

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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FLORIDA, )  
 )  
 ) Plaintiff, )  
 )  
 ) v. ) No. 142, Orig.  
 )  
GEORGIA, )  
 )  
 ) Defendant. )  
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Pages: 1 through 71

Place: Washington, D.C.

Date: January 8, 2018

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9

10 Washington, D.C.

11 Monday, January 8, 2018

12

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 11:05 a.m.

16

17 APPEARANCES:

18 GREGORY G. GARRE, Washington, D.C.; on behalf  
19 of the Plaintiff.

20 CRAIG S. PRIMIS, Washington, D.C.; on  
21 behalf of the Defendant.

22 EDWIN S. KNEEDLER, Deputy Solicitor General,  
23 Department of Justice, Washington, D.C.; on  
24 behalf of the United States, as amicus curiae, in  
25 support of overruling Florida's exception 2c.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next this morning in Case 142 on our  
5 original docket, Florida against Georgia.

6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF THE PLAINTIFF

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

11 The Special Master based his  
12 recommendation on two critical premises:  
13 First, that Florida has suffered real harm as a  
14 result of Georgia's ever-increasing consumption  
15 of upstream waters; and, second, that Georgia's  
16 consumption is unreasonable and largely  
17 unrestrained. In fact, the Special Master  
18 found that Georgia's position practically,  
19 politically, and legally is that it can consume  
20 as much water as it wishes without regard to  
21 any of the long-term consequences for the  
22 Apalachicola region.

23 The Special Master nevertheless  
24 concluded that this case should be terminated  
25 at the outset and that Georgia's wasteful

1 consumption be allowed to continue unabated  
2 because Florida had failed to show an adequate  
3 -- adequate certainty of complete relief.

4 With respect to the Special Master, we  
5 believe he -- he made a legal error on this  
6 discrete issue that the case should be returned  
7 to him for him to complete the work that he has  
8 begun.

9 JUSTICE GINSBURG: Mr. Garre, I  
10 thought that the Special Master -- this is at  
11 page 63 to 65 of his report -- said that  
12 Florida at the trial concentrated only on the  
13 harm from the low flows in drought years and it  
14 did not address the benefits of increased flow  
15 during normal non-drought periods.

16 It didn't even address it, he said, no  
17 -- no less showed the benefits that it would  
18 gain. So he said if -- if Florida has not  
19 established its case, it's Florida's fault  
20 because all they did was concentrate on the  
21 drought years.

22 MR. GARRE: Right. And I think, first  
23 of all, the Special Master's entire report has  
24 to be viewed in light of the legal standard of  
25 redressability that he applied. And we believe

1 that he applied far too great of a standard.

2 Second of all, I think it is fair to  
3 say that Florida's presentation was focused on  
4 the harm that we suffered during drought  
5 conditions in the extreme low-flow periods.  
6 But two things about that are important to  
7 understand.

8 There's two ways to address that harm.  
9 One is to provide more water during those  
10 periods, the extreme low-flow periods, the  
11 worst of the worst, and the other way is to  
12 reduce the frequency and severity of those  
13 drought operations.

14 And the United States, even the United  
15 States in this case -- and it's at page 28 of  
16 its brief -- recognizes that a decree in this  
17 case limiting Georgia's consumption would  
18 benefit Florida by reducing the frequency,  
19 severity, and duration of drought conditions.

20 Now, we think that that benefit --

21 JUSTICE KAGAN: Where does the record  
22 show that?

23 MR. GARRE: That we would benefit from  
24 that? Well, what I can point you to, for  
25 example, is the 2012 drought. And we've

1 explained this in the evidence cites at pages  
2 48 to 49 of our brief.

3 And what that example shows is that if  
4 more water had come into the system during the  
5 2012 drought, which one of -- is one of the  
6 worst that the region has experienced, it would  
7 have meant that the Corps would not have dipped  
8 into its drought operations during -- for --  
9 for nine months during that period, which means  
10 that the Corps would not have fallen into the  
11 red zone, where all the sort of needles are at  
12 the far end of the spectrum, for nine months  
13 during that drought.

14 And that has to have resulted in  
15 beneficial effects.

16 JUSTICE KAGAN: So here -- here's my  
17 difficulty, Mr. Garre, with this argument. And  
18 it's especially with respect to this exception  
19 2d, I think it is.

20 MR. GARRE: Yeah.

21 JUSTICE KAGAN: Is that you have  
22 common sense on your side. I mean, you say,  
23 well, it has to have shortened the drought or,  
24 you know, surely we would have gotten more  
25 water and that would have been beneficial to

1 us.

2 But there seems to be a real dearth of  
3 record evidence specifically quantifying how  
4 much more water you would have gotten, exactly  
5 what benefits would have followed from that.  
6 It just doesn't seem as though Florida put that  
7 into the record, even though you kind of want  
8 to say, well, that must obviously be true.

9 MR. GARRE: Okay. Well, first of all,  
10 I agree with you it obviously has to be true.  
11 Second of all, let me give you some more --

12 JUSTICE KAGAN: Well, but, you know, I  
13 guess what I'm saying is that's your first  
14 reaction, but there must have been some reason  
15 why it didn't put that into the record.

16 MR. GARRE: Right. So let me give you  
17 some more evidentiary cites. And then --  
18 before I do that, let me just point you to what  
19 this Court said in the Idaho II case, Idaho  
20 versus Oregon II, in which the Court said that  
21 uncertainties about the future do not provide a  
22 basis for fashioning the relief.

23 And I think, overall, that's a central  
24 principle that's critical in this case, is of  
25 course allowing more water through -- through



1 is going to address this harm. This Court has  
2 never had a situation where it's recognized a  
3 state as being injured, it's recognized that  
4 the upstream state is wasting a resource, and  
5 it's recognized that -- and the evidence shows  
6 that relief is possible and indeed likely and  
7 the Court has said: Nope, too bad, we're going  
8 home.

9 And so let me get back to the  
10 evidence.

11 JUSTICE GINSBURG: But in this -- but  
12 in this case, Mr. Garre, the Special Master  
13 said: Yeah, there was proof on that point, but  
14 it was put in by Georgia, and Georgia's expert  
15 said it wouldn't make enough of a difference --  
16 a difference to cure Florida's problem.

17 MR. GARRE: Well -- and I'm going to  
18 get back to the -- the evidentiary cites, but  
19 on that, Justice Ginsburg, and just to be  
20 clear, we think that one of the Special  
21 Master's central error was to deal with all of  
22 this on the basis of a central -- of a  
23 threshold redressability inquiry and that  
24 instead what this should have done is gone to  
25 the equitable balancing stage of the equitable

1     apportionment proceeding, where the Special  
2     Master would have to make all the findings that  
3     he did not complete on the -- on the costs that  
4     Georgia would incur of a decree, the full range  
5     of harms that Florida has suffered. He didn't  
6     conclude those findings.

7             JUSTICE KENNEDY: You do agree -- you  
8     do agree that you have the burden to show  
9     redressability?

10            MR. GARRE: We have the burden like  
11     any plaintiff to show redressability in the  
12     Article III sense, Justice Kennedy. And we  
13     think that we meet redressability under any  
14     conceivable standard.

15            Now, I think when you get into the  
16     equitable balancing stage, I actually think  
17     that the burden shifts to Georgia at that stage  
18     because if we've shown, as the Special Master  
19     acknowledged that we have, that we have  
20     suffered real harm as a result of Georgia's  
21     inequitable conduct, then at that point under  
22     this Court's precedents, Colorado versus New  
23     Mexico in particular, the burden shifts to  
24     Georgia, but I think --

25            JUSTICE KENNEDY: You -- you would say

1 you do not have the burden, once you've shown  
2 the injury, to show that a consumption cap can  
3 help cure the problem.

4 MR. GARRE: Well --

5 JUSTICE KENNEDY: You do not have the  
6 burden to show that?

7 MR. GARRE: I -- I think we do.  
8 Certainly, we have to show that a consumption  
9 cap is going to work. And the question is by  
10 what standard?

11 JUSTICE SOTOMAYOR: All right.  
12 Mr. Garre, but --

13 MR. GARRE: Do we have to show that a  
14 mere certainty standard --

15 JUSTICE SOTOMAYOR: It is very  
16 critical for me that you go through the  
17 evidence of that.

18 MR. GARRE: Yes.

19 JUSTICE SOTOMAYOR: Now, just so --  
20 correct me if I'm wrong, the Special Master  
21 made two findings. The first one was that in  
22 drought periods, you didn't prove that the  
23 Corps -- the -- the Corps would release more  
24 water.

25 The SG agrees with that and says,

1 under the protocols in place, during drought  
2 periods you're not going to get more water by a  
3 consumption cap.

4 Putting aside whether that's close to  
5 the gavel -- gravel situation or not, I'm  
6 really not addressing that --

7 MR. GARRE: Right.

8 JUSTICE SOTOMAYOR: But I do want to  
9 go to the non-drought time.

10 MR. GARRE: Right.

11 JUSTICE SOTOMAYOR: And as I read his  
12 report, he -- he does say there was no evidence  
13 of the cap providing you with more water. And,  
14 in fact, I did find plenty of evidence of that.  
15 So I'm not quite sure. And he discussed some  
16 evidence and rejected it as meaningful.

17 So point me to evidence he didn't  
18 discuss and explain why it's meaningful.

19 MR. GARRE: Sure. I mean, first of  
20 all, just to be clear, if Georgia's consumption  
21 is limited, it's going to result in more water  
22 in the system and that water is going to flow  
23 through --

24 JUSTICE SOTOMAYOR: And that's Justice  
25 Kagan's logic point.

1 MR. GARRE: Well, no --

2 JUSTICE SOTOMAYOR: But I'm -- I'm --

3 MR. GARRE: -- the Special Master  
4 recognizes that because, for example, on pages  
5 6 and 30 -- 37 of his report, he recognizes  
6 that the -- the Woodruff facilities, a  
7 run-of-the river facility, water's going to go  
8 through it. The United States recognizes that  
9 on page 33 of its brief.

10 JUSTICE SOTOMAYOR: They -- they --  
11 they agree with you.

12 MR. GARRE: That water is going to go  
13 through. And so, if we're talking about the  
14 non-drought periods, what I would point you to,  
15 for example, is the 2016 biological opinion by  
16 the Fish and Wildlife Services, JX 168 at page  
17 50, where it talks about the benefits of  
18 additional water coming into the system.

19 I would point you to the Hornberger  
20 direct testimony at paragraph 53 where it talks  
21 about the benefits of having additional water  
22 come through to help reduce the salinity for  
23 the mussels.

24 I would -- I would point you to the  
25 Allen direct, paragraph 3-D, where it talks

1 about the benefits of even modest additions of  
2 waters and helping to halt an irreversible  
3 cycle.

4 I would point you to the White direct  
5 testimony, paragraph 164, where it makes  
6 similar claims about this. These are all  
7 supporting --

8 JUSTICE SOTOMAYOR: I -- I -- I agree.

9 MR. GARRE: Okay.

10 JUSTICE SOTOMAYOR: But where do they  
11 quantify it to show that the improvement would  
12 be meaningful? How -- how --

13 MR. GARRE: All of those talk about  
14 how adding additional water, even in  
15 non-drought periods, helping the system  
16 rejuvenate is going to have a meaningful,  
17 beneficial effect. Do they have a precise --

18 JUSTICE SOTOMAYOR: And so your  
19 argument about the standard is that you didn't  
20 have to prove the exact amount, you just had to  
21 prove that it was meaningful?

22 MR. GARRE: Exactly. And this Court  
23 said exactly that in Colorado versus New Mexico  
24 where the Court said that absolute precision is  
25 not required. Instead, this is an equitable

1 proceeding governed by broad and flexible --

2 JUSTICE GORSUCH: Mr. Garre, you talk  
3 about a burden-shifting regime. And I want to  
4 -- I want to understand your -- your thought on  
5 that a little bit more clearly.

6 So, once you show that there are  
7 benefits, you think then what happens?

8 MR. GARRE: Well, actually, I think,  
9 and this is laid out in Colorado versus New  
10 Mexico, Footnote 13, I think, is first, we have  
11 the burden, by clear and convincing evidence,  
12 to show that we have suffered real harm as a  
13 result of Georgia's upstream consumption.

14 Once we meet that burden, the Special  
15 Master I think concluded that we did, or he  
16 assumed we did at the very least, then the  
17 burden shifts to Georgia essentially to show  
18 that the costs of the decree would be so much  
19 that they outweigh the injury that Florida is  
20 suffering.

21 And part of that inquiry --

22 JUSTICE GORSUCH: Well, now, does the  
23 burden ever shift back to you to prove your  
24 case at the end of the day that the benefits  
25 you seek outweigh the harms you'd cause or --

1 MR. GARRE: Well, that's --

2 JUSTICE GORSUCH: -- or does the  
3 burden ultimately rest with Georgia as a  
4 defendant, in your view --

5 MR. GARRE: I think --

6 JUSTICE GORSUCH: -- and can that be  
7 -- can that be right?

8 MR. GARRE: First of all, I think  
9 whichever way you think the burden lies at the  
10 end, we meet it under the correct  
11 redressability standard.

12 Second of all, I think what this Court  
13 has talked about is when you get to that  
14 equitable balancing stage, the burden is on the  
15 diverting state to show that it's -- that it --  
16 it either cost too much or it's not worth it.

17 JUSTICE GORSUCH: Look, I thought that  
18 the burden ultimately was for the plaintiff who  
19 wishes to alter the status quo to show that the  
20 benefits he wishes to obtain significantly  
21 outweigh the harms that the relief he seeks  
22 would cause. Am I wrong about that?

23 MR. GARRE: Well, I think you are  
24 under Colorado versus New Mexico, but -- but if  
25 you are right about that, Your Honor, I would



1 say that we have met that and that the Special  
2 Master's --

3 JUSTICE GORSUCH: Okay. Help me with  
4 that. Assume I'm -- I'm stuck on that  
5 standard.

6 MR. GARRE: Sure.

7 JUSTICE GORSUCH: How do you meet that  
8 high threshold seeking -- seeking this Court's  
9 equitable --

10 MR. GARRE: First of all, assume no  
11 change in the core operations. The United  
12 States itself recognizes, and this is at page  
13 28 of its brief, that a decree limiting  
14 Georgia's consumption is going to benefit  
15 Florida because it's going to reduce the  
16 frequency, severity, and duration of the worst  
17 possible periods, the drought conditions.  
18 That's point number 1.

19 The second point is, is that the  
20 United States has reckoned -- the Army Corps of  
21 Engineers and the United States have recognized  
22 that if this Court were to enter a decree in  
23 this case, the Army Corps of Engineers would  
24 review that decree and would adjust its  
25 operations accordingly, so that it would --

1 JUSTICE GORSUCH: Well, let's just  
2 stick with the non-drought operations. Okay?  
3 Assume my standard. How do you win under the  
4 non-drought years?

5 MR. GARRE: I think we have to show  
6 that it is a likelihood of at least partial  
7 redress. And I think that we have shown that  
8 because --

9 JUSTICE SOTOMAYOR: Assume that.  
10 Let's go to the real question, which is if it's  
11 your burden to prove the balance, assume that,  
12 how have you shown that the benefit to you is  
13 greater than the cost to them?

14 MR. GARRE: Okay.

15 JUSTICE GORSUCH: Thank you.

16 MR. GARRE: First of all, Justice  
17 Sotomayor, to answer that question, you have to  
18 know what the costs to them are. And there's a  
19 dispute between the parties about that.

20 They argue in their brief it's going  
21 to cost them \$350 million a year. In fact, our  
22 witness, Mr. Sundean, put on evidence it was  
23 going to be \$35 million a year, and the Special  
24 Master didn't make findings on that because he  
25 short circuited these decisions --

1           JUSTICE GORSUCH:  So is that your real  
2  beef then, that at the end of the day that the  
3  Special Master went off track on  
4  redressability, with non-drought years, you  
5  have redressability, and that he should have,  
6  therefore, conducted a more thorough balancing  
7  test in weighing the equities on the  
8  non-drought years at the very least?

9           MR. GARRE:  Yes, ultimately that's  
10 what we think should happen next, and in that  
11 proceeding what you would take into account is,  
12 okay, what's the full extent of Florida's  
13 injuries?  The Special Master has found that  
14 we've been gravely injured with respect to --  
15 to oysters.

16           He didn't make findings on the  
17 threatened Gulf sturgeon or the threatened  
18 mussels in the Apalachicola River.  He didn't  
19 make those findings yet.

20           JUSTICE KAGAN:  But, again, this goes  
21 back to my first question.  Suppose the Special  
22 Master thought, you know, I can't even begin to  
23 do a cost/benefit analysis in the way that you  
24 would have liked him to because Florida hasn't  
25 shown that they're going to benefit at all.  So

1 it doesn't matter what the costs are with  
2 respect to Georgia. They could be fairly  
3 minimal.

4 But Florida hasn't put on any evidence  
5 that they're going to get enough water as a  
6 result of these consumption caps going into  
7 place that would improve their ecosystems,  
8 improve the oyster beds or so forth, and  
9 without that, I can't go forward.

10 MR. GARRE: Your Honor, there was  
11 significant evidence put in through our  
12 witnesses, for example, Dr. Hornberger, about  
13 the -- the benefits of the water coming through  
14 and --

15 JUSTICE KAGAN: Well, there are two  
16 kinds of evidence that you might be talking  
17 about. One is evidence saying a lot more water  
18 would help our ecosystems. And I think that  
19 there is a fair amount of evidence with respect  
20 to that.

21 But there's a prior question, which is  
22 exactly how much more water would you get --

23 MR. GARRE: Yes.

24 JUSTICE KAGAN: -- if these caps went  
25 into place? And that's the place where it

1 seems to me that there's kind of a vacuum.

2 MR. GARRE: Well, I don't think so.

3 And, you know, what I would point you to, for  
4 example, is the United States' post-trial  
5 brief.

6 If you look at page 19 of that brief,  
7 I think, it recognizes that during low flow  
8 periods, not the extreme low flows but the low  
9 flows bumping up on the worst possible harm,  
10 during that period, additional water coming in  
11 would go through to Georgia.

12 And the example that it has is if you  
13 had a flow rate at the border of 6,000 cfs and  
14 additional water coming through of 2,000 cfs,  
15 that you then have 8,000 going through. That's  
16 -- that's a lot of water.

17 And our -- our witnesses  
18 overwhelmingly show that that kind of water was  
19 going to have a significant impact on the  
20 Apalachicola River.

21 And I -- and I think, again, going  
22 back to the -- stepping -- taking a step back  
23 in terms of what we have to show in this  
24 proceeding, this Court has always made clear in  
25 this setting that uncertainties about the

1 future are not a basis to provide a brief, a  
2 decree, that absolute precision is not  
3 required. And that's because this Court is in  
4 the realm of equity.

5 This Court has never had a situation  
6 where it's found harm, it's found inequitable  
7 conduct, and its found that relief is possible.  
8 I think you have to conclude on this record  
9 that relief is possible.

10 And the Special Master, the error that  
11 he committed, and I would agree with Justice  
12 Gorsuch on this, is he got off track on this  
13 threshold redressability ruling, that instead  
14 he should have continued the good work that he  
15 had done, made all the findings in terms of all  
16 the harm that Florida suffers, the costs that  
17 Georgia is going to incur from the decree, and  
18 then determine whether or not a decree, an  
19 equitable apportionment, should be entered.

20 Now, if I could go to the Army Corps  
21 of Engineers because I do think that this is a  
22 separate basis for finding redressability. And  
23 to be fair to the Special Master, he didn't  
24 have the benefit of this. And that's the  
25 record of the decision that was issued about

1 six weeks after the Special Master made his  
2 recommendation here, where the Army Corps of  
3 Engineers said if this Court enters a decree in  
4 this case, it would review that decree and  
5 adjust its operations accordingly.

6 CHIEF JUSTICE ROBERTS: Is that the  
7 March 30 decree?

8 MR. GARRE: Yes, Your Honor.

9 CHIEF JUSTICE ROBERTS: Okay.

10 MR. GARRE: And I think it -- that's  
11 on page 18 of that document.

12 And the United States importantly  
13 recognizes that, in its brief at page 30 of its  
14 brief, that that -- that a decree in this case  
15 would form a part of the constellation of laws  
16 that the Army Corps of Engineers would have to  
17 look to in order to decide how to respond to  
18 that.

19 We don't know what the Army Corps of  
20 Engineers is going to do, but I think common  
21 sense would tell you that any good government  
22 actor would look at a decision by this Court  
23 and seek to adjust its operations in a way that  
24 would facilitate that decree. And you can just  
25 take the Army Corps of Engineers' word for it.

1           At page 4 of that document, the record  
2 of decision, the Army Corps of Engineers says  
3 that it has continually asserted its  
4 preparedness to implement an agreed upon  
5 formula by the states. And that's certainly  
6 consistent with the Army Corps of Engineers'  
7 statements over time.

8           And then it also goes on to say that  
9 the same formula could be instituted by  
10 Congress or by the Court. Now, the Army Corps  
11 of Engineers, again, it has continually  
12 asserted its preparedness to implement a  
13 decree.

14           And that makes sense because, as the  
15 government has recognized in this case, a  
16 decree equitably apportioning the waters is  
17 only going to result in more water in the  
18 system and make it easier for the Army Corps of  
19 Engineers to accomplish its objectives.

20           So then the question is what would the  
21 Army Corps of Engineers do with that water?  
22 Would it somehow stash it away or just send it  
23 to Georgia or would it look at the decision, a  
24 decision by this Court in this case and seek to  
25 facilitate that decision rather than frustrate



1 it?

2 I think everything would tell you,  
3 including the words that I just quoted from the  
4 Army Corps of Engineers' own decision, that it  
5 would seek to facilitate the decision. And  
6 that in itself should provide redressability.  
7 The only way that it wouldn't provide  
8 redressability is if we have to show a  
9 certainty of complete relief today.

10 This Court has never required that.  
11 If you look at your redressability cases like  
12 Bennett versus Spears and Utah versus Evans,  
13 this Court has treated situations where even  
14 though the government wouldn't be formally  
15 bound by a decision by this Court, it's  
16 recognized that where that decision would  
17 change the laws under which the agency would  
18 have to operate, as was true in Bennett versus  
19 Spears, that that was sufficient to establish  
20 redressability because that made redress  
21 likely.

22 And I think -- I've pointed you,  
23 Justice Kagan, to -- to evidence in the record.  
24 I would encourage you to read Mr. Hornberger's  
25 testimony and other testimonies about the

1 benefits of additional water. But I think --

2 JUSTICE SOTOMAYOR: You haven't  
3 answered Justice Kagan's question, though. We  
4 -- I accept there's plenty of evidence on the  
5 benefits of additional water.

6 MR. GARRE: Right.

7 JUSTICE SOTOMAYOR: She seems to be  
8 saying the link that you haven't proven is  
9 that, by putting in the consumption limit, that  
10 that water would actually reach Florida.

11 MR. GARRE: Oh, okay. Well --

12 JUSTICE SOTOMAYOR: That -- that I  
13 think is her question. That's mine too.

14 MR. GARRE: Okay. I mean, first of  
15 all, I don't think the Special Master disagreed  
16 with the notion that the water is going to go  
17 flew -- through. I -- I think that he accepted  
18 that. And I think if you look at pages 6 and  
19 --

20 JUSTICE KAGAN: Have you at all  
21 quantified how much water you were going to get  
22 as a result of these consumption caps?

23 MR. GARRE: And -- and I think --  
24 again, I think we did. I think if you look at  
25 the testimony, the Hornberger testimony in

1 particular, other testimony about the amount of  
2 water, there certainly was a -- a dispute  
3 between the parties.

4 JUSTICE SOTOMAYOR: If you have those  
5 cites, mention them. You've mentioned  
6 Hornberger --

7 MR. GARRE: And I think, again, I  
8 mean, all that the Special Master -- the lens  
9 that he was looking at the record in was  
10 whether we had shown that there was a guarantee  
11 that the Corps would exercise its discretion in  
12 a particular way, and he concluded that we  
13 haven't shown to certainty that the water would  
14 get through.

15 JUSTICE SOTOMAYOR: Do you have  
16 another cite besides the one you've mentioned,  
17 Hornberger?

18 MR. GARRE: Well, in terms of the --  
19 the water that would go through?

20 JUSTICE SOTOMAYOR: Yes.

21 MR. GARRE: I mean, I also would point  
22 you to the government's brief, that recognizes  
23 on page 33 --

24 JUSTICE SOTOMAYOR: It doesn't  
25 quantify it, though.

1           MR. GARRE: It -- well, we're talking  
2 about -- our case was focused on showing that a  
3 consumption cap would result in anywhere from  
4 2,000 to 1,000 additional CFS flowing through  
5 and that -- the limits we put in place. And I  
6 think the evidence is very specific, when you  
7 get into it, about that water flowing through.

8           JUSTICE SOTOMAYOR: I see.

9           MR. GARRE: And --

10          JUSTICE SOTOMAYOR: So you're saying  
11 that the drought information holds true at  
12 minimum for the non-drought one? So a certain  
13 amount --

14          MR. GARRE: Well, that holds flew --  
15 true for the water going through. And then  
16 there are two questions. Then the question  
17 becomes: When is that water going to go  
18 through?

19                 And -- and on that, I think first you  
20 have to take as a given that water going  
21 through, even outside of those drought periods,  
22 is going to reduce the frequency and severity  
23 of the drought periods. And that in itself is  
24 relief. It's meaningful relief. And the  
25 government recognizes that at page 28.

1           On the question of water going through  
2     in drought operations, we put in evidence --  
3     substantial evidence about how the Corps has  
4     released -- made discretionary releases of  
5     water at the Woodruff Dam even in drought  
6     operations, going back decades.

7           And it also gets to this question of  
8     how would the Corps respond to a decree in this  
9     case? And in a sense, I mean, the Court is in  
10    an unusual situation here where there's sort of  
11    a chicken and the egg problem; you know that  
12    you have a serious problem here. The  
13    Apalachicola region has suffered serious harm.  
14    Not only have its oysters been decimated but  
15    really a way of life as such --

16           JUSTICE SOTOMAYOR: So really what the  
17    issue is -- let me see if I understand it.

18           MR. GARRE: Sure.

19           JUSTICE SOTOMAYOR: You claim that --  
20    I have to go back to the report and read it now  
21    to find this -- that the Special Master  
22    accepted that a consumption cap of 1- to 2,000  
23    at minimum would flow through, drought and  
24    non-drought years.

25           MR. GARRE: Well, let me --

1 JUSTICE SOTOMAYOR: Or I --

2 MR. GARRE: -- let me say it this way:  
3 I think the Special Master did find that we  
4 didn't prove to a certainty, a certainty, there  
5 was no guarantee, that's what he said on page  
6 69, that the Corps would allow additional water  
7 through during drought periods.

8 JUSTICE SOTOMAYOR: I know that's what  
9 it said.

10 MR. GARRE: Right.

11 JUSTICE SOTOMAYOR: I don't care what  
12 happens with the Corps. I'm saying did he find  
13 that the consumption cap would release a  
14 certain minimum amount of water that would get  
15 to the Corps?

16 MR. GARRE: He -- he didn't -- he  
17 certainly didn't frame it this way -- that way,  
18 Your Honor, in terms of you can't say that I  
19 found that X amount is going on to go through.  
20 I don't think he was quart -- he felt himself  
21 --

22 JUSTICE KAGAN: Is your view,  
23 Mr. Garre -- talk about non-drought  
24 operations --

25 MR. GARRE: Sure.

1 JUSTICE KAGAN: -- am I right? Is  
2 your view that if a consumption cap saves --  
3 you know, saves 2,000 cubic feet of water, that  
4 all of that necessarily gets through to  
5 Florida?

6 MR. GARRE: Yes. I mean, that's the  
7 way nature --

8 JUSTICE KAGAN: Just by physics?

9 MR. GARRE: By physics, exactly. And  
10 eventually it's going to get through. The  
11 United States says it right in page 33 of its  
12 brief where it says it's timing.

13 JUSTICE BREYER: I mean, that's true,  
14 but the question -- the mystery to me -- and I  
15 have only one question, which I could ask all  
16 three groups of lawyers, is why isn't the  
17 United States in this case? I mean, they --  
18 they have -- they give mystical answers. I  
19 mean, the -- I don't understand it.

20 As I -- maybe I don't -- look, as I  
21 understand the whole thing, imagine that I'm  
22 standing south of the Woodruff in that  
23 Apalachicola Bay or the river, I'm standing  
24 there in the south, okay? And suppose about  
25 2,000 cubic feet comes from the Flint River.

1 And now what the Corps will do with the other  
2 river, which is the Chattahoochee, it'll make  
3 certain it gets up to 4500, so they put in  
4 2500.

5 Now, if one day instead of 2,000 in  
6 this drought period comes down to Flint, 3,000  
7 comes down to Flint, why in heavens name  
8 doesn't the Corps send a little less and a  
9 little more? In other words, what they're  
10 thinking is, well, if 2,000 comes down, then  
11 the Corps will reduce that part that it sends  
12 down the Chattahoochee by 2,000.

13 That's a pretty tough position.  
14 Wouldn't they be a little grateful? Wouldn't  
15 they think anything of the oysters? Wouldn't  
16 they say let's at least give them a  
17 teaspoonful? We've saved 2,000 cubic feet of  
18 water. So let's give them a little bit of it.

19 Now, the obvious people to answer that  
20 question is the Corps. And whereas the other  
21 case wants to get rid of them, in your case,  
22 you don't want them. But I would like them  
23 here --

24 (Laughter.)

25 JUSTICE BREYER: -- so I could ask



1       them that.  You're not going to give them a  
2       teaspoon of water?  And that's in the drought  
3       years.  And in the non-drought years, we know  
4       there's a lot of extra water stuffed up  
5       there -- you don't even have to get down into  
6       Zone 3 -- because so much is flowing down to  
7       Flint.

8                   Well, that's -- that's pretty good,  
9       isn't it, because if you have a lot more in  
10      Zone 3 up there on the Chattahoochee, then you  
11      have more water to send down once the drought  
12      begins.  And won't you do it?  What reason is  
13      there for thinking you won't?  Okay?

14                   Now, that's as I understand this case,  
15      which I expect you to say you're way off base  
16      because I'd love to agree with you but I don't,  
17      or you might say, yeah, you're on base, that's  
18      the point.  I wonder.

19                   MR. GARRE:  Well, Justice Breyer, I  
20      mean, I think -- I think one way to think about  
21      the Corps' position in this case, which has  
22      evolved a bit --

23                   JUSTICE BREYER:  Am I basically on  
24      base?

25                   MR. GARRE:  I think you're on base to

1 think that life would be a lot easier if the  
2 Corps had intervened --

3 JUSTICE BREYER: Yeah, but I haven't  
4 got this right as the -- as --

5 MR. GARRE: But I think -- I think one  
6 question is -- is the light -- what the Corps  
7 has said to you in its brief and the --

8 JUSTICE BREYER: Well, what the Corps  
9 has said to me at the moment I'm assuming is  
10 sort of vague. My question is whether my  
11 question was a good question.

12 MR. GARRE: Well --

13 (Laughter.)

14 MR. GARRE: Yes. Without --  
15 absolutely, Justice Breyer. But -- but I think  
16 what the Corps has said to you in its brief  
17 today, and I think that this in itself compels  
18 that you not accept the Special Master's  
19 recommendation, is that, first, Florida would  
20 be benefitted by a decree insofar as it would  
21 reduce the frequency, severity, and duration of  
22 drought operations. That's on page 28.

23 Second, they stand by the Corps'  
24 statement in its record decision that they will  
25 review a decree by this Court and adjust its

1 operations accordingly.

2 And, third, they recognize that that  
3 decree would form a part of the constellation  
4 of laws by which the Corps would have to  
5 operate.

6 So there's every reason to believe  
7 that a decision in this Court imposing the  
8 decree that equity would demand would result in  
9 meaningful relief for Florida and we were not  
10 required to show anything more than that to  
11 allow this action to proceed.

12 If I may reserve the remainder of my  
13 time.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 MR. GARRE: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Primis.

18 ORAL ARGUMENT OF CRAIG S. PRIMIS  
19 ON BEHALF OF THE DEFENDANT

20 MR. PRIMIS: Mr. Chief Justice, and  
21 may it please the Court:

22 Florida has premised this entire case  
23 on the proposition that a cap on Georgia's  
24 water consumption alone would result in a  
25 material increase in water to Florida during

1 drought without any change to Army Corps  
2 operations.

3 After two years of discovery and a  
4 five-week trial, Florida failed to prove that  
5 case.

6 CHIEF JUSTICE ROBERTS: Well, but I  
7 don't think they've premised it entirely on  
8 that. They've premised it on the fact that the  
9 Corps may change how it allocates water.  
10 That's what they say in the March decision.  
11 "Should the Supreme Court issue a decree  
12 apportioning the waters of the ACF basin, the  
13 Corps would take those developments into  
14 account and adjust its operations accordingly."

15 So, I mean, the -- the decree granting  
16 Florida greater claims to water will at the  
17 very least change the facts on the ground and,  
18 according to the Corps itself, cause them to  
19 adjust its operations accordingly.

20 MR. PRIMIS: Mr. Chief Justice, we --  
21 we do need to distinguish between drought  
22 periods and non-drought periods. The entire  
23 trial was over drought periods and what the  
24 Corps would do.

25 The Corps just finished a 10 year

1 process of creating a Water Control Manual that  
2 determined that during times of drought,  
3 Florida is entitled to 5,000 cubic feet per  
4 second. That was blessed by the United States  
5 Fish and Wildlife Service, which studied the  
6 region and said that would be adequate to  
7 protect endangered species.

8 And so what the Corps said in the  
9 record of decision and clarified in its brief  
10 in this Court is that, of course, it would  
11 review and consider a decree or an order of  
12 this Court, but it also said explicitly that it  
13 is not bound by an order of this Court and that  
14 it may --

15 CHIEF JUSTICE ROBERTS: Right.

16 MR. PRIMIS: -- may not do anything.

17 CHIEF JUSTICE ROBERTS: Right. And it  
18 reminds me of sort of the contract bidding  
19 discrimination cases where you have someone was  
20 discriminated against during the bid process.

21 We don't require that person to show,  
22 well, if I hadn't been, I would have gotten the  
23 contract. We just say if you show you were  
24 discriminated against in the process, you get a  
25 fair shot like everybody else.

1           It seems to me it's asking an awful  
2           lot for Florida to have to say: We know that  
3           the Corps is going to change things the way it  
4           benefits us. Well, instead they just want to  
5           say, well, look, they're going to make a  
6           different decision if they've got more water to  
7           allocate.

8           MR. PRIMIS: Your -- Your Honor --

9           CHIEF JUSTICE ROBERTS: You'll be able  
10          to argue that. And right now they can't even  
11          argue that.

12          MR. PRIMIS: Well, Florida can  
13          certainly argue that, but the Corps has issued  
14          its Water Control Manual. There is an APA  
15          challenge that has been brought to that manual.  
16          That case is proceeding in the district court  
17          of District of Columbia.

18          Florida has not joined that suit. I  
19          suspect it's because the arguments that it  
20          would have to make in that suit would confirm  
21          that the Corps is, in fact, necessary to solve  
22          the problem.

23          And so there has been a lengthy  
24          administrative process where Florida has made  
25          all the same arguments it makes in this Court

1 and it chose not to challenge the Water Control  
2 Manual in district court.

3 JUSTICE BREYER: Did they say, look, I  
4 have in front of me this slightly  
5 incomprehensible chart, and -- and what I --  
6 what I derive from it is that, imagine now,  
7 nothing is coming down the Flint River.

8 And then tomorrow because they  
9 convince the mayor of Atlanta, whatever, to  
10 drink more Pepsi or something, or whatever they  
11 drink, Coca-Cola, I imagine, and -- and -- and  
12 whatever reason that is --

13 MR. PRIMIS: Yes, it would be -- it  
14 would be Coca-Cola, Justice Breyer.

15 JUSTICE BREYER: Yeah, I know that.  
16 The -- the -- the -- the 3,000 cubic feet comes  
17 down to Flint. Okay? So now the Corps doesn't  
18 have to give 5,000. It can only -- it need  
19 only give 2,000. See?

20 So it has 3,000 more. Am I right so  
21 far? So far?

22 MR. PRIMIS: I would quarrel with the  
23 hypothetical because there's no possibility of  
24 that much water being generated for  
25 consumption.

1 JUSTICE BREYER: Well, I'm just using  
2 it as a big example, but it's some amount.  
3 It's some amount. I'm just using it as a big  
4 example.

5 MR. PRIMIS: Okay. I accept the  
6 amount.

7 JUSTICE BREYER: Okay. So fine. Now,  
8 they have a lot more water, say in my  
9 hypothetical, 3,000 cubic feet. Now, what  
10 reason is there to think that they won't give a  
11 teaspoonful, they won't give a little bit at  
12 least, of that extra water they never thought  
13 they had to help the mussels and the oysters  
14 and the others down in Florida? What reason?  
15 It doesn't say in the chart what they'll do in  
16 that situation.

17 All it says is that they guarantee  
18 5,000 feet. They've got their 5,000. It  
19 happens that 3,000 is coming from Flint. And  
20 now what will they do with that extra? And --  
21 and the answer, I think, is we don't know.  
22 They won't say. But you'd think if we're being  
23 equitable here, it would be equitable to give  
24 at least a little bit to Florida.

25 Now, what's wrong with that?



1 MR. PRIMIS: Justice Breyer, the Corps  
2 is governed by a panoply of federal statutes,  
3 congressional dictates and mandates, as to how  
4 to control the water in this basin.

5 And it is not as simple as if extra  
6 water comes in, then you just pass it through  
7 to Florida because they have articulated one  
8 concern. There are multiple interests in the  
9 basin, there are multiple stakeholders, and  
10 multiple congressionally-defined purposes.

11 Having studied this basin for a  
12 decade, the Corps has determined that in  
13 periods of drought and under its drought  
14 operations, when the reservoirs get to a  
15 critically low level, the Corps will release  
16 5,000 cubic feet per second.

17 And that's not just an accidental  
18 number. That number was chosen because that  
19 number allows the Corps to protect the  
20 endangered species downstream, as the Fish and  
21 Wildlife Service has said, but also to protect  
22 water quality, water supply in Atlanta,  
23 navigation, flood control, hydropower. There's  
24 a multitude of reasons.

25 And --

1 JUSTICE GORSUCH: Can we --

2 JUSTICE BREYER: Well, but there --

3 JUSTICE GINSBURG: -- can we agree --  
4 can we agree that a cap at the very least would  
5 prevent -- would prevent the situation in  
6 Florida from getting worse? That is, that if  
7 we do nothing, then the situation in Florida  
8 can get worse, even worse than it is now.

9 If there is a cap, then Florida is  
10 protected at least to that extent. It won't  
11 get worse. Is that not so?

12 MR. PRIMIS: That's not correct,  
13 Justice Ginsburg. In periods of drought, the  
14 Corps answered the question that it will  
15 continue to pass 5,000 CFS and store the  
16 remainder of the water saved by that cap in its  
17 reservoirs upstream until the drought --

18 JUSTICE SOTOMAYOR: So, what do we do  
19 with their non-drought statement in their brief  
20 where they say the U.S. does not mean to  
21 suggest that a consumption cap would provide no  
22 benefit to the Corps' operation in the basin or  
23 to Florida?

24 And they say: As explained to the  
25 Special Master, increased basin in-flows would

1 generally benefit the ACF system by delaying  
2 the onset of drought operations by allowing the  
3 Corps to meet the 5,000 CFS minimum flow during  
4 longer -- flow longer during extended drought  
5 and by quickening the resumption of normal  
6 operations after drought.

7 And, in fact, your adversary points to  
8 a lot of history showing that when there's  
9 increased water, the Corps gives increased  
10 water under its own protocol. The Corps says  
11 under its own protocols, when there's increased  
12 water during non-drought situations, more water  
13 flows to Florida.

14 Isn't that their case?

15 MR. PRIMIS: Justice Sotomayor, the  
16 Special Master at page 65 found unequivocally  
17 that Florida presented no evidence assessing  
18 the impact of a consumption cap on shortening  
19 the Corps' drought operations or on increased  
20 pass-through flows during --

21 JUSTICE SOTOMAYOR: Well, I disagree.  
22 If I can point to, your colleague has  
23 suggested, to a lot of record evidence, not  
24 just the SG's statement, but statements from  
25 Dr. Allen, Dr. Gilbert, Dr. Greenblatt, and

1 from other experts showing that, would the --  
2 would we just say the Special Master was wrong  
3 or that he didn't explain why that evidence was  
4 inadequate?

5 MR. PRIMIS: Well, he wasn't wrong.  
6 He was absolutely correct. All of the  
7 individuals that Your Honor just mentioned are  
8 biologists or deal with issues like salinity.

9 The -- the people who -- that Florida  
10 hired to assess whether water would pass  
11 through in these non-drought, shortened drought  
12 operations periods were Dr. Hornberger and  
13 Dr. Shanahan. Neither of them provided any  
14 testimony on this case because --

15 JUSTICE KAGAN: Well, Mr. Primis, how  
16 is it possible that it wouldn't pass through?  
17 I mean, if I understand what Mr. Garre said,  
18 it's something like this: If Georgia consumes  
19 2,000 feet less of water, just as a matter of  
20 physics, it's all going to get to Florida.

21 So -- and now there does seem, as you  
22 suggest, to be not all that much in the record  
23 showing that that's true. But it seems as  
24 though it should be true.

25 Do you think it's not true?

1 MR. PRIMIS: With regard --

2 JUSTICE KAGAN: That all of that saved  
3 water will eventually go south?

4 MR. PRIMIS: The water -- it is a  
5 question of timing and when the water will go  
6 south. During a drought we know, the Corps has  
7 answered that question, and all the evidence at  
8 trial showed --

9 JUSTICE KAGAN: No, but I was talking  
10 about non-drought.

11 MR. PRIMIS: Correct. So let me --  
12 let me address that directly.

13 With regard to shortened drought  
14 operations, the evidence -- Georgia did present  
15 evidence on this. Florida did not.

16 And there's a reason, because I think,  
17 Your Honor, one of -- Justice Breyer or you  
18 maybe used the word common sense. There's  
19 nothing common sense about the operations of  
20 this basin. It is incredibly complicated.

21 There are five reservoirs. They're  
22 subjected to different rules by the Army Corps.  
23 They have different hydrologic conditions.  
24 They serve different purposes.

25 That's why we create or the Corps

1 creates complicated computer models, incredibly  
2 complicated, and both sides hired experts to  
3 evaluate the situation, your question under  
4 those models.

5 JUSTICE KAGAN: Well, can you give me  
6 an example of how it would be that an  
7 additional 2,000 units saved in Georgia would  
8 not benefit Florida to the same amount? How  
9 would that be possible?

10 MR. PRIMIS: Certainly. The -- the --  
11 the -- the problem is with the hypothetical  
12 because, as I said before, you cannot get 2,000  
13 cubic feet per second. Georgia consumes a much  
14 smaller amount of water, and this is just in  
15 the agricultural part of the state.

16 JUSTICE KAGAN: No, You're --

17 JUSTICE GORSUCH: Counsel, with  
18 respect, I think you're fighting the  
19 hypothetical --

20 MR. PRIMIS: Okay.

21 JUSTICE GORSUCH: -- and maybe --  
22 maybe you can direct your attention to the  
23 Corps' own statement --

24 MR. PRIMIS: Sure.

25 JUSTICE GORSUCH: -- and the SG's

1 statement, which Justice Sotomayor read, maybe  
2 that'll help move us along --

3 MR. PRIMIS: But --

4 JUSTICE GORSUCH: -- which suggests  
5 that in non-drought operations, there will be  
6 more water going to Florida --

7 MR. PRIMIS: Well --

8 JUSTICE GORSUCH: -- the government,  
9 the Federal Government says, and that that will  
10 reduce the onset of drought operations.

11 I would have thought, and maybe this  
12 is just where we're all stuck, is that's  
13 redressability, at least. And then you have to  
14 go weigh benefits and harms, which didn't seem  
15 to take place here.

16 MR. PRIMIS: Justice Gorsuch, the  
17 United States says explicitly in its brief at  
18 17 that those are hypotheticals. And they say  
19 also, this is a quote, "not attempts to  
20 precisely quantify any particular effect on  
21 flows" --

22 JUSTICE GORSUCH: No, there is no  
23 precise quantification, but on page 28, they  
24 say that it -- I'm not going to repeat it all  
25 again, but pretty darn clearly that they

1 anticipate that non-drought operations, there  
2 will be more water going through. Well, and  
3 that that will help diminish drought  
4 operations.

5 MR. PRIMIS: Georgia did quantify  
6 this. We ran the Corps' computer model. And  
7 we determined that as you add the water that  
8 could be saved, and Georgia didn't skimp, we  
9 modeled a 30 percent reduction in water use on  
10 the Georgia side of the line, and the truth is  
11 that the amount of water that that generates  
12 just does not move the period in which Florida  
13 goes -- I'm sorry, when the Corps goes into  
14 drought operations. It's just not enough water  
15 given passive systems --

16 JUSTICE KAGAN: No, but when you're in  
17 -- when you're in non-drought operations, how  
18 is it possible for the amount of water saved in  
19 Georgia not to benefit Florida?

20 MR. PRIMIS: Okay. Well, that -- let  
21 me -- that's, I think, a different question.

22 When there is plenty of water in the  
23 system, when there's rain, we're not in  
24 drought, Florida has not claimed it needs  
25 additional water. It gets plenty of water just



1 through gravity and -- and meteorology. And  
2 they have said --

3 JUSTICE KAGAN: Well, there must be a  
4 set of months that are dry, so that Florida  
5 wants more water, but not drought.

6 MR. PRIMIS: And the Corps' operations  
7 account for that, when -- and that's baked into  
8 the chart that the Special Master included in  
9 his -- his report.

10 But the important point is Florida, it  
11 is not a mistake that Florida didn't present  
12 this evidence. And I do understand the Court's  
13 statements that it seems common sense that it  
14 would shorten drought operations or make it  
15 fewer and farther between.

16 Florida didn't present its modeling  
17 because when Florida's expert, Dr. Hornberger,  
18 ran the ResSim model that the Corps uses, he  
19 tried a 50 percent cap, and it still didn't  
20 move drought operations.

21 JUSTICE BREYER: I have some --

22 MR. PRIMIS: It still started in  
23 August.

24 JUSTICE BREYER: -- I have some kind  
25 in front of me, a Bedient Demo 13, do you know

1 what I'm talking about, this thing?

2 MR. PRIMIS: Yes.

3 JUSTICE BREYER: Okay. They seemed to  
4 be Georgia. And they say 71 days in 2007  
5 Florida would receive more water flow from a  
6 cap on Georgia's water consumption, so that's  
7 71 days they get more water.

8 Seventy-one days they get more water,  
9 that means the Corps has to reduce less water.

10 If the Corps has -- and, you know, the  
11 Court can -- the Corps can save water on its  
12 side in the Chattahoochee, right? And so if  
13 they have more water saved up there in whatever  
14 those zones are, 1, 2, and 3, they have -- the  
15 can into 3 later. And if they get into 3  
16 later, they have more water to give out later.  
17 Is that right?

18 MR. PRIMIS: No, Justice Breyer.

19 JUSTICE BREYER: No, okay.

20 MR. PRIMIS: What I'm trying to tell  
21 you is that Dr. Bedient --

22 JUSTICE BREYER: Yeah.

23 MR. PRIMIS: -- is the expert that the  
24 Special Master credited --

25 JUSTICE BREYER: I know he was on your

1 side, but that doesn't --

2 MR. PRIMIS: But -- but the rest of it  
3 -- another part of his analysis shows that we  
4 don't shorten the drought operations. And  
5 those 71 days are small increments that don't  
6 benefit Florida. They're not material.

7 JUSTICE BREYER: All right. Is there  
8 any --

9 MR. PRIMIS: They're random.

10 JUSTICE BREYER: Is there -- probably  
11 your answer is going to be -- but I don't like  
12 to turn this thing on who presented what and on  
13 what time. I mean, it's a serious matter and a  
14 lot of people need the water. And there are  
15 all kinds of demands and it ought to go really  
16 on not who said what in such and such, but what  
17 the merits really are.

18 It's our case. Could we say: we  
19 want, or request, the SG to provide material  
20 experts and have a hearing and the hearing will  
21 focus on what would be best for the region,  
22 taken in light of all the demands, and Florida  
23 and Georgia and anyone else who wanted to, as  
24 an amicus, perhaps, could participate so that  
25 the Master can get a decision here about

1 whether or not there should be or should not be  
2 less water going from the Flint to the grazing  
3 areas in Atlanta. Do you see what I have in  
4 mind?

5 Is there some way of working that out?

6 MR. PRIMIS: The Court --

7 JUSTICE BREYER: I mean, not in  
8 Atlanta, south of Atlanta.

9 MR. PRIMIS: The Court surely has the  
10 power under its original --

11 JUSTICE BREYER: Would that make  
12 sense?

13 MR. PRIMIS: It would not, for two  
14 reasons. One is that the Army Corps just went  
15 through that entire process. Everyone was  
16 heard, and there is an APA litigation ongoing  
17 today, about just those questions that Your  
18 Honor articulated.

19 The second reason is that, while I  
20 understand --

21 JUSTICE SOTOMAYOR: Except that the  
22 government tells us that in its protocols, it's  
23 not charged with looking at the harm we're  
24 looking at; that it's not charged with looking  
25 at the harm to the oysters or the muscles or

1 the other things that are being affected here.

2 So I don't think it's done a study  
3 that addresses the issues of the harms that are  
4 at -- in question in this litigation.

5 MR. PRIMIS: That's -- that's not  
6 correct. The Army Corp, through the Endangered  
7 Species Act, does look at the muscles and  
8 sturgeon that live in the Apalachicola River.  
9 It has said that the Apalachicola Bay is beyond  
10 its jurisdiction, and that's why to Chief  
11 Justice Roberts' question, the Court has said  
12 in -- the -- the page 2-62 of its final  
13 environmental impact statement that it doesn't  
14 have the authority, without congressional  
15 action, which is why -- to -- to help the  
16 oysters or the bay.

17 And that's why this -- this case is an  
18 ill-fitting vehicle for that. So I do want to  
19 --

20 CHIEF JUSTICE ROBERTS: So what is the  
21 standard that you would require Florida to  
22 meet? Presumably they don't have to show to an  
23 absolute certainty that, you know, they'll --  
24 they'll benefit in a particular way, but what  
25 do you think the standard is?

1           MR. PRIMIS: The standard is that  
2 Florida should be required to show by clear and  
3 convincing evidence that its requested --

4           CHIEF JUSTICE ROBERTS: Where did that  
5 come from, by clear and convincing evidence?

6           MR. PRIMIS: That comes from Colorado  
7 versus New Mexico and Colorado versus Kansas.  
8 It is consistent --

9           CHIEF JUSTICE ROBERTS: Is that at the  
10 equitable weighing stage or as an initial  
11 matter, almost of standing?

12           MR. PRIMIS: Well, this is not a  
13 standing question. This is as a matter of  
14 equitable apportionment, the Court has  
15 consistently said both in equitable balancing  
16 and at the preliminary stage of injury and  
17 benefit that it is clear and convincing  
18 evidence, and that makes sense given the  
19 sovereign interests of the states at issue.  
20 The Court has consistently recognized that.  
21 And --

22           CHIEF JUSTICE ROBERTS: Okay. I  
23 interrupted you. You were saying they have to  
24 show by clear and convincing evidence --

25           MR. PRIMIS: That they are requested

1 remedy will provide a material benefit. And  
2 that is consistently mentioned in Washington  
3 versus Oregon; the Court asked is it materially  
4 more advantageous? In Idaho versus Oregon, the  
5 Court asked, are there going to be numbers of  
6 fish justifying additional restrictions? And  
7 Colorado versus New Mexico put the burden on  
8 the state seeking to disrupt the status quo.  
9 The burden to prove benefits of the diversion  
10 must substantially outweigh the harms that  
11 might result.

12 Now, Florida told the Court, the  
13 Special Master at the beginning of this case,  
14 this is a quote from Docket No. 125 at 29, "If  
15 you conclude after a trial that caps on  
16 consumption will not redress Florida's harm,  
17 then Florida will not have proved its case."

18 That's exactly what happened here.  
19 Florida did not prove its case. It did not  
20 prove that caps on consumption would redress  
21 their harm.

22 CHIEF JUSTICE ROBERTS: But, I mean,  
23 obviously that depends on what you mean by  
24 redress. If -- if the Corps came up and said  
25 we will definitely review our running of the

1 whole system in this -- in this basin, if the  
2 Supreme Court tells us that Florida under an  
3 equitable apportionment would get more water,  
4 we will take another look at it, is that  
5 redress?

6 MR. PRIMIS: It is not redress. It is  
7 too speculative. And the Court requires clear  
8 and convincing evidence of the material  
9 benefit.

10 But the Corps would have to go through  
11 a whole public comment process that has taken  
12 decades. And in that scenario --

13 JUSTICE GINSBURG: But why is that so?  
14 I think one of the things that we're told is  
15 that the Corps, although it may not be required  
16 to do so, has exceeded the minimum flows  
17 whenever water is available.

18 So -- so does -- the Corps, the past  
19 history is it has exceeded the minimum flows  
20 when water is available.

21 MR. PRIMIS: Well, in drought periods  
22 it shoots for roughly 5,000 cfs. It is very  
23 hard to get it right at 5,000. Sometimes it  
24 exceeds it. Sometimes there is rain --

25 JUSTICE GINSBURG: And why are we



1 dividing drought and non-drought? If the water  
2 is eventually going to get to Florida, that  
3 will help Florida. And that isn't to say that  
4 it has to be immediately.

5 That was one of the problems with the  
6 Special Master's report. He seemed to think  
7 that the benefit had to be immediate, instead  
8 of eventual.

9 MR. PRIMIS: Not immediate, but the --  
10 the time when the Corps is in drought  
11 operations can be very lengthy. And Florida,  
12 when the Corps is coming out of drought  
13 operations, there is plenty of rain.

14 Florida has not made the case that it  
15 needs more water at a time when there is plenty  
16 of rain and water in the system. It just --  
17 that water just will wash out to sea and won't  
18 benefit anybody.

19 When they really need it -- and that's  
20 what the role trial was about -- I'm sorry, Mr.  
21 Chief Justice --

22 CHIEF JUSTICE ROBERTS: Finish your  
23 sentence.

24 MR. PRIMIS: What the whole trial was  
25 about was can they get it during a drought?

1 And the Army Corps -- all the evidence shows  
2 conclusively that they cannot.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Mr. Kneedler.

6 ORAL ARGUMENT OF EDWIN S. KNEEDLER ON BEHALF OF  
7 THE DEPUTY SOLICITOR GENERAL, DEPARTMENT OF JUSTICE,  
8 FOR UNITED STATES AS AMICUS CURIAE

9 MR. KNEEDLER: Mr. Chief Justice and  
10 may it please the Court:

11 This case has proceeded from the  
12 outset on the premise that the Corps of  
13 Engineers' operations have to be taken as a  
14 given and any decree by this Court would not  
15 require a change in the Corps' operations.

16 That flowed directly from the fact  
17 that the United States is a required party, but  
18 has not been joined because it can't -- it  
19 hasn't waived its sovereign immunity. And,  
20 therefore, the Court cannot order the Corps of  
21 Engineers to take any different operation.

22 CHIEF JUSTICE ROBERTS: Well, we don't  
23 -- maybe -- maybe we can order the Corps and  
24 maybe we can't, but surely you will. I mean, I  
25 understand that's what you say in the March 30.

1 You're not going to ignore the determination by  
2 the Court that what Georgia has done is  
3 inequitable in arrogating to itself water that  
4 should be flowing down.

5 Now, maybe at the end of the day you  
6 say: Well, we've got other interests. We're  
7 still going to do this. But that would change  
8 the facts on the ground, wouldn't it? The  
9 decision from us?

10 MR. KNEEDLER: Yes, but let me -- let  
11 me explain the role of the Corps' operations  
12 here because I think it's important. This is  
13 not a -- an ordinary apportionment case where  
14 there is no act of Congress that -- that has  
15 been involved.

16 Here, there is an act of Congress.  
17 Now, Congress, pursuant to its Commerce Clause  
18 and other authorities, can enact statutes or  
19 approve compacts that regulate or apportion  
20 water in a stream. In Arizona versus  
21 California, for example, the Court concluded  
22 that the Boulder Canyon project had directly  
23 allocated the water and so there was nothing  
24 left for the Court, as a matter of equitable  
25 apportionment, to do.

1           Here, Congress has enacted a statute  
2 that doesn't directly apportion between the  
3 states, but it -- it does heavily regulate this  
4 river system. If the protocols that are in the  
5 Corps' manual had been enacted into law, I  
6 think there's no question that this Court would  
7 have to respect that, could not order the court  
8 to change it, and would have to take them as a  
9 given.

10           Here, what Congress did instead was to  
11 delegate to the Corps of Engineers the  
12 responsibility for balancing all those  
13 different interests and to do so through an  
14 extensive public process that takes into  
15 account all the basin interests, the -- the  
16 hydropower, which was one of the primary  
17 purposes of -- of this integrated system of  
18 dams to begin with; flood control; Endangered  
19 Species Act; and also re- -- refilling water  
20 and being conservative so if a -- if a drought  
21 is extended, that there will be enough water to  
22 serve all of those purposes.

23           Congress vested in the Corps of  
24 Engineers the responsibility --

25           JUSTICE BREYER: So, why don't you

1 just waive the sovereign immunity, get into  
2 this, and try to help the Special Master reach  
3 an equitable solution?

4 MR. KNEEDLER: For -- for the reason  
5 that I -- that I said, that here you have an  
6 act of Congress that delegates the power to the  
7 Corps in the first instance. The Corps'  
8 judgments would be reviewed under the APA,  
9 under the arbitrary and capricious standard,  
10 after it balances all of the interests. It's  
11 not really a role for this Court to -- to de  
12 novo determine what the role of the -- of the  
13 Corps of Engineers is in a situation like this.

14 JUSTICE SOTOMAYOR: So what about a  
15 consumption cap? It changes the rules on the  
16 ground. It gives more water.

17 In what ways does a determination by  
18 the Special Master that more water should come  
19 into the system negatively affect your  
20 discretion?

21 MR. KNEEDLER: Well, it depends how  
22 that plays out. As we say, I don't think the  
23 Court could order the Corps to take a -- a  
24 different position, but under the Corps' own  
25 protocols, there are circumstances in which

1 additional water that -- that would be freed up  
2 would flow to -- would flow to Florida.

3 There is -- not at the drought period,  
4 because the -- the Corps has set a minimum in  
5 order to preserve water in case a drought is  
6 extended, but above the 5,000 --

7 JUSTICE SOTOMAYOR: But you've taken  
8 no position on whether that extra release would  
9 actually provide a material benefit?

10 MR. KNEEDLER: Right. We have not  
11 taken -- we have not gotten in --

12 JUSTICE SOTOMAYOR: Why not? Could we  
13 ask you to take that position?

14 MR. KNEEDLER: I -- I -- I suppose you  
15 -- the -- the government could participate that  
16 -- in that as an evidentiary matter, but -- but  
17 it seems --

18 JUSTICE SOTOMAYOR: I asked a very  
19 specific question. Could we ask for an amicus  
20 brief that does that?

21 MR. KNEEDLER: I -- I suppose you  
22 could if you think --

23 JUSTICE BREYER: But what do you  
24 think? In other words, what do you think we  
25 should do?

1 (Laughter.)

2 MR. KNEEDLER: I --

3 JUSTICE SOTOMAYOR: Do you think we  
4 should --

5 MR. KNEEDLER: From the -- from the  
6 United States' perspective, we think that what  
7 -- we are not taking a position on whether  
8 Florida has shown that -- that a cap would  
9 produce sufficient water to justify the cap in  
10 terms of benefits to Florida.

11 Our interest here --

12 JUSTICE KAGAN: But you do think,  
13 Mr. Kneedler, am I wrong, your -- your brief  
14 says that if there were a consumption cap,  
15 Florida would get material amounts, more water.

16 MR. KNEEDLER: There would be  
17 additional water. It depends what you mean by  
18 "material." Would they be -- would -- would  
19 they come at the right time such that it would  
20 -- it would produce a material benefit to the  
21 ecosystem in Florida?

22 The -- the claim of injury isn't just  
23 -- doesn't -- can't depend just on whether  
24 there's more water going through but what would  
25 happen as a result of that water. Would the

1 ecosystem be -- be improved?

2 And so that is the evidentiary  
3 question.

4 JUSTICE KAGAN: So suppose that we  
5 think that looking at the record that was  
6 before the Special Master, there was quite a  
7 lot of evidence that, with more water, the  
8 ecosystem would be improved.

9 Do you think -- as I hear you, you're  
10 saying: And there would be more water.  
11 However much water is saved in Georgia comes to  
12 Florida.

13 MR. KNEEDLER: No, not -- that -- that  
14 is not necessarily true because the Corps  
15 operates the five dams as an integrated whole  
16 and it does so in part on basin inflow but in  
17 part on how much water is stored in the  
18 reservoirs at any particular time of year.

19 So there are certain situations,  
20 looking at total basin inflow, for example, if  
21 more water came in from the Flint River, that  
22 would free up water to be stored upstream for  
23 release during -- during low-flow periods.  
24 It's operated as an integrated whole. There is  
25 not a one-for-one tradeoff. Now, it maybe --



1           JUSTICE KAGAN: And that's true even  
2 in non-drought operations?

3           MR. KNEEDLER: Yes. Right above --  
4 right above drought operations, there is a  
5 period -- there -- under different times of  
6 year, from 5 to 10,000 feet, all of that flow  
7 would go to Florida, but there are other times  
8 when only 50 percent of the flow would go to  
9 Florida; there are still other times when none  
10 of the additional flow would go to Florida.  
11 That -- that is under the protocol.

12           But if the Court concludes that a cap  
13 within that, not -- not -- taking that  
14 framework as a given, that additional -- that a  
15 cap would produce additional water, the Corps  
16 does not have a stake in that fight.

17           I did want to address one point about  
18 the -- the prediction, the question of how  
19 certain it is what the Court will do -- the  
20 Corps will do. This is a different situation  
21 than the typical case where there's a third  
22 party and -- and how likely is it that will --  
23 something -- something will happen.

24           Congress has adopted a separate  
25 statutory regime in which the Corps has to

1     decide what to do with the range of additional  
2     water that may be available at any particular  
3     time.

4                   CHIEF JUSTICE ROBERTS:  But I just --  
5     I'm sorry to interrupt, but it does seem fairly  
6     important.  You say we can't order you to do  
7     something, but you've told us that you will  
8     take it into account.  And it seems to me that  
9     that's arguably real redress to Florida, that  
10    you're going to take into account a decision  
11    saying that, equitably, they're entitled to  
12    more water, that Georgia is improperly taking  
13    its water.

14                   MR. KNEEDLER:  Well --

15                   CHIEF JUSTICE ROBERTS:  And -- and --  
16    and you say you'll take it into account.

17                   MR. KNEEDLER:  Well, several things  
18    about that.

19                   To say that Florida is equitably  
20    entitled to more water can't ignore the regime  
21    that the Corps of Engineers has put in place  
22    because equity follows the law in an original  
23    case as any other.

24                   So if the allocation that the Corps  
25    has made, I think, has to be taken as a given

1 in the Court deciding what -- what is an  
2 equitable apportionment. And Florida --

3 JUSTICE KENNEDY: Well, you have said  
4 -- you have said you don't have any stake in  
5 the argument about whether more water would  
6 help Florida. Can't we ask you that question  
7 when we're talking about your expertise?

8 You say, well, whatever you decide,  
9 we'll use our expertise to follow it, but then  
10 you don't tell us what to decide and you're the  
11 experts.

12 MR. KNEEDLER: Well, the -- the Corps  
13 is the expert through the process of the -- of  
14 the manual, which was exactly what Congress  
15 meant. The Corps -- if -- if this Court --  
16 going back to the -- the Chief -- Chief  
17 Justice's question, if -- what would the Corps  
18 do if this Court entered a decree, first of  
19 all, if the Court entered the decree that  
20 Florida needed more water than the Corps of  
21 Engineers' operation protocols right now  
22 provide for, that's really sort of inconsistent  
23 with the way this case began, which is that --  
24 that -- that it was premised on the fact that  
25 the Corps' procedures would not have to be

1 changed.

2 And that's not to say that the -- that  
3 I suppose the Court could decide to do that  
4 anyway.

5 JUSTICE BREYER: But we don't know --  
6 see, I'm sure you have got this point, but, I  
7 mean, I don't know what to do without knowing  
8 what the Corps is likely to do. And I agree  
9 with you that it's Florida's fault; at the  
10 beginning, they said we don't want the Corps in  
11 here.

12 And now it seems like you're their  
13 best hope, all right? So -- so -- so that's  
14 why I seriously asked you the question, if you  
15 were sitting right here in my shoes, what would  
16 you do?

17 MR. KNEEDLER: Well, what -- one  
18 course would be, if -- if you agree that  
19 Florida has not made the showing that it --  
20 that it said that it would make, that there  
21 would be material benefits from the increased  
22 flows, Florida has the ability to challenge the  
23 Corps of Engineers' master manual and say that  
24 it does not provide sufficient downstream flows  
25 for Florida or to petition the Corps to adopt a

1 new -- a new manual and revise it.

2 It's not at all clear that the  
3 governing statutes -- may I finish? -- even  
4 allow the Corps of Engineers to allocate  
5 additional water for the Apalachicola Bay or to  
6 do so would be consistent with balancing all  
7 the other responsibilities the Corps has.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 Mr. Kneedler.

10 Mr. Garre, two minutes.

11 REBUTTAL ARGUMENT BY GREGORY G. GARRE  
12 ON BEHALF OF THE PLAINTIFF

13 MR. GARRE: Thank you, Your Honor.

14 First, the problem here is Georgia's  
15 consumption. The only way to address that is  
16 through an equitable apportionment. Second, we  
17 have heard a lot about the Master Control Water  
18 Manual. The record of decision itself says  
19 that the adoption of that manual, "in no way  
20 would it prejudice this Court in adopting an  
21 equitable apportionment."

22 And I think the arguments we have just  
23 heard would result in a great deal of  
24 prejudice.

25 JUSTICE SOTOMAYOR: Mr. Garre, what do

1 we do with the Special Master's conclusion on  
2 65-66, where they credit the report by  
3 Georgia's expert, Dr. Bedient, and Dr. Bedient  
4 did a remodeling and came to the conclusion  
5 that even if there was extra flow, it wouldn't  
6 materially change the environmental impact?

7 MR. GARRE: Right.

8 JUSTICE SOTOMAYOR: That's your  
9 greatest challenge.

10 MR. GARRE: Special Master is relying  
11 on the wrong redressability standard. The  
12 evidence -- Bedient was relying on a model that  
13 didn't take into account discretionary  
14 releases.

15 Let me give you some more evidence.  
16 Shanahan --

17 JUSTICE SOTOMAYOR: If we -- if we say  
18 that he couldn't, that he had to follow the  
19 Army Corps' and assume that the Army Corps'  
20 protocol would control, is Bedient right?

21 MR. GARRE: No, because he wouldn't be  
22 addressing non-drought conditions where we're  
23 going to get benefits with additional water  
24 coming through. The evidence --

25 JUSTICE SOTOMAYOR: Bedient did it on

1 just drought conditions not on --

2 MR. GARRE: That's what the focus.  
3 The evidence is that the water is going to come  
4 through --

5 JUSTICE SOTOMAYOR: So why does the  
6 Special Master rely upon it with the  
7 non-drought situation?

8 MR. GARRE: Your Honor, in the context  
9 of that discussion, I -- I don't think that  
10 reliance on that can support the conclusion  
11 that this case should end.

12 If I could give you some more  
13 evidence, Shanahan directed at paragraph 60  
14 explains the water that goes through.  
15 Shanahan's testimony, page 25, 23, says the  
16 water is going to go through. Allen paragraph  
17 85 says even modest amounts will help Florida.

18 Justice Ginsburg, you're right, even  
19 just preventing the situation from worsening is  
20 going to provide redress. Hornberger addresses  
21 that at paragraphs 125 to 126.

22 When it comes to what Congress has  
23 said, what I would point to is a statute that  
24 my friend, Mr. Kneedler, neglected but the  
25 United States pointed to in its post-trial --

1 its motion to dismiss brief, where it said that  
2 there is no reason to -- to assume that the  
3 Corps would ignore a decree and it pointed to  
4 the Compact statute passed in 1997 where  
5 Congress directed federal officials to the  
6 maximum extent possible to help facilitate the  
7 state's agreed-upon allocation formula, there's  
8 no reason to presume that the Corps would treat  
9 a decree by this Court any differently.

10 We would ask this Court to decline the  
11 Special Master's recommendation. Thank you,  
12 Your Honors.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel. The case is submitted.

15 (Whereupon, 12:07 p.m., the case was  
16 submitted.)

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## Official - Subject to Final Review

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