No. 142, Original

In the Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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

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EXCEPTIONS TO REPORT OF THE SPECIAL MASTER

Plaintiff State of Florida respectfully submits the following exceptions to the Report of the Special Master issued on December 11, 2019:

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

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

a. The Special Master's application of a heightened burden of proof and inflexible inquiry at the equitable-balancing stage of this case;

b. The Special Master's conclusion that Florida has not been injured by Georgia's increasing consumption of the waters at issue;

c. The Special Master's conclusion that Georgia's use of the waters at issue has been reasonable and not inequitable;

d. The Special Master's conclusion that the U.S. Army Corps of Engineers (Corps) would not allow the additional water generated by a decree through to Florida when needed and would apply its Master Manual without modification;

e. The Special Master's conclusion that Florida would receive no appreciable benefits from a decree;

f. The Special Master's conclusion that Georgia would be greatly harmed by a decree;

g. The Special Master's conclusion that the benefits of a decree would not substantially outweigh the harms that might result;

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

i. The Special Master's refusal to account for the benefits of a decree in redressing future conditions and preventing the situation from worsening; and

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

3. Florida also takes exception to the Special Master's refusal to allow additional evidence, as to circumstances after the 2016 trial, concerning (i) the continued and worsening harm to the Apalachicola Bay and River; (ii) Georgia's continued increase in consumption of the waters at issue; (iii) the impact of the Corps' Revised Master Manual; and (iv) the reasonable modifications that could be made to that Manual to accommodate a decree.

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INTRODUCTION

Following the Court's remand in *Florida v. Georgia,* 138 S. Ct. 2502, 2518 (2018), this case is in more need of this Court's attention than ever.

When this case last arrived at the Court, Special Master Ralph Lancaster, after presiding over a five-week trial in which 32 witnesses testified live, had issued a report concluding that "Florida has suffered harm from decreased flows in the [Apalachicola] River," including "an unprecedented collapse in its oyster fisheries"; Georgia's water use "has been—and continues to be—largely unrestrained"; and "Georgia's position" is that this consumption "should be subject to no limitations, regardless of the long-term consequences for the Basin." Report of Special Master Lancaster 31-34 (Feb. 14, 2017) (Lancaster Report), Dkt. 636. Yet Special Master Lancaster concluded, as a matter of law, that Florida's request for relief must be denied given the lack of any guarantee that the U.S. Army Corps of Engineers (Corps) would facilitate a decree. *Id.* at 69.

Without disturbing Special Master Lancaster's "specific and key statements" about the facts, this Court held that he had erred on redressability. *Florida*, 138 S. Ct. at 2512. In particular, the Court held that this case should be decided on the premise that the Corps "*will* work to accommodate" a decree in Florida's favor, and remanded for the Special Master to conduct an equitable-balancing inquiry. *Id.* at 2526 (emphasis added). Under this Court's precedents, that balancing inquiry is not conducted unless a complaining State has already shown that the diversion at issue has or will cause a substantial injury to its interests. *Id.* at 2515. The case that

returns today is scarcely recognizable compared to the one that this Court remanded in 2018.

On remand, the new Special Master—the Honorable Paul Kelly—heard no witnesses and refused to receive new evidence, even as to Georgia's rising consumption and the harm to Florida *since* the 2016 trial. Then, a month after the single, hour-and-a-half hearing that he held on remand, Special Master Kelly issued a report that flipped Special Master Lancaster's core conclusions following trial. According to his report, Florida has "not suffered any harm from Georgia's consumption"; Georgia's consumption, in fact, has been entirely "reasonable"; and the only thing Florida has to complain about is its *own* misconduct. Report of Special Master Kelly 14, 25, 52 (Dec. 11, 2019) (Kelly Report), Dkt. 670. Without identifying any evidence not considered by Special Master Lancaster, Special Master Kelly rewrote this case from the ground up. The difference is not one of degree—it is night and day.

That stunning result is a product of a series of cascading errors. First, Special Master Kelly deviated from this Court's own mandate in *Florida* in critical legal respects that corrupted his entire balancing inquiry. Second, he improperly threw out Special Master Lancaster's conclusions after trial on crucial issues such as harm and inequitable conduct. Third, he inexplicably dismissed powerful evidence—including the admissions of Georgia's own officials that their consumption was dangerously depleting flows, and the testimony of those who witnessed the decimation of the oyster fisheries firsthand. And, fourth, he disregarded Florida's *equal* right to the reasonable use of the waters at issue—granting Georgia carte blanche to use much as it wants.

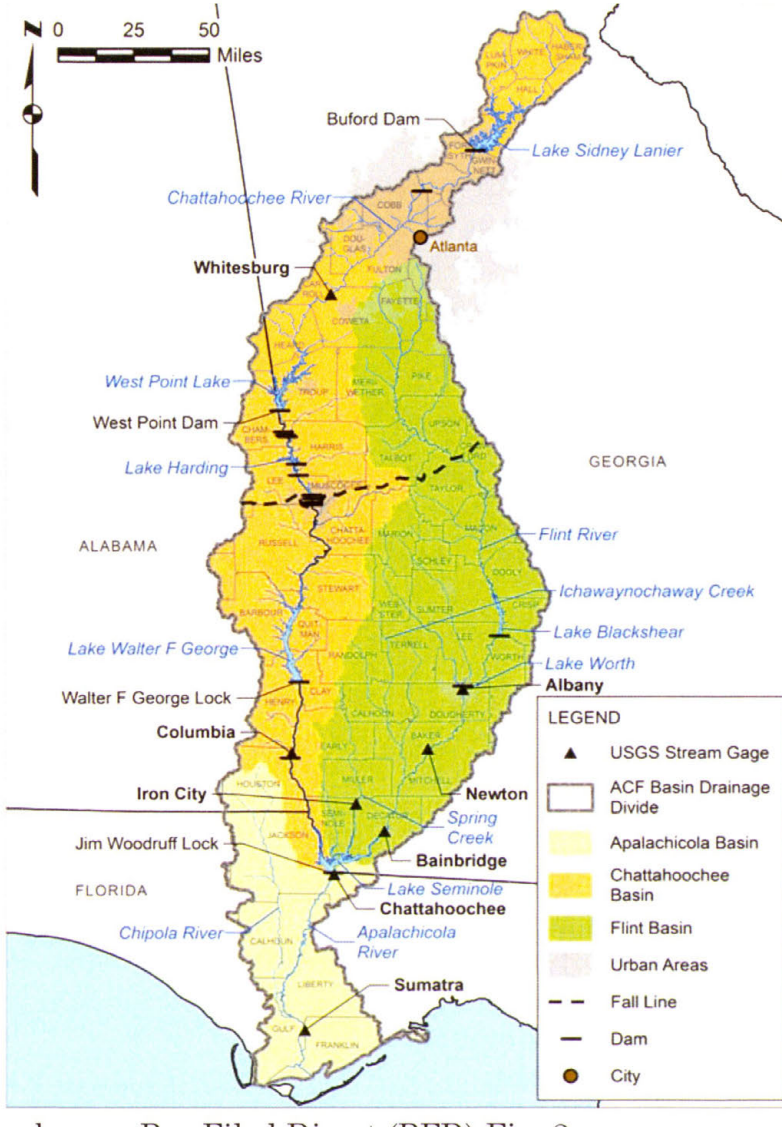
Given Georgia's insatiable consumption of the waters at issue, adopting Special Master Kelly's recommendation would spell doom for the Apalachicola—a cruel twist on the "just and equitable apportionment" this Court's precedents require at the equitable-balancing stage. *Florida,* 138 S. Ct. at 2515 (citation omitted).

STATEMENT OF THE CASE

A. Factual Background

1. The Apalachicola Basin

The Apalachicola-Chattahoochee-Flint River Basin (ACF Basin), depicted below, "accounts for 35% of the fresh water that flows along Florida's western coast," *Florida*, 138 S. Ct. at 2509, and is the lifeblood of the Apalachicola Region.



Hornberger Pre-Filed Direct (PFD) Fig. 2.

The Apalachicola River (River) is formed from the convergence of the Flint and Chattahoochee Rivers at the Florida-Georgia border. It feeds a network of tributaries, swamps, and "sloughs" in a basin roughly the size of Delaware and home to an

extraordinary concentration of species, including endangered mussels, the threatened Gulf sturgeon, and the largest stand of Tupelo trees in the world. *Florida*, 138 S. Ct. at 2519. The River, in turn, feeds an equally unique ecosystem—the Apalachicola Bay (Bay)—where the mixture of fresh and salt water forms "one of the most productive estuaries in the northern hemisphere." Lancaster Report 8-9.

Steverson PFD ¶29.

The Bay is known for its oysters in particular. Historically, it has offered "an 'ideal' place for oysters to thrive" and has produced "ninety percent of Florida's oyster harvest and ten percent of the nation's oyster harvest." Lancaster Report 9. Apalachicola oysters are "widely recognized for their quality." *Id.* The Bay's oysters and other fisheries not only are the cornerstone of the region's economy, but for generations have sustained a unique culture and way of life, much as fishing has in communities along the New England coast. *Id.* at 9-10. To conserve that resource, Florida has long prohibited the mechanized harvesting of oysters on public lands. *Id.* at 9; *see* Steverson PFD ¶27.

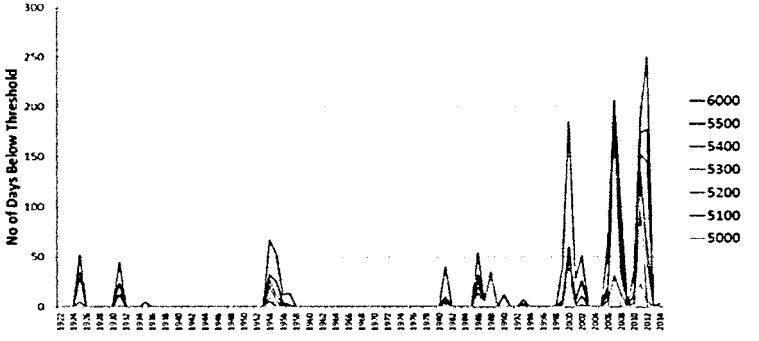
Since 1965, Florida has invested nearly half a billion dollars to protect this ecosystem, including by

conserving more than 340,000 acres in the Apalachicola Basin through land purchases and conservation easements. *Id.* ¶¶16-19. The federal government and non-profits have set aside more than 500,000 additional acres. *Id.* ¶¶18-19. Florida also has undertaken projects to restore the river ecosystem after dredging ceased more than ten years ago, Kondolf PFD ¶¶32-33, as well as additional actions, *see* Fla.'s Post-Trial Br. 61-65, Dkt. 630.

Yet, while Florida has spent the last half-century trying to preserve the Apalachicola, it has faced an ever-growing threat upstream.

2. Georgia's Skyrocketing Consumption Has Depleted Flows Into The Apalachicola Basin

All parties agree that flows in the Apalachicola River have decreased dramatically in recent years, especially during drought periods. As river gauge recordings starkly illustrate, flows into the Apalachicola Basin in the past decade have been lower, for longer, than at any time in recorded history. Flows began to drop in the 1970s—just as Georgia increased its irrigation along the Flint, *see infra* 10-11, 32-33—then plummeted in the 1990s. Hornberger PFD ¶¶42-65. The graph below (FX-D-17), from Georgia's own expert, shows the increasing frequency of severe low flows:



Source: "Bedient Demo. 52-53.xlsx" Workbook, "ChattaQ&H" Worksheet

These low flow rates constitute a dramatic departure from historical levels. From 1930 to 1970, only six months had average flows on the Apalachicola near the Georgia border below 6,000 cubic feet per second (cfs). But over the past four decades, flows at that location were persistently below 6,000 cfs for *thirty-four* total months between 1999 and 2012. *See* FX-D-1; Hornberger PFD ¶46. Over recorded time, the Basin has periodically suffered extreme droughts and other meteorological events, but only once Georgia's consumption began to spike did the incidence of extreme low flows.

3. Reduced Flows Have Devastated The Apalachicola Basin

As Special Master Lancaster concluded (at 31)—and this Court reiterated—"[t]here is little question that Florida has suffered harm from decreased flows in [the River]." *Florida,* 138 S. Ct. at 2512.

Nowhere is that harm more evident than in the Bay's iconic oyster fisheries. After surviving droughts and other severe events for centuries, the Bay suffered an "unprecedented collapse of its oyster fisheries in 2012." Lancaster Report 31. "[O]yster mortality reached devastating levels, leaving many

previously-productive oyster reefs virtually empty." *Id.* It was so bad that the National Oceanic and Atmospheric Administration (NOAA) issued a fishery disaster determination. *Id.* at 31-32; FX-413 (NOAA Final Decision). That determination concluded that "the oyster collapse came as a result of increased salinity in the Bay caused by low flows in the River." Lancaster Report 31-32.

The increased salinity created a double whammy for oysters. Even slight changes in salinity impact the growth and health of oysters. Glibert PFD ¶¶4, 64, 71, 81-83; JX-122 at 34. But the increased salinity also created an environment in which the oysters' predators—*e.g.*, conchs—thrived. As one witness explained: "The conchs were more abundant than you can imagine. It's almost like a science fiction movie how many conchs there were out there." 17 Trial Tr. (Tr.) 4336:6-4336:16 (quoting Berrigan). A third-generation oysterman likewise testified that "[i]t used to be common to harvest hundreds of oysters and maybe find one conch. Now, there's probably 100 conchs for every oyster." Ward PFD ¶5.

This picture shows an oyster basket inundated with conchs (or drills) and even their egg sacks, indicating that predators even were able to *breed* in the Bay, which was unprecedented:

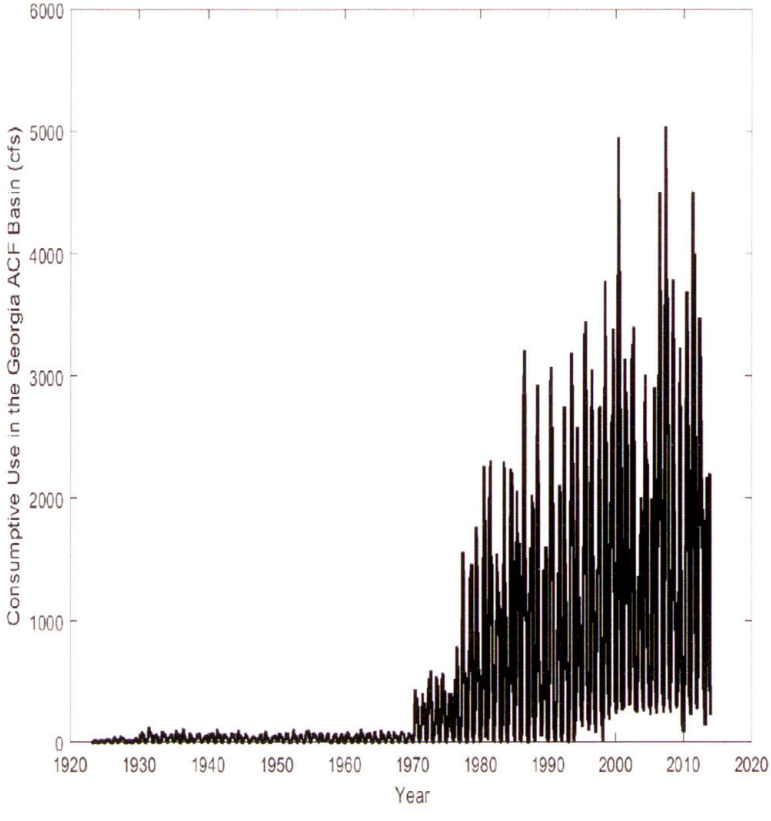
Kimbro ¶4 & Fig. 2; *see* FX-770b; 4 Tr. 1005:23-1006:6 (Berrigan); JX-77 at 6-7. Other saltwater predators invaded the oyster beds, too. Berrigan PFD ¶¶42-46.

The Apalachicola River also has seen harmful effects from the persistent extreme low flows in recent years. In 1999, the Environmental Protection Agency (EPA) and U.S. Fish and Wildlife Service (USFWS) found that "[e]xtreme low-flows are likely among the most stressful natural events faced by river biota"—*i.e.*, animal and plant life—on the Apalachicola. FX-599 at FL-ACF-02545883. Due to severe low flows, mussels, Gulf sturgeon, the iconic Ogeechee tupelos, and other species have suffered serious harms. Fla. Suppl. Br. 14, Dkt. 651 (citations).

4. Georgia Has Long Recognized That It Is Depleting Flows

Nor is there any mystery as to why flows have plummeted—irrigation along the Flint River has

taken off since the 1970s. Lancaster Report 32-33. The following chart shows the spike in usage:



Hornberger PFD Fig. 7; *see id.* ¶¶77, 79, Fig. 8.

And everyone has long recognized this threat. In 1999, the Director of Georgia's Environmental Protection Division (GEPD) admitted that "[w]hen thousands of irrigation systems are operating during dry weather, such as we have been having this year [1999], one can see a significant reduction in Flint River flows." FX-2 at GA02257045. As early as 1995, the U.S. Geological Survey (USGS) also warned that "stream-aquifer-flow declines upstream

of the Apalachicola River will ... cause reductions in flow of the Apalachicola River." JX-7 at 68.

Yet, Georgia refused to act. "In the face of this sharp increase in water use, Georgia has taken few measures to limit consumptive water use for agricultural irrigation." Lancaster Report 33. Instead, Georgia has proceeded as if its consumption "should be subject to no limitations, regardless of the long-term implications for the Basin." *Id.* at 34.

B. This Litigation

Having exhausted all other options, Florida turned to this Court for relief, seeking an equitable apportionment protecting *both* States' right to reasonable use of the waters at issue.

1. Proceedings Before Special Master Lancaster

Special Master Lancaster oversaw discovery, multiple rounds of briefing, several hearings—and a five-week trial. Lancaster Report 17-22. Thirty-two witnesses were subjected to live cross-examination, re-direct, and re-cross. *Id.* at 22. Special Master Lancaster placed great weight on live testimony and generally refused to consider testimony from anyone who did not appear and subject themselves to cross-examination. *Id.* During key junctures at trial, he frequently questioned witnesses himself.

At trial, Georgia did not seriously dispute the sharp decline in flows or damage to the Bay and its oysters. Instead, it pointed a finger at everyone else. It blamed the Corps for not allowing more water through to Florida at Lake Seminole because of its operational rules. It blamed decreased flows on climatic changes, rather than its own skyrocketing

agricultural consumption. And it blamed the oyster collapse on overharvesting, rather than low flows.

Following trial, Special Master Lancaster issued a report that summarized the evidence and made clear his view (at 31-34) that Florida had suffered real harm from decreased flows, especially as to Apalachicola's oysters, and that Georgia's unrestrained consumption was unreasonable. Likewise, he rejected Georgia's affirmative defense that overharvesting or other factors were to blame. *Id.* at 32. But Special Master Lancaster ultimately concluded that Florida's request for relief should be denied because there was "no guarantee" that the Corps would facilitate a decree. *Id.* at 70.

2. This Court's Decision

This Court disagreed. The Court emphasized that it "rel[ied] upon" Special Master Lancaster's "specific and key statements," including as to the harm suffered by Florida and Georgia's unreasonable use of water. *Florida*, 138 S. Ct. at 2512 (citing Lancaster Report). The Court also noted Special Master Lancaster's statement that "'the evidence presented tends to show that increased salinity ... led to the collapse'" of the Bay's oysters. *Id.* at 2518-19 (alteration in original) (quoting Lancaster Report 32). And the Court relied on Special Master Lancaster's discussion of the evidence throughout its decision.

Yet, the Court concluded that Special Master Lancaster had erred on the issue of redressability and, in particular, in determining that this Court "would not be able to fashion an appropriate equitable decree" given the role of the Corps and its Manual. *Id.* at 2516; *see id.* at 2527. Instead, this

Court explained that "an equity-based cap on Georgia's use of the Flint River would likely lead to a material increase in streamflow." *Id.* at 2526. Furthermore, the Court found, that increased flow "may significantly redress the economic and ecological harm that Florida has suffered." *Id.*; *see id.* at 2520 ("[T]he record suggests that an increase in streamflow of 1,500 to 2,000 cfs is reasonably likely to benefit Florida significantly.").

The Court remanded for the Special Master to "conduct the equitable-balancing inquiry," including to make further findings and "take additional evidence" as appropriate. *Id.* at 2518, 2527.

3. Proceedings Before Special Master Kelly

After this Court's decision, Special Master Lancaster retired and Special Master Kelly took his place. At the outset, Florida asked to supplement the record with new evidence—limited to events *after* the 2016 trial—on Georgia's continuing spike in consumption, the continued and worsening harm to Florida, and the impact of the Corps' Revised Master Manual—but the Special Master denied that request. Dkt. 644 at 5-6. Special Master Kelly thus heard from no witnesses and received no new evidence. Instead, after limited briefing on the paper record, he held a single hearing where each side was granted 45 minutes. Dkt. 665 at 2. A month later, the Special Master issued his report.

SUMMARY OF ARGUMENT

The Court should decline to adopt the Special Master's recommendation and, instead, hold that

Florida is entitled to a decree under the framework established by its prior decision in this case.

On remand, this case immediately went awry. Inexplicably, Special Master Kelly dismissed Special Master Lancaster's conclusions after seeing the trial, and found that Florida has not been harmed at all by Georgia's consumption. Then, he relied on that flawed premise to conclude that Georgia's unrestrained consumption was reasonable—again reversing Special Master Lancaster. And he even disregarded this Court's own holding that the Corps *would* accommodate a decree in this case, and so reasoned that virtually no water generated by a decree would benefit Florida. Meantime, he just dismissed key evidence, including the admissions of Georgia's own officials that the State's ballooning consumption along the Flint was depleting flows and that affordable measures were available to curb it. In short, Special Master Kelly's balancing inquiry was over before it ever even started.

Under the balancing this Court called for, Florida is entitled to relief. The harm from the extreme low flows caused by Georgia's spiking irrigational use is clear—especially as to the oyster fisheries. Even an additional 1,000 cfs during droughts would significantly aid the Apalachicola Region and its oysters in particular. And, as this Court held, the Corps *would* facilitate such a decree. Much of the additional water could be generated simply by eliminating obvious waste and mismanagement in existing irrigational uses; the rest can be generated by adopting the same sort of common-sense measures that other States (including Florida) have implemented to save water—and Georgia's own officials have previously proposed. By contrast,

Georgia's astronomical cost estimates are based on the absurd notion that it would have to cease irrigation altogether—a classic strawman.

Special Master Kelly also lost sight of the bigger picture. Once a case proceeds to the balancing stage, equity governs and the object is to arrive at a "just and equitable apportionment"—reconciling the *equal* rights of *both* States. *Florida,* 138 S. Ct. at 2515 (citation omitted). Denying Florida's claim for relief would do just the opposite. It would give Georgia free rein to consume as much as it wants, regardless of the consequences for the Apalachicola Region. The Framers gave this Court original jurisdiction to prevent precisely that kind of self-interested raiding of what, ultimately, is a shared resource.

ARGUMENT

Florida reaffirms the equitable principle at the heart of this case: No State has the right to deplete a river just because it can. *See* 138 S. Ct. at 2513 (citing cases). To the contrary, "States have an affirmative duty to take reasonable steps to conserve and even to augment the natural resources within their borders to the benefit of other States." *Id.* (citation omitted). And where, as here, water flows from one State to another, *both* States have "'an equal right to make a reasonable use of the waters." *Id.* (citation omitted). The Framers gave to this Court alone the duty to assure that this "reasonable use" principle is respected, and that no State is permitted either to waste or unreasonably consume shared waters to the detriment of another, simply because it happens to be upstream.

New Jersey v. New York, 283 U.S. 336 (1931), exemplifies this principle—and this Court's special

role in enforcing it. There, New York sought to divert waters from the Delaware River to benefit New York City. New Jersey sued, claiming that the diversion would harm it, including its oyster fisheries—by increasing the salinity of the oysters' habitat and thus inviting predators. *Id.* at 343-44; *see* Report of the Special Master 164-65, *New Jersey v. New York,* 283 U.S. 336 (1931) (No. 16, Original) (*New Jersey* Report). New York argued that the salinity changes at issue were too miniscule to matter, and that denying the water to New York City would be disastrous. *See New Jersey* Report 168-75; *New Jersey* N.Y.C. Br. 5-6, 30. The special master recommended a decree limiting the proposed diversion—to protect the oysters in particular—and this Court agreed. 283 U.S. at 345-46.

In his opinion for the Court, Justice Holmes wrote: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." *Id.* at 342. New York—the upstream state—had "the physical power to cut off all the water within its jurisdiction." *Id.* "But," Justice Holmes wrote, "clearly the exercise of such a power to the destruction of interests of lower States could not be tolerated." *Id.* Nor could New Jersey demand that the river "come down to it undiminished." *Id.* Instead, "[b]oth States have real and substantial interests in the River that must be reconciled as best they may." *Id.* at 342-43. Because the likely damage to the oysters in particular from the proposed diversion was "greater than New Jersey ought to bear," the Court entered a decree stemming New York's consumption. *Id.* at 345-46. Substitute the States, and the same follows here.

Underscoring the importance of these disputes, this Court defers to no one in resolving them. While the Court enlists special masters to receive evidence, "at the end of the day, 'the ultimate responsibility for deciding what are correct findings of fact remains with [the Court].'" *Florida,* 138 S. Ct at 2517 (citation omitted). De novo review is especially important here, given that the Special Master below relied on the same cold record available to this Court. Indeed, if anything, the Court should be skeptical, given that Special Master Kelly so flagrantly dismissed the conclusions of the experienced Special Master who presided over the trial. As courts have held, replacement factfinders generally "should be hesitant to overrule [an] earlier determination" by their predecessors. *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017); *see Stevenson v. Four Winds Travel, Inc.*, 462 F.2d 899, 905 & n.4 (5th Cir. 1972); *see Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 623 (1993) (emphasizing benefits of seeing testimony live).[1]

As explained below, the Court's independent review of the record should lead to the conclusion that Florida is entitled to the requested relief.

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[1] This Court variously referred to Special Master Lancaster's conclusions as "key statements," "evidentiary determinations," "findings of fact," and "assumptions." *Florida*, 138 S. Ct. at 2512, 2517, 2526. No matter the best label, Special Master Lancaster plainly based (at 3, 4-10, 30-34) his report on his assessment of the trial evidence. In particular, he made "clear" his conclusions on harm and inequitable conduct. *See id.* at 31-34. While he also stated (at 34) that "more" would need to be said if the case proceeded, it is inconceivable that he would have reversed the core conclusions he reached from trial.

I. SPECIAL MASTER KELLY'S FLAWED LEGAL FRAMEWORK TAINTED HIS ANALYSIS OF FLORIDA'S CASE

Special Master Kelly's one-sided findings are unsupported by—and, indeed, overwhelmingly contradicted by—the evidence. But his report suffers from a more systemic failure: the framework that he applied in analyzing Florida's claim contravenes this Court's mandate for how this case should proceed, as well as longstanding principles governing equitable apportionments.

At the outset, Special Master Kelly overlooked the significance of the fact that this Court, after undertaking its own "'independent examination of the record,'" remanded with instructions to "conduct the equitable-balancing inquiry." *Florida*, 138 S. Ct. at 2518 (citation omitted). A case cannot reach this second, balancing stage unless a State first proves that it has suffered a "real and substantial injury or damage" from the complained-of diversion—by clear-and-convincing evidence. *Id.* at 2514 (citation omitted). And remanding for the balancing stage made perfect sense, since, as Special Master Lancaster explained (at 31), and the evidence shows, "[t]here is little question that Florida has suffered [real] harm from decreased flows in the River."

As this has Court stressed, at the balancing stage, "flexibility" is the linchpin, and the Court seeks to "'arrive at a "just and equitable" apportionment.'" *Florida*, 138 S. Ct. at 2515 (citation omitted); *see id.* at 2527. The burden also shifts to the *diverting State*—Georgia, here—to show that the costs of a decree outweigh its benefits. *See Colorado v. New Mexico,* 467 U.S. 310, 317 (1984);

Colorado v. New Mexico (*Colorado I*), 459 U.S. 176, 187-88 n.13 (1982). Of course, the Court also invited the Special Master to make findings in conducting this balancing, including the *extent* of the injury suffered by Florida. *Florida*, 138 S. Ct. at 2527. But it never suggested that the Special Master should return to stage one and revisit whether Florida had shown that it had suffered real harm from the challenged diversion to begin with. And it never suggested that he should throw out Special Master Lancaster's own conclusions and start from scratch.

Yet Special Master Kelly did just that. He demanded from the outset (at 7-9, 20-21) that Florida show injury by "clear and convincing evidence," and then concluded—in a 180-flip from Special Master Lancaster—that Florida had failed to show that it had "suffered *any* harm from Georgia's consumption" in the first place, *id.* at 25 (emphasis added). As explained below, that threshold error corrupted Special Master Kelly's entire equitable-balancing analysis. Indeed, by finding that Florida had not suffered any injury from Georgia's consumption, the outcome of Special Master Kelly's balancing analysis was all but preordained.

Special Master Kelly's analysis contravenes this Court's mandate in another key respect that further skewed his balancing. One of the central issues in *Florida* was how to factor in the role of the Corps and its Manual. Georgia argued that Florida would not benefit from a decree because the Corps would hold the water back when most needed. This Court rejected that argument and held that Florida's claim should be assessed on the premise that "the Corps *will* work to accommodate any determinations or obligations" in any decree apportioning the waters.

Florida, 138 S. Ct. at 2526 (emphasis added). Nevertheless, Special Master Kelly predicated his balance-of-harms on the opposite premise—that the Corps would *not* alter its operations. Kelly Report 54-61. Indeed, he stressed this point in explaining his conclusion. *Id.* at 7. That legal error effectively eliminated the *benefit* side of the equation.

More generally, Special Master Kelly approached this case as if an equitable apportionment is an *either/or* proposition. As this Court has stressed, "Georgia and Florida possess 'an equal right to make a *reasonable use* of the waters of the stream'—which, in this case, is the Flint River." *Florida,* 138 S. Ct. at 2513 (citation omitted); *see United States v. Willow River Power Co.*, 324 U.S. 499, 505 (1945). Both Georgia and Florida law engrain this "reasonable use" principle. *See, e.g., Hendrick v. Cook*, 4 Ga. 241, 255-57 (1848); *Taylor v. Tampa Coal Co.*, 46 So. 2d 392, 394 (Fla. 1950). Yet, Special Master Kelly focused almost exclusively on whether *Georgia's* use was reasonable; he never genuinely considered ways of protecting *Florida's* own equal right to the reasonable use of the waters.

These over-arching errors underscore the need for this Court to conduct its own balancing under the correct legal framework and equitable principles.

II. FLORIDA HAS BEEN HARMED BY GEORGIA'S CONSUMPTION

No matter what standard of proof is applied, Special Master Kelly erred in concluding that "Florida has not suffered *any* harm from Georgia's consumption." Kelly Report 25 (emphasis added).

A. As Special Master Lancaster Concluded, Florida Has Suffered "Real Harm" From Georgia's Upstream Consumption

No one disputes that river flows have decreased dramatically in recent years. *Supra* 6-7. And as Special Master Lancaster concluded (at 31), "[t]here is little question that Florida has suffered harm from [those] decreased flows in the River."

The harm to the Bay's oyster fisheries is undeniable. Apalachicola is renowned across America for its oysters, which account for 90% of Florida's oyster harvest and 10% of the nation's. Lancaster Report 9; Steverson PFD ¶26. What's more, oysters—and oystering—have created a distinct way of life in Apalachicola passed down from generation-to-generation; whole communities depend on the fisheries for their economic livelihood. *See* Lancaster Report 9, 32 (citing Ward PFD ¶¶24-29, 42). The oyster is to Apalachicola what the lobster is to many New England towns. Yet, as the 2012 collapse shows, Georgia's insatiable upstream consumption has decimated Apalachicola's oyster fisheries.

The chain of causation is clear: Decreasing the fresh water flowing into the Bay increases salinity there, and the evidence shows that even relatively small changes in salinity causes significant harm to

oysters if prolonged. Glibert PFD ¶¶4, 64, 71, 81-83; 7 Tr. 1830:17-1831:13, 1867:24-1870:12 (Glibert); FX-379 at 11; FX-789 at 67 (increasing salinity trend from 2002-2012). As the USFWS has found, even a 1 part-per-thousand (ppt) increase in median salinity in East Bay "may exceed salinity thresholds for juvenile Gulf Sturgeon and oysters." JX-122 at 34. Low flows also reduce the nutrients reaching the Bay from the Apalachicola floodplain, disrupting the food chain. Fla. Proposed Findings of Fact (FoF) ¶15, Dkt. 652 (citations). Worse, increasing salinity creates an environment in which oysters' predators thrive. *Id.* ¶13; Kimbro PFD ¶¶4, 99 & Fig. 2.

In emphasizing the harm to oysters from low flows, Special Master Lancaster particularly relied on two eyewitnesses to the collapse. The first, Mark Berrigan, served as Florida's primary oyster biologist for thirty years and personally monitored oyster fisheries in the Bay. In his contemporaneous 2011-2012 reports (JX-50, JX-77), Mr. Berrigan documented the effects of decreased freshwater flows on the oyster population. *See, e.g.*, JX-50 at 4 ("It is evident from divers' observations that many reefs in Apalachicola Bay are showing the negative effects of decreased rainfall and freshwater flow rates," including "increased natural oyster mortality (predation, disease, and stress associated with high salinity regimes)."). Those reports further stated that "[predatory] drills are more abundant than at any time in recent memory." JX-77 at 6-7.

At trial, Mr. Berrigan explained "that high salinities was the primary factor that was adversely affecting the oyster populations throughout the bay." 3 Tr. 765:22-25. He recalled that predators "passed across entire reefs, devouring every oyster."

Berrigan PFD ¶44. The "mortality in th[e] outer bars was substantial if not 100 percent. ... The conchs were more abundant than you can imagine." 17 Tr. 4336:6-4337:3 (Lipcius) (quoting Berrigan); *see* FX-875 at 3. Equally critical, the predators depleted up to 90% of the "reefs at the mouth of the Apalachicola River," a critical area where brackish waters normally shelter oysters that can later reseed the entire Bay. Berrigan PFD ¶48.

Tommy Ward—a third-generation oysterman—corroborated this unprecedented invasion. Mr. Ward maintains the largest private oyster leases in the Bay, and thus presented a controlled experiment on increased oyster predation. He explained that "[i]n the past, conchs were not a significant problem on my beds, as fresh water ... flowed into the Bay and decreased salinities so that the conchs could not survive." Ward PFD ¶34. Following the severe drop in flows, he testified, "I have never seen the number of conchs that are in Apalachicola Bay today. They eat our oysters, leaving nothing left to harvest." *Id.* ¶5. Indeed, "[i]t used to be common to harvest hundreds of oysters and maybe find one conch. Now, there's probably 100 conchs for every oyster." *Id.*

Scientific experts confirmed that increased salinity caused the oyster collapse. Dr. Kimbro, for example, concluded based on laboratory and field experiments that "the cause of the oyster fishery collapse in 2012 was a reduction in freshwater," which allowed "high salinity conditions to develop and in turn promoted oyster disease, oyster predators, and oyster recruitment failure." Kimbro PFD ¶4; *see id.* ¶¶63-87, Fig. 2; Sutton PFD ¶48. And he emphasized that "predation was significant" even on the "reefs closest to the River" like East Bay,

which normally are a refuge for oysters, Kimbro PFD ¶93, and are critical to "reseed[ing]" the whole bay" after drought. 6 Tr. 1571:20-1572:2 (Kimbro).

The expert federal agency charged with protecting fisheries—NOAA—also found that the central cause of the 2012 oyster collapse was "the physical (high salinity) and biological (increased predation and natural mortality) environmental issues." FX-413 at NOAA-22897. NOAA specifically noted that the "low discharge rate [from the Apalachicola River] is compounded by increased upstream water consumption during the drought periods." NOAA-22896. Special Master Lancaster likewise concluded (at 31-32) that it was "high salinity in the Bay from reduced streamflow" that "allowed marine predators to invade the Bay in unprecedented levels, preying on the Bay's oyster population"—and causing the catastrophic collapse.

B. Special Master Kelly's Contrary Finding Disregards Compelling Evidence

Yet, without identifying any change in facts, Special Master Kelly found (at 16) that the oyster collapse was caused by "overharvesting and a lack of re-shelling" (planting shells on oyster bars)—and not the unprecedented reduction of flows into the Bay. Special Master Lancaster had expressly rejected (at 32) the theory that "potential mismanagement of oyster resources" caused Florida's harm, because the trial evidence "tends to show that increased salinity rather than harvesting pressure led to the collapse." In doing a 180-degree turn, Special Master Kelly disregarded the most probative evidence of harm and dismissed NOAA's expertise.

First, Special Master Kelly dismissed the powerful eyewitness testimony of the unprecedented invasion of predators that ravished the oyster beds. *Supra* 22-23. Second, he ignored the key fact that dead oysters remained on the bars. As Mr. Berrigan explained, the fact that "oysters were not removed from the bars, but rather remained dead on the reefs," is clear evidence that they died from "predation, disease, and stress" and "not commercial harvesting." Berrigan PFD ¶51; *see* 4 Tr. 982:3-982:15 (Berrigan) ("The oysters ... they were still there. ... We saw dead oysters from the size of a thumbnail up to marketable size."). And, third, he ignored the significance of Mr. Ward's testimony. Mr. Ward's leases were private—and so not subject to the alleged overharvesting—yet he observed the same influx of predators. Ward PFD ¶34.

These eyewitnesses—who had decades of experience in the Bay—thus squarely refuted the theory that overharvesting caused the collapse. Instead, as Mr. Berrigan explained, "[h]arvesting pressure was a consequence of the depletion, not a cause." Berrigan PFD ¶64; *see id.* ¶51. Both witnesses provided uncontradicted eyewitness testimony at trial about what has happened in the Bay. No doubt, that explains why Special Master Lancaster (at 9-10, 31-32) relied heavily on them in his report. Notably, the special master in *New Jersey* likewise specifically credited the "evidence of practical oystermen," which, he stressed, "should also not be overlooked." *New Jersey* Report 176.

Georgia introduced no eyewitness testimony to rebut this powerful testimony. Yet, remarkably, Special Master Kelly (at 12-13) just dismissed it—affording it "little" to no weight. He reasoned that

Mr. Ward "limited [his testimony] to only the reefs that he leases" and "did not directly measure the salinity at his leases." *Id.* But the fact that Mr. Ward testified about the decimation of his own oyster beds—not subject to public harvesting—is what makes his testimony especially powerful, because it refutes Georgia's overharvesting theory. Ward PFD ¶¶2, 32. Moreover, Mr. Ward, who has spent his whole life on the Bay and buys oysters from public beds throughout the Bay, also is intimately familiar with and testified about conditions throughout the Bay as well. *Id.* ¶¶4-6, 27-29, 41. Likewise, no one disputes that increased predation is linked to greater salinity. As Mr. Ward put it, "I don't need salinity readings anymore—I can see with my own eyes the overwhelming number of conchs on my leases ...." *Id.* ¶33.[2]

Special Master Kelly also improperly dismissed NOAA's expert views, reasoning (at 14) that NOAA "did not have the benefit of evidence gathered through an adversarial process," and it "had to decide whether to grant relief quickly based in part on socioeconomic considerations." But federal agencies routinely make findings outside the adversarial process; this Court has never discounted such findings on that basis. And socioeconomic factors do not come into play under the governing statute unless NOAA first determines that natural causes (i.e., low flows) caused the collapse, not overharvesting; such factors are thus irrelevant as to causation. *See* FX-413 at NOAA-22895; 16 U.S.C.

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[2] Other evidence refuted the overharvesting theory too, including a 2012 Seafood Watch report ranking Florida top among all Gulf States in oyster management. FX-957 at 24.

§ 1861a(a)(1) (permitting fishery-disaster declaration only for "natural causes" or man-made causes "beyond the control of fishery managers to mitigate through conservation and management measures").

Special Master Kelly's remaining observations also do not withstand scrutiny. He asserted (at 77) that Florida had "not established that bars closer to the River's mouth were significantly harmed by the collapse." Yet he overlooked extensive evidence on the damage done to those bars, demonstrating that their destruction was a tipping point making recovery for the Bay far more difficult. *See, e.g.*, Kimbro PFD ¶¶29, 93; FX-797 at 13-14; 6 Tr. 1571:20-1572:2 (Kimbro); Berrigan PFD ¶48.

Special Master Kelly's reliance (at 16) on "re-shelling" efforts also does not withstand scrutiny. As Special Master Lancaster found (at 32 n.25 (citing Berrigan PFD ¶¶61-63; Ward PFD ¶41)), "[s]helling can significantly increase oyster productivity under favorable conditions, but it cannot counteract high salinity conditions." Mr. Ward, for instance, consistently planted shells on his leases in the years leading up to the collapse, yet that reshelling did nothing to save the oyster population. Ward PFD ¶41. The reason is obvious: the influx of predators, not a lack of reshelling, caused the oysters' demise.

Special Master Kelly's heavy reliance on the testimony of Georgia's expert, Dr. Lipcius (at 15-19), that there was "little evidence of a large scale predation event" is also a red flag. Unlike Florida's eyewitnesses to that event, Dr. Lipcius spent no time on the Bay (save a single afternoon with Georgia's lawyers), collected no data, performed no experiments, and never dove the bars to observe the obvious effects of predation. *See, e.g.*, 17 Tr. 4316:8-

4320:19 (Lipcius); Lipcius PFD ¶¶5-6. Dr. Lipcius' conjectures thus entirely failed to overcome Ward and Berrigan's eyewitness accounts.

Likewise, in blaming overharvesting, Dr. Lipcius relied heavily upon an email stating that "[i]llegal harvest is really exploding"—yet admitted at trial that the oyster fisheries discussed in that email were *not in Apalachicola Bay at all.* Lipcius PFD ¶170; 17 Tr. 4371:15-20. And when confronted with his own testimony that there was "no evidence of increased mortality due to predation," Dr. Lipcius confessed at trial that was "false." 17 Tr. 4414:8-14. Yet his report ignored evidence of such predation (and failed to account for salinity changes). *See also* Kimbro PFD ¶102; White PFD ¶¶114, 117.[3]

The harm to the Bay and its oysters alone justifies relief. *See New Jersey*, 283 U.S. at 343-44. But the River and its fish and wildlife also have been greatly harmed by the severe low flows. As flows diminish, floodplain ecosystems are cut off, receiving little or no fresh water and causing aquatic life to die

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[3] As Dr. Lipcius himself acknowledged, even where there is overharvesting, oysters can recover with reshelling. 17 Tr. 4378:12-4380:4. Yet the Bay's oysters have not—even after reshelling efforts. *Supra* 27. That further proves that unprecedented low flows—not overharvesting—caused the historic collapse. *See* Lancaster Report 32 n.25 ("Shelling ... cannot counteract high salinity conditions."). Moreover, even if overharvesting contributed in some way, that would not defeat causation. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §41, at 268 (5th ed. 1984) (where defendant's conduct is a "substantial factor" in causing harm, existence of "contributing causes" does not defeat causation); *see Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979) (same). In short, overharvesting is just another failed attempt to shift the blame for Georgia's own conduct.

if higher flows do not resume quickly. Fla. FoF ¶16 (citations). Species can survive low flows that are occasional or short lived, but not persistent low flows below 6,000 cfs. Allan PFD ¶¶26-27, 32, 44-45. Sloughs are cut off, swamp forests are not flooded, salinity intrudes further into the tidal reach, and fish, mussels, and tupelo and other plants, perish and face reduced habitat, resulting in weaker populations. *Id.* ¶¶23, 29-30, 32, 54, 60-62.

In dismissing this evidence, Special Master Kelly asserted (at 23) that Florida's expert, Dr. Allan, "did not conduct any studies to determine whether the species he considered" were decreasing. But, here again, he ignored evidence: Dr. Allan had ample such data. 3 Tr. 570:19-572:7 (Allan) (relying on "population data" and "mortality to individuals" for mussels); Allan PFD ¶60 & Fig. 22 (relying upon published work for data); FX-790 at 123-24. The same goes for his statement (at 23) that Florida provided only a single example of an "isolated die-off" of mussels. Florida provided numerous examples. *See, e.g.*, Allan PFD Figs. 1, 11, 12, 17. It was *Georgia* that focused only on one isolated example. Ga.'s Suppl. Resp. Br. 2-3, Dkt. 656.[4]

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[4] Special Master Kelly also erred in denying Florida leave to submit evidence showing harm *since* the 2016 trial. Consistent with this Court's instructions, *Florida*, 138 S. Ct. at 2527, Florida sought to offer evidence of the continued lack of recovery in the Bay—since trial. Dkt. 644 at 18-23. Special Master Kelly rejected that request because "the record developed at trial was extensive." Kelly Report 5. But that is a non sequitur. The evidence Florida sought to introduce was not available at trial and would have underscored the harm caused by Georgia's (still) increasing consumption.

C. Special Master Kelly's Causation Analysis Is Directly At Odds With *New Jersey v. New York*

The chain of causation established by the record here is hardly novel: New Jersey relied on the same chain in its case. *See New Jersey* Report 164 ("[T]he oyster lives and thrives in a salinity lower than that in which these enemies can survive, and ... an increase in salinity over the oyster beds will permit the inroad of these enemies ...."); *see* 283 U.S. at 343-44. In response, New York argued that any change in salinity was too slight to make a difference. *New Jersey* Report 164-65, 168-75. But the special master disagreed, *id.* at 176, and this Court—citing salinity—entered a decree. 283 U.S. at 345-46.

Special Master Kelly's causation analysis deviates from *New Jersey* in key respects. First, whereas the *New Jersey* special master specifically credited the "evidence of practical oystermen" (*New Jersey* Report 176), Special Master Kelly dismissed such testimony. *Supra* 25-26. Second, Special Master Kelly trivialized (at 20) the impact of a "salinity increase of one to two ppt" as "small," as did New York. State of N.Y. Br. 24-25, *New Jersey v. New York* (*New Jersey* State of N.Y. Br.) (contending that a "change in salinity ... from 0.5 to 1.5 parts per thousand" was too "insignificant" to affect "the enemies of the oyster). But this Court necessarily rejected that argument in holding that New Jersey was entitled to a decree. 283 U.S. at 345.

Finally, Special Master Kelly refused (at 14, 21) to consider "harms arising in the future." The evidence overwhelmingly showed that Florida has *already* suffered severe harm from Georgia's

consumption. But there was no basis to disregard the effect of Georgia's consumption on the *future* of the Bay. Indeed, *New Jersey* involved a challenge to a *proposed* diversion, and the resulting decree thus expressly "appl[ied] to future conditions." *New Jersey* Report 193-95. Yet Special Master Kelly myopically focused on past harm and prior wrongs—refusing to consider how a decree would prevent the situation in Apalachicola from *worsening*. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983).

D. Special Master Kelly's Erroneous Finding On Harm Corrupted His Entire Balancing Analysis

Special Master Kelly's flawed finding that Georgia's consumption has not harmed Florida infected virtually every subsequent step of his analysis. Based on this finding, he concluded that (1) "a rich variety of ecosystems and species" in the River and Bay did "not weigh heavily" in his analysis, Report 47; (2) "Georgia's use is not unreasonable," *id.* at 53-54; and (3) the increased water from a decree could not benefit Florida, *id.* at 76 n.48; *see id.* at 77. Accordingly, if this Court concludes that Special Master Kelly erred in finding that Georgia's consumption has not harmed Florida, then the remainder of his report must fall as well.

III. GEORGIA'S USE HAS BEEN UNREASONABLE AND UNRESTRAINED

After seeing Georgia's witnesses under cross-examination, Special Master Lancaster emphatically concluded (at 34) that Georgia's position is that its "agricultural water use should be subject to no limitations, regardless of the long-term consequences

for the Basin." Given Georgia's repeated attempts at trial to portray itself as the consummate steward of natural resources, that conclusion is the ultimate adverse finding in this case. Bolstering the point, he explained (with citations to the record) that:

- "Agricultural irrigation has increased dramatically since 1970," *id.* at 32;
- Despite "this sharp increase in water use, Georgia has taken few measures to limit [such] consumptive water use," *id.* at 33;
- "Even the exceedingly modest measures Georgia has taken have proven remarkably ineffective," *id.*; and
- Georgia has "conveniently" disregarded even the few limits it has adopted as "'too little, too late,'" *id.* at 34.

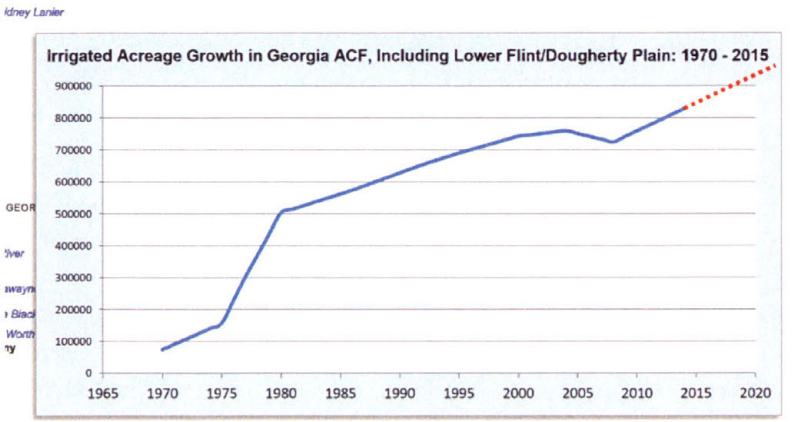
Yet, in the face of these findings, Special Master Kelly—again, without identifying any new evidence—found (at 52) that "Georgia's consumption has been reasonable," after all. That finding is overwhelmingly contradicted by the evidence.

A. Georgia's Consumption Estimates Are Fundamentally Flawed

At the outset, Special Master Kelly erred in adopting Georgia's fantastical estimates of how much water it is consuming in the Basin. According to Georgia, "its highest *ever* Flint River consumption in one month was only 1,407 cfs," and its "highest *ever* monthly consumption in the entire ACF Basin has never exceeded 2,000 cfs." Kelly Report 26. But those estimates have three fundamental problems: (1) they are at odds with the undeniable fact that irrigational use has exploded in the Flint Basin;

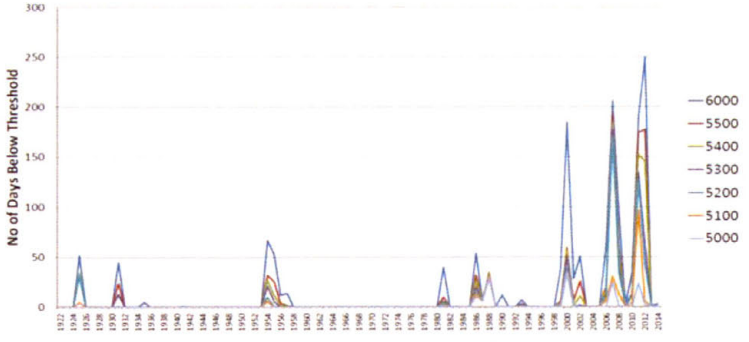
(2) they are based on a fundamentally flawed model; and (3) they fail to explain where all the water that Georgia supposedly is *not* consuming actually goes.

First, Georgia's consumption estimates are impossible to square with what is happening on the ground. As all agree, agricultural irrigation has soared in the Basin, particularly along the Flint. The following chart (plotting acreage data from FX-269) illustrates the steep increase since 1970:



This irrigation consumes massive amounts of water. For example, as Georgia officials put it, "in a drought year, a few thousand farmers will still consume more water than six or seven million people in metro Atlanta will." FX-15 at GA00181626.

Meantime, objective USGS gage data shows that state-line flows during recent drought periods have dropped by up to 4,000-5,000 cfs compared with prior historic droughts. Hornberger PFD ¶¶3b, 51; Fla. FoF ¶¶3-7 (citations). The increase in days with flows below 6,000 cfs—which even Special Master Kelly recognized (at 42)—is particularly striking.



FX-D-17. In short, as irrigation has exploded, flows have shrunk dramatically—just as one would expect.

Florida's consumption estimates account for this unprecedented decrease in flows. They are based on rainfall runoff modeling—a widely-respected tool, used by multiple federal agencies and Georgia's own GWRI—which, generally speaking, measures rainfall entering the Basin, accounts for factors like temperature and evaporation, and compares results with streamflow gage data to determine the water being consumed. *See, e.g.*, Hornberger PFD ¶¶71, 83; JX-82 (USGS rainfall runoff model); FX-534 at 193-94. Multiple rainfall runoff model results have estimated Georgia's peak consumption as between about 4,000 cfs to over 5,000 cfs—amounts that correlate with the sharp decrease in flows in summer months. *See* Fla. FoF ¶¶23-24 (citations).

Second, Georgia's own model for estimating consumption is fundamentally flawed, explaining the stark discrepancy between its small consumption estimates (about 1,400-2,000 cfs) and the drastic depletion in flows. Georgia purported to aggregate all individual uses in the Basin to calculate consumption. But such models are notoriously difficult for large areas, because they require a

complete and accurate accounting of *all* water uses. If individuals are using more water than is reported or don't report at all, the model will necessarily understate consumption. And Florida demonstrated at trial that Georgia's "bottom up" estimates consistently do just that. *See* FX-534 at 191, iv.

Indeed, *Georgia itself* has long understood that it fails to capture the full range of consumptive uses in the Basin, especially when it comes to agricultural irrigation. *E.g.*, FX-2; FX-3; FX-4; FX-5. Georgia's most recent estimates of irrigated acreage in the ACF—approximately 582,000 acres, Ga. FoF ¶37—are drastically lower than any estimates Georgia has made in the past 15 years. *E.g.*, FX-219 at 9 (over 920,000 acres); FX-D-24 (826,877 irrigated acres); JX-129. Strikingly, Georgia's GWRI authored an evaluation in 2012 concluding that one dataset could undercount irrigation consumption by "*up to 70%* of the actual crop water requirement." FX-534 at 10 (emphasis added); *see also id.* at iv-v, 189-94. In other words, Georgia's model undercounted—by 40-70%—the amount of water used on irrigation alone.

In addition to the hundreds of thousands of irrigated acres that are missing from Georgia's estimates, Georgia admitted that it intentionally excluded (and withheld as privileged) *all* of the evaporation loss from the thousands of farm irrigation ponds found throughout Georgia—despite estimates from Georgia's own GWRI that such losses could total as much as 1,200 cfs. *See* FX-534 at 191; 13 Tr. 3208:7-10, 3368:6-22 (Zeng). Those losses—not accounted for at all in Georgia's model—also help to explain why its estimates are so low.

Finally, there is an even more glaring problem with Georgia's position: it doesn't explain *what*

accounts for the discrepancy between what Georgia claims it is consuming (at most 2,000 cfs) and the huge decrease in flows (up to 4,000-5,000 cfs). Where does all that water go—the 2,000-3,000 cfs per month that, according to Georgia, is not being consumed, but just disappears?

At times, Georgia—which, tellingly, declined to call a climate expert at trial—has tried to shift blame for declining flows to changes in climate. But Florida showed that "other climate variables that affect runoff and streamflow, including evapotranspiration, have changed only slightly in the last century." Lettenmaier PFD ¶26; *see* FX-D-17. In recent decades, the number of extreme low-flow days have jumped—without any corresponding trend in precipitation. *See* FX-893. Likewise, prior droughts have not had anywhere near the same impact on flows as experienced in recent decades—even when those historical droughts were more severe. *See* Hornberger PFD ¶¶50-53.

At most, climatic changes have *exacerbated* the harm caused by Georgia's overconsumption. But that hardly excuses Georgia for its own overuse. *Cf. Carlson v. Chisholm-Moore Hoist Corp.*, 281 F.2d 766, 770 (2d Cir. 1960) (Friendly, J.). Rather, it would simply mean that that the reasonableness of Georgia's consumption must be determined *in light of drought conditions*. *See* Restatement (Second) of Torts § 850A cmts. a, j (1979); *New Jersey* Report 176. And by that baseline, Georgia's use is even more unreasonable: even Special Master Kelly recognized (at 53) that Georgia overuses water during droughts. *See infra* 37-42.

In the end, Georgia's own evidence solves the mystery of where this water has gone. Even by

Georgia's own count, its "irrigated acreage has increased from under 75,000 acres in 1970 to more than 825,000 acres in 2014," and its "own estimates show a dramatic growth in consumptive water use for agricultural purposes." Lancaster Report 32-33. No matter the precise number on Georgia's consumption, it is clear that it has jumped right along with irrigation in the Basin. Special Master Kelly erred in erasing Georgia's spike in consumption by adopting its fanciful estimates.

B. Georgia's Own Officials Have Acknowledged Georgia's Gross Mismanagement, Yet Failed To Act

What's worse, internal documents show that, even though Georgia knew its increasing consumption was depleting flows into Florida, it repeatedly failed to do anything about it. Yet, Special Master Kelly dismissed this evidence, too.

As early as 1995, a USGS report explained that "stream-aquifer-flow declines upstream of the Apalachicola River will reduce flows entering Lake Seminole and, subsequently, cause reductions in flow of the Apalachicola River." JX-7 at 68. At the same time, Georgia's own Department of Natural Resources was itself raising the red flag, warning that Georgia's methodology for ensuring adequate flows could lead to "significant degradation of stream communities." FX-36 at GA00100747. Even Georgia's GEPD Director admitted that, "[w]hen thousands of irrigation systems are operating during dry weather, such as we have been having this year [1999], one can see a significant reduction in Flint River flows." FX-2 at GA02257045.

The situation grew so extreme that, by 1999, Georgia officials explained that if irrigation were not limited soon, "Georgia's negotiators will not be able to commit Georgia to deliver *any* Flint River flow to the state line during droughts." FX-4 at 4 (emphasis added). Indeed, they concluded that Georgia's farmers had "already exceeded the 'safe' upper limit of permitable acreage in the lower Flint." *Id.* at 3 (emphasis omitted). So what did Georgia do to address the problem? Nothing.

Instead, Georgia continued to grant irrigation permits year after year. At trial, for instance, the former GEPD Director admitted that, after publicly announcing a permitting "moratorium" in November 1999, he nonetheless issued roughly 864 *additional* permits for more than 100,000 irrigated acres. 3 Tr. 645:11-646:24 (Reheis); JX-132; FX-D-16 (total permitted acreage in Basin by year). Then, the permitting authorities loosened the law even further and—as the former director admitted—"essentially just issued permits for any farmer that requested them." FX-3 at GA02257040.

So the situation worsened. In 2006, the USFWS warned Georgia that "[t]he current over-allocation of water, as it is enacted in low-flow years, does not appear to protect current downstream agricultural users or other water users; it is also not protecting future users." FX-46 at 2; *see* JX-21 at 22 (2006) ("Since extensive development of irrigation in the lower Flint River Basin, drought-year low flows are reached sooner and are lower than before irrigation became widespread."); FX-46 at 2-4 (2006) (USFWS expressing concern Flint River flows were "current[ly]" over-allocated and impacted mussel

habitats); FX-47 at 2-3 (2008) (water use, not climate conditions, caused record low flows).

Yet, Georgia just kept cranking out irrigation permits. From 2006-2015, Georgia issued more than 1,400 permits covering more than 160,000 acres of newly irrigated farmland. FX-D-16. All told, Georgia's permitted acreage nearly doubled after it first acknowledged its problems with over-irrigation along the Flint in the early 1990s, grew by 40 percent since 1998, and grew by nearly 20 percent *more* after 2006. *See* Fla. Suppl. Br. 23 (citations). Most of those permits, moreover, contain no limits on the water farmers can use for their irrigation, leaving farmers with little incentive to invest in more efficient systems. Lancaster Report 33.

Moreover, as Special Master Lancaster found, even the "exceedingly modest measures" Georgia did adopt have proven "remarkably ineffective." *Id.* For example, Georgia passed the Flint River Drought Protection Act to implement "irrigation auctions" whenever a severe drought was predicted, but invoked it only twice (in 2001-2002), after which it cut off funding for auctions. *See* 3 Tr. 685:4-7 (Reheis). In 2011, despite warnings of a drought, Georgia "chose not to declare a drought," "clearly not wishing to incur the cost of preventative action." Lancaster Report 33-34. Then, in 2012, with another drought looming, Georgia "conveniently" claimed that invoking the Act would be "'too little, too late'—despite lacking scientific support for that conclusion." *Id.* at 34. Special Master Lancaster's detailed account of these efforts (at 33-34) makes clear that he found the contrary testimony of Georgia's officials at trial not credible.

Georgia's officials also have recognized what all this means for Florida. Outside the bounds of this litigation, Georgia officials have candidly acknowledged that "the state *will* need to put a cap on water depletions one of these days from the Floridan aquifer to keep water flowing in the lower Flint River in drought years." FX-5 at 1. That day, of course, has not yet arrived—and, if Georgia has its way—never will. *See* Lancaster Report 34.

C. Special Master Kelly's Contrary Finding Is Unsupportable

In the face of all this, Special Master Kelly somehow found (at 54) that Georgia's use is "not unreasonable." That conclusion is overwhelmingly contradicted by the evidence summarized above. But it is also tainted by three independent errors.

First, as noted, Special Master Kelly ultimately grounded his finding on reasonableness on his prior finding that Florida had not been harmed at all by Georgia—invoking Justice Story's observation "that 'the true test' of reasonable use is whether it injures other users." Kelly Report 54 (quoting *Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.D.R.I. 1827)). "Given that test," Special Master Kelly concluded "Georgia's use is not unreasonable because Florida has not shown that the oyster collapse was caused by Georgia's consumptive use." *Id.* But as explained, that threshold finding on injury is plainly wrong. And once it is corrected, injury compels a finding of unreasonableness under Justice Story's test.

Second, Special Master Kelly (at 53) himself recognized that "when severe droughts hit the region, Georgia's agricultural consumption only increases, and Georgia has not effectively curbed

this use." That finding—that Georgia has only increased its consumption when water matters most to Florida—alone compels a finding that Georgia's consumption is unreasonable. In concluding otherwise, Special Master Kelly simply pointed to his erroneous finding on injury. *Id.* at 53-54.

Third, Special Master Kelly erred in dismissing Georgia's own admissions about its misuse of water. *Supra* 37-40. Remarkably, Special Master Kelly reasoned that these statements were due "little weight" in that they did not amount to "'hard facts.'" Kelly Report 42 n.31 (citation omitted). That makes no sense. The admissions of Georgia's own officials on the extent and impact of Georgia's increasing consumption, as well as Georgia's failure to do anything about it, are highly probative. The back-of-the-hand dismissal of this evidence flouts this Court's emphasis on the need for flexibility at this stage. *Florida,* 138 S. Ct. at 2526.

Fourth, Special Master Kelly overlooked the abundant evidence of waste and deliberate indifference on Georgia's part. Even Special Master Kelly did not meaningfully dispute that Georgia:

- Continued to issue irrigation permits long after it knew of the dramatically decreased flows. *Supra* 38-39.
- Failed to include any limits on many irrigation permits or otherwise cap water depletions. *Supra* 39.
- Declined to enforce its existing laws and stop irrigation on acres that are currently irrigated illegally. *Infra* 48-49; Sunding PFD ¶¶46-47.

- Failed to fund and implement the Drought Protection Act, even in years with extreme drought. *Supra* 39.

That sort of waste and mismanagement is, by definition, unreasonable. *See, e.g.*, *Colorado I,* 459 U.S. at 184 (holding that "wasteful or inefficient uses will not be protected"); *Hendrick v. Cook,* 4 Ga. at 255-56. Special Master Kelly himself (at 46) recognized that wasteful uses are not protected. Yet he refused to factor in Georgia's failure even to enforce its own permit terms—once again citing his finding that there was no harm. *Id.* at 79 n.51.

IV. THE BENEFITS OF A DECREE WOULD SUBSTANTIALLY OUTWEIGH ANY HARM THAT MIGHT RESULT

What remains is the equitable-balancing inquiry that this Court intended to be the heart of remand proceedings. *Florida,* 138 S. Ct. at 2525-27. Under a proper balancing of benefits and costs, Florida is entitled to a decree apportioning the Basin's waters.

A. Florida Would Greatly Benefit From A Decree

As this Court has already recognized, increasing flows, by limiting Georgia's consumption, would greatly benefit the Apalachicola. *See Florida*, 138 S. Ct. at 2520 ("[T]he record suggests that an increase in streamflow of 1,500 to 2,000 cfs is reasonably likely to benefit Florida significantly."). In fact, even an increase of only 1,000 cfs would help to facilitate meaningful recovery. *See* Fla. Suppl. Br. 31 (citations). Likewise, a year-round cap at current levels would replenish needed waters, provide a

buffer for droughts, and, at a minimum, ensure the situation does not worsen. *Id.* at 30-31.

1. Special Master Kelly's Contrary Finding Is Based On A Legal Error

In nevertheless finding that Florida "would receive *no* appreciable benefit from a decree" (Report 62 (emphasis added)), Special Master Kelly repeated the very error this Court identified in *Florida*: He assumed that the Corps would inflexibly follow its Master Manual and not allow the additional water through to Florida when needed. *See id.* at 54-61. Moreover, he expressly declined to analyze "whether the Corps could make reasonable modifications to its Master Manual" to accommodate a decree (and refused to take evidence on this). *Id.* at 5, 61. In circular fashion, he reasoned that, because (in his view) Florida has not shown that an equitable apportionment is justified, there was no need to consider how the Corps could modify its operations to effectuate a decree. *Id.* That reasoning—which excluded consideration of the benefits of a decree—flouts this Court's ruling that the Corps *will* facilitate any decree by this Court, *see Florida,* 138 S. Ct. at 2526, and alone warrants remand.

Moreover, as Special Master Lancaster found (at 53-55, 61), the Corps has discretion to release additional water even *without* modifying its Master Manual—and has "historically exercised its discretion" to do so. Special Master Lancaster declined to factor that discretion into his analysis only because it was not *certain* the Corps would exercise it. *Id.* at 55. But this Court held that he erred in demanding such certainty. *Florida,* 138 S. Ct. at 2526. Once again, Special Master Kelly had

no basis to dismiss Special Master Lancaster's findings following the trial.[5]

Special Master Kelly also contravened this Court's decision by dismissing the benefit that would inure to Florida under the Corps' existing rules from simply delaying or shortening the onset of drought operations. *See Florida,* 138 S. Ct. at 2523. That, too, could provide critical relief—by preventing or delaying extreme low flows—when water is most needed. *See, e.g.*, FEIS Volume 1 at 4-18 to 4-20 (2016); Record of Decision 2 (2017)[6]; FX-811 at 2; GX-924. Yet Special Master Kelly simply dismissed (at 59) this additional benefit on the mistaken ground that Georgia does not consume more than 2,000 cfs (*but see supra* 32-37) and by relying on changes in the Revised Manual—even though he refused to allow Florida's request for fact-finding on the impact of the Revised Manual (*supra* 13).[7]

Based on these legal errors alone, Special Master Kelly wiped out the benefits side of the equation.

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[5] Contrary to Special Master Kelly (at 58), the Corps *has* previously exercised its discretion to release more than 5,000 cfs during drought operations. *See* Shanahan PFD ¶57. But even if it had not previously done so, that would hardly mean the Corps would refuse in the face of a decree from this Court.

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

[7] Contrary to Special Master Kelly (at 61 n.40), Florida pressed this argument on remand. *E.g.,* Fla. Suppl. Br. 29.

2. Additional Flows Of Even 1,000 cfs Would Greatly Benefit Apalachicola

The evidence overwhelmingly shows that Florida would materially benefit from an increase in flows of even 1,000 cfs.[8] Historically, the River and Bay have always recovered from droughts and other natural disasters, so long as flows did not dip persistently below 6,000 cfs for months or years at a time. *See* FX-D-1; Sutton PFD ¶¶59, 66. Even the severe low flows of 1999-2001 did not precipitate a total crash of the fisheries, and the oysters soon recovered. The difference in 2011-12 was that flows dropped well below 6,000 cfs for many months at a time for multiple years in a row. FX-D-1; *see supra* 7, 23-24. Avoiding passing that tipping point again is critical to the survival of the Apalachicola ecosystem.

This historical record of resiliency more than suffices to support the "reasonable predictions" that the River and Bay would recover with the help of a decree. *Florida*, 138 S. Ct. at 2514 (citation omitted). But Florida presented much more. As for the Bay, Florida showed that increases in freshwater flows would protect the oyster fisheries by driving out predators and promoting an increase in oyster biomass. *See* Fla. FoF ¶27 (citations). As for the River, Florida showed that maintaining flow levels at 6,000 cfs, 7,000 cfs, or higher would keep floodplain sloughs connected and channel margins inundated, greatly benefiting animal and plant

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[8] Based on his flawed finding on Georgia's consumptive use (*supra* 32-37), Special Master Kelly never considered the even greater benefits of an additional 2,000 cfs—the top end of Florida's requested decree. Kelly Report 66.

species in the River. *See id.*; 3 Tr. 580:18-584:7 (Allan) (many sloughs disconnect at 5,000-9,000 cfs).

In dismissing that evidence, Special Master Kelly reasoned (at 75) that an additional 1,000 cfs would make no difference because it would reduce salinity by approximately 1 ppt in most parts of the Bay. Notably, in *New Jersey,* New York raised the same argument that a "change in salinity ... from 0.5 to 1.5 parts per thousand" was too "insignificant" to affect "the enemies of the oyster." *New Jersey* State of N.Y. Br. 24-25. Yet, this Court nonetheless held that such a change was "greater than New Jersey ought to bear." *New Jersey*, 283 U.S. at 345.

That holds doubly true here, where the evidence shows that 1 ppt can make a life-or-death difference for the Bay's oysters. Comparable *increases* in salinity led to the crash; lowering salinity levels to prior conditions would allow recovery. Furthermore, as a *comparative* figure, 1 ppt is highly significant—some key areas of the Bay normally maintain salinities of 0-5 ppt. 7 Tr. 1869:23-1870:12 (Glibert). Even a 1 ppt difference in East Bay, where salinity normally ranges from 0 to 5 ppt, means a *20-30%* reduction in salt stress. *Id.* at 1869:23-1870:12. And the health of East Bay bars, closest to the River, is crucial because they "reseed[] the whole bay" when there is a collapse—which is impossible when inundated by predators. 6 Tr. 1516:6-16 (Kimbro); *id.* at 1571:1-1572:2. The destruction of those refuge bars pushes the Bay past a tipping point that makes recovery far slower and more difficult.

The 2011-12 drought was an unprecedented event from which the Bay has still not recovered. The only hope for its sustained recovery is that flows never again drop so low for so long. And that, in

turn, requires ensuring sufficient water—as the requested decree would. By saving Apalachicola's oyster fisheries alone, a decree would preserve an invaluable natural resource, not to mention the communities that have depended on that resource for generations. And, as discussed, a decree would benefit many other species as well.

B. Special Master Kelly Drastically Overstated The Cost Of A Decree

To achieve these significant benefits, Florida has proposed a series of affordable measures, many of which Georgia's own officials have previously suggested or have been implemented successfully in other States. *See* JX-154 at 2; Fla. FoF ¶30; 11 Tr. 2849:22-2886:1 (Sunding). Florida's economic expert, Dr. Sunding, calculated annual fiscal costs to Georgia of approximately $35 million for a remedy that would increase flows to Florida by 2,000 cfs during periods of peak consumption—and considerably less for a more limited remedy like 1,000 cfs. *See* Sunding PFD ¶¶88-93 & Tables 4-6.

1. The Costs Of Eliminating Waste And Inefficiency Do Not Count In The Balancing

In concluding that costs of generating 1,000 cfs or more of additional flows are nevertheless prohibitive, Special Master Kelly grossly overestimated the costs of a decree—beginning with the costs of simply eliminating existing waste and mismanagement of irrigational practices. As Special Master Kelly himself recognized, "wasteful or inefficient uses [of water] will not be protected." Kelly Report 46 (quoting *Colorado I,* 459 U.S. at 184); *see Wyoming v.*

Colorado, 259 U.S. 419, 484 (1922). The burden of curbing wasteful and inefficient uses therefore should not weigh against a decree. Yet Special Master Kelly refused to consider such measures.

For example, Florida proposed that Georgia prevent farmers from continuing to irrigate their land when the marginal benefit of such irrigation approaches zero. Kelly Report 70. By definition, the cost of reducing such overwatering would be zero, as crops cannot benefit from it. Special Master Kelly dismissed this remedy on the ground that overwatering was not occurring. *Id.* (citing Masters PFD ¶¶46-49). But there is extensive evidence that such overwatering in fact occurs—roughly 98,000 acre-feet of it, resulting in 162 to 192 cfs of lost water in a drought year. Sunding PFD ¶51; *see id.* ¶¶49-54 & Figs. 3-4.[9]

Special Master Kelly also dismissed (at 69-70) simply requiring Georgia to enforce its own laws by cracking down on farmers who irrigate unpermitted acreage—in violation of their permits. Even Special Master Kelly recognized that taking this step would increase streamflow by at least 125 cfs during dry years, and would cost Georgia nothing, because Georgia law already forbids such irrigation. *Id.*; *see* Sunding PFD ¶90 & Tables 4-6. Yet Special Master Kelly refused (at 79 n.51) to "fashion[] a decree to better enforce permit terms" based on his prior finding that Florida had not been harmed by

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[9] In response, Georgia's expert cherry-picked three farmers and argued that their meters were mislabeled. Master PFD ¶48. But, in fact, Florida's expert had *already* excluded those three farmers from his analysis, along with all other meter readings over 50 inches per acre. *See* FX-784 at A-2.

Georgia's consumption. Once that erroneous finding is corrected, it follows that Florida is entitled to a decree on this issue at the very least.

2. Georgia's Own Officials Have Recognized That Additional Limits Are Feasible

Special Master Kelly also unreasonably dismissed internal documents showing that Georgia itself recognized that many of the same proposals offered by Florida for limiting irrigational consumption were both feasible and affordable.

For example, one document (JX-154) memorialized a discussion between the GEPD's director and Flint Basin interests about a range of solutions that could, at relatively low cost, limit irrigation impacts. FX-69; 12 Tr. 2966:17-2968:1, 2970:6-14, 2972:20-2982:2 (Turner); 9 Tr. 2270:15-2275:25 (Cowie). Likewise, Georgia's Water Contingency Planning Task Force recommended municipal leak abatement as a "no-regrets" conservation measure that would save 27 MGD (approximately 42 cfs). JX-41 at 32, 28 & Fig. 13; Sunding PFD ¶43. This evidence proves that reasonable and affordable limits are available.[10]

Georgia also recognized that it would be "feasible" to work with the Corps on facilitating conditions for minimum flows of 6,000 cfs at the state line. Zeng PFD ¶¶140-41; *see* 12 Tr. 3074:18-3076:21 (Turner); Fla. FoF ¶15 (citations). Although

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[10] Special Master Kelly suggested (at 67) that Georgia has implemented many leak-abatement measures. But the testimony he cited fails to specify any measures that were actually implemented. *Id.* (citing Mayer PFD ¶37).

Georgia ultimately declined to pursue this proposal, it underscores that Georgia itself recognizes that there are feasible ways of increasing flows and provides a yardstick of what Georgia thought would be a reasonable expense to prevent further harm to the Basin. Yet here again, Special Master Kelly largely ignored these highly probative admissions by Georgia's own officials about what could be done.

3. Special Master Kelly Erred In Relying On Georgia's Grossly Inflated Cost Estimates

Special Master Kelly compounded these errors by accepting Georgia's overblown claims that any conservation efforts would be astronomically costly or flatly infeasible. Kelly Report 67-75.

For example, Special Master Kelly dismissed (at 72) Florida's proposal that Georgia buy back irrigation permits from farmers as a way of stemming consumption. In doing so, he appears to have accepted Georgia's claims that Florida is proposing to halt *all* irrigation in the region—something Florida has never suggested. Using that erroneous assumption, Special Master Kelly accepted (at 72) the estimate of Georgia's expert, Dr. Stavins, that a permit buyback would cost Georgia nearly a *billion* dollars in lost crop yield.

But Dr. Stavins acknowledged that he made no effort to analyze the costs of *limiting*—rather than eliminating—most irrigation in the ACF, or the possibility of saving water by altering *how* irrigation was done. *See* Fla. Suppl. Br. 36-37 & n.9 (citations). Special Master Kelly appears to have adopted this error, stating that Georgia's agricultural consumption "provides substantial benefits" because

expected yields during dry years would be as much as 93% lower if irrigation were limited. Kelly Report 52 (citing Stavins PFD ¶23). But those numbers represent the difference between current irrigation practices and *no irrigation at all*—they have no relevance to the decrease in yields if Georgia simply imposed reasonable limits on irrigation, as Florida proposed. *See* Stavins PFD ¶88; FX-784 ¶¶71-84.

Special Master Kelly (at 71) also erred in asserting that efficiency improvements in irrigation would produce little gain at extravagant cost. Georgia itself has acknowledged that implementing Variable Rate Irrigation (VRI) could achieve agricultural water savings of 15% in a dry year. GX-868 at 77. And improving irrigation *scheduling* could reduce agricultural water use by an additional 15 percent. *Id.* at 78. Yet Georgia does not require its farmers to use irrigation scheduling—a nearly costless measure. 14 Tr. 3668:18-22 (Masters); *see also* Masters PFD ¶76; FX-960 at 44 (potential 70-80% water savings from sod-based crop rotation). Dr. Stavins failed to analyze these irrigation efficiency measures. *See* Fla. Suppl. Br. 36-37 & n.9.

In sum, by adopting Georgia's inflated figures across-the-board, Special Master Kelly grossly overstated the costs of adopting the sort of common-sense, widely-used measures proposed by Florida.

C. The Balance Of Harms Weighs Heavily In Favor Of A Decree

Because of his flawed findings that Florida was not injured by Georgia's consumption and that none of the water generated by a decree would flow through to Florida when needed anyway, Special Master Kelly's equitable-balancing was doomed from

the start. Correcting those inputs, however, it is clear that the benefits of a decree substantially outweigh its actual costs. This is not to say that Georgia offers nothing on its side of the ledger. But here, just as in *New Jersey*, balancing both States' equal right to the reasonable use of the waters at issue results in the conclusion that Florida is entitled to a decree *limiting* Georgia's consumption—which is to say, preventing Georgia from taking as much as it wants, without restraint.

All told, the benefits of a decree substantially outweigh its realistic costs ($9-$35 million per year). Sunding PFD ¶¶89-90 & Tables 4-6. These costs are entirely fair to preserve a one-of-a-kind ecosystem, protect what has been one of the nation's most productive estuaries, and save its oyster and fish populations—and the communities that have depended on them for generations. As even Special Master Kelly recognized (at 46), in balancing the benefits and harms, it cannot be that the "larger state always wins." Yet that is essentially what Georgia and its industry-minded amici have proposed, suggesting that Florida's generations-old oyster business cannot possibly trump the relatively recent explosion of agribusiness in the Flint.

At the end of the day, both States possess "an equal right to make *reasonable use* of the waters" at issue. *Florida,* 138 S. Ct. at 2513 (citation omitted). As *New Jersey* underscores, the question for this Court is not which use generates the most revenue or seems most desirable as a matter of social policy. Instead, the question is whether the upstream State's consumption unreasonably burdens the reasonable use of the downstream State. Here, Florida's decision to use the waters at issue to

preserve a unique estuary that is home not only to one of the nation's most famous oyster fisheries but also innumerable animal and plant species (*see Florida*, 138 S. Ct. at 2519) is plainly reasonable. Georgia's wasteful and unrestrained consumption of water upstream to the detriment of that reasonable use is "greater than [Florida] ought to bear." *New Jersey*, 283 U.S. at 345; *see New Jersey* Report 194.

V. DENYING RELIEF WOULD SUBVERT EQUITY AND THIS COURT'S CONSTITUTIONALLY ASSIGNED ROLE

The Framers gave to this Court a special role in resolving disputes among the States that might have necessitated a diplomatic resolution or even a call to arms before the founding. *See Missouri v. Illinois,* 180 U.S. 208, 241 (1901); *Kansas v. Nebraska,* 575 U.S. 445, 454-55 (2015). This safety valve is critical to a strong Union. Setting the bar so high that a State cannot secure relief from this Court in real disputes like this not only would defeat the Framers' intent, but sow conflict among the States.

This case is the culmination of decades of effort by Florida to save the Apalachicola—which has included self-imposed conservation efforts, lower-court litigation, and attempts to negotiate an interstate compact. *See* Lancaster Report 10-13. Throughout that time, Florida has sat by helpless as Georgia's consumption of water has continued to explode, resulting in historically low flows into the Apalachicola and, ultimately, a historic collapse of the Bay's iconic oyster fisheries. This is exactly the sort of conflict in which the "real and substantial interests" of both States "must be reconciled as best they may be" through equitable apportionment.

Florida, 138 S. Ct. at 2513 (quoting *New Jersey*, 283 U.S. at 342-43). Special Master Kelly made no genuine attempt to reconcile the legitimate interests of both States and, instead, took an all-or-nothing approach to the ultimate balancing.

If this Court accepts the Special Master's recommendation, Georgia's consumption will only increase, and the situation in the Apalachicola will inevitably worsen. After observing Georgia's officials hem, haw, and try to deny the obvious, Special Master Lancaster (at 34) made perhaps the most important determination in this case: Georgia's position is that "Georgia's agricultural use should be subject to no limitations, regardless of the long-term consequences for the Basin." And here again, he was right. Asked at the hearing on remand whether there was any limit to how much water Georgia could consume, counsel for Georgia refused to acknowledge a limit—or even to rule out that Georgia could say to Florida one day, "I'm sorry, there's no more water for you." Remand Tr. 43, Dkt. 669. Engraining that position in a decree from this Court denying relief would be the height of inequity.

This Court should hold that Florida is entitled to a decree equitably apportioning the waters at issue and order further proceedings on fashioning such a decree. As Florida has explained, a decree could take different forms. *See* Fla. Suppl. Br. 34-35, 38-40. In addition, the Court could instruct the parties to negotiate on the decree's terms, including as appropriate with the Corps. The Corps has previously represented that it would be willing to participate in such negotiations. *Id.* at 40. Florida believes that such negotiations—following a decision by this Court holding that Florida is entitled to an

equitable apportionment—would facilitate a decree that would reasonably accommodate the interests of all concerned. The parties could then present the decree to the Special Master for approval. If this process fails, then the Special Master should order further proceedings on fashioning a decree.

* * * * *

Neither Georgia, nor any other State, has the right to consume as much water as it wishes. The Union was built, and has endured, on the common-sense principle that all States have an equal right to the reasonable use of shared resources. That is all that Florida asks this Court to vindicate here.

CONCLUSION

The Court should decline to adopt Special Master Kelly's recommendation, hold that Florida is entitled to relief, and order further proceedings.

Respectfully submitted,

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