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 E. Siler, Jr.

BRIEF OF AMICI CURIAE LAW PROFESSORS

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I. THE AMICI'S INTEREST[1]

Amici are professors who teach, research, and write on water and property law. That includes researching this case since it was filed half a decade ago. *See* Noah D. Hall & Joseph Regalia, *Interstate Groundwater Law Revisited: Mississippi v. Tennessee*, 34 Va. Envtl. L.J. 152, 181 (2016); Noah D. Hall, Joseph Regalia, *Lines in the Sand: Interstate Groundwater Disputes in the Supreme Court*, Nat. Resources & Env't, Fall 2016; Joseph Regalia & Noah D. Hall, *Waters of the State*, 59 Nat. Resources J. 59, 60 (2019); Joseph Regalia, *A New Water Law Vista: Rooting the Public Trust Doctrine in the Courts*, 108 Ky. L.J. __ (2019); *see also* Robert Abrams *et al.*, LEGAL CONTROL OF WATER RESOURCES (West Publishing Co. 2018); Robert Abrams, *Water and Property Rights in an Era of Hydroclimate Instability*, College of William & Mary, Gideon-Kanner Property Rights Journal (2018).

Amici include the following: Joseph Regalia, Associate Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas; Noah Hall, Professor of Law, Wayne State University Law School; and Robert H Abrams, Professor of Law, Florida A&M University College of Law.

[1] Counsel for amici curiae authored this brief in its entirety and no party or its counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund its preparation or submission.

II. SUMMARY OF ARGUMENT

As aptly put by the Special Master: The "importance" of our nation's groundwater resources is "hard to overstate." Mem. at 26. "It provides freshwater to millions for a range of essential uses." *Id.* Justice Holmes agreed, describing water as a "necessity of life" so vital that the law requires it to "be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342–43 (1931). Water's extreme importance is why the law treats it differently than it treats everything else—and always has. An unbroken line of U.S. Supreme Court precedent makes clear: Water does not fall under the neat label of "good" or "chattel." Instead, it is a *res communes*; a unique public resource managed by states as trustees, not property owners.

And that is what Mississippi misses in framing this case as about water "ownership." There's no such thing. Mississippi claims outdated and overruled property rights in a *public* water resource. Why Mississippi takes this novel approach is no mystery: The state believes that claiming to own the water will strip the Supreme Court of its power to allocate the aquifer for the good of both Mississippi *and* Tennessee citizens. Our nation's history with water—including the U.S. Supreme Court's many dips into the matter—confirm that Mississippi presses a right it never had. State interests in water are not amenable to the lines we draw around property. And they never will be.

The Special Master has signaled as much, mentioning that Mississippi's claim of a property right in the aquifer is "inconsistent with precedent and theory." Mem Dec. at 21. As a state sovereign, Mississippi holds only right to seek protection of water for its future and current citizens; the rights of a sovereign trustee over the state's natural resources. So yes, Mississippi can challenge Tennessee's pumping if it harmed the public's interest in Mississippi waters. But no, Mississippi can't use a property theory to drift around the Supreme Court's equitable power to balance interests in groundwater.

The Special Master has framed the inquiry as whether this aquifer water is "interstate." But Mississippi does not "own" either *inter*state or *intra*state waters. The state instead has the very different sovereign interest of protecting the Mississippi public's continued use of its water resources, whatever the label. This is the same interest that Tennessee holds. And the only sort of test that can resolve disputes between co-equal sovereigns—representing co-equal citizens—is a flexible one that accounts for everyone's interests.

In any event, our nation's ever-growing need to protect current and future interests in groundwater makes Mississippi's property framework unworkable. States charged with protecting the public's interest cannot approach water conflicts like trade disputes. They have tried that before—and lost. States must work together to balance all citizens' interest in this precious resource. Failing that, the

Supreme Court must do that balancing. Mississippi's ownership theory could open the floodgates for water wars between the states, an outcome the Supreme Court has worked to prevent. Not to mention that recognizing a state's interest in groundwater as one of property could signal a sea change in our nation's water law jurisprudence generally.

At bottom, Mississippi seeks to use a claim of water ownership to shirk its sovereign duties as a public trustee. Claims of ownership cannot allow a state to avoid the hard decisions that come with managing our nation's critical and collective water resources. The physical and social realities of water have rounded its corners so that it can never fit in the square hole of property.

III. DISCUSSION

A. Mississippi sues over ownership rights it never had.

In Mississippi's view, states are "vested with ownership . . . over the land and waters within [their] territorial boundaries." Compl. at ¶¶ 8–10, 42–45. Mississippi believes that if another state pumps groundwater from an aquifer—and this pumping drains water in Mississippi—this other state has unlawfully taken Mississippi's *property*. *Id*. at ¶ 14 (accusing Defendants of committing "conversion" and "trespass").

To support this novel water-ownership theory, Mississippi cites cases like *Kansas v. Colorado* for the proposition that a state holds actual "title" to the waters

within its borders. *See Kansas v. Colorado*, 206 U.S. 46 (1907). The upshot of this ownership approach, according to Mississippi, is that it strips the Court of power to engage in an equitable balancing of competing state interests in the aquifer—as the Court has otherwise done for hundreds of years. But this Court has resoundingly rejected state claims of ownership over water in several contexts, and Mississippi offers nothing new.

It is true that states can own things. They own plots of land—like they own the structures built on them. And states can sue other states (or anyone else) for stealing the things they own. But water is different.[2] Early English common law recognized that. S*ee* LORD HAILSHAM OF ST. MARYLEBONE, 49(2) HALSBURY'S LAWS OF ENGLAND 62 ("[T]he water itself, whether flowing in a known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody."). And so has an unbroken line of this Court's precedent stretching back a century.

Early U.S. cases reasoned that the federal government transferred much of the nation's water to each state as it entered the union—known today as the equal-footing doctrine. *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842). But the federal

[2] That governments have a different relationship with water has been true since at least early Roman law. *See* Noah D. Hall & Joseph Regalia, *Interstate Groundwater Law Revisited: Mississippi v. Tennessee*, 34 Va. Envtl. L.J. 152, 181 (2016); Joseph Regalia & Noah D. Hall, Waters of the State, 59 Nat. Resources J. 59, 60 (2019).

government could give only what rights it held—and those rights did not include traditional title; they included only the sovereign power to police and manage water for the public good. *See Stockton v. Railroad Co.*, 32 Fed. Rep. 9, 19 (1887) (noting that following the American Revolution, navigable waterways "were held by the state, as they were by the king, in trust for [] public uses. . .").

True, a handful of cases before and near the turn of the nineteenth century sometimes said the words "property" or "title" when talking about the states' relationship with water. *See, e.g.*, *Donnelly v. United States*, 228 U.S. 243, 260 (1913) (noting "that the *title* of the navigable waters . . . was in the state . . . ." (emphasis added)). And a few other cases around that time suggested the states could use some sort of property-like right to push other states' citizens out of an intrastate water resource—usually by restricting fishing or oystering. *See, e.g.*, *Corfield v. Coryell* (allowing New Jersey to prevent citizens of other states from harvesting oyster beds within New Jersey); *McCready v. Virginia*, 94 U.S. 391, 394–95 (1877) (holding that Virginia, on behalf of its citizens, held "a property right, and not a mere privilege or immunity of citizenship" in its oyster beds). But these old cases never held that states own the water within their borders. And this Court's later decisions leave no doubt that a state-ownership theory has washed away.

States claiming an ownership interest in water often rally behind *Hudson County Water Co. v. McCarter,* an early case that concerned harm to water resources (as opposed to oysters or other wildlife). 209 U.S. 349 (1908). The Court there upheld a New Jersey statute prohibiting transfers of waters out of state, relying on "the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens." *Id.*

But even here, the Supreme Court was already signaling what it would hold decades later: Water is not and cannot be owned by states. The Court in *Hudson* was careful never to call New Jersey's interest in water "property" or "ownership"—despite using these same terms when siding for state owners in prior cases. *Compare McCready*, 94 U.S. 391, at 395 *with Hudson*, 209 U.S. at 356. Instead, the Court tactfully based its holding on a "principle of public interest and the police power, and not merely [a view of the state] as the inheritor of a royal prerogative." *Hudson*, 209 U.S. at 356. The Court repeatedly described New Jersey's interest as one of "protecting natural resources," not protecting state title: "the state, as quasi-sovereign and representative of the interests of the public, has a standing in court *to protect* the atmosphere, the water, and the forests within its territory." *Id*. at 355 (emphasis added).

Even in one of the earliest equal footing cases, the Supreme Court explained that the government held water "for the benefit of the *whole* people," and "in

trust." *Shively v. Bowlby*, 152 U.S. 1, 30, 49 (1894) (emphasis added). Justice Field was even more explicit in *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), explaining that the states' relationship with water is "different in character" from other resources, held "in trust for the people of the state." *Id.* at 401; *see also United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 693 (1899) (applying federalism principles to set aside a state's interests in a river and ignoring the state's ownership interest).

And long before any of these early Supreme Court cases came down, a slew of state and lower courts had already concluded that state water ownership made no sense. *See, e.g.*, *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1821) ("The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.").

As water conflicts escalated throughout the twentieth century, the Court needed to address state water ownership at the headwaters. Several interstate conflicts percolated through the courts, often raising dormant commerce clause claims. And this Court responded without hesitation: States cannot own water—nor can they use water ownership as a shield to monopolize water resources. *See, e.g.*, *Cal.-Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163–64

(1935) (describing waters as "publici juris, subject to the plenary control of the designated states").

Cases like *McCreedy* that talked about "owning" water were relegated to the pages of history. Every attempt by a state to raise a water-ownership theory in a conflict with another state has met rejection ever since. Indeed, the theory that states can own any wild resources has been trounced in several contexts. *See* Noah D. Hall & Joseph Regalia, *Interstate Groundwater Law Revisited: Mississippi v. Tennessee*, 34 Va. Envtl. L.J. 152, 181 (2016) (explaining various failed attempts by states to argue that they have some special ownership interest in water and related resources).

State ownership theories over water officially drowned as early as the late 1940s. *See Toomer v. Witsell*, 334 U.S. 385 (1948). *Toomer*, for just one example, addressed a challenge to South Carolina's shrimping statute, which prevented other states from using South Carolina's water beds. Defendants, unsurprisingly, touted cases like *McCready* to contend that South Carolina's "ownership" rights empowered the state to ignore outside interests in its water resources. *Id*. at 395.

The Court responded by calling out the state ownership concept on its face: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id*. at 402. The

Court explained that when it said in the past that states "own" water, it really meant that states have power to regulate the resources to protect them. *Id.*

After *Toomer*, the Court continued to reject state ownership theories over water. *See, e.g.*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420–21 (1948) (holding that an ownership theory over fish could not save California's attempt to prevent certain residents from fishing). Indeed, the fiction of state ownership reached even Congress's attention: "[W]hat we really mean by this sort of [water] 'ownership' is sovereignty, not proprietorship . . ." Federal-State Water Rights: Hearing Before the S. Comm. on Interior and Insular Affairs, 87th Cong. 118 (1961) (statement of Northcutt Ely, Washington, D.C.) (emphasis added).

In the 1970s, the Court authored several opinions ending any remaining debate about whether a state can use a property theory to shield itself in water conflicts. In 1977, in *Douglas v. Seacoast Products, Inc.*, the Court rejected the argument that Virginia's "ownership" of fish in its territorial waters allowed the State to forbid nonresidents from fishing in those waters. *Id.* The Court pulled no punches: "A State does not stand in the same position as the owner of a private [] preserve and it is pure fantasy to talk of 'owning'" water resources. The Court put its earlier cases in perspective: "The 'ownership' language of cases [like *McCready*] . . . must be understood as no more than a 19th-century legal fiction." *Id.*

Finally, in *Hughes v. Oklahoma*, 441 U.S. 322 (1979) and *Sporhase v. Nebraska*, 458 U.S. 941 (1982)—the Court "traced the demise of the public ownership theory and definitively recast it as 'but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" *Sporhase*, 458 U.S. at 951.

Sporhase is worth mulling over because, like here, it addressed a state's interest in groundwater. *Id.* at 951. The Court explained that the idea that a state could use property rights as a sword in groundwater disputes "is still based on the legal fiction of state ownership." *Id.* The Court recognized the profound interest states have in groundwater resources and emphasized that these interests must be balanced when applying doctrines that settle disputes. *Id.* The Court also explained that groundwater implicates important national issues, which further militate against viewing state groundwater conflicts as a matter of property interests. *Id.*

The Court's modern jurisprudence is clear and simple: states do not own water, neither by royal prerogative nor on behalf of their citizens.

B. Mississippi's ownership theory is at loggerheads with various doctrines recognized by this Court.

As noted by the Special Master, the Court's rejection of state ownership of water is also implicit in various longstanding doctrines, including equitable apportionment, the public trust doctrine, the federal reserved rights doctrine, and others.

When faced with competing state claims to water, the Court has always turned to equitable apportionment. *See, e.g.*, *Evans*, 462 U.S. at 1024. Similarly, the public trust doctrine inhibits states from harming water resources—a restriction inconsistent with ownership. *See, e.g.*, *Illinois Central. Ill. Cent. R.R. Co.*, 146 U.S. at 387 (striking down a state's attempt to alienate water resources). As is the federal reserved rights doctrine, which allows the federal government to reserve even *intra*state waters.

C. Mississippi's ownership theory over groundwater clashes even with its own state laws.

Mississippi's argument that it owns groundwater like a piece of chattel is not only out of whack with this Court's precedent, it defies its own state laws. Both Tennessee and Mississippi settle groundwater disputes using *equitable* principles, not *ownership*. Mississippi created an administrative system to manage water use and conflicts. *See Riverbend Utilities, Inc. v. Mississippi Envtl. Quality Permit Bd.*, 130 So. 3d 1096, 1104 (Miss. 2014). In resolving conflicting groundwater interests, this agency considers a slew of equitable principles, including "how the permit applicant plans to use the water, . . . the amount of water requested, . . . whether the wells will be spaced in a manner to avoid interference with existing wells, . . . and the projected drawdown of the aquifer." Mississippi's regulations explain that: "In areas where conflicts exist between competing interests or demands for . . . groundwater supplies, or where there is a potential for such

conflicts to arise in the future, . . . beneficial uses . . . will be given priority." 11.7-1 MISS. CODE R. § 1.4(B). These uses include public supply and conservation of habitats. Indeed, ownership of the overlying property is not even among the factors for settling water disputes. Tennessee likewise uses equitable principles to settle water conflicts. *Rickert*, 89 S.W.2d at 896 (explaining that groundwater rights "must be correlative and subject to the maxim that one must so use his own as not to injure another . . .").

Mississippi's ownership theory ignores even its own system for allocating groundwater.[3]

D. Mississippi's legislative declarations confirm that the state does not "own" its groundwater.

States usually say a lot in their statutes and constitutions about their relationship with water—and that goes for Mississippi and Tennessee, too. Mississippi's legislative declarations make clear that if it had any ownership interest, it disclaimed them.

[3] If states have a deeper sovereign ownership interest over their water, perhaps there are reasons to rethink some of our federal water concepts, too. After all, the federal government often infringes on what states claim are owned water resources. Those claims have largely been rejected, no matter where the water is located. If this Court holds for the first time that states do have ownership rights over intrastate groundwater, squaring those rights against the federal government's will become tricky and could undo a century of precedent. *See Ariz. v. Cal.*, 373 U.S. 546,597-98 (1963) (discussing federal rights to reserve water from states).

Mississippi's statutes declare that water belongs not to the state, but "to the *people* of this state." Miss. Code Ann. § 51-3-1 (2003) (emphasis added). Its statutes characterize the state's power over water as one of "control and development." *Id.* But only as an "exercise of its police powers" to "take such measures to effectively and efficiently manage, protect, and utilize the water resources of Mississippi." *Id.* Tennessee similarly declared "[t]hat the waters of the state are . . . held in public trust for the benefit of its citizens." Tenn. Code Ann. § 68-221-702 (2013).

Conspicuously missing in all this is any mention of water "ownership" or "title." Mississippi itself has declared that its only interest in its waters is as a general sovereign exerting "police powers" to "protect and utilize the water resources of Mississippi." Miss. Code Ann. § 51-3-1. Taking Mississippi at its word, it has only general sovereign interests in water, not any sort of ownership.

Mississippi's statutory declaration that it only "controls" or "manages" water for the benefit of the public is much like those made by many other states. Although states vary in precisely how they describe their water interests, the bulk of them recognize that their power over water is distinct from traditional property concepts. *See* Joseph Regalia & Noah D. Hall, *Waters of the State*, 59 Nat. Resources J. 59, 60 (2019) (detailing various state declarations about state water rights).

E. Mississippi's sovereign interest in the aquifer thus extends only to its general police powers and public trust rights.

If states like Mississippi don't own water—then what is the source of their power over it? This Court has identified two: (1) the states' sovereign police powers, and (2) the state's rights and duties as a public trustee.

The first power is born of state sovereignty: The states' police power to regulate matters within their borders so long as those powers are not entrusted to the federal government or directly to the people. *See Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615, 619 (1936) (describing the states' police powers over water). "Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. It exists without express declaration." *Washington Kelpers Ass'n v. State*, 81 Wash. 2d 410, 417, 502 P.2d 1170, 1174 (1972); *see also Barker v. State Fish Comm'n*, 88 Wash. 73, 152 P. 537 (1915).

Both Mississippi and Tennessee have general police powers to regulate the waters within their borders for the general welfare of their citizens—but that power does not confer on Mississippi any special right or interest during a water dispute. Any conflict between *co-equal* sovereign interests would require resolution from this Court. *See Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (discussing the "equality of right" between states). That is because resolving co-equal sovereign interests requires an equitable balancing. *See South Carolina v. North Carolina*,

130 S. Ct. 854, 856 (2010) (addressing the "[s]tate's sovereign interest in ensuring that it receives an equitable share" of water "on behalf of its citizens").

The second power stems from the public trust doctrine, first described by this Court in *Illinois Central*. *Ill. Cent. R.R. Co.*, 146 U.S. at 387. The public trust is both sword and shackle. States are empowered to protect against harms to current and future uses of important water resources. But the trust simultaneously limits each state's ability to harm important waterways. More and more courts and scholars agree that the states' role with water is better viewed as trustee than sovereign. And that view aligns with this Court both rejecting state ownership claims and recognizing the public trust imposed on all states.[4]

Whether Mississippi brings this case as public trustee or as a co-equal sovereign seeking to prevent harms against its citizens: Neither power gives Mississippi the ability to avoid this Court's long-held power to equitably resolve competing state interests in water resources.

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[4] As far back as the early 1800's, courts have explained that the sovereign police power over water should be limited when it comes to water. *See Arnold v. Mundy*, 6 N.J.L. 1, 53 (1821) ("The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people."). And various states and courts since have declared that the states' police power over water is limited by its role of trustee. *See, e.g.*, *San Carlos Apache Tribe v. Super. Ct. ex rel. Cty of Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) (rejecting a state legislature's attempt to abolish public trust limitations).

F. Groundwater is a precious national resource and state conflicts over this resource require equitable resolutions.

There is pressing need for governments to protect our nation's dwindling groundwater resources. The U.S. is facing the worst water crisis in history. And climate change is just upping the pressure.[5] Rainfall will decrease; evaporation will increase; water resources will dry up. Couple the climate threats with greater demands for water in urban areas like Memphis—and you have a water management storm.

The competing demands for surface water—including maintaining in-stream flows and other environmental protections—have pressed even harder on our stores. Groundwater offers several advantages over surface water. It is widely available, less vulnerable to pollution, and often suitable for drinking with little treatment. Groundwater is also not used for navigation, recreation, or fishing. So it is no surprise that since 1950, groundwater withdrawals have more than doubled from 34 billion gallons per day to 76 billion gallons per day. MOLLY A. MAUPIN ET AL., ESTIMATED USE OF WATER IN THE UNITED STATES IN 2015, at 2, 7, 53 (2015),

[5] *See, e.g.*, U.S. CLIMATE CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES: A STATE OF KNOWLEDGE REPORT 41 (2009); Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 Envt'l & Energy L. & Pol'y J. 237, 243 (2010) ("Groundwater contributes flow to many rivers and streams and is an important source of drinking and irrigation water. Climate change is expected to reduce aquifer recharge and water levels, especially in shallow aquifers."

available at https://pubs.usgs.gov/circ/1441/circ1441.pdf (discussing increasing groundwater demands generally). Even as total water withdrawals have declined, groundwater use continues to rise. *Id.* at 50.

Groundwater now provides over a quarter of the freshwater used in the United States. *Id.* And interstate conflicts over the use of transboundary groundwater are emerging around the country. The ongoing dispute over the Snake Valley Aquifer, putting the water needs of Las Vegas against environmental and agricultural interests in Utah, is one example. Over the last few decades, Las Vegas's population has exploded—and along with it, the region's need for water. *See* Noah D. Hall, Benjamin L. Cavataro, *Interstate Groundwater Law in the Snake Valley: Equitable Apportionment and A New Model for Transboundary Aquifer Management*, 2013 Utah L. Rev. 1553, 1561 (2013). Las Vegas turned its gaze onto groundwater tucked away in the northern half of the state. *Id.* The only problem is that some of these stores hydrologically connect to neighboring Utah's aquifers—pitting the two states in a fight much like Mississippi and Tennessee's. Conflicts like these will only increase in coming years.

How the Court deals with this case will thus have deep ramifications for similar disputes across the nation. If Mississippi's ownership theory is given any shrift, this Court will be hamstrung when resolving competing interests and uses of water. States will have less incentive to seek out beneficial uses of waters, with

scales now tipped in favor of whoever happens to claim a better ownership stake. Our nation's water crisis requires flexibility and cooperation—both of which Mississippi's property theory would shut out.

G. Public Nuisance may prove the most useful standard here.

The Special Master has already rejected nuisance law in this case, and the amici view this matter as tangential at this stage. But the amici offer a couple brief reasons this test may make sense in cases like this one. The Supreme Court has used interstate nuisance for standing bodies of water, airsheds, and other resources that when used by one state, lead to harm in another state. *See*, *e.g.*, *See Wisconsin v. Illinois*, 278 U.S. at 399–400. In *Wisconsin*, Wisconsin, Michigan, New York, and other Great Lakes states sued Illinois, alleging that Chicago had diverted waters from Lake Michigan, lowering water levels by more than six inches. *Id.* The Supreme Court relied on interstate nuisance—not equitable apportionment—to resolve the conflict. *Id.*

The Supreme Court's thinking was likely driven by several factors. Interstate nuisance avoids the difficult task of quantifying the available water supply—the first step in any apportionment. The supply in a flowing river is easy to gauge. But determining the available supply of an aquifer requires extensive measuring and modeling and remains an educated guess. Interstate nuisance avoids asking how much resource is available to divide, and instead focuses on the harms of the use.

These technical considerations relate to a more fundamental policy divide between equitable apportionment and interstate nuisance. Apportionment cases have tended to assume that the entire resource is available for division and allocation. This reflects the historical view towards natural resources, which is that total consumption is just fine. Interstate nuisance, on the other hand, evolved not to divide shared resources, but to balance harms and interests in preserving shared resources. Courts used it to protect "the environment" decades before the term "environment" entered law and society.

As values shift from total consumption to at least some restraint and preservation, interstate nuisance aligns more closely with our modern goals.

IV. CONCLUSION

Mississippi and Tennessee's fight presents the Court with a chance to craft a rule that sensibly balances the many competing needs for groundwater. While the issue may sound novel, the Court has waded into similar waters many times before. Sovereign water ownership arguments have been a thing since the birth of the nation. And those arguments always meet the same answer: Water is uniquely vital, and it cannot be "owned" by anyone, state sovereign or otherwise. Mississippi's interest in this case is properly framed as one of a sovereign trustee, not a property owner.

Dated: October 15, 2019.

Respectfully submitted,

/s/ Noah Hall

CERTIFICATE OF SERVICE

Pursuant to Paragraph 3 of the Special Master's Case Management Plan (Dkt. No. 57), I hereby certify that all parties on the Special Master's approved service list (Dkt. No. 26) have been served by electronic mail, this the 15th day of October, 2019.

/s/ Noah Hall
Counsel for Amici