No. 133, ORIGINAL

In The
Supreme Court of the United States

STATE OF ARKANSAS,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

OKLAHOMA'S RESPONSE IN OPPOSITION TO ARKANSAS'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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QUESTIONS PRESENTED

1. Does Arkansas's Bill of Complaint present issues of sufficient dignity and seriousness to warrant the exercise of this Court's original jurisdiction when the same issues are currently being litigated in federal district court between Oklahoma and the real parties in interest – the defendants in Oklahoma's lawsuit ("Poultry Integrator Defendants")?

2. Does Arkansas have standing to bring this lawsuit when Oklahoma's lawsuit against the Poultry Integrator Defendants has caused Arkansas no legally-cognizable injury?

3. In addition to the federal statutory and common law claims that Oklahoma has brought against the Poultry Integrator Defendants, Oklahoma's Complaint also includes supplemental state law claims. In the event the district court, applying choice of law principles, determines that Oklahoma law should be applied to Oklahoma's state law tort and equitable claims as they relate to conduct occurring in Arkansas but causing injury in Oklahoma, would the application of Oklahoma law be barred by the United States Constitution even though it has long been appropriate under the Constitution to hold a person acting outside the state responsible according to the law of the state for injurious consequences within the state?

4. Does the Arkansas River Basin Compact require Oklahoma to exhaust any procedure with the Compact Commission prior to filing a lawsuit against private parties even though (1) the Compact does not provide Oklahoma with a remedy against private parties nor even address disputes between a state and private parties, and (2) the Compact indicates that resort to 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"?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OKLAHOMA'S RESPONSE IN OPPOSITION TO ARKANSAS'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT 1

INTRODUCTION 1

COUNTER-STATEMENT OF THE CASE 5

ARGUMENT 8

I. The exercise of original jurisdiction would not be appropriate in this case because (1) Arkansas's claims lack seriousness and dignity, and (2) the issues Arkansas raises are currently being litigated in federal district court by the real parties in interest 8

A. Arkansas's claimed interests lack seriousness and dignity 8

B. The district court is the appropriate forum to first address the issues that Arkansas attempts to raise 10

II. Arkansas does not have standing to seek to enjoin Oklahoma's lawsuit because Arkansas has not been injured by Oklahoma's attempt to seek redress from the Poultry Integrator Defendants for knowingly polluting Oklahoma's Watershed 13

A. Arkansas's sovereignty is not threatened by Oklahoma's attempt to hold the Poultry Integrator Defendants accountable under federal law and/or whichever state law the district court deems appropriate 14

TABLE OF CONTENTS – Continued

Page

B. The Compact does not create for Arkansas a legally-cognizable interest that it would not otherwise have because no provision of the Compact bars Oklahoma's lawsuit 15

III. The United States Constitution does not prohibit Oklahoma from seeking to hold the Poultry Integrator Defendants accountable for knowingly polluting Oklahoma's invaluable natural resources and endangering the health of Oklahomans 17

A. Oklahoma's lawsuit does not violate the negative implications of the Commerce Clause because the lawsuit does not discriminate against out-of-state economic activity, and any incidental burden it might impose on interstate commerce is not clearly excessive in relation to Oklahoma's interest in protecting its environment and the health of Oklahomans 18

1. The state-law claims in Oklahoma's lawsuit are applied even-handedly because they seek to stop the flow of pollution into Oklahoma's Watershed from in-state and out-of-state sources 21

2. To the extent that Oklahoma's state-law claims impose any burden on interstate commerce, that burden does not clearly outweigh Oklahoma's interest in protecting the health of its citizens and its invaluable natural resources 22

TABLE OF CONTENTS – Continued

Page

B. Oklahoma's lawsuit against the Poultry Integrator Defendants does not threaten Arkansas's sovereignty nor the due process rights of the Poultry Integrator Defendants because it addresses an injury in Oklahoma 23

IV. The Compact does not prohibit Oklahoma's lawsuit against the Poultry Integrator Defendants who are knowingly polluting Oklahoma's invaluable natural resources because (1) the Compact does not grant jurisdiction to the Commission over suits between a signatory State and private parties, and (2) the Compact indicates that resort to the Commission is not a condition precedent to filing suit 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alabama v. Arizona, 291 U.S. 286 (1934) 12, 13, 16

Arizona v. New Mexico, 425 U.S. 794 (1976).....7, 10, 11

Arkansas v. Texas, 346 U.S. 368 (1953)..... 13

BMW of N.A. v. Gore, 517 U.S. 559 (1996)..... 20, 24, 25

Baldwin v. Seelig, 294 U.S. 511 (1935) 19, 20

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986)..... 19

Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777 (3d Cir. 1992) 20

C & A Carbone, Inc., v. Town of Clarkstown, 511 U.S. 383 (1994) 19

California v. Texas, 437 U.S. 601 (1978) 13, 14

Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245 (D.N.J. 2000)..... 20

City of Boston v. Smith & Wesson Corp., 66 F. Supp. 2d 246 (D. Mass. 1999)..... 25

City of New York v. Beretta U.S.A. Corp., 315 F. Supp. 2d 256 (E.D.N.Y. 2004) 22, 25

Ex parte Collett, 337 U.S. 55 (1949) 28

Crowley v. CyberSource Corp., 166 F. Supp. 2d 1263 (N.D. Cal. 2001)..... 20

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907)..... 6, 15

Granholm v. Heald, 125 S. Ct. 1885 (2005) 19

TABLE OF AUTHORITIES – Continued

Page

Ileto v. Glock Inc., 349 F.3d 1191 (9th Cir. 2003), *reh'g en banc denied*, 370 F.3d 860 (9th Cir. 2004), *cert denied sub nom. China North Indus. Corp. v. Ileto*, 125 S. Ct. 865 (2005) 20, 22

Illinois v. City of Milwaukee, 406 U.S. 91 (1972).... 6, 12, 15

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987)..... 29

Jell-O Co. v. Brown, 3 F. Supp. 132 (W.D. Wash. 1926)..... 23

Kansas v. Colorado, 533 U.S. 1 (2001) 16

King v. St. Vincent's Hosp., 502 U.S. 215 (1991)..... 28

Louisiana v. Texas, 176 U.S. 1 (1900)..... 8, 13

Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35 (1st Cir. 2000) 23

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 19

Mississippi v. Louisiana, 506 U.S. 73 (1992) 8

NAACP v. AcuSport Inc., 271 F. Supp. 2d 435 (E.D.N.Y. 2003) 22

New York v. New Jersey, 256 U.S. 296 (1921) 14

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 6, 12, 15

Oklahoma v. Cook, 304 U.S. 387 (1938)..... 13

Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93 (1994)..... 19

Pennsylvania v. New Jersey, 426 U.S. 660 (1976) 13

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 19, 20, 21, 22

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)..... 19, 20

TABLE OF AUTHORITIES – Continued

Page

State Farm Mutual Auto. Ins. Co. v Cambell, 538 U.S. 408 (2003) 25, 26

Stone ex rel. Estate of Stone v. Frontier Airlines, Inc., 256 F. Supp. 2d 28 (D. Mass. 2002) 20

Texas v. New Mexico, 462 U.S. 554 (1983)..... 8, 29

Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971)..... 6, 12, 15

Young v. Masci, 289 U.S. 253 (1933) 7, 15, 17, 26

STATE CASES

Cameron v. Vandegriff, 13 S.W. 1092 (Ark. 1890)..... 15, 17

Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002)..... 25

District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633 (D.C. 2005), *cert. denied*, 126 S. Ct. 399 (2005) 24, 25

Gomez v. ITT Educ. Servs., Inc., 71 S.W.3d 542 (Ark. 2002) 18

N.C. Corff Partnership v. OXY USA, Inc., 929 P.2d 288 (Okla. Ct. App. 1996)..... 3

New Hampshire v. Lord, 16 N.H. 357 (1844)..... 18

DOCKETED CASES

Oklahoma v. Tyson Foods, Inc., No. 05-CV-329-JOE-SAJ (N.D. Okla. filed Jun. 13, 2005) 2

FEDERAL STATUTES

U.S. Const. art. 1, § 8 ..... 18, 23

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1257(2) 11

Designation of Hazardous Substances, 40 C.F.R. § 302.4 (2005) 4

STATE STATUTES

2 Okla. Stat. § 2-18.1 3

27A Okla. Stat. § 2-6-105 3

82 Okla. Stat. § 1452 1

PUBLICATIONS

Holleman, John T., *In Arkansas Which Comes First, The Chicken or the Environment*, 6 Tul. Envtl. L.J. 21, 27 (1992) 2

OKLAHOMA'S RESPONSE IN OPPOSITION TO ARKANSAS'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

The State of Oklahoma provides the following response in opposition to Arkansas's Motion for Leave to File Bill of Complaint ("Motion for Leave") and respectfully requests the Court to decline original jurisdiction in this case.

INTRODUCTION

The Illinois River Watershed and Tenkiller Ferry Lake ("Watershed") are natural resources of unparalleled importance to Oklahoma. (Oklahoma's First Amended Complaint ("Okla. Compl.") ¶¶ 22-31, Arkansas Appendix ("Ark. App.") 10a-11a.) In 1970, the Oklahoma Legislature designated the Illinois River and portions of its tributary rivers, Baron Fork Creek and Flint Creek, as "scenic river areas." 82 Okla. Stat. § 1452. These rivers and streams "possess such unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the state that it is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma." *Id.* The Illinois River feeds directly into the 12,900 acre Tenkiller Ferry Lake, which has been dubbed "the emerald jewel in Oklahoma's crown of lakes." (Okla. Compl. ¶ 26, Ark. App. 11a.) In addition to the Watershed's recreational and ecological significance, it is an invaluable source of drinking water for area residents. (*Id.* ¶ 28.)

Tragically, the quality of these waters has become severely impaired, largely as a result of the improper waste disposal practices of a highly concentrated and integrated poultry industry doing business in Oklahoma and Arkansas. The poultry industry produces hundreds of thousands of tons of waste in the Watershed each year. (Okla. Compl. ¶ 1, Ark. App. 2a.) It is estimated that the

amount of phosphorous in the waste produced by poultry production in the Watershed each year is the equivalent to the waste stream of 10.7 million people, more people than live in all of Arkansas, Kansas, and Oklahoma combined. *See* Okla. Water Resources Bd., *Illinois River Basin Tour* at 11 (Aug. 12, 2002) (http://www.owrb.state.ok.us/news/news2/pdf_news2/pres/Ill_RiverTour%20Guide.pdf). The waste is generally disposed of on land in the Watershed in amounts far in excess of agronomic need and in a manner that causes releases of hazardous constituents into the soil, groundwater, and surface water. (Okla. Compl. ¶¶ 48-64, Ark. App. 14a-18a.) It is beyond dispute that the poultry industry's improper waste disposal practices are having deleterious effects on the Watershed. (Okla. Compl. ¶¶ 65-67, Ark. App. 18a.) "An area unsurpassed in natural beauty is now swimming in a sea of animal manure." Holleman, John T., *In Arkansas Which Comes First, The Chicken or the Environment*, 6 Tul. Envtl. L.J. 21, 27 (1992).

After years of unsuccessful negotiations with the poultry industry, Oklahoma was left with no other alternative than to file suit to stop the pollution of Oklahoma's natural resources caused by the industry and restore Oklahoma's Watershed.[1] *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-329 JOE-SAJ (N.D. Okla. filed Jun. 13, 2005). Oklahoma's lawsuit is brought against fourteen poultry companies, most of which are Delaware corporations ("Poultry Integrator Defendants"). The Poultry Integrator Defendants raise millions of chickens and turkeys annually in Arkansas and Oklahoma. (Okla. Compl. ¶¶ 1, 32-45, Ark. App. 2a, 11a-14a.) The Poultry Integrator Defendants are legally responsible for the improper disposal of the waste produced by their birds. (Okla. Compl. ¶¶ 48-64, Ark. App. 14a-18a.) Through their improper poultry waste

[1] "Oklahoma's Watershed" refers to that portion of the Illinois River Watershed that lies in Oklahoma.

disposal practices, the Poultry Integrator Defendants are knowingly and intentionally polluting Oklahoma's irreplaceable natural resources and endangering the health and welfare of Oklahomans. (*Id.*) Pursing all available remedies, Oklahoma's lawsuit asserts claims based on two federal environmental statutes, federal common law, and applicable state law.

Contrary to Arkansas's representations, Oklahoma's lawsuit against the Poultry Integrator Defendants is not an attempt to enforce Oklahoma regulations on farming activity in Arkansas. In fact, Oklahoma's lawsuit is largely based on federal environmental law and federal common law. (Okla. Compl. ¶¶ 70-97, 109-18, Ark. App. 19a-25a, 27a-29a.) The two causes of action that do rely on Oklahoma regulations, Counts 8 and 9, are specifically limited in their application to the Poultry Integrator Defendants' conduct in Oklahoma. (Okla. Compl. ¶¶ 133-39, Ark. App. 32a-34a.) The remaining counts are based in state tort law and equitable law and are generally subject to established choice of law principles. (Okla. Compl. ¶¶ 98-108, Ark. App. 25a-27a (nuisance claim); ¶¶ 119-27, Ark. App. 29a-31a (trespass claim); ¶¶ 128-32, Ark. App. 31a-32a (nuisance claim[2]); ¶¶ 140-47, Ark. App. 34a-35a (equitable

[2] Count 7 states causes of action pursuant to two Oklahoma Statutes: 2 Okla. Stat. § 2-18.1 and 27A Okla. Stat. § 2-6-105. (Okla. Compl. ¶¶ 128-32, Ark. App. 31a-32a.) Oklahoma clarified that it did not intend that Section 2-18.1 be applied to conduct occurring exclusively in Arkansas because application of Section 2-18.1 is limited by its terms to operations subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry. (Plaintiff's Response in Opposition to "Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint" (Oklahoma Appendix ("Okla. App.") 25 n.17).) Section 2-6-105, on the other hand, is not limited in its application to operations subject to the jurisdiction of an Oklahoma administrative agency. Section 2-6-105 "simply carries the intent of the Oklahoma Legislature into effect, by declaring any pollution of state waters to be [a public nuisance], in and of itself, as to 'affect at the same time an entire community or neighborhood.'" *N.C. Corff Partnership v. OXY USA, Inc.*, 929 P.2d 288, 295 (Okla. Ct. App. 1996). The district

(Continued on following page)

claims).) Thus, Oklahoma's lawsuit does not seek to apply Oklahoma regulations to conduct occurring in Arkansas and takes no issue with conduct occurring in Arkansas except to the extent that the conduct causes injury in Oklahoma.[3]

Oklahoma's lawsuit is also not an attempt to regulate legitimate uses of fertilizer and nutrients by farmers in Arkansas. Oklahoma's Complaint alleges that the Poultry Integrator Defendants' waste disposal practices in both states are "not consistent with good agricultural practices and, as such, constitute waste disposal rather than any normal or appropriate application of fertilizer." (Okla. Compl. ¶ 50, Ark. App. 15a.) The Poultry Integrator Defendants are responsible for the application of poultry waste to the lands of the Watershed in both states in amounts far in excess of any legitimate agronomic need. (Okla. Compl. ¶¶ 50-55, Ark. App. 15a-16a.)

Further, Oklahoma's lawsuit is concerned with a diverse array of hazardous constituents of poultry waste beyond those which Arkansas characterizes as "nutrients" (Mot. for Leave at 2 (referring to nitrogen and phosphorous as "nutrients")). These include, at a minimum, microbial pathogens, hormones, copper, zinc, and arsenic.[4]

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court is competent to determine to what extent this statute is applicable to conduct occurring in both states.

[3] As is permissible under Rule 8 of the Federal Rules of Civil Procedure, Oklahoma's Complaint pleads several different types of relief which may, in some respects, be alternative theories. Oklahoma has a good faith basis for each of its claims. The goal of Oklahoma's multi-count Complaint is not the application of any specific law, as Arkansas suggests. Rather, the goal is to obtain the relief sought by the Complaint through whatever means the district court deems appropriate in the final analysis after it has analyzed the facts of the case and made its choice of law determination.

[4] Phosphorous, arsenic, zinc, and copper are designated as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act. *Designation of Hazardous Substances*, 40 C.F.R. § 302.4 (2005).

(Okla. Compl. ¶ 58, Ark. App. 16a-17a.) Oklahoma's Complaint does not state that it seeks to abate the usage of poultry fertilizer in Oklahoma's Watershed as Arkansas claims (Mot. for Leave at 7 (claiming that Oklahoma's Complaint "request[s] a permanent injunction requiring defendants to 'immediately abate' poultry fertilizer usage within the Illinois River Watershed' "')). Rather, Oklahoma's Complaint seeks "[a] permanent injunction requiring each and all of the Poultry Integrator Defendants *to immediately abate their pollution-causing conduct* in the [Watershed] . . . [and] to take all such actions as may be necessary *to abate the imminent and substantial endangerment to [human] health and the environment. . . .*" (Okla. Compl., Prayer for Relief ¶ 3, Ark. App. 35a (emphasis added).)

COUNTER-STATEMENT OF THE CASE

Arkansas's Bill of Complaint essentially asks this Court for two remedies. (Ark. Bill of Compl. at 16.) First, on the basis of the Arkansas River Basin Compact[5] ("Compact"), Arkansas seeks to enjoin portions of Oklahoma's lawsuit against the Poultry Integrator Defendants. Contrary to the plain language of the Compact, Arkansas asserts that the Compact requires Oklahoma to somehow exhaust an ill-defined "negotiation and collaboration" process with the Compact Commission before Oklahoma can seek to hold the Poultry Integrator Defendants accountable for the injury they have caused to Oklahoma. (Mot. for Leave at 3 and Ark. Bill of Compl. at 16.) Apparently, what Arkansas really means is that Oklahoma cannot bring suit against private parties who are polluting Oklahoma's Watershed by their improper conduct in Arkansas without first obtaining Arkansas's permission. Second, Arkansas asks this Court to flatly declare that

[5] Okla. App. 41-56.

Oklahoma law cannot constitutionally be applied to the state law causes of action raised in Oklahoma's Complaint insofar as those causes of action pertain to conduct occurring in Arkansas and causing injury in Oklahoma. (Ark. Bill of Compl. at 16.) At its core, Arkansas is asking this Court to make the choice of law decision that is currently pending before the district court (which the district court is unquestionably competent to handle).

Arkansas's suggestion that, by entering into the Compact, Oklahoma voluntarily surrendered its sovereign power and duty to hold accountable private parties who are destroying Oklahoma's Watershed and jeopardizing the health of Oklahomans is contradicted by the unambiguous terms of the Compact. The Compact indicates that resort to 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. . . ." (Compact (IX)(A)(8), Okla. App. 51 (emphasis added).)

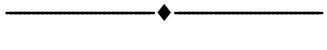
Without question, Oklahoma values the efforts of the two states' work on interstate water quality issues through the Compact Commission. Oklahoma has great respect for the goals and accomplishments of the Commission and will continue to cooperate with Arkansas to carry on the work of the Commission in the future, just as it has in the past. Yet, the Compact does not grant the Commission jurisdiction to address disputes between a signatory state and private parties. The Commission is simply not an available, or appropriate, forum for Oklahoma to resolve its dispute with the Poultry Integrator Defendants.

Arkansas's constitutional claims are also without merit. There is nothing particularly novel about Oklahoma's attempt to abate a public nuisance arising in one state and causing harm in another. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 108 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496 (1971); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971). Moreover, application of state law to remedy injuries occurring in the state

that are caused by persons acting outside the state has long been appropriate under the Constitution. *See Young v. Masci*, 289 U.S. 253, 258-59 (1933) ("The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it."). Arkansas's contentions boil down to a choice of law issue. It is up to the district court to determine whether federal statutory law, federal common law, Oklahoma law, or Arkansas law apply to the claims for relief raised in Oklahoma's lawsuit.

Finally, Arkansas's asserted claims should not be addressed by this Court in an original action because the real parties in interest, the Poultry Integrator Defendants, have raised the very same issues in the district court. As will be demonstrated below, the district court is, of course, competent to handle these issues in the first instance. This Court does not need to address such routine matters in an original action because it retains the ability to address these issues in its appellate capacity if it deems it necessary to do so. *See Arizona v. New Mexico*, 425 U.S. 794, 797 (1976).

Arkansas's proposed lawsuit is nothing more than an attempt by Arkansas to use its status as a state to shield private companies from being held liable for their intentional pollution of Oklahoma's natural resources. Oklahoma's lawsuit is not a dispute with the State of Arkansas, despite Arkansas's repeated assertions to the contrary. Oklahoma has not sued Arkansas and Oklahoma's lawsuit does not challenge the adequacy of Arkansas laws. Oklahoma is exercising its sovereign power to protect the health of its citizens and its natural resources from the actions of fourteen private companies doing business in both Oklahoma and Arkansas. Arkansas cannot circumvent the Eleventh Amendment for the Poultry Integrator Defendants by bringing this collateral attack to Oklahoma's lawsuit on their behalf.



ARGUMENT

I. The exercise of original jurisdiction would not be appropriate in this case because (1) Arkansas's claims lack seriousness and dignity, and (2) the issues Arkansas raises are currently being litigated in federal district court by the real parties in interest.

The Court's original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). The Court has reserved "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court. . . ." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). In deciding whether a particular case is appropriate for the Court's original jurisdiction, two factors are evaluated:

> First, we look to the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim. The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign. Second, we explore the availability of an alternative forum in which the issue tendered can be resolved.

Mississippi v. Louisiana, 506 U.S. 73, 77 (1992) (citations and quotations omitted). Arkansas's proposed lawsuit satisfies neither of these two elements.

A. Arkansas's claimed interests lack seriousness and dignity.

Although it is addressed throughout this brief, the lack of seriousness and dignity of Arkansas's claims can be summarized here. Arkansas asserts that it has an interest in protecting private companies, engaged in activity in both Oklahoma and Arkansas, from a lawsuit filed by

Oklahoma designed to remedy a harm that the companies are causing to Oklahoma. Arkansas does not appear to dispute that the Poultry Integrator Defendants' activities are resulting in the pollution of Oklahoma's natural resources. Yet, Arkansas inexplicably labels their improper poultry waste disposal practices as "lawful" and maintains that it would be unconstitutional for Oklahoma to take action to abate it.[6] *Arkansas cannot convert Oklahoma's lawsuit against private parties to abate pollution causing injury to Oklahoma into a constitutional battle between two States by simply labeling the Poultry Integrator Defendants' conduct as "lawful."* For the reasons discussed below, Oklahoma's lawsuit against the Poultry Integrator Defendants is a constitutionally permissible effort to abate pollution causing injury to Oklahoma as a result of the companies' improper poultry waste disposal practices in Arkansas and Oklahoma.

Arkansas also asks this Court to rewrite the Compact to add a term requiring Oklahoma to somehow "exhaust" a "negotiation and collaboration" process before it can bring

[6] Arkansas repeatedly characterizes the actions of the Poultry Integrator Defendants as lawful. (*See, e.g.*, Mot. for Leave at 2, 8, 9, 12, 13, 15, 19, 20, 21.) Obviously, the "lawfulness" of the Poultry Integrator Defendants' conduct – conduct which has caused and continues to cause injury and damages to the waters of Oklahoma – is the ultimate issue in Oklahoma's case against the Poultry Integrator Defendants. The "lawfulness" of the Poultry Integrator Defendants' conduct will be judged by the Comprehensive Environmental Response, Compensation and Liability Act; the Solid Waste Disposal Act; federal common law; and applicable state law. As to the state tort and equitable claims, whether the Poultry Integrator Defendants' conduct will be judged "lawful" (or, more appropriately, unlawful) as a matter of Oklahoma or Arkansas law can only be determined once the district court makes its choice of law determination. But it is improper for Arkansas, without any supporting proof whatsoever, to simply label the Poultry Integrator Defendants' conduct as lawful. Arkansas cannot truly be telling this Court that the Poultry Integrator Defendants have carte blanche to dispose of their poultry waste in Arkansas without regard for the environmental consequences to Oklahoma.

suit against private actors who are actively destroying Oklahoma's natural resources and endangering the health and welfare of Oklahomans. First, the Compact does not even hint at controlling disputes between a signatory state and private parties. Second, the unambiguous language of the Compact indicates that resort to 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. . . ." (Compact (IX)(A)(8), Okla. App. 51.) Third, Arkansas never explains how the "negotiation and collaboration" remedy that it envisions would ever be sufficiently exhausted such that Oklahoma could take action to protect its citizens and environment from the imminent and substantial endangerment caused by the continuing actions of the Poultry Integrator Defendants. The Compact simply did not empower Arkansas to authorize pollution of Oklahoma's natural resources or exempt private companies from federal and state law.

B. The district court is the appropriate forum to first address the issues that Arkansas attempts to raise.

Arizona v. New Mexico, 425 U.S. 794 (1976), instructs that deference should be given to lower courts when the *issues* raised by a request for this Court's original jurisdiction are currently pending in the lower court. In that case, Arizona attempted to bring before this Court a dispute which was currently being litigated in New Mexico state court between New Mexico and several Arizona utility companies that were generating electricity in the State of New Mexico for sale to Arizona citizens and the State of Arizona. The suit challenged a New Mexico tax that had the practical effect of taxing the energy produced by these Arizona utilities and sold to Arizona citizens at a higher rate than if it were sold to New Mexico citizens. *Id.* at 794-96. Arizona sought to represent the rights of its citizens and its own rights as a consumer of electricity in its constitutional challenge to the discriminatory tax. *Id.* at

795-76. Prior to Arizona seeking to invoke this Court's original jurisdiction, the three utility companies filed a suit in New Mexico state court that "raise[d] the same constitutional issues as would be presented by the bill of complaint which the state of Arizona now seeks to file in this Court." *Id.* at 796. Recognizing that the Court's original jurisdiction should be "invoked sparingly," *id.* (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972)), the Court declined to accept jurisdiction. The Court acknowledged that the district court was competent to address the issues raised by Arizona and, if necessary, this Court would have an opportunity to review the rulings in its appellate capacity:

> In the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated. If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U.S.C. § 1257(2).

Id. at 797. The Court closed its opinion with the recognition that Arizona's attempt to invoke the Court's original jurisdiction represented a slippery slope by which the Court could end up as "a potential principal forum" for settling disputes between states and persons living outside their borders. *Id.* at 798.

Similarly, Arkansas asks this Court to resolve issues that are already being litigated in federal district court and over which the federal district court has jurisdiction. (*See, e.g.*, Tyson Foods, Inc.'s Motion to Dismiss, Okla. App. 75-79 (raising Commerce Clause contentions), and Okla. App. 79-82 (raising sovereignty contentions, including issues of due process and federalism); Peterson Farms, Inc.'s Motion to Dismiss, Okla. App. 102-04 (raising sovereignty contentions, including issues of due process),

Okla. App. 104-07 (raising Commerce Clause contentions); and Okla. App. 110-16 (raising Compact contentions, albeit in preemption context).) The district court is presumed competent to resolve these issues. *See Illinois*, 406 U.S. at 108 (declining to accept original jurisdiction over instate pollution dispute because district court's "powers are adequate to resolve the issues"); *Ohio v. Wyandotte Chemicals Corp*., 401 U.S. 493 (1971) (same); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971) (concluding that district court had jurisdiction over interstate water pollution case where Texas was suing private parties in New Mexico for polluting the water flowing into Texas and commending Texas for accommodating the limited judicial resources of the Supreme Court by turning first to the district court). Moreover, the Poultry Integrator Defendants are the real parties in interest when it comes to Oklahoma's lawsuit. They have every motivation to have these issues resolved by the district court. *See Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (noting that Alabama's challenge to an Arizona law would "speedily and conveniently be tested" by the private parties who were directly impacted by Arizona's law).

If the district court decides only federal or Arkansas law is applicable to the actions of the Poultry Integrator Defendants occurring in Arkansas and causing injury in Oklahoma, then Arkansas's concerns will have been resolved without consuming this Court's resources. If the district court decides Oklahoma law is applicable to some, or all, of the state law causes of action, then this Court may choose to address those issues at the *certiorari* stage if the Court deems it necessary to do so.

II. Arkansas does not have standing to seek to enjoin Oklahoma's lawsuit because Arkansas has not been injured by Oklahoma's attempt to seek redress from the Poultry Integrator Defendants for knowingly polluting Oklahoma's Watershed.

Arkansas "has standing to sue only [if] its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam); *accord Louisiana v. Texas*, 176 U.S. 1, 16 (1900) ("In order, then, to maintain jurisdiction of this bill of complaint as against the state of Texas, it must appear that the controversy to be determined is a controversy arising directly between the state of Louisiana and the state of Texas, and not a controversy in vindication of the grievances of particular individuals."). The Court will look beyond Arkansas's asserted claims to determine whose interests are really at stake:

> In determining whether the interest being litigated is an appropriate one for the exercise of our original jurisdiction we of course look behind and beyond the legal form in which the claim of the State is pressed. We determine whether in substance the claim is that of the State, whether the State is indeed the real party in interest.

Arkansas v. Texas, 346 U.S. 368, 371 (1953) (citing *Oklahoma v. Cook*, 304 U.S. 387, 392-96 (1938)).

Arkansas must allege in its Bill of Complaint "facts that are *clearly sufficient to call for a decree in its favor*." *Alabama v. Arizona*, 291 U.S. 286, 291 (1934) (emphasis added). "Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent." *Id. Accord California v. Texas*, 437 U.S. 601, 614 (1978) (per curiam) (Stewart, J., concurring) ("The original jurisdiction of this Court exists to remedy real and substantial injuries inflicted by sovereign States upon their sister States. As yet, California has suffered no

injury at the hand of Texas, and there is indeed a 'fair probability' that the injury will never come to pass.") (internal citation omitted).[7]

Arkansas claims to possess two independent interests to vindicate on its own behalf. First, Arkansas asserts that its sovereignty will somehow be threatened by Oklahoma's lawsuit. (Mot. for Leave at 9, 11.) Second, Arkansas "seeks to enforce the Compact with Oklahoma, and to compel Oklahoma to address its pollution-based grievances through negotiation and collaboration before the Commission. . . ." (Mot. for Leave at 8.) Arkansas's asserted claims will not survive close examination because Arkansas is merely seeking to stand in the shoes of the Poultry Integrator Defendants to bring this collateral attack on Oklahoma's lawsuit.

A. Arkansas's sovereignty is not threatened by Oklahoma's attempt to hold the Poultry Integrator Defendants accountable under federal law and/or whichever state law the district court deems appropriate.

Arkansas's first asserted interest is based on an incorrect characterization of Oklahoma's lawsuit and a misunderstanding of the constitutional principles that Arkansas invokes. Oklahoma's lawsuit is based largely on federal environmental law and federal common law. It also raises state tort and equitable causes of action that are generally subject to established choice of law principles.

[7] Before this Court will grant the relief Arkansas seeks, Arkansas must present clear and convincing evidence that Oklahoma's lawsuit against the Poultry Integrator Defendants injures Arkansas in a legally-cognizable way. *See California*, 437 U.S. at 614 (Stewart, J., concurring); *New York v. New Jersey*, 256 U.S. 296, 309 (1921) ("Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.").

Oklahoma's lawsuit, however, does not seek to impose its agricultural and environmental regulations on activities occurring in Arkansas or on Arkansas citizens. There is nothing particularly novel about Oklahoma's lawsuit which seeks to abate a public nuisance arising in one state yet causing harm in another. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 108 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496 (1971); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907); *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971).

Arkansas asserts that its sovereignty will be diminished if the district court chooses to apply Oklahoma law to Oklahoma's tort and equitable claims. However, state tort law is routinely and constitutionally applied to persons acting outside the state and causing injury inside the state. *See Young v. Masci*, 289 U.S. 253, 258-59 (1933). Even Arkansas applies its law to out-of-state actors who cause injury in Arkansas if application of Arkansas law is appropriate under established choice of law rules. *See, e.g.*, *Cameron v. Vandegriff*, 13 S.W. 1092, 1093 (Ark. 1890), *cited with approval in Young*, 289 U.S. at 259. Thus Arkansas's sovereignty is not threatened by Oklahoma's lawsuit against the Poultry Integrator Defendants.

B. The Compact does not create for Arkansas a legally-cognizable interest that it would not otherwise have because no provision of the Compact bars Oklahoma's lawsuit.

Arkansas's second asserted interest is likewise illusory. As explained elsewhere in this brief, the Compact does not require Oklahoma to negotiate and collaborate with Arkansas to the point of exhaustion prior to seeking to protect itself from private parties who are actively destroying its natural resources and jeopardizing the health of its citizens (if indeed a process of "negotiation and collaboration" was capable of being exhausted). Moreover, Arkansas recognizes that Oklahoma has actively participated and cooperated with the Commission

and with Arkansas. (*See, e.g.*, Mot. for Leave at 5, 24.) Through the cooperation of the two signatory states, Arkansas alleges to have implemented changes in its legislation so that its laws "are similar to Oklahoma laws, which Oklahoma presumably considered to be a reasonable approach to dealing with nutrient loading originating from agriculture occurring within Oklahoma." (Mot. for Leave at 6.) These assertions by Arkansas highlight the fact that Oklahoma's lawsuit is not "fundamentally . . . a dispute between two States. . . ." (Mot. for Leave at 8.)

Oklahoma's dispute is with the Poultry Integrator Defendants, not with Arkansas.[8] Arkansas has not shown "facts that are *clearly sufficient to call for a decree in its favor*." *Alabama v. Arizona*, 291 U.S. 286, 291 (1934) (emphasis added). Nor has Arkansas shown that, by virtue of the Compact, it is in imminent danger of suffering a clear injury of serious magnitude by Oklahoma's request that the federal district court issue an order that remedies the destruction of Oklahoma's natural resources by the Poultry Integrator Defendants. By asking this Court to order Oklahoma to seek permission from Arkansas before suing the Poultry Integrator Defendants, Arkansas is attempting to use the Compact to veto Oklahoma's lawsuit. However, the Compact does not provide Arkansas with grounds to seek an order compelling Oklahoma to exhaust an illusory "negotiation and collaboration" remedy before Oklahoma can bring a lawsuit against private parties who are actively engaged in the destruction of Oklahoma's natural resources.

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[8] This discussion also describes why Arkansas's lawsuit is barred by the Eleventh Amendment. Generally, the Eleventh Amendment does not bar a state from suing another state. However, when the plaintiff state is merely asserting the claims of private parties, the Eleventh Amendment remains as a bar to the claims that the private parties could not otherwise bring on their own behalf. *See Kansas v. Colorado*, 533 U.S. 1, 7 (2001).

III. The United States Constitution does not prohibit Oklahoma from seeking to hold the Poultry Integrator Defendants accountable for knowingly polluting Oklahoma's invaluable natural resources and endangering the health of Oklahomans.

As set forth above, Oklahoma asserts claims against the Poultry Integrator Defendants under federal law and constitutionally applicable state tort and equitable law (whether it be Arkansas or Oklahoma law). Because the district court is competent to determine whether federal law, Arkansas law, or Oklahoma law (or some combination thereof) applies to Oklahoma's claims for relief, this Court need not do so in the first instance and can decline Arkansas's request for original jurisdiction without determining which law Oklahoma's causes of action call for.

Nevertheless, the Constitution does not prohibit the application of Oklahoma law to the conduct of the Poultry Integrator Defendants in Arkansas to the extent that the conduct causes injury in Oklahoma.

> The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus liability is commonly imposed under such circumstances for homicide, *Commonwealth v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; for maintenance of a nuisance, *State v. Lord*, 16 N.H. 357, 359; for blasting operations, *Cameron v. Vandergriff*, 53 Ark. 381, 386, 13 S.W. 1092; and for negligent manufacture, *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann. Cas. 1916C, 440.

Young v. Masci, 289 U.S. 253, 258-59 (1933). Indeed, one of the cases cited by *Young* was an Arkansas case recognizing a viable tort cause of action for an injury occurring in Arkansas even though the injury was caused by conduct occurring outside the jurisdiction. *Cameron v. Vandegriff*, 13 S.W. 1092, 1093 (Ark. 1890) ("The rock which occasioned

the injury was put in motion by the appellants in the Indian Territory; but, by the same force, its motion was continued, and the injury done in this state. The cause of action arose here.").[9] The Superior Court of New Hampshire likewise held, in *New Hampshire v. Lord*, that "[t]he nuisance complained of being within this State, it is not important that the dam which occasioned it was in the State of Maine." 16 N.H. 357, 359 (1844). Thus, it would be constitutionally permissible for the district court to apply Oklahoma law to Oklahoma's tort and equitable claims designed to remedy injuries to Oklahoma caused by the Poultry Integrator Defendants' improper poultry waste disposal practices in Arkansas.

A. Oklahoma's lawsuit does not violate the negative implications of the Commerce Clause because the lawsuit does not discriminate against out-of-state economic activity, and any incidental burden it might impose on interstate commerce is not clearly excessive in relation to Oklahoma's interest in protecting its environment and the health of Oklahomans.

This Court has found a negative implication in the Commerce Clause, U.S. Const. art. 1, § 8, that prevents

[9] Arkansas still follows the *lex loci delicti* choice of law rule but has softened its rigid application with the "Leflar factors." *See Gomez v. ITT Educ. Servs., Inc.*, 71 S.W.3d 542 (Ark. 2002). It is ironic that Arkansas believes it appropriate to lean towards application of Arkansas law when an injury occurs in Arkansas that is occasioned by out-of-state conduct, yet claims that it would by unconstitutional for the United States District Court for the Northern District of Oklahoma, using Oklahoma choice of law rules (as it must), to apply Oklahoma law to remedy an injury to Oklahoma merely because part of the conduct that caused the injury occurred in Arkansas. In any event, this fact simply underscores that the matter raised by Arkansas is, at its core, simply a choice of law issue.

states from engaging in economic protectionism at the expense of out-of-state enterprises. "Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 125 S. Ct. 1885, 1895 (2005) (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994)). "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement." *Baldwin v. Seelig*, 294 U.S. 511, 527 (1935). Thus, "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism. . . ." *C & A Carbone, Inc., v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

"If a state law purporting to promote environmental purposes is in reality 'simple economic protectionism,' [the Court applies] a 'virtually *per se* rule of invalidity.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). On the other hand, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Court has "recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). "The crucial inquiry, therefore, must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon

interstate commerce that are only incidental." *Philadelphia*, 437 U.S. at 624.

Ignoring the purpose of both the dormant Commerce Clause and Oklahoma's lawsuit, Arkansas instead relies on "formulas and catchwords," *Baldwin*, 294 U.S. at 527, by repeatedly claiming, without substantive analysis, that Oklahoma is trying to use its lawsuit to directly regulate Arkansas industry.[10] Arkansas never identifies the eco-

[10] Of course, it is far from clear that dormant Commerce Clause analysis was ever intended to apply to state-law tort and equity claims. The dormant Commerce Clause generally applies only to positive law. This Court has recognized that "[s]tate 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." *BMW of N.A. v. Gore*, 517 U.S. 559, 572 n.17 (1996). Yet, courts that have considered the specific question of whether common law causes of action could violate the dormant Commerce Clause have generally concluded that the dormant Commerce Clause does not apply to common law causes of action. *See Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 784, n.9 (3d Cir. 1992) (commenting that the court was unable to find one dormant Commerce Clause case "invalidating liability founded on principles of state common law"); *Stone ex rel. Estate of Stone v. Frontier Airlines, Inc.*, 256 F. Supp. 2d 28, 46 (D. Mass. 2002) ("Reduced to its essence, Frontier's argument is that the dormant Commerce Clause precludes state tort law from regulating any activity that, while having local effects, also effectuates some external consequences. The *reductio ad absurdum* of this reasoning, however, is an evisceration of state tort law because almost every activity a state regulates has some 'extraterritorial effects.' "); *Crowley v. CyberSource Corp.*, 166 F. Supp. 2d 1263, 1272 (N.D. Cal. 2001) (commenting that the Court could not find a case invalidating "state tort law on dormant Commerce Clause grounds"); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 254 (D.N.J. 2000) ("A case where a plaintiff seeks to prevent allegedly harmful consequences from occurring outside of its borders without respect to the citizenship of the defendant simply does not constitute the sort of state action contemplated by dormant Commerce Clause jurisprudence. Accordingly, the Court finds it doubtful that dormant Commerce Clause analysis applies to an action such as this one simply because a governmental entity is the plaintiff."). *But see*, *Ileto v. Glock Inc.*, 349 F.3d 1191, 1217 (9th Cir. 2003) (applying *Pike* test and denying dormant Commerce Clause challenge to tort lawsuit but placing the word "regulation" in quotes apparently out of a recognition that a tort lawsuit was not really the

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nomic discrimination that Oklahoma is supposedly engaging in. Arkansas also fails to define how Oklahoma's lawsuit is designed to advance the economic interests of Oklahoma citizens to the disadvantage of the economic interests of Arkansas citizens by exercising some type of control over the flow of interstate commerce. The reason for Arkansas's failure to do so is simple: Oklahoma's lawsuit is not aimed at economic interests and even-handedly applies the law to the Poultry Integrator Defendants because it seeks abatement of their pollution-causing activities in both states. (*See* Complaint, Prayer for Relief ¶ 3, Ark. App. 35a.)

1. The state-law claims in Oklahoma's lawsuit are applied even-handedly because they seek to stop the flow of pollution into Oklahoma's Watershed from in-state and out-of-state sources.

Philadelphia v. New Jersey, 437 U.S. 617 (1978), illustrates why Oklahoma's state-law claims are applied even-handedly to the Poultry Integrator Defendants. That case dealt with a New Jersey statute that prevented the importation of out-of-state solid waste. *Id.* at 618-19. The Court found that the statute violated the Commerce Clause because it blocked out-of-state waste from New Jersey landfills but permitted in-state waste to be placed in the landfills. Directly relevant here, the Court stated, "*it may be assumed as well that New Jersey may pursue [its goal of preventing pollution of open lands] by slowing the flow of* <u>*all*</u> *waste into the State's remaining landfills, even though interstate commerce may incidentally be affected*." *Id.* at 626-27 (emphasis added). Oklahoma's lawsuit meets this standard because it seeks to stop the

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type of regulation that the dormant Commerce Clause was intended to address), *reh'g en banc denied*, 370 F.3d 860 (9th Cir. 2004), *cert. denied sub nom. China North Indus. Corp. v. Ileto*, 125 S. Ct. 865 (2005).

flow of pollution into Oklahoma's Watershed *regardless of whether the pollution was originally released in Oklahoma or Arkansas*.

2. To the extent that Oklahoma's state-law claims impose any burden on interstate commerce, that burden does not clearly outweigh Oklahoma's interest in protecting the health of its citizens and its invaluable natural resources.

Because Oklahoma's lawsuit treats in-state and out-of-state pollution even-handedly, it could only run afoul of the dormant Commerce Clause if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Oklahoma's interest in preserving the quality of its Watershed more than outweighs any minimal burden that the lawsuit may have on interstate commerce. *See Ileto v. Glock Inc.*, 349 F.3d 1191, 1217 (9th Cir. 2003) (applying *Pike* test and denying dormant Commerce Clause challenge to public nuisance cause of action brought by shooting victims against several out-of-state firearms manufacturers), *reh'g en banc denied,* 370 F.3d 860 (9th Cir. 2004), *cert. denied sub nom. China North Indus. Corp. v. Ileto*, 125 S. Ct. 865 (2005); *City of New York v. Beretta U.S.A. Corp*., 315 F. Supp. 2d 256 (E.D.N.Y. 2004) (holding that public nuisance claim seeking injunction against conduct by out-of-state gun manufacturers was not barred by the Commerce Clause or Due Process clause); *NAACP v. AcuSport Inc.*, 271 F. Supp. 2d 435, 464 (E.D.N.Y. 2003) ("The Commerce Clause is not designed to prevent individual states from protecting those within the state from tortious action by those engaged in commerce whose products or activities put the state's citizens at risk.").

Accordingly, the Commerce Clause does not shield the Poultry Integrator Defendants from liability for their improper poultry waste disposal practices in Arkansas that cause pollution of Oklahoma's Watershed. "The Interstate

Commerce Clause of the Constitution (article 1, Sec. 8, cl. 3) does not carry with it the right to create a nuisance. . . ." *Jell-O Co. v. Brown*, 3 F. Supp. 132, 133 (W.D. Wash. 1926).

B. Oklahoma's lawsuit against the Poultry Integrator Defendants does not threaten Arkansas's sovereignty nor the due process rights of the Poultry Integrator Defendants because it addresses an injury in Oklahoma.

Arkansas takes the position that its status as a state somehow empowers it to unilaterally prevent its sister state from holding private companies accountable under Oklahoma law for knowingly polluting Oklahoma's natural resources by their improper conduct in Arkansas. Arkansas's erroneous contention that Oklahoma is attempting to apply its agricultural and environmental regulations to Arkansas farmers has been sufficiently addressed elsewhere in this brief and need not be readdressed here. The real substance of Arkansas's "sovereignty" claim is its argument that Oklahoma's state-law claims violate the Due Process Clause (an argument that is currently before the district court). Thus, Oklahoma will focus its attention on Arkansas's Due Process argument.

Arkansas argues that Oklahoma's lawsuit seeks to "deprive thousands of Arkansas citizens of due process in violation of the Fourteenth Amendment." (Mot. for Leave at 19.) As an initial matter, Oklahoma's state law claims are pressed only against the fourteen Poultry Integrator Defendants, most of which are Delaware corporations. Arkansas's claim that Oklahoma's lawsuit will violate the due process rights of thousands of Arkansas farmers (Mot. for Leave at 19 n.4) ignores the reality that these farmers are not even parties to the lawsuit. *Cf. Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 42 (1st Cir. 2000) (recognizing that non-parties who are subject to injunctions because they are in active concert

or participation with the party specifically enjoined have their due process interests vicariously protected by the enjoined party; those nonparties who are not in active concert or participation with the enjoined party are not subject to the injunction). More to the point, however, *BMW of N.A. v. Gore*, 517 U.S. 559 (1996), and the other cases relied on by Arkansas, do not establish that a judgment against the Poultry Integrator Defendants for the harm they have caused and are causing in and to Oklahoma would violate the Due Process Clause of the Fourteenth Amendment.

Arkansas's principal case, *BMW*, reviewed a punitive damage award issued by an Alabama jury. *Id.* at 567. At trial, the plaintiff supported his punitive damage claim with evidence that BMW had sold many cars in other states to residents of those states without disclosing that the cars had received some repair prior to their initial sale. *Id.* at 564. Essentially, the jury imposed punitive damages for conduct occurring in other states even though that conduct had no effect on the citizens of Alabama. The Court recognized that due process principles would not permit a state "to punish BMW for conduct that was lawful where it occurred *and that had no impact on Alabama or its residents*." *Id.* at 573 (emphasis added). To prevent the encroachment of one state's laws on the sovereignty of another state, "the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, *must be supported by the State's interest in protecting its own consumers and its own economy*." *Id.* at 572 (emphasis added).

BMW clearly prohibits State A from penalizing conduct that is occurring in State B *to the extent that the conduct has no effect in State A*. However, *BMW* does not prohibit Oklahoma from seeking redress from the Poultry Integrator Defendants for the harm they are causing to

Oklahoma. *See District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 659 (D.C. 2005) ("Under *Gore*, the [Assault Weapon Manufacturing Strict Liability Act] would violate due process only if it penalized manufacturers 'for conduct that was lawful where it occurred *and that had no impact on [the District] or its residents*.'"), *cert. denied*, 126 S. Ct. 399 (2005); *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 286 (E.D.N.Y. 2004) ("According to the principle established in *BMW* . . . the Due Process Clause prevents a state from punishing conduct that was lawful where it occurred if it had no impact on the state or its residents. Principles of state sovereignty and comity do not bar any of the claims or relief sought in the instant suit. The City seeks relief for the harm imposed on itself and on those within its own borders."); *City of Boston v. Smith & Wesson Corp.*, 66 F. Supp. 2d 246, 250 (D. Mass. 1999) ("Their use of *Gore* is inapposite, however, as the Supreme Court held in that case that punitive sanctions may not be used by a state court to punish lawful behavior in another state that has no harmful effects in the original state. . . . The Court did not hold that an Alabama plaintiff could not collect punitive damages (or any other form of relief) for actions outside the state, lawful where committed, that harmed a consumer in Alabama."); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1150 (Ohio 2002) ("Although the injunctive relief sought may affect out-of-state conduct, we reject appellees' argument that such relief would violate the Commerce Clause. Unlike the *BMW* case, which involved an excessive punitive damages award intended to change a tortfeasor's lawful conduct in states outside Alabama, in this case, the alleged harm, which may or may not call for punitive damages, directly affects the residents of Cincinnati.").

Arkansas also relies on *State Farm Mutual Automobile Insurance Company v. Cambell*, 538 U.S. 408 (2003). Like *BMW*, *State Farm* merely recognized that states have

no "legitimate concern" for imposing punitive damage awards for out-of-state conduct that had no effect on in-state residents. *Id*. at 421-22 ("Any proper adjudication of conduct that occurred outside Utah *to other persons would require their inclusion*, and, to those parties, the Utah courts, in their usual case, would need to apply the laws of their relevant jurisdiction.") (emphasis added). Oklahoma's lawsuit does not violate the due process clause because Oklahoma is seeking redress against the Poultry Integrator Defendants for the harm they have caused and are causing to Oklahoma and its citizens. *See Young v. Masci*, 289 U.S. 253, 258-59 (1933) ("A person who sets in motion in one state the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the means employed be a responsible agent or an irresponsible instrument.").

IV. The Compact does not prohibit Oklahoma's lawsuit against the Poultry Integrator Defendants who are knowingly polluting Oklahoma's invaluable natural resources because (1) the Compact does not grant jurisdiction to the Commission over suits between a signatory State and private parties, and (2) the Compact indicates that resort to the Commission is not a condition precedent to filing suit.

Arkansas's argument that Oklahoma cannot proceed against the Poultry Integrator Defendants for the harm they have caused to Oklahoma without first "exhaust[ing] . . . remedies" (Ark. Bill of Compl. at 16) before the Commission is fatally flawed for at least two reasons. First, the Compact does not grant jurisdiction to the Commission to entertain Oklahoma's claims against the Poultry Integrator Defendants. In fact, the Compact does not even hint at addressing disputes between a signatory state and private

parties. The Commission's authority to hold hearings and issue orders is reserved for matters between the two states which concern "the proper administration of this Compact." (Compact (IX)(A)(7), Okla. App. at 51.)

Second, it is illogical for Arkansas to assume that resort to the Commission is a condition precedent to filing suit to hold private actors accountable for creating a public nuisance within Oklahoma when it is not even a condition precedent to filing suit to enforce the Compact against a party to the Compact. The Compact expressly 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 (IX)(A)(8), Okla. App. at 51-52 (emphasis added).) If the plain language of the Compact does not require resort to the Commission before a signatory State can seek to enforce its rights against the other signatory State, then the Compact definitely does not require resort to the Commission before a signatory State can seek to hold private parties accountable for creating public nuisances.

Because Arkansas cannot cite to any provision of the Compact that would require Oklahoma to exhaust some remedy with the Commission before it could bring suit against the Poultry Integrator Defendants, it instead cites to aspirational provisions of the Compact which speak of "encourag[ing] the maintenance of an active pollution abatement program" (Compact (I)(D), Okla. App. 42), "[t]he cooperation of the appropriate state agencies . . . to investigate and abate sources of alleged interstate pollution" (*id.* (VII)(B), Okla. App. 47), and "[e]nter[ing] into

joint programs for the identification and control of sources of pollution" (*id.* (VII)(C), Okla. App. 47). (Mot. for Leave at 22.) Arkansas fails to explain how any of these provisions require Oklahoma to first exhaust some "negotiation and collaboration" process with Arkansas before it can hold private actors accountable for polluting Oklahoma and endangering the health of Oklahomans.[11] To the

[11] Arkansas's argument depends entirely on extrinsic evidence to support its conclusion that Oklahoma has contracted away its right to seek redress against private parties who are polluting Oklahoma's Watershed. This reliance on extrinsic evidence is improper and unnecessary because the plain language of the Compact expressly recognizes that resort to the Commission is not a condition precedent to filing suit. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 222 n.14 (1991) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Ex parte Collett*, 337 U.S. 55, 61 (1949) ("The short answer is that there is no need to refer to the legislative history where the statutory language is clear. The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.") (citations and quotations omitted).

In any event, it is worth noting that a close examination of the context of many of Arkansas's references reveals that the documents do not support Arkansas's contentions. For example, Arkansas alleges that the Oklahoma Water Resources Board ("Board") previously concluded that resort to the Commission is a condition precedent to filing suit. (Mot. for Leave at 21.) In support of its claim, Arkansas cites not to a statement of the Board, but to a privileged legal memorandum between an attorney and his client (an attorney who now represents one of the Poultry Integrator Defendants (Okla. App. 90)). The opinion of the attorney is not binding on the client/agency, let alone the entire State of Oklahoma. Moreover, a review of the memorandum demonstrates that it contemplated a dispute between the two states, not a dispute between Oklahoma and various private parties. Arkansas also claims that "Oklahoma and Arkansas recognized that issues of interstate water quality must be handled on a cooperative basis through the auspices of the Commission." (Mot. for Leave at 24.) In support of its erroneous contention, Arkansas cites to a discussion by the Environmental and Natural Resources Committee, not the Commission, about developing a common phosphorous monitoring technique between the

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contrary, the States agreed to "[u]tilize the provisions of all federal and state water pollution laws . . . in the resolution of any pollution problems affecting the waters of the Arkansas River Basin." Oklahoma is, of course, doing this very thing in its lawsuit against the Poultry Integrator Defendants.

Arkansas's contention that the Compact gives Arkansas the right to unilaterally veto any attempt by Oklahoma to prevent private actors from polluting Oklahoma's Watershed is entirely without merit. Though contrary to the unambiguous language of the Compact, Arkansas asks the Court to infer from the Compact that Oklahoma voluntarily relinquished a significant aspect of its sovereign power – the power and duty to hold accountable individuals who pollute Oklahoma's Watershed and endanger the health of Oklahomans. This relinquishment of sovereign power that Arkansas suggests should not be inferred. *Cf. Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (refusing to infer divestment of sovereign power). This Court should decline Arkansas's request to create an exhaustion of remedies requirement where none existed before. *See Texas v. New Mexico*, 462 U.S. 554, 565 (1983) (noting that the Court is not free to "rewrite" compacts).

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two states. (Ark. App. 334a ("Commissioner Smith so moved that the Environmental and Natural Resources Committee be assigned the task to investigate a way to come to some agreement on water quality monitoring between the two states in the Compact area. . . .").) The reference obviously does not support the contention for which Arkansas has cited it.

CONCLUSION

For the foregoing reasons, the State of Oklahoma objects to Arkansas's Motion for Leave to File Bill of Complaint and respectfully requests the Court to decline original jurisdiction.

Respectfully submitted,

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