No. 143, Original

IN THE
# Supreme Court of the United States

STATE OF MISSISSIPPI,
*Plaintiff*,
v.

STATE OF TENNESSEE, CITY OF MEMPHIS, TENNESSEE,
AND MEMPHIS LIGHT, GAS & WATER DIVISION,
*Defendants*.

**On Bill of Complaint**
**Before the Special Master, Hon. Eugene Siler**

## MOTION OF DEFENDANT STATE OF TENNESSEE FOR JUDGMENT ON THE PLEADINGS


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## INTRODUCTION

This case is Mississippi's third attempt to seek more than $600 million in damages based on a legal theory that is contrary to Supreme Court precedent. It concerns groundwater in the Memphis Sands Aquifer (the "Aquifer"), an underground geological formation that lies underneath Mississippi, Tennessee, and other States. Mississippi does not allege that Defendants have prevented it from obtaining water from the Aquifer. Nor does Mississippi allege that it suffers from any water shortage. Rather, Mississippi alleges that Memphis's groundwater pumping on Tennessee's side of the Aquifer has, through the laws of physics, induced some water to flow across the State boundary. That injures Mississippi, according to the Complaint, because it infringes on Mississippi's inherent property right to all water that would have remained beneath Mississippi under natural conditions. On the basis of that "territorial property rights theory," Mississippi alleges that Defendants are liable for money damages for every water molecule that has allegedly flowed across the border due to Memphis's pumping.

Mississippi's claims should be dismissed because the territorial property rights theory lacks merit as a matter of law. No Supreme Court case supports Mississippi's expansive theory of sovereign ownership or its extravagant claims for money damages. It is undisputed – indeed, affirmatively alleged in Mississippi's Complaint – that the Aquifer lies under multiple States. The

Supreme Court's equitable-apportionment doctrine, not Mississippi tort law, therefore governs each State's right to the Aquifer's groundwater. And, under the doctrine of equitable apportionment, a State cannot claim a property right to any portion of an interstate water source unless it first enters an interstate compact or obtains a Supreme Court decree equitably apportioning the water. Mississippi has no cause of action here because it has done neither.

Allowing Mississippi to assert a legal right to the Aquifer's groundwater without first obtaining an equitable allocation would be unprecedented. To Tennessee's knowledge, *every* Supreme Court interstate water-rights decision has rejected claims to interstate water based on territorial boundaries. Creating a different rule for the Aquifer not only would conflict with those holdings, but would frustrate the core purpose of the equitable-apportionment doctrine. Indeed, States like Tennessee have relied for decades on the assurance that the equitable-apportionment doctrine protects their existing uses of unapportioned water resources. Mississippi's claims, if sustained, would undermine those reliance interests and upend centuries of settled law. The Court should dismiss Mississippi's claims now, on the pleadings, and avoid the cost and confusion that discovery on Mississippi's novel theory would create.

Mississippi's claims also should be dismissed on the basis of issue preclusion. In *Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625 (5th Cir.

2009), Mississippi brought virtually identical claims against Memphis, alleging that Memphis's groundwater pumping was infringing on Mississippi's property right to the Aquifer's groundwater. The Fifth Circuit affirmed the dismissal of Mississippi's claims and held, based on a full discovery record, that "the amount of water to which each state is entitled from [the Aquifer] must be allocated [through equitable apportionment] before one state may sue an entity for invading its share." *Id.* at 630. Mississippi now collaterally attacks that judgment based on the same legal arguments the Fifth Circuit already considered and rejected. Allowing Mississippi to drag the parties through another round of discovery over those issues would create unnecessary expense and needlessly burden the Supreme Court's original docket.

## STATEMENT OF THE CASE

**1.** The Aquifer is an underground sandstone formation that lies beneath both Mississippi and Tennessee, as well as several other States. Compl. ¶¶ 18, 22, 41, 50.[1] The Aquifer contains groundwater (*i.e.*, subsurface water) that filters down from the surface through layers of clay and silt. *Id.* ¶¶ 15-16. Because those layers filter out contaminants, the groundwater stored in the Aquifer is relatively

[1] As set forth in its Answer, Tennessee denies many of Mississippi's allegations, including the allegation that the State itself has controlled or otherwise participated in Memphis's groundwater pumping from the Aquifer. *Compare* Compl. ¶ 21 *with* Answer ¶¶ 3, 21, 39. Tennessee nonetheless accepts Mississippi's factual allegations solely for purposes of this motion. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

pure and suitable for "high quality" residential use. *Id*. ¶¶ 16-17; *see* Miss. App. 29a-30a (explaining that the Aquifer's layers "protect[] the high quality of the stored water from surface pollution"). Also due to those confining layers, the natural flow of the Aquifer's groundwater is "'slow.'" Miss. Br. 18 (quoting Miss. App. 233a). Mississippi alleges (at ¶¶ 15-17) that, under natural conditions, the groundwater in the Aquifer mostly flowed from Tennessee's side of the Aquifer into Mississippi. It admits, however, that water in certain areas of the Aquifer naturally "enter[ed] Tennessee" in the opposite direction. Miss. Br. 9 n.7; *see* Hr'g Tr. 15:22-23 ("Both states have recharge points and both states have ground water movement."); Miss. App. 70a (depicting the Aquifer's hydrology).

For more than 125 years, beginning in the nineteenth century, Memphis and its utility company (collectively, "Memphis") have pumped groundwater from the Aquifer to serve the residential and commercial needs of a large metropolitan area. Compl. ¶¶ 20-23; *see* Miss. App. 138a-140a, 202a. Mississippi's DeSoto County (located across the Mississippi border from Memphis) also pumps water from the Aquifer, but it is far less populated than Memphis and thus uses far less water. Miss. App. 59a, 62a.[2] The interconnected nature of the multistate Aquifer – along with the regional importance of its high-quality groundwater supply – have led

[2] As of July 2014, the Census Bureau estimated that DeSoto County has approximately 171,000 residents, compared to nearly 940,000 residents in Shelby County, Tennessee, which includes Memphis. *See* http://www.census.gov/popest/data/counties/totals/2014/CO-EST2014-01.html.

Mississippi, Tennessee, and Arkansas jointly to study the impact of groundwater pumping conducted in each State and to analyze strategies for long-term conservation. Compl. ¶ 34; Miss. App. 219a.

Mississippi's allegations center on the groundwater pumping conducted by Memphis. Memphis extracts groundwater from the Aquifer through wells drilled on Tennessee's side of the State border. Compl. ¶¶ 18-19. Mississippi does not allege that Defendants have physically intruded into Mississippi to extract water from the Aquifer through wells drilled diagonally to cross the State boundary. *See id.*; Hr'g Tr. 16:8-12. Rather, Mississippi alleges that Memphis's pumping of water from beneath Tennessee has had indirect hydrological effects on Mississippi's side of the Aquifer. Compl. ¶¶ 18, 24-25. Specifically, Mississippi asserts that Memphis's pumping has created a reduction in water pressure on Tennessee's side of the border (which the Complaint calls a "cone of depression") that, through the laws of fluid dynamics, has induced some groundwater beneath Mississippi to flow into Tennessee. *Id.*; *see* Miss. App. 20a-22a. Mississippi alleges (at ¶ 14) that it owns that groundwater because, under "natural conditions," it would have remained beneath Mississippi's territory.

On the basis of that legal theory, Mississippi's Complaint seeks: (1) a declaratory judgment that it has "sovereign right, title and exclusive interest" in all groundwater within the Aquifer that would have remained beneath Mississippi

under "natural conditions" (Compl. ¶ 40); (2) at least $615 million in damages – based apparently on the asserted market price of the groundwater that has flowed into Tennessee (*id*. ¶ 55; Miss. App. 131a-182a) – or alternatively disgorgement of "all profits, proceeds, consequential gains, saved expenditures, and other benefits" obtained by Defendants (Compl. ¶ 56); and (3) an injunction requiring Defendants "to prospectively take all actions necessary to eliminate" the alleged cones of depression caused by Memphis's pumping (*id.* ¶ 57).

**2.** This is Mississippi's third attempt to bring suit over Memphis's alleged use of the Aquifer. On February 1, 2005, Mississippi sued Memphis and its utility company (but not Tennessee) in the United States District Court for the Northern District of Mississippi. *See Hood ex rel. Mississippi v. City of Memphis*, No. 2:05CV32-D-B (N.D. Miss.). That lawsuit alleged that the "cone of depression" arising from Memphis's pumping was influencing the Aquifer's natural groundwater flow. *See* 5th Cir. Rec. 51 (¶ 20(d)). Mississippi further alleged that those effects were interfering with Mississippi's efforts to pump groundwater from its side of the Aquifer. *Id.* at 49-53 (¶¶ 19-22). Based on those alleged facts, Mississippi asserted various common-law claims against Memphis – including for unjust enrichment, trespass, and conversion. *Id.* at 53-62 (¶¶ 23-52).

In March 2005, Memphis filed a motion to dismiss Mississippi's complaint under Federal Rule of Civil Procedure 19, contending that Tennessee was a

necessary party and that joinder of Tennessee would bring the case within the Supreme Court's exclusive original jurisdiction. *Id.* at 120-21. The district court denied that motion in August 2005. *Id.* at 300. Mississippi then filed an amended complaint, in which it maintained its state common-law claims against Memphis but withdrew its prior allegations of harm to Mississippi's use of the Aquifer. Instead, Mississippi argued that it possessed an inherent, exclusive ownership right to all groundwater stored on its side of the State boundary. *Id.* at 779-88 (¶¶ 23-52). Even if Memphis's pumping was not materially affecting Mississippi's ability to use the Aquifer, Mississippi claimed, that pumping was injuring Mississippi by infringing on its property right to the water pulled across the border. *Id.*

On June 12, 2007, Memphis filed motions for judgment on the pleadings, again asserting that Mississippi's amended complaint should be dismissed for failure to join Tennessee (as well as Arkansas) as a party. The district court denied that motion. *Id.* at 2883-85. The parties thereafter engaged in extensive fact and expert discovery, involving roughly 15 depositions and five lengthy expert reports. On January 28, 2008, roughly two weeks prior to the scheduled bench trial, the court announced that it was reconsidering its prior ruling on Memphis's Rule 19 defense. *Id.* at 3488-89. After further briefing and argument, the court dismissed Mississippi's claims for failure to join Tennessee. *See Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646, 647-50 (N.D. Miss. 2008).

The district court held that Mississippi's state-law claims necessarily implicated Tennessee's sovereign interests in the shared use of the Aquifer. Although Mississippi framed the groundwater beneath its territory as Mississippi "property," the court held that its claims were more properly subject to "the doctrine of equitable apportionment." *Id.* at 648. The court held that it could not determine whether Memphis was "pumping water that belongs to the State of Mississippi" without such an apportionment. *Id.* Because any such apportionment necessarily would implicate Tennessee's sovereign interests, the court concluded that Tennessee was a "necessary party." *Id.* at 649. And, because joinder of Tennessee would trigger the Supreme Court's exclusive jurisdiction under 28 U.S.C. § 1251(a), the court dismissed Mississippi's complaint pursuant to Rule 19(b). *Id.* at 649-51.

**3.** The Fifth Circuit affirmed. As the Fifth Circuit framed the dispute, the necessity of Tennessee's participation turned on whether Mississippi's state-law claims "require[d] an equitable apportionment of the Aquifer." *Hood*, 570 F.3d at 629. On that issue, it affirmed the district court's conclusion that it could not determine whether Memphis "had misappropriated" the Aquifer's groundwater without "an equitable apportionment" first allocating to Mississippi a specific share of that water. *Id.* Citing the Supreme Court's longstanding precedents, the Fifth Circuit held that "[t]he Aquifer is an interstate water source, and the amount

of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share." *Id.* at 630 (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104-05 (1938)). Given that conclusion, it held that Mississippi's property-rights-based claims demanded "application of the equitable apportionment doctrine," which made Tennessee a necessary party. *Id.* at 630-31.

The Fifth Circuit rejected "Mississippi's fundamental argument" "that the Aquifer's water is not an interstate resource subject to equitable apportionment." *Id.* at 629. It found that the Aquifer "flows, if slowly, under several states" and is legally "indistinguishable from a lake bordered by multiple states or from a river bordering several states depending upon it for water." *Id.* at 630. The court further found Mississippi's arguments about the particular hydrological characteristics of the Aquifer – *i.e.*, that it "is located underground, as opposed to resting above ground as a lake" – to be "of no analytical significance." *Id.* Given its holding that the Aquifer is an interstate groundwater resource, the Fifth Circuit "rejected" Mississippi's argument "that state boundaries determine the amount of water to which each state is entitled." *Id*. Any adjudication of Mississippi's sovereign share of the Aquifer, the court concluded, could occur only in an "equitable apportionment action" in "the Supreme Court." *Id.* at 633. The court therefore

affirmed the dismissal of Mississippi's complaint without prejudice to the refiling of an equitable-apportionment action under 28 U.S.C. § 1251(a). *Id.* at 632-33.

Mississippi filed a petition for a writ of certiorari. *See* Miss. Cert. Pet., No. 09-289 (filed Sept. 2, 2009). It contended that the Aquifer contains groundwater that, "[u]nlike the surface water of watersheds, streams, rivers and lakes," is a "pure finite resource" that "under natural conditions" would never flow into Tennessee. *Id.* at 3. The Fifth Circuit had erred, according to Mississippi, by applying the Supreme Court's "equitable apportionment cases" to such groundwater. *Id.* at 9. It had further erred, Mississippi contended, by rejecting the argument that Mississippi owns all "ground water resources within the geographical confines of its boundaries as a function of statehood." *Id*. at 11-12. Mississippi thus asked the Supreme Court to grant certiorari, reverse the Fifth Circuit, and hold that "equitable apportionment is not an appropriate remedy for the wrong asserted by Mississippi." *Id.* at 14.

On January 25, 2010, the Court denied certiorari. *See* 130 S. Ct. 1319.

**4.** On September 2, 2009, contemporaneously with its certiorari petition, Mississippi filed in the Supreme Court a provisional motion for leave to file an original complaint (the "2009 Complaint") against Memphis and Tennessee. That complaint contained two causes of action. First, Mississippi asserted its territorial property rights theory, alleging that Memphis's pumping constituted a "wrongful

diversion, taking and conversion of state-owned natural resources." 2009 Compl. ¶ 24. Second, Mississippi alleged that, "*if and only if* this Court determines that Mississippi does not own and control the ground water resources within its borders," the Court should "determine the equitable apportionment of the ground water contained in the aquifer" between Tennessee and Mississippi. *Id.* ¶ 5(c).

Tennessee opposed leave to file the 2009 Complaint, arguing that Mississippi's territorial property rights theory was inconsistent with the Court's longstanding equitable-apportionment precedents. *See* 2009 Tenn. Opp. 12-19. Absent an equitable apportionment, Tennessee maintained, Mississippi lacked any ownership interest in the Aquifer capable of supporting a claim for damages. *Id.* As for Mississippi's alternative claim for equitable apportionment, Tennessee explained that Mississippi had failed to plead – and in fact had disclaimed – the type of substantial injury that would warrant the Court's equitable intervention. *See id.* at 29 (citing admission from Mississippi's expert that the alleged pumping had reduced groundwater levels in Mississippi by only 0.0027%).

On January 25, 2010, the same day it denied Mississippi's certiorari petition, the Supreme Court denied without prejudice Mississippi's motion for leave to file the 2009 Complaint. 130 S. Ct. 1317. The court's order denying leave cited two cases: *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003), and *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). *Id.* Footnote 9 in *Virginia v. Maryland*

states that "[f]ederal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river." 540 U.S. at 74 n.9. Footnote 13 in *Colorado v. New Mexico* states that "a State seeking to prevent or enjoin a diversion by another State bears the burden of proving that the diversion will cause it real or substantial injury or damage." 459 U.S. at 187 n.13.

**5.** On June 6, 2014, Mississippi sought leave to file the current Complaint reprising its territorial property rights theory. As before, the Complaint alleges (at ¶ 14) that groundwater in the Aquifer is a "limited natural resource" that "[u]nder natural conditions . . . would not leave Mississippi's groundwater storage." Also as before, Mississippi alleges (at ¶ 38) that the Aquifer contains groundwater that "does not fall within the Court's equitable apportionment jurisprudence." Unlike the 2009 Complaint, however, the current Complaint does not seek equitable apportionment of the Aquifer, even as fallback relief. The Complaint thus does not attempt to allege facts that would support a right to an equitable apportionment. Mississippi instead focuses (at ¶ 54) on the loss of its supposed property interest in the groundwater that would have remained beneath Mississippi's territory in the absence of Memphis's pumping.

Memphis and Tennessee opposed Mississippi's motion for leave to file the Complaint, arguing that Mississippi's claims are foreclosed both by the equitable-

apportionment doctrine and by issue preclusion. The United States filed an *amicus* brief agreeing that leave should be denied because Mississippi had no cognizable property right to the Aquifer in the absence of an equitable apportionment or an interstate compact. *See* U.S. Br. 13-23. On June 29, 2015, the Supreme Court granted Mississippi leave to file and directed Defendants to answer the Complaint. 135 S. Ct. 2916 (Dkt. No. 12). After Defendants filed their answers, on November 10, 2015, the Supreme Court referred the case to the Special Master, granting him authority "to direct subsequent proceedings" as he sees fit. 136 S. Ct. 499 (Dkt. No. 17). On January 26, 2016, the Special Master invited Defendants to file preliminary dispositive motions and stayed discovery while those motions were pending. Hr'g Tr. 24:2-4; *see* Dkt. No. 25, at ¶¶ 1-2.

## ARGUMENT

The Court should dismiss the Complaint on the pleadings. *See* Fed. R. Civ. P. 12(c). Motions for judgment on the pleadings are subject to the same standard as motions to dismiss. *See* 5C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367, at 218 (3d ed. 2004) ("Wright & Miller"); *D'Ambrosio v. Marino*, 747 F.3d 378, 383 (6th Cir.), *cert. denied*, 135 S. Ct. 758 (2014).[3] Judgment on the pleadings is thus appropriate unless a plaintiff's factual allegations support "recovery under a viable legal theory." *D'Ambrosio*, 747 F.3d at 383. In evaluating whether a plaintiff has met that standard, a court should accept as true a plaintiff's well-pleaded factual allegations but disregard its "legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Mississippi's Complaint should be dismissed on the pleadings because the alleged facts, taken as true, demonstrate that its claims are barred as a matter of law.

### I. MISSISSIPPI'S CLAIMS FAIL AS A MATTER OF LAW BECAUSE MISSISSIPPI HAS NO ENFORCEABLE PROPERTY RIGHT TO THE UNAPPORTIONED GROUNDWATER IN THE AQUIFER

Mississippi's claims should be dismissed because they rely on a theory of sovereign ownership that the Supreme Court's water-law precedents foreclose. At bottom, Mississippi's various tort and equitable claims depend on a single premise:

[3] Tennessee moves for judgment on the pleadings under Rule 12(c), rather than to dismiss under Rule 12(b)(6), because it has already filed an answer. *See* Fed. R. Civ. P. 12(c) (governing motions "[a]fter the pleadings are closed").

that Mississippi inherently owns all groundwater in the Aquifer that would "be stored within Mississippi's borders" under natural conditions. Compl. ¶ 24. That premise conflicts with the doctrine of equitable apportionment, which the Supreme Court has used to resolve interstate water disputes for more than a century. Under that doctrine, a State has no legal right to any portion of an interstate water resource unless it has entered into an interstate compact or obtained an equitable allocation from the Supreme Court. Because Mississippi has obtained neither, its claims fail as a matter of law.[4]

### A. The Doctrine Of Equitable Apportionment Precludes Mississippi's Territorial Property Rights Theory

#### 1. Mississippi's assertion of sovereign ownership over the Aquifer conflicts with equitable-apportionment principles

Mississippi's territorial property rights theory conflicts with the Supreme Court's framework for resolving interstate water disputes. For more than a century, "disputes over the allocation of water [have been] subject to equitable

[4] Federal common law determines when "one state may sue an entity for invading its share" of an interstate water resource like the Aquifer. *Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 630 (5th Cir. 2009). Mississippi is therefore incorrect (at ¶ 11) to base its claims on Mississippi state-law principles. Regardless, Mississippi's lack of ownership over the Aquifer's groundwater is fatal to its claims under state law as well. *See Wilson v. General Motors Acceptance Corp.*, 883 So. 2d 56, 68 (Miss. 2004) ("Ownership of the property is an essential element of a claim for conversion."); *Great N. Nekoosa Corp. v. Aetna Cas. & Sur. Co.*, 921 F. Supp. 401, 415 (N.D. Miss. 1996) (trespass in Mississippi is a "[c]ause of action[] which seek[s] to preserve the rights incidental to ownership of property"); *Hans v. Hans*, 482 So. 2d 1117, 1122 (Miss. 1986) (restitution applies only where "money or property . . . ought to belong" to another person).

apportionment by the courts." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2125 (2013). Under the equitable-apportionment doctrine, a "State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). Thus, the Supreme Court's equitable-apportionment cases have "consistently denied" the proposition that a State may exercise exclusive "ownership or control" over all "waters flowing within her boundaries." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102 (1938); *cf. Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 951 (1982) (rejecting the "legal fiction of state ownership" of "ground water").[5] A State acquires an ownership share of such resources not by mere virtue of sovereignty, but rather by seeking a "just and equitable allocation" from the Supreme Court. *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982).

In an equitable-apportionment case, the Supreme Court allocates a disputed water resource based on a "flexible" analysis that involves "'consideration of many factors'" beyond mere geography. *Id.* (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)). The goal of an equitable apportionment is not to enforce a

[5] The principle that States may not exercise exclusive ownership over interstate resources within their boundaries underpins not just the Court's equitable-apportionment doctrine, but also "the Court's Commerce Clause cases." *Idaho ex rel. Evans*, 462 U.S. at 1025. Mississippi's legal theory, if accepted, could therefore have destabilizing consequences beyond the Court's equitable-apportionment jurisprudence. *See also Sporhase*, 458 U.S. at 954 (subjecting groundwater to strictures of Commerce Clause because "[g]round water overdraft is a national problem"); *infra* Part I.D.

State's territorial boundaries, but rather "to secure a 'just and equitable' allocation" in light of "all relevant factors." *Id.* (quoting *Nebraska v. Wyoming*, 325 U.S. at 618). For that reason, an equitable apportionment is "neither dependent on nor bound by existing legal rights to the resource being apportioned." *Idaho ex rel. Evans*, 462 U.S. at 1025. Principles of "justice," rather than the traditional property-rights concepts that Mississippi invokes, are decisive. *See Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907) (interstate water disputes must be resolved "in such a way as will recognize the equal rights of both [States] and at the same time establish justice between them").[6]

Those principles undermine the legal theory on which Mississippi's claims depend. The equitable-apportionment doctrine reflects the sound judgment that "strict adherence" to a rigid "rule" of allocation – such as Mississippi's territory-based rule – would hamper the Supreme Court's ability to deliver "just and equitable" results in interstate water cases. *Nebraska v. Wyoming*, 325 U.S. at 618. Indeed, allocating interstate waters demands a "delicate adjustment of interests" that must be sensitive to a wide array of hydrological, "climatic," and

[6] *See also Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) (concluding that a State's border is "essentially irrelevant to the adjudication of these sovereigns' competing claims"); *Colorado v. New Mexico*, 459 U.S. at 182 n.8 ("reject[ing]" contention "that the mere fact that the Vermejo River originates in Colorado automatically entitles Colorado to a share of the water"); *see also* 4 *Waters and Water Rights* § 36.02, at 36-8 to 36-9 & nn.16-17 (Robert E. Beck ed., 2004 repl. vol.) ("the Supreme Court has made it abundantly clear that it has little patience with claims of absolute 'ownership' " of interstate water resources).

"econom[ic]" forces. *Id.* To ignore all those factors in favor of a rule that States inherently "own" all water within their borders – no matter the economic or geological ramifications for other States – would vitiate the "flexible doctrine" the Court has long used to produce "just and equitable allocation[s]" of interstate water. *Colorado v. New Mexico*, 459 U.S. at 183.

The absence of an equitable allocation here forecloses Mississippi's claims as a matter of law. Mississippi's Complaint disclaims any request for the Supreme Court to equitably allocate the Aquifer. *See* Compl. ¶ 38 ("This case does not fall within the Court's equitable apportionment jurisprudence."). Having sought neither an equitable apportionment nor an interstate compact, Mississippi has no legal right to complain about extractions by the Aquifer's other users. *See Hood*, 570 F.3d at 630 (holding that Mississippi cannot "sue an entity for invading its share" of the Aquifer unless and until the Aquifer has been "allocated" via "compact" or "equitable apportionment") (citing *Hinderlider*, 304 U.S. at 104-05).

**2. The Court's denial of leave to file the 2009 Complaint demonstrates the flaw in Mississippi's claims**

The Supreme Court's order denying Mississippi leave to file the 2009 Complaint confirms that Mississippi remains unable to state a valid legal claim. Mississippi urged the Court to permit the 2009 Complaint based on the same territorial property rights theory it advances here. *See* 2009 Compl. ¶ 2 ("Mississippi and Tennessee separately own and control the valuable ground

waters within their respective sovereign borders."). The two cases the Court cited in its order denying leave reject that theory. *See* 130 S. Ct. 1317. The first case (*Virginia v. Maryland*, 540 U.S. 56 (2003)) holds that the doctrine of "[e]quitable apportionment" "governs interstate bodies of water." *Id.* at 74 n.9. The second case (*Colorado v. New Mexico*, 459 U.S. 176 (1982)) holds that a State may obtain an equitable apportionment only if it can show that another State's use of the water resource is causing "real or substantial injury or damage" to its sovereign interests. *Id.* at 187 n.13. The 2009 Complaint violated both principles. Without an equitable apportionment, Mississippi had no legal interest supporting its claims for damages. And lacking allegations of substantial injury, Mississippi was not entitled to obtain an equitable apportionment from the Supreme Court.

Mississippi's current Complaint violates those same principles. Equitable apportionment, not the State boundary, governs Mississippi's rights to the Aquifer. And the current Complaint not only fails to allege substantial injury; it affirmatively disclaims (at ¶ 38) any request for equitable apportionment. Accordingly, Mississippi's claims should be dismissed for the reasons given in the cases the Court cited in denying leave to file the 2009 Complaint.

The Court's grant of leave to file the current Complaint does not suggest a rejection of Tennessee's legal arguments. A grant of leave "is not a judgment that the bill of complaint . . . states a claim upon which relief may be granted," *Idaho ex*

*rel. Andrus v. Oregon*, 429 U.S. 163, 164 (1976) (per curiam), and the Court's order here implies no such judgment. After all, there is little reason to think that the Court in 2014 suddenly reversed its position on the territorial property rights theory – which it had rejected just four years before in denying both Mississippi's motion for leave to file the 2009 Complaint and its parallel petition for a writ of certiorari. Rather, there were strong prudential reasons for the Court to grant leave to file in 2014 and thereby facilitate resolution of Mississippi's claims on "the merits." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

Indeed, while another order denying Mississippi leave to file would have left the door open for yet another future lawsuit based on the same claims, an order granting leave paves the way for the Court to dismiss those claims once and for all. *See*, *e.g.*, *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982) (affirming judgment on pleadings for defendant after granting leave to file). The Court's unusual selection of an experienced circuit judge to serve as Special Master further suggests that the Court wanted a legal analysis of Mississippi's theory, so that it may review the merits of that theory on what will be anticipated exceptions to the Special Master's report. The Court's order granting leave will enable it to adjudicate and dismiss Mississippi's claims in that context, with the benefit of a recommendation by an appellate judge in the first instance.

### B. Mississippi's Arguments Against The Equitable-Apportionment Doctrine Are Unpersuasive

#### 1. The Court should not credit Mississippi's conclusory assertion that the Aquifer contains "intrastate" water

Mississippi no longer disputes that it falls short of the requirements for an equitable apportionment. Rather, Mississippi contends (at ¶¶ 38-41) that the equitable-apportionment doctrine is inapplicable because the groundwater in this case constitutes "intrastate" water. That conclusory assertion is inconsistent with the Court's precedents and with the facts that Mississippi alleges.

The Supreme Court has applied the equitable-apportionment doctrine broadly to all interstate "disputes over the allocation of water." *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2125. When the Court first formulated the concept of equitable apportionment, it explained that the doctrine governs "whenever . . . the action of one state reaches, through the agency of natural laws, into the territory of another state," and thereby requires the Court to reconcile the competing "rights of the two states." *Kansas v. Colorado*, 206 U.S. at 97-98. The Court has extended that principle to an array of interstate water resources, including rivers, *see Nebraska v. Wyoming*, 325 U.S. at 617-19; groundwater tributaries, *see Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995); and even migratory fish, *see Idaho ex rel. Evans*, 462 U.S. at 1024-25. In each case, the need for apportionment was a "simple consequence of geography": when geography allows one State to

"depriv[e]" another State "of the benefit of water" that otherwise "would flow into its territory," equitable apportionment supplies the remedy. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015).

Mississippi's factual allegations establish that equitable apportionment applies to the Aquifer. Mississippi admits that the Aquifer is a "geologic formation" that "straddles two states." Compl. ¶ 41; *see id.* ¶ 50 ("[t]he Sparta Sand formation underlies both Mississippi and Tennessee"). Mississippi further admits that the Aquifer is hydrologically interconnected such that no physical barrier prevents its groundwater from flowing naturally across State boundaries. *See* Miss. Br. 9 n.7 (admitting that some water in the Aquifer "might enter Tennessee" under natural conditions); Hr'g Tr. 16:2-5 (admitting that the Aquifer's groundwater "does move . . . an inch or two daily" under natural conditions). And Defendants' alleged conversion of that water arises not from any physical intrusion into Mississippi's territory,[7] but rather from the laws of physics: Memphis's pumping on Tennessee's side of the border supposedly creates a "drop in pressure" that induces water beneath Mississippi to flow "northward" across the border.

[7] Mississippi concedes that Memphis's wells do not physically cross the State boundary. *See* Hr'g Tr. 16:8-12 (admitting "they are pumping out of the state of Tennessee" and that Mississippi is "not arguing" that Memphis "drilled" across the boundary); Miss. App. 94a (maps incorporated into the Complaint showing that Memphis pumps groundwater exclusively within Tennessee).

Compl. ¶¶ 24-25. That phenomenon epitomizes the "agency of natural laws" at work. *Kansas v. Colorado*, 206 U.S. at 97.

Mississippi's admissions foreclose its characterization of the disputed groundwater as "intrastate." In the face of its own concrete factual allegations demonstrating the interstate character of the groundwater at issue, Mississippi's attempt to classify that water as "intrastate" amounts to a mere legal conclusion that the Court should disregard. *See Iqbal*, 556 U.S. at 678-79. Notwithstanding those legal assertions, the alleged facts show that the Aquifer is an "interstate water resource[]" subject to "equitable allocation." *Hood*, 570 F.3d at 631; *see Kansas v. Colorado*, 206 U.S. at 115 (rejecting similar conclusory legal contention that an interstate river was "really two rivers, one . . . terminating at or near the state line, and the other commencing" on the other side of the boundary).

Mississippi itself has previously acknowledged the Aquifer's interstate character. In *Hood*, Mississippi argued that the district court had subject-matter jurisdiction because its "claims involv[ed] transboundary or interstate ground water." C.A. Br. 1; *see id.* at 21 ("[i]t is the interstate context that actually confirms the District Court's subject matter jurisdiction"). Although Mississippi later argued against a Rule 19(b) dismissal on the grounds that "the Aquifer's water is not an interstate resource subject to equitable apportionment," *Hood*, 570 F.3d at 629 – a losing argument that gives rise to issue preclusion here, *see infra*

Part II – its jurisdictional admission remains instructive. As the district court observed, Mississippi sought to "have it both ways": it contended that the court had jurisdiction "because interstate water is the subject of the suit," but then opposed dismissal based on a merits argument that "only Mississippi water is involved." *Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646, 649 (N.D. Miss. 2008). Mississippi had it right the first time. Its prior concession that the Aquifer is an "interstate" resource further supports disregarding the contrary legal conclusion in its current Complaint.

### 2. Mississippi's argument that groundwater is exempt from the equitable-apportionment doctrine is unpersuasive

Mississippi also argues that the Aquifer is immune from equitable-apportionment principles because it contains "groundwater," rather than water in a surface "river or stream." That argument is unpersuasive for three reasons. *First*, as explained above, the Court has broadly applied the equitable-apportionment doctrine to a variety of different water resources. *See supra* pp. 21-22. What matters is not whether the water is underground or above ground (or whether the resource is even water itself, as opposed to fish).[8] Rather, the doctrine applies

[8] In *Idaho ex rel. Evans v. Oregon*, the Court held that "the natural resource of anadromous [*i.e.*, migratory] fish is sufficiently similar" to a river "to make equitable apportionment an appropriate mechanism for resolving allocative disputes." 462 U.S. at 1024. Reasoning that "a State that overfishes a run downstream deprives an upstream State of the fish it otherwise would receive," the Court identified "no reason" to invent a new legal rule to govern interstate fishing

whenever, as a "simple consequence of geography," *Kansas v. Nebraska*, 135 S. Ct. at 1052, one State's use of a shared water resource causes injury to another State's use of that same resource "through the agency of natural laws," *Kansas v. Colorado*, 206 U.S. at 97. That is precisely what Mississippi alleges here.

*Second*, the Supreme Court has applied the equitable-apportionment framework to cases involving disputed groundwater. In *Washington v. Oregon*, 297 U.S. 517 (1936), for example, the Court addressed a claim – similar to Mississippi's – that Oregon farmers should be enjoined from pumping "subsurface water" because of the effect on water in Washington. *Id.* at 523-26. The Court applied the equitable-apportionment doctrine and concluded that no injunction was warranted because the water pumped in Oregon did not "materially lessen[] the quantity of water available" in Washington. *Id.* at 526; *see id.* (analyzing whether "use of wells or pumps," combined with surface irrigation, had diverted "more than [the farmers'] equitable proportion" of water). Several other cases have likewise analyzed disputes over groundwater pumping through the lens of

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disputes. *Id.* To hold otherwise, the Court observed, would conflict with the principle that "a State may not preserve solely for its own inhabitants natural resources located within its borders." *Id.* at 1025. If that principle applies to migratory fish, then surely it applies to the groundwater within a multistate resource like the Aquifer.

equitable apportionment.[9] Mississippi identifies no authority for treating the groundwater here any differently.

*Third*, Mississippi's position frustrates the purpose of the equitable-apportionment doctrine. The hallmark of the equitable-apportionment doctrine is "flexibility": that doctrine supplies a framework under which the Court "weigh[s] the harms and benefits to competing States" and tailors a remedy in light of *both* the "benefits" and possible "harms" of a proposed use. *Colorado v. New Mexico*, 459 U.S. at 186-88. Mississippi's claims, however, ask the Court to consider only the supposed "harm" to Mississippi's property interests while ignoring the "countervailing equities" that support Memphis's pumping. *Id.* at 186-87. Indeed, Mississippi alleges (at ¶ 54) that Defendants are absolutely foreclosed from engaging in *any* pumping that pulls groundwater across the State boundary – even where the benefits of such pumping substantially outweigh the costs. A rule so rigid conflicts with the "emphasis on flexibility" that has long been vital to the Court's water-law jurisprudence. *Colorado v. New Mexico*, 459 U.S. at 187-88;

[9] *See Nebraska v. Wyoming*, 515 U.S. at 14 (addressing claim that "groundwater pumping in Wyoming can . . . deplete surface water flows" within context of equitable apportionment); *Texas v. New Mexico*, 462 U.S. 554, 556-57 & nn.1-2 (1983) (discussing effects of aquifer pumping on nearby Pecos River); *Kansas v. Colorado*, 206 U.S. at 114 (rejecting attempt to distinguish "subsurface water" from surface "stream" otherwise subject to equitable apportionment); *cf. Sporhase*, 458 U.S. at 951 (rejecting the "legal fiction of state ownership" of "ground water" and subjecting groundwater regulations to Commerce Clause).

*see Kansas v. Nebraska*, 135 S. Ct. at 1053 (noting "flexible character" of Court's "equitable powers" to allocate water).

Mississippi identifies nothing unique about groundwater that would counsel such a result. True, Mississippi alleges that the groundwater is not part of a "river, stream or lake," Compl. ¶ 41, and that its movement is "exceedingly slow," Miss. Br. 18. But neither fact supports exempting the Aquifer from the doctrine of equitable apportionment. Under that "flexible doctrine," *Colorado v. New Mexico*, 459 U.S. at 183, there is nothing talismanic about the rate of speed at which a body of water flows, or its proximity to the surface. *See Hood*, 570 F.3d at 630 (finding such facts to be "of no analytical significance"). As the Fifth Circuit correctly held, the Aquifer "flows, if slowly, under several states, and it is indistinguishable from a lake bordered by multiple states or from a river bordering several states." *Id*. A hydrological resource of that nature – whatever its proximity to the surface – "is subject to interstate compact or equitable allocation." *Id.* at 631.

### C. Mississippi Law Confirms That The Equitable-Apportionment Doctrine Applies To The Aquifer

#### 1. Mississippi statutory law recognizes the equitable-apportionment doctrine

Mississippi law refutes its claim of inherent sovereign control over groundwater resources. The Complaint invokes various statutory provisions that supposedly establish Mississippi's exclusive ownership of all groundwater beneath

its territory. *See* Compl. ¶¶ 12, 42-43 (citing Miss. Code Ann. § 51-3-1 *et seq.*). The very chapter Mississippi cites, however, groups interstate groundwater together with surface water and recognizes that both are subject to equitable allocation. *See* Miss. Code Ann. § 51-3-41. Specifically, Mississippi law authorizes the Commission on Environmental Quality to negotiate "compacts and agreements concerning [Mississippi's] share of *ground water* and waters flowing in watercourses where a portion of those waters are contained within the territorial limits of a neighboring state." *Id.* (emphasis added).[10] That provision reveals Mississippi's own awareness that, under longstanding equitable-apportionment principles, an interstate compact could be necessary to establish its rights to an interstate groundwater resource like the Aquifer.

Were Mississippi's current legal theory correct, no such authority would be necessary: Mississippi's "share" of such groundwater would already be fixed as a matter of sovereignty. And were Mississippi correct that groundwater is so "unlike surface water" as to demand a different legal regime, Miss. Br. 18, its own legislature would not have treated the two identically in contemplating interstate negotiations over Mississippi's "share" of such waters. Miss. Code Ann. § 51-3-41. In fact, Mississippi identifies no provision of Mississippi law contemplating exclusive ownership of groundwater resources "where a portion of those waters are

[10] The legislature in 1995 amended the interstate-compact provision specifically to include "ground water." *See* 1995 Miss. Laws ch. 505, § 4.

contained within the territorial limits of a neighboring state." Miss. Code Ann. § 51-3-41. The absence of any such provision undermines Mississippi's attempt to exempt groundwater from ordinary equitable-apportionment principles. *Cf. Colorado v. New Mexico*, 459 U.S. at 183 ("The laws of the contending States concerning intrastate water disputes are an important consideration governing equitable apportionment.").[11]

**2. The public trust doctrine is inapplicable**

Mississippi also cites (at ¶¶ 10-11) the "public trust doctrine" established by *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 516-17 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). Under that doctrine, a State holds in trust the waters and submerged lands confined within its own territorial borders, subject to fiduciary duties to preserve those resources for the benefit of the public. *See* 4 *Waters and Water Rights* § 30.02(a)-(c), at 30-26 to 30-34; *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (such ownership

[11] With respect to intrastate water disputes, Mississippi follows a "regulated riparianism" regime for both surface and groundwater, pursuant to which a State administrative body issues permits for the use of intrastate groundwater and resolves permit disputes. *See* Miss. Code Ann. §§ 49-17-28, 51-3-1, 51-3-3(e), 51-3-13; 6 *Waters and Water Rights* at 708-09 (2005 repl. vol.). Tennessee, for its part, follows a "correlative rights" regime for resolving intrastate disputes over percolating groundwater, which, like the Court's equitable-apportionment doctrine, calls for equitable sharing of groundwater by adjacent landowners. *See Nashville, C. & St. L. Ry. v. Rickert*, 89 S.W.2d 889, 896-97 (Tenn. Ct. App. 1935); 6 *Waters and Water Rights* at 1040-43. Neither regime is consistent with the rigid territorial property rights theory that Mississippi advances in this case.

is "title different in character from that which the state holds in lands intended for sale" and creates only "title held in trust for the people of the state").

The public trust doctrine does not control here because it merely defines the rights and obligations of a State vis-à-vis its own citizens with respect to purely intrastate water and submerged lands. It is inapplicable to disputes over the use of interstate water resources, which implicate the co-equal rights of neighboring States and require equitable allocation. *See Kansas v. Colorado*, 206 U.S. at 97-98 (allocation of interstate water resources must "recognize the equal rights" of neighboring States); *Hood*, 570 F.3d at 630 (holding public trust doctrine inapplicable because "the Aquifer is not a fixed resource like a mineral seam, but instead migrates across state boundaries").[12] Like *Cinque Bambini*, all the public trust cases that Mississippi cites (at ¶¶ 8, 10-11) involve disputes between a State and private claimants over intrastate lands or waters.[13] None has any bearing here.

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[12] To the extent Mississippi suggests (Miss. Br. 17) that *Kansas v. Colorado* supports its ownership claim, its argument fails for similar reasons. That decision contemplates each State's ownership of "*the lands*" within its territory, "including the beds of streams and other waters." 206 U.S. at 93 (emphasis added). It does not suggest that States have title to subsurface groundwater contained within a hydrologically connected aquifer. *See United States v. Alaska*, 521 U.S. 1, 5 (1997) (equal-footing doctrine recognized in *Kansas v. Colorado* applies to "the beds of navigable waters"); *see also* U.S. Br. 18-19.

[13] *See*, *e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 286-87 (1997) (title dispute between State and Indian tribe over lake bed entirely in Idaho); *Montana v. United States*, 450 U.S. 544, 550-51 (1981) (title dispute between State and Indian tribe over "the bed of the Big Horn River"); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 365, 370-71

### D. The Court Should Dismiss Mississippi's Claims Before Discovery

The Special Master should conclude that the equitable-apportionment doctrine applies to Mississippi's allegations and recommend that the Court dismiss Mississippi's claims at this stage of the proceedings. Allowing Mississippi's claims to proceed any further would not only contravene longstanding water-law precedent; it would threaten to destabilize State water policy across the Nation. *See Kansas v. Nebraska*, 135 S. Ct. at 1053 (Court can consider "the public interest" in original cases). "[W]ater, unlike other natural resources, is essential for human survival." *Sporhase*, 458 U.S. at 952. In the context of a multistate groundwater resource like the Aquifer, therefore, "States' interests" in "local management of ground water . . . have an interstate dimension" and must sometimes yield to the "significant federal interest in conservation as well as in fair allocation." *Id.* at 952-53. That core insight underpins the Court's equitable-apportionment doctrine: given the interstate character of groundwater management, the "relative rights of contending States" must be adjudicated within a framework that serves the broader national interest, rather than the parochial "considerations . . . applied in such States for the solution of similar questions of private right." *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931).

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(1977) (title dispute over lands located entirely within Oregon); *Illinois Cent. R.R.*, 146 U.S. at 452 (title dispute over lands near Chicago); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 220, 230 (1845) (ejectment action concerning land in Alabama).

Mississippi's claims risk undermining that well-settled framework for managing interstate water resources. For decades, States have formulated water policy with the knowledge that the federal equitable-apportionment doctrine protects "existing economies" and looks unfavorably on legal claims that threaten to "disrupt[] established uses." *Colorado v. New Mexico*, 459 U.S. at 187. But the Complaint seeks to cast that regime aside in favor of a rule allowing States like Mississippi to use their own tort laws to upend the groundwater policies of neighboring States. Were Mississippi correct that a State could sue in tort (without any prior apportionment) based on the supposed hydrological effects of pumping in other States, every State that extracts water from an interstate aquifer – a category that includes many States across the Nation[14] – could be forced to defend itself against lawsuits threatening ruinous liability and disruption of existing water uses. *See* Compl. ¶ 55 (seeking at least $615 million in damages); *see also* U.S. Br. 17 (observing that, under Mississippi's theory, "Tennessee could not pump *any* water from the Aquifer"). Given the paramount importance of doctrinal "stability" in the area of "water rights," *Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983), the damage caused by such upheaval could be substantial.

[14] *See* U.S. Geological Survey, *Ground-Water Availability in the United States*, Circular 1323, at 32 (2008) (depicting multistate aquifers throughout the country and noting that they account for "about 94 percent of the Nation's total ground-water withdrawals"), *available at* http://water.usgs.gov/watercensus/AdHocComm/Background/Ground-WaterAvailabilityintheUnitedStates.pdf.

The hydrological complexity of Mississippi's theory reinforces the point. Mississippi asks (at ¶ 14) the Court to determine ownership of each molecule of water in the Aquifer by determining whether it would have "resided in Mississippi" under "natural conditions." But modeling historical groundwater flow is complex and imprecise under any circumstances; it is especially challenging here because Mississippi's theory depends on reconstructing the "natural" state of the Aquifer in the nineteenth century prior to pumping. *See* Miss. App. 33a (tracing cone of depression to 1886). The need to account for the effect of Mississippi's own pumping – as well as the consequences of various surface recharges in the different States – compounds the challenge of calculating which water molecules would have remained beneath Mississippi without human intervention. *See id.* at 203a-204a, 237a-238a. Indeed, the parties have already proffered models reaching polar opposite conclusions regarding groundwater flow in the Aquifer under "natural" conditions in this case.[15]

If this lawsuit proceeds, the Special Master will be forced to resolve that complex hydrological dispute and develop a historical picture of what the Aquifer looked like centuries ago. *See*, *e.g.*, *id.* at 15a-57a (describing potentiometric maps

[15] *Compare* Compl. ¶ 16 (citing USGS report supposedly showing prevailing pre-development flows into Mississippi) *with* Answer ¶ 16 (citing recent article critiquing USGS model and demonstrating pre-development groundwater flow into Tennessee); *see also* Brian Waldron & Daniel Larsen, *Pre-Development Groundwater Conditions Surrounding Memphis, Tennessee: Controversy and Unexpected Outcomes*, 51 J. Am. Water Resources Ass'n 133 (Feb. 2015).

purporting to show "cones of depression" emanating from Memphis's wells). The threat of hundreds of millions of dollars in retrospective damages based on the results of such an uncertain analysis would unjustifiably disrupt the Aquifer's "established economy" and thwart the policies of certainty and stability at the heart of federal common law in this area. *Colorado v. New Mexico*, 459 U.S. at 186.

Those concerns highlight the need to dismiss Mississippi's claims on the pleadings. The Supreme Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented." *Ohio v. Kentucky*, 410 U.S. at 644. Allowing Mississippi's claims to proceed to discovery would merely delay the inevitable: a conclusion that one State cannot sue another over the Aquifer without a prior equitable allocation. Reaching that conclusion now, rather than later, would avoid the destabilizing signal that Mississippi's novel claims would send if allowed to proceed. And dismissal would "shield" the Court from the "noisome, vexatious, [and] unfamiliar task[]" of supervising this litigation through discovery. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 499 (1971). There is no good reason to burden the Court with a lengthy discovery process just to confirm the legal flaws that are apparent on the face of Mississippi's Complaint.

Dismissal on the pleadings is also warranted in light of the extensive discovery that Mississippi has already taken. In *Hood*, Mississippi received an

opportunity to develop a full factual record in support of its territorial property rights theory. *See supra* p. 7. By the time the district court dismissed Mississippi's claims in *Hood*, the litigation had already spanned more than three years, involved extensive document and deposition discovery, and generated five expert reports analyzing the Aquifer. Based on that discovery record, the Fifth Circuit rejected Mississippi's arguments and held that the Aquifer is an "interstate water source" whose groundwater "must be allocated before one state may sue an entity for invading its share." 570 F.3d at 630. The Court should not now permit Mississippi to drag Defendants through a second round of protracted discovery on those very same issues. As in *Hood*, Mississippi's claims remain inconsistent with the Supreme Court's longstanding water-law precedents. The Special Master should therefore recommend the dismissal of those claims with prejudice.

## II. MISSISSIPPI'S CLAIMS ARE BARRED BY ISSUE PRECLUSION

The doctrine of issue preclusion reinforces the need to dismiss Mississippi's claims at an early stage. Issue preclusion "foreclos[es] successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001).[16] That doctrine embodies the "fundamental precept of common-law

[16] The term "issue preclusion" has "replaced a more confusing lexicon" and now "encompasses the doctrines once known as 'collateral estoppel' and 'direct estoppel.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008).

adjudication" that a party cannot "dispute[]" an issue that a prior court has "directly determined" against it. *Montana v. United States*, 440 U.S. 147, 153 (1979). As just explained, the Fifth Circuit in *Hood* rejected Mississippi's claims after extensive discovery. The Fifth Circuit's holding is not just persuasive authority for dismissing Mississippi's claims on the merits; it also precludes Mississippi from relitigating those claims here.[17]

### A. *Hood* Forecloses Mississippi's Territorial Property Rights Theory

It is beyond dispute that the Fifth Circuit's holding in *Hood* was a "valid court determination essential to [a] prior judgment." *New Hampshire v. Maine*, 532 U.S. at 748-49. It is likewise beyond dispute that Mississippi had a "full and fair opportunity to litigate" the issues that *Hood* resolved against it. *Montana v. United States*, 440 U.S. at 153. As such, issue preclusion bars Mississippi's claims to the extent they seek to relitigate an "issue of fact or law" that was already "litigated and resolved" in *Hood*. *New Hampshire v. Maine*, 532 U.S. at 748-49.

Mississippi's claims do just that. The Complaint here rises and falls on one core issue: whether, in the absence of an equitable apportionment, Mississippi has any enforceable property right to a portion of the Aquifer's groundwater. *See supra* Part I.A-B. The Fifth Circuit held squarely that it does not. *See Hood*, 570

[17] The Fifth Circuit affirmed the district court's judgment dismissing Mississippi's claims under Rule 19(b), which rested on similar reasoning and is likewise entitled to preclusive effect. *See supra* pp. 7-9.

F.3d at 630 ("The Aquifer is an interstate water resource, and the amount of water to which each state is entitled from a disputed interstate water source must be allocated before one state may sue an entity for invading its share."). That ruling is sufficient to trigger issue preclusion. Whatever disagreements Mississippi may have with the Fifth Circuit's reasoning, it remains bound by that ruling here. *See* Restatement (Second) of Judgments § 27 cmt. c (1982) (party cannot make "new arguments . . . to obtain a different determination" of previously decided issue). Accordingly, Mississippi is precluded from seeking any relief against Defendants until it satisfies *Hood*'s requirement that it first obtain an apportionment of the Aquifer through an "interstate compact or equitable allocation." 570 F.3d at 631.

Mississippi's arguments to the contrary only confirm that issue preclusion is appropriate. Indeed, the Complaint asks the Court to reach a different result based on the very same contentions the Fifth Circuit already considered and rejected. *First*, the Complaint reprises (at ¶ 38) the territorial property rights theory that Mississippi has a "core sovereign prerogative[]" to control all groundwater "naturally accumulated" within its borders. It made that same argument in *Hood*.[18] But the Fifth Circuit "rejected the argument" that "state boundaries determine the amount of water to which each state is entitled from an interstate water source."

[18] *Compare* Miss. C.A. Br. 17 (groundwater in Aquifer "has belonged to the State, as sovereign, since the time of statehood in 1817") *with* Compl. ¶ 44 (groundwater in Aquifer "became the sovereign property of Mississippi" "upon its admission to the Union in 1817").

570 F.3d at 630. Instead, the Fifth Circuit held that the Aquifer falls "squarely within . . . the equitable apportionment doctrine," under which a State's territorial boundaries have little significance. *Id.*

*Second*, the Complaint invokes (at ¶¶ 10-12) the "public trust doctrine" as support for its claim of sovereign authority over the Aquifer. In doing so, Mississippi raises the same points – and cites the same authority – as it did in *Hood*. *See* 570 F.3d at 630 (noting that Mississippi "cit[ed] to Mississippi and federal law demonstrating the state's sovereign rights over the soil, forest, minerals, etc.").[19] The Fifth Circuit, however, held the public trust doctrine inapplicable because "the Aquifer is not a fixed resource like a mineral seam, but instead migrates across state boundaries." *Id.* For that reason, Mississippi's rights to the Aquifer must be determined not by reference to "state boundaries," but through the doctrine of "equitable apportionment." *Id*.

*Third*, Mississippi seeks to avoid the equitable-apportionment doctrine based on the same hydrological distinctions it tried to draw in *Hood*. Then, as now, Mississippi asserted that its claims concern *intrastate* water immune from

[19] *Compare* Miss. C.A. Br. 43 (invoking "public trust doctrine" to support Mississippi's ownership of "waters within the state's geographical confines"; citing *Cinque Bambini*, 491 So. 2d at 516) *with* Compl. ¶¶ 11-12 (invoking "public trust doctrine" to support Mississippi's "ownership of all groundwater resources within Mississippi"; also citing *Cinque Bambini*); *compare* Miss. C.A. Br. 40 (arguing that similar precepts are "codified in Mississippi's statutory modern regulated riparian regime"; citing Miss. Code Ann. § 51-3-1) *with* Compl. ¶ 12 (making identical point; citing Miss. Code Ann. § 51-3-1).

equitable-apportionment principles. *See* Miss. C.A. Br. 17 ("Situated exclusively under Mississippi for millennia, the ground water which is the subject of Mississippi's common law tort claims . . . has belonged to the State, as sovereign, since the time of statehood in 1817. There is nothing to apportion."). And then, as now, Mississippi sought to confine the Court's equitable-apportionment precedents to rapidly flowing surface water.[20] The Fifth Circuit considered both arguments at some length, and then rejected them. *See Hood*, 570 F.3d at 629 (rejecting "Mississippi's fundamental argument" "that the Aquifer's water is not an interstate resource subject to equitable apportionment"); *id.* at 630 (finding distinctions between groundwater and surface water "of no analytical significance").

It is now far too late for Mississippi to attack those conclusions. The time for challenging the Fifth Circuit's holding was on direct appeal – and, indeed, Mississippi unsuccessfully sought certiorari in *Hood* based on the identical legal

[20] *Compare* Miss. C.A. Br. 38 (distinguishing "equitable apportionment cases" as "involv[ing] waters in turbulent flow between states" rather than an "underground aquifer" "situated within Mississippi's borders") *with* Compl. ¶ 48 ("[e]quitable apportionment principles have only been applied by this Court to those disputes [involving] water available within each state under natural conditions such as rivers and other surface waters"); *compare* Miss. C.A. Reply Br. 9 ("The aquifer is not a river and, in its natural unstressed state, a constant volume comprising Mississippi's share would always be contained within the State's borders.") *with* Compl. ¶ 41 (Aquifer is "not part of an underground river, stream or lake" that would "flow north into Tennessee" under "natural conditions").

arguments it now advances again.[21] But having failed to persuade the Supreme Court to review the Fifth Circuit's judgment, Mississippi is estopped from collaterally attacking that judgment now. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) ("a losing litigant deserves no rematch after a defeat fairly suffered"); *Montana v. United States*, 440 U.S. at 153 (final "determination" of previously litigated issue "is conclusive in subsequent suits based on a different cause of action"). Mississippi therefore remains bound by the Fifth Circuit's holding that the equitable-apportionment doctrine bars its claim of sovereign ownership over the Aquifer's groundwater.

### B. Early Dismissal Would Further Issue Preclusion's Purposes

The issue-preclusion doctrine further highlights the need to dismiss Mississippi's claims on the pleadings, rather than after another round of discovery. Issue preclusion is "central to the purpose" of civil litigation. *Montana v. United States*, 440 U.S. at 153. By preventing "parties from contesting matters that they have had a full and fair opportunity to litigate," issue preclusion avoids "the

[21] *Compare* Miss. Cert. Pet. 12 (Mississippi "owns the surface water and ground water resources within the geographical confines of its boundaries as a function of statehood") *with* Compl. ¶ 38 (Mississippi has "sovereign prerogative[]" over "waters naturally residing within its boundaries"); *compare* Miss. Cert. Pet. 16-17 (invoking "public trust doctrine"; citing *Cinque Bambini*) *with* Compl. ¶¶ 11-12 (same); *compare* Miss. Cert. Pet. 12 (distinguishing "equitable apportionment cases" as "involv[ing] disputes between states over surface water flowing through both states in a river, its tributaries or water sheds") *with* Compl. ¶ 48 (equitable apportionment applies only to water "such as rivers and other surface waters, and the watersheds supplying them").

expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action." *Id.* at 153-54. The Supreme Court has "reaffirmed" those benefits repeatedly, expanding issue preclusion even to "contexts not formerly recognized at common law." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Courts therefore have "broad discretion" to apply issue preclusion to "protect[] litigants" and "promot[e] judicial economy." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 331 (1979).

Additional discovery on Mississippi's claims would offend those central policies. The "cost and vexation," *Allen*, 449 U.S. at 94, threatened by Mississippi's recycled claims is particularly severe in light of the extensive discovery already taken in *Hood*. *See supra* pp. 34-35. Discovery in that case culminated in a 3,586-page record on appeal before the Fifth Circuit, briefing and oral argument before the Fifth Circuit, and 75 combined pages of certiorari-stage briefing in the Supreme Court. Mississippi's attempt to rehash its claims from *Hood* threatens Defendants with the "burden of relitigating an identical issue" already decided at great expense. *Parklane Hosiery*, 439 U.S. at 326.

There is little reason to think that Mississippi's claims will be any less burdensome to resolve this time around. Interstate "disputes over the allocation of water" before the Supreme Court "often result[] in protracted and costly legal proceedings." *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2125. In fact, this case

could prove even more costly than *Hood*, as the inclusion of Tennessee as a party (and the United States' potential participation as *amicus*) will broaden the scope of the proceedings. *Cf. Nebraska v. Wyoming*, 504 U.S. 982, 982 (1992) (noting additional "cost[]" of litigating with "intervenors/*amici*").

Moreover, this action could lead to another round of expensive and protracted discovery. Based on the parties' initial pleadings, permitting the case to proceed could lead to requests for discovery concerning (among other things): historical groundwater flow in the Aquifer, *see* Answer ¶ 16; the historical and current volumes of pumping in both Mississippi and Tennessee, *see* Miss. App. 59a; the potential impact of pumping by other States and in other regional aquifers, *see* U.S. Br. 19 & n.3; the Aquifer's hydrological connection to other surface and subsurface water resources, *see* Answer ¶ 17; Tennessee's purported involvement in Memphis's pumping, *see id.* ¶ 21; the reduction (if any) in Mississippi's groundwater storage, *see id.* ¶ 54(c); the monetary value of any water lost, *see* Compl. ¶ 55; and Mississippi's diligence (or lack thereof) in bringing suit, *see* Answer at 18 (raising limitations and acquiescence defenses). Defendants should not have to incur the burdens of conducting such extensive discovery in service of a legal theory that Mississippi has already litigated and lost.

Finally, allowing protracted relitigation of Mississippi's claims would frustrate Defendants' justifiable "reliance on [the prior] adjudication" in *Hood*.

*Allen*, 449 U.S. at 94. Reliance interests are particularly important in the "adjudication of water rights," where the Court has recognized that the "policies advanced by the doctrine of res judicata perhaps are at their zenith." *Nevada v. United States*, 463 U.S. at 129 n.10; *see Arizona v. California*, 460 U.S. 605, 619-20 (1983) (preclusion principles assume heightened importance regarding "real property," including "the holding and use of water rights").

Those policies apply here with great force. For the past six years, Memphis has formulated policy regarding water in the Aquifer – which serves vital municipal needs[22] – in reliance on the Fifth Circuit's holding that Mississippi may not "sue an entity for invading its share" of the Aquifer unless and until the Aquifer is equitably apportioned. *Hood*, 570 F.3d at 630. Mississippi's attempt to relitigate that holding now threatens Defendants' settled expectations in an area where the Court has recognized a "compelling need for certainty." *Arizona v. California*, 460 U.S. at 620. In that way, allowing Mississippi to move forward with its legally baseless claims would undermine a "major purpose" of the rulings in *Hood* – to give Defendants "assurance" regarding "the amount of water they can anticipate to receive" from the Aquifer. *Id.*

[22] The water at issue, according to Mississippi, represents roughly "15-20% of Memphis' total water supply." Compl. ¶ 26; *see* Miss. App. 140a-141a (asserting that groundwater in the Aquifer is "superior in quality" and permits cost-effective distribution to Memphis consumers).

### C. This Case's Posture In The Supreme Court Heightens The Importance Of An Early Dismissal

The Supreme Court's original jurisdiction over this case further strengthens the rationale for applying issue preclusion at the pleading stage. In *Hood*, the parties' dispute over Tennessee's absence hinged on the necessity of an equitable apportionment: Mississippi argued that its tort claims did "not implicate any sovereign interest of Tennessee" – and should therefore proceed in district court – because no "equitable apportionment of the Aquifer" was required. 570 F.3d at 629. In rejecting that argument and affirming the dismissal of Mississippi's claims, the Fifth Circuit held that Tennessee was a necessary party (and "the Supreme Court" the necessary forum) because Mississippi's only cognizable remedy was to pursue "an equitable apportionment action." *Id.* at 633. In short, the only reason this case is in the Supreme Court – and the only reason Tennessee is a defendant – is that *Hood* already rejected Mississippi's attempt to sue for conversion in the absence of an "equitable apportionment." *Id.* at 632.[23]

[23] Although the *Hood* dismissal was under Rule 19(b), the judgment remains binding as a matter of issue preclusion. *See* 18A Wright & Miller § 4436, at 154 (2d ed. 2002 & 2015 Supp.) (non-merits dismissal "preclude[s] relitigation of the issues determined"). Indeed, a Rule 19 dismissal for "failure to join an indispensable party" is "entitled to issue preclusive effect." *In re Sonus Networks, Inc. Shareholder Derivative Litig.*, 499 F.3d 47, 59 (1st Cir. 2007). By contrast, because a non-merits dismissal "does not bar a second action as a matter of claim preclusion," 18A Wright & Miller § 4436, at 154, *Hood* would not foreclose Mississippi from bringing a proper equitable-apportionment action.

True, the courts in *Hood* would have lacked jurisdiction to entertain an actual lawsuit between Mississippi and Tennessee. But the absence of such jurisdiction does not deprive *Hood* of preclusive effect as to the issues it decided. As the Supreme Court has explained, once "a Federal court has decided" a jurisdictional issue – even where the court doing so lacks power to rule on the merits – a later court "in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact." *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). That conclusion holds true even when the later court has exclusive jurisdiction: for example, "a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts." *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *see Becher v. Contoure Labs., Inc.*, 279 U.S. 388, 391-92 (1929) (reaching that conclusion in a patent suit). The same principle applies here. Just as state-court judgments may retain issue-preclusive force in subsequent cases within the exclusive jurisdiction of federal courts, so too does *Hood* retain issue-preclusive force here. In both contexts, the earlier forum's inability to hear the later suit does not deprive its judgment of preclusive effect.

Affording issue-preclusive effect to *Hood* is thus consistent with the Supreme Court's prerogative to resolve "all controversies between two or more States." 28 U.S.C. § 1251(a); *cf.* U.S. Br. 19-20 n.4. *Hood* did not itself dispose of

any claims that Mississippi might bring against Tennessee, and Tennessee does not contend that *Hood* has *claim*-preclusive effect here. It remains for the Supreme Court alone – assisted by the Special Master – to resolve this lawsuit. In doing so, the Special Master should recommend that the Court apply issue-preclusion principles and bar Mississippi from relitigating the issues it already lost. That would represent not an abdication of the Court's original jurisdiction, but rather a prudent exercise of it. *See Arizona v. California*, 460 U.S. at 619 (applying issue-preclusion "principles" in an original action even when "the technical rules of preclusion [were] not strictly applicable").

Indeed, issue-preclusion principles have even greater value in original cases, which "tax the limited resources of [the Supreme] Court" by "diverting [its] attention from [its] primary responsibility as an appellate tribunal." *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010). In the original-jurisdiction context, issue preclusion's core goal of conserving judicial resources assumes paramount importance. *See Wyandotte Chems.*, 401 U.S. at 503-04 (describing "serious drain" of "resources" caused by meritless original claims). And allowing Mississippi to relitigate the theory that *Hood* already rejected would consume those resources needlessly. *See supra* Part I.D. If Mississippi wanted the Supreme Court to supervise the laborious discovery process that its claims demand, it should have sued there in the first instance under a cognizable legal theory that is true to

the Court's precedents. Having instead made the strategic decision to file and litigate in the lower courts – and having received a fair opportunity to take discovery and defend its theory in those courts – Mississippi is not now entitled to an expensive "rematch." *B&B Hardware*, 135 S. Ct. at 1303.

## CONCLUSION

The Court should enter judgment on the pleadings in favor of Defendants and dismiss Mississippi's Complaint with prejudice.

Respectfully submitted,

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February 25, 2016

## CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's Order on Initial Conference (Dkt. No. 25), I hereby certify that all parties on the Special Master's approved service list (Dkt. No. 26) have been served by electronic mail.

/s/ *David C. Frederick*
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