No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,
A TEXAS STATE AGENCY,
Petitioner,

v.

RUDOLF JOHN HERRMANN, ET AL.,
Respondents.

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

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Petitioner Tarrant Regional Water District, a political subdivision of the State of Texas, is responsible for supplying water to nearly two million people in North Central Texas, one of the fastest growing and most productive regions of the country. Tarrant has identified certain water within Oklahoma as the most practical source for supplying the region's immediate and long-term needs. *See* Pet'r Br. at 15.

Critically, Texas has "equal rights to . . . use" that water under Section 5.05(b)(1) of the Red River Compact, an interstate compact approved by Congress. 1JA at 25. By upholding Oklahoma's protectionist water-permitting laws, however, the Tenth Circuit thwarted Tarrant's ability to obtain any water from within the Oklahoma portion of the Red River Basin. Texas has a substantial interest in ensuring that its residents have access to their share of that water.

SUMMARY OF ARGUMENT

The Red River Compact grants Texas a right to use a fixed percentage of water from within Reach II, Subbasin 5 of the Red River Basin, a geographically defined area that traverses parts of Oklahoma, Texas, and Arkansas. Nonetheless, the Tenth Circuit concluded that Oklahoma may apply its discriminatory laws to prevent Texas users like Tarrant from acquiring any portion of Texas's share of Subbasin 5 water from within the physical boundaries of Oklahoma—even if that water cannot be accessed from inside Texas's border.

Relying upon a presumption against the implied preemption of state laws, the Tenth Circuit determined

that Section 5.05(b)(1) of the Compact could be squared with Oklahoma's challenged statutes by narrowly construing each Signatory State's "equal rights to the use of" Subbasin 5 water to include only water from within each State's own physical boundaries. The Tenth Circuit's use of the presumption to interpret the Compact was misplaced and prejudicial. The rationale underlying the presumption against implied preemption—that Congress does not lightly interfere with the States' ability to enact and enforce their own laws—is inapposite here, where the federal law at issue is an interstate compact that was negotiated by several States themselves. Applying the presumption was particularly inappropriate because the Compact sets forth the Signatory States' specific intent to preempt any state laws that conflict with water apportionments made in the agreement.

Under a proper "plain terms" analysis of Section 5.05(b)(1) of the Compact, and especially when compared to other sections of the agreement, it is clear that Texas (and each Signatory State) is entitled to use up to 25% of Subbasin 5 water without reference to state borders. The Compact, therefore, provides Texas with the right to obtain its share of Subbasin 5 water from that portion of the subbasin that sits within the physical boundaries of Oklahoma. At a minimum, Oklahoma cannot prevent Texas users from accessing the State's share of Subbasin 5 water from within Oklahoma if that water cannot be obtained from inside the Texas portion of the subbasin, which lies downstream from Oklahoma.

Instead of providing access to Texas's share of Subbasin 5 water, however, Oklahoma enacted a series of laws that effectively prevent out-of-state users like Tarrant from appropriating any water from within Oklahoma. The Court should reverse the Tenth Circuit's judgment to ensure that Oklahoma may not escape its compact obligations—and deprive Texas users of the water they are entitled to use—under the cover of Oklahoma's statutes.

ARGUMENT

TEXAS'S "EQUAL RIGHT[] TO THE USE OF" A FIXED PERCENTAGE OF WATER LOCATED WITHIN REACH II, SUBBASIN 5 OF THE RED RIVER COMPACT PREEMPTS OKLAHOMA'S PROTECTIONIST WATER LAWS.

For nearly a century, the States have negotiated compacts to govern the use and control of interstate waters in the arid West. With Congress's approval, such compacts become federal law, superseding inconsistent state laws, *Del. River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 433-34 (1940), and other preexisting state-granted water rights, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938).

Compacts, therefore, enable States to plan for future demand with certainty that water will be available when the need arises—irrespective of competing claims based upon priority or other interests. *See Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011) (Compacts may be used "to guarantee [States] a set quantity of water . . . ."); *see also Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 n.20 (1982) ("[T]his Court has encouraged

States to resolve their water disputes through interstate compacts rather than by equitable apportionment adjudication.") (citation omitted).[1]

The Red River Compact is one such compact joined by the States of Arkansas, Louisiana, Oklahoma, and Texas. One of its "principal purposes" is "[t]o provide a basis for state . . . planning and action by ascertaining and identifying each state's share in the interstate water of the Red River Basin and the apportionment thereof." 1JA at 9-10 (Compact, § 1.01(e)). Whether those apportionments conflict with—and therefore preempt—Oklahoma's challenged water-permitting laws requires interpretation of the Compact. *Cf. Hinderlider*, 304 U.S. at 110-11 (Court may determine the effect of an interstate compact even where the contracting States are not parties to the suit).

A. An Interstate Compact Must Be Read According to Its Plain Terms—Not with a Presumption Against Preemption of Conflicting State Laws.

1. While an interstate compact approved by Congress is federal law, *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), it is also a type of contract that is construed according to ordinary principles of contract law, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). The primary goal of contract interpretation is to effectuate the

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1. Despite best intentions, the mere existence of an interstate water compact does not foreclose the possibility that the Court may be required to interpret its language to resolve a dispute that arises between the compacting States. *Cf. Texas v. New Mexico*, 462 U.S. 554, 568 (1983).

contracting parties' intent. *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-71 (1984). That is accomplished by adhering to and enforcing the "plain terms" of the contract. *Montana*, 131 S. Ct. at 1779; *see also New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008) ("Interstate compacts, like treaties, are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.'") (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)).

Faced with Tarrant's Supremacy Clause challenge to Oklahoma's water-permitting statutes, the Tenth Circuit disregarded these cardinal tools of compact construction and instead interpreted the Red River Compact under the distorting effect of a "presumption against implied conflict preemption." *See* Pet. App. at 34-35, 40-41, 43.

2. The Supremacy Clause provides that "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." U.S. CONST. art. VI, cl. 2. Consistent with the plain command of the Supremacy Clause, state laws that conflict with federal law are "'without effect.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

State laws may be preempted by force of the Supremacy Clause through express language in a congressional statute, by implication arising from the

breadth of federal enactments occupying a particular legislative field, or by implication based upon an actual conflict with federal law. *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265-66 (2012) (citations omitted). Conflict preemption occurs in cases where compliance with both federal and state law is a physical impossibility and in those instances in which state law stands as an obstacle to the accomplishment of federal objectives. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (citations omitted).

Although the Court has employed a presumption against implied conflict preemption, under which federal law is construed to avoid a conflict with state law to the extent possible, s*ee, e.g., Wyeth v. Levine*, 555 U.S. 555, 565 (2009), the Court also has held that the presumption should not be used to interpret the "substantive (as opposed to pre-emptive) *meaning*" of federal law when there is no doubt that the law is intended to preempt state laws, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996) (the "meaning" of a federal statute is a separate question from "whether" it is preemptive) (emphasis in original). *See also Cuomo v. Clearing House Ass'n,* 557 U.S. 519, 555-56 (2009) (Thomas, J., concurring in part and dissenting in part) (The act of statutory construction "may clarify the pre-emptive scope of enacted federal law . . . .").

More recently, in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), the Court expressed uncertainty regarding the continuing vitality of the presumption. *Compare id.* at 2580 (Thomas, J., plurality op.) (Courts "should not strain to find ways to reconcile federal law with seemingly conflicting state law," but should instead

"look no further than the ordinary meaning of federal law" without "distort[ing] federal law to accommodate conflicting state law.") (internal quotation marks omitted), *with id.* at 2583 (Sotomayor, J. dissenting) ("[A] plurality of the Court tosses aside our repeated admonition that courts should hesitate to conclude that Congress intended to pre-empt state laws governing health and safety.").

3. Despite any lingering uncertainty over the proper tool of construction for interpreting federal statutes and regulations in a typical conflict-preemption case, the presumption against preemption should not have been applied here, where the federal law at issue is an interstate compact.

The Court utilizes the presumption out of "respect for the States as 'independent sovereigns in our federal system,'" under the assumption that Congress does not "'cavalierly'" act to eliminate the States' authority to enact and enforce their own laws. *Wyeth*, 555 U.S. at 565 n.3 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Accordingly, it makes little sense to apply the presumption when interpreting an interstate compact that was negotiated, drafted, and executed by a group of States—at least when the Court is tasked with determining whether the compact conflicts with one of the party State's own laws.

Employing the presumption effectively favors one State's interpretation of the compact over the objective meaning of its terms, and in turn, will often deprive non-breaching States of bargained-for compact benefits under the guise of respecting State sovereignty. Not surprisingly, the Court long ago recognized that States

may not unilaterally determine the effect of their compact obligations by force of their own laws:

> It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State.

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951); *see also Hinderlider*, 304 U.S. at 106 ("Whether the apportionment of the water of an interstate stream be made by compact . . . with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."); *Kentucky v. Indiana*, 281 U.S. 163, 176-77 (1930) (States cannot determine their rights under an interstate compact "inter sese," but instead, the Court "must pass upon every question essential to such a determination, although local legislation . . . may be involved.").

At bottom, the Tenth Circuit was able to salvage Oklahoma's challenged water statutes only by erroneously subverting the other Signatory States' rights under the Red River Compact.

4. What is more, the Tenth Circuit overlooked the fact that the Signatory States had anticipated the potential for conflict between the Compact and state laws, and explicitly proclaimed in two places that the

Compact must prevail in all such instances. First, Section 2.01 of the Compact states:

> Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state [and] may freely administer water rights and uses in accordance with the laws of that state, *but such uses shall be subject to the availability of water in accordance with the apportionments made by this Compact*.

1JA at 10 (emphasis added). Section 2.10(a) then states:

> Nothing in this Compact shall be deemed to: [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, *not inconsistent with its obligations under this Compact*.

Id. at 12 (emphasis added).

Although the Tenth Circuit cited portions of these provisions to support its conclusion that Congress and the Signatory States intended to preserve the States' ability to regulate the usage and control of water within their boundaries, *see* Pet. App. at 33, 35, the court omitted and failed to account for the overriding effect of the italicized language. The cited provisions make unmistakably clear that, although the Signatory States are generally permitted to administer water rights within their borders, they may not legislate away their Compact commitments. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-72 (2000) (a "saving" clause

preserving the operation of state law does not bar or affect the ordinary working of conflict preemption principles).

Simply put, there is no basis for employing a presumption against implied preemption when the Signatory States specifically provided that the Compact must prevail in the event of any conflict with state law. *See Medtronic,* 518 U.S. at 485 (Preemptive "purpose . . . is the ultimate touchstone in every preemption case.") (internal quotation marks omitted). Instead of endeavoring to reconcile the Compact with Oklahoma law, the Tenth Circuit should have aimed to give effect to the plain meaning of the Compact's text. *See Smiley*, 517 U.S. at 744 ("What *is* at issue here is simply the meaning of a provision that does not . . . deal with pre-emption [itself], and hence does not bring into play the considerations" warranting usage of a presumption against preemption.) (emphasis in original).

B. Section 5.05(b)(1)'s "Equal Rights" Provision Supercedes Oklahoma's Water-Permitting Scheme.

1. Oklahoma's challenged water-permitting statutes cannot be reconciled with the plain command of Section 5.05(b)(1) of the Compact. That section declares that the Signatory States "shall have *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," further providing that "no state is *entitled* to more than 25 percent of the

water in excess of 3,000 cubic feet per second." 1JA at 25 (emphases added).[2]

Section 5.05(b)(1) does not limit Signatory States to water usage they can obtain from within their own borders. Neither does it limit States to water that trickles down from upstream States from within the subbasin. Instead, Section 5.05(b)(1) entitles each Signatory State to use up to 25% of water that originates in or flows into an interstate area. No other subbasin established in the Compact allocates water in the same fashion.

To begin with, Subbasin 5 is not defined by state lines: it traverses parts of Oklahoma, Texas, and Arkansas. This contrasts with other subbasins that are defined by State boundaries. *See* 1JA at 18-19 (Compact § 4.02(a)); *id.* at 19 (Compact § 4.03(a)); *id.* at 22 (Compact § 5.01(a)); *id.* at 23 (Compact § 5.02(a)); *id.* at 38 (Compact § 8.01). But unlike several subbasins that do cross state lines, Section 5.05(b)(1) does *not* limit the Signatory States' "equal rights to the use of" water in Subbasin 5 to the usage they can obtain from within their respective borders. *Compare id.* at 25 (Compact § 5.05(b)(1)), *with id.* at 23-24 (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.* at 33 (Compact § 6.03(b)) ("Texas and Louisiana *within their respective boundaries* shall each have the unrestricted

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2. The Red River meets these minimum flow conditions over 95% of the time. 1JA, at 30.

use of the water of this subbasin . . . .") (emphasis added).

Moreover, Section 5.05(b)(1) does not limit downstream States to a percentage of "flow into" their borders from upstream States in Subbasin 5, which, again, contrasts with the Compact's mode for allocating water in other interstate subbasins. *Compare id.* at 25 (Compact § 5.05(b)(1)), *with id.* at 36-37 (Compact § 7.02(b)) ("The State of Arkansas shall have free and unrestricted use of the water of this reach subject to the limitation that [it] shall allow a quantity of water equal to forty (40) percent of the weekly runoff . . . to flow into Louisiana.").

Instead, Section 5.05(b)(1) provides all four Signatory States with "equal rights to the use of runoff originating in . . . and undesignated water flowing into" any part of Subbasin 5 without reference to state lines. The differing terminology used throughout the Compact is presumptively meaningful. *See New Jersey*, 552 U.S. at 615-16; *cf. Miller v. Robertson*, 266 U.S. 243, 251 (1924) (intention of parties to an agreement should be gathered from the whole instrument); NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES & STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

2. Under its plain terms, and particularly when compared to other sections of the Compact, Section 5.05(b)(1) provides each Signatory State with the right to use up to 25% of the water from anywhere within Subbasin 5. Consequently, Texas has the right to

obtain Subbasin 5 water from within the Oklahoma portion of the subbasin, provided that Texas does not appropriate more than its 25% allotment.[3] Indeed, Oklahoma cannot use more than its own 25% share of Subbasin 5 water before the water crosses out of the State. *Cf.* 1JA at 30 (Interpretive Comment) ("If the states have competing uses and the amount of water available in excess of 3000 cfs cannot satisfy all such uses, each state will honor the other's right to 25% of the excess flow."). Requiring Oklahoma to allow Texas users to access Texas's share of Subbasin 5 water from within Oklahoma will not upend other compact arrangements across the country because, as Oklahoma recognizes, the specific language used in Section 5.05(b)(1) does not appear in any other compact in the United States. Br. Opp'n at 17; Suppl. Br. at 9.

At a minimum, Oklahoma cannot prevent Texas users from accessing Texas's share of Subbasin 5 water from within Oklahoma if such water is unavailable inside Texas's own borders. To that end, Tarrant

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3. The Court need not determine whether or how much water Tarrant is entitled to appropriate from within the Oklahoma portion of Reach II, Subbasin 5 at this stage of the lawsuit. The question presented is whether Oklahoma may apply its laws to prevent Texas users like Tarrant from accessing Subbasin 5 water in the face of Texas's rights under Section 5.05(b)(1) of the Compact. If the Court concludes that the Compact preempts the challenged laws at issue, the State of Texas will have authority to administer rights to its share of Subbasin 5 water. 1JA at 10 (Compact § 2.01) ("Each Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state. Each state may freely administer water rights and uses in accordance with the laws of that state . . . .").

maintains that the Texas portion of Subbasin 5 does not yield sufficient quantities of water to support Texas's allotment. Pet'r Br. at 9 n.5. But in endeavoring to salvage Oklahoma's challenged laws, the courts below forbade Tarrant from adducing evidence to make that showing, deeming it irrelevant. *See* Pet. App. at 44 n.3 ("The only fact we take the parties to dispute—whether Texas can receive a 25 percent share of the excess water in the Texas part of Reach II, Subbasin 5—is not necessary to our disposition of this issue because we hold that § 5.05(b)(1) does not allocate water located in Oklahoma to Texas regardless of what amount of water Tarrant and other Texas users can appropriate in Texas."). Texas plainly loses the benefits of the bargain it made with Oklahoma (among others) if Texans are both physically unable to access the State's share of Subbasin 5 water from within Texas, and legally prevented from obtaining it in Oklahoma on account of their residency.

3. By establishing a series of legal obstacles that restrict out-of-state water users like Tarrant from obtaining water, Oklahoma's challenged laws conflict with and burden Texas's rights under Section 5.05(b)(1) of the Compact. While Oklahoma is entitled to regulate and administer water rights within its boundaries, it may not prevent Texas users from accessing, with Texas's regulatory approval, Texas's rightful share of Subbasin 5 water from within Oklahoma. 1JA at 10, 12 (Compact §§ 2.01, 2.10(a)).

Although the Tenth Circuit correctly concluded that Section 5.05, as a whole, is designed to "ensure that an equitable share of water from the subbasin reaches the

states downstream from Oklahoma and Texas," Pet. App. at 36, the court overlooked the remainder of the rights established by the section in its effort to accommodate the challenged Oklahoma laws. Sections 5.05(b)(2)-(3) do require the upstream States to allow certain amounts of water to flow into Louisiana under low-flow conditions. But nothing changes the fact that the Signatory States also are entitled to enjoy their equal share of Subbasin 5 water under ordinary flow conditions. As Tarrant points out, the Compact would not have established an interstate subbasin providing the Signatory States with "equal rights to the use of" water therein, 1JA at 25, had the drafters intended only to ensure downstream flows to Louisiana, *see* Pet'r Br. at 36-37.

4. Because Oklahoma's water-permitting statutes cannot be reconciled with Section 5.05(b)(1) of the Compact, they must "give way" to the Compact as a matter of law. *PLIVA*, 131 S. Ct. at 2577. The Court should reverse the Tenth Circuit's judgment and hold that Oklahoma's challenged laws cannot be applied to restrict Tarrant from obtaining Texas's share of Subbasin 5 water from within Oklahoma.

CONCLUSION

The Court should reverse the judgment of the Tenth Circuit and remand for further proceedings.

Respectfully submitted.

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