

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FLORIDA,)
)
) Plaintiff,)
)
) v.) No. 142, Orig.
)
GEORGIA,)
)
) Defendant.)

Pages: 1 through 66
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FLORIDA,)

Plaintiff,)

v.) No. 142, Orig.

GEORGIA,)

Defendant.)

- - - - -

Washington, D.C.

Monday, February 22, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

GREGORY G. GARRE, ESQUIRE, Washington, D.C.;

on behalf of the Plaintiff.

CRAIG S. PRIMIS, ESQUIRE, Washington, D.C.;

on behalf of the Defendant.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GREGORY G. GARRE, ESQ.	
4	On behalf of the Plaintiff	3
5	ORAL ARGUMENT OF:	
6	CRAIG S. PRIMIS, ESQ.	
7	On behalf of the Defendant	36
8	REBUTTAL ARGUMENT OF:	
9	GREGORY G. GARRE, ESQ.	
10	On behalf of the Plaintiff	63
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Original Case 142,
5 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 last time this case was here, the
12 Court remanded for the Special Master to conduct
13 an equitable balancing inquiry, but, on remand,
14 the Special Master immediately short-circuited
15 that inquiry by finding that Florida has not
16 been harmed at all as a result of Georgia's
17 exploding irrigation use along the Flint River.

18 That finding, which is overwhelmingly
19 refuted by the evidence, corrupted his entire
20 analysis. The Special Master relied on the
21 supposed absence of harm in concluding that
22 Georgia's consumption was reasonable. He relied
23 on the absence of harm in concluding that
24 Florida would not benefit from a decree. And he
25 relied on the absence of harm in refusing even

1 to order Georgia to stop irrigating on permitted
2 acreage.

3 And yet, despite getting off track,
4 even Special Master Kelly found that Georgia's
5 consumption only increases in drought periods,
6 when water matters most, that Georgia has not
7 effectively curbed this use, and that there's no
8 doubt that extreme low flows have occurred much
9 more frequently in recent times. Those findings
10 alone compel the conclusion that Georgia's
11 unrestrained consumption is unreasonable.

12 Under the balancing called for by this
13 Court, the evidence overwhelmingly establishes
14 that Florida would significantly benefit from a
15 decree and that meaningful relief is available
16 for little or even no cost to Georgia. In fact,
17 hundreds of additional CFS inflows could be
18 generated at zero cost simply by halting illegal
19 irrigation, eliminating over-watering, and
20 scheduling irrigation to maximize its impact.
21 That water in itself could prevent the extreme
22 low flow conditions that decimated the
23 Apalachicola in 2012, a huge benefit.

24 Denying relief in these circumstances
25 not only would be a death sentence for

1 Apalachicola but would extinguish Florida's
2 equal right to the reasonable use of the waters
3 at issue.

4 I welcome the Court's questions.

5 CHIEF JUSTICE ROBERTS: Mr. Garre, how
6 should we analyze the case if we think based on
7 the record that Georgia contributed to the
8 collapse of the oyster harvest but not enough to
9 cause that on its own, that the situation is
10 like that on "Murder on the Orient Express," a
11 lot of things took a stab at the fishery:
12 drought, overharvesting, Florida regulatory
13 policies, but also lower salinity that was
14 caused by Georgia's use of the water. But you
15 can't say that any one of those things is
16 responsible for -- for killing the -- the
17 fishery.

18 How -- how should we analyze the case
19 from that perspective?

20 MR. GARRE: Sure. Under basic
21 causation principles, Your Honor, and as we
22 explain in our brief, the test under the
23 restatement for causation is that we have to
24 show that Georgia's consumption was a
25 substantial factor in the harm to the bay and

1 river area.

2 The fact that there may be
3 contributing causes doesn't mean that Georgia's
4 consumption, if it is a substantial cause,
5 factors, as we think the record overwhelmingly
6 shows. The -- the fact that there could be
7 contributing causes does not defeat causation.

8 And, here, the one thing that we know
9 that changed in the region over time is that
10 Georgia's consumption has drastically increased,
11 and that has led to an extreme increase in the
12 low flow periods that precipitated the 2012
13 crash of the oysters.

14 Over -- the overharvesting theory is
15 utterly refuted by the evidence and in
16 particular the fact that dead oysters remained
17 on the bars and that private leases that were
18 not subject to public harvesting were decimated
19 as well.

20 CHIEF JUSTICE ROBERTS: Well, the --
21 the Special Master concluded that Georgia --
22 Georgia would be required to allow huge amounts
23 of water to flow into the bay to really allow
24 recovery of the oyster fishery and that that
25 would not be -- be equitable.

1 What is your response to that?

2 MR. GARRE: Well, first, Your Honor,
3 as the chart on page 18 of our reply brief
4 shows, just an additional 500 CFS inflows in key
5 months would help eliminate the conditions that
6 precipitated the crash, and I think that in
7 itself would be huge relief.

8 Secondly, the evidence overwhelmingly
9 showed that additional flows or flows in that
10 range would significantly benefit the bay. He
11 focused on bars that were further from the mouth
12 of the river. Dr. Glibert testified that at the
13 mouth of the river, which serves as a nursery
14 area for the entire bay, that the additional
15 flows could result in a reduction of up to 30
16 percent in salt stress and that this would help
17 recede the entire bay, and --

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas.

21 JUSTICE THOMAS: Thank you, Mr. Chief
22 Justice.

23 Mr. Garre, a couple of questions.
24 You -- you say that Georgia has influenced the
25 reduction in flow. Could you give us a before

1 and after?

2 You seem to suggest in your -- in your
3 briefs that an increase of above 6,000 cubic
4 feet per second would be beneficial to the
5 oyster beds, and -- but there's much discussion
6 about the Corps limiting the flow to 5,000
7 square -- cubic feet -- feet per second during
8 the low flow and drought periods.

9 Could you give us a sense of when
10 there was a flow that was above 5,000 and when
11 did that reduction occur, and what role does the
12 Corps play in the reduction during the drought
13 and dry period being at 5,000?

14 MR. GARRE: Sure, Your Honor. And,
15 first, I, again, would point you to the chart on
16 page 18 of our reply brief, which shows the
17 flows in specific months and shows this -- the
18 increase in the number of months in which flows
19 have dipped below 6,000 and the steady increase
20 right before the crash in 2012. So that --
21 that's point one.

22 Two, historically, if you go back and
23 compare low flows in the modern era versus low
24 flows during drought periods, historically, you
25 see that state line flows have decreased by 4-

1 to 5,000 CFS. And Georgia's consumption
2 estimates are so small it has no answer for,
3 we're up to 3,000 in CFS and differential goes.
4 It has no answer for that.

5 And then, Your Honor, as to the Corps,
6 this Court in its prior decision said that the
7 Corps would work to accommodate a decree in this
8 case. The more water that goes into the system
9 is going to be more water into the reservoirs
10 that would help the Corps avoid drought
11 operations in the first place.

12 So I think a remedy here would
13 undoubtedly result in more water and would
14 undoubtedly result in the elimination of the
15 conditions that precipitated the crash, and that
16 can be achieved with as little as 500 CFS, Your
17 Honor.

18 JUSTICE THOMAS: Well, that's -- you
19 know, that's interesting because one of the
20 problems we had during the dry and drought
21 period before was that the Corps under its
22 manual and its operate -- its operating manual
23 had a tendency to hold water behind the dams and
24 only allow 5,000 cubic feet per second.

25 The -- I don't know, what would --

1 what would you do, what could the Corps do,
2 within the confines of its current operating
3 manual to accommodate what you're asking for?

4 MR. GARRE: Well, Your Honor, first,
5 the Special Master -- Master Lancaster found and
6 I think even Special Master Kelly recognized the
7 Corps has discretion to release more than 5,000
8 CFS, and it has done so historically. Special
9 Master Lancaster outlined the evidence at pages
10 53, 55 of his initial report.

11 And, Your Honor, we're asking this
12 Court to order an equitable apportionment of water.
13 This Court made clear in the prior decision, and
14 the Corps itself, the United States, has
15 represented to it, that it will work to
16 accommodate a decree. It can release more.

17 Counsel for Georgia recognized at the
18 hearing below at pages 47 to 48 that one of the
19 modifications that could be made would be to
20 adjust the rule when the Corps goes into drought
21 operations.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Breyer.

25 JUSTICE BREYER: Well, the part I

1 don't understand, I mean, you now face two big
2 hurdles. Of course, one is all these -- a lot
3 of people testified or some testified, experts,
4 that there was overharvesting of the oysters,
5 and that was the major cause. That's your basic
6 problem.

7 The other, which I don't understand
8 too well, which I'd appreciate your clarifying
9 first, I assume your experts went out and they
10 said, this is how much water falls in Georgia or
11 comes into Georgia every year, and we'll
12 subtract from that the water that evaporates and
13 we end up with a number that they must be using,
14 and that's a lot.

15 And the other side says, well, let's
16 go out and measure what they're actually using.
17 And they went and measured it, and that was a
18 little. And between the two, there's a lot of
19 disappearing water. Where does it go? And why?

20 I mean, you have the burden of clear
21 and convincing evidence. So, if the Special
22 Master, and we looked through the record,
23 adequately supported if it is, that they didn't
24 use that much water.

25 How do you get around that?

1 MR. GARRE: Right. So, first, Your
2 Honor, our estimates square with what's
3 happening on the ground, which is to say a
4 severe reduction in state line flows declining
5 basing yield and a significant increase in the
6 number of low flow days below 6,000.

7 I mean, all of that confirms that
8 there has been a major change in the area. And
9 the -- and the evidence also shows
10 overwhelmingly that Georgia's irrigation use has
11 skyrocketed and that George -- that Florida has
12 been harmed as a result of these low flows.

13 Now Special Master Kelly himself said
14 that the true test of unreasonable consumption
15 was harm. Here, you have overwhelming evidence
16 of harm. You have overwhelming evidence of
17 what's causing that harm: the extreme spike in
18 Georgia's --

19 JUSTICE BREYER: Well, what is the
20 evidence? Give me your best evidence. I mean,
21 you have -- you -- you -- you have some oyster
22 fishermen who went out and said, hey, there are
23 a lot of dead oysters around here. And if we
24 overharvested them, why are there all these dead
25 oysters? Because they're in somebody's stomach

1 but not on the reefs or not out here.

2 And -- but the other side says there
3 are not that many and the water wasn't that
4 saline and there are a few more conches but not
5 too many, and you did overharvest the oysters
6 after the oil spill particularly because you
7 thought get them now or never. So we have
8 conflicting evidence.

9 MR. GARRE: Your Honor, you don't
10 have --

11 JUSTICE BREYER: So what's your --

12 MR. GARRE: -- you don't have
13 conflicting evidence about this.

14 One, that -- there was an
15 unprecedented invasion of predators into the
16 bay. Mr. Ward and Mr. Berrigan, as well as
17 Mr. Kimbro, testified to that.

18 Two, that dead oysters remained on the
19 bars. Mr. Berrigan testified as to that.
20 That's utterly inconsistent with overharvesting.

21 Three, that the private leases that
22 were not subject to subject to public harvesting
23 were decimated as well.

24 And, four, that reshellings efforts
25 haven't worked. Even Georgia's own expert, Dr.

1 Lipcius, recognized that reshelling works when
2 the conditions is right. Florida has been
3 trying to reshell and bring the bay back for
4 many, many years, and to this day, it hasn't
5 come back because the conditions, it's not
6 overharvesting that caused the crash.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Alito.

10 JUSTICE ALITO: This is about the most
11 fact-bound case that we have heard in recent
12 memory, and we have two comprehensive reports by
13 two outstanding masters and they are not -- to
14 put the point perhaps mildly, not entirely
15 consistent on a number of key points. What do
16 we do with that?

17 MR. GARRE: So, Your Honor,
18 ultimately, this Court has responsibility as
19 fact-finder and would take de novo review of all
20 the evidence. Now you're right, I mean, that
21 the Special Masters reached diametrically
22 opposed conclusions. We think the fact that
23 Special Master Lancaster actually sat through
24 the trial, heard the cross-examination, is very
25 important. But, ultimately, this Court has to

1 make its own findings, and that's what we're
2 asking it to do.

3 JUSTICE ALITO: All right. To follow
4 up on the point that Justice Breyer was -- was
5 exploring, which is the cause of the collapse of
6 the oyster beds, there's conflicting evidence.
7 You have evidence from Dr. Berrigan and
8 Mr. Ward. The other side has evidence from its
9 expert, Dr. Lipcius. But what about hard
10 scientific evidence about salinity? What is the
11 maximum salinity for healthy oyster beds, what
12 was the salinity in 2012 at the time of the
13 collapse, what is it today, et cetera?

14 MR. GARRE: Right. So Dr. Greenblatt,
15 Dr. Kimbro, and Dr. Glibert all testified as to
16 that, Your Honor. Dr. Glibert testified that
17 the normal range at the mouth of the bay is zero
18 to 5 parts per thousand. And -- and that's
19 significant because the remedy that we're
20 talking about could result in an increase of --
21 of one -- one part per thousand or more, which
22 would mean a 20 to 30 percent decrease in salt
23 stress at the mouth of the bay. And so Dr.
24 Greenblatt also testified about the salinity
25 conditions.

1 And this is all very similar to what
2 happened in New Jersey versus New York, Your
3 Honor, where this Court ordered an equitable
4 apportionment under very similar conditions in
5 order to protect New Jersey's oysters --
6 oysters.

7 JUSTICE ALITO: Yeah, well, what was
8 the -- what was the salinity at the time of the
9 collapse?

10 MR. GARRE: Again, Your Honor, in --
11 at the mouth of the bay, the salinity is in the
12 range of zero to 5. Ordinarily -- I mean, what
13 -- what all of the experts and eyewitnesses
14 showed is that there was a great increase in
15 salinity in the bay, and it essentially became a
16 marine environment. And the biggest evidence of
17 that, Your Honor, is the unprecedented influx of
18 predators, the oyster drills and other snails,
19 which devoured the oysters. I mean, the --

20 JUSTICE ALITO: No, I -- I understand
21 all that. You -- you have -- you know, you have
22 some good evidence in support of your theory of
23 cause, but I take it we -- we really do not have
24 before and after measurements of salinity at
25 the -- in the bay -- in -- in -- at the -- at

1 the -- at the beds, is that correct?

2 MR. GARRE: I don't think it's
3 accurate. I believe Dr. Kimbro did a number of
4 studies on that, Your Honor, and I think -- you
5 know, again, ultimately, I don't think there's
6 any serious dispute that the -- the main problem
7 is that the bay became essentially a marine
8 environment because of the increase in salinity.
9 That's what causes the influx of predators. And
10 the Court recognized this in New Jersey.

11 So we could debate about the exact
12 number, but the -- the problem is, is that the
13 change in salinity caused this invasion of
14 predators that our witnesses described was like
15 a science fiction movie, it was so bad. And --

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Sotomayor.

19 JUSTICE SOTOMAYOR: Counsel, my
20 biggest problem with your case are three facts,
21 all offered by your experts.

22 First, Dr. Greenblatt modeled that
23 without any water consumption by Georgia,
24 salinity would have changed by one to eight
25 parts per thousand but generally less than five

1 ppts. Then you have Dr. Kimbro, who he relied
2 on, and his experiments show that to see any
3 appreciable effect on predation, you need
4 salinity changes of 5 to 15 ppts. And then you
5 have Dr. White, who predicted that if Georgia
6 had not consumed any water, oyster biomass in
7 2012 would have been 7 to 10 percent higher.

8 I'm doubtful that a 10 percent change
9 is sufficient to be viewed as an invasion of
10 rights of a serious magnitude. It's hard to --
11 to imagine how water consumption that at most,
12 by your own experts, contributed less than 10
13 percent to your problem, to Florida's problem,
14 how would that justify the use of an equitable
15 remedy?

16 MR. GARRE: Well, Your Honor, the --
17 the Court in New Jersey versus New York found
18 that it did justify the use of an equitable
19 remedy in almost identical circumstances. The
20 change in salinity there was .5 to 1.5. That's
21 point one.

22 Point two is Dr. Glibert specifically
23 testified that the remedy that we're requesting
24 could result in a 20 to 30 percent reduction in
25 salt stress at the mouth of the river. And this

1 is the critical point, and it goes to
2 Dr. White's finding about biomass. That was
3 taken from a single bar which was further away
4 from the mouth of the river. Dr. Kimbro and Dr.
5 White testified that there would be considerably
6 more oyster biomass on the reef. That's at
7 pages 1720 to 21 of Dr. White's testimony. She
8 would expect large increases at bars closer to
9 the river. That's 1725.

10 JUSTICE SOTOMAYOR: But you know --

11 MR. GARRE: And that the --

12 JUSTICE SOTOMAYOR: -- counsel,
13 Dr. White was your expert.

14 MR. GARRE: She was, Your Honor.

15 JUSTICE SOTOMAYOR: And so why didn't
16 she do the test there? Why should the Special
17 Master or us be bound by the testimony of an
18 expert who takes tests at the best part of the
19 river for her and for her conclusions and
20 doesn't at the parts where she says it's a
21 greater effect?

22 MR. GARRE: Well, Your Honor, I mean,
23 she knows oysters well and she -- she testified
24 as to the normal range of salinity there, which
25 is zero to -- to five. And she testified as to

1 the, you know, significant results of increasing
2 flows at the mouth of the river.

3 JUSTICE SOTOMAYOR: Well --

4 MR. GARRE: And Dr. Kimbro --

5 JUSTICE SOTOMAYOR: -- but let me ask
6 you a further question on this, you know, this
7 one ppt change, which, in the east bay, as -- as
8 she testified, it's about 10 percent. But I
9 don't know where the expert testimony is that 6
10 ppts, as opposed to 5, is bad for oysters or is
11 what caused the -- the issue -- the -- the
12 decrease here. Your own experts, Dr. Kimbro and
13 Dr. White, said that at least 12 or 15 ppts is
14 actually optimal for oysters.

15 MR. GARRE: Your Honor, I -- I would
16 point you specifically to Dr. Glibert's
17 testimony at pages 1869 to 70, where she --
18 where again she testified that the remedy we're
19 talking about would result in a 20 to 30 percent
20 decrease in salt stress and this would have many
21 positive feedbacks. Dr. Kimbro said that there
22 would be much more pronounced benefit as you
23 move closer to the river and that this could
24 help reseed the entire bay. This is at 1570 --

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Kagan.

3 JUSTICE KAGAN: Mr. Garre, you said a
4 while ago that Florida would benefit from as
5 little as 500 CFS. And I didn't get that in
6 your briefs. You know, in your briefs, it
7 didn't seem to me that you made an argument that
8 less than 1,000 CFS would make any difference in
9 the bay. So where is this 500 coming from?
10 What's the evidence that you have that 500 CFS
11 would matter?

12 MR. GARRE: Sure. First, I mean, if
13 you look at the chart on page 18 of our reply
14 brief, it shows how the 500 CFS would bump flows
15 above 6,000. And the one thing you can see from
16 the record is that, historically, what happened
17 before the crash is you had extreme frequency of
18 low flows below 6,000. So the 6,000, which
19 Dr. Hornberger and Dr. Allan testified was a
20 biologically important threshold -- Hornberger
21 at paragraph 46 of his pre-filed direct, Allan
22 at paragraph 32 -- that would help avoid the
23 conditions that precipitated the crash.

24 Now Dr. Allan also testified that as
25 little as 300 to 500 CFS could have a

1 disproportionately large impact -- pre-filed
2 direct paragraph 3d and 26, paragraph 80 -- and
3 it would be a wonderful positive step to
4 protecting the ecosystem. He had no doubt
5 whatsoever about that. Page 592 of his trial
6 transcript. So the record does show that, Your
7 Honor.

8 JUSTICE SOTOMAYOR: And did you ever
9 quantify exactly how much water would flow to
10 you on -- on the assumption that Georgia would
11 increase its conservation efforts? That seems
12 to be a gap in the record, that there's no
13 quantification of that, you know, pretty
14 important measure.

15 MR. GARRE: I don't -- we did, Your
16 Honor, absolutely, Dr. Sunding in particular,
17 and I can run through those.

18 I mean, halting illegal irrigation and
19 enforcing permits would result in 125 to 151
20 CFS. That's paragraph 47 in his pre-filed
21 direct.

22 Eliminating overwatering would be an
23 additional 341 CFS, FX 801 at 2. Irrigation
24 scheduling, just maximizing the impact of
25 irrigation, Sunding paragraph 58. Masters, his

1 testimony at 368, that would -- that would
2 result in significant savings as well up to 200
3 CFS.

4 And eliminating farm pond irrigation
5 itself could result up to 300 CFS. And he
6 testified to this at his Table 4 to 6 on page 44
7 of his testimony. All of those, I might add,
8 would cost Georgia nothing or very little.

9 JUSTICE SOTOMAYOR: And those
10 statistics that you just gave to me, does that
11 take into account the Corps' operations or not?

12 MR. GARRE: Well, now this is the
13 water that could be generated, Your Honor,
14 this -- the separate question of the water going
15 through, and I -- and I think, I guess, I would
16 point you to what the Court said in the prior
17 decision, that the Corps would work to
18 accommodate any decree.

19 I mean, we're sort of in a
20 chicken-and-egg situation here, but I don't
21 think the Corps made clear last time and made
22 clear in its brief again here that if this Court
23 orders a decree, it would accommodate that
24 decree, and the easiest way to do that would be
25 to exercise the discretion it has to allow

1 additional water through.

2 JUSTICE SOTOMAYOR: Thank you, Mr.
3 Garre.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch.

6 MR. GORSUCH: Good morning, Mr. Garre.

7 I -- I take it we start from common
8 ground that to succeed, Florida has to show that
9 the benefits of an apportionment decree would
10 substantially outweigh the harm that would
11 result.

12 MR. GARRE: Yes, that's fair.

13 JUSTICE GORSUCH: Okay. Judge Kelly
14 found that the decree would cost about 100
15 million dollars a year in drought years for
16 Georgia on the one hand and that the entire
17 oyster fishery generates about 6.6 million
18 dollars a year before the collapse.

19 Even -- even assuming that Judge Kelly
20 was mistaken by several orders of magnitude, why
21 doesn't that preclude or at least pose a problem
22 for you?

23 MR. GARRE: Sure. I mean, first, this
24 Court made clear that each state has an equal
25 right to the reasonable use of the waters.

1 Georgia has never disputed that Florida's
2 decision to use the waters to replenish an
3 irreplaceable ecological resource is reasonable.
4 And Georgia's use is extinguishing that right.

5 So I don't think that the pure
6 dollar-and-cents inquiry in that respect is
7 correct. And I think New Jersey versus New York
8 proves that because, if it really just came down
9 to oysters versus, you know, lots of people or
10 otherwise, then New York City would have crushed
11 New Jersey in that case, and that's not the way
12 it worked out.

13 And I also would say that Special
14 Master Kelly's cost estimates were fatally
15 flawed, in particular insofar as they rely on
16 the premise that our remedy would wipe out
17 irrigation altogether.

18 And -- and I would urge this Court, if
19 you read one thing for the record, please read
20 Dr. Stevens' cross-examination from pages 4453
21 to -- to 4468 and 4490 to 95. There, Dr.
22 Stevens recognizes all of the things that he
23 didn't consider that would generate additional
24 flows, including eliminate -- eliminating
25 illegal irrigation, scheduling irrigation, farm

1 pond evaporation, simply irrigating less.

2 Instead, Dr. Stevens' cost estimates
3 depend on the premise that we would eliminate
4 irrigation and eliminate farming altogether in
5 the region, a particularly absurd premise given
6 that over half of the farming in the region is
7 done without any irrigation whatsoever.

8 JUSTICE GORSUCH: I -- I guess I was
9 trying to get at, I -- I accept that there are
10 ecological harms as well, but how -- how do we
11 account for those given the dollar-and-cents
12 disparity?

13 Assume for the moment Judge Kelly's
14 numbers are not completely to be dismissed.
15 Then --

16 MR. GARRE: Right.

17 JUSTICE GORSUCH: -- then what?

18 MR. GARRE: Well, first, if you're
19 going to consider dollar and cents, you should
20 also consider that Florida has invested hundreds
21 of millions in preserving this ecological
22 treasure, and so that ought to count.

23 And second, the remedy that we're
24 asking for, you can generate more than 500 CFS
25 at zero cost to Georgia. Even -- even Special

1 Master Kelly recognized that halting irrigation
2 would -- illegal irrigation would result in an
3 additional 125 CFS at zero cost. That's on page
4 75 of his report.

5 And then, if you include eliminating
6 overwatering, irrigation scheduling to simply
7 maximize the impact, reducing farm pond
8 irrigation, all of those things would cost
9 Georgia next to nothing and save --

10 JUSTICE GORSUCH: Thank you. Thank
11 you, counsel.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh.

14 JUSTICE KAVANAUGH: Thank you,
15 Mr. Chief Justice.

16 Good morning, Mr. Garre. Just picking
17 up on Justice Gorsuch's line of questioning,
18 what if there would be substantial benefits to
19 Florida of an -- an apportionment but also
20 substantial cost to Georgia of doing so?

21 So just assume that: benefits,
22 substantial cost, substantial. How in that
23 circumstance could we say that the benefits
24 substantially outweigh the costs if both the
25 costs and the benefits are substantial in -- in

1 some way?

2 MR. GARRE: Right. Well, if you
3 conclude that costs outweigh the benefits, then,
4 you know, we're done, but -- but, obviously, we
5 don't think you should conclude that.

6 And on the costs, I mean, just to be
7 clear, more than 400 CFS can be generated at no
8 cost at all to Georgia, none. And -- and,
9 again, I mean, we're talking about eliminating
10 illegal irrigation, you know, over 90,000 acres
11 that have no permits at all, enforcing existing
12 permit terms, that would cost zero.

13 Simply eliminating overwatering, such
14 as using center pivots to water outside of the
15 field, scheduling irrigation to maximize impact,
16 reducing farm pond evaporation. I mean, there's
17 over a hundred -- 1200 CFS evaporates from farm
18 ponds every year, And this is needless waste and
19 efficiency that's not protected.

20 And so I think a decree in this case
21 could cost Georgia virtually nothing and
22 generate significant flows above 500 CFS that
23 would eliminate the very conditions that
24 precipitated the crash.

25 And given the benefits to Florida,

1 given preserving this ecological resource, we
2 think that that substantially outweighs the
3 costs of the very little that Georgia would have
4 to incur.

5 JUSTICE KAVANAUGH: Well, I think you
6 assumed away part of what I was posing, which is
7 I was posing a question that assumed you're
8 right about the benefits to Florida, but assume
9 also that there are substantial costs to
10 Georgia. I know you disagree with that, but
11 just assume that.

12 How do we then go about doing the --
13 the balancing in that circumstance?

14 MR. GARRE: Right. Well, I mean,
15 first, you can calibrate the remedy to reduce
16 the cost, Your Honor. I mean, there's a range
17 of options, you know, starting with simply
18 requiring Georgia to eliminate waste and
19 inefficiency. Special Master Kelly declined to
20 consider that because of his flawed harm finding
21 at paragraph 50 but not -- 51 of his decision.

22 Secondly, there are enormous benefits
23 to preserving this ecological treasure. It's
24 one of the unique -- most unique estuaries in
25 the northern hemisphere.

1 And again, third, I'd point you to New
2 Jersey versus New York. In that case, New York
3 City wanted more water for municipal purposes,
4 and yet the Court held that it couldn't have as
5 much as it wanted because it was going to
6 preserve New Jersey -- New Jersey's little old
7 oysters.

8 And I think that the same balancing
9 would call for the same result here, where
10 preventing waste and inefficiency could result
11 in the additional flows that could help save
12 this irreplaceable ecological treasure as well
13 as the oysters and the communities that depend
14 on it.

15 The Seafood Oysters Association brief
16 explains in compelling terms how for centuries
17 these communities have relied upon the bay, its
18 resources, and its oysters. And what Georgia is
19 doing is wiping that out because of its
20 voracious consumption of water, which is
21 extinguishing Florida's reasonable right to use
22 that water.

23 JUSTICE KAVANAUGH: Thank you, Mr.
24 Garre.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett.

2 JUSTICE BARRETT: Good morning, Mr.
3 Garre. I have a question about what showing
4 you're required to make at this stage about the
5 Corps' -- what role the Corps would have in
6 ensuring that extra water went to Florida even
7 assuming that we impose this cap of 1,000 cubic
8 feet per second.

9 I mean, last time around, the Court
10 said that the Special Master had required too
11 much and too soon, essentially, from you with
12 respect to the proof of what the Corps would do.

13 Specifically, what more have you shown
14 this time around? Because now the other
15 findings that Special Master Lancaster did not
16 make have been made.

17 So have you done anything additional
18 to show what the Corps could do to accommodate?

19 MR. GARRE: Sure.

20 JUSTICE BARRETT: Are you just kind of
21 relying on the government to -- to pony that up?

22 MR. GARRE: Sure, Your Honor.

23 The first thing we did when the case
24 got back in remand before Special Kelly was to
25 ask for additional fact-finding on the

1 reasonable modifications that the the Corps
2 could make to its manual, as well as the impact
3 of the revised manual and changes in consumption
4 in harm since the last trial. And Special
5 Master Kelly denied that fact-finding out of the
6 box.

7 So the answer to your question is that
8 there's not more evidence in the record, and
9 it's because Special Master Kelly denied us the
10 opportunity to develop that -- that evidence,
11 which we think was wrong.

12 Now, having said that, you know, last
13 time, this Court made clear that the Corps would
14 accommodate a decree and that the case should be
15 decided on that premise. And I think one of the
16 flaws in Special Master Kelly's report is
17 that -- is that he repeatedly disregarded that
18 in finding that the Corps would not allow the
19 water through.

20 This Court in its prior decision, I
21 think, requires the Court to presume that the
22 Corps would allow the water through, would work
23 to accommodate a decree, as it said, again, in
24 the brief before this Court.

25 JUSTICE BARRETT: Okay, Mr. Garre, let

1 me switch gears, and I just want to narrow down
2 what is actually at stake here, what your
3 contentions are.

4 Most of your brief and most of your
5 argument has focused on Georgia's agricultural
6 uses. So are you abandoning any challenge to
7 municipal use?

8 MR. GARRE: We are. Our focus here is
9 on agricultural use and irrigation in the Flint
10 River, Your Honor.

11 JUSTICE BARRETT: Okay. And,
12 similarly, briefs and oral argument have focused
13 primarily on the effects of Georgia's
14 consumption on the oyster industry. It seemed
15 to me that your evidence of effects on the
16 wildlife and plant life as a result of the
17 consumption was pretty weak, that you didn't
18 show a reduction in species. So am I correct
19 that you're really primarily focused simply on
20 the harms to the oyster industry?

21 MR. GARRE: No, Your Honor, we do
22 think the harms to the river area are
23 significant as well, and, you know, we pointed
24 to evidence about the sharp decline in tree
25 species in particular.

1 JUSTICE BARRETT: But that's predated,
2 right? Those charts were from, what is it,
3 between 1976 and 2004?

4 MR. GARRE: Well, I think Dr. Allan,
5 as well as Dr. Clawndaw, described the harms,
6 you know, over time and in more recent periods.
7 I mean, what's happening is that sloughs are
8 becoming disconnected, and, in particular,
9 mussels are drying up. The U.S. Fish and
10 Wildlife Service itself has recognized that, and
11 it, you know, condemned Georgia's consumption.
12 I point you to FX 46, 47, and 48 in particular
13 on that, where they've raised increasing alarm
14 bells about Georgia's consumption and its impact
15 on the mussels in that area.

16 JUSTICE BARRETT: Thank you,
17 Mr. Garre.

18 CHIEF JUSTICE ROBERTS: A minute to
19 wrap up, Mr. Garre.

20 MR. GARRE: Thank you, Your Honor.

21 I guess I would say in closing it's
22 hard to imagine New England without lobsters or,
23 say, the Chesapeake without crabs, but, in
24 effect, that's a future that Apalachicola now
25 faces when it comes to its oysters and other

1 species. And yet, just to be clear, no one is
2 asking or saying to Georgia farmers, sorry, you
3 can't grow your crops anymore because there's no
4 water left for you. Under the decree Florida is
5 requesting, all farmers could continue --
6 continue to grow their crops. A decree would
7 simply require them to prevent outright waste
8 and adopt more efficient measures to save water
9 while still irrigating. That's hardly asking
10 too much.

11 As this Court stressed in its prior
12 decision, Florida has an equal right to the
13 reasonable use of the waters at issue. Georgia
14 has never disputed that Florida's use of the
15 water to replenish an irreplaceable ecological
16 treasure is reasonable. And yet, if the Court
17 accepts the Special Master's recommendation,
18 that right will be extinguished, and the
19 Apalachicola, not to mention the communities
20 that have fished and depended on it for
21 centuries, will be lost.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Primis.

1 ORAL ARGUMENT OF CRAIG S. PRIMIS
2 ON BEHALF OF THE DEFENDANT
3 MR. PRIMIS: Mr. Chief Justice, and

4 may it please the Court:

5 Florida's petition should be denied
6 for a very basic reason. Simply put, Florida
7 failed to prove its case. On this record, after
8 a five-week trial, Florida has not shown by
9 clear and convincing evidence that Georgia
10 caused Florida's alleged harms. And Florida
11 also failed to show that the benefits of the
12 decree it seeks substantially outweigh the harm
13 it might cause.

14 Florida's oyster allegations prove the
15 point. Florida failed to demonstrate that
16 Georgia's water use caused the oyster collapse.
17 Instead, the record shows that Florida allowed
18 oyster fishing at unprecedented levels in the
19 years preceding the collapse. As one Florida
20 official said at the time, they bent their
21 oyster fishery until it broke.

22 To remedy this self-inflicted wound,
23 Florida asks the Court to impose draconian caps
24 on Georgia. But a 50 percent cut in irrigation
25 would cost hundreds of millions of dollars to

1 Georgia and all for an increase in oysters of
2 about 1 percent. This same problem, massive
3 costs on Georgia to provide negligible relief
4 for Florida, cuts across every aspect of
5 Florida's case.

6 Granting relief on this record would
7 be the very opposite of equity. Georgia is home
8 to more than 90 percent of the population, 98
9 percent of the jobs, and 99 percent of the
10 economy in the ACF basin. The vast majority of
11 the water in this basin already flows into
12 Florida every year, and Georgia puts the
13 relatively small amount it consumes to highly
14 productive uses.

15 The Court's earlier opinion in this
16 case reaffirmed that a complaining state must
17 have not merely some technical right to more
18 water but a right with a corresponding benefit.
19 Here, Florida has neither. Georgia respectfully
20 requests that the Court overrule Florida's
21 exceptions and enter judgment in favor of
22 Georgia.

23 I look forward to answering the
24 Court's questions.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. I'd like to pose to you the same
2 question I did to Mr. Garre. You just said
3 Georgia did not cause Florida's harms. Even if
4 you're not a sufficient cause, how do you
5 analyze the case if we conclude the record
6 supports the idea that you were a contributing
7 cause? In other words, are you off the hook if
8 you alone did not cause the harm to the fishery?

9 MR. PRIMIS: Mr. Chief Justice, the
10 Court has not directly addressed the causation
11 issue that you posed in its prior cases. On
12 this record, the Court need not actually decide
13 it because Florida hasn't proven causation by
14 Georgia under any standard that's been proposed
15 and certainly not the substantial factor --

16 CHIEF JUSTICE ROBERTS: All right.
17 Well, that's -- that's, of course, avoiding the
18 question. Assume I read the record differently
19 than you do.

20 MR. PRIMIS: Understood, Chief
21 Justice. The Court's opinions do suggest a
22 greater level of directness than Mr. Garre
23 suggested, given the interests at stake between
24 states and the natural resource -- resources
25 that they share. This Court's decisions are

1 more consistent with a higher level of causation
2 on the state whose conduct is being challenged.

3 CHIEF JUSTICE ROBERTS: So, if you're,
4 you know, a 20 percent cause, maybe that's not
5 enough, but if you're a 40 percent cause, then
6 that can be enough to move to equitable
7 apportionment?

8 MR. PRIMIS: No. Given the
9 extraordinary nature of the remedy, Chief
10 Justice, the causation must be much higher for
11 the state whose conduct is being challenged. We
12 would say something akin to a but-for causation
13 requirement. And that's consistent with the
14 extraordinary nature of the remedy that's at
15 issue here. But, again, on this record, we
16 would suggest the Court need not decide that.

17 CHIEF JUSTICE ROBERTS: Well, we don't
18 really know what the extent of the remedy would
19 be. That's what you're going to decide if the
20 case moves toward equitable apportionment. But
21 you think a -- a significant causation level
22 above 50 percent is necessary before you even
23 get to that stage?

24 MR. PRIMIS: Yes, Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: How do you

1 weigh the interests of -- competing interests of
2 Florida oystermen and Georgia farmers? I mean,
3 if we conclude that the contribution to the
4 overall economy of the farmers is, you know,
5 much more in dollar value than the contribution
6 of the Florida oysters, does that mean you win?

7 MR. PRIMIS: Well, certainly, economic
8 contribution would be one factor of the
9 multi-factored balancing test, but we don't
10 think that it's a straight question of which
11 state has the larger industry. The more
12 compelling factor here is that even under
13 Florida's own evidence, advanced by its experts,
14 if the Court were to cap Georgia irrigation at
15 50 percent of its current utilization, that
16 would only result in a maximum of a 1.4 percent
17 benefit to Florida's oysters, and that would not
18 be --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas.

22 JUSTICE THOMAS: Thank you, Mr. Chief
23 Justice.

24 Mr. Primis, the -- do you agree that
25 there has been a reduction in the flow of water

1 into the Apalachicola over the years?

2 MR. PRIMIS: Comparing the
3 pre-reservoir, pre-Army Corps operations, and
4 post-Army Corps operations, the answer to that
5 question is yes, Justice Thomas.

6 JUSTICE THOMAS: So the -- when
7 reading the -- Florida's brief, if I were to
8 entitle it, it would be something along the
9 lines of the case of the disappearing water.
10 And if that is accurate, where do you think it
11 went if Georgia is not the source of that
12 disappearance?

13 MR. PRIMIS: Certainly. The water is
14 not disappearing. The first point I would make
15 is that Florida is making a completely inapt
16 comparison by comparing the ACF basin prior to
17 the building of the dams and reservoirs and the
18 Army Corps operations post.

19 The Army Corps has the overriding
20 influence in the amount and timing of flow from
21 Georgia into Florida, and the reason that there
22 were more days closer to 5,000 is because the
23 Army Corps is controlling those flows in a way
24 that did not exist previously. So it's not
25 disappearing. The water -- it would be in

1 reservoirs.

2 But it's compounded by the fact that
3 there have been three back-to-back droughts that
4 did not exist in the historic record, and the
5 rain -- lack of rainfall accounts for the
6 reduced flows as well as the change in
7 seasonality. So the water's not disappearing.
8 There's just less of it. And the Army Corps is
9 intervening.

10 JUSTICE THOMAS: And I -- I'd like to
11 go back to something else, taking my lead from
12 Justice Alito's question. When we had this case
13 the last time, the -- Special Master Lancaster
14 focused on redressability, and, of course, the
15 Court thought that we should go beyond that, and
16 -- but there are pieces of his findings of
17 portions that suggest that Georgia, particularly
18 the agricultural area, caused some harm. And
19 Judge Kelly now seems to come out the other way.

20 And the question is -- I think Justice
21 Alito's question is appropriate. What do we do
22 with that, with that in -- apparent
23 inconsistency?

24 MR. PRIMIS: Yes. Well, Special
25 Master Lancaster specifically reserved on

1 causation, and Special Master Kelly was charged
2 with looking at that very question, including
3 how much water is Georgia using, how does it use
4 it, and what would happen if it used less.

5 And so what Special Master Kelly
6 found, which was highly supported by the record,
7 is that the irrigated acreage connected to the
8 Flint River and the Upper Florida Aquifer --
9 Aquifer has not exploded in the way that Georgia
10 suggests. It's flat from the period of 2004 to
11 2014.

12 Georgia's own expert said that 80
13 percent of Georgia farmers are under water. And
14 at present, they are using the water very
15 efficiently with center pivot irrigation systems
16 that have been upgraded to 90 percent
17 efficiency, and there's been a moratorium on new
18 permits since 2012.

19 So, Justice Thomas, I would say that
20 Special Master Kelly's findings are detailed and
21 supported by the record. And while the Corps
22 usually pays tacit respect and -- and defers to
23 Special Master Kelly or to a Special Master in
24 this case, it's -- it's all documented for the
25 Court to see and can find -- reach that

1 conclusion on its own.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: Well, I have two
6 questions and one totally irrelevant question.
7 The first was Justice Thomas's. How can there
8 be these big discrepancies in how you measure
9 this water that's being used by Georgia? I
10 mean, huge discrepancies. I don't understand
11 that. Anything you want to say further, fine.

12 And the second is, how can there be
13 these oysters all over the place and they go out
14 and look and there are load -- loads of dead
15 oysters all over and they say, well, actually,
16 no, it's overfishing that caused it all? Well,
17 if you overfish, then you catch them.

18 And my third question, which is
19 absolutely irrelevant, this has been going on
20 for years, and Florida thinks that it wouldn't
21 cost Georgia much to remedy the situation.
22 Maybe Georgia has a different view.

23 But has anybody ever tried to work out
24 a -- that Florida would pay something to Georgia
25 to solve the problem? Has anybody ever tried is

1 only my question there. You don't have to
2 answer it if you don't want to, but the first
3 two I'd like to know.

4 MR. PRIMIS: Well, let me try the
5 first two first given the limited time, Justice
6 Breyer.

7 With regard to the oysters, I would
8 refer the Court to the expert report of Dr.
9 Lipcius, and what he found was that the actual
10 data collected by Florida officials who were
11 responsible for managing the oyster resource did
12 not document elevated levels of dead oysters and
13 did not document elevated levels of predators in
14 2011 and 2012, the period leading up to the
15 collapse.

16 So the data collected by Florida just
17 doesn't support that conclusion, and that's
18 counted just by the anecdotal testimony of these
19 two individuals.

20 Florida's own oyster expert, before he
21 became their expert, he sent an e-mail in 2012
22 saying that he had inspected one of the bars and
23 it looked like a gravel parking lot due to all
24 the harvesting. That's the same expert who
25 later testified to the contrary.

1 So the -- the -- the data just doesn't
2 support it. And, in addition, Dr. Lipcius found
3 that the bars that were heavily fished
4 collapsed, and the ones that were not heavily
5 fished, even with elevated salinities, survived
6 and some of them even thrived.

7 With regard to the data on how much
8 water is consumed, the -- I would note that the
9 two experts that Florida hired to conduct that
10 analysis both conceded that their models had
11 inherent errors ranging from 2,000 cubic feet
12 per second to 10,000 cubic feet per second,
13 which exceeds the total amount that Florida
14 claims Georgia utilizes.

15 So those models that they used and put
16 forward the numbers are worthless from a
17 scientific perspective. And with regard to
18 Georgia, they have mapped their entire lower
19 Flint basin region. They know where all of the
20 center pivot irrigation systems are, and they
21 document how much water those use through
22 metering. And so they have a very detailed and
23 specific and well-grounded basis to do this from
24 the bottom up and come up with reliable
25 estimates.

1 JUSTICE BREYER: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: If we think there's
4 some harm to Florida, but the imposition of the
5 decree would cause harm to Georgia, what do we
6 do with -- with that data?

7 If it's just a matter of calculating
8 the dollar value of Georgia agriculture and the
9 Florida oyster and seafood industry, that's
10 pretty straightforward.

11 But Mr. Garre appropriately mentions
12 that what is at stake is a precious ecosystem.
13 So how do we take that into account? And in
14 answering that, maybe you could answer this --
15 this question: To what degree are these oyster
16 beds a natural phenomenon and to what degree are
17 they a man-made creation?

18 Was something like this present when
19 Ponce de Leon sailed up, or is this something
20 that oyster farmers have created?

21 MR. PRIMIS: Justice Alito, with
22 regard to the second question, the oysters do
23 occur naturally in Apalachicola Bay, but they
24 have to be managed and the resource has to be
25 cared for by humans.

1 And so the two elements of that.
2 There are limits on the amount of oysters that
3 can be taken from the bay, and then the oyster
4 resource managers have to -- have to re-shell
5 the bay and the oyster beds to ensure that
6 there's a sufficient substrate for the new
7 oysters to grow on.

8 And so the combined effect of removing
9 all the oysters from overharvesting and not
10 replacing it with shell that future oysters can
11 grow on has the effect of causing the bay to
12 collapse. So it's actually a -- the combined
13 answer.

14 And I'm sorry, I lost the track of
15 your first question.

16 JUSTICE ALITO: Well, how do we -- do
17 we factor in the damage to the ecosystem if --
18 if a comparison is not going to be truly a
19 question of money?

20 MR. PRIMIS: Correct. And -- and
21 Georgia does agree that it is not just a pure
22 monetary comparison. I think the Court's
23 decisions address this in saying that the
24 potential benefits of the diversion must
25 substantially outweigh the harm, and that has to

1 be shown by clear and convincing evidence.

2 So the Court has set an appropriately
3 high burden before it will intervene in really
4 the internal water policy of various states.

5 JUSTICE ALITO: All right. Let me --
6 let me squeeze in one quick question.

7 MR. PRIMIS: Sure.

8 JUSTICE ALITO: How do you get around
9 New York versus New Jersey? Why isn't this just
10 like that case?

11 MR. PRIMIS: Sure. Ultimately, the
12 record in this case answers the question. One
13 thing that was not present in New York versus
14 New Jersey was testimony from New Jersey's own
15 experts that the additional water would give it
16 no benefit.

17 And, here, even taking every
18 assumption favorable to Florida that it could --
19 that Georgia could produce 1,000 CFS, that the
20 Army Corps would pass all of that water through,
21 even though it won't, if you -- even using
22 Florida's inflated use estimates, if you assume
23 all of that and pass it all through, the end
24 result that Florida's side said was 1.4 percent
25 increase in the oyster bar, so, here, it truly

1 would be a vane thing to take out that much
2 agriculture for the purpose of -- of helping
3 oysters to the tune of 1 percent.

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor.

7 JUSTICE SOTOMAYOR: Counsel, you're
8 talking about taking out agriculture, but your
9 brother on the other side points out that many
10 of the conservation methods are at no cost.

11 So, for example, you've made great
12 strides in -- in improving irrigation
13 efficiency. I see that in the record. But I
14 also understand that half of Georgia's
15 irrigation permits impose no limit whatsoever on
16 how much water farmers can draw out of the
17 ground or, once they do, whether they're
18 overwatering.

19 Now, whether or not 80 percent are not
20 overwatering, there's still 20 percent that are.
21 There has been a significant proof of more use
22 by the farmers. I'm -- I'm just not sure how we
23 can ignore the fact that there are measures that
24 would not be costly that would only require that
25 you do something about your grandfathered

1 permits so that there are limits put in and
2 limits that are related to need rather than
3 open-ended.

4 Why should we ignore that those
5 conservation methods would come at no cost?

6 MR. PRIMIS: Justice Sotomayor, the --
7 I -- I think you hit on a key point when you
8 said that the evidence in the record does show
9 that 80 percent are -- are not overwatering, in
10 fact, they're underwatering, which suggests that
11 the fact that the grandfathered permits don't
12 have limits is not causing the massive problem
13 that Florida suggests.

14 And what the Court's precedents
15 suggest is that the Court will not intervene
16 unless a state can show by clear and convincing
17 evidence that the benefits substantially
18 outweigh the harms.

19 And I think what the Court might be
20 walking into here is becoming a -- a bit of a
21 local water regulator and focusing on
22 Georgia's -- how it handles its permits and --
23 and how it handles its metering program at a
24 point where doing so would give no benefit to
25 Florida because, even if the Court were to limit

1 these allegedly wasteful practices, it would
2 still result in no benefit to Florida.

3 So we will not -- have not
4 accomplished that side of the cost/benefit
5 analysis, and now the Court will be involved in
6 managing decrees on local water issues.

7 JUSTICE SOTOMAYOR: Thank you,
8 counsel.

9 CHIEF JUSTICE ROBERTS: Justice Kagan.

10 JUSTICE KAGAN: Mr. Primis, I'd like
11 to take you back to your conversation with
12 Justice Thomas about the Corps operations and
13 how we should think about that. I mean, suppose
14 that we had what you think is a different case
15 than this one, but a case where it was clear
16 that Georgia was overconsuming water and it was
17 clear that that -- that if that water was able
18 to get down to Florida, Florida would be much
19 benefited. But then suppose that we had no
20 reason to believe that the water would get down
21 to Florida because of the Corps' operations.
22 How would they think about that kind of case?

23 MR. PRIMIS: I think the answer again
24 lies in the Court's precedence, which is that
25 Florida would still lose because they will not

1 have shown by clear and convincing evidence that
2 the benefits to them, which under the
3 hypothetical I assume would be zero, would
4 substantially outweigh the harm to Georgia from
5 the reductions that the Court would impose.

6 JUSTICE KAGAN: But -- but we wouldn't
7 say in that kind of case, look, you know,
8 putting the Corps aside, the case for equitable
9 apportionment is completely clear, and we should
10 put the Corps aside because, if we make that
11 clear to the Corps, you know, not -- even though
12 the Corps is not a party here, but if we say,
13 look, the -- there would be an equitable
14 apportionment here, except for the Corps'
15 practices, then we would typically expect the
16 Corps to change its practices.

17 MR. PRIMIS: Right, Justice Kagan, and
18 that was the subject of the -- of the prior
19 case. And I think what was shown there and what
20 is reshown since there, since that time, is that
21 the Corps -- it said it again on remand that
22 they have multiple policies, multiple
23 legislative directives that the Corps must
24 balance and that there's no reason to believe
25 that the additional water that may be generated

1 through the decree that Your Honor has described
2 would get through even after its administrative
3 process. And that's an administrative process
4 that would require public comment, would require
5 environmental analyses. It would require
6 evaluation of all of the other dictates that the
7 Corps is operating under.

8 And so it would be, I believe, not
9 clear and convincing evidence under the Court's
10 existing standards because it would be
11 speculative as to whether the Court would
12 actually ever do anything, and it could be
13 years, if not a decade, from now.

14 JUSTICE KAGAN: So what you're really
15 saying is that this case could be as bad as it
16 comes and Georgia would still win? In other
17 words, Georgia could be overconsuming with --
18 without any regard to the downstream -- the
19 downstream state's wellbeing and -- and Florida
20 could be suffering massive harm, and none of it
21 matters because the Corps is standing in the
22 way?

23 MR. PRIMIS: No, Justice Kagan, that's
24 not what we're saying. What we're saying here
25 is that Florida has the benefit of being able to

1 receive a guaranteed minimum flow from the Corps
2 and from its reservoirs and dams that provide
3 great benefit to Florida at a time when the
4 whole region is in stress. So Georgia is
5 subject to all of the same rules as any other
6 state in terms of reasonable use and equitable
7 balancing, and Georgia takes that responsibility
8 seriously in its practice --

9 JUSTICE KAGAN: Thank you, Mr. Primis.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch.

12 JUSTICE GORSUCH: Good morning,
13 Mr. Primis. One of Florida's complaints is that
14 the two Special Masters seem to have pointed in
15 different directions and that the -- the second,
16 Judge Kelly, did not proceed to hold an
17 evidentiary hearing or trial and, procedurally,
18 that there's a problem here. What -- what's
19 your response to that?

20 MR. PRIMIS: Yes, the -- the critical
21 issue in the case and on remand was the cause of
22 the 2012 oyster collapse and whether anything
23 could be done to provide Florida redress for
24 that.

25 All of that evidence was already in

1 the record. Special Master Kelly was absolutely
2 right to determine that. And so he didn't need
3 to take any additional fact-finding on that
4 issue, and that ultimately is the dispositive
5 issue in terms of the balancing.

6 I -- I would also note that Florida
7 has great resources and a lot of information
8 under its own control. It didn't need more
9 discovery or more evidentiary hearing to proffer
10 what it would have told Special Master Kelly and
11 to identify other ways in which it could have
12 obtained a benefit. It -- it had no evidence to
13 suggest that. So they didn't put forward a
14 compelling reason or record for Judge Kelly to
15 open the record again, and for the issues that
16 were driving the result in the case and needed
17 to be considered, the -- the -- he didn't need
18 to.

19 JUSTICE GORSUCH: Mr. Garre has
20 suggested an argument today that a change of
21 just 500 cfs would make all the difference in
22 the world. They don't need a thousand anymore,
23 just 500, and that 500 would impose a more
24 modest burden on Georgia. I'd like to hear your
25 thoughts on that.

1 MR. PRIMIS: Certainly. We know
2 that's not the case because Florida's own
3 experts evaluated a varied -- a variety of
4 remedy scenarios that involved reduction of 50
5 percent of agriculture in Georgia, which would
6 result in about a thousand cfs coming through,
7 and those showed no benefit to Florida. With
8 regard to the bay, it showed less than a 1
9 percent or around a 1 percent increase in the
10 oyster population.

11 There's no evidence of harm to any
12 other species in the bay, so it really does come
13 down to the oysters, and there's just no benefit
14 to them. And then with regard to the river, I
15 believe Mr. Garre was referencing the
16 possibility that 500 cfs may connect some
17 additional -- what are called sloughs, but that
18 -- there was no study done of that, and Dr.
19 Allan's analysis of the same remedy scenario, a
20 thousand cfs, showed that the populations he
21 studied, if his analysis was even correct, would
22 improve by 2 and a half percent or less. So if
23 -- if -- at 500 cfs, there would be even less
24 benefit than what Florida's experts modeled,
25 finding virtually no benefit.

1 JUSTICE GORSUCH: Do you accept the
2 premise, though, that there's no cost to Georgia
3 at 500 cfs?

4 MR. PRIMIS: No, I don't accept that
5 premise. That would involve a reduction in
6 agriculture for sure, which would cost Georgia.

7 JUSTICE GORSUCH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh.

10 JUSTICE KAVANAUGH: Thank you,
11 Mr. Chief Justice, and good morning, Mr. Primis.

12 I want to pick up on Justice Alito's
13 question with respect to the balancing and the
14 substantially outweigh test that you articulate.
15 You say that the potential benefits must
16 substantially outweigh the harm and that that
17 needs to be shown by clear and convincing
18 evidence, as I understand your argument.

19 And I think one of the big responses
20 is how do you explain New York versus New
21 Jersey. And that's certainly in the briefs and
22 again Mr. Garre today has said, well, if you
23 took that analysis and really applied it in the
24 same way that Georgia is articulating here, then
25 New York versus New Jersey have come out the

1 other way. So I want to hear what ever you have
2 to say about New York versus New Jersey.

3 MR. PRIMIS: Yes, Justice Kavanaugh,
4 and I think I need to revert to one of my
5 earlier answers, which is that there is critical
6 evidence here, and I -- I believe substantially
7 more testimony and analysis in this case, as to
8 the effect of a decree on the oyster population
9 in Apalachicola Bay. And what it shows is that
10 there is really no benefit, an increase of a
11 maximum of 1.4 percent and, in most cases, less
12 than that.

13 And so we can't say what the Court in
14 New Jersey versus New York would have done if --
15 if confronted with that additional testimony,
16 but we think that it's a distinction and a
17 dispositive one in this case.

18 JUSTICE KAVANAUGH: Thank you,
19 Mr. Primis.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett.

22 JUSTICE BARRETT: Good morning,
23 Mr. Primis. I have a legal question for you.
24 So Special Master Kelly seems to have concluded
25 that a modest injury -- and -- and it -- you

1 know, put the injury to Florida from Georgia's
2 actions at about 1.4 percent of a decrease in
3 oyster biomass, that a modest injury didn't
4 justify an equitable decree, that the injury had
5 to be serious.

6 And I want to know if that's the right
7 legal way to look at it. And I'll -- let me put
8 it to you this way: What if the injury was, in
9 fact, modest but it would be virtually costless
10 to Georgia to remedy it? Would we still say
11 that that wouldn't justify an equitable decree?
12 So was Judge Kelly right to say that a modest
13 injury doesn't justify an equitable decree?

14 MR. PRIMIS: Well, I -- I think it
15 comes back to the test that requires a
16 substantial invasion of rights of a serious
17 magnitude through the action of another state.
18 And so I don't believe that a modest injury
19 would -- would qualify and would justify this
20 Court's invocation of its extraordinary power
21 under equitable apportionment to intervene.

22 But that's the answer to the legal
23 question. In terms of what was before Judge
24 Kelly, he was also looking at a record where
25 there was inadequate proof of causation and

1 inadequate proof of any benefit to Florida as
2 well.

3 JUSTICE BARRETT: Let me -- I want to
4 follow up on -- it's related to this question,
5 but it follows up on one of Justice Alito's,
6 which was asking you to measure the harm to an
7 ecosystem. So, you know, here you said earlier
8 that the larger state doesn't always win. And,
9 of course, if we're looking just at the dollar
10 value of Georgia's agricultural industry versus
11 the dollar value of Florida's oyster injury --
12 industry, we would say, you know, as -- as Judge
13 Kelly did, let's just assume those figures were
14 right, that the benefit -- the cost to Georgia
15 dwarfs the benefit to Florida.

16 But how do we put a price on -- I
17 mean, let's -- let's imagine -- and I know you
18 disagree with this, but let's just imagine that
19 Georgia could take measures that cost less and
20 help Georgia -- help Florida preserve the
21 Apalachicola oysters, how -- how do we put a
22 price on an environmental benefit like that?

23 MR. PRIMIS: Right. Well, that is a
24 difficult question and the experts at -- at
25 trial debated whether one could put a monetary

1 or economic value on that, but Florida never
2 attempted to do so and so we don't know from
3 their perspective what the answer to that
4 question is.

5 Ultimately that may pose a difficult
6 issue in a future case, but in a case where
7 there is no benefit and substantial evidence of
8 self-inflicted harm, I -- I -- I would suggest
9 the Court does not need to resolve that here,
10 but certainly one could imagine where a -- an
11 ecological harm did rise to a level of
12 substantial invasion of -- of serious magnitude,
13 and in that situation it would be a -- a much
14 more difficult question. It's just not present
15 here.

16 JUSTICE BARRETT: Thank you, Mr.
17 Primis.

18 CHIEF JUSTICE ROBERTS: A minute to
19 wrap up, Mr. Primis.

20 MR. PRIMIS: Florida has had every
21 opportunity to prove its case. But after years
22 of discovery and a lengthy trial, it is now
23 clear that Florida's allegations were not based
24 in science or in fact. Instead, Florida's own
25 evidence at trial showed that even Draconian

1 caps on Georgia's water use would cause hundreds
2 of millions of dollars in harm to Georgia and
3 yield no benefit at all to Florida or its
4 oysters. Georgia's evidence showed the same.

5 That is not the high equity that
6 warrants relief. The Court set out in detail
7 the questions it wanted answered to evaluate
8 these claims. The answers came back and they
9 point decisively in one direction: Florida's
10 request for a decree should be denied.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Garre, rebuttal.

15 REBUTTAL ARGUMENT OF GREGORY G. GARRE
16 ON BEHALF OF THE PLAINTIFF

17 MR. GARRE: Thank you, Your Honor. I
18 mean, first on the question of where does all
19 the water go, Mr. Primis pointed to the Corps.
20 But that's a red herring because all the
21 water going into the system is going to come out
22 of the system eventually. The Corps just
23 controls the timing.

24 So the fact that state line flows have
25 plummeted over time in the recent era is

1 devastating for Georgia.

2 Secondly, he pointed to climate, but
3 that's refuted by the chart on page 6 of our
4 reply as well as the testimony of Dr.
5 Lettenmaier and Dr. Hornberger. And the most
6 damning thing is that Georgia declined to
7 present its own climate expert at trial, which
8 tells this Court everything.

9 And in terms of the consumption
10 models, the U.S. Fish and Wildlife Service in
11 Georgia itself have noted that Georgia's models
12 have systematic errors in undercounting. I
13 would point you to FX 534 and FX 530.

14 The variations that Mr. Primis pointed
15 to were based on a day-to-day comparison, which
16 is completely irrelevant because those models
17 were designed to -- to examine trends over time.
18 I'd point you to Hornberger testimony at 2012
19 and Lettenmaier testimony at 2404.

20 On the 1.4 percent oyster mass, that's
21 a red herring, too, because that dealt with one
22 bar which is further away from the mouth of the
23 river, and the evidence from Glibert and Kimbro
24 and White was that there would be much more
25 pronounced benefits at the mouth of the river

1 and that could reseed the entire bay.

2 On the 500 CFS, eliminating the
3 conditions that precipitated the crash is a huge
4 benefit. And notably Mr. Primis has no answer
5 to page -- the chart on page 18 of our reply
6 which shows how just 500 CFS can do that.

7 And then as to the cost of the 500
8 CFS, again, Mr. Primis pointed out that this
9 would reduce irrigation. That's completely
10 false, as his own expert admitted in his
11 cross-examination, Dr. Stavins at 4468. And --
12 and more damningly Dr. Stavins admitted, from
13 4453 to 468, that he didn't consider any of the
14 cost-efficient measures that could be taken at
15 zero to no cost.

16 And so on this there's just a dearth
17 of evidence for Georgia.

18 On New Jersey versus New York, the
19 difference here is that in New Jersey they were
20 debating what might happen. Here we know what
21 has happened. The oysters, one of the most
22 famed oyster fisheries in the nation, have been
23 devastated.

24 The benefits here and the need for a
25 decree are overwhelming and New York City there

1 would trump anything that Georgia has to offer
2 here.

3 Last I would say that there has been a
4 lot of debate about what may happen with the
5 decree. But one thing is certain: Without a
6 decree Georgia will just continue to consume
7 more and more and the Apalachicola will be
8 irreversibly lost.

9 The solution here can't be to do
10 nothing to stop this. Thank you, Your Honors.

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

13 (Whereupon, at 11:06 a.m., the case
14 was submitted.)

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Official - Subject to Final Review

1	5	actually [8] 11:16 14:23 20:14 33:2 38:12 44:15 48:12 54:12	6	appropriate [1] 42:21
1 [4] 37:2 50:3 57:8,9	5 [5] 15:18 16:12 18:4,20 20:10	add [1] 23:7	7	appropriately [2] 47:11 49:2
1,000 [3] 21:8 31:7 49:19	5,000 [7] 8:6,10,13 9:1,24 10:7 41:22	addition [1] 46:2	7 [1] 18:7	Aquifer [2] 43:8,9
1.4 [5] 40:16 49:24 59:11 60:2 64:20	50 [5] 29:21 36:24 39:22 40:15 57:4	additional [16] 4:17 7:4,9,14 22:23 24:1 25:23 27:3 30:11 31:17, 25 49:15 53:25 56:3 57:17 59:15	70 [1] 20:17	area [6] 6:1 7:14 12:8 33:22 34:15 42:18
1.5 [1] 18:20	500 [18] 7:4 9:16 21:5,9,10,14,25 26:24 28:22 56:21,23,23 57:16,23	address [1] 48:23	75 [1] 27:4	argument [13] 1:14 2:2,5,8 3:4,7 21:7 33:5,12 36:1 56:20 58:18 63:15
10 [4] 18:7,8,12 20:8	58:3 65:2,6,7	addressed [1] 38:10	8	Army [5] 41:18,19,23 42:8 49:20
10,000 [1] 46:12	51 [1] 29:21	adequately [1] 11:23	80 [4] 22:2 43:12 50:19 51:9	around [6] 11:25 12:23 31:9,14 49:8 57:9
10:00 [2] 1:15 3:2	53 [1] 10:10	adjust [1] 10:20	801 [1] 22:23	articulate [1] 58:14
100 [1] 24:14	530 [1] 64:13	administrative [2] 54:2,3	9	articulating [1] 58:24
11:06 [1] 66:13	534 [1] 64:13	admitted [2] 65:10,12	90 [2] 37:8 43:16	aside [2] 53:8,10
12 [1] 20:13	55 [1] 10:10	adopt [1] 35:8	90,000 [1] 28:10	asks [1] 36:23
1200 [1] 28:17	58 [1] 22:25	advanced [1] 40:13	95 [1] 25:21	aspect [1] 37:4
125 [2] 22:19 27:3	592 [1] 22:5	ago [1] 21:4	98 [1] 37:8	Association [1] 30:15
142 [1] 3:4	A	agree [2] 40:24 48:21	99 [1] 37:9	assume [9] 11:9 26:13 27:21 29:8, 11 38:18 49:22 53:3 61:13
15 [2] 18:4 20:13	a.m [3] 1:15 3:2 66:13	agricultural [4] 33:5,9 42:18 61:10	abandoning [1] 33:6	assumed [2] 29:6,7
151 [1] 22:19	abandoning [1] 33:6	agriculture [5] 47:8 50:2,8 57:5 58:6	able [2] 52:17 54:25	assuming [2] 24:19 31:7
1570 [1] 20:24	above [5] 8:3,10 21:15 28:22 39:22	akin [1] 39:12	above-entitled [1] 1:13	assumption [2] 22:10 49:18
1720 [1] 19:7	absent [3] 3:21,23,25	alarm [1] 34:13	absolutely [3] 22:16 44:19 56:1	attempted [1] 62:2
1725 [1] 19:9	absurd [1] 26:5	Alito [12] 14:9,10 15:3 16:7,20 47:2,3,21 48:16 49:5,8 50:4	absurd [1] 26:5	available [1] 4:15
18 [4] 7:3 8:16 21:13 65:5	accept [3] 26:9 58:1,4	Alito's [4] 42:12,21 58:12 61:5	accepts [1] 35:17	avoid [2] 9:10 21:22
1869 [1] 20:17	accommodate [8] 9:7 10:3,16 23:18,23 31:18 32:14,23	Allan [4] 21:19,21,24 34:4	accommodate [8] 9:7 10:3,16 23:18,23 31:18 32:14,23	avoiding [1] 38:17
1976 [1] 34:3	accomplished [1] 52:4	Allan's [1] 57:19	account [3] 23:11 26:11 47:13	away [3] 19:3 29:6 64:22
2	account [3] 23:11 26:11 47:13	allegations [2] 36:14 62:23	accounts [1] 42:5	B
2 [2] 22:23 57:22	accurate [2] 17:3 41:10	alleged [1] 36:10	ACF [2] 37:10 41:16	back [8] 8:22 14:3,5 31:24 42:11 52:11 60:15 63:8
2,000 [1] 46:11	achieved [1] 9:16	allegedly [1] 52:1	acres [1] 28:10	back-to-back [1] 42:3
20 [5] 15:22 18:24 20:19 39:4 50:20	acreage [2] 4:2 43:7	allow [6] 6:22,23 9:24 23:25 32:18, 22	across [1] 37:4	bad [3] 17:15 20:10 54:15
200 [1] 23:2	action [1] 60:17	allowed [1] 36:17	actions [1] 60:2	balance [1] 53:24
2004 [2] 34:3 43:10	actions [1] 60:2	almost [1] 18:19	actual [1] 45:9	balancing [8] 3:13 4:12 29:13 30:8 40:9 55:7 56:5 58:13
2011 [1] 45:14	actual [1] 45:9	alone [2] 4:10 38:8		bar [3] 19:3 49:25 64:22
2012 [10] 4:23 6:12 8:20 15:12 18:7 43:18 45:14,21 55:22 64:18		already [2] 37:11 55:25		Barrett [11] 31:1,2,20 32:25 33:11 34:1,16 59:21,22 61:3 62:16
2014 [1] 43:11		altogether [2] 25:17 26:4		bars [6] 6:17 7:11 13:19 19:8 45:22 46:3
2021 [1] 1:11		amount [4] 37:13 41:20 46:13 48:2		based [3] 5:6 62:23 64:15
21 [1] 19:7		amounts [1] 6:22		basic [3] 5:20 11:5 36:6
22 [1] 1:11		analyses [1] 54:5		basin [4] 37:10,11 41:16 46:19
2404 [1] 64:19		analysis [7] 3:20 46:10 52:5 57:19, 21 58:23 59:7		basing [1] 12:5
26 [1] 22:2		analyze [3] 5:6,18 38:5		basis [1] 46:23
3		anecdotal [1] 45:18		bay [25] 5:25 6:23 7:10,14,17 13:16 14:3 15:17,23 16:11,15,25 17:7 20:7,24 21:9 30:17 47:23 48:3,5, 11 57:8,12 59:9 65:1
3 [1] 2:4		another [1] 60:17		became [3] 16:15 17:7 45:21
3,000 [1] 9:3		answer [11] 9:2,4 32:7 41:4 45:2 47:14 48:13 52:23 60:22 62:3 65:4		becoming [2] 34:8 51:20
30 [4] 7:15 15:22 18:24 20:19		answered [1] 63:7		beds [6] 8:5 15:6,11 17:1 47:16 48:5
300 [2] 21:25 23:5		answering [2] 37:23 47:14		behalf [8] 1:19,21 2:4,7,10 3:8 36:2 63:16
32 [1] 21:22		answers [3] 49:12 59:5 63:8		behind [1] 9:23
341 [1] 22:23		anybody [2] 44:23,25		believe [7] 17:3 52:20 53:24 54:8 57:15 59:6 60:18
36 [1] 2:7		Apalachicola [9] 4:23 5:1 34:24 35:19 41:1 47:23 59:9 61:21 66:7		bells [1] 34:14
368 [1] 23:1		apparent [1] 42:22		below [4] 8:19 10:18 12:6 21:18
3d [1] 22:2		APPEARANCES [1] 1:17		beneficial [1] 8:4
4		applied [1] 58:23		benefit [26] 3:24 4:14,23 7:10 20:22 21:4 37:18 40:17 49:16 51:24
4 [2] 8:25 23:6		apportion [1] 10:12		
40 [1] 39:5		apportionment [8] 16:4 24:9 27:19 39:7,20 53:9,14 60:21		
400 [1] 28:7		appreciable [1] 18:3		
44 [1] 23:6		appreciate [1] 11:8		
4453 [2] 25:20 65:13				
4468 [2] 25:21 65:11				
4490 [1] 25:21				
46 [2] 21:21 34:12				
468 [1] 65:13				
47 [3] 10:18 22:20 34:12				
48 [2] 10:18 34:12				

Official - Subject to Final Review

<p>52:2 54:25 55:3 56:12 57:7,13,24, 25 59:10 61:1,14,15,22 62:7 63:3 65:4</p> <p>benefited [1] 52:19</p> <p>benefits [16] 24:9 27:18,21,23,25 28:3,25 29:8,22 36:11 48:24 51:17 53:2 58:15 64:25 65:24</p> <p>bent [1] 36:20</p> <p>Berrigan [3] 13:16,19 15:7</p> <p>best [2] 12:20 19:18</p> <p>between [3] 11:18 34:3 38:23</p> <p>beyond [1] 42:15</p> <p>big [3] 11:1 44:8 58:19</p> <p>biggest [2] 16:16 17:20</p> <p>biologically [1] 21:20</p> <p>biomass [4] 18:6 19:2,6 60:3</p> <p>bit [1] 51:20</p> <p>both [2] 27:24 46:10</p> <p>bottom [1] 46:24</p> <p>bound [1] 19:17</p> <p>box [1] 32:6</p> <p>Breyer [9] 10:24,25 12:19 13:11 15:4 44:4,5 45:6 47:1</p> <p>brief [9] 5:22 7:3 8:16 21:14 23:22 30:15 32:24 33:4 41:7</p> <p>briefs [5] 8:3 21:6,6 33:12 58:21</p> <p>bring [1] 14:3</p> <p>broke [1] 36:21</p> <p>brother [1] 50:9</p> <p>building [1] 41:17</p> <p>bump [1] 21:14</p> <p>burden [3] 11:20 49:3 56:24</p> <p>but-for [1] 39:12</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>calculating [1] 47:7</p> <p>calibrate [1] 29:15</p> <p>call [1] 30:9</p> <p>called [2] 4:12 57:17</p> <p>came [3] 1:13 25:8 63:8</p> <p>cap [2] 31:7 40:14</p> <p>caps [2] 36:23 63:1</p> <p>cared [1] 47:25</p> <p>Case [39] 3:4,11 5:6,18 9:8 14:11 17:20 25:11 28:20 30:2 31:23 32:14 36:7 37:5,16 38:5 39:20 41:9 42:12 43:24 49:10,12 52:14,15,22 53:7,8,19 54:15 55:21 56:16 57:2 59:7,17 62:6,6,21 66:12,13</p> <p>cases [2] 38:11 59:11</p> <p>catch [1] 44:17</p> <p>causation [11] 5:21,23 6:7 38:10, 13 39:1,10,12,21 43:1 60:25</p> <p>cause [15] 5:9 6:4 11:5 15:5 16:23 36:13 38:3,4,7,8 39:4,5 47:5 55:21 63:1</p> <p>caused [8] 5:14 14:6 17:13 20:11 36:10,16 42:18 44:16</p> <p>causes [3] 6:3,7 17:9</p> <p>causing [3] 12:17 48:11 51:12</p> <p>center [3] 28:14 43:15 46:20</p> <p>cents [1] 26:19</p> <p>centuries [2] 30:16 35:21</p> <p>certain [1] 66:5</p>	<p>certainly [6] 38:15 40:7 41:13 57:1 58:21 62:10</p> <p>cetera [1] 15:13</p> <p>CFS [30] 4:17 7:4 9:1,3,16 10:8 21:5,8,10,14,25 22:20,23 23:3,5 26:24 27:3 28:7,17,22 49:19 56:21 57:6,16,20,23 58:3 65:2,6,8</p> <p>challenge [1] 33:6</p> <p>challenged [2] 39:2,11</p> <p>change [8] 12:8 17:13 18:8,20 20:7 42:6 53:16 56:20</p> <p>changed [2] 6:9 17:24</p> <p>changes [2] 18:4 32:3</p> <p>charged [1] 43:1</p> <p>chart [5] 7:3 8:15 21:13 64:3 65:5</p> <p>charts [1] 34:2</p> <p>Chesapeake [1] 34:23</p> <p>chicken-and-egg [1] 23:20</p> <p>CHIEF [39] 3:3,9 5:5 6:20 7:18,21 10:22 14:7 17:16 20:25 24:4 27:12,15 30:25 34:18 35:23 36:3 37:25 38:9,16,20 39:3,9,17,24,25 40:19,22 44:3 47:2 50:5 52:9 55:10 58:8,11 59:20 62:18 63:12 66:11</p> <p>circumstance [2] 27:23 29:13</p> <p>circumstances [2] 4:24 28:19</p> <p>City [3] 25:10 30:3 65:25</p> <p>claims [2] 46:14 63:8</p> <p>clarifying [1] 11:8</p> <p>Clawndaw [1] 34:5</p> <p>clear [19] 10:13 11:20 23:21,22 24:24 28:7 32:13 35:1 36:9 49:1 51:16 52:15,17 53:1,9,11 54:9 58:17 62:23</p> <p>climate [2] 64:2,7</p> <p>closer [3] 19:8 20:23 41:22</p> <p>closing [1] 34:21</p> <p>collapse [10] 5:8 15:5,13 16:9 24:18 36:16,19 45:15 48:12 55:22</p> <p>collapsed [1] 46:4</p> <p>collected [2] 45:10,16</p> <p>combined [2] 48:8,12</p> <p>come [7] 14:5 42:19 46:24 51:5 57:12 58:25 63:21</p> <p>comes [4] 11:11 34:25 54:16 60:15</p> <p>coming [2] 21:9 57:6</p> <p>comment [1] 54:4</p> <p>common [1] 24:7</p> <p>communities [3] 30:13,17 35:19</p> <p>compare [1] 8:23</p> <p>Comparing [2] 41:2,16</p> <p>comparison [4] 41:16 48:18,22 64:15</p> <p>compel [1] 4:10</p> <p>compelling [3] 30:16 40:12 56:14</p> <p>competing [1] 40:1</p> <p>complaining [1] 37:16</p> <p>complaints [1] 55:13</p> <p>completely [5] 26:14 41:15 53:9 64:16 65:9</p> <p>compounded [1] 42:2</p> <p>comprehensive [1] 14:12</p> <p>conceded [1] 46:10</p>	<p>conches [1] 13:4</p> <p>conclude [4] 28:3,5 38:5 40:3</p> <p>concluded [2] 6:21 59:24</p> <p>concluding [2] 3:21,23</p> <p>conclusion [3] 4:10 44:1 45:17</p> <p>conclusions [2] 14:22 19:19</p> <p>condemned [1] 34:11</p> <p>conditions [10] 4:22 7:5 9:15 14:2, 5 15:25 16:4 21:23 28:23 65:3</p> <p>conduct [4] 3:12 39:2,11 46:9</p> <p>confines [1] 10:2</p> <p>confirms [1] 12:7</p> <p>conflicting [3] 13:8,13 15:6</p> <p>confronted [1] 59:15</p> <p>connect [1] 57:16</p> <p>connected [1] 43:7</p> <p>conservation [3] 22:11 50:10 51:5</p> <p>consider [5] 25:23 26:19,20 29:20 65:13</p> <p>considerably [1] 19:5</p> <p>considered [1] 56:17</p> <p>consistent [3] 14:15 39:1,13</p> <p>consume [1] 66:6</p> <p>consumed [2] 18:6 46:8</p> <p>consumes [1] 37:13</p> <p>consumption [17] 3:22 4:5,11 5:24 6:4,10 9:1 12:14 17:23 18:11 30:20 32:3 33:14,17 34:11,14 64:9</p> <p>contentions [1] 33:3</p> <p>continue [3] 35:5,6 66:6</p> <p>contrary [1] 45:25</p> <p>contributed [2] 5:7 18:12</p> <p>contributing [3] 6:3,7 38:6</p> <p>contribution [3] 40:3,5,8</p> <p>control [1] 56:8</p> <p>controlling [1] 41:23</p> <p>controls [1] 63:23</p> <p>conversation [1] 52:11</p> <p>convincing [7] 11:21 36:9 49:1 51:16 53:1 54:9 58:17</p> <p>Corps [40] 8:6,12 9:5,7,10,21 10:1, 7,14,20 23:17,21 31:5,12,18 32:1, 13,18,22 41:3,4,18,19,23 42:8 43:21 49:20 52:12 53:8,10,11,12,16, 21,23 54:7,21 55:1 63:19,22</p> <p>Corps' [4] 23:11 31:5 52:21 53:14</p> <p>correct [5] 17:1 25:7 33:18 48:20 57:21</p> <p>corresponding [1] 37:18</p> <p>corrupted [1] 3:19</p> <p>cost [25] 4:16,18 23:8 24:14 25:14 26:2,25 27:3,8,20,22 28:8,12,21 29:16 36:25 44:21 50:10 51:5 58:2,6 61:14,19 65:7,15</p> <p>cost-efficient [1] 65:14</p> <p>cost/benefit [1] 52:4</p> <p>costless [1] 60:9</p> <p>costly [1] 50:24</p> <p>costs [7] 27:24,25 28:3,6 29:3,9 37:3</p> <p>couldn't [1] 30:4</p> <p>counsel [16] 7:19 10:17,23 14:8</p>	<p>17:17,19 19:12 21:1 27:11 35:24 38:1 40:20 50:7 52:8 63:13 66:12</p> <p>count [1] 26:22</p> <p>counted [1] 45:18</p> <p>couple [1] 7:23</p> <p>course [4] 11:2 38:17 42:14 61:9</p> <p>COURT [46] 1:1,14 3:10,12 4:13 9:6 10:12,13 14:18,25 16:3 17:10 18:17 23:16,22 24:24 25:18 30:4 31:9 32:13,20,21,24 35:11,16 36:4,23 37:20 38:10,12 39:16 40:14 42:15 43:25 45:8 49:2 51:15,19, 25 52:5 53:5 54:11 59:13 62:9 63:6 64:8</p> <p>Court's [10] 5:4 37:15,24 38:21,25 48:22 51:14 52:24 54:9 60:20</p> <p>crabs [1] 34:23</p> <p>CRAIG [3] 1:20 2:6 36:1</p> <p>crash [9] 6:13 7:6 8:20 9:15 14:6 21:17,23 28:24 65:3</p> <p>created [1] 47:20</p> <p>creation [1] 47:17</p> <p>critical [3] 19:1 55:20 59:5</p> <p>cross [2] 35:3,6</p> <p>cross-examination [3] 14:24 25:20 65:11</p> <p>crushed [1] 25:10</p> <p>cubic [6] 8:3,7 9:24 31:7 46:11,12</p> <p>curbed [1] 4:7</p> <p>current [2] 10:2 40:15</p> <p>cut [1] 36:24</p> <p>cuts [1] 37:4</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [3] 1:10,18,20</p> <p>damage [1] 48:17</p> <p>damning [1] 64:6</p> <p>damningly [1] 65:12</p> <p>dams [3] 9:23 41:17 55:2</p> <p>data [5] 45:10,16 46:1,7 47:6</p> <p>day [1] 14:4</p> <p>day-to-day [1] 64:15</p> <p>days [2] 12:6 41:22</p> <p>de [2] 14:19 47:19</p> <p>dead [6] 6:16 12:23,24 13:18 44:14 45:12</p> <p>dealt [1] 64:21</p> <p>dearth [1] 65:16</p> <p>death [1] 4:25</p> <p>debate [2] 17:11 66:4</p> <p>debated [1] 61:25</p> <p>debating [1] 65:20</p> <p>decade [1] 54:13</p> <p>decide [3] 38:12 39:16,19</p> <p>decided [1] 32:15</p> <p>decimated [3] 4:22 6:18 13:23</p> <p>decision [7] 9:6 10:13 23:17 25:2 29:21 32:20 35:12</p> <p>decisions [2] 38:25 48:23</p> <p>decisively [1] 63:9</p> <p>decline [1] 33:24</p> <p>declined [2] 29:19 64:6</p> <p>declining [1] 12:4</p> <p>decrease [4] 15:22 20:12,20 60:2</p>
---	---	--	--

Official - Subject to Final Review

<p>decreased [1] 8:25 decree [25] 3:24 4:15 9:7 10:16 23:18,23,24 24:9,14 28:20 32:14,23 35:4,6 36:12 47:5 54:1 59:8 60:4,11,13 63:10 65:25 66:5,6 decrees [1] 52:6 defeat [1] 6:7 Defendant [4] 1:7,21 2:7 36:2 defers [1] 43:22 degree [2] 47:15,16 demonstrate [1] 36:15 denied [4] 32:5,9 36:5 63:10 Denying [1] 4:24 depend [2] 26:3 30:13 depended [1] 35:20 described [3] 17:14 34:5 54:1 designed [1] 64:17 despite [1] 4:3 detail [1] 63:6 detailed [2] 43:20 46:22 determine [1] 56:2 devastated [1] 65:23 devastating [1] 64:1 develop [1] 32:10 devoured [1] 16:19 diametrically [1] 14:21 dictates [1] 54:6 difference [3] 21:8 56:21 65:19 different [3] 44:22 52:14 55:15 differential [1] 9:3 differently [1] 38:18 difficult [3] 61:24 62:5,14 dipped [1] 8:19 direct [3] 21:21 22:2,21 direction [1] 63:9 directions [1] 55:15 directives [1] 53:23 directly [1] 38:10 directness [1] 38:22 disagree [2] 29:10 61:18 disappearance [1] 41:12 disappearing [5] 11:19 41:9,14,25 42:7 disconnected [1] 34:8 discovery [2] 56:9 62:22 discrepancies [2] 44:8,10 discretion [2] 10:7 23:25 discussion [1] 8:5 dismissed [1] 26:14 disparity [1] 26:12 dispositive [2] 56:4 59:17 disproportionately [1] 22:1 dispute [1] 17:6 disputed [2] 25:1 35:14 disregarded [1] 32:17 distinction [1] 59:16 diversion [1] 48:24 document [3] 45:12,13 46:21 documented [1] 43:24 doing [4] 27:20 29:12 30:19 51:24 dollar [5] 26:19 40:5 47:8 61:9,11 dollar-and-cents [2] 25:6 26:11 dollars [4] 24:15,18 36:25 63:2 done [7] 10:8 26:7 28:4 31:17 55:</p>	<p>23 57:18 59:14 doubt [2] 4:8 22:4 doubtful [1] 18:8 down [5] 25:8 33:1 52:18,20 57:13 downstream [2] 54:18,19 draconian [2] 36:23 62:25 drastically [1] 6:10 draw [1] 50:16 drills [1] 16:18 driving [1] 56:16 drought [9] 4:5 5:12 8:8,12,24 9:10,20 10:20 24:15 droughts [1] 42:3 dry [2] 8:13 9:20 drying [1] 34:9 due [1] 45:23 during [4] 8:7,12,24 9:20 dwarfs [1] 61:15</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>e-mail [1] 45:21 each [1] 24:24 earlier [3] 37:15 59:5 61:7 easiest [1] 23:24 east [1] 20:7 ecological [8] 25:3 26:10,21 29:1,23 30:12 35:15 62:11 economic [2] 40:7 62:1 economy [2] 37:10 40:4 ecosystem [4] 22:4 47:12 48:17 61:7 effect [6] 18:3 19:21 34:24 48:8,11 59:8 effectively [1] 4:7 effects [2] 33:13,15 efficiency [3] 28:19 43:17 50:13 efficient [1] 35:8 efficiently [1] 43:15 efforts [2] 13:24 22:11 eight [1] 17:24 elements [1] 48:1 elevated [3] 45:12,13 46:5 eliminate [6] 7:5 25:24 26:3,4 28:23 29:18 eliminating [8] 4:19 22:22 23:4 25:24 27:5 28:9,13 65:2 elimination [1] 9:14 end [2] 11:13 49:23 enforcing [2] 22:19 28:11 England [1] 34:22 enormous [1] 29:22 enough [3] 5:8 39:5,6 ensure [1] 48:5 ensuring [1] 31:6 enter [1] 37:21 entire [7] 3:19 7:14,17 20:24 24:16 46:18 65:1 entirely [1] 14:14 entitle [1] 41:8 environment [2] 16:16 17:8 environmental [2] 54:5 61:22 equal [3] 5:2 24:24 35:12 equitable [15] 3:13 6:25 10:12 16:3 18:14,18 39:6,20 53:8,13 55:6</p>	<p>60:4,11,13,21 equity [2] 37:7 63:5 era [2] 8:23 63:25 errors [2] 46:11 64:12 ESQ [3] 2:3,6,9 ESQUIRE [2] 1:18,20 essentially [3] 16:15 17:7 31:11 establishes [1] 4:13 estimates [6] 9:2 12:2 25:14 26:2 46:25 49:22 estuaries [1] 29:24 et [1] 15:13 evaluate [1] 63:7 evaluated [1] 57:3 evaluation [1] 54:6 evaporates [2] 11:12 28:17 evaporation [2] 26:1 28:16 even [24] 3:25 4:4,16 10:6 13:25 24:19,19 26:25,25 31:6 38:3 39:22 40:12 46:5,6 49:17,21,21 51:25 53:11 54:2 57:21,23 62:25 eventually [1] 63:22 everything [1] 64:8 evidence [42] 3:19 4:13 6:15 7:8 10:9 11:21 12:9,15,16,20,20 13:8,13 14:20 15:6,7,8,10 16:16,22 21:10 32:8,10 33:15,24 36:9 40:13 49:1 51:8,17 53:1 54:9 55:25 56:12 57:11 58:18 59:6 62:7,25 63:4 64:23 65:17 evidentiary [2] 55:17 56:9 exact [1] 17:11 exactly [1] 22:9 examine [1] 64:17 example [1] 50:11 exceeds [1] 46:13 except [1] 53:14 exceptions [1] 37:21 exercise [1] 23:25 exist [2] 41:24 42:4 existing [2] 28:11 54:10 expect [2] 19:8 53:15 experiments [1] 18:2 expert [12] 13:25 15:9 19:13,18 20:9 43:12 45:8,20,21,24 64:7 65:10 experts [12] 11:3,9 16:13 17:21 18:12 20:12 40:13 46:9 49:15 57:3,24 61:24 explain [2] 5:22 58:20 explains [1] 30:16 exploded [1] 43:9 exploding [1] 3:17 exploring [1] 15:5 Express [1] 5:10 extent [1] 39:18 extinguish [1] 5:1 extinguished [1] 35:18 extinguishing [2] 25:4 30:21 extra [1] 31:6 extraordinary [3] 39:9,14 60:20 extreme [5] 4:8,21 6:11 12:17 21:17 eyewitnesses [1] 16:13</p>	<p style="text-align: center;">F</p> <hr/> <p>face [1] 11:1 faces [1] 34:25 fact [12] 4:16 6:2,6,16 14:22 42:2 50:23 51:10,11 60:9 62:24 63:24 fact-bound [1] 14:11 fact-finder [1] 14:19 fact-finding [3] 31:25 32:5 56:3 factor [5] 5:25 38:15 40:8,12 48:17 factors [1] 6:5 facts [1] 17:20 failed [3] 36:7,11,15 fair [1] 24:12 falls [1] 11:10 false [1] 65:10 famed [1] 65:22 farm [5] 23:4 25:25 27:7 28:16,17 farmers [8] 35:2,5 40:2,4 43:13 47:20 50:16,22 farming [2] 26:4,6 fatally [1] 25:14 favor [1] 37:21 favorable [1] 49:18 February [1] 1:11 feedbacks [1] 20:21 feet [7] 8:4,7,7 9:24 31:8 46:11,12 few [1] 13:4 fiction [1] 17:15 field [1] 28:15 figures [1] 61:13 find [1] 43:25 finding [6] 3:15,18 19:2 29:20 32:18 57:25 findings [5] 4:9 15:1 31:15 42:16 43:20 fine [1] 44:11 first [19] 7:2 8:15 9:11 10:4 11:9 12:1 17:22 21:12 24:23 26:18 29:15 31:23 41:14 44:7 45:2,5,5 48:15 63:18 Fish [2] 34:9 64:10 fished [3] 35:20 46:3,5 fisheries [1] 65:22 fishermen [1] 12:22 fishery [6] 5:11,17 6:24 24:17 36:21 38:8 fishing [1] 36:18 five [2] 17:25 19:25 five-week [1] 36:8 flat [1] 43:10 flawed [2] 25:15 29:20 flaws [1] 32:16 Flint [4] 3:17 33:9 43:8 46:19 FLORIDA [62] 1:3 3:5,15,24 4:14 5:12 12:11 14:2 21:4 24:8 26:20 27:19 28:25 29:8 31:6 35:4,12 36:6,8,10,15,17,19,23 37:4,12,19 38:13 40:2,6 41:15,21 43:8 44:20,24 45:10,16 46:9,13 47:4,9 49:18 51:13,25 52:2,18,18,21,25 54:19,25 55:3,23 56:6 57:7 60:1 61:1,15,20 62:1,20 63:3 Florida's [24] 5:1 18:13 25:1 30:21</p>
--	---	---	---

Official - Subject to Final Review

<p>35:14 36:5,10,14 37:5,20 38:3 40:13,17 41:7 45:20 49:22,24 55:13 57:2,24 61:11 62:23,24 63:9</p> <p>flow [12] 4:22 6:12,23 7:25 8:6,8,10 12:6 22:9 40:25 41:20 55:1</p> <p>flows [21] 4:8 7:9,15 8:17,18,23,24,25 12:4,12 20:2 21:14,18 25:24 28:22 30:11 37:11 41:23 42:6 63:24</p> <p>focus [1] 33:8</p> <p>focused [5] 7:11 33:5,12,19 42:14</p> <p>focusing [1] 51:21</p> <p>follow [2] 15:3 61:4</p> <p>follows [1] 61:5</p> <p>forward [3] 37:23 46:16 56:13</p> <p>found [7] 4:4 10:5 18:17 24:14 43:6 45:9 46:2</p> <p>four [1] 13:24</p> <p>frequency [1] 21:17</p> <p>frequently [1] 4:9</p> <p>further [5] 7:11 19:3 20:6 44:11 64:22</p> <p>future [3] 34:24 48:10 62:6</p> <p>FX [4] 22:23 34:12 64:13,13</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gap [1] 22:12</p> <p>GARRE [58] 1:18 2:3,9 3:6,7,9 5:5,20 7:2,23 8:14 10:4 12:1 13:9,12 14:17 15:14 16:10 17:2 18:16 19:11,14,22 20:4,15 21:3,12 22:15 23:12 24:3,6,12,23 26:16,18 27:16 28:2 29:14 30:24 31:3,19,22 32:25 33:8,21 34:4,17,19,20 38:2,22 47:11 56:19 57:15 58:22 63:14,15,17</p> <p>gave [1] 23:10</p> <p>gears [1] 33:1</p> <p>generally [1] 17:25</p> <p>generate [3] 25:23 26:24 28:22</p> <p>generated [4] 4:18 23:13 28:7 53:25</p> <p>generates [1] 24:17</p> <p>George [1] 12:11</p> <p>GEORGIA [79] 1:6 3:5 4:1,6,16 5:7 6:21,22 7:24 10:17 11:10,11 17:23 18:5 22:10 23:8 24:16 25:1 26:25 27:9,20 28:8,21 29:3,10,18 30:18 35:2,13 36:9,24 37:1,3,7,12,19,22 38:3,14 40:2,14 41:11,21 42:17 43:3,9,13 44:9,21,22,24 46:14,18 47:5,8 48:21 49:19 52:16 53:4 54:16,17 55:4,7 56:24 57:5 58:2,6,24 60:10 61:14,19,20 63:2 64:1,6,11 65:17 66:1,6</p> <p>Georgia's [26] 3:16,22 4:4,10 5:14,24 6:3,10 9:1 12:10,18 13:25 25:4 33:5,13 34:11,14 36:16 43:12 50:14 51:22 60:1 61:10 63:1,4 64:11</p> <p>getting [1] 4:3</p> <p>give [5] 7:25 8:9 12:20 49:15 51:24</p> <p>given [7] 26:5,11 28:25 29:1 38:23 39:8 45:5</p>	<p>Glibert [5] 7:12 15:15,16 18:22 64:23</p> <p>Glibert's [1] 20:16</p> <p>Gorsuch [11] 24:5,6,13 26:8,17 27:10 55:11,12 56:19 58:1,7</p> <p>Gorsuch's [1] 27:17</p> <p>got [1] 31:24</p> <p>government [1] 31:21</p> <p>grandfathered [2] 50:25 51:11</p> <p>Granting [1] 37:6</p> <p>gravel [1] 45:23</p> <p>great [4] 16:14 50:11 55:3 56:7</p> <p>greater [2] 19:21 38:22</p> <p>Greenblatt [3] 15:14,24 17:22</p> <p>GREGORY [5] 1:18 2:3,9 3:7 63:15</p> <p>ground [3] 12:3 24:8 50:17</p> <p>grow [4] 35:3,6 48:7,11</p> <p>guaranteed [1] 55:1</p> <p>guess [3] 23:15 26:8 34:21</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half [3] 26:6 50:14 57:22</p> <p>halting [3] 4:18 22:18 27:1</p> <p>hand [1] 24:16</p> <p>handles [2] 51:22,23</p> <p>happen [3] 43:4 65:20 66:4</p> <p>happened [3] 16:2 21:16 65:21</p> <p>happening [2] 12:3 34:7</p> <p>hard [3] 15:9 18:10 34:22</p> <p>hardly [1] 35:9</p> <p>harm [24] 3:21,23,25 5:25 12:15,16,17 24:10 29:20 32:4 36:12 38:8 42:18 47:4,5 48:25 53:4 54:20 57:11 58:16 61:6 62:8,11 63:2</p> <p>harmed [2] 3:16 12:12</p> <p>harms [7] 26:10 33:20,22 34:5 36:10 38:3 51:18</p> <p>harvest [1] 5:8</p> <p>harvesting [3] 6:18 13:22 45:24</p> <p>healthy [1] 15:11</p> <p>hear [3] 3:3 56:24 59:1</p> <p>heard [2] 14:11,24</p> <p>hearing [3] 10:18 55:17 56:9</p> <p>heavily [2] 46:3,4</p> <p>held [1] 30:4</p> <p>help [8] 7:5,16 9:10 20:24 21:22 30:11 61:20,20</p> <p>helping [1] 50:2</p> <p>hemisphere [1] 29:25</p> <p>herring [2] 63:20 64:21</p> <p>high [2] 49:3 63:5</p> <p>higher [3] 18:7 39:1,10</p> <p>highly [2] 37:13 43:6</p> <p>himself [1] 12:13</p> <p>hired [1] 46:9</p> <p>historic [1] 42:4</p> <p>historically [4] 8:22,24 10:8 21:16</p> <p>hit [1] 51:7</p> <p>hold [2] 9:23 55:16</p> <p>home [1] 37:7</p> <p>Honor [29] 5:21 7:2 8:14 9:5,17 10:4,11 12:2 13:9 14:17 15:16 16:3,10,17 17:4 18:16 19:14,22 20:15</p>	<p>22:7,16 23:13 29:16 31:22 33:10,21 34:20 54:1 63:17</p> <p>Honors [1] 66:10</p> <p>hook [1] 38:7</p> <p>Hornberger [4] 21:19,20 64:5,18</p> <p>huge [5] 4:23 6:22 7:7 44:10 65:3</p> <p>humans [1] 47:25</p> <p>hundred [1] 28:17</p> <p>hundreds [4] 4:17 26:20 36:25 63:1</p> <p>hurdles [1] 11:2</p> <p>hypothetical [1] 53:3</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea [1] 38:6</p> <p>identical [1] 18:19</p> <p>identify [1] 56:11</p> <p>ignore [2] 50:23 51:4</p> <p>illegal [5] 4:18 22:18 25:25 27:2 28:10</p> <p>imagine [5] 18:11 34:22 61:17,18 62:10</p> <p>immediately [1] 3:14</p> <p>impact [7] 4:20 22:1,24 27:7 28:15 32:2 34:14</p> <p>important [3] 14:25 21:20 22:14</p> <p>impose [5] 31:7 36:23 50:15 53:5 56:23</p> <p>imposition [1] 47:4</p> <p>improve [1] 57:22</p> <p>improving [1] 50:12</p> <p>inadequate [2] 60:25 61:1</p> <p>inapt [1] 41:15</p> <p>include [1] 27:5</p> <p>including [2] 25:24 43:2</p> <p>inconsistency [1] 42:23</p> <p>inconsistent [1] 13:20</p> <p>increase [13] 6:11 8:3,18,19 12:5 15:20 16:14 17:8 22:11 37:1 49:25 57:9 59:10</p> <p>increased [1] 6:10</p> <p>increases [2] 4:5 19:8</p> <p>increasing [2] 20:1 34:13</p> <p>incur [1] 29:4</p> <p>individuals [1] 45:19</p> <p>industry [6] 33:14,20 40:11 47:9 61:10,12</p> <p>inefficiency [2] 29:19 30:10</p> <p>inflated [1] 49:22</p> <p>inflows [2] 4:17 7:4</p> <p>influence [1] 41:20</p> <p>influenced [1] 7:24</p> <p>influx [2] 16:17 17:9</p> <p>information [1] 56:7</p> <p>inherent [1] 46:11</p> <p>initial [1] 10:10</p> <p>injury [8] 59:25 60:1,3,4,8,13,18 61:11</p> <p>inquiry [3] 3:13,15 25:6</p> <p>insofar [1] 25:15</p> <p>inspected [1] 45:22</p> <p>Instead [3] 26:2 36:17 62:24</p> <p>interesting [1] 9:19</p> <p>interests [3] 38:23 40:1,1</p>	<p>internal [1] 49:4</p> <p>intervene [3] 49:3 51:15 60:21</p> <p>intervening [1] 42:9</p> <p>invasion [5] 13:15 17:13 18:9 60:16 62:12</p> <p>invested [1] 26:20</p> <p>invocation [1] 60:20</p> <p>involve [1] 58:5</p> <p>involved [2] 52:5 57:4</p> <p>irrelevant [3] 44:6,19 64:16</p> <p>irreplaceable [3] 25:3 30:12 35:15</p> <p>irreversibly [1] 66:8</p> <p>irrigated [1] 43:7</p> <p>irrigating [3] 4:1 26:1 35:9</p> <p>irrigation [27] 3:17 4:19,20 12:10 22:18,23,25 23:4 25:17,25,25 26:4,7 27:1,2,6,8 28:10,15 33:9 36:24 40:14 43:15 46:20 50:12,15 65:9</p> <p>isn't [1] 49:9</p> <p>issue [9] 5:3 20:11 35:13 38:11 39:15 55:21 56:4,5 62:6</p> <p>issues [2] 52:6 56:15</p> <p>itself [6] 4:21 7:7 10:14 23:5 34:10 64:11</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>Jersey [15] 16:2 17:10 18:17 25:7,11 30:2,6 49:9,14 58:21,25 59:2,14 65:18,19</p> <p>Jersey's [3] 16:5 30:6 49:14</p> <p>jobs [1] 37:9</p> <p>Judge [9] 24:13,19 26:13 42:19 55:16 56:14 60:12,23 61:12</p> <p>judgment [1] 37:21</p> <p>JUSTICE [129] 3:3,10 5:5 6:20 7:18,20,21,22 9:18 10:22,24,25 12:19 13:11 14:7,9,10 15:3,4 16:7,20 17:16,18,19 19:10,12,15 20:3,5,25 21:2,3 22:8 23:9 24:2,4,4,13 26:8,17 27:10,12,12,14,15,17 29:5 30:23,25,25 31:2,20 32:25 33:11 34:1,16,18 35:23 36:3 37:25 38:9,16,21 39:3,10,17,24,25 40:19,21,22,23 41:5,6 42:10,12,20 43:19 44:2,3,3,5,7 45:5 47:1,2,2,3,21 48:16 49:5,8 50:4,5,5,7 51:6 52:7,9,9,10,12 53:6,17 54:14,23 55:9,10,10,12 56:19 58:1,7,8,8,10,11,12 59:3,18,20,20,22 61:3,5 62:16,18 63:12 66:11</p> <p>justify [6] 18:14,18 60:4,11,13,19</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan [9] 21:2,3 52:9,10 53:6,17 54:14,23 55:9</p> <p>Kavanaugh [8] 27:13,14 29:5 30:23 58:9,10 59:3,18</p> <p>Kelly [22] 4:4 10:6 12:13 24:13,19 27:1 29:19 31:24 32:5,9 42:19 43:1,5,23 55:16 56:1,10,14 59:24 60:12,24 61:13</p> <p>Kelly's [4] 25:14 26:13 32:16 43:</p>
--	--	--	---

Official - Subject to Final Review

<p>20 key ^[3] 7:4 14:15 51:7 killing ^[1] 5:16 Kimbrow ^[9] 13:17 15:15 17:3 18:1 19:4 20:4,12,21 64:23 kind ^[3] 31:20 52:22 53:7 knows ^[1] 19:23</p> <hr/> <p style="text-align: center;">L</p> <p>lack ^[1] 42:5 Lancaster ^[6] 10:5,9 14:23 31:15 42:13,25 large ^[2] 19:8 22:1 larger ^[2] 40:11 61:8 last ^[7] 3:11 23:21 31:9 32:4,12 42: 13 66:3 later ^[1] 45:25 lead ^[1] 42:11 leading ^[1] 45:14 leases ^[2] 6:17 13:21 least ^[2] 20:13 24:21 led ^[1] 6:11 left ^[1] 35:4 legal ^[3] 59:23 60:7,22 legislative ^[1] 53:23 lengthy ^[1] 62:22 Leon ^[1] 47:19 less ^[11] 17:25 18:12 21:8 26:1 42: 8 43:4 57:8,22,23 59:11 61:19 Lettenmaier ^[2] 64:5,19 level ^[4] 38:22 39:1,21 62:11 levels ^[3] 36:18 45:12,13 lies ^[1] 52:24 life ^[1] 33:16 limit ^[2] 50:15 51:25 limited ^[1] 45:5 limiting ^[1] 8:6 limits ^[4] 48:2 51:1,2,12 line ^[4] 8:25 12:4 27:17 63:24 lines ^[1] 41:9 Lipcius ^[4] 14:1 15:9 45:9 46:2 little ^[8] 4:16 9:16 11:18 21:5,25 23:8 29:3 30:6 load ^[1] 44:14 loads ^[1] 44:14 lobsters ^[1] 34:22 local ^[2] 51:21 52:6 look ^[6] 21:13 37:23 44:14 53:7,13 60:7 looked ^[2] 11:22 45:23 looking ^[3] 43:2 60:24 61:9 lose ^[1] 52:25 lost ^[3] 35:21 48:14 66:8 lot ^[8] 5:11 11:2,14,18 12:23 45:23 56:7 66:4 lots ^[1] 25:9 low ^[9] 4:8,22 6:12 8:8,23,23 12:6, 12 21:18 lower ^[2] 5:13 46:18</p> <hr/> <p style="text-align: center;">M</p> <p>made ^[9] 10:13,19 21:7 23:21,21 24:24 31:16 32:13 50:11 magnitude ^[4] 18:10 24:20 60:17</p>	<p>62:12 main ^[1] 17:6 major ^[2] 11:5 12:8 majority ^[1] 37:10 man-made ^[1] 47:17 managed ^[1] 47:24 managers ^[1] 48:4 managing ^[2] 45:11 52:6 manual ^[5] 9:22,22 10:3 32:2,3 many ^[6] 13:3,5 14:4,4 20:20 50:9 mapped ^[1] 46:18 marine ^[2] 16:16 17:7 mass ^[1] 64:20 massive ^[3] 37:2 51:12 54:20 Master ^[31] 3:12,14,20 4:4 6:21 10: 5,5,6,9 11:22 12:13 14:23 19:17 25:14 27:1 29:19 31:10,15 32:5,9, 16 42:13,25 43:1,5,20,23,23 56:1, 10 59:24 Master's ^[1] 35:17 masters ^[4] 14:13,21 22:25 55:14 matter ^[3] 1:13 21:11 47:7 matters ^[2] 4:6 54:21 maximize ^[3] 4:20 27:7 28:15 maximizing ^[1] 22:24 maximum ^[3] 15:11 40:16 59:11 mean ^[27] 6:3 11:1,20 12:7,20 14: 20 15:22 16:12,19 19:22 21:12 22: 18 23:19 24:23 28:6,9,16 29:14, 16 31:9 34:7 40:2,6 44:10 52:13 61:17 63:18 meaningful ^[1] 4:15 measure ^[4] 11:16 22:14 44:8 61: 6 measured ^[1] 11:17 measurements ^[1] 16:24 measures ^[4] 35:8 50:23 61:19 65: 14 memory ^[1] 14:12 mention ^[1] 35:19 mentions ^[1] 47:11 merely ^[1] 37:17 metering ^[2] 46:22 51:23 methods ^[2] 50:10 51:5 might ^[4] 23:7 36:13 51:19 65:20 mildly ^[1] 14:14 million ^[2] 24:15,17 millions ^[3] 26:21 36:25 63:2 minimum ^[1] 55:1 minute ^[2] 34:18 62:18 mistaken ^[1] 24:20 modeled ^[2] 17:22 57:24 models ^[5] 46:10,15 64:10,11,16 modern ^[1] 8:23 modest ^[6] 56:24 59:25 60:3,9,12, 18 modifications ^[2] 10:19 32:1 moment ^[1] 26:13 Monday ^[1] 1:11 monetary ^[2] 48:22 61:25 money ^[1] 48:19 months ^[3] 7:5 8:17,18 moratorium ^[1] 43:17 morning ^[7] 3:4 24:6 27:16 31:2</p>	<p>55:12 58:11 59:22 most ^[9] 4:6 14:10 18:11 29:24 33: 4,4 59:11 64:5 65:21 mouth ^[10] 7:11,13 15:17,23 16:11 18:25 19:4 20:2 64:22,25 move ^[2] 20:23 39:6 moves ^[1] 39:20 movie ^[1] 17:15 much ^[20] 4:8 8:5 11:10,24 20:22 22:9 30:5 31:11 35:10 39:10 40:5 43:3 44:21 46:7,21 50:1,16 52:18 62:13 64:24 multi-factored ^[1] 40:9 multiple ^[2] 53:22,22 municipal ^[2] 30:3 33:7 Murder ^[1] 5:10 mussels ^[2] 34:9,15 must ^[6] 11:13 37:16 39:10 48:24 53:23 58:15</p> <hr/> <p style="text-align: center;">N</p> <p>narrow ^[1] 33:1 nation ^[1] 65:22 natural ^[2] 38:24 47:16 naturally ^[1] 47:23 nature ^[2] 39:9,14 necessary ^[1] 39:22 need ^[11] 18:3 38:12 39:16 51:2 56: 2,8,17,22 59:4 62:9 65:24 needed ^[1] 56:16 needless ^[1] 28:18 needs ^[1] 58:17 negligible ^[1] 37:3 neither ^[1] 37:19 never ^[4] 13:7 25:1 35:14 62:1 New ^[35] 16:2,2,5 17:10 18:17,17 25:7,7,10,11 30:1,2,2,6,6 34:22 43:17 48:6 49:9,9,13,14,14 58:20, 20,25,25 59:2,2,14,14 65:18,18,19, 25 next ^[1] 27:9 none ^[2] 28:8 54:20 normal ^[2] 15:17 19:24 northern ^[1] 29:25 notably ^[1] 65:4 note ^[2] 46:8 56:6 noted ^[1] 64:11 nothing ^[4] 23:8 27:9 28:21 66:10 novo ^[1] 14:19 number ^[6] 8:18 11:13 12:6 14:15 17:3,12 numbers ^[2] 26:14 46:16 nursery ^[1] 7:13</p> <hr/> <p style="text-align: center;">O</p> <p>obtained ^[1] 56:12 obviously ^[1] 28:4 occur ^[2] 8:11 47:23 occurred ^[1] 4:8 offer ^[1] 66:1 offered ^[1] 17:21 official ^[1] 36:20 officials ^[1] 45:10 oil ^[1] 13:6</p>	<p>Okay ^[3] 24:13 32:25 33:11 old ^[1] 30:6 once ^[1] 50:17 one ^[36] 5:15 6:8 8:21 9:19 10:18 11:2 13:14 15:21,21 17:24 18:21 20:7 21:15 24:16 25:19 29:24 32: 15 35:1 36:19 40:8 44:6 45:22 49: 6,12 52:15 55:13 58:19 59:4,17 61:5,25 62:10 63:9 64:21 65:21 66:5 ones ^[1] 46:4 only ^[6] 4:5,25 9:24 40:16 45:1 50: 24 open ^[1] 56:15 open-ended ^[1] 51:3 operate ^[1] 9:22 operating ^[3] 9:22 10:2 54:7 operations ^[8] 9:11 10:21 23:11 41:3,4,18 52:12,21 opinion ^[1] 37:15 opinions ^[1] 38:21 opportunity ^[2] 32:10 62:21 opposed ^[2] 14:22 20:10 opposite ^[1] 37:7 optimal ^[1] 20:14 options ^[1] 29:17 oral ^[6] 1:14 2:2,5 3:7 33:12 36:1 order ^[3] 4:1 10:12 16:5 ordered ^[1] 16:3 orders ^[2] 23:23 24:20 Ordinarily ^[1] 16:12 Orient ^[1] 5:10 Original ^[1] 3:4 other ^[16] 11:7,15 13:2 15:8 16:18 31:14 34:25 38:7 42:19 50:9 54:6, 16 55:5 56:11 57:12 59:1 otherwise ^[1] 25:10 ought ^[1] 26:22 out ^[19] 11:9,16 12:22 13:1 25:12, 16 30:19 32:5 42:19 44:13,23 50: 1,8,9,16 58:25 63:6,21 65:8 outlined ^[1] 10:9 outright ^[1] 35:7 outside ^[1] 28:14 outstanding ^[1] 14:13 outweigh ^[9] 24:10 27:24 28:3 36: 12 48:25 51:18 53:4 58:14,16 outweighs ^[1] 29:2 over ^[11] 6:9,14 26:6 28:10,17 34:6 41:1 44:13,15 63:25 64:17 over-watering ^[1] 4:19 overall ^[1] 40:4 overconsuming ^[2] 52:16 54:17 overfish ^[1] 44:17 overfishing ^[1] 44:16 overharvest ^[1] 13:5 overharvested ^[1] 12:24 overharvesting ^[6] 5:12 6:14 11: 4 13:20 14:6 48:9 overriding ^[1] 41:19 overrule ^[1] 37:20 overwatering ^[6] 22:22 27:6 28: 13 50:18,20 51:9 overwhelming ^[3] 12:15,16 65:25</p>
---	--	--	--

Official - Subject to Final Review

<p>overwhelmingly ^[5] 3:18 4:13 6:5 7:8 12:10</p> <p>own ^[15] 5:9 13:25 15:1 18:12 20:12 40:13 43:12 44:1 45:20 49:14 56:8 57:2 62:24 64:7 65:10</p> <p>oyster ^[31] 5:8 6:24 8:5 12:21 15:6, 11 16:18 18:6 19:6 24:17 33:14, 20 36:14, 16, 18, 21 45:11, 20 47:9, 15, 20 48:3, 5 49:25 55:22 57:10 59:8 60:3 61:11 64:20 65:22</p> <p>oystermen ^[1] 40:2</p> <p>oysters ^[36] 6:13, 16 11:4 12:23, 25 13:5, 18 16:5, 6, 19 19:23 20:10, 14 25:9 30:7, 13, 15, 18 34:25 37:1 40:6, 17 44:13, 15 45:7, 12 47:22 48:2, 7, 9, 10 50:3 57:13 61:21 63:4 65:21</p>	<p>plummeted ^[1] 63:25</p> <p>point ^[18] 8:15, 21 14:14 15:4 18:21, 22 19:1 20:16 23:16 30:1 34:12 36:15 41:14 51:7, 24 63:9 64:13, 18</p> <p>pointed ^[6] 33:23 55:14 63:19 64:2, 14 65:8</p> <p>points ^[2] 14:15 50:9</p> <p>policies ^[2] 5:13 53:22</p> <p>policy ^[1] 49:4</p> <p>Ponce ^[1] 47:19</p> <p>pond ^[4] 23:4 26:1 27:7 28:16</p> <p>ponds ^[1] 28:18</p> <p>pony ^[1] 31:21</p> <p>population ^[3] 37:8 57:10 59:8</p> <p>populations ^[1] 57:20</p> <p>portions ^[1] 42:17</p> <p>pose ^[3] 24:21 38:1 62:5</p> <p>posed ^[1] 38:11</p> <p>posing ^[2] 29:6, 7</p> <p>positive ^[2] 20:21 22:3</p> <p>possibility ^[1] 57:16</p> <p>post ^[1] 41:18</p> <p>post-Army ^[1] 41:4</p> <p>potential ^[2] 48:24 58:15</p> <p>power ^[1] 60:20</p> <p>ppt ^[1] 20:7</p> <p>ppts ^[4] 18:1, 4 20:10, 13</p> <p>practice ^[1] 55:8</p> <p>practices ^[3] 52:1 53:15, 16</p> <p>pre-Army ^[1] 41:3</p> <p>pre-filed ^[3] 21:21 22:1, 20</p> <p>pre-reservoir ^[1] 41:3</p> <p>precedence ^[1] 52:24</p> <p>precedents ^[1] 51:14</p> <p>preceding ^[1] 36:19</p> <p>precious ^[1] 47:12</p> <p>precipitated ^[6] 6:12 7:6 9:15 21:23 28:24 65:3</p> <p>preclude ^[1] 24:21</p> <p>predated ^[1] 34:1</p> <p>predation ^[1] 18:3</p> <p>predators ^[5] 13:15 16:18 17:9, 14 45:13</p> <p>predicted ^[1] 18:5</p> <p>premise ^[6] 25:16 26:3, 5 32:15 58:2, 5</p> <p>present ^[5] 43:14 47:18 49:13 62:14 64:7</p> <p>preserve ^[2] 30:6 61:20</p> <p>preserving ^[3] 26:21 29:1, 23</p> <p>presume ^[1] 32:21</p> <p>pretty ^[3] 22:13 33:17 47:10</p> <p>prevent ^[2] 4:21 35:7</p> <p>preventing ^[1] 30:10</p> <p>previously ^[1] 41:24</p> <p>price ^[2] 61:16, 22</p> <p>primarily ^[2] 33:13, 19</p> <p>PRIMIS ^[42] 1:20 2:6 35:25 36:1, 3 38:9, 20 39:8, 24 40:7, 24 41:2, 13 42:24 45:4 47:21 48:20 49:7, 11 51:6 52:10, 23 53:17 54:23 55:9, 13, 20 57:1 58:4, 11 59:3, 19, 23 60:14 61:23 62:17, 19, 20 63:19 64:14</p>	<p>65:4, 8</p> <p>principles ^[1] 5:21</p> <p>prior ^[8] 9:6 10:13 23:16 32:20 35:11 38:11 41:16 53:18</p> <p>private ^[2] 6:17 13:21</p> <p>problem ^[11] 11:6 17:6, 12, 20 18:13, 13 24:21 37:2 44:25 51:12 55:18</p> <p>problems ^[1] 9:20</p> <p>procedurally ^[1] 55:17</p> <p>proceed ^[1] 55:16</p> <p>process ^[2] 54:3, 3</p> <p>produce ^[1] 49:19</p> <p>productive ^[1] 37:14</p> <p>proffer ^[1] 56:9</p> <p>program ^[1] 51:23</p> <p>pronounced ^[2] 20:22 64:25</p> <p>proof ^[4] 31:12 50:21 60:25 61:1</p> <p>proposed ^[1] 38:14</p> <p>protect ^[1] 16:5</p> <p>protected ^[1] 28:19</p> <p>protecting ^[1] 22:4</p> <p>prove ^[3] 36:7, 14 62:21</p> <p>proven ^[1] 38:13</p> <p>proves ^[1] 25:8</p> <p>provide ^[3] 37:3 55:2, 23</p> <p>public ^[3] 6:18 13:22 54:4</p> <p>pure ^[2] 25:5 48:21</p> <p>purpose ^[1] 50:2</p> <p>purposes ^[1] 30:3</p> <p>put ^[11] 14:14 36:6 46:15 51:1 53:10 56:13 60:1, 7 61:16, 21, 25</p> <p>puts ^[1] 37:12</p> <p>putting ^[1] 53:8</p>	<p>39:18 49:3 54:14 57:12 58:23 59:10</p> <p>reason ^[5] 36:6 41:21 52:20 53:24 56:14</p> <p>reasonable ^[9] 3:22 5:2 24:25 25:3 30:21 32:1 35:13, 16 55:6</p> <p>REBUTTAL ^[3] 2:8 63:14, 15</p> <p>recede ^[1] 7:17</p> <p>receive ^[1] 55:1</p> <p>recent ^[4] 4:9 14:11 34:6 63:25</p> <p>recognized ^[6] 10:6, 17 14:1 17:10 27:1 34:10</p> <p>recognizes ^[1] 25:22</p> <p>recommendation ^[1] 35:17</p> <p>record ^[25] 5:7 6:5 11:22 21:16 22:6, 12 25:19 32:8 36:7, 17 37:6 38:5, 12, 18 39:15 42:4 43:6, 21 49:12 50:13 51:8 56:1, 14, 15 60:24</p> <p>recovery ^[1] 6:24</p> <p>red ^[2] 63:20 64:21</p> <p>redress ^[1] 55:23</p> <p>redressability ^[1] 42:14</p> <p>reduce ^[2] 29:15 65:9</p> <p>reduced ^[1] 42:6</p> <p>reducing ^[2] 27:7 28:16</p> <p>reduction ^[10] 7:15, 25 8:11, 12 12:4 18:24 33:18 40:25 57:4 58:5</p> <p>reductions ^[1] 53:5</p> <p>reef ^[1] 19:6</p> <p>reefs ^[1] 13:1</p> <p>refer ^[1] 45:8</p> <p>referencing ^[1] 57:15</p> <p>refusing ^[1] 3:25</p> <p>refuted ^[3] 3:19 6:15 64:3</p> <p>regard ^[7] 45:7 46:7, 17 47:22 54:18 57:8, 14</p> <p>region ^[5] 6:9 26:5, 6 46:19 55:4</p> <p>regulator ^[1] 51:21</p> <p>regulatory ^[1] 5:12</p> <p>related ^[2] 51:2 61:4</p> <p>relatively ^[1] 37:13</p> <p>release ^[2] 10:7, 16</p> <p>reliable ^[1] 46:24</p> <p>relied ^[5] 3:20, 22, 25 18:1 30:17</p> <p>relief ^[6] 4:15, 24 7:7 37:3, 6 63:6</p> <p>rely ^[1] 25:15</p> <p>relying ^[1] 31:21</p> <p>remained ^[2] 6:16 13:18</p> <p>remand ^[4] 3:13 31:24 53:21 55:21</p> <p>remanded ^[1] 3:12</p> <p>remedy ^[17] 9:12 15:19 18:15, 19, 23 20:18 25:16 26:23 29:15 36:22 39:9, 14, 18 44:21 57:4, 19 60:10</p> <p>removing ^[1] 48:8</p> <p>repeatedly ^[1] 32:17</p> <p>replacing ^[1] 48:10</p> <p>replenish ^[2] 25:2 35:15</p> <p>reply ^[5] 7:3 8:16 21:13 64:4 65:5</p> <p>report ^[4] 10:10 27:4 32:16 45:8</p> <p>reports ^[1] 14:12</p> <p>represented ^[1] 10:15</p> <p>request ^[1] 63:10</p> <p>requesting ^[2] 18:23 35:5</p>
<p style="text-align: center;">P</p> <p>PAGE ^[10] 2:2 7:3 8:16 21:13 22:5 23:6 27:3 64:3 65:5, 5</p> <p>pages ^[5] 10:9, 18 19:7 20:17 25:20</p> <p>paragraph ^[7] 21:21, 22 22:2, 2, 20, 25 29:21</p> <p>parking ^[1] 45:23</p> <p>part ^[4] 10:25 15:21 19:18 29:6</p> <p>particular ^[6] 6:16 22:16 25:15 33:25 34:8, 12</p> <p>particularly ^[3] 13:6 26:5 42:17</p> <p>parts ^[3] 15:18 17:25 19:20</p> <p>party ^[1] 53:12</p> <p>pass ^[2] 49:20, 23</p> <p>pay ^[1] 44:24</p> <p>pays ^[1] 43:22</p> <p>people ^[2] 11:3 25:9</p> <p>per ^[9] 8:4, 7 9:24 15:18, 21 17:25 31:8 46:12, 12</p> <p>percent ^[32] 7:16 15:22 18:7, 8, 13, 24 20:8, 19 36:24 37:2, 8, 9, 9 39:4, 5, 22 40:15, 16 43:13, 16 49:24 50:3, 19, 20 51:9 57:5, 9, 9, 22 59:11 60:2 64:20</p> <p>perhaps ^[1] 14:14</p> <p>period ^[4] 8:13 9:21 43:10 45:14</p> <p>periods ^[5] 4:5 6:12 8:8, 24 34:6</p> <p>permit ^[1] 28:12</p> <p>permits ^[7] 22:19 28:11 43:18 50:15 51:1, 11, 22</p> <p>permitted ^[1] 4:1</p> <p>perspective ^[3] 5:19 46:17 62:3</p> <p>petition ^[1] 36:5</p> <p>phenomenon ^[1] 47:16</p> <p>pick ^[1] 58:12</p> <p>picking ^[1] 27:16</p> <p>pieces ^[1] 42:16</p> <p>pivot ^[2] 43:15 46:20</p> <p>pivots ^[1] 28:14</p> <p>place ^[2] 9:11 44:13</p> <p>Plaintiff ^[6] 1:4, 19 2:4, 10 3:8 63:16</p> <p>plant ^[1] 33:16</p> <p>play ^[1] 8:12</p> <p>please ^[3] 3:10 25:19 36:4</p>	<p style="text-align: center;">Q</p> <p>qualify ^[1] 60:19</p> <p>quantification ^[1] 22:13</p> <p>quantify ^[1] 22:9</p> <p>question ^[30] 20:6 23:14 29:7 31:3 32:7 38:2, 18 40:10 41:5 42:12, 20, 21 43:2 44:6, 18 45:1 47:15, 22 48:15, 19 49:6, 12 58:13 59:23 60:23 61:4, 24 62:4, 14 63:18</p> <p>questioning ^[1] 27:17</p> <p>questions ^[5] 5:4 7:23 37:24 44:6 63:7</p> <p>quick ^[1] 49:6</p>	<p style="text-align: center;">R</p> <p>rain ^[1] 42:5</p> <p>rainfall ^[1] 42:5</p> <p>raised ^[1] 34:13</p> <p>range ^[5] 7:10 15:17 16:12 19:24 29:16</p> <p>ranging ^[1] 46:11</p> <p>rather ^[1] 51:2</p> <p>re-shell ^[1] 48:4</p> <p>reach ^[1] 43:25</p> <p>reached ^[1] 14:21</p> <p>read ^[3] 25:19, 19 38:18</p> <p>reading ^[1] 41:7</p> <p>reaffirmed ^[1] 37:16</p> <p>really ^[10] 6:23 16:23 25:8 33:19</p>	<p style="text-align: center;">R</p>

Official - Subject to Final Review

<p>requests ^[1] 37:20 require ^[5] 35:7 50:24 54:4,4,5 required ^[3] 6:22 31:4,10 requirement ^[1] 39:13 requires ^[2] 32:21 60:15 requiring ^[1] 29:18 reseed ^[2] 20:24 65:1 reserved ^[1] 42:25 reservoirs ^[4] 9:9 41:17 42:1 55:2 reshell ^[1] 14:3 reshelling ^[2] 13:24 14:1 reshown ^[1] 53:20 resolve ^[1] 62:9 resource ^[6] 25:3 29:1 38:24 45:11 47:24 48:4 resources ^[3] 30:18 38:24 56:7 respect ^[4] 25:6 31:12 43:22 58:13 respectfully ^[1] 37:19 response ^[2] 7:1 55:19 responses ^[1] 58:19 responsibility ^[2] 14:18 55:7 responsible ^[2] 5:16 45:11 restatement ^[1] 5:23 result ^[2] 3:16 7:15 9:13,14 12:12 15:20 18:24 20:19 22:19 23:2,5 24:11 27:2 30:9,10 33:16 40:16 49:24 52:2 56:16 57:6 results ^[1] 20:1 revert ^[1] 59:4 review ^[1] 14:19 revised ^[1] 32:3 rights ^[2] 18:10 60:16 rise ^[1] 62:11 River ^[6] 3:17 6:1 7:12,13 18:25 19:4,9,19 20:2,23 33:10,22 43:8 57:14 64:23,25 ROBERTS ^[29] 3:3 5:5 6:20 7:18 10:22 14:7 17:16 20:25 24:4 27:12 30:25 34:18 35:23 37:25 38:16 39:3,17,25 40:19 44:3 47:2 50:5 52:9 55:10 58:8 59:20 62:18 63:12 66:11 role ^[2] 8:11 31:5 rule ^[1] 10:20 rules ^[1] 55:5 run ^[1] 22:17</p> <hr/> <p style="text-align: center;">S</p> <p>sailed ^[1] 47:19 saline ^[1] 13:4 salinities ^[1] 46:5 salinity ^[15] 5:13 15:10,11,12,24 16:8,11,15,24 17:8,13,24 18:4,20 19:24 salt ^[4] 7:16 15:22 18:25 20:20 same ^[9] 30:8,9 37:2 38:1 45:24 55:5 57:19 58:24 63:4 sat ^[1] 14:23 save ^[3] 27:9 30:11 35:8 savings ^[1] 23:2 saying ^[6] 35:2 45:22 48:23 54:15,24,24 says ^[3] 11:15 13:2 19:20</p>	<p>scenario ^[1] 57:19 scenarios ^[1] 57:4 scheduling ^[5] 4:20 22:24 25:25 27:6 28:15 science ^[2] 17:15 62:24 scientific ^[2] 15:10 46:17 Seafood ^[2] 30:15 47:9 seasonality ^[1] 42:7 second ^[10] 8:4,7 9:24 26:23 31:8 44:12 46:12,12 47:22 55:15 Secondly ^[3] 7:8 29:22 64:2 see ^[5] 8:25 18:2 21:15 43:25 50:13 seeks ^[1] 36:12 seem ^[3] 8:2 21:7 55:14 seemed ^[1] 33:14 seems ^[3] 22:11 42:19 59:24 self-inflicted ^[2] 36:22 62:8 sense ^[1] 8:9 sent ^[1] 45:21 sentence ^[1] 4:25 separate ^[1] 23:14 serious ^[5] 17:6 18:10 60:5,16 62:12 seriously ^[1] 55:8 serves ^[1] 7:13 Service ^[2] 34:10 64:10 set ^[2] 49:2 63:6 several ^[1] 24:20 severe ^[1] 12:4 share ^[1] 38:25 sharp ^[1] 33:24 shell ^[1] 48:10 short-circuited ^[1] 3:14 show ^[9] 5:24 18:2 22:6 24:8 31:18 33:18 36:11 51:8,16 showed ^[7] 7:9 16:14 57:7,8,20 62:25 63:4 showing ^[1] 31:3 shown ^[6] 31:13 36:8 49:1 53:1,19 58:17 shows ^[9] 6:6 7:4 8:16,17 12:9 21:14 36:17 59:9 65:6 side ^[6] 11:15 13:2 15:8 49:24 50:9 52:4 significant ^[8] 12:5 15:19 20:1 23:2 28:22 33:23 39:21 50:21 significantly ^[2] 4:14 7:10 similar ^[2] 16:1,4 similarly ^[1] 33:12 simply ^[8] 4:18 26:1 27:6 28:13 29:17 33:19 35:7 36:6 since ^[4] 32:4 43:18 53:20,20 single ^[1] 19:3 situation ^[4] 5:9 23:20 44:21 62:13 skyrocketed ^[1] 12:11 sloughs ^[2] 34:7 57:17 small ^[2] 9:2 37:13 snails ^[1] 16:18 solution ^[1] 66:9 solve ^[1] 44:25 somebody's ^[1] 12:25 soon ^[1] 31:11</p>	<p>sorry ^[2] 35:2 48:14 sort ^[1] 23:19 Sotomayor ^[14] 17:18,19 19:10,12,15 20:3,5 22:8 23:9 24:2 50:6,7 51:6 52:7 source ^[1] 41:11 Special ^[34] 3:12,14,20 4:4 6:21 10:5,6,8 11:21 12:13 14:21,23 19:16 25:13 26:25 29:19 31:10,15,24 32:4,9,16 35:17 42:13,24 43:1,5,20,23,23 55:14 56:1,10 59:24 species ^[4] 33:18,25 35:1 57:12 specific ^[2] 8:17 46:23 specifically ^[4] 18:22 20:16 31:13 42:25 speculative ^[1] 54:11 spike ^[1] 12:17 spill ^[1] 13:6 square ^[2] 8:7 12:2 squeeze ^[1] 49:6 stab ^[1] 5:11 stage ^[2] 31:4 39:23 stake ^[3] 33:2 38:23 47:12 standard ^[1] 38:14 standards ^[1] 54:10 standing ^[1] 54:21 start ^[1] 24:7 starting ^[1] 29:17 state ^[12] 8:25 12:4 24:24 37:16 39:2,11 40:11 51:16 55:6 60:17 61:8 63:24 state's ^[1] 54:19 STATES ^[5] 1:1,15 10:14 38:24 49:4 statistics ^[1] 23:10 Stavins ^[2] 65:11,12 steady ^[1] 8:19 step ^[1] 22:3 Stevens ^[1] 25:22 Stevens' ^[2] 25:20 26:2 still ^[6] 35:9 50:20 52:2,25 54:16 60:10 stomach ^[1] 12:25 stop ^[2] 4:1 66:10 straight ^[1] 40:10 straightforward ^[1] 47:10 stress ^[5] 7:16 15:23 18:25 20:20 55:4 stressed ^[1] 35:11 strides ^[1] 50:12 studied ^[1] 57:21 studies ^[1] 17:4 study ^[1] 57:18 subject ^[5] 6:18 13:22,22 53:18 55:5 submitted ^[2] 66:12,14 substantial ^[12] 5:25 6:4 27:18,20,22,22,25 29:9 38:15 60:16 62:7,12 substantially ^[10] 24:10 27:24 29:2 36:12 48:25 51:17 53:4 58:14,16 59:6 substrate ^[1] 48:6 subtract ^[1] 11:12</p>	<p>succeed ^[1] 24:8 suffering ^[1] 54:20 sufficient ^[3] 18:9 38:4 48:6 suggest ^[7] 8:2 38:21 39:16 42:17 51:15 56:13 62:8 suggested ^[2] 38:23 56:20 suggests ^[3] 43:10 51:10,13 Sunding ^[2] 22:16,25 support ^[3] 16:22 45:17 46:2 supported ^[3] 11:23 43:6,21 supports ^[1] 38:6 suppose ^[2] 52:13,19 supposed ^[1] 3:21 SUPREME ^[2] 1:1,14 survived ^[1] 46:5 switch ^[1] 33:1 system ^[3] 9:8 63:21,22 systematic ^[1] 64:12 systems ^[2] 43:15 46:20</p> <hr/> <p style="text-align: center;">T</p> <p>Table ^[1] 23:6 tacit ^[1] 43:22 technical ^[1] 37:17 tells ^[1] 64:8 tendency ^[1] 9:23 terms ^[6] 28:12 30:16 55:6 56:5 60:23 64:9 test ^[6] 5:22 12:14 19:16 40:9 58:14 60:15 testified ^[18] 7:12 11:3,3 13:17,19 15:15,16,24 18:23 19:5,23,25 20:8,18 21:19,24 23:6 45:25 testimony ^[13] 19:7,17 20:9,17 23:1,7 45:18 49:14 59:7,15 64:4,18,19 tests ^[1] 19:18 theory ^[2] 6:14 16:22 there's ^[2] 4:7 8:5 11:18 15:6 17:5 22:12 28:16 29:16 32:8 35:3 42:8 43:17 47:3 48:6 50:20 53:24 55:18 57:11,13 58:2 65:16 they've ^[1] 34:13 thinks ^[1] 44:20 third ^[2] 30:1 44:18 Thomas ^[11] 7:20,21 9:18 40:21,22 41:5,6 42:10 43:19 44:2 52:12 Thomas's ^[1] 44:7 though ^[3] 49:21 53:11 58:2 thoughts ^[1] 56:25 thousand ^[6] 15:18,21 17:25 56:22 57:6,20 Three ^[3] 13:21 17:20 42:3 threshold ^[1] 21:20 thrived ^[1] 46:6 timing ^[2] 41:20 63:23 today ^[3] 15:13 56:20 58:22 took ^[2] 5:11 58:23 total ^[1] 46:13 totally ^[1] 44:6 toward ^[1] 39:20 track ^[2] 4:3 48:14 transcript ^[1] 22:6 treasure ^[4] 26:22 29:23 30:12 35:</p>
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Official - Subject to Final Review

<p>16 tree ^[1] 33:24 trends ^[1] 64:17 trial ^[9] 14:24 22:5 32:4 36:8 55:17 61:25 62:22,25 64:7 tried ^[2] 44:23,25 true ^[1] 12:14 truly ^[2] 48:18 49:25 trump ^[1] 66:1 try ^[1] 45:4 trying ^[2] 14:3 26:9 tune ^[1] 50:3 Two ^[14] 8:22 11:1,18 13:18 14:12, 13 18:22 44:5 45:3,5,19 46:9 48:1 55:14 typically ^[1] 53:15</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S ^[2] 34:9 64:10 ultimately ^[6] 14:18,25 17:5 49:11 56:4 62:5 Under ^[14] 4:12 5:20,22 9:21 16:4 35:4 38:14 40:12 43:13 53:2 54:7, 9 56:8 60:21 undercounting ^[1] 64:12 understand ^[6] 11:1,7 16:20 44: 10 50:14 58:18 Understood ^[1] 38:20 underwatering ^[1] 51:10 undoubtedly ^[2] 9:13,14 unique ^[2] 29:24,24 UNITED ^[3] 1:1,15 10:14 unless ^[1] 51:16 unprecedented ^[3] 13:15 16:17 36:18 unreasonable ^[2] 4:11 12:14 unrestrained ^[1] 4:11 until ^[1] 36:21 up ^[18] 7:15 9:3 11:13 15:4 23:2,5 27:17 31:21 34:9,19 45:14 46:24, 24 47:19 58:12 61:4,5 62:19 upgraded ^[1] 43:16 Upper ^[1] 43:8 urge ^[1] 25:18 uses ^[2] 33:6 37:14 using ^[6] 11:13,16 28:14 43:3,14 49:21 utilization ^[1] 40:15 utilizes ^[1] 46:14 utterly ^[2] 6:15 13:20</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>value ^[5] 40:5 47:8 61:10,11 62:1 vane ^[1] 50:1 variations ^[1] 64:14 varied ^[1] 57:3 variety ^[1] 57:3 various ^[1] 49:4 vast ^[1] 37:10 versus ^[14] 8:23 16:2 18:17 25:7,9 30:2 49:9,13 58:20,25 59:2,14 61: 10 65:18 view ^[1] 44:22 viewed ^[1] 18:9</p>	<p>virtually ^[3] 28:21 57:25 60:9 voracious ^[1] 30:20</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>walking ^[1] 51:20 wanted ^[3] 30:3,5 63:7 Ward ^[2] 13:16 15:8 warrants ^[1] 63:6 Washington ^[3] 1:10,18,20 waste ^[4] 28:18 29:18 30:10 35:7 wasteful ^[1] 52:1 water ^[57] 4:6,21 5:14 6:23 9:8,9, 13,23 10:12 11:10,12,19,24 13:3 17:23 18:6,11 22:9 23:13,14 24:1 28:14 30:3,20,22 31:6 32:19,22 35:4,8,15 36:16 37:11,18 40:25 41:9,13,25 43:3,13,14 44:9 46:8, 21 49:4,15,20 50:16 51:21 52:6, 16,17,20 53:25 63:1,19,21 water's ^[1] 42:7 waters ^[4] 5:2 24:25 25:2 35:13 way ^[11] 23:24 25:11 28:1 41:23 42: 19 43:9 54:22 58:24 59:1 60:7,8 ways ^[1] 56:11 weak ^[1] 33:17 weigh ^[1] 40:1 welcome ^[1] 5:4 well-grounded ^[1] 46:23 wellbeing ^[1] 54:19 whatsoever ^[3] 22:5 26:7 50:15 Whereupon ^[1] 66:13 whether ^[5] 50:17,19 54:11 55:22 61:25 White ^[5] 18:5 19:5,13 20:13 64:24 White's ^[2] 19:2,7 whole ^[1] 55:4 wildlife ^[3] 33:16 34:10 64:10 will ^[11] 3:3 10:15 35:18,21 49:3 51:15 52:3,5,25 66:6,7 win ^[3] 40:6 54:16 61:8 wipe ^[1] 25:16 wiping ^[1] 30:19 within ^[1] 10:2 without ^[6] 17:23 26:7 34:22,23 54:18 66:5 witnesses ^[1] 17:14 wonderful ^[1] 22:3 words ^[2] 38:7 54:17 work ^[5] 9:7 10:15 23:17 32:22 44: 23 worked ^[2] 13:25 25:12 works ^[1] 14:1 world ^[1] 56:22 worthless ^[1] 46:16 wound ^[1] 36:22 wrap ^[2] 34:19 62:19</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[5] 11:11 24:15,18 28:18 37: 12 years ^[7] 14:4 24:15 36:19 41:1 44: 20 54:13 62:21 yield ^[2] 12:5 63:3 York ^[14] 16:2 18:17 25:7,10 30:2,</p>	<p>2 49:9,13 58:20,25 59:2,14 65:18, 25</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero ^[9] 4:18 15:17 16:12 19:25 26: 25 27:3 28:12 53:3 65:15</p>
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