No. 143, Original

IN THE
Supreme Court of the United States

STATE OF MISSISSIPPI,
Plaintiff,
v.

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

On Exceptions to Report of the Special Master

SUR-REPLY IN SUPPORT OF EXCEPTION IN PART OF DEFENDANTS STATE OF TENNESSEE, CITY OF MEMPHIS, AND MEMPHIS LIGHT, GAS & WATER DIVISION TO REPORT OF THE SPECIAL MASTER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

GLOSSARY

2009 Compl.	Compl., *Mississippi v. City of Memphis, et al.*, No. 139, Orig. (U.S. Sept. 2, 2009) (reproduced at App. 54a-64a)
2014 Compl.	Compl., *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. June 6, 2014)
App.	Appendix bound together with Brief in Support of Exception in Part of Defendants State of Tennessee, City of Memphis, and Memphis Light, Gas & Water Division to Report of the Special Master, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Feb. 22, 2021)
Aquifer	Middle Claiborne Aquifer
Defs. Exception Br.	Brief in Support of Exception in Part of Defendants State of Tennessee, City of Memphis, and Memphis Light, Gas & Water Division to Report of the Special Master, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Feb. 22, 2021)
Miss. Exception Br.	Brief in Support of Exceptions to Report of the Special Master by Plaintiff State of Mississippi, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Feb. 22, 2021)

Miss. Post-Hearing Response Br.	State of Mississippi's Combined Response to Defendants' Post-Hearing Briefs, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Oct. 21, 2019) (Special Master's Dkt. #127)
Miss. Reply	Plaintiff's Reply to Defendants' Exception to Report of the Special Master, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Apr. 23, 2021)
Rep. or Report	Report of the Special Master, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Nov. 5, 2020) (Special Master's Dkts. #135 & #136)
Special Master	Honorable Eugene E. Siler, Jr.
Tenn. Post-Hearing Br.	Post-Hearing Brief of the State of Tennessee, *Mississippi v. Tennessee, et al.*, No. 143, Orig. (U.S. Sept. 19, 2019) (Special Master's Dkt. #114)

INTRODUCTION

For more than 15 years, Mississippi has asserted against Defendants tort claims premised on its alleged sovereign authority over a portion of the Middle Claiborne Aquifer. The Special Master rightly concluded that the Aquifer is interstate and that the equitable-apportionment doctrine bars those claims. The Special Master erred only in recommending that this Court grant Mississippi leave to amend to assert an equitable-apportionment claim. Mississippi repeatedly has disavowed any such claim, and it failed to adduce facts to support converting this case into an equitable-apportionment action. Granting leave to amend to assert the very theory Mississippi disclaims and fails to justify would improperly expand this litigation and prejudice Defendants.

Mississippi concedes (at 3, 5-6) that it disclaimed equitable apportionment in this action and that an amendment to assert such a claim "would expand the proceedings." An equitable-apportionment claim, unlike Mississippi's tort claims, would not allow Mississippi to pursue monetary damages. It also could cause Mississippi to receive less water than it currently takes from the Aquifer. And it would require Mississippi to make a heightened showing of substantial injury – a showing it failed to make when this Court denied it leave to file an equitable-apportionment claim in 2010 and again fails to make here.

Mississippi's current Complaint does not allege any substantial injury, and the evidentiary record confirmed that Mississippi cannot make that showing. Mississippi's Reply does not grapple with this record or otherwise explain how it could plead a serious

injury. Instead, Mississippi argues (at 2-3, 6-8) that Defendants' Exception is "premature" and "speculative." But Mississippi's failure to meet this Court's threshold requirement for leave to amend is not speculative; it is apparent from the face of Mississippi's Complaint and from the extensive record the Special Master compiled. Mississippi cannot wish away those deficiencies by speculating that keeping this long-running lawsuit alive for even more years somehow will unearth support for an equitable-apportionment claim. The question presented is whether Mississippi deserves leave to amend now, based on *this* Complaint and *this* evidentiary record. The answer, as Mississippi scarcely contests, is no.

Because Mississippi purposefully disclaimed equitable apportionment – and the record confirms that it has not suffered serious harm – leave to amend is unwarranted. This Court should not allow Mississippi to prejudice Defendants by shoehorning an equitable-apportionment claim into this action.

ARGUMENT

I. GRANTING MISSISSIPPI LEAVE TO BRING AN EQUITABLE APPORTIONMENT VIOLATES THE STANDARD FOR AMENDED PLEADINGS IN ORIGINAL ACTIONS

A. An Equitable-Apportionment Claim Is Beyond The Scope Of This Litigation

Allowing Mississippi to amend "would take the litigation beyond what [this Court] reasonably anticipated when [it] granted leave to file the initial pleadings." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). Defendants identified four reasons why allowing Mississippi to add an equitable-apportionment claim would expand the scope of its

Complaint. *See* Defs. Exception Br. 16-19. Of the four, Mississippi attempts to dispute only one.

First, Mississippi acknowledges that it purposefully disclaimed an equitable apportionment in its Complaint, which Mississippi filed after this Court denied it leave to assert an equitable-apportionment claim in 2010. *See id.* at 17; Miss. Reply 3, 5; Miss. Exceptions Br. 50; *compare* 2009 Compl. ¶ 5(c) (App. 56a-57a) *with* 2014 Compl. ¶ 38. Mississippi's disclaimer was an intentional, strategic decision to allow it to pursue $615 million in damages against Defendants – monetary relief an equitable apportionment forecloses. *See* Defs. Exception Br. 25-26.

Second, Mississippi does not deny that – unlike its tort claims – an equitable-apportionment action requires Mississippi to make a heightened threshold showing of harm. *See id.* at 17.

Third, Mississippi does not dispute that an equitable-apportionment claim is substantially different from the inflexible property-rights tort claims Mississippi has pursued for more than 15 years. *See id.* at 18. An equitable apportionment would require extensive factual findings addressing a complex range of factors and equities, necessitating far-ranging discovery on issues the parties have not yet litigated. *See id.* Indeed, Mississippi concedes that an amendment "would expand the proceedings." Miss. Reply 5-6.

Fourth, Mississippi dismisses (at 6) as "speculative" the risk that an equitable apportionment might require discovery from and direct participation by other States. But there is nothing speculative about Defendants' argument. Mississippi does not – and cannot – dispute that the Aquifer sits beneath eight different States and that States other than Missis-

sippi and Tennessee pump groundwater from the Aquifer. *See* Defs. Exception Br. 18-19. Pumping in at least some of the other States overlying the Aquifer also has created cones of depression that cross state lines – some of which are much larger than the one of which Mississippi complains here. *See id.* at 19. Mississippi also does not dispute that all groundwater in the Aquifer will eventually leave Mississippi and flow into neighboring States (or the Mississippi River). An equitable apportionment, unlike Mississippi's tort claims, may involve participation by some or all of these other States, whose rights and interests could be affected by any resulting decree. *See id.* at 18-19. That alone creates a substantial risk of broadening this proceeding.

Mississippi's other arguments lack merit. Mississippi attempts to distinguish *Ohio v. Kentucky*, 410 U.S. 641 (1973) – in which this Court denied Ohio leave to file an amended complaint – by claiming (at 4) that Ohio's amendment sought to raise a claim that Ohio "had affirmatively disavowed for over 150 years." But this Court relied on Ohio's "persistent failure to assert [that] claim" and its "long acquiescence," not an affirmative disavowal. 410 U.S. at 649. If anything, the case for denying leave is clearer here. Mississippi *did* affirmatively disavow equitable apportionment in its Complaint. *See* 2014 Compl. ¶ 38.

Similarly, Mississippi's emphasis (at 4) on the different procedural posture in *Ohio* – that this Court had referred Ohio's proposed amendment to a Special Master – misses the point. Here, Mississippi intentionally declined to seek leave to amend. Even following the hearing, when Defendants asked the Special Master to dismiss the Complaint with

prejudice, *see* Tenn. Post-Hearing Br. 34, Mississippi responded that it "does not seek equitable apportionment," Miss. Post-Hearing Response Br. 37. Indeed, the Special Master acknowledged that Mississippi "has not sought equitable apportionment" or otherwise requested an amendment. Rep. 32. And Mississippi declines to seek leave even now before this Court. *See* Miss. Reply 8 ("Defendants can argue against an equitable apportionment amendment *if and when* Mississippi pleads it.") (emphasis added). The Special Master erred by recommending that the Court *sua sponte* give Mississippi leave to pursue a claim it has disavowed.

Finally, Mississippi's argument (at 5-6) that an amendment "would not be unreasonable or unwarranted" because Defendants cannot claim "surprise" is incorrect and beside the point.[1] Adding an equitable-apportionment claim at this stage would create unfairness by reversing the core premise on which Defendants have litigated this case for many years.[2] In any event, "surprise" to Defendants is not

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[1] Mississippi relies (at 5) on Defendants' position that the "equitable-apportionment doctrine governs this case. To be clear, Defendants never have argued that Mississippi is *entitled* to an equitable apportionment. Rather, Defendants consistently have sought dismissal of Mississippi's Complaint because the equitable-apportionment *doctrine* controls what claims Mississippi can assert for rights to contested water in the interstate Aquifer. And the equitable-apportionment doctrine requires Mississippi to make a threshold showing of serious injury that Mississippi never has made.

[2] For that reason, Mississippi's "surprise" argument fails even under the more liberal Rule 15 standard for amendments. *See* Fed. R. Civ. P. 15(a)(2). Defendants – as well as the courts in the *Hood* litigation, this Court in response to Mississippi's 2009 Complaint in No. 139, Orig., and the Special Master in this action – have all alerted Mississippi that its only viable

the legal standard for amendments in original actions. Rather, this Court asks whether the amendment would expand the scope of the complaint that the plaintiff originally received leave to file. *See Nebraska*, 515 U.S. at 8. Such an expansion via amendment – whether a surprise or not – would undermine the gatekeeping function this Court's original-jurisdiction rules perform. *See* Defs. Exception Br. 15-16.

B. Granting Leave To Amend Would Allow Mississippi To Sidestep The Threshold Injury Requirement

To invoke this Court's jurisdiction over an equitable-apportionment claim, Mississippi bears the burden of pleading a "substantial injury," *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982), of "serious magnitude," *Florida v. Georgia*, 138 S. Ct. 2502, 2514 (2018). In 2010, this Court properly applied that standard in denying Mississippi leave to pursue its alternative equitable-apportionment claim. *See Mississippi v. City of Memphis*, 559 U.S. 901, 901 (2010).

Nothing has changed to warrant a different result. Mississippi's Complaint remains devoid of any allegations showing substantial harm – a deficiency Mississippi notably failed to address in its Reply. Instead, Mississippi suggests it need not articulate a substantial injury because it "has not yet requested equitable apportionment." Miss. Reply 7 (emphasis omitted).

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claim was for equitable apportionment, yet Mississippi has refused to assert such a claim. Allowing Mississippi to reverse course now would prejudice Defendants. *See also infra* pp. 9-10.

Mississippi's position – that it should receive leave to amend without even requesting it – is untenable. Under this Court's precedents, Mississippi must show a substantial injury *before* invoking this Court's original jurisdiction to hear an equitable-apportionment claim.[3] The Special Master erred when he sidestepped that requirement by recommending that Mississippi receive leave to amend before it has made the showing this Court's precedents demand. Mississippi acknowledges that the Special Master's recommendation would allow it to circumvent the gatekeeping function of a substantial-injury showing, because Mississippi could bring an equitable apportionment "while the parties are [already] before this Court." Miss. Reply 8. That gatekeeping function is too important to allow Mississippi to bypass it so easily. *See Florida v. Georgia*, 141 S. Ct. 1175, 1180 (2021) ("Given the weighty and competing sovereign interests at issue in these cases, 'a complaining State must bear a burden that is "much greater" than the burden ordinarily shouldered by a private party seeking an injunction.'") (quoting *Florida*, 138 S. Ct. at 2514).

The record evidence supports the same conclusion. As Defendants explained, the trial established that Mississippi cannot make the injury showing required to invoke this Court's jurisdiction over an equitable

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[3] Even if this Court were to conclude that it lacked discretion to deny Mississippi leave to file such a claim as an original matter, *see Texas v. California*, 141 S. Ct. 1469, 1469 (2021) (Alito, J., dissenting from denial of motion for leave to file complaint), this Court should not permit a State to amend its complaint to assert a futile claim that it expressly has disavowed. *See* Defs. Exception Br. 19 n.9.

apportionment.[4] *See* Defs. Exception Br. 21-24. Even in its Reply, Mississippi proffers no evidence that Defendants' pumping has inflicted an injury of "serious magnitude." *Florida*, 138 S. Ct. at 2514. Instead, Mississippi's claims of injury are reduced to a single footnote (at 7 n.4), arguing without evidence that it has suffered various "types of substantial harm." The record disproves these purported harms.

First, according to the most reliable pre-development study in the record, *less* water is now flowing from Mississippi into Tennessee than was flowing under pre-development conditions. *See* Defs. Exception Br. 23. *Second*, Mississippi's own expert testified that there is no evidence of material adverse changes or contaminated water moving into the Aquifer. *See id.* Indeed, Mississippi's expert also testified that the volume of water beneath DeSoto County has changed very little since pumping began more than 100 years ago. *See id.* at 22. *Third*, Mississippi remains able to obtain all the water it needs from the Aquifer and has increased its water

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[4] Mississippi cherry-picks (at 8-9) a quotation from *Nebraska v. Wyoming*, 515 U.S. 1 (1995), to suggest it is "premature" to consider any evidence of injury at this time. There, Nebraska sought to amend its pleading to enjoin particular Wyoming developments – a claim within the ambit of the original action. *See id.* at 4-7, 12. This Court rejected as premature "Wyoming's argument that any proof of environmental injury that Nebraska will present will be highly speculative," noting that "[p]urely speculative harms will not, of course, carry Nebraska's burden of showing substantial injury," but that it was improper for the Court to judge Nebraska's evidence on the merits at the pleading stage. *Id.* at 13. *Nebraska* merely recognizes that a plaintiff State must prove a properly pleaded injury before it obtains relief. It does not relieve Mississippi of the burden of *pleading* a substantial injury – or at least explaining how it could plead one – before invoking this Court's original jurisdiction.

usage significantly in recent decades. *See id.* *Finally*, Mississippi's expert admitted that he had not tried to quantify any potential increase in electricity needed to pump water to the surface. DFOF ¶ 244 (App. 126a). Regardless, speculation of increased electricity costs does not demonstrate a "'threatened invasion of rights' that is 'of serious magnitude.'" *Florida*, 138 S. Ct. at 2514 (quoting *Washington v. Oregon*, 297 U.S. 517, 522 (1936)). In short, this is not a case where an equitable apportionment is necessary, such as "where the claims to the water . . . exceed the supply." *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945).

II. GRANTING LEAVE TO AMEND WOULD PREJUDICE DEFENDANTS

The Special Master's recommendation that Mississippi receive leave to amend is erroneous even under the more liberal standard of Federal Rule of Civil Procedure 15(a)(2). Defendants have litigated this case for years relying on Mississippi's representations that equitable apportionment was not at issue. Allowing an amendment now will lead to another round of protracted and expensive discovery, which unnecessarily will drive up litigation costs by requiring the parties to start over. *See* Defs. Exception Br. 24-26.

Mississippi tries (at 9-10) to distinguish *New Hampshire v. Maine*, 532 U.S. 742 (2001), by claiming judicial estoppel is not at issue. Mississippi misses the point. Defendants are not citing *New Hampshire* to argue that Mississippi should be judicially estopped from seeking equitable apportionment. Rather, Defendants rely on *New Hampshire* to demonstrate the prejudice to Defendants if Mississippi were allowed to amend and assert a position

contrary to what it has claimed for 15 years. *See* Defs. Exception Br. 24-25.

Finally, Mississippi argues (at 10-11) that the significance of the issues favors granting it leave to amend. Mississippi has it backwards. Because an equitable apportionment implicates competing state interests, a State seeking equitable apportionment first must allege a substantial injury of serious magnitude. Mississippi has not alleged such an injury, and the record evidence – including testimony of its own expert witnesses – demonstrates that any attempt to do so now would be futile. Should Mississippi elect to file an equitable-apportionment action in the future, respect for the rights of competing States would require it to show a material change in circumstances supporting an allegation of a substantial injury. *See* Defs. Exception Br. 27.

CONCLUSION

The Partial Exception of Defendants to the Report of the Special Master should be sustained, Mississippi's Exceptions to the Report of the Special Master should be overruled, and Mississippi's Complaint should be dismissed with prejudice.

Respectfully submitted,

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