

No. 11-889

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In The Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT,  
A TEXAS STATE AGENCY,

*Petitioner,*

v.

RUDOLF JOHN HERRMANN ET AL.,

*Respondents.*

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

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**BRIEF FOR THE FORT WORTH CHAMBER OF  
COMMERCE, THE DALLAS REGIONAL CHAMBER,  
THE GREATER FORT WORTH REAL ESTATE  
COUNCIL, AND THE DALLAS CITIZENS COUNCIL AS  
*AMICI CURIAE* IN SUPPORT OF PETITIONER**

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### INTEREST OF *AMICI CURIAE*<sup>1</sup>

The Fort Worth Chamber of Commerce is a 501(c)6 membership association with more than 2,000 member businesses throughout North Texas (mostly in Tarrant County) and more than 4,500 individuals who participate in events, committees or leadership positions. The Fort Worth Chamber has consistently been recognized as one of the nation's top economic development organizations in the country. Through business-to-business marketing, educational events, economic development, workforce development and government advocacy, the Fort Worth Chamber assumes a leadership role in making Fort Worth, the 16th-largest city in the United States, a premier location in which to live, work, and do business.

The Dallas Regional Chamber is the area's leading membership-driven business organization committed to promoting economic prosperity by leading economic development, driving improvements in public education, influencing public policy, and catalyzing and advocating for regional partnerships. The Chamber works to ensure that the Dallas region will become the most economically prosperous region – and the most desirable place to live and work – in the United

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<sup>1</sup> No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Nor did any person or entity, other than *amici*, their members, or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

States. The Chamber is a not-for-profit organization comprised of businesses which represent all facets of the North Texas business community. Their range of members includes sole proprietors, small and medium-sized businesses, and large corporations.

The Greater Fort Worth Real Estate Council is made up of professionals involved in the commercial real estate industry. The mission of The Greater Fort Worth Real Estate Council is to be a unified voice for the commercial real estate industry, influencing action and supporting change to accomplish long-term job growth and enhance the quality of life in the Greater Fort Worth area.

The Dallas Citizens Council is a 75-year-old non-profit organization made up of 110 CEOs of the city's most prominent businesses who may join by invitation only. It has taken the lead in addressing issues affecting the long-term well being of the Dallas area, such as transportation, water resources, and a variety of civic projects.

Each of these *amici* is interested in this case because of the critical role water plays in the region's economy and the vital importance of nondiscriminatory access to adequate supplies of water to meet the area's growing needs.

## SUMMARY OF ARGUMENT

1. The Dallas-Fort Worth Metroplex is an economically vibrant and growing area that makes a tremendous contribution to the regional and national economies. It is home to a wide variety of industries and businesses that depend on reliable and reasonably priced access to water in order to function. If the region is unable to obtain reasonable access to water from nearby sources, and is forced to rely on more distant, unreliable, and expensive sources that may be unavailable in times of critical need, the impact on businesses and the economy will be devastating. The consequences for just so-called Region C, which encompasses the Metroplex, could, by 2060, be \$49 billion in lost earnings, \$3 billion in lost state and local taxes, and 545,000 lost jobs from a *single year* of drought without adequate water resources. And those consequences are substantial underestimates of the total harm that would result from failing to obtain adequate water supplies.

The critical need for water in the Metroplex region and the devastating consequences of a failure to obtain adequate supplies provide important context for interpreting the Compact and applying the Commerce Clause. It makes Respondent's interpretation of its supposed authority in this area utterly implausible and inconsistent with the rationale for entering into the Compact in the first place and the rationale underlying the Commerce Clause.

2. Even apart from the provisions of the Red River Compact expressly designed to provide Texas, and the Metroplex region in particular, with equal access to water from Reach II, Subbasin 5, the Commerce

Clause exists to eliminate the type of economic Balkanization reflected here and to prevent the hoarding of goods and resources that are essential to the efficient functioning of an integrated national economy. Overt discrimination against exports used to allow businesses to make efficient production decisions squarely offends the anti-discrimination principles this Court has long held to be embodied in the Commerce Clause. Such discrimination is subject to strict scrutiny and must be narrowly tailored, with the burden on the party imposing such discriminatory restrictions to satisfy the elements of such scrutiny. Unlike ordinary state laws subject to lesser scrutiny, laws subject to strict scrutiny are not entitled to a presumption of constitutionality. Rather, when a State engages in overt discrimination against interstate commerce the presumption is precisely the opposite. Contrary to the reasoning of the court of appeals below, any ambiguous provisions or commentary in the Compact that might be read to endorse state control over water resources within its territory are not bolstered by any presumption favoring state laws, but are severely undermined by the strict scrutiny and contrary presumption arising from overt discrimination against interstate commerce. Nothing in the Compact clearly and unmistakably authorizes conduct that would otherwise be a clear violation of the Commerce Clause.

## ARGUMENT

### I. **Non-Discriminatory Access to Water Is Essential to the Business Environment and Economy in Texas and the Nation.**

*Amici* agree with Petitioner that Texas and Petitioner have a proper and lawful expectation under the Compact of access to water allocated to Texas, wherever located. Rather than rehash Petitioner's compelling legal arguments, *amici* will focus on the consequences of disrupting that expectation under the Compact and the role of the Commerce Clause in prohibiting Oklahoma's discrimination against interstate commerce in water.

As Petitioner and other *amici* have noted, The Dallas-Fort Worth Metroplex (which Petitioner Tarrant serves), is a large, populous, economically vibrant, and growing area that has a significant need for water. Its projected requirements for water exceed its current and projected supply, and consequently new, reasonably priced, sources of water are a critical priority. Petitioner's plan to import water from Oklahoma is a significant partial solution to this problem. But Oklahoma's discriminatory restriction on the export of water stands as a substantial obstacle to meeting the water needs of the Metroplex. At a minimum, those restrictions on interstate commerce in water will make it more difficult and more expensive for Tarrant and the Metroplex to obtain the water they need, and it may well make it impossible for the Metroplex to meet all its projected needs in any economically reasonable manner.

While others have discussed the need for water and the consequences of shortage in the Metroplex in general, this brief will focus on the economic consequences of restricting the water resources available to the Metroplex. In short, without access to adequate, reliable, and reasonably priced supplies of water, economic development and growth in the Metroplex will falter, businesses will stay away or leave, jobs will be lost, state and federal tax revenues will decline, and the economy will become more Balkanized and inefficient. Those results are at odds with the purposes behind the Red River Compact, with the purpose and function of the Commerce Clause, and with common sense and sound public policy.

**A. The Dallas-Fort Worth Metroplex Makes a Tremendous Contribution to the Regional and National Economies.**

To place this case in perspective and to appreciate the consequences of denying the Petitioner access to adequate supplies of water, it helps to understand how productive the Metroplex is when it does have such access. As explained by the Texas Water Development Board in the course of analyzing the State's water needs, the "Dallas-Fort Worth metropolitan area is centrally located in the region, and its surrounding counties are among the fastest growing in the state. Major economic sectors in the region include service, trade, manufacturing, and government." Texas Water Dev. Bd., *Water for Texas 2012 State Water Plan* at 44 (Jan. 2012) (available at [http://www.twdb.state.tx.us/publications/state\\_water\\_plan/2012/2012\\_SWP.pdf](http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf)). Based on numerous factors that make the area a favorable business envi-

ronment, the Metroplex has produced substantial economic growth when it has had access to sufficient supplies of water.

Between 2001 and 2010, the GDP of the Metroplex rose nearly 50%, from roughly \$250 billion in 2001 to \$374 billion in 2010.<sup>2</sup> To put that in context, the GDPs for Texas and the United States in 2010 were roughly \$1.223 trillion and \$14.508 trillion, respectively.<sup>3</sup> The Metroplex thus accounted for approximately 30.58% of the Texas GDP and 2.58% of the national GDP in 2010. And those numbers have continued to improve to 33% and 2.88% of the Texas and United States GDPs in 2011, respectively.<sup>4</sup>

In addition to generating substantial GDP, employment in the Metroplex has grown from 2.737 million people in 2001 to 3.004 million people in 2010.<sup>5</sup>

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<sup>2</sup> *GDP of the Dallas–Fort Worth metroplex from 2001 to 2010*, STATISTA (available at <http://www.statista.com/statistics/183837/gdp-of-the-dallas-fort-worth-metroplex/>).

<sup>3</sup> *See GDP by State* (available at [http://www.usgovernmentspending.com/gdp\\_by\\_state](http://www.usgovernmentspending.com/gdp_by_state)).

<sup>4</sup> *See, e.g., The Fort Worth Chamber of Commerce 83<sup>rd</sup> Legislative Session Positions* at 9 (2013) (“The Dallas-Fort Worth metropolitan area \* \* \* produces over 33% of the state’s Gross Domestic Product”) (available at <http://www.fortworthchamber.com/am-site/media/2013-state-legislative-positions.pdf>); *GDP by State, supra* (in 2011 Texas GDP was \$1.308 trillion and U.S. GDP was \$14.959 trillion). Texas thus constituted 8.74% of the U.S. GDP in 2011, and the Metroplex constituted 33% of that amount, or 2.88% of U.S. GDP in that year.

<sup>5</sup> Texas Workforce Commission, *Texas Labor Market Information* (as of December 2001 and 2010) (available at <http://www.tracer2.com/cgi/dataanalysis/AreaSelection.asp>).

At present, the Metroplex employs approximately 3.148 million people (as of December 2012), or 26.5% of employment in Texas (11.859 million people) and 2.2% of employment in the U.S (143.060 million people).<sup>6</sup>

The significant economic activity and employment in the Metroplex not only provide support for those who live and work in Texas, they also enable them to purchase goods and services from around the country – contributing to economic growth elsewhere – and to pay substantial taxes to the state and federal governments.

In short, with access to the resources it needs, the Dallas-Fort Worth Metroplex is a vibrant and powerful economic engine producing benefits not just on the local level, but regionally and nationally as well.

### **B. Access to Water Is a Critical Requirement for Economic Growth.**

Central to the past and continued economic success of the Dallas-Fort Worth Metroplex is the availability of reliable and cost-effective water supplies to meet the needs of businesses and residents. “Indeed, the dramatic population and employment growth enjoyed by the Metroplex over the past several decades would not have occurred absent an abundant and re-

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?tableName=Labforce) (selecting MSA 200 defined, Dallas-Fort Worth-Arlington, 2001 and 2010, December, Not Seasonally Adjusted, Employment).

<sup>6</sup> Texas Workforce Commission, *Texas Labor Market Review*, at 10 (Jan. 2013) (available at [http://www.tracer2.com/admin/uploadedPublications/2075\\_TLMR-January13.pdf](http://www.tracer2.com/admin/uploadedPublications/2075_TLMR-January13.pdf)).

liable supply of fresh water for residential and commercial uses.” Bernard L. Weinstein and Terry L. Clower, *An Overview of the Dallas-Fort Worth Area’s Long-Term Water and Transportation Needs* at 1 (North Texas Future Fund, Mar. 2004) (available at <http://digital.library.unt.edu/ark:/67531/metadc30398/m1/>).

Water is an important requirement of the operations of a wide range of businesses and industries, including: manufacturers such as “food processors, paper mills, electronics manufacturers, aircraft assemblers, and petrochemical refineries”; mining companies, such as “coal, oil and gas, and aggregate producers”; steam-electric producers, such as “coal and natural gas-fired and nuclear power generation plants”; livestock producers, such as “feedlots, dairies, poultry farms, and other commercial animal operations; and irrigation for “commercial field crop production.” *2012 State Water Plan, supra*, at 135. Commercial and institutional users within municipalities also contribute significantly to water demand. *Id.* at 134.

Numerous well-known companies and industries rely on substantial quantities of water to run their businesses. The Miller Brewing Company in Fort Worth and Texas Instruments in Dallas are two of the largest business consumers of water in the Metroplex. “Both industries need a lot of water to produce their products.” BJ Austin, *KERA ‘Thirsty’ Series: Who Uses the Most Water in Dallas-Fort Worth?*, KERA NEWS, May 14, 2009 (available at <http://keranews.org/post/ker-thirsty-series-who-uses-most-water-dallas-fort-worth>). Miller Brewing uses nearly a billion gallons a year and Texas In-

struments consumes more than two billion gallons. As TI's environmental and energy manager explained to a reporter, "it takes a lot of water to make computer chips." *Id.*<sup>7</sup>

And while the business community is certainly able and willing to conserve in times of shortage, a still-substantial demand for water cannot be avoided. *See* Dave Montgomery, *Rising concern: Water talk makes splash in Austin*, FORT WORTH BUSINESSPRESS, Dec. 22, 2012 ("Many major businesses in the Metroplex have curtailed their water usage through conservation measures but nevertheless must use sizeable amounts of water to carry out their operations.") (available at <http://www.fwbusinesspress.com/main.asp?SectionID=13&subsectionID=38&articleID=24826>). As described by a spokesman for Lockheed Martin Aero-

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<sup>7</sup> *See also* Dave Montgomery, *Rising concern: Water talk makes splash in Austin*, FORT WORTH BUSINESSPRESS, Dec. 22, 2012 ("Natural gas producers in the Barnett Shale also depend heavily on water for hydraulic fracturing") (available at <http://www.fwbusinesspress.com/main.asp?SectionID=13&subsectionID=38&articleID=24826>); Jada Brazell, *Water supply an increasing concern for Dallas-Fort Worth area*, PEGASUS NEWS, May 9, 2012 ("In about 100 years, the [NRDC] report warns that the agricultural sector will require 50 percent more water due to the possible climate change.") (available at <http://www.pegasusnews.com/news/2012/may/09/water-supply-increasing-concern-dallas-fort-worth/>).

nautics in Fort Worth, “‘an adequate, safe and secure supply of water in North Texas [is important] to meet our future needs and for economic development in the region.’” *Id.* Indeed, while all parts of the region are doing their part to conserve water, because the area has significant commercial and industrial activities, it requires more water than areas with less business activity. While that may mean “‘that North Texas needs more water than the rest of the state due to the heavy concentration of manufacturing here, [that] is a good thing in terms of jobs and the regional economy,’” explained the Lockheed spokesman. *Id.*<sup>8</sup>

In addition to the importance of available water for businesses already in the Dallas-Fort Worth Metroplex, access to water is an important consideration for new businesses that could benefit from the

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<sup>8</sup> Any suggestion that the Metroplex is profligate or wasteful in its water consumption thus misunderstands the consumption dynamic. Substantial commercial and industrial use may make the per-capita consumption appear high, but those figures are not a fair reflection of water usage by the non-commercial residents of the area. Notwithstanding the greater water needs created by strong economic growth and activity, both Petitioner and the Metroplex in general are stepping up their efforts to become even more efficient in their water use. *See, e.g.*, Tarrant Regional Water District, *Wetlands Overview* (describing innovative wetlands water reuse program) (available at <http://www.trwd.com/Wetlands>); Tarrant Regional Water District, *Water Conservation and Drought Contingency Plan* (Apr. 2009) (describing extensive conservation efforts) (available at [http://www.savetarrantwater.com/Shared%20Documents/TRWDconservation\\_drought\\_plan\\_final\\_April\\_2009.pdf](http://www.savetarrantwater.com/Shared%20Documents/TRWDconservation_drought_plan_final_April_2009.pdf)). But improved efficiency will only go so far, and additional supplies of water will remain a critical necessity.

advantages and efficiencies of the Metroplex. But without assurances of access to water, companies may be forced to seek out less advantageous and efficient alternative locales. *See* Montgomery, *Rising concern, supra* (according to the Texas Association of Business, meeting water supply needs “‘is essential’” for Texas “‘to continue to attract economic opportunities’”).

One essential element for business investment and economic growth is confidence that resources such as water will be available when they are needed. Few businesses are eager to invest substantial sums on new or expanded operations if the future availability of a critical resource is in doubt. The very notion of an integrated, efficient, and fluid national economy requires the freedom to move such critical resources to where they are needed. Because building the infrastructure to ensure available water from new sources has a long lead-time, even for nearby sources such as Oklahoma, it is essential that such resources, and the plans to bring them where they are needed, be in place well in advance if businesses are to have the confidence they need to make further investments in the area. As Petitioner’s director has explained, “policy-makers ‘can’t afford to tarry’ in mapping the next water resource options beyond 2030 and need to have firm decisions in place by 2015.” Montgomery, *Rising concern, supra*. This Court’s decision thus will have a substantial impact on the ability of policy-makers to pursue, in a timely manner, the most efficient and rational option for increasing the water resources available to the Metroplex and thereby to

provide the confidence needed to sustain and increase economic growth in the area.

**C. The Economic Consequences of Denying the Region Access to Needed Water Supplies Will Be Devastating.**

Given the substantial role water plays in the economic activity of the Metroplex, it is hardly surprising to note that the *lack* of access to sufficient water would be destructive to the economy. Indeed, failure to meet water supply needs could lead to “serious social, economic, and environmental consequences.” *2012 State Water Plan*, at 175. For example, drought-induced water shortages could have “overwhelming negative implications,” including cutbacks in “economic activity in industries heavily reliant on water, which could result in not only job loss but a monetary loss to” the state and local economies. *Id.* Indeed, it is no exaggeration to suggest, as many North Texas leaders have, that the area’s “economic viability depends on” ensuring adequate supplies of water.<sup>9</sup>

Beyond such general descriptions of the danger from inadequate water resources, the Texas Water Development Board has studied the more detailed economic consequences of a failure to meet water needs in Texas and in the Metroplex and surrounding areas, known as Region C. Based on economic modeling of the single-year consequences of a drought

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<sup>9</sup> Matthew Tresaugue, *Texas water supply for the future is uncertain*, CHRON, Nov, 12, 2011 (available at <http://www.chron.com/news/houston-texas/article/Where-s-tomorrow-s-water-2266277.php>).

where supplies were insufficient to meet the State's needs, "Texas businesses and workers could lose approximately \$11.9 billion in income in 2010, with that total increasing to an estimated \$115.7 billion by 2060. Losses to state and local business taxes associated with commerce could reach \$1.1 billion in 2010 and escalate to roughly \$9.8 billion in 2060." *2012 State Water Plan*, at 183. Furthermore, failure to meet the State's water needs could result in "an estimated 115,000 lost jobs in 2010 and 1.1 million in 2060" as the result of a single-year drought. *Id.*<sup>10</sup>

While the entire State thus faces serious consequences if its water needs go unmet, Region C – which includes Tarrant County and the Dallas-Fort Worth Metroplex – will face an especially severe economic impact. Thus, in Region C alone, the annual losses from inadequate water supplies during a drought would escalate from a loss of \$2.34 billion in income in 2010 to \$49.72 billion in 2060. State and local annual loss of business taxes during a drought would escalate from \$130 million to \$3.06 billion during that period. And annual loss of jobs during a drought would rise from 23,808 full- and part-time jobs lost to 545,676 jobs lost during that same period. *2012 State Water Plan*, at 184 (Table 6.5).

The disproportionate impact of unmet water needs on the Dallas-Fort Worth Metroplex and its neighbors

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<sup>10</sup> "[E]stimated socioeconomic impacts are point estimates for years in which water needs are reported (2010, 2020, 2030, 2040, 2050, and 2060)." *2012 State Water Plan*, at 183. Monetary figures are given in constant 2006 dollars. *Id.* The unadjusted dollar loss obviously would be considerably higher.

can be seen by comparing the state and regional losses and discovering that Region C would account for a large and growing percentage of the State's annual loss from a drought, rising from nearly 20% of the potential lost earnings to 43% of the lost earnings by 2060. Similarly, Region C would account for 12% of the loss in business taxes, rising to 31% of the loss over the same period. And it likewise would account for 21% of the loss in jobs, rising to 50% of the loss over the same period.

More sobering still, these figures do not cover all the likely economic consequences of an inadequate supply of water for the Metroplex and Region C. For example, the measure of economic loss used in the modelling only looks to a limited set of impacts on the companies themselves and their suppliers. It did not include "impacts on businesses that purchase the sector's final product. Thus, the measured impacts of a given water shortage likely represent an underestimate of the losses to a region's economy." *2012 State Water Plan* at 183. And the estimated losses only describe a single-year drought. But "if drought conditions were to recur, the duration would likely exceed a single year and possibly cause actual impacts to the state that would exceed the estimates included in the 2012 State Water Plan." *Id.*

The estimates of economic harm likewise did not include the potential consequences to cities that have issued bonds to finance improvements to their water-related infrastructure. Such bonds are often paid for by the fees municipalities charge for water, and a lack of supply of water could jeopardize those bonds. Indeed, "[c]redit ratings agencies may not have taken

drought issues into account at the level that they should. Extreme disruptions of the water supply of any city would have severe financial consequences.”<sup>11</sup>

And finally, failure to secure adequate supplies of water will cripple the ability of the region to attract additional investment and businesses, stifling future economic growth and stunting long-term progress. A “lack of reliable water supply may bias corporate decision-makers against expanding or locating their businesses in Texas.” *2012 State Water Plan* at 175. Inadequate “future water supplies could chase away prospective out-of-state industries \* \* \*. ‘If we don’t have secure water sources for the years ahead,’ said Matt Geske, director of government affairs for the Fort Worth Chamber of Commerce, ‘they could look elsewhere.’” Montgomery, *Rising concern, supra*.

As all of the above demonstrates, the availability of water is an essential component to productive economic activity and the ability of businesses to locate themselves in areas having efficiencies and synergies conducive to economic growth. And the lack of adequate supplies of water is likewise destructive to such efficiencies, synergies, and growth. In drafting the Red River Compact, the signatories and Congress were no doubt fully aware of the importance of this resource for growth and wrote an agreement designed to ensure access to adequate supplies of water. Read with such background in mind, and conscious of the

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<sup>11</sup> Charles B. Stockdale, Michael B. Sauter, Douglas A. McIntyre, *The Ten Biggest American Cities That Are Running Out Of Water*, 24/7 WALL ST., Nov. 1, 2010 (available at [http://finance.yahoo.com/news/pf\\_article\\_111186.html](http://finance.yahoo.com/news/pf_article_111186.html)).

severe harms that will result from allowing Oklahoma to hoard water contrary to the language and purposes of that Compact, the decision below is both legally erroneous and economically disastrous and should be reversed.

## **II. The Commerce Clause Requires Virtually *Per Se* Invalidation of Oklahoma’s Facially Discriminatory Anti-Export Rules.**

In addition to the language of the Compact, which ensures Texas access to its equal share of the water in Reach II, Subbasin 5, the dormant Commerce Clause likewise forbids Oklahoma’s discriminatory prohibition on the export of water. As Petitioner’s brief explains, Oklahoma law concerning water use, appropriation, and sale is facially discriminatory against other States and their citizens. *See* Pet. Br. at 15-19 (describing extensive discrimination against export of water); *id.* at 19 (“The practical upshot of this statutory scheme is a categorical prohibition against permits to appropriate Oklahoma surface water for use in another State.”).

The court of appeals rejected Petitioner’s Commerce Clause claim, however, because it deemed the Compact to authorize not merely constitutionally unproblematic rules governing water usage, but also discriminatory laws that otherwise plainly violate the Commerce Clause. Pet. App. 24a-28a. It reached this conclusion without identifying any language in the Compact specifically authorizing such discrimination, allowing a signatory-State to prohibit exports, or exempting the signatories from the otherwise applicable rules under the Commerce Clause. Rather, it cobbled

together the requisite supposedly clear statement of congressional consent from the “broad,” and notably non-specific, language permitting each State to “‘use the water allocated to it by this Compact in any manner deemed beneficial by that state,’” to “‘freely administer water rights and uses in accordance with the laws of that state,’” and providing that “[n]othing in this Compact shall be deemed \* \* \* to interfere within its boundaries the appropriation, use, and control of water.’” *Id.* at 24a-25a (quoting selective excerpts of Compact language).

While Petitioner and other *amici* discuss in greater detail the holdings and application of this Court’s decisions in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), and *South-Central Timber v. Wunnicke*, 467 U.S. 82 (1984), and the failure of the Compact to provide the unambiguous authorization from Congress required to avoid a Commerce Clause violation, this brief will make just a few supplemental points regarding the purposes of the Commerce Clause and the standards to be used in evaluating the constitutional claim and defense in this case.

First, the fundamental purpose of the Commerce Clause is to avoid the “economic Balkanization” that plagued the States under the Articles of Confederation. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). During that earlier period, “each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents,” resulting in a “conflict of commercial regulations, destructive to the harmony of the States.” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring in the judgment). “If there was any one

object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.” *Id.* at 231.

Oklahoma’s anti-export rules are virtually paradigmatic examples of what the Commerce Clause was intended to remedy. The very point of adopting the Commerce Clause was to encourage economic union, unobstructed by the barriers that prevented the efficient movement of goods and resources to where the market could make best use of them. While States are certainly expected to engage in healthy competition within the market, they are barred from such unhealthy – and conflict-producing – competitive tactics as monopolizing the inputs of production or discriminating against buyers and sellers from other States. “By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent.” *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577-78 (1997).

On its face, Oklahoma’s anti-export regime is simply “economic protectionism,” *id.*, and a “naked restraint on export” of water, *Wunnicke*, 467 U.S. at 99. Nothing about Oklahoma’s scheme suggests any genuine concern with water shortages or the health of its citizens in the relevant part of the State. As Petitioner has noted, even Oklahoma recognizes that water in this part of Oklahoma is abundant, and many multiples of the volume of water sought by Petitioner are left to flow downstream unused and discharge into the Gulf of Mexico. Pet. Br. 14. Under current and

foreseeable circumstances in Reach II, Subbasin 5, therefore, there is not even a colorable claim that Oklahoma's anti-export rule involves a regulation of "the use of water in times and places of shortage for the purpose of protecting the health of its citizens." *Sporhase*, 458 U.S. at 956.

Lacking any colorable need for the water to protect the public health, one might infer that Oklahoma is hoarding its water resources as a means of dampening the attraction to businesses of its neighboring State and perhaps luring some of those businesses to Oklahoma with the prospect of a greater availability of water. But that sort of manipulation of the market to discourage businesses from locating where they might otherwise operate more efficiently is in fundamental conflict with the Commerce Clause. This "Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.'" *Wunnicke*, 467 U.S. at 100 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)) (citations omitted); *see also id.* ("the Commerce Clause forbids a State to require work to be done within the State for the purpose of promoting employment"). That Oklahoma may be seeking to draw businesses away from neighboring States through protectionist restrictions on water access rather than by more direct requirements of home-state production does not change the fundamental nature

of the barrier to commerce, and may well make it worse.

Because Oklahoma's anti-export rule does precisely what this court has held the Commerce Clause forbids – it “ ‘bloc[ks] the flow of interstate commerce at a State's borders,’ ” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) – it should be subject to strict scrutiny and invalidated.

Second, any potential concerns with the provenance of the “dormant” aspect of the Commerce Clause are unwarranted in this case. As even such a severe critique as Justice Scalia has explained, while he is unwilling to expand the dormant Commerce Clause “beyond its existing domain,” *stare decisis* supports the continued application of this Court's long-standing jurisprudence “(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.” *General Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring). Oklahoma's anti-export regime involves precisely such facially discriminatory laws. This Court has “consistently \* \* \* held that the Commerce Clause \* \* \* precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom.” *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982). Because Oklahoma's anti-export regime facially discriminates against interstate commerce and is indeed indistinguishable from

past precedent, the full force of this Court's precedents should continue to apply.

Finally, in evaluating Oklahoma's claim of congressional consent to its discriminatory restrictions on water exports, there is no room for any presumption of validity or presumption against preemption. *Cf.* Pet. App. 34a-35a (applying presumption against preemption to the Compact claim). Unlike general challenges claiming that state law is preempted, or violates some constitutional provision that affords the states considerable leeway, under this Court's long-standing dormant Commerce Clause jurisprudence, "[s]tate laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)). While there are some potential defenses against such invalidity, in "assessing respondents' arguments, [this Court] would [apply its] 'strictest scrutiny.'" *Camps*, 520 U.S. at 581 (quoting *Hughes v. Oklahoma*, 441 U.S., at 337). "This is an extremely difficult burden, 'so heavy that "facial discrimination by itself may be a fatal defect."'" *Id.* at 582 (quoting *Oregon Waste*, 511 U.S. at 101, in turn quoting *Hughes*, 441 U.S. at 337).

Such strict scrutiny is entirely incompatible with any presumptions of constitutionality or against preemption. As an initial matter, once a State engages in conduct that facially violates the Commerce Clause, it effectively forfeits any such presumptions by having so clearly crossed the line of what is constitutional. Having erected "an explicit barrier to com-

merce between the two States,” Oklahoma now “bears the initial burden of demonstrating a close fit between the [restriction] and its asserted local purpose.” *Sporhase*, 458 U.S. at 957 (citing *Hughes*, 441 U.S. at 336, and *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951)). Such burden-shifting is the precise antithesis of any presumption in favor of state laws.

Furthermore, this Court has frequently struck down facially discriminatory laws without excessive deference to the purported justifications for such discrimination. *See Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (“Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry”). That, too, is inconsistent with any claimed favorable presumption.

The defense of congressional authorization, in particular, is likewise incompatible with any favorable presumptions. As Petitioner explains, Pet. Br. 48, any claimed congressional consent must be expressed in clear and unmistakable terms. Such a clear-statement rule once again illustrates a change in the balance and the presumptions, and has no room for a favorable presumption to be applied to ambiguous congressional language that does not satisfy the rigorous clear-statement requirement. *Cf. Wunnicke*, 467 U.S. at 91-92 (“The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine.”).

The mere existence of a compact does not change this deep skepticism against laws that facially and

explicitly discriminate against interstate commerce. That a clearly worded compact provision approved by Congress *could* provide the requisite authorization for laws that discriminate against interstate commerce does not mean that it should be *presumed* to have done so. That reasoning is circular and assumes its conclusion. Any federal law could provide authorization for conduct that would otherwise violate the Commerce Clause, but this Court certainly does not presume such authorization in the name of federalism. Rather, it requires clear language that a statute or other claimed authorization in fact waived otherwise applicable Commerce Clause restrictions. The fact that the authorization claimed here involves a compact makes no difference whatsoever. Indeed, if anything, the fact that Oklahoma claims authority that plainly acts to the severe detriment of other signatories, and contrary to the foundational and integrative aspect of Our Federalism, makes it even less likely that that was what was intended or agreed to by the signatories, much less approved by Congress.<sup>12</sup>

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<sup>12</sup> That one or several States might bear greater burdens under a federal statute is far less improbable than the suggestion that one or more States *agreed* to such unlikely burdens. Particular States might not be able to block federal legislation despite their objection to the burdens imposed thereby. But even a single State has complete power to block a compact containing such unfavorable terms or restrictions: it need only refuse to sign. The notion that the water-poor States in the Compact agreed to grant the water-rich States the power to discriminate against exports and to have Congress waive otherwise existing constitutional protections against such discrimination simply is not credible. Thus, far from creating a presumption in favor of state authority to discriminate

Indeed, the language of the Compact here is a particularly inapt basis for reversing the usual presumptions and burdens that come with strict scrutiny. For example, the savings clause providing that “[n]othing 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 \* \* \* not inconsistent with its obligations under this Compact,” Compact § 2.10, is notably limited in its language. It does not authorize or endorse *any* State water regulation that does not conflict with the Compact, but rather provides that the Compact *itself* shall not implicitly invalidate state laws unless they are contrary to the Compact’s terms. Such language says nothing regarding the validity of state laws that are contrary to some *other* supervening prohibition – even a prohibition that Congress has the power to waive.

Under Respondent’s theory, Congress has given Oklahoma unrestricted power to control water use within the State subject only to the express terms of the Compact, and not bound by otherwise applicable Commerce Clause restrictions. By that same reasoning Oklahoma’s power would likewise be unrestricted by other supervening authority within Congress’s purview, such as federal statutes that limit Oklahoma’s conduct with regard to water use. Oklahoma thus might just as easily claim the authority to drain wetlands located within the relevant reaches of the

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against commerce, the fact that a Compact is involved here would strengthen the contrary presumption that Congress (and the water-poor signatories) did not agree to any such power.

Compact, notwithstanding that such conduct might be contrary to federal environmental law.

That, of course, is absurd. But the suggestion that free use and the lack of any implied preemption of Oklahoma's water laws exempts the State from other federal laws as well is no less absurd than the suggestion that it exempts the State from the core restrictions of the Commerce Clause. Just as the language does not expressly authorize Oklahoma to violate other federal statutes, it does not expressly authorize it to violate federal constitutional constraints, regardless whether Congress *could have* so provided. The relevant point is that Congress did not so provide in anything remotely resembling the clear and unambiguous language required by this Court's precedents.

### CONCLUSION

For the reasons above, this Court should reverse the decision below.

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Respectfully submitted,

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Dated: February 26, 2013