No. 142, Original

In The
Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

Before the Special Master

Hon. Ralph I. Lancaster

BRIEF OF AMICUS CURIAE AMERICAN PEANUT SHELLERS ASSOCIATION AND GEORGIA FRUIT AND VEGETABLE GROWERS ASSOCIATION

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BRIEF OF AMICUS CURIAE
AMERICAN PEANUT SHELLERS ASSOCIATION
AND GEORGIA FRUIT AND VEGETABLE GROWERS ASSOCIATION

Pursuant to this Court's September 21, 2016 Order granting leave, the American Peanut Shellers Association ("APSA") and the Georgia Fruit and Vegetable Growers Association ("GFVGA") (collectively "Amici") submit the following Brief.

I. INTERESTS OF THE AMICI

The APSA and GFVGA represent farmers and industries that depend upon irrigation in the Flint River Basin for their economic survival. The APSA is a non-profit trade association composed of commercial peanut shellers and crushers throughout the peanut producing areas of the United States. Georgia is the leading peanut producer in the country and annually produces peanuts with a farm gate value of over $550 million, which generates economic activity well in excess of $1.1 billion. The Flint River Basin is home to seven[1] of the top ten Georgia counties in peanut production.

[1] 2015 GEORGIA FARM GATE VALUE REPORT, University of Georgia College of Agricultural & Environmental Sciences, www.caes.uga.edu/center/caed, *last visited*, September 16, 2016 (the "FARM GATE REPORT") at pages 26-27. These figures are for calendar year 2014, the most recent available on the internet. Worth County, half of which lies within the Flint River Basin, ranks fifth in the state in the farm gate value of its peanut production.

The GFVGA represents hundreds of Georgia fruit and vegetable growers, ranging in size from relatively small individual farmers to companies with annual gross sales in excess of $10 million. The farm gate value of vegetables and fruits in Georgia is in excess of $1.79 billion annually.[2] The Flint River Basin is home to seven of the top twenty Georgia counties in vegetable production and five of the top ten Georgia counties in fruit production.[3]

The livelihood of virtually every peanut, fruit and vegetable farmer in the Flint River Basin, and scores of related industries, depends upon reliable groundwater and surface water irrigation. In this case, the State of Florida seeks relief in the form of caps on Georgia's consumption of water. (Compl. at 21, Prayer for Relief). Relief in the form of caps on irrigation in the Flint River Basin would have a direct, immediate, concrete and possibly devastating impact upon the industries and farmers represented by Amici, their families and their communities, and their way of life. Not hundreds but thousands of jobs are at stake, and the ripple effect of caps on irrigation would be felt throughout the region, from Bainbridge to Leesburg, Putney to Iron City. Amici oppose the granting of any such relief.

[2] FARM GATE REPORT, pages 60, 94.

[3] *Id*.

II. DISCUSSION

Introduction and Scope

Since the parties themselves will be marshaling the evidence in support of their respective positions, Amici in this brief will focus upon two legal issues that are vital to the interests of the Amici and to the proper resolution of this case. First, Amici will address the specific issue of the reasonableness of Georgia's use of the waters for irrigation and show how the evidence establishes that Georgia irrigators have taken, and continue to take, all physically feasible and practical steps to conserve water. *See Colorado v. New Mexico,* 467 U.S. 310, 319 (1984) ("*Colorado v. New Mexico II")* ("Our cases require only conservation measures that are 'financially and physically feasible' and 'within practicable limits.'" (citations omitted)). Of particular interest is the Court's analysis of Special Master Kerr's findings in *Colorado v. New Mexico II* as to the sufficiency of New Mexico's conservation efforts in that case, discussed in detail below.

The second, broader issue that Amici will address arises from the positions taken by Florida in its October 12, 2016 Pretrial Brief. In its Pretrial Brief, Florida purports to track the accepted equitable apportionment cause of action. A closer review reveals that it is pressing the Court to make fundamental changes to the law of equitable apportionment. Under current precedent, before Georgia may be compelled by a decree to cap irrigation or other consumption, Florida must

establish with clear and compelling evidence that Georgia's unreasonable use of water is causing Florida substantial injury to a cognizable interest – typically an economic interest. *New York v. New Jersey,* 256 U.S. 296, 309 (1921) ("Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one state at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.")

As candidly acknowledged in 2003 by Professor J.B. Ruhl, who is writing an amicus brief in this case in support of Florida's position, Florida likely cannot meet this test in this case. Ruhl, *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age,* 19 Journal of Land Use 47, 52 (2003). According to Professor Ruhl, the Court must first "update its law of interstate water allocation with a dose of ecological reality" by recognizing the true economic value of leaving the water in the river system. *Id.* Although Florida does not ask the Court to make new law as explicitly as Professor Ruhl does – it buries the point in a footnote – Florida's theory of recovery is essentially the same. As Amici explain below, the Court should reject Florida's invitation to make new federal common law to accommodate the weaknesses in Florida's case.

A. Georgia's Reasonable Use of Water for Irrigation

Georgia's use of the waters of the Apalachicola, Chattahoochee, and Flint River Basin ("ACF") for irrigation is reasonable by any measure and Georgia has taken appropriate steps to conserve the resource:

1. Reasonable use. This Court has repeatedly recognized in equitable apportionment cases that irrigation is a reasonable use. In *Kansas v. Colorado*, 206 U.S. 85, 113-14 (1906), the Court denied downstream Kansas relief even though Colorado's upstream irrigation was causing Kansas some harm. The Court held:

> [T]he diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet, when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

And in *Washington v. Oregon*, 297 U.S. 517 (1936), upstream irrigation in Washington substantially depleted the flow of the Walla Walla River running into Oregon. But since a greater flow into Oregon would do Washington little good, the Court denied relief, refusing to disturb the "long-established settlement of tillers of the soil for no other or better purpose than to vindicate a barren right."

Like the long-established "tillers of the soil" in *Washington v. Oregon,* the Georgia irrigators in the Flint River Basin have for decades efficiently used the waters Flint and the Floridan aquifer, and forcing Georgia farmers to switch to

"dryland" farming would cause devastation without any corresponding benefit to Florida.

Before Florida may recover equitable relief, it must establish that Georgia's use is unreasonable. Whether a particular riparian use is reasonable is, of course, a fact-bound inquiry that depends upon a number of factors. Though it applies to disputes between individuals, and not states, The Restatement (Second) of Torts, § 850(A) provides a list of common-sense factors for determining reasonableness of use. These factors include "the purpose of the use," the "suitability of the use to the watercourse," the "social value of the use," and the "economic value of the use."[4]:

As for the "purpose of the use," according to the Restatement, "[i]rrigation of crops, once thought of as primarily a use for arid regions, is now widely practiced in humid areas to supplement natural rainfall, and is everywhere held to be beneficial." *Id.,* comment b. As to "suitability:" the location of most of Georgia's ACF irrigation wells – on the Floridan aquifer – is ideal. (*See* Flint River Basin Regional Water Development and Conservation Plan (May 20, 2006), at 62-66 (attached as Exhibit 62 to Georgia Pretrial Brief)). The social and

[4] The other Restatement factors include the extent of harm the use causes, the practicality of avoiding the harm by adjusting the use, the practicality of adjusting the quantity of use, the protection of existing values of water uses, land, investment and enterprises, and the justice of requiring the user causing the harm to bear the loss.

economic value of the irrigation is of course substantial: In 2013, agricultural revenue in ACF Georgia from row and forage crops[5] was $1.3 billion. (Expert Report of Robert N. Stavins, Ph.D. ("Stavins Report") at 31 (attached as Exhibit 43 to Georgia's Pretrial Brief)). Substantial additional economic activity is dependent upon the agricultural sector, accounting for an additional $687 million in GRP. (*Id.* at 32). Without doubt, irrigation is essential to the productivity and profitability of the agricultural sector in ACF Georgia. (*Id.* at 33 – 36).

These dry numbers do not capture the magnitude of the agricultural economy and community in Georgia dependent upon irrigation, particularly when compared to the number of people and businesses who use the water downstream in Florida. Amici do not wish any harm upon those who depend upon the Apalachicola for their livelihood in Florida, but there is simply no evidence that Georgia's use is causing harm, and the numbers simply do not compare. For every person in Florida who relies upon the water for their livelihood, there are 80 in Georgia. (*Id.,* at 18).

2. Reasonable conservation measures. Florida does not seriously challenge the beneficial nature of Georgia's use, the suitability of the ACF for irrigation, or its social and economic value. Florida does, however, contend that Georgia has

[5] Row and forage crops include Georgia's three largest crops (cotton, peanuts, and corn), as well as barley, hay, oats, silage, sorghum, straw, soybean, tobacco, and wheat. (Stavins at 31).

failed to take appropriate measures to conserve the resource. *See Nebraska v. Wyoming,* 325 U.S. 589, 618 (1945) (listing as a relevant factor "the practical effect of wasteful uses on downstream areas"); *Colorado v. New Mexico,* 459 U.S. 176, 190 (1982) ("*Colorado v. New Mexico I*") (listing as relevant factors "the extent to which reasonable conservation measures in both States might eliminate waste").

In its attempt to show that Georgia has failed to take reasonable conservation measures, Florida in its Pretrial Brief focuses extensive attention on the efforts of the Georgia Environmental Protection Division to curb groundwater irrigation in the Flint River Basin in the drought years between 1990 and today. (Florida's Pretrial Brief at pages 26-35). Florida notes correctly that the EPD became increasingly aware of the impact of groundwater pumping from the Floridan acquifer upon stream flows in the Flint River, particularly during drought. *Id.* What Florida fails to note is what came next: "Georgia promptly took a series of proactive and reasonable actions in response to these potential issues and developed a regime of comprehensive and effective water management of the ACF Basin," including a moratorium on new groundwater and surface water permits, the passage of the Flint River Drought Protection Act, the purchase and installation of over 4,000 flow meters in the ACF, and the passage of legislation mandating upgrades to center pivot system technology. (Georgia Pretrial Brief at 28-30).

What Georgia has done in the field to increase efficient irrigation and conservation is truly impressive. Just one example is the University of Georgia's Stripling Irrigation Park, a state-of-the-art irrigation research and education center located in the heart of the Lower Flint River Basin between Camilla and Newton. The objective of Stripling Irrigation Park is to "research, develop and implement best management practices for agricultural irrigation." (Expert Report of Suat Irmak, Ph.D. ("Irmak Report ") at 84 (attached as Exhibit 62 to Georgia's Pretrial Brief)).

Georgia's conservation efforts have been successful. Irrigation efficiency has improved and, contrary to Florida's statements, the impact of Georgia's irrigation upon the streamflow of the Flint is *not* increasing. (Georgia Pretrial Brief at 31).

Florida's expert discusses several conservation measures that he believes Georgia could take to improve efficiency and reduce waste: reducing early pecan irrigation, so-called deficit irrigation, and use of low pressure nozzles. As Georgia's experts explain, these alleged conservation measures have either already been implemented by Georgia (low pressure nozzles and, to an extent, reducing early pecan irrigation), or are, as a practical matter, inefficient and unproductive (deficit irrigation). (Stavins Report at 52, 54-60 (attached as Exhibit 43 to Georgia's Pretrial Brief)).

Crucially, the issue is not whether Georgia can conceivably be more efficient and eliminate even more waste, but whether it can take conservation measures that are "financially and physically feasible" and "within practical limits." For example, in *Colorado v. New Mexico I,* Colorado was in Florida's position seeking equitable relief from the Court against New Mexico, and claimed that New Mexico's water conservation measures were inadequate. The Court remanded the action to the special master to make findings of fact on several issues, including whether reasonable conservation measures by New Mexico could mitigate the harm that might be caused by Colorado's proposed increased use. In *Colorado v. New Mexico II,* Justice O'Connor described the Special Master Kerr's findings on this issue:

> Moreover, with respect to reasonable conservation measures available, the Master indicated his belief that more careful water administration in New Mexico would alleviate shortages from unregulated stockponds, fishponds, and water detention structures, prevent waste from blockage and clogging in canals, and ensure that users fully devote themselves to development of available resources. He further concluded that "the heart of New Mexico's water problem is the Vermejo Conservancy District," id., at 20, which he considered a failed "reclamation project [that had] never lived up to its expectations or even proved to be a successful project, ... and [that] quite possibly should never have been built." Id., at 8. Though the District was quite arguably in the "middle range in reclamation project efficiencies," id., at 20, the Master was of the opinion "that [the District's] inefficient water use should not be charged to Colorado."

467 U.S. at 318. Even though New Mexico's Vermejo Conservancy District was only in the "middle range" in reclamation project efficiencies, the Court disagreed

with Special Master Kerr's conclusion that New Mexico's inefficiencies were sufficient to warrant the granting of equitable relief to Colorado:

> But Colorado has not identified any "financially and physically feasible" means by which the District can further eliminate or reduce inefficiency and, contrary to the Master's suggestion, we believe that the burden is on Colorado to do so. A State can carry its burden of proof in an equitable apportionment action only with specific evidence about how existing uses might be improved, or with clear evidence that a project is far less efficient than most other projects. Mere assertions about the relative efficiencies of competing projects will not do.

467 U.S. at 319-320. Florida has not and cannot show that Georgia's use of the water is "far less efficient" than it should be; indeed, the evidence establishes to the contrary.

Finally, the ultimate question is not whether Georgia has engaged in waste (which it has not), but "the practical effect of wasteful uses on downstream areas." *Nebraska v. Wyoming,* 325 U.S. at 618. As Georgia has shown in its Pretrial Brief, and as further explored in Part B, below, Florida has not established that Georgia's water use has caused it harm of "serious magnitude." *New York v. New Jersey,* 256 U.S. at 309.

B. The Court Should Refuse Florida's Invitation to Change the Law

Although Florida purports to track the traditional elements of an equitable apportionment cause of action, a closer review of its argument reveals that it is seeking substantial changes to the law. One change that Florida is trying to have the Court make is to expand what is considered to be a cognizable injury – an issue

that is closely related to the elements of causation and redressability. Identifying the cognizable injury determines the number of links that needs to be proven in the causal chain and drives the determination of whether a proposed remedy does any good. Under established precedent, the cognizable injury in an equitable apportionment case is substantial economic loss. Florida, therefore, must show not only that Georgia's use causes a diminution in flow, but also that the diminution in flow causes substantial economic injury (and that the proposed remedy will reverse whatever is causing the economic loss).

Florida's theory of the case, however, appears to be that the diminution in flow itself is a cognizable injury sufficient to trigger the equitable apportionment of the ACF.[6] This is illustrated by the introduction and summary of Florida's Pretrial Brief, which devotes exclusive attention to alleged diminution in flow, and does not mention any injury – environmental or economic – caused by such diminution. Florida does not address the alleged environmental impact of diminished flow until page 22, even then makes no attempt to link alleged environmental impact with economic injury, as the law requires.

[6] Florida also greatly exaggerates the impact of Georgia's use upon the flow into Florida. Georgia's consumptive use (M&I and agriculture) amounts to less than 5% of the water actually flowing across the state line. (Expert Report of Philip B. Bedient, at 3 (attached as Exhibit 36 to Georgia's Pretrial Brief)).

Florida attempts to disguise its failure to prove the causal link between diminution in flow and environmental or economic harm by claiming that any change to flow potentially causes harm to certain species. (Georgia Pretrial Brief at 16 (citing Hoehn 30 (b)(6) Tr. 60:18-24)). There are multiple problems with this argument. First, the evidence will again destroy Florida's claims, as it has before. *See infra,* note 7. Second, the ecology of the Apalachicola does not depend upon the aggregate amount of flow, but upon the entire flow regime – the timing, frequency and duration of flows – and the flow regime is controlled exclusively by the Corps. In fact, ten years ago, when Florida sued the Corps and the United States Fish and Wildlife Service under the Endangered Species Act, it claimed that the Corps' flow regime was killing the same species that are involved in this case. *Alabama v. U.S. Army Corps of Engineers*, 441 F. Supp. 2d 1123, 1134 (N.D. Ala. 2006).[7]

In 2003 Professor Ruhl correctly anticipated the difficulties Florida would face proving its case under current precedent: "It is difficult for a state in Florida's

[7] The District Court rejected the claim because Florida did not prove causation:

> Florida urges this court to find that the Corps' choice as to the amount of water to retain upstream in storage verses the amount to release downstream to support protected mussels violates the anti-taking provision of the ESA. The court is not convinced that the predicament faced by these protected mussels rests at the feet of the Corps. Instead, the weight of evidence points to other causes for the exposure of the mussels and harm to their habitat.

441 F. Supp. 2d at 1134.

position, under the conventional burden of proof, to pinpoint the nature and magnitude of injury needed to open the Court's door." Ruhl, *supra,* at 52. To enable Florida to recover, Professor Ruhl reasoned, the Court should use the ACF dispute to "update its law of interstate water allocation" by recognizing the economic value to Florida of the natural flow regime. *Id.*

Florida in this litigation is not as direct as Professor Ruhl, but it too acknowledges that its theory of recovery requires at least a modification of existing federal common law. In listing the "relevant factors" enumerated by the Court in *Colorado v. New Mexico I,* 459 U.S. at 183 (which in turn quoted Justice Douglas' decision in *Nebraska v. Wyoming,* 325 U.S. at 618), Florida adds as a factor the effect of upstream uses on Florida's "wildlife and environment." (Florida's Pretrial Brief at 13). This factor does not appear in the *Colorado v. New Mexico I* or *Nebraska v. Wyoming* decision. In a footnote, Florida states: "Moreover, as a species of the federal common law, an equitable apportionment must be mindful of the long-standing trend in federal law toward increased consideration and protection of environmental issues." (*Id.,* n. 3).

The Court should refuse Florida's invitation to change existing law to make up for the factual deficiencies in Florida's case. First, recognizing diminution in flow itself as a cognizable injury would be a substantial change in the law. The Court has repeatedly rejected the argument that a state is entitled to the natural

flow of the river. *E.g., Colorado v. Kansas,* 320 U.S. 383, 393–94 (1943) (holding that the downstream state is not entitled to have "the stream flow as it would in nature regardless of need or use"); *Kansas v. Colorado*, 206 U.S. at 117 (recognizing the right of each state "to receive benefit through irrigation and in any other manner from the waters of this stream"); *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931) (rejecting Connecticut's claim that, as a riparian owner, it "has a vested right in the use of the flowing waters, and is entitled to have them to flow as they were wont, unimpaired as to quantity and uncontaminated as to quality").

It is one thing to add protection of the environment as a factor in making the cost-benefit decisions in an equitable apportionment case, but it is quite another to dispense with the causation requirement entirely by presuming that any diminution in flow constitutes environmental harm. Again, the cases require the complaining state to prove, with clear and compelling evidence, real and substantial injury caused by the upstream state's use of the river. The concrete injury requirement is not only a feature of equitable apportionment cases; it is "a principal fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches." *Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 576 (1992).

The second reason for refusing Florida's invitation is, indeed, the federal "trend" itself. In its footnote suggesting that the Court should follow the "longstanding trend in federal law toward increased consideration and protection of environmental issues," Florida lists a number of federal statutes that have been passed in the last forty years, including the Clean Water Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the National Environmental Policy Act, the Wild and Scenic Rivers Act, etc. The fact that Congress has legislated so extensively in this field, however, demonstrates that the Court should not, and need not, undertake to create federal common law in this case. *Cf. City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 325 (1981) ("The invocation of federal common law by the District Court and the Court of Appeals in the face of congressional legislation supplanting it is peculiarly inappropriate in areas as complex as water pollution control."). The issues addressed by Congress in these laws are quintessential political questions involving broad economic, environmental, and technical issues, ill-suited to the ad hoc, case-by-case development through federal common law. *See United States v. Windsor*, 133 S. Ct. 2675, 2699 (2013) (Scalia, J. dissenting) ("Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress.")

In *Baker v. Carr,* 369 U.S. 186, 217 (1962), the Court set forth six independent tests for determining the existence of a non-justiciable political question, at least four of which are implicated in this case: "a lack of judicially discoverable and manageable standards" for resolution; "the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion;" "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" and "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Amici does not contend that this entire case presents a non-justiciable political question, but the separation-of-powers issues implicated by the political question doctrine are identical to the concerns that the Court has expressed when confronted with the opportunity or temptation to make federal common law in interstate cases.

For example, Florida contends that it is entitled to equitable relief here in part because Georgia's consumption threatens the survival of several listed and non-listed species in the Apalachicola. Yet preservation of species is a national priority that Congress has comprehensively addressed in the Endangered Species Act of 1973, which is "the most comprehensive legislation for the preservation of

endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).[8]

Third, the Court has traditionally approached an invitation to make new federal common law in interstate cases with extreme caution so as to avoid taking "the place of a legislature." *Missouri v. Illinois,* 200 U.S. 496, 519 (1906). Justice Holmes described the challenge:

> Therefore, if one state raises a controversy with another, this court must determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature.

Justice Holmes continued:

> Before this court ought to intervene, the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. See *Kansas* v. *Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552.

200 U.S. at 521.

Fourth, it is not necessary to reach this issue in this case. Regardless of the nature of Florida's cognizable injury, the harm to Florida will be far outweighted by the harm to Georgia of granting Florida equitable relief. *Kansas v. Colorado,* 206 U.S. at 117 (finding "perceptible injury" but denying relief because upstream

[8] Indeed, Florida brought an ESA suit against the Corps and the U.S. Fish and Wildlife Service over the Gulf sturgeon and three of the mussel species involved in this case. *See supra*, note 7.

use "transform[ed] thousands of acres into fertile fields."); *Washington v. Oregon*, 297 U.S. at 523 ("This is not the high equity that moves the conscience of the court in giving judgment between states.").

For the foregoing reasons, the Court should deny Florida relief.

Respectfully submitted this 22st day of October, 2016.[9]

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[9] This brief replaces the brief submitted on October 21, 2016, which contained pagination errors.

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CERTIFICATE OF SERVICE

This is to certify that the Brief of Amicus Curiae American Peanut Shellers Association and Georgia Fruit and Vegetable Growers Association has been served on this 22ndt day of October 2016, in the manner specified below:

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