

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MISSISSIPPI,)
)
) Plaintiff,)
)
) v.) No. 143, Orig.
)
TENNESSEE, CITY OF MEMPHIS,)
)
TENNESSEE, AND MEMPHIS LIGHT,)
)
GAS & WATER DIVISION,)
)
) Defendants.)

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19
20
21
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| | | |
|----|----------------------------------|-------|
| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF: | PAGE: |
| 3 | JOHN V. COGHLAN, ESQ. | |
| 4 | On behalf of the Plaintiff | 5 |
| 5 | ORAL ARGUMENT OF: | |
| 6 | DAVID C. FREDERICK, ESQ. | |
| 7 | On behalf of the Defendants | 35 |
| 8 | ORAL ARGUMENT OF: | |
| 9 | FREDERICK LIU, ESQ. | 58 |
| 10 | For the United States, as amicus | |
| 11 | curiae, in support of overruling | |
| 12 | the Plaintiff's exceptions | |
| 13 | REBUTTAL ARGUMENT OF: | |
| 14 | JOHN V. COGHLAN, ESQ. | |
| 15 | On behalf of the Plaintiff | 74 |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: I have the
4 honor to announce on behalf of the Court that
5 the October 2020 term of the Supreme Court of
6 the United States is now closed and the October
7 2021 term is now convened.

8 I'd like to begin by noting that
9 Justice Kavanaugh will be participating in the
10 argument today remotely.

11 Today's orders of the Court have been
12 duly entered and certified and filed with the
13 clerk.

14 I am also pleased to welcome Gail
15 Curley as the new Marshal of the Court. Marshal
16 Curley retired from the United States Army this
17 summer, where she held the rank of Colonel, and
18 was most recently Chief of the National Security
19 Law Division of the Judge Advocate General. We
20 wish her well in her service as the Court's 11th
21 Marshal, which she commenced on June 21.

22 We will hear argument first this
23 morning in Original Case 143, Mississippi
24 against Tennessee.

25 Mr. Coghlan.

1 ORAL ARGUMENT OF JOHN V. COGHLAN

2 ON BEHALF OF THE PLAINTIFF

3 MR. COGHLAN: Mr. Chief Justice, and
4 may it please the Court:

5 The Court should reject the Special
6 Master's conclusion that equitable apportionment
7 is Mississippi's sole remedy because it's a
8 remedy that redresses the wrong injury.
9 Mississippi does not claim that Defendants are
10 taking more than their fair share of
11 groundwater. Rather, Mississippi's case turns
12 on a different question: Do Defendants have the
13 right to control groundwater while it is located
14 within Mississippi's sovereign territory?

15 And the Court has answered this
16 question in Tarrant Regional Water District
17 versus Herrmann. There, in considering an
18 interstate surface river that had already been
19 apportioned, the Court recognized an injury
20 other than that of an upstream state harming a
21 downstream state by taking too much water.
22 Specifically, the Court recognized that one
23 state may not divert water from another state's
24 sovereign territory absent a waiver of that
25 sovereignty.

1 And, here, it's undisputed that
2 Tennessee is diverting groundwater from
3 Mississippi without Mississippi's permission and
4 they do so knowingly. In the 1960s, the U.S.
5 Geological Survey warned them it was happening.
6 But rather than stop, Defendants opened new well
7 fields within three miles of the border and
8 substantially increased their pumping.

9 As of 2014, when Mississippi filed its
10 complaint, they had suctioned more than 400
11 billion gallons of groundwater across the
12 border. They've increased the cost of
13 Mississippi's own groundwater pumping. And by
14 their own admission, Defendants' pumping is
15 draining an overlying surficial aquifer that
16 record evidence indicates is pulling
17 contaminants down into the aquifer at issue in
18 this case.

19 Now the Special Master, in reaching
20 its conclusions, asked whether the Middle
21 Claiborne Aquifer was an interstate resource.
22 This was the wrong question to ask because the
23 answer doesn't matter. Even if the aquifer is
24 an interstate resource, Mississippi still
25 possesses sole and exclusive control over

1 groundwater within its sovereign territory, as
2 recognized in Tarrant and ensured by the
3 Constitution, and Defendants cannot force
4 groundwater across the border without violating
5 this sovereignty.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Well, counsel, you
8 seem to complain about Tennessee pumping water
9 from Mississippi, but you admit that Tennessee
10 does not enter across the border into
11 Mississippi, isn't that correct?

12 MR. COGHLAN: Well, Justice Thomas, we
13 acknowledge that their wells are physically --

14 JUSTICE THOMAS: Okay. So -- but the
15 case that you cite as an intrusion from -- I
16 think it's Tarrant or Tarrant -- wasn't that a
17 cross-border situation?

18 MR. COGHLAN: Well, yes, Your Honor,
19 and we would say that this is a cross-border
20 situation too. So we certainly acknowledge that
21 their wells are physically located in Tennessee,
22 but the pumping is physically crossing the
23 border, unnaturally changing the pressure levels
24 in this aquifer.

25 JUSTICE THOMAS: But isn't that true

1 of any well? I mean, let's say it was a lake
2 and Tennessee was pumping water on its side of
3 the lake. Couldn't you argue that technically
4 it was drawing water from Mississippi?

5 MR. COGHLAN: I -- I think so, Your
6 Honor, and I think the -- the key is where --
7 what is the range of the unnatural effect that
8 is controlling the water? And so, here, it's --
9 it's undisputed that there -- these wells create
10 cones of depression that are measurable,
11 limited, and controllable and predictable. And
12 so Tennessee is exercising control over the
13 groundwater within that area.

14 JUSTICE THOMAS: But couldn't
15 Tennessee make the exact same argument about
16 you? Couldn't Tennessee, Arkansas, Missouri all
17 make the same argument that whenever you pump
18 you're causing similar problems for them?

19 MR. COGHLAN: They certainly could,
20 and we should be held to the same standard, Your
21 Honor. We don't believe that Mississippi is
22 pulling any groundwater or exercising control
23 over groundwater extraterritorially. Certainly,
24 if that was the case, Mississippi should be held
25 to the same standard.

1 JUSTICE THOMAS: Lastly, and I'll be
2 done, do you have any cases that suggest that --
3 or to support your argument on that point, that
4 the mere fact that you draw from the same well
5 without entering another state is actionable?

6 MR. COGLAN: Well, Your Honor, I -- I
7 would point back to -- to Tarrant in this sense,
8 that Tarrant doesn't specifically say that there
9 has to be a physical crossing of the border.
10 Tarrant focuses on the water and who's
11 exercising control over the water.

12 And so we would -- I would contend
13 that, here, it's Tennessee exercising control
14 over this water unnaturally while it was within
15 Mississippi, essentially creating a vacuum and
16 intentionally putting these vacuums right next
17 to the border to exercise a limited area of
18 control over water and pull it out of
19 Mississippi into Tennessee.

20 JUSTICE THOMAS: All right.

21 CHIEF JUSTICE ROBERTS: Counsel, I
22 think your position comes down to arguing that
23 equitable apportionment is a remedy that should
24 be used only in the case of interstate waters,
25 in addition, you know, to the salmon, who kind

1 of go with the flow.

2 MR. COGHLAN: Mr. Chief Justice,
3 that's not our argument, and I think that
4 Tarrant makes this point because Tarrant dealt
5 with an interstate surface river that had
6 already been apportioned. But I think the
7 problem is equitable apportionment redresses a
8 different type of injury. It addresses a case
9 where states are acting entirely within their
10 own sovereign borders, the unnatural taking of
11 water is occurring entirely within a state's
12 sovereign borders.

13 This is different because this is a
14 state crossing the border, exercising control
15 over that resource beyond the border, so that's
16 why I say it doesn't matter --

17 CHIEF JUSTICE ROBERTS: Well, what
18 other cases would you -- putting aside water,
19 what other cases would you admit are subject to
20 equitable apportionment?

21 MR. COGHLAN: Your Honor, I'm not
22 sure, and I'm not sure the equitable
23 apportionment should or should not apply as a
24 concept to groundwater. I think there are
25 reasons why, based on the nature of groundwater,

1 it might not make sense.

2 But I think the Court doesn't need to
3 address that question about whether or not
4 equitable apportionment should apply to
5 groundwater because, as I say, this is a
6 different type of injury. This is an injury
7 where one state is reaching across the border
8 and exercising control --

9 CHIEF JUSTICE ROBERTS: Well --

10 MR. COGHLAN: -- beyond its sovereign
11 territory.

12 CHIEF JUSTICE ROBERTS: -- putting
13 aside your reaching across the border, I mean,
14 in -- in the absence -- you do -- you concede,
15 don't you, that the aquifer flows from
16 Mississippi into Tennessee?

17 MR. COGHLAN: We -- we concede that
18 there is some water that crosses the border,
19 yes.

20 CHIEF JUSTICE ROBERTS: Well, I
21 suppose then you're -- you're not saying that
22 there's no equitable apportionment of that
23 water?

24 MR. COGHLAN: I think, Your Honor, our
25 point is that whether or not aquifers and

1 groundwater should be subject to equitable
2 apportionment is not the legal issue that we're
3 presenting before the Court.

4 What we're presenting is does
5 Tennessee have the right to control the resource
6 beyond Tennessee's sovereign boundaries in
7 Mississippi when Mississippi has not waived its
8 sovereign right over control of that
9 groundwater.

10 JUSTICE KAGAN: I'm not sure I
11 understand that, Mr. Coghlan. I mean, you're
12 not now saying that this is not an interstate
13 water. You're conceding that it is an
14 interstate water, is that correct?

15 MR. COGHLAN: I don't know that we're
16 conceding it, Justice Kagan. I --

17 JUSTICE KAGAN: You're saying that you
18 win even if it is an interstate water --

19 MR. COGHLAN: That's --

20 JUSTICE KAGAN: -- is that correct?

21 MR. COGHLAN: -- that's correct.

22 JUSTICE KAGAN: Okay. So you're
23 saying it's irrelevant whether it's an
24 interstate water or not?

25 MR. COGHLAN: That's correct.

1 JUSTICE KAGAN: So let's assume that
2 it is an interstate water.

3 MR. COGHLAN: Okay.

4 JUSTICE KAGAN: And you're saying that
5 the reason you should win is because -- is
6 because what? Because Mississippi is
7 essentially doing something unnatural to have
8 access to that interstate water? What --

9 MR. COGHLAN: I'd say, Your Honor,
10 it's that Tennessee --

11 JUSTICE KAGAN: Tennessee, excuse me.

12 MR. COGHLAN: That Tennessee is
13 exercising control over groundwater while it is
14 located within Mississippi's sovereign
15 territory.

16 JUSTICE KAGAN: Well, but Tennessee is
17 doing things, I think you admitted, in -- in --
18 in one of the questions that Justice Thomas put
19 to you -- Tennessee is acting entirely within
20 its own borders. It is having effects on
21 Mississippi, but that's the case with respect to
22 people using a flowing river, that if there's a
23 -- a flowing river, Tennessee might be taking
24 water from it, which has effects in Mississippi.

25 So why is it any different?

1 MR. COGHLAN: Justice Kagan, where I
2 would disagree with you is that Tennessee is
3 acting entirely within its own borders. Their
4 -- their wells are physically located in
5 Tennessee, but this pumping is creating a
6 unnatural area of effect that's predictable,
7 measurable, and controllable, and that area of
8 effect is having physical effect, unnatural --

9 JUSTICE KAGAN: Well, it's have --

10 MR. COGHLAN: -- physical effects --

11 JUSTICE KAGAN: -- it's -- it's
12 predictable, measurable, and controllable when
13 an upstream state takes a lot of water from a
14 river that that will leave the downstream state
15 with less water. All of that is predictable in
16 the exact same way that one state is harming
17 another, and yet we turn to equitable
18 apportionment to deal with that.

19 MR. COGHLAN: And I think, Your Honor,
20 the difference as -- as I -- in this case is
21 that in all of the Court's equitable
22 apportionment cases, the state who's, you know,
23 unnaturally having an effect on the water by
24 taking and removing water is acting, and the
25 effect of that is occurring -- the direct effect

1 of that is occurring entirely within the state's
2 sovereign territory and that whether or not the
3 water ultimately doesn't reach the downstream
4 state because it doesn't flow there is -- is
5 incidental, whereas, here, there is a direct
6 intentional effect.

7 The -- the -- the purpose of pumping
8 is to move water. And Tennessee is putting
9 these wells next to the border, creating a
10 vacuum, and of -- of a measurable area of
11 effect, and intentionally pulling the water out
12 of Mississippi and exercising control, direct
13 control I would say, over that groundwater while
14 it is within Mississippi's sovereign territory.
15 And I think --

16 JUSTICE SOTOMAYOR: Counsel, can you
17 please explain to me how that's different from a
18 dam, if Tennessee built a dam and put it on the
19 Tennessee side, it's completely on its side, and
20 it's interfering with the natural flow of water
21 to Mississippi? So how is that different than
22 putting a well that interferes with the natural
23 flow of the groundwater?

24 MR. COGHLAN: Well, Justice Sotomayor,
25 I don't know that it would be appropriate to --

1 to dam a water, but the difference I would say
2 is -- is this: that creating a dam within your
3 own sovereign territory is an action occurring
4 within your own sovereign territory. The --
5 the -- the physical direct effect of it is
6 within Tennessee if that's what's happening.

7 Pumping here is exercising control
8 over the water while it is physically located in
9 Mississippi. In -- in the example of the dam,
10 the physical control over the water is occurring
11 entirely within Tennessee.

12 Here, it's occurring within
13 Mississippi's sovereign territory, where
14 Mississippi has the exclusive right to exercise
15 control over the groundwater.

16 JUSTICE SOTOMAYOR: May I turn your
17 attention to an issue you didn't mention, which
18 is whether you should be given leave to amend or
19 not? That is what your -- the other side is
20 pointing to as their exception.

21 Could you tell me -- you've been
22 litigating this case for over 16 years. You
23 started in the Fifth Circuit. You went to the
24 district court, you went to the circuit court;
25 both courts told you you've got to seek

1 equitable apportionment. You come here in 2010.
2 We tell you the same thing.

3 Now this is the third time you've done
4 this. This -- this time you explicitly disclaim
5 any claim for equitable apportionment.

6 When is enough enough? When should
7 you be stopped from amending and seeking
8 equitable apportionment, assuming you lose? But
9 it is a question that's open in this case.

10 MR. COGHLAN: Well --

11 JUSTICE SOTOMAYOR: It's only an
12 assumption I'm working from, but when is enough
13 enough?

14 MR. COGHLAN: Well, Your Honor, I
15 think there's a recognition in equitable
16 apportionment cases that it's prospective, and
17 it's for future injury. It's not to rectify
18 past injury. That's part -- that's part of the
19 reason why we think it's the wrong remedy here.

20 We also think it doesn't redress the
21 injury over sovereign control of water. But,
22 based on the nature of the remedy and that it is
23 prospective only, I think there's a recognition
24 that states should always have the right to be
25 able to pursue that -- that remedy, particularly

1 here, where, in the interim, Tennessee continues
2 to pull groundwater out of Mississippi.

3 I think it would be inequitable to
4 prevent us from --

5 JUSTICE SOTOMAYOR: Well, why
6 shouldn't we just leave that question alone?
7 Why should we just not decide this case,
8 whatever the decision is, and not decide whether
9 to grant -- to grant permission or not and,
10 assuming you finally say you're going to amend
11 or do amend, let you figure out what's equitable
12 at that time or not?

13 MR. COGHLAN: Well, I -- I think, Your
14 Honor, again, setting aside the fact that we
15 think equitable apportionment is the wrong
16 remedy for -- for this case --

17 JUSTICE SOTOMAYOR: So that goes to my
18 -- begs my question --

19 MR. COGHLAN: Yeah.

20 JUSTICE SOTOMAYOR: -- which is, if
21 you think it's the wrong remedy, can you plead
22 it, number one? Will you plead it, number two?

23 MR. COGHLAN: If -- if the Court
24 disagrees with us and finds that equitable
25 apportionment is the only remedy available to

1 Mississippi, we would still want the option
2 to -- to pursue that. Even if it's -- we think
3 it would be incomplete as a form of relief, we
4 would want to obtain whatever relief is possible
5 for -- for Mississippi.

6 CHIEF JUSTICE ROBERTS: Counsel, you
7 emphasized in your -- your answers so far the
8 concept of physical control of the aquifers. In
9 Mississippi, it's theirs to control.

10 You know, in the western states, they
11 have these, I don't know, wild horses or wild
12 burros, whatever they are, and they don't obey
13 the state lines and they're wandering around and
14 they -- let's just say they go from, you know,
15 New Mexico to wherever.

16 Let's suppose that they're -- I know
17 they're pests, I guess, in some places, but
18 let's suppose they're a valuable resource. If
19 they were in Mississippi and crossed into
20 Tennessee and Tennessee seized them at that
21 point, would that be damaging Mississippi, or
22 could Tennessee say, look, they're on our
23 territory, they're under our physical control,
24 we can exercise dominion over them, period?

25 MR. COGHLAN: Mr. Chief Justice, I

1 think, if they're exercising control within
2 Tennessee, that is distinct from what's
3 happening here, where there's control --

4 CHIEF JUSTICE ROBERTS: Well, I don't
5 care if it's distinct from what's happening here
6 or not. I'm just wondering if -- I -- I would
7 suggest that that's at least in some sense an
8 interstate resource.

9 Normally, under our precedents, those
10 are subject to equitable apportionment. But --
11 but you would say under your theory that, no,
12 that Tennessee could take all the value of that
13 interstate resource just because it happened to
14 be under Tennessee -- in Tennessee under that
15 particular point?

16 MR. COGLAN: Mr. Chief Justice, I --
17 I -- I don't know the answer to that question,
18 but I think the point is this: whatever the
19 limits of that sovereign control are -- and
20 we're not saying here that Mississippi's
21 sovereign control over groundwater is unlimited.
22 Certainly, Congress can place limits on it.
23 This Court, acting appropriately, can place
24 limits on it. Our point is that Tennessee may
25 not limit it in Mississippi by exercising

1 control over it while it is within Mississippi.

2 CHIEF JUSTICE ROBERTS: So I -- so it
3 sounds to me like you're not going to give me an
4 answer on the wild horses?

5 MR. COGHLAN: Well, Mr. --

6 CHIEF JUSTICE ROBERTS: It's an
7 interstate resource that goes back and forth
8 between two different states. You seem to say
9 that if it's in one state, that's theirs. If
10 it's in the other, you know, it's -- it's that
11 state's. And I'm positing a resource that
12 migrates between the two states because some
13 people might think that's what's at issue here.

14 MR. COGHLAN: And, Mr. Chief Justice,
15 I -- I apologize. Your question is whether or
16 not Tennessee could take -- capture all the
17 horses --

18 CHIEF JUSTICE ROBERTS: Yeah.

19 MR. COGHLAN: -- while --

20 CHIEF JUSTICE ROBERTS: Whoever -- you
21 know, in the spring or whenever, they -- they go
22 to Mississippi, and then, in the fall, they go
23 to Tennessee, and can Tennessee, say, just grab
24 -- round them up and say they're ours?

25 MR. COGHLAN: While they're in

1 Tennessee?

2 CHIEF JUSTICE ROBERTS: While they're
3 in Tennessee.

4 MR. COGHLAN: I would suggest yes,
5 they could. Whether or not they could do so to
6 the extent that they would preclude all of those
7 horses from going back to --

8 CHIEF JUSTICE ROBERTS: Yeah, every
9 last one they -- they grab.

10 MR. COGHLAN: Your Honor, probably
11 not. But I -- I would suggest that the
12 difference in the example you're suggesting is
13 -- is that which distinguishes equitable -- all
14 the Court's equitable apportionment cases from
15 -- from that here, which is that in the example
16 Your Honor is, you know, suggesting, Tennessee
17 is acting entirely within Tennessee's borders.
18 It's not acting extra -- extraterritorially.

19 And I'd say that is what distinguishes
20 the case here from Your Honor's example and --
21 and from all the Court's equitable apportionment
22 cases.

23 JUSTICE BREYER: So what -- what -- I
24 have the same kind of question. My
25 understanding -- and you have to -- it's very

1 elementary. I mean, I think water falls from
2 the sky. Some of it's evaporated back. Others
3 of it goes into oceans or lakes or streams. A
4 huge amount goes under water -- underground.
5 It's groundwater, and it runs all over the
6 place. That's why I like the wild horses. My
7 idea of that groundwater is it's going all over
8 the place.

9 MR. COGHLAN: Yes.

10 JUSTICE BREYER: So what's the
11 standard? Are there any cases? What's the
12 standard when one state takes some of that
13 running-around groundwater that another state
14 says, oh, no, you should've stayed here?

15 It sounds to me -- you know, San
16 Francisco has beautiful fog. Suppose somebody
17 came by in an airplane and took some of that
18 beautiful fog and flew it to Colorado, which has
19 its own beautiful water -- air. And somebody
20 took it and flew it to Massachusetts or some
21 other place.

22 I mean, do you understand how I'm
23 suddenly seeing this and I'm totally at sea?
24 It's that the water runs around. And whose
25 water is it? I don't know. So you have a lot

1 to explain to me, unfortunately, and I will
2 forgive you if you don't.

3 MR. COGHLAN: Well, Justice Breyer, I
4 would say this: We're not claiming here that
5 Mississippi owns the water in a sense of
6 absolute title to the water. What we're talking
7 about is the -- the right to exercise control
8 over the resource while it is within the -- the
9 sovereign territory and the borders of
10 Mississippi.

11 And Mississippi is not trying to
12 prevent the water from flowing naturally or to
13 go across the border or -- or prevent the wild
14 horses in the Chief Justice's hypothetical from
15 going across the border.

16 What we're saying is Tennessee does
17 not have a right to exercise any control over
18 them while -- or over -- control over the
19 groundwater while it is within Mississippi.

20 And what -- so what we're proposing is
21 that states can, you know, withdraw groundwater
22 from within as long as the physical effects --
23 and this is something that's measurable and
24 predictable, as I said -- as long as the
25 physical effects of those pump -- that pumping

1 does not encroach and affect the water and
2 control the water outside the -- or in -- in a
3 sister state.

4 JUSTICE KAGAN: Yeah, but you're
5 saying that the question is whether there's an
6 extraterritorial action. But there has not been
7 a trespass. There has not been pumping on
8 Mississippi's land. What there has been is
9 actions on Tennessee's land that have a
10 measurable and predictable effect. That is
11 often true when it comes to water, that one can
12 take action in one state and have effects in
13 another state. I mean, all of our cases in this
14 area are premised on that.

15 So why is it any more true in this
16 case than in any other that there's
17 extraterritorial action as opposed to
18 extraterritorial effects?

19 MR. COGHLAN: Your Honor, because I
20 would say that there's -- the intent of pumping
21 is to move water and to exercise control over
22 the groundwater in this case. And so I come
23 back to the fact that it's -- it's measurable
24 and predictable because that's the area over
25 which states know they're going to be impacting

1 and having a direct effect on the groundwater.

2 And, you know, what Mississippi --
3 what Tennessee and Defendants seem to want to
4 say is, well, if there was a pipe that crossed
5 the border and that made -- made a physical
6 intrusion of space, that Mississippi would win
7 and this case would be different when a pipe
8 doesn't actually do anything to water. It's the
9 pumping that controls the water and causes the
10 water to move from one place to another.

11 And so to say that, well, you need to
12 have a pipe or some sort of physical intrusion
13 of space for this case -- in this exercise of
14 control over the water to be actionable, we
15 think, would elevate form over substance because
16 they don't need a pipe to exercise control over
17 this groundwater.

18 JUSTICE BARRETT: Okay. I have a
19 follow-up on Justice Kagan.

20 JUSTICE KAVANAUGH: Mr. Coghlan --

21 JUSTICE BARRETT: I think what you're
22 asking -- or what she's asking you and pointing
23 out is that it wouldn't work this way if we were
24 talking about water that was above ground. So
25 what is your argument -- and this is kind of

1 what Justice Kagan asked you at the beginning.
2 What is your argument for treating the
3 groundwater differently?

4 I mean, how much of it depends on your
5 assertion that, well, it travels interstate but
6 very slowly, it can take centuries to move from
7 Mississippi into Tennessee? I mean, is it the
8 speed at which the water moves that matters
9 here? And if so, when is it so fast that
10 actually it falls into the -- the aboveground --

11 MR. COGHLAN: Well --

12 JUSTICE BARRETT: -- kind of category?

13 MR. COGHLAN: Well, Your Honor, our
14 view is that this principle would apply equally
15 to groundwater, to surface water, to -- to other
16 types of resources. And we think that's what
17 the Court recognized in Tarrant when it
18 recognized this concept when dealing with an
19 interstate surface river that had already had
20 the remedy of apportionment applied and
21 recognizing that there was a different type of
22 injury because, in that case, Texas was seeking
23 to divert water and exercise control over it
24 while it was within Oklahoma's sovereign
25 territory.

1 So I -- I would posit that it does --
2 it does not matter that the water here is
3 groundwater in the subsurface. The principle
4 should apply equally and we think the Court has
5 found it to apply equally with surface water in
6 Tarrant.

7 JUSTICE GORSUCH: I'd like to --

8 JUSTICE KAVANAUGH: Mr. Coghlan --

9 JUSTICE GORSUCH: Oh, go -- go ahead,
10 Justice Kavanaugh.

11 CHIEF JUSTICE ROBERTS: Justice --
12 Justice Kavanaugh.

13 JUSTICE KAVANAUGH: The amicus brief
14 of eight states says that your position would
15 "inject dangerous uncertainty into established
16 systems of natural resource management and
17 undermine an established process to resolve
18 disputes over a natural resource."

19 So I just wanted to get your response
20 to those states which seem to suggest that your
21 position would cause a lot of problems in how to
22 manage these resources.

23 MR. COGHLAN: Well, Justice Kavanaugh,
24 the states' amicus is premised on the notion
25 that there is no known duty. And we would posit

1 there is a known duty here. The Court has
2 recognized it in -- in Tarrant, is that states
3 can only exercise control, sovereign control,
4 over a resource within their own borders.

5 So I think what we're asking to do is
6 for the Court to just simply extend the
7 principles recognized in Tarrant to the -- to
8 the case -- which are known duties, to the case
9 here.

10 And I think I would respond to the
11 western states by saying, what would happen if
12 Tennessee wins? And I think the danger there is
13 -- is what we're already seeing here, where you
14 have both Mississippi and Tennessee pumping on
15 each side of the border, trying to have a tug of
16 war over this groundwater at issue, unnaturally
17 draining the -- the aquifer and damaging it when
18 -- if, based on the nature of groundwater, if
19 both states pumped away from the border, neither
20 state would have any impact whatsoever on the
21 groundwater within the -- the neighboring state.

22 And I think that's unique about --
23 about groundwater. But -- but Tennessee could
24 have gotten all the groundwater and pumped as
25 much groundwater as it wanted and had zero

1 effect on the groundwater in Mississippi if it
2 had -- if the cones of depression were not
3 crossing the border. And so this is an area
4 where it's distinct from surface water because
5 there isn't this natural leveling out of water
6 when -- when you take it out. There's only a
7 limited area of effect when you're pumping
8 groundwater outside of which there's no impact
9 whatsoever on the rest of the aquifer.

10 And I think that's another -- that's a
11 reason why, conceptually, equitable
12 apportionment may not make sense to apply to
13 groundwater, because it's not about the amount
14 of groundwater coming out; it's purely about
15 where that groundwater is -- is -- is coming
16 from.

17 But, to -- to -- to answer your
18 question directly, Justice Kavanaugh, we do not
19 believe that there would be the detrimental
20 effects that the western states complain of.

21 CHIEF JUSTICE ROBERTS: Counsel, I
22 just have one additional question. If you
23 prevail, then, presumably, Tennessee could bring
24 -- or could bring a counterclaim against you in
25 those situations where your wells take water

1 from Tennessee, right?

2 MR. COGHLAN: That is true, Your
3 Honor, but I --

4 CHIEF JUSTICE ROBERTS: Okay. Then --
5 then, if they do, presumably, the normal thing
6 would be I'd take whatever you owe -- Tennessee
7 owes you and whatever you owe Tennessee and set
8 it off against the other and that's what would
9 happen, right?

10 MR. COGHLAN: I -- it -- it could,
11 Your Honor. I think that it would be a
12 motivating factor for states to come and
13 negotiate interstate contact.

14 CHIEF JUSTICE ROBERTS: Okay. So, if
15 it could, that starts to sound a lot like
16 equitable apportionment. How is it different at
17 the end of the day?

18 MR. COGHLAN: Well, in the sense that
19 it would motivate states to -- to come and
20 negotiate, we think it would have -- it would
21 have -- be similar to equitable apportionment
22 in -- in that respect.

23 CHIEF JUSTICE ROBERTS: Thank you.
24 Justice Thomas?

25 JUSTICE THOMAS: I have no further

1 questions.

2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer?

4 Justice Alito? Nothing?

5 Justice Kagan?

6 Justice Gorsuch?

7 JUSTICE GORSUCH: I -- I do have one
8 quick question just to follow up on Justice
9 Sotomayor's line of questioning to you, counsel.

10 Suppose you fail to prevail here
11 today. I'm -- I'm wondering what we do next.
12 The Special Master recommended that we grant
13 leave to amend to add an equitable apportionment
14 claim. But we don't actually have a motion for
15 leave to amend before us. And we have a
16 standard that has to be met among other things,
17 whether it's a logical outgrowth of the existing
18 litigation, timeliness, as Justice Sotomayor
19 alluded to, and I'm just wondering what you
20 would have the Court do should you fail to
21 prevail?

22 MR. COGHLAN: We'd ask the Court to --
23 to grant us leave to amend, and, of course, the
24 Court could --

25 JUSTICE GORSUCH: Have you -- have you

1 moved? Have you sought to meet the standards?
2 I -- I -- I haven't seen that in the papers
3 before us.

4 MR. COGHLAN: We -- we have not yet,
5 Justice Gorsuch.

6 JUSTICE GORSUCH: So, again, what
7 would you have this Court's judgment line look
8 like should you fail to prevail? We wouldn't
9 grant leave to amend because there's no motion
10 pending before us. Do we just say, as Justice
11 Sotomayor said, nothing?

12 MR. COGHLAN: Justice Gorsuch, we
13 think the Court could grant leave to amend but
14 certainly reflect the principles you -- you just
15 mentioned, that if Mississippi does not behave
16 timely or -- or does not file a -- a proper
17 motion, that the Court could obviously deny
18 that.

19 JUSTICE GORSUCH: So give you a
20 certain number of days in which to present the
21 Court with a proper motion? Is that the
22 suggestion?

23 MR. COGHLAN: I wouldn't put a
24 specific number and obviously would defer --

25 JUSTICE GORSUCH: Of course not. No

1 -- no -- no one wants a deadline. But should --
2 give you an opportunity within a reasonable
3 period of time, and we might set a deadline for
4 a motion. Is -- is that -- is that your
5 suggestion?

6 MR. COGHLAN: We would -- I think the
7 Court certainly could do that. And -- and
8 whatever number the Court would feel would be
9 reasonable, we would act within that period.

10 JUSTICE GORSUCH: Thank you very much,
11 counsel.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh.

14 JUSTICE KAVANAUGH: Just picking up on
15 that, isn't your position that you want to
16 preserve the right to seek equitable
17 apportionment into the future even if you don't
18 seek it now, or am I misunderstanding that?

19 MR. COGHLAN: I -- I -- I think it's
20 both, Justice Kavanaugh. We would like the
21 opportunity to -- to replead in this matter, but
22 also, because equitable apportionment is a
23 prospective remedy only, we would want the
24 opportunity to pursue that in the future in a
25 new action if -- if needed.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: None.

5 CHIEF JUSTICE ROBERTS: Okay. Thank
6 you, counsel.

7 Mr. Frederick.

8 ORAL ARGUMENT OF DAVID C. FREDERICK
9 ON BEHALF OF THE DEFENDANTS

10 MR. FREDERICK: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 Tennessee has lawfully pumped
13 groundwater out of the Middle Claiborne Aquifer
14 on its side of the border for more than 130
15 years. The Special Master correctly recommended
16 dismissal of Mississippi's complaint but erred
17 in suggesting that Mississippi be freely granted
18 leave to amend.

19 First, the Equitable Apportionment
20 Doctrine provides the exclusive remedy for
21 complaints about the usage of water that flows
22 from one state into another and the actions in
23 one state affect interstate water flow.
24 Mississippi's claim for more than \$600 million
25 in damages, therefore, must be dismissed.

1 Mississippi's principal argument in
2 response is that the aquifer water flows slowly.
3 But this Court has never conditioned the
4 application of the Equitable Apportionment
5 Doctrine on water velocity.

6 Here, even Mississippi's expert
7 acknowledged that in predevelopment conditions,
8 more than 37 million gallons of water per day
9 flowed out of Mississippi and into adjoining
10 states.

11 Second, the Master did not consider
12 how this case would fundamentally change if
13 Mississippi were freely allowed to amend to
14 plead an equitable apportionment action at this
15 stage after disavowing an apportionment claim
16 for the last decade.

17 Nor did the Master consider that
18 Mississippi can show no injury at all from
19 Tennessee's water withdrawals. The undisputed
20 facts are the aquifer's water volume in the
21 greater Memphis and northern Mississippi area
22 has changed very little in the past 100 years.
23 The aquifer is fully saturated and in a state of
24 equilibrium. And Mississippi has increased its
25 own pumping dramatically and can extract all the

1 water it needs.

2 Mr. Chief Justice, I welcome the
3 Court's questions.

4 JUSTICE THOMAS: Mr. Frederick,
5 counsel for Mississippi says that if you simply
6 moved your pumps away from the border, all would
7 be well. What do you make of that?

8 MR. FREDERICK: Well, two things.
9 There was testimony on this at the trial.
10 Dr. Sprule was asked that question and said that
11 Memphis could engage in a massive relocation,
12 and then Mississippi's other expert, Mr. Wiley,
13 said that it would have no appreciable effect on
14 the cone of depression.

15 Dr. Sprule, on cross-examination,
16 conceded that Mississippi's own pumps are closer
17 to the border than those in Tennessee. And when
18 Dr. Waldron, our expert, testified, he said that
19 that pumping was causing a reversal in the
20 change in the water flow and that Mississippi
21 was, in fact, intercepting -- that was his words
22 -- water that would have flowed from Mississippi
23 to Tennessee in its natural state.

24 JUSTICE THOMAS: And you oppose
25 amending the complaint here to include

1 appportionment, equitable appportionment. What is
2 to stop Mississippi from simply filing a new
3 motion in this case and starting all over?

4 MR. FREDERICK: Nothing would stop it,
5 but Mississippi would have to meet the standards
6 for a material change in circumstances that
7 would warrant this Court's consideration of an
8 equitable appportionment claim.

9 In the case of Colorado versus Kansas,
10 decided in the early 1940s, this Court said that
11 the standard was a material change in
12 circumstances. That, of course, was the
13 long-running dispute over the Arkansas River.

14 And what the Court said was that if
15 that material change in circumstances has not
16 occurred, then denial of a motion for leave to
17 file a complaint is the appropriate disposition.

18 JUSTICE THOMAS: Thank you.

19 JUSTICE SOTOMAYOR: Mr. Frederick, you
20 claim that the equitable appportionment is the
21 exclusive remedy. The amici law professors say
22 it shouldn't be, that a nuisance action could
23 also be appropriate.

24 If all they wanted was to stop you
25 from drawing water because the way you're

1 drawing it harmed the aquifers, which is, I
2 think, what I heard them say earlier, why
3 wouldn't a nuisance action be appropriate?

4 MR. FREDERICK: A nuisance action
5 would be appropriate if there was damage to the
6 water or if there was some issue of subsidence
7 or other water quality. I think this Court's
8 case in City of Milwaukee is representative of a
9 cross-boundary tort.

10 But what they are complaining about is
11 our usage of the water that flows in interstate
12 --

13 JUSTICE SOTOMAYOR: So it's a --

14 MR. FREDERICK: -- waters.

15 JUSTICE SOTOMAYOR: -- question of how
16 they pleaded?

17 MR. FREDERICK: I think that's
18 correct. And in the nuisance context, the law
19 professors don't say exactly how you would
20 administer a nuisance claim under what they are
21 talking about. And I would point out that there
22 was evidence at the trial about the absence of
23 subsidence or any degradation of water quality.
24 We presented that in our Defendants' Proposed
25 Findings of Fact Numbers 246 and 47 on page

1 126A.

2 JUSTICE SOTOMAYOR: One last question.
3 What does a material change mean to you? What
4 would qualify?

5 MR. FREDERICK: I think what would
6 qualify is if Mississippi was able to plead
7 plausibly and with the suggestion that clear and
8 convincing evidence would follow that it was
9 unable to extract water, that it had to engage
10 in significantly increased costs in order to
11 pump, that it suffered a degradation in water
12 quality or that there was evidence of subsidence
13 in the aquifer as a result of pumping.

14 Those would be of the type that you
15 would measure their significance based on the
16 classic standard that you would look --

17 JUSTICE SOTOMAYOR: Given the way this
18 has been litigated, those issues have not
19 actually been decided by anyone.

20 MR. FREDERICK: They haven't been
21 decided, but they're --

22 JUSTICE SOTOMAYOR: So why should we
23 even say don't amend until there's a material
24 change? Because we don't even know what the
25 baseline is right now.

1 MR. FREDERICK: Well, what you would
2 say is that -- and I think to your earlier
3 question to my friend, I think you would say
4 nothing. Where the Special Master erred was in
5 suggesting that there be a free motion to amend
6 without actually following through the necessary
7 steps, a motion satisfying of the standard for a
8 material change in circumstances.

9 And you do have cases on this, Your
10 Honor. Nebraska versus Wyoming, which looked at
11 the question of what constitutes a fundamentally
12 different change of character of the claim, is
13 directly on point, as is the Colorado versus
14 Kansas case.

15 So you do have standards. It would be
16 Mississippi's burden, of course, to prove that
17 since 2010, when this Court denied Mississippi's
18 complaint in the alternative for an equitable
19 apportionment, that circumstances had changed
20 sufficiently to warrant allowing it to go
21 forward.

22 JUSTICE KAGAN: Mr. Frederick, suppose
23 that Mississippi had an entirely intrastate lake
24 that was near the Mississippi/Tennessee border
25 but was -- all the borders of this lake were in

1 Mississippi. And suppose -- and suppose that
2 there was some newfangled technological way of
3 Tennessee helping itself to the waters of that
4 lake.

5 Would that be an equitable
6 apportionment claim, or, in that case, would
7 Mississippi have a different kind of action?

8 MR. FREDERICK: I think it would have
9 a different kind of action. The Equitable
10 Apportionment Doctrine has applied to interstate
11 bodies of water in which there is flow, there's
12 natural flow. And under your hypothetical,
13 Justice Kagan, there would be no interstate
14 character to the water.

15 JUSTICE KAGAN: Is -- is there such a
16 thing as, when you're dealing with groundwater,
17 looking at groundwater and saying that it moves
18 so slowly, with the consequence of transferring
19 so little water between these states, that we
20 should treat it as my hypothetical rather than
21 treat it in the same way as, say, an interstate
22 river?

23 MR. FREDERICK: There was no evidence
24 at the trial, the five-day trial, about that,
25 although there was a lot of questioning about

1 that concept, and all of the hydrologists
2 acknowledged a couple of key facts for the
3 court.

4 One is there is no physical barrier
5 between the water in the ground under Tennessee
6 and under Mississippi. There is no distinction
7 in the subsoil surface, the sands and the
8 composition. It is one continuous hydrological
9 unit. That was acknowledged by all five
10 hydrologists who testified.

11 And so what you would be looking at
12 there, I think, is a situation that would be
13 quite different than the aquifer that we have
14 before us here.

15 Now, on the volume question, Justice
16 Kagan --

17 JUSTICE KAGAN: I mean -- I mean,
18 maybe that would be true -- you -- you started
19 by saying, oh, look, this is, like, 37 million
20 -- what was it, 37 --

21 MR. FREDERICK: Thirty-seven million
22 gallons per day.

23 JUSTICE KAGAN: Right. And -- and --
24 and you suggested that that's a relevant fact
25 such that if there weren't 37 million, if there

1 were 37,000 or if there were 37, we should maybe
2 have a different way of analyzing this question,
3 is that right?

4 MR. FREDERICK: I don't think so
5 because, in the interstate lake hypothetical
6 that Justice Thomas, I believe, posed, you'd
7 still have the same kind of phenomenon. Water
8 in its natural state is always going to be
9 moving. Water molecules will be moving.

10 Now how quickly they move ought to be
11 irrelevant to the application of the Equitable
12 Apportionment Doctrine for a couple of reasons.
13 Legally, the Court has never said that, and in
14 the Oregon versus Washington case, where it
15 looked at whether or not the anadromous fish --
16 sorry, Idaho case, the anadromous fish, those
17 fish were out at the ocean for years before they
18 came back to spawn.

19 And the Court has also considered
20 situations where rivers have run dry for long
21 stretches of time before there's any water flow.
22 It nonetheless has held that the Equitable
23 Apportionment Doctrine applies.

24 But, on the volume point, Justice
25 Kagan, I think it's important to take into

1 account the size, the sheer size, of this
2 aquifer. Not only does it encompass parts of
3 eight -- it lies underneath parts of eight
4 different states, but the thickness of the
5 aquifer is huge. In parts of it, it's as much
6 as 500 feet. In parts under Tennessee, it goes
7 to 1100 feet.

8 And so one inch of movement per day,
9 which is what the testimony was at trial, can
10 translate into tens of millions of gallons of
11 water per day. And, of course, if you were to
12 annualize that, you'd be able to cover the
13 entire District of Columbia in more than a foot
14 of water by the amount that is moving one inch
15 at a time out of this aquifer.

16 JUSTICE GORSUCH: Mr. Frederick, our
17 Doctrine of Equitable Apportionment arises in
18 the area of moving water, of rivers, and you're
19 asking to extend it to groundwater, and you've
20 made a very strong argument for why that might
21 be sound.

22 I'm -- I'm wondering what the limiting
23 principle is, however, and what we're buying
24 here. Is every aquifer in -- in the country
25 that might have some interstate effect now going

1 to be part of this Court's original
2 jurisdiction? Is -- is Justice Breyer's fog now
3 part of the Court's original jurisdiction? Is
4 the Chief Justice's herd of wild burros, who may
5 or may not be a nuisance, part of this Court's
6 original jurisdiction now?

7 MR. FREDERICK: Well, what the Court
8 has held is that the Equitable Apportionment
9 Doctrine applies to natural resources,
10 principally water and, in the one case of the
11 fish, to the public trust doctrine.

12 JUSTICE GORSUCH: But -- but so far --

13 MR. FREDERICK: And --

14 JUSTICE GORSUCH: -- it has been about
15 moving water and the fish. You're right. I
16 forgot about the fish. Okay. But that's part
17 of the moving water, the salmon in the river.
18 And this is an extension. And I'm -- I'm --
19 just analytically, what are the outer bounds of
20 it? You can sell me on how it's not a big deal.
21 Fine, I got it. But what are the outer bounds
22 of this principle?

23 MR. FREDERICK: I think --

24 JUSTICE GORSUCH: Where does it end?

25 MR. FREDERICK: I think the outer

1 bounds are where this Court recognizes the
2 public trust doctrine to apply. In those
3 resources that are outside the public trust
4 doctrine, the Court has not applied the
5 equitable apportionment principle. And so, in
6 those -- in those resources -- air is one of
7 them. Justice Holmes recognized that in the old
8 Illinois Central case over --

9 JUSTICE GORSUCH: Right.

10 MR. FREDERICK: -- a century ago.

11 JUSTICE GORSUCH: Right.

12 MR. FREDERICK: So, to Justice Breyer,
13 you know, if there were --

14 JUSTICE GORSUCH: So the wild --

15 MR. FREDERICK: -- such a plane --

16 JUSTICE GORSUCH: -- the wildfires --

17 MR. FREDERICK: -- the fog actually --

18 JUSTICE GORSUCH: -- in California
19 affecting Colorado, the burros -- I'm not aware
20 of any in Mississippi, but there might be some,
21 wild -- all of that's now part of the Court's
22 original jurisdiction?

23 MR. FREDERICK: Well, I -- I would say
24 that, of course, the burden on the complaining
25 state has to be a significant injury of

1 substantial magnitude. That has been the
2 Court's standard for over a century from Kansas
3 versus Colorado. And if the burros or the fog
4 created a significant injury of substantial
5 magnitude, I think it would be appropriate for
6 the Court to exercise its jurisdiction.

7 Sitting here today, I have a hard time
8 seeing that in the real world. But I think that
9 what the Court could say is that you have
10 extended groundwater in certain respects to
11 equitable apportionment cases when there has
12 been substantial pumping of groundwater that has
13 affected surface flows.

14 You did that in the Oregon versus
15 Washington case back in the 1930s, where there
16 were 300 pumps of water on the Oregon side of
17 the boundary, and the Court said that Washington
18 nonetheless could show no injury to its own
19 irrigators because there was subsur- --
20 subsurface flow that was occurring.

21 You've held that in other cases
22 involving compacts, where you've enforced
23 compact decrees for surface flows
24 notwithstanding the fact that there have been
25 substantial water pumping going on on either

1 side of the state.

2 And so I think that it's not that far
3 of an extension to say that where Mississippi
4 has uniquely pleaded a claim about an aquifer
5 that all the evidence showed at trial was
6 connected to surface streams, and, here, the
7 Wolf River, itself an interstate river, flows
8 directly into the Middle Claiborne Aquifer at a
9 recharge zone in the eastern part of the area
10 that we're talking about.

11 JUSTICE BREYER: I'm still nervous
12 about the question that Justice Gorsuch is
13 asking. I mean, there's groundwater under every
14 state. I mean, every state will start suing
15 each other, except maybe Hawaii or Alaska. And
16 we haven't seen a lot of cases like that.

17 And my -- my thought then is what you
18 think about is maybe it could be done, but maybe
19 it's better left to compacts or to Congress.
20 And should we say anything about amendment?
21 That's where the -- that's where we have to
22 decide something here, because anything we say,
23 of course, they have a right to ask to amend.

24 MR. FREDERICK: Yes.

25 JUSTICE BREYER: But, if we say a word

1 about it, that's going to be taken as this is a
2 totally appropriate kind of suit, and wild
3 horses we worry about later, and -- and I don't
4 know where it's going.

5 MR. FREDERICK: Well, Justice Breyer,
6 two points in response to your question.

7 One, I think their approach spawns
8 much more litigation than our approach.
9 Equitable apportionment is about sharing. It's
10 about sharing scarce resources when those
11 resources become scarce. It's not about money
12 grabs because of the way that flow has been
13 affected by pumping.

14 And, Chief Justice, you asked about
15 Tennessee counterclaims. Dr. Waldron testified
16 that there was significant -- tens of millions
17 of -- of gallons of water every day that was
18 flowing into Tennessee and out of Tennessee and
19 into Memphis and -- and into Mississippi.

20 And so what the evidence at trial
21 would show would be that there would be
22 substantial counterclaims if that were the
23 standard. And that's why we respectfully
24 suggest it should not be the standard.

25 Now, with respect to the fact that

1 aquifers are under many, many states, in fact,
2 most of the states in the country, respectfully,
3 the question ought to be is there scarcity and,
4 if there is scarcity, is there a doctrine that
5 calls for conservation, calls for historic uses,
6 calls for weighing the harms and benefits, calls
7 for prospective action that would enable the
8 scarce resource to be shared? And the answer is
9 yes.

10 JUSTICE BREYER: Well, maybe we should
11 just wait to decide that matter, which could
12 lead to all kinds of lawsuits, until we have to
13 decide it.

14 MR. FREDERICK: You could, but what I
15 think you should say is that this is
16 indisputably an interstate water resource in
17 which there is flow. If there is a remedy, it
18 falls under the Equitable Apportionment
19 Doctrine. Mississippi has disclaimed an
20 equitable apportionment claim. Therefore, its
21 complaint should be dismissed. Period.

22 JUSTICE BARRETT: And not specify with
23 or without prejudice for leave to amend?

24 MR. FREDERICK: I don't --

25 JUSTICE BARRETT: Just say nothing?

1 MR. FREDERICK: I -- I thought I just
2 captured what I think is the appropriate
3 disposition. They haven't moved to amend their
4 complaint. They've been very careful not to say
5 whether they plan to do it. Their entire gambit
6 here has been to get Tennessee to pay them
7 hundreds of millions of dollars for water that
8 in part they have intercepted at the boundary.

9 So it's not -- and they say this on
10 page 36 of the blue brief. They do not claim
11 that Tennessee is taking out more than its fair
12 share of the water. That's not their claim.

13 Their claim is that they think they
14 have an ownership right that entitles them to
15 charge Tennessee for water. And that, we think,
16 the Court should say, no, that's not the correct
17 statement of the law.

18 JUSTICE KAVANAUGH: Shouldn't a
19 dismissal be without prejudice to them filing an
20 equitable apportionment action? It would seem
21 extreme to me to bar them from doing so in the
22 future.

23 MR. FREDERICK: Justice Kavanaugh, I
24 think that the correct disposition would be to
25 dismiss this complaint, their territorial

1 ownership claim, with prejudice. And I would
2 urge the Court to do that to disincentivize any
3 other state from seeking --

4 JUSTICE KAVANAUGH: What -- what --

5 MR. FREDERICK: -- to limit a --

6 JUSTICE KAVANAUGH: Sorry to
7 interrupt. What would the effects of that be on
8 their ability to file an equitable apportionment
9 claim even if they can't show a material change
10 in circumstances?

11 MR. FREDERICK: You would address that
12 at the motion for leave to file a new complaint,
13 where they would be put to their burden to show
14 that there's been a material change and there
15 has been a significant injury of serious
16 magnitude, and Tennessee would respond depending
17 on what they pleaded in their new complaint.

18 CHIEF JUSTICE ROBERTS: Mr. Frederick,
19 thank you. I've had a little trouble following
20 the science here. Is this really water we're
21 talking about? I mean --

22 MR. FREDERICK: Yes.

23 CHIEF JUSTICE ROBERTS: -- it's
24 complete -- well, it's mixed up with silt and
25 small particles and all. If you -- you can put

1 it in your hand, right, and it would be silt?
2 It would be wet, but, until you pump it, it's
3 really not the water, right?

4 MR. FREDERICK: No, the definition of
5 an aquifer is a fully saturated formation,
6 hydrogeological formation, in which there are
7 usable quantities of water.

8 CHIEF JUSTICE ROBERTS: Yeah, yeah, I
9 read that, but "fully saturated" means it's
10 saturating something, right?

11 MR. FREDERICK: Yes. It's sand
12 mostly.

13 CHIEF JUSTICE ROBERTS: It's not like
14 a -- sand, okay. Someone explained to me it's
15 like you're in the -- the side of the shore and
16 you put your foot down and when you lift it up,
17 it kind of fills with water in that gap, right?

18 MR. FREDERICK: That is descriptive of
19 parts of the aquifer, yes.

20 CHIEF JUSTICE ROBERTS: Well, it's the
21 part that I could understand.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: So -- so why
24 should we view it as like -- just like our
25 interstate water cases? I mean, it is an

1 unnatural operation of the pumping, separates
2 out the water, and at that point, it's -- it's
3 usable.

4 MR. FREDERICK: For the --

5 CHIEF JUSTICE ROBERTS: But, before
6 that, you would just call it silt, and if
7 somebody showed you, you know, a handful of
8 silt, they wouldn't say, oh, that's water.

9 MR. FREDERICK: Well, Mr. Chief
10 Justice, I think you would say that it is water
11 because it's some of the finest water that
12 anyone can drink in the United States. This
13 artesian water is absolutely spectacular water
14 that they have pumped, and they have run it over
15 filters that filter out some of the iron and
16 some of the other minerals, but it is very pure
17 water and it is delicious.

18 And I would urge the Court to consider
19 the aquifer -- just because it is -- it is mixed
20 in with sediment does not distinguish what it
21 actually is, which is water when it is pulled
22 out, and it is not a sophisticated scientific
23 operation to do that.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?

2 JUSTICE THOMAS: No questions, Chief.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer?

5 JUSTICE BREYER: No.

6 CHIEF JUSTICE ROBERTS: Justice Alito?
7 No?

8 JUSTICE GORSUCH: Mr. Frederick, on
9 the -- on -- on the question of leave to amend,
10 just to nail that down, would -- would you have
11 any objection to this Court simply resolving the
12 case as before us and saying that there is no
13 leave to amend currently pending before us? We
14 don't need to address it. The Special Master
15 was erroneous to the extent that he suggested
16 there was?

17 MR. FREDERICK: We -- that if -- with
18 that last part, Justice Gorsuch, we would have
19 no objection to that.

20 JUSTICE GORSUCH: Okay.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: No further
24 questions.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: I do have one
3 question following up on the Chief's question to
4 you about separating the water from the silt.

5 What if you could separate out some
6 other thing from the silt, like some sort of
7 mineral, and find some sort of way to pump it
8 and pull it into Tennessee? How would that
9 fare? Would that be subject to equitable
10 apportionment?

11 MR. FREDERICK: No, Your Honor.
12 Minerals have not been subjected to the
13 Equitable Apportionment Doctrine because they're
14 not covered by public trust. They are privately
15 owned, usually through surface ownership rights
16 by personal property. Sometimes they get
17 severed in some states where you can own the
18 surface land and sever off the mineral rights.

19 Those would be treated separately
20 under well-established law.

21 JUSTICE BARRETT: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 MR. FREDERICK: Thank you.

25 CHIEF JUSTICE ROBERTS: Mr. Liu.

1

2

ORAL ARGUMENT OF FREDERICK LIU

3

FOR THE UNITED STATES, AS AMICUS CURIAE,

4

IN SUPPORT OF OVERRULING THE PLAINTIFF'S EXCEPTIONS

5

MR. LIU: Thank you, Mr. Chief

6

Justice, and may it please the Court:

7

Under Mississippi's theory of this

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case, certain groundwater belongs to Mississippi

9

simply by virtue of having passed through

10

Mississippi's territory.

11

There's no support for such a theory.

12

Indeed, Mississippi can't point to a single

13

jurisdiction that has ever allocated groundwater

14

based on such a theory.

15

This Court, when confronted with

16

disputes over the allocation of interstate

17

resources, has applied the Doctrine of Equitable

18

Apportionment. That doctrine represents the

19

most sensible way of allocating an interstate

20

resource because it respects the equal

21

sovereignty of the states.

22

And Mississippi identifies no reason

23

why that doctrine should govern interstate

24

surface water and fish but not the groundwater

25

at issue here. Mississippi's exceptions to the

1 Special Master's report should, therefore, be
2 overruled.

3 I welcome the Court -- the Court's
4 questions.

5 CHIEF JUSTICE ROBERTS: Well, counsel,
6 you say on page 18 of your brief that
7 Mississippi's case is indistinguishable from --
8 from or at least sufficiently similar to all the
9 Court's prior precedents because it's
10 groundwater that -- it crosses across state
11 lines and affects the other state.

12 But there are a lot of other ways in
13 which it's distinguishable. The fact that we
14 were just talking about that it's -- however
15 delicious it might be when you get the silt out
16 of it, it's not too good when the silt's in it
17 and the fact that it's groundwater.

18 And I'm just wondering, this is a case
19 of first impression, isn't it? You really are
20 trying to move this beyond the flowing water and
21 the fish?

22 MR. LIU: Well, it -- it's true that
23 this Court has not addressed directly the
24 question of how to deal with the allocation of
25 water in an aquifer. Our point is that this

1 Court's prior precedents have identified two
2 characteristics of the resources at issues in
3 those cases that justified the application of
4 the Doctrine of Equitable Apportionment.

5 And in this case, those two
6 characteristics, that is, the resource moving
7 naturally across state lines and the fact that
8 one state's use of the resource within its
9 borders affects the presence of the resource in
10 the other, those two characteristics are present
11 here. At least they're sufficiently similar.

12 And so, while there are certainly
13 differences between groundwater and surface
14 water, those are the -- those are the two
15 differences that matter, and they matter
16 because, when those characteristics are
17 satisfied, that's when the Doctrine of Equitable
18 Apportionment makes sense.

19 When those characteristics exist,
20 you're inevitably going to have a conflict of
21 sovereign interests of, on the one hand, the
22 sovereign interest of the state's right to use
23 the water here in Tennessee and, of course, the
24 sovereign -- the interests of the other
25 sovereign to protect its citizens from whatever

1 effects that use may have.

2 And because one state can't simply
3 impose its policy on the other, the Doctrine of
4 Equitable Apportionment does what the best we
5 can do, which is to treat each state as an equal
6 sovereign, take account of all their interests,
7 put both states' bound -- both states' interests
8 on the balance, and then reconcile them as best
9 as we can.

10 JUSTICE KAGAN: Mr. Liu, suppose that
11 instead of drilling their wells straight down,
12 Tennessee drilled its wells, like, on a slant --

13 MR. LIU: Right.

14 JUSTICE KAGAN: -- so that, in fact,
15 the wells did cross the boundary between
16 Tennessee and Mississippi. Is it then an
17 equitable apportionment claim, or, at that
18 point, does Mississippi have a different kind of
19 action?

20 MR. LIU: Well, I want to be clear
21 about what we think the domain of equitable
22 apportionment is. We think this doctrine
23 applies when one state is complaining about the
24 other state's use of the water.

25 So there might still be equitable

1 appportionment as --

2 JUSTICE KAGAN: Well, that's really
3 what Tennessee -- Mississippi would be
4 complaining about, right? Because it's drilled
5 these wells and it's getting all this water.
6 Let's say that the gravamen of the claim is
7 really exactly the same, they're taking our
8 water.

9 This -- the only thing that's
10 different --

11 MR. LIU: Right.

12 JUSTICE KAGAN: -- is the mechanism,
13 that the mechanism they've used is one that does
14 a physical trespass.

15 MR. LIU: Yeah, that -- that's
16 definitely a different case. And I think it's
17 because the -- there's a -- an additional harm
18 there that I think has been understood --

19 JUSTICE KAGAN: But not the harm that
20 anybody cares about. You know, it doesn't
21 matter that it's stepped an inch onto
22 Mississippi's land. What -- you know, what
23 Mississippi is complaining about is we have less
24 water than we used to have.

25 MR. LIU: Well, I -- I think it does

1 matter whether the -- the state is crossing the
2 boundary or not. That -- that isn't -- that
3 isn't a --

4 JUSTICE KAGAN: Well --

5 MR. LIU: -- circumstance where --

6 JUSTICE KAGAN: -- presumably, that
7 would be a very minimal kind of damages, this --
8 the crossing of the border. The damages are
9 going to come from the taking of the water, and
10 the taking of the water, let's presume in my
11 hypothetical, is exactly the same.

12 MR. LIU: If the taking of the water
13 is exactly the same, I think there -- the water
14 would still be subject to equitable
15 apportionment, but one very important factor in
16 how you import -- apportion that water might be
17 how the water was extracted.

18 Again, I just want to be clear there
19 probably is room for a different kind of tort
20 that's actionable because of the trespass, and
21 so I'm not saying that that's -- that's somehow,
22 you know, not -- not as -- not an important
23 boundary that's literally been crossed in that
24 case.

25 Now my friend tries to distinguish

1 this Court's equitable apportionment cases from
2 this case on a number of grounds, but I don't
3 think any of those grounds suffices. One of the
4 things my friend said was: Well, in this case,
5 we have an exercise of Mississippi's sovereign
6 authority. But, of course, that's going to be
7 true in all of this Court's equitable
8 apportionment cases. There's always going to
9 be, for example, an upstream state that's
10 exercising sovereign authority over the water
11 before it passes on to another state.

12 My friend mentioned this unnatural
13 effect of -- of -- of how the water is moving
14 from Mississippi to Tennessee. But, in all of
15 these cases, what you're going to have is some
16 human intervention that extracts the resource
17 from its natural state, whether it's the
18 fishermen in Idaho v. Oregon or the irrigators
19 in Kansas versus Colorado. Here, it's the wells
20 in Tennessee. So that -- that doesn't really
21 distinguish this case.

22 The mechanism by which the water is
23 moving across, that's not different in this case
24 either. In all of these cases, the effect that
25 one state has on the other, the mechanism is

1 through the agency of natural laws.

2 So, in the case of a stream, it's --
3 it's just simple laws of physics that if you
4 take water out of a stream, there's going to be
5 less water downstream.

6 Here, it's really no different. I
7 mean, the -- the experts have put a fancy name
8 on what a cone of depression is, but anyone who
9 has ever removed water from a vessel knows that
10 when you remove the water, more water is going
11 to flow to where you removed it. And -- and
12 that's -- that's simply what's happening here.

13 The one thing my friend also mentioned
14 was the -- the pace of the movement. But the
15 fact that it's moving slowly doesn't change the
16 fact that what we have here is a single
17 continuous resource that moves across state
18 lines.

19 And, as Mr. Frederick emphasized, that
20 movement is hardly trivial. We're talking
21 millions and millions of gallons per day.
22 Compare that to the river at issue in Kansas
23 versus Colorado. There, the Court noted that
24 the flow of the river varied during certain
25 parts of the year and in even some parts of the

1 year ran totally dry.

2 And the Court said, well, that doesn't
3 really matter. What matters is that we're
4 talking about a single continuous river that
5 flows from Kansas to Colorado -- I'm sorry, from
6 Colorado to Kansas. And, here, we're talking
7 about a single continuous aquifer that -- that
8 exists underneath eight different states,
9 including Mississippi and Tennessee.

10 Justice Kavanaugh asked about the
11 uncertainty that might exist if this Court
12 adopted Tennessee and our view of the case. I
13 think it's -- it's quite the opposite, that the
14 approach that Mississippi is advocating is
15 unprecedented.

16 This -- this might be a new issue,
17 Mr. Chief Justice, that this Court is
18 addressing, but the allocation of groundwater is
19 an issue that's resolved intrastate every day of
20 the week. We -- we have state courts that look
21 at, well, how do we allocate groundwater between
22 one owner or the other? And the way they do it
23 isn't the way Mississippi wants you to do it.

24 No one -- no one pulls up water from a
25 well and then says, well, some of this -- some

1 of these molecules came under the landowner's
2 property; I have to -- I have to put those back
3 in the water. No, all -- all these
4 jurisdictions apply some sort of equitable
5 principle where they share the water that's
6 underneath them.

7 So I think the upheaval would come not
8 from adopting our approach, which is continuous
9 with not only this Court's equitable
10 apportionment precedents but also how states
11 deal with this issue, but rather in adopting my
12 friend from Mississippi's position.

13 JUSTICE KAVANAUGH: Mr. Liu?

14 MR. LIU: Yes.

15 JUSTICE KAVANAUGH: The final sentence
16 of your brief says that the complaint should be
17 dismissed. Should that dismissal be with
18 prejudice or without prejudice?

19 MR. LIU: Well, Justice Kavanaugh, we
20 did not file an amicus brief on Tennessee's
21 exceptions to that part of the Special Master's
22 report, and so we don't take any position on
23 that issue. We view that as principally a
24 dispute between these specific parties.

25 I will say, though, that Mississippi

1 has gotten a number of chances already to seek
2 an equitable apportionment claim. They -- they
3 filed a complaint in 2009. They filed the
4 instant complaint in 2014. In neither complaint
5 have they made any real effort to plead an
6 equitable apportionment claim.

7 And so we would simply ask this Court
8 that if it does allow leave to amend in this
9 instance that it at least allow those new
10 allegations to be subject and tested to a prompt
11 motion to dismiss or motion for judgment of the
12 plead -- on the pleadings just in case we don't
13 need any lengthy discovery or an evidentiary
14 hearing to -- to resolve what --

15 JUSTICE KAVANAUGH: Well, they -- they
16 presumably didn't raise that because they didn't
17 think that was the right box, analytical box,
18 for this kind of dispute. But, if we say that,
19 in fact, equitable apportionment is the right
20 categorization, why should they be precluded
21 from then seeking an equitable apportionment
22 remedy as a matter of basic fairness?

23 MR. LIU: I -- I think whether this
24 Court gives them a chance to seek that
25 opportunity, basically, it comes down to whether

1 this Court thinks enough is enough or whether
2 they've already had a chance to do so. We don't
3 have a position on whether Mississippi is given
4 that opportunity.

5 Our only point is that if they are
6 given that opportunity, that we -- we -- that
7 this Court allow those allegations to be tested
8 promptly because, at least so far, the
9 allegations we've seen with respect to injury,
10 which is a threshold requirement of equitable
11 apportionment, haven't -- haven't been
12 sufficient.

13 Justice Gorsuch mentioned a concern
14 about opening the doors of this Court's original
15 jurisdiction. I think one of the -- one of the
16 underpinnings of this Court's original
17 jurisdiction docket has been this threshold
18 requirement of injury. This Court has -- has
19 consistently required that the complaining state
20 show an injury of serious magnitude that would
21 justify invoking this Court's extraordinary
22 authority to compel one sovereign to -- to stop
23 what it's doing.

24 And I -- I -- I think here, again, our
25 proposal would leave that injury requirement in

1 place. And so that injury requirement would
2 filter out many of the cases that simply don't
3 have merit.

4 I think another problem with
5 Mississippi's approach is that they have no
6 injury requirement. Mississippi has not really
7 tried to show injury here. They've simply tried
8 to show that certain molecules took a certain
9 path through the water from Mississippi to
10 Tennessee. And every state that sits on top of
11 an interstate aquifer and that drills wells is
12 going to inevitably create a cone of depression
13 and you're going to have these claims available
14 to this --

15 JUSTICE GORSUCH: But -- but why
16 doesn't that suffice to state a harm in -- in at
17 least an Article III type sense, that the less
18 water available to Mississippi necessarily
19 impairs its natural resources and, therefore,
20 its ability to attract businesses and
21 residential units in the future, and maybe it
22 doesn't need it today, but it's -- it's in the
23 bank for -- for the state's future and future
24 generations?

25 MR. LIU: Well, we -- we're certainly

1 not challenging Mississippi's Article III
2 standing in this case.

3 JUSTICE GORSUCH: Yeah, but you're
4 saying an -- an injury. So why isn't that an
5 injury? Or just an injury in the sense of -- of
6 the aesthetic pleasure of knowing and certainty
7 that your natural resources are preserved for
8 future generations?

9 MR. LIU: And -- and -- and I think,
10 Justice Gorsuch, when this Court is properly
11 presented with an equitable apportionment claim,
12 the Court would have the opportunity to discuss
13 what sorts of injuries in this context suffice.

14 JUSTICE GORSUCH: You're selling us on
15 injury as being a filtering device, no pun
16 intended, right?

17 MR. LIU: No pun intended.

18 JUSTICE GORSUCH: No pun intended.
19 But -- but -- but now you're saying that that
20 will have to be sorted out in the future. Is
21 that what I'm hearing?

22 MR. LIU: Well, I think, at -- at a
23 minimum, the injury can't be a injury to their
24 right of ownership or sovereign control over the
25 --

1 JUSTICE GORSUCH: But if -- I -- I --

2 MR. LIU: -- resources.

3 JUSTICE GORSUCH: Again, I can just --
4 I can transplant that. Instead of ownership, if
5 you don't like ownership, how about parens
6 patriae and the protection of natural resources
7 for future generations? Do you like that?

8 MR. LIU: Well, I think they could get
9 in the door, but then the question is whether --

10 JUSTICE GORSUCH: That gets them in
11 the door, but ownership doesn't?

12 MR. LIU: Ownership doesn't because
13 that -- that's -- that's -- that's simply a
14 legal right that doesn't exist. And I think
15 even today Mississippi conceded that they're not
16 claiming absolute ownership over this resource.

17 Their -- their point in invoking
18 sovereign authority in ownership is to sort of
19 justify a legal theory that -- that -- that
20 would in turn justify the 615 million dollars in
21 damages they're seeking.

22 And my only point is it didn't take
23 much for them to be able to allege that claim,
24 and it's not going to take much for other states
25 either because these cones of depression are the

1 inevitable consequence of any well use over an
2 interstate aquifer.

3 And there's nothing stopping
4 Tennessee, if Mississippi's theory is upheld,
5 from bringing the very next suit. So --

6 JUSTICE GORSUCH: So it sounds to me
7 like the government thinks that it should be
8 equitable apportionment because that's a better
9 doctrinal fit but that Mississippi very likely
10 has a claim it can state?

11 MR. LIU: I -- I -- I -- I doubt that
12 Mississippi has a claim it -- it can state. If
13 you look at our limitation brief that we filed
14 when -- when -- when -- when Mississippi
15 originally filed the complaint, we looked at the
16 allegations and said in that brief that the
17 allegations were not sufficient enough to -- to
18 plead a sufficiently serious injury.

19 Now it may well be that Mississippi
20 has injuries now they would like to plead.
21 Granted, they weren't trying to plead an
22 equitable apportionment claim in 2014. But the
23 allegations we've seen have not sufficed.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?
2 JUSTICE THOMAS: No questions, Chief.
3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer?
5 Justice Alito?
6 Justice Kavanaugh, any further
7 questions?
8 JUSTICE KAVANAUGH: No further
9 questions.
10 CHIEF JUSTICE ROBERTS: And Justice
11 Barrett? No?
12 Thank you, counsel.
13 Mr. Frederick, you have rebuttal? I'm
14 sorry, Mr. Coghlan, do you have rebuttal? Thank
15 you.
16 REBUTTAL ARGUMENT OF JOHN V. COGHLAN
17 ON BEHALF OF THE PLAINTIFF
18 MR. COGHLAN: Thank you, Mr. Chief
19 Justice. Just -- just briefly a few points.
20 On the suggestion that Mississippi
21 does not have the ability to -- to show a real
22 and substantial injury, we -- we certainly
23 dispute that.
24 And the core injury which we pled from
25 the beginning, I think, is an injury to

1 Mississippi's sovereignty. That's the -- the
2 core injury, the fact that Tennessee is acting
3 extraterritorially and usurping Mississippi's
4 exclusive sovereign control over the groundwater
5 within its borders. We think that in of itself
6 is a -- a sufficient injury, as recognized in --
7 in Tarrant.

8 But we have others. It's certainly
9 the case that Mississippi's -- the cost of
10 Mississippi to access the groundwater has
11 increased. Dr. Sprule, Mississippi's expert,
12 talks about this in the hearing transcript at
13 pages 212 to 214, that there's greater cost
14 because the water levels have dropped as a
15 result of this pumping. So, while they may in
16 theory be able to get the same amount of water,
17 as Mr. Frederick said, that comes at a greater
18 cost.

19 More importantly, there's a suggestion
20 that there's no indication that there's any harm
21 to the water. The record evidence suggests
22 otherwise too. Defendants acknowledge at
23 page -- or, excuse me, Defense Finding of Fact
24 156 that their pumping is draining an overlying
25 surficial aquifer, and both the U.S. Geological

1 Survey and Mississippi's expert, Dr. Sprule,
2 have testified that that's pulling contaminants
3 down into the aquifer at issue here, which is
4 where both states get their drinking water from.

5 So we think that's a real and
6 substantial injury. And these issues have not
7 fully been explored. Because of the way the
8 Special Master set up the proceedings,
9 Mississippi did not have a chance to fully build
10 a record on this -- on these points, but we do
11 think that there's sufficient evidence there.

12 Justice Kagan, you asked whether the
13 case would be different if some of these wells
14 physically intruded by an inch in -- across the
15 border. And I think your question demonstrates
16 why that shouldn't matter, because even if it is
17 an inch, but all the damage and the injuries
18 that -- is the same, it really kind of elevates
19 form over -- over -- over substance.

20 And I turn back to Tarrant. Tarrant
21 did not talk about there being a physical
22 violation or invasion of space. Tarrant talked
23 about a proposed diversion of water and
24 exercising control over the water in that case.

25 And I think that's where the injury

1 was considered there, and that's where the
2 injury is here, that Tennessee is exercising
3 control over groundwater while it was within
4 Mississippi.

5 And just -- just finally, if the
6 Court, you know, wants to consider applying
7 equitable apportionment to groundwater, which we
8 don't think it needs to answer that question to
9 rule in Mississippi's favor, I would contend it
10 doesn't solve the problem because of the nature
11 of groundwater.

12 Extracting groundwater has a very
13 limited area of effect, so you can't just
14 apportion it and say each state gets a certain
15 amount of water. Tennessee gets 5 billion
16 gallons and Mississippi gets 5 billion gallons.

17 Where that water is coming from and
18 specifically with relation to the border matters
19 because Tennessee, as we've said, could get all
20 the groundwater it wants, could pump as much as
21 it wants, and have no impact whatsoever on the
22 Mississippi because of the nature of
23 groundwater.

24 So I think simply apportioning it
25 without taking into consideration the border

1 will not solve the problem. And that's why we
2 contend that's what the -- this is a different
3 injury and -- and -- and requires a different
4 remedy.

5 And so, ultimately, we think Tarrant
6 addresses the case that we have here. We don't
7 think the Court needs to pave a new -- new law
8 to -- to rule in Mississippi's favor. We
9 believe they just need to extend the principles
10 recognized in Tarrant to the case here.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:13 a.m., the case
15 was submitted.)

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|--|---|---|--|---|
| \$ | | | | |
| \$600 [1] 35:24 | access [2] 13:8 75:10 | alternative [1] 41:18 | 13 36:2,23 40:13 43:13 45:2,5,15,24 49:4,8 54:5,19 55:19 59:25 66:7 70:11 73:2 75:25 76:3 | benefits [1] 51:6 |
| 1 | account [2] 45:1 61:6 | although [1] 42:25 | | best [2] 61:4,8 |
| 10:00 [2] 1:17 4:2 | acknowledge [3] 7:13,20 75:22 | amend [18] 16:18 18:10,11 32:13,15,23 33:9,13 35:18 36:13 40:23 41:5 49:23 51:23 52:3 56:9,13 68:8 | aquifer's [1] 36:20 | better [2] 49:19 73:8 |
| 100 [1] 36:22 | acknowledged [3] 36:7 43:2,9 | amending [2] 17:7 37:25 | aquifers [4] 11:25 19:8 39:1 51:1 | between [8] 21:8,12 42:19 43:5 60:13 61:15 66:21 67:24 |
| 11:13 [1] 78:14 | across [12] 6:11 7:4,10 11:7,13 24:13,15 59:10 60:7 64:23 65:17 76:14 | amendment [1] 49:20 | area [13] 8:13 9:17 14:6,7 15:10 25:14,24 30:3,7 36:21 45:18 49:9 77:13 | beyond [4] 10:15 11:10 12:6 59:20 |
| 1100 [1] 45:7 | act [1] 34:9 | amici [1] 38:21 | argue [1] 8:3 | big [1] 46:20 |
| 11th [1] 4:20 | acting [8] 10:9 13:19 14:3, 24 20:23 22:17,18 75:2 | amicus [6] 2:9 3:10 28:13, 24 58:3 67:20 | arguing [1] 9:22 | billion [3] 6:11 77:15,16 |
| 126A [1] 40:1 | action [14] 16:3 25:6,12,17 34:25 36:14 38:22 39:3,4 42:7,9 51:7 52:20 61:19 | among [1] 32:16 | argument [19] 1:16 3:2,5,8, 13 4:10,22 5:1 8:15,17 9:3 10:3 26:25 27:2 35:8 36:1 45:20 58:2 74:16 | blue [1] 52:10 |
| 130 [1] 35:14 | actionable [3] 9:5 26:14 63:20 | amount [5] 23:4 30:13 45:14 75:16 77:15 | arises [1] 45:17 | bodies [1] 42:11 |
| 143 [1] 4:23 | actions [2] 25:9 35:22 | anadromous [2] 44:15,16 | Arkansas [2] 8:16 38:13 | border [27] 6:7,12 7:4,10, 23 9:9,17 10:14,15 11:7,13, 18 15:9 24:13,15 26:5 29:15,19 30:3 35:14 37:6,17 41:24 63:8 76:15 77:18,25 |
| 156 [1] 75:24 | actually [7] 26:8 27:10 32:14 40:19 41:6 47:17 55:21 | analytical [1] 68:17 | Army [1] 4:16 | borders [10] 10:10,12 13:20 14:3 22:17 24:9 29:4 41:25 60:9 75:5 |
| 16 [1] 16:22 | add [1] 32:13 | analytically [1] 46:19 | around [2] 19:13 23:24 | both [8] 16:25 29:14,19 34:20 61:7,7 75:25 76:4 |
| 18 [1] 59:6 | addition [1] 9:25 | analyzing [1] 44:2 | artesian [1] 55:13 | bound [1] 61:7 |
| 1930s [1] 48:15 | additional [2] 30:22 62:17 | announce [1] 4:4 | Article [2] 70:17 71:1 | boundaries [1] 12:6 |
| 1940s [1] 38:10 | address [3] 11:3 53:11 56:14 | annualize [1] 45:12 | aside [3] 10:18 11:13 18:14 | boundary [5] 48:17 52:8 61:15 63:2,23 |
| 1960s [1] 6:4 | addressed [1] 59:23 | another [10] 5:23 9:5 14:17 23:13 25:13 26:10 30:10 35:22 64:11 70:4 | assertion [1] 27:5 | bounds [3] 46:19,21 47:1 |
| 2 | addresses [2] 10:8 78:6 | answer [6] 2:3 20:17 21:4 30:17 51:8 77:8 | Assistant [1] 2:7 | box [2] 68:17,17 |
| 2009 [1] 68:3 | addressing [1] 66:18 | answered [1] 5:15 | assume [1] 13:1 | BREYER [12] 22:23 23:10 24:3 32:3 47:12 49:11,25 50:5 51:10 56:4,5 74:4 |
| 2010 [2] 17:1 41:17 | adjoining [1] 36:9 | answers [1] 19:7 | assuming [2] 17:8 18:10 | Breyer's [1] 46:2 |
| 2014 [3] 6:9 68:4 73:22 | administer [1] 39:20 | anybody [1] 62:20 | assumption [1] 17:12 | brief [7] 28:13 52:10 59:6 67:16,20 73:13,16 |
| 2020 [1] 4:5 | admission [1] 6:14 | apologize [1] 21:15 | attention [1] 16:17 | briefly [1] 74:19 |
| 2021 [2] 1:13 4:7 | admit [2] 7:9 10:19 | APPEARANCES [1] 2:1 | attract [1] 70:20 | bring [2] 30:23,24 |
| 21 [1] 4:21 | admitted [1] 13:17 | application [3] 36:4 44:11 60:3 | authority [4] 64:6,10 69:22 72:18 | bringing [1] 73:5 |
| 212 [1] 75:13 | adopted [1] 66:12 | applied [4] 27:20 42:10 47:4 58:17 | available [3] 18:25 70:13, 18 | build [1] 76:9 |
| 214 [1] 75:13 | adopting [2] 67:8,11 | applies [3] 44:23 46:9 61:23 | aware [1] 47:19 | built [1] 15:18 |
| 246 [1] 39:25 | Advocate [1] 4:19 | apply [8] 10:23 11:4 27:14 28:4,5 30:12 47:2 67:4 | away [2] 29:19 37:6 | burden [3] 41:16 47:24 53:13 |
| 3 | advocating [1] 66:14 | applying [1] 77:6 | B | burros [4] 19:12 46:4 47:19 48:3 |
| 300 [1] 48:16 | aesthetic [1] 71:6 | apportion [2] 63:16 77:14 | back [9] 9:7 21:7 22:7 23:2 25:23 44:18 48:15 67:2 76:20 | businesses [1] 70:20 |
| 35 [1] 3:7 | affect [2] 25:1 35:23 | apportioned [2] 5:19 10:6 | balance [1] 61:8 | buying [1] 45:23 |
| 36 [1] 52:10 | affected [2] 48:13 50:13 | apportioning [1] 77:24 | bank [1] 70:23 | C |
| 37 [5] 36:8 43:19,20,25 44:1 | affecting [1] 47:19 | apportionment [70] 5:6 9:23 10:7,20,23 11:4,22 12:2 14:18,22 17:1,5,8,16 18:15, 25 20:10 22:14,21 27:20 30:12 31:16,21 32:13 34:17,22 35:19 36:4,14,15 38:1,1,8,20 41:19 42:6,10 44:12,23 45:17 46:8 47:5 48:11 50:9 51:18,20 52:20 53:8 57:10,13 58:18 60:4,18 61:4,17,22 62:1 63:15 64:1,8 67:10 68:2,6,19,21 69:11 71:11 73:8,22 77:7 | BARRETT [11] 26:18,21 27:12 35:3,4 51:22,25 57:1,2,21 74:11 | California [1] 47:18 |
| 37,000 [1] 44:1 | affects [2] 59:11 60:9 | appreciable [1] 37:13 | barrier [1] 43:4 | call [1] 55:6 |
| 4 | agency [1] 65:1 | approach [5] 50:7,8 66:14 67:8 70:5 | based [5] 10:25 17:22 29:18 40:15 58:14 | calls [4] 51:5,5,6,6 |
| 4 [1] 1:13 | ago [1] 47:10 | appropriate [8] 15:25 38:17,23 39:3,5 48:5 50:2 52:2 | baseline [1] 40:25 | came [4] 1:15 23:17 44:18 67:1 |
| 400 [1] 6:10 | ahead [1] 28:9 | appropriately [1] 20:23 | basic [1] 68:22 | cannot [1] 7:3 |
| 47 [1] 39:25 | air [2] 23:19 47:6 | aquifer [28] 6:15,17,21,23 7:24 11:15 29:17 30:9 35:13 | basically [1] 68:25 | capture [1] 21:16 |
| 5 | airplane [1] 23:17 | | beautiful [3] 23:16,18,19 | captured [1] 52:2 |
| 5 [3] 3:4 77:15,16 | Alaska [1] 49:15 | | become [1] 50:11 | care [1] 20:5 |
| 500 [1] 45:6 | Alito [3] 32:4 56:6 74:5 | | begin [1] 4:8 | careful [1] 52:4 |
| 58 [1] 3:9 | allegations [6] 68:10 69:7, 9 73:16,17,23 | | beginning [2] 27:1 74:25 | cares [1] 62:20 |
| 6 | allege [1] 72:23 | | begs [1] 18:18 | Case [54] 4:23 5:11 6:18 7:15 8:24 9:24 10:8 13:21 14:20 16:22 17:9 18:7,16 22:20 25:16,22 26:7,13 27:22 29:8,8 36:12 38:3,9 39:8 41:14 42:6 44:14,16 46:1 |
| 615 [1] 72:20 | allocate [1] 66:21 | | behalf [9] 2:4,6 3:4,7,15 4:4 5:2 35:9 74:17 | |
| 7 | allocated [1] 58:13 | | behave [1] 33:15 | |
| 74 [1] 3:15 | allocating [1] 58:19 | | believe [4] 8:21 30:19 44:6 78:9 | |
| A | allocation [3] 58:16 59:24 66:18 | | belongs [1] 58:8 | |
| a.m [3] 1:17 4:2 78:14 | allow [3] 68:8,9 69:7 | | | |
| ability [3] 53:8 70:20 74:21 | allowed [1] 36:13 | | | |
| able [5] 17:25 40:6 45:12 72:23 75:16 | allowing [1] 41:20 | | | |
| above [1] 26:24 | alluded [1] 32:19 | | | |
| above-entitled [1] 1:15 | alone [1] 18:6 | | | |
| aboveground [1] 27:10 | already [6] 5:18 10:6 27:19 29:13 68:1 69:2 | | | |
| absence [2] 11:14 39:22 | | | | |
| absent [1] 5:24 | | | | |
| absolute [2] 24:6 72:16 | | | | |
| absolutely [1] 55:13 | | | | |

Official

| | | | | |
|---|---|---|---|--|
| 10 47:8 48:15 56:12 58:8 59:7,18 60:5 62:16 63:24 64:2,4,21,23 65:2 66:12 68:12 71:2 75:9 76:13,24 78:6,10,13,14 cases [20] 9:2 10:18,19 14: 22 17:16 22:14,22 23:11 25:13 41:9 48:11,21 49:16 54:25 60:3 64:1,8,15,24 70:2 categorization [1] 68:20 category [1] 27:12 cause [1] 28:21 causes [1] 26:9 causing [2] 8:18 37:19 Central [1] 47:8 centuries [1] 27:6 century [2] 47:10 48:2 certain [7] 33:20 48:10 58: 8 65:24 70:8,8 77:14 certainly [10] 7:20 8:19,23 20:22 33:14 34:7 60:12 70: 25 74:22 75:8 certainty [1] 71:6 certified [1] 4:12 challenging [1] 71:1 chance [3] 68:24 69:2 76:9 chances [1] 68:1 change [12] 36:12 37:20 38:6,11,15 40:3,24 41:8,12 53:9,14 65:15 changed [2] 36:22 41:19 changing [1] 7:23 character [2] 41:12 42:14 characteristics [5] 60:2,6, 10,16,19 charge [1] 52:15 CHIEF [59] 4:3,18 5:3 9:21 10:2,17 11:9,12,20 19:6,25 20:4,16 21:2,6,14,18,20 22: 2,8 24:14 28:11 30:21 31: 4,14,23 32:2 34:12 35:2,5, 10 37:2 46:4 50:14 53:18, 23 54:8,13,20,23 55:5,9,24 56:2,3,6,21,25 57:22,25 58: 5 59:5 66:17 73:24 74:2,3, 10,18 78:12 Chief's [1] 57:3 Circuit [2] 16:23,24 circumstance [1] 63:5 circumstances [6] 38:6, 12,15 41:8,19 53:10 cite [1] 7:15 citizens [1] 60:25 CITY [2] 1:6 39:8 Claiborne [3] 6:21 35:13 49:8 claim [26] 5:9 17:5 32:14 35:24 36:15 38:8,20 39:20 41:12 42:6 49:4 51:20 52: 10,12,13 53:1,9 61:17 62:6 68:2,6 71:11 72:23 73:10, 12,22 claiming [2] 24:4 72:16 | claims [1] 70:13 classic [1] 40:16 clear [3] 40:7 61:20 63:18 clerk [1] 4:13 closed [1] 4:6 closer [1] 37:16 COGHLAN [61] 2:3 3:3,14 4:25 5:1,3 7:12,18 8:5,19 9:6 10:2,21 11:10,17,24 12:11,15,19,21,25 13:3,9, 12 14:1,10,19 15:24 17:10, 14 18:13,19,23 19:25 20: 16 21:5,14,19,25 22:4,10 23:9 24:3 25:19 26:20 27: 11,13 28:8,23 31:2,10,18 32:22 33:4,12,23 34:6,19 74:14,16,18 Colonel [1] 4:17 Colorado [9] 23:18 38:9 41:13 47:19 48:3 64:19 65: 23 66:5,6 Columbia [1] 45:13 come [6] 17:1 25:22 31:12, 19 63:9 67:7 comes [4] 9:22 25:11 68: 25 75:17 coming [3] 30:14,15 77:17 commenced [1] 4:21 compact [1] 48:23 compacts [2] 48:22 49:19 Compare [1] 65:22 compel [1] 69:22 complain [2] 7:8 30:20 complaining [6] 39:10 47: 24 61:23 62:4,23 69:19 complaint [15] 6:10 35:16 37:25 38:17 41:18 51:21 52:4,25 53:12,17 67:16 68: 3,4,4 73:15 complaints [1] 35:21 complete [1] 53:24 completely [1] 15:19 composition [1] 43:8 concede [2] 11:14,17 conceded [2] 37:16 72:15 conceding [2] 12:13,16 concept [4] 10:24 19:8 27: 18 43:1 conceptually [1] 30:11 concern [1] 69:13 conclusion [1] 5:6 conclusions [1] 6:20 conditioned [1] 36:3 conditions [1] 36:7 cone [3] 37:14 65:8 70:12 cones [3] 8:10 30:2 72:25 conflict [1] 60:20 claim [26] 5:9 17:5 32:14 35:24 36:15 38:8,20 39:20 41:12 42:6 49:4 51:20 52: 10,12,13 53:1,9 61:17 62:6 68:2,6 71:11 72:23 73:10, 12,22 claiming [2] 24:4 72:16 | 18 77:6 consideration [2] 38:7 77: 25 considered [2] 44:19 77:1 considering [1] 5:17 consistently [1] 69:19 constitutes [1] 41:11 Constitution [1] 7:3 contact [1] 31:13 contaminants [2] 6:17 76: 2 contend [3] 9:12 77:9 78:2 context [2] 39:18 71:13 continues [1] 18:1 continuous [5] 43:8 65:17 66:4,7 67:8 control [40] 5:13 6:25 8:12, 22 9:11,13,18 10:14 11:8 12:5,8 13:13 15:12,13 16: 7,10,15 17:21 19:8,9,23 20: 1,3,19,21 21:1 24:7,17,18 25:2,21 26:14,16 27:23 29: 3,3 71:24 75:4 76:24 77:3 controllable [3] 8:11 14:7, 12 controlling [1] 8:8 controls [1] 26:9 convened [1] 4:7 convincing [1] 40:8 core [2] 74:24 75:2 correct [8] 7:11 12:14,20, 21,25 39:18 52:16,24 correctly [1] 35:15 cost [4] 6:12 75:9,13,18 costs [1] 40:10 Couldn't [3] 8:3,14,16 counsel [15] 7:7 9:21 15: 16 19:6 30:21 32:9 34:11 35:6 37:5 55:25 57:23 59: 5 73:25 74:12 78:13 counterclaim [1] 30:24 counterclaims [2] 50:15, 22 country [2] 45:24 51:2 couple [2] 43:2 44:12 course [9] 32:23 33:25 38: 12 41:16 45:11 47:24 49: 23 60:23 64:6 COURT [64] 1:1,16 4:4,5, 11,15 5:4,5,15,19,22 11:2 12:3 16:24,24 18:23 20:23 27:17 28:4 29:1,6 32:20, 22,24 33:13,17,21 34:7,8 35:11 36:3 38:10,14 41:17 43:3 44:13,19 46:7 47:1,4 48:6,9,17 52:16 53:2 55: 18 56:11 58:6,15 59:3,23 65:23 66:2,11,17 68:7,24 69:1,7,18 71:10,12 77:6 78:7 Court's [23] 4:20 7:6 14:21 22:14,21 33:7 37:3 38:7 39:7 46:1,3,5 47:21 48:2 59:3,9 60:1 64:1,7 67:9 69: | 14,16,21 courts [2] 16:25 66:20 cover [1] 45:12 covered [1] 57:14 create [2] 8:9 70:12 created [1] 48:4 creating [4] 9:15 14:5 15:9 16:2 cross [1] 61:15 cross-border [2] 7:17,19 cross-boundary [1] 39:9 cross-examination [1] 37: 15 crossed [3] 19:19 26:4 63: 23 crosses [2] 11:18 59:10 crossing [6] 7:22 9:9 10: 14 30:3 63:1,8 curiae [3] 2:9 3:11 58:3 Curley [2] 4:15,16 currently [1] 56:13 | depends [1] 27:4 depression [6] 8:10 30:2 37:14 65:8 70:12 72:25 Deputy [1] 2:3 descriptive [1] 54:18 detrimental [1] 30:19 device [1] 71:15 difference [3] 14:20 16:1 22:12 differences [2] 60:13,15 different [27] 5:12 10:8,13 11:6 13:25 15:17,21 21:8 26:7 27:21 31:16 41:12 42: 7,9 43:13 44:2 45:4 61:18 62:10,16 63:19 64:23 65:6 66:8 76:13 78:2,3 differently [1] 27:3 direct [5] 14:25 15:5,12 16: 5 26:1 directly [4] 30:18 41:13 49: 8 59:23 disagree [1] 14:2 disagrees [1] 18:24 disavowing [1] 36:15 disclaim [1] 17:4 disclaimed [1] 51:19 discovery [1] 68:13 discuss [1] 71:12 disincentivize [1] 53:2 dismiss [2] 52:25 68:11 dismissal [3] 35:16 52:19 67:17 dismissed [3] 35:25 51:21 67:17 disposition [3] 38:17 52:3, 24 dispute [4] 38:13 67:24 68: 18 74:23 disputes [2] 28:18 58:16 dealt [1] 10:4 distinct [3] 20:2,5 30:4 distinction [1] 43:6 distinguish [3] 55:20 63: 25 64:21 distinguishable [1] 59:13 distinguishes [2] 22:13, 19 District [3] 5:16 16:24 45: 13 diversion [1] 76:23 divert [2] 5:23 27:23 diverting [1] 6:2 DIVISION [2] 1:8 4:19 docket [1] 69:17 doctrinal [1] 73:9 Doctrine [20] 35:20 36:5 42:10 44:12,23 45:17 46:9, 11 47:2,4 51:4,19 57:13 58:17,18,23 60:4,17 61:3, 22 doing [4] 13:7,17 52:21 69: 23 dollars [2] 52:7 72:20 domain [1] 61:21 dominion [1] 19:24 |
|---|---|---|---|--|

D

D.C [3] 1:12 2:5,8

dam [5] 15:18,18 16:1,2,9

damage [2] 39:5 76:17

damages [4] 35:25 63:7,8
72:21

damaging [2] 19:21 29:17

danger [1] 29:12

dangerous [1] 28:15

DAVID [3] 2:5 3:6 35:8

day [8] 31:17 36:8 43:22 45:

8,11 50:17 65:21 66:19

days [1] 33:20

deadline [2] 34:1,3

deal [4] 14:18 46:20 59:24
67:11

dealing [2] 27:18 42:16

dealt [1] 10:4

decade [1] 36:16

decide [5] 18:7,8 49:22 51:
11,13

decided [3] 38:10 40:19,21

decision [1] 18:8

decrees [1] 48:23

Defendants [10] 1:9 2:6 3:

7 5:9,12 6:6 7:3 26:3 35:9

75:22

Defendants' [2] 6:14 39:

24

Defense [1] 75:23

defer [1] 33:24

definitely [1] 62:16

definition [1] 54:4

degradation [2] 39:23 40:
11

delicious [2] 55:17 59:15

demonstrates [1] 76:15

denial [1] 38:16

denied [1] 41:17

deny [1] 33:17

Department [1] 2:8

depending [1] 53:16

Official

| | | | | |
|--|--|--|--|---|
| <p>done [3] 9:2 17:3 49:18 door [2] 72:9,11 doors [1] 69:14 doubt [1] 73:11 down [7] 6:17 9:22 54:16 56:10 61:11 68:25 76:3 downstream [4] 5:21 14: 14 15:3 65:5 draining [3] 6:15 29:17 75: 24 dramatically [1] 36:25 draw [1] 9:4 drawing [3] 8:4 38:25 39:1 drilled [2] 61:12 62:4 drilling [1] 61:11 drills [1] 70:11 drink [1] 55:12 drinking [1] 76:4 dropped [1] 75:14 dry [2] 44:20 66:1 duly [1] 4:12 during [1] 65:24 duties [1] 29:8 duty [2] 28:25 29:1</p> <hr/> <p style="text-align: center;">E</p> <p>each [4] 29:15 49:15 61:5 77:14 earlier [2] 39:2 41:2 early [1] 38:10 eastern [1] 49:9 effect [19] 8:7 14:6,8,8,23, 25,25 15:6,11 16:5 25:10 26:1 30:1,7 37:13 45:25 64:13,24 77:13 effects [10] 13:20,24 14:10 24:22,25 25:12,18 30:20 53:7 61:1 effort [1] 68:5 eight [4] 28:14 45:3,3 66:8 either [3] 48:25 64:24 72: 25 elementary [1] 23:1 elevate [1] 26:15 elevates [1] 76:18 emphasized [2] 19:7 65: 19 enable [1] 51:7 encompass [1] 45:2 encroach [1] 25:1 end [2] 31:17 46:24 enforced [1] 48:22 engage [2] 37:11 40:9 enough [7] 17:6,6,12,13 69: 1,1 73:17 ensured [1] 7:2 enter [1] 7:10 entered [1] 4:12 entering [1] 9:5 entire [2] 45:13 52:5 entirely [8] 10:9,11 13:19 14:3 15:1 16:11 22:17 41: 23 entitles [1] 52:14</p> | <p>equal [2] 58:20 61:5 equally [3] 27:14 28:4,5 equilibrium [1] 36:24 equitable [70] 5:6 9:23 10: 7,20,22 11:4,22 12:1 14:17, 21 17:1,5,8,15 18:11,15,24 20:10 22:13,14,21 30:11 31:16,21 32:13 34:16,22 35:19 36:4,14 38:1,8,20 41:18 42:5,9 44:11,22 45: 17 46:8 47:5 48:11 50:9 51:18,20 52:20 53:8 57:9, 13 58:17 60:4,17 61:4,17, 21,25 63:14 64:1,7 67:4,9 68:2,6,19,21 69:10 71:11 73:8,22 77:7 erred [2] 35:16 41:4 erroneous [1] 56:15 ESQ [4] 3:3,6,9,14 ESQUIRE [1] 2:5 essentially [2] 9:15 13:7 established [2] 28:15,17 evaporated [1] 23:2 Even [11] 6:23 12:18 19:2 34:17 36:6 40:23,24 53:9 65:25 72:15 76:16 evidence [9] 6:16 39:22 40: 8,12 42:23 49:5 50:20 75: 21 76:11 evidentiary [1] 68:13 exact [2] 8:15 14:16 exactly [4] 39:19 62:7 63: 11,13 example [5] 16:9 22:12,15, 20 64:9 except [1] 49:15 exception [1] 16:20 exceptions [5] 2:10 3:12 58:4,25 67:21 exclusive [5] 6:25 16:14 35:20 38:21 75:4 excuse [2] 13:11 75:23 exercise [12] 9:17 16:14 19:24 24:7,17 25:21 26:13, 16 27:23 29:3 48:6 64:5 exercising [14] 8:12,22 9: 11,13 10:14 11:8 13:13 15: 12 16:7 20:1,25 64:10 76: 24 77:2 exist [3] 60:19 66:11 72:14 existing [1] 32:17 exists [1] 66:8 expert [5] 36:6 37:12,18 75: 11 76:1 experts [1] 65:7 explain [2] 15:17 24:1 explained [1] 54:14 explicitly [1] 17:4 explored [1] 76:7 extend [3] 29:6 45:19 78:9 extended [1] 48:10 extension [2] 46:18 49:3 extent [2] 22:6 56:15 extra [1] 22:18</p> | <p>extract [2] 36:25 40:9 extracted [1] 63:17 Extracting [1] 77:12 extracts [1] 64:16 extraordinary [1] 69:21 extraterritorial [3] 25:6,17, 18 extraterritorially [3] 8:23 22:18 75:3 extreme [1] 52:21</p> <hr/> <p style="text-align: center;">F</p> <p>fact [18] 9:4 18:14 25:23 37: 21 39:25 43:24 48:24 50: 25 51:1 59:13,17 60:7 61: 14 65:15,16 68:19 75:2,23 factor [2] 31:12 63:15 facts [2] 36:20 43:2 fail [3] 32:10,20 33:8 fair [2] 5:10 52:11 fairness [1] 68:22 fall [1] 21:22 falls [3] 23:1 27:10 51:18 fancy [1] 65:7 far [4] 19:7 46:12 49:2 69:8 fare [1] 57:9 fast [1] 27:9 favor [2] 77:9 78:8 feel [1] 34:8 feet [2] 45:6,7 few [1] 74:19 fields [1] 6:7 Fifth [1] 16:23 figure [1] 18:11 file [5] 33:16 38:17 53:8,12 67:20 filed [6] 4:12 6:9 68:3,3 73: 13,15 filing [2] 38:2 52:19 fills [1] 54:17 filter [2] 55:15 70:2 filtering [1] 71:15 filters [1] 55:15 final [1] 67:15 finally [2] 18:10 77:5 find [1] 57:7 Finding [1] 75:23 Findings [1] 39:25 finds [1] 18:24 Fine [1] 46:21 finest [1] 55:11 first [3] 4:22 35:19 59:19 fish [8] 44:15,16,17 46:11, 15,16 58:24 59:21 fishermen [1] 64:18 fit [1] 73:9 five [1] 43:9 five-day [1] 42:24 flew [2] 23:18,20 flow [14] 10:1 15:4,20,23 35:23 37:20 42:11,12 44: 21 48:20 50:12 51:17 65: 11,24 flowed [2] 36:9 37:22</p> | <p>flowing [5] 13:22,23 24:12 50:18 59:20 flows [8] 11:15 35:21 36:2 39:11 48:13,23 49:7 66:5 focuses [1] 9:10 fog [5] 23:16,18 46:2 47:17 48:3 follow [2] 32:8 40:8 follow-up [1] 26:19 following [3] 41:6 53:19 57:3 foot [2] 45:13 54:16 force [1] 7:3 forgive [1] 24:2 forgot [1] 46:16 form [3] 19:3 26:15 76:19 formation [2] 54:5,6 forth [1] 21:7 forward [1] 41:21 found [1] 28:5 Francisco [1] 23:16 FREDERICK [55] 2:5,7 3:6, 9 35:7,8,10 37:4,8 38:4,19 39:4,14,17 40:5,20 41:1,22 42:8,23 43:21 44:4 45:16 46:7,13,23,25 47:10,12,15, 17,23 49:24 50:5 51:14,24 52:1,23 53:5,11,18,22 54:4, 11,18 55:4,9 56:8,17 57:11, 24 58:2 65:19 74:13 75:17 free [1] 41:5 freely [2] 35:17 36:13 friend [6] 41:3 63:25 64:4, 12 65:13 67:12 fully [5] 36:23 54:5,9 76:7,9 fundamentally [2] 36:12 41:11 further [4] 31:25 56:23 74: 6,8 future [10] 17:17 34:17,24 52:22 70:21,23,23 71:8,20 72:7</p> <hr/> <p style="text-align: center;">G</p> <p>Gail [1] 4:14 gallons [8] 6:11 36:8 43:22 45:10 50:17 65:21 77:16, 16 gambit [1] 52:5 gap [1] 54:17 GAS [1] 1:8 General [3] 2:3,7 4:19 generations [3] 70:24 71: 8 72:7 Geological [2] 6:5 75:25 gets [4] 72:10 77:14,15,16 getting [1] 62:5 give [3] 21:3 33:19 34:2 given [4] 16:18 40:17 69:3, 6 gives [1] 68:24 GORSUCH [34] 28:7,9 32: 6,7,25 33:5,6,12,19,25 34: 10 45:16 46:12,14,24 47:9,</p> | <p>11,14,16,18 49:12 56:8,18, 20 69:13 70:15 71:3,10,14, 18 72:1,3,10 73:6 got [2] 16:25 46:21 gotten [2] 29:24 68:1 govern [1] 58:23 government [1] 73:7 grab [2] 21:23 22:9 grabs [1] 50:12 grant [6] 18:9,9 32:12,23 33:9,13 granted [2] 35:17 73:21 gravamen [1] 62:6 greater [3] 36:21 75:13,17 ground [2] 26:24 43:5 grounds [2] 64:2,3 groundwater [66] 5:11,13 6:2,11,13 7:1,4 8:13,22,23 10:24,25 11:5 12:1,9 13: 13 15:13,23 16:15 18:2 20: 21 23:5,7,13 24:19,21 25: 22 26:1,17 27:3,15 28:3 29:16,18,21,23,24,25 30:1, 8,13,14,15 35:13 42:16,17 45:19 48:10,12 49:13 58:8, 13,24 59:10,17 60:13 66: 18,21 75:4,10 77:3,7,11,12, 20,23 guess [1] 19:17</p> <hr/> <p style="text-align: center;">H</p> <p>hand [2] 54:1 60:21 handful [1] 55:7 happen [2] 29:11 31:9 happened [1] 20:13 happening [5] 6:5 16:6 20: 3,5 65:12 hard [1] 48:7 hardly [1] 65:20 harm [4] 62:17,19 70:16 75: 20 harmed [1] 39:1 harming [2] 5:20 14:16 harms [1] 51:6 Hawaii [1] 49:15 hear [1] 4:22 heard [1] 39:2 hearing [3] 68:14 71:21 75: 12 held [6] 4:17 8:20,24 44:22 46:8 48:21 helping [1] 42:3 herd [1] 46:4 Herrmann [1] 5:17 historic [1] 51:5 Holmes [1] 47:7 honor [19] 4:4 7:18 8:6,21 9:6 10:21 11:24 13:9 14: 19 17:14 18:14 22:10,16 25:19 27:13 31:3,11 41:10 57:11 Honor's [1] 22:20 horses [7] 19:11 21:4,17 22:7 23:6 24:14 50:3</p> |
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Official

| | | | | |
|---|--|---|--|---|
| <p>however [2] 45:23 59:14 huge [2] 23:4 45:5 human [1] 64:16 hundreds [1] 52:7 hydrogeological [1] 54:6 hydrological [1] 43:8 hydrologists [2] 43:1,10 hypothetical [5] 24:14 42:12,20 44:5 63:11</p> <hr/> <p style="text-align: center;">I</p> <p>Idaho [2] 44:16 64:18 idea [1] 23:7 identified [1] 60:1 identifies [1] 58:22 Ill [2] 70:17 71:1 Illinois [1] 47:8 impact [3] 29:20 30:8 77:21 impacting [1] 25:25 impairs [1] 70:19 import [1] 63:16 important [3] 44:25 63:15, 22 importantly [1] 75:19 impose [1] 61:3 impression [1] 59:19 inch [5] 45:8,14 62:21 76:14,17 incidental [1] 15:5 include [1] 37:25 including [1] 66:9 incomplete [1] 19:3 increased [5] 6:8,12 36:24 40:10 75:11 Indeed [1] 58:12 indicates [1] 6:16 indication [1] 75:20 indisputably [1] 51:16 indistinguishable [1] 59:7 inequitable [1] 18:3 inevitable [1] 73:1 inevitably [2] 60:20 70:12 inject [1] 28:15 injuries [3] 71:13 73:20 76:17 injury [37] 5:8,19 10:8 11:6, 6 17:17,18,21 27:22 36:18 47:25 48:4,18 53:15 69:9, 18,20,25 70:1,6,7 71:4,5,5, 15,23,23 73:18 74:22,24, 25 75:2,6 76:6,25 77:2 78:3 instance [1] 68:9 instant [1] 68:4 instead [2] 61:11 72:4 intended [3] 71:16,17,18 intent [1] 25:20 intentional [1] 15:6 intentionally [2] 9:16 15:11 intercepted [1] 52:8 intercepting [1] 37:21</p> | <p>interest [1] 60:22 interests [4] 60:21,24 61:6, 7 interferes [1] 15:22 interfering [1] 15:20 interim [1] 18:1 interrupt [1] 53:7 interstate [32] 5:18 6:21, 24 9:24 10:5 12:12,14,18, 24 13:2,8 20:8,13 21:7 27:5,19 31:13 35:23 39:11 42:10,13,21 44:5 45:25 49:7 51:16 54:25 58:16,19,23 70:11 73:2 intervention [1] 64:16 intrastate [2] 41:23 66:19 intruded [1] 76:14 intrusion [3] 7:15 26:6,12 invasion [1] 76:22 invoking [2] 69:21 72:17 involving [1] 48:22 iron [1] 55:15 irrelevant [2] 12:23 44:11 irrigators [2] 48:19 64:18 isn't [9] 7:11,25 30:5 34:15 59:19 63:2,3 66:23 71:4 issue [13] 6:17 12:2 16:17 21:13 29:16 39:6 58:25 65:22 66:16,19 67:11,23 76:3 issues [3] 40:18 60:2 76:6 itself [3] 42:3 49:7 75:5</p> <hr/> <p style="text-align: center;">J</p> <p>Jackson [1] 2:3 JOHN [5] 2:3 3:3,14 5:1 74:16 Judge [1] 4:19 judgment [2] 33:7 68:11 June [1] 4:21 jurisdiction [8] 46:2,3,6 47:22 48:6 58:13 69:15,17 jurisdictions [1] 67:4 Justice [208] 2:8 4:3,9 5:3 7:7,12,14,25 8:14 9:1,20, 21 10:2,17 11:9,12,20 12:10,16,17,20,22 13:1,4,11, 16,18 14:1,9,11 15:16,24 16:16 17:11 18:5,17,20 19:6,25 20:4,16 21:2,6,14,18, 20 22:2,8,23 23:10 24:3 25:4 26:18,19,20,21 27:1, 12 28:7,8,9,10,11,11,12,13, 23 30:18,21 31:4,14,23,24, 25 32:2,2,4,5,6,7,8,18,25 33:5,6,10,12,19,25 34:10, 12,12,14,20 35:1,2,2,4,5, 11 37:2,4,24 38:18,19 39:13,15 40:2,17,22 41:22 42:13,15 43:15,17,23 44:6,24 45:16 46:2,12,14,24 47:7,9, 11,12,14,16,18 49:11,12, 25 50:5,14 51:10,22,25 52:18,23 53:4,6,18,23 54:8,13, 20,23 55:5,10,24 56:1,2,3,</p> | <p>3,5,6,6,8,18,20,21,21,23, 25,25 57:2,21,22,25 58:6 59:5 61:10,14 62:2,12,19 63:4,6 66:10,17 67:13,15, 19 68:15 69:13 70:15 71:3, 10,14,18 72:1,3,10 73:6,24 74:1,2,3,3,5,6,8,10,10,19 76:12 78:12 Justice's [2] 24:14 46:4 justified [1] 60:3 justify [3] 69:21 72:19,20</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN [31] 12:10,16,17, 20,22 13:1,4,11,16 14:1,9, 11 25:4 26:19 27:1 32:5 41:22 42:13,15 43:16,17, 23 44:25 61:10,14 62:2,12, 19 63:4,6 76:12 Kansas [7] 38:9 41:14 48:2 64:19 65:22 66:5,6 Kavanaugh [25] 4:9 26:20 28:8,10,12,13,23 30:18 34:13,14,20 35:1 52:18,23 53:4,6 56:22,23 66:10 67:13, 15,19 68:15 74:6,8 key [2] 8:6 43:2 kind [14] 9:25 22:24 26:25 27:12 42:7,9 44:7 50:2 54:17 61:18 63:7,19 68:18 76:18 kinds [1] 51:12 knowing [1] 71:6 knowingly [1] 6:4 known [3] 28:25 29:1,8 knows [1] 65:9</p> <hr/> <p style="text-align: center;">L</p> <p>lake [6] 8:1,3 41:23,25 42:4 44:5 lakes [1] 23:3 land [4] 25:8,9 57:18 62:22 landowner's [1] 67:1 last [4] 22:9 36:16 40:2 56:18 Lastly [1] 9:1 later [1] 50:3 Laughter [1] 54:22 Law [6] 4:19 38:21 39:18 52:17 57:20 78:7 lawfully [1] 35:12 laws [2] 65:1,3 lawsuits [1] 51:12 lead [1] 51:12 least [6] 20:7 59:8 60:11 68:9 69:8 70:17 leave [16] 14:14 16:18 18:6 32:13,15,23 33:9,13 35:18 38:16 51:23 53:12 56:9,13 68:8 69:25 left [1] 49:19 legal [3] 12:2 72:14,19 Legally [1] 44:13 lengthy [1] 68:13</p> | <p>less [4] 14:15 62:23 65:5 70:17 leveling [1] 30:5 levels [2] 7:23 75:14 lies [1] 45:3 lift [1] 54:16 LIGHT [1] 1:7 likely [1] 73:9 limit [2] 20:25 53:5 limitation [1] 73:13 limited [4] 8:11 9:17 30:7 77:13 limiting [1] 45:22 limits [3] 20:19,22,24 line [2] 32:9 33:7 lines [4] 19:13 59:11 60:7 65:18 literally [1] 63:23 litigated [1] 40:18 litigating [1] 16:22 litigation [2] 32:18 50:8 little [3] 36:22 42:19 53:19 LIU [26] 2:7 3:9 57:25 58:2, 5 59:22 61:10,13,20 62:11, 15,25 63:5,12 67:13,14,19 68:23 70:25 71:9,17,22 72:2,8,12 73:11 located [5] 5:13 7:21 13:14 14:4 16:8 logical [1] 32:17 long [3] 24:22,24 44:20 long-running [1] 38:13 look [6] 19:22 33:7 40:16 43:19 66:20 73:13 looked [3] 41:10 44:15 73:15 looking [2] 42:17 43:11 lose [1] 17:8 lot [7] 14:13 23:25 28:21 31:15 42:25 49:16 59:12</p> <hr/> <p style="text-align: center;">M</p> <p>made [4] 26:5,5 45:20 68:5 magnitude [4] 48:1,5 53:16 69:20 manage [1] 28:22 management [1] 28:16 many [3] 51:1,1 70:2 Marshal [3] 4:15,15,21 Massachusetts [1] 23:20 massive [1] 37:11 Master [8] 6:19 32:12 35:15 36:11,17 41:4 56:14 76:8 Master's [3] 5:6 59:1 67:21 material [8] 38:6,11,15 40:3,23 41:8 53:9,14 matter [13] 1:15 6:23 10:16 28:2 34:21 51:11 60:15,15 62:21 63:1 66:3 68:22 76:16 matters [3] 27:8 66:3 77:18 mean [16] 8:1 11:13 12:11</p> | <p>23:1,22 25:13 27:4,7 40:3 43:17,17 49:13,14 53:21 54:25 65:7 means [1] 54:9 measurable [7] 8:10 14:7, 12 15:10 24:23 25:10,23 measure [1] 40:15 mechanism [4] 62:12,13 64:22,25 meet [2] 33:1 38:5 MEMPHIS [5] 1:6,7 36:21 37:11 50:19 mention [1] 16:17 mentioned [4] 33:15 64:12 65:13 69:13 mere [1] 9:4 merit [1] 70:3 met [1] 32:16 Mexico [1] 19:15 Middle [3] 6:20 35:13 49:8 might [12] 11:1 13:23 21:13 34:3 45:20,25 47:20 59:15 61:25 63:16 66:11,16 migrates [1] 21:12 miles [1] 6:7 million [6] 35:24 36:8 43:19,21,25 72:20 millions [5] 45:10 50:16 52:7 65:21,21 Milwaukee [1] 39:8 mineral [2] 57:7,18 minerals [2] 55:16 57:12 minimal [1] 63:7 minimum [1] 71:23 MISSISSIPPI [90] 1:3 2:4 4:23 5:9 6:3,9,24 7:9,11 8:4,21,24 9:15,19 11:16 12:7, 7 13:6,21,24 15:12,21 16:9, 14 18:2 19:1,5,9,19,21 20:25 21:1,22 24:5,10,11,19 26:2,6 27:7 29:14 30:1 33:15 35:17 36:9,13,18,21,24 37:5,20,22 38:2,5 40:6 41:23 42:1,7 43:6 47:20 49:3 50:19 51:19 58:8,12,22 61:16,18 62:3,23 64:14 66:9, 14,23 67:25 69:3 70:6,9,18 72:15 73:9,12,14,19 74:20 75:10 76:9 77:4,16,22 Mississippi's [35] 5:7,11, 14 6:3,13 13:14 15:14 16:13 20:20 25:8 35:16,24 36:1,6 37:12,16 41:16,17 58:7, 10,25 59:7 62:22 64:5 67:12 70:5 71:1 73:4 75:1,3,9, 11 76:1 77:9 78:8 Mississippi/Tennessee [1] 41:24 Missouri [1] 8:16 misunderstanding [1] 34:18 mixed [2] 53:24 55:19 molecules [3] 44:9 67:1 70:8</p> |
|---|--|---|--|---|

Official

| | | | | |
|--|--|---|--|--|
| <p>Monday ^[1] 1:13 money ^[1] 50:11 morning ^[1] 4:23 most ^[3] 4:18 51:2 58:19 mostly ^[1] 54:12 motion ^[12] 32:14 33:9,17, 21 34:4 38:3,16 41:5,7 53:12 68:11,11 motivate ^[1] 31:19 motivating ^[1] 31:12 move ^[6] 15:8 25:21 26:10 27:6 44:10 59:20 moved ^[3] 33:1 37:6 52:3 movement ^[3] 45:8 65:14, 20 moves ^[3] 27:8 42:17 65:17 moving ^[10] 44:9,9 45:14, 18 46:15,17 60:6 64:13,23 65:15 much ^[9] 5:21 27:4 29:25 34:10 45:5 50:8 72:23,24 77:20 must ^[1] 35:25</p> | <p>4 41:4 51:25 73:3 noting ^[1] 4:8 notion ^[1] 28:24 notwithstanding ^[1] 48:24 nuisance ^[6] 38:22 39:3,4, 18,20 46:5 number ^[7] 18:22,22 33:20, 24 34:8 64:2 68:1 Numbers ^[1] 39:25</p> | <p>Others ^[2] 23:2 75:8 otherwise ^[1] 75:22 ought ^[2] 44:10 51:3 out ^[23] 9:18 15:11 18:2,11 26:23 30:5,6,14 35:13 36:9 39:21 44:17 45:15 50:18 52:11 55:2,15,22 57:5 59:15 65:4 70:2 71:20 outer ^[3] 46:19,21,25 outgrowth ^[1] 32:17 outside ^[3] 25:2 30:8 47:3 over ^[49] 6:25 8:12,23 9:11, 14,18 10:15 12:8 13:13 15:13 16:8,10,15,22 17:21 19:24 20:21 21:1 23:5,7 24:8, 17,18,18 25:21,24 26:14, 15,16 27:23 28:18 29:4,16 38:3,13 47:8 48:2 55:14 58:16 64:10 71:24 72:16 73:1 75:4 76:19,19,19,24 77:3 overlying ^[2] 6:15 75:24 overruled ^[1] 59:2 overruling ^[3] 2:10 3:11 58:4 owe ^[2] 31:6,7 owes ^[1] 31:7 own ^[13] 6:13,14 10:10 13:20 14:3 16:3,4 23:19 29:4 36:25 37:16 48:18 57:17 owned ^[1] 57:15 owner ^[1] 66:22 ownership ^[10] 52:14 53:1 57:15 71:24 72:4,5,11,12, 16,18 owns ^[1] 24:5</p> | <p>65:21 period ^[4] 19:24 34:3,9 51:21 permission ^[2] 6:3 18:9 personal ^[1] 57:16 pests ^[1] 19:17 phenomenon ^[1] 44:7 physical ^[14] 9:9 14:8,10 16:5,10 19:8,23 24:22,25 26:5,12 43:4 62:14 76:21 physically ^[6] 7:13,21,22 14:4 16:8 76:14 physics ^[1] 65:3 picking ^[1] 34:14 pipe ^[4] 26:4,7,12,16 place ^[7] 20:22,23 23:6,8, 21 26:10 70:1 places ^[1] 19:17 Plaintiff ^[6] 1:4 2:4 3:4,15 5:2 74:17 Plaintiff's ^[3] 2:10 3:12 58:4 plan ^[1] 52:5 plane ^[1] 47:15 plausibly ^[1] 40:7 plead ^[9] 18:21,22 36:14 40:6 68:5,12 73:18,20,21 pleaded ^[3] 39:16 49:4 53:17 pleadings ^[1] 68:12 please ^[4] 5:4 15:17 35:11 58:6 pleased ^[1] 4:14 pleasure ^[1] 71:6 pled ^[1] 74:24 point ^[18] 9:3,7 10:4 11:25 19:21 20:15,18,24 39:21 41:13 44:24 55:2 58:12 59:25 61:18 69:5 72:17,22 pointing ^[2] 16:20 26:22 points ^[3] 50:6 74:19 76:10 policy ^[1] 61:3 posed ^[1] 44:6 posit ^[2] 28:1,25 positing ^[1] 21:11 position ^[7] 9:22 28:14,21 34:15 67:12,22 69:3 possesses ^[1] 6:25 possible ^[1] 19:4 precedents ^[4] 20:9 59:9 60:1 67:10 preclude ^[1] 22:6 precluded ^[1] 68:20 predevelopment ^[1] 36:7 predictable ^[7] 8:11 14:6, 12,15 24:24 25:10,24 prejudice ^[5] 51:23 52:19 53:1 67:18,18 premised ^[2] 25:14 28:24 presence ^[1] 60:9 present ^[2] 33:20 60:10 presented ^[2] 39:24 71:11 presenting ^[2] 12:3,4 preserve ^[1] 34:16</p> | <p>preserved ^[1] 71:7 pressure ^[1] 7:23 presumably ^[4] 30:23 31:5 63:6 68:16 presume ^[1] 63:10 prevail ^[4] 30:23 32:10,21 33:8 prevent ^[3] 18:4 24:12,13 principal ^[1] 36:1 principally ^[2] 46:10 67:23 principle ^[6] 27:14 28:3 45:23 46:22 47:5 67:5 principles ^[3] 29:7 33:14 78:9 prior ^[2] 59:9 60:1 privately ^[1] 57:14 probably ^[2] 22:10 63:19 problem ^[4] 10:7 70:4 77:10 78:1 problems ^[2] 8:18 28:21 proceedings ^[1] 76:8 process ^[1] 28:17 professors ^[2] 38:21 39:19 prompt ^[1] 68:10 promptly ^[1] 69:8 proper ^[2] 33:16,21 properly ^[1] 71:10 property ^[2] 57:16 67:2 proposal ^[1] 69:25 Proposed ^[2] 39:24 76:23 proposing ^[1] 24:20 prospective ^[4] 17:16,23 34:23 51:7 protect ^[1] 60:25 protection ^[1] 72:6 prove ^[1] 41:16 provides ^[1] 35:20 public ^[4] 46:11 47:2,3 57:14 pull ^[3] 9:18 18:2 57:8 pulled ^[1] 55:21 pulling ^[4] 6:16 8:22 15:11 76:2 pulls ^[1] 66:24 pump ^[6] 8:17 24:25 40:11 54:2 57:7 77:20 pumped ^[4] 29:19,24 35:12 55:14 pumping ^[24] 6:8,13,14 7:8, 22 8:2 14:5 15:7 16:7 24:25 25:7,20 26:9 29:14 30:7 36:25 37:19 40:13 48:12, 25 50:13 55:1 75:15,24 pumps ^[3] 37:6,16 48:16 pun ^[3] 71:15,17,18 pure ^[1] 55:16 purely ^[1] 30:14 purpose ^[1] 15:7 pursue ^[3] 17:25 19:2 34:24 put ^[9] 13:18 15:18 33:23 53:13,25 54:16 61:7 65:7 67:2</p> |
| O | | | | |
| <p>obey ^[1] 19:12 objection ^[2] 56:11,19 obtain ^[1] 19:4 obviously ^[2] 33:17,24 occurred ^[1] 38:16 occurring ^[7] 10:11 14:25 15:1 16:3,10,12 48:20 ocean ^[1] 44:17 oceans ^[1] 23:3 October ^[3] 1:13 4:5,6 often ^[1] 25:11 Okay ^[10] 7:14 12:22 13:3 26:18 31:4,14 35:5 46:16 54:14 56:20 Oklahoma's ^[1] 27:24 old ^[1] 47:7 one ^[40] 5:22 11:7 13:18 14:16 18:22 21:9 22:9 23:12 25:11,12 26:10 30:22 32:7 34:1 35:22,23 40:2 43:4,8 45:8,14 46:10 47:6 50:7 57:2 60:8,21 61:2,23 62:13 63:15 64:3,25 65:13 66:22,24,24 69:15,15,22 only ^[12] 9:24 17:11,23 18:25 29:3 30:6 34:23 45:2 62:9 67:9 69:5 72:22 open ^[1] 17:9 opened ^[1] 6:6 opening ^[1] 69:14 operation ^[2] 55:1,23 opportunity ^[7] 34:2,21,24 68:25 69:4,6 71:12 oppose ^[1] 37:24 opposed ^[1] 25:17 opposite ^[1] 66:13 option ^[1] 19:1 oral ^[7] 1:16 3:2,5,8 5:1 35:8 58:2 order ^[1] 40:10 orders ^[1] 4:11 Oregon ^[4] 44:14 48:14,16 64:18 Original ^[7] 4:23 46:1,3,6 47:22 69:14,16 originally ^[1] 73:15 other ^[26] 5:20 10:18,19 16:19 21:10 23:21 25:16 27:15 31:8 32:16 37:12 39:7 48:21 49:15 53:3 55:16 57:6 59:11,12 60:10,24 61:3, 24 64:25 66:22 72:24</p> | <p>obey ^[1] 19:12 objection ^[2] 56:11,19 obtain ^[1] 19:4 obviously ^[2] 33:17,24 occurred ^[1] 38:16 occurring ^[7] 10:11 14:25 15:1 16:3,10,12 48:20 ocean ^[1] 44:17 oceans ^[1] 23:3 October ^[3] 1:13 4:5,6 often ^[1] 25:11 Okay ^[10] 7:14 12:22 13:3 26:18 31:4,14 35:5 46:16 54:14 56:20 Oklahoma's ^[1] 27:24 old ^[1] 47:7 one ^[40] 5:22 11:7 13:18 14:16 18:22 21:9 22:9 23:12 25:11,12 26:10 30:22 32:7 34:1 35:22,23 40:2 43:4,8 45:8,14 46:10 47:6 50:7 57:2 60:8,21 61:2,23 62:13 63:15 64:3,25 65:13 66:22,24,24 69:15,15,22 only ^[12] 9:24 17:11,23 18:25 29:3 30:6 34:23 45:2 62:9 67:9 69:5 72:22 open ^[1] 17:9 opened ^[1] 6:6 opening ^[1] 69:14 operation ^[2] 55:1,23 opportunity ^[7] 34:2,21,24 68:25 69:4,6 71:12 oppose ^[1] 37:24 opposed ^[1] 25:17 opposite ^[1] 66:13 option ^[1] 19:1 oral ^[7] 1:16 3:2,5,8 5:1 35:8 58:2 order ^[1] 40:10 orders ^[1] 4:11 Oregon ^[4] 44:14 48:14,16 64:18 Original ^[7] 4:23 46:1,3,6 47:22 69:14,16 originally ^[1] 73:15 other ^[26] 5:20 10:18,19 16:19 21:10 23:21 25:16 27:15 31:8 32:16 37:12 39:7 48:21 49:15 53:3 55:16 57:6 59:11,12 60:10,24 61:3, 24 64:25 66:22 72:24</p> | <p>pace ^[1] 65:14 PAGE ^[5] 3:2 39:25 52:10 59:6 75:23 pages ^[1] 75:13 papers ^[1] 33:2 parents ^[1] 72:5 part ^[12] 17:18,18 46:1,3,5, 16 47:21 49:9 52:8 54:21 56:18 67:21 participating ^[1] 4:9 particles ^[1] 53:25 particular ^[1] 20:15 particularly ^[1] 17:25 parties ^[1] 67:24 parts ^[7] 45:2,3,5,6 54:19 65:25,25 passed ^[1] 58:9 passes ^[1] 64:11 past ^[2] 17:18 36:22 path ^[1] 70:9 patriae ^[1] 72:6 pave ^[1] 78:7 pay ^[1] 52:6 pending ^[2] 33:10 56:13 people ^[2] 13:22 21:13 per ^[5] 36:8 43:22 45:8,11</p> | <p>pace ^[1] 65:14 PAGE ^[5] 3:2 39:25 52:10 59:6 75:23 pages ^[1] 75:13 papers ^[1] 33:2 parents ^[1] 72:5 part ^[12] 17:18,18 46:1,3,5, 16 47:21 49:9 52:8 54:21 56:18 67:21 participating ^[1] 4:9 particles ^[1] 53:25 particular ^[1] 20:15 particularly ^[1] 17:25 parties ^[1] 67:24 parts ^[7] 45:2,3,5,6 54:19 65:25,25 passed ^[1] 58:9 passes ^[1] 64:11 past ^[2] 17:18 36:22 path ^[1] 70:9 patriae ^[1] 72:6 pave ^[1] 78:7 pay ^[1] 52:6 pending ^[2] 33:10 56:13 people ^[2] 13:22 21:13 per ^[5] 36:8 43:22 45:8,11</p> | <p>per ^[5] 36:8 43:22 45:8,11</p> |
| P | | | | |

Official

| | | | | |
|---|--|--|--|---|
| <p>putting [5] 9:16 10:18 11:12 15:8,22</p> | <p>relevant [1] 43:24 relief [2] 19:3,4 relocation [1] 37:11 remedy [16] 5:7,8 9:23 17:19,22,25 18:16,21,25 27:20 34:23 35:20 38:21 51:17 68:22 78:4</p> | <p style="text-align: center;">S</p> <p>salmon [2] 9:25 46:17 same [15] 8:15,17,20,25 9:4 14:16 17:2 22:24 42:21 44:7 62:7 63:11,13 75:16 76:18</p> | <p>shouldn't [4] 18:6 38:22 52:18 76:16 show [9] 36:18 48:18 50:21 53:9,13 69:20 70:7,8 74:21</p> | <p>10 69:22 71:24 72:18 75:4 sovereignty [4] 5:25 7:5 58:21 75:1 space [3] 26:6,13 76:22 spawn [1] 44:18 spawns [1] 50:7 Special [9] 5:5 6:19 32:12 35:15 41:4 56:14 59:1 67:21 76:8</p> |
| <p style="text-align: center;">Q</p> <p>qualify [2] 40:4,6 quality [3] 39:7,23 40:12 quantities [1] 54:7 question [31] 5:12,16 6:22 11:3 17:9 18:6,18 20:17 21:15 22:24 25:5 30:18,22 32:8 37:10 39:15 40:2 41:3,11 43:15 44:2 49:12 50:6 51:3 56:9 57:3,3 59:24 72:9 76:15 77:8 questioning [2] 32:9 42:25 questions [10] 7:6 13:18 32:1 37:3 56:2,24 59:4 74:2,7,9 quick [1] 32:8 quickly [1] 44:10 quite [2] 43:13 66:13</p> | <p>remotely [1] 4:10 remove [1] 65:10 removed [2] 65:9,11 removing [1] 14:24 replead [1] 34:21 report [2] 59:1 67:22 representative [1] 39:8 represents [1] 58:18 required [1] 69:19 requirement [5] 69:10,18, 25 70:1,6 requires [1] 78:3 residential [1] 70:21 resolve [2] 28:17 68:14 resolved [1] 66:19 resolving [1] 56:11 resource [22] 6:21,24 10:15 12:5 19:18 20:8,13 21:7,11 24:8 28:16,18 29:4 51:8,16 58:20 60:6,8,9 64:16 65:17 72:16 resources [13] 27:16 28:22 46:9 47:3,6 50:10,11 58:17 60:2 70:19 71:7 72:2,6 respect [4] 13:21 31:22 50:25 69:9 respectfully [2] 50:23 51:2 respects [2] 48:10 58:20 respond [2] 29:10 53:16 response [3] 28:19 36:2 50:6 rest [1] 30:9 result [2] 40:13 75:15 retired [1] 4:16 reversal [1] 37:19 rights [2] 57:15,18 river [14] 5:18 10:5 13:22, 23 14:14 27:19 38:13 42:22 46:17 49:7,7 65:22,24 66:4 rivers [2] 44:20 45:18 ROBERTS [42] 4:3 9:21 10:17 11:9,12,20 19:6 20:4 21:2,6,18,20 22:2,8 28:11 30:21 31:4,14,23 32:2 34:12 35:2,5 53:18,23 54:8,13, 20,23 55:5,24 56:3,6,21,25 57:22,25 59:5 73:24 74:3, 10 78:12 room [1] 63:19 round [1] 21:24 rule [2] 77:9 78:8 run [2] 44:20 55:14 running-around [1] 23:13 runs [2] 23:5,24</p> | <p>San [1] 23:15 sand [2] 54:11,14 sands [1] 43:7 satisfied [1] 60:17 satisfying [1] 41:7 saturated [3] 36:23 54:5,9 saturating [1] 54:10 saying [15] 11:21 12:12,17, 23 13:4 20:20 24:16 25:5 29:11 42:17 43:19 56:12 63:21 71:4,19 says [5] 23:14 28:14 37:5 66:25 67:16 scarce [3] 50:10,11 51:8 scarcity [2] 51:3,4 science [1] 53:20 scientific [1] 55:22 sea [1] 23:23 Second [1] 36:11 Security [1] 4:18 sediment [1] 55:20 seeing [3] 23:23 29:13 48:8 seek [5] 16:25 34:16,18 68:1,24 seeking [5] 17:7 27:22 53:3 68:21 72:21 seem [5] 7:8 21:8 26:3 28:20 52:20 seen [4] 33:2 49:16 69:9 73:23 seized [1] 19:20 sell [1] 46:20 selling [1] 71:14 sense [9] 9:7 11:1 20:7 24:5 30:12 31:18 60:18 70:17 71:5 sensible [1] 58:19 sentence [1] 67:15 separate [1] 57:5 separately [1] 57:19 separates [1] 55:1 separating [1] 57:4 serious [3] 53:15 69:20 73:18 service [1] 4:20 set [3] 31:7 34:3 76:8 setting [1] 18:14 sever [1] 57:18 severed [1] 57:17 share [3] 5:10 52:12 67:5 shared [1] 51:8 sharing [2] 50:9,10 she's [1] 26:22 sheer [1] 45:1 shore [1] 54:15 should've [1] 23:14</p> | <p>showed [2] 49:5 55:7 side [9] 8:2 15:19,19 16:19 29:15 35:14 48:16 49:1 54:15 significance [1] 40:15 significant [4] 47:25 48:4 50:16 53:15 significantly [1] 40:10 silt [7] 53:24 54:1 55:6,8 57:4,6 59:15 silt's [1] 59:16 similar [4] 8:18 31:21 59:8 60:11 simple [1] 65:3 simply [12] 29:6 37:5 38:2 56:11 58:9 61:2 65:12 68:7 70:2,7 72:13 77:24 since [1] 41:17 single [4] 58:12 65:16 66:4, 7 sister [1] 25:3 sits [1] 70:10 Sitting [1] 48:7 situation [3] 7:17,20 43:12 situations [2] 30:25 44:20 size [2] 45:1,1 sky [1] 23:2 slant [1] 61:12 slowly [4] 27:6 36:2 42:18 65:15 small [1] 53:25 sole [2] 5:7 6:25 Solicitor [2] 2:3,7 solve [2] 77:10 78:1 somebody [3] 23:16,19 55:7 somehow [1] 63:21 Someone [1] 54:14 Sometimes [1] 57:16 sophisticated [1] 55:22 sorry [4] 44:16 53:6 66:5 74:14 sort [5] 26:12 57:6,7 67:4 72:18 sorted [1] 71:20 sorts [1] 71:13 SOTOMAYOR [15] 15:16, 24 16:16 17:11 18:5,17,20 32:18 33:11 38:19 39:13, 15 40:2,17,22 Sotomayor's [1] 32:9 sought [1] 33:1 sound [2] 31:15 45:21 sounds [3] 21:3 23:15 73:6 sovereign [3] 5:14,24 7:1 10:10,12 11:10 12:6,8 13:14 15:2,14 16:3,4,13 17:21 20:19,21 24:9 27:24 29:3 60:21,22,24,25 61:6 64:5,</p> | <p>10 69:22 71:24 72:18 75:4 standing [1] 71:2 start [1] 49:14 started [2] 16:23 43:18 starting [1] 38:3 starts [1] 31:15 state [49] 5:20,21,23 9:5 10:14 11:7 14:13,14,16,22 15:4 19:13 21:9 23:12,13 25:3,12,13 29:20,21 35:22,23 36:23 37:23 44:8 47:25 49:1,14,14 53:3 59:10,11 60:7 61:2,5,23 63:1 64:9,11,17, 25 65:17 66:20 69:19 70:10,16 73:10,12 77:14 state's [8] 5:23 10:11 15:1 21:11 60:8,22 61:24 70:23 statement [1] 52:17 STATES [34] 1:1,17 2:9 3:10 4:6,16 10:9 17:24 19:10 21:8,12 24:21 25:25 28:14,20 29:2,11,19 30:20 31:12,19 36:10 42:19 45:4 51:1,2 55:12 57:17 58:3,21 66:8 67:10 72:24 76:4 states' [3] 28:24 61:7,7 stayed [1] 23:14 stepped [1] 62:21 steps [1] 41:7 still [6] 6:24 19:1 44:7 49:11 61:25 63:14 stop [5] 6:6 38:2,4,24 69:22 stopped [1] 17:7 stopping [1] 73:3 straight [1] 61:11 stream [2] 65:2,4 streams [2] 23:3 49:6 stretches [1] 44:21 strong [1] 45:20 subject [6] 10:19 12:1 20:</p> |
| <p style="text-align: center;">R</p> <p>raise [1] 68:16 ran [1] 66:1 range [1] 8:7 rank [1] 4:17 Rather [4] 5:11 6:6 42:20 67:11 reach [1] 15:3 reaching [3] 6:19 11:7,13 read [1] 54:9 real [4] 48:8 68:5 74:21 76:5 really [10] 53:20 54:3 59:19 62:2,7 64:20 65:6 66:3 70:6 76:18 reason [4] 13:5 17:19 30:11 58:22 reasonable [2] 34:2,9 reasons [2] 10:25 44:12 REBUTTAL [4] 3:13 74:13, 14,16 recently [1] 4:18 recharge [1] 49:9 recognition [2] 17:15,23 recognized [10] 5:19,22 7:2 27:17,18 29:2,7 47:7 75:6 78:10 recognizes [1] 47:1 recognizing [1] 27:21 recommended [2] 32:12 35:15 reconcile [1] 61:8 record [3] 6:16 75:21 76:10 rectify [1] 17:17 redress [1] 17:20 redresses [2] 5:8 10:7 reflect [1] 33:14 Regional [1] 5:16 reject [1] 5:5 relation [1] 77:18</p> | <p>resource [22] 6:21,24 10:15 12:5 19:18 20:8,13 21:7,11 24:8 28:16,18 29:4 51:8,16 58:20 60:6,8,9 64:16 65:17 72:16 resources [13] 27:16 28:22 46:9 47:3,6 50:10,11 58:17 60:2 70:19 71:7 72:2,6 respect [4] 13:21 31:22 50:25 69:9 respectfully [2] 50:23 51:2 respects [2] 48:10 58:20 respond [2] 29:10 53:16 response [3] 28:19 36:2 50:6 rest [1] 30:9 result [2] 40:13 75:15 retired [1] 4:16 reversal [1] 37:19 rights [2] 57:15,18 river [14] 5:18 10:5 13:22, 23 14:14 27:19 38:13 42:22 46:17 49:7,7 65:22,24 66:4 rivers [2] 44:20 45:18 ROBERTS [42] 4:3 9:21 10:17 11:9,12,20 19:6 20:4 21:2,6,18,20 22:2,8 28:11 30:21 31:4,14,23 32:2 34:12 35:2,5 53:18,23 54:8,13, 20,23 55:5,24 56:3,6,21,25 57:22,25 59:5 73:24 74:3, 10 78:12 room [1] 63:19 round [1] 21:24 rule [2] 77:9 78:8 run [2] 44:20 55:14 running-around [1] 23:13 runs [2] 23:5,24</p> | <p>sea [1] 23:23 Second [1] 36:11 Security [1] 4:18 sediment [1] 55:20 seeing [3] 23:23 29:13 48:8 seek [5] 16:25 34:16,18 68:1,24 seeking [5] 17:7 27:22 53:3 68:21 72:21 seem [5] 7:8 21:8 26:3 28:20 52:20 seen [4] 33:2 49:16 69:9 73:23 seized [1] 19:20 sell [1] 46:20 selling [1] 71:14 sense [9] 9:7 11:1 20:7 24:5 30:12 31:18 60:18 70:17 71:5 sensible [1] 58:19 sentence [1] 67:15 separate [1] 57:5 separately [1] 57:19 separates [1] 55:1 separating [1] 57:4 serious [3] 53:15 69:20 73:18 service [1] 4:20 set [3] 31:7 34:3 76:8 setting [1] 18:14 sever [1] 57:18 severed [1] 57:17 share [3] 5:10 52:12 67:5 shared [1] 51:8 sharing [2] 50:9,10 she's [1] 26:22 sheer [1] 45:1 shore [1] 54:15 should've [1] 23:14</p> | <p>size [2] 45:1,1 sky [1] 23:2 slant [1] 61:12 slowly [4] 27:6 36:2 42:18 65:15 small [1] 53:25 sole [2] 5:7 6:25 Solicitor [2] 2:3,7 solve [2] 77:10 78:1 somebody [3] 23:16,19 55:7 somehow [1] 63:21 Someone [1] 54:14 Sometimes [1] 57:16 sophisticated [1] 55:22 sorry [4] 44:16 53:6 66:5 74:14 sort [5] 26:12 57:6,7 67:4 72:18 sorted [1] 71:20 sorts [1] 71:13 SOTOMAYOR [15] 15:16, 24 16:16 17:11 18:5,17,20 32:18 33:11 38:19 39:13, 15 40:2,17,22 Sotomayor's [1] 32:9 sought [1] 33:1 sound [2] 31:15 45:21 sounds [3] 21:3 23:15 73:6 sovereign [3] 5:14,24 7:1 10:10,12 11:10 12:6,8 13:14 15:2,14 16:3,4,13 17:21 20:19,21 24:9 27:24 29:3 60:21,22,24,25 61:6 64:5,</p> | <p>10 69:22 71:24 72:18 75:4 standing [1] 71:2 start [1] 49:14 started [2] 16:23 43:18 starting [1] 38:3 starts [1] 31:15 state [49] 5:20,21,23 9:5 10:14 11:7 14:13,14,16,22 15:4 19:13 21:9 23:12,13 25:3,12,13 29:20,21 35:22,23 36:23 37:23 44:8 47:25 49:1,14,14 53:3 59:10,11 60:7 61:2,5,23 63:1 64:9,11,17, 25 65:17 66:20 69:19 70:10,16 73:10,12 77:14 state's [8] 5:23 10:11 15:1 21:11 60:8,22 61:24 70:23 statement [1] 52:17 STATES [34] 1:1,17 2:9 3:10 4:6,16 10:9 17:24 19:10 21:8,12 24:21 25:25 28:14,20 29:2,11,19 30:20 31:12,19 36:10 42:19 45:4 51:1,2 55:12 57:17 58:3,21 66:8 67:10 72:24 76:4 states' [3] 28:24 61:7,7 stayed [1] 23:14 stepped [1] 62:21 steps [1] 41:7 still [6] 6:24 19:1 44:7 49:11 61:25 63:14 stop [5] 6:6 38:2,4,24 69:22 stopped [1] 17:7 stopping [1] 73:3 straight [1] 61:11 stream [2] 65:2,4 streams [2] 23:3 49:6 stretches [1] 44:21 strong [1] 45:20 subject [6] 10:19 12:1 20:</p> |

Official

| | | | | |
|---|---|---|--|--|
| <p>10 57:9 63:14 68:10 subjected ^[1] 57:12 submitted ^[2] 78:13,15 subsidence ^[3] 39:6,23 40:12 subsoil ^[1] 43:7 substance ^[2] 26:15 76:19 substantial ^[7] 48:1,4,12,25 50:22 74:22 76:6 substantially ^[1] 6:8 subsur ^[1] 48:19 subsurface ^[2] 28:3 48:20 suctioned ^[1] 6:10 suddenly ^[1] 23:23 suffered ^[1] 40:11 suffice ^[2] 70:16 71:13 sufficed ^[1] 73:23 suffices ^[1] 64:3 sufficient ^[4] 69:12 73:17 75:6 76:11 sufficiently ^[4] 41:20 59:8 60:11 73:18 suggest ^[6] 9:2 20:7 22:4,11 28:20 50:24 suggested ^[2] 43:24 56:15 suggesting ^[4] 22:12,16 35:17 41:5 suggestion ^[5] 33:22 34:5 40:7 74:20 75:19 suggests ^[1] 75:21 suing ^[1] 49:14 suit ^[2] 50:2 73:5 summer ^[1] 4:17 support ^[5] 2:10 3:11 9:3 58:4,11 suppose ^[9] 11:21 19:16,18 23:16 32:10 41:22 42:1,1 61:10 SUPREME ^[3] 1:1,16 4:5 surface ^[14] 5:18 10:5 27:15,19 28:5 30:4 43:7 48:13,23 49:6 57:15,18 58:24 60:13 surficial ^[2] 6:15 75:25 Survey ^[2] 6:5 76:1 systems ^[1] 28:16</p> <hr/> <p style="text-align: center;">T</p> <p>talked ^[1] 76:22 talks ^[1] 75:12 Tarrant ^[19] 5:16 7:2,16,16 9:7,8,10 10:4,4 27:17 28:6 29:2,7 75:7 76:20,20,22 78:5,10 technically ^[1] 8:3 technological ^[1] 42:2 TENNESSEE ^[8] 1:6,7 4:24 6:2 7:8,9,21 8:2,12,15,16 9:13,19 11:16 12:5 13:10,11,12,16,19,23 14:2,5 15:8,18,19 16:6,11 18:1 19:20,20,22 20:2,12,14,14,24 21:16,23,23 22:1,3,16 24:16 26:3 27:7 29:12,14,</p> | <p>23 30:23 31:1,6,7 35:12 37:17,23 42:3 43:5 45:6 50:15,18,18 52:6,11,15 53:16 57:8 60:23 61:12,16 62:3 64:14,20 66:9,12 70:10 73:4 75:2 77:2,15,19 Tennessee's ^[5] 12:6 22:17 25:9 36:19 67:20 tens ^[2] 45:10 50:16 term ^[2] 4:5,7 territorial ^[1] 52:25 territory ^[14] 5:14,24 7:1 11:11 13:15 15:2,14 16:3,4,13 19:23 24:9 27:25 58:10 tested ^[2] 68:10 69:7 testified ^[4] 37:18 43:10 50:15 76:2 testimony ^[2] 37:9 45:9 Texas ^[1] 27:22 theirs ^[2] 19:9 21:9 theory ^[7] 20:11 58:7,11,14 72:19 73:4 75:16 there's ^[26] 11:22 13:22 17:15,23 20:3 25:5,16,20 30:6,8 33:9 40:23 42:11 44:21 49:13 53:14 58:11 62:17 64:8 65:4 73:3 75:13,19,20,20 76:11 therefore ^[4] 35:25 51:20 59:1 70:19 They've ^[5] 6:12 52:4 62:13 69:2 70:7 thickness ^[1] 45:4 thinks ^[2] 69:1 73:7 third ^[1] 17:3 Thirty-seven ^[1] 43:21 THOMAS ^[18] 7:7,12,14,25 8:14 9:1,20 13:18 31:24,25 37:4,24 38:18 44:6 56:1,2 74:1,2 though ^[1] 67:25 three ^[1] 6:7 threshold ^[2] 69:10,17 timeliness ^[1] 32:18 timely ^[1] 33:16 title ^[1] 24:6 today ^[5] 4:10 32:11 48:7 70:22 72:15 Today's ^[1] 4:11 took ^[3] 23:17,20 70:8 top ^[1] 70:10 tort ^[2] 39:9 63:19 totally ^[3] 23:23 50:2 66:1 transcript ^[1] 75:12 transferring ^[1] 42:18 translate ^[1] 45:10 transplant ^[1] 72:4 travels ^[1] 27:5 treat ^[3] 42:20,21 61:5 treated ^[1] 57:19 treating ^[1] 27:2 trespass ^[3] 25:7 62:14 63:20</p> | <p>trial ^[7] 37:9 39:22 42:24,24 45:9 49:5 50:20 tried ^[2] 70:7,7 tries ^[1] 63:25 trivial ^[1] 65:20 trouble ^[1] 53:19 true ^[7] 7:25 25:11,15 31:2 43:18 59:22 64:7 trust ^[4] 46:11 47:2,3 57:14 trying ^[4] 24:11 29:15 59:20 73:21 tug ^[1] 29:15 turn ^[4] 14:17 16:16 72:20 76:20 turns ^[1] 5:11 two ^[9] 18:22 21:8,12 37:8 50:6 60:1,5,10,14 type ^[5] 10:8 11:6 27:21 40:14 70:17 types ^[1] 27:16</p> <hr/> <p style="text-align: center;">U</p> <p>U.S ^[2] 6:4 75:25 ultimately ^[2] 15:3 78:5 unable ^[1] 40:9 uncertainty ^[2] 28:15 66:11 under ^[17] 19:23 20:9,11,14,14 23:4 39:20 42:12 43:5,6 45:6 49:13 51:1,18 57:20 58:7 67:1 underground ^[1] 23:4 undermine ^[1] 28:17 underneath ^[3] 45:3 66:8 67:6 underpinnings ^[1] 69:16 understand ^[3] 12:11 23:22 54:21 understanding ^[1] 22:25 understood ^[1] 62:18 undisputed ^[3] 6:1 8:9 36:19 unfortunately ^[1] 24:1 unique ^[1] 29:22 uniquely ^[1] 49:4 unit ^[1] 43:9 UNITED ^[8] 1:1,17 2:9 3:10 4:6,16 55:12 58:3 units ^[1] 70:21 unlimited ^[1] 20:21 unnatural ^[7] 8:7 10:10 13:7 14:6,8 55:1 64:12 unnaturally ^[4] 7:23 9:14 14:23 29:16 unprecedented ^[1] 66:15 until ^[3] 40:23 51:12 54:2 up ^[8] 21:24 32:8 34:14 53:24 54:16 57:3 66:24 76:8 upheaval ^[1] 67:7 upheld ^[1] 73:4 upstream ^[3] 5:20 14:13 64:9 urge ^[2] 53:2 55:18 usable ^[2] 54:7 55:3</p> | <p>usage ^[2] 35:21 39:11 uses ^[1] 51:5 using ^[1] 13:22 usurping ^[1] 75:3</p> <hr/> <p style="text-align: center;">V</p> <p>vacuum ^[2] 9:15 15:10 vacuums ^[1] 9:16 valuable ^[1] 19:18 value ^[1] 20:12 varied ^[1] 65:24 velocity ^[1] 36:5 versus ^[9] 5:17 38:9 41:10,13 44:14 48:3,14 64:19 65:23 vessel ^[1] 65:9 view ^[4] 27:14 54:24 66:12 67:23 violating ^[1] 7:4 violation ^[1] 76:22 virtue ^[1] 58:9 volume ^[3] 36:20 43:15 44:24</p> <hr/> <p style="text-align: center;">W</p> <p>wait ^[1] 51:11 waived ^[1] 12:7 waiver ^[1] 5:24 Waldron ^[2] 37:18 50:15 wandering ^[1] 19:13 wanted ^[3] 28:19 29:25 38:24 wants ^[5] 34:1 66:23 77:6,20,21 war ^[1] 29:16 warned ^[1] 6:5 warrant ^[2] 38:7 41:20 Washington ^[6] 1:12 2:5,8 44:14 48:15,17 WATER ^[147] 1:8 5:16,21,23 7:8 8:2,4,8 9:10,11,14,18 10:11,18 11:18,23 12:13,14,18,24 13:2,8,24 14:13,15,23,24 15:3,8,11,20 16:1,8,10 17:21 23:1,4,19,24,25 24:5,6,12 25:1,2,11,21 26:8,9,10,14,24 27:8,15,23 28:2,5 30:4,5,25 35:21,23 36:2,5,8,19,20 37:1,20,22 38:25 39:6,7,11,23 40:9,11 42:11,14,19 43:5 44:7,9,21 45:11,14,18 46:10,15,17 48:16,25 50:17 51:16 52:7,12,15 53:20 54:3,7,17,25 55:2,8,10,11,13,13,17,21 57:4 58:24 59:20,25 60:14,23 61:24 62:5,8,24 63:9,10,12,13,16,17 64:10,13,22 65:4,5,9,10,10 66:24 67:3,5 70:9,18 75:14,16,21 76:4,23,24 77:15,17 waters ^[3] 9:24 39:14 42:3 way ^[13] 14:16 26:23 38:25 40:17 42:2,21 44:2 50:12</p> | <p>57:7 58:19 66:22,23 76:7 ways ^[1] 59:12 week ^[1] 66:20 weighing ^[1] 51:6 welcome ^[4] 4:14 7:6 37:2 59:3 well-established ^[1] 57:20 wells ^[13] 7:13,21 8:9 14:4 15:9 30:25 61:11,12,15 62:5 64:19 70:11 76:13 western ^[3] 19:10 29:11 30:20 wet ^[1] 54:2 whatever ^[8] 18:8 19:4,12 20:18 31:6,7 34:8 60:25 whatsoever ^[3] 29:20 30:9 77:21 whenever ^[2] 8:17 21:21 whereas ^[1] 15:5 Whereupon ^[1] 78:14 wherever ^[1] 19:15 whether ^[2] 6:20 11:3,25 12:23 15:2 16:18 18:8 21:15 22:5 25:5 32:17 44:15 52:5 63:1 64:17 68:23,25 69:1,3 72:9 76:12 who's ^[2] 9:10 14:22 Whoever ^[1] 21:20 wild ^[9] 19:11,11 21:4 23:6 24:13 46:4 47:14,21 50:2 wildfires ^[1] 47:16 Wiley ^[1] 37:12 will ^[10] 4:9,22 14:14 18:22 24:1 44:9 49:14 67:25 71:20 78:1 win ^[3] 12:18 13:5 26:6 wins ^[1] 29:12 wish ^[1] 4:20 withdraw ^[1] 24:21 withdrawals ^[1] 36:19 within ^[3] 5:14 6:7 7:1 8:13 9:14 10:9,11 13:14,19 14:3 15:1,14 16:2,4,6,11,12 20:1 21:1 22:17 24:8,19,22 27:24 29:4,21 34:2,9 60:8 75:5 77:3 without ^[8] 6:3 7:4 9:5 41:6 51:23 52:19 67:18 77:25 Wolf ^[1] 49:7 wondering ^[5] 20:6 32:11,19 45:22 59:18 word ^[1] 49:25 words ^[1] 37:21 work ^[1] 26:23 working ^[1] 17:12 world ^[1] 48:8 worry ^[1] 50:3 Wyoming ^[1] 41:10</p> <hr/> <p style="text-align: center;">Y</p> <p>year ^[2] 65:25 66:1 years ^[4] 16:22 35:15 36:22 44:17</p> |
|---|---|---|--|--|

Z

zero [1] 29:25

zone [1] 49:9