No. 142, Original

In the Supreme Court of the United States

STATE OF FLORIDA,
Plaintiff,
v.
STATE OF GEORGIA,
Defendant.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS TO REPORT OF THE SPECIAL MASTER BY PLAINTIFF STATE OF FLORIDA AND BRIEF IN SUPPORT OF EXCEPTIONS

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EXCEPTIONS TO REPORT OF THE SPECIAL MASTER

Plaintiff State of Florida respectfully submits the following exceptions to the Report of the Special Master issued on February 14, 2017:

1. Florida takes exception to, and this Court should decline to adopt, the Special Master's report and recommendation to deny Florida's request for relief.

2. Florida also takes exception to, and this Court should decline to adopt, the components of the Special Master's report and recommendation, including:

a. The Special Master's heightened standard for establishing redressability;

b. The Special Master's conclusion that, even after establishing injury, Florida bore the burden of proving redressability by clear and convincing evidence;

c. The Special Master's conclusion that the U.S. Army Corps of Engineers' discretion in operating its facilities precludes a finding of redressability;

d. The Special Master's failure to account for the ways in which Florida's injuries would be redressed, no matter how the Corps exercises its discretion;

e. The Special Master's failure to account for principles of equity and the constitutional role of this Court in resolving disputes among the States; and

f. The other flaws discussed in the accompanying brief, which addresses these exceptions (and related errors) more fully.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

This original action represents the State of Florida's last remaining, legal remedy to save the Apalachicola Region—one of the nation's most unique, diverse, and irreplaceable environmental resources—from devastation as a result of the State of Georgia's ever increasing consumption of the waters on which the Apalachicola ultimately depends for its life.

After a five-week trial, the Special Master had no difficulty concluding that Georgia's "upstream water use" has been and continues to be "unreasonable," and that the Apalachicola Region has sustained "real harm" as a result of the decreased flow of water into Florida. Report of the Special Master (Report) 30-31 (Feb. 14, 2017), Dkt. No. 636. Underscoring the inequitable nature of Georgia's conduct, the Special Master also found that "Georgia's position—practically, politically, and legally—can be summarized as follows: Georgia's agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin." *Id.* at 34. Yet, the Special Master concluded that this Court should deny Florida's request for relief because there is "no guarantee" that the U.S. Army Corps of Engineers (Corps)—which is not a party to this proceeding—would refrain from acting to *offset* the benefits of such a decree. *Id.* at 69.

The Special Master framed that ruling in terms of "redressability," and premised his entire report and recommendation on that "single, discrete issue." *Id.* at 30. The Special Master was mistaken, as a matter of law, in believing that this action should be short-circuited on that basis. Whether viewed from the standpoint of this Court's equitable apportionment cases or Article III redressability cases, the possibility

that the Corps might respond to a decree by seeking to counteract its benefits for Florida provides no basis for dismissing this case. As this Court explained in *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1026 (1983) (*Idaho II*), "[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree." The Special Master was mistaken in believing that Florida was required to establish redressability to a certainty.

Ample evidence, including the Corps' past practice, indicates that the Corps is likely to exercise its discretion in a manner that effectuates, rather than offsets, the benefits of a decree entered by this Court. And the Corps' most recent, and direct, statement on the matter eliminates any doubt. In approving its new water control manual, the Corps stated: "Should the Supreme Court issue a decree apportioning the waters of the [Apalachicola-Chattahoochee-Flint River] Basin . . . [the Corps] would . . . adjust its operations accordingly." Record of Decision adopting Proposed Action Alternative for Implementation of Updated Apalachicola-Chattahoochee-Flint River Basin Master Manual 18 (Mar. 30, 2017) (Record of Decision).[1] Moreover, no matter how the Corps exercises its discretion in particular conditions, adding more water to the system—by reducing Georgia's consumption—can only alleviate the increasing strains on the Apalachicola and provide meaningful redress.

Never before has this Court found both injury and inequitable conduct (as the Special Master did here),

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[1] This document is available at http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/ACF%20ROD%20Signed%2030%20March%2017.pdf?ver=2017-03-30-142329-577.

and yet held that the Court is powerless to do anything about it. Such a ruling would flout the principles of equity that guide equitable apportionment actions by allowing an acknowledged wrong to go unremedied. Moreover, it would upset the constitutional role of this Court in resolving disputes among the States—a vital mechanism on which all States rely, since they surrendered the traditional rights of sovereigns to protect their own citizens and lands from threats beyond their borders when they entered the Union.

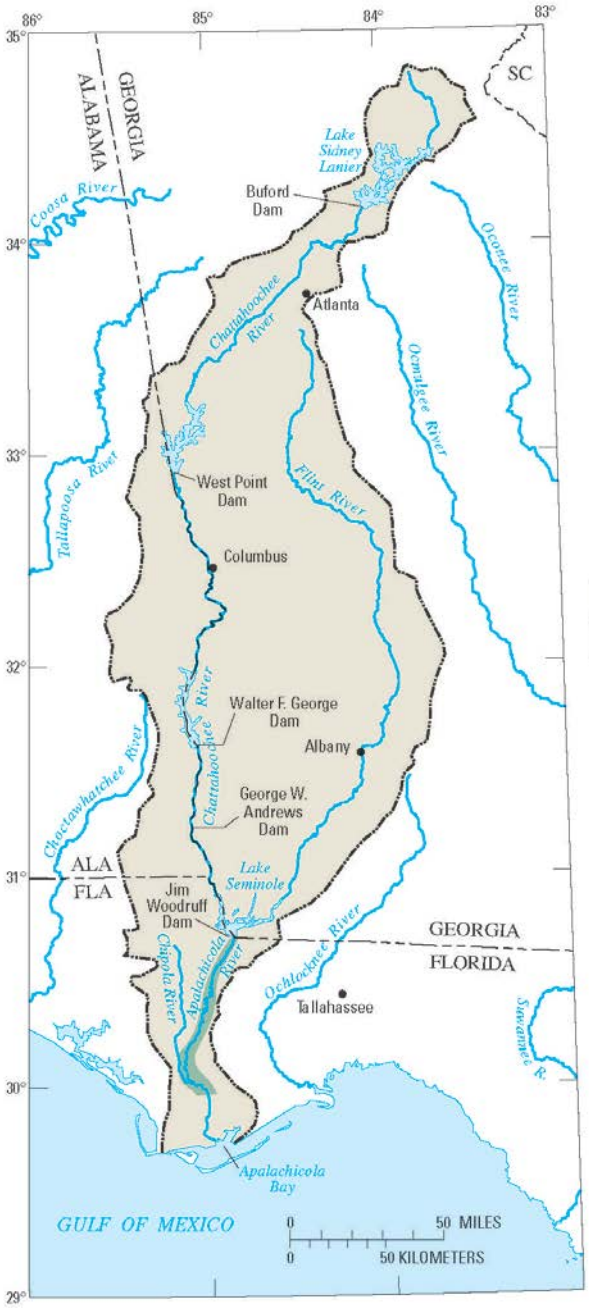
The Court should correct the legal error on which the Special Master's recommendation is based and return the case to him for further proceedings.

STATEMENT OF THE CASE

At the heart of this case is the Apalachicola Region in northwestern Florida, an area renowned for its natural beauty, diverse ecosystems, and distinct way of life. The health of this Region depends on the flow of water into it. For most of recorded history, that has not been a problem, even with the natural droughts that the region has periodically faced. But since the 1970s, Georgia's upstream consumption of the waters that flow into the Apalachicola has grown drastically. This has had the predictable effect: It is effectively strangling the Apalachicola Region and killing or threatening its animal and plant life. For decades, Florida has done everything it could to avert that result—and Georgia has fought it at every turn. This litigation represents Florida's last opportunity to stem Georgia's inequitable consumption, and protect these irreplaceable natural resources, by apportioning the waters equitably between the States.

A. The Apalachicola

The Apalachicola-Chattahoochee-Flint River Basin (ACF Basin or Basin) drains waterfall from northern and western Georgia, southeastern Alabama, and northern Florida, through three rivers. Report 4-5. The longest of those rivers is the Chattahoochee, which rises in northern Georgia and flows more than 430 miles south and west, forms part of the border between Georgia and Alabama, and ultimately terminates at Lake Seminole on the border of Georgia and Florida. *Id.* at 4. Joining it at Lake Seminole is the Flint River, which rises near Atlanta. *Id.* at 5. Those two rivers in turn form the Apalachicola River, which begins at Lake Seminole on the northern Florida border and wends its way for 106 miles through the Florida panhandle before emptying into the Apalachicola Bay. *See id.* The following map, included in Exhibit B to the Special Master's report, shows the ACF Basin and its three main waterways:


86°
85°
84°
83°
35°
34°
33°
32°
31°
30°
29°
GEORGIA
ALABAMA
SC
Lake Sidney Lanier
Buford Dam
Coosa River
Atlanta
Chattahoochee River
Oconee River
Ocmulgee River
Tallapoosa River
West Point Dam
Flint River
Columbus
Walter F. George Dam
Albany
Chattahoochee River
Choctawhatchee River
George W. Andrews Dam
ALA
FLA
Lake Seminole
Jim Woodruff Dam
GEORGIA
FLORIDA
Chipola River
Apalachicola River
Ochlockonee River
Tallahassee
Suwannee R.
Apalachicola Bay
GULF OF MEXICO
0
50 MILES
0
50 KILOMETERS

As anyone who has visited the area knows, the Apalachicola Region in Florida is not only one of the nation's true environmental treasures, but supports a distinct way of life, with families that have for centuries fished the waters and lived off its bounty. *See* Jim McClellan, *Life Along the Apalachicola River* 7-8 (2014). The Apalachicola River and Bay support distinct ecosystems that the Special Master recognized as among the most unique, diverse, and rich in animal and plant life in all of North America. Report 7-8. The Apalachicola River and its associated floodplain—which can spread out several miles from the river on either side—contains a network of smaller tributaries, swamps, and "sloughs," which are natural channels connected to and fed (in ordinary conditions) by the river. *Id.* This area is "home to the highest species density of amphibians and reptiles in all of North America, and supports hundreds of endangered or threatened animal and plant species." *Id.* at 8.

For example, the U.S. Fish & Wildlife Service has declared the River a "critical habitat . . . essential for . . . conservation" of the Gulf sturgeon, a threatened species. *Id.*; Allan Pre-Filed Direct Testimony (PFD) ¶¶ 52-54 (Nov. 4, 2016), Dkt. No. 534. The River also supports 26 species of freshwater mussels, including three endangered or threatened species. Report 8; Allan PFD ¶ 13. The freshwater fish assemblage of the Apalachicola River and its floodplain is one of the most diverse in Florida, with 142 freshwater and estuarine fish species, making it a haven for fishing. Allan PFD ¶ 12. The area also supports an extraordinary array of plant life, including the largest stand of Tupelo trees in the world, making this one of the few places where

Tupelo honey is produced commercially. Scyphers PFD ¶ 19 (Nov. 4, 2016), Dkt. No. 551.

The Apalachicola River, in turn, feeds the Apalachicola Bay, a related but distinct ecosystem. In the Bay, where the River delivers its waters and essential nutrients into the Gulf of Mexico, the mixture of nutrients, fresh water, and salt water forms "one of the most productive estuaries in the northern hemisphere." Report 8-9. Historically, the Bay has offered "an 'ideal' place for oysters to thrive, . . . producing ninety percent of Florida's oyster harvest and ten percent of the nation's oyster harvest." *Id.* at 9. The Bay is also "a major fishery resource for . . . shrimp[] and finfish," and the harvesting of oysters, shrimp, crab, and fish in the Bay "is the primary economy in the Apalachicola Region." *Id.* at 8, 10. Like the relationship between fishing or lobstering and seaside towns throughout New England, the Bay's resources, especially its oysters, have fostered "a distinctive culture" in Apalachicola. *Id.* at 9-10.

Working closely with the federal government and others, Florida has long acted to protect and preserve the Apalachicola Region's precious resources and ecology. In 1979, for example, Florida and the National Oceanic and Atmospheric Administration (NOAA) established the Apalachicola Estuarine Sanctuary to ensure "the long term preservation of the [Apalachicola's] natural ecosystem for baseline research and educational purposes." Steverson PFD ¶¶ 24-25 (Nov. 4, 2016), Dkt. No. 553; *see* Report 10. Since 1965, Florida has also spent hundreds of millions of dollars to conserve 342,489 acres in the Basin by purchasing land or acquiring conservation easements,

and undertaken extensive efforts to manage and protect these areas. *See* Steverson PFD ¶ 16; FX-144.[2]

B. The Decimating Effects Of Georgia's Increased Consumption Of Water

While the State of Florida has long sought to protect the Apalachicola Region from threats within its control, this case concerns a threat *outside* of Florida's control, because it stems from conduct outside of Florida—Georgia's exploding consumption of the water on which the Apalachicola ultimately depends for its sustenance. As the following graph illustrates, Georgia has drastically increased its consumptive use of water in the ACF Basin since the 1970s:

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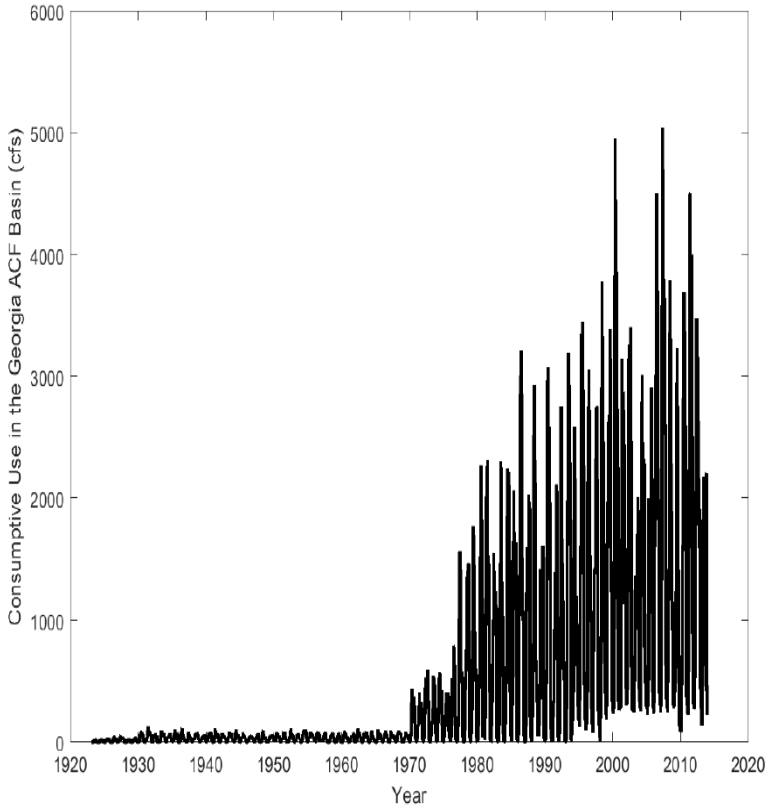
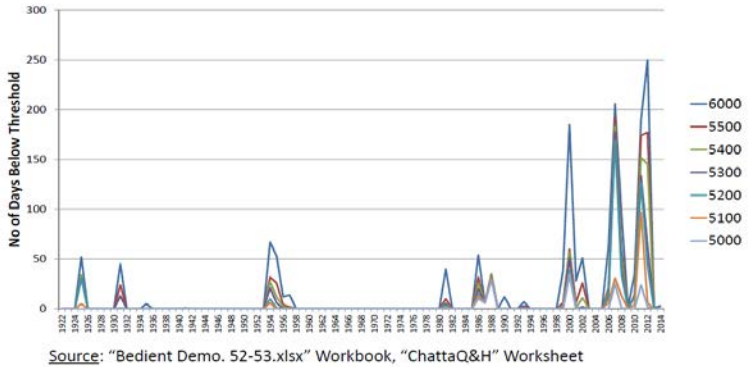
[2] A video displaying the vast beauty of the Apalachicola Region, which was introduced into evidence, is available at https://www.facebook.com/ApalachicolaNationalEstuarineResearchReserve/videos/690678477752160/.



Hornberger PFD at 37, Fig. 7 (Nov. 4, 2016), Dkt. No. 546.

A driving cause of this trend has been "[a]gricultural irrigation," especially in the Flint River Basin, which, as the Special Master found, has "increased dramatically . . . since 1970." Report 32; *see* Hornberger PFD ¶¶ 77, 79, Fig. 8. Indeed, Georgia's irrigated acreage in the ACF Basin has increased more than ten-fold since 1970, growing from 75,000 acres to more than 825,000 acres in 2014. Report 33. Even "Georgia's own estimates show a dramatic growth in consumptive water use for agricultural purposes." *Id.*

Because there is only so much water available, increased consumption in Georgia means less water for Florida. And this has had the predictable result. Over the period of this explosion, U.S. Geological Survey data "show that the magnitude, frequency, and duration of low flows entering Florida from Georgia" have become much more severe. Hornberger PFD ¶ 44. The graph below, from Georgia's own expert, shows the increasing frequency of severe low flows:



FX-D-17.

From 1930 to 1970, the Geological Survey recorded only six months—total—in which average flow on the Apalachicola near the Georgia border was below 6,000 cubic feet per second (cfs). But following the massive expansion of Georgia's irrigation and consumption over the past four decades, in 2011 and 2012 alone average monthly streamflow at the same location was below 6,000 cfs for *fourteen* months. *See* FX-D-1; Hornberger PFD ¶ 46.

While low flows have been most severe during meteorological droughts, even average rainfall years (what the Special Master called "'normal' periods," Report 65) have produced much lower flows over recent decades than they did historically. For example,

the evidence at trial showed that, while the amount of rainfall has not changed significantly since the 1970s, streamflow has declined by thousands of cfs. *See* Lettenmaier PFD ¶¶ 37-38, Figs. 9, 10 (Nov. 4, 2016), Dkt. No. 550; *see also* Hornberger PFD ¶¶ 63-64, Table 4 (documenting decline in basin yield since the 1970s).

Just as one would expect, the increasingly frequent and extended periods of low flows (even in "normal," or non-drought, years), and the overall reduction in the amount of water reaching the Apalachicola River and Bay, have profoundly impacted the ecology of these precious ecosystems. Remarkably, Georgia has repeatedly denied any harm whatsoever, and it no doubt will again in this Court. But the Special Master found that there is "little question" that Florida has experienced "devastating" harm from these "decreased flows in the River." Report 31. Most notably, restricting the flow of fresh water into the Bay has reduced the supply of nutrients that are essential for Bay organisms and altered the salinity of the Bay, significantly impacting "oyster production." *Id.* at 32.

The problem reached a crisis point in 2012, when (as the Special Master found) "high salinity in the Bay from reduced streamflow" led to an oyster collapse so severe that the federal government (through NOAA) issued a fishery disaster determination. *Id.*; *see* FX-413, NOAA Final Decision Memorandum, at NOAA-0022896-97. The high salinities had allowed oyster predators like conchs to thrive in unprecedented numbers. *Id.* at NOAA-0022897. As one official put it, it was "almost like a science fiction movie how many conchs there were out there." Tr. vol. 17, at 4336:6-

4337:3 (Lipcius) (quoting Berrigan Dep. 161:13-162:1).[3] Conchs "passed across entire reefs, devouring every oyster and then moving on to the next reef." Berrigan PFD ¶ 44 (Nov. 4, 2016), Dkt. No. 536; *see* Tr. vol. 17, at 4336:6-4337:3 (Lipcius). As the Special Master found, the decimation of the oyster beds has, in turn, "greatly harmed the oystermen of the Apalachicola Region, threatening their long-term sustainability." Report 32.

Even now, five years on from this disaster, the Bay has yet to recover, because the reduction in flow in average rainfall years (compared to historical baselines) due to Georgia consumption has prevented salinity in the Bay from returning to its natural levels. *See* Kimbro PFD ¶ 107 (Nov. 4, 2016), Dkt. No. 547 (the oyster fishery will not be restored while there are low flows and the resulting high salinity and proliferation of oyster disease, predators, and recruitment failure); Tr. vol. 6, at 1488:13-19 (Sutton); Berrigan PFD ¶¶ 62-63; Ward PFD ¶¶ 31-41 (Nov. 4, 2016), Dkt. No. 557; Sutton PFD ¶¶ 65-67 (Nov. 4, 2016), Dkt. No. 556.

The Apalachicola River, too, has suffered from the unconstrained growth of upstream consumption in Georgia. While low flows into the Bay impact the level of salinity in the water, low flows in the River impact whether there is water *at all* in crucial areas around the River. A 1999 guidance document issued by the Environmental Protection Agency (EPA) and the U.S. Fish and Wildlife Service noted that "[e]xtreme low-flows are likely among the most stressful natural events faced by river biota"—that is, animal and plant

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[3] "Tr. vol. __ (witness)" refers to October 31-December 1, 2016 Trial Transcripts volumes 1-17 therein, available at http://www.pierceatwood.com/florida-v-georgia-no-142-original.

life (and all living organisms)—on the Apalachicola. Instream Flow Guidelines, FX-599, at FL-ACF-02545883. The agencies explained that, "[a]s flow level decreases, available habitat constricts and portions of the channel become dry. Aquatic animals that are unable to move to remaining pools or burrow into the moisture of the stream bed itself perish." *Id.*

As flows decline, hundreds of sloughs—the narrow channels through which water reaches much of the floodplain—become disconnected from the River. *See* U.S. Geological Survey Technical Paper 1594, GX-7, at Appendix II (listing connection ranges for streams and sloughs of the Apalachicola River). When sloughs are disconnected from the River for an extended period, they "turn into puddles and ponds." Hoehn PFD ¶ 44 (Nov. 4, 2016), Dkt. No. 544. When that occurs, dissolved oxygen in the stagnant water "drops to levels that are lethal for many fish and mussels within a matter of days." *Id.* And in extended low flow periods, sloughs can dry up entirely, "killing all aquatic animals trapped in the slough." *Id.*[4]

The more frequent and prolonged low flow periods also have seriously harmed mussels that inhabit the area, including endangered and threatened species, stranding and killing them. Allan PFD ¶ 21; Tr. vol. 2, at 278:25-280:16 (Hoehn). Plant species that have long thrived in the Apalachicola likewise have suffered. For example, swamp trees like the iconic Tupelo have experienced stunted growth and are gradually dying off and being replaced by species typically found in

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4 Photographs displaying the stark drop in water in the sloughs during low flow periods are reproduced in the testimony of Florida witness Theodore Hoehn. *See* Hoehn PFD at 31.

dryer conditions. *See* Menzie PFD ¶ 155 (Nov. 4, 2016), Dkt. No. 569; Tr. vol. 2, at 278:25-280:16 (Hoehn).

C. Georgia's Recognition Of The Problem And Refusal To Do Anything About It

In this litigation, Georgia has repeatedly denied the devastating ecological effects that its consumption has had on the Apalachicola River and Bay. But, in fact, Georgia has long known about the threat its increased consumption has posed to the region.

As early as 1992, Georgia admitted to the federal government that "Georgia has [an] area of potential groundwater overdraft . . . in the southwestern corner of the state where there have been large withdrawals made in the last two decades for the irrigation of crops"—*i.e.*, along the Flint River. FX-1 at GA00811963. Three years later, a U.S. Geological Survey report warned that "stream-aquifer-flow declines upstream of the Apalachicola River will reduce flows entering Lake Seminole and, subsequently, cause reductions in flow of the Apalachicola River." JX-7 at 68. At the same time, Georgia's Department of Natural resources was itself raising the red flag, warning that Georgia's methodology for ensuring adequate flows in its rivers was not "scientifically defensible" and could lead to "significant degradation of stream communities." FX-36 at GA00100747.

By 1999, Georgia's Chief of Fisheries concluded that there was "clear evidence that groundwater is over-allocated in the lower Flint River basin." FX-6 at FL-ACF-0254447. The Director of its Environmental Protection Division, Harold Reheis, likewise admitted that, "[w]hen thousands of irrigation systems are operating during dry weather, such as we have been

having this year [1999], one can see a significant reduction in Flint River flows." FX-2 at GA02257045.

Nor was Georgia under any illusions about the cause of that predicament. In internal correspondence revealed through discovery, Reheis explained that the laws requiring farmers to obtain irrigation permits "are the weakest of all Georgia's environmental laws." *Id.* at GA02257044. That weakness was nevertheless unavoidable, he wrote, because "the General Assembly would not accept more than that in regulating farmers." *Id.* The permitting authorities operating under Reheis then loosened the law even further through an approach that—as Reheis himself admitted—"essentially just issued permits for any farmer that requested them." FX-3 at GA02257040. This system had "worked well for the farmers," Reheis explained—but it had not "worked very well for the water resources." FX-2 at GA02257045.

At trial, Florida introduced documents showing Georgia's own recognition in the late 1990s that "we've already exceeded the 'safe' upper limit of permittable acreage in the lower Flint," and that "[o]ver-use will cause severe impacts on fish and other aquatic life in the Flint River and its tributaries." FX-4 at GA01419036-37 (italics and bold omitted). Georgia also appreciated how its over-consumption could harm it in litigation down the road. "If new irrigation uses are not limited effectively and soon," one Georgia official prophetically observed in 1999, "it will create a bigger Achilles' heel than we currently have" on the day when litigation over an equitable allocation of waters among the States ultimately arrived. *Id.* at GA01419039.

In fact, Georgia was concerned enough about the prospect of such litigation that it imposed a purported

moratorium on new irrigation permits and passed legislation—the Flint River Drought Protection Act—providing for "irrigation auctions" in the Flint River Basin whenever a severe drought was predicted, essentially paying farmers to consume less water. *See* Legislative Summary of Flint River Drought Protection Act, FX-10, at 30-31 (legislative history explaining that the Act was passed, "in large part," to stave off "litigation between Georgia, Florida, and Alabama over water rights in the region").

But the political will to actually follow through on those measures soon ran dry. The State invoked the Drought Protection Act only twice, in 2001 and 2002, after which the State cut off funding for irrigation auctions. *See* Tr. vol. 3, at 685:4-7 (Reheis). In 2007 and 2008, during severe drought conditions, Georgia failed to implement the Act's auction procedures at all, prompting criticism from the U.S. Fish and Wildlife Service. FX-47 at GA00537496-98. When worse drought conditions threatened in 2011, Georgia again declined to invoke the Act, "not wishing to incur the cost of preventative action." Report 33. And in 2012, with another drought looming, Georgia "conveniently took the position that implementing the [Act] would be 'too little, too late'—despite lacking scientific support for that conclusion." *Id.* at 34.

Instead of conservation, Georgia has just doubled down on consumption. In 2006, Georgia lifted the moratorium on new irrigation permits, and since then the State has issued nearly 1,400 permits covering more than 160,000 acres of newly irrigated farmland—a 17 percent increase in just a decade. FX-D-16 (data compiled from JX-132). Those permits contain no limitations on the amount of water farmers can use for

their irrigation, leaving Georgia farmers with no economic incentive whatsoever to invest in more efficient irrigation systems. *See* Report 33.

In the face of this abysmal record, the Special Master found "that Georgia's upstream agricultural use has been—and continues to be—largely unrestrained"; Georgia's conservation efforts have been "exceedingly modest"; and what few measures Georgia has implemented have "proven remarkably ineffective." *Id.* at 32-33. None of this comes as a surprise. As the Special Master put it, "Georgia's position—practically, politically, and legally—can be summarized as follows: Georgia's agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin." *Id.* at 34.

D. The U.S. Army Corps Of Engineers' Operations On The Chattahoochee

While recognizing the devastating impact of Georgia's insatiable consumption of water, the Special Master focused much of his analysis on the role of a different actor—the Army Corps of Engineers.

Unlike the situation in many western States, "[t]he United States does not own the water in the ACF Basin and the Corps has no authority to apportion water among States or determine water rights." U.S. Opp. to Ga.'s Mot. to Dismiss 4 (Mar. 11, 2015), Dkt. No. 66; *see* U.S. Invitation Br. 19 (Sept. 18, 2014) (same). The Corps does, however, operate five dams and three storage reservoirs on the Chattahoochee River, shown on the map above (*supra* at 5). *See* Report 6, App. C (map). The largest storage facility is Lake Lanier, which sits above Atlanta and thus is the only reservoir

from which the Corps can provide municipal water supply to the Atlanta metropolitan area. Report 6.

In contrast to the Chattahoochee, the Flint River—along which much of the consumption at issue occurs—is unimpeded by any Corps storage reservoirs or dams. *Id.* The Flint flows into Lake Seminole, after which the waters flow through Jim Woodruff Dam and into Florida via the Apalachicola River. *Id.* As the Special Master found, the Jim Woodruff Dam is a "run-of-river" project, meaning that it lacks any "appreciable storage" capacity. *Id.* Thus, the dam "simply pass[es] flows downstream without impounding the water for any appreciable length of time." *Id.* at 37. There is no place, and no way, for the Corps to store water from the Flint before it flows into Florida.

The Corps operates these facilities in accordance with specific "project purposes" designated by Congress, including conservation of fish and wildlife, flood control, water supply, hydropower, navigation, and recreation. *Id.* at 6-7, 38. To help it achieve those objectives, the Corps has developed a set of protocols to guide its decisions about when to store or release water. *Id.* at 38. As a general matter, those guidelines are based on the amount of water entering the Corps' system of facilities ("basin inflow"); the amount of water available in its reservoirs ("conservation storage"); and the time of the year (which correlates with dry and wet periods). *Id.* at 42. As basin inflow increases, storage levels in the Corps' reservoirs generally increase too, making it easier to meet the demands on the system as a whole. *Infra* at 46-49.

The Corps' guidelines set certain minimum flow rates for Jim Woodruff Dam based on these factors, in recognition of the harms to fish and wildlife from

reduced flows. Report 43. The minimum flow rate at Jim Woodruff Dam during drought operations, which are triggered by low conservation storage levels in the reservoirs, is 5,000 cfs (or, when storage drops even lower, 4,500 cfs). *Id.* at 44. That 5,000 cfs minimum flow rate also applies if basin inflow falls below 5,000 cfs during *non*-drought operations, meaning that in those times the Corps must supplement basin inflow with releases from its reservoirs. *See id.* at 43. And when storage levels and basin inflows are higher, the minimum flow rates are higher as well. *Id.*

The Corps must ensure that at least those designated amounts of water get to Florida. But, as the Special Master found, the Corps has discretion "to release *more* than the required . . . minimum" during drought or other periods. *Id.* at 53-54 (emphasis added); *see also id.* at 61. And, in fact, the Corps has "historically exercised its discretion" to do just that—*i.e.*, release more water, when it is available, than is called for by its minimum flow rate. *See id.* at 55.

Nevertheless, the Special Master concluded that "[t]here is *no guarantee* that the Corps will exercise its discretion to release or hold back water at any particular time." *Id.* at 69 (emphasis added). Thus, "[w]hile the evidence presented at trial shows that the Corps retains discretion in its operations, how the Corps will exercise that discretion *remains unknown.*" *Id.* at 53 (emphasis added). As discussed below, that "unknown" became the lynchpin for the Special Master's recommendation. *See id.* at 69. What is undeniable, however, is that water consumed by Georgia will never reach Florida. And more water flowing into the system can only result in more water flowing out of the system—and into Florida.

E. Previous Efforts To Stem Georgia's Increasing Water Consumption

As the Special Master observed, this action is hardly the first attempt to stem the harm caused by Georgia's exploding consumption of water. Report 1. How Florida ended up in this Court provides an important backdrop to its claims here.

By the early 1990s, the ill effects of the spike in Georgia's consumption were evident to all concerned. In 1990, Alabama sued in federal district court to stop Georgia's plan to begin municipal water withdrawals from the Lake Lanier reservoir. In response, Georgia agreed with Alabama, Florida, and the Corps to a study that could facilitate an agreed-upon allocation of waters in the ACF Basin. *See* Report 10-11; Pub. L. No. 105-104, 111 Stat. 2219 (1997); *see also* FX-205 at GA00128576 (statement by then-Georgia Governor, Zell Miller, about study).

In 1997, Florida, Georgia, Alabama, and the federal government agreed to enter into a compact establishing a process by which the States could negotiate an equitable apportionment of the Basin's waters. Report 11; *see also* Pub. L. No. 105-104, § 1, 111 Stat. at 2222-24. In ratifying that compact, Congress noted its intent (shared with the party States) that "all state and federal officials . . . administering other state and federal laws affecting the ACF Basin *shall, to the maximum extent practicable*, . . . administer those laws in furtherance of the purposes of this Compact and the allocation formula adopted by the Commission." Pub. L. No. 105-104, § 1, 111 Stat. at 2225 (emphasis added).

Six years later, negotiations collapsed. Georgia refused to accept any outside limit on its

consumption—the whole point of the compact. *See, e.g.*, Tr. vol. 13, at 3423:16-3424:8 (Kirkpatrick) (testifying that Atlanta would never accept any mandatory or "artificial" limits on its water use). Indeed, once Florida and Alabama agreed to the compact arrangement, Georgia just insisted on higher levels of consumption—which it knew could "scuttle[]" any deal. FX-206 at GA02322676. Meantime, Georgia tried to strike a side deal with the Corps in which the Corps would effectively allocate water to Georgia without Florida's (or Alabama's) involvement—an obvious act of "bad faith." *Alabama v. U.S. Army Corps of Eng'rs*, 357 F. Supp. 2d 1313, 1318 (N.D. Ala. 2005), *vacated and remanded on other grounds*, 424 F.3d 1117 (11th Cir. 2005); *see also* Struhs PFD ¶¶ 27-33, 38-44 (Nov. 4, 2016), Dkt. No. 554 (discussing Georgia's bad faith approach to the negotiations).

In 2009, on the heels of another Alabama suit seeking to restrict Georgia's intake from Lake Lanier, Georgia suggested that it was willing to again consider limits on its consumption. It commissioned a new study of how to minimize its consumption and create additional sources of supply, *see* Water Contingency Planning Task Force: 2009 Findings & Recommendations, JX-41, and passed a "Water Stewardship Act" in an effort "to influence the ongoing negotiations with Florida and Alabama, Congress, and the court hearing Georgia's appeal of the recent district court's decision." FX-905 at 204 (footnote omitted). But as soon as that court order was reversed by the U.S. Court of Appeals for the Eleventh Circuit in 2011, Georgia abandoned all but the flimsiest of these conservation mechanisms. *See* Tr. vol. 13, at 3396:15-3397:4, 3397:9-3398:10 (Kirkpatrick).

Throughout this period, Georgia's answer has always been to point to some other door as a way of resolving the crisis. When Alabama sued in 1990, Georgia suggested the States negotiate an agreed upon allocation. When Congress approved a compact to facilitate such negotiations, Georgia refused to put a meaningful offer on the table and, instead, tried to strike a side deal with the Corps. And when Georgia found itself back in district court after those negotiations collapsed, it argued that only this Court could resolve a "water allocation" dispute between the States.[5] And so to this Court Florida came.

F. This Original Action

In 2013, Florida filed this original action seeking an equitable apportionment of the waters and a cap on Georgia's consumption. Amazingly, Georgia responded by arguing that *this* Court was not an appropriate forum either, and that Florida had not even *alleged* an adequate injury. Ga. Opp. 16-32 (Jan. 31, 2014). This Court disagreed and appointed Ralph I. Lancaster, Jr., as Special Master to oversee the case. Report 16.

Georgia then moved to dismiss the case on the ground that the United States was a necessary party that could not be joined due to sovereign immunity. *Id.* at 17. The United States, as *amicus curiae*, opposed Georgia's motion alongside Florida. And, after hearing argument, the Special Master denied the motion,

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[5] *See Alabama v. U.S. Army Corps. of Eng'rs*, 382 F. Supp. 2d 1301, 1309 (N.D. Ala. 2005); Ga. Response Br., *Georgia v. Southeastern Fed. Power Customers, Inc.*, No. 02-10135D, 2002 WL 32641401, at *9 (U.S. filed Feb. 8, 2002); Ga. Opp., *Alabama v. U.S. Army Corps of Eng'rs*, No. 05-1138, 2006 WL 1287606, at *20 (U.S. filed May 8, 2006).

concluding that *all* the equitable factors set out in Federal Rule of Civil Procedure 19(b) supported allowing this action to proceed. *See* Order on Ga.'s Mot. to Dismiss 11-22 (June 19, 2015), Dkt. No. 128. As he explained, because Florida sought only a cap on Georgia's consumption, there was little risk of prejudice to the United States or Georgia if the United States were not a party. *Id.* at 19-20. He further found that Georgia had failed to prove that such a cap "would be ineffective absent a decree binding on the Corps." *Id.* at 13. And he concluded that, if this action were dismissed, "Florida would have no other adequate remedy," *id.* at 21—a gross "inequity," *id.* at 22.

Following extensive discovery, the case proceeded to a five-week trial beginning on October 31, 2016. The United States did not participate in the trial and declined to submit a pretrial brief. Near the end of the trial, however, the Special Master, *sua sponte*, asked the United States to submit "a post-trial amicus brief," "two weeks after the close of trial," "addressing specifically the issue of the Army Corps of Engineers' operations in the ACF River Basin." Nov. 22, 2016 Email from J. Dunlap to M. Gray (Dec. 14, 2016), Dkt. No. 577. In that brief, the United States opined on the Corps' operations, but did not take a position on Florida's claims—and did not specifically address how it would respond to a decree if one were entered. U.S. Post-Trial Amicus Br. (Dec. 15, 2016), Dkt. No. 631.

On February 14, 2017, the Special Master issued his Report and Recommendation. At the outset, he concluded that the "evidentiary hearing made clear" that "Florida points to real harm and, at the very least, likely misuse of resources by Georgia." Report 31. Nevertheless, the Special Master reasoned that the

case turned on "a single, discrete issue"—whether Florida had shown that a cap on Georgia's consumption would redress its injury if the decree did not bind the Corps as well. *Id.* at 30-31. To answer that question, the Special Master considered whether Florida had proved, by "clear and convincing evidence," that the additional water generated by a cap would *necessarily* reach Florida and remedy its harm. *Id.* at 53-54, 69-70.

The Special Master recognized that the natural course of the additional water gained by limiting Georgia's consumption on the Flint would be to flow into Lake Seminole, a pass-through reservoir, and into Florida. *Id.* at 46-47. But the Special Master concluded that Florida had failed to prove "by clear and convincing evidence that increased streamflow on the Flint River *will inevitably* provide timely relief to Florida," reasoning that the Corps could "offset" the additional water flowing into "Lake Seminole by managing releases from its storage reservoirs" on the Chattahoochee. *Id.* at 52-53 (emphasis added).

The Special Master recognized that the Corps not only *can* allow additional flows through, but historically *has* exercised its discretion to allow additional water through, when it is available. *Id.* at 54-55, 60. But because there was "no guarantee" that the Corps would exercise its discretion in any particular way in the *future*, the Special Master concluded that Florida failed to prove by "clear and convincing evidence" that a decree capping Georgia's consumption of water "would provide a material benefit to Florida." *Id.* at 69-70. On that basis, alone, the Special Master recommended that the Court deny Florida's request for relief. *Id.* App. J (proposed decree).

G. The Corps' Record Of Decision Finalizing Its Revised Manual

On March 30, 2017, ten days after this Court formally received the Special Master's report, the Corps issued a Record of Decision finalizing a revised water control manual, different from the one that had been in effect at the time of trial. Among other things, the Record of Decision specifically emphasized that the Corps did not intend its new manual to "apportion the waters of the ACF Basin among the States or in any way prejudice the Supreme Court . . . with respect to a future apportionment of the waters of the ACF Basin." *Id.* at 18. To the contrary, the Corps stated: "Should the Supreme Court issue a decree apportioning the waters of the ACF Basin . . . [the Corps] would take those developments into account and adjust its operations accordingly, including new or revised [manuals] . . . ." *Id.*

SUMMARY OF ARGUMENT

The Special Master correctly recognized both the harm to Florida from Georgia's exploding consumption and the inequitable nature of that consumption. But he mistakenly believed that this Court was powerless to issue a decree because there was "no guarantee" about how the Corps would respond to one if it were issued. Report 69. This Court should correct that legal error and return the case to the Special Master.

I. The Special Master explicitly premised his recommendation on an unprecedented redressability requirement. He believed that Florida was required to show to a certainty that a decree in its favor would fully redress its injury. This Court, however, has held that "[u]ncertainties about the future . . . do *not*

provide a basis for declining to fashion a decree" in an equitable-apportionment action. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1026 (1983) (*Idaho II*) (emphasis added). In addition, even in the context of conventional litigation, this Court has held that a plaintiff need only show a likelihood of redress. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). The Special Master then compounded that error by holding that Florida was required to meet his redressability standard by an unprecedented burden of proof.

II. The record and the Corps' own statements establish redressability under the proper legal standard, no matter what burden of proof applies.

A. As an initial matter, it is undeniable that water saved by reducing Georgia's consumption along the Flint River or Lower Chattahoochee will *necessarily* flow into Florida, because, as the Special Master found, the Corps lacks storage capacity with which it could hold that water back before it flows into Florida, even if it wanted to do so. That fact alone is sufficient to establish redressability. The possibility that the Corps might *offset* those additional flows by holding back water upstream does not preclude a finding of redressability. As this Court has held, the possibility that someone could frustrate the effectiveness of a judicial decree is not a sufficient ground for denying relief where, as here, the third party's action is not *required* to secure relief in the first place.

B. Even if the possibility that the Corps could offset increased flows were relevant to the redressability inquiry, the evidence shows that the Corps would be much more likely to facilitate a decree than to frustrate one. It is undisputed that the Corps has discretion to exceed its minimum flow guidelines

when additional water is available. And, as the Special Master found, the Corps has consistently done so in the past. That past conduct may not "guarantee" that the Corps will continue to allow higher flows through in the future—but it is strong evidence that it is *likely* to do so. And the entry of a decree by this Court apportioning the waters based on a finding of injury would only increase the likelihood that the Corps would do what it can to effectuate that decree.

Any doubt about that is eliminated by the Record of Decision accompanying the Corps' revised water manual, which the Corps released after the Special Master issued his report in this case. In that decision, the Corps stated: "Should the Supreme Court issue a decree apportioning the waters of the ACF Basin . . . [the Corps] would . . . adjust its operations accordingly." Record of Decision 18. This Court can, and should, take judicial notice of that formal agency decision. And that pronouncement, alone, establishes that the Corps is likely to do just what one would expect from a good government actor—*i.e.*, facilitate an equitable apportionment, not frustrate it.

C. Further, even if the Corps did choose to hold back releases from upstream reservoirs to offset the addition of water from the Flint, a decree would still provide redress. It is undeniable that limiting Georgia's consumption will result in more water in the system, or basin inflow. No matter how the Corps chooses to handle releases from its reservoirs during drought periods, increasing basin inflow would reduce the frequency, duration, and severity of drought operations by bolstering the Corps' reserves generally. In addition, increasing the amount of water flowing to Florida in non-drought periods would enhance the

Apalachicola's capacity to recuperate from drought periods. The Special Master discounted the significance of those benefits because they might not redress Florida's injury *completely*. But as this Court's precedents recognize, even a partial remedy is sufficient to establish redressability, especially when doing nothing would allow an existing harm to worsen.

III. On a broader level, accepting the Special Master's recommendation would flout the principles of equity guiding this equitable-apportionment action and defeat the Constitution's mechanism for resolving disputes between the States. It is well established that "equity will not suffer a wrong without a remedy." Yet that is precisely what the Special Master's report—which found both injury to Florida and inequitable conduct by Georgia—ultimately recommends. Moreover, refusing to enter any relief on these terms would shirk this Court's constitutional duty to resolve disputes among the States. Because States must disavow the traditional self-help mechanisms enjoyed by sovereigns to respond to threats outside their borders when they enter the Union, the Court's performance of that duty is critical to ensuring the health and tranquility of the Republic.

ARGUMENT

Although we are a nation of 50 States, we remain a land of shared natural resources. This Court has held time and again that "a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) (*Idaho II*) (citing cases). Indeed, "States have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to preserve and even to augment the natural resources

within their borders for the benefit of other States." *Id.* Because Georgia has flagrantly violated that duty, Florida has turned to this Court to fairly apportion the waters of the ACF Basin, and thus stem Georgia's inequitable consumption of this shared resource. The Special Master found both that Florida has sustained "real harm" from Georgia's consumption of water and that Georgia's consumption is "unreasonable." Report 30-31. But he recommended that this Court simply deny Florida's request for relief. The Court should decline to adopt that recommendation.

I. THE SPECIAL MASTER BASED HIS REPORT ON A FLAWED CONCEPTION OF THE REDRESSABILITY REQUIREMENT

A. The Special Master Erred In Requiring Florida To Show That A Decree Is "Guaranteed" To Work

The Special Master based his entire recommendation on the premise that, even accepting that "Florida has sustained injury as a result of unreasonable upstream water use by Georgia," relief should be denied because Florida has failed to show that a decree is "guarantee[d]" to work. Report 30-31, 69.[6] The Special Master framed that ruling in terms of

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6 *See also, e.g.*, Report 30 ("Florida must prove that any water not consumed by Georgia as the result of a decree imposing a consumption cap *will* reach Florida and alleviate Florida's injury." (emphasis added)); *id.* at 31 (Florida has not proven redressability with "sufficient certainty"); *id.* at 48 (same); *id.* at 52-53 (evidence not sufficient to show "that increased streamflow on the Flint River *will inevitably* provide timely relief to Florida" (emphasis added) (emphasis added); *id.* at 69 ("There is *no guarantee* that

"redressability." *Id.* at 28-29; *see id.* at 3, 24, 30, 63, 69. That redressability requirement is legally flawed.

In order to invoke this Court's authority to undertake an equitable apportionment, this Court has imposed a heavy burden on States to show that they have suffered a "real and substantial injury or damage." *Idaho II*, 462 U.S. at 1027 (citing cases). But as noted, the Special Master based his report on the fact that Florida "*has* sustained injury," a finding he had "little question" about. Report 30-31 (emphasis added). Once a State establishes injury, the balance shifts and the inquiry changes. At that point, "[f]lexibility is the linchpin"—and "[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree." *Idaho II*, 462 U.S. at 1026 & n.10. As this Court has recognized, "[r]eliance on reasonable predictions of future conditions is necessary to protect the equitable rights of a State." *Id.* at 1026; *see also Nebraska v. Wyoming*, 325 U.S. 589, 616-17 (1945).

In *Idaho II*, this Court held that the Special Master had erred in concluding that the existence of "[u]ncertainties" about how a decree would work in practice, including the extent to which federally-operated dams would restrict the movement of the fish at issue, was reason to refrain from entering a decree at all. 462 U.S. at 1026-27. The Court concluded, however, that the Special Master had properly found that the complaining State (Idaho) had failed to establish either that it had sustained an injury or that the upstream States (Oregon and Washington) had "mismanaged the resource" at issue. *Id.* at 1027-28.

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the Corps will exercise its discretion to release or hold back water at any particular time." (emphasis added)); *see id.* at 3, 49, 54, 61.

Here, by contrast, the Special Master found both injury and mismanagement; yet he concluded that the lack of certainty about what the Corps would do in the future if a decree were entered should prevent this Court from entering any decree at all. That was error.

The Special Master's certainty requirement for establishing redressability not only ignores the "broad and flexible equitable concerns" that govern equitable-apportionment actions (*id.* at 1025), but replaces those concerns with an essentially paralyzing standard. As this case illustrates, the Special Master's rule creates a "chicken and the egg" dilemma in which the Court cannot be *certain* what effect a decree would have until it has entered one, but cannot enter a decree until it is *certain* what effect it would have. And, when, as here, a State has shown injury and mismanagement, that rule can only promote *waste*—a result that both this Court's precedents and equity more generally counsel strongly against. *See Washington v. Oregon*, 297 U.S. 517, 528 (1936) ("There must be no waste . . . of the 'treasure' of a river." (quoting *New Jersey v. New York*, 283 U.S. 336, 342 (1931)); *infra* at 52-56.

The Special Master's rule also goes beyond the conventional requirements of Article III. This Court has repeatedly held that, to meet Article III's redressability requirement, a plaintiff need only show a *likelihood* of at least partial redress. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (test is "a *likelihood* that the requested relief will redress the alleged injury" (emphasis added)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (same); *Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a

discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.").

Moreover, in applying this standard, this Court has shown a special solicitude for States challenging environmental harms originating from conduct outside their borders in recognition of the self-help rights that States surrendered upon entering the Union. *See, e.g.*, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-39 (1907). *Massachusetts v. EPA*, 549 U.S. 497, 519-20 (2007), underscores how far the Court has been willing to take that special solicitude. But this case—in which, as the Special Master found, Florida has shown that it is *already* suffering "*real* harm" from consumption in Georgia, Report 31 (emphasis added)—presents a much more compelling situation for applying this principle than *Massachusetts v. EPA*, which concerned the far more tenuous possibility of harm *decades* later.

In stating that Florida "must prove that *any* water not consumed by Georgia as a result of a decree imposing a consumption cap *will* reach Florida and alleviate Florida's injury" (Report 30 (emphasis added)), the Special Master pointed to this Court's decisions in *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 392 (1980) (*Idaho I*), and *Washington*, 297 U.S. at 523. Neither case held that a State must show a certainty of complete redress in order to secure relief even where, as here, an injury and inequitable conduct has been established, and both cases are distinguishable in key respects.

In *Washington*, the downstream State (Washington) claimed that the upstream State (Oregon) was "wrongfully diverting" water for irrigation purposes in Oregon. 297 U.S. at 518. Unlike this case, the Special Master there not only rejected

the claim of injury, but found that Oregon's use of the water was "reasonable, beneficial, and necessary." *Id.* at 524. In adopting the Special Master's recommendation that Washington's request for relief should be denied, this Court also recognized that there was a certainty that the water at issue would *not* get through to Washington anyway, because the water not only was "small at the beginning," but would be "quickly absorbed and lost in the deep gravel beneath the channel" before it reached the state line. *Id.* at 523. In other words, in *Washington*, the record established that relief was physically *im*possible. Here, by contrast, the Special Master recognized that redress was possible; he just concluded it was not guaranteed.

Idaho I does not support the Special Master's "guarantee" requirement either. In that case, the Court *rejected* the Special Master's recommendation that Idaho's action against Oregon and Washington be dismissed for failure to join the United States. 444 U.S. at 392-93. In the passage cited by the Special Master, the Court recognized that Idaho bore the burden of proving that it has been "adversely and unfairly affected" by the challenged conduct, *id.* at 392—a showing that Florida made here (Report 30-31). The Court by no means held that the case should be dismissed if there was uncertainty over whether a decree would work. In fact, instead of holding that any uncertainty should be resolved *against* the complaining State, the Court—citing *Washington*—stated that relief would be proper unless the evidence demonstrated "that natural and manmade obstacles *will prevent* any additional fish . . . from reaching Idaho in numbers justifying additional restrictions." 444 U.S. at 392 (emphasis added).

Accordingly, *Idaho I* and *Washington* simply stand for the proposition that a complaining State cannot prevail where the evidence shows that the proposed remedy is *certain to fail*. They by no means establish the converse: that a suit must be dismissed unless the complaining State shows that the relief sought is guaranteed to redress an injury that (as here) has been shown. If there were any doubt about that, it was eliminated when *Idaho I* returned to the Court two years later and the Court held that "[u]ncertainties about the future . . . do not provide a basis for declining to fashion a decree." *Idaho II*, 462 U.S. at 1026.

B. The Special Master Compounded This Legal Error By Requiring Florida To Establish Redressability With Clear And Convincing Evidence

The Special Master exacerbated this legal error by requiring Florida to meet his mistaken redressability standard with "clear and convincing evidence." Report 47. This Court has held that a State seeking to enjoin another State's "invasion of rights"—including its misallocation of water—bears the burden of showing by clear and convincing evidence that it has been *injured*. *See New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Connecticut v. Massachusetts*, 282 U.S. 660, 666-67, 669 (1931). That heightened burden reflects the Court's "traditional reluctance *to exercise* original jurisdiction in any but the most serious of circumstances." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (emphasis added). But this Court has never held that, once an injury has been shown by clear and convincing evidence, the injured State must also establish by clear and convincing evidence that a decree is certain to redress that injury. Report 30.

And imposing such a burden would frustrate the *flexibility* that this Court has emphasized is essential for fashioning relief in such cases. *Supra* at 30.

Here, the Special Master framed his redressability ruling on the premise that Florida *has* proved substantial injury by clear and convincing evidence. Report 30-31. Florida presented evidence at trial of numerous injuries it has suffered, and the Special Master gave particular attention to the "unprecedented collapse of its oyster fisheries." *Id.* at 31. That finding is sufficient in itself to invoke this Court's original jurisdiction. *See New Jersey v. New York*, 283 U.S. at 345 (entering decree predicated on harm stemming from "the effect of increased salinity . . . upon the oyster fisheries").[7]

Once Florida proved by clear and convincing evidence an injury warranting the exercise of this Court's original jurisdiction, the equation changes. At that point, the question is no longer whether this Court should exercise its original jurisdiction to decide the States' dispute, but rather which State is in the right and what relief is appropriate. And on *that* question, there is no reason to tilt the scale in favor of Georgia merely because it is the upstream State and can seize water without need for this Court's intervention. To the contrary, once this Court's jurisdiction is properly invoked, "[e]ach State stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907). And this Court's role is "to settle th[e] dispute

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[7] Because of his redressability ruling, the Special Master did not need to opine further on the harm that Florida has suffered. Report 34. He had "little question," however, "that Florida has suffered harm from decreased flows in the River." *Id.* at 31.

in such a way as will recognize the *equal* rights of *both* [States] and at the same time establish justice between them." *Id.* at 98 (emphasis added).[8]

In any event, the Special Master's central error was in holding that Florida was required to show that a decree was "guarantee[d]" to work. Report 69. Under the correct legal standard, the evidence establishes that Florida has met the redressability requirement no matter what burden of proof applies.

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[8] In *Colorado v. New Mexico*, this Court held that, where the downstream State (New Mexico) had established injury, the burden shifted to the upstream State (Colorado) to prove that its injurious conduct nevertheless should be allowed under an equitable balancing. *See Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982) (*Colorado I*); *Colorado v. New Mexico*, 467 U.S. 310, 317-18, 320, 323-24 (1984) (*Colorado II*). The question at the "equitable balancing" stage of the inquiry is—as the Special Master here recognized—whether the "redress" the Court can provide would be "equitable." Report 27. The Special Master declared that application of *Colorado I*'s burden-shifting principles "in the context of a dispute between riparian states is not an altogether straightforward exercise," *id.* at 28-29 n.23, and ultimately avoided that issue (and the "equitable balancing" inquiry) entirely by introducing a threshold requirement that Florida establish a guarantee of complete redress by clear-and-convincing evidence. As explained above, that was error. And it was an error that fundamentally altered the nature of the inquiry: even assuming riparian principles would somehow mean that the downstream State—rather than the upstream diverter, as in *Colorado I* and *Colorado II*—should bear the burden of proof at the equitable-balancing stage, the analysis still requires a *balancing* of the equities. The Special Master's threshold redressability ruling, by contrast, gave no weight whatsoever to Georgia's inequitable conduct and the magnitude of Florida's injury. Moreover, the Special Master did not complete the full analysis of the harms Florida faced and other factors that would be necessary before balancing the equities. *See id.* at 34.

II. THE RECORD AND CORPS' STATEMENTS ESTABLISH REDRESSABILITY UNDER THE CORRECT LEGAL STANDARD

Because the Special Master's recommendation is based on a legal error concerning what Florida was required to show to prove redressability, the Court should, at a minimum, send the case back and ask the Special Master to consider redressability under the correct standard. But for several independent reasons, this Court also can, and should, hold that redressability is no impediment to entering relief in this case.

A. The Possibility That The Corps Could "Offset" The Impact Of A Decree Is No Basis For Denying Relief

As an initial matter, the possibility that the Corps could act to negate the benefits of a decree should not factor into the *redressability* analysis at all. Under this Court's precedents, a third party's independent discretion is relevant to the redressability inquiry only where "redress of the . . . injury in fact [plaintiffs] complain of *requires action* . . . by [an unjoined party]." *Lujan*, 504 U.S. at 571 (plurality opinion) (emphasis added); *see also Utah v. Evans*, 536 U.S. 452, 514 (2002) (Scalia, J., dissenting) (explaining that redressability was not in issue where "redress of the plaintiffs' injuries *did not require action* by an independent third party that was not (and could not be) brought to answer before a federal court" (emphasis added)). In other words, when A sues B to stop B from harming A, the possibility that C could interfere with a court-ordered remedy is not a basis to conclude that A has failed to establish redressability—unless C's action is *required* for A to obtain relief.

Here, it is clear that the Corps' involvement is not *required* for Florida to secure redress from Georgia's overconsumption of water. Most of the water at issue is consumed by excessive irrigation in the Flint River and lower Chattahoochee Basins. *See* Report 32-33; Hornberger PFD ¶ 112; Sunding PFD at 44, Tables 4, 5 (Nov. 4, 2016), Dkt. No. 555. The additional water generated by capping Georgia's consumption there *will* flow into Florida because the only thing standing between that water and Florida is a "run-of-river" facility (Jim Woodruff Dam) that lacks any appreciable storage capacity. *See supra* at 18. No action is required on the part of the Corps to ensure that the additional water generated by capping consumption in the Flint and lower Chattahoochee Basins reaches Florida. Nature will do all the work.

In a crude sense, Lake Seminole is like a sink that drains into the Apalachicola Basin, and the Chattahoochee and Flint Rivers represent a two-handled faucet. The Corps has some control over one faucet handle (the upper Chattahoochee); Georgia has complete control over the other handle (the Flint). Georgia's consumption from irrigation along the Flint has reduced the flow from the second faucet to a trickle, and Florida now asks the Court to enjoin the over-consumption and thereby re-open the second faucet. There is no question that the Court could do that, and that Georgia can indeed open that faucet by limiting its consumption along the Flint.

Georgia does not dispute that the Jim Woodruff Dam is a "run-of-river project." Report 47. Rather, Georgia argues that the Corps will exercise its discretion to "offset any increased flows from the Flint River into the Apalachicola River by withholding more

water upstream" on the Chattahoochee. *Id.* As explained next, if this Court enters a decree capping Georgia's consumption, it is by no means likely that the Corps would act to offset the benefits of that decree. But even if that response were likely, it would not preclude a finding of redressability under the case law discussed above, because the possibility that a third party could take action to frustrate or impair a court-ordered remedy is not a basis to find lack of redressability where, as here, the third party's action is not *required* to secure relief in the first place.

This is not to say that the possibility that an absent third party will frustrate the effectiveness of a judicial decree is irrelevant altogether. Federal Rule of Civil Procedure 19(b) allows a court to take that into account in deciding whether, "in equity and good conscience," a case should proceed where a necessary party cannot be joined. And, indeed, Georgia based its initial motion to dismiss on a Rule 19, "indispensable party" analysis. But the Special Master denied that motion after finding that all of the factors pointed against dismissal. *See* Order on Ga.'s Mot. to Dismiss 11-22.

It is clear, moreover, that the Special Master did not base his later recommendation that the Court deny Florida relief on Rule 19 or a joinder analysis. Unlike the "redressability" rule on which he premised his report, which postulates that any uncertainty about how the Corps would respond to a decree mandates dismissal, the Rule 19 inquiry turns on a balancing of four factors: (1) whether a judgment in the absence of the United States would prejudice the United States (or any existing parties); (2) whether any such "prejudice could be lessened or avoided by" protections in any resulting decree; (3) whether a judgment in the

United States' absence would be adequate; and (4) "whether [Florida] would have an adequate remedy if the action were dismissed for nonjoinder." *See* Fed. R. Civ. P. 19(b)(1)-(4). And as the Special Master recognized, in invoking Rule 19 as a defense, *Georgia* bore the burden of "prov[ing] that any decree providing for a cap on Georgia's consumption would be ineffective absent a decree binding on the Corps." Order on Ga.'s Mot. to Dismiss 13.

To make a recommendation based on Rule 19, the Special Master's report would have needed to address each of those factors, and then balance them to make an ultimate judgment as to whether Georgia had proved that, in "equity and good conscience," this action should not be allowed to proceed. The Special Master's report does not do that. Nor does his report revisit his prior conclusions that any prejudice to the United States or Georgia due to the absence of the United States could be avoided, and that Florida would have no other adequate remedy if this action were dismissed. *See* Order on Ga.'s Mot. to Dismiss 16-22; *see also Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 501 n.9 (7th Cir. 1980) ("The absence of an alternative forum would weigh heavily, if not conclusively against dismissal . . . ."). There is thus no way to shoehorn his redressability analysis into the more flexible and equitable mold of a Rule 19 determination.

B. The Evidence And Corps' Statements Establish That The Corps Is Likely To Facilitate A Decree If One Is Entered

Even assuming that the Corps' future conduct—and its exercise of discretion—is relevant in assessing redressability, the evidence at trial and the Corps' statements after trial overwhelmingly establish that

the Corps is likely to facilitate, rather than frustrate, a decree entered by this Court. No more is required to establish redressability under this Court's precedents.

The Corps' operating rules do not require it to hold back water that would otherwise flow into Florida through the Jim Woodruff Dam. Instead, the manual constrains the Corps' discretion in the opposite manner—requiring it to pass along at least a designated *minimum* flow amount. For example, in drought operations, the Corps must release a minimum flow of at least 5,000 cfs into Florida. But as the Special Master found, "the Corps retains discretion to release *more* than the required 5,000 cfs minimum" when that water is available. Report 53 (emphasis added); *see id.* at 53-54, 60-61. Georgia's own expert admitted as much. *See id.* at 55.

This is not a hypothetical scenario. As the Special Master recognized, this is exactly what the Corps has done in the past when extra water has been available—exercised its discretion to allow water significantly in excess of the minimum required flow. *See id.* at 55, 38. During the 2012 drought, for example, the Corps consistently released several hundred cfs more than the minimum flow levels its manual required, and similar trends were apparent during earlier years, including during 2008 drought operations. *See, e.g.*, Shanahan PFD ¶ 60, Table 4 (Nov. 4, 2016), Dkt. No. 552; FX-811, Shanahan Def. Expert Rep. 2-3, 20. The evidence demonstrates that the Corps consistently made discretionary releases greater than 5,000 cfs even during drought operations when basin inflows were less than 5,000 cfs. *See* JX-128, https://waterdata.usgs.gov/usa/nwis; JX-137, http://water.sam.usace.army.mil/acfframe.htm.

The Special Master nevertheless concluded that this evidence failed to establish redressability because there was still "no guarantee" about how the Corps would exercise its discretion in the future. Report 69-70, 58; *see also id.* at 56 (Florida showed "only that the Corps may have exercised its discretion to release more than it was required to release *in the past;* it has not proven that the Corps will release more than the minimum *in the future*."). That conclusion was based on the Special Master's erroneous belief that Florida was required to establish redressability by a certainty—*i.e.*, what *will* happen. This Court, however, at most requires a plaintiff to show a likelihood of redress and, in evaluating whether that standard is met, the Court has relied on past practice. *See, e.g.*, *Bennett v. Spears*, 520 U.S. 154, 170-71 (1997).

When it comes to the past, it is also significant that, in 1997, when Florida, Georgia, and Alabama agreed to an interstate compact that put in place a framework for trying to work out an agreed-upon allocation formula, Congress passed a law stating that "all state and *federal* officials . . . administering other state and federal laws affecting the ACF Basin *shall, to the maximum extent practicable,* . . . administer those laws in furtherance of the purposes of this Compact and the allocation formula adopted by the Commission." Pub. L. No. 105-104, § 1, 111 Stat. at 2255 (emphasis added). That law itself is a strong indication that federal policy would favor facilitating an equitable apportionment.

Indeed, pointing to this very law, the United States, in a brief signed by the Solicitor General, stressed that there was no reason to "suggest that the Corps would ignore . . . a decree if it were entered in this case" and that "[t]he Corps may well be able to accommodate any

agreement on water allocation between the states—subject to the limits of the Corps' authority." U.S. Opp. to Ga.'s Mot. to Dismiss 18 n.4. The United States could hardly be expected to take an equitable apportionment entered by this Court any less seriously than an allocation agreed to by the parties. Moreover, when Georgia argued at the outset of this case that the Corps would simply "increase impoundments upstream to offset increased flows from the Flint River," the United States responded that this was not only "speculation" but "entirely unwarranted" speculation under existing operational protocols. *Id.* at 19.

Nor would the United States have an institutional interest in resisting (or counter-acting) an equitable apportionment limiting Georgia's consumption. As the United States has repeatedly recognized in this case, "a cap on Georgia's consumption would not be likely to adversely affect the Corps' operations." U.S. Post-Trial Amicus Br. 3 n.1; *see also* U.S. Opp. to Ga.'s Mot. to Dismiss 16. Indeed, a cap could only *benefit* the Corps, because it would produce more water flowing into the Corps' system and thereby make it *easier* for the Corps to achieve its statutory objectives.

Moreover, the United States has stated that the Corps seeks to accomplish its federal objectives "while accommodating, to the extent possible, uses of the waters of the system as allowed by state law." U.S. Opp. to Ga.'s Mot. to Dismiss 4. As the Solicitor General has acknowledged, "the Corps has no authority to apportion water among States or determine water rights." *Id.* But if *this* Court were to apportion the water and hold that Florida is entitled to a greater portion of the water in the ACF Basin than it is currently receiving, there is no reason to think that the

Corps would use its operating discretion to nevertheless hold that water back for use in Georgia.

In reaching a different conclusion, the Special Master pointed to statements in the United States' post-trial amicus brief about how its guidelines might operate in various situations. *See* Report 48. For several reasons, the Special Master's reliance on that brief was misplaced. To begin with, the brief was not "evidence" and, because it was submitted after trial, Florida never had an opportunity to explain at trial, through its witnesses, why the United States' brief does not establish that a decree would be ineffective. Moreover, the brief was not directed to the key question—which is how the Corps would respond if this Court entered a decree. Instead, the brief simply addressed how the Corps' existing protocols and then-pending revisions would operate generally, without specifically addressing the impact of a decree.

The disconnect between the question the Special Master asked and the question that he needed to answer became particularly clear six weeks after he finalized his report, when the Corps released the revised version of its ACF manual. In the Record of Decision finalizing the revised manual's adoption, the Corps stated that "[s]hould the Supreme Court issue a decree apportioning the waters of the ACF Basin, . . . USACE would take those developments into account and adjust its operations accordingly, including new or revised [water control manuals], new or supplemental NEPA or ESA documentation, or any other actions as may be appropriate under applicable law." Record of Decision 18. This Court can, and should, take judicial notice of that official statement. *See, e.g.*, *United States v. Louisiana*, 363 U.S. 1, 12-13 (1960) (taking judicial

notice of undisputed documents in original proceeding); Fed. R. Evid. 201(b)(2), (d); Sup. Ct. R. 17.2.

The Corps' Record of Decision also states that its revised manual "would not apportion the waters of the ACF Basin among the States or *in any way prejudice the Supreme Court*, the States, or Congress with respect to a future apportionment of the waters of the ACF Basin." Record of Decision 18 (emphasis added). It is difficult to believe that the Corps would make that statement if it expected to negate the benefits of such a "future apportionment" by offsetting the addition of water saved on the Flint by holding back releases upstream, while disregarding the ongoing harm to Florida on which a decree would have to be based.

Indeed, one of the Corps' statutory objectives is the protection of fish and wildlife. *See* U.S. Army Corps of Engineers, Final Environmental Impact Statement 2-61 (Dec. 2016) (recognizing that the Corps must consider impacts on fish and wildlife under the Fish and Wildlife Coordination Act of 1958).[9] And with respect to threatened and endangered species in particular, both the Corps and the Fish and Wildlife Service have recognized that the Endangered Species Act (ESA) would obligate the Corps to minimize harm to threatened and endangered species in the Apalachicola, such as the Gulf sturgeon and certain mussels. *See* JX-168, 2016 Fish & Wildlife Service Biological Opinion (2016 Biological Opinion) 193, 195-96; Dep't of the Army Mem. for Director of Civil Works

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[9] This document is available at http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/10_ACF_FEIS_Dec 2016_Volume 4 Part_1.pdf?ver=2016-12-07-164634-643.

(Mar. 30, 2017) (ordering the Corps to effectuate the conditions set forth in the Fish and Wildlife Service's Biological Opinion).[10] There is no reason to assume that the Corps would disregard those obligations.

It is true that no one can say *for certain* what the Corps will do if this Court enters a decree. But in the face of all this, it is far more likely that the Corps would act to facilitate such a decree, rather than frustrate it.

C. Even If The Corps Chose To Hold Back Releases Upstream During Droughts, Meaningful Redress Is Still Likely

Because of the way that the Corps' system operates as a general matter, even if the Corps sought to hold back releases upstream during drought operations as Georgia surmises, a decree that reduces Georgia's consumption would still translate into meaningful redress in the Apalachicola Basin. That is because, at the end of the day, the less water Georgia consumes, the more water that will flow into—and out of—the system. And that can only help the fragile ecosystems that are currently dying in Florida due to a lack of water, including by reducing the frequency, duration, and severity of drought operations by the Corps.

This is largely elemental. As discussed, under the Corps' existing protocols, two of the most significant variables in determining the non-discretionary minimum release levels are (1) basin inflow and (2) conservation storage levels in the Corps' reservoirs.

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[10] This document is available at http://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/ACF%20ASA%20Transmittal%20to%20DCW%2030%20March%2017.pdf?ver=2017-03-30-142328-340.

See supra at 18-19. Reducing Georgia's consumption of water in the Flint River Basin, or anywhere else, would have favorable effects on both of them: Limiting consumptive uses *necessarily* increases basin inflow, because less consumption by Georgia results in more water flowing into the system. *See* Report 2 n.1, 42. And when basin inflow is higher, then the storage levels in the Corps' reservoirs remain higher as well—either because there is more water with which to replenish them (if the Corps is in the process of increasing storage) or less need to deplete them (if the Corps is in the process of supplementing flows with releases from existing storage).

Anything that increases both basin inflow and the Corps' storage levels will ultimately produce higher minimum flows under the Corps' protocols—as one would expect, more water going in means more water coming out. *See* Tr. vol. 10, at 2523:12-16 (Shanahan) ("There is really no place else for it to go. It's not going to disappear someplace. All the water is going to Florida eventually. It's not a question of if; it's a question of when. And that's a hydrologic certainty."). That is certainly true in periods when the Corps is passing all basin inflow through to Florida. But the point holds for other periods as well.

With additional water as a result of a consumption cap, there would be less need for the Corps to supplement river flows with releases from conservation storage upstream during dry periods. As a result, it would take longer for conservation storage to reach the level (or zone) at which drought operations are triggered, and the Corps likewise would be able to restock its stores more quickly during normal or wet periods. In this way, a consumption cap would provide

what the United States has aptly referred to as a "cushion during low-flow periods," making it possible for the Corps "to maintain a flow rate of greater than 5,000 cfs for a longer period of time *without any alteration of the Corps' operations*." U.S. Opp. to Ga.'s Mot. to Dismiss 19 (emphasis added).

This "cushion" would help reduce the frequency, severity, and duration of drought operations. As the United States itself has explained, "[a]dditional basin inflow would be expected to, in some measure, *delay* the onset of drought operations . . . and *quicken* the resumption of normal operations after a drought ends." U.S. Post-Trial Amicus Br. 2 (emphasis added); *see* U.S. Opp. to Ga.'s Mot. to Dismiss 19 (same). Those benefits themselves would provide real redress.

An example illustrates the point.[11] While 2011 was a drought year, the Corps did not enter drought operations until May 2012, when conservation storage dipped into composite "Zone 4"—the point at which drought operations began under the Corps protocols in effect at the time, Report 40-41—by a maximum of about 40,000 acre-feet. *See* GX-924 (chart of Army Corps composite storage in 2012, showing that storage only dipped briefly and incrementally into zone 4 in April/May and July 2012); FX-811, Shanahan Def.

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[11] This example is based on the operating protocols in effect at trial and on which the parties' evidentiary presentations were largely focused. The Corps released updated guidance *after* trial, first in near-final format a week after trial ended, *see* Report 35 n.29, and then in its final form six weeks after the Special Master issued his report, *see* Record of Decision. Florida obviously was not able to present evidence based on guidance that had yet to be issued, but the principles illustrated by the example in the text here would hold true under the new guidance as well.

Expert Rep. 2. Because drought operations are only commenced under the Corps' guidelines when conservation storage drops to the designated levels, if the Corps had been able to store (or not release) a mere 40,000 acre-feet more water in the 2011-2012 drought, it could have avoided drought operations entirely. And the remedy Florida has requested would have produced that water: It would increase streamflow by up to 2,000 cfs daily in peak summer months, *see* Sunding PFD ¶ 89, which amounts to roughly 60,000 cfs-days, or approximately 120,000 acre feet of additional available water. Thus, in the 2011-2012 drought alone, the Corps—following its own manual—could have stored a third of the water saved by a consumption cap in just one month to avoid drought operations entirely, while releasing most of the additional flows to benefit the Apalachicola.[12]

The Special Master failed to account for the way in which the Corps' system would necessarily yield benefits for Florida if more water were added to the system from the Flint or elsewhere. Instead, pointing to the testimony of Georgia expert Philip Bedient, the Special Master concluded that increased basin inflow would have only "minimal" effects on flows into Florida if the Corps attempted to hold the maximum amount of water back during drought operations. Report 65-66

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[12] Similarly, a decree could be fashioned so that Georgia is barred from withdrawing water under existing or future water supply contracts during particular periods. Doing so would reduce the demands on the Corps' upstream storage reservoirs and thus make it even less likely that the Corps would hold back releases in drought periods. Because of his redressability ruling, the Special Master never considered how a decree might be fashioned.

(citing Bedient PFD ¶¶ 55-57 (Nov. 4, 2016), Dkt. No. 559). The Special Master's reliance on Bedient, and conclusion that this "cushion" that would be generated by the boost in basin inflow did not establish redressability, was misplaced in two key respects.

First, Bedient's analysis was fundamentally flawed. Indeed, it was based on modeling software—the so-called "ResSim" program—that the Special Master himself recognized cannot reliably predict flows into Florida. *See* Report 60. The ResSim software has never been demonstrated to provide an accurate comparison of flows into Florida under significantly divergent consumption scenarios, the task Bedient employed it for here. And ResSim is inherently ill-suited for that task because it does not accurately reflect the Corps' practice of storing more water than it absolutely *has* to during wet periods in order to provide a bigger "cushion" when dry periods arrive. *See* Shanahan PFD ¶ 8(f); FX-785, Hornberger Expert Report 46-47; FX-794, Shanahan February 2016 Expert Report 2. By underestimating the amount of additional water the Corps would be able to store up and retain during *non*-drought periods, ResSim fails to capture the benefits of such increased storage in the form of delayed, avoided, or shortened drought operations, as discussed above.

Second, even if Bedient were correct that the increase in flows would be relatively small during "critical summer months" absent the sort of discretionary releases the Corps has made in the past, Report 66-67, the Special Master was wrong to conclude that that meant Florida has failed to establish redressability. Additional water, even if in more modest amounts, would still provide relief. The Special

Master seemed to believe that, to establish redressability, Florida was required to show that *all* the water produced by a decree would make it to the Apalachicola and redress Florida's injuries—*completely*. *See* Report 30 ("Florida must prove that *any* water not consumed by Georgia as the result of a decree imposing a consumption cap *will* reach Florida and alleviate Florida's injury." (emphasis added)). But that is not the standard. *See Larson*, 456 U. S. at 244 n.15 (a plaintiff "need not show that a favorable decision will relieve his *every* injury"); *supra* at 31-32.

In addition, even if (contrary to the evidence discussed above) the additional water generated by a decree only results in increased flows in non-drought periods, that would still provide meaningful redress by helping the Apalachicola ecosystems rejuvenate and recover from harms suffered in droughts. The EPA and Fish and Wildlife Service, for example, have identified levels of flow below which the Apalachicola River should be allowed to drop at most once in every four years, lest permanent harm occur—but the reduced flow in even normal years has caused the Apalachicola to fall below those levels in almost *every one* of the past 16 years. *See* FX-D-23 at 4.

If allowed to continue, the combination of reduced normal year flows and extreme low flows in drought years will have an irreversible effect on the River and Bay because—as EPA and the Fish and Wildlife Service explained—"[a]quatic populations can survive extremely stressful conditions and persist without essential habitat conditions occasionally, but not for many years in succession." *See* Instream Flow Guidelines, FX-599, at FL-ACF-02545882. Increasing

flow in normal or wet periods would help eliminate these "extremely stressful conditions."

Moreover, a decree capping Georgia's consumption would at least prevent the situation from worsening in the Apalachicola. As the Special Master found, Florida has already sustained injury as a result of Georgia's mismanagement of the waters at issue. If this Court denies Florida's request for relief, Georgia would be free to continue, and even increase, its consumption as it wishes—"regardless of the long-term consequences for the Basin." Report 34. And that is exactly what will happen: left to its own devices and wishes, Georgia's consumption in the coming decades will only continue to increase, significantly. *See* Hornberger PFD ¶¶125-26. Preventing an existing injury from worsening is itself a sufficient basis to enter a decree.

III. THE SPECIAL MASTER'S REPORT SUBVERTS PRINCIPLES OF EQUITY AND THE ROLE OF THIS COURT

The Special Master's recommendation that the Court refuse relief because redress is not "guaranteed" is fatally flawed under the principles that this Court applies even in ordinary cases. *Supra* at 31-32. But this is not an ordinary case—it is an equitable apportionment action. And this Court has repeatedly stressed that it is guided in such proceedings by "broad and flexible equitable concerns," *Idaho II*, 462 U.S. at 1025, rather than "hard and fast rule[s]," *Nebraska*, 325 U.S. at 616. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) ("When federal law is at issue and the 'public interest is involved,'" a federal court's "'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" (citation omitted)).

The Special Master's recommendation flouts two time-honored principles of equity. The first is that "equity will not suffer a wrong without a remedy." *Independent Wireless Tel. Co. v. Radio Corp. of Am.*, 269 U.S. 459, 472 (1926) (citing 1 *Pomeroy's Equity Jurisprudence* §§ 423, 424 (4th ed. 1918)); *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011) ("[E]quity suffers not a right to be without a remedy." (citing R. Francis, *Maxims of Equity* 29 (1st Am. ed. 1823))). And the second is that "[e]quity abhors a windfall." *US Airways, Inc. v. McCutchen*, 663 F.3d 671, 679 (3d Cir. 2011), *vacated on other grounds*, 133 S. Ct. 1537 (2013); *see also Prudential Ins. Co. of Am. v. S.S. Am. Lancer*, 870 F.2d 867, 871 (2d Cir. 1989).

The Special Master found that "Florida points to real harm and, at the very least, likely misuse of resources by Georgia." Report 31. As to Georgia's misuse, the Special Master elaborated "that Georgia's upstream, agricultural water use has been—and continues to be—largely unrestrained"; "the exceedingly modest [conservation] measures Georgia has taken have proven remarkably ineffective"; and "Georgia's position" is that its "agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin." *Id.* at 32-34. Equity thus cries out for a remedy. Yet, the Special Master recommended that the Court dismiss this action because there is "no guarantee" (*id.* at 69) as to how the Corps will respond to a decree. That would grant Georgia an enormous windfall: the ability to continue its inequitable consumption indefinitely, with this Court's (effective) stamp of approval, "regardless of the long-term consequences for the Basin." *Id.* at 34.

Adopting the Special Master's recommendation also would fundamentally circumscribe the constitutionally assigned role of this Court in resolving disputes among the States. More than a century and a half ago, in another suit between these same States in which it was also argued that the absence of the United States as a party meant that Florida could obtain no relief, this Court recognized its "duty . . . to mould its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred" by Article III's grant of original jurisdiction. *Florida v. Georgia*, 58 U.S. (17 How.) 478, 492 (1854). Even if ordinary rules of procedure *would* preclude entry of a decree in an ordinary case, the Court recognized, a suit between two sovereigns concerning a serious dispute is no ordinary case. *Id.* at 494 ("It would hardly become this tribunal, intrusted with jurisdiction where sovereignties are concerned . . . to do injustice rather than depart from English precedents."). That duty is no less compelling today.

The role that the framers assigned to this Court, in particular, as a neutral arbiter of serious disputes between the States makes the Special Master's recommended outcome in this case especially untenable. If Florida were a foreign state, "all must admit that she could seek a remedy by negotiation, and, that failing, by force," for the injuries that Georgia has inflicted. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). "Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy . . . is found in the constitutional provisions" for original actions in this Court between States. *Id.*

As this Court held at Georgia's urging a century ago, "[w]hen the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court." *Georgia v. Tennessee Copper Co.*, 206 U.S. at 237. Given the vital role this Court's jurisdiction plays under the constitutional design as a replacement for armed conflict in resolving controversies between the States, this Court should not effectively neuter that option by holding it unavailable whenever it cannot "guarantee" that the relief it would provide will fully redress a complainant State's proven injury. Neither Article III nor any of this Court's precedents permits such a "failure of justice" in these circumstances. *Florida v. Georgia*, 58 U.S. at 494-96.

This Court has never refused to grant an equitable apportionment where both injury and inequitable conduct had been found on the ground that a third party *might* interfere with the effectiveness of its remedy. To do so here would be to effectively cede control over a substantial portion of this Court's original docket to the Corps, which operates dams—and thus has the potential to affect water flows—on many of the nation's great waterways. That is plainly not what the founders intended when they empowered this Court to "mould its proceedings for itself, in a manner that would best attain the ends of justice" in disputes between sovereign States. *Id.* at 492.

The answer here cannot be to say, as the Special Master has recommended, that, yes, Florida is being

injured by decreased flows; yes, Georgia's consumption is inequitable; and, yes, Georgia's position is that its "agricultural water use should be subject to no limitations, *regardless of the long-term consequences for the Basin*," Report 34 (emphasis added); but no, this Court can do nothing about it because one cannot say, with 100% certainty today, what the Corps will do if a decree is entered. Neither this Court's precedents, time-honored principles of equity, nor simple common sense supports that unjust result.

CONCLUSION

The Court should decline to adopt the Special Master's recommendation, return the case to the Special Master, and instruct the Special Master to determine whether Florida is entitled to the requested relief under the correct legal framework.

Respectfully submitted,

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