No. 11-889

In the Supreme Court of the United States

TARRANT REGIONAL WATER DISTRICT, PETITIONER

v.

RUDOLF JOHN HERRMANN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

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QUESTIONS PRESENTED

The Red River Compact (the Compact) apportions the water in the Red River Basin among the States of Arkansas, Louisiana, Oklahoma, and Texas. Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305. To accomplish that apportionment, the Compact divides the Red River Basin into five reaches, and it further divides each reach into subbasins. Compact § 2.12, 94 Stat. 3307; Art. IV-VIII, 94 Stat. 3308-3315. For the water in Reach II, Subbasin 5, the Compact provides:

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

§ 5.05(b)(1), 94 Stat. 3311. The questions presented are as follows:

1. Whether Section 5.05(b)(1) of the Compact allows petitioner to divert water included in Texas's apportionment for Reach II, Subbasin 5 from within Oklahoma, thereby superseding Oklahoma statutes that would prohibit Texas water users from accessing that water.

2. Whether the Commerce Clause prohibits respondents from enforcing Oklahoma statutes that would prevent petitioner from accessing Texas's apportionment of Reach II, Subbasin 5 water from within Oklahoma.

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INTEREST OF THE UNITED STATES

This case presents the questions (1) whether the Red River Compact allows petitioner to divert water included in Texas's apportionment for Reach II, Subbasin 5 from within Oklahoma, and (2) whether the Commerce Clause prohibits respondents from enforcing Oklahoma statutes that would prevent petitioner from doing so. The Red River Compact was negotiated with the permission of Congress and was subsequently approved by Congress. See Act of Aug. 11, 1955, ch. 784, 69 Stat. 654; Act of Dec. 22, 1980, Pub. L. No. 96-564, 94 Stat. 3305. The United States has a substantial interest in the proper interpretation of interstate compacts apportioning water. At the Court's invitation, the United States filed a brief amicus curiae at the petition stage of this case.

STATEMENT

1. The Red River flows from west to east across the north Texas panhandle, forms the boundary between Oklahoma and Texas and then between Arkansas and Texas, then flows through Arkansas and finally into Louisiana, where it joins the Atchafalaya and Mississippi Rivers. See Pet. App. 52a. In 1955, Congress granted permission to Arkansas, Louisiana, Oklahoma, and Texas to negotiate an agreement apportioning the water in the Red River Basin among those States. Act of Aug. 11, 1955, ch. 784, 69 Stat. 654. In 1978, the States entered into the Red River Compact, which Congress approved in 1980. Act of Dec. 22, 1980 (Compact), Pub. L. No. 96-564, 94 Stat. 3305. One purpose of the Compact is to "provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries." § 1.01(b), 94 Stat. 3305. To accomplish that apportionment, the Compact divides the Red River Basin into five reaches, and it further divides each reach into subbasins. § 2.12, 94 Stat. 3307; Art. IV-VIII, 94 Stat. 3308-3315; see Pet. Br. App. (map depicting the five reaches and the five subbasins in Reach II). The water in each subbasin is allocated to one or more of the compacting States. Art. IV-VIII, 94 Stat. 3308-3315.

Section 2.01 of the Compact provides that "[e]ach Signatory State may use the water allocated to it by this Compact in any manner deemed beneficial by that state." 94 Stat. 3306. That section further provides that "[e]ach state 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." *Ibid.* Section 2.10(a) provides 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, or quality of water, not inconsistent with its obligations under this Compact." 94 Stat. 3306-3307.

2. a. Petitioner is a Texas state agency that provides water to north-central Texas, including Fort Worth, Arlington, and Mansfield. Pet. App. 4a. In 2007, in an effort to procure water for the growing needs of its service area, petitioner applied to the Oklahoma Water Resources Board (OWRB) for permits to appropriate water at three locations in Oklahoma.[1] At issue in this case is petitioner's application for a permit to appropriate 310,000 acre feet per year of surface water from the Kiamichi River, a tributary of the Red River that is located in Oklahoma. 2 J.A. 8-26 (permit application). Petitioner sought permission to divert water from the Kiamichi River above where it discharges into the main stem of the Red River. According to petitioner, the water becomes "irreversibly degraded in quality beyond potable beneficial purposes" by salinity in the main stem. C.A. App. 58 (petitioner's motion for a temporary restraining order); 2 J.A. 2 (affidavit of Dan Buhman); Pet. Br. 6. The Kiamichi River originates in Reach II, Subbasin 1 and then flows south into Reach II, Subbasin 5. The water in Reach II, Subbasin 1 is apportioned to Oklahoma, which "shall have unrestricted use thereof." § 5.01(b), 94 Stat. 3310. The proposed point of petitioner's diver-

[1] Oklahoma law provides that anyone "intending to acquire the right to the beneficial use of any water" located in Oklahoma, including any "state or federal governmental agency, or subdivision thereof," must apply to OWRB for a permit. Okla. Stat. Ann. tit. 82, § 105.9 (West 1990).

sion is downstream on the Kiamichi, in Reach II, Subbasin 5. See Pet. Br. App.

The Compact defines Reach II, Subbasin 5 as "th[e] portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II." § 5.05(a), 94 Stat. 3311. That geographic area includes portions of Arkansas, Oklahoma, and Texas. Pet. App. 36a, 52a. The "tributaries included in the other four subbasins," and thereby excluded from Subbasin 5, are generally the portions of tributaries flowing into that stretch of the main stem that are "above existing, authorized and proposed last downstream major damsites" on those tributaries. See §§ 5.01(a), 5.02(a), 5.03(a), 5.04(a), 94 Stat. 3310-3311.[2] Thus, Subbasin 5 is the portion of the Red River watershed below those damsites on both sides of the main stem of the river between Denison Dam and the Arkansas-Louisiana boundary.

As relevant here, the water in Reach II, Subbasin 5 is apportioned as follows:

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

Compact § 5.05(b)(1), 94 Stat. 3311.[3] When the Red River's flow is below 3000 cubic feet per second at the Ar-

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[2] The specific damsites are identified in each section.

[3] The Compact defines the term "undesignated water" as "all water released from storage other than 'designated water.'" § 3.01(l), 94

kansas-Louisiana boundary, Arkansas, Oklahoma, and Texas must "allow to flow into the Red River for delivery to * * * Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5." § 5.05(b)(2), 94 Stat. 3311. When the flow at the Arkansas-Louisiana boundary falls below 1000 cubic feet per second, Arkansas, Oklahoma, and Texas must "allow a quantity of water equal to all the weekly runoff originating in subbasin 5 and all undesignated water flowing in subbasin 5 within their respective states to flow into the Red River." § 5.05(b)(3), 94 Stat. 3311-3312. When the flow at Index, Arkansas is below 526 cubic feet per second, Oklahoma and Texas must "allow a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 within their respective states to flow into the Red River." § 5.05(c), 94 Stat. 3312.[4]

b. On the same day that petitioner filed its permit applications, petitioner brought this suit against the members of the OWRB, respondents here, in federal district court in Oklahoma.[5] Petitioner sought declara-

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Stat. 3308. It defines "designated water" as "water released from storage, paid for by non-Federal interests, for delivery to a specific point of use or diversion." § 3.01(k), 94 Stat. 3308.

[4] Petitioner's other two permit applications sought permission to appropriate water from Beaver Creek and Cache Creek, which are Oklahoma tributaries of the Red River in Reach I, Subbasin 2. Pet. 10. Under the Compact, Oklahoma has "free and unrestricted use" of the water in that subbasin. § 4.02(b), 94 Stat. 3309. Petitioner does not seek review of the court of appeals' affirmance of summary judgment for respondents on those claims. Pet. Br. 5 n.1.

[5] Section 13.03 of the Compact provides that "[t]he United States District Courts shall have original jurisdiction (concurrent with that of the Supreme Court of the United States, and concurrent with that

tory and injunctive relief barring respondents from applying certain Oklahoma statutes that govern the sale, exportation, and use of water to bar petitioner from diverting water in Oklahoma. Pet. App. 2a. Specifically, petitioner challenged now-expired statutes that were enacted in 2004 and placed a five-year moratorium on the export of water from Oklahoma. See Pet. App. 6a-7a; Okla. Stat. Ann. tit. 82, § 1B(A) and tit. 74, § 1221.A (West Supp. 2012); Pet. App. 7a. Petitioner also challenged, *inter alia*, another statute that provides an exception to the general requirement that permitted water be put to beneficial use within seven years only if the proposed use "will promote the optimal beneficial use of water in [Oklahoma]," *id.* § 105.16(B) (West Supp. 1993). Petitioner alleged that the Oklahoma statutes place impermissible burdens on interstate commerce in violation of the Commerce Clause and are preempted by the grant of "equal rights" to the use of Reach II, Subbasin 5 water to all four compacting States under Section 5.05(b)(1) of the Compact. Pet. App. 6a. By stipulation of the parties, respondents will take no action on petitioner's permit applications until this litigation concludes. Pet. Br. 16.

Respondents moved to dismiss the complaint on grounds of ripeness, Eleventh Amendment immunity, abstention principles, and failure to join Louisiana and Arkansas as parties. Pet. App. 8a. The district court denied the motion. *Tarrant Reg'l Water Dist.* v. *Herrmann*, No. CIV-07-0045-HE, 2007 WL 3226812

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of any other Federal or state court, in matters in which the Supreme Court, or other court has original jurisdiction) of any case or controversy involving the application or construction of this Compact." 94 Stat. 3319. That jurisdiction "shall include, but not be limited to, suits between Signatory States." *Ibid.*

(W.D. Okla. Oct. 29, 2007). In doing so, the court stated its understanding that it did not need to "appropriate water or * * * determine water rights under the Red River Compact," because petitioner had "merely challenged the validity of the Oklahoma laws in question." *Id.* at *5. The court of appeals affirmed. *Tarrant Reg'l Water Dist.* v. *Sevenoaks*, 545 F.3d 906 (10th Cir. 2008).

c. Petitioner then amended its complaint to challenge additional Oklahoma laws that were enacted after the complaint was filed. Petitioner challenged a new requirement that the OWRB must consider whether water that is the subject of a permit application for out-of-state use "could feasibly be transported to alleviate water shortages in the State of Oklahoma" (Okla. Stat. Ann. tit. 82, § 105.12(A)(5) (West Supp. 2012)); a requirement that the OWRB may not issue permits to out-of-state water users if that use would "[i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact" (*id.* § 105.12A(B)); a periodic permit-review scheme applicable only to out-of-state water users (*id.* § 105.12(F)); and a requirement of legislative approval before the OWRB may grant a permit to for out-of-state water users for "water apportioned to [Oklahoma] under an interstate compact" (*id.* § 105.12A(D)). Pet. App. 9a-10a.

3. The district court granted summary judgment for respondents. Pet. App. 53a-74a.

a. The court rejected petitioner's argument that the Oklahoma statutes, by placing restrictions on out-of-state applicants for Oklahoma water permits, violate the Commerce Clause. Pet. App. 61a-69a. The court concluded that although the Commerce Clause is "ordinarily directed to preventing protectionist state measures designed to secure an economic or other advantage for

the state or its citizens," "approval of the [Compact] by Congress * * * constituted its consent to a legal scheme different from that which would otherwise survive Commerce Clause scrutiny." *Id.* at 67a, 68a.

b. In a one-paragraph discussion, the district court also rejected petitioner's argument that the Oklahoma statutes are preempted by the Compact. Pet. App. 70a. The court found "no necessary conflict between the federal law here in question—the [Compact]—and the state laws [petitioner] challenges" because "[t]he compact itself explicitly states it is not intended to supplant any state legislation if it is otherwise consistent with the compact." *Ibid.* In so ruling, the court did not refer to Section 5.05 of the Compact. The court further stated that "[i]n light of the foregoing discussion as to Congress' intent in the context of a Commerce Clause claim, the court can discern no basis upon which the [Compact] could be a basis for preemption, at least in the context of any claim which [petitioner] has standing to pursue." *Ibid.*

The district court observed that "[a]n effort by the State of Texas (or another signatory state) to acquire water allocated to it by the compact, if thwarted by one or more of the challenged statutes, might well give rise to a claim under the compact in favor of that state." Pet. App. 68a n.16. But the court stated that although petitioner is a subdivision of the State of Texas, it was not entitled to assert in these proceedings rights that Texas has under the Compact. *Ibid.* The court also expressed an understanding elsewhere in its opinion that petitioner's claims, "though involving issues of compact interpretation, are not based directly on the assertion of rights under the [Compact]." *Id.* at 60a.

c. After petitioner amended its complaint to make clear that it was authorized by Texas to acquire water apportioned to Texas under the Compact, the district court issued a further order stating that "the court's prior determination of the various constitutional questions was not grounded wholly, or even principally, on a question of standing." Pet. App. 82a-83a.

4. The court of appeals affirmed. Pet. App. 1a-52a.

a. The court first rejected petitioner's Commerce Clause argument. Pet. App. 15a-28a. The court acknowledged this Court's holding in *Sporhase* v. *Nebraska*, 458 U.S. 941 (1982), that a Nebraska law restricting the interstate transfer of groundwater violated the Commerce Clause. Pet. App. 19a. The court also acknowledged that a protectionist state law restricting commerce in water can withstand Commerce Clause scrutiny only if Congress's consent to the state law is "expressly stated" or otherwise "unmistakably clear." *Id.* at 19a-20a (citing *Sporhase*, *supra*, and *South-Central Timber Dev.* v. *Wunnicke*, 467 U.S. 82 (1984)). But here, the court concluded, the Compact contains such a clear statement. *Id.* at 24a.

The court of appeals explained that by ratifying Section 2.01's statement that "Oklahoma may 'freely administer' appropriated water and use it 'in any manner' the state deems beneficial, Congress conferred broad regulatory authority on the state using unqualified terms." Pet. App. 24a-25a; see also *id.* at 25a-26a (citing Compact § 2.10(a), 94 Stat. 3306-3307). The court determined that, "[t]aken together, the Compact provisions * * * give the Oklahoma Legislature wide latitude to regulate interstate commerce in its state's apportioned water." *Id.* at 27a.

b. The court of appeals also rejected petitioner's argument that Section 5.05(b)(1) of the Compact preempts Oklahoma statutes that prevent Texas water users from diverting Reach II, Subbasin 5 water in Oklahoma. Pet. App. 28a-45a. The court was "especially reluctant to find preemption in matters of longstanding state regulation," and it believed that "[t]he presumption against preemption is particularly strong in this case because history reveals 'the consistent thread of purposeful and continued deference to state water law by Congress.'" *Id.* at 34a-35a (quoting *California* v. *United States*, 438 U.S. 645, 653 (1978)).

The court found it significant that the Compact's general provisions "demonstrate pronounced federal deference to state water law." See Pet. App. 35a (citing Compact §§ 2.01 and 2.10(a), 94 Stat. 3306-3307). The court also pointed to Section 5.05(b)(3) and (c), which it read as merely providing protection to Louisiana and Arkansas during periods of low flow, and which require upstream states to allow certain quantities of water "within their respective states" to flow into the Red River to maintain downstream flow requirements. *Id.* at 37a, 39a. The court concluded that, "[t]aken together, the provisions of [Section] 5.05 stand for the principle that the upstream states control the water within their boundaries, provided they meet their minimum flow obligations to downstream states and do not take more than an equal share of the excess water." *Id.* at 39a. The court found support for this limited view of Section 5.05's purposes in the interpretive comments provided by the compact drafters' Legal Advisory Committee, 1 J.A. 7-51. See Pet. App. 39a.[6]

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[6] The Legal Advisory Committee wrote interpretive comments "so that members of the respective legislatures, congressional commit-

The court also noted that Section 5.05(b)(1) itself "does not say that a Texas user is entitled to take Texas's share of th[e] water from a tributary located in Oklahoma[,] [a]nd it does not say that the OWRB is precluded from applying Oklahoma water laws to a[n] * * * application to divert water in Oklahoma for use in Texas." Pet. App. 40a. The court explained that although those conclusions might nonetheless be plausibly inferred "based on the language of [Section] 5.05(b)(1) alone," they are not reasonable when Section 5.05(b)(1) is read in conjunction with the Compact as a whole, especially in light of the presumption against preemption. *Ibid.*

For those reasons, the court concluded that the language in Section 5.05(b)(1) affording each State "equal rights to the use of" the excess water in Reach II, Subbasin 5 "can reasonably be read to mean that each signatory state has the same opportunity and entitlement to use up to 25 percent of the excess water *in its state* and under its state laws," but not to divert any water outside its own borders. Pet. App. 42a-43a (emphasis added).

SUMMARY OF ARGUMENT

I. An interstate compact is "a contract * * * that must be construed and applied in accordance with its terms." *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987) (citation omitted). Based on the text of the Red River Compact and the record developed in this case, the better interpretation is that Oklahoma may not categorically foreclose Texas from diverting water in Reach II,

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tees, Federal agencies, and subsequent compact administrators might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact." 1 J.A. 9.

Subbasin 5 of the Red River in Oklahoma, at least where such a prohibition would prevent Texas from exercising its "equal right[]" under Section 5.05(b)(1) of the Compact to use excess water in that subbasin.

A. The court of appeals improperly applied a presumption against preemption to interpret the Compact. Although an interstate compact is a federal law, its terms are agreed to by the States themselves. The compromises and mutual cessations of authorities on which the States agree should be interpreted according to the terms of their agreement, without application of a presumption that favors one State's law.

The text of the Compact contains no state-boundary restriction on a State's exercise of its equal right to use the excess water in Reach II, Subbasin 5. By contrast, other Compact provisions that divide multi-state subbasins between States do include a state-boundary restriction, which suggests that no similar restriction was intended in Section 5.05(b)(1).

Furthermore, the limitation of each State to 25% of the excess water indicates that a purpose of Section 5.05(b)(1) is to divide the excess water in the subbasin equally among the four States. An interpretation of the Compact that would allow state laws to prohibit a State from obtaining its 25% share of water would thwart Section 5.05(b)(1)'s guarantee of equal rights to use the excess water in the subbasin.

B. If Texas can access its full 25% share of water from within its borders, Oklahoma laws that barred diversions by Texas water users in Oklahoma would not necessarily be preempted by the Compact. That issue was not resolved by the courts below. Moreover, the available record with respect to Section 5.05(b)(1) has not been fully developed. Accordingly, after correcting

the basic errors in the court of appeals' decision, the Court may wish to remand the case for the lower courts to review all relevant materials that could shed light on the parties' intent with respect to Section 5.05(b)(1).

C. If the Court determines that Oklahoma may not categorically bar Texas water users from accessing Reach II, Subbasin 5 water in Oklahoma, there would remain many complicated questions that could affect whether petitioner is entitled to divert water in any specific amount and from any specific location in Reach II, Subbasin 5. Those questions would need to be addressed in additional proceedings, perhaps in the first instance by the OWRB in acting on petitioner's permit application, or in a suit between or among compacting States.

II. Once the question of whether the Compact enables a State to access any portion of its Reach II, Subbasin 5 water from outside of its boundaries is resolved, the Commerce Clause has no role to play. If Texas water users may access a portion of Texas's share of Reach II, Subbasin 5 water in Oklahoma, then it is the Compact, not the Commerce Clause, that prohibits respondents from enforcing Oklahoma laws that would bar such access.

ARGUMENT

I. OKLAHOMA MAY NOT CATEGORICALLY FORECLOSE TEXAS WATER USERS FROM DIVERTING REACH II, SUBBASIN 5 WATER IN OKLAHOMA, AT LEAST WHERE SUCH A PROHIBITION WOULD PREVENT TEXAS FROM EXERCISING ITS "EQUAL RIGHT[]" TO USE EXCESS WATER IN THE SUBBASIN

A. The Compact Does Not Allow A State To Enforce State Laws That Would Prevent Other States From Obtaining Their Share Of Reach II, Subbasin 5 Water

Section 5.05(b)(1) of the Compact provides that, so long as there is a flow of 3000 cubic feet per second or more at the Arkansas-Louisiana border, the compacting States have "equal rights" to the use of the excess water in Reach II, Subbasin 5, and "no state is entitled to more than 25 percent of the [excess] water." 94 Stat. 3311. The court of appeals held that Section 5.05(b)(1) entitles each compacting State only "to use up to 25 percent of the excess water *in its state*," but not to divert any water outside its own boundaries. Pet. App. 42a-43a (emphasis added). In reaching that conclusion, the court of appeals erroneously applied a presumption against preemption and misread general Compact provisions concerning state administration of water rights in a way that could allow one State to prevent other States from exercising their "equal rights" to use the excess water in the subbasin.

An interstate compact is "a contract * * * that must be construed and applied in accordance with its terms." *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987) (citation omitted). This Court has stated that, "[a]s with all contracts, we interpret [a] Compact according to the intent of the parties." *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1771 n.4 (2011). The bargaining history of a compact is

relevant extrinsic evidence that may be used to discern the parties' intent with respect to compact terms. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 233-238 (1991). Evidence concerning the parties' course of performance may similarly shed light on their intent with respect to the Compact's terms. *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2309 (2010). At the same time, congressional approval transforms an interstate compact into a law of the United States, and the Compact therefore must also be interpreted as a federal statute. *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998).

In the view of the United States, based on the text of the Compact and the record as developed below and before this Court, the best reading of the Compact is that it does not allow Oklahoma categorically to foreclose Texas water users from accessing Reach II, Subbasin 5 water in Oklahoma, at least to the extent such a prohibition would prevent Texas from exercising its "equal right[]" to use excess water in the subbasin. As explained below, however, the record concerning the drafting of the Compact and factual issues that could be relevant to the disposition of the case were not fully developed below, and the additional documents included by the parties for the first time in the Joint Appendix do not include what we understand from the parties to be a range of further materials, which could also be relevant to the ultimate resolution of petitioner's efforts to obtain water from within Oklahoma. Accordingly, after correcting several basic errors by the court of appeals, the Court may wish to vacate the judgment below and remand for further proceedings.

1. A presumption against preemption should not be applied in interpreting Section 5.05(b)(1)

As an initial matter, the court of appeals erred in relying on a presumption against preemption in determining whether the challenged Oklahoma statutes conflict with Section 5.05(b)(1) of the Compact. Pet. App. 29a, 34a, 40a, 41a, 43a. The court was of the view that such a presumption was "particularly strong in this case" because water administration is an area of "longstanding state regulation." *Id.* at 34a-35a. To the contrary, a presumption against preemption is out of place in interpreting an interstate compact.

This Court has applied a presumption against preemption when a controversy concerns "whether a given state authority conflicts with, and thus has been displaced by, the existence of federal government authority." *New York* v. *F.E.R.C.*, 535 U.S. 1, 17-18 (2002); see, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 518-519 (1992); *Hillsborough Cnty.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). The Court has found such an approach appropriate in those circumstances "because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt'" state law. *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009) (quoting *Lohr*, 518 U.S. at 485). That rationale is not relevant to deciding whether state law conflicts with an interstate compact.

An interstate compact approved by Congress is a federal law, see *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981), but it is not one imposed by Congress on the States. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 245 (1991) (Rehnquist, C.J., concurring in part and dissenting in part) ("Congressional consent elevates an inter-

state compact into a law of the United States, yet it remains a contract which is subject to normal rules of enforcement and construction."). The compact is instead a collaborative effort among States to formulate a solution to a common problem, which is later given the status of federal law when the agreement is presented by the compacting States and approved by Congress. The States themselves create the terms of the Compact, and a general assumption that "*Congress* does not cavalierly pre-empt state law" based on its respect for the States as independent sovereigns, see *Wyeth*, 555 U.S. at 565 n.3 (citation omitted; emphasis added), therefore sheds little light on the Compact's interpretation.

Moreover, an interstate compact ordinarily embodies a number of compromises and mutual cessions of rights or regulatory authorities that the States might otherwise claim. See, *e.g.*, *Kansas* v. *Colorado*, 533 U.S. 1, 20 (2001) (O'Connor, J., concurring in part and dissenting in part) ("A compact * * * represents a bargained-for exchange between its signatories."). A generalized presumption against preemption is out of place in determining whether certain rights or regulatory authorities of one signatory State or another on a particular issue have been retained or given up, in whole or in part, through the Compact.

2. The text of Section 5.05(b)(1) does not impose a state-boundary restriction on a State's exercise of its "equal right[]" to use the excess water in Reach II, Subbasin 5

The text of the Compact does not contain a state-boundary restriction on a State's ability to use the excess water in Reach II, Subbasin 5. Section 5.05(b)(1) of the Compact provides that when the flow of the Red River at the Arkansas-Louisiana border is 3000 cubic

feet per second or more, "[t]he Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, * * * provided no state is entitled to more than 25 percent of the [excess] water." 94 Stat. 3311. Subbasin 5 encompasses parts of three States, see § 5.05(a), 94 Stat. 3311, and the provision makes no reference to state boundaries in its description of those States' "equal rights" to use the excess water in the subbasin. § 5.05(b)(1), 94 Stat. 3311.

Although the absence of any reference to state boundaries in Section 5.05(b)(1) may not in itself be sufficient to sustain petitioner's argument that it may divert Reach II, Subbasin 5 water in Oklahoma, other provisions of the Compact provide further context. In other Compact provisions that divide the water of a multi-state subbasin between States, the Compact does provide a geographic limitation on a State's allocated share of water, and therefore on a State's right of access to such water. For example, the Compact divides Reach II, Subbasin 3 between Oklahoma and Arkansas and provides that "[t]he States of Oklahoma and Arkansas shall have free and unrestricted use of the water of this subbasin *within their respective states*," subject to certain downstream flow requirements. § 5.03(b), 94 Stat. 3310 (emphasis added). Similarly, the Compact divides Reach III, Subbasin 3 between Texas and Louisiana and provides that "Texas and Louisiana *within their respective boundaries* shall each have the unrestricted use of the water of this subbasin," subject to certain other requirements. § 6.03(b), 94 Stat. 3313 (emphasis added). And within Section 5.05 itself, the Compact requires upstream States to allow specific quantities of water "within their respective states" to flow downstream during

certain low-flow periods. See §§ 5.05(b)(3) and (c), 94 Stat. 3311-3312. The parties' inclusion of a state-boundary restriction or requirement in other allocation provisions suggests that no similar restriction was intended for Reach II, Subbasin 5. Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

3. The application of state laws that would prevent a State from exercising its "equal right[]" to use excess water in Reach II, Subbasin 5 would stand as an obstacle to the Compact's allocation of the excess water in that subbasin

a. The Compact's grant of "equal rights" to use the excess water in Reach II, Subbasin 5, coupled with the directive that "no state is entitled to more than 25% of the [excess] water," is also significant. § 5.05(b)(1), 94 Stat. 3311. The 25% limitation indicates that a purpose of Section 5.05(b)(1) is to allocate to each of the four States an equal one-fourth share of the excess water in Reach II, Subbasin 5. That understanding is reinforced by the rules developed by the Red River Compact Commission's Engineering Advisory Committee, and approved by the Commission, to compute and enforce compliance with Section 5.05. See 1 J.A. 55, Red River Compact Interim Rules and Regulations Rule 5(a)(2) (stating that when the total runoff and undesignated flow is between 7500 and 12,000 cubic feet per second, "Louisiana's allocation shall be 3,000 cfs and each of the three upstream states will *equally share* the runoff and undesignated flow in excess of 3,000 cfs") (emphasis added); *ibid.*, Rule 5(a)(3) (stating that when the total runoff and undesignated flow is 12,000 cubic feet per second or more, "each of the signatory states *shall be entitled to 25% of the total* runoff and undesignated flow") (emphasis added). The application of state laws that

would prevent a State from obtaining its equal share (its full 25% entitlement) of Reach II, Subbasin 5 water would thwart Section 5.05(b)(1)'s guarantee of equal rights to use the excess water in the subbasin.

b. The court of appeals concluded that the purpose of Section 5.05(b) is simply "to ensure that an equitable share of water from the subbasin reaches the states *downstream* from Oklahoma and Texas," Pet. App. 36a (emphasis added), and therefore did not create any rights and obligations as between Oklahoma and Texas. The court similarly read the interpretive comments to indicate that Section 5.05(b) is designed to ensure adequate downstream flows and nothing more. *Id.* at 39a. But Section 5.05(b) does more than protect downstream States, and specifically Louisiana. Section 5.05(b)(2)-(3) and (c) do establish downstream flow requirements during low-flow periods, and thereby ensure an equitable flow to Louisiana. But those provisions accomplish that purpose in a manner that also provides for equitable sharing of the burden of doing so among the three upstream States of Arkansas, Oklahoma, and Texas. § 5.05(b)(2)-(3) and (c), 94 Stat. 3311-3312.

Section 5.05(b)(1), at issue here, apportions the subbasin's excess water in *non*-low-flow periods, *i.e.*, when the flow *exceeds* 3000 cubic feet per second at the Arkansas-Louisiana border. Under those conditions, all four States have "equal rights" to use of the excess water, enforced by a 25% cap on the amount any one State can use. To be sure, that provision serves to ensure that Louisiana (as well as Arkansas) will receive a 25% share. But the provision for equal rights and an equal cap also protects Texas and Oklahoma, including as against each other. The interpretive comments recognize that further purpose by explaining that "[w]hen the flow is high,

* * * all states are free to use whatever amount of water they can put to beneficial use," and that "[i]f the states have competing uses and the amount of water available in excess of 3000 [cubic feet per second] cannot satisfy all such uses, each state will honor the other's right to 25% of the excess flow." 1 J.A. 29-30.[7]

The court of appeals' conclusion that Section 5.05(b) is concerned only with downstream delivery requirements is further undermined by another portion of the interpretive comments "emphasiz[ing] that * * * periods of low flow on the mainstem are relatively rare," and that "[f]lows less than 3000 [cubic feet per second] have [historically] occurred only 4.2% of the time." 1 J.A. 30. Given that there was excess water in Reach II, Subbasin 5 the vast majority of the time, it is logical to assume that dividing the excess water in the subbasin among the four States on an equal basis was at least as much of a concern to the compacting States as ensuring flows for downstream States.

c. The court of appeals also identified several "[g]eneral [p]rovisions" of the Compact that in its view "demonstrate pronounced federal deference to state wa-

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[7] If Section 5.05(b)(1) protected only the downstream States of Arkansas and Louisiana by ensuring that they each are able to use up to 25% of the total excess water in Subbasin 5—and if, as petitioner asserts (Pet. Br. 2, 9 & n.5), more than 25% of the total excess water is in Oklahoma and less than 25% is in Texas—then the result of the court of appeals' (and apparently respondents') interpretation would be that Texas alone among the compacting States would be unable to use 25% of the subbasin's excess water. That result would not only be inconsistent with Section 5.05(b)(1)'s conferral of "equal rights," but also would effectively leave a portion of the total excess water unallocated, contrary to the evident purpose of the Compact to allocate all water in the covered reaches of the Red River. § 1.01(b) and (e), 94 Stat. 3305-3306.

ter law," and it concluded based on those provisions that "[t]he Compact's general policy is to give the Compact states unrestricted authority to regulate their apportioned water." Pet. App. 35a. That conclusion of course begs the question of what the States' "apportioned water" *is*. Moreover, the Compact's general provisions cannot be read to override its specific allocations, and thus do not support a conclusion that Oklahoma may categorically bar Texas water users from accessing a portion of *Texas's* share of Reach II, Subbasin 5 water in Oklahoma, at least when doing so is necessary to enable Texas to use the full amount of its 25% share.

Indeed, the general provisions of the Compact on which the court of appeals relied make clear that a State's regulation of water use within its boundaries must be consistent with the allocations made under the Compact. Section 2.01 provides that "[e]ach state 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*." § 2.01, 94 Stat. 3306 (emphasis added). Similarly, Section 2.10(a) provides 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, or quality of water, *not inconsistent with its obligations under this Compact.*" 94 Stat. 3306-3307 (emphasis added). The interpretive comments repeat that limitation. See 1 J.A. 14 ("*Subject to the general constraints of water availability and the apportionment of the Compact*, each state is free to continue its existing internal water administration, or to modify it in any manner it deems appropriate.") (emphasis added).

Under those general provisions of the Compact, the States retain authority to enforce state water laws within their boundaries, but they may not enforce those laws if doing so would prevent another State from obtaining and putting to beneficial use its allocated share of water. In those circumstances and to that extent, the state laws would conflict with the Compact's terms and frustrate the accomplishment of its purposes, and must give way. See *Hines* v. *Davidowitz*, 312 U.S. 52, 62-63 (1941).

B. Further Development Of The Record Is Necessary To Determine Whether Respondents' Enforcement Of Any Oklahoma Laws That Would Prohibit Petitioner From Diverting Reach II, Subbasin 5 Water In Oklahoma Would Violate The Compact

1. There are unresolved factual issues concerning whether Texas can access its share of Reach II, Subbasin 5 water from within its borders

The court of appeals erred by applying a presumption against preemption and by interpreting general Compact provisions concerning state administration of water rights to allow Oklahoma categorically to bar Texas from diverting any portion of its share of Reach II, Subbasin 5 water from outside of its boundaries. There is a further question, however, whether the Compact entitles each State to divert Reach II, Subbasin 5 water out of state as a matter of course, or whether a State may be entitled to do so only when it cannot obtain full access to its equal share of water within its boundaries.

Although the language of the Compact suggests that state laws concerning the administration of water rights would be preempted to the extent those laws would prevent another State from accessing its allocated share of Compact water, such laws would not necessarily be preempted if they were enforced against a compacting

State that was capable of accessing its share of water from within its own borders. In those circumstances, enforcement of the state laws would not appear to frustrate the purpose of the allocation of Reach II, Subbasin 5 water provided by Section 5.05(b)(1). Indeed, if a State had access to its 25% share of water from within its borders but endeavored to take all or part of its share from within another State, that could prevent *the other State* from accessing *its* equal share of Reach II, Subbasin 5 water, and could unnecessarily intrude upon the authority of *the other State*, recognized in Sections 2.01 and 2.10(a) of the Compact, to freely administer water rights and regulate the use and control of water within *its* borders. 94 Stat. 3306-3307.

Petitioner argued below that Texas could not fully access its share of Reach II, Subbasin 5 water from within its borders because "the part of Texas located within Reach II, Subbasin 5 contains primarily intermittent streams and dry arroyos yielding a small fraction of the total water flowing in Subbasin 5." Pet. App. 41a (citation omitted). The district court granted summary judgment in favor of respondents before petitioner presented any evidence on that point. See *id.* at 44a n.3. The court of appeals acknowledged that the parties disputed "whether Texas can receive a 25% share of the excess water in the Texas part of Reach II, Subbasin 5," but the court concluded that resolution of that factual dispute was "not necessary to [its] disposition of this issue because * * * [Section] 5.05(b)(1) does not allocate water located in Oklahoma to Texas regardless of what amount of water [petitioner] and other Texas users can appropriate in Texas." *Ibid.*

Moreover, although the main stem of the Red River passes through or borders each of the compacting

States, it does not necessarily follow that each State could access its share of Reach II, Subbasin 5 water from within its borders by diverting water from the River's main stem. The northern border of Texas with Oklahoma east of the Texas panhandle is the Red River's south vegetation line, such that the main stem of the River is located entirely within Oklahoma. See Red River Boundary Compact, Pub. L. No. 106-288, 114 Stat. 919; *United States* v. *Texas*, 162 U.S. 1, 90-91 (1896); *Texas* v. *Oklahoma*, 457 U.S. 172, 172 (1982). Although it is conceivable that there are ways to divert main stem water from within Texas's northern border—*e.g.*, by placing an intake pipe at the mouth of a Texas tributary just as it is about to join the main stem—the court of appeals' interpretation of the Compact would appear to prohibit petitioner from diverting water directly from the river's main stem, which is in Oklahoma. Cf. *New Jersey* v. *Delaware*, 552 U.S. 597, 615, 623 (2008) ("New Jersey's regulatory authority is qualified once the boundary line at low water is passed," and "it was within Delaware's authority to prohibit construction * * * within its domain").

There may be still further issues concerning the quality of the water in the main stem of the Red River. There is a factual question about whether the water in the main stem within Reach II, at least in the segments immediately north of Texas's border with Oklahoma and Arkansas, is too saline to be used for irrigation, drinking, or other purposes. The issue of salinity in the river's main stem was known to the States when they entered into the Compact. The interpretive comments note that "[n]atural salt pollution in the Red River Basin is * * * seriously detrimental to all states." 1 J.A. 48. And an officer of the U.S. Army Corps of Engineers

stated in a hearing on the Compact that "[t]he Red River main stem flows cannot be used for many purposes due to the chloride contamination from natural and manmade sources," but that "[g]enerally, most tributary flows are suitable for domestic and industrial use with normal treatment." *Red River Compact and Caddo Lake Compact: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 96th Cong. 2d Sess. 6 (1980) (statement of Colonel Alan L. Laubscher, Assistant Director of Civil Works).[8] On the other hand, there is evidence that Texas water users are treating and using water from Lake Texoma, which is immediately west of Reach II, Subbasin 5, for municipal purposes. See U.S. Army Corps of Engineers, Public Notice, Permit No. SWT-0-01311, http://rec-swt.usace.army.mil/permits/permitdetail.cfm?PublicNoticeApplicationNumber=SWT-0-1311 (last visited Feb. 26, 2013).

Such considerations may or may not have influenced the States' understanding of how excess water in Reach II, Subbasin 5 would be apportioned among them or how Texas's equal right to use excess water in that subbasin could be exercised. It is possible, for example, that notwithstanding any salinity concerns, the States nonetheless contemplated that all States would divert their shares from tributaries within their borders and from the main stem, and that they assumed Texas would be

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[8] The salinity of the main stem is diluted by freshwater sources flowing into the river as it flows east and south. See U.S. Geological Survey, *Assessment of Selected Water-Quality Data Collected in the Lower Red River (Main Stem) Basin, Texas, 1997-98* 4 (Nov. 2003) (noting that the lowest salinity levels for sites tested in the study was at Index, Arkansas), http://pubs.usgs.gov/fs/fs10603/pdf/FS_106-03.pdf.

able to draw water directly from the main stem even though the main stem lies outside its borders.[9]

If the Court concludes that the court of appeals erred by applying a presumption against preemption and by reading the general provisions of the Compact concerning the States' administration of water rights to allow Oklahoma categorically to prohibit water users in other States from accessing Reach II, Subbasin 5 water within Oklahoma, then whether Texas can divert 25% of the water in Reach II, Subbasin 5 from within its borders may be relevant to the issue of preemption. The Court therefore may wish to consider remanding the case to the district court for consideration of whether Texas may access a portion of its share of Reach II, Subbasin 5 water in Oklahoma, taking into account any relevant legal and factual issues.

2. The record concerning the parties' intent with respect to Section 5.05(b)(1) was not fully developed in the proceedings below

In other respects as well, the record with respect to Section 5.05(b)(1) was not fully developed in the proceedings below. The district court granted summary judgment in favor of respondents, and in doing it so rendered an interpretation of the Compact before the parties had presented detailed arguments and materials concerning the meaning of Section 5.05(b)(1).

Respondents' exhibit list for trial included minutes from some portion of the meetings among representa-

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[9] See, *e.g.*, See 1 J.A. 59-63, Red River Compact Interim Rules and Regulations Rule 6 (procedures to compute state runoff, undesignated inflows, and flow of the Red River at the Arkansas-Louisiana boundary; reflecting an assumption that States would divert water from particular segments of the main stem).

tives negotiating the Compact, but those minutes were not addressed by the parties or attached to any pretrial motion for the district court's consideration. See C.A. App. 770-772; 2 J.A. 27-304. Furthermore, there was evidence submitted to the district court in support of petitioner's motion for a temporary restraining order, but not attached to any pretrial motion, showing that petitioner previously made an offer to purchase Reach II, Subbasin 5 water from Oklahoma and the Choctaw and Chickasaw Nations. See C.A. App. 96-98 (affidavit of Robert Smith); 2 J.A. 336-382 (status report on water compact). The negotiating history of a compact and the parties' course of performance under it are relevant to discerning the parties' intent with respect to compact terms. See *Oklahoma* v. *New Mexico*, 501 U.S. at 233-238; *Alabama* v. *North Carolina*, 130 S. Ct. at 2309.

The Compact had an extensive negotiation history. See generally Marguerite A. Chapman, *Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin*, 38 Okla. L. Rev. 1 (1985). In addition to the additional materials included in the Joint Appendix in this Court, which were not presented to or considered by the district court, there exist various pre-execution and post-execution documents (several of which petitioner has sought leave to lodge with the Clerk of this Court) that may further illuminate the parties' intent with respect to Section 5.05(b)(1). The parties have informed this Office that there are, for example, drafts of the Compact, additional negotiating minutes, minutes and reports from the Engineering Advisory Committee, and letters exchanged between Compact negotiators. Recognizing that it is "a court of review, not of first view," this Court does not typically re-

view such materials in the first instance or reach issues that "were not addressed by the [c]ourt of [a]ppeals." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). A broader remand may therefore be appropriate for further development of the record with respect to Section 5.05(b)(1).

C. Additional Proceedings Would In Any Event Be Required In Some Forum To Determine Whether Petitioner's Permit Application Should Ultimately Be Granted

Although vacatur of the judgment of the court of appeals would reopen the door for petitioner to obtain the relief it has sought in this case—*i.e.*, declaratory and injunctive relief prohibiting respondents from applying Oklahoma laws that would absolutely bar petitioner from obtaining a permit to divert Reach II, Subbasin 5 water in Oklahoma, see Pet. App. 2a—there would remain many complicated questions concerning whether petitioner would ultimately be entitled to obtain a permit to divert water in any specific amount and from any specific location within Oklahoma. Those questions would need to be addressed in additional proceedings, perhaps in the first instance by the OWRB in acting on petitioner's permit application, or in a suit involving additional parties (*i.e.*, in a suit between or among compacting States, either in this Court or in the district court, see n.5, *supra*).

The permit application at issue in this case sought to appropriate 310,000 acre feet per year of surface water from the Kiamichi River in Oklahoma. 2 J.A. 8-26. Although Section 5.05(b)(1) may allow Texas water users to access a portion of Texas's allocated share of Reach II, Subbasin 5 water in Oklahoma in some circumstances, that ability would not directly entitle petitioner to a permanent appropriation of 310,000 acre feet per year of

surface water from Reach II, Subbasin 5, from either the Kiamichi or the main stem. Texas is not entitled to a fixed quantity of water under the Compact; it is entitled to use 25% of the excess water in the subbasin, and that quantity will change over time with changes in precipitation and perhaps changes in uses of water in tributaries upstream of Subbasin 5. § 5.05(b)(1), 94 Stat. 3311.[10]

There would also be factual and legal questions regarding how much water is practicably available at any given time for the compacting States to divide equally among themselves. As noted above, if the water in some segments of the Red River's main stem is too saline to be useable, as petitioner contends, then there could be a question about the relevance of that fact to Texas's exercise of "equal rights" to the use of excess water. Computation of the amount of excess water may also require the States to create or enforce accounting procedures designed to measure the runoff originating in the subbasin and the undesignated water flowing into the subbasin. The competing interests of water users in Oklahoma and other compacting States in diverting water from a particular point within the subbasin, in addition to environmental and other restrictions, may also be relevant to whether a particular diversion by Texas water users should be allowed.

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[10] Water flows into Subbasin 5 from the other four subbasins of Reach II. Subbasin 1 is apportioned to Oklahoma, see § 5.01(b), 94 Stat. 3310; Subbasins 2 and 4 are apportioned to Texas, see §§ 5.02(b), 5.04(b), 94 Stat. 3310-3311; and Subbasin 3 is divided between Oklahoma and Arkansas, § 5.03(b), 94 Stat. 3310. Section 2.04 of the Compact provides that "[t]he failure of any State to use any portion of the water allocated to it shall not constitute relinquishment or forfeiture of the right to such use." 94 Stat. 3306.

The outcome of other legal proceedings could also have an effect on the amount of excess water available in the subbasin. The United States, the OWRB, and the Choctaw and Chickasaw Nations are currently involved in litigation and mediation over the rights asserted by the Choctaw and Chickasaw Nations to water within their historic treaty territory, which includes areas encompassed by Reach II, Subbasin 5. See *Oklahoma Water Res. Bd* v. *United States*, No. 5:12-cv-00275-W (W.D. Okla. Mar. 12, 2012); *Chickasaw Nation* v. *Fallin*, 5:11-cv-000927-W (W.D. Okla. Aug. 18, 2011). The Compact protects any such rights by expressly providing that "[n]othing in this Compact shall be deemed to impair or affect the powers, rights, or obligations of the United States, or those claiming under its authority, in, over and to water of the Red River Basin." § 2.07, 94 Stat. 3306. Accordingly, resolution of issues concerning the Nations' water rights could affect the amount or location of available excess water, and any such rights cannot be impaired by a State's efforts to obtain its share of Reach II, Subbasin 5 water.[11]

II. THE COURT OF APPEALS' COMMERCE CLAUSE HOLDING WAS UNNECESSARY

At this stage, the parties' dispute requires nothing more than an interpretation of the Compact and its preemptive force. Once the question whether the Compact enables a State to access any portion of its share of Reach II, Subbasin 5 water from outside of its borders is resolved, the Commerce Clause has no role to play. In this Court, petitioner is asserting a right only to access

[11] Any proceedings on remand in this case would not require, and should not include, the resolution of any issues concerning the Choctaw and Chickasaw Nations' water rights.

water that, under its interpretation of the Compact, is allocated to Texas. Petitioner is not asserting a right to access water that is allocated to Oklahoma. See Pet. Br. 47 n.13. The court of appeals' Commerce Clause holding was based on its conclusion that the water petitioner sought to access was allocated to Oklahoma under the Compact. See Pet. App. 27a ("Taken together, the Compact provisions * * * give the Oklahoma Legislature wide latitude to regulate interstate commerce *in its state's apportioned water*.") (emphasis added). That Commerce Clause holding would not apply to water that is allocated to Texas under the Compact. And if petitioner is correct that Texas water users may not be altogether barred from accessing Texas's allocated share of Reach II, Subbasin 5 water in Oklahoma, at least in some circumstances, then it is the Compact, not the Commerce Clause, that prohibits respondents from enforcing state laws that would bar such access. See pp. 13-22, *supra*.[12]

[12] The separate question whether the Commerce Clause is implicated if Oklahoma anti-export laws prohibited Oklahoma appropriators from selling water to Texas water users is not presented in this case.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with the Court's decision.

Respectfully submitted.

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FEBRUARY 2013