No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO AND STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim Report of the Special Master

BRIEF OF THE STATE OF KANSAS AS *AMICUS CURIAE* IN SUPPORT OF TEXAS

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Rio Grande Compact equitably apportions the waters of the Rio Grande Basin. The Compact provides for Texas's fair share of the waters by requiring New Mexico to deliver a specified amount of water to the Elephant Butte Reservoir, a federal reclamation project located in New Mexico approximately 105 miles north of the Texas state line. The water is then distributed based on contracts with irrigation districts in New Mexico and Texas. Texas alleges that New Mexico has violated the Compact through excessive groundwater pumping and other diversions in New Mexico below the Elephant Butte Reservoir (and above the New Mexico-Texas border) that have depleted the stream flow in the basin, thereby intercepting water allocated to Texas.

The important question the State of Kansas will address is whether the Rio Grande Compact, or any interstate water compact, allows an upstream State to unilaterally reduce a downstream State's apportioned share of water through groundwater pumping or any other diversion that depletes stream flow.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The State of Kansas is all too familiar with the upstream-State tactics New Mexico is using to deprive Texas of the water it is entitled to receive under the Rio Grande Compact. First, agree to an interstate compact that equitably apportions a shared scarce water resource, here the waters of the Rio Grande Basin. Next, use groundwater pumping and other diversions to avoid the compact's restrictions on water usage, leaving the downstream State with less than its allocated share of water. Finally, when challenged, put the downstream State to great expense and potentially years of delay by litigating in defense of the upstream State's unlawful actions.

Nebraska followed this strategy against Kansas in recent years, exceeding its allocation under the Republican River Compact by 70,869 acre-feet in just two years. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1051 (2015). When Kansas called it to task starting in the early 1990s, Nebraska (like New Mexico here) claimed the Compact did not cover groundwater pumping, even if it reduced Republican River stream flow and in turn reduced the amount of water available to Kansas. This Court rejected Nebraska's attempt to supplement its compact allocations at Kansas's expense, *see id.* at 1050 (citing *Kansas v. Nebraska*, 530 U.S. 1272 (2000)), and ordered Nebraska to disgorge a portion of its ill-gotten gains, *id.* at 1057, in addition to the compensatory damages Nebraska ultimately agreed to pay Kansas, *id.* at 1053.

Kansas is a predominantly downstream State with little leverage over upstream States other than the costly and time-consuming remedy of original action litigation in this Court; the same remedy Texas was forced to resort to in this case. Given its geographic predicament, Kansas has a substantial interest in ensuring that upstream States are not allowed to circumvent interstate water compacts through excessive groundwater pumping (or other water diversions) that deprives downstream States like Texas and Kansas of the water they have been allocated under such compacts.

SUMMARY OF THE ARGUMENT

Kansas offers three points in support of Texas and the Special Master's conclusion that the Rio Grande Compact precludes New Mexico from intercepting water allocated for Texas under the compact by extracting it through groundwater pumping or other diversions before the water reaches Texas.

I. The Court has repeatedly recognized the well-established hydrological fact that there is a negative connection between groundwater pumping and stream flow, and has already concluded that several interstate water compacts take groundwater into account. *See, e.g.*, *Kansas v. Nebraska*, 135 S. Ct. 1042, 1050 (2015); *Kansas v. Colorado*, 514 U.S. 673, 690 (1995); *Texas v. New Mexico*, 446 U.S. 540 (1980). Excessive groundwater pumping leads to reduced stream flow, which in turn reduces the amount of water a downstream State receives under a compact. New Mexico's bold claim that it can satisfy its Rio Grande Compact obligations by delivering water to the Elephant Butte Reservoir, and subsequently

intercepting and diverting the water allocated to Texas before the water reaches Texas, indisputably deprives Texas of the water it bargained for. Such upstream State tactics require a forceful response from this Court.

In *Kansas v. Nebraska*, 135 S. Ct. at 1057, this Court recognized that downstream States' geographic predicament creates a structural imbalance in interstate compacts that tempts upstream States to take more than their fair share of water at the expense of downstream States. The Court also recognized that one of its roles is to help stabilize interstate water compacts by reducing the allure of that temptation. *Id.* The Court could use this case to do just that—provide further structural balance and stability for downstream States by adopting a presumption that interstate water compacts that equitably apportion shared waters cover any extraction of groundwater or other diversion that reduces the apportioned stream's surface flow.

II. Kansas's history with interstate water disputes, dating back to 1902, highlights the damage upstream States can cause when they refuse to curb excessive groundwater usage or otherwise divert surface water. For example, Nebraska refused for years to bring its groundwater pumping in the Republican River Basin under control. In 2005 and 2006 alone, Nebraska exceeded its compact allocation by nearly 71,000 acre-feet, which is enough to sustain a city of one million people for a year, and enough to seriously injure farmers who rely on Republican River water for irrigation. Only after 15 years of litigation, including proceedings in this Court, did Kansas recover a total of $5.5 million ($3.7 million for Kansas's loss and

$1.8 million in disgorgement). But Kansas and its farmers forever lost the water they were entitled to receive during the water-short years of 2005 and 2006. *Kansas v. Nebraska*, 135 S. Ct. at 1056, 1059.

III. New Mexico claims that the Special Master's interpretation of the Rio Grande Compact violates its sovereignty by precluding New Mexico from intercepting water allocated to Texas under the Compact. But an interstate compact that Congress approves is a federal law that preempts conflicting state law. *See Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 n.8 (2013). And the preemptive effect of interstate compacts raises no federalism concerns because the States must negotiate a compact before Congress can approve it and make it federal law. Congress does not write the compacts; the States themselves do. New Mexico's state sovereignty argument is nothing more than an attempt to undermine the very compact that New Mexico itself negotiated with Texas.

ARGUMENT

The Rio Grande Compact equitably apportions the waters of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. The Compact requires New Mexico to deliver a specified amount of water to Elephant Butte Reservoir, a federal Bureau of Reclamation project located roughly 105 miles from the New Mexico-Texas border. Rep. 160-61 & n.43.[1] The federal Bureau of Reclamation then distributes the

[1] This brief cites the First Interim Report of the Special Master as "Rep."

water downstream based on contracts with irrigation districts in southern New Mexico and western Texas that preexisted the Rio Grande Compact. On this much, it appears New Mexico and Texas agree. *See* Rep. 210-11.

But a dispute arose when New Mexico began allowing surface water diversions and groundwater pumping in areas of southern New Mexico between the Elephant Butte Reservoir and the New Mexico-Texas border. Texas alleges that in 2011, New Mexico allowed tens of thousands of acre-feet of water to be diverted or pumped. And, Texas claims, because the surface and ground water in the Rio Grande Basin are hydrologically connected to the Rio Grande below the Elephant Butte Reservoir, New Mexico's unlawful diversions and pumping reduced the amount of water that reaches Texas. In ruling on New Mexico's motion to dismiss, the Court must accept these factual allegations as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

New Mexico moved to dismiss Texas's complaint, claiming that it can satisfy its obligations under the Rio Grande Compact by delivering to Elephant Butte the amount of water the Compact requires, much of which is allocated for use in Texas, then diverting and pumping a substantial amount of the water intended for Texas before it reaches the state line.

The Special Master rightly concluded that New Mexico's position is absurd based on the text, structure, and purpose of the Compact. Rep. 194-210. As he said, "it is unfathomable to accept that Texas 'would trade away its right to the Court's equitable apportionment,' had it contemplated then that New Mexico would be

able to disown its obligations under the 1938 Compact and simply recapture water it delivered to [Elephant Butte], destined for Texas, upon its immediate release from the Reservoir." Rep. 209 (citation omitted) (quoting *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015)).

New Mexico now "accedes" to the Special Master's recommendation to deny its motion to dismiss, but apparently only as a strategy for leaving open the possibility of relitigating whether it can satisfy its Compact obligations by giving water with one hand, getting credit for it under the Compact, then taking it away with the other. *See* New Mexico Exceptions Br. 1, 13, 27-28 & n.8. New Mexico claims it has never argued that "it may simply deliver water to Elephant Butte and then recapture that water for use in New Mexico with no regard for Texas' Compact rights." *Id.* at 24. Yet that is exactly what it argued in its motion to dismiss—that no "term of the Compact imposes a duty on New Mexico . . . to prevent diversions of water after New Mexico has delivered it at Elephant Butte Reservoir." New Mexico Motion to Dismiss 28.

New Mexico doubles down on this argument in its exceptions brief, repeatedly claiming to have a sovereign right to use the waters within its borders as it sees fit, bound only by New Mexico law. *See, e.g.*, New Mexico Exceptions Br. 16 & n.7 ("New Mexico's Compact obligations ended at Elephant Butte, so that remedies for any dispute below the reservoir arise under reclamation and state law."), 31 (the Reclamation Act defers to state law).

It should come as no surprise that Kansas, a predominantly downstream State, is troubled by upstream States' claims that they are accountable only to themselves to regulate their water usage—even in the face of a binding interstate compact approved by Congress. New Mexico, as some of Kansas's upstream neighbors have done in the past, ignores the alleged connection between its groundwater pumping and the stream flow the Rio Grande Compact has equitably apportioned. Experience has demonstrated, and this Court has ruled, that downstream States like Texas and Kansas are short-changed by upstream States' diversions of water—including ground water pumping—that reduce stream flow. Such actions violate many, if not all, interstate compacts, and if left unchecked will undermine the legal protection that compacts are supposed to provide downstream States.

I. Interstate Water Compacts Should Presumptively Cover Groundwater Pumping that Affects Agreed-Upon Equitable Apportionment.

The "hydraulic connection between stream flow and groundwater is a well established scientific fact." First Report of the Special Master at 2-3 n.3, *Kansas v. Nebraska*, No. 126, Orig. (Jan. 28, 2000), *available at* https://www.supremecourt.gov/SpecMastRpt/Orig126_012800.pdf ("McKusick Rep."). "[S]treams gain water from inflow of ground water through the streambed, they lose water to ground water by outflow through the streambed, or they do both, gaining in some reaches and losing in other reaches." Thomas C. Winter, et al., *Ground Water and Surface Water: A Single Resource: U.S. Geological Survey Circular 1139*

9 (1998), *available at* https://pubs.usgs.gov/circ/1998/1139/report.pdf. "[G]roundwater pumping intervenes . . . in the hydrological cycle, intercepting water that would otherwise flow to the stream." Burke W. Griggs, *Beyond Drought: Water Rights in the Age of Permanent Depletion*, 62 U. Kan. L. Rev. 1263, 1297-98 (2014). And the "over-pumping of groundwater produces depletions" in stream flow that can be permanent if left unchecked. *Id.*

Though New Mexico seems to ignore this fact, this Court has not. For example, in *Kansas v. Nebraska*, 530 U.S. 1272 (2000), this Court "summarily agreed" with the special master's recommendation that groundwater pumping should be counted against Nebraska's annual allotment of water in the amount that the pumping depleted stream flow in the Republican River Basin. *Kansas v. Nebraska*, 135 S. Ct. at 1050. The Court rejected Nebraska's argument, which New Mexico has reprised here, that groundwater pumping was outside the scope of the Republican River Compact, even if it diminished stream flow. *Id.*

But the Court's reiteration in *Kansas v. Nebraska* of the connection between groundwater and surface water is nothing new and should not have caught any upstream State by surprise. Even in water-rights disputes that *predate* the 1938 Rio Grande Compact, this Court acknowledged this fundamental hydrological principle.

In 1907, this Court decided *Kansas v. Colorado*, 206 U.S. 46, an original action in which Kansas complained that Colorado irrigators were depleting the Arkansas river upstream and depriving Kansas of water it was entitled to receive. The Court observed that "[i]f the bed

of a stream is not solid rock, but earth, through which water will percolate, . . . undoubtedly water will be found many feet below the surface, and the lighter the soil the more easily will it find its way downward and the more water will be discoverable by wells or other modes of exploring the subsurface." 206 U.S. at 114.

In 1923, the Court decided *Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co.*, 260 U.S. 596, involving "conflicting claims to underground waters collected and brought to the surface by a mining tunnel" along a tributary of the Provo River in Utah. *Id.* at 597. The Court described the waters the tunnel intercepted and collected as "percolating waters, which before [the tunnel] was driven found their way naturally, but not in a defined channel, through the rocks, gravel, and soil of the mountain into open springs near the stream, and thence by surface channels into the stream." *Id.* at 598.

The mining company that built the tunnel claimed it was entitled to the groundwater the tunnel collected and brought to the surface. An irrigation company downstream of the tunnel claimed it was entitled to the water because long before the tunnel existed the irrigation company appropriated all the waters of the stream for irrigation and other beneficial uses. *Id.* at 597-98.

The Court agreed with the irrigation company that "waters percolating underground" within public lands were "open to appropriation for irrigation or other beneficial uses" and that "*appropriation of the natural flow of a surface stream . . . reach[es] and include[es] its underground sources of supply within the public lands*." *Id.* at 599 (emphasis added); *see also, e.g.*, Samuel C.

Weil, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 362 (1929) ("[C]onnection between surface streams and groundwater is usual, and in fact invariable.").

Again in 1976, the Court recognized that "(g)roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." *Cappaert v. United States*, 426 U.S. 128, 142 (internal quotation marks omitted); *see also Texas v. New Mexico*, 462 U.S. 554, 557 (1983) ("If development in New Mexico were not restricted, especially the groundwater pumping near Roswell, no water at all might reach Texas in many years.").

Consistent with the Court's repeated acknowledgment of the fundamental hydrological connection between groundwater and surface water, the Court has held that a compact does not need to apportion groundwater directly, or even make specific reference to groundwater consumption, in order to create enforceable restrictions on groundwater consumption. For example, in *Texas v. New Mexico*, 446 U.S. 540 (1980), the methodology the Court approved for determining compact violations took into account groundwater use. McKusick Rep. 35-36. In *Kansas v. Colorado*, 514 U.S. 673 (1995), the Court held that a provision in the Arkansas River Compact prohibiting "material depletions in usable river flows" covered "improved and increased pumping by existing wells." *Id.* at 690 (internal quotation marks and alterations in original omitted). And in *Kansas v. Nebraska*, 135 S. Ct. at 1050, the Court summarily approved the special master's recommendation that the Republican River Compact, which equitably apportioned "virgin

water supply" within the Republican River Basin, included "the entire natural stream flow of the Basin, which includes all groundwater that would be part of the stream flow in the Basin" if it were not intercepted by "the activities of man such as pumping." McKusick Rep. 28; *see also Kansas v. Nebraska*, 530 U.S. 1272.[2]

New Mexico, like Nebraska before it, asks this Court to ignore the scientifically established effect its groundwater consumption has on water intended for Texas under the Rio Grande Compact. Adopting New Mexico's approach would not only deny the hydrological fact that groundwater and surface water are related, it would undermine the purpose of interstate water compacts to avoid interstate conflict and promote the equitable apportionment of interstate streams, which deliver "a necessity of life" to downstream States. *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

More than a century of interstate water disputes demonstrates that some upstream States will press their geographic advantage in violation of a compact, unless and until this Court specifically orders them to stop. Downstream States like Texas and Kansas have little leverage, and no immediate remedy, for even the most egregious compact violations. Recognizing downstream States' "vulnerable" position, and the Court's role of "guarding against upstream States'

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[2] See also Burke W. Griggs, *The Political Cultures of Irrigation and the Proxy Battles of Interstate Water Litigation*, 57 Nat. Resources J. 1, 4-5, 38 (2017), in which Professor Griggs describes the "interstate 'water wars,'" litigated under this Court's original jurisdiction, where the Court held on several occasions that interstate water compacts cover groundwater.

inequitable takings of water," this Court in *Kansas v. Nebraska*, 135 S. Ct. at 1057, ordered Nebraska to disgorge a portion of its profits from repeated compact violations due to its failure to control groundwater pumping. The Court intended that remedy to stabilize the compact by deterring future violations and promoting the compact's successful administration. *Id.*

New Mexico's abuse of its upstream position to intercept water intended for Texas under the Rio Grande Compact warrants a similarly strong response from this Court. Given upstream States' repeated failure to respect this Court's admonishment not to cheat on compact obligations through excessive groundwater pumping, this Court should use this case to expressly adopt a presumption that interstate compacts that equitably apportion shared waters necessarily cover any extraction of groundwater or other diversion that reduces the apportioned stream flow.

Such a presumption would not be novel. For example, the Colorado Supreme Court long ago adopted a similar presumption that places the burden of proof on one asserting that groundwater is not "tributary" to "the stream in the watershed of which it lies." *Safranek v. Town of Limon*, 228 P.2d 975, 977 (Colo. 1951); *accord Kobobel v. State Dep't of Nat. Res.*, 249 P.3d 1127, 1136-37 (Colo. 2011).

Like the disgorgement award in *Kansas v. Nebraska*, a presumption tailored to the interstate compact context would stabilize compacts by reminding upstream States of their legal obligations, deter future violations by putting upstream States on notice that groundwater pumping that reduces a downstream

State's share of water presumptively violates an interstate water compact, and promote successful administration of compacts by improving the structural balance between upstream and downstream States.

Absent a more aggressive approach to upstream compact violators, downstream States like Texas and Kansas will be relegated to enforcing their compact rights through the costly and lengthy process of original action litigation in this Court. The prospect of an award of money damages, and possibly some disgorgement, years after compact violations is a poor substitute for the timely receipt of water to which downstream States are entitled.

II. Kansas's Experience Shows the Significant Detrimental Effects of Upstream States' Circumvention of Compact Promises through Excessive Groundwater Pumping.

Kansas has suffered a long and unfortunate history of upstream States taking advantage of their upstream positions to trample Kansas's water rights. *See, e.g.*, *Kansas v. Colorado*, 206 U.S. at 99, 117; *Kansas v. Colorado*, 185 U.S. 125, 145-46 (1902). Even after securing interstate compacts equitably apportioning the waters of interstate rivers shared with neighboring upstream States, Kansas repeatedly has had to resort to litigation in this Court to enforce its compact rights due to the upstream States' overuse of groundwater. *See, e.g.*, *Kansas v. Nebraska*, 135 S. Ct. at 1049-50; *Kansas v. Colorado*, 514 U.S. at 690.

Nebraska was the most recent culprit. And perhaps because Nebraska's approach—to violate the compact now and pay pennies on the dollar a decade

later—worked so well, New Mexico is running a very similar play at Texas's expense.

Shortly after Congress approved the Rio Grande Compact in 1939, it approved the Republican River Compact in 1943. Under the Republican River Compact, Kansas, Nebraska, and Colorado agreed to equitably apportion the Republican River's "virgin water supply," defined as Republican Basin water that is "undepleted by the activities of man" for the States' "beneficial consumptive use" of such water. *Kansas v. Nebraska*, 135 S. Ct. at 1049.

Between 1960 and 1990, the groundwater-irrigated acreage in Nebraska's part of the Basin expanded from about 175,000 acres to nearly a million acres. Naturally, the increase in groundwater pumping started reducing the Republican River's flow, and in turn reducing the water Kansas was receiving under the Compact. In the 1980s, Kansas complained to the Republican River Compact Administration that Nebraska was violating the Compact. But Nebraska ignored Kansas's complaints, claiming that the Compact did not cover groundwater pumping.

From 1995 to 1997, the States attempted to mediate the dispute, to no avail. In 1998, Kansas initiated an original action in this Court against Nebraska and Colorado to enforce its rights under the Republican River Compact. Nebraska filed a motion to dismiss, arguing (much as New Mexico does here) that the Compact did not cover groundwater pumping—even if the pumping diminished the Republican River's stream flow and the amount of water Kansas could receive under the Compact. *See Kansas v. Nebraska*, 135 S. Ct. at 1050. The special master recommended denying

Nebraska's motion to dismiss, concluding that Nebraska's groundwater pumping counted against Nebraska's annual allotment of water to the extent it depleted Republican River stream flow in the basin. This Court summarily agreed. *Id.*; *Kansas v. Nebraska*, 530 U.S. 1272.

And this was just the beginning of the saga. After much negotiation, Kansas, Nebraska, and Colorado agreed on accounting procedures to govern how groundwater usage would be incorporated into determining water allocations under the Compact. *Kansas v. Nebraska*, 135 S. Ct. at 1050. Yet Nebraska immediately exceeded its allocation under the new accounting procedures.

Nebraska's repeated and egregious overuse of water due to excessive groundwater pumping is detailed in a 2013 special master report. *See* Report of the Special Master, *Kansas v. Nebraska*, No. 126, Orig. (Nov. 15, 2013), *available at* https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/Orig126_report_special_master.authcheckdam.pdf ("Kayatta Rep."). It shows that between 2003 and 2006, Nebraska exceeded its compact allocation by 132,929 acre-feet. *In 2005 and 2006 alone, Nebraska overused by nearly 71,000 acre-feet—enough water to sustain a city of one million people for a year*.

Nebraska's compact violations had a tremendous negative economic impact on Kansas farmers who rely on Republican River water for irrigation. In 2005 and 2006, the on-farm impact of Nebraska's overuse was more than $1 million *each year*. *See* Kayatta Rep. 171. Add in all the secondary effects of this loss and the total comes to nearly $2 million per year. *Id.*

The effects of upstream overuse are substantial, widespread, and difficult to calculate precisely. And this does not include the cost to a State like Kansas of engaging in more than a decade of litigation to bring Nebraska into compliance with its compact obligations. Nor does it account for the fact that the performance Kansas bargained for in the Republican River Compact, like Texas in the Rio Grande Compact, was *water*—water the State cannot replace and will never receive.

III. New Mexico's Interpretation of the Rio Grande Compact, Not Texas's and the Special Master's, Disrespects State Sovereignty.

There can be no doubt that Kansas is a staunch defender of States' rights, including States' sovereign prerogative to regulate the natural resources within their borders. *See, e.g.*, Brief of the States of Kansas, Indiana, Missouri, and 19 Other States as *Amici Curiae* in Support of Petitioners, *Am. Farm Bureau Fed'n v. U.S. Envt'l Protection Agency*, No. 15-599 (S. Ct. Dec. 9, 2015) (arguing that the Environmental Protection Agency's interpretation of its authority under the Clean Water Act to set "the total maximum daily load" for certain bodies of water encroaches on States' traditional authority to regulate land use within their borders), *cert. denied*, 136 S. Ct. 1246 (Feb. 29, 2016). Regulating the lands and waters within a State's borders is a "quintessential state and local power" that is not easily overridden. *See Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality).

But New Mexico's claim—that its state water law supersedes an interstate water compact negotiated and signed by the affected States and enacted by Congress as federal law—is absurd. There is nothing novel or offensive to States' sovereignty about recognizing that *an interstate compact* can limit a compacting State's groundwater usage.

To begin with, this is not the first time an upstream State has made such an argument. In 1938—the year that Texas, New Mexico, and Colorado agreed to the Rio Grande Compact—the Court observed:

> The claim that on interstate streams the upper State has such ownership or control of the whole stream as entitles it to divert all the water, regardless of any injury or prejudice to the lower State, has been made by Colorado in litigation concerning other interstate streams, but has been consistently denied by this Court. The rule of equitable apportionment was settled by *State of Kansas v. Colorado*, 206 U.S. 46, 97 [(1907)].

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 102 (1938); *see also, e.g.*, *New Jersey v. New York*, 283 U.S. at 342, 343 (interstate streams "offer[] a necessity of life that must be rationed among those who have power over it"; while "New York has the physical power to cut off all the water within its jurisdiction . . . clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated").

Moreover, when States negotiate and enter compacts they voluntarily agree to give up some of the authority they might otherwise have over the water

within their borders. Once the States agree to terms, Congress must approve the compact before it can take effect. U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, ..."). Congress approved the Rio Grande Compact in the Act of May 31, 1939, 53 Stat. 785. But it is the States themselves who negotiate the terms and provisions.

Once given, "congressional consent transforms an interstate compact . . . into a law of the United States." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). The Supremacy Clause, Art. VI, cl. 2, then ensures that a congressionally approved compact, as a federal law, preempts any state law that conflicts with the compact. *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 n.8 (2013).[3]

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[3] New Mexico heavily relies on *Tarrant Regional Water District* to support its breathtaking claim that the Rio Grande Compact places no limit on New Mexico's sovereign authority to intercept water intended for Texas before it hits the Texas border. But as Texas has amply explained, *Tarrant Regional Water District* has no bearing on this case because Texas does not seek to appropriate water in New Mexico or enter that State and export water. Tex. Reply Br. 30. To be clear, Kansas does not contend that the Rio Grande Compact, or any other compact, should be construed as granting to the downstream State an enforceable groundwater right in the upstream State. Rather, Kansas argues, consistent with this Court's cases, that interstate water compacts restrict upstream States' authority to allow groundwater pumping or other diversions to the extent they diminish water supply that a compact has apportioned.

That the States necessarily must agree to the terms of a compact before Congress consents, is the same reason why the presumption against preemption does not apply to compact interpretation:

> [T]he presumption against pre-emption is rooted in respect for the States as independent sovereigns in our federal system and assume[s] that Congress does not cavalierly pre-empt state laws. When the States themselves have drafted and agreed to the terms of a compact, and Congress' role is limited to approving that compact, there is no reason to invoke the presumption.

Tarrant Reg'l Water Dist., 133 S. Ct. at 2132 n.10 (internal citation and quotation marks omitted).[4]

Instead, it is New Mexico's interpretation of the Rio Grande Compact that presents a serious threat to State sovereignty. In the Rio Grande Compact, co-equal sovereign States agreed to equitably apportion the waters of the Rio Grande Basin. Rather than respect Texas's right to the water it bargained to receive, New Mexico authorized groundwater pumping that intercepts the water intended for Texas before it

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[4] Where an interstate water compact is not involved, States retain their traditional "plenary control" over waters within their borders. *See Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935); *see also, e.g.*, Petition for a Writ of Certiorari, *Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians*, No. 17-40, 4, 35-36 (S. Ct. July 5, 2017), *petition pending*; Petition for Writ of Certiorari, *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, No. 17-42, 16-17 & n.3 (S. Ct. July 3, 2017), *petition pending*.

reaches the state line. Such a flagrant violation of Texas's sovereign interest highlights the need for swift adjudication of downstream States' compact rights and strict enforcement in the event of a violation.

CONCLUSION

The State of Kansas respectfully requests that the Court reject New Mexico's attempt to undermine the Rio Grande Compact by delivering water to Elephant Butte one day, then intercepting it the next before the water reaches its intended destination in Texas. To prevent such duplicitous behavior, Kansas urges the Court to adopt a presumption that similar interstate water compacts cover groundwater pumping and other diversions that reduce apportioned stream flow. Such a presumption would provide more structural balance between upstream and downstream States under existing compacts, and deter upstream States from using tactics like New Mexico's to circumvent their compact obligations.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Solicitor General
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Amicus Curiae