No. 142, Original

In the
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

STATE OF GEORGIA'S SUPPLEMENTAL RESPONSE BRIEF

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INTRODUCTION

Florida has not proven that the potential benefits of its requested cap substantially outweigh the harm that would result to Georgia. Both the Supreme Court and the Special Master identified specific questions that Florida needed to answer to receive an equitable apportionment, but Florida refuses to answer those questions with any degree of specificity. Instead, it hinges its case on high-level generalizations devoid of any true evidentiary support. Empty rhetoric, however, is no stand-in for the "hard facts" the Supreme Court demands in equitable-apportionment cases. *Colorado v. New Mexico*, 467 U.S. 310, 320 (1984) (*Colorado II*).

Florida's evidentiary failures cut across every feature of the case. Florida repeatedly claims ecological "devastation" in the Apalachicola River and Bay, but apart from the oysters (where Florida itself contributed significantly to the harm), there is no evidence that any species has been injured, much less "devastated." Even taking Florida's unproven injury allegations at face value, Florida never identifies the specific amounts of water necessary to redress those injuries, when that water is needed, or how significantly those increased flows would benefit wildlife. Florida also never says how much additional water can be generated on the Flint River, let alone how much of that water the Corps would ultimately release to Florida or when those releases would occur. Nor does Florida provide any specifics about the nature and contours of the ultimate decree it seeks, instead proposing that the Court simply award it judgment and then order the parties to negotiate about the form of the decree. And Florida refuses to quantify the true harm to Georgia or potential benefits to Florida from the litany of water-use reductions it proposes.

Absent proof with respect to these basic questions of harm, causation, redress, and relative costs and benefits, Florida cannot prevail. Florida's case boils down to this: a largely self-inflicted injury to its $5-8-million-per-year oyster industry, which it now tries to leverage into a punitive and devastating cap that will cost Georgia hundreds of millions, if not billions, of dollars in real harm. That is not the stuff of an *equitable* apportionment. Florida has not proven, by clear and convincing evidence or otherwise, that the potential benefits of its proposed cap substantially outweigh the enormous costs to Georgia, and in many instances it has not even tried. The Special Master should recommend that the Court enter judgment for Georgia.

ARGUMENT

I. Florida Failed To Prove Harm Or Causation In The River Or Bay.

Florida repeatedly claims "devastation" of the Apalachicola River and Bay, Fl.'s Suppl. Br ("Fl. Br.") 10, 13, 15, 21, 26, 32, but no evidence supports that extreme claim. All of Florida's alleged injuries lack evidentiary support or were not caused by Georgia.

The River. The principal River "devastation" Florida identifies is a 2006 mussel die-off in Swift Slough, a small stream off the Apalachicola River. Fl. Br. 14. But Florida biologists and environmental officials concluded at the time of the die-off that *the Corps* was responsible for that incident—not Georgia's water use. After an investigation in August 2006, Florida officials found that Corps dredging caused sand to block the entrance to Swift Slough. SOF ¶ 9; Ga. Post-Trial Br. 50-55; Kondolf Direct, ¶¶ 48-49; Tr. 182:1-187:25 (Hoehn). They concluded that this blockage, coupled with the Corps' decision to release only 5,000 cfs from Woodruff Dam, caused Swift Slough's "disconnection from

the main stem of the Apalachicola River." GX-1276, ¶ 42. This led Florida to tell a federal court in 2009 that it was "the Corps [that] reduced flows in the Apalachicola River to 5,000 cfs for extended periods during 2006 and 2007" and thereby "killed *essentially all of the mussels* in Swift Slough." GX-1274, at 48; *see* Ga. Post-Trial Br. 53-55.

Florida's other alleged harms to the River ecosystem likewise do not prove ecological devastation. Florida claims that reductions of habitat have harmed "fish and mussel species," "resulting in smaller and weaker populations." Fl. Br. 14. But Florida presented no evidence of actual population declines for *any* species of fish or mussel. SOF ¶ 3; Tr. 419:14-21 (Allan). Florida also now claims harm to Gulf sturgeon, but at trial presented no evidence of declining sturgeon populations, SOF ¶ 3; Tr. 396:15-397:2 (Allan), and, in 2016, federal regulators found the sturgeon population to be "roughly stable or slightly increasing," SOF ¶ 5. Finally, Florida's claim that low flows have reduced the number of tupelo trees, Fl. Br. 14, ignores findings from USGS and Florida's own scientists that channel deepening from Corps activities was the primary cause of a shift from tupelo trees to other types of trees in the region, SOF ¶ 10; *see also* Ga. Post-Trial Br. 45-47.[1]

The Bay. While Florida claims "estuarine species" in the Bay have been harmed, Fl. Br. 12, it offered no actual evidence at trial to support that theory (other than for oysters,

[1] Florida tries to blame Georgia for the Corps' dredging activities and claims those activities no longer affect the River. Fl. Br. 20. Both assertions are wrong. Ga. Post-Trial Resp. Br. 44-45 & n.15, 62. Florida provided the permits that allowed the Corps to dredge in the first place, *id.* at 62, Florida has done almost nothing to remedy the impact from those dredging activities, *id.*, and "dredge spoils *are still going back into the river and can clog sloughs*," Tr. 2727:13-18 (Kondolf) (emphasis added).

see infra at 4-5). Instead, Florida argued that changes in freshwater inflows *might* cause changes at the base of the food web (*i.e.*, algae), which in turn *might* have cascading effects up the food web. Glibert Direct, ¶ 68. But no evidence supports that theory, and in particular no evidence shows Florida's predicted harm to fish species at the top of the food chain. Menzie Direct, ¶ 126. Florida's own expert, Dr. Glibert, admitted she has no "data or information indicating that any fish species in Apalachicola Bay has been negatively impacted by impaired food availability." Tr. 1852:7-11; *see id.* at 1850:6-12 (same for blue crab and white shrimp). Florida, moreover, declined to call its fish expert at trial after he admitted at his deposition that he had found no harm to fish in the Bay. GX-1352, at 65:18-70:21. Georgia's ecologist analyzed decades of historic data and also found no evidence of harm to any fish species, blue crab, white shrimp, plants, or juvenile fish—or any other species in the Bay. Menzie Direct, ¶¶ 113-38; Tr. 4232:15-4235:18 (Menzie).

The Oysters. Finally, Florida has not proven that Georgia caused the oyster-fishery collapse. Florida's causal argument boils down to the assertion that Georgia's water use must be to blame because the oyster fishery did not crash during the historic droughts of 1931 and 1954-55, but did in 2011-12. That argument disregards a fundamental distinction: the 2011-2012 drought was uniquely intense and long, and more severe than the droughts of 1931 and 1954-55. Those earlier droughts also occurred before the Corps' reservoirs existed, and pre-reservoir data is not an appropriate comparison because reservoir operations control the timing and duration of flows. *See infra* at 5-7.

Florida also ignores its own role in causing the 2012 collapse. Florida allowed *unlimited* oyster harvesting in the years leading up to the collapse, and it admitted to the

federal government that "[i]ntensive harvesting, removal of sub-legal oysters, and [lifting of harvesting restrictions] have contributed to population declines" at Cat Point and East Hole, the two most heavily harvested oyster bars. FX-412, at NOAA-3823; *see also* JX-77, at FL-ACF-3386190. This self-described "'use it or lose it' attitude," *id.* at FL-ACF-3386197, resulted in fishing pressures in 2012 that were not present in 1931, 1954-55, 1999-2001, or 2006-08, SOF ¶ 12. In light of these other causal factors, Florida has not proven that Georgia's water use caused the 2012 collapse, just like University of Florida scientists found no connection between flows and oyster mortality. Ga. Br. 8.

II. Corps Regulation And Unprecedented Drought Explain Recent Flow Declines.

Florida wrongly claims that Georgia's water use is "[t]he only potential explanation" for recent flow declines in the Apalachicola River. Fl. Br. 10. In fact, trial evidence shows that lower flows are directly linked to the Corps' regulation of the River and unprecedented drought conditions, not Georgia's consumption.

Corps Reservoirs. Florida's claims about the cause of lower state-line flows are inherently flawed and incomplete because they fail to account for the Corps' "highly regulated system" of reservoirs and dams. GX-544, at 2. The Corps' reservoirs control the amount and timing of releases from Woodruff Dam and thus streamflow levels in the Apalachicola River. U.S. Post-Trial Br. 5-12; Bedient Direct, ¶¶ 18, 92. This is especially true during drought, when the Corps' operating rules call for maintaining state-line flows of approximately 5,000 cfs as part of a delicate balance of storage and releases. SOF ¶ 47; *see also* U.S. Post-Trial Br. 12-13. Thus, flows have been closer to 5,000 cfs in recent decades because of Corps operations, not Georgia's consumption. *See* Ga. Br. 11.

Drought Conditions. The record also shows that recent flow declines in the Apalachicola River are part of a broader regional pattern directly linked to extreme drought conditions. Since 1998, three historic, unprecedented droughts have struck the ACF Basin (1999-2001, 2006-08, 2011-12). Bedient Direct, ¶¶ 127-29. Those droughts were back-to-back, multi-year events that were "of longer duration, more frequent and more severe" than the mostly single-year droughts of earlier decades. Panday Direct, ¶¶ 60, 122; *see also* Bedient Direct, ¶ 129; *id.* at p. 56 (Demo. 34). It is a fundamental principle of hydrology that less rainfall means less streamflow. *See* Tr. 4017:23-4018:13 (Bedient). It is no surprise, then, that hydrologic data shows a "strong, direct correlation" between lower rainfall from these droughts and lower flows across the ACF Basin. Bedient Direct, ¶¶ 124-29; *id.* at pp. 55-56 (Demos. 33, 34); Tr. 4006:16-4007:20 (Bedient); Zeng Direct, ¶¶ 144-52; *id.* at pp. 52, 54 (Demos. 20, 21); Tr. 3320:5-20 (Zeng); Tr. 3906:4-3907:6 (Panday). Indeed, six other rivers and tributaries in northern Florida have seen similar declines, and those water bodies are not connected to Georgia's water use. Zeng Direct, ¶¶ 149-152; *id.* at p. 54 (Demo. 21); Menzie Direct, ¶ 28; *id.* at p. 15 (Demo. 5).

The record does not support Florida's efforts to chip away at the strong evidence linking flow declines in the ACF Basin to natural hydrologic changes. *First*, Florida points to statistics showing more frequent state-line flows below 6,000 cfs. Fl. Br. 8-9. But the data shows no material difference in the number of days of flow below 6,000 cfs between the pre- and post-irrigation periods once the recent drought years are excluded from that data. Bedient Direct, ¶¶ 213-14; *id.* at p. 87 (Demos. 52-53). This shows that those recent drought events, not Georgia's irrigation, are responsible for lower flow levels.

Second, Florida improperly cites *annual* precipitation data to claim that recent droughts are no more severe than earlier ones. Fl. Br. 11, 17-18. But annual data masks the "significant changes" in *intra-annual* precipitation patterns that have occurred in recent decades, resulting in lower flows in dry summer months. Zeng Direct ¶¶ 8, 145-48. In the past few decades, there has been less rainfall in the summer and more rainfall in the winter, even though *annual* precipitation has remained relatively constant. This natural shift explains why recent drought years have seen lower summer flows for the same amount of annual rainfall. *Id.*; *id.* at p. 52 (Demo. 20); Tr. 3354:21-3355:22 (Zeng); GX-1042.

Third, Florida cites incomplete data to claim the 1931 and 1954-55 droughts were "comparable [to] (or worse [than])" the 2011-12 drought, yet produced higher streamflow levels. Fl. Br. 11. Even setting aside that it is nonsensical to compare pre- and post-reservoir data, 1931 was a single-year drought preceded by normal flow conditions, unlike the multi-year 2011-12 drought. GX-979. And Florida's data artificially inflates flow levels in 1954 by overlooking significant "carry-over" flooding from 1953, Bedient Direct, ¶¶ 205-08, which "had one of the largest rains on record," Tr. 4008:1-4009:19 (Bedient).

Fourth, Florida's own data undermines its theory that Georgia's irrigation caused "basin yield" to "fall[] substantially" since the 1970s. Fl. Br. 9-10. As Florida admitted, "basin yield" actually *increased* from 1971-98, notwithstanding nearly 30 years of growth in Georgia's consumptive use. Tr. 1998:17-1999:10 (Hornberger); Bedient Direct, ¶¶ 209-12; *id.* at p. 86 (Demo. 51). Indeed, "only once the severe, multi-year droughts since 1999 are included does the overall 'trend' from 1970 actually show a decline." *Id.* at ¶ 211.

III. Georgia Accurately Reports Its Consumptive Use In The ACF Basin.

Georgia has a reliable method for determining its consumptive use, and federal regulators rely on Georgia's numbers to manage the ACF Basin. This data shows that Georgia's water use is reasonable and that even eliminating *all* of Georgia's use would not generate the water Florida claims to need. In the face of reliable data that undermines its narrative, Florida tries to inflate greatly Georgia's water-use data. Those efforts fail.

First, Florida erroneously relies on a Georgia Water Resources Institute ("GWRI") report regarding "unimpaired flows" ("UIFs")—an artificial dataset used only for hydrologic-modeling studies—to suggest that Georgia's consumptive-use numbers are wrong. Fl. Br. 16-17. The GWRI report is irrelevant, however, because Georgia *does not rely* on the UIFs to calculate its consumptive use, and GWRI's findings regarding the UIFs do not question the accuracy of Georgia's data. *See* FX-534, at 1; Zeng Direct, ¶¶ 73-75; Tr. 3316:10-3317:2 (Zeng). For example, although Florida claims that GWRI found Georgia's agricultural-irrigation rates to be undercounted by "up to 70%," Fl. Br. 16, that figure speaks only to computer-modeled estimates of crop-water needs—not to real-world irrigation levels, FX-534, at 10. Georgia's *actual* irrigation rates are based on real-world field measurements and painstaking mapping efforts, not hypothetical crop-model predictions. Zeng Direct, ¶¶ 53-55, 59. Florida also accuses Georgia of failing to account for 1,200 cfs in evaporative losses from farm ponds. Fl. Br. 16. But Florida misleadingly cites only the *upper bound* of GWRI's monthly net evaporative losses, ignoring GWRI's finding that average annual net evaporative losses are only *225 cfs* and, in severe drought, could drop to zero. FX-534, at 191, 198. More fundamentally, farm ponds provide a *net*

gain of water to the system: the ponds act "like a reservoir" and allow farmers to irrigate during dry periods without using groundwater or water from the Flint. Tr. 3319:8-3920:4 (Zeng); Tr. 3895:4-23 (Panday).

Second, Florida points to statements from the ACF Stakeholders ("ACFS"), a third-party interest group, regarding purported "errors in the UIF dataset." Fl. Br. 16-17. Setting aside the irrelevance of the UIFs, the ACFS—like the Corps, USGS, and USFWS—found that Georgia's numbers are "*the best available*" data on ACF water use. GX-1325, at 2, 27 (emphasis added); Tr. 3313:14-3315:19 (Zeng). This is why the ACFS relied on Georgia's numbers in its Sustainable Water Management Plan. GX-1325, at 27-28.

Third, Florida wrongly claims that irrigation caused a "shortfall" of 1,376 cfs in Flint-River flows. Fl. Br. 25. But Florida misconstrues the water-planning report it cites. The 1,376-cfs estimate is based on a *modeling exercise* that uses an "artificially high demand" and "was not intended to replicate what actually occurred on the river"—*i.e.*, there was no real-world shortfall. Tr. 2245:9-24, 2302:2-25 (Cowie). Moreover, 1,376 cfs is a *single-day* maximum over a *68-year* streamflow record. The average modeled shortfall (where any existed at all) was only 352 cfs. *Id.* at 2302:2-2305:9; FX-24, at 3-5.

Finally, Florida continues to tout its rainfall-runoff models that are rife with error and bias and grossly inflate Georgia's water use. SOF ¶¶ 25-29; Ga. Br. 14. Florida also wrongly implies that GWRI endorsed this method over Georgia's. GWRI suggests only that rainfall-runoff models could be used "[a]s an alternative" in the absence of real-world consumptive use data. FX-534, at 193. Georgia presented actual, real-world water-use data at trial and continues to rely on it here.

IV. Florida's Attacks On Georgia's Conservation Efforts Fail.

Florida relies on a handful of outdated and out-of-context statements in an attempt to undermine Georgia's conservation accomplishments over the past 15 years. Those efforts fail as to both municipal & industrial ("M&I") and agricultural measures.

As to M&I, Special Master Lancaster recognized that "Georgia appears to have taken significant steps to conserve water in the Atlanta metropolitan region." Report of the Special Master ("Report") at 34 n.28. Nevertheless, Florida invents issues with two M&I measures. Florida first criticizes Georgia for not building Glades reservoir—an $803-million project proposed as an alternative source of water for Atlanta if Florida's lawsuit against the Corps cut off Atlanta's ability to withdraw water from Lake Lanier. JX-40, at 82; GX-829; Turner Direct, ¶ 55; Kirkpatrick Direct, ¶ 67. Florida did not prevail in that lawsuit. In any event, that extremely costly project was never intended to provide "additional water flowing downstream to Florida," and therefore would do nothing to ameliorate Florida's alleged harms. *Id*. at ¶¶ 67-68.

Florida also argues that Georgia should implement additional outdoor-watering restrictions. But there is simply no basis for requiring Georgia to do more than it already has. Since 2010, Georgia has banned *all* outdoor watering statewide between 10 a.m. and 4 p.m., *id.* at ¶ 44, resulting in substantially lower watering in 2011 than in prior drought years, Mayer Direct, ¶ 90. In 2015, Georgia imposed even-more-extensive limitations on outdoor watering during droughts. GX-935a. Those are best-in-class measures that even Florida's own M&I expert could not criticize. *See* Ga. Br. 35.

On the agricultural side, Florida cites misleading 1990s-era statements while

ignoring Georgia's more recent efforts. Over the past 20 years, Georgia has substantially improved agricultural conservation in the ACF Basin through scientific study and responsive action. As the former Director of Georgia EPD explained, 1990s-era concerns about Flint water use were based on "rudimentary" models and crude, outdated estimates. Tr. 703:8-24, 704:19-705:17 (Reheis). Still, Georgia acted on that limited information: it imposed a six-year moratorium on new irrigation permits, Reheis Direct, ¶¶ 34, 47; Ga. Post-Trial Resp. Br. 65-67, and immediately instituted measures to increase irrigation efficiency and conservation, JX-9; GX-64; Reheis Direct, ¶ 60. Georgia also initiated a years-long Sound Science Study to better understand the effect of agricultural pumping on streamflow. *Id.* at ¶¶ 37-40. Georgia performed advanced irrigated-acreage mapping, expanded water metering, and, in conjunction with USGS, developed a state-of-the-art hydrological model. Ultimately, the Study proved that 1990s-era concerns were greatly overstated. *Id.* at ¶ 34; Ga. Post-Trial Resp. Br. 66-67. But Georgia still instituted the Flint River Basin Plan in 2006 to overhaul its regulatory program. *Id.* at 67. Georgia placed stringent permitting requirements on areas where withdrawals have the greatest streamflow impact, stopped accepting new applications for the most-sensitive areas in 2012, and imposed stringent efficiency requirements on all irrigation equipment. SOF ¶¶ 81-84.

V. Florida Fails To Address The Corps' Role In Determining Flow.

Florida critically undermines its proposed remedy by failing to account for the impact of Corps operations on state-line flow. Unlike Georgia, which quantified how much water the Corps would allow to pass into Florida under multiple cap scenarios, Ga. Br. 18-28, Florida did not discuss—much less quantify—the additional releases the Corps would

make from Woodruff Dam if a cap were imposed. Rather, it simply asks the Court to accept on faith that the Corps would either use its "discretion" or "chang[e] its Manual" on Florida's behalf. Fl. Br. 28. Neither theory supports an equitable apportionment.

The Corps has already repudiated Florida's argument as to "discretion." U.S. Amicus Br. 28-29; U.S. Post-Trial Br. 17-18. Congress did not give the Corps the kind of unfettered "discretion" Florida suggests; rather, the Corps' discretion is limited to reacting to "unplanned deviations," including emergencies or maintenance. JX-124, at 2-80; Zeng Direct, ¶¶ 107-08; *see also* U.S. Amicus Br. 27.

Florida's argument regarding proposed changes to the Master Manual similarly fails. The Corps is not a party to this case, and the Court cannot order it to take any particular action. Even if the Corps were inclined to act *voluntarily*, it could do so only through a lengthy and unpredictable administrative process that may not benefit Florida at all and would likely be subject to additional litigation. Ga. Br. 29-30. Finally, Florida implies that Georgia's prior willingness to work with Florida and the Corps in an effort to guarantee a 6,000-cfs flow is evidence that a cap is feasible. Fl. Br. 38-39. But Georgia's proposal—made in an effort to settle this dispute—did not involve *any* caps on Georgia. Instead, it involved an offer to coordinate with Florida to present a united front in urging the Corps to adopt a suite of major revisions. Zeng Direct, ¶ 140; Turner Direct, ¶ 39. In any event, Florida rejected that proposal and the Corps never evaluated or approved it.

Florida argues that the Corps would work to accommodate a proposed decree, Fl. Br. 2, 28, but the United States has never said that. It has said that it will "review" a final decision and "consider" potential adjustments. U.S. Amicus Br. 30 (citation omitted).

Significantly, the Corps has never *committed* to modifying its operations to provide Florida relief, has repeatedly emphasized that a decree "would not formally bind the Corps to take any particular action because the United States is not a party," has said that any potential changes would have to go through a lengthy administrative process involving "other Basin interests and a process of public notice and involvement," and has stated that it "cannot prejudge those required processes." *Id*. at 31-32. The Court cannot grant an equitable apportionment when Florida's only chance at relief turns on the unknown action of a third party and the speculative outcome of an entirely new legal proceeding.

VI. Florida's Case Fails Because The Enormous Costs Of A Decree To Georgia Outweigh The Speculative And Insubstantial Benefits To Florida.

In remanding this case, the Supreme Court could not have been clearer that "Florida will be entitled to a decree only if it is shown that 'the benefits of the [apportionment] substantially outweigh the harm that might result.'" *Florida v. Georgia*, 138 S. Ct. 2502, 2527 (2018) (citation omitted). Not only has Florida failed to make that showing, but the record proves the opposite: the economic harms to Georgia from Florida's proposed cap would overwhelm any minimal and speculative benefits to Florida.[2]

[2] Florida suggests the clear-and-convincing-evidence standard might not apply to the ultimate balancing question, Fl. Br. 4 & n.1, but that is clearly wrong. In remanding this case, the Court did not overturn precedent on burden-of-proof issues; it merely asked the Special Master to make "more precise findings in respect to the nature and scope of the range of likely harms and likely benefits" to allow the Court to weigh the merits in full. *Florida*, 138 S. Ct. at 2516-17. As the party seeking to disrupt the status quo, Florida bears the burden of showing by clear and convincing evidence that its proposed relief substantially outweighs the harm that might result. Ga. Post-Trial Resp. Br. 5-6; *Colorado II*, 467 U.S. at 317; *Colorado v. New Mexico*, 459 U.S. 176, 186-87 (1982) (*Colorado I*).

Florida seeks two forms of relief: (1) an every-year cap on Georgia's total consumptive use at existing levels, and (2) a cap that would purportedly increase state-line flows by 2,000 cfs in predicted drought years (providing no specifics as to when or how such predictions would be made). Fl. Br. 30. The Special Master can easily dismiss the "every-year cap" proposal: Florida made no effort at trial to prove harm in normal or wet years and offered no evidence that an every-year cap would remedy drought-year harm. SOF ¶¶ 1-2; Ga. Br. 4; Report at 68. Given Florida's exclusive focus on drought years, Georgia focuses here on the drought-year cap proposal. As explained below, the costs of such a cap are substantial and certain, whereas the benefits are small and speculative.

A. Florida's Drought-Year Cap Would Impose Heavy Costs On Georgia.

It is undisputed that Florida's proposed drought-year cap would impose significant costs on Georgia—the only question is exactly *how severe* those costs would be. Georgia has endeavored to present an accurate picture of the true economic costs of Florida's proposals; Florida consistently seeks to minimize them.

To begin, it is simply impossible for Georgia to increase state-line flows by 2,000 cfs during drought—at any cost. Ga. Br. 14-18. Even during the driest months of the worst drought years, Georgia's *total consumptive use* in the ACF Basin has never exceeded 2,000 cfs, and its highest-ever Flint use was far less (1,407 cfs). GX-940; Zeng Direct, at p. 7 (Demo. 3). And while Florida now claims "it is impossible to say in advance how much the decree would increase flows along the Flint River specifically," Fl. Br. 39 n.11, Georgia has shown that a cap would generate, at most, a few hundred cfs in increased Flint flow—and even then the Corps would not pass on that additional water to Florida at the times

Florida claims to need it, Ga. Br. 17-25.

Even attempting to approach Florida's 2,000-cfs target would impose massive costs on Georgia. Florida's own expert, Dr. Sunding, calculated that his proposed 2,000-cfs remedy would cost Georgia $35 million annually, which translates to $105 million every drought year. Tr. 2783:19-2784:12 (Sunding assumed droughts occur every 3 years). Although the Special Master should reject that artificially low estimate, Florida has failed to prove that the speculative and *de minimis* benefits of its proposed cap would exceed even its own $105-million cost estimate.

In any event, there is no question that Sunding's cost estimate is greatly understated. *First*, Sunding inexplicably assigned $0 in costs for two-thirds of his proposed conservation measures—including *all* of his M&I proposals—despite assigning such costs in his expert report. FX-784, at 81 (Table 15). Fixing those errors alone would add another $141 million to his cost estimate. *Id.*; *see also* Tr. 2787:21-2788:16, 2792:2-23 (Sunding) (admitting that his outdoor-water-use-reduction proposal would impose $120 million in "real" welfare costs per dry year). *Second*, Georgia's economist, Dr. Stavins, showed that the true cost of Sunding's deficit-irrigation measure alone is more than $335 million in direct costs, plus $322 million in lost Gross Regional Product and $15.4 million in lost tax revenue each year that measure was implemented. SOF ¶¶ 87-88. Sunding's M&I measures would be even more costly. His leak-abatement proposal would cost Georgia at least $260 million to implement, plus an additional $1.2-2.4 billion for line-replacement costs. SOF ¶ 90. A 50% reduction in outdoor-water-use would cost Georgia more than $445 million in welfare losses for each drought year it was implemented. SOF ¶ 91. And, finally, Florida's

proposal to eliminate inter-basin transfers would cost Georgia *billions* to develop, since it would require entirely new wastewater infrastructure. SOF ¶ 92.[3]

Florida tries to dismiss Stavins' cost estimates by arguing that he considered only the costs of "halt[ing] all irrigation in the [ACF]," and purportedly did not not "consider the available measures for *limiting* irrigation or changing *how* it is done." Fl. Br. 36-37. But Stavins analyzed the costs of eliminating all irrigation because, as a hydrological matter, that would be necessary to even approach Florida's desired 2,000-cfs streamflow increase. *See* SOF ¶ 86; Ga. Br. 37. In any event, Stavins *did* evaluate the cost of limiting irrigation, finding that a 20% reduction would cost $69 million per dry year, a 50% reduction would cost $161 million, and a 75% reduction would cost $240 million. Stavins Direct, at p. 32 (Demo. 12). He also considered the costs of Sunding's proposed changes to irrigation methods, finding that Georgia already mandates high-efficiency center-pivot systems and additional efficiency savings would be minimal—only 13-16 cfs (not the 111 cfs Sunding claimed). *Id.* ¶¶ 67-71. Moreover, Stavins did not measure the costs of certain other proposals, such as adopting Variable Rate Irrigation, sod-based and other crop rotations, and aquifer storage and recovery, because Sunding himself did not include those measures in his proposed remedies or calculate their costs. Tr. 4444:13-15 (Stavins).

[3] Buying irrigation permits for 20% of irrigated acreage would cost Georgia an additional $809 million in lost-crop yields. SOF ¶ 89. Florida argues that number is overstated by pointing to USDA data about land values. But that data is unreliable because, among other reasons, it includes (1) *statewide* (not ACF-specific) land values and (2) noncommercial and "hobby" farms, both of which lower average cropland value. Tr. 4475:25-4479:5 (Stavins). The better evidence for permit-buyback costs comes from Georgia EPD's auctions in 2001 and 2002, and those values support Stavins' estimates, not Sunding's. *Id.*

Finally, there is no merit to Florida's argument that many of the costs it seeks to impose on Georgia "are not … properly cognizable in the equitable balance" because they purportedly "represent the expense of implementing 'reasonable conservation measures.'" Fl. Br. 33-34 (citation omitted). Florida's draconian measures, which would impose hundreds of millions—if not billions—in costs on Georgia, are hardly "reasonable." But even setting that aside, no case supports Florida's theory. To the contrary, the Supreme Court has consistently measured costs from the *existing status quo* and for good reason: established economies rely on existing water uses, and the equities typically support maintaining established economies over speculative and unproven future benefits. *See Colorado I*, 459 U.S. at 187-88. The Special Master should therefore include in the equitable balance *all* costs Florida's proposed cap would impose on Georgia—not just those above an artificial baseline that wrongly deflates the true costs of Florida's measures.

B. Florida's Proposed Cap Would Not Result In Any Material Benefits.

Florida also has not proven that it would materially benefit from its proposed cap, much less that those potential benefits "substantially outweigh" the significant costs discussed above. Florida claims it would receive a material benefit if Apalachicola-River flows were maintained at levels 1,000-2,000 cfs higher than current levels and salinity were decreased by 1 ppt in some areas of the Bay. Neither argument has merit.

First, the Special Master should reject Florida's claim that it would materially benefit from adding 1,000-2,000 cfs to the Apalachicola River to "maintain[] river flow levels at 6,000 cfs, 7,000 cfs, or higher." Fl. Br. 33. Only the Corps can increase minimum state-line flows above 5,000 cfs during droughts, which is why Florida has argued

throughout this litigation that it was not seeking a minimum state-line flow. Br. in Opp'n to Ga.'s Mot. to Dismiss 18 ("Florida is not asking the Court to impose any 'minimum flow' regime."); Hr'g Tr. 32:11-18 (June 2, 2015) (Florida "specifically and essentially had disavowed" a minimum-flow remedy). That was a strategic decision by Florida to avoid the Court dismissing this case at the outset for failure to join the Corps as a necessary and indispensable party.

In any event, there is no evidence that a minimum-flow increase would remedy Florida's alleged harm or allow its resources to recover more quickly. For oysters, Florida's expert testified that cutting 50% of Georgia's agricultural water use (and wrongly assuming that the increased flow would immediately go to Florida) would have increased oyster biomass by no more than 1.4%—an insignificant amount. SOF ¶¶ 67, 72. Regarding species in the Apalachicola River, the USFWS has already concluded that the Corps' 5,000-cfs minimum flow is sufficient to protect endangered species, at least one of which (the fat threeridge mussel) is thriving under current Corps operations. SOF ¶ 4; JX-168, at 3, 170, 188. And there is no evidence that a remedy would affect the floodplain forest. The Remedy Scenario resulted in a change of less than 1% of "harm days" under Dr. Allan's tree metrics. Tr. 544:7-10 (Allan). And Allan admitted he does not know if that minimal increase in flows "w[ould] have any impact at all on the population of tupelo-cypress swamp trees in the Apalachicola." *Id.* at 546:9-13.

Second, decreasing salinity by 1 ppt would not meaningfully benefit oysters. Florida asserts that USFWS "found that [a] 1 ppt salinity change would materially improve the survival rates of oysters," Fl. Br. 32 (citing JX-122), but USFWS found no such thing.

And Florida did not use that document (a draft) to support any such argument at trial. The document says only that "[d]ifferences in low flows most likely manifest themselves in relatively minor salinity shifts, but may exceed salinity thresholds for … oysters." JX-122, at 34.[4] It says nothing about materially improving survival rates of *any species* and does not claim that a 1-ppt change would have *any* effect on those species, let alone (as Florida claims) that a 1-ppt salinity change would "materially improve" oysters' survival rates. Fl. Br. 32; JX-122, at 34. Florida also asserts that USFWS "has found, even a 1 [ppt] increase in median salinity in *East Bay* 'may exceed salinity thresholds for … oysters," Fl. Br. 12 (emphasis added) (quoting JX-122); *see id.* at 32. That is wrong: USFWS applies oyster-salinity thresholds only at Cat Point and Dry Bar—*not East Bay*. JX-122, at 34.[5] Indeed, Florida's reliance on the USFWS report is ultimately self-defeating, because the report concludes that the complained-of salinity changes "result from changes in the volume and timing of freshwater inflow *due to the reservoir operations* ..., and *less so to apparent changes in consumptive water uses*." JX-122, at 26 (emphases added); *see* FX-863, at 52.[6]

[4] In the final version, USFWS deleted the quoted text from the cited section. *Compare* JX-122 (Draft), at 34 *with* FX-863 (Final), at 56; *see also* JX-122, at 23 and FX-863, at 49-50.

[5] Although USFWS's juvenile-sturgeon threshold applies to East Bay, that threshold is irrelevant here. Florida has not shown any harm to Gulf sturgeon (juvenile or otherwise). SOF ¶¶ 3, 5. And, in any event, the threshold applies only during the high-flow winter months for which Florida has not shown harm. JX-122, at 25; JX-168, at 79-80.

[6] Glibert's testimony cannot save Florida's claim. She predicted how a 1-ppt change might affect East-Bay plants that act as a nursery for fish, but never studied any fish that actually use East Bay as a nursery—let alone how those fish are affected by salinity. Tr. 1852:2-21, 1867:24-1870:12. Further, the plant data she used is wrong: Georgia's expert observed East-Bay grasses where Glibert's data claimed they did not exist. Menzie Direct, ¶ 41.

VII. Florida Cannot Obtain A Decree Without Proving Its Case On The Merits.

Finally, the unconventional relief that Florida seeks in the final pages of its submission only confirms it has not met its merits burden. Florida proposes that the Special Master "issue a report finding that Florida is entitled to a decree, then instruct the parties to negotiate, including as appropriate with the Corps, regarding the final form of a recommended decree." Fl. Br. 40. Florida then surmises a number of items that could theoretically be included in this "negotiated" decree—including "construct[ing] reservoirs" and proposing "modifications to Corps operations"—without providing any specifics about how much those measures would cost, how much streamflow they would generate, and how significant the benefits (if any) would be to Florida. *Id.* at 39-40.

That entire approach highlights the bankruptcy of Florida's case. Florida simply wants a decree in its favor without any findings about the exact form of a decree or the costs and benefits that such a decree would create. That is not how equitable-apportionment cases work. *Florida*, 138 S. Ct. at 2527 ("Florida will be entitled to a decree *only if* it is shown that 'the benefits of the [apportionment] substantially outweigh the harm that might result.'" (emphasis added) (quoting *Colorado I*, 459 U.S. at 187)). The nature of the decree, the costs it would impose, and the benefits it would generate are part and parcel of what Florida must prove *to get a decree in the first place*—not mere afterthoughts that can be resolved after a decree is entered. Florida's inability (or unwillingness) to answer those questions now just proves it has failed to meet its burden.

CONCLUSION

The Court should deny Florida's request for an equitable apportionment.

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Respectfully submitted,

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No. 142, Original

In The
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STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

Before the Special Master

Hon. Paul J. Kelly, Jr.

CERTIFICATE OF SERVICE

This is to certify that the STATE OF GEORGIA'S SUPPLEMENTAL RESPONSE BRIEF has been served on this 28th day of February, 2019, in the manner specified below:

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