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

BRIEF OF FRANKLIN COUNTY SEAFOOD WORKERS ASSOCIATION AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE[1]

Amicus is the trade association representing Franklin County's oystermen, who, for generations, have made their living harvesting oysters from Florida's Apalachicola Bay. The oysters, and the myriad other species of flora and fauna that the oysters used to support, define the economic and cultural life of Franklin County's seafood workers. Because increased salinity has annihilated the oyster beds, our way of life is disappearing before our eyes.

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Amicus therefore has a strong interest in the outcome of this litigation: Apalachicola Bay's oysters will not return unless there is a steady supply of freshwater coming from the Chattahoochee and the Flint Rivers into the Apalachicola River, which runs into the Bay.

SUMMARY OF ARGUMENT

Apalachicola Bay is one of the nation's last pristine estuaries. The Bay is home to thousands of specifies of flora and fauna, including many that are threatened or endangered. For centuries, the Bay's natural bounty has provided a way of life to the inhabitants of Franklin County, the locality in which the Bay sits. Generations of Franklin County seafood workers have lived in harmony with the Bay's ecosystem, maintaining its healthy populations of wildlife while sharing its riches with the rest of the country.

The Bay's plant, animal, and human life hangs together in a delicate balance, the foundation of which is the oyster. Oysters filter the Bay's waters, allowing submerged grasses to thrive. Oysters provide a safe habitat for various species of fish who use their dense, architecturally complex reefs to avoid predators. And the rhythms of the oysters' lifecycle govern the rhythms of Franklin County's cultural and economic life. The Apalachicola oystermen harvest oysters the traditional way—using wooden hand tongs. Oyster Radio, the local radio station, provides us with music and news. And every year, we gather for the Blessing of the Fleet—a ceremony in which the local religious leaders offer their benediction to the fleet of small, 20-foot boats on which the oystermen ply the Bay's waters.

But today, this way of life is threatened and disappearing. Apalachicola Bay, once lauded nationwide for the quality of its bivalves, is almost completely empty of oysters. The crash came in 2012, after a period of unprecedented low flows, when the supply of fresh water running into the Apalachicola River and Bay from the Chattahoochee and Flint Rivers dried up. Without this fresh water, the Bay turned from brackish to salty—almost as salty as the rest of the Gulf of Mexico, in fact—devastating the oysters. They need a mix of fresh and salty water; without it they can get sick and die. Worse still, predators of the oyster, like oyster drills and conch, prefer salty water to brackish. Thus, as the waters of the Bay became more salty, these predators were able to wreak havoc: oystermen and biologists have observed beds of oysters that lived for centuries—through storms, hurricanes, and droughts—now completely devoid of living oysters, and full of predators.

In light of this evidence, Special Master Ralph Lancaster concluded in 2016 that "[t]here is little question that Florida has suffered harm from decreased flows in the River." But things have only gotten worse for the Bay since then. The years since Special Master Lancaster took evidence have confirmed that, unless the Bay can rely on a steady stream of fresh water from the Chattahoochee and Flint Rivers down the Apalachicola River

and into the Bay, one of the nation's few remaining pristine estuarine ecosystems—and the human society that relies on it—will not recover.

ARGUMENT

I. Oysters Play a Vital Role in the Ecosystem and Society of Apalachicola Bay

A. The Apalachicola Bay is a "unique ecosystem." Report of Special Master Lancaster 8 (Feb. 14, 2016) (Lancaster Report), Dkt. 636. The Bay is "among the nation's few remaining . . . near pristine systems." Nat'l Oceanic & Atmospheric Admin., *Apalachicola National Estuarine Research Reserve: Management Plan* 9 (April 2014).[2] Along with the rivers that drain into it, the Bay provides "essential feeding and nesting grounds for a diverse assemblage of upland, coastal and estuarine wildlife, including more than 300 species of birds, 1,300 species of plants, 40 species of amphibians, 80 species of reptiles, 50 species of mammals and 180 species of fishes." *Id.* Many of these species are designated as threatened or even endangered by the federal government. *Id.* at Appendix B.4.

The flora and fauna of the Bay hang together in a "delicate balance." Chris Berry & Amanda Concha-Holmes, *Disaster in Apalachicola, in Disasters in Paradise: Natural Hazards, Social Vulnerability, and Development Decisions* 79, 80 (Amanda Concha-Holmes & Anthony Oliver-Smith eds., 2019). The Bay's waters are "wide" and "shallow," Lancaster Report 8, which allows light to penetrate and provide energy to the

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[2] https://coast.noaa.gov/data/docs/nerrs/Reserves_APA_Mgmt-Plan.pdf

submerged aquatic grasses. These grasses, in turn, provide habitat and food to "waterfowl, fish, shellfish and invertebrates." Fla. Dep't of Envt'l Prot., *Submerged Aquatic Vegetation Monitoring at ANERR* (February 27, 2019).[3]

B. Oysters play a central role in maintaining the Bay's ecosystem. They play the critical part of "biofilters," removing "sediment, silt and nutrients" from the Bay's waters. Brooke Saari, Univ. of Fla., *Apalachicola Oysters: Importance and Decline* (Nov. 7, 2012).[4] By removing these elements from the water, oysters prevent algal blooms, which "blot out the sun," and starve the submerged grasses of the energy they need to photosynthesize. See *Norfolk S. v. Roanoke*, 916 F.3d 315, 323 (4th Cir. 2019) (Wilkinson, J. concurring) (describing the similar ecosystem of the Chesapeake Bay). And "[a]s the underwater grasses die for lack of sun, the fauna that rely on them begin to die as well." *Id.* Thus, oysters are considered the metaphorical "foundation" on which the Bay's ecosystem is balanced. Kimbro PFD ¶ 19.

Oysters serve as the Bay's literal "foundation" as well. They are called "ecosystem engineers" because they develop "massive, architecturally complex reefs." Fla. State Univ. Coastal & Marine Lab., *Oyster Reefs – Why Are They Important?* (Jan. 30, 2020).[5] These reefs "provide critical refuge, feeding grounds, and nursery habitat to many other economically and ecologically important fish

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[3] https://floridadep.gov/rcp/nerr-apalachicola/content/submerged-aquatic-vegetation-monitoring-anerr

[4] https://nwdistrict.ifas.ufl.edu/nat/2012/11/07/oyster_decline/

[5] https://marinelab.fsu.edu/absi/outreach-and-education/oyster-reef-importance/

and invertebrate species, and feeding habitat for shorebirds." *Id.* Among the creatures that make their home in these reefs are "recreationally and commercially important" species "including blue crabs, stone crabs, flounders, red drum, black drum, spotted seatrout, and sheepshead." Kimbro PFD ¶ 20. The oyster reefs "also serve as a breakwater for waves and storm surge, helping to protect coastal habitats such as marshes and prevent erosion of valuable coastal property." *Id.* ¶ 23.

C. Human society around the Bay is shaped by a centuries-old tradition of oyster stewardship. For at least 5,000 years, people have relied on the Bay's oysters for sustenance. Berry & Concha-Holmes, *supra*, at 80. Commercial harvesting of oysters began in the 1800s. *Id.* Many of us oystermen are descended from the families that settled in the area in those times. Ward PFD ¶ 12.

Franklin County, where the Bay is located, is entirely defined by the oyster industry. *Id.* In 2008, one in every ten residents was an oysterman. Thomas Becnel, *Apalachicola Bay Oystermen Still Harvest by Hand*, Herald-Trib., Dec. 27, 2008.[6] The local radio station calls itself "Oyster Radio." Kevin McCarthy, *Apalachicola Bay* 65 (2004). It's the kind of place where the local newspaper prints in full detailed reports on the Bay's water quality by state regulators, and where speeches on planktonic trophic levels by Ph.D ecologists are advertised on the bulletin board at the Piggly Wiggly. Berrgian PFD ¶ 22; Becnel, *supra*.

The county is proud to be the home to the annual Florida Seafood Festival—originally called "Oyster Day"—the oldest maritime event in the state. Ward PFD ¶ 18.

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[6] https://www.heraldtribune.com/article/LK/20081227/News/605239806/SH

Every year at the festival, local worthies are crowned "King Retsyo" ("oyster" spelled backwards) and Miss Florida Seafood. McCarthy, *supra*, at 71. The festival includes the ceremony of the "Blessing of the Fleet," in which ministers from local churches bless our oyster boats. *Id.* There is also an oyster-eating contest. *Id.* To those who have not spent time in Apalachicola, it is impossible to appreciate how important the oysters—and oystering—are to our community.

Franklin County's "distinctive culture" is "built around the harvesting of oysters by hand from small boats." Lancaster Report 9. This practice is known as "tonging," and those who practice are known as "tongers." Becnel, *supra*. We tongers use long, double-handled rakes to scoop oysters from the estuary floor onto the "culling boards" of our small boats, where the catch can be inspected and the oysters that are too small to harvest can be thrown back. Becnel, *supra*; Berrigan Tr. vol. 7 at 819:4. A single dip of these tongs can harvest only some ten or twenty oysters at a time, preventing overharvesting. *See* Rowan Jacobsen, *Tonging for Oysters in Apalachicola*, OysterGuide (May 11, 2012).[7] This traditional method remains the "[t]ypical[]" way in which oysters are harvested in the Apalachicola Bay—mechanical dredging has long been prohibited—and it has supplied generations of Apalachicola oystermen our way of life. Berrigan Tr. vol. 7 at 818:21.

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[7] https://www.oysterguide.com/new-discoveries/tonging-for-oysters-in-apalachicola/

II. The Bay's Oyster Population Suffered a Catastrophic Decline in 2012

A. Before 2012, Apalachicola Bay was considered "ideal" for the nurturing and development of oyster beds, and was an "extraordinarily productive oyster habitat." Lancaster Report 9. Small, rural Franklin County provided 10 percent of all the oysters nationwide and ninety percent of the oysters in the state of Florida. *Id.* But in 2012 the oyster population—foundation of the Bay's biodiversity and of the oystermen's way of life—collapsed.

Special Master Kelly largely dismissed the testimony of those of us who live and work on the Bay. This was an error: "The evidence of practical oystermen . . . should also not be overlooked." Report of the Special Master, 176 *New York v. New Jersey*, No. 16, Original (1930). Take Tommy Ward, who is a third-generation Apalachicola oystermen and two-time King Retsyo. Ward PFD ¶ 1. He has seen tough times, including Hurricane Dennis, which destroyed his oyster house. *Id.* ¶ 23. But, as he testified before the Special Master in 2016, "what we're experiencing here now looks and feels different. The Bay isn't coming back, and it has me worried for the future." *Id.*

From 2012 to 2016, Ward's business lost 80-90 percent of its customers, and he had to lay off the vast majority of his workforce. *Id.* at ¶ 26. He watched as Franklin County's "dozens" of oyster dealers dwindled to just 10-15. *Id.* at ¶ 29. Apalachicola Bay oysters were once touted by the *New York Times* and the Martha Stewart Show. *Id.* at ¶ 21; *From Apalachicola Bay, Oysters Rated the Best*, N.Y. Times, June 15, 2002.[8] Ward, owner

[8] https://www.nytimes.com/2002/06/15/us/from-apalachicola-bay-oysters-rated-the-best.html

of the largest private oyster bed lease in the Bay, was proud to sell the bulk of his catch nationwide. Ward PFD ¶ 22. But in 2016, he testified that he cannot harvest enough to sell his oysters outside Franklin County and its immediate environs. *Id.*

B. The 2012 crash was evident to scientific and governmental authorities as well as the "practical oystermen." In 2012, Mark Berrigan was nearing the end of his 30-year stint as a senior biologist for the Florida Department of Natural Resources. Berrigan PFD ¶ 2. Over that time, he spent "thousands of hours" above and below the surface of the waters of Apalachicola Bay, analyzing the oyster populations. *Id.* ¶ 13. From this position, Berrigan witnessed the Bay's oyster stocks go from "plentiful" in 2009, to "severely depleted in 2011, to "[in]capable of sustaining commercial harvesting" by the end of 2012. *Id.* ¶¶ 27, 35. This crash prompted the National Oceanic and Atmospheric Administration to issue a "fishery disaster determination" for the Bay in 2013. Lancaster Report 31-32. Based on this evidence, Special Master Lancaster concluded that "[i]n late 2012, oyster mortality reached *devastating* levels, leaving many previously-productive oyster reefs virtually empty." *Id.* 31 (emphasis added).

C. The cause of the crash was clear to oystermen and scientists alike: low flows into the Bay from the Apalachicola River. Before the crash, the Apalachicola River supplied the Bay with fresh water, yielding a brackish mix of salt and fresh water, which is "ideal" for oyster cultivation. Kimbro PFD ¶ 28; Lancaster Report 9. However, thanks to Georgia's over-use of water upstream from the Bay, the flow of fresh water decreased dramatically. Lancaster Report 32. This increased the salinity of the Bay's waters, making them more hostile to oysters than before.

Increased salinity directly harms oysters, expanding their predators' range and viability, making previously inaccessible oyster beds vulnerable. (High salinity on its own is also associated with "disease and stress" in oysters. Berrigan PFD ¶ 33.) The oyster drill, also known as the Florida rock snail or southern conch, is the "principal enemy" of the oyster. Report of the Special Master at 164, *New York v. New Jersey*, No. 16, Original (1930). Other predators include the Florida crown conch. Berrigan PFD ¶ 45-46. Normally, oysters are protected from these predators by low salinity: "[T]he oyster lives and thrives in a salinity lower than that in which these enemies can survive." Report of the Special Master at 164, *New York v. New Jersey*, No. 16, Original (1930). But "an increase in salinity over the oyster beds will permit the inroad of these enemies and ... these enemies will do great destruction to the young seed oysters." *Id.*

That is precisely what occurred here: "In 2012, high salinity in the Bay from reduced streamflow allowed marine predators to invade the Bay in unprecedented levels, preying on the Bay's oyster population." Lancaster Report 32. Special Master Lancaster's conclusion is confirmed by the observations of the oystermen and the scientists. Berrigan, the scientist who spent 30 years studying Apalachicola Bay, testified that the oyster drills "were more abundant than you can imagine. It's almost like a science fiction movie." Tr. vol. 17, at 4336:6-4337:3 (quoting Berrigan). Tommy Ward, the third-generation oysterman, was overcome with emotion when he testified that "I seen the predators come in and start killing off the oysters." Tr. Vol. at 1806:24-1807:5. Mr. Ward tried everything he could to protect his oyster beds but nothing worked. Ward PFD ¶ 36. No matter what he tried, his oyster beds were overwhelmed by the drills and other

predators; where he used to find one drill or conch per 100 oysters, in 2016, he testified that the ratio was reversed. Ward PFD ¶ 5.

D. High-salinity predators, and not overharvesting, was the cause of the 2012 collapse. Oystermen are stewards of the oyster population, not exploiters of it. That is one of the reasons we use wooden tongs, instead of mechanized harvesting tools. The tradition of Apalachicola's oystermen stretches back generations, and many of the current oystermen want nothing more than for our children to continue the profession. Tommy Ward, for instance, testified with evident pride that before the crash his "kids" had chosen to join him in the family business, forgoing "so many opportunities outside Apalachicola." Ward PFD ¶ 18. The oystermen would not deliberately deny future generations the chance to make their living as they did.

And the scientific evidence does not support the theory that overharvesting caused the crash. Overharvesting happens when too many oysters are taken out of the Bay to be sold, which would lead to empty oyster beds. That is not what was seen here. Mark Berrigan observed full oyster beds—but full of dead oysters instead of living ones. Berrigan PFD ¶¶ 51-52. Even the *New York Times* reporters who visited the Bay in the wake of the crash saw the dead oysters that were the only things we were able to pull out of the Bay. *See* Lizette Alvarez, *A Fight Over Water, and To Save a Way of Life,* N.Y. Times, June 2, 2013.[9] These oysters had not been harvested, but had been killed while they were still lying on the Bay bottom. Some of the beds where the crash was

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[9] https://www.nytimes.com/2013/06/03/us/thirst-for-fresh-water-threatens-apalachicola-bay-fisheries.html

most severe—up to 100 percent mortality—had been closed to commercial harvesting for months before the effects of the crash were observed. Berrigan PFD ¶ 53. The theory that Apalachicola Bay's oysters have been overharvested simply does not fit the evidence. *Id.* ¶ 54.

Special Master Lancaster examined this evidence, along with evidence of Georgia's policy of putting "no limitations" on its "unrestrained" use of fresh water from the Chattahoochee and Flint Rivers. Lancaster Report 32-33. He concluded that "[t]here is little question that Florida has suffered harm from decreased flows in the River." Lancaster Report 31. Georgia's position seems to be that it was simply a coincidence that the unprecedented invasion of predators was unleashed just as flows dried up at unprecedented levels. But that makes no sense. We have been working these waters for our whole lives and have never seen anything like the invasion that the Bay experienced during the 2012 collapse.

III. The Bay's Oyster Population Has Still Not Recovered

Since the Special Master took evidence in 2016, things have only gotten worse for Apalachicola Bay oystermen. In 2016, Tommy Ward testified that there were just 10-15 oyster dealers left in Franklin County. Now there are three. Before 2012, there were 500-600 small oyster boats that regularly carried tongers out onto the Bay. Now there are just two. Perhaps the cruelest irony is that the Bay no longer supplies enough oysters to fulfill even the needs of the Florida Seafood Festival—this event, the pride of Franklin County, now must source its oysters from *other* fisheries.

Without a steady supply of fresh water from the Apalachicola River, especially in the summer months, oystermen and scientists agree that the Bay's oysters will

never recover and the Apalachicola Bay will be permanently part of the 99 percent of oyster fisheries that have been wiped out. Nat'l Oceanic & Atmospheric Admin., *Oyster Reef Habitat* (Jan. 21, 2020).[10]

We have suffered droughts, hurricanes, and other extreme climatic events, but—until 2012—the one constant has been that the Bay has always recovered, and the oysters have always come back. But that's no longer the case. To those of us who have spent our lives working the Bay, the answer is clear. Something fundamental has changed. And the one thing we know has changed is that the freshwater flowing into the Bay has dried up, especially during drought periods in the summer when it is most needed.

The harm has lasted so long in part because the reefs near the River have also been destroyed. After droughts and hurricanes in the past, those reefs in particular have sheltered enough oysters to populate the rest of the Bay once conditions returned to normal. Tr. vol. 6 at 1571:16-1572:2. But this time, flows were so low that high-saline waters and predators killed even those oysters, so that—even if conditions allowed new oysters to survive—there would be nothing to reseed the Bay. Berrigan PFD ¶ 48. Even a small amount of steady fresh water could preserve these reefs for the future.

While many of us have never left Apalachicola, we're certainly familiar with the importance of fishing in other communities in America and along the eastern coast. We wonder, for instance, how New England would react if the lobsters died out. We're now living that nightmare, as our

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[10] https://www.fisheries.noaa.gov/national/habitat-conservation/oyster-reef-habitat#benefits-of-oyster-reef-habitat

oysters have been obliterated. And what's most frustrating is that the source of the problem is staring everyone in the face.

Again, we're not saying Georgia should not be able to use the water. We're just asking that it take only its fair share. A decree equitably apportioning the waters would return flows to the minimum levels under which the Bay has historically been productive, while leaving plenty of water for Georgia itself.

For these reasons and those stated by the petitioner, it is essential that the Court hold that Florida is entitled to a decree equitably apportioning it sufficient fresh river water to recreate the ideal oyster conditions that once prevailed in Apalachicola Bay.

CONCLUSION

For the foregoing reasons, amicus curiae requests that Florida be granted relief.

Respectfully submitted,

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