No. 11-889

In The Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,

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 THE STATES OF LOUISIANA AND ARKANSAS AS AMICI CURIAE SUPPORTING RESPONDENTS

JAMES D. "BUDDY" CALDWELL
Louisiana Attorney General
RYAN M. SEIDEMANN
Counsel of Record
Assistant Attorney General
Chief, Lands & Natural Resources Section
seidemannr@ag.state.la.us
MEGAN K. TERRELL
Assistant Attorney General
Chief, Environmental Section
OFFICE OF THE LOUISIANA ATTORNEY GENERAL
1885 North Third Street
Baton Rouge, LA 70802
225.326.6085

SAM KALEN
UNIVERSITY OF WYOMING COLLEGE OF LAW
1000 East University Avenue
Laramie, WY 82071

DUSTIN MCDANIEL
Arkansas Attorney General
CHARLES L. MOULTON
Senior Assistant Attorney General
charles.moulton@arkansasag.gov
KENDRA AKIN JONES
Assistant Attorney General
OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street, Ste. 200
Little Rock, AR 72201
501.682.5310

Counsel for Amici Curiae

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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INTEREST OF AMICI CURIAE

The States of Louisiana and Arkansas are Signatory States to the Red River Compact and depend on the Red River's water to support drinking water, agriculture, aquaculture, and industrial uses as well as to maintain the environment and ecology of the Red River, Atchafalaya River, and Mississippi River basins. The Amici Curiae States have a direct interest in the outcome of this litigation, as what Texas' political subdivisions are and are not allowed to do under the Red River Compact will substantially impact the uses of the River in the downstream Amici States.

Both Louisiana and Arkansas share Oklahoma's interpretation of the Compact. The Amici States agree with and adopt as their own Oklahoma's analysis and interpretation of the history and negotiation process of the Red River Compact and share Oklahoma's perplexity regarding the Petitioner's new notion that cross-border water rights were created under the Compact. Further, Louisiana and Arkansas are interested in this matter because a decision favoring the Petitioner would constitute a significant infringement on their sovereignty and a departure of over more than three decades of the implementation of the Compact. Petitioner's tortured construction of the Compact would undermine the Amici States' bargained-for understanding that the Red River Compact safeguarded the States' ability to protect their public trust resources in any manner deemed beneficial. In this case, such protections manifest as repelling intrusions from Texas and its political subdivisions

whenever the Lone Star State's whims for more water are not satiated.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Red River Compact ("Compact" or "RRC") equitably apportions among Arkansas, Louisiana, Oklahoma, and Texas the water of the Red River and its tributaries. Pub. L. No. 96-564, 94 Stat. 3305 (1980). Importantly, although equitable apportionment was undoubtedly the primary purpose of the Compact, an equally notable theme throughout the Compact is the preservation of each Signatory States' sovereign authority to use and regulate the water within its boundaries. An interpretation of Section 5.05(b)(1) of the Compact must be performed through the ordinary rules of statutory interpretation that require all provisions of a Compact be read in context and in light of the efforts by all Signatory States to resolve their dispute through the Compact. The Petitioner would have this Court ignore the context in which the Compact was executed as well as the Compact's explicit, unambiguous, and repeated binding provisions that preserve the Signatory States' authority to "freely administer water rights and uses in accordance with the laws of the state" and the "power of any Signatory State to regulate *within its boundaries* the appropriate, use, and control of water." RRC, §§2.01, 2.10(a).

The Compact effects the division of waters in the Red River among the States, but the right to an absolute, unrestricted use of the water allocated to each State is limited by the boundaries within which that water is located, unless the Compact explicitly provides to the contrary. Tarrant Regional Water District's ("Tarrant" or "Petitioner") suggestion that the Signatory States intended to permit, *implicitly* in an otherwise all-encompassing Compact, the unfettered authority of one party to reach across another State's borders to appropriate water requires that the Court not only disregard the plain language of Section 5.05(b)(1), but also gives no meaning to the clear preservation of State governing authority over intrastate waters that the Signatory States' bargained-for when the Compact was ratified by Congress.

The Compact expressly recognizes and preserves each Signatory States' authority to regulate without restriction – except as otherwise dictated by the Compact – the use of water within its borders. Notwithstanding this clear pronouncement, Tarrant asks this Court to find that the drafters of the Compact intended to make the then-existing and all later-enacted laws of the Signatory States subservient to the rights of a water supplier to reach across state boundaries to divert water. "[E]qual rights to the use of runoff," as provided in Section 5.05(b)(1), simply does not constitute a clear expression by the Signatory States or Congress that this one phrase was added for the purpose of overriding the regulatory authority of the

States over intrastate waters that was otherwise maintained throughout the Compact.

ARGUMENT

I. THE *PLAIN MEANING*, *CONTEXT*, AND *PURPOSE* OF THE RED RIVER COMPACT ALL SUGGEST THAT OKLAHOMA ACTED WITHIN ITS AUTHORITY UNDER THE COMPACT.

All the Signatory Compact States except Texas recognize that the Compact reserves to the States the authority to develop programs such as that by Oklahoma, and absent a clear statement in the Compact to the contrary, the Signatory States should not be presumed to have surrendered their sovereignty over intrastate water. Texas now seeks to garner greater benefits than it bargained for in the Compact, and neither the plain and unambiguous language of the Compact, nor its context or purpose support Texas' or Tarrant's interpretation. In *State ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951), this Court noted that,

> [i]t 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.

Texas and its political subdivision, Tarrant, urge this Court to upset the Compact's bargain purportedly as a consequence of the need for more water. Amici too appreciate the challenges confronting states and their desire for more water. It is a challenge for many states.

Because of the state-controlled regulation of water in general, waterways, such as the Red River, that wholly or partially form the boundary between sovereign states present unique problems of regulation and use. The practical and obvious solution to problems attendant with allocating the usage of waterways subject to the claims of multiple states is through a contractual agreement subject to the approval of Congress under Article 1, Section 10. "The compact – the legislative means – adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations." *Hinderlider v. La Plata Co.*, 304 U.S. 92, 104 (1938). This is precisely the mechanism employed by Oklahoma, Texas, Louisiana, and Arkansas to provide for apportionment, allocation, and regulation of the shared portions of the Red River. Pub. L. No. 96-564, 94 Stat. 3305 (Dec. 22, 1980).

Through the enactment of the Red River Compact and numerous others like it,[1] both the participating states and the Congress recognize that the regulation of water usage can be accomplished best by interstate agreements. *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685, 699-704 (1925). The organic legislation for all such compacts begins as a contract among the participating states whose interests as the sovereign protectors of their trust resources are the driving forces behind the confection of such agreements. These agreements, which arrive before Congress as complete documents for approval under the Compact Clause, are carefully negotiated contracts, tailored to protect these finite resources in the best interests of the citizens of each signatory state.

Congress' approval of interstate water compacts elevates these agreements to the status of federal law. This elevation serves two purposes. First, it insulates the otherwise protectionist nature of state laws enacted pursuant to the agreements from possible constitutional scrutiny. Second, the only other

[1] Of particular import to the Amici States are the similarities between the portions of the Red River Compact at issue in this matter and those of the Sabine River Compact (Pub. L. No. 83-578, 68 Stat. 690 (1954)) and the Arkansas River Basin Compact (Pub. L. No. 81-82, 63 Stat. 145 (1949)). *See e.g.*, Ryan M. Seidemann, *Water and Power: The Sabine River Authority of Louisiana – A Review of Property Disputes, Hydropower, and Water Sales*, 25 TUL. ENVTL. L.J. 389, 405-412 (2012).

mechanism available to regulate interstate relations regarding shared water boundaries would be through the enactment of comprehensive federal water legislation, a reality that would upset more than two centuries of individual state water regulation.

This latter point is at least a tacit acknowledgment that one size does not fit all when it comes to the regulation of water as among states. It is widely accepted that there is a major divide, largely along geographic lines, as to how the individual states treat water and water rights. *See* Mark S. Davis & Michael Pappas, *Escaping the* Sporhase *Maze: Protecting State Waters Within the Commerce Clause*, 73 LA. L. REV. 175, 180-183 (2012). A singular nationwide approach to water regulation (which would, admittedly, obviate the need for water compacts) is impractical, as the regulation of water in Louisiana, a traditionally water-rich state, would be substantially different from the regulation of water in, say, Nevada, a traditionally water-poor state.

Accordingly, with interstate compacts as the principal viable mechanism for settling water disputes between states – absent resort to this Court and requesting an equitable apportionment, it is axiomatic that, eschewing the federal one-size-fits-all approach to water regulation, the entire purpose behind water compacts is to maintain existing state water law, while creating waterway-specific solutions to the regulation and use of shared water bodies. Little doubt exists that, in an interstate context, certain state restrictions on water use might qualify as

protectionist, possibly violating the dormant Commerce Clause. However, compacts such as the Red River Compact are authorized by Congress with a distinctly protectionist bent, favoring the protection of sovereign waters within state boundaries over interstate commerce.

Consequently, it would stretch Compact interpretation beyond logic to suggest, as Petitioner does, that the Compact is not shielded from the dormant Commerce Clause. The express purpose of the Compact is to "remove causes of controversy" and to "provide a basis for state or joint 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." RRC, §1.01(e). This includes insulating compacts from dormant Commerce Clause challenges. *E.g.*, *Intake Water Co. v. Yellowstone River Compact Com'n*, 769 F.2d 568, 570 (9th Cir. 1985) ("When Congress approved this compact, Congress was acting within its authority to immunize state law from some constitutional objections by converting it into federal law."), *cert. denied*, 476 U.S. 1163 (1986).

A. The Compact's Plain Language Supports Oklahoma's Regulation.

Indeed, the express and unambiguous terms of the Red River Compact permit Oklahoma's restrictions. The Compact expressly preserves the individual States' water regulations for waters within their borders. The language in section 2.01 is clear: "Each

Signatory State *may use* the water allocated to it by this Compact in *any manner deemed beneficial by that state*." RRC, Art. II, §2.01 (emphasis added). It further provides that "[e]ach state *may freely administer water rights and uses in accordance with the laws of that state*," subject only to availability and apportionment under the Compact. *Id.* (emphasis added). And the Compact explicitly recognizes that it shall not 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, . . . not inconsistent with its obligations under this Compact." RRC, §2.10(a). For each state's allocation in Reach II, Subbasins 1-4, it grants "unrestricted use" of its water. RRC, §§5.01-5.04. Nothing about any of these terms is equivocal or unambiguous.

B. Petitioner's Interpretation of the "Equal Rights" Language in the Compact Strains Credulity.

Tarrant's reading of Section 5.05(b)(1) provides unique insight into why it erroneously interprets the Compact. Section 5.05(b)(1) provides, in pertinent part (emphasis added):

> [t]he Signatory States shall have **equal rights to the use** of the runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second or

> more, provided no state is entitled to more than twenty-five percent (25%) of the water in excess of 3,000 cubic feet per second.

Two critical observations flow from this provision: (1) this section provides to the States equal rights to use Subbasin 5 water, not equal shares or unrestricted use of water; and (2) "provided no state is entitled to more than twenty-five percent" is a limitation on that use, not a guarantee of a quantity of water. Notwithstanding the clear language, Tarrant would read section 5.05(b)(1) as providing the Signatory States with an "equal share" (Pet. Br. at 9) and giving to Texas an unrestricted "right to a 25% share" (Pet. Br. at 16), an interpretation that is contrary to the plain language of this provision.

Consistent with the plain language of the Compact, Louisiana and Arkansas interpret "equal rights to the use of" 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 law*." *Tarrant Regional Water Dist. v. Herrmann*, 656 F.3d 1222, 1246 (10th Cir. 2011). While it may be unfortunate that Tarrant is facing increased water demands, these demands have no bearing on the meaning of the Compact, nor do they require the Court to re-write the Compact in a way that diminishes the authorities reserved to the Signatory States that were so carefully protected when drafting the Compact. Tarrant is not without a source of water within the State of Texas, and the Compact is clear that Tarrant's right to use Texas' allocation of Subbasin

5 water is limited to water within Texas' boundaries. Indeed, each States' rights to the use of Subbasin 5 water is limited to the use of such water from within each State's waterways.

Nowhere in the Compact are the intrastate water laws of the Signatory States made subservient to States acquiring their "equal share." In fact, had Oklahoma, or Louisiana or Arkansas for that matter, intended to undermine their own water law schemes as signatories to the Compact, it is doubtless that the Compact would so state. It does not. Louisiana and Arkansas, therefore, join Oklahoma in recognizing that the Compact unambiguously provides that intrastate waters are to be governed by intrastate laws and that Tarrant misconstrues the "equal rights of the use of" language in such a way that requires speculation as to its meaning from outside of the Compact.

Tarrant further suggests that the drafters of the Red River Compact must have intended its interpretation that any state could reach beyond its borders any time a need for additional water arises. As an example of this argument, Tarrant notes that none of Subbasin 5 extends into Louisiana, but Louisiana is guaranteed a 25% allocation of Subbasin 5 water (Pet. Br. at 31). Surely then, Tarrant argues, the Compact's drafters intended for Louisiana to reach into Texas, Arkansas, and Oklahoma to quench its thirst. *Id*.

But logic and the clear language of the Compact belie Tarrant's interpretation. Because the Red River

flows in a southeasterly direction into Louisiana, Louisiana's allocation of the Subbasin 5 water flows into the State from points north and west. The dynamic nature of running water means that Louisiana need not reach across state lines to acquire its share of the water "originating in" Subbasin 5. RRC, §5.05(b)(1). Rather, Louisiana's use of water "originating in" Subbasin 5 is delivered to it and becomes subject to Louisiana's water usage laws at the State line based on simple principles of hydrodynamics.

Nor is it relevant that Subbasin 5 water that flows into Louisiana becomes Reach V water once it crosses the border (Pet. Br. at 34). Section 5.05 of the Compact was intended to impose certain obligations on upstream states. As long as the water allocated to Louisiana arrives at the State line in quantities sufficient to meet the requirements set forth in Section 5.05, the upstream states' obligations are met, regardless of the classification of the water after it crosses the State line. Similarly, that Louisiana is guaranteed 25% of the water originating in Subbasin 5 is a logical consequence of the reality that Louisiana is the only Signatory State that cannot store Subbasin 5, to the detriment of an upstream State, water in times of high flow. *See* RRC, §5.05(b)(2) (" . . . this requirement shall not be interpreted to require any state to release stored water.").

C. If the Signatory States Intended to Abrogate Their Intrastate Water Rights, They Would Have Stated So Expressly.

Tarrant's argument also requires this Court to read into the Compact non-existent language. As Tarrant correctly notes, this Court's insertion of such language into the Compact is prohibited as "transcend[ing] the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). Such language would establish a scheme to invade the borders of neighboring states in order for any of the compacting states to satisfy their ever-changing water needs. This language simply does not exist in the Compact. Rather, the Occam's Razor explanation for how Louisiana gets its share of Subbasin 5 water is that the Compact drafters recognized that Louisiana's share would be delivered to its borders naturally, as would be the case with all of the Compacting States' shares. Indeed, contrary to Tarrant's general position in this matter that the Compact's allocation of no more than 25% to each of the states authorizes sovereign invasions, the purpose is precisely what the Compact states: to conserve the resource, to promote interstate comity, and to ensure that minimum flows reach downstream states. RRC, Art. I. Tarrant's strained reading of the Compact ignores this. Several provisions of the Compact, including Sections 2.01 and 2.10(a) and (b), retain the States' regulatory authority over water within their boundaries and nothing in Section 5.05(b)(1) expressly abrogates this authority.

II. THE CLEAR STATEMENT CANON OF CONSTRUCTION SHOULD NOT BE MECHANISTICALLY APPLIED TO INTERSTATE COMPACTS.

Petitioner's argument hinges upon an erroneous assumption that Oklahoma's restrictions are valid only if this Court concludes that the Red River Compact includes an express provision affirmatively authorizing the specific restriction. Petitioner's asserted justification for requiring such a unique specific provision springs from its assumption that (a) the restriction would otherwise violate the dormant Commerce Clause; *and* (b) that to avoid a violation of the dormant Commerce Clause the clear statement canon of construction applies. To begin with, the *assumption* that the "clear statement" canon of construction applies mechanistically to constitutionally-mandated, congressionally-approved compacts is misplaced.

Ironically, Petitioner and those supporting Petitioner would have this Court apply a substantive canon of construction while simultaneously asking that the Court apply general principles of contract interpretation. The two endeavors are quite different, and this Court cautiously has avoided suggesting that general principles of contract interpretation apply. "[A]n interstate compact," after all, "is not just a contract; it is a federal statute enacted by Congress." *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312 (2010). *See Cuyler v. Adams*, 449 U.S. 433, 439 n.7 (1981) (Compact is "law of the Union" and presents a federal question). Compacts, therefore, do not

necessarily have an implied obligation of good faith and fair dealing.[2] The "clear statement" canon reflects a substantive canon this Court *may* employ as but one tool of construction, which "reflect[s] substantive values drawn from the common law, federal statutes, or the United States Constitution."[3] Yet, two principal reasons counsel against applying this substantive canon to the instant interpretative task.

First, the canon's relevance depends upon the questionable *assumption* that, absent the Compact, Oklahoma's actions violate the dormant Commerce Clause. This Court's dormant Commerce Clause jurisprudence has been evolving.[4] In *Greer v. Connecticut*,

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[2] *Id*. *See also Virginia v. Maryland*, 540 U.S. 56, 66 (2003) ("We interpret a congressionally approved interstate compact '[j]ust as if [we] were addressing a federal statute.' ") (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). And it would be quite remarkable if, as has been suggested by some, that the mistake of fact contract principle could be applied to the Colorado River Compact (70 Cong. Rec. 324 (1928)). *Cf*. John U. Carlson, Alan E. Boles, Jr., *Contrary Views of the Law of the Colorado River: An Examination of Rivalries Between the Upper and Lower Basins*, 32 ROCKY MNT. MIN. L. INST. 21 (1986) (suggesting possible application of contract law doctrine).

[3] William N. Eskridge, Jr., Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 (1992); *see also* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010).

[4] *See generally* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005-2006); Barry Friedman & Daniel T. Deacon, *A Course Unbroken: the Constitutional Legitimacy of the Dormant Commerce Clause*,

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161 U.S. 519 (1896), and then in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), the Court permitted states' efforts to limit the export of their natural resources. This changed when the Court invalidated Oklahoma's law embargoing the export of natural gas, *West v. Kan. Natural Gas Co.*, 221 U.S. 229 (1911), and also overruled its earlier cases and struck down the State's prohibition against transporting in-state minnows for sale outside the state. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). *Cf. City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966) (summarily affirming invalidation of Texas law barring interstate water export absent state legislative assent).

Yet, state control of water resources presents unique challenges, particularly with increasingly complex hydrological changes – and this Court's decision in *Sporhase v. Nebraska*, 458 U.S. 941 (1982) does not preclude Oklahoma from responding to these challenges. In *Sporhase*, Nebraska sought to restrict the out-of-state export of groundwater from wells within the state and required a permit for exporting groundwater. Further, Nebraska would issue a permit only if the proposed water withdrawal was reasonable and did not adversely affect the ecosystem or citizens of the state, and then only if the water was being exported to a state that reciprocated and allowed water

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97 VA. L. REV. 1877 (2011); Sam Kalen, *Reawakening the Dormant Commerce Clause in Its First Century*, 13 U. DAYTON L. REV. 417 (1988).

to be imported into Nebraska. The Court accepted the ability of the state to ensure against adverse environmental and other effects on the water transfer but treated the reciprocity provision as an impermissible discrimination against interstate commerce. The Court emphasized that Nebraska had not shown that its reciprocity provision was reasonably tailored to address a valid conservation concern. 458 U.S. at 958 ("If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision."). *See also Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (involving an impermissible reciprocity requirement).

This Court, therefore, should be cautious before accepting Petitioner's implicit invitation to expand *Sporhase* beyond its narrow conclusion regarding the reciprocity provision. There is little more fundamental to a state's identity than its public trust resources. Professor Craig aptly characterizes the states' regulation of these resources:

> Public trust law, in other words, is very much a species of state common law. Moreover, as with other forms of common law, states have evolved their public trust doctrines in light of the particular histories and

the perceived needs and problems of each state.[5]

The concept that waters are a specific trust resource regulated by individual states is one long recognized by this Court. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-453 (1892). In fact, this Court has noted that, not only are navigable waters state-regulated trust resources, but also that a state might be limited in its ability to abdicate its regulatory obligation over these waters *Id*. *Cf. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Unlike other possibly traditional articles of commerce, water in many western states is constitutionally treated as a state owned resource or a publicly owned resource for the benefit of the state's citizens.[6]

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[5] Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 53 (2010). This Court, in fact, recently observed that areas subject to the equal footing doctrine may be allocated by state law "subject only to 'the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.'" *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)). *See also Massachusetts v. New York*, 271 U.S. 65, 89 (1926) ("[D]ominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged").

[6] *E.g.*, Wyoming Const., Art. VIII, Sec. 1. The Court in *Sporhase* dismissed public ownership as a fiction, apparently in light of water marketing, but the issues involving the transfer and marketing of water are quite complex, and require an acute

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In Louisiana, the Constitution expressly charges the Legislature with protecting the State's waters. *See* La. Const. Art. IX, Sec. 1 ("The natural resources of the state, including air and *water*, and the healthful, scenic, historic, and esthetic quality of the environment *shall be protected, conserved, and replenished* insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy" (emphasis added)). Although Arkansas' Constitution lacks an analogous provision, its public trust obligations towards water are embodied in various statutes and court decisions. *See e.g.,* Ark. Code Ann. §§15-22-201, *et seq*.; Ark. Code Ann. §§15-22-301, *et seq*.; *Anderson v. Reames*, 161 S.W.2d 957, 960-961 (Ark. 1942).

Indeed, Louisiana water law highlights why states should be afforded ample latitude to develop programs tailored to their unique hydrological needs. This fundamental natural resource has been recognized, since the early days of statehood, as a trust resource that the State is obligated to manage in the best interests of the people. In conjunction with Louisiana's Public Trust Doctrine, Louisiana's Civil Code identifies running water as a public trust resource. La. C.C. Art. 450 specifically states that "[p]ublic things that belong to the state are such as running waters, the waters and bottoms of natural

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appreciation for the effects of out-of-basin transfers, the impact and expectation of return flows, as well as a host of other issues.

navigable water bodies, the territorial sea, and the seashore." This concept in Louisiana law is derived directly from Roman roots. *See* INSTITUTES OF JUSTINIAN, Book II, Title I(1) (J.B. Moyle, trans., Oxford, 1911). Thus, the conceptual roots of a sovereign controlling its waters are ancient. While this provision does not imbue the State with any regulatory authority over the use of "running waters," it does vest ownership of the resource in the State as the trustee for its citizens.[7] And it is a resource that in Louisiana alone, like in many of the nation's western states, has been the object of more than a century of legislating.

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[7] Early versions of the Louisiana Civil Code provided for various riparian water rights through predecessors to current Code Articles 456, 657, and 658, by dictating how riparian landowners could use waters running through or adjacent to their property. The legal concepts from these Code articles were present in Louisiana at least as early as the Civil Code of 1870. In 1910, the Louisiana Legislature, through La. R.S. 9:1101, further clarified the public trust nature of the waters in the State by stating, in part, that, "[t]here shall never be any charge assessed against any person for the use of the waters of the state for municipal, industrial, agricultural or domestic purposes." Louisiana's regulation of its water resources has continued to the present day. As part of a comprehensive effort to ensure the protection of this resource from overuse, in 2010, Louisiana's Legislature passed Act 955 (as amended and reauthorized by Acts 2012, No. 261). This law sets forth a scheme for the regulation of consumptive uses of the State's surface waters and the jurisprudence requires that environmental impacts analyses of any such uses be undertaken. La. R.S. 30:961-963; *Save Ourselves, Inc. v. Louisiana Environmental Control Com'n*, 452 So.2d 1152 (La. 1984). Consequently, the fundamental principle that water is a public trust resource carries continued resonance today.

Consequently, pernicious and unnecessary consequences could flow from bootstrapping into the interpretative task a mechanistic application and expansion of *Sporhase* to Oklahoma's quite different circumstances and restrictions on exports. *See generally* Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. REV. 131, 137-139 (2011) (addressing *Sporhase* and the complexities of state water law); *see also* Davis & Pappas, *supra*.

Second, the canon undoubtedly is a powerful interpretative tool that should be used only when the norms it seeks to protect are at risk, and those norms are not present when the States and Congress cooperatively exercise authority under Article 1, Section 10. The canon often serves as a surrogate for protecting principles of federalism.[8] Justice Kennedy aptly noted that the clear statement rule is an interpretive

[8] Eskridge & Frickey, *Clear Statement Rules as Constitutional Lawmaking*, *supra*, at 612. *See Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004) ("federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires."). *E.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (whether act unmistakably abrogates states' Eleventh Amendment immunity); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995) (whether an area traditionally regulated by state and whether to apply federal law); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (plain statement rule when possible intrusion into state governmental functions).

device that "facilitate[s] a dialogue between Congress and the Court." *Boumediene v. Bush*, 553 U.S. 723, 738 (2008). The Court added:

> If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. If Congress amends, its intent must be respected even if a difficult constitutional question is presented.

553 U.S. at 738. The canon has been employed, for instance, to protect traditional state interests against possibly unintended federal intrusion. *Rapanos v. United States*, 547 U.S. 715, 738 (2006). *See also* Felix Frankfurter, *Some Reflections on the Readings of Statutes*, 47 COLUM. L. REV. 527, 539-540 (1947) (quoted in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)). This Court's longstanding presumption against preemption is similarly designed to ensure that congressional statutes are not construed so broadly as to supplant state legislation absent sufficient evidence of congressional intent to do so.[9] Conversely, the Court has sought to protect the values embedded in

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[9] *See Reigel v. Medtronic*, 552 U.S. 312, 334-335 (2008) (Ginsberg, J., dissenting); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431, 449 (2005); *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 788-789 (2000) (Ginsburg, J., concurring) (concluding that no clear statement exists subjecting states to *qui tam* suits by private parties).

the dormant Commerce Clause by employing a clear statement canon in instances *when Congress has exercised its Article 1, Section 8 powers*.[10] But petitioner conflates Congress' exercise of these powers with its exercise of the unique joint federal/state dynamic permitted *by Article 1, Section 10*.[11]

The cooperative federal/state effort that occurs when acting pursuant to Article 1, Section 10 not only does not implicate the norms the canon is designed to protect, the use of the canon in circumstances involving water compacts would turn the interpretative exercise on its head. After all, in the words of one of the nation's foremost pioneers in western water law, Dean Trelease, "[e]conomic protection is the very purpose of the compact." Frank J. Trelease, *State Water and State Lines: Commerce in Water Resources*, 56 U. COLO. L. REV. 347, 349 (1985).[12] Indeed, the Court

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[10] *White v. Mass. Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983) ("Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause. . . . "); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982) ("when Congress has not 'expressly stated its intent and policy' to sustain state legislation") (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427, 431 (1946)).

[11] *See generally* Dave Frohnmayer, *The Compact Clause, The Appointments Clause and the New Cooperative Federalism: The Accommodation of Constitutional Values in the Northwest Power Act*, 17 ENVTL. L. 767 (1987) (former state Attorney General for Oregon discussing how the exercise of authority under Compact Clause reflects efforts in cooperative federalism).

[12] The early development of the Compact Clause suggests it serves as Congress' ability to participate in any effort by states

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in *Granholm v. Heald*, 544 U.S. 460, 472-473 (2005), noted that the dormant Commerce Clause avoids forcing states to negotiate with one another "regarding favored or disfavored status for their own citizens." The Compact Clause serves precisely that negotiation function. The same is true for the surrounding clauses in Article 1, Section 10, which involve state activities that, absent congressional assent, run afoul of the authorities granted to Congress in Article 1, Section 8: states impliedly are precluded from engaging in certain activities with foreign nations under Article 1, Section 8, while Article 1, Section 10 affords Congress and states the express authority to allow states to enter into agreements with foreign nations.[13]

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that might otherwise interfere with Congress's powers or increase the political powers of the signatory states. Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 762 (2010). *See also* Abraham C. Wenfeld, *Comment: What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts*," 3 U. CHI. L. REV. 543 (1935-1936) (exploring the meaning of the terms). *E.g.*, *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) ("The application of the Compact Clause is limited to agreements that are '[d]irected to the formation of any combination tending to the increase of political power in the states, which may encroach or interfere with the just supremacy of the United States.'") (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). *See also U.S. Steel v. Multistate Tax Com'n*, 434 U.S. 452, 473 (1978) ("enhances state power *quoad* the National Government").

[13] *See* Hollis, *Unpacking the Compact Clause*, *supra*, at 785 (discussing states' ability to enter into foreign agreements and whether possibly limited by exclusive authority in the federal government); *see also* Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071 (2008) (discussing foreign agreement involving water transfers). *E.g.,* An Act to Authorize the

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Also, interstate compacts occur in a variety of areas, see David E. Engdahl, *Interstate Urban Areas and Interstate "Agreements" and "Compacts": Unclear Possibilities*, 58 GEO. L.J. 799, 800-801 (1970), and mechanistically applying substantive canons when interpreting the range of compacts and correspondingly potential constitutional issues could easily lead to unintended consequences. *See* Frohnmayer, *The Compact Clause*, *supra* (addressing Appointments Clause issue for Northwest Power Planning Council).

When in a compact, therefore, one state seeks to ensure that it can access the water resources in another state, it need not, as Petitioner suggests, include an explicit statement about the dormant Commerce Clause, but rather it includes a specific clause in the compact allowing it to do so. That is precisely what the parties did in the Colorado River Compact, when they included specific provisions allowing a state the ability to attempt to secure its allocation from within the borders of another state. Articles 11, 12, Upper Colorado River Basin Compact (Pub. L. No. 81-37, 63 Stat. 31 (1949)). Such explicit language is

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Construction and Maintenance of a Bridge Across the Niagara River, 16 Stat. 173 (June 30, 1870) (approving International Bridge Compact); *Canada Southern Ry. Co. v. International Bridge Co.*, 8 F. 190, 192 (D.C. N.Y. 1881) ("It was an inherent condition to the complete enjoyment of the grant . . . that congress should sanction the undertaking proposed, as congress was a necessary party to any compact which involved the cession of the sovereignty of the United States over that part of the Niagara river [which,] . . . is a public, navigable water, and under the power to regulate commerce. . . .").

absent from the Red River Compact and should not be supplied by implication.

CONCLUSION

This Court, therefore, should affirm the Tenth Circuit's decision in this matter, and uphold the clear language of the Red River Compact and its well-settled understanding by all the signatory states except Texas.

Respectfully submitted,

JAMES D. "BUDDY" CALDWELL
Louisiana Attorney General
RYAN M. SEIDEMANN
Counsel of Record
Assistant Attorney General
Chief, Lands & Natural Resources Section
seidemannr@ag.state.la.us
MEGAN K. TERRELL
Assistant Attorney General
Chief, Environmental Section
OFFICE OF THE LOUISIANA ATTORNEY GENERAL
1885 North Third Street
Baton Rouge, LA 70802
225.326.6085

Counsel for Amicus Curiae State of Louisiana

SAM KALEN
UNIVERSITY OF WYOMING
COLLEGE OF LAW
1000 East University Avenue
Laramie, WY 82071

Counsel for Amicus Curiae
State of Louisiana

DUSTIN MCDANIEL
Arkansas Attorney General
CHARLES L. MOULTON
Senior Assistant Attorney General
charles.moulton@arkansasag.gov
KENDRA AKIN JONES
Assistant Attorney General
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Ste. 200
Little Rock, AR 72201
501.682.5310

Counsel for Amicus Curiae
State of Arkansas

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