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.

Before the Honorable Eugene E. Siler, Jr., Special Master

CITY OF MEMPHIS, TENNESSEE AND MEMPHIS LIGHT, GAS & WATER DIVISION'S REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

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Memphis & MLGW Mot.	City Of Memphis And Memphis, Light, Gas & Water Division's Motion and Memorandum in Support of Their Motion for Judgment on the Pleadings (February 24, 2016)
Miss. Resp.	The State of Mississippi's Response in Opposition to Defendants' Motions for Judgment on the Pleadings (April 6, 2016)

Defendants The City of Memphis, Tennessee ("Memphis"), and Memphis, Light, Gas & Water Division ("MLGW"), by and through counsel, hereby submit their Reply Memorandum in Support of Their Motion for Judgment on the Pleadings. Defendants respectfully request oral argument.

I. INTRODUCTION

Mississippi's attempt to marshal the allegations in its Complaint under the banner of "state sovereignty" is legally unsupportable. It is an effort by Mississippi to justify its erroneous position that equitable apportionment does not govern this dispute between states over the allocation of an interstate aquifer.

If Mississippi had legitimate concerns that Defendants' groundwater pumping from the Memphis Sand Aquifer, also referred to as the Sparta Aquifer (the "Aquifer"), had caused a real and substantial injury to Mississippi's ability to withdraw water from the shared interstate resource, the doctrine of equitable apportionment would provide Mississippi a well-established path to seek judicial relief. However, Mississippi has affirmatively disavowed a claim under that doctrine.

Mississippi's effort to distance itself from equitable apportionment has become so strained that its Complaint and Response are replete with allegations and arguments that are illogical, contradict its previous claims, and violate constitutional principles. For example:

- Mississippi has reversed its previously oft-asserted position that the Aquifer is a shared interstate water resource and now argues that the groundwater is an intrastate resource of Mississippi;

- Mississippi asserts that the Aquifer is an "intrastate" resource of Mississippi despite admitting that the Aquifer underlies both Mississippi and Tennessee and that, under natural conditions, some groundwater in the Aquifer flowed from Mississippi into Tennessee;

- Mississippi alleges and argues that interstate groundwater should be treated differently than interstate surface water, despite its own state policy, which, by statute, treats them the same; and

- Despite conceding MLGW's groundwater wells are located entirely within and governed by the laws of Tennessee, Mississippi alleges it is entitled to recover damages against Tennessee citizens for alleged violations of Mississippi law.

It is important to ask why Mississippi goes to such lengths to argue that, merely because the interstate water resource at issue in this case is below ground rather than above it, the Court should toss aside a century of equitable apportionment precedents and, in their place, apply Mississippi state tort law. The allegations in Mississippi's Complaint provide the answer. An equitable apportionment action presents two major disadvantages to Mississippi: (1) Mississippi cannot prove (and did not even plead) a real and substantial injury, and (2) equitable apportionment does not afford Mississippi the opportunity to recover monetary damages. Mississippi asserts its tort claims of conversion and trespass in a desperate effort to circumvent these obstacles to its desired recovery.

The Court's equitable apportionment decisions have directly or by implication rejected every argument Mississippi advances in its Response. The

allegations and claims in Mississippi's Complaint, if allowed to go forward, would do irreparable harm to both the "cardinal rule" of relationships between the states—"equality of right," *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907)—and the most "basic principle of federalism"—the notion that no state can impose its laws on another, *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). The Court should not permit it.

For the above reasons and those set out below, Mississippi has failed to state a viable claim for relief. The Court should grant Defendants' Motions for Judgment on the Pleadings and dismiss Mississippi's Complaint with prejudice.

II. ARGUMENT

A. EQUITABLE APPORTIONMENT, NOT MISSISSIPPI TORT LAW, GOVERNS THIS DISPUTE OVER RIGHTS TO AN INTERSTATE AQUIFER.

1. The Aquifer Is an Interstate Water Resource—Mississippi Has Conceded This Point.

Mississippi admits the Aquifer underlies both Mississippi and Tennessee and, under natural conditions, some of the ground water in the Aquifer flows naturally from Mississippi into Tennessee. Miss. Resp. 17 n.12, 30 n.22; Compl. ¶¶ 18, 50. Yet Mississippi clings to its legally unsupportable position that "[t]his

case involves only Mississippi intrastate groundwater."[1] Miss. Resp. 17 n.12. Mississippi's contention fails for the following reasons:

When Mississippi brought its first lawsuit against Memphis and MLGW in federal district court in 2005 ("*Mississippi I*"),[2] Mississippi affirmatively alleged—and, in fact, relied on—the "interstate character" of the same Aquifer and the same groundwater at issue in the present case.[3] Now, however, Mississippi argues the

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[1] Mississippi's assertion that the groundwater in the Aquifer is "intrastate" water is not a well-pled fact. Instead, it is a legal conclusion and, therefore, should not be taken as true for purposes of Defendants' Motions for Judgment on the Pleadings. *See* Memphis & MLGW Mot. 12-13.

[2] As explained more fully in Memphis and MLGW's Motion, Mississippi first sued Memphis and MLGW in federal district court in 2005, seeking monetary damages for withdrawing and using groundwater within Tennessee from the Aquifer. In the federal district court lawsuit, Mississippi brought and lost the same tort claims it now seeks to bring before this Court. *See Hood, ex rel. Mississippi v. City of Memphis, Tenn.*, 533 F. Supp. 2d 646 (N.D. Miss. 2008), *aff'd*, 570 F.3d 625 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1319 (2010). That lawsuit will be referred to herein as *Mississippi I*.

[3] *See, e.g.*, *Mississippi I*, First Am. Compl. ¶ 8 ("Jurisdiction in this interstate or transboundary ground water dispute is proper in this Court under 28 U.S.C.A. Sections 1331 & 1332"); *id.* ¶ 11 ("This is an interstate groundwater action . . . ."); *Mississippi I*, Fifth Circuit Br. 1 (averring that its "claims involving transboundary or interstate ground water confer federal question jurisdiction on the District Court"); *id.* at 21 ("The interstate nature of the aquifer confers federal question jurisdiction on the District Court. . . . It is the interstate context that actually confirms the District Court's subject matter jurisdiction . . . ."); *id.* at 46 ("The interstate context of this case confers federal question jurisdiction upon the District Court . . . .").

As explained in Memphis and MLGW's Response in Opposition to State of Mississippi's Motion to Exclude, which is filed concurrently herewith, Defendants may properly rely on these pleadings from *Mississippi I*. However, the Court need not rely on any of the materials at issue in Mississippi's Motion to Exclude, as

Aquifer is not an interstate resource and not a shared resource—directly contradicting its position in *Mississippi I*. Mississippi's reversal is not based on any new facts or change in the law. Rather, Mississippi is simply manipulating the words it uses to describe the Aquifer and the groundwater in it. Thus, the same water Mississippi previously asserted to be an "interstate" resource, Mississippi now calls an "intrastate" resource. Mississippi then erroneously avers because the Aquifer and the groundwater are "intrastate" resources, equitable apportionment does not apply to its claims.[4]

Mississippi urges the Court to ignore the fact that the Aquifer is shared by and underlies multiple states (which Mississippi concedes to be true), and instead consider the Aquifer as a collection of separate "intrastate" portions—each portion defined by the borders of the state overlying it. Compl. ¶¶ 42, 45. Mississippi urges the Court to declare these fictional "intrastate" portions of the Aquifer to be

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Defendants are entitled to Judgment on the Pleadings regardless of whether the Court considers those materials.

[4] Mississippi's remarkable statement that it "could have presented its case better" in *Mississippi I*, Miss. Resp. 3, appears to be an attempt to explain away its prior admissions that the Aquifer is an interstate resource and the groundwater in it is interstate water. The Court should not be persuaded. Throughout *Mississippi I*, Mississippi relied on the "interstate" nature of the Aquifer, the groundwater in it, and the dispute itself, as its asserted basis for subject-matter jurisdiction and the application of federal common law. *See supra* note 3. Mississippi's reversal of its original position is not, as Mississippi appears to suggest, a correction of an inadvertent error or ineffective tactics. Mississippi is deliberately attempting to reverse course to try to avoid the same fate it met in *Mississippi I* when it brought and lost these same tort claims.

independent of one another, each owned by the respective sovereign under whose borders it lies. *See, e.g.*, Miss. Resp. 31; Compl. ¶¶ 42, 45. The Court rejected a similar argument in *Kansas v. Colorado*, the case in which the Court first established the doctrine of equitable apportionment. *Kansas v. Colorado*, 206 U.S. 46 (1907). There, Colorado argued (as Mississippi asserts here) that the Arkansas River should be treated as two separate rivers—one starting in the mountains of Colorado and terminating at Colorado's border with Kansas, and another starting near the Kansas border and flowing through Kansas and Oklahoma on its way to the Gulf of Mexico. *Id.* at 115. The Court declared Colorado's position "untenable." *Id.*

The Court has long recognized "[t]he river throughout its course in both states is but a single stream, wherein each state has an interest which should be respected by the other." *Hinderlider v. LaPlata River & Cherry Ditch Co.*, 304 U.S. 92, 102 (1938); *see also Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) (finding that the origin of the river "should be essentially irrelevant" to the equitable apportionment of the interstate resource). The interstate Aquifer in this case should be treated no differently.

2. Until and Unless the Aquifer is Apportioned, Mississippi Cannot Assert a Viable Claim Against Defendants for "Wrongfully Taking" "Mississippi's Groundwater."

By claiming damages for the alleged loss of "its" water, Mississippi attempts to unilaterally allocate to itself a portion of the groundwater in the Aquifer—what it wrongly calls "Mississippi groundwater." Miss. Resp. 1.[5] In its Response, Mississippi argues only "Mississippi groundwater" is at issue, and the Aquifer need not be apportioned because this lawsuit only concerns groundwater that is not "naturally shared" or "naturally available" in Tennessee. *Id.* at 16.

Mississippi's argument is contrary to the Court's longstanding recognition that an interstate water resource can be allocated between states only by interstate compact or equitable apportionment. *See Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2125 (2013) ("Absent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment by the courts . . . ."); *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003) ("Federal 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."");

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[5] *See* Albert E. Utton, *Sporhase, El Paso, and Unilateral Allocation of Water Resources: Some Reflections on International and Interstate Groundwater Law*, 57 U. COLO. L. REV. 549, 556 (1986) ("Unilateral, or self-allocation of groundwater resources should be restrained, just as it is in the case of surface waters. Self-allocation, whether under the guise of the commerce clause or of being upstream, is not in the best interest of the planned use of the resource, nor of good federalism.").

Colorado v. New Mexico, 459 U.S. 176, 183 (1982) ("Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream."). Unless and until the Aquifer is apportioned, Mississippi has no actionable claim for what it alleges to be the wrongful taking of "Mississippi's groundwater."

3. The Fifth Circuit and District Court Holdings in *Mississippi I* Follow Established Supreme Court Precedents.

Mississippi urges the Court to disregard the district court and Fifth Circuit decisions in *Mississippi I*, arguing that those courts did not really mean what they said or that the rulings are somehow "dicta or error." Miss. Resp. 19-20, 40-41.[6] Mississippi's position is without merit.

The district court found the Aquifer "has not been apportioned, neither by agreement of the involved States nor by the U.S. Supreme Court, . . . absent apportionment, this court cannot afford relief to the Plaintiff and hold that the Defendants are pumping water that belongs to the State of Mississippi, because it has not yet been determined which portion of the aquifer's water is the property of which State." *Hood, ex rel. Mississippi v. City of Memphis, Tenn.*, 533 F. Supp. 2d 646, 648 (N.D. Miss. 2008). The court held "[i]t is simply not possible for this court to grant the relief the Plaintiff seeks without engaging in a *de facto*

[6] It is also ironic that Mississippi—which chose to file its original lawsuit in the United States District Court in Mississippi—now argues that court did not have jurisdiction to act on its claims.

apportionment of the subject aquifer; such relief, however, is in the original and exclusive jurisdiction of the United States Supreme Court because such a dispute is necessarily between the State of Mississippi and the State of Tennessee." *Id.*

The Fifth Circuit agreed, ruling "[t]he 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." *Hood, ex rel. Mississippi v. City of Memphis, Tenn.*, 570 F.3d 625, 629-30 (5th Cir. 2009) (citing *Hinderlider*, 304 U.S. at 104-05). Citing Supreme Court equitable apportionment precedents, the Fifth Circuit found "that the district court made no error of law as to the necessity of equitably apportioning the Aquifer." *Id.* at 629-30 (emphasis added). "The Aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests, and whose allotment is subject to interstate compact or equitable allocation. Therefore, we find no error in the district court's conclusion that Tennessee's presence in the lawsuit was necessary to accord complete relief to Mississippi and Memphis." *Id.* at 631.

The decisions of the district court and the Fifth Circuit were well-considered rulings and entirely consistent with this Court's equitable apportionment jurisprudence. The Court should not allow Mississippi another chance to revisit

the same claims and arguments that the district court and the Fifth Circuit already heard and rejected under well-settled law.

4. The Application of Equitable Apportionment to Interstate Groundwater Is Consistent With the Court's Longstanding Precedents.

According to Mississippi, equitable apportionment is a limited doctrine that only applies to "rights to anadromous fish migrating interstate or an interstate river." Miss. Resp. 21. Based on that overly restrictive characterization, Mississippi claims that applying equitable apportionment to interstate groundwater would "radically extend" the federal common law doctrine. *Id.* at 18-19. That claim, too, is wrong.

The Court has broadly applied equitable apportionment to interstate resources. For example, in applying equitable apportionment doctrine to migratory fish, the Court expressly found "the natural resource of anadromous fish is sufficiently similar" to interstate water, and saw "no reason to accord different treatment to a controversy over a similar natural resource." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 (1983). The same reasoning applies to groundwater. As Mississippi concedes, there are numerous examples in which the Court has applied equitable apportionment to groundwater that is hydrologically connected to interstate surface water. Miss. Resp. 1 n.2 (citing *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015); *Nebraska v. Wyoming*, 534 U.S. 40 (2001); *Kansas v. Colorado*, 533

U.S. 1 (2001); *Nebraska v. Wyoming*, 515 U.S. 1 (1995); *Kansas v. Colorado*, 514 U.S. 673 (1995); *Texas v. New Mexico*, 462 U.S. 554 (1983)).[7]

5. Mississippi's Arguments Against Equitable Apportionment Are Not Credible.

Mississippi has not pointed to a single case or authority holding that interstate water resources below the ground should be apportioned differently from those above the ground. Mississippi tries to distinguish this case from *Kansas v. Colorado*, 206 U.S. 46 (1907), by claiming that Tennessee does not have an equitable interest in the Aquifer in the same way that Kansas and Colorado each have an equitable interest in the Arkansas River. Miss. Resp. 16. That effort, however, is unpersuasive.

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[7] Water law scholars agree that equitable apportionment should govern the allocation of groundwater between states overlying a common aquifer. *See*, *e.g.*, 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, 1607-12 (2013) (identifying the following "indicator[s] that the Court views interstate groundwater as subject to the equitable apportionment doctrine": (1) the Court "has considered groundwater issues within the equitable apportionment of groundwater-connected surface water"; (2) "the Court has applied the equitable-apportionment doctrine in the interstate dispute outside of the surface water context" to anadromous fish; and (3) in *Hood ex rel. Mississippi v. City of Memphis*, the Supreme Court denied Mississippi's petition for certiorari letting the Fifth Circuit's ruling stand); Utton, *supra* note 5 at 556 ("Water resources which underlie a state boundary should be treated in the same way as those that flow on the surface across state boundaries. Unilateral, or self-allocation of groundwater resources should be restrained, just as it is in the case of surface waters.").

In *Kansas v. Colorado*, the Court found that those states have an interest in the Arkansas River because "[b]efore either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which now composes these two states." *Kansas v. Colorado*, 206 U.S. at 98. There is no analytical difference between the interstate Aquifer at issue in this case and the Arkansas River in *Kansas v. Colorado*. *See Hood*, 570 F.3d at 630 ("The fact that this particular water source is located underground, as opposed to resting above ground as a lake, is of no analytical significance. 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 depending upon it for water.").

The Aquifer was (and is) a water-bearing natural resource underlying what is now Mississippi and Tennessee long before the states were settled and their common boundary line established. *See* Compl. ¶ 41 (alleging that the "geologic formation in which the groundwater is stored straddles two states"). Mississippi cannot viably claim that Tennessee has no established or equitable right to the groundwater at issue.

Mississippi then argues that *Kansas v. Colorado* is distinguishable because the groundwater at issue would not be in Tennessee "under natural conditions." Miss. Resp. 16. The Court has never endorsed such a position and Mississippi offers no authority to support it. By definition, all of the Court's equitable

apportionment cases involve the balancing of factors under circumstances that are changed from "natural conditions"—namely, the use or diversion of an interstate resource so as to affect one or more other states. For example, the question in *Kansas v. Colorado* was "whether Kansas has a right to the continuous flow of the waters of the Arkansas river, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow." *Kansas v. Colorado*, 206 U.S. at 85. This case similarly involves a claim by Mississippi that Tennessee has "siphon[ed] Mississippi's groundwater northward at an accelerated velocity substantially in excess of the water's natural seepage." Compl. ¶ 24.

Equitable apportionment is the governing doctrine that reconciles the competing rights of states to withdraw water from within their own boundaries. *Kansas v. Colorado*, 206 U.S. at 97-98. Mississippi's averment that it "defies common sense" to compare this dispute to the Court's equitable apportionment decisions, Miss. Resp. 18, cannot be sustained. The only distinction is that the interstate water resource at issue here is below the ground rather than above it. For purposes of allocating that resource, it is a distinction without a difference.

6. Mississippi's Position Directly Conflicts With Mississippi's Own Laws and Regulations.

Mississippi's position in this case is refuted by its own state policy: Mississippi's legislature has clearly and unambiguously declared that interstate

groundwater and interstate surface water should be treated the same. *See* Memphis & MLGW Mot. 35-36. Mississippi Code Annotated § 51-3-41 grants authority to the Commission on Environmental Quality to negotiate agreements concerning the "state'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." (Emphasis added). In its Response, Mississippi shrugs off Defendants' position as suggesting that Mississippi's sovereign powers have been waived and its public trust nullified. Miss. Resp. 31. Mississippi has missed (or more likely is trying to avoid) the real significance of its own statute.

In Section 51-3-41, the Mississippi legislature recognizes and acknowledges (1) interstate surface water and interstate groundwater are treated alike; and (2) interstate surface water and interstate groundwater are subject to apportionment. These two critical points are irreconcilable with the questionable premise upon which Mississippi's claims are brought, namely that groundwater should be treated differently from surface water.

Further, while Mississippi law does not apply here, it is notable that even under Mississippi law, disputes between private landowners over a shared aquifer are resolved, not by conversion and trespass claims based on property lines, but instead by prioritizing the nature of the use of the groundwater by the competing

pumpers on their respective properties. *See* 11 Miss. Admin. Code Pt. 7, R. 1.4.B. That is the very nature of equitable apportionment.

B. MISSISSIPPI'S RELIANCE ON SOVEREIGN RIGHTS DOES NOT SUPPORT A CAUSE OF ACTION AGAINST DEFENDANTS BASED ON MISSISSIPPI TORT LAW.

1. The Relief Sought in Mississippi's Complaint Infringes on Tennessee's Sovereignty and Violates the Constitution.

(a) Mississippi's claims can be viable only by unconstitutionally imposing Mississippi law beyond its border.

Mississippi purports to bring this lawsuit to vindicate its sovereignty against Defendants' alleged trespass upon and conversion of "Mississippi groundwater" from an interstate aquifer. Miss. Resp. 14-15, 23-24. Mississippi claims authority to regulate groundwater pumping within Mississippi under the "public trust doctrine." Compl. ¶ 12, 42. Mississippi misleadingly alleges Defendants have infringed on Mississippi's sovereignty by pumping groundwater "located in Mississippi." *Id*. ¶¶ 16, 4l. Mississippi asserts Defendants are violating Mississippi's water law. *Id.* ¶ 14 (averring that Defendants have "violated Mississippi water law"); Miss. Resp. 2 (averring that MLGW has been pumping groundwater "without as much as an application for a permit in compliance with Mississippi law").

Mississippi's position cannot be sustained in light of three crucial concessions. First, Mississippi concedes all of MLGW's groundwater wells and

pumps are physically located entirely within the State of Tennessee.[8] *See* Miss. Resp. 6 n.8, 26. Second, Mississippi concedes Tennessee has the authority to regulate groundwater pumping that takes place within Tennessee. *Id.* at 31; Compl. ¶¶ 45, 46. Third, Mississippi concedes "Tennessee's control over public water systems extends to the location and drilling of water wells and the withdrawal of groundwater from MLGW wells." Compl. ¶ 21 (emphasis added).

These concessions by Mississippi demonstrate that, contrary to its allegations, it is plainly Mississippi that is trying to infringe on Tennessee's sovereignty. On its face, Mississippi's Complaint asks this Court to impose Mississippi law beyond Mississippi's northern border by seeking money damages and injunctive relief against Defendants for alleged violations of Mississippi water law even though it is undisputed that Defendants' groundwater pumping takes place entirely within Tennessee borders. *See* Compl. ¶ 14; Miss. Resp. 2. Therein lies the fatal flaw in Mississippi's position: Under the U.S. Constitution, Mississippi's right to swing its arms ends just where Tennessee's nose begins.[9]

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[8] MLGW's wells are drilled vertically, *i.e.*, straight down (not horizontally or slanted). MLGW's wells and all the physical components of its wells are located well within the borders of Tennessee. Mississippi has pled no facts to support any contentions to the contrary, and any such claim would be false.

[9] Adapted from Zechariah Chafee, *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 957 (1919).

"A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Campbell*, 538 U.S. at 422 (emphasis added). Thus, while Mississippi has jurisdiction to regulate the withdrawal of groundwater from wells located within Mississippi, it is prohibited by the Constitution from extending "the effect of its laws beyond its borders so as to destroy or impair the right of citizens of [Tennessee]." *Hartford Accident & Indem. Co. v. Delta & Pine Land Co*., 292 U.S. 143, 149 (1934); *see also Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . ."). Tennessee, as a co-equal state, is granted the same authority and limitations with respect to its own territory.

Mississippi's improper attempt to extend its authority outside its own boundaries "throw[s] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). To attack the City of Memphis and MLGW for doing in Tennessee what Tennessee law plainly allows "is a due process violation

of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).[10] That Mississippi is prohibited from doing so "is so obviously the necessary result of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound." *New York Life Ins. Co.*, 234 U.S. at 161.

(b) The constitutional prohibition against one state's imposing its laws on another state—as Mississippi attempts to do—led to the doctrine of equitable apportionment.

Mississippi quotes the Court's opinion in *Kansas v. Colorado*, for the proposition that "'each State has full jurisdiction over the lands within its borders, including the beds of streams *and other waters*.'" Miss. Resp. 11 (quoting *Kansas v. Colorado*, 206 U.S. at 93).[11] The quoted language from *Kansas v. Colorado* is, however, taken out of context and is misleading. Mississippi omits the Court's remaining analysis, which refutes the very point that Mississippi tries to make.

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[10] Surely, an angler in the Mississippi River fishing within the borders of Mississippi would not be required to purchase a Tennessee fishing license (or be subject to the laws of Tennessee) because she caught fish that would, under "natural conditions," have remained in the part of the river within Tennessee had they not been "lured" into Mississippi by the scent of the angler's bait.

[11] Mississippi's use of italics grammatically distorts the meaning of the Court's statement. The objects of the Court's statement concerning the jurisdiction of states were "lands" and "beds." The phrase "of streams and other waters" is merely descriptive of the word "beds"—i.e., "beds of streams" and "beds of other waters." *See* discussion of the public trust doctrine in Memphis & MLGW Mot. 42-43 (noting that the public trust doctrine concerns real property and the land beneath (or beds) of navigable rivers and tidewaters, but not the waters with flow in the beds).

The Court recognized that each state has jurisdiction of matters within its own borders (as Mississippi acknowledges), that no state could impose its laws on another, and that the cardinal rule of states' relationships to one another is equality of right. *Kansas v. Colorado*, 206 U.S. at 97. These pillars became part of the foundation upon which the Court built a doctrine of equitable apportionment to settle disputes between sovereign states over their respective rights to use a shared interstate water resource "in such a way as will recognize the equal rights of both and at the same time establish justice between them." *Id*. at 98.

Since *Kansas v. Colorado*, the Court has developed and broadened its application of equitable apportionment, but it remains the doctrine by which the Court resolves disputes between states over the allocation of interstate water resources "on the basis of equality of right." *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931); *see Tarrant*, 133 S. Ct. at 2131; *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945) (explaining that "in determining whether one State is 'using, or threatening to use, more than its equitable share of the benefits of a stream, all of the factors which create equities in favor of one state or the other must be weighed'") (quoting *Colorado v. Kansas*, 320 U.S. 383, 394 (1943)).

Because the Aquifer underlies both Mississippi and Tennessee,[12] Mississippi's "allotment" or "portion" of the Aquifer can be determined only by an interstate compact or an equitable apportionment action in this Court. Until one or the other occurs, Mississippi cannot state a claim for wrongful taking of groundwater from the Aquifer.

2. The *Tarrant* Ruling Does Not Support Mississippi's Erroneous "State Sovereignty" Position.

Mississippi cites the Court's decision in *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013), no less than ten times in its Response. As shown below, *Tarrant* does not support Mississippi's position. To the contrary, it bolsters Defendants' arguments that Mississippi's lawsuit should be dismissed.

Tarrant is a contract interpretation case. The contract at issue was an interstate compact allocating "water rights among the States within the Red River basin." *Id.* at 2125; *see also id.* at 2130 ("Interstate compacts are construed as contracts under the principles of contract law.").[13]

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[12] *Hood*, 533 F. Supp. 2d at 648 ("While there are apparently no reported cases dealing with interstate subsurface water or aquifers, it is admitted by all parties and revealed in exhibits that the Memphis Sands or Sparta aquifer lies under several States including the States of Tennessee and Mississippi.").

[13] The limited portion of *Tarrant* cited by Mississippi throughout its Response was not the holding of the Court. Rather, it was part of the Court's efforts to construe the provisions of the interstate compact by determining the "intent of the Compact's signatories." *Tarrant*, 133 S. Ct. at 2133. Specifically, the Court was addressing Tarrant's assertion that the language of the interstate compact should be construed to include "cross-border rights" because the provision Tarrant relied

As between Mississippi and Tennessee, it is undisputed that there is no interstate compact concerning the Aquifer. *See* Miss. Resp. 23. In the absence of such a contract, what law governs a dispute between states over their respective rights to use a shared interstate resource? Candor should have required Mississippi to quote Justice Sotomayor's answer to that question on behalf of a unanimous Court:

> Absent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment by the courts … .

Tarrant, 133 S. Ct. at 2125 (emphasis added) (citing *Arizona v. California*, 460 U.S. 605, 609 (1983)).[14]

Tarrant is significant and relevant to this case because it is a unanimous reaffirmation of well-settled law: Mississippi's only judicial remedy for a dispute over the use of the interstate Aquifer is an equitable apportionment lawsuit (and then, only if it can prove a real or substantial injury). As Defendants have maintained and as the decisions of the district court and Fifth Circuit in *Mississippi*

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upon did not mention state borders. As a matter of contract interpretation, the Court found Tarrant's position unconvincing because, "States do not easily cede their sovereign powers, including their control over waters within their own territories … ." *Id*. at 2132. Thus, the Court found that, "[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens." *Id.* (internal quotation marks omitted).

[14] **Appendix A** to this Reply Memorandum contains a number of additional instances in which Mississippi has mischaracterized authorities on which it relies or otherwise has erroneously cited cases.

I made clear, "[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." *Hood*, 570 F.3d at 630.

C. ISSUE PRECLUSION BARS MISSISSIPPI'S CLAIMS.

Mississippi contends that the district court and Fifth Circuit holdings in *Mississippi I* cannot have preclusive effect because those courts lacked jurisdiction "to determine matters between states." Miss. Resp. 37. The flaw in this argument is that every court has jurisdiction to determine whether it has subject matter jurisdiction. And issues adjudicated as a necessary part of a court's determination are entitled to preclusive effect. *See Ruhrgas AG v. Marathon Oil Co*., 526 U.S. 574, 585 (1999) ("If a federal court dismisses a removed case for want of personal jurisdiction, that determination may preclude the parties from relitigating the very same personal jurisdiction issue in state court."); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) ("By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction: That decision will be res judicata on that issue in any further proceedings."); *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938) ("Where adversary parties appear, a court

must have the power to determine whether or not it has jurisdiction of the person of a litigant … .").

In *Mississippi I*, the district court had jurisdiction to determine Tennessee was an indispensable party and to adjudicate those issues necessary to support its dismissal under Rule 19 of the Federal Rules of Civil Procedure. As to those issues adjudicated and affirmed by the Fifth Circuit, the Court's findings are conclusive and entitled to preclusive effect, including: (1) the Aquifer is an interstate resource used by Mississippi and Tennessee; (2) Mississippi's allocation of ground water from the Aquifer can be judicially determined only by an equitable apportionment action filed in the Supreme Court; and (3) unless and until the Aquifer has been equitably apportioned, Mississippi cannot state a viable claim for wrongful diversion of ground water from the Aquifer. *See* Memphis & MLGW Mot. 20-28.

III. CONCLUSION

Disputes between states over their respective rights to use an interstate water resource are not new to the Court. Since 1907, the Court has considered each such dispute through the lens of the doctrine of equitable apportionment. The Court has applied equitable apportionment to both navigable and non-navigable interstate streams, to groundwater that is hydrologically connected to interstate surface water and even to migrating wild salmon. The only difference between this case and the

other interstate water disputes heard by the Court is that the primary water resource is below rather than above the ground. The Fifth Circuit correctly found this difference to be of "no analytical significance." *Hood*, 570 F.3d at 630.

Mississippi wrongly argues that the "distinction" between interstate groundwater and interstate surface water is significant enough to warrant the Court's abandoning equitable apportionment and instead applying Mississippi tort law to this dispute. None of the authority cited in Mississippi's Response supports such a drastic shift away from settled law and there is simply no case or authority that supports Mississippi's legally baseless theory of recovery. The unbroken line of Supreme Court precedents is clear—the federal common law of equitable apportionment applies to interstate water disputes. Since the Aquifer has never been so apportioned, Mississippi has no cognizable claim for alleged wrongful taking of groundwater from the Aquifer. 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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APPENDIX

ERRONEOUS CITATIONS IN MISSISSIPPI'S RESPONSE

STATEMENTS IN MISSISSIPPI'S RESPONSE AND AUTHORITY CITED	MEMPHIS AND MLGW'S CORRECTIONS AND CLARIFICATIONS
"Mississippi was admitted as the twentieth State to the Union on equal footing with the original thirteen colonies … including sovereign ownership, control, and dominion over the land and waters within its territorial boundaries." Miss. Resp. 8 (emphasis added). Citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-78 (1977); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *Pollard v. Hagan*, 44 U.S. 212, 222-23 (1845); *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842); *Montana v. United States*, 450 U.S. 544, 551-52 (1981); *Idaho v. Coeur d'Alene Trib*e, 521 U.S. 261, 286-87 (1997).	None of the cases cited by Mississippi stands for the proposition that a state has sovereign ownership, control, and dominion over "waters" within its territorial boundaries. Rather, the cases relied on by Mississippi all concern land or land lying beneath (*i.e.*, "beds" of) waters. *See, e.g.*, *Phillips Petroleum Co.* (land lying under waters influenced by the tide); *Oregon* (land underlying the Willamette River); *Illinois Cent. R.R. Co.* (land on Chicago's lake front); *Pollard* (shore of and soil beneath navigable rivers and the soils under them); *Martin* (land covered with water in the Raritan bay); *Montana* (bed of the Big Horn River); *Idaho* (submerged land and bed of Lake Coeur d'Alene and tributary rivers).

"Mississippi was granted 'full jurisdiction over the lands within its borders, including the beds of streams and other waters.'" Miss. Resp. 9 (emphasis added). Quoting *Rhode Island v. Massachusetts*, 37 U.S. 657, 733-35, 737-40 (1838).	The quoted language does not appear in the cited case.
"Defendants' 'no ownership' arguments for dismissal of Mississippi's claims disregard incidents of ownership held by Mississippi under the public trust doctrine, and the Supreme Court's recognition of a state's 'greater ownership interest' in groundwater water as its most valuable natural resource." Miss. Resp. 10 n.10 (emphasis added). Quoting *Sporhase v. Nebraska*, 458 U.S. 941, 951 (1982).	Mississippi's use of the phrase "greater ownership interest" is taken out of context and extremely misleading. Mississippi omits reference to the very next sentence in the opinion in which the Court finds that, while the appellee's "greater ownership interest" may have some relevance to a Commerce Clause analysis, that interest "is still based on the legal fiction of state ownership." *Sporhase*, 458 U.S. at 951.

"In *Kansas v. Colorado* … the Court held that '[i]n proper original actions' money damages are available." Miss. Resp. 14. Quoting *Kansas v. Colorado*, 533 U.S. 1, 6 (2001).	The phrase "proper original actions" is taken out of context by Mississippi and does not support the proposition for which it is cited. "Proper original action" in the context of *Kansas v. Colorado* meant an original action for breach of an existing interstate compact. Kansas filed an original action seeking money damages for Colorado's breach the Arkansas River Compact negotiated between the two states to "equitably divide and apportion" the waters of the Arkansas River. *Kansas v. Colorado*, 533 U.S. at 5. The Special Master issued a report recommending that Colorado pay money damages for its violation of the compact. *Id*. at 6. The Court found that the Eleventh Amendment did not act as a bar to recovery of money damages. *Id*. at 6. The phrase "proper original actions" appears in a case cited by the Court to support its finding. *See id*. at 7 (citing *Texas v. New Mexico*, 482 U.S. 124, 130 (1987)).

"The Defendants' intentional violation of Mississippi's territorial sovereignty goes to the foundations of the Constitution and its Amendments on which our federal system is built. In this context, the Court possesses the authority to both grant such relief and enforce such remedies as are necessary to prevent such abuses and best promote the purposes of justice." Miss. Resp. 15. Citing *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015).	In *Kansas v. Nebraska*, the Court's analysis concerning its authority to grant relief was the context of a dispute between the two states to <u>enforce the existing interstate compact</u> between them. *Kansas v. Nebraska*, 135 S. Ct. at 1052 (the Court noting its role shifted to "declare rights under the Compact and enforce its terms.") Mississippi's failure to provide that context is extremely misleading. Mississippi also failed to acknowledge that, immediately preceding the language upon which it relied, the Court reaffirmed its long-standing authority to equitably apportion intestate waters: "<u>This Court has recognized for more than a century its inherent authority, as part of the Constitution's grant of original jurisdiction, to equitably apportion interstate streams between States</u>." *Id*. (emphasis added).