No. 133, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ARKANSAS,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

On Motion for Leave to File Bill of Complaint

REPLY BRIEF

MIKE BEEBE
ATTORNEY GENERAL OF ARKANSAS
TERESA BROWN MARKS*
DEPUTY ATTORNEY GENERAL
CHARLES MOULTON
SENIOR ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007

Counsel for Plaintiff

* Counsel of Record

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In this original action, Arkansas seeks a declaration by this Court that Oklahoma cannot impose its laws and regulations on economic activity occurring within Arkansas. Arkansas additionally seeks an interpretation of the plain terms of its interstate compact with Oklahoma—The Arkansas River Basin Compact ("Compact") ratified by Congress on November 13, 1973, Pub. L. No. 93-152, 87 Stat. 569—which Oklahoma circumvented by taking unilateral action in district court to abate pollution allegedly emanating from Arkansas. Oklahoma's conduct effectively repudiated the Compact and in the process demeaned the sovereignty of Arkansas. The issues raised in this action, which plainly implicate Arkansas's rights as a sovereign, are of sufficient "'seriousness and dignity'" to warrant the exercise of this Court's original jurisdiction. *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992).

In its Response, Oklahoma mischaracterizes this conflict as between a State and private parties. It is in fact between two

States. Oklahoma also misrepresents Arkansas's Commerce Clause claim and mislabels the Due Process claim as merely a choice of law disagreement. Finally, Oklahoma misinterprets the Compact. Each of Oklahoma's arguments ignores that this Court has routinely adjudicated interstate controversies, particularly when interpretation of a compact between States is at issue.

Fundamentally, Oklahoma ignores the equitable and obvious mechanism to address its interstate pollution-related grievances. Under the Compact, Oklahoma could have raised its pollution-related grievances before the Arkansas River Basin Compact Commission. It seems only reasonable that by allowing a federally authorized body—made up of representatives from both states, with the scientific resources and the historical knowledge of the complexities of this matter and the common goal of improving water quality in the shared watershed—to work in a cooperative environment, there is a much greater possibility of reaching an effective agreement in the best interests of both States. However, Oklahoma has chosen to act unilaterally against a sister State. That action violates the basic Constitutional plan defining the relationship among the several States that has permitted the Republic to endure for over 200 years. Oklahoma, like Arkansas, gave up the right to infringe upon the sovereignty of a sister State when it ratified the Constitution.

Furthermore, there is no adequate alternative forum where Arkansas can raise its claims. Only this Court, by exercising its exclusive original jurisdiction, can afford Arkansas the full relief it seeks. See 28 U.S.C. § 1251(a). In no other forum can Arkansas effectively participate both in the adjudication of its constitutional claims and in the resolution of competing interpretations of an interstate compact—where this Court has its strongest "claim to . . . expertise," *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 505 (1971).

I. ARKANSAS SEEKS TO VINDICATE ITS SOVEREIGN INTERESTS.

Oklahoma's assertion that Arkansas lacks standing is based on a fundamental misconception of Arkansas's claims and a misreading of this Court's precedents. Arkansas not only has standing to protect its sovereign capacity to govern within its borders and the rights of its citizens as *parens patriae*, but the harms it suffers are of significant seriousness and dignity to warrant the exercise of this Court's original jurisdiction.

1. This conflict is not between Oklahoma and private litigants. By moving for leave to file its complaint, Arkansas seeks to remedy Oklahoma's affront to its sovereignty and Oklahoma's breach of the Compact. Such injuries to Arkansas as a sovereign are not grievances of the private parties being sued in district court, nor injuries any private party could possibly assert. Oklahoma has conceded as much by arguing in district court that the private parties cannot raise defenses based on Arkansas's rights as a sovereign State. See Resp. in Opp. to Mot. to Dismiss Counts 4-10 of First Am. Compl. (Resp. App. at 28 n.20) (arguing that district court defendants are without standing to raise "violations of the sovereignty of Arkansas").

The standard for a justiciable controversy is nowhere near as onerous as Oklahoma suggests. Nowhere has the Court held that the existence of a remedy that *might* collaterally benefit third parties defeats constitutional standing in original jurisdiction actions. Instead, it has held that a "controversy" exists where "'the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.'" *Maryland* v. *Louisiana*, 451 U.S. 725, 735-36 (1981) (quoting *Massachusetts* v. *Missouri*, 308 U.S. 1, 15 (1939)). Accordingly, the Court has exercised original jurisdiction when one State has infringed upon a sister State's

primary power of governance, even when that decision might concomitantly affect private third parties. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 452 (1992); *Maryland*, 451 U.S. at 743. Compare *Southeast Interstate Low-Level Radioactive Waste Mgmt. Comm'n* v. *North Carolina*, 533 U.S. 926 (2001) (dismissing complaint filed by private party entity), with *Alabama* v. *North Carolina*, 540 U.S. 1014 (2003) (asserting jurisdiction over same complaint filed by States).

Here, Oklahoma's actions—seeking to override Arkansas's ability to legislate within its borders—have caused serious and judicially redressable injury. Each State entered our Nation with its "sovereignty intact." *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991). Our constitutional compact dictates: "No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular." *Bonaparte* v. *Appeal Tax Court*, 104 U.S. 592, 594 (1881). Oklahoma, seeking to impose its social and environmental prerogatives on a neighbor, has displaced Arkansas's legislative and executive judgments by imposing different (and conflicting) standards on commercial and economic activity occurring wholly within Arkansas. A remedy prohibiting the wholesale export of Oklahoma law would redress this injury.

Moreover, Oklahoma has breached the Compact by acting unilaterally to resolve its pollution-related concerns. No private party can assert Arkansas's right to enforce the Compact, and only this Court can arbitrate disputes over a constitutionally authorized, congressionally sanctioned agreement between the States. See *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987) ("By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them . . . this power includes the capacity to provide one State a remedy for . . . breach of [compact by] another.").

Because Arkansas seeks to vindicate injury to *its* sovereignty and *its* rights under the terms of the Compact, and not the interests of private third parties, Oklahoma's reliance on

Arizona v. *New Mexico*, 425 U.S. 794 (1976), is misplaced. That dispute involved the propriety of a New Mexico law imposing a 4% tax on New Mexico energy used out of state, which Arizona argued unconstitutionally discriminated against its citizens "by placing upon them the burdens of the tax." *Id.* at 796. Arizona alleged no other injury in its complaint, seeking in its original action only to vindicate *its citizens'* rights and not its own. As such, this Court concluded that a concurrent district-court action—where three Arizona utilities, one a political subdivision of the State, see *Maryland*, 451 U.S. at 743, sought a declaration that New Mexico's tax was unconstitutional—"provide[d] an appropriate forum in which the Issues tendered . . . may be litigated." *Arizona*, 425 U.S. at 797.[1]

By contrast, when a State sues to vindicate its sovereign interests, this Court has held that pending litigation in which the State is not a participant cannot constitute an "appropriate forum." Oklahoma's failure to distinguish, or even cite, *Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992), is telling. In *that* original action, Oklahoma proffered an identical argument to the one here, and the Court rejected that argument. Wyoming challenged an Oklahoma law limiting the amount of Wyoming-produced coal Oklahoma municipal governments could consume. The law, primarily affecting private entities producing Wyoming coal, undermined "Wyoming's ability to collect severance tax revenues, an action undertaken in its sovereign capacity." *Id.* at 451. Thus, while the "mining companies affected in Wyoming could bring suit raising

[1] Oklahoma's reliance on *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) (per curiam), is similarly flawed. There, no plaintiff State could assert injury independent of that of its citizens. *Id.* at 664. Nor does *Arkansas* v. *Texas*, 346 U.S. 368 (1953), undermine Arkansas's motion. In that case, the Court rejected a contention that the University of Arkansas was a private party, rather than an instrumentality of the State, by "look[ing] beyond . . . [the] asserted claims." Resp. at 13 (citing *Arkansas*, 346 U.S. at 371). Arkansas's claims can *only* be raised by Arkansas in its sovereign capacity.

the Commerce Clause challenge," there were no assurances they could, or would, represent the State's interests. Because this Court has exclusive original jurisdiction over disputes between States, "[i]t was proper to entertain th[e] case without assurances . . . that a State's interests under the Constitution will find a forum for appropriate hearing and full relief." *Id.* at 452.

Arkansas thus seeks redress for harm to its sovereign capacity within its borders, and to its rights under the Compact. These are not injuries private parties could seek to redress in district court.

2. Nor should Oklahoma be permitted blithely to claim its complaint has no effect in Arkansas. Oklahoma's assertion that it is not seeking "to enforce Oklahoma regulations on farming activity in Arkansas," Resp. at 3; see also *id.* at 15, is plainly contradicted by the relief Oklahoma seeks in district court—an injunction requiring application of Oklahoma law *within* Arkansas. See Okla. First Am. Compl. Prayer for Relief ¶ 3 (Mot. for Leave, App. 35a) (hereinafter "App.").

Indeed, Oklahoma has already demonstrated it will seek to enforce its environmental standards without regard for State borders. For example, Oklahoma has apparently unilaterally installed water quality monitoring devices on public and private property in Arkansas without obtaining the landowners' consent. See Jason Schultz, *County leaders say Oklahoma crossed the line,* Ark. Democrat-Gazette, May 19, 2005, at 1B ("Washington County Judge Jerry Hunton said he is upset that Oklahoma officials didn't notify the county or landowners before installing the devices."); Schultz, *County judge upset by cloak around testing,* Ark. Democrat-Gazette, May 18, 2005, at 1B (same).

In any event, in its Response, Oklahoma seeks to impose its standards upon Arkansas by condemning "the application of poultry waste to the lands of the [Illinois River] Watershed *in both states* in amounts far in excess of any legitimate agro-

nomic need." Resp. at 4 (emphasis added). The application of poultry litter to the land in the Illinois River Watershed in Arkansas is regulated by laws properly enacted by elected Arkansas officials. By characterizing conduct clearly legal in Arkansas as conduct it seeks to punish, Oklahoma seeks to arrogate to itself the power to determine what constitutes lawful conduct in both States. This is precisely what Arkansas complains of in alleging that "Oklahoma now asserts the right to directly apply its laws and regulations to conduct occurring wholly within Arkansas, as a means to address water quality concerns." See Bill of Compl. at 9 ¶ 40. See also *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 608 (1982) ("We turn now to the allegations of the complaint to determine whether they satisfy [the conditions for exercising original jurisdiction].").

3. Oklahoma's claim that this "lawsuit is nothing more than an attempt by Arkansas to use its status as a state to shield private companies" is specious on an independent ground. See Resp. at 7. The Court has recognized that a State has *parens patriae* standing to assert its quasi-sovereign interest to protect its citizens' legal rights. See, e.g., *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 665 (1976) (per curiam) ("The Court has recognized the legitimacy of parens patriae suits."); *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 592 (1923) ("[T]he state, as the representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law."), *aff'd on reh'g*, 263 U.S. 350 (1923). In *Snapp*, the Court permitted Puerto Rico to prosecute the rights of 787 of its citizens under federal civil rights laws, because they implicated the commonwealth's independent concern for "the health and well-being—both physical and economic—of its residents in general." 458 U.S. at 607. In contrast, Oklahoma's actions involve wholesale regulation of northwest Arkansas's primary industry, affecting thousands of Arkansans. Bill of Compl. at 6 ¶ 26 ("In northwest Arkan-

sas, the region of the Illinois River Watershed, poultry industry activity alone generates 12% of the jobs, 13% of the wages and 10% of the value added to the regional economy."). Accordingly, Arkansas has standing to defend and assert the rights of these widely dispersed farmers who apply poultry litter to their lands. See Mot. for Leave at 19 n.4.

4. Oklahoma's claim that "Arkansas's lawsuit is barred by the Eleventh Amendment," Resp. at 16 n.8, is spurious. The Eleventh Amendment extends only to a "suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Arkansas is not a citizen of "another State" or a "Citizen[] or Subject[] of any Foreign State." This Court has stated "that a State may recover monetary damages from another State in an original action, without running afoul of the Eleventh Amendment." *Kansas* v. *Colorado*, 533 U.S. 1, 7 (2001). Furthermore, Arkansas seeks only injunctive and declaratory relief, not money damages. See Bill of Compl. at 16, Prayer for Relief ¶¶ 1-5.

II. SUBSTANTIAL CONSTITUTIONAL ISSUES WARRANT THE EXERCISE OF ORIGINAL JURISDICTION.

1. Oklahoma is mistaken in arguing that direct State regulation of interstate commerce is not prohibited by the Constitution and that Arkansas's Commerce Clause claim must be analyzed under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). This Court has held that the *Pike* balancing test is inapplicable where a State seeks *directly* to regulate commerce taking place wholly within the borders of another State.[2] See *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). Such regulatory

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[2] Moreover, although *Pike* does not apply to this case, even if it did, the Court should not dismiss this case outright. Due to the fact-intensive nature of *Pike*, the special master would need to determine the facts to resolve whether or not this case should move forward.

practices are *per se* invalid. See *id.* (contrasting *Pike* balancing test with review of State actions imposing extraterritorial regulation). Indeed, direct State regulation of *inter*state commerce unambiguously contradicts the constitutional grant of exclusive authority to Congress. See U.S. Const. art. I, § 8, cl. 3 (The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .").

Accordingly, when one State imposes its laws on conduct occurring within a sister State, the Court has "generally struck down the statute without further inquiry." *Brown-Forman*, 476 U.S. at 579; see also *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640 (1982) (plurality opinion) ("The Commerce Clause, however, permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited."). Hence, Oklahoma's proffered justification for applying its law in Arkansas—that the burden on Arkansas's economic activity is outweighed by the benefit to Oklahoma's environment—has no bearing on the proper constitutional analysis (as it is only relevant under the *Pike* test). See *Shafer* v. *Farmers Grain Co. of Embden*, 268 U.S. 189, 199 (1925) (Extraterritorial regulation is "prohibited . . . and invalid, regardless of the purpose with which it was enacted."); *Edgar*, 457 U.S. at 642-43 (plurality opinion) ("The Commerce Clause also precludes the application of a state statute . . . that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."). Extraterritorial regulation of out-of-state commerce is constitutionally impermissible without regard to governmental purpose. See *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (A State cannot regulate "'commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'"). The *only* inquiry this Court must make "is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.*[3] Here,

[3] Oklahoma's reliance on *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), is misplaced. First, that decision did not involve extraterritorial

Oklahoma's attempt to restrict Arkansas's use of poultry litter—lawful commercial activity—directly regulates interstate commerce.

Although Oklahoma argues that its actions have no effect beyond its borders, these claims are belied by its district-court filings. Oklahoma has conceded in them that it seeks to regulate the management and application of poultry litter not only within its borders, but also in Arkansas, see Resp. in Opp. to Mot. to Dismiss Counts 4-10 of First Am. Compl. (Resp. App. at 5), and that this regulation will supplant Arkansas law (expressly authorizing application of poultry litter as a natural fertilizer).[4] *Id.* at 19-22 (arguing that under choice-of-law principles, Oklahoma law applies to poultry waste disposal practices that have "admittedly occurred in Arkansas"). This concession is fatal; Oklahoma should not be permitted to argue contradictory positions.[5]

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regulation of interstate commerce. Second, even if relevant, it does not support Oklahoma's actions. In *Philadelphia*, the Court held that New Jersey could slow the "flow" of waste into its landfills, but not in a manner discriminating against interstate commerce. *Id.* at 626-27. Here, Oklahoma has sought selectively to impede nutrient flow into the Illinois River Watershed by regulating the application of poultry litter within Arkansas (poultry is predominately an Arkansas industry) while not enforcing such standards against industries which economically benefit Oklahoma. *See* Bill of Compl. at 7-8 ¶ 34. The Commerce Clause plainly prohibits one State from favoring its industries over those of sister States. *Pike*, 397 U.S. at 145-46; *Oregon Waste Systems, Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994) (The dormant commerce clause doctrine bars "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.").

[4] *See, e.g.*, Ark. Code Ann. §§ 15-20-901, *et seq.*; *id.* §§ 15-20-1101, *et seq.*

[5] As a last resort, Oklahoma argues that under Commerce Clause analysis, a distinction between State tort law and State economic regulations exists. Resp. at 20 n.10. This Court, however, has rejected such arbitrary line drawing: "[R]egulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent

2. Oklahoma seeks to divert the Court's attention by asserting that "Arkansas's contentions boil down to a choice of law issue." Resp. at 7. This is verbal sleight of hand. "Choice of law" is not a talismanic formula transforming a constitutional violation into an unexceptional state-law issue. As Justice Jackson long ago observed, "we may candidly recognize that choice-of-law questions, when properly raised, ought to and do present constitutional questions." Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 27 (1945). Indeed, many of this Court's cases concerning the Constitutional need to keep States from applying their laws extraterritorially could be—and have been—characterized as "choice of law" cases.[6] Accordingly, Oklahoma begs the question Arkansas asks this Court to decide: Does the Constitution allow Oklahoma to project its laws over lawful activity occurring wholly within Arkansas?

Oklahoma additionally seeks to minimize the importance of its own law to its suit, claiming the action is "based largely on

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method of governing conduct and controlling policy." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959); *see also BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.").

[6] *Compare, e.g., New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914) (A rule that States cannot apply their law extraterritorially "is so obviously the necessary result of the Constitution that it has rarely been called into question . . . ."), *with* Russell J. Weintraub, *Commentary on the Conflict of Laws* 523 (3d ed. 1986) (discussing *Head* as a choice of law case); *and Watson* v. *Employers Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954) (declaring "the due process principle that a state is without power to exercise 'extra territorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries"), *with* Weintraub, *supra*, at 208, 401 n.30, 515-16, 532 n.95, 551 n.83 (discussing *Watson* as a choice of law case).

federal environmental law and federal common law." Resp. at 14. Arkansas's Bill of Complaint contains no allegations that the proper application of the Comprehensive Environmental Response Compensation Liability Act ("CERCLA"), the Resource Conservation and Recovery Act ("RCRA") or federal common law to Arkansas residents is unconstitutional. Compare Bill of Compl. with Oklahoma's First Am. Compl., cts. 1, 2, 3, 5 & 10 (App. 19a-25a, 27a-29a, 34a-35a) (alleging violations of those federal laws). However, a cursory examination of Oklahoma's complaint demonstrates that enforcing federal law is a secondary goal, as much of the relief sought is available *only* under Oklahoma law. See, *e.g.*, Okla. First Am. Compl. ¶ 147 (App. 35a) ("[T]he State of Oklahoma is entitled to disgorgement of all gains the [private-party] defendants realized . . . ." under an unjust enrichment theory.).[7]

Furthermore, any suggestion that Oklahoma is indifferent to the district-court application of either Oklahoma or Arkansas law is belied by its complaint. In setting forth its state-law claims, Oklahoma expressly invokes 27A Okla. Stat. § 2-6-105 (public nuisance *per se* statute), see Oklahoma's First Am. Compl. ¶ 103 (App. 26a), 2 Okla. Stat. § 2-18.1 (public nuisance *per se* based on jurisdiction of Oklahoma Department of Agriculture, Food, and Forestry), see Oklahoma's First Am. Compl. ¶ 104 (App. 26a), and 12 Okla. Stat. § 904 (recovery of attorneys fees, court costs, and interest), see Oklahoma's First Am. Compl. ¶¶ 108, 127 (App. 27a, 31a). Nowhere does it allege a violation of Arkansas law. Thus, far from making generalized common-law complaints regarding conduct in Arkansas, Oklahoma explicitly seeks to apply its

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[7] The federal law invoked by Oklahoma would only entitle it to damages and clean-up costs. *See* 42 U.S.C. §§ 6972 (setting forth relief in RCRA citizen suits) & 9607 (setting forth relief in CERCLA cases); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 89 (5th ed. 1984) (setting forth the remedies in nuisance cases).

own law to establish liability and its entitlement to specific forms of relief.

Where Oklahoma does address what law should apply, it contends there is nothing extraordinary about extraterritorial application of its nuisance law. Yet none of the nuisance cases Oklahoma cites stands for such a proposition. See, *e.g.*, Resp. at 7, 15 (citing cases). Each involves the application of *federal* rather than state common law, further demonstrating the extraordinary nature of Oklahoma's action. In *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907)—a pre-*Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), decision—the Court applied federal common law under the rule previously announced in *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) and *Texas* v. *Pankey*, 441 F.2d 236 (10th Cir. 1971) are equally unavailing. Both cases involved application of the federal common law of nuisance across state boundaries. See *City of Milwaukee*, 406 U.S. at 103 ("When we deal with air and water in their ambient or interstate aspects, there is federal common law . . . ."); *Pankey*, 441 F.2d at 240. As the Tenth Circuit stated in *Pankey*:

> Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain.

Id. at 241. Far from supporting the assertion that States may displace their sister States' laws under the guise of common law adjudication, these cases rest on the premise that such interstate conflicts are beyond the competence of a single State to solve.

Nor does *Ohio* support the proposition that a State may displace a sister State's laws with its own nuisance law. There, the Court actually refused to hear the case (never ruling on the applicable law), explicitly reserving the question of

whether Ohio could project its nuisance law beyond its borders. See 401 U.S. at 500. In fact, the Court declined to apply state law to the case in part because "Ohio and Michigan are both participants in the Lake Erie Enforcement Conference," which ought to be allowed to pursue its course without judicial interference. *Id.* at 502-03. Analogously, Oklahoma here seeks to replace the interstate process of the Compact Commission with litigation. It is noteworthy that when this Court considered a very similar fact pattern—a nuisance claim involving interstate pollution on the Great Lakes—a year after *Ohio*, in *City of Milwaukee*, it explicitly looked to *federal*, not *state*, substantive law.[8]

These decisions demonstrate that unilateral state action is not effective or appropriate in resolving interstate-pollution problems. By contrast, Arkansas argues that the Constitution provides a mechanism for resolving these disputes—the Compact Clause—and prohibitions against unilateral State action—the Commerce Clause, Due Process Clause and the basic structure of our constitutional compact.

III. THE COMPACT BETWEEN OKLAHOMA AND ARKANSAS IS DESIGNED TO RESOLVE THESE DISPUTES.

In its Response, Oklahoma states that it "values the efforts of the two states' work on interstate water quality issues through the Compact Commission," emphasizing both a "great respect for the goals and accomplishments of the Commission" and the desire to "continue to cooperate with Arkansas to carry on the work of the Commission in the future, just as it has in the past." Resp. at 6. Oklahoma's unilateral district court action, however, speaks far louder

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[8] Oklahoma also cites *Young* v. *Masci*, 289 U.S. 253 (1933), *see, e.g.*, Resp. at 7, 15, which did not involve extraterritorial application of nuisance law. Rather, it presented the question of whether a State could hold a principal liable for a tort caused by his agent within the State's boundaries. 289 U.S. at 256-58.

than its words concerning the "respect" it has for the Congressionally-recognized Compact it claims to esteem. Its arguments justifying this action are unavailing.

1. Oklahoma contends that the Compact Commission lacks jurisdiction over its private-party defendants. *Id.* at 26. This argument is of no merit because, as discussed above, this is an interstate water dispute between two States, a conflict which the Compact was designed specifically to resolve.

2. Oklahoma also contends that the Compact does not require a signatory State to come before the Commission as a condition precedent to filing suit. *Id.* at 6, 27; see Compact, art. IX.A.(8). Thus, Oklahoma argues that it need not "exhaust some remedy with the Commission," Resp. at 27, before suing in district court. Its selective quotation ignores the full import of the very Compact language it cites. The Compact provides:

> The making of findings, recommendations, or reports by the Commission shall not be a condition precedent to instituting or maintaining any action or proceeding of any kind by a signatory state in any court, or before any tribunal, agency or officer, *for the protection of any right under this Compact or for the enforcement of any of its provisions.*

Compact, art. IX.A.(8) (emphasis added). Nowhere does this language absolve Oklahoma of its *obligation* under the Compact to resolve interstate pollution disputes in the Arkansas River Basin through bilateral negotiation. It merely provides that a signatory State need not wait for "findings, recommendations, or reports by the Commission" before seeking an adjudication of its rights *under the Compact.* Thus, under Article IX.A.(8), a signatory State need not appeal to the Commission before bringing an action under the Court's original jurisdiction against another signatory State for breach

of the Compact.[9] Thus, Arkansas can bring this action against Oklahoma without first exhausting remedies at the Commission.

Finally, this conflict is well within the Commission's purview. Since the Compact's inception, both States have resolved pollution-abatement issues within the Illinois River Watershed through negotiation—issues over which the Commission has exercised jurisdiction. See Mot. for Leave at 22-24 (citing Minutes from Annual meetings of the Arkansas-Oklahoma Arkansas River Compact Commission). In fact, the Commission's focused efforts have led to positive, tangible results concerning pollution abatement in the Illinois River Watershed which are reflected in the States' legislative and regulatory responses. See *id.* at 23-25. Arkansas, recognizing progress due to collaborative efforts under the Compact and wishing to avoid the alternative—a series of escalating disputes between the States—wishes to preserve this well-established process.[10]

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[9] Under circumstances not present here, a signatory State can bring an action in district court to enforce standards promulgated under the Compact. *See* Compact, art. XIII.B.; 33 U.S.C. § 466g-1. All other disputes are within this Court's exclusive original jurisdiction. *See* 28 U.S.C. § 1251(a).

[10] If the Court were to deny leave and require that Arkansas litigate elsewhere, that the result likely would be flatly inconsistent with how the Constitution envisioned State versus State conflicts would be resolved. Arkansas could litigate its claims in its own district court—where it would likely name Oklahoma officials as defendants—while Oklahoma's district court action remains pending. Ultimately, the two claims could be simultaneously adjudicated. Risk of potentially contradictory judgments would be real, and injury to Arkansas's sovereignty in the interim palpable. Years from now, after great expense, time and piecemeal litigation—hardly befitting the dignity the Constitution afforded to a conflict between two sovereign States when its Framers incorporated original jurisdiction provisions in Article III—this matter could return to this Court. The resulting records would contain conflicting factual findings in dueling lower courts, appealed to different federal circuits—the Eighth (Arkansas) and Tenth (Oklahoma)—and, quite possibly, by another motion for leave to

In its compact claim, Arkansas seeks no more than an interpretation of the already-existing Compact. This Court alone has a "'serious responsibility to adjudicate cases where there are actual, existing controversies' between States over the waters in interstate streams," *Oklahoma* v. *New Mexico*, 501 U.S. 221, 241 (1991) (quoting *Arizona* v. *California*, 373 U.S. 546, 564 (1963)), especially when an interstate compact is at issue. See *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) (noting that the Supreme "Court . . . must have final power to pass upon the meaning and validity of compacts").

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for leave to file the Complaint.

Respectfully submitted,

MIKE BEEBE
ATTORNEY GENERAL OF ARKANSAS
TERESA BROWN MARKS*
DEPUTY ATTORNEY GENERAL
CHARLES MOULTON
SENIOR ASSISTANT ATTORNEY GENERAL
OFFICE OF THE ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007

Counsel for Plaintiff

February 3, 2006 * Counsel of Record

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file a complaint in this Court from one of the States. Such a process would undoubtedly result in millions of dollars in litigation expenses. All the while, Arkansas's sovereign authority, as well as the viability of its comprehensive statutory and regulatory scheme, would remain clouded by Oklahoma's action.