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 the Exception to the Third Interim Report of the Special Master

Brief of *Amici Curiae* State of Utah and 22 Other States in Support of the Joint Reply to the Exception of the United States by the States of Texas, New Mexico, and Colorado

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QUESTION PRESENTED

Should the Court deny the United States' Exception to the Special Master's Third Interim Report, thereby rejecting an unprecedented, improperly expanded role for the United States in the interpretation and enforcement of interstate water compacts?

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INTEREST OF AMICI CURIAE[1]

Amici curiae—the States of Utah, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Mississippi, Montana, Nebraska, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming—represent the interests of their citizens in the equitable apportionment and management of water. *Amici* States are parties to interstate water compacts negotiated, as sovereigns, among themselves and other States that equitably divide interstate waters.

As parties to interstate water compacts, *Amici* States expect certainty from their agreements and to be able to manage their state waters in accordance with such agreements. If a dispute arises regarding an interstate water compact, the state parties to the compact have the authority to resolve these disputes among themselves. State sovereignty and principles of federalism prevent undue interference from the United States when the United States is not a party to the compact.

To protect these important sovereign interests, *Amici* States submit this brief in support of the joint Reply of Texas, New Mexico, and Colorado (together the "Rio Grande Compact States") to the United States' Exception to the Special Master's Third Interim Report ("Exception"), which Exception seeks to block the entry of the Rio Grande Compact States' joint motion to enter a consent decree resolving the

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[1] *Amici* States notified the parties of their intention to file this brief ten days in advance, and *Amici* States submit this brief pursuant to Sup. Ct. Rule 37.4.

Rio Grande Compact ("Compact") dispute. In seeking the unprecedented authority to veto the consent decree agreed upon by the Rio Grande Compact States, the United States argues that it may enforce its own interpretation of the Compact terms and dictate how New Mexico must manage its water to comply with the terms of the Compact. *See* Exception at 21-24, 27-28, 43-47. The United States asserts an expanded federal role in interstate water compact disputes that, if accepted by the Court, would result in the ability of the United States to insert itself into the equitable apportionment and governance of water among the States. *Amici* States have a strong interest in avoiding that result.

SUMMARY OF ARGUMENT

A key element of state sovereignty is the authority of States to enter into compacts with one another to address cross-boundary issues. *See Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209 (1837). Specifically, States may enter into interstate water compacts determining the division and management of interstate waters. Compacts act as contracts between the state parties and are interpreted and enforced as such. *Oklahoma v. New Mexico*, 501 U.S. 221, 242 (1991) (Rehnquist, C.J., concurring).

States entering into compacts must have the ability to comply with, interpret, enforce, and defend their negotiated agreements on behalf of their citizens without undue interference from the United States. Accordingly, the role of the United States in disputes regarding interstate water compacts to which it is not a party must be strictly limited to those unique circumstances where the United States is permitted to intervene to defend "distinctively federal interests." *Texas*

v. New Mexico, 583 U.S. 407, 412-13 (2018) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 745, n.21 (1981)). In such cases, the United States should not be allowed to expand its role in the interpretation or enforcement of compact terms or the division and governance of water between the compacting States.

The United States does not have a role in the administration of state water to meet compact obligations. States are the appropriate representatives of their citizens' interests regarding the appropriation and distribution of water. *See California v. United States*, 438 U.S. 645, 653-70, 678-79 (1978). It is for the States, as the compacting parties, to administer and distribute water to comply with the compact.

Even in those instances where there is a federal water project associated with an interstate compact, the existence of the federal water project does not create a role for the United States in the enforcement or interpretation of the compact or in the division and governance of water between the States. Federal law requires that the United States comply with state law relating to the control, appropriation, and distribution of water in federal water projects. *See* 43 U.S. § 383; *see also* 43 U.S.C. § 666. Federal water project authorizations do not supersede compact terms negotiated by States and cannot impose new terms and conditions that were not agreed to by the compacting parties.

This Court should reject the United States' argument that it may enforce against state parties its own interpretation of interstate water compacts to which it is not a party and refuse the United States' attempt to expand its role in the interpretation and enforcement of such compacts. Thus, the Court should deny the Exception of the United States and grant the

motion of the Rio Grande Compact States to enter a consent decree.

ARGUMENT

I. The United States' Exception Encroaches on the Compacting States' Sovereign Authority to Form, Interpret, and Enforce Their Interstate Compact.

The ability to form interstate compacts is a key component of state sovereignty. *See Poole*, 36 U.S. (11 Pet.) at 209 (sovereign right of States to fix boundary disputes by compact); *see also New York v. New Jersey*, 598 U.S. 218, 220 (2023) (describing States' "sovereign authority" to enter into interstate compacts). The compacting authority of the States is recognized in Article I of the Constitution: "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power." U.S. Const., art. I, § 10, cl. 3 ("Compact Clause"). While the Compact Clause requires congressional consent for interstate compacts, it empowers the States to "draft and agree[] to the terms" of compacts with one another. *Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 631 n.10 (2013).

Interstate compacts allow States to address issues that cross jurisdictional boundaries. For example, States routinely rely upon the Compact Clause to compact with each other to equitably apportion and manage interstate waters. Numerous interstate water compacts are in effect throughout the United States. The Court considers these compacts to be "essentially a contract between the signatory States." *Oklahoma*, 501 U.S. at 242. States entering into interstate water compacts appropriately expect that they will have the ability to enforce and interpret the terms of their

compacts under contract principles. *See Tarrant Reg'l Water Dist.*, 569 U.S. at 628.

1. The United States has no role in the administration of state water to meet compact obligations. The administration and distribution of state water is a "core attribute of state sovereignty." *Kansas v. Nebraska*, 574 U.S. 445, 480 (2015) (Thomas, J., concurring). This necessarily includes the management of water to meet compact obligations. *See California*, 438 U.S. at 653-70, 678-79 (summarizing States' interests and rights in the utilization and control of their water resources).

In entering into interstate water compacts, States do not presume that they are waiving or limiting their sovereign rights with respect to the United States. It is a "well-established principle that States do not easily cede their sovereign powers," and silence is not construed as a waiver of sovereignty. *Tarrant Reg'l Water Dist.*, 569 U.S. at 631. In interpreting interstate water compacts, the Court therefore presumes that States intend to retain and protect their sovereignty over their water except to the extent they expressly agree to limit that authority. *Id.* 632 (silence in a compact does not indicate intent to modify traditional state authority).

Unless a compacting State expressly cedes its sovereign authority, the United States does not have a role in the management of state water, including the interpretation or enforcement of interstate water compacts.

2. The United States, however, seeks to insert itself into the Rio Grande Compact States' distribution and administration of water by enforcing what it calls a "duty" on the part of New Mexico to

limit groundwater or other diversions of water below Elephant Butte Reservoir. Exception at 22–23. This is not a duty identified in the Compact. And even if it were, it would not be a duty owed by New Mexico to the United States, but rather to the *other* Rio Grande Compact States. The United States has no role in a State's administration of its water rights—even to meet purported compact duties. *See California*, 438 U.S. at 653-70, 678-79.

The United States cannot and should not be able to interfere with the sovereign authority of the States to manage their water by pursuing compact claims or an apportionment of water that is different than that agreed to by compacting States. Accordingly, to the extent the United States participates in the administration or use of state water, it must comply with state law. *See* Reclamation Act of 1902, § 8, 32 Stat. 390 (codified at 43 U.S.C. § 383) ("Reclamation Act § 8"); *California*, 438 U.S. at 675. States must have certainty in their apportionment of water and the ability to determine how to provide water to their water users.

II. The United States' Federal Water Project Does Not Expand Its Limited Role in This Interstate Water Compact Dispute.

That the Compact Clause requires congressional consent for interstate compacts, U.S. Const., art. I, § 10, cl. 3, does not authorize federal regulation of interstate compacts. To the contrary, the Court has noted that "[t]his provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of

the others." *Florida v. Georgia*, 58 U.S. 478, 494 (1854).

In other words, the Compact Clause is intended to allow States to negotiate and compact on behalf of their citizens while safeguarding equity and comity among the States. The Compact Clause does not empower the United States to insert itself into negotiated agreements between the States and does not grant the United States the authority to interpret or enforce the terms of compacts entered into among the States.

In limited circumstances, the Court may permit the federal government to intervene in compact suits to defend "distinctively federal interests." *Texas*, 583 U.S. at 413 (quoting *Maryland*, 451 U.S. at 745, n.21). But such limited intervention does not include authority to determine the apportionment of water between States or management of water within States. *See id.* The Court's "permission should not be confused for license," and does not put the United States in the same position as the compacting parties to enforce and interpret compact terms. *Id.*

The United States does not have the same rights as a party State to enforce or interpret compact terms. *See id.* ("[J]ust because Congress enjoys a special role in approving interstate agreements, it does not necessarily follow that the United States has blanket authority to intervene in cases concerning the construction of those agreements."). Nor can this Court add provisions to a compact approved by Congress that would expand the rights of the United States:

> We do not – we cannot – add provisions to a federal statute. And in that regard a statute which is a valid interstate compact is no

> different. We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented.

Alabama v. North Carolina, 560 U.S. 330, 352 (2010).

The United States was granted leave to intervene in the Compact dispute to protect its claimed distinctively federal interests relating to its Rio Grande Project and related obligations. *Texas*, 583 U.S. at 413-15. But in its Exception, the United States does not limit itself to arguments based upon the vindication of distinctively federal interests. The United States argues that New Mexico has Compact duties to the United States, that New Mexico has breached its duties under the Compact, and that the United States is entitled to remedies under the Compact. Exception at 21–23.

Specifically, the United States seeks to insert itself into the division of water among the States and into the governance of state water within the borders of the States. The United States argues it has a role in determining Compact compliance regarding the division of water between New Mexico and Texas and in the appropriation and use of groundwater in New Mexico. *See* Exception at 22-23, 28, 43-44.

1. The division and administration of water between the States and the management of water resources within a State is not a distinctively federal interest. Rather, it is an element of state sovereign authority. *See, e.g.*, *California*, 438 U.S. at 675 (requiring the United States to comply with state law conditions as to the appropriation, control, use, and

distribution of water); *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (stating that Congress has "almost invariably" required federal entities to abide by state water law).

The United States argues that it has a role in interpreting and enforcing water compacts between States even where the compact does not grant the United States such authority. *See* Exception at 43-47. This newly claimed authority far exceeds the United States' traditional and limited role in approving interstate water compacts. *See supra*; *see also Texas*, 583 U.S. at 413. The Court should reject the United States' attempt to expand its power in this way.

If the Court accepts the United States' argument, the inevitable result will be further efforts by the United States to insert itself into the interpretation and enforcement of other interstate water compacts. The Court should reject this obvious affront to federalism and States' sovereign powers.

2. Nor can the United States justify its role in the enforcement or interpretation of compact terms because there is a federal water project associated with the Compact. *See* Exception at 30–34. Federal water projects do not supersede interstate water compacts or the States' authority to manage their water to meet compact obligations. The mere existence of a federal water project associated with compact water does not give the United States a role in the division of water between States or in enforcing or interpreting terms of an interstate water compact to which the United States is not a party.

Federal law requires the United States to comply with state law relating to the control, appropriation, and distribution of water in federal water projects. *See*

Reclamation Act § 8. Under the Reclamation Act, Congress established a program to construct and operate water storage and distribution projects. *See California*, 438 U.S. at 650; *Orff v. United States*, 545 U.S. 596, 598 (2005). But Congress clearly intended to defer to state water law and provided that such projects are subsidiary to state water law and compacts between sovereign States. Section 8 of the Reclamation Act provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water . . . and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

43 U.S. § 383.

This provision requires the federal government, in operating reclamation projects, to comply with state water law and state water allocations. Water stored in federal water projects must be appropriated and managed subject to state law. Further, through the McCarran Amendment, the United States has waived its sovereign immunity and defers to state law regarding the determination and administration of water rights for federal reclamation projects. 43 U.S.C. § 666. The fact that water subject to a compact is also associated with a federal water project does not diminish the sovereign authority of the State parties to the compact or give the United States expanded control over the compact terms or distribution of water under the compact.

That does not mean, however, that the United States is without recourse. If the United States has a claim regarding water appropriated to it in relation to a federal water project, the United States, like all other water right holders, may turn to state courts to protect project water rights. *See, e.g., In re Gen. Determination of Rights to the Use of Water*, 110 P.3d 666, 668 (Utah 2004).

In line with these principles, laws authorizing federal water projects that involve compact water recognize that such projects are subsidiary to interstate compacts and must operate within the compact framework. *See, e.g.*, Colorado River Storage Project Act of 1956, § 9, 70 Stat. 110 (codified as amended at 43 U.S.C. § 620h) ("Nothing contained in this chapter shall be construed to alter, amend, repeal, construe, interpret, modify, or be in conflict with . . . the Colorado River Compact, the Upper Colorado River Basin Compact, the Rio Grande Compact of 1938, or the Treaty with the United Mexican States." (citation omitted)); Colorado River Basin Project Act, § 601 (codified as amended at 43 U.S.C. § 1551(a)) ("Nothing in this chapter shall be construed to alter, amend, repeal, modify, or be in conflict with the provisions of the Colorado River Compact [or] the Upper Colorado River Basin Compact . . . ." (citations omitted)); The Twenty-First Century Water Works Act, 43 U.S.C. § 2427 ("Nothing in this subchapter preempts or affects State water law or an interstate compact governing water."); Reclamation Rural Water Supply Act, 43 U.S.C. § 2406(h) ("Nothing in this subchapter preempts or affects State water law or an interstate compact governing water."); North Bay Water Reuse Program, 43 U.S.C. § 390h-34(a)(5) ("Nothing in this

section affects or preempts State water law; or an interstate compact relating to the allocation of water.").

The existence of a federal water project does not give the United States authority to interpose its preferred interpretation or enforcement of interstate water compact terms.

CONCLUSION

For the foregoing reasons, the Court should deny the United States' Exception and grant the joint motion of the Rio Grande Compact States to enter a consent decree.

Respectfully submitted.

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