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 The Special Master's Report

BRIEF OF AMICI CURIAE STATES OF COLORADO, IDAHO, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, AND WYOMING IN SUPPORT OF DEFENDANT TENNESSEE

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I. IDENTITY AND INTEREST OF AMICI CURIAE

The states joining this amicus brief share water with their neighbors – other states, Indian tribes, and other countries. How we share this water differs, but all of the amici states have extensive experience with interstate compacts, equitable apportionment decrees, and other approaches.

Colorado, for example, straddles the Continental Divide, where snowmelt from the Rocky Mountains fills the headwaters of many of the nation's major rivers, including the Colorado, Platte, Rio Grande, and Arkansas. *See* Justice Gregory J. Hobbs, Jr., *Protecting Prior Appropriation Water Rights through Integrating Tributary Groundwater: Colorado's Experience*, 47 Idaho L. Rev. 5, 9 (2010). These river systems provide water to eighteen states, many Indian Tribes, and the Republic of Mexico. To administer these and other rivers originating in our state, Colorado has been a party to negotiations and court proceedings that have led to nine interstate compacts and two equitable apportionment decrees.

Like Colorado, Wyoming is a headwater state, whose streams and rivers ultimately deliver water to the Missouri, Colorado, and Columbia Rivers, as well as the Great Basin. Wyoming is a party to seven interstate compacts and is subject to two equitable apportionment decrees which apportion many of these interstate waters. However, several interstate river systems in Wyoming are not subject to interstate compacts or decrees.

North Dakota is a party to the Yellowstone River Compact, which was recently the subject of an original action in this Court, *Montana v. Wyoming*, 563 U.S. 368 (2011). Also, North Dakota shares rivers with Canada, the state's eastern border with Minnesota is the Red River, and the Missouri River, which flows through North Dakota and drains portions of ten states, is not at this time subject to a compact or judicial equitable apportionment.

Idaho is a member of the Bear River Compact, adopted to resolve issues relating to the distribution and use of the waters of the Bear River in Idaho, Utah, and Wyoming, and is currently participating in negotiations to modernize the Columbia River Treaty, which addresses hydropower operations and management of flood risk in the Columbia River, impacting, irrigation, municipal water use, industrial use, navigation, fisheries, and recreational uses of water throughout the Columbia River Basin.

This case is not about dividing the waters of a river. But the amici states' long experience with navigating the complex legal issues that arise about water will help this Court place this dispute in context and ensure that no unforeseen consequences arise from the ruling here. The amici states take no position on whether the natural resource at the center of this case, the Middle Claiborne Aquifer, is an interstate natural resource.[1] That determination turns on the facts here.

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[1] Based on the procedure and prior positions taken during litigation, the amici states also take no position on the Special

But the amici states have strong interests because this case's outcome could reshape established methods of determining states' obligations to each other about natural resource use within their own borders.

II. STATEMENT

Interstate disputes over states' use of natural resources within their borders implicate a wide range of interests, including the sovereign interests of affected states and the health and economic well-being of citizens within those states. For a century, states have used compacts to solve these disputes or asked the Court to wrestle with "the problem of apportionment and the delicate adjustment of interests which must be made." *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). Although neither approach is easy, whether states resolve their disputes by interstate compact or before this Court, they can rely on a known process that defines their duties to another state.

Mississippi asks the Court to turn this system on its head by awarding damages and enjoining uses in Tennessee without first establishing duties and obligations for how the states should collectively manage the resource. If allowed to proceed, this new mechanism would inject dangerous uncertainty into established systems of natural resource management on which communities and economies depend. If states can be liable for damages even without a known duty to

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Master's recommendation that the Court grant Mississippi leave to file for an equitable apportionment.

another state, then they cannot plan for the future or effectively regulate natural resources use within their borders. The Court should not create a new way for states to resolve their disputes over natural resource use that addresses past violations of unknown duties and does not solve the problem of how states can share a natural resource going forward. Colorado and the other amici that join this brief can already resolve their differences through the well-established means of interstate negotiation and, if necessary, resort to this Court for equitable apportionment. Allowing ad hoc lawsuits to extract damages for past conduct without a known duty to another state would undermine cooperation among the states and encourage opportunistic original actions without encouraging states to work together on the common mission of fairly sharing natural resources.

III. ARGUMENT

A. Absent an interstate compact or judicial equitable apportionment, a state has no duty to manage shared natural resources for the benefit of another state.

Without an interstate compact or decreed equitable apportionment, a state has no affirmative duty to protect a shared natural resource for the benefit of another state. Whether and how much a state must manage shared natural resources in a way that benefits another state depends only on the terms of an applicable compact or equitable apportionment decree.

States enjoy sovereign control of natural resources and land use within their borders. When a state voluntarily cedes some of that control through an interstate compact, the Court assumes that it cedes only as much as necessary to carry out the agreement. *See, e.g.*, *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 632 (2013) ("when confronted with silence in compacts . . . '[i]f any inference at all is to be drawn . . . we think it is that each state was left to regulate the activities of her own citizens'") (quoting *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) (power to regulate land use is not impliedly relinquished). And even when states involuntarily cede their sovereign control in the context of a judicial equitable apportionment, they take on specific duties, not a general affirmative duty to protect the resource for the benefit of another state. *See Wyoming v. Colorado*, 259 U.S. 419, 484 (1922) ("[t]he question . . . is not what one State should do for the other, but how each should exercise her relative rights in the waters of this interstate stream"). In fashioning an equitable apportionment decree, the Court considers the benefits of the resource that a state has enjoyed in the past, but the specific duties it assigns to a state are prospective. *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (detailing past water use from the North Platte River in Colorado, Wyoming, and Nebraska and fixing specific duties in the decree).

Whatever concerns Mississippi may have over Tennessee's groundwater withdrawals, Tennessee has

no duty to address them unless the two states agree to a compact or the Court equitably apportions the aquifer at the request of one of the states. Absent such requirements, Mississippi has no legal basis to seek damages or other relief.

B. Without an interstate compact or judicial equitable apportionment, states cannot obtain damages or an injunction for intrastate use of a shared natural resource.

A state may obtain damages or an injunction for intrastate use of a shared natural resource only where there is a duty under a compact or equitable apportionment decree. Once a state acquires a duty under an interstate compact to protect a shared natural resource for the benefit of another state, a benefitting state may sue to enforce the duty. *See Texas v. New Mexico*, 482 U.S. 124, 130–31 (1987) ("[t]he Court has recognized the propriety of money judgments against a State in an original action, and specifically in a case involving a compact." (internal citations omitted)); *Kansas v. Nebraska*, 574 U.S. 445, 474–75 (2015) (awarding disgorgement of profits for violating an interstate water compact); *Kansas v. Colorado*, 533 U.S. 1, 7 (2001) (recognizing that money damages are available in an action to enforce an interstate compact); *Montana v. Wyoming*, 138 S. Ct. 758 (2018), *as revised* (Feb. 20, 2018) (awarding money damages against Wyoming and in favor of Montana for violations of the Yellowstone River Compact).

An equitable apportionment decree provides a remedy going forward, it does not determine past liability:

> Because apportionment is based on broad and flexible equitable concerns rather than on precise legal entitlements, a decree is not intended to compensate for prior legal wrongs.
>
> . . .
>
> Equitable apportionment is directed at ameliorating present harm and preventing future injuries to the complaining State, not at compensating that State for prior injury.

Idaho ex rel. Evans v. Oregon, 462 U.S. 1017, 1025, 1028 (1983) (internal citation omitted).

Without an interstate compact or equitable apportionment decree, a state cannot recover damages or obtain an injunction for intrastate use of a shared natural resource.

C. The Court should not create a claim for damages or enjoin uses if there is no interstate compact or judicial equitable apportionment.

1. A new claim for damages or an injunction would incentivize lawsuits over compact negotiations.

In our federal system, a state's ceding its sovereignty through the vehicle of an interstate compact provides the rare exception to state power and

authority. States enter compacts in part due to the risk of judicial resolution of interstate disputes. They might otherwise be slow to come to the negotiating table, "but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact." *State of Kansas v. State of Colorado*, 185 U.S. 125, 144 (1902) (quotation omitted).

History has borne out the Court's words when it comes to water. Interstate compacts are the favored method for many states to determine how to apportion rights to interstate streams, which offer "a necessity of life that must be rationed among those who have power over it." *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 103 (1938) (quoting *New Jersey v. New York*, 283 U.S. 336, 342 (1931)). Interstate compacts provide much-needed certainty about the water supply available for each state to develop in perpetuity; this is particularly important because it can take years to plan and complete water infrastructure projects. *See, e.g., People ex rel. Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1249 (Colo. 1996) ("[t]he Compact was executed between the states and approved by Congress to ensure Colorado and Kansas a secure and lasting apportionment of the waters of the Arkansas River").

This backdrop counsels against allowing a claim for damages or an injunction without the specific duties that an interstate compact or equitable apportionment decree provides. The possibility of judicial resolution of interstate water disputes brings states to the table. The availability of a claim for damages or an

injunction before negotiations have even begun would undermine comity among the states and all but ensure the proliferation of original actions where the states involved have not yet tried to resolve the dispute on their own. If states could simply bide their time and sue their neighbor state after the fact, they would have little incentive to try to reach an agreement on how to share a natural resource.

States have two vehicles for solving their disagreements over natural resources: the interstate compact and judicial equitable apportionment. The Court should not create a third, more volatile option.

2. A new claim for damages or an injunction undermines the doctrine of judicial equitable apportionment.

When states have not agreed by compact on how to allocate a shared natural resource and a genuine controversy exists, equitable apportionment of the resource by the Court is appropriate. *See Colorado v. New Mexico*, 459 U.S. 176, 183 (1982); *Nebraska v. Wyoming*, 325 U.S. 589, 616–17 (1945). Although the Court has made only a few equitable apportionments, it has laid out the standards a state must meet in such a proceeding and the relief that can be granted. Allowing a new claim along the lines that Mississippi proposes would facilitate an end run around judicial equitable apportionment that solves nothing for states that share a natural resource. And it would create an open-ended

process that would bring states back to this Court to resolve the same dispute over and over.

When apportioning interstate rivers, states enjoy "an equal right to make a reasonable use of the waters of the stream." *United States v. Willow River Power Co.*, 324 U.S. 499, 505 (1945), *see also Colorado v. New Mexico*, 459 U.S. at 184. Controlling the conduct of one state at the request of another is an extraordinary power. *Washington v. Oregon*, 297 U.S. 517, 522 (1936). In addition to restricting a state's sovereign authority to allocate and administer the natural resources within its borders, limiting use of natural resources can lead to disruption and destruction of existing economies. *See id.* at 529 (noting the danger of "destroying possessory interests enjoyed without challenge for over half a century"). Thus, apportioning a river is a delicate and complex matter that requires the Court to balance equities by considering prior development, economic impact, and the benefits to each state. *See Washington*, 297 U.S. at 523 ("[t]o limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users."); *Nebraska*, 325 U.S. at 621 (refusing to limit Colorado's present uses of water and concluding that "the established economy in Colorado's section of the river basin based on existing uses of water should be protected"); *Colorado v. Kansas*, 320 U.S. 383, 394 (1943) (finding that Kansas' proposed decree would result in injury to existing agricultural interests upstream in Colorado).

Mississippi's claims for damages and an injunction – but not an equitable apportionment – would undermine an established process to resolve disputes over a natural resource. Mississippi seeks payment for past groundwater withdrawals from a resource that has not yet been apportioned and a halt to future groundwater withdrawals in Tennessee. This approach would unlock the Court's extraordinary power without weighing the equities involved, and it would not help Mississippi and Tennessee determine how to share the aquifer in the future.

3. A new mechanism that allows for claims for damages or an injunction would create uncertainty for states as they administer natural resource use within their borders.

Water law in the West is complex and multi-layered. For example, in Colorado, water administration in one river basin could involve, at the same time, the application of interlocking intrastate priority administration and compliance with an interstate compact or equitable apportionment decree. Economies have grown around frameworks like this for decades.

A sudden claim by another state for damages or an injunction with no preexisting duty established by interstate compact or equitable apportionment would upset the certainty that supports towns, cities, and livelihoods. Farmers rely on a predictable system of water administration when they decide what crops to

grow, how much acreage to bring under cultivation, and what equipment they should purchase. Municipalities need the same predictability as they build water supply systems and manage their growth. The prospect of a neighbor state obtaining a judgment that changes how they can use water would create harmful uncertainty around this critical resource. It would discourage investment and make any enterprise that depends on water more expensive.

Granted, even a judicial equitable apportionment could disrupt or destroy existing economies. *See Washington*, 297 U.S. at 529. But at least in that case, the Court considers the consequences of its ruling for the people who use the resource at issue. *See Colorado v. Kansas*, 320 U.S. at 393. And if there is an existing compact or judicial equitable apportionment, everyone is aware of the state's obligations and can plan accordingly. If allowed to proceed, Mississippi's proposed method of resolving its dispute with Tennessee would set a precedent that could overturn settled expectations essential for economies and communities to survive.

IV. CONCLUSION

States settle their disputes over shared natural resources by interstate compact or judicial equitable apportionment. Each of these methods establishes forward-looking duties; neither method compensates for prior actions that may have harmed one of the states. In recognizing the gravity of interstate disputes

and the crucial importance of natural resource use to every state, the Court should decline to entertain a new method that would pit states against each other in a fruitless and expensive struggle.

Respectfully submitted,

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