

IN THE  
**Supreme Court of the United States**

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STATE OF MISSISSIPPI,  
*Plaintiff,*

v.

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

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

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**OPPOSITION OF THE STATE OF TENNESSEE  
TO THE STATE OF MISSISSIPPI'S MOTION TO EXCLUDE**

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The same day that Mississippi filed its brief in opposition to Tennessee's motion for judgment on the pleadings, it also moved to exclude certain "materials outside Mississippi's Complaint that have been presented by Defendants as part of their motions for judgment on the pleadings." Motion To Exclude ("Mot.") at 3. Mississippi's motion targets three general categories of materials cited by Tennessee: (1) "materials contained within the Appendix" that Mississippi attached to its motion for leave to file its Complaint in the Supreme Court; (2) Mississippi's pleadings in prior litigation, as well as its counsel's "statements" to the Special Master; and (3) "population estimates" drawn from the United States Census. *Id.* at 4. Mississippi's motion should be denied because Tennessee's citation to each of those categories of materials was proper.

*First*, Tennessee properly cited the appendix that Mississippi attached to its motion for leave to file the Complaint in the Supreme Court. On a motion to dismiss, courts "ordinarily examine" the "documents incorporated into the complaint by reference." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Mississippi's appendix, which it attached to its submission when seeking leave to file its Complaint, satisfies that test. *See Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015) (courts "may consider the complaint and any exhibits attached thereto" and "items appearing in the record of the case") (alteration omitted); *Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)

(courts may consider “exhibits attached to the complaint” at the pleading stage) (italics omitted). Mississippi’s decision to include the appendix as part of the record with respect to its Complaint makes the appendix fair game for Tennessee’s motion for judgment on the pleadings.

Mississippi’s choice formally to attach the appendix to its motion for leave, rather than the Complaint itself, does not alter that conclusion. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1383-85 (10th Cir. 1997) (considering, on a motion for judgment on the pleadings, exhibits that the plaintiff “did not formally incorporate by reference or append . . . to its complaint” but instead “attached . . . as an exhibit to its brief in opposition”). Because Mississippi selected those materials, and relied on them in obtaining leave to file the Complaint, it is “obviously on notice of [their] contents” and cannot “dispute the[ir] authenticity.” *Id.* at 1385. Any “rationale” for refusing to consider those materials therefore “dissipates.” *Id.*

*Second*, Tennessee properly cited “the record on appeal” in *Hood ex rel. Mississippi v. City of Memphis*, No. 08-60152 (5th Cir.), the “briefs filed” in that litigation, and Mississippi’s “statements” to the Special Master. Mot. at 4. On a motion to dismiss, a court may consider evidence of prior “judicial proceedings” for their “existence” rather than their “truth.” *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008). Tennessee cited such documents for that

purpose here. Indeed, Tennessee relies on Mississippi's prior pleadings and statements not for the truth of the matters asserted, but for the fact that Mississippi asserted them. *See, e.g.*, Tenn. Mot. for Judgment on the Pleadings ("Tenn. Mot.") at 37-39 (citing *Hood* pleadings as evidence of Mississippi's prior arguments for issue-preclusion purposes); *id.* at 22 & n.7 (citing counsel's statements as evidence of Mississippi's legal position). The Court may consider those facts in evaluating Tennessee's motion. *See, e.g.*, *Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548, 557 (9th Cir. 2003) ("[w]e have discretion to consider a statement made in briefs to be a judicial admission"); *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994) (collecting cases that courts may rely on "public court documents" from prior proceedings at the pleading stage).\*

*Third*, the Court should deny Mississippi's motion to exclude the "population estimates" that Tennessee cites. Mot. at 4. Tennessee cites two population estimates from the United States Census Bureau to demonstrate that DeSoto County, Mississippi, is less populated than Shelby County, Tennessee. *See* Tenn. Mot. at 4 n.2. The Court may consider that evidence because Census estimates are "matters of which a court may take judicial notice." *Tellabs*, 551

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\* The same is true of the "third-party groundwater studies" that Mississippi moves to exclude. Mot. at 4. Tennessee cites those studies not for their truth, but for their existence in demonstrating the likely course of discovery in this action. *See, e.g.*, Tenn. Mot. at 33 n.15 (citing article referenced in Tennessee's Answer to demonstrate a disputed issue that will require discovery).

U.S. at 322; *see United States v. Esquivel*, 88 F.3d 722, 726-27 (9th Cir. 1996) (“census documents” qualify for “judicial notice” because “they are not subject to reasonable dispute”).

## CONCLUSION

The Court should deny Mississippi’s motion to exclude.

Respectfully submitted,

/s/ David C. Frederick

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## **CERTIFICATE OF SERVICE**

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

/s/ David C. Frederick  
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