No. 11-889

In The
Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,

Petitioner,

v.

RUDOLF JOHN HERRMANN ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* CITY OF IRVING, TEXAS, CITY OF HUGO, OKLAHOMA, AND HUGO MUNICIPAL AUTHORITY IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* CITY OF IRVING, TEXAS, CITY OF HUGO, OKLAHOMA, AND HUGO MUNICIPAL AUTHORITY IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The Tenth Circuit's decision, construing the Red River Compact to authorize facially discriminatory state legislation obstructing interstate commerce in water (an increasingly scarce, valuable and essential natural resource), should be reversed by this Court. It is contrary to the standard announced in this Court's landmark opinion in *Sporhase v. Nebraska*, establishing that water is an article of interstate commerce subject to the dormant Commerce Clause.[2] This case presents the Court with the decision either to affirm its existing compact consent analysis set out thirty years ago in *Sporhase*, or somehow to modify or reject that precedent. As it stands, the precedent of the Tenth Circuit's decision provides a basis for comparable restraints on interstate commerce in water

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[1] Pursuant to Rule 37.6, *amici* the City of Irving, the City of Hugo, and the Hugo Municipal Authority affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.3(a), *amici* have obtained the written consent of all parties to the filing of this brief, and copies of those written consents have been filed with the Clerk of the Court.

[2] 458 U.S. 941, 954 (1982) ("Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional.").

throughout the western United States because most interstate water apportionment compacts among the Western States contain language comparable to the Red River Compact provisions that served as the basis for the Tenth Circuit's authorization of discriminatory legislation.

The interests of the City of Hugo, Oklahoma and the Hugo Municipal Authority (collectively "Hugo") and the City of Irving, Texas ("Irving") underscore the seriousness of Oklahoma's discriminatory legislation and the Tenth Circuit decision regarding the dormant Commerce Clause. Irving, a growing Texas municipality with projected water needs that far exceed current supplies, entered into a contract, the Irving-Hugo Agreement, to purchase water from Hugo to meet those needs. Hugo currently holds water rights from the State of Oklahoma, granted prior to the Red River Compact, for 30,500 acre-feet per year and has a pending application to appropriate significant additional supplies.

Irving and Hugo's exercise of their respective rights and obligations under the Irving-Hugo Agreement is restricted, if not outright prohibited, by the same Oklahoma statutes that are being challenged by Petitioner.[3] The water that is the subject of the

[3] In order to proceed under the Irving-Hugo Agreement, Irving and Hugo brought their own suit for declaratory judgment and injunctive relief, challenging these Oklahoma statutes under the dormant Commerce Clause. In that case, the Tenth Circuit ultimately ordered the case remanded for dismissal for

(Continued on following page)

Irving-Hugo Agreement is part of Reach II, Subbasin 1 of the Red River Basin, the waters of this Subbasin 1 being apportioned to the State of Oklahoma under the Red River Compact. See Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980), § 5.01. Thus, the Tenth Circuit's holding, in Petitioner's case, that "the Red River Compact insulates Oklahoma water statutes from dormant Commerce Clause challenge insofar as they apply to surface water subject to the Compact" also forecloses Irving and Hugo's ability to obtain judicial relief under the Commerce Clause and thus to proceed with their interstate water project involving Compact water. See Pet. App. at 51a.[4] Under that analysis of the Red River Compact, Oklahoma is free to preclude an out-of-state water sale by an Oklahoma water right holder such as Hugo, even where the water rights were permitted prior to the negotiation and ratification of the Red River Compact. See Pet. App. at 25a, 26a.

Irving and Hugo are local governments who have the authority and bear the responsibility to manage

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lack of federal jurisdiction, based on its conclusion that Hugo lacks standing as an Oklahoma political subdivision to challenge the Oklahoma statutes under the Commerce Clause of the U.S. Constitution. *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011). This Court denied Irving and Hugo's petition for a writ of certiorari to review that decision on standing. See *City of Hugo v. Buchanan*, Docket No. 11-852.

[4] All citations in this brief to the Petition Appendix ("Pet. App.") are to materials contained in the Appendix made part of Tarrant's Petition for a Writ of Certiorari in Docket No. 11-889.

water resources and provide long-term water supply in their respective jurisdictions. As Petitioner has detailed, Oklahoma enjoys an abundance of water supply far in excess of the needs in that state, and the north Texas region that includes Irving's service area is a rapidly growing metropolitan area, in which cities and other water providers must seek additional sources to meet future water demands. Pet. Br. at 13-15. Hugo is an Oklahoma appropriator of Oklahoma water, who wishes to sell and deliver some of its appropriated water, in excess of regional needs in Oklahoma, to Irving, a Texas purchaser. This is the simple and classic exercise of interstate commerce, through which the compensation paid to Hugo will substantially benefit Oklahoma's regional economy.

Under the Tenth Circuit's analysis of the Red River Compact, however, Oklahoma's anti-export statutes will render infeasible the Irving-Hugo Agreement particularly, and more generally will effectively preclude this needed interstate water market between willing Oklahoma water sellers and willing Texas water buyers. At a time when the pervasive and increasing effects of drought and climate change starkly present the need for more, cooperative interstate resolution of water resource demand and distribution problems, this Court should weigh carefully the effect of the Tenth Circuit's holding, which will instead embolden compact states to enact more parochial and protectionist approaches to water management.

As an Oklahoma water right holder of Compact water, and as parties to an interstate water sale and purchase agreement hampered by the Tenth Circuit's broad reading of congressional consent to Oklahoma's protectionist legislation, Irving and Hugo's unique perspective on this lawsuit will assist the Court in its disposition of this case. Irving and Hugo have a direct interest in the Court's resolution of the merits of the Compact consent question presented in this case, and present relevant arguments not advanced by Petitioner that support reversal of the Tenth Circuit decision on this issue. This brief is filed in order to provide additional context for the far-reaching implications of the Tenth Circuit's decision.

SUMMARY OF ARGUMENT

Irving and Hugo address the second of the two questions presented by Petitioner Tarrant Regional Water District ("Tarrant"), namely whether Congress's approval of the Red River Compact ("Compact"), utilizing language common to most such interstate water compacts, "manifests an unmistakably clear congressional consent to discriminatory state laws." See Pet. Br. at i, 47-55. Because the Tenth Circuit's analysis contravenes this Court's established precedent (i) requiring "expressly stated" or "unmistakably clear" congressional consent to state statutes that otherwise would violate the dormant Commerce Clause, and (ii) finding that consent lacking in equitable apportionment language of interstate water compacts, the

Tenth Circuit's holding that the Red River Compact "insulates" the Oklahoma statutes from dormant Commerce Clause challenge should be reversed. This Compact consent issue presents a substantially important legal and policy question with implications not only for the Red River Compact and its four signatory states, but well beyond that to the dozens of interstate compacts that apportion stream water throughout the western United States using similar terms. The context of Oklahoma's water abundance, Oklahoma's intentionally discriminatory anti-export statutes, and their effect on Oklahoma appropriators (like Hugo) who seek to transact in that excess water, well illustrate the ramifications of the Compact consent issue before this Court.

Although not addressed herein, *amici* Irving and Hugo also support Petitioner's legal position on its first, preemption question presented.

ARGUMENT

I. The Tenth Circuit's analysis of the Red River Compact ignores this Court's prior analysis regarding water apportionment compacts and the dormant Commerce Clause, and creates open-ended opportunity for protectionist action by apportionment compact states.

A. This Court in *Sporhase* expressly considered and rejected compact apportionment of interstate water resources as "persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce."

The Tenth Circuit correctly recognized this Court's "*Sporhase/Wunnicke* standard for congressional consent," under which Congress's intent to immunize state statutes from dormant Commerce Clause requirements must be "expressly stated" or otherwise "unmistakably clear." Pet. App. at 19a-20a; *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982); *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). Having recited that standard, however, the Tenth Circuit dispenses with this Court's dormant Commerce Clause precedent from *Sporhase* simply by distinguishing it from this case, because *Sporhase* involved Nebraska's attempt to regulate interstate transfer of groundwater that was not subject to an interstate compact. Pet. App. at 23a; see also *id*. at 27a. The Tenth Circuit conducted no analysis guided by *Sporhase*, despite this Court's

consideration and rejection of Compact consent arguments in that case.

The problem with the Tenth Circuit's shelving of *Sporhase* in its consent analysis of the language of the Red River Compact is that it thereby ignored this Court's consideration in *Sporhase* of whether equitable apportionment by an interstate water compact satisfies the congressional consent standard. The *Sporhase* Court considered and expressly rejected arguments made by Nebraska and Amici Curiae States[5] that various federal water legislation and interstate water allocation compacts reflect congressional authorization of state-adopted restrictions on interstate commerce involving water. *Sporhase*, 458 U.S. at 958. Nebraska had argued:

> Congress clearly exempted water resources from application of the Commerce Clause of the Constitution . . . by the specific approval of water appropriation compacts between states on the nation's rivers and waterways.[6]

The Amici Curiae States in their brief even more clearly, and expansively, urged:

> The amici states have enacted laws limiting or prohibiting the export of water for use outside the boundaries of the state. These

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[5] Colorado, Wyoming, Utah, Nevada, Kansas, North Dakota, South Dakota, and Missouri.

[6] Brief of Appellee at *27, *Sporhase v. Nebraska*, 458 U.S. 941 (1982), *available at* 1982 WL 608566.

> statutes are consistent with equitable apportionment decrees of this court and are necessary to implement the interstate compacts consented to by Congress. Implicit in all compacts apportioning interstate waters, and explicit in some, is the assumption that each state may prohibit the diversion of apportioned waters for use outside its boundaries.[7]

The Court could have ruled that such federal law authorities were not applicable to the (non-compact) groundwater at issue (as did the lower courts in this case), but instead it directly addressed the merits of Nebraska's argument – ruling that the proposition was incorrect and that state laws addressing water apportioned by compact are still generally subject to the constitutional restrictions of the Commerce Clause. The *Sporhase* Court explicitly considered whether interstate water compacts (or other federal water legislation) implicitly waive Commerce Clause restrictions, and ruled as follows:

> Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid*

[7] Brief of Amici Curiae States at *7, *Sporhase v. Nebraska*, 458 U.S. 941 (1982), *available at* 1982 WL 608568.

> state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce.

Sporhase, 458 U.S. at 959-960 (footnotes omitted, emphasis in original).

By this conclusion, the Court intentionally announced a rule that the equitable apportionment of water accomplished by interstate compacts does not waive otherwise applicable Commerce Clause restrictions. See Douglas L. Grant, *State Regulation of Interstate Water Export*, 3 WATERS AND WATER RIGHTS at 48-38 to 48-39 (Amy L. Kelley, ed., 3d ed. Lexis Nexis/Matthew Bender 2011) ("In other words, Congress' mere consent to the water compacts was not an unmistakably clear expression of intent to authorize unreasonable state burdens on commerce.").[8] The logic of the *Sporhase* Court's treatment of compact apportionment is undeniable: Equating congressional consent to the apportionment of water with consent

[8] See also Olen Paul Matthews & Michael Pease, *The Commerce Clause, Interstate Compacts, And Marketing Water Across State Boundaries*, 46 Nat. Resources J. 601, 635 (2006); Chris Seldin, *Interstate Marketing of Indian Water Rights: The Impact of the Commerce Clause*, 87 Cal. L. Rev. 1545, 1555 (1999).

to violate dormant Commerce Clause requirements would mean that interstate surface water apportioned by a compact is not subject to the dormant Commerce Clause, while intrastate surface water and underground water remain subject to dormant Commerce Clause restrictions.

This understanding of the *Sporhase* rule is also supported by western states' legislative responses following the Court's decision. Prior to *Sporhase*, fourteen western states limited or prohibited the export of water.[9] Following *Sporhase*, two of those embargo statutes were repealed,[10] one was struck down by a federal district court,[11] and nine states amended or adopted legislation designed at least in part to qualify under the *Sporhase* standards for permissible constraints on interstate commerce in water.[12] Like those states whose pre-*Sporhase* export statutes were repealed or stricken, so also these nine states (Arizona, Idaho, Kansas, Montana, Nebraska, Nevada, Oregon, South Dakota and Utah) are all

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[9] See generally Richard S. Harnsberger, Josephine R. Potuto & Norman W. Thorson, *Interstate Transfers of Water: State Options after* Sporhase, 70 Neb. L. Rev. 754, 817 and Appendix (1991).

[10] COLO. REV. STAT. § 37-81-101 (1973) (repealed 1983); WYO. STAT. § 41-3-105 (1977) (repealed 1983).

[11] N.M. STAT. ANN. § 72-12-19 (1978) (repealed 1983); see *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983).

[12] See Harnsberger et al., *supra note* 9, Appendix. Whether such legislation actually satisfies *Sporhase* standards is undetermined.

"compact states." This state-level response to this Court's *Sporhase* analysis reflects a clear and shared understanding that the dormant Commerce Clause still limits a state's ability to embargo export of its water resources, even where the state is party to one or more interstate water compacts.

As discussed further below, the various provisions of the Red River Compact on which the Tenth Circuit relied to find "broad regulatory authority," see Pet. App. at 25a, 27a, for the "Compact states to protect their apportionments of water," Pet. App. at 3a, see also Pet. App. at 27a, are typical of the terms of many other interstate water compacts involving vast amounts of water resources throughout the western United States. Beyond the direct holding regarding the Red River Compact and its signatory states, this case presents this Court with the opportunity to affirm, or to modify, its conclusion in *Sporhase* that equitable apportionment alone does not manifest congressional intent to insulate a state's discriminatory water statutes from Commerce Clause scrutiny.

B. Under the *Sporhase* and *Wunnicke* analysis of Compact consent, the Red River Compact provisions on which the Tenth Circuit relied do not supply "persuasive evidence" or "unmistakably clear" congressional consent.

Because indisputably there is no "expressly stated" congressional consent in the Red River Compact

that would relieve Oklahoma of the restrictions of the dormant Commerce Clause in regulating its Compact water,[13] the Tenth Circuit's holding can only be justified if such intent is otherwise "unmistakably clear." *Wunnicke*, 467 U.S. at 91-92. To determine congressional consent, the Tenth Circuit therefore correctly focused on the language of the Red River Compact itself. Pet. App. at 23a, 24a. However, the various terms, provisions, and phrases in the Red River Compact on which the Tenth Circuit relied are common provisions found in nearly all of the many interstate water compacts among the western states, and are not properly read to immunize the signatory states from dormant Commerce Clause protections.[14]

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[13] Cf. Pet. App. at 21a-22a (describing and quoting from the opinion of the district court).

[14] Irving and Hugo's compilation of a comparative review of the terms and provisions of these western interstate compacts was made part of the record in their appeal before the Tenth Circuit. See *City of Hugo v. Nichols*, 656 F.3d 1251 (10th Cir. 2011) (consolidated Case Nos. 10-7043 and 10-7044). Accompanying the filing of their amicus brief supporting the petition for certiorari in this docket, pursuant to Rule 32.3 *amici* submitted a letter to the Clerk of the Court describing the material comprising this comparative review and proposing that it be lodged for the Court's consideration of Tarrant's petition. Subsequently, on December 20, 2012, the Clerk's office contacted the undersigned counsel and requested that the material proffered by Irving and Hugo be provided, and same was electronically transmitted to the Clerk's office that same day. Accordingly, this comparative review of compact provisions, the full text of those compacts, and the accompanying map are before this Court for consideration in this docket.

As this Court noted in *Sporhase*, such interstate compacts are "agreements among States regarding rights to surface water." *Sporhase*, 458 U.S. at 959; see also *Montana v. Wyoming*, 131 S.Ct. 1765, 1772 n. 4 (2011) ("As with all contracts, we interpret the [Yellowstone] Compact according to the intent of the parties, here the signatory States."). In this context, general provisions regarding a compact purpose of apportionment of the water resources of a particular basin are certainly not remarkable. See Pet. Br. at 50-51. The clear rule set out in *Sporhase* is that water apportionment by compact is, by itself, not persuasive evidence of congressional consent. *Sporhase*, 458 U.S. at 960. Indeed, a comparative review of certain key provisions of the 21 western interstate water compacts demonstrates that all of these compacts have the nature or purpose of apportionment.

The "non-interference" provision of the Red River Compact is also common language found in other interstate water apportionment compacts. See Red River Compact, § 2.10, Pet. App. at 87a; Pet. Br. at 51. Such general provisions reflect Congress's general deference to state water law, stated in numerous federal statutes including compact ratifications, which this Court acknowledged but found insufficient to immunize water compact states from dormant Commerce Clause prohibitions. See *Sporhase*, 458 U.S. at 959-960. Nearly all of the other western states'

water compacts also contain this type of provision.[15] The Tenth Circuit places significant emphasis on the Red River Compact phrasing that gives each signatory state, as part of the non-interference provision (§ 2.10), "control" over the water allocated to that state. Pet. App. at 25a. Review of the other compacts, however, again demonstrates that at least eight of them use this same phrasing – non-interference means the state's right to regulate within its boundaries the "appropriation, use and control" of water, not

[15] See Arkansas River Basin Compact, 87 Stat. 569 (1973), art. XI(B); Arkansas River Basin Compact, 80 Stat. 1409 (1966), art. XIII(B); Arkansas River Compact, 63 Stat. 145 (1949), art. VI(A); Big Blue River Compact, 86 Stat. 193 (1972), § 7.2(3); Canadian River Compact, 66 Stat. 74 (1952), art. X(d); Colorado River Compact, 45 Stat. 1057, 1064 (1928), art. IV(c); Pecos River Compact, 63 Stat. 159 (1949), art. VIII; Republican River Compact, 57 Stat. 86 (1943), art. IV; Sabine River Compact, 68 Stat. 690 (1954), *as amended by* 76 Stat. 34 (1962), art. II; Snake River Compact, 64 Stat. 29 (1950), art. IX; Yellowstone River Compact, 65 Stat. 663 (1951), art. XVIII. In the cases of water apportionment compacts that (i) include provisions for basin-wide treatment of certain issues, across state lines, or (ii) do not establish a compact commission, and thus do not require a clarification of state vs. compact commission authority, such a "non-interference" provision would not be expected, and is not found. See Costilla Creek Compact, 77 Stat. 350 (1963), *amending* 60 Stat. 246 (1946); Klamath River Basin Compact, 71 Stat. 497 (1957); Upper Colorado River Basin Compact, 63 Stat. 31 (1949) (basin-wide treatment); and South Platte River Compact, 44 Stat. 195 (1926); La Plata River Compact, 43 Stat. 796 (1925) (no compact commission).

inconsistent with the state's obligations under the compact.[16]

Even the Tenth Circuit's emphasis on the "free and unrestricted use" phrasing, in the Red River Compact provisions that allocate water resources for specific "reaches" and "subbasins" among the signatory states, does not satisfy this Court's standard for unmistakably clear congressional consent. Pet. App. at 26a; see Pet. App. at 87a (§ 4.02 (Reach I, Subbasin 2, water the subject of two of Petitioner's permit applications to OWRB)); see also Red River Compact, § 5.01 (Reach II, Subbasin 1, water the subject of Hugo's water rights and permit applications pending with OWRB). Again, this is common water apportionment compact language – 11 of 18 western states' compacts recognize the right of "free and unrestricted" use (or comparable authorization) of water allocated to a state by the compact.[17] The Tenth Circuit

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[16] See Arkansas River Basin Compact, 87 Stat. 569 (1973), art. XI(B); Arkansas River Basin Compact, 80 Stat. 1409 (1966), art. XIII(B); Big Blue River Compact, 86 Stat. 193 (1972), § 7.2(3); Canadian River Compact, 66 Stat. 74 (1952), art. X(d); Colorado River Compact, 45 Stat. 1057, 1064 (1928), art. IV(c); Pecos River Compact, 63 Stat. 159 (1949), art. VIII; Sabine River Compact, 68 Stat. 690 (1954), *as amended by* 76 Stat. 34 (1962), art. II; Snake River Compact, 64 Stat. 29 (1950), art. IX.

[17] See Arkansas River Basin Compact, 87 Stat. 569 (1973), art. IV; Arkansas River Basin Compact, 80 Stat. 1409 (1966), art. V; Bear River Compact, 94 Stat. 4 (1980), *amending* 72 Stat. 38 (1958), art. V(A); Big Blue River Compact, 86 Stat. 193 (1972), § 5.2; Canadian River Compact, 66 Stat. 74 (1952), art. IV(a); Colorado River Compact, 45 Stat. 1057, 1064 (1928), art. III(a);

(Continued on following page)

incorrectly and overbroadly interprets the phrase "free and unrestricted use" to give a signatory state, in this case Oklahoma, a complete and prospective blank check to discriminate against out-of-state water marketing and use.

Examination of other compact examples further establishes that this interpretation of "free and unrestricted use" is not legally sound. First, one of the interstate stream compacts (to which Nebraska is a party) offered for this Court's consideration in *Sporhase* also includes such provisions. See South Platte River Compact, 44 Stat. 195 (1926), art. III (apportioning tributary waters of Lodgepole Creek, with Nebraska having "the full and unmolested use and benefit of all waters" above the designated point of diversion, and Colorado having "the exclusive use and benefit" of all waters flowing at or below that point). The *Sporhase* Court, however, concluded that "the interstate compacts . . . do not indicate that Congress wished to remove federal constitutional constraints on such state laws." *Sporhase*, 458 U.S. at 959-960.

La Plata River Compact, 43 Stat. 796 (1925), art. II(1), (2)(a); Sabine River Compact, 68 Stat. 690 (1954), *as amended by* 76 Stat. 34 (1962), art. IV; South Platte River Compact, 44 Stat. 195 (1926), art. III; Upper Niobrara River Compact, 83 Stat. 86 (1969), art. V(A)(1). The three compacts that utilize a "basin-wide administration" approach, discussed above, are excluded from this aspect of the comparative analysis because of their fundamentally different approach, disregarding state boundaries.

Second, among the western states' water apportionment compacts there are several that, in sharp contrast to the Red River Compact's provisions, "specifically require consent from the signatory states or from a compact commission before water can be exported outside the river basin." Grant, 3 WATERS AND WATER RIGHTS at 48-39 & n. 220.[18] Typical of such express export consent requirements, Section 5.4 of the Kansas-Nebraska Big Blue River Compact provides: "Neither state shall authorize the exportation from the Big Blue river of water originating within that basin without the approval of the [compact agency's] administration." But Section 5.3 of that same compact also provides: "The State of Kansas shall have *free and unrestricted use* of all waters of the Big Blue River Basin flowing into Kansas from Nebraska in accordance with this Compact. . . ." (emphasis added). If "free and unrestricted use" signifies the outright and absolute power of a compact state to regulate its allocated water even to the point of discriminating against water export, as the Tenth Circuit believes, it is difficult to see how such authorization could be harmonized within a compact that requires approval by another entity before the signatory state can authorize water export.

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[18] See Kansas-Nebraska Big Blue River Compact, art. V, § 5.4, 86 Stat. 193, 197 (1972); Snake River Compact, art. IV, 64 Stat. 29, 31 (1950); Yellowstone River Compact, art. X, 65 Stat. 663, 669 (1951).

Another, more recent, example of an interstate water compact sharply contrasting with the Red River Compact in its detailed provisions restricting out-of-basin water transfers is the Great Lakes-St. Lawrence River Basin Water Resources Compact ("Great Lakes Compact"). The parties to the Great Lakes Compact are the eight Great Lakes States,[19] who had earlier entered into a broader agreement also including the Canadian Provinces of Ontario and Quebec. In October 2008, President Bush signed a joint resolution of Congress consenting to the Great Lakes Compact. See Pub. L. No. 110-342, 122 Stat. 3739 (2008). The Great Lakes Compact encompasses both surface water and groundwater within the Great Lakes-St. Lawrence River Basin, and generally prohibits "[a]ll New or Increased Diversions,"[20] subject to certain clearly delineated exceptions. In that case, although the Compact contains various provisions acknowledging the primary role of each party state in adjudicating and administering water rights applications (termed "Proposals"), at the same time it

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[19] Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Wisconsin, and the Commonwealth of Pennsylvania. The geographic area included under the Great Lakes Compact is shown in the map that is Exhibit 2 in Irving and Hugo's material lodged with the Court in this docket.

[20] "Diversion" is defined therein as a "transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer," except for water used in the Basin or a Great Lake watershed to manufacture or produce a product that is then transferred out. Great Lakes Compact § 1.2.

requires that party states act on such Proposals under standards set out in the Compact, and establishes a detailed structure whereby many such Proposals must first be subjected to "regional review" by a body comprised of representatives of each of the eight party states as well as both of the Canadian provinces. See generally Great Lakes Compact §§ 4.3, 4.5, 4.7-4.9, 4.11. Where Congress has consented to water transfer restrictions set out in such detail, it is hard to imagine a more unmistakably clear example of intent to authorize state regulation.

In contrast, like the many other compact examples including provisions for "free and unrestricted use" by a state of its compact-allocated water, these provisions in the Red River Compact do not carry the legal weight that the Tenth Circuit has afforded them. None of the provisions on which the court relied to foreclose dormant Commerce Clause challenges to Oklahoma's anti-export statutes is anything more than the typical compact apportionment language considered and rejected by the *Sporhase* Court. The Tenth Circuit's reading of what it considers to be "broad language of key Compact provisions," Pet. App. at 24a, that "give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water," Pet. App. 27a, is manifestly based on the court's failure to follow this Court's *Sporhase* analysis of compact provisions. Evaluated with that guidance, the Red River Compact does not satisfy this Court's "unmistakably clear" standard for

congressional consent, and the Tenth Circuit's holding should be reversed.

C. The common provisions of water apportionment compacts also demonstrate the far-reaching implications that call for reversal of the Tenth Circuit's Compact consent holding.

Comparison of specific language in the Red River Compact to the terms and conditions of other interstate water apportionment compacts is necessary not only to determine whether congressional approval of this Compact amounts to "unmistakably clear" authorization of otherwise prohibited restrictions on interstate commerce, but it also highlights for this Court the vast legal and economic implications of leaving the Tenth Circuit's Compact consent holding in place. As shown in the compacts map prepared by Irving and Hugo and lodged with this Court, most of the major stream water sources in the western United States are subject to interstate equitable apportionment compacts. Comparative consideration of these compacts' terms makes abundantly clear that the Tenth Circuit's interpretation of language in the Red River Compact would equally apply to the terms of numerous other compacts, and thus the (existing and future) laws of numerous other compact states.

The Tenth Circuit's Compact consent analysis, if not rejected by this Court, has such sweeping effect that it validates the "apportionment equals consent"

argument made by Nebraska and the amici states, and rejected by this Court, in *Sporhase*. Notwithstanding the Court's thirty year-old holding in that case that water is an article of interstate commerce, as a practical matter water allocated by interstate compacts would be utterly vulnerable to states' unilateral protectionism. There is certainly no mistaking these ramifications from the point of view of Respondents' counsel throughout this litigation. Most recently in an article published last summer, they assert that "where Congress has affirmatively apportioned water to a compacting state, the dormant commerce clause is simply inapplicable." Charles T. DuMars & Stephen Curtice, *Interstate Compacts Establishing State Entitlements to Water: An Essential Part of the Water Planning Process*, 64 Okla. L. Rev. 515, 530 (2012). Respondents' counsel, by characterizing all such interstate water compacts as "congressional apportionment," categorically argue that any compact involving states' water allocations and ratified by Congress necessarily demonstrates consent that the dormant Commerce Clause have no effect. *Id*. at 532-535.

Unconstrained by the Commerce Clause, and emboldened by the "wide berth" and "wide latitude" described by the Tenth Circuit, Pet. App. at 27a, 28a, it is easy to foresee many more states taking now-sanctioned actions in the interest of gaining various forms of economic advantage by hoarding their water resources for in-state use. Indeed, there would be nothing to prevent Oklahoma and other compact

states from reverting to outright embargos against export of their water resources. This is precisely the type of "economic Balkanization" the Commerce Clause intended to prevent. Cf. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

This outcome is obviously of paramount concern to cities and other water providers in areas of growing population, water shortage and recurring drought such as north Texas.[21] Indeed, this dispute over "compact water" is only one of several disputes recently brought before this Court, including other cases in which states have brought original actions challenging each other over compact obligations. See generally *Montana v. Wyoming*, No. 137, Orig.; *Kansas v. Nebraska*, No. 126, Orig.; *Texas v. New Mexico*, No. 220141 ORG (motion for leave pending). This pattern illustrates the importance of the Court's carefully construing water compact provisions, so that states cannot simply rely on a defense that their compact "insulates" them from action under questionable circumstances. Enmeshed in this case are the broader national policy implications of facilitating increased parochialism among the states in managing

[21] Cf. Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENVTL. & ENERGY L. & POL'Y J. No. 2 (Fall 2010) (assessing relative risks and legal uncertainty resulting from climate change, for interstate water sources subject to compacts, which comprise over 95% of the nation's available freshwater resources).

trans-boundary water resources, if the Tenth Circuit's analysis of the Red River Compact is affirmed.

The Tenth Circuit concluded its opinion by stating that its role is "not to pass judgment on the economic policy implications of the Red River Compact . . . [but] to ascertain what the Compact says about state regulation of apportioned water." Pet. App. at 51a. Irving and Hugo respectfully submit that, given the flawed Compact consent analysis employed by the Tenth Circuit and the sweeping national importance of its holding, *this* Court's critically important role is either to affirm its existing compact consent analysis set out thirty years ago in *Sporhase*, in the further light of *Wunnicke*, or somehow to modify or reject that precedent.

These challenges to the Oklahoma anti-export statutes, viewed in light of the Red River Compact, frame an issue of tremendous importance to states, local governments, water providers, and indeed all who rely on a vital market in this uniquely essential natural resource. Especially against the backdrop of severe, historic and persistent drought, the Court is confronted with the real potential for compact states to hamper interstate water development as a critical part of interstate commerce. The Court's resolution of this issue will either facilitate or frustrate cooperative solutions to increasingly challenging problems of developing and distributing adequate water supplies to meet demands.

II. Oklahoma's anti-export water laws intentionally discriminate against projects such as the Irving-Hugo Agreement, and forecast the potential for similar approaches by other compact states.

A. Hugo is an Oklahoma appropriator that seeks to sell excess Oklahoma water to Irving.

The City of Hugo, Oklahoma, either in its own name or through the Hugo Municipal Authority (collectively "Hugo"), has held a permit to appropriate water from the Kiamichi River of the Red River Basin since 1954. Through this initial permit, and a second permit acquired in 1972, Hugo is presently the duly authorized appropriator of 30,500 acre-feet of stream water each year from the Kiamichi River. Hugo's rights to these quantities predate both the signing (1978) and the congressional ratification (1980) of the Red River Compact.

In 2002, Hugo applied to the Oklahoma Water Resources Board ("OWRB") for an additional 200,000 acre-feet annually from the Kiamichi River. The OWRB has yet to rule upon this application. Although this permit, if granted, would authorize a substantial increase in Hugo's current appropriation, the total amount of stream water both currently appropriated by and sought to be accessed by Hugo represents only a small fraction of the stream water available in the segment of the Kiamichi River at issue. According to the OWRB, more than 1.8 million acre-feet of adjusted total stream water flows through this segment

annually, and only about 44,000 acre-feet is estimated to be used within Oklahoma. To put these quantities in perspective, the amount of stream water that flows unused through the Kiamichi River and out of Oklahoma every year could more than supply the annual needs of the entire population of New York City. OWRB Status Report to the Office of the Governor, *Joint State/Tribal Water Compact & Water Marketing Proposals, Southeast Oklahoma Water Resources Development Plan*, at 27 (March 2002). The Kiamichi River water in particular is lost to its highest beneficial use if not diverted in Oklahoma, as the Hugo-Irving project would entail; once it reaches Lake Texoma and the Red River downstream from it, the water becomes too salty for municipal use. This unused excess from the Kiamichi is only a small fraction of the 36 million acre-feet of total stream water that leaves Oklahoma in a given year – a quantity that dwarfs the 2.6 million acre-feet that is actually allocated for annual use within the state. OWRB, Oklahoma Water Facts, *available at* http://www.owrb.ok.gov/util/waterfact.php (visited Feb. 19, 2013).

In short, Oklahoma's water supplies are plentiful compared to its needs, and the Hugo area is uniquely situated within the State to reap the potential benefits of this abundance. As an Oklahoma municipality, Hugo possesses a right, guaranteed by the Oklahoma Constitution, "to engage in any business or enterprise which may be engaged in by a person, firm, or corporation. . . ." Okla. Const. art. 18, § 6. Thus, Hugo

should be ideally positioned to transact in its surplus of stream water – a recognized article of interstate commerce – with a willing buyer. Hugo found such a buyer in the City of Irving, Texas, located in a high growth area of north Texas and planning for its future water supply needs. In August, 2008, Hugo and Irving executed a contract whereby Hugo agreed to sell, and Irving agreed to buy, certain volumes of stream water appropriated by Hugo pursuant to both its existing and pending water permits (the "Irving-Hugo Agreement"). From its inception, however, this transaction has faced obstacles imposed by the Oklahoma Legislature that prohibit or burden interstate water exports, for the sole and impermissible purpose of protecting Oklahoma's own economic interests.

B. Various Oklahoma statutes facially discriminate against the permit amendments sought by Hugo and the interstate project planned by Hugo and Irving.

The Tenth Circuit's opinion in Petitioner's case acknowledges that "[s]ome of these statutes require the OWRB to treat permits for in-state and out-of-state water use differently." Pet. App. at 5a. The statutory impediments to the Irving-Hugo Agreement, which are the statutory provisions also challenged by Petitioner in this case, fall into three general categories. In 2002, around the same time that Hugo applied to the OWRB for an additional appropriation from the Kiamichi River, the legislature enacted

the facially discriminatory (and now expired) Oklahoma Moratorium, which created an outright prohibition on "the sale or exportation of surface water and/or groundwater outside this state." OKLA. STAT. tit. 82, § 1B(A), OKLA. STAT. tit. 74, § 1221.A. Still in effect are multiple other provisions designed to prevent Oklahoma residents from selling in-state stream water to nonresidents,[22] and additional provisions enacted in 2009, following the legal challenges brought by Petitioner and separately by Irving and Hugo, that further burden any attempts to transfer Oklahoma stream water for out-of-state use.[23] See H.B. 1483, 52nd Leg., 1st Sess. (Okla. 2009).

Unmistakably, "the overall thrust" of these laws "is to prevent Oklahoma water from being removed from the state." *Tarrant Regional Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2007 WL 3226812, at *3 (W.D. Okla. Oct. 29, 2007). When considered in light of the Irving-Hugo Agreement, their obstructive effect on the natural flow of interstate commerce as driven by basic principles of supply and demand becomes quite evident. Thus, effective nullification of the Irving-Hugo Agreement by fiat of the legislature is a realistic prospect under these statutes.

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[22] These include: OKLA. STAT. tit. 82, § 105.16(B); OKLA. STAT. tit. 82, § 1085.2(2); and OKLA. STAT. tit. 82, § 1085.22.

[23] These latest provisions include: OKLA. STAT. tit. 82, § 105.12A(B)(1); OKLA. STAT. tit. 82, § 105.12A(D); OKLA. STAT. tit. 82, § 105.12(A)(5); and OKLA. STAT. tit. 82, § 105.12(F).

The Oklahoma Legislature removed any doubt as to its intent to apply direct oversight, and different treatment, of transactions like those planned by Hugo and Irving with the passage of new restrictions in 2009. Among these provisions is a requirement that all permits for out-of-state water use that authorize use of water subject to an interstate compact (including, but not limited to, the Red River Compact) be specifically authorized by an act of the Oklahoma Legislature. OKLA. STAT. tit. 82, § 105.12A(D). The legislature also has continuing oversight over any such permit, which presumably includes the power to later disapprove or restrict the permit even after initial legislative authorization and OWRB approval. *Id*. These 2009 restrictions also: (i) bar the granting of any permit for out-of-state water use that would impair Oklahoma's ability to meet its obligations under an interstate compact (thus placing the burden of satisfying Oklahoma's compact obligations only on out-of-state water users), see OKLA. STAT. tit. 82, § 105.12A(B)(1); (ii) require OWRB to consider, before granting any permit for out-of-state use (but not permits for in-state use), whether the requested water could feasibly be transported elsewhere in Oklahoma to alleviate water shortages, see OKLA. STAT. tit. 82, § 105.12(A)(5); and (iii) subject permits for out-of-state water use (and only out-of-state water use) to OWRB review at least every 10 years, to determine whether material conditions justifying the permit have changed with respect to other water needs and availability in Oklahoma, see OKLA. STAT. tit. 82, § 105.12(F).

Each of these provisions, and all of them collectively, render infeasible a water development project by which an Oklahoma appropriator such as Hugo seeks to sell excess water to a willing Texas buyer such as Irving. At a minimum, these laws jeopardize the viability of any water sale transaction contemplated between residents and non-residents by creating legal uncertainties and contingencies that impose substantial, if not insurmountable, burdens of financing a multi-million dollar project. However, they are more than mere inconveniences to interstate commerce created in the interest of public wellbeing. They were openly enacted with the goal of thwarting projects like that planned under the Irving-Hugo Agreement. As discussed below, the lawmakers who enacted these 2009 provisions did so in unabashed furtherance of purposes impermissible under the dormant Commerce Clause, despite lip-service paid to aims of conservation.

C. Oklahoma's anti-export water laws were enacted with discriminatory and protectionist intent, and burden interstate commerce in water.

Not only do Oklahoma's challenged statutes create layers of conditions and burdens that apply directly to, and inhibit, interstate water sale transactions such as the Irving-Hugo Agreement, they do so without imposing similar requirements on permits for in-state water uses. By their terms, they mandate "differential treatment of in-state and out-of-state

economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 99 (1994). In other words, they are facially discriminatory, and therefore "virtually per se invalid" under the dormant Commerce Clause unless the state "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id*. While a legitimate state interest justifying such discrimination might exist for "demonstrably arid" states that suffer from water shortages "as a whole," *Sporhase*, 458 U.S. at 958, by the assessments of the OWRB itself, Oklahoma is plainly not such a state. Rather, state officials have openly proclaimed economic protectionism as the motivating purpose – a fact that, again, should result in per se invalidity of the legislation so enacted. See *Philadelphia v. New Jersey*, 437 U.S. 617, 623-624 (1978).

While H.B. 1483 was still pending, several Oklahoma legislators, including sponsors of the bill, called a press conference, issued a press release, and announced to the world that the bill was designed to apply legislative oversight to transactions such as the Irving-Hugo Agreement to ensure that Oklahoma water could not be sold on terms they deemed insufficiently beneficial to Oklahoma. See Oklahoma State Senate Press Release, "Lawmakers Share Concerns over Possible Sale of Oklahoma Water to Texas" (May 13, 2009), http://www.oksenate.gov/news/press_releases/press_releases_2009/ pr20090513b.html. In other words, the undisguised motive was to override natural

market forces and buttress Oklahoma's economic advantage over an abundant natural resource. The public comments of State Senator Jim Wilson and State Representative Jerry Ellis make this purpose clear:

> There's a lot of money involved in this. When we talked about it during the Keating Administration we were selling the water too cheap we thought, even though it was a significant amount of money it seemed like. The argument that that's going to help our general fund is not significant unless the rate of the water goes up. So what we're going to do is we're going to try to create enough hurdles so that Texas will have the, uh, decide it's cheaper to desalinate water than it is to buy it from Oklahoma.
>
> . . .
>
> We've got to have a lot of money for this water if, in fact, we sell it.
>
> . . .
>
> This is about creating hurdles . . . obstacles that [out-of-state purchasers] will have to overcome.
>
> . . .
>
> Anything we can do to slow [the sale of water to out-of-state purchasers] down is certainly in our benefit.

See Audio recording of remarks by State Senator Jim Wilson and State Representative Perry Ellis at

May 13, 2009 press conference, http://www.oksenate.gov/news/press_releases_audio_clips/2009_audio_clips/prac200905.html. After H.B. 1483 was unanimously passed by the Oklahoma Senate, Senator Brian Bingman, a co-author of the bill, reiterated this economic protectionist purpose:

> We know the importance of Oklahoma water and the positive economic impact it has on our state,. . . . Oklahoma will now have more control of the protection and distribution of its own water, which will help make us stronger as a state.

Oklahoma State Senate Press Release, "Senate Approves Landmark Water Bill" (May 21, 2009), *available at* http://www.oksenate.gov/news/press_releases_audio_clips/2009_audio_clips/prac200905.html/.

These remarks bring the intended function of these 2009 provisions into sharp relief. In place of the expired (and challenged) Oklahoma Moratorium, which proscribed outright transactions such as the Irving-Hugo Agreement by its plain terms, the Oklahoma Legislature has constructed "oversight" mechanisms that still achieve the same effect – disruption of any proposed interstate transaction involving Oklahoma water that the legislature may deem insufficiently advantageous to Oklahoma interests. With this agenda laid bare, any argument that Hugo's permit applications and the Irving-Hugo Agreement may be allowed to proceed under the present statutory scheme rings hollow. The laws in question facially discriminate against out-of-state buyers of a plentiful

Oklahoma resource, and the Tenth Circuit's Compact consent analysis offers no protection for an Oklahoma appropriator such as Hugo that already holds water rights permits. See Pet. App. at 25a, 26a.

This Court has seen the State of Oklahoma attempt export restrictions on natural resources before:

> The statute of Oklahoma recognizes [gas] to be a subject of interstate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. . . . If States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. . . . To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines." In such commerce. . . . is constituted . . . the welfare of all the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state. . . . This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court.

West v. Kansas Natural Gas Co., 221 U.S. 229, 255-56 (1911).

Oklahoma's anti-export statutes are now accomplishing what this Court prohibited Oklahoma laws from attempting more than 100 years ago – the arrest of commerce in an abundant natural resource at state lines. To the detriment of Hugo and Irving, and to the potential detriment of any who would freely buy or sell the waters of a state subject to any interstate water allocation compact, the Tenth Circuit has allowed these laws to stand. A great "turning backward" is underway, and predictably will spread to other water compact states. Hugo and Irving respectfully ask that this Court reject the Tenth Circuit's Compact consent analysis, and reverse its holding regarding the Red River Compact.

CONCLUSION

Following the "unmistakably clear" standard established in its opinions in *Sporhase* and *Wunnicke*, the Court should reverse the Tenth Circuit's holding that the Oklahoma statutes are "insulated" or "inoculated" from dormant Commerce Clause challenge as those statutes apply to water apportioned under the Red River Compact.

Respectfully submitted.

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