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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2017-IA-00167-SCT

THE PROMENADE D'IBERVILLE, LLC **APPELLANT**

VS.

JEA **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT OF
HARRISON COUNTY, MISSISSIPPI, SECOND JUDICIAL DISTRICT

SUPPLEMENTAL BRIEF OF THE APPELLANT THE PROMENADE D'IBERVILLE, LLC

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INTRODUCTION

On July 5, 2018, this Court ordered supplemental briefing to address the following question:

> Would our declining to apply the damages caps of the Mississippi Tort Claims Act comport with the Full Faith and Credit Clause in light of the Mississippi Constitution's broad eminent domain provision, which constitutionally established Mississippi's policy of assuring that private property owners obtain due compensation for damage to land taken for public use?[1]

The answer is "Yes" – declining to apply the damages caps of the Mississippi Tort Claims Act ("MTCA") would comport with the Full Faith and Credit Clause (the "Clause") because doing so treats JEA no differently than a similarly situated Mississippi public entity pursuant to the broad prohibition in Article 3, §17 of Mississippi's Constitution ("Section 17") against damage to private property for a public use. Accordingly, declining the application of the damages caps does not evince a special rule of law against JEA, nor a policy of hostility to the public acts of Florida.

Moreover, Section 17's self-executing mandate, which echoes (if not enlarges) the private property protections in the 5th and 14th Amendments to the U.S. Constitution, qualifies as a "sufficient policy consideration" to justify the application of a special rule.

Were the Court to take either path in declining to apply the damages caps of the MTCA, it would satisfy the principles established by the U.S. Supreme Court in *Franchise Bd. of California v. Hyatt* ("*Hyatt II*") because it would comport with the Clause or constitute a justifiable departure therefrom.

[1] Order (July 5, 2018) (citing Miss. Const. Art. 3, §17). The Order directs the parties to assume, for the purposes of the supplemental briefing, that "the remedy of inverse condemnation is not available against the State of Florida for damage to land situated in the State of Mississippi."

SUMMARY OF SUPPLEMENTAL ARGUMENT

The critical issue is not whether JEA can formally condemn private property in another jurisdiction, but whether a Mississippi public utility would be entitled to the affirmative application of the MTCA's damages caps for a physical invasion causing damage to private property. If a Mississippi entity would not be entitled to the MTCA's caps, then JEA has no basis for asking that the caps be applied to it under the standard articulated in *Hyatt II*. Stated another way, declining to apply the MTCA's caps to JEA comports with the Clause so long as the Court is not applying a special rule of law against JEA that would not be applied to a Mississippi agency.

Promenade's claim against JEA for physical invasion to property presents the circumstances in which the Court can allow Promenade to pursue the full measure of its damages without running afoul of the "partial credit" standard required by *Hyatt II*. Under Section 17, a landowner is entitled to "due compensation" – without any limitation under the MTCA – for the damage to its property by state actors. Thus, declining to apply the damages caps to Promenade's claim for JEA's physical invasion of Promenade's property would not constitute a special rule and would be giving JEA "no greater status under our tort law than any other similarly situated defendant."[2]

Regardless of the technical similarities between Promenade's physical invasion claim and one based on Section 17 for damage to property, the constitutional policy embodied therein qualifies as a "sufficient policy consideration" that would allow for a justified departure from the analytical framework established by *Hyatt II*.

[2] *See Church v. Massey*,697 So.2d 407, 410 ("A foreign governmental entity enjoys no greater status under our tort law than any other similarly situated tort defendant.").

SUPPLEMENTAL ARGUMENT

I. *Hyatt II* holds that, subject to sufficient policy considerations, the Full Faith and Credit Clause prohibits a forum state from awarding a private citizen greater damages than the private citizen could obtain in a similar suit against the forum state's own agencies.

To answer the question posed by this Court it is first necessary to revisit the question addressed in *Hyatt II*.

In *Hyatt II*, the U.S. Supreme Court reviewed the Nevada Supreme Court's decision to uphold a multimillion dollar award to a private citizen against a California State tax agency for torts the agency committed in Nevada. In the state court litigation, California argued that the damages award exceeded what a private litigant could have recovered from a Nevada state tax agency due to damages caps in Nevada's immunity laws. In its appeal to the U.S. Supreme Court, California asked the Court "to reverse the Nevada court's decision insofar as it awards the private citizen greater damages than Nevada law would permit a private citizen to obtain in a *similar suit* against Nevada's own agencies."[3]

The U.S. Supreme Court's majority framed the issue as: "whether the [U.S.] Constitution permits Nevada to award Hyatt damages against a California state agency that are greater than those that Nevada would award in a *similar suit* against its own state agencies."[4] The Court held that, subject to "sufficient policy considerations[,]" the Clause prevents a state's application of its damages law in a manner that "reflects a special, and constitutionally forbidden, 'policy of hostility to the public Acts' of a sister State[.]'"[5]

The Court did not detail what might constitute "sufficient policy considerations," stating

[3] *Hyatt II,* 136 S. Ct. 1277, 1279 (2016) (emphasis added).
[4] *Hyatt II,* 136 S. Ct. 1277, 1280 (2016) (emphasis added).
[5] *Id*. at 1279, 1283; *see also* Order for Supplemental Briefing (July 5, 2018), at p. 1.

only that Nevada's assertions about California's lack of agency oversight were insufficient. But the Court did elaborate on what made Nevada's decision a "special rule of law[.]" The Court explained that under Nevada's ordinary legal principles, Hyatt's claims in a similar suit against a Nevada agency could not exceed an award of $50,000 in damages. The Court explained, "viewed through a full faith and credit lens, a State that disregards its own ordinary legal principles … *is* hostile to another State."[6]

The principle crafted by the *Hyatt II* majority was to require forum courts to apply the same legal principles to a foreign-state agency defendant that would apply to their own agencies facing a similar suit.[7] Doing so necessitates a fiction, whereby the forum court applies forum laws that are otherwise exclusively reserved for forum-state agencies to the foreign-state agency defendant (it was this fiction and the departure from the text of the Clause that Chief Justice Roberts derided as "partial credit" in his *Hyatt II* dissent).[8]

The *Hyatt II* majority embraced the amorphous language of the Clause to establish what amounts to a fairness standard.[9] This new analytical framework is expressly *not* an exact science. The Court did not hold that the Clause requires strict substitution of the defendant State's law for that of the forum; rather, it held that in most cases damages must be dialed-down to the amounts that could be recovered from a forum-state agency "in similar circumstances."[10]

Applying the *Hyatt II* analytical framework to Promenade's suit against JEA, this Court's ruling would only run afoul of the Clause if (a) it allowed damages against JEA that are greater than those that could be recovered in a similar suit against a Mississippi agency; and (b) the

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[6] *Id*. at 1283 (emphasis in original).
[7] *See id.* at 1283.
[8] *See id.* at 1284.
[9] *See id.* at 1283-8.
[10] *Hyatt II*, 136 S.Ct. at 1281 (Relying on *Carroll v. Lanza*, 349 U.S. 408, 411 (1955) and holding the "Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy.").

circumstances lacked "sufficient policy considerations" to justify a special rule of law against JEA. As discussed in subparts II and III *infra,* Section 17 favors a decision that declines to apply the damages caps to JEA, and does so without infringing on the *Hyatt II* majority's interpretation of the Clause.

II. Declining to apply the damages caps of the Mississippi Tort Claims Act comports with the Full Faith and Credit Clause because it treats JEA no differently than a Mississippi agency that damaged private property pursuant to a public use.

The Circuit Court granted Promenade leave to amend its complaint to add a claim for physical invasion to Promenade's land. The amendment stated, *inter alia,* that JEA's byproducts "effected a physical invasion of Plaintiff's land and its interest in the private use and enjoyment of its land in Mississippi that was caused by JEA through misadventure, happenstance, or otherwise."[11]

A claim for physical invasion is subject to strict liability, making it unnecessary to prove negligence on the part of the offending party creating a physical invasion.[12] Promenade moved for partial summary judgment on its claim and established a record that demonstrated JEA placed its combustion waste into rail cars, then directed and paid for its shipment to Mississippi as a cost-savings alternative to storing the materials at its on-site landfill for the benefit of the community-owned utility and the City of Jacksonville.[13] The background of JEA's interstate waste removal and marketing program targeting Mississippi is detailed in Promenade's

[11] R. 4431, Amendment to Complaint (March 26, 2015) at ¶227.

[12] *See* R. 4534-40, Promenade's Motion for Partial Summary Judgment against Defendant JEA (Apr. 28, 2015) at R. 4535 (citing *Donald v. AMOCO Prod. Co.*, 735 So. 2d 161, 172 (Miss. 1999)).

[13] *See* JEA's Appellee Brief (Feb. 14, 2018) at pp. 16 and 19 (JEA concedes "JEA paid LA Ash a transportation subsidy to avoid the greater cost of landfilling" and noting the impact those costs have on the City of Jacksonville as the City's second largest source of revenue, "[l]ast year, the utility transferred $235 million to the City, about 24 percent of the budget."); *see also* R. 4541-4576, Memorandum in Support of Promenade's Motion for Partial Summary Judgment on its Claim for Physical Invasion (Apr. 28, 2015) at R. 4553-4.

Appellant Brief.

The public purpose of JEA's interstate waste removal effort is set forth in detail with specific references to the record in Promenade's Reply Brief.[14] In short, JEA targeted Mississippi and then used it as a dumping ground for its waste material to benefit the operation of its publicly-owned Northside Generating Station (i) to avoid penalties from the Florida Department of Environmental Protection; (ii) to relieve capacity in its publicly-owned and publicly permitted onsite Byproduct Storage Area solid waste landfill; (iii) so it could record the material sent to Mississippi as "beneficially reused" in order to protect the same designation for its byproducts marketed in the Jacksonville area; (iv) to save millions in off-site landfill fees; (v) to defer investment in additional onsite waste management infrastructure; and (vi) to support its financial obligations to the City of Jacksonville, Florida.

JEA filed a cross-motion for partial summary judgment on Promenade's physical invasion claim and that motion was denied. That decision is not under review.[15]

However, before the trial on Promenade's claims, the Circuit Court ruled in its Omnibus Order that the damages caps in the MTCA applied to all of Promenade's claims, including its claim for physical invasion to property.[16] Based on the majority holding by the U.S. Supreme Court in *Hyatt II*, the analysis should be whether the MTCA's damages caps would limit Promenade's recovery in a "similar suit" for a physical invasion caused by a Mississippi agency.

Due to the broad protections for private landowners in Section 17, and the similarity between a suit premised on a physical invasion to land and one brought pursuant to Section 17 against a Mississippi agency, the MTCA's damages caps should not apply to limit Promenade's

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[14] (March 15, 2018) at pp 17-18. (Note that the reference to "p. 10" in Footnote 61 on page 18 of Promenade's Reply Brief is a typographical error and should read "p. 19."

[15] *See, e.g.,* JEA's Appellee Brief (Feb. 14, 2018) (JEA concedes that "Promenade has a claim for physical invasion. It theoretically could have a legal remedy for that[.]").

[16] R. 6406-19, Omnibus Order at 6409-14

recovery.

a. Section 17 protects private property from damage by government agencies by ensuring due compensation that is not limited by the MTCA.

JEA relies on *Hyatt II* to request this Court to limit Promenade's damages to the caps in the MTCA. By doing so, JEA is demanding that the caps enacted by the Mississippi Legislature for the benefit of Mississippi state agencies be extended to JEA on the grounds that this Court's refusal to do so would constitute a special rule of law applicable only to foreign-state agencies.

However, the MTCA does not cap damages on all claims against state actors. Section 17 of the Mississippi Constitution requires "due compensation" when private property is "taken *or damaged* for public use."[17] Section 17 has been held to be mandatory, self-executing, and beyond limitation by the Legislature. This Court held that it operates in conjunction with the "the common-law remedy existing in favor of the property owner for damages to his property, beyond the appropriation thereof,"[18] and that damages recoverable under Section 17 "cannot be precluded by the protections of an act, like the MTCA, a creation of the Legislature."[19]

The foregoing fundamental characteristics of Section 17 were articulated in detail by this Court in its decision in *Parker v. State Highway Commission.*[20] In *Parker* a landowning plaintiff sued the State Highway Commission and a contractor for damages to his land and residence caused by the construction of a state highway adjacent to and abutting his property. The Commission claimed that the statutes enacted by the Legislature establishing the Commission provided no means of recovery against it, and contended that it was therefore not subject to a suit for damages to the plaintiff's property. In reversing the lower court's dismissal of the case, this Court explained the evolution of Article III, Section 17 to more broadly protect private property

[17] *See* Miss. Const. Art. 3, §17 (emphasis added).
[18] *Parker v. State Highway Com.*, 162 So. 162, 165 (Miss. 1935).
[19] *City of Tupelo v. O'Callaghan*, 208 So. 3d 556, 566 (Miss. 2017).
[20] 162 So. 162 (Miss. 1935).

from injury:

> Prior to the adoption of the Constitution of 1890, a citizen was only protected against the taking of his property for public use without due compensation; he had no protection against injuries to his rights as an owner of private property, less than the appropriation of the property itself. The words 'or damaged' were inserted in the section of the Constitution, [Art. III, § 17], in order to remedy this wrong, and it was the manifest purpose of the framers of the Constitution to protect the citizen in the use and enjoyment of his property, and to guarantee to him those damages which were not embraced within the actual taking of the property. Prior to that time his damages were damnum absque injuria, but since the adoption of this Constitution the burden formerly resting upon the citizen rests upon the agency damaging the property, as well as the appropriation thereof.[21]

Relying on, *inter alia, King v. City of Vicksburg Railway & Light Co.,* and quoting from *City of Vicksburg v. Herman,* the Court held that "the words 'or damaged' in our Constitution: '… are without limitation or qualification. They embrace within their inhibition all those attempting to convert private property to public use, -- artificial as well as natural persons, municipal and other corporations alike, -- and they cover all damages of whatever character."[22]

The Court emphasized that "section 17, Constitution of 1890, is self-executing" and reiterated the effect of the section's broader language: "[p]rior to the adoption of this Constitution the Legislature could limit a landowner's recovery … but as section 17 now exists it is quite clear that *any effort* on the part of the Legislature to shield the government or any arm thereof from payment of damages occasioned by it on the appropriation of land would be futile and of no effect."[23] Removing the possibility of any doubt, the Court held: "*Section 17 of the*

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[21] 162 So. 162, 163 (Miss. 1935).

[22] *Parker,* 162 So. at 163 (citing *King v. City of Vicksburg Railway & Light Co.,* 42 So. 204 (Miss. 1906) and quoting from *Vicksburg v. Herman,* 16 So. 434 (Miss. 1894)).

[23] *Id*. at 164 (emphasis added). The term "self-executing" does not mean that a qualifying "taking" need not be pleaded. *See, e.g., Garretson v. MDOT,* 156 So. 3d 241, 249 (Miss. 2014) (affirming dismissal of an action where plaintiffs failed to plead a taking and holding "the term 'self-executing' as used there meant that the Legislature could not limit the right — not that a plaintiff did not have to plead it.").

Constitution is mandatory."[24]

The Court ruled in favor of the property owner, holding "[t]he common-law remedy existing in favor of the property owner for damages to his property, beyond the appropriation thereof, is clear in this case."[25] And the Court rejected the contentions by the Commission:

> It is urged upon us that the result of holding the state highway commission liable for damages in this class of cases would be a very great financial burden upon the state highway commission. Section 17 of the Constitution replies to this argument firmly, positively, decisively, and unequivocably. The courts of the land, in order to preserve the liberty and rights of the people, must adhere to the plain stipulations of that document, and it would be a sad day in the history of a democratic constitutional form of government if the courts should swerve from the plain mandates of the organic law, which all the people are bound together in solemn compact to uphold and preserve.[26]

The *Parker* decision is not an aberration; rather, it echoes the adamantine precedent reinforcing the mandatory and self-executing nature of Section 17 and has been repeatedly carried forward by subsequent decisions of this Court. This Court's review of cases involving property damage have confirmed that Section 17 supersedes any acts of limitation on damages by the Legislature, and that relief under Section 17 is neither determined by nor restricted to accompanying claims of negligence or intentional conduct.

In *Thompson v. Philadelphia,* this Court held that Section 17 "applies to the state, as well as all of its political subdivisions, including municipalities, and regardless of whether the taking or damaging is in the exercise of governmental action or not."[27] The Court also held that "liability under section 17 of the Constitution is not dependent on negligence but on the taking or damaging."[28] In *Jackson v. Cook,* this Court held that tort claims and claims for relief under

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[24] *Parker,* 162 So. at 164 (emphasis added).
[25] *Id*. at 165.
[26] *Id.* at 165.
[27] *Thompson v. Philadelphia,* 177 So. 39, 40 (Miss. 1937).
[28] *Id*.

Section 17 are not mutually exclusive or inconsistent.[29] This Court explained in *Jackson* that:

> Section 17 requires payment for damage to private property taken for public use whether such damage be the result of negligence or not … if the action be grounded in negligence recovery can be had if there be damage without negligence … the two grounds are not antagonistic, or even inconsistent. The negligence charge is simply an enlargement of the charge of damage without negligence.[30]

In the 2008 decision *McLemore v. Miss. Transp. Comm'n,* the majority stated that Section 17's mandate that "private property shall not be taken or damaged for public use … is without limitation."[31] This Court quoted from *City of Vicksburg v. Herman,* finding,"[t]he citizen must now be held, under this new provision of our fundamental law, to be entitled to due compensation for, not the taking, only, of his property for public use, *but for all damages to his property that may result from works for public use.*"[32]

The *McLemore* and *Herman* decisions were recently discussed at length in *City of Tupelo v. O'Callaghan.*[33] In *Tupelo,* this Court considered whether prior holdings established that a Section 17 claim was "without limitation or qualification" of any sort, including the statute of limitations prescribed by Miss. Code 15-1-49. Surveying other jurisdictions, this Court held that the statute of limitations did apply to takings claims, and clarified that the prohibitory language in Section 17 was intended to specifically target the concept of *damages*. Of course, there is no issue involving the statute of limitations presented here.

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[29] *Jackson v. Cook,* 58 So. 2d 498, 500 - 501 (Miss. 1952).

[30] *Id; see also McDowell v. Natchez,* 135 So.2d 185 (Miss. 1961) (quoting from *City of Jackson v. Cook,* 58 So. 2d 498): "'Section 17 requires payment to damage for private property taken for public use, whether such damage be the result of negligence or not … 'liability does not depend on improper construction and maintenance', and if the action be grounded in negligence recovery can be had if there be damage without negligence.'").

[31] *McLemore v. Miss. Transp. Comm'n,* 992 So. 2d 1107, 1110 (Miss. 2008).

[32] *McLemore,* 992 So. 2d at 1110 (quoting from *City of Vicksburg v. Herman,* 16 So. 434, 435 (Miss. 1894)).

[33] *City of Tupelo v. O'Callaghan,* 208 So.3d 556 (Miss. 2017).

However, as to damages (which are directly at issue here), this Court held that "the phrase 'without limitation or qualification' applies to the *type* of damage inflicted upon the property in question, and not the *remedy* recoverable by the property owner."[34] This Court also explained that "a thorough reading of the [*Herman*] case and this Court's analysis clearly indicates that this Court intended property owners to have the opportunity to recover for damage of any kind, whether negligently or intentionally inflicted on their property by state actors."[35]

It also stated that "this Court has advanced the rule that damage incurred by private property owners through the taking of their property by state actors cannot be restricted in an effort to prevent recovery."[36] Referencing its decision in *McLemore,* this Court further clarified that "constitutional provisions like Article 3, Section 17, are self-executing and cannot be precluded by the protections of an act, like the MTCA, a creation of the Legislature."[37]

Thus, any limitation on *damages* for private property taken or damaged by Mississippi state actors is strictly prohibited. JEA has asked this Court to affirm the Circuit Court's Omnibus Order, which held that all of Promenade's damages claims against JEA are limited by the caps in the MTCA. However, JEA's request is fatally flawed to the extent any of Promenade's claims against JEA are similar to a Section 17 suit against a Mississippi state agency because the MTCA would not apply to limit the amount of due compensation.

b. A suit for physical invasion to land against JEA is similar to one brought pursuant to Section 17 against a Mississippi agency.

The majority in *Hyatt II* created a "similarity" standard for determining the propriety of a court's treatment of a foreign-state defendant. Specifically, the *Hyatt II* majority requires a court to consider how the law would be applied in "a *similar suit* against its own state agencies" and to

[34] *Id*. at 563 (emphasis in original).
[35] *Id*.
[36] *Id*. at 564.
[37] *Id*. at 566.

afford a foreign agency the same damages protections to which its own state agency would be entitled "in similar circumstances."[38] Accordingly, the Court must evaluate Promenade's claim for physical invasion to property for similarities to a Section 17 claim for damage to private property. These similarities are self-evident. In fact, physical invasion to property has been repeatedly identified by this Court as the fundamental basis for a Section 17 claim against a Mississippi agency causing property damage.[39]

For example, this Court held in *King v. Vicksburg R. & L. Co.* (which was featured in Promenade's motion for partial summary judgment on its claim for physical invasion and in its prior appellate briefing to this Court), that a Section 17 claimant is entitled to just compensation when "[t]he evidence shows that the property of the plaintiff was damaged by physical invasion of deleterious agents" produced and "set in motion" by a publicly chartered entity.[40] This Court held that Section 17 protects the owner of private property even "when no condemnation is had and his property is taken or damaged by public use."[41]

In substance, a private claim for physical invasion and a Section 17 claim for due compensation are practically identical but for two distinctions: (1) a Section 17 action is against a public agency and (2) Section 17 requires that the property damage was for or from a "public use."

Under the *Hyatt II* analytical framework: if the MTCA must be considered for the claims against JEA, so too must the Constitutional prohibitions of Section 17. Thus, while Promenade

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[38] *Hyatt II*, 136 S. Ct. at 1280 and 1281; *see also* JEA's Appellee Brief (Feb. 14, 2018), at p. 28 (JEA argues it should be treated as "[a] Mississippi political subdivision under similar facts and circumstances[.]").

[39] *See Gilich v. Mississippi State Highway Com.*, 574 So. 2d 8, 12 (Miss. 1990) ("an actual *taking or physical invasion* of the property is not the only basis for compensation.") (emphasis in original).

[40] 42 So. 204, 204 - 205 (Miss. 1906); *see also Kwong v. Board of Mississippi Levee Comm'rs*, 144 So. 693, 694 (Miss. 1933) ("Under section 17 of our Constitution, property damaged for public use must be compensated for as well as property physically invaded.").

[41] *King*, 42 So. at 205.

disputes the notion that JEA is "the State" of Florida and is entitled to the sovereignty protections provided under the *Hyatt II* analytical framework, it nevertheless assumes a contrary finding to complete the analysis requested by the Court.[42] Accordingly, if JEA were a *Mississippi* community-owned utility, it would be subject to claims under Section 17 for damaging private property.[43]

Promenade pleaded a separate count against JEA that JEA's byproducts "effected a physical invasion of Plaintiff's land and its interest in the private use and enjoyment of its land in Mississippi that was caused by JEA[.]"[44] In Promenade's subsequent summary judgment briefing on that specific claim (which was filed with the Circuit Court *prior* to the U.S. Supreme Court's decision in *Hyatt II*), Promenade developed a substantial record that demonstrated JEA's interstate waste removal program was for the primary public purpose of maintaining its Florida beneficial use designation for its waste material and avoiding the substantial public infrastructure spending to expand JEA's on-site byproducts landfill.[45] JEA did not substantively refute these facts.[46] Moreover, as soon as the trial court reversed its prior position on JEA's public status due to the decision in *Hyatt II*, Promenade immediately moved for leave to amend its complaint. Promenade's proposed claims specifically referenced Section 17: "237. In the alternative, such physical invasion and damage constitutes a taking under Article 3, Section 17 of the Mississippi

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[42] *See* Promenade's Appellant Brief (Dec. 11, 2018), at p. 6-8.

[43] *See Thompson v. Philadelphia*, 177 So. 39, 40 (Miss. 1937) (holding that Section 17 "applies to the state, as well as all of its political subdivisions, including municipalities, and regardless of whether the taking or damaging is in the exercise of governmental action or not.").

[44] R. 4431, Amendment to Complaint (March 26, 2015) at ¶227. Understandably, Promenade did not originally plead a taking because under *Church v. Massey*, JEA was not to be treated as a "public" defendant. Notably, Promenade moved for and was granted leave to assert its claim for physical invasion to land prior to the U.S. Supreme Court's decision in *Hyatt II*.

[45] *See* R. 4541-4576, Promenade's Motion for Partial Summary Judgment at R. 4542-4557; see also Promenade's Appellant Brief at pp. 6-19.

[46] *See, generally*, JEA's Appellee Brief (Feb. 14, 2018).

Constitution."[47]

Under the "similarity" standard in *Hyatt II,* this Court needs only to determine whether Promenade's claim for physical invasion against an out-of-state public utility that paid to send its waste to Mississippi to avoid investment in pollution-controlling infrastructure is "similar" to a Section 17 claim for damage caused for or from a public use. In *Pearl River Valley Water Supply Dist. v. Brown,* this Court found that the stated purpose of "pollution control" for a proposed condemnation under Section 17 "alone justifies the taking insofar as the question of public use is concerned."[48] Moreover, this Court held that when a dispute involving whether a "public use" exists, *"[t]he burden of proof is on the condemnor* on this issue."[49] While an actual inverse condemnation claim may require an allegation of public use for the purpose of putting the public defendant on notice of a Section 17 claim,[50] it defies reason that a public entity could escape the mandate of Section 17 by damaging property and then claiming it was done for a strictly private purpose.[51] Thus, JEA's "public use" arguments are undone by the record established by Promenade, the underlying purpose of the "public use" requirement, and the approximate "similarity" standard of *Hyatt II*.

The Court should also reject attempts by JEA to hide behind its co-defendant LA Ash as

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[47] R. 5695-8, Promenade's Amendment to Complaint attached as Exhibit A to Motion for Leave to Amend, at R. 5696. The denial (without any stated grounds) of Promenade's Motion for Leave to Amend is one of the issues currently before this Court.

[48] *Pearl River Valley Water Supply Dist. v. Brown,* 156 So. 2d 572, 577 (Miss. 1963).

[49] *Id.* at 576 (emphasis added); *see also Lemon v. Mississippi Transp. Comm'n,* 735 So. 2d 1013, 1024 (Miss. 1999) (holding "the condemnor has the burden of proof on the issue of public use.").

[50] *See, e.g., Kelley v. Corinth PUC,* 200 So. 3d 1107, 118 (Miss. Ct. App. 2016) (granting summary judgment against plaintiff whose third amended complaint contained no plausible allegation that the alleged damage to the property was for any public use). Notably, the state actor in *Kelley* was being paid for services, as opposed to circumstances of this case in which JEA was paying LA Ash to remove its waste to Mississippi.

[51] *See Kirkpatrick v. City of Jacksonville,* 312 So.2d 487, 490 (Fla. Dist. Ct. App. 1975) (per curiam) ("The proviso that a landowner's *553 property may be taken from him only 'for a public purpose' is for the landowner's protection and is not placed in the Constitution as a sword to be used against the landowner when the state has summarily taken his property without due process.").

a means to defeat Section 17's mandate. The Constitutional principle remains the same. This Court held in *Pearl River Valley Water Supply Dist.*, "when land is taken for a public purpose which is primary and paramount, the taking will not be defeated by the fact that incidentally a private use or benefit will result which would not of itself warrant the exercise of the [eminent domain] power."[52] Moreover, damages to private property caused by contractors working in furtherance of a state actor have been determined to be compensable by this Court.[53] Thus, the fact that JEA set its waste in motion by paying private companies to transport it to Mississippi does not remove the public benefit JEA realized through its side arrangement.

Accordingly, a comparison of Promenade's claim for physical invasion against JEA to a Section 17 claim for property damage against a Mississippi agency satisfies the "similarity" standard called for by the *Hyatt II* analytical framework. Under that framework, the Clause would prohibit this Court from allowing Promenade to recover damages from JEA greater than Promenade could recover from a Mississippi agency on a similar claim. It follows that, because Promenade's physical invasion claim is similar to a Section 17 claim, and Promenade's recovery under a Section 17 action would not be limited by the MTCA's damages caps, refusing to apply the damages caps to Promenade's physical invasion claim against JEA would not constitute a special rule or policy of hostility towards Florida. To hold otherwise would give Florida the benefit of MTCA damages caps to which a similarly-situated Mississippi entity would not be entitled.

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[52] *Id*. at 156 So. 2d 577; *see also id.* (quoting 2 Nichols, Eminent Domain, 3rd Ed. (1950), Sec. 7.222 "The taking is not invalid merely because an incidental benefit will inure to private individuals.").

[53] *See, e.g., Walker v. Laurel Urban Renewal Agency*, 383 So. 2d 149, 150 (Miss. 1980) (citing *Williams v. Walley*, 295 So. 2d 286 (Miss. 1974)).

III. Even if declining to apply the MTCA caps could be considered a "special rule of law," Section 17 constitutes a "sufficient policy consideration" to justify a constitutional departure from the Clause.

The *Hyatt II* majority held that, subject to "sufficient policy considerations[,]" the Clause prevents a state's application of its damages law in a manner that "reflects a special, and constitutionally forbidden, 'policy of hostility to the public Acts' of a sister State[.]'"[54]

The Court's use of the term "constitutionally forbidden" is noteworthy in light of Promenade's claim against JEA for physical invasion to property. The *Hyatt II* Court relied on the Clause to require the provision of Nevada's legislated tort damages caps to a California agency. The facts in *Hyatt II* (which were developed at trial, unlike the instant case) are readily distinguishable. In *Hyatt II* the Clause was the only constitutional principle at stake, and it was used by the majority to ratchet-down compensatory and punitive damages awarded for the intentional infliction of emotional distress. Conversely, in this case JEA's damage to Promenade's private property implicates state constitutional principles and also invokes a coequal principle of full faith and credit in the U.S. Constitution itself (the prohibition on the deprivation of property without due process of law).[55]

As the question presented properly assumes, the Mississippi Constitution "established Mississippi's policy of assuring that private property owners obtain due compensation for damage to land taken for public use."[56] Section 17 is explicit and provides a statement of public policy on which this State – and this nation – are built. There is no need to go draw inferences to find that public policy. It is right there in black and white.

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[54] *Hyatt II* at 1279, 1283; *see also* Order for Supplemental Briefing (July 5, 2018), at p. 1.

[55] The existence of a federal cross-constitutional conflict in this case (the Clause versus the property protections in the 5th and 14th Amendments) should drive the analysis back to Mississippi's policy interests, which are well defined by Section 17.

[56] *See* Order (July 5, 2018).

Indeed, this Court has safeguarded the foundational policies of Mississippi as established in the specific constitutional mandate of Section 17 by repeatedly holding that the mandate may not be infringed upon by the Legislature. Section 17 is an inviolable protection against the sovereign, be it Mississippi or, as suggested here, the State of Florida. Declining to apply the MTCA caps on the basis of Section 17 would not lack a "healthy regard for" Florida's sovereign status; rather it would rely on the contours of Mississippi's own sovereign immunity (or lack thereof) in instances of damage to private property as a benchmark for its analysis.

Accordingly, Section 17 is an unmistakable example of the public policy exception that is explicitly identified in *Hyatt II.* It is difficult to imagine a more "sufficient policy consideration" than the fundamental protection of private property from damage by the government, especially in light of the corresponding protections in the U.S. Constitution.

CONCLUSION

Based on the foregoing, this Court should at least reverse the Circuit Court's application of the MTCA's damages caps to Promenade's claim against JEA for physical invasion to property. Promenade's claim for physical invasion is a similar suit to a claim brought against a Mississippi agency under Section 17 for damage to private property, which entitles claimants to "due compensation" without any statutory limitation. Accordingly, an award of due compensation for the damage done to Promenade's property would not be an award that exceeds what Promenade could recover from a Mississippi agency under similar circumstances, and thus would not constitute a special rule, or otherwise be contrary to the protections of the Full Faith and Credit Clause. Such a ruling is also compelled by the public policy of Mississippi as explicitly embodied in the property rights provisions of this State's Constitution.

Respectfully submitted, this the 4th day of September 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing Supplemental Brief with the Clerk of the Court using the ECF system, which sent notification of such filing to all counsel of record by operation of the Court's electronic filing system:

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I also certify that I served a copy of the foregoing Supplemental Brief to the following via United States mail:

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SO CERTIFIED, this the 4th day of September, 2018.

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