant currently seeks for its immediate use is wasted by discharge to the Gulf of Mexico each year. *Id*. at 90. The OWRB has itself stated that "the average annual flow of the six major river basins in southeastern Oklahoma is 6,363,628 acre-feet" (*Status Report to the Office of the Governor* (2002), Compl. Ex. 5 at 27), enough to supply the entire State of Oklahoma three times over. *Ibid.*

B. The Red River Compact

Tarrant is seeking the water it needs under the Red River Compact, one of more than 30 interstate agreements that address allocation and use of water across state borders. See National Center for Interstate Compacts, http://tinyurl.com/bvvmqbc. The Red River is the second largest river basin in the southern Great Plains, marking the southern border of Oklahoma before flowing through Arkansas and Louisiana and into the Gulf of Mexico. The Red River Compact is an interstate agreement among those States and Texas, which, when approved by Congress in 1980, assumed the status of federal law. Pub. L. No. 96-564, 94 Stat. 3305 (1980). See generally *Texas* v. *New Mexico*, 462 U.S. 554, 564 (1983). It is intended to "provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries" (Compact § 1.01(b)) "by ascertaining and identifying each State's share in the interstate water of the Red River Basin and the apportionment thereof" (*id.* § 1.01(e)).

The Compact divides the Red River Basin into five "reaches," and those reaches into subbasins. As relevant here, the Compact apportions water in reach II, subbasin 5 (Compact § 5.05) and reach I, subbasin 2 (*id.* § 4.02) among the signatory States. The Red River itself does not flow into or through Texas in reach II, subbasin 5, but does flow through the other three signatory States.

As to reach II, subbasin 5, 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 that

no state is entitled to more than 25 percent of the water in excess of 3,000 cubic feet per second." Compact § 5.05(b)(1). The signatories are allocated different shares when the Red River's flow is lower than 3,000 cubic feet per second. *Id.* §§ 5.05(b)(2)-(3), (c); cf. *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1770, 1779 (2011) (citing other compacts that "unambiguously apportio[n]" and thereby "guarantee" a "set quantity" of available water "by percentage").

The Compact uses different terms in addressing reach I, subbasin 2, allocating to Oklahoma "free and unrestricted use" of that water. Compact § 4.02(b).

General provisions of the Compact explain how the signatory States are permitted to use the water allocated to them. 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" and that "[e]ach state may freely administer water rights and uses in accordance with the laws of that state"; it makes clear, however, that "such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact." And, using language that appears in almost every interstate water compact, Section 2.10(a) provides that "[n]othing in this Compact shall be deemed" to "interfere with or impair the right" of "any Signatory State to regulate within its boundaries the appropriation, use, and control of water"—provided, however, that the State's exercise of that right is "not inconsistent with its obligations under this Compact." *Id.* § 2.10(a).

Nothing in the Compact declares expressly that any signatory State's regulation of water is free from the limitations imposed by the dormant Commerce Clause.

C. Oklahoma's water export embargo

Notwithstanding the Compact, Oklahoma has established a water permitting scheme that operates as an absolute embargo on the export of water from the State for out-of-state use.

The scheme requires that anyone "intending to acquire the right to the beneficial use of any water" located in Oklahoma, including any "state or federal governmental agency, or subdivision thereof," apply to OWRB "for a permit to appropriate." Okla. Stat. tit. 82, § 105.9. In acting on permit applications, OWRB is statutorily required to "effectuat[e]" the express public policy of Oklahoma that "[w]ater use within Oklahoma should 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), 1086.2.

Between 2004 and 2009 Oklahoma enforced this policy through an express moratorium on the export of water from the State. Following expiration of the moratorium in 2009 (see Okla. Stat. tit. 82, § 1B (2009 Supp.); Okla. Stat. tit. 74, § 1221.A (2009 Supp.)), Oklahoma now achieves the same result by imposing highly restrictive requirements that expressly discriminate against out-of-state consumers of water and that, in practical effect, continue to preclude the issuance of water-use permits to out-of-state users. The particular provisions challenged by Tarrant in this suit include:

- Allowing long-term water appropriations only upon a showing that the proposed use "will promote the optimal beneficial use of water in [Oklahoma]," effectively preventing any out-of-state uses that have the lengthy planning periods necessary for municipal water supply. Okla. Stat. tit. 82, § 105.16(B).[2]
- Prohibiting OWRB from making any contract "conveying the title or use of any waters of" Oklahoma "for sale or use in any other state unless such contract be specifically authorized by an act of the Oklahoma Legislature and thereafter as approved by it." *Id.* § 1085.2(2); see also *id*. § 1324.10(B).
- Requiring OWRB, when an "application is for use of water out of state," to evaluate whether that water "could feasibly be transported to alleviate water shortages in the State of Oklahoma." *Id.* § 105.12(A)(5).
- Requiring OWRB regularly to revisit existing permits authorizing water use outside Oklahoma and empowering it to impose additional conditions. *Id.* § 105.12(F).
- Imposing special considerations with regard to Oklahoma's compact obligations that apply solely when a permit application is "to use wa-

[2] Enormous investments are required for water projects on the scale Tarrant proposes. Oklahoma's water embargo stands as a major deterrent to out-of-state users even applying for a permit, given the substantial resources required to evaluate particularized transactions and the feasibility of the infrastructure (*e.g.*, reservoirs and pipelines) necessary to support them.

ter outside the boundaries of the State." *Id.* § 105.12A(B).

- Requiring that legislative approval be obtained for out-of-state use of water apportioned to Oklahoma by compact, without regard to whether Oklahoma is using that water. *Id.* § 105.12A(D).[3]
- Mandating that the Oklahoma Water Conservation Storage Commission "not permit the sale or resale of any water for use outside the State of Oklahoma." *Id.* § 1085.22.

There is no dispute that the practical upshot of Oklahoma's restrictive permitting scheme is categorically to prevent out-of-state applicants from obtaining a license to receive water located in Oklahoma for out-of-state use. Thus, OWRB's executive director has acknowledged that Oklahoma's permitting laws, which were intended to "protect Oklahoma's water supply" against "out-of state-water sales," "give[] Oklahoma much greater security" than even the pre-2009 moratorium and "actually strengthen[]" its protectionist scheme by requiring legislative approval for any such permits. *New Bill Protects Oklahoma Water Rights*, 2009-2 Oklahoma Water News 4, available at http://tinyurl.com/cxpotnv. See also Janice Francis-Smith, *Senator proposes legislation to make it harder to buy state's water*, The Journal Record (May 14, 2009), available at http://tinyurl.-com/7vogg4z (the permitting scheme "makes Okla-

[3] Despite the Compact's apportionment to Texas of an equal share of the water in reach II, subbasin 5, Oklahoma argues that all water located in the State belongs to Oklahoma for its exclusive in-state use. Appellee CA Br., at 31.

homa's water supply even more secure" than the prior moratorium).

D. Tarrant's efforts to obtain water from Oklahoma

At issue in this case are Tarrant's futile efforts to obtain water allocated to Texas by Section 5.05 of the Compact, as well as other water over which Oklahoma has free and unrestricted use under Section 4.02.

As required by Oklahoma law, Tarrant filed an application with OWRB for a permit to appropriate surface water from the Kiamichi River, within reach II, subbasin 5 in southern Oklahoma. App., *infra*, 55a; CA App. 805-806, 811. This application sought approximately 310,000 acre feet of water per year—well below Texas's allocation from subbasin 5 in the Compact. Tarrant sought to appropriate this water in Oklahoma because Texas does not have access to its full apportionment of subbasin 5 water from within its borders. CA App. 90, 805, 1181.

Tarrant simultaneously filed with OWRB two applications for permits to appropriate surface water in southern Oklahoma within reach I, subbasin 2. Section 4.02(b) of the Compact gives Oklahoma free and unrestricted use of waters in that subbasin. App., *infra*, 55a-56a.

By stipulation of the parties, OWRB will take no official action on any of Tarrant's permit applications until this litigation is concluded. But OWRB has made clear its intention to deny the applications, as it is required to do by state law. In fact, a number of Oklahoma's restrictive permitting regulations were enacted in connection with this very lawsuit, specifically to prevent Tarrant from obtaining Oklahoma water. See Compl. ¶ 23; App., *infra*, 9a-10a.

E. The decisions below

1. At the same time that Tarrant filed applications with OWRB, it sued the members of OWRB alleging that (1) Oklahoma's water embargo laws violate the dormant Commerce Clause by unduly restricting interstate commerce in water, and (2) the Red River Compact preempts the Oklahoma statutes that prevent Tarrant's appropriation of water from subbasin 5. Tarrant sought a declaratory judgment to that effect and an injunction prohibiting OWRB from enforcing the statutes.

The district court in Oklahoma granted summary judgment to OWRB on both claims. First addressing the dormant Commerce Clause, the court focused not only on the "the language of the [Compact]," but also on its "nature" and "purpose." App., *infra*, 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.

The district court also rejected Tarrant's Supremacy Clause challenge. It reasoned 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." App. *infra*, 70a (citing Compact § 2.10(a)).[4]

2. The Tenth Circuit affirmed. 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 standard 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." App. *infra*, 19a-20a. But the court of appeals 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." App., *infra*, 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

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[4] Tarrant subsequently entered into agreements with property owners to obtain water from Oklahoma that is not subject to the Compact, and amended its complaint to assert a Commerce Clause challenge based on those transactions. The district court dismissed these claims on standing and ripeness grounds, and the Tenth Circuit affirmed. App. *infra*, 45a-51a, 75a-83a. Tarrant does not seek review as to those claims.

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.

The court of appeals also rejected Tarrant's Supremacy Clause claim that the Compact preempts Oklahoma laws that prevent Tarrant from appropriating water allocated to it from reach II, subbasin 5. The court acknowledged 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 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." App., *infra*, 36a-39a. Once minimum downstream flow requirements are met, according to the court, 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 within Texas. *Id.* at 40a. In reaching this conclusion, the court was influenced by the presumption against preemption, which it deemed "particularly strong in this case." *Id.* at 34a-36a. Having read the Compact in this way, the court held that it does not conflict with Oklahoma law.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit held that the Compact displaces Commerce Clause limitations on the regulation of water, thus authorizing Oklahoma to discriminate against other States (including Compact signatories) in a manner that otherwise would be unconstitutional. The importance of that ruling cannot

be overstated. It denies an essential resource to millions of north Texas residents; calls into question the meaning of the many other compacts that are written in similar terms; and permits the sort of economic protectionism that will encourage retaliation and is fomenting significant tension between Texas and Oklahoma. In these circumstances, intervention by this Court is warranted.

I. The Tenth Circuit's Commerce Clause Holding Departs From This Court's Precedents And Fosters Economic Protectionism.

The Tenth Circuit premised its Commerce Clause holding exclusively on the proposition that Congress, by approving the Compact, authorized Oklahoma to discriminate against interstate commerce in a manner that otherwise would be unconstitutional.[5] That ruling should not survive. This Court has held repeatedly that only wholly unambiguous congressional language is sufficient to authorize state interference with interstate commerce. Other courts of appeals have applied this rule faithfully, striking down protectionist state laws in circumstances closely analogous to those here. The decision below, which upheld discriminatory state legislation in reliance on boilerplate Compact language that does not advert to the restriction of interstate commerce *at all*, misun-

[5] The court of appeals therefore found it unnecessary to decide whether Oklahoma's statutory scheme would be consistent with the Commerce Clause *absent* congressional authorization. App., *infra*, 28a. But the discrimination against out-of-state users is patent: Oklahoma does not permit out-of-state users to access water in the State, even when (as in this case) the water has been allocated to them.

derstands the import of, and cannot be reconciled with, this authority.

A. The Tenth Circuit's Commerce Clause ruling flatly contradicts the "clear statement rule."

1. Before an act of Congress may be interpreted as "alter[ing] the 'usual constitutional balance between the States and the Federal Government,'" it is "incumbent upon the federal courts to be certain" that Congress's intent to "'override[]' this balance" is "unmistakably clear in the language of the statute." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) and *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)). This "clear statement rule" applies fully with respect to the negative implications of the Commerce Clause.

The Court has held consistently that "Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve" violation of the Commerce Clause. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992). "Congress' intent and policy to sustain state legislation from attack under the Commerce Clause [ordinarily is] expressly stated." *Sporhase*, 458 U.S. at 960. Although this Court has not required use of any "talismanic" form of words, it has insisted that, "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*." *Wunnicke*, 467 U.S. at 91 (emphasis added). It follows that, when Congress has not expressly stated its intent "to sustain state legislation from attack under the Commerce Clause, [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)). The Court has stated this requirement in the most forceful possible terms.[6]

The reason for this rule is plain: "The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying [the] dormant Commerce Clause doctrine" itself; it is not "merely a wooden formalism." *Wunnicke*, 467 U.S. at 91-92. As the Court has explained:

> Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. * * * On the other hand, when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. * * * *A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly*

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[6] See, *e.g.*, *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring in the judgment) ("Congress must be 'unmistakably clear' before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause"); *Wyoming*, 502 U.S. at 458 (a State has the "burden of demonstrating a clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate commerce"); *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986) ("An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation" to be "exempt[] from Commerce Clause scrutiny").

> *the risk that unrepresented interests will be adversely affected by restraints on commerce.*

Id. at 91-92 (emphasis added). See also *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986). The Court has insisted on the same degree of clarity in other areas of the law where the nature of the interests at stake make it essential to have confidence that Congress intended a particular result.[7]

2. The Court's decision in *Sporhase* illustrates the application of this clear statement rule in a factual setting strikingly similar to the one here. *Sporhase* involved a Commerce Clause challenge to "a Nebraska statutory restriction on the withdrawal of ground water" that was analytically indistinguishable from the restriction on surface water at issue here: it prohibited, without a proper permit, the extraction of water from the ground for purposes of transporting the water across state lines for use in another State. 458 U.S. at 943-944. As a practical matter, the permitting scheme functioned as an embargo on the net exportation of ground water from Nebraska. *Id.* at 957 (the statute "operates as an explicit barrier to commerce between" Nebraska and its adjoining States).

In arguing that its water embargo survived dormant Commerce Clause scrutiny, Nebraska pointed

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[7] See, *e.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989) (congressional intent to abrogate state sovereign immunity must be "unmistakably clear in the language of the statute"); *Lane* v. *Pena*, 518 U.S. 187, 192 (1996) (congressional intent to waive federal sovereign immunity must be "unequivocally expressed"); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 952 (1997) (with respect to retroactivity, there must be "a clear statutory expression of congressional intent").

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 believed to show that Congress "authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water." 458 U.S. at 958. "[T]ypical" of the statutes that Nebraska relied upon was the federal Reclamation Act of 1902, Pub. L. 161, 32 Stat. 390, which establishes funding for irrigation across the western States, including Nebraska. That statute provided that "[n]othing in this Act shall be construed" to "in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." *Sporhase*, 458 U.S. at 959 (quoting 43 U.S.C. § 383).

This Court squarely 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. Thus, "[a]lthough 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, "[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.

3. Although the Tenth Circuit cited *Sporhase* and *Wunnicke* in passing (App., *infra*, 19a-20a, 27a-28a), it misunderstood this Court's clear statement rule in a number of key respects.

First, the Compact language relied upon by the court of appeals does not remotely speak with the clarity necessary to signify a congressional intent to displace the negative Commerce Clause. Certain of that language—that "'[n]othing in this Compact shall be deemed" to "interfere within [a State's] boundaries [with] the appropriation, use, and control of water'" (App., *infra*, 25a)—is virtually identical to language that this Court held in *Sporhase* and *New England Power* to be *insufficient* to allow state discrimination against interstate commerce. See *Sporhase*, 458 U.S. at 958; *New England Power*, 455 U.S. at 341.[8] Such language may disclaim federal statutory preemption (a disclaimer that, as we discuss below, is itself limited in this case by the Compact), but it says nothing to show "that Congress affirmatively contemplate[d] otherwise invalid state legislation" or that there was, "in fact," a "collective [congressional] decision" to override constitutional requirements. *Wunnicke*, 467 U.S. at 91-92. Were the Tenth Circuit's contrary view correct, myriad federal statutes

[8] In the court of appeals' view, "*Sporhase* is distinguishable because in that case Nebraska was attempting to regulate the interstate transfer of groundwater that was not subject to an interstate compact," whereas "[i]n this case, the water is subject to the Red River Compact." App., *infra*, 23a. But the court offered no explanation why that observation has any bearing on whether Congress, in approving the Compact, expressed a clear intent to displace the dormant Commerce Clause.

effectively would nullify the dormant Commerce Clause.[9]

Second, the Tenth Circuit found support for Oklahoma's discriminatory restrictions in Compact language that it read to indicate a policy conferring "broad regulatory authority" on the signatory States over apportioned water. App., *infra*, 25a, 27a. But this is precisely the kind of gestalt approach that this Court's precedent forbids. As the Court explained in *Wunnicke*, "[t]he fact that the state policy in this case 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 indicium of congressional intent." 467 U.S. at 92. Indeed, as the Fifth Circuit has put it, reliance on policies and "purposes" rather than "express language" necessarily "indicates that Congress has" *not* expressed

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[9] The remaining language cited by the Tenth Circuit is equally deficient. Much of that language applies only to reach I, subbasin 2. As to that, the Compact indicates that the signatory States may use the water allocated to them "in any manner" and "freely administer water rights and uses in accordance with the laws of that state" (App., *infra*, 24a), and that Oklahoma shall have "free and unrestricted use of the water" (*id.* at 26a). This may give Oklahoma use of reach I, subbasin 2 water, but does not suggest (let alone indicate with unmistakable clarity) that it overrides the Commerce Clause regarding water within Oklahoma that is allocated to *other* States in *another* subbasin. As for the Compact language specifically addressing reach II, subbasin 5, the Tenth Circuit opined that the matter was "more complex," but nevertheless concluded that Section 5.05 "confers authority to the states to regulate water use within their respective boundaries." *Id.* at 26a-27a. But the court pointed to no language in this provision giving exclusionary authority over *all* water in Oklahoma sufficient to lift Commerce Clause requirements.

consent in unmistakably clear terms. *Piazza's Seafood World, LLC* v. *Odom*, 448 F.3d 744, 751 (5th Cir. 2006). Instead, as the Third Circuit has said, displacement of the dormant Commerce Clause must be "clearly and affirmatively contemplated by Congress, and expressly authorized in the statutory language." *Tri-M Group, LLC* v. *Sharp*, 638 F.3d 406, 431 (3d Cir. 2011). The Tenth Circuit's decision here cannot be squared with these cases. A compact may assure a State the right to make use of its own water as it wishes, but such assurance, standing alone, does not entitle that State to discriminate against other States or embargo other States' water.[10]

Third, the Tenth Circuit recognized that certain of the Compact's language "might suggest no more than preservation of existing state laws without protecting them from dormant Commerce Clause attack." App., *infra*, 25a. That, of itself, should have been an end to the matter: language susceptible to more than one interpretation cannot be "unmistakably clear." But the court went on to find that the Compact's Interpretive Comments—that is, its legislative history—"refute this suggestion." *Ibid*. That is so, the court reasoned, because 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

[10] Compact provisions like Section 2.10 allow a state to administer water rights within its borders as long as the state meets its obligations to other states under a compact. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 102-106 (1938).

Congress ratified the Compact and granted to each state the power to 'freely administer' the water, it gave congressional consent to the pre-Moratorium statutes at issue here." *Id*. at 25a-26a.

But that analysis is wrong on its own terms: even assuming (improbably) that Congress had been aware of the Interpretive Comments' statement that each signatory State could continue its existing water administration, it would have regarded "[t]he negative implications of the Commerce Clause" to be "ingredients of the *valid* state law to which [it] has deferred." *Sporhase*, 458 U.S. at 960.

And the Tenth Circuit's analysis suffers from a more fundamental defect: although the court of appeals found recourse to the legislative history necessary to confirm its reading of the Compact, this Court has rejected *any* reliance on legislative history to satisfy a clear statement rule. Thus, in other clear-statement-rule contexts such as Eleventh Amendment immunity, the Court has held that "[l]egislative history generally will be irrelevant" to evaluating the clarity of Congress's statement: "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; 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*, 491 U.S. at 230. See also, *e.g.*, *Hoffman* v. *Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 104 (1989) (plurality opinion) (substantially the same); *Hilton* v. *S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 204 (1991) ("[T]he Court will not look to legislative history in making its inquiry").

The Court similarly has eschewed recourse to legislative history when applying the clear statement rule used to determine whether Congress waived the United States' sovereign immunity: "A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; 'the unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text.'" *Lane*, 518 U.S. at 192 (quoting *United States* v. *Nordic Vill.*, 503 U.S. 30, 37 (1992)).

The same rule must apply here: "[I]solated references" in the legislative history "do not satisfy [the Court's] requirement of an explicit statutory authorization" to depart from the dormant Commerce Clause. *C&A Carbone*, 511 U.S. at 410 (O'Connor, J., concurring) (citing *Dellmuth* and *Nordic Village*).

The necessity of this rule is apparent. In the best of circumstances, reliance on "isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.'" *New England Power*, 455 U.S. at 342. Dependence on such easily manipulable evidence is wholly inappropriate in the Commerce Clause setting, where it is essential that Congress *actually* consider the issue and act *affirmatively* before individual states are permitted to restrain interstate commerce. And such reliance is doubly misplaced in this case, where the Tenth Circuit assumed Congress considered *state* legislative history.

Following this Court's lead, the Fourth Circuit has rejected an argument very similar to the one accepted by the Tenth Circuit here. In *Waste Management Holdings* v. *Gilmore*, 252 F.3d 316 (4th Cir. 2001), the defendants argued that abrogation of the Commerce Clause was supported by legislative histo-

ry suggesting that Congress was aware of, and authorized, discriminatory state laws. The Fourth Circuit gave that argument short shrift, holding that the cobbling together of "fragments of statutory language and legislative history" falls "far short of the demanding standard that congressional intent be unmistakably clear." *Id.* at 347. The Tenth Circuit should have reached the same conclusion here.[11]

B. Proper resolution of the Commerce Clause question is a matter of immense importance.

Correction of the Tenth Circuit's error is a matter of great practical and doctrinal importance. Most immediately, the holding below will have dire consequences for water providers in Texas. Given current drought conditions (2011 ranks as the driest year on record in the State), Tarrant's reservoir storage has declined to less than 70%, substantially below the 75% emergency level that triggers mandatory water use restrictions. Tarrant must take immediate action to address both this concern and its longer term need for water. Enormous investments of time and money are required for water acquisition and transfer projects of the scale needed by Tarrant, including planning for and construction of new infrastructure

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[11] Consistent with the Tenth Circuit's approach below, the First Circuit has approved reliance on "legislative history" and reference to the "design of the statute as a whole" as a basis for inferring "unmistakably clear" Congressional consent to displace the dormant Commerce Clause. *N.Y. State Dairy Foods, Inc.* v. *Ne. Dairy Compact Comm'n*, 198 F.3d 1, 9 (1st Cir. 1999). The Ninth Circuit likewise has approved reliance on "legislative history" to "glean[]" the "requisite intent." *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177, 1180 (9th Cir. 1998). The extent of this confusion confirms the need for this Court's intervention.

like reservoirs and pipelines. CA App. 126. The lower court's error will thwart this process irreparably and defeat over twenty years of state water planning, which relied upon the expectation that Texas would be able to access and use all of the water apportioned to it from reach II, subbasin 5.

This impact on the millions of people who rely on Tarrant to supply potable water is illustrative of the broader implications of the decision below. Almost every major water source in the West is governed by an interstate compact, and almost every one of those compacts contains the same boilerplate language that the Tenth Circuit found to insulate the Red River Compact from Commerce Clause scrutiny.[12] Thus, on the Tenth Circuit's reasoning, Congress has authorized virtually every State west of the Mississippi to enact protectionist water laws that are likely to upend carefully balanced arrangements governing the management of western waterways.

That result is deeply troubling, for obvious reasons. To begin with, a reliable, long-term water sup-

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[12] See Alabama-Coosa-Tallapoosa River Basin Compact of 2002, art. X(d) & XVI; Apalachicola-Chattahoochee-Flint River Basin Compact of 1997, art. X(d) & XVI; Arkansas River Basin Compact of 1970, art. XI(b); Arkansas River Compact of 1949, art. VI(a)(2); Arkansas River Compact of 1965, art. XIII(b); Big Blue River Compact of 1971, art. VII, § 7.2(3); Canadian River Compact of 1950, art. X(d); Colorado River Compact of 1922, art. IV(c); Delaware River Basin Compact of 1961, art. 14.19; Great Lakes–St. Lawrence River Basin Water Resources Compact of 2005, art. 8.2; Pecos River Compact of 1949, art. VIII; Republican River Compact of 1943, art. VII; Sabine River Compact of 1951, art. II; Snake River Compact of 1943, art. IX; Susquehanna River Basin Compact of 1968, art. 15.19; Upper Colorado River Basin Compact of 1948, art. XV(b).

ply is essential to supporting population and economic growth. Yet the West's water supply, including in the area served by Tarrant, is under great strain: "[T]he severe prolonged drought that began in 2000, coupled with demands associated with increasing population and economic growth over several decades," has placed unprecedented stress on local municipalities' water management plans, bringing regional "reservoirs to historic low levels." Balaji Rajagopalan, et al., *Water supply risk on the Colorado River: Can management mitigate?*, 45 Water Resources Res. W08201, at 1 (2009).

This strain makes appropriations by arid western States from water-rich neighboring States essential. But by encouraging "the tendencies toward economic Balkanization" that the Commerce Clause was intended to prevent (*Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979)), the decision below may make such appropriations effectively impossible. Localities blessed with substantial water reserves now are free, under the Tenth Circuit's rule, to hoard water while their immediate neighbors go dry.[13] Such protectionist measures are especially likely when, as in this case, a "regulation is of such a character that its burden falls principally upon those without the

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[13] That States are certain to hoard water resources is hardly an exaggeration. One local "beneficial use" that Oklahoma officials have said they will invoke to keep Tarrant from appropriating any of Oklahoma's water in this case is "conservation"—which is to say, no use at all. See Bryan Smith, *OK Water Resources Board not yielding to Texas on water rights*, eCapitol News (May 14, 2008) ("In a subtle nod to the lawsuit, [OWRB's executive director] said not to expect the board's [water planning] efforts to reveal 'excess water,' as all resources are needed, if not for consumption then recreation and conservation").

state"; in such circumstances, legislative action is not likely to be subjected to those political restraints "which are normally exerted on legislation where it affects adversely some interests within the state." *Wunnicke*, 467 U.S. at 92.

The Tenth Circuit's departure from the approach mandated by this Court and followed by the Third, Fourth, and Fifth Circuits therefore creates confusion about the constitutionality of these protectionist schemes, casts uncertainty on water management plans throughout the Nation, encourages protectionist legislation that will impede interstate commerce, and foments interstate tension. This Court's immediate intervention is urgently needed.

II. Oklahoma's Refusal To Allow Texas To Obtain The Water It Is Allocated By The Compact Is Preempted By The Compact's Plain Terms.

Oklahoma's refusal to allow the appropriation of water by Texas from reach II, subbasin 5 also is preempted by the Compact's plain terms. The Compact provides expressly that the signatory States have "equal rights to the use of" that water (Compact § 5.05(b)(1)); this language cannot plausibly be read, as the Tenth Circuit did, to allow Oklahoma to bar Texas from using its full allocated share. And the Tenth Circuit compounded its error by upholding Oklahoma's discriminatory legislation in reliance on the general presumption against preemption—a presumption that rightfully applies when Congress *unilaterally* imposes a rule on the States, but is entirely out of place with respect to interstate compacts that the States freely negotiate among themselves. Because these errors involve the meaning of an agreement among States on a recurring matter of great

importance—and because "the meaning of a compact is a question over which this Court has the final say" (*Petty* v. *Tenn.-Mo. Bridge Commission*, 359 U.S. 275, 278 (1959))—further review is warranted.

A. The Tenth Circuit's preemption analysis rests on an incorrect interpretation of the Compact.

At the outset, the Tenth Circuit's analysis of the preemptive effect of the Compact is fundamentally flawed. The court recognized that the law of a signatory State is preempted to the extent that it is inconsistent with the Compact's terms. App., *infra*, 33a. See, *e.g.*, *Del. River Joint Toll Bridge Comm'n* v. *Colburn*, 310 U.S. 419, 433-434 (1940) (interstate compact superseded inconsistent state law); *Hinderlider*, 304 U.S. at 106 (apportionment by compact is binding on signatory states and overrides inconsistent state grant of water rights). In nevertheless concluding that the Compact does not preempt Oklahoma's embargo, the court misread the Compact's text in a manner that departed from its plain terms and distorted the intent of the signatory States.

1. The Tenth Circuit read Compact Section 2.01 as a grant of "broad discretion to states to regulate the use of their water apportionments." App., *infra*, 35a. As a consequence of this broad grant, the court concluded, Oklahoma's protectionist statutes are not preempted. But Section 2.01 contains a significant condition, making the free administration of water rights by States "subject to the availability of water in accordance with the apportionments made by this Compact." And the Compact expressly apportions to each signatory State "*equal rights* to the use of" the water in reach II, subbasin 5, with no State "entitled to more than 25 percent of the water in excess." *Id.*

§ 5.05(b)(1) (emphasis added).[14] This provision thus declares, in so many words, that Texas has a *right* to the water that Tarrant (on behalf of that State) claims in this case. Oklahoma's discretion to regulate its apportionment thus cannot be understood as discretion to restrict *other* States' apportionments.

Likewise, the Tenth Circuit read Section 2.10 to "caution against reading preemption into the Compact's other provisions." App., *infra*, 35a. But Section 2.10 provides only that nothing in the Compact shall be deemed to "interfere 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*." (Emphasis added). Thus, by its plain terms, Section 2.10 *does* supplant any state law that is inconsistent with the Compact. As one leading authority put it, "[m]any compacts state that nothing in the compact shall impair the right of a signatory state to regulate water use inside its borders 'not inconsistent with' its obligations under the compact. The clear implication is that state laws inconsistent with the compact must give way." Douglas L. Grant, *Interstate Water Allocation*, in Waters and Water Rights, at § 46.04 (Robert E. Beck ed.) (3d ed. 2009).

2. In upholding Oklahoma's discriminatory laws despite the Compact's equal allocation of subbasin 5 waters, the Tenth Circuit reasoned that the "equal rights" language of Section 5.05(b)(1) was intended

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[14] These allocations apply when the flow is at least 3000 cubic feet per second, which is usually the case. See Compact Interpretive Comments, CA App. 435 ("Flows less than 3000cfs have occurred only 4.2% of the time").

only to "ensure that an equitable share of water from the subbasin reaches the states downstream from Oklahoma and Texas" at times when the Red River has an unusually low flow. App., *infra*, 36a; see also *id.* at 37a-39a, 42a-43a. But that is not what the Compact says.

The Compact provides that "[t]he Signatory States shall have equal rights to the use of" of subbasin 5 water (Compact § 5.05(b)(1)); Texas is one of the signatory States; it therefore is entitled to use of the water at issue here. In reaching the contrary conclusion, the Tenth Circuit 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*." App., *infra,* 42a-43a (emphasis added). But the Compact cannot be read to say any such thing: "equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5" (Compact § 5.05(b)(1)) simply does not mean "entitlement to use up to 25 percent of the excess water *in its state*"—particularly because subbasin 5 is a geographic area not defined by state lines and Texas has limited ability to take its water in subbasin 5 from within Texas.[15]

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[15] The Tenth Circuit assumed the truth of Tarrant's observations that "the part of Texas located within Reach II, Subbasin 5" yields "a small fraction of the total water" in that subbasin and that "Texas must divert some water in Oklahoma for Texas to secure its equal share." App., *infra*, 41a. The court nevertheless "h[e]ld that § 5.05(b)(1) does not allocate water located in Oklahoma to Texas regardless of what amount of water Tarrant * * * can appropriate in Texas." *Id*. at 44a n.3.

The Tenth Circuit inferred a critical restriction not expressed in the Compact: that Texas is not allowed to access its equal apportionment throughout subbasin 5 (including from the Red River itself), and instead is limited to subbasin 5 water within Texas. But compacts should be read according to their "plain terms." *Montana*, 131 S. Ct. at 1779. Here, the Tenth Circuit's reading "does not follow from the text and would drastically redefine" Section 5.05(b)'s meaning (*id.* at 1778), making Texas the only signatory State not able to obtain its full equal apportionment in reach II, subbasin 5. Had the Compact intended a state-line prohibition, it easily could have said so; instead, it created a subbasin that traverses state lines.

In fact, the "low flow" provisions in Compact Sections 5.05(b)(2) and (3) upon which the Tenth Circuit relied address the rare circumstances when the Red River's flow is below 3000 cubic feet per second at the Arkansas-Louisiana state boundary. During these low flow periods, the Compact requires upstream States to allow a certain quantity of water to flow to Louisiana, and those States may determine individually the best way to provide the necessary deliveries. Compact § 5.05(b)(2), (3). But *Section 5.05(b)(1)*, by its plain terms, is not limited to ensuring particular flows to Louisiana; on the face of it, ensuring *each* State its equal share, and limiting *each* to no "more than 25 percent" of the water in the subbasin, has several quite different and much broader purposes.

First, by providing that the signatory States are to share equally in flows over 3000 cubic feet per second, Section 5.05(b)(1) has the effect of assuring *each* State a specified amount of water and protecting *all* signatories from predatory use by another

State—including protecting Texas against Oklahoma using more than its fair share of the water in subbasin 5.

Second, the Compact is designed to ensure *beneficial use* of water. Compact § 2.01. But if Texas is unable to access its share of subbasin 5 water, that water will go to waste. None of the other compacting States is allowed to use more than its 25 percent share of flow over 3,000 cubic feet per second. As a consequence, no State will be able to use the 25 percent that would have gone to Texas absent Oklahoma's protectionist laws.

Third, nothing in the Compact says that Texas is limited to taking the water to which it is entitled under Section 5.05(b)(1) from within its own borders. To the contrary, the Compact allocates water to Texas from reach II, subbasin 5—not from the *portion* of reach II, subbasin 5 *that is located in Texas*. This phrasing is significant: When the signatory States meant to impose a state-boundary limitation on an allocation, they said so expressly. See Compact § 5.03(b) ("Oklahoma and Arkansas shall have free and unrestricted use of the water of this subbasin *within their respective states*") (emphasis added); *id.* § 6.03(b) ("Texas and Louisiana *within their respective boundaries* shall have unrestricted use of the water of this subbasin") (emphasis added). But they included no such limitation in Section 5.05(b)(1). This omission, of course, is presumed to be "intentional[] and purpose[ful]." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

B. The presumption against preemption does not apply to interstate compacts.

The Tenth Circuit went astray not only in its construction of the Compact, but also in its interpretive approach. The court found substantial support for its unnatural reading of the Compact's terms in the presumption against preemption, which the court invoked no fewer than four times. App., *infra*, 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 this analysis is obvious. An interstate compact is not imposed upon 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, but honors it. The Tenth Circuit itself noted that the presumption against preemption derives from "respect for the States as independent sovereigns in our federal system" (App., *infra*, 34a (quoting *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009)))—and that respect dictates reading compacts according to their plain terms, as written by the States themselves.

Thus the rationale underlying the presumption against preemption—respect for state sovereignty—is simply inapplicable when it comes to the preemptive force of interstate compacts. The Tenth Circuit's trumpeting of the "consistent thread of purposeful and continued deference to state water law by Congress" (App., *infra*, 34a-35a) was, in this way, fundamentally misguided: The source of preemptive authority in this case was an agreement that *itself* reflects the judgment of the signatory States with respect to the proper allocation of Red River waters. This Court has noted that, "[a]s with all contracts," compacts must be interpreted "according to the intent of the parties, here the signatory States." *Montana*, 131 S. Ct. at 1771 n.4. But the Tenth Circuit's presumption will require federal courts to favor one reading of compacts over another, leading to results that are inconsistent with both the plain compact language and the signatory States' intent as reflected in that language. That surely will frustrate States' use of compacts to achieve "sensible compromise." Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustment,* 34 Yale L.J. 685, 706 (1925). For this reason, as well, review of the decision below is warranted.

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This Court has recognized its special role in policing state actions that disadvantage and discriminate against the interests of other States, explaining that "[t]he history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union." *Camps Newfound/Owatonna* v. *Town of Harrison*, 520 U.S. 564, 595 (1997). Thus "to coun-

tenance discrimination of the sort that [Oklahoma's] statute[s] represent[] would invite significant inroads on our 'national solidarity.'" *Ibid.*

Here, the discriminatory impact of the Oklahoma regime is clear. Because the decision below declined to remedy that discrimination, leaves the law in a state of confusion, and addresses legal issues that are of immense practical importance, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KEVIN L. PATRICK
SCOTT C. MILLER
Patrick, Miller & Kropf 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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