

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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

2 (10:00 a.m.)

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

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

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

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

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

25 Mr. Coghlan.

1 ORAL ARGUMENT OF JOHN V. COGHLAN

2 ON BEHALF OF THE PLAINTIFF

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

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

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

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

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

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

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

6 I welcome the Court's questions.

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

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

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

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

25 JUSTICE THOMAS: But isn't that true

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

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

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

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

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

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

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

20 JUSTICE THOMAS: All right.

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

1 of go with the flow.

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

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

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

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

1 it might not make sense.

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

9 CHIEF JUSTICE ROBERTS: Well --

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

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

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

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

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

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

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

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

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

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

19 MR. COGHLAN: That's --

20 JUSTICE KAGAN: -- is that correct?

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

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

25 MR. COGHLAN: That's correct.

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

3 MR. COGHLAN: Okay.

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

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

11 JUSTICE KAGAN: Tennessee, excuse me.

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

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

25 So why is it any different?

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

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

10 MR. COGHLAN: -- physical effects --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. COGHLAN: Well --

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

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

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

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

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

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

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

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

19 MR. COGHLAN: Yeah.

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

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

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

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

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

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

25 MR. COGHLAN: Mr. Chief Justice, I

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

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

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

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

1 control over it while it is within Mississippi.

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

5 MR. COGHLAN: Well, Mr. --

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

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

18 CHIEF JUSTICE ROBERTS: Yeah.

19 MR. COGHLAN: -- while --

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

25 MR. COGHLAN: While they're in

1 Tennessee?

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

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

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

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

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

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

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

8 MR. COGHLAN: Yes.

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

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

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

1 forgive you if you don't.

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

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

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

19 And what -- so what we're proposing is
20 that states can, you know, withdraw groundwater
21 from within as long as the physical effects --
22 and this is something that's measurable and
23 predictable, as I said -- as long as the
24 physical effects of those pump -- that pumping
25 does not encroach and affect the water and

1 control the water outside the -- or in -- in a
2 sister state.

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

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

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

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

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

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

19 JUSTICE KAVANAUGH: Mr. Coghlan --

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

1 What is your argument for treating the
2 groundwater differently?

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

10 MR. COGHLAN: Well --

11 JUSTICE BARRETT: -- kind of category?

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

25 So I -- I would posit that it does --

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

6 JUSTICE GORSUCH: I'd like to --

7 JUSTICE KAVANAUGH: Mr. Coghlan --

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

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

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

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

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

1 recognized it in -- in Tarrant, is that states
2 can only exercise control, sovereign control,
3 over a resource within their own borders.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE THOMAS: I have no further
25 questions.

1 CHIEF JUSTICE ROBERTS: Justice

2 Breyer?

3 Justice Alito? Nothing?

4 Justice Kagan?

5 Justice Gorsuch?

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

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

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

24 JUSTICE GORSUCH: Have you -- have you
25 moved? Have you sought to meet the standards?

1 I -- I -- I haven't seen that in the papers
2 before us.

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

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

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

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

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

24 JUSTICE GORSUCH: Of course not. No
25 -- no -- no one wants a deadline. But should --

1 give you an opportunity within a reasonable
2 period of time, and we might set a deadline for
3 a motion. Is -- is that -- is that your
4 suggestion?

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

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

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh.

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

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

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: None.

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

6 Mr. Frederick.

7 ORAL ARGUMENT OF DAVID C. FREDERICK

8 ON BEHALF OF THE DEFENDANTS

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

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

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

25 Mississippi's principal argument in

1 response is that the aquifer water flows slowly.
2 But this Court has never conditioned the
3 application of the Equitable Apportionment
4 Doctrine on water velocity.

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

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

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

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

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

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

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

23 JUSTICE THOMAS: And you oppose
24 amending the complaint here to include
25 apportionment, equitable apportionment. What is

1 to stop Mississippi from simply filing a new
2 motion in this case and starting all over?

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

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

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

17 JUSTICE THOMAS: Thank you.

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

23 If all they wanted was to stop you
24 from drawing water because the way you're
25 drawing it harmed the aquifers, which is, I

1 think, what I heard them say earlier, why
2 wouldn't a nuisance action be appropriate?

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

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

12 JUSTICE SOTOMAYOR: So it's a --

13 MR. FREDERICK: -- waters.

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

16 MR. FREDERICK: I think that's
17 correct. And in the nuisance context, the law
18 professors don't say exactly how you would
19 administer a nuisance claim under what they are
20 talking about. And I would point out that there
21 was evidence at the trial about the absence of
22 subsidence or any degradation of water quality.
23 We presented that in our Defendants' Proposed
24 Findings of Fact Numbers 246 and 47 on page
25 126A.

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

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

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

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

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

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

25 MR. FREDERICK: Well, what you would

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

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

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

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

1 there was some newfangled technological way of
2 Tennessee helping itself to the waters of that
3 lake.

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

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

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

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

1 acknowledged a couple of key facts for the
2 court.

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

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

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

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

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

22 JUSTICE KAGAN: Right. And -- and --
23 and you suggested that that's a relevant fact
24 such that if there weren't 37 million, if there
25 were 37,000 or if there were 37, we should maybe

1 have a different way of analyzing this question,
2 is that right?

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

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

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

23 But, on the volume point, Justice
24 Kagan, I think it's important to take into
25 account the size, the sheer size, of this

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

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

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

21 I -- I'm wondering what the limiting
22 principle is, however, and what we're buying
23 here. Is every aquifer in -- in the country
24 that might have some interstate effect now going
25 to be part of this Court's original

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

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

11 JUSTICE GORSUCH: But so far --

12 MR. FREDERICK: And --

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

22 MR. FREDERICK: I think --

23 JUSTICE GORSUCH: Where does it end?

24 MR. FREDERICK: I think the outer
25 bounds are where this Court recognizes the

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

8 JUSTICE GORSUCH: Right.

9 MR. FREDERICK: -- a century ago.

10 JUSTICE GORSUCH: Right.

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

13 JUSTICE GORSUCH: So the wild --

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

15 JUSTICE GORSUCH: -- the wildfires --

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

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

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

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

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

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

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

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

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

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

23 MR. FREDERICK: Yes.

24 JUSTICE BREYER: But, if we say a word
25 about it, that's going to be taken as this is a

1 totally appropriate kind of suit, and wild
2 horses we worry about later, and -- and I don't
3 know where it's going.

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

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

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

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

24 Now, with respect to the fact that
25 aquifers are under many, many states, in fact,

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

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

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

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

23 MR. FREDERICK: I don't --

24 JUSTICE BARRETT: Just say nothing?

25 MR. FREDERICK: I -- I thought I just

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

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

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

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

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

1 urge the Court to do that to disincentivize any
2 other state from seeking --

3 JUSTICE KAVANAUGH: What -- what --

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

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

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

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

21 MR. FREDERICK: Yes.

22 CHIEF JUSTICE ROBERTS: -- it's
23 complete -- well, it's mixed up with silt and
24 small particles and all. If you -- you can put
25 it in your hand, right, and it would be silt?

1 It would be wet, but, until you pump it, it's
2 really not the water, right?

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

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

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

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

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

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

21 (Laughter.)

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

1 out the water, and at that point, it's -- it's
2 usable.

3 MR. FREDERICK: For the --

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: No questions, Chief.

2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer?

4 JUSTICE BREYER: No.

5 CHIEF JUSTICE ROBERTS: Justice Alito?
6 No?

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

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

19 JUSTICE GORSUCH: Okay.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: No further
23 questions.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

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

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

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

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

20 JUSTICE BARRETT: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 MR. FREDERICK: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Liu.

25

1 ORAL ARGUMENT OF FREDERICK LIU
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 IN SUPPORT OF OVERRULING THE PLAINTIFF'S EXCEPTIONS

4 MR. LIU: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 Under Mississippi's theory of this
7 case, certain groundwater belongs to Mississippi
8 simply by virtue of having passed through
9 Mississippi's territory.

10 There's no support for such a theory.
11 Indeed, Mississippi can't point to a single
12 jurisdiction that has ever allocated groundwater
13 based on such a theory.

14 This Court, when confronted with
15 disputes over the allocation of interstate
16 resources, has applied the Doctrine of Equitable
17 Apportionment. That doctrine represents the
18 most sensible way of allocating an interstate
19 resource because it respects the equal
20 sovereignty of the states.

21 And Mississippi identifies no reason
22 why that doctrine should govern interstate
23 surface water and fish but not the groundwater
24 at issue here. Mississippi's exceptions to the
25 Special Master's report should, therefore, be

1 overruled.

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

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

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

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

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

1 characteristics of the resources at issue in
2 those cases that justified the application of
3 the Doctrine of Equitable Apportionment.

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

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

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

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

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

12 MR. LIU: Right.

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

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

24 So there might still be equitable
25 apportionment as --

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

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

10 MR. LIU: Right.

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

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

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

24 MR. LIU: Well, I -- I think it does
25 matter whether the -- the state is crossing the

1 boundary or not. That -- that isn't -- that
2 isn't a --

3 JUSTICE KAGAN: Well --

4 MR. LIU: -- circumstance where --

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

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

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

24 Now my friend tries to distinguish
25 this Court's equitable apportionment cases from

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

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

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

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

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

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

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

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

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

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

23 No one -- no one pulls up water from a
24 well and then says, well, some of this -- some
25 of these molecules came under the landowner's

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

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

12 JUSTICE KAVANAUGH: Mr. Liu?

13 MR. LIU: Yes.

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

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

24 I will say, though, that Mississippi
25 has gotten a number of chances already to seek

1 an equitable apportionment claim. They -- they
2 filed a complaint in 2009. They filed the
3 instant complaint in 2014. In neither complaint
4 have they made any real effort to plead an
5 equitable apportionment claim.

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

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

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

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

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

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

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

1 filter out many of the cases that simply don't
2 have merit.

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

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

24 MR. LIU: Well, we -- we're certainly
25 not challenging Mississippi's Article III

1 standing in this case.

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

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

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

16 MR. LIU: No pun intended.

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

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

25 JUSTICE GORSUCH: But if --

1 MR. LIU: -- resources.

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

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

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

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

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

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

1 interstate aquifer.

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: No questions, Chief.

2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer?

4 Justice Alito?

5 Justice Kavanaugh, any further
6 questions?

7 JUSTICE KAVANAUGH: No further
8 questions.

9 CHIEF JUSTICE ROBERTS: And Justice
10 Barrett? No?

11 Thank you, counsel.

12 Mr. Frederick, you have rebuttal? I'm
13 sorry, Mr. Coghlan, do you have rebuttal? Thank
14 you.

15 REBUTTAL ARGUMENT OF JOHN V. COGHLAN
16 ON BEHALF OF THE PLAINTIFF

17 MR. COGHLAN: Thank you, Mr. Chief
18 Justice. Just -- just briefly a few points.

19 On the suggestion that Mississippi
20 does not have the ability to -- to show a real
21 and substantial injury, we -- we certainly
22 dispute that.

23 And the core injury which we pled from
24 the beginning, I think, is an injury to
25 Mississippi's sovereignty. That's the -- the

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

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

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

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

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

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

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

24 And I think that's where the injury
25 was considered there, and that's where the

1 injury is here, that Tennessee is exercising
2 control over groundwater while it was within
3 Mississippi.

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

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

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

23 So I think simply apportioning it
24 without taking into consideration the border
25 will not solve the problem. And that's why we

1 contend that's what the -- this is a different
2 injury and -- and -- and requires a different
3 remedy.

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

10 Thank you.

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

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

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Official - Subject to Final Review

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