

No. 09- 09 - 289 SEP 2 - 2009

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In The

**Supreme Court of the United States**

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THE STATE OF MISSISSIPPI,

*Petitioner,*

v.

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

*Respondents.*

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*On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Fifth Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

Whether ground water residing within the boundaries of the State of Mississippi at the time it entered the Union, which did not under natural circumstances flow into the State of Tennessee, constitutes a natural resource over which the State of Mississippi holds the rights of a sovereign, making the doctrine of equitable apportionment inapplicable.

Whether an action filed by the State of Mississippi solely against the City of Memphis, Tennessee and its public utility for compensation for the wrongful extraction of Mississippi ground water through the use of artificial, mechanical means, constitutes a suit by one state against another state triggering the exclusive jurisdiction of this Court under U.S. Const. Art. III, Section 2 and 28 U.S.C. Section 1251(a).

Whether the Fifth Circuit decision affirming the District Court's order requiring the joinder of the State of Tennessee as a necessary party in the suit against the City of Memphis, Tennessee and its utility division conflicts with the decisions of the Supreme Court and the Eleventh and Eighth Circuits governing application of 28 U.S.C. Section 1251(a).

**RULE 14.1(b) STATEMENT**

A list of all parties to the proceeding in the lower court whose judgment is the subject of this petition is as follows:

*Plaintiff-Appellant and Petitioner:* The State of Mississippi

*Defendants-Appellees and Respondents:* The City of Memphis, Tennessee and Memphis Light, Gas & Water Division

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## **PETITION FOR A WRIT OF CERTIORARI**

Mississippi respectfully petitions for a Writ of Certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit.

### **OPINIONS BELOW**

The unpublished opinion of the U.S. Court of Appeals for the Fifth Circuit, dated June 5, 2009, and its judgment, dated June 29, 2009, are reproduced at App. A, 1a - 18a.

The Bench Opinion Dismissing Action Without Prejudice of the U.S. District Court for the Northern District of Mississippi, Delta Division, dated February 4, 2008, is officially reported at 533 F. Supp.2d 646 (N.D. Miss. 2008) and is reproduced at App. B, 19a - 29a.

### **JURISDICTION**

The judgment of the U.S. Court of Appeals for the Fifth Circuit sought to be reviewed was entered on June 5, 2009. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1 and Rule 13.3 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §1254(1).

For purposes of Supreme Court Rule 14.1(g)(ii), the Court of first instance had federal question jurisdiction under 28 U.S.C. §1331.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are Article III, Section 2 of the United States Constitution; 28 U.S.C. Section 1251; and Mississippi Code Annotated Section 51-3-1 (2008). Pursuant to Supreme Court Rules 14.1(f) & (i)(v), the relevant constitutional and statutory provisions are reproduced verbatim at App. F, 39a - 42a.

## STATEMENT OF THE CASE

### *PREAMBLE*

The State of Mississippi (“Mississippi”) requests this Court’s review and reversal of the Fifth Circuit’s opinion and judgment, App. A. In the event this Court does not grant Mississippi’s petition and reverse the Fifth Circuit on the questions presented for review, then Mississippi requests this Court to review and grant Mississippi’s Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously herewith.

### I. BACKGROUND FACTS AND ISSUES

On December 10, 1817, Mississippi was admitted to the Union on an equal footing with the original thirteen colonies, retaining all attributes of sovereignty not ceded to the federal government in the United States Constitution. On admission to the Union the federal government transferred title to all land within the state borders and to the natural resources above and below the surface of that land, except to the extent expressly reserved by the United States. It is



well established that one of the attributes of sovereignty retained by the states is the power to preserve, protect and regulate the use of all natural resources found within the states' established borders.

This action arises from the wrongful taking and conversion of a natural resource over which Mississippi holds sovereign authority under the Constitution and Laws of the United States: ground water contained within a deep confined aquifer which, under natural conditions, has resided within the territorial boundaries of Mississippi since long before the drawing of state lines. This ground water is not a naturally shared resource, but one which has been confined within Mississippi's boundaries by the geology of the Sparta or Memphis Sand Aquifer ("the aquifer") in which this finite supply of prehistoric water naturally resides. Under north Mississippi, the aquifer is a deep confined geological formation of limited permeability consisting of dense sand, rock, silt and clay sandwiched between two separate clay formations. The ground water stored in this aquifer accumulated over millennia as it slowly filtered imperceptibly through soil, sediment and rocks to deposit a finite supply of pure water naturally entrapped and residing for thousands of years between the two confining clay strata above and below the deep aquifer sand formation.

Unlike the surface water of watersheds, streams, rivers and lakes which is constantly replenished and flows freely from place to place, the ground water in the aquifer beneath Mississippi is a pure finite resource, and only arduously moves under natural conditions. Once collected in the deep confined aquifer the accumulated ground water does not move freely or

randomly; rather, its movement is restricted by the porosity and surface friction of the constituents of the geology and the direction is determined by the geologic formation of the confining clays. In north Mississippi this geology has always restricted both the introduction of new water into the aquifer, and the natural movement of the finite supply of ground water contained in the aquifer. Ground water extracted from the aquifer in Mississippi takes thousands of years to replenish; and, under natural conditions, the ground water stored in the aquifer only moves about an inch per day, or 30.4 feet per year across north Mississippi in a predominately east to west direction. App., 44a-45a. These forces created an essentially static reserve of pure water which has resided within the present boundaries of Mississippi for thousands of years. The same geological factors created a similar finite, confined reserve of ground water beneath the western part of the State of Tennessee (“Tennessee”).

With the growth of the City of Memphis (“Memphis”), it has authorized its wholly owned division, Memphis Light, Gas & Water (“MLGW”), to construct and operate an increasingly larger and larger water well pumping operation withdrawing water from the aquifer to the point that MLGW now boasts that it operates one of the largest water well pumping operations in the world, consisting of over one hundred seventy-five wells pumping from ten separate well fields drawing from the aquifer. App. 52a-53a. In its constant expansion of its water well pumping operation MLGW has located three of its ten fields very near the Mississippi state border. From these ten fields, MLGW pumps more than two hundred million gallons of ground water daily. This aggressive extraction of ground water by Memphis and

MLGW from the aquifer has largely drained the aquifer under Memphis and created a massive cone of depression within the aquifer extending across the Tennessee state line into Mississippi. By this mechanism, Memphis has siphoned hundreds of billions of gallons of irreplaceable pure water from within Mississippi which would never have crossed into Tennessee's borders in the Memphis area under natural conditions -- and it continues to do so. App., 46a - 51a. The Mississippi ground water being taken by Memphis and MLGW is being derived from an area of Mississippi which is rapidly growing and for which this resource is essential to sustain economic health and future residential and commercial development. This taking by Memphis and MLGW is intentional and they have taken no steps to cease or curtail their activities by which they continue to wrongfully seize over twenty-four million gallons of Mississippi ground water daily.<sup>1</sup>

Mississippi's action is not against Tennessee and the action does not involve a shared natural resource. Neither Mississippi nor Tennessee dispute the other states' sovereign right to control, protect and preserve the ground water naturally residing within their respective lawful boundaries and no such rights are at

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<sup>1</sup> For a more comprehensive discussion of the aquifer and the impact of MLGW's pumpage on Mississippi's ground water resources, see Affidavit of David A. Wiley (Professional Geologist) with excerpts from his expert report entitled "Report on Diversion of Ground Water from Northern Mississippi Due to Memphis-Area Wellfields" dated May 2007 annexed as Exhibit 2 to "Appendix G" at 56a-117a to Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously with this petition.

issue in this action.<sup>2</sup> Mississippi's action is against Memphis and MLGW which effectively take the position that Memphis is free to seize and siphon away all the ground water it can extract from within Mississippi by mechanical means as long as its equipment does not physically cross the state line. Under these facts Mississippi has instituted an action against Memphis and MLGW for damages arising from the intentional and wrongful taking of a Mississippi natural resource to which Memphis has no claim of right, and to enjoin future diversions and the conversion of Mississippi's ground water.

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<sup>2</sup> Tennessee's *amicus curiae* brief in the Fifth Circuit appellate proceedings, essentially agreeing with Mississippi's positions regarding the states' ownership and control of all water resources within their separate borders, stated:

Tennessee certainly has an interest as sovereign in the ground water *within its borders*. Like other natural resources, *the ground water in Tennessee* is held by the state in "public trust" for the use of the people of the state[.] Tenn. Code Ann. §69-3-102(a) (2004). As sovereign, Tennessee may exercise its police power to regulate ground water so as to protect and conserve the public resource. (emphasis, in italics, added).

See "Appendix I" at 235a to Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously with this petition. While Mississippi acknowledges Tennessee's sovereign powers over its ground water, this dispute involves only ground water siphoned and diverted by Memphis' utility's pumping from within Mississippi's borders. No water resources under Tennessee's control are involved.

## II. DECISION OF THE DISTRICT COURT

On February 1, 2005, Mississippi sued Memphis and MLGW for monetary damages and injunctive relief for trespass and conversion of state-owned water resources. On three separate occasions, Defendants moved to dismiss the District Court action for lack of subject matter jurisdiction, arguing, *inter alia*, that Tennessee should be joined as an indispensable party-defendant and that such joinder would invoke the original and exclusive jurisdiction of the Supreme Court under 28 U.S.C. §1251(a). Each time, the District Court, relying in part on *Illinois v. Milwaukee*, 406 U.S. 91 (1972), denied Defendants' motions. App., 30a - 38a.

Trial was set for February 4, 2008. On the first day of trial, the District Court *sua sponte* revisited the issue of its subject matter jurisdiction. See App., 19a - 29a; *Hood, ex rel. the State of Mississippi v. The City of Memphis, Tennessee*, 533 F. Supp.2d 646, 646-47 (N.D. Miss. 2008). The trial court held that, because the aquifer underlies parts of Mississippi and Tennessee, Mississippi's action "*must necessarily*" be an action "between two or more States" for purposes of 28 U.S.C. §1251(a). *Id.* at 650. The District Court found that it lacked subject matter jurisdiction and dismissed Mississippi's action without prejudice. *Id.* The District Court also determined that this Court must equitably apportion the aquifer as between Mississippi and Tennessee before the requested monetary damages may be awarded. *Id.* at 649.

### III. DECISION OF THE FIFTH CIRCUIT

Mississippi appealed the District Court's dismissal without prejudice to the U.S. Court of Appeals for the Fifth Circuit. On June 5, 2009, the Fifth Circuit, affirming the ruling of the District Court, equated the ground water suspended within a deep confined geologic formation with such clearly shared interstate resources such as rivers, lakes or streams, stating that "[t]he aquifer must be allocated like other interstate water resources in which different states have competing sovereign interests." App., 11a. The Court of Appeals found no error in the District Court's conclusion that Tennessee's presence in the lawsuit was necessary to accord complete relief between Mississippi and Memphis. *Id.*

The Fifth Circuit acknowledged that Mississippi had correctly argued that a suit involving interstate water does not automatically invoke the jurisdiction of the Supreme Court and strip the District Court of jurisdiction. App., 12a. In fact, the Fifth Circuit noted that cases of concurrent jurisdiction (original, but not exclusive jurisdiction) under 28 U.S.C. §1251(b)(3) should be brought in the District Court in the first instance. The court below distinguished the authorities relied on by Mississippi as involving non-state parties, and not other states, despite the fact that Mississippi's action is also, and only, against non-state parties, Memphis and MLGW, not Tennessee. *Id.*

## REASONS FOR GRANTING THE PETITION

### I. THE FIFTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING THE STATE'S SOVEREIGN AUTHORITY OVER NATURAL RESOURCES WITHIN ITS BORDERS

The Fifth Circuit's decision perpetuates the District Court's confusion between the Court's cases addressing the sovereign rights of a single state over natural resources residing *in situ* within its boundaries and those cases addressing the competing rights of multiple states asserting transitory claims to water naturally flowing through their territories. The equitable apportionment cases address only the latter classification, not the former; and the equitable apportionment remedy does not apply to Mississippi's case against Memphis and MLGW. This is true for at least three reasons: (a) the ground water residing within the aquifer in Mississippi is not a natural resource shared with another state; (b) there is no dispute between competing sovereigns holding legitimate claims to this ground water under the Constitution and Laws of the United States; and (c) equitable apportionment does not afford Mississippi a remedy for Memphis and MLGW's past wrongful conversion of Mississippi's natural resource.

#### A. The Mississippi Ground Water is Not a Shared Natural Resource Under *Martin v. Waddell's Lessee* (1842) and Its Progeny Covering One Hundred Sixty Years.

By affirming the District Court's decision, the Fifth Circuit implicitly adopted Memphis' argument that a

naturally limited and confined resource -- pure ground water accumulated in a deep confined aquifer residing within a state's boundaries -- cannot be owned, controlled, protected, preserved or regulated by that state. This argument finds no support in the Constitution and Laws of the United States under which this Court has repeatedly recognized the sovereignty of each state over the ownership, preservation, use and control of its natural resources for the benefit of its citizens. Under the equal footing doctrine, each state, upon entry into the Union, became vested with ownership, control and dominion over the natural resources within its territorial boundaries.<sup>3</sup> In *Phillips Petroleum Co. v. Mississippi*, this Court affirmed a decision of the Mississippi Supreme Court declaring the State's ownership and plenary authority over its subterranean resources. 484 U.S. at 476, 479 (affirming *Cinque Bambini Partnership v. State of Mississippi*, 491 So.2d 508, 511-14, 516-17 & 519-20 (1986) (effective upon statehood in 1817, federal law provided that the United States granted to Mississippi in trust all lands, to which the United States then held title, including their mineral, land and other subsurface resources)). Ever since the federal sovereign ceded title to Mississippi, state law

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<sup>3</sup> *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) (reaffirming longstanding Supreme Court precedents holding that the states, upon entry into the Union, received ownership of their lands and waters); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-78 (1977); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *Howard v. Ingersoll*, 54 U.S. 381 (1852); *Pollard v. Hagan*, 44 U.S. 212, 222-23 (1845); *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842). See also *Montana v. United States*, 450 U.S. 544, 551-52 (1981); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 286-87 (1997).



has controlled ownership and allocation of the use of Mississippi's natural resources. *Oregon*, 429 U.S. at 378-82; *Cinque Bambini*, 491 So.2d at 513, 516-19. It is, thus, the State's prerogative to control and preserve state-owned resources. *Id.* at 513, 517.

The ground water at issue has been owned by Mississippi for almost two hundred years, since 1817. For over 160 years, an unbroken line of Supreme Court decisions has consistently traced state ownership of natural resources within the states' boundaries above and below the surface to the American Revolution. Each state's right and responsibility to control the natural resources within its boundaries arises from the American colonies' inheritance of England's common law under which the sovereign or King owned all of the waters, forests, game, minerals and profits upon or under the land. See *Phillips Petroleum*, 484 U.S. at 479; *Oregon*, 429 U.S. at 378; *Illinois Centr.*, 146 U.S. at 452; *Pollard*, 44 U.S. at 222-23; *Waddell's Lessee*, 41 U.S. at 410. When the original thirteen colonies joined in rejecting English royal claims by the Declaration of Independence, each colony asserted the same governmental ownership and control of the waters and other natural resources within their boundaries which was previously exercised by the sovereign. As new states entered the Union, each entered on "equal footing" with those of the original thirteen colonies; that is, each new state was presumed to be endowed with the same sovereign rights and privileges, including sovereignty over all natural resources within the particular territory, as retained by the original thirteen. *Pollard*, 44 U.S. at 222-23.

Within the context of natural resources, this Court has consistently recognized that every state, including

Mississippi, owns the surface water and ground water resources within the geographical confines of its boundaries as a function of statehood. The water resources of each state properly belong to each such state by their inherent sovereignty. *Kansas v. Colorado*, 206 U.S. 46, 93-94 (1907).

*Hinderlider v. LaPlata Co.* (1938) and other equitable apportionment cases relied on by the Fifth Circuit all involved disputes between states over surface water flowing through both states in a river, its tributaries or water sheds. Neither the parties to those cases, nor the Court questioned the individual states' sovereignty over the water while it resided within the state's borders; however, because the water naturally flowed through the boundaries of more than one state, each of those states claimed complete sovereignty over the moving water while it passed through its borders. The remedy of equitable apportionment was necessary in *Kansas v. Colorado*, 206 U.S. 46, 92 - 100 (1907) because both states asserted legitimate sovereign rights in the water of the Arkansas River. As the Court observed: "[b]efore either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which now composes these two States." *Id.* at 99. Exercising this sovereignty, each state had the authority to adopt and enforce different rules of law relating to the taking and use of the water while it remained within the state's borders; but the unconstrained exercise of complete sovereignty by one state with a legitimate claim to the flowing waters violated the cardinal rule of equality of right between those states. *Id.* at 97 - 98. These issues simply do not exist in Mississippi's case against Memphis and MLGW. Before either Mississippi or Tennessee was settled, the water to which Mississippi

claims ownership already resided in Mississippi, not Tennessee, and the ground water at issue falls solely under Mississippi's sovereignty. As a limited natural resource, the ground water in the aquifer was apportioned and each state's rights were established when the state lines of Tennessee and Mississippi were established.

B. Equitable Apportionment Is Neither a Required Nor an Appropriate Remedy in Mississippi's Civil Action

Mississippi has sued a municipality and its wholly owned utility for the wrongful taking of a natural resource belonging to Mississippi and its citizens. This is not the subject of the Court's equitable apportionment cases which acknowledge each separate state's sovereignty within its geographic boundaries as a natural resource belonging to the state; rather, these cases address a specific problem: while each state is free -- subject to Congress' power to regulate interstate commerce -- to exercise its sovereignty to regulate and control the water within its state, it may not impose its policies on another state through which such water also naturally flows. *Kansas v. Colorado*, 206 U.S. at 95. Nor may Congress impose laws resolving such a dispute between the sovereign states. *Id.* at 97. Accordingly, the Court must resolve disputes between the states arising from their exercise of their sovereign rights.

The District Court and the Fifth Circuit improperly dismissed Mississippi's case for failure to join Tennessee because Mississippi and Tennessee are not asserting conflicting rights. Both states assert sovereignty over the ground water within their state;

Mississippi did not sue Tennessee or challenge its sovereignty over ground water within Tennessee; and Tennessee never moved to intervene in Mississippi's suit against Memphis and MLGW, or objected to the jurisdiction of the District Court. When it filed its *amicus* brief in the Fifth Circuit, Tennessee acknowledged a state's sovereignty over the ground water within its borders and merely stated the position that, if an equitable apportionment action is instituted in the United States Supreme Court by Mississippi, Tennessee would be a party. Neither state contends that Mississippi's suit creates a controversy between Mississippi and Tennessee, and no claim for equitable apportionment has been raised, making the District Court's dismissal error.

Beyond the lack of any legal basis supporting Memphis and MLGW's desire to have part of Mississippi's ground water apportioned to Memphis, equitable apportionment is not an appropriate remedy for the wrong asserted by Mississippi. Equitable apportionment does not compensate for past legal wrongs; rather, it is solely designed to ensure a state its future share of a shared natural resource. *Idaho, ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025-26 (1983). Mississippi seeks damages for retroactive periods dating back forty years. Its damages will continue and increase as long as the present pumping by Memphis is maintained, expanding the cone of depression progressively further into Mississippi. Respondents cannot return or replace the converted water; it is forever lost to Mississippi, and it is impossible for any of the ground water in the aquifer to return or be replenished as long as MLGW continues pumping and expanding the cone of depression further into Mississippi. Without relief, the loss of Mississippi's

natural resources will never be compensated and will only increase.

In order to stop Memphis' taking of Mississippi's water, Memphis will have to shut down a majority of its wellfields and move them north and east out of its service area to contract the cone, or fund, construct and operate a river water treatment plant and distribution system extracting its water supply from the Mississippi River to substitute for the water being taken from Mississippi.<sup>4</sup>

## II. THE OPINION OF THE FIFTH CIRCUIT CONFLICTS WITH MISSISSIPPI'S DECISIONAL AND STATUTORY LAW APPLICABLE TO THE PRESERVATION AND MANAGEMENT OF ITS NATURAL RESOURCES

The Court has repeatedly recognized the authority of the states to adopt both common law and statutory regimes for the preservation, regulation and management of the natural resources within their boundaries, including both surface and ground water. In affirming the District Court's dismissal of Mississippi's action the Fifth Circuit failed to recognize and apply the Mississippi law governing ownership and use of the State's ground water.

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<sup>4</sup> The federal courts have authority to require utilities, like MLGW, to expend funds and construct and operate new facilities when necessary to recompense damages caused to another state. *See Wisconsin v. Illinois & Sanitary Dist. of Chicago*, 278 U.S. 367, 420-21 (1929) (Court, in original action, required non-state party sanitation district to provide sufficient funding and to construct and operate "with all reasonable expedition" adequate plants for sewage disposition rather than by lake diversions).

A. *Cinque Bambini* and Mississippi's "Omnibus Water Rights Act"

In *Cinque Bambini*, the Mississippi Supreme Court announced that the public trust doctrine applies to all the State's natural resources, including subterranean resources such as ground water. *Cinque Bambini* largely reaffirmed Mississippi's decisional law and policy establishing state ownership and control of the water resources within its borders for the beneficial use of the people of the State.<sup>5</sup> About the same time, Mississippi enacted its "Omnibus Water Rights Act" which declared and confirmed the State's ownership of all water sources within the State's borders.<sup>6</sup> These basic principles are codified in Mississippi's statutory

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<sup>5</sup> See *State Game & Fish Comm'n v. Louis Fritz Co.*, 187 Miss. 539, 193 So. 9 (1940) (State is the owner of water within its borders and incident to this ownership has a right and duty to police and protect it; court stresses police power connected with State's ownership in trust for the people); *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44 (1938) (State has power, as trustee, to bring a trespass action to recover value of subterranean resources removed from river bed).

<sup>6</sup> MISS. CODE ANN. §§51-3-1, *et seq.* (1985 & Supp. 2008) (Mississippi's 1985 Omnibus Water Rights Act codifies state ownership of ground water under the public trust). See also Mississippi's 1976 Ground Water Capacity Use Act, MISS. CODE ANN. §51-4-1 (1976) (declaring ground water to be among the State's basic resources subject to state control and development for the benefit of the people); Richard J. McLaughlin, "Mississippi" in 6 *Water and Water Rights*, 712 (Robert E. Beck, Ed., 1991, repl. vol. 2005) ("[b]oth surface water and ground water are regarded as property of the State of Mississippi.").

regulated riparian regime<sup>7</sup> which provides, in pertinent part:

***All water, whether occurring on the surface of the ground or underneath the surface of the ground, is hereby declared to be among the basic resources of this state and therefore belong to the people of this state, and is subject to regulation in accordance with the provisions of this chapter. The control and development and use of water for all beneficial purposes shall be in the state, which, in the exercise of its police powers, shall take such measures to effectively and efficiently manage, protect and utilize the water resources of Mississippi.***

MISS. CODE ANN. §51-3-1 (1985 & Supp. 2008) (emphasis, in bold italics, added). This statute reaffirms that, as the legal owner of its water resources, Mississippi has the power, authority, and fiduciary obligation, to take all steps necessary to protect ground water for its citizens' use.

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<sup>7</sup> Mississippi's adoption of regulated riparianism is part of a trend in a majority of eastern states to abandon antiquated 19th century riparian common law doctrines and replace those old legal systems with modern legislative regimes premised upon state ownership and management of water resources. *See generally* App., 57a - 60a. Such principles have long dominated water law and rights in all the western states. *See id.*, 60a-62a. *See also* American Society of Civil Engineers, "Regulated Riparian Model Water Code," Section 1-R-1-01 at 1 (2004) ("the waters of the State are a natural resource owned by the State in trust for the public and subject to the State's sovereign power to plan, regulate and control the withdrawal and use of those waters").

The state boundaries superimpose a geopolitical grid over the territories occupied by the states overlying the geological formation making up the aquifer. In order to give full credence to the sovereignty retained in each state over its land and natural resources, the Court has recognized the state borders in determining the rights of the state and its citizens over the competing claims of citizens of abutting states.<sup>8</sup> The ground water underlying Mississippi belongs to Mississippi, the ground water underlying Tennessee belongs to Tennessee, and so on. The Fifth Circuit decision errs in equating the aquifer ground water to interstate surface waters. These distinctly different water resources have profoundly different behavior characteristics which determine the residence and ownership of the resource. The Fifth Circuit's decision overlooks the residence time of water within a particular geographic area. Surface water

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<sup>8</sup> See *Howard v. Ingersoll*, 54 U.S. 381 (1852). Ingersoll brought an action in the circuit court of Alabama (state court) to recover damages for wrongful obstruction by Howard of the Chattahoochee River which caused the waters of the river to flood Ingersoll's land and obstruct the use of his mill. While the underlying dispute involved private (non-state) claimants, the determinative issue, according to the Court, was one of boundary between the States of Georgia and Alabama. The Court held that the western line of Georgia was established upon the western bank of the Chattahoochee River and that, therefore, the river "resided" within Georgia's territorial boundaries. The Court sent the case back to state court, quoting from an earlier opinion by Chief Justice Marshall: "[W]hen a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants territory on the one side only, it retains the river within its domain, and the newly created State extends to the river only." 54 U.S. at 412.



has a very brief residency -- perhaps only hours or days -- as it flows freely across state lines. Even then, each state owns and controls the water resources while they exist or reside within that state's borders. In contrast, ground water has residency times that span millennia. The Mississippi ground water in the aquifer resided there for thousands of years and would have continued to reside in Mississippi for its citizens in the future but for MLGW's aggressive mechanical extractions from under Mississippi territory. Mississippi's ground water resource is not and has never been a shared resource under natural conditions.

B. The Fifth Circuit's Decision Effectively Abrogates the Public Trust Doctrine and Conflicts with the Laws of All States Regarding State Ownership and Control of Water Resources.

All states trace their sovereign ownership and rights to manage and preserve their water resources to the public trust. Mississippi's sovereign authority and responsibility over its natural resources as recognized in *Cinque Bambini*, *Louis Fritz* and *Stewart* comports with federal and state authorities from a majority of states. Mississippi's Omnibus Water Rights Act codifying the public trust and the State's sovereign role as trustee is also consistent with legislative enactments and constitutional provisions of other states. A compilation of numerous decisions, statutes and constitutional provisions from thirty-five states may be referenced at App., 54a-62a. These state laws are firmly rooted in this Court's cases overlooked by the Court of Appeals. *See* note 3 & accompanying text *supra*.

Under the United States Constitution as read by the Court, the ground water in the aquifer which is the subject of Mississippi's federal court action became the property and responsibility of Mississippi at the time it was admitted to the Union as one of these United States; accordingly, there is nothing to apportion. Taken to its logical conclusion, the Fifth Circuit's decision appears to suggest that this Court's decisions assert an Article III right and obligation of the Court to "equitably reallocate" one state's natural resources to a municipality across the state line in another state. This is certainly the essence of Memphis' argument with which it obtained the dismissal of the District Court case; however, there is no Constitutional basis for any such claim.

III. THE FIFTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISIONS OF THE COURT AND THEIR APPLICATION BY THE ELEVENTH AND EIGHTH CIRCUITS LIMITING THE COURT'S EXERCISE OF ITS ORIGINAL AND EXCLUSIVE JURISDICTION UNDER U.S. CONST. ART. III, SECTION 2 AND 28 U.S.C. §1251(a).

Mississippi claims that Memphis and MLGW have mechanically extracted and converted ground water naturally residing within Mississippi's territorial boundaries through the medium of the aquifer, an interstate geological formation. Under *Illinois v. Milwaukee*, 406 U.S. 91 (1972), these claims involving a transboundary dispute between a state and a municipality and public utility in another state, both non-state entities, conferred federal question

jurisdiction<sup>9</sup> on the District Court. Because the action does not involve two states, it is not within the original and exclusive jurisdiction of the United States Supreme Court and the proper, available forum is the District Court. *Illinois v. Milwaukee*, *supra* at 97, 103-08; *Alabama v. United States Army Corps of Engineers*, 424 F.3d 1117, 1130 (11th Cir. 2005) (“*Alabama II*”); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-26 (8th Cir. 2003), *cert. den.*, 541 U.S. 987 (2004); *Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242, 1254-55 (11th Cir. 2002); *Alabama v. United States Army Corps of Engineers*, 382 F.Supp.2d 1301, 1309-12 (N.D. Ala. 2005) (“*Alabama I*”).

The Fifth Circuit’s position -- that a dispute over ground water residing in a deep confined aquifer is automatically “between two states” -- ignores the

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<sup>9</sup> The interstate nature of the sand formation comprising the aquifer conferred federal question jurisdiction on the District Court. *Illinois*, *supra*, at 104-07; *Hinderlider v. LaPlata Co.*, 304 U.S. 92, 110 (1938); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Mississippi’s claims are governed by federal common law because of the transboundary character of the aquifer. Federal courts have long recognized the need to create and apply federal common law in a variety of claims including trespass, conversion, unjust enrichment and injunctive relief as sought by Mississippi. Thus, it is the interstate context that actually gives rise to the District Court’s subject matter jurisdiction in a manner consistent with the decisions of the Court and the Eighth and Eleventh Circuits relied on herein. State law will be adopted as the federal rule in fashioning federal common law remedies for Mississippi’s claims. *Compare Illinois*, *supra*, at 107 (state’s standards relevant and considered in dispute resolution) *with Central Pines Land Co. v. United States*, 274 F.3d 881, 890 nn. 32 & 34, 892-93 & n. 49 (5th Cir. 2001) (state law borrowed as the federal rule of decision).

undisputed geology and hydrogeology. This broad formulation also ignores the distinction between sovereign governments and their citizens which have been recognized by this Court and the Eleventh and Eighth Circuits in cases involving water quality and allocation disputes. *Illinois, supra* at 97-98, 108 (Supreme Court declined to exercise §1251(a) jurisdiction holding that Wisconsin was not a mandatory party in Illinois' suit against Milwaukee over pollution of Lake Michigan); *Alabama II, supra*, at 1130 (Eleventh Circuit held that Alabama's water supply allocation suit against Corps of Engineers involving Lake Lanier with Georgia and Florida on opposite sides of case did not deprive district court of jurisdiction under §1251(a)); *Ubbelohde, supra*, at 1025-26 (Eighth Circuit held water quantity controversy between South Dakota and Corps involving releases from Missouri River where Nebraska sought intervention did not trigger §1251(a) to strip district court of jurisdiction despite states' adverse interests); *Georgia, supra*, at 1254-55 (Eleventh Circuit held intervention of Florida and utility in Georgia's water quantity action against Corps did not invoke §1251(a) jurisdiction of Supreme Court); *Alabama I, supra*, at 1309-10 (Georgia's "argument that 'interstate water disputes' automatically fall within the Supreme Court's original exclusive jurisdiction because the general subject implicates states' competing interests in water is misplaced"). The Fifth Circuit's decision conflicts with governing decisions from this Court and the Eighth and Eleventh Circuit Courts of Appeals.

There are two basic flaws in the Fifth Circuit's rejection of Mississippi's authorities on this issue. First, this is not a state versus state controversy;

rather, Mississippi sued Memphis, a political subdivision of Tennessee, and its utility division, MLGW, both of which are non-state entities. The Eighth and Eleventh Circuits' cases involved state actions against the Corps of Engineers, a non-state entity; however, neither the presence, nor potential intervention or participation, of state parties divested the district courts of jurisdiction in *Alabama II* (Eleventh Circuit), *Ubbelohde* (Eighth Circuit), or in this Court's seminal ruling in *Illinois v. Milwaukee*. The instant action presents an even clearer example of a state versus non-state entities. Second, there is an available forum in which this matter is already prepared for trial and complete adjudication of the issues may be obtained -- the U.S. District Court for the Northern District of Mississippi.

These two essential factors, rigorously applied in evaluating the Court's exercise of jurisdiction under Section 1251(a), were not given proper attention by the Fifth Circuit. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1991), this Court held that to constitute a proper controversy under 28 U.S.C. §1251(a), it must appear that the complaining state has suffered wrong through the action of the other state, furnishing ground for judicial redress, or is asserting a right against the other state which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence. *Wyoming v. Oklahoma*, 502 U.S. at 447, citing *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981) (quoting *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)); see also *New York v. Louisiana*, 274 U.S. 488, 490 (1927).

For this action to be characterized as a dispute “between states,” Mississippi must seek relief against Tennessee for wrongs caused by Tennessee’s actions. *See Mississippi v. Louisiana*, 506 U.S. 73, 78 n. 2 (1992) (“Louisiana’s intervention is also unaffected by §1251(a) because it does not seek relief against Mississippi.”); *United States v. Nevada*, 412 U.S. 534, 537 (1973) (where two states with opposing interests in federal water allocation suit did not seek relief from one another, case fell outside §1251(a) jurisdiction).

Mississippi seeks damages against Memphis and MLGW only and has made no claim against Tennessee. Nor does Tennessee have any adverse claim against Mississippi. Other circuits in water quantity and quality cases have held that “[a] controversy between two or more states exists only when, unlike this case at this time, the states are actually seeking relief from one another.” *Alabama I*, *supra*, at 1311. *See also Alabama II*, *supra*, at 1130 (to invoke Supreme Court’s §1251(a) jurisdiction, plaintiff state must first demonstrate that injury for which redress is sought was directly caused by actions of another state, *quoting Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976)); *Ubbelohde*, *supra*, at 1025-26 (same); *Georgia*, *supra*, at 1256 n. 11 (same).

The Fifth Circuit’s conflict with decisions of this Court and other federal circuits stems from its assumption that ground water residing in any, however slightly permeable, interstate geological formation must, by definition, be a shared resource of all states overlying that formation. This leap from the apportionment of free flowing interstate surface water jointly claimed by two sovereign states, to a city’s mechanical extraction of prehistoric water residing in

another state and to which its own state makes no claim, finds no support in the law. Tennessee's rights and interests are not implicated solely because the ground water being siphoned from Mississippi by Memphis must travel through a transboundary geological formation. Because Mississippi owns the ground water naturally residing in the State as sovereign and Mississippi's claims do not cover any ground water which would ever naturally reside in Tennessee, this action does not concern competing claims of states against one another. *See Alabama II, supra*, at 1130 (suit must involve controversy between states based on damages to one state directly caused by the other state); *see also Georgia, supra*, at 1248, 1254-55 (Florida argued that Georgia was seeking to effect *de facto* apportionment in water quantity allocation dispute over interstate water basins; district court allowed intervention, but retained subject matter jurisdiction as Florida may not be able to protect its interests in Supreme Court equitable apportionment action).

*Illinois v. Milwaukee* squarely addresses and controls the question presented. *Illinois* was an action by a state (Illinois) against a municipality (Milwaukee) and certain sewerage commissions involving water pollution. This Court declined to exercise its §1251(a) jurisdiction and remitted the parties to the district court which had jurisdiction over the parties and could provide complete relief without joinder of other affected states. 406 U.S. at 107. The recent decisions in *Alabama I & II, Georgia* and *Ubbelohde, supra*, follow the logic of *Illinois*. *See also Connecticut v. Cahill*, 217 F.3d 93, 95, 104-05 (2nd Cir. 2000) (New York's sovereignty not implicated as no relief sought that would require state to disburse funds from its

treasury to Connecticut; §1251(a) jurisdiction not invoked as suit not “between two or more States”); *accord, California v. Nevada*, 447 U.S. 125, 133 (1980) (because matter did not involve dispute between California and Nevada, it did not fall in Supreme Court’s original jurisdiction); *North Dakota v. Minnesota*, 263 U.S. 365, 371-72, 378 (1923) (bill dismissed as Minnesota not responsible for flooding in North Dakota).

These cases recognize that 28 U.S.C. §1251 circumscribes the Supreme Court’s original jurisdiction based on the identity of the parties to a dispute, not based on the subject of the dispute between the parties. In *Alabama I, supra*, the court observed that even when states are in conflict, the Supreme Court’s original jurisdiction is not necessarily implicated:

Just because states pursue opposing interests in a case does not necessarily mean a “controversy” exists between or among them, or that the Supreme Court will exercise original jurisdiction.

*Id.* at 1310. In deciding whether to accept an action -- even one clearly within its original jurisdiction -- the Supreme Court considers two factors: “the nature of the interest of the complaining state” and “the availability of an alternative forum in which the issue tendered can be resolved.” *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

The Court exercises its original jurisdiction only very sparingly. *See id.*; *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992); *Maryland v. Louisiana*, 451 U.S.



725, 739 (1981); *Arizona v. New Mexico*, 425 U.S. 794, 796 (1976); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971). It will only exercise jurisdiction in “serious” cases such as would amount to *casus belli* if the states were fully sovereign. *Mississippi*, 506 U.S. at 77; *Texas v. New Mexico*, 462 U.S. 554, 571 n. 18 (1983); *Alabama I, supra*, at 1311. See also *Illinois, supra*, at 93-94 (§1251(a) jurisdiction obligatory only in cases of seriousness); *Louisiana v. Texas*, 176 U.S. 1, 15 (1900) (original jurisdiction exercised only when necessity is absolute). The exclusive jurisdiction of the Supreme Court is limited to cases in which the states are and remain opponents in the controversy, regardless of their formal alignment. *Alabama I, supra*, at 1310, citing *United States v. Nevada*, 412 U.S. 534, 538-40 (1973); *California v. Nevada*, 447 U.S. 125, 133 (1980). Simply stated, it is essential that the complaining state has suffered a wrong through the action of the other state. *Alabama II, supra*, at 1130; *Georgia, supra*, at 1256 n. 11 (quoting *Massachusetts v. Missouri*, 308 U.S. 1 (1939)); *Alabama I, supra*, at 1311, citing *Mississippi*, 506 U.S. at 78 n. 2; *United States v. Nevada*, 412 U.S. 534, 537 (1973) (*per curiam*) and relying on *Ubbelohde*, 330 F.3d at 1025-26, and *Georgia*, 302 F.3d at 1256 n. 11. As Mississippi and Tennessee have neither asserted a wrong nor sought any relief against one another for injury directly caused by either state, the first factor governing exercise of Supreme Court original jurisdiction cannot be demonstrated.

The second factor -- availability of an alternative forum -- mandates reversal of the Fifth Circuit. Mississippi’s common law tort action for damages against the sole tortfeasors, Memphis and MLGW, may be heard in the District Court which has

jurisdiction over the parties and authority to grant complete relief to those parties already present in the case. See *Mississippi*, 506 U.S. at 77; *Texas*, 462 U.S. at 571 n. 18; *Arizona*, 425 U.S. at 797; *Illinois*, 406 U.S. at 93; *Georgia*, 302 F.3d at 1254-55; *Alabama I* at 1311. Accordingly, this Court's original, exclusive jurisdiction under §1251(a) is not invoked by Mississippi's claims and the Fifth Circuit should be reversed to resolve the conflict between the Circuits and with this Court's decisions.

#### IV. THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE REGARDING THE SOVEREIGN RIGHTS OF MISSISSIPPI AND ALL OTHER STATES TO OWNERSHIP AND CONTROL OF STATE WATER RESOURCES.

The Court should grant certiorari because the core issues implicate the sovereign rights and powers of all states and impact significant property rights and pecuniary interests.

Mississippi's claims are based on its ownership of all water resources within its territorial boundaries. Mississippi, like every state in the United States, entered the Union on "equal footing" with the original thirteen colonies and was presumed to be endowed with the same self-evident, inalienable rights and privileges, including sovereignty with respect to all waters and other natural resources within their borders. See *Phillips Petroleum*, 484 U.S. at 479; *Oregon*, 429 U.S. at 378; *Illinois Centr.*, 146 U.S. at 452; *Pollard*, 44 U.S. at 222-23; *Waddell's Lessee*, 41 U.S. at 410. All states, including Mississippi, have declared sovereignty and plenary authority over water resources within their boundaries, including

subterranean ground water. *Cinque Bambini*, 491 So.2d 508, 511-14, 516-17 & 519-20 (affirmed by this Court in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988)), MISS. CODE ANN. §51-3-1 (1985 & Supp. 2008). The Fifth Circuit's decision -- which effectively declares that Mississippi does not own the State's ground water resources -- would, if affirmed, have the pernicious effect of abrogating the public trust doctrine and undermining the constitutional, statutory and decisional laws of most, if not all, states of the Union which rest on the rights and powers retained by the states under the United States Constitution. *See App.*, 54a - 62a.

The water rights laws and water management policies of Mississippi and the remaining forty-nine states are grounded historically in the public trust doctrine arising from the retained sovereignty of the states. The Fifth Circuit's decision is in conflict with these fundamental precepts applying to all states. The Court has granted certiorari to review decisions of circuit courts of appeals in matters where the interests of other states may be affected. *See New York v. Ferber*, 458 U.S. 747, 749 n. 2 (1982) (Court noted that statute in question had identical or similar counterparts in statutes in forty-seven other states); *Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961) (Court granted certiorari (364 U.S. 811) because of importance of the ruling to the new state of Alaska); *New York v. O'Neill*, 359 U.S. 1, 3 (1958) (Court granted certiorari (356 U.S. 972) inasmuch as holding brought into question the constitutionality of statute enforced in forty-two states and the Commonwealth of Puerto Rico); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221 (1957) (Court granted certiorari to Texas Court of Appeals (352 U.S. 925) because case raised

important question, not only to California, but to other states which have similar laws); *New York v. United States*, 326 U.S. 572, 547 (1946) (Court granted certiorari to Second Circuit (322 U.S. 724) in matter involving state's sales of waters or other disposition of natural resources under laws similar to other states). On these authorities, this Court should grant Mississippi's petition.

Mississippi's claims also involve significant property rights governed by State law. *Oregon*, 429 U.S. at 378-82; *Cinque Bambini*, 491 So.2d at 513, 516-19. The ground water which has underlain Mississippi for thousands of years, now being wrongfully extracted from Mississippi by Memphis and MLGW through mechanical means, represents a valuable property residing in the State under the Constitution. In its action, Mississippi seeks recovery of more than one billion dollars in compensatory damages and prejudgment interest.<sup>10</sup>

This Court has often granted certiorari in matters involving important questions of liability for substantial monetary damages or where significant property interests were in dispute. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 211 n. 7 (1982) (Court granted certiorari because of an important question of government's liability for monetary damages for breach of trust in connection with management of

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<sup>10</sup> Details regarding the bases for and derivation of Mississippi's damages may be reviewed in the excerpts from expert economic reports prepared by Dr. William G. Foster and Dr. William W. Wade annexed as Exhibits 3 & 4 to "Appendix G" at 118a-188a to Mississippi's Motion for Leave to File Bill of Complaint in Original Action filed contemporaneously with this petition.

forest resources allotted lands of Quinault Indian Reservation); *Andrus v. Utah*, 446 U.S. 500, 506 (1980) (Court granted certiorari to Tenth Circuit (442 U.S. 982) because dispute involved disposition of vast amounts of public lands amounting to over 500,000 acres in state claim to right to select valuable oil shale lands in lieu of lost school lands); *Commissioner of Internal Revenue v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 nn. 4 & 5 (1977) (Court granted certiorari to Tenth Circuit (429 U.S. 814) because decision conflicted with Fourth, Fifth, Sixth and Seventh Circuits and involved an important liability question with more than one hundred million dollars in dispute); *Territory of Alaska v. American Can Co.*, 358 U.S. 224, 224-25 (1959) (Court granted certiorari in view of fiscal importance of question to State of Alaska); *United States v. Zazove*, 334 U.S. 602, 613-14 n. 17 (1948) (certiorari granted to Seventh Circuit in matter involving potential liability amounting to billions of dollars).

The Fifth Circuit's judgment in Mississippi's action implicates all of these important issues and provides the Court with an opportunity to address them in an area of national importance to every state in the Union: the states' rights in ground water resources.

### CONCLUSION

In accordance with the foregoing, Mississippi respectfully requests the Court to grant its Petition for Writ of Certiorari and for such other and further relief to which Mississippi may, in equity and good conscience, be entitled.

Respectfully submitted,

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