No. 143, Original

IN THE

Supreme Court of the United States

STATE OF MISSISSIPPI,

Plaintiff,

v.

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

Defendants.

ON BILL OF COMPLAINT

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF DEFENDANTS

PROFESSOR JOSEPH REGALIA
WILLIAM S. BOYD SCHOOL OF LAW
4505 S. Maryland Parkway
Las Vegas, NV 89154
(650) 889-9272

PROFESSOR ROBERT H. ABRAMS
FLORIDA A&M UNIVERSITY COLLEGE OF LAW
201 M. Beggs Avenue
Orlando, FL 32801
(407) 254-4001

PROFESSOR NOAH D. HALL
Counsel of Record
WAYNE STATE UNIVERSITY LAW SCHOOL
471 W. Palmer Street
Detroit, MI 48202
(734) 646-1400
Nhall@wayne.edu

PROFESSOR JESSE J. RICHARDSON, JR.
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
969 Vandalia Road
Morgantown, W. VA 26501
(540) 327-7508

Counsel for Amici Curiae

(For Continuation of Appearances See Inside Cover)

304310

Professor Burke W. Griggs
Washburn University
School of Law
1700 SW College Avenue
Topeka, Kansas 66621
(785) 670-1666

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I THE INTERESTS OF AMICI

Amici are professors who teach, research, and write on water and property law.[1] That includes researching this case since it was filed half a decade ago. *See* Noah D. Hall & Joseph Regalia, *Interstate Groundwater Law Revisited: Mississippi v. Tennessee*, 34 VA. ENVTL. L.J. 152 (2016); Noah D. Hall & Joseph Regalia, *Lines in the Sand: Interstate Groundwater Disputes in the Supreme Court*, NAT. RESOURCES & ENV'T, Fall 2016; Joseph Regalia & Noah D. Hall, *Waters of the State*, 59 NAT. RESOURCES J. 59 (2019); Joseph Regalia, *A New Water Law Vista: Rooting the Public Trust Doctrine in the Courts*, 108 KY. L.J. 1 (2019); Robert H. Abrams, *Water and Property Rights in an Era of Hydroclimate Instability*, 7 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 129 (2018); Burke W. Griggs, *Interstate Water Litigation in the West: A Fifty-Year Retrospective,* 20 U. DENV. WATER L. REV. 153 (2018); Burke W. Griggs, *Interstate Litigation, State Reaction, and Federalism in the Age of Groundwater,* 65 ROCKY MTN. MIN. L. FDN. J. 69 (2019).

Amici include: Robert H. Abrams, Professor of Law, Florida A&M University College of Law; Burke W. Griggs, Associate Professor of Law, Washburn University School of Law; Noah D. Hall, Professor of Law, Wayne State University Law School; Joseph Regalia, Associate

1. Amici law professors are all attorneys admitted to practice in the Supreme Court and have authored this brief in its entirety on their own behalf. No party or its counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund its preparation or submission. This brief is being filed with the consent of all parties.

Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas; and Jesse J. Richardson, Jr., Professor of Law, West Virginia University College of Law.

II. SUMMARY OF ARGUMENT

Justice Holmes explained that water is a "necessity of life" so vital that the law requires it to "be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342–43 (1931). Water's unique importance is why the law treats it differently than it treats most everything else. An unbroken line of U.S. Supreme Court precedent agrees: Water does not fall under the neat label of "good" or "chattel." Instead, it is a *res communes*; a unique public resource managed by states as trustees, not simple property owners.

As the Special Master explained in his final report: the crux of this case is that "Mississippi thinks Tennessee has stolen and continues to steal its water." Report at 1. So, according to Mississippi, it is entitled to "injunctive relief and money damages"—much like any private plaintiff bringing a tort claim. *Id.*

Accordingly, Mississippi is wrong that it can press what amounts to a conversion claim over water it "owns." That is because the state is not a water owner; it is a water trustee. Mississippi claims outdated and overruled property rights to a *public* water resource. Why Mississippi takes this approach is no mystery: The state believes that claiming to own the water will strip this Court of its equitable power to allocate the aquifer for the good of both Mississippi *and* Tennessee citizens. This

Court's constitutional role and its decisions on interstate water disputes over the past 120 years make clear that Mississippi presses a right which the Court has never recognized. State interests in water are not now amenable to the lines we draw to bound property, nor will they ever be.

As a state sovereign, Mississippi has the duty and right to protect water supplies for its future and current citizens. Those are the rights and duties of a sovereign trustee over the state's natural resources. Thus, Mississippi can challenge Tennessee's pumping if it harmed Mississippi's public interest in its waters, but Mississippi cannot craft an unprecedented ownership theory that limits the Supreme Court's Article III jurisdiction and power to equitably balance the states' respective interests in water and the public's interests in the water found in this aquifer system.

The Special Master framed the inquiry as whether the aquifer is an "interstate" resource. That distinction is not crucial to the resolution of this case. Mississippi does not "own" either *inter*state or *intra*state waters. The state instead has the sovereign interest of protecting the Mississippi public's continued use of water resources that may be available to its citizens, whatever the label. Tennessee holds a co-equal interest. And the settled doctrine for resolving disputes between co-equal sovereigns—representing co-equal citizens—is an equitable balancing that accounts for all interests.[2]

2. Amici agree that the aquifer here is an interstate (not intrastate) resource, as carefully explained by the Special Master and supported by an extensive record. Amici address only Mississippi's ownership theory in this brief.

Mississippi's ownership theory is unworkable in practice and unsupported in law. States charged with protecting the public's interest cannot approach water conflicts as they might trade disputes or commodity sales. States must work together to balance interests in this limited and necessary resource. Failing that, the Court must do that equitable balancing. Mississippi's ownership theory could open the floodgates for water wars between the states, an outcome the Court has worked hard to prevent. Mississippi's legal theory would also upend our nation's water law jurisprudence generally, from private disputes to regulatory takings claims. The physical realities and societal importance of water have shaped the law of water such that it does not fit in the square hole of property.

III. ARGUMENT

A. Mississippi presses for ownership rights it never had.

In Mississippi's view, states are "vested with ownership . . . over the land and waters within [their] territorial boundaries." Compl. ¶¶ 8–10, 42–45. Mississippi believes that if another state pumps groundwater from an aquifer—and this pumping drains water in Mississippi—this other state has unlawfully taken Mississippi's *property*. *Id.* ¶ 14 (accusing Defendants of committing "conversion" and "trespass").[3]

3. In its Exceptions to the Report of the Special Master, Mississippi couches its interest as one of a sovereign needing to "protect[] and preserve the resources it holds in trust for the use and benefit of its citizens." Exceptions at 22. But that is not the theory propounded in this dispute. Mississippi's complaint seeks

To support this water-ownership theory, Mississippi cites cases such as *Kansas v. Colorado,* 206 U.S. 46 (1907), to suggest that a state holds "title" to the waters within its borders. The upshot of this ownership approach, according to Mississippi, is that it strips this Court of power to engage in an equitable balancing of competing state interests in the aquifer—as the Court has otherwise done for more than one hundred years. This Court has resoundingly rejected state claims of ownership over water in several contexts, and Mississippi offers nothing new now.

It is true that states can own things. They own plots of land—like they own the structures built on them. And states can sue other states (or anyone else) for stealing

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not the safekeeping of water resources, but "a full accounting and [] damages, prejudgment interest, and all other monetary relief . . . relating to or resulting from Defendants' mechanical extraction of groundwater." Compl. ¶ 7. This is what the Special Master found, too, after managing this case for years, stating in his final report that Mississippi sues under a theory of "protected interests in tangible property." Report at 6. Mississippi repeatedly cites its "ownership" interest in groundwater as the basis for seeking money damages. *See, e.g., id.* ¶ 14 (claiming that Tennessee committed "trespass" and "converted" Mississippi's property); ¶ 25 (referring to Tennessee's allegedly "wrongful taking"). If Mississippi really wanted to assert its rights *only* as a public trustee, then equitable apportionment is the tool for that. After all, the trust is about the public's interest, not solely Mississippi's. Mississippi has not even tried to articulate how a bright-line injunction on all future pumping, coupled with money damages, is needed to protect the public's interest in the aquifer. Would a mere reduction in pumping protect the public's interest? Does Mississippi plan to buy more water with the $615 million it requests—so that the public's interest is restored?

the things they own. But water is different. Early English common law recognized that. S*ee* Lord Hailsham of St. Marylebone, 49(2) Halsbury's Laws of England 62 ("[T]he water itself, whether flowing in a known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody.").[4] That same view is fully articulated in an unbroken line of this Court's precedents stretching back over a century. Early U.S. cases recognized the *sovereignty* interest of the original states in their water resources and reasoned that the federal government transferred an identical sovereign authority over those portions of the nation's water to each new state as it entered the union. This is a key aspect of what is known today as the equal- footing doctrine. *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842).

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

True, a handful of cases before and near the turn of the nineteenth century sometimes mentioned the

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

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

The Court's jurisprudence on the equitable apportionment of interstate waters has always rejected a state's claim to the ownership and/or complete control over the waters within its boundaries. In *Kansas v. Colorado,* the Court rejected Colorado's claim to all of the waters of the Arkansas River originating within Colorado's boundaries. 206 U.S. 46, 97-98 (1907). Thus, fifteen years before the Court actually equitably allocated an interstate stream, *Wyoming v. Colorado*, 259 U.S. 419 (1922), the Court had already rejected the claim Mississippi makes in this case. The Court rejected Colorado's similar claim to the waters of the Laramie River in that case. *Id.* at 457, 466. The Court has also consistently rejected federal claims to the ownership of unappropriated water. *Kansas v. Colorado*, 206 U.S. at 46, 86-87; *Nebraska v. Wyoming*,

325 U.S. 589, 611-12, 616 (1945). The current standard case that articulates the equitable apportionment doctrine has stressed that the location of a state's border is "essentially irrelevant to the adjudication of . . . sovereigns' competing claims" over an interstate water resource. *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984). Mississippi's atavistic claim recombines legal and technical arguments that the Court has consistently rejected for over a century. *See* Burke W. Griggs, *Interstate Water Litigation in the West: a Fifty-Year Retrospective,* 20 U. Denv. Water L. Rev. 153, 161-63, 200-01 (2018).

States claiming an ownership interest in water often rally behind *Hudson County Water Co. v. McCarter,* an early case about harm to water (as opposed to wildlife). 209 U.S. 349 (1908). This Court upheld a New Jersey statute prohibiting transfers of waters out of state, relying on "the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens." *Id.* Even there, the Supreme Court was already signaling what it would hold decades later: water is not and cannot be owned by states. The Court in *Hudson* was careful never to call New Jersey's interest in water "property" or "ownership"— despite using these same terms when siding for state owners in prior cases. *Compare McCready*, 94 U.S. 391, at 395 *with Hudson*, 209 U.S. at 356. Instead, the Court based its holding on a "principle of public interest and the police power, and not merely [a view of the state] as the inheritor of a royal prerogative." *Hudson*, 209 U.S. at 356. The Court repeatedly described New Jersey's interest as one of "protecting natural resources," not protecting state title: "the state, as quasi- sovereign and representative of the interests of the public, has standing in court *to protect* the atmosphere, the water, and the forests within its territory." *Id.* at 355 (emphasis added).

Even in one of the earliest equal-footing cases, the Supreme Court explained that the government held water "for the benefit of the *whole* people," and "in trust." *Shively v. Bowlby*, 152 U.S. 1, 30, 49 (1894) (emphasis added). Justice Field was even more explicit in *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), explaining that the states' relationship with water is "different in character" from other resources; water is held "in trust for the people of the state." *Id.* at 401; *see also United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 693 (1899) (applying federalism principles to set aside a state's interests in a river and ignoring the state's ownership interest). Long before any of these early Supreme Court cases came down, a slew of state and lower courts had concluded that state water ownership made no sense. *See, e.g.*, *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1821) ("The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.").

As water conflicts escalated throughout the twentieth century, the Court addressed state water ownership at the headwaters. Several interstate conflicts percolated through the courts, often raising dormant commerce clause claims. And this Court responded: States cannot own water—nor can they use water ownership as a shield to monopolize water resources. *See, e.g.*, *Cal.-Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163–64 (1935) (describing waters as "publici juris, subject to the plenary control of the designated states").

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

State ownership theories over water officially drowned as early as the late 1940s. *See Toomer v. Witsell*, 334 U.S. 385 (1948). *Toomer*, for just one example, addressed a challenge to South Carolina's shrimping statute, which prevented other states from using South Carolina's water beds. Defendants touted cases like *McCready* to argue that South Carolina's "ownership" rights empowered the state to ignore outside interests in its water. *Id.* at 395. The Court responded by calling out state ownership on its face: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id.* at 402. The Court explained that when it said in the past that states "own" water, it really meant that states have power to regulate those resources. *Id.*

After *Toomer*, the Court continued to reject state water ownership theories. *See, e.g.*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420–21 (1948) (holding that an ownership theory over fish could not save California's attempt to prevent certain residents from fishing). The

fiction of state ownership reached even Congress's attention: "[W]hat we really mean by this sort of [water] 'ownership' is sovereignty, not proprietorship . . . ." Federal-State Water Rights: Hearing Before the S. Comm. on Interior and Insular Affairs, 87th Cong. 118 (1961) (statement of Northcutt Ely, Washington, D.C.) (emphasis added).

In the 1970s, the Court authored several opinions ending any debate about whether a state can use a property theory to shield itself in water conflicts. In 1977, in *Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 284, the Court rejected the argument that Virginia's "ownership" of fish allowed the State to forbid nonresidents from fishing in the state's waters. *Id.* The Court pulled no punches: "A State does not stand in the same position as the owner of a private [] preserve and it is pure fantasy to talk of 'owning'" water resources. *Id.* The Court put its earlier cases in perspective: "The 'ownership' language of cases [like *McCready*] . . . must be understood as no more than a 19th-century legal fiction." *Id.*

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

Sporhase is worth mulling over because, as here, it addressed a state's interest in groundwater. *Id.* at 951. The Court explained that the idea that a state could use property rights as a sword in groundwater disputes "is

still based on the legal fiction of state ownership." *Id.* The Court emphasized how important it is that competing state interests be balanced against one another. *Id.* The Court also explained that groundwater implicates nuanced national issues, which further militate against viewing state groundwater conflicts as about property interests. *Id.*

The Court's modern jurisprudence is clear and simple: states do not own water, either by royal prerogative or on behalf of their citizens.

B. Mississippi's groundwater ownership theory is at loggerheads with its own state laws.

Mississippi's argument that it owns groundwater is not only out of step with this Court's precedent, it defies its own laws. Both Tennessee and Mississippi settle groundwater disputes using *equitable* principles, not *ownership*. Mississippi created an administrative system to manage water use and conflicts. *See Riverbend Utilities, Inc. v. Mississippi Envtl. Quality Permit Bd.*,130 So. 3d 1096, 1104 (Miss. 2014). In resolving conflicting groundwater interests, the state's agency considers multiple equitable principles, including "how the permit applicant plans to use the water, . . . the amount of water requested, . . . whether the wells will be spaced in a manner to avoid interference with existing wells, . . . and the projected drawdown of the aquifer." *Id.* Mississippi's regulations explain that: "In areas where conflicts exist between competing interests or demands for . . . groundwater supplies, or where there is a potential for such conflicts to arise in the future, . . . beneficial uses . . . will be given priority." 11.7-1 MISS. CODE R. § 1.4(B). These uses include public supply and conservation of habitats. Ownership of the overlying property is not even among the

factors listed by Mississippi for settling intrastate water disputes. Tennessee likewise uses equitable principles to settle water conflicts. See *Nashville, Chattanooga & St. Louis Ry. v. Rickert*, 89 S.W.2d 889, 896 (Tenn. Ct. App. 1935) (explaining that groundwater rights "must be correlative and subject to the maxim that one must so use his own as not to injure another . . . ."). Mississippi's ownership theory ignores even its own system for allocating groundwater.[5]

States say a lot in their statutes and constitutions about their relationship with water—and that goes for both Mississippi and Tennessee. Mississippi's legislative declarations make clear that if it had any ownership interest, it disclaimed them. Mississippi's statutes declare that water belongs not to the state, but "to the *people* of this state." Miss. Code Ann. § 51-3-1 (2003) (emphasis added). Its statutes characterize the state's power over water as one of "control and development." *Id.* But only as an "exercise of its police powers" to "take such measures to effectively and efficiently manage, protect, and utilize the water resources of Mississippi." *Id.* Tennessee similarly declared "[t]hat the waters of the state are . . . held in public trust for the benefit of its citizens." Tenn. Code Ann. § 68-221-702 (2013). Missing in all this is

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

mention of water "ownership" or "title." Mississippi has declared that its interest in its waters is as that of a sovereign exerting "police powers" to "protect and utilize the water resources of Mississippi." Miss. Code Ann. § 51-3-1. Taking Mississippi at its word, it has only general sovereign interests in water, not any sort of ownership of the water resources it claims are at issue in this case, far less the water of the aquifer as a whole. Mississippi's statutory declaration that it only "controls" or "manages" water for the benefit of the public is much like those made by many other states. Although states vary in precisely how they describe their water interests, the bulk of them recognize that their power over water is distinct from traditional property concepts. *See* Joseph Regalia & Noah D. Hall, *Waters of the State*, 59 Nat. Resources J. 59, 60 (2019) (detailing various state declarations about state water rights).

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

If states like Mississippi don't own water—then what is the source of their power over it? This Court has identified two: (1) the states' sovereign police powers, and (2) the states' rights and duties as public trustees. The first power is born of state sovereignty: the states' enjoy the police power to regulate matters within their borders so long as those powers are not entrusted to the federal government or directly to the people. *See Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615, 619 (1936) (describing the states' police powers over water). "Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. It exists without express declaration." *Washington Kelpers*

Ass'n v. State, 81 Wash. 2d 410, 417, 502 P.2d 1170, 1174 (1972); *see also Barker v. State Fish Comm'n*, 88 Wash. 73, 152 P. 537 (1915).

Both Mississippi and Tennessee have general police powers to regulate the waters within their borders for the general welfare of their citizens—but that powerdoes not confer on Mississippi any special right or interest during an interstate water dispute. Any conflict between *co-equal* sovereign interests would require resolution from this Court. *See Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (discussing the "equality of right" between states). That is because resolving co-equal sovereign interests requires an equitable balancing. *See South Carolina v. North Carolina*, 130 S. Ct. 854, 856 (2010) (addressing the "[s]tate's sovereign interest in ensuringthat it receives an equitable share" of water "on behalf of its citizens").

The second power stems from the public trust doctrine, first described by this Court in *Illinois Central. Ill. Cent. R.R. Co.*, 146 U.S. at 387. The public trust is both sword and shackle. States are empowered to protect against harms to current and future uses of important water resources, but the trust simultaneously limits each state's ability to harm important waterways. That view aligns with this Court's pronouncements, both those rejecting state ownership claims and those recognizing the public trust imposed on states.[6] Whether Mississippi brings this case as public

6. As far back as the early 1800's, courts have explained that the sovereign police power over water should be limited when it comes to water. *See Arnold v. Mundy*, 6 N.J.L. 1, 53 (1821) ("The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never

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

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

There is pressing need for governments to steward our nation's dwindling groundwater resources. When climate change challenges are coupled with greater demands for water in urban areas like Memphis—it creates a water management storm that cannot be solved by Mississippi's unilateral claims of ownership of water.

The competing demands for surface water—including maintaining in-stream flows and other environmental protections—have pressed even harder on our water stores. Groundwater offers several advantages over surface water; it is widely available, less vulnerable to pollution, and often suitable for drinking with little treatment. Groundwater is also not used for navigation, recreation, or fishing. It is no surprise that since 1950, groundwater withdrawals have more than doubled from 34 billion gallons per day to 76 billion gallons per day. Molly A. Maupin et al., Estimated Use of Water in the United States in 2015, at 2, 7, 53 (2015).[7] Even as

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could be long borne by a free people."). And various states and courts since have declared that the states' police power over water is limited by its role of trustee. *See, e.g.*, *San Carlos Apache Tribe v. Super. Ct. ex rel. Cty of Maricopa*, 972 P.2d 179, 199 (Ariz. 1999) (rejecting a state legislature's attempt to abolish public trust limitations).

7. See also, *e.g.,* U.S. Climate Change Research Program, Global Climate Change Impacts In The United States: A State

total water withdrawals have declined, groundwater use continues to rise. *Id.* at 50.

Groundwater now provides over a quarter of the freshwater used in the United States. *Id.* The case at bar will not be the last concerned with interstate conflicts over the use of transboundary groundwater, making it doubly important that the established jurisprudence of this Court's equitable resolution cases be applied to all such cases. The ongoing dispute over the Snake Valley Aquifer, putting the water needs of Las Vegas against environmental and agricultural interests in Utah, is one example. Over the last few decades, Las Vegas's population has exploded—and along with it, the region's need for water. *See* Noah D. Hall & Benjamin L. Cavataro, *Interstate Groundwater Law in the Snake Valley: Equitable Apportionment and A New Model for Transboundary Aquifer Management*, 2013 Utah L. Rev. 1553, 1561 (2013). Las Vegas turned its gaze onto groundwater tucked away in the northern half of the state. *Id.* The only problem is that some of these stores hydrologically connect to neighboring Utah's aquifers—pitting the two states in a fight much like Mississippi and Tennessee's. Conflicts like these will only increase in coming years and competing proprietary ownership claims offer no basis for their resolution.

How the Court deals with this case will have deep ramifications for similar disputes across the nation. If

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Of Knowledge Report 41 (2009) available at https://pubs.usgs.gov/circ/1441/circ1441.pdf (discussing increasing groundwater demands generally); Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 Envt'l & Energy L. & Pol'y J. 237, 243 (2010) ("Groundwater contributes flow to many rivers and streams and is an important source of drinking and irrigation water. Climate change is expected to reduce aquifer recharge and water levels, especially in shallow aquifers.").

Mississippi's ownership theory is given any shrift, this Court will be hamstrung when resolving competing interests and uses of water. States will have less incentive to seek out beneficial uses of waters, with scales now tipped in favor of whoever happens to claim a better ownership stake. Our nation's water crisis requires flexibility and cooperation—both of which Mississippi's property theory shut out.

E. Public nuisance may prove the most useful doctrine here.

The Special Master rejected nuisance law here, and the amici view this matter as tangential. Even though a tangential issue in this case, the amici respectfully suggest interstate nuisance law as the appropriate doctrine for alleged harms to groundwater, when an apportionment of a complex aquifer is not technically feasible. This Court has used interstate nuisance for standing bodies of water, airsheds, and other resources that when used by one state, lead to harm in another state. *See, e.g.*, *Wisconsin v. Illinois*, 278 U.S. at 399–400. In *Wisconsin*, Wisconsin, Michigan, New York, and other Great Lakes states sued Illinois, alleging that Chicago had diverted waters from Lake Michigan, lowering water levels by more than six inches. *Id.* The Supreme Court relied on interstate nuisance—not equitable apportionment—to resolve the conflict. *Id.*

This Court's thinking was likely driven by several factors. Interstate nuisance avoids the difficult task of quantifying the available water supply—the first step in any apportionment. The supply in a flowing river is easy to gauge. But determining the available supply of an aquifer requires extensive measuring and modeling and remains

an educated guess. Interstate nuisance avoids asking how much resource is available to divide, and instead focuses on the harms of the use, which are a comparatively easy to ascertain threshold issue in the Court's equitable apportionment cases.

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

As values shift from total consumption to imposing a degree of restraint and efforts at preservation and sustainable use of water resources, interstate nuisance aligns more closely with modern goals.

IV. CONCLUSION

Mississippi and Tennessee's fight presents the Court with the opportunity to craft a rule that sensibly balances the many competing needs for groundwater. While the issue may sound novel, the Court has waded into similar waters many times before. Sovereign water ownership arguments have been raised since the birth of the nation and those arguments always meet the same answer: water is uniquely vital, and it cannot be "owned" by anyone, whether a state sovereign or otherwise. Mississippi's

interest in this case is properly framed as one of a sovereign trustee, not a property owner.

Dated: April 30, 2021

Respectfully submitted,

PROFESSOR JOSEPH REGALIA
WILLIAM S. BOYD
SCHOOL OF LAW
4505 S. Maryland Parkway
Las Vegas, NV 89154
(650) 889-9272

PROFESSOR ROBERT H. ABRAMS
FLORIDA A&M UNIVERSITY
COLLEGE OF LAW
201 M. Beggs Avenue
Orlando, FL 32801
(407) 254-4001

PROFESSOR BURKE W. GRIGGS
WASHBURN UNIVERSITY
SCHOOL OF LAW
1700 SW College Avenue
Topeka, Kansas 66621
(785) 670-1666

PROFESSOR NOAH D. HALL
Counsel of Record
WAYNE STATE UNIVERSITY LAW
SCHOOL
471 W. Palmer Street
Detroit, MI 48202
(734) 646-1400
Nhall@wayne.edu

PROFESSOR JESSE J.
RICHARDSON, JR.
WEST VIRGINIA UNIVERSITY
COLLEGE OF LAW
969 Vandalia Road
Morgantown, W. VA 26501
(540) 327-7508

Counsel for Amici Curiae