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

REPLY BRIEF FOR DEFENDANT STATE OF TENNESSEE IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

DAVID C. FREDERICK
DEREK T. HO
JOSHUA D. BRANSON
BRADLEY E. OPPENHEIMER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Special Counsel to the
State of Tennessee

HERBERT H. SLATERY III
Attorney General
ANDRÉE S. BLUMSTEIN
Solicitor General
BARRY TURNER
Deputy Attorney General
Counsel of Record
SOHNIA W. HONG
Senior Counsel
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-3491
(barry.turner@ag.tn.gov)

Counsel for the
State of Tennessee

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INTRODUCTION

Mississippi is seeking hundreds of millions of dollars in damages – and a ruling that Memphis must overhaul its longstanding groundwater policies on Tennessee's side of the Memphis Sands Aquifer (the "Aquifer") – based on a legal theory it acknowledges to have no support in existing Supreme Court precedent. Every Supreme Court case to address States' competing rights to water in a multistate resource has made clear that the equitable-apportionment doctrine – not territorial boundaries – determines a State's entitlement to the water within such a resource. Here, Mississippi has disclaimed any request for an equitable apportionment because it concededly cannot establish the type of injury the Court has long viewed as necessary to justify such an apportionment.

Mississippi attempts to avoid that unbroken line of cases primarily by arguing (*e.g.*, at 17, 43) that Memphis has "reach[ed] into Mississippi" to take "intrastate" groundwater beneath its territory. But the Complaint itself exposes those arguments as rhetoric, not well-pleaded factual allegations. The Complaint does not factually allege – and Mississippi's counsel expressly disclaimed at the hearing before the Special Master – that Defendants have physically intruded in any way into or under Mississippi's territory. What Mississippi means by "reach[ing] into Mississippi" is merely that Memphis's pumping within Tennessee has induced some water to flow across the border. Mississippi's theory thus depends on the interconnectedness of the Aquifer – and on the ability of pumping

on Tennessee's side to affect the water on Mississippi's side via natural principles of hydraulics. That theory, in the context of a multistate formation in which some water concededly flows into Tennessee under natural conditions, epitomizes the type of dispute to which the equitable-apportionment doctrine applies.

Given the fatal legal flaw in Mississippi's Complaint, the Special Master should recommend that the Court dismiss the case now. Mississippi has already had ample discovery in the prior district court litigation against Memphis; it is not entitled to a burdensome and expensive second bite at the apple. Moreover, that burdensome discovery is unnecessary to evaluating the legal validity of Mississippi's unprecedented territorial property rights theory. Again, Mississippi's claims *depend* on the very fact – the interconnectedness of the multistate Aquifer – that demands the application of the equitable-apportionment doctrine. Because the Court does not need discovery to apply that doctrine, it should reject Mississippi's claims on the pleadings. Indeed, as the United States agrees, allowing this case to proceed to discovery would send a destabilizing signal regarding the Court's water-rights jurisprudence.

Finally, Mississippi's claims also should be dismissed on the basis of issue preclusion. Mississippi does not dispute that *Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625 (5th Cir. 2009), resolved the core issue in this case in Memphis's favor. Rather, Mississippi argues only that *Hood*'s resolution of that issue was *dicta* that fell beyond the jurisdiction of the lower courts. That argument

is unpersuasive. Barring Mississippi from re-litigating the arguments it lost in *Hood* would promote the purpose of non-mutual issue preclusion and would represent a prudent exercise of the Supreme Court's exclusive original jurisdiction.

ARGUMENT

I. MISSISSIPPI'S CLAIMS ARE FORECLOSED BY THE DOCTRINE OF EQUITABLE APPORTIONMENT

A. The Equitable-Apportionment Doctrine Governs Mississippi's Claims

As Tennessee has explained, Mississippi's claims depend on a theory of sovereign ownership that the equitable-apportionment doctrine forecloses. Tenn. Br. 14-27; *see also* U.S. Br. 15-20. Determining water rights based on territorial boundaries would impede the "'delicate adjustment of interests'" necessary to achieve "'just and equitable'" allocations of interstate waters. Tenn. Br. 16-17 (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)). The Supreme Court thus has long used the equitable-apportionment doctrine – which rests on principles of equity, not geography – to allocate interstate water resources in light of the competing interests of neighboring States. *Id.* at 17-18, 21-27; *see Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) ("reject[ing] the notion that the mere fact that" a river "originates" in one State "automatically entitles [that State] to a share of the river's waters").

Mississippi does not dispute that, if the equitable-apportionment doctrine applies here, its claims should be dismissed. Rather, it argues (at 1) the doctrine should not apply because Memphis is allegedly "pumping groundwater across state borders out of [Mississippi's] sovereign territory." That insinuation of a physical incursion across the State boundary is crucial to Mississippi's position: Mississippi's core argument appears to be that Defendants have taken this case beyond the scope of the equitable-apportionment doctrine by physically "*reach[ing] into*" Mississippi and "forcibly tak[ing]" Mississippi's water. Opp. 21-22; *see, e.g.*, Opp. 3 (arguing that Defendants are not "entitled to pump groundwater out of Mississippi"), 17 n.12 (asserting that Memphis "pump[s] the water from underneath Mississippi's borders"), 43 ("Defendants have no right . . . to reach into Mississippi"; asserting a "cross-border extraction" that "seize[s] groundwater from Mississippi").

Mississippi's Complaint, however, does not support the implication of physical intrusion suggested in its brief. The Complaint alleges no facts suggesting that Defendants have extended any pumps into Mississippi's territory; instead, it alleges that Memphis's pumping on Tennessee's side of the border has created a "cone of depression" indirectly inducing groundwater to flow across the boundary. Compl. ¶ 25; *see id.* ¶ 19 (alleging that Memphis pumps water "within three miles of the Mississippi border"). Mississippi's Opposition likewise admits (at 26) that

Memphis's wells are "physically located within Tennessee's borders."[1] And, at the Status Conference before the Special Master, Mississippi's counsel conceded that Defendants had not drilled those wells diagonally to cross the State boundary. *See* Hr'g Tr. 16:8-12; Tenn. Br. 22 n.7. Given those admissions, the Court should disregard Mississippi's insinuation that Defendants have physically "reach[ed] into Mississippi" to withdraw water from within its territory. Opp. 43; *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (courts should ignore mere "conclusions" and "naked assertions devoid of further factual enhancement") (alteration omitted).

Without the unsupported insinuation of a physical intrusion across the boundary, the rest of Mississippi's argument falls apart. Mississippi now admits (at 17 n.12) that some of the groundwater in the Aquifer "naturally seep[s] into Tennessee" without human intervention. It also admits (at 16 n.11) that the Aquifer is a single, interconnected hydrological "formation" that "crosses State borders." *See* Compl. ¶ 50 (the Aquifer is a geological "formation" that "underlies

[1] Tennessee is filing a separate opposition to Mississippi's motion to exclude, which should be denied for the reasons Tennessee explains in that opposition. But the Court need not rule on Mississippi's motion, because the admissions in Mississippi's Complaint by themselves warrant judgment on the pleadings. Moreover, Mississippi has not sought to preclude Tennessee from relying on the concessions in Mississippi's legal brief before the Special Master. *See Arturet-Vélez v. R.J. Reynolds Tobacco Co.*, 429 F.3d 10, 13 n.2 (1st Cir. 2005) (court may consider "concessions in the complainant's response to the motion to dismiss"). Accordingly, although the additional cited materials properly support judgment on the pleadings, the Special Master may recommend a ruling in Tennessee's favor without relying on those materials.

both Mississippi and Tennessee"). Those admissions are fatal. By Mississippi's own account, groundwater in the Aquifer moves naturally *in both directions* between the two States. Moreover, Mississippi's claim necessarily depends on the interconnectedness of the Aquifer. Memphis's pumping on Tennessee's side of the boundary thus affects Mississippi only via the "agency of natural laws," as groundwater from beneath Mississippi purportedly flows into the pressure vacuum created as a byproduct of pumping within Tennessee. *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907).[2] An effect so indirect – stemming solely from pumping within Tennessee's own borders – epitomizes the type of situation the equitable-apportionment doctrine was designed to address. *See* Tenn. Br. 15-18.

Mississippi relies heavily (at 13, 21-23) on *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013), but that case supports Tennessee's position. There, a Texas water utility sought to obtain extra water under an interstate compact by going into Oklahoma and "divert[ing]" a "tributary of the Red River *located in Oklahoma*." 133 S. Ct. at 2128 (emphasis added); *see id.* at 2138 App.

[2] Mississippi asserts (at 18) that Memphis's groundwater pumping "is not the 'agency of natural laws' " because it involves the use of "turbine pumps." But, although the alleged pumping involves human intervention to extract water from beneath Tennessee, the resulting *effect on Mississippi* occurs only via the laws of physics. *See* Tenn. Br. 22-23. Memphis's pumping thus resembles the classic equitable-apportionment case in which an upstream State places a pipe in a river to pump out water with human-generated power and thereby deprives the downstream State of water it otherwise would have received through the "natural laws" of the flowing river. *Kansas v. Colorado*, 206 U.S. at 97-98.

A (showing diversion points within Oklahoma territory). The question, as framed by the Supreme Court, was whether the Texas utility had "the right to cross state lines and divert water from Oklahoma" under the compact. *Id.* at 2129. The Court answered in the negative: because States are presumed not to cede their prerogative to "control water within their own boundaries," the Court held that the compact was not intended to grant Texas utilities a "cross-border right[]" physically to enter Oklahoma and divert a river into Texas. *Id.* at 2132-33.

Unlike in *Tarrant*, Mississippi does not seek to stop Defendants from "cross[ing] state lines." *Id.* at 2129. Rather, Mississippi seeks to enjoin Defendants from pumping groundwater that, when extracted, undisputedly lies beneath Tennessee's territory. Granting Mississippi such relief, which would require Tennessee to stop pumping groundwater within its own borders, would usurp *Tennessee's* sovereign "prerogative to control water within [its] own boundaries." *Id.* at 2132-33. That dilemma well-illustrates the need for the equitable-apportionment doctrine: because Mississippi's claims necessarily implicate Tennessee's own right to manage the groundwater on its side of the Aquifer, any remedy must "recognize the equal rights of both [States] and at the same time establish justice between them." *Kansas v. Colorado*, 206 U.S. at 98. Mississippi, however, seeks to short-circuit that inquiry in favor of a rigid territorial rule that would make States either stop all pumping that could induce

some groundwater to flow across the border from another State, or pay a ransom to a neighboring State asserting a property interest in such water. The very purpose of the equitable-apportionment doctrine is to prevent one State from "impos[ing] its own policy upon [other States]" in such a manner. *Id.* at 95.

B. Mississippi's Hydrological Arguments Are Unpersuasive

1. Mississippi cannot avoid the equitable-apportionment doctrine based on the location of the disputed groundwater

Mississippi's attempt (at 15-18) to evade the equitable-apportionment doctrine based on the Aquifer's hydrology fares no better. Many of the Supreme Court's equitable-apportionment cases have called on the Court to allocate subsurface water much like that at issue here. *See* Tenn. Br. 25-26 & n.9. Moreover, the doctrine's core rationale – achieving equitable allocations that balance the competing interests of multiple States – counsels against creating a new, property-rights-based rule for the Aquifer's groundwater. *See id.* at 26-27.

Mississippi responds (at 16) that, unlike surface water flowing in an interstate river, "the groundwater Mississippi claims would [n]ever be naturally available in Tennessee." As noted above, however, Mississippi concedes (at 30 n.22) that some of the Aquifer's groundwater "seeps into Tennessee under natural conditions." *See supra* pp. 5-6. That concession, by itself, confirms that the "Aquifer flows, if slowly, under several states" and bears a close hydrological resemblance to the "lake[s]" and "river[s]" that Mississippi concedes are subject to

the equitable-apportionment doctrine. *Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 630 (5th Cir. 2009).[3]

Further, *Hood* correctly rejected Mississippi's distinction between groundwater and surface water as lacking "analytical significance." *Id.* Just as in the classic case of an upstream State diverting an interstate river, Mississippi argues that Defendants have exploited "geography" to "depriv[e]" Mississippi "of the benefit of water that by nature would [reside within] its territory." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015). The only difference is that, whereas the traditional upstream State's actions *prevent* water from flowing to the downstream State, *see, e.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102-03 (1938), Mississippi argues inversely that Defendants have induced water to *flow out* of Mississippi. But the key principle remains the same: in both cases, one State's extraction of water from its own territory affects the water's natural trajectory to the asserted detriment of the other State. The allocation of such water "should turn on the benefits, harms, and efficiencies" of the two States'

[3] Mississippi cannot escape that admission by asserting (at 30 n.22) that the portion of the Aquifer's groundwater naturally flowing "into Tennessee" is "not part of [Mississippi's] claims." Whether or not Mississippi seeks to recover for the particular water molecules naturally flowing into Tennessee, the conceded existence of cross-border flows demonstrates that the Aquifer is an interstate resource subject to equitable allocation. Mississippi cites no authority allowing a State artificially to compartmentalize the water in such a resource into separate "interstate" and "intrastate" portions. *See Kansas v. Colorado*, 206 U.S. at 115 (rejecting similar argument that an interstate river was "really two rivers, one . . . terminating at or near the state line, and the other commencing" on the other side).

"competing uses," rather than the property-rights concepts Mississippi invokes. *Colorado v. New Mexico*, 467 U.S. at 323.

Mississippi's interest in the groundwater stored naturally on its side of the Aquifer is conceptually no different from a downstream State's interest in the water that flows naturally through its territory. Whether or not the water would have remained stationary under natural conditions, it remains subject to the venerable principle that 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). By the same token, Tennessee's interest in the groundwater on its side of the Aquifer is conceptually no different from an upstream State's interest in river water flowing through its territory. In both cases, the first State "divert[s]" water – groundwater here, flowing surface water in the traditional case – that would have ended up in another State under natural conditions. *Colorado v. New Mexico*, 467 U.S. at 312. It makes no difference whether the disputed water would have flowed naturally into another State (as in the traditional case), as opposed to being "located" in the other State to begin with (as Mississippi alleges here). Opp. 16.[4] Either way, the Court should apply the

[4] Mississippi's assertion (at 17) that the disputed groundwater "would never under natural conditions[] reside in Tennessee" does not change the analysis. True, this case is (allegedly) different from an interstate-river case because the disputed groundwater supposedly never flows through Tennessee's territory under natural conditions. But the ultimate point is the same: in an interstate-river case,

equitable-apportionment doctrine to "recognize the equal rights of both" States to the shared water resource. *Kansas v. Colorado*, 206 U.S. at 98.

2. Mississippi's groundwater arguments conflict with the Supreme Court's water-law cases

The Supreme Court's precedents further undermine Mississippi's asserted distinction between groundwater and surface water. Mississippi does not even purport to cite a case exempting groundwater from the equitable-apportionment doctrine. The decisions it cites instead address a State's right to protect its natural resources from private citizens, *see* Opp. 9;[5] boundary disputes, *see* Opp. 12-13;[6] or state-law disputes between private litigants, *see* Opp. 17 n.12, 23-26 & nn.16-

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the water taken by an upstream State – while it does flow temporarily through that State's territory – would not *remain there* under natural conditions. The equitable-apportionment doctrine therefore supplies a framework for balancing the upstream State's need for a "diversion" of the water's natural flow against the "harm[s]" that such a "diversion" might create for downstream States. *Colorado v. New Mexico*, 459 U.S. 176, 187-88 (1982). The same calculus applies here.

[5] *See, e.g.*, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988) (affirming Mississippi's ownership of "all lands under waters subject to the ebb and flow of the tide"); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236-37 (1907) (addressing Georgia's "quasi-sovereign" authority to sue Tennessee copper company for "discharging noxious gas" over Georgia's "territory"); *see also* Tenn. Br. 30 n.13 (distinguishing Mississippi's other public trust cases).

[6] *See, e.g.*, *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 733 (1838) (addressing the "power to settle the boundary" between two States); *cf. United States v. Louisiana*, 363 U.S. 1, 4-5 (1960) (addressing which States were "entitled to exclusive possession of . . . the lands, minerals, and other natural resources underlying the waters of the Gulf of Mexico").

21.[7] None has any bearing on disputes "among the States . . . over the allocation of water," which are instead "subject to equitable apportionment by the courts." *Tarrant*, 133 S. Ct. at 2125. Indeed, on several occasions the Court has applied the equitable-apportionment doctrine to reject claims based on "'subsurface'" pumping where – like here – the pumping did not "'materially lessen[] the quantity of water available'" in the complaining State. Tenn. Br. 25 (quoting *Washington v. Oregon*, 297 U.S. 517, 526 (1936)); *see id.* at 26 n.9.

Mississippi attempts (at 1 n.2) to distinguish Tennessee's cases as involving groundwater "hydrologically connected to [other] disputed surface water." Again, that presents a distinction without a difference. To survive dismissal, Mississippi must convince the Court (at 1) to draw a categorical distinction between "groundwater dispute[s]" and the traditional "surface water law" disputes that it admits fall within the equitable-apportionment doctrine. By Mississippi's own account, however, the Court's cases cut against that distinction by allocating groundwater right alongside the surface water to which it is connected. *See* Tenn. Br. 25-26 & n.9 (collecting cases). Were Mississippi's legal theory correct, the

[7] *See, e.g., Great N. Nekoosa Corp. v. Aetna Cas. & Sur. Co.*, 921 F. Supp. 401, 404, 415 (N.D. Miss. 1996) (addressing dispute arising out of suit by private landowners against proprietor of pulp mill, and recognizing "trespass" in Mississippi as a cause of action arising out of "possessory interests" in real "property"); *Forbell v. City of New York*, 164 N.Y. 522, 524-25 (1900) (addressing lawsuit by farmer against municipality whose wells had "deprive[d] the plaintiff of his natural supply of underground water" on adjacent land).

Court would have created a different framework for allocating such groundwater in its prior cases, hydrologically interconnected or not.

In any event, Mississippi's reading of the Court's cases does not support allowing its claims to proceed. In Mississippi's view (at 1), the "Supreme Court has never decided a single case involving a groundwater dispute" exactly like this one. But Mississippi has no persuasive argument against extending the rationale underlying the Court's line of water-rights cases to the Aquifer. *See* Tenn. Br. 15-18, 26-27. Indeed, the leap from surface water to groundwater is far shorter than the one from "water" to "anadromous fish," which the Court made without hesitation in applying the equitable-apportionment doctrine. *Idaho ex rel. Evans*, 462 U.S. at 1024; *see* Tenn. Br. 24 n.8. As the Fifth Circuit thus held correctly in *Hood*, the "Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests." 570 F.3d at 631.

3. Mississippi's groundwater argument is inconsistent with the Supreme Court's 2010 order denying leave to file

The Supreme Court's order denying Mississippi leave to file the 2009 Complaint further undermines Mississippi's invented distinction between groundwater and surface water. *See* Tenn. Br. 18-20. Mississippi does not dispute that its 2009 Complaint presented the very same property-rights-based groundwater theory it now alleges. *See id.*; *id.* at 10-13. But the Supreme Court denied leave to file that complaint, and the citations in its order invoked the

principle that "[e]quitable apportionment" "governs interstate bodies of water." *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003); *see Mississippi v. City of Memphis*, 130 S. Ct. 1317 (2010) (citing *Virginia v. Maryland*). That holding refutes Mississippi's attempt to immunize groundwater from the equitable-apportionment doctrine. Under Mississippi's legal theory, which assumes that the Court's equitable-apportionment cases are categorically inapplicable to groundwater, the Court should have allowed it to file the 2009 Complaint.

True, the Supreme Court in 2014 "granted Mississippi leave to file" its current Complaint. Opp. 35. But any interpretation of that 2014 order must also account for the Court's denial of leave in 2010. And Mississippi has offered no explanation of the 2010 order at all, much less one reconciling that order with the merits of its legal theory. In light of the 2010 order, the Court's order in 2014 granting leave to file does not suggest an acceptance of Mississippi's territorial property rights theory. *See* Tenn. Br. 19-20. The opposite inference is far more plausible: given Mississippi's serial attempts to litigate its flawed claims concerning the Aquifer, the Court had prudential reasons in 2014 to facilitate a resolution of those claims on "the merits" once and for all. *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). Granting leave to file – and referring the case to an

experienced appellate judge for a recommendation on Defendants' dispositive motions – offered the best way to accomplish that goal.[8]

C. Mississippi Law Supports Judgment On The Pleadings

Mississippi's territorial property rights theory also conflicts with its own statutory regime. *See* Tenn. Br. 27-29. That regime contemplates the negotiation of interstate compacts "concerning [Mississippi's] share of ground water . . . where a portion of those waters are contained within the territorial limits of a neighboring state." Miss. Code Ann. § 51-3-41. Although Mississippi argues (at 31) that provision "does nothing more than empower [it] to negotiate compacts," it makes no effort to square such authority with the theory of sovereign ownership on which its Complaint depends. Under Mississippi's theory, there would be little need for interstate compacts: each State bordering on a shared groundwater resource would inherently own all the groundwater on its side. Mississippi's legislature, however, contemplated something different: that compacts could be necessary to apportion Mississippi's "share" of any "ground water" that traverses the "territorial limits of"

[8] There is precedent for the Supreme Court granting leave to file an original complaint and then, after further "brief[ing] and argu[ment]," granting judgment on the pleadings for the defendant. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982). Although Mississippi correctly observes (at 4 n.7) that such cases are rare, the posture of this case is equally so: Tennessee has located no other original case in which a State was denied leave to file only to return four years later seeking to file essentially the same complaint. In those unique circumstances, disposing of Mississippi's claims on the pleadings promotes judicial economy and furthers the purposes of the Court's original jurisdiction. *See* Tenn. Br. 19-20.

multiple States. Miss. Code Ann. § 51-3-41. That conclusion undermines Mississippi's effort to exempt groundwater from traditional equitable-apportionment principles. *See* Tenn. Br. 28-29.

Mississippi's argument (at 31) that Tennessee's interpretation of § 51-3-41 "nullifies the public trust [doctrine]" lacks merit. Contrary to Mississippi's suggestion, Tennessee does not read § 51-3-41 to "waive[] Mississippi's sovereign powers" over "*all* water in the State." Opp. 31. On the contrary: § 51-3-41's reach is co-extensive with the equitable-apportionment doctrine, and it governs only the allocation of "watercourses where a portion of th[e] waters are contained within the territorial limits of [multiple] state[s]." Miss. Code Ann. § 51-3-41. Like the equitable-apportionment doctrine that § 51-3-41 endorses, the statute does not lessen Mississippi's authority to manage the purely *intrastate* resources subject to the public trust doctrine. *See* Tenn. Br. 29-30.[9]

D. Mississippi's Claims Should Be Dismissed

The equitable-apportionment doctrine is fatal to each of the "[a]lternative [c]auses of [a]ction" identified (at 23) in Mississippi's Opposition. As the Supreme Court made clear in denying Mississippi leave to file the 2009 Complaint,

[9] Mississippi concedes (at 30) that the public trust doctrine applies only to "purely intrastate water." As Tennessee has explained, the Aquifer's groundwater is not intrastate water subject to the public trust doctrine; it is interstate water whose allocation must "recognize the equal rights" of both Mississippi and Tennessee. *Kansas v. Colorado*, 206 U.S. at 97-98; *see* Tenn. Br. Part I.C.2.

"[f]ederal common law," not state law, "governs interstate bodies of water" to "ensur[e] that the water is equitably apportioned between the States." *Virginia v. Maryland*, 540 U.S. at 74 n.9; *see* U.S. Br. 16. To the extent Mississippi invokes (at 23-25 & nn.16-20) state-law tort principles to support its territorial property rights theory, those principles conflict with federal law and are preempted. *See* Tenn. Br. 15 n.4. Indeed, the "determination of the relative rights of contending States" to interstate waters "is not governed by the same rules of law that are applied" to "similar questions of private right." *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931). Mississippi's lengthy discussion (at 23-26) of the Restatement and other private-law tort cases is thus beside the point.[10]

In any event, Mississippi's claims fail even within a state-law framework. As Tennessee has explained, each of those claims depends on Mississippi having an enforceable property interest in the Aquifer's groundwater. Tenn. Br. 15 n.4 (citing Mississippi authority). In the absence of an equitable allocation, Mississippi has no such interest. *See Sporhase v. Nebraska ex rel. Douglas*, 458

[10] The Court's holding that "a State may recover monetary damages from another State in an original action," *Kansas v. Colorado*, 533 U.S. 1, 7 (2001), is not to the contrary. *Cf.* Opp. 14-15. Mississippi's claims should be dismissed not because of some categorical bar on damages, but because it lacks any underlying property right to the Aquifer's groundwater. In every case of which Tennessee is aware to award damages in an interstate water dispute, the damages claim arose out of a violation of a prior interstate compact or an equitable decree – both of which Mississippi has disclaimed here. *See, e.g.*, *Kansas v. Colorado*, 514 U.S. 673, 679-80 (1995) (adjudicating dispute over "post-Compact" pumping).

U.S. 941, 951 (1982) (rejecting the "legal fiction of state ownership" of "ground water"); *Hood*, 570 F.3d at 630 (equitable allocation must precede "one state . . . su[ing]" another "for invading its share" of the Aquifer under state law). Mississippi's claims, whether sounding in state or federal law, therefore fail for lack of any "legal entitlement to the water in the Aquifer." U.S. Br. 20; *see id.* (noting "equitable apportionment" is a prerequisite to such an entitlement).

E. Dismissal Before Discovery Is Warranted

The Special Master should recommend the dismissal of Mississippi's claims on the pleadings. *See* Tenn. Br. 31-35; U.S. Br. 23-24. Allowing Mississippi's claims to proceed to discovery would send a destabilizing signal and call into question the core premise underpinning more than a century of water-law jurisprudence. *See* U.S. Br. 22 (agreeing with Tennessee that Mississippi's claims "threaten to destabilize water policy across the Nation") (ellipsis omitted). Indeed, one important purpose of the equitable-apportionment doctrine is to protect "existing economies" from unnecessary "disrupti[on]." *Colorado v. New Mexico*, 459 U.S. at 187. Mississippi's theory threatens just that: it asks the Court to overhaul Defendants' use of the Aquifer – no matter the economic or hydrological consequences – without any showing that Memphis's extraction of water causes a legally cognizable injury to Mississippi's citizens. Were the Special Master to

signal an acceptance of that unprecedented theory, the resulting upheaval could be profound. *See* Tenn. Br. 32-33.

Mississippi's allegation that Memphis can avoid disruption by "mov[ing] its wells to the north and east" does not suggest otherwise. Opp. 33-34 (citing Compl. ¶ 27). That allegation, even assumed to be true, does not support the need for discovery because it is unnecessary to Mississippi's legal assertion (at 5-6) of an "exclusive right to control the taking and use of all waters residing within its borders." If Mississippi is right that it has absolute ownership over the water on its side of the Aquifer, the consequences to Memphis are presumably irrelevant. That is why Mississippi's legal theory is so destabilizing: no matter *what* the evidence shows regarding Memphis's alternatives, Defendants would remain barred from pumping in any way that affected Mississippi's supposed property rights. *See* Tenn. Br. 26; U.S. Br. 13; *see also* Memphis Answer ¶ 27 (denying Mississippi's allegation that well relocation is feasible).

The concerns about destabilization are not "rank speculation," Opp. 32-33; they represent the core policy principles the Supreme Court has recognized in formulating the equitable-apportionment doctrine. *See Colorado v. New Mexico*, 459 U.S. at 186-88. The policy of weighing the costs and benefits of competing uses – which preserves States' "equality of right" to interstate water resources – is essential to the equitable-apportionment doctrine's purpose of "establish[ing]

justice." *Kansas v. Colorado*, 206 U.S. at 97-98. Moreover, those principles apply with particular force to "ground water," which implicates a "significant federal interest in conservation as well as in fair allocation." *Sporhase*, 458 U.S. at 952-53. In light of those policies, the risk of disruption posed by Mississippi's theory should weigh heavily in the calculus of whether to dismiss its claims at an early stage. *See* Tenn. Br. 31-35; U.S. Br. 22-24; *see also Kansas v. Nebraska*, 135 S. Ct. at 1051-52 (consideration of "equitable" concepts is proper in "mould[ing] the process" of original litigation to "best promote the purposes of justice").

Early dismissal is also appropriate because Mississippi has identified no reason it needs more discovery. *See* Tenn. Br. 34-35; U.S. Br. 23-24. Although Mississippi frames (at 1) the legal question presented here as a "significant" one "of first impression," further factual discovery is unnecessary for the Court to resolve that question. Indeed, Mississippi concedes (at 35) it already took "extensive" discovery in *Hood*. Additional discovery might shed light on whether Mississippi's Complaint accurately describes the conditions within the Aquifer, *see, e.g.*, Tenn. Answer ¶ 16 (explaining that the Aquifer's groundwater flowed into Tennessee under natural conditions), but it would not aid the Court in determining whether the territorial property rights theory is viable as a legal matter. At the same time, discovery would be expensive and would thrust the Special Master into the role of reconstructing groundwater flow in the multistate Aquifer in

its natural state more than a century ago when Memphis first began pumping. *See* Tenn. Br. 33-34. The "expense" of such an exercise, as well as the challenges of modeling a hypothetical state of nature that has not existed for approximately 130 years, further supports dismissal on the pleadings. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

Mississippi's suggestion (at 35) that the parties "explore case management procedures" does not ameliorate those concerns. *See Twombly*, 550 U.S. at 559 (calling "careful case management" "no answer" for the "discovery expense" created by allowing meritless claims to advance). Historically speaking, "the success of judicial supervision" in curtailing discovery costs "has been on the modest side," *id.*, and Mississippi provides no reason to expect a different outcome here. Indeed, original cases – even more than traditional civil cases – "often result[] in protracted and costly legal proceedings." *Tarrant*, 133 S. Ct. at 2125. Mississippi's observation (at 35) that "Tennessee was not even a party to the prior proceedings" only compounds that concern. Tennessee's inclusion as a Defendant – and the new discovery that inclusion demands, *see, e.g.*, Tenn. Answer ¶¶ 3, 21 – threatens to make this proceeding even more expensive than *Hood* was. Mississippi already had a full and fair chance to take discovery in that case, and it

should not be permitted an expensive do-over in service of allegations that fail to state a valid legal claim. *See* Tenn. Br. 34-35.[11]

II. MISSISSIPPI'S CLAIMS ARE FORECLOSED BY ISSUE PRECLUSION

Issue preclusion provides another independent ground for dismissing Mississippi's claims on the pleadings. *See* Tenn. Br. 35-47. After a lengthy and expensive proceeding, *Hood* 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." 570 F.3d at 630. Having lost on that issue once, Mississippi is estopped from relitigating it here. *See Montana v. United States*, 440 U.S. 147, 153 (1979) (final "determination" of previously litigated issue "is conclusive in subsequent suits based on a different cause of action"). An early dismissal not only would comport with that doctrinal principle, but also would further issue preclusion's main purpose of "'promoting judicial economy.'" Tenn. Br. 41 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)).

[11] Although the "extensive discovery from the prior proceeding" may create some efficiencies in this case, Opp. 35, it will not eliminate the expense associated with another round of discovery. For one thing, Tennessee's inclusion as a Defendant (and the United States' participation as an *amicus*) will create costs that were absent in *Hood*. *See* Tenn. Br. 41-42. For another, the state of hydrological research has advanced since 2008, and a new wave of discovery could be necessary on a wide array of issues raised by that research. *See id.* at 42 (listing topics); *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).

Mississippi does not dispute that *Hood* already decided the core issue in this case against it. *See* Tenn. Br. 36-37. Nor does Mississippi dispute that *Hood* did so after considering and rejecting the very same arguments Mississippi now presses once again. *See id.* at 37-40. Rather, Mississippi characterizes (at 36-42) *Hood*'s rejection of its arguments as *dicta* on issues over which the lower courts lacked jurisdiction. Mississippi's arguments are unpersuasive.

A. *Hood*'s Equitable-Apportionment Ruling Was Essential To The Outcome

As Tennessee has explained, *Hood*'s rejection of Mississippi's territorial property rights theory was essential to the disposition of that case. *See* Tenn. Br. 44. The dispute in *Hood*, as Mississippi frames it (at 38), centered on whether "Mississippi's claims of groundwater ownership implicated Tennessee's sovereign interests" and therefore made Tennessee a necessary party under Federal Rule of Civil Procedure 19. That dispute, in turn, centered on the "necessity of equitably apportioning the Aquifer." *Hood*, 570 F.3d at 629-30. As the Fifth Circuit observed, "Mississippi's fundamental argument as to why Tennessee's presence in the lawsuit is unnecessary [wa]s that the Aquifer's water is not an interstate resource subject to equitable apportionment." *Id.* at 629. Indeed, Mississippi's theory was (as it is now) that no apportionment was necessary because "only Mississippi's water is at issue." *Id.* Had the courts in *Hood* accepted that argument, "Tennessee's sovereign interests" would not have been "implicated by

the suit," and the case could have proceeded in district court. *Id.* Instead, the Fifth Circuit affirmed the district court's dismissal of Mississippi's tort claims and held that Mississippi's only "remedy" was an "equitable apportionment action" against Tennessee in "the Supreme Court." *Id.* at 633.[12]

Mississippi's characterization (at 39) of that holding as "*dicta*" contradicts its own arguments in *Hood*. If the necessity of an equitable apportionment was truly an "extraneous" question not presented in *Hood*, Opp. 38, Mississippi would not have gone to such great lengths to argue the issue. *See, e.g.*, Miss. C.A. Reply Br. 6 ("[t]he doctrine of equitable apportionment . . . cannot be applied to alter or otherwise negate Mississippi's ownership of water resources within its territorial boundaries"). After all, Mississippi did not respond to Memphis's equitable-apportionment argument in *Hood* by contending it was irrelevant; Mississippi instead debated the merits of that issue based on all the same arguments it makes here. *See* Tenn. Br. 37-40 & nn.18-21 (surveying Mississippi's briefs). *Hood*'s rejection of those arguments, by Mississippi's own account at the time, was "essential" to the "final outcome." *Bobby v. Bies*, 556 U.S. 825, 835 (2009).

[12] Mississippi incorrectly suggests (at 40-41) that the district court employed a different analysis. Like the Fifth Circuit, the district court held that "the doctrine of equitable apportionment has historically been the means by which disputes over interstate waters are resolved." *Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646, 648 (N.D. Miss. 2008), *aff'd*, 570 F.3d 625 (5th Cir. 2009). The district court further held, like the Fifth Circuit, that the Aquifer was an interstate resource because it "lies under several States." *Id.*

Mississippi further notes (at 39-40) that the *Hood* courts "recogni[zed] that [they] lacked authority" to "determine the respective rights" of Tennessee and Mississippi. But that does not convert *Hood*'s holding about the necessity of an equitable apportionment into *dicta*. True, the courts in *Hood* acknowledged that they lacked jurisdiction to adjudicate an equitable-apportionment claim, which fell within the Supreme Court's exclusive jurisdiction. *See Hood*, 570 F.3d at 632-33; *Hood*, 533 F. Supp. 2d at 649-50. That acknowledgement, however, merely demonstrates that *Hood*'s resolution of the equitable-apportionment issue *was* essential to the outcome: the district court dismissed Mississippi's claims (rather than joining Tennessee) precisely because it was "without jurisdiction to hear" the only type of claim available to Mississippi. *Hood*, 533 F. Supp. 2d at 649. And, in affirming, the Fifth Circuit likewise decided that dismissal (rather than joinder) was appropriate because the Supreme Court alone could entertain a claim "for equitable apportionment of the Aquifer." *Hood*, 570 F.3d at 632. Had Mississippi persuaded those courts instead that "only Mississippi's water [wa]s at issue," *id.* at 629, it would have obtained a different result.

B. The Supreme Court's Exclusive Jurisdiction Over This Lawsuit Poses No Bar To Issue Preclusion

Mississippi's attempt (at 36-38) to use the Supreme Court's original jurisdiction to avoid issue preclusion fares no better. As Tennessee has explained, the lower courts' lack of jurisdiction to hear an equitable-apportionment action

does not divest *Hood* of preclusive effect. Tenn. Br. 44-47. It is well-settled that one tribunal's ruling may "'have preclusive effect in a subsequent action within the exclusive jurisdiction'" of another tribunal. *Id.* at 45 (quoting *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985)). That principle carries even greater force in the context of original litigation, which uniquely "'tax[es] the limited resources'" of the Supreme Court. *Id.* at 46 (quoting *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010)). Neither the history nor the purpose of issue preclusion supports allowing Mississippi to consume those resources re-litigating issues that *Hood* already decided.

Mississippi's contrary arguments are unpersuasive. Holding Mississippi's claims precluded would not, as Mississippi suggests (at 37), "delegate the Supreme Court's exclusive [jurisdiction]" to the lower courts. Tennessee is asking the Supreme Court and the Special Master – not the lower courts in *Hood* – to resolve this lawsuit and dismiss Mississippi's claims. Issue preclusion's role in that decision is merely a function of Mississippi's own strategic choices. Mississippi chose to bring a tort action in district court; insisted its claims did not implicate the Supreme Court's original jurisdiction; fought to keep its claims in district court by arguing that the equitable-apportionment doctrine was inapplicable; and now, having lost on that issue, seeks to re-litigate it in a new forum. *See* Tenn. Br. 36-40. Rejecting Mississippi's gambit neither enlarges the lower courts' jurisdiction

nor usurps the Supreme Court's original jurisdiction. Instead, it simply honors the principle that "a losing litigant deserves no rematch after a defeat fairly suffered." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015).

Mississippi's reliance (at 37-38) on *Mississippi v. Louisiana*, 506 U.S. 73 (1992), is misplaced. There, the Supreme Court held that lower courts lack "jurisdiction" over "controversies between two or more States," and it reversed a lower-court judgment "insofar as it purports to grant any relief to Louisiana against Mississippi." 506 U.S. at 77-78. But the Court also held that 28 U.S.C. § 1251(a) "speaks not in terms of claims or issues, but in terms of parties." *Id.* at 78. Lower courts thus have jurisdiction to resolve "issues" that implicate States' sovereign interests – such as "where the boundary lies between the two States" – so long as those courts do not themselves "grant any relief" in a lawsuit between two States. *Id.*; *see Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam) ("[T]he pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated.").[13] That holding supports issue preclusion here. *Hood* assuredly resolved "issues" relevant to Mississippi and Tennessee, but it

[13] The Court's observation that States "are not bound by any decision . . . rendered in a lawsuit between private litigants" is not to the contrary. *Mississippi v. Louisiana*, 506 U.S. at 78. In any context, issue preclusion applies only against a "party to the prior litigation." *Montana v. United States*, 440 U.S. at 153. Thus, a "lawsuit between private litigants" would not bind a State under ordinary preclusion principles. *Mississippi v. Louisiana*, 506 U.S. at 78. Here, however, Mississippi was a party to *Hood*, and preclusion arises as to the issues that Mississippi itself litigated unsuccessfully in that case.

afforded no "relief" directly between them. *Mississippi v. Louisiana*, 506 U.S. at 78. Accordingly, *Hood*'s rejection of Mississippi's territorial property rights theory did not offend the Court's exclusive prerogative to adjudicate lawsuits "between two or more States." 28 U.S.C. § 1251(a).

Mississippi's attempt to avoid issue preclusion therefore founders on its own observation (at 41) that Tennessee "was not even a party to the prior proceeding." Tennessee's non-party status in *Hood* was the crucial fact that provided the lower courts with full authority to resolve the issues before them. That resolution suffices to trigger issue preclusion here, even though Mississippi has now added Tennessee as a Defendant. Indeed, the Supreme Court long ago abandoned "mutuality of parties" as a requirement for collateral estoppel, and Tennessee's lack of participation in *Hood* is irrelevant to its defense of non-mutual preclusion in this case. *Parklane Hosiery*, 439 U.S. at 326-27.[14] Mississippi is surely correct that *Hood* could not have resolved *this* lawsuit involving *these* parties. But, under the doctrine of non-mutual preclusion, that does not justify affording Mississippi

[14] Tennessee's non-party status in the "prior proceeding" does not diminish its concerns about "repetitive discovery and relitigation." Opp. 41. Because Tennessee makes non-mutual, "defensive use of collateral estoppel," it makes no difference whether Tennessee itself bore the costs of discovery in *Hood*. *Parklane Hosiery*, 439 U.S. at 329. At any rate, Tennessee did incur costs in *Hood*: it submitted an *amicus* brief in the Fifth Circuit, and the State was involved in fact discovery even as a non-party. *See, e.g.*, 5th Cir. Rec. 1205 (notice of deposition of the University of Memphis Ground Water Institute).

"more than one full and fair opportunity" to litigate "the same issue" that was present in both cases. *Id.* at 328.

Finally, Mississippi incorrectly suggests (at 41) that Tennessee's issue-preclusion defense seeks to "have it both ways." Tennessee's argument in *Hood*, with which the Fifth Circuit agreed, was that Mississippi's only potential "remedy" was an "equitable apportionment action" in "the Supreme Court." *Hood*, 570 F.3d at 633; *see* Tenn. C.A. Amicus Br. 5 ("Tennessee would be a necessary and indispensable party to an equitable apportionment action."). Had Mississippi complied with the Fifth Circuit's holding and brought an equitable-apportionment action, issue preclusion would not apply at all. Instead, in this lawsuit Mississippi brings the same failed tort claims that Tennessee previously opposed and that *Hood* rejected. The Special Master should recommend the dismissal of those claims once again.

CONCLUSION

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

Respectfully submitted,

/s/ *David C. Frederick*
DAVID C. FREDERICK
DEREK T. HO
JOSHUA D. BRANSON
BRADLEY E. OPPENHEIMER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Special Counsel to the
State of Tennessee

HERBERT H. SLATERY III
Attorney General
ANDRÉE S. BLUMSTEIN
Solicitor General
BARRY TURNER
Deputy Attorney General
Counsel of Record
SOHNIA W. HONG
Senior Counsel
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-3491
(barry.turner@ag.tn.gov)

Counsel for the
State of Tennessee

April 28, 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*
David C. Frederick
Special Counsel to the
State of Tennessee