

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FLORIDA,)

4 Plaintiff,)

5 v.) No. 142, Orig.

6 GEORGIA,)

7 Defendant.)

8 - - - - -

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
7 returned to him for him to complete the work
8 that he has 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 redress 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, it's JX 168 at
17 page 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: Okay. First of all,
11 assume no change in the Corps operations. The
12 United States itself recognizes, and this is at
13 page 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 for operations?

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 it's found that relief is
8 possible. I think you have to conclude on this
9 record 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 about
12 what happens with the Corps. I'm saying did he
13 find 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 even going to give them
2 a 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 ultimate
8 --

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

13 MR. GARRE: Well --

14 (Laughter.)

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

24 Second, they stand by the Corps'
25 statement in its record of decision that they

1 will review a decree by this Court and adjust
2 its operations accordingly.

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. GARRE: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Primis.

19 ORAL ARGUMENT OF CRAIG S. PRIMIS

20 ON BEHALF OF THE DEFENDANT

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

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

1 material increase in water to Florida during
2 drought without any change to Army Corps
3 operations.

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

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

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

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

1 The Corps just finished a 10-year
2 process of creating a Water Control Manual that
3 determined that during times of drought,
4 Florida is entitled to 5,000 cubic feet per
5 second. That was blessed by the United States
6 Fish and Wildlife Service, which studied the
7 region and said that would be adequate to
8 protect endangered species.

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

16 CHIEF JUSTICE ROBERTS: Right.

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

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

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

1 fair shot like everybody else.

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

9 MR. PRIMIS: Your -- Your Honor --

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

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

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

24 And so there has been a lengthy
25 administrative process where Florida has made

1 all the same arguments it makes in this Court
2 and it chose not to challenge the Water Control
3 Manual in district court.

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

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

15 MR. PRIMIS: Yes, it would be -- it
16 would be Coca-Cola, Justice Breyer.

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

22 So it has 3,000 more. Am I right so
23 far? So far?

24 MR. PRIMIS: I would quarrel with the
25 hypothetical because there's no possibility of

1 that much water being generated for
2 consumption.

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

7 MR. PRIMIS: Okay. I accept the
8 amount.

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

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

1 at least a little bit to Florida.

2 Now, what's wrong with that?

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

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

13 Having studied this basin for a
14 decade, the Corps has determined that in
15 periods of drought and under its drought
16 operations, when the reservoirs get to a
17 critically low level, the Corps will release
18 5,000 cubic feet per second.

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

1 a multitude of reasons.

2 And --

3 JUSTICE GINSBURG: Can we --

4 JUSTICE BREYER: Well, but there --

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

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

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

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

1 And they say: As explained to the
2 Special Master, increased basin in-flows would
3 generally benefit the ACF system by delaying
4 the onset of drought operations by allowing the
5 Corps to meet the 5,000 cfs minimum flow during
6 longer -- flow longer during extended drought
7 and by quickening the resumption of normal
8 operations after drought.

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

16 Isn't that their case?

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

23 JUSTICE SOTOMAYOR: Well, I disagree.
24 If I can point to, your colleague has
25 suggested, to a lot of record evidence, not

1 just the SG's statement, but statements from
2 Dr. Allen, Dr. Gilbert, Dr. Greenblatt, and
3 from other experts showing that, would the --
4 would we just say the Special Master was wrong
5 or that he didn't explain why that evidence was
6 inadequate?

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

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

17 JUSTICE KAGAN: Well, Mr. Primis, how
18 is it possible that it wouldn't pass through?
19 I mean, if I understand what Mr. Garre said,
20 it's something like this: If Georgia consumes
21 2,000 feet less of water, just as a matter of
22 physics, it's all going to get to Florida.

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

1 though it should be true.

2 Do you think it's not true?

3 MR. PRIMIS: With regard --

4 JUSTICE KAGAN: That all of that saved
5 water will eventually go south?

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

11 JUSTICE KAGAN: No, but I was talking
12 about non-drought.

13 MR. PRIMIS: Correct. So let me --
14 let me address that directly.

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

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

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

1 They serve different purposes.

2 That's why we create or the Corps
3 creates complicated computer models, incredibly
4 complicated, and both sides hired experts to
5 evaluate the situation, your question under
6 those models.

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

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

18 JUSTICE KAGAN: No, you're --

19 JUSTICE GORSUCH: Counsel, with
20 respect, I think you're --

21 MR. PRIMIS: Yes?

22 JUSTICE GORSUCH: -- fighting the
23 hypothetical --

24 MR. PRIMIS: Okay.

25 JUSTICE GORSUCH: -- and maybe --

1 maybe you can direct your attention to the --
2 the Corps' own statement --

3 MR. PRIMIS: Sure.

4 JUSTICE GORSUCH: -- and the SG's
5 statement, which Justice Sotomayor read, maybe
6 that'll help move us along --

7 MR. PRIMIS: But --

8 JUSTICE GORSUCH: -- which suggests
9 that in non-drought operations, there will be
10 more water going to Florida --

11 MR. PRIMIS: Well --

12 JUSTICE GORSUCH: -- the government,
13 the federal government says, and that that will
14 reduce the onset of drought operations.

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

20 MR. PRIMIS: Justice Gorsuch, the
21 United States says explicitly in its brief at
22 17 that those are hypotheticals. And they say
23 also, this is a quote, "not attempts to
24 precisely quantify any particular effect on
25 flows" --

1 JUSTICE GORSUCH: No, there is no
2 precise quantification, but on page 28, they
3 say that it -- I'm not going to repeat it all
4 again, but pretty darn clearly that they
5 anticipate that non-drought operations, there
6 will be more water going through and that that
7 will help diminish drought operations.

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

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

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

25 When there is plenty of water in the

1 system, when there's rain, we're not in
2 drought, Florida has not claimed it needs
3 additional water. It gets plenty of water just
4 through gravity and -- and meteorology. And
5 they've said in their papers --

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

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

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

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

24 JUSTICE BREYER: I have some --

25 MR. PRIMIS: It still started in

1 August.

2 JUSTICE BREYER: -- I have some kind
3 in front of me, a Bedient Demo 13, do you know
4 what I'm talking about, this thing?

5 MR. PRIMIS: Yes.

6 JUSTICE BREYER: Okay. That seemed to
7 be Georgia. And they say 71 days in 2007
8 Florida would receive more water flow from a
9 cap on Georgia's water consumption, so that's
10 71 days they get more water.

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

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

21 MR. PRIMIS: No, Justice Breyer.

22 JUSTICE BREYER: No, okay.

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

25 JUSTICE BREYER: Yeah.

1 MR. PRIMIS: -- is the expert that the
2 Special Master credited --

3 JUSTICE BREYER: I know he was on your
4 side, but that doesn't --

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

10 JUSTICE BREYER: All right. Is there
11 any --

12 MR. PRIMIS: They're random.

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

21 It's our case. Could we say: we
22 want, or request, the SG to provide material
23 experts and have a hearing and the hearing will
24 focus on what would be best for the region,
25 taken in light of all the demands, and Florida

1 and Georgia and anyone else who wanted to, as
2 an amicus perhaps, could participate so that
3 the Master can get a decision here about
4 whether or not there should be or should not be
5 less water going from the Flint to the grazing
6 areas in Atlanta. Do you see what I have in
7 mind?

8 Is there some way of working that out?

9 MR. PRIMIS: The Court --

10 JUSTICE BREYER: I mean not in
11 Atlanta, south of Atlanta.

12 MR. PRIMIS: The Court surely has the
13 power under its original --

14 JUSTICE BREYER: Would that make
15 sense?

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

22 The second reason is that, while I
23 understand that we -- we --

24 JUSTICE SOTOMAYOR: Except that the
25 government tells us that in its protocols, it's

1 not charged with looking at the harm we're
2 looking at; that it's not charged with looking
3 at the harm to the oysters or the mussels or
4 the other things that are being affected here.

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

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

19 And that's why this is -- this case is
20 an ill-fitting vehicle for that. But I do want
21 to --

22 CHIEF JUSTICE ROBERTS: So what --
23 what is the standard that you would require
24 Florida to meet? Presumably they don't have to
25 show to an absolute certainty that, you know,

1 they'll -- they'll benefit in a particular way,
2 but what do you think the standard is?

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

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

8 MR. PRIMIS: That comes from Colorado
9 versus New Mexico and Colorado versus Kansas.
10 It's consistent --

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

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

24 CHIEF JUSTICE ROBERTS: Okay. I
25 interrupted you. You were saying they have to

1 show by clear and convincing evidence --

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

14 Now, Florida told the Court, the
15 Special Master at the beginning of this case,
16 this is a quote from Docket Number 125 at 29,
17 "If you conclude after a trial that caps on
18 consumption will not redress Florida's harm,
19 then Florida will not have proved its case."

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

24 CHIEF JUSTICE ROBERTS: But, I mean,
25 obviously that depends on what you mean by

1 redress. If -- if the Corps came up and said
2 we will definitely review our running of the
3 whole system in this -- in this basin, if the
4 Supreme Court tells us that Florida under an
5 equitable apportionment would get more water,
6 we'll take another look at it, is that redress?

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

11 But the Corps would have to go through
12 a whole public comment process that has taken
13 decades. And in that scenario, Chief Justice
14 Roberts --

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

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

23 MR. PRIMIS: Well, in drought periods,
24 it shoots for roughly 5,000 cfs. It's very
25 hard to get it right at 5,000. Sometimes it

1 exceeds it.

2 JUSTICE GINSBURG: Then why are we --

3 MR. PRIMIS: Sometimes there is rain

4 --

5 JUSTICE GINSBURG: -- why are we
6 dividing drought and non-drought? If the water
7 is eventually going to get to Florida, that
8 will help Florida. And that isn't to say that
9 it has to be immediately.

10 That was one of the problems with the
11 Special Master's report. He seemed to think
12 that the benefit had to be immediate, instead
13 of eventual.

14 MR. PRIMIS: Not immediate, but the --
15 the time when the Corps is in drought
16 operations can be very lengthy. And Florida,
17 when the Corps is coming out of drought
18 operations, there's plenty of rain.

19 Florida has not made the case that it
20 needs more water at a time when there's plenty
21 of rain and water in the system. It just --
22 that water just will wash out to sea and won't
23 benefit anybody.

24 When they really need it -- and that's
25 what the whole trial was about -- I'm sorry,

1 Mr. Chief Justice --

2 CHIEF JUSTICE ROBERTS: Finish your
3 sentence.

4 MR. PRIMIS: What the whole trial was
5 about was can they get it during a drought?
6 And the Army Corps -- all the evidence shows
7 conclusively that they cannot.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Kneedler.

11 ORAL ARGUMENT OF EDWIN S. KNEEDLER ON BEHALF OF
12 THE DEPUTY SOLICITOR GENERAL, DEPARTMENT OF JUSTICE,
13 FOR UNITED STATES AS AMICUS CURIAE

14 MR. KNEEDLER: Mr. Chief Justice, and
15 may it please the Court:

16 This case has proceeded from the
17 outset on the premise that the Corps of
18 Engineers' operations have to be taken as a
19 given and any decree by this Court would not
20 require a change in the Corps' operations.

21 That flowed directly from the fact
22 that the United States is a required party but
23 has not been joined because it can't -- it
24 hasn't waived its sovereign immunity. And,
25 therefore, the -- the Court cannot order the

1 Corps of Engineers to take any different
2 operation.

3 CHIEF JUSTICE ROBERTS: Well, we don't
4 -- maybe -- maybe we can order the Corps and
5 maybe we can't, but surely you will. I mean, I
6 understand that's what you say in the March 30.
7 You're not going to ignore the determination by
8 the Court that what Georgia has done is
9 inequitable in arrogating to itself water that
10 should be flowing down.

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

16 MR. KNEEDLER: Yes, but let me -- let
17 me explain the role of the Corps' operations
18 here because I think it's important. This is
19 not a -- an ordinary apportionment case where
20 there is no act of Congress that -- that has
21 been involved.

22 Here, there is an act of Congress.
23 Now, Congress, pursuant to its Commerce Clause
24 and other authorities, can enact statutes or
25 approve compacts that regulate or apportion

1 water in a stream. In Arizona versus
2 California, for example, the Court concluded
3 that the Boulder Canyon project had directly
4 allocated the water and so there was nothing
5 left for the Court, as a matter of equitable
6 apportionment, to do.

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

16 Here, what Congress did instead was to
17 delegate to the Corps of Engineers the
18 responsibility for balancing all those
19 different interests and to do so through an
20 extensive public process that takes into
21 account all the basin interests, the -- the
22 hydropower, which was one of the primary
23 purposes of -- of this integrated system of
24 dams to begin with; flood control; Endangered
25 Species Act; and also re- -- refilling water

1 and being conservative so if a -- if a drought
2 is extended, that there will be enough water to
3 serve all of those purposes.

4 Congress vested in the Corps of
5 Engineers the responsibility --

6 JUSTICE BREYER: So, why don't you
7 just waive the sovereign immunity, get into
8 this, and try to help the Special Master reach
9 an equitable solution?

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

20 JUSTICE SOTOMAYOR: So what about a
21 consumption cap? It changes the rules on the
22 ground. It gives more water.

23 In what ways does a determination by
24 the Special Master that more water should come
25 into the system negatively affect your

1 discretion?

2 MR. KNEEDLER: Well, it depends how
3 that plays out. As we say, I don't think the
4 Court could order the Corps to take a -- a
5 different position, but under the Corps' own
6 protocols, there are circumstances in which
7 additional water that -- that would be freed up
8 would flow to -- would flow to Florida.

9 There is -- not at the drought period,
10 because the -- the Corps has set a minimum in
11 order to preserve water in case a drought is
12 extended, but above the 5,000 --

13 JUSTICE SOTOMAYOR: But you've taken
14 no position on whether that extra release would
15 actually provide a material benefit?

16 MR. KNEEDLER: Right. We have not
17 taken -- we have not gotten in --

18 JUSTICE SOTOMAYOR: Why not? Could we
19 ask you to take that position?

20 MR. KNEEDLER: I -- I -- I suppose you
21 -- the -- the government could participate that
22 -- in that as an evidentiary matter, but -- but
23 it seems --

24 JUSTICE SOTOMAYOR: I asked a very
25 specific question. Could we ask for an amicus

1 brief that does that?

2 MR. KNEEDLER: I -- I suppose you
3 could if you think --

4 JUSTICE BREYER: But what do you
5 think? In other words, what do you think we
6 should do?

7 (Laughter.)

8 MR. KNEEDLER: I --

9 JUSTICE SOTOMAYOR: Do you think we
10 should --

11 MR. KNEEDLER: From the -- from the
12 United States' perspective, we think that what
13 -- we are not taking a position on whether
14 Florida has shown that -- that a cap would
15 produce sufficient water to justify the cap in
16 terms of benefits to Florida.

17 Our interest here --

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

22 MR. KNEEDLER: There would be
23 additional water. It depends what you mean by
24 "material." Would they be -- would -- would
25 they come at the right time such that it would

1 -- it would produce a material benefit to the
2 ecosystem in Florida?

3 The -- the claim of injury isn't just
4 -- doesn't -- can't depend just on whether
5 there's more water going through but what would
6 happen as a result of that water. Would the
7 ecosystem be -- be improved?

8 And so that is the evidentiary
9 question.

10 JUSTICE KAGAN: So suppose that we
11 think that looking at the record that was
12 before the Special Master, there was quite a
13 lot of evidence that, with more water, the
14 ecosystem would be improved.

15 Do you think -- as I hear you, you're
16 saying: And there would be more water.
17 However much water is saved in Georgia comes to
18 Florida.

19 MR. KNEEDLER: No, not -- that -- that
20 is not necessarily true because the Corps
21 operates the five dams as an integrated whole
22 and it does so in part on basin inflow but in
23 part on how much water is stored in the
24 reservoirs at any particular time of year.

25 So there are certain situations,

1 looking at total basin inflow, for example, if
2 more water came in from the Flint River, that
3 would free up water to be stored upstream for
4 release during -- during low-flow periods.

5 It's operated as an integrated whole. There is
6 not a one-for-one tradeoff. Now, it maybe --

7 JUSTICE KAGAN: And that's true even
8 in non-drought operations?

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

18 But if the Court concludes that a cap
19 within that, not -- not -- taking that
20 framework as a given, that additional -- that a
21 cap would produce additional water, the Corps
22 does not have a stake in that fight.

23 I did want to address one point about
24 the -- the prediction, the question of how
25 certain it is what the Court will do -- the

1 Corps will do. This is a different situation
2 than the typical case where there's a third
3 party and -- and how likely is it that will --
4 something -- something will happen.

5 Congress has adopted a separate
6 statutory regime in which the Corps has to
7 decide what to do with the range of additional
8 water that may be available at any particular
9 time.

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

20 MR. KNEEDLER: Well --

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

23 MR. KNEEDLER: Well, several things
24 about that.

25 To say that Florida is equitably

1 entitled to more water can't ignore the regime
2 that the Corps of Engineers has put in place
3 because equity follows the law in an original
4 case as any other.

5 So if the allocation that the Corps
6 has made, I think, has to be taken as a given
7 in the Court deciding what -- what is an
8 equitable apportionment. And Florida --

9 JUSTICE KENNEDY: Well, you have said
10 -- you have said you don't have any stake in
11 the argument about whether more water would
12 help Florida. Can't we ask you that question
13 when we're talking about your expertise?

14 You say, well, whatever you decide,
15 we'll use our expertise to follow it, but then
16 you don't tell us what to decide and you're the
17 experts.

18 MR. KNEEDLER: Well, the -- the Corps
19 is the expert through the process of the -- of
20 the manual, which was exactly what Congress
21 meant. The Corps -- if -- if this Court --
22 going back to the -- the Chief -- Chief
23 Justice's question, if -- what would the Corps
24 do if this Court entered a decree, first of
25 all, if the Court entered a decree that Florida

1 needed more water than the Corps of Engineers'
2 operation protocols right now provide for,
3 that's really sort of inconsistent with the way
4 this case began, which is that -- that -- that
5 it was premised on the fact that the Corps'
6 procedures would not have to be changed.

7 And that's not to say that the -- that
8 I suppose the Court could decide to do that
9 anyway.

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

17 And now it seems like you're their
18 best hope, all right? So -- so -- so that's
19 why I seriously asked you the question, if you
20 were sitting right here in my shoes, what would
21 you do?

22 MR. KNEEDLER: Well, what -- one
23 course would be, if -- if you agree that
24 Florida has not made the showing that it --
25 that it said that it would make, that there

1 would be material benefits from the increased
2 flows, Florida has the ability to challenge the
3 Corps of Engineers' master manual and say that
4 it does not provide sufficient downstream flows
5 for Florida or to petition the Corps to adopt a
6 new -- a new manual and revise it.

7 It's not at all clear that the
8 governing statutes -- may I finish? -- even
9 allow the Corps of Engineers to allocate
10 additional water for the Apalachicola Bay or
11 that to do so would be consistent with
12 balancing all the other responsibilities the
13 Corps has.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Kneedler.

16 Mr. Garre, two minutes.

17 REBUTTAL ARGUMENT OF GREGORY G. GARRE

18 ON BEHALF OF THE PLAINTIFF

19 MR. GARRE: Thank you, Your Honor.

20 First, the problem here is Georgia's
21 consumption. The only way to address that is
22 through an equitable apportionment.

23 Second, we've heard a lot about the
24 Master Control Water Manual. The record of
25 decision itself says that the adoption of that

1 manual, "in no way would it prejudice this
2 Court in adopting an equitable apportionment."

3 And I think the arguments we have just
4 heard would result in a great deal of
5 prejudice.

6 JUSTICE SOTOMAYOR: Mr. Garre, what do
7 we do with the Special Master's conclusion on
8 65-66, where they credit the report by
9 Georgia's expert, Dr. Bedient, and Dr. Bedient
10 did a remodeling and came to the conclusion
11 that even if there was extra flow, it wouldn't
12 materially change the environmental impact?

13 MR. GARRE: Right.

14 JUSTICE SOTOMAYOR: That's your
15 greatest challenge.

16 MR. GARRE: Special Master is relying
17 on the wrong redressability standard. The
18 evidence -- Bedient was relying on a model that
19 didn't take into account discretionary
20 releases.

21 Let me give you some more evidence.
22 Shanahan --

23 JUSTICE SOTOMAYOR: If we -- if we say
24 that he couldn't, that he had to follow the
25 Army Corps' and assume that the Army Corps'

1 protocol would control, is Bedient right?

2 MR. GARRE: No, because he wouldn't be
3 addressing non-drought conditions where we're
4 going to get benefits with additional water
5 coming through. The evidence --

6 JUSTICE SOTOMAYOR: Bedient did it on
7 just drought conditions, not on --

8 MR. GARRE: That's what the focus.
9 The evidence is the water is going to come
10 through the United States --

11 JUSTICE SOTOMAYOR: So why does the
12 Special Master rely upon it with the
13 non-drought situation?

14 MR. GARRE: Your Honor, in the context
15 of that discussion, I -- I don't think that
16 reliance on that can support the conclusion
17 that this case should end.

18 If I could give you some more
19 evidence, Shanahan direct at paragraph 60
20 explains the water that goes through.
21 Shanahan's testimony, page 25, 23, says the
22 water is going to go through. Allen paragraph
23 85 says even modest amounts will help Florida.

24 Justice Ginsburg, you're right, even
25 just preventing the situation from worsening is

1 going to provide redress. Hornberger addresses
2 that at paragraphs 125 to 126.

3 When it comes to what Congress has
4 said, what I would point to is a statute that
5 my friend, Mr. Kneedler, neglected but the
6 United States pointed to in its post-trial --
7 its motion to dismiss brief, where it said that
8 there's no reason to -- to assume that the
9 Corps would ignore a decree and it pointed to
10 the Compact statute passed in 1997 where
11 Congress directed federal officials to the
12 maximum extent possible to help facilitate the
13 state's agreed-upon allocation formula, there's
14 no reason to presume that the Corps would treat
15 a decree by this Court any differently.

16 We would ask this Court to decline the
17 Special Master's recommendation. Thank you,
18 Your Honors.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 12:07 p.m., the case
22 was submitted.)

23
24
25

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