No. 142, Original

In the
Supreme Court of the United States

STATE OF FLORIDA,
Plaintiff,
v.
STATE OF GEORGIA,
Defendant.

BRIEF FOR ALABAMA AS AMICUS CURIAE REGARDING NON-JOINDER OF ALABAMA

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PRELIMINARY STATEMENT

Alabama has substantial interests in the Apalachicola-Chattahoochee-Flint River Basin, and Alabama reserves all rights to protect these interests in the future. But in light of the claims and arguments Alabama understands Florida and Georgia to have made in this litigation, Alabama does not believe that it is a necessary party at this particular time. Florida repeatedly has stated that it is not seeking any relief against Alabama, and Georgia has made no claim against Alabama. Moreover, Florida has limited its request for relief to a cap on Georgia's withdrawals from the ACF Basin. If that is the only remedy Florida is seeking, Alabama's presence is unnecessary here, for that cap would not prejudice Alabama's interests in the ACF Basin. It also is difficult to see how a later suit by Alabama could subject Georgia to obligations that are inconsistent with that cap. There is no obvious reason for Alabama to become a part of this litigation at this time, and at least until such a reason becomes apparent, the Court should respect Alabama's current decision to protect its interests in the ACF Basin via means other than intervention in this lawsuit.

INTERESTS OF THE AMICUS CURIAE

Alabama believes that the relevant procedural principles do not require its presence in this particular case, and Alabama does not desire, as a prudential matter, to become involved in this litigation at this time. But to be clear, Alabama has compelling interests in the waters that flow through the ACF Basin. Approximately 2,800 square miles of the basin lie within Alabama's borders, and more than 300,000 Alabama residents live there. These Alabamians use these waters for numerous reasons, and Alabama previously has taken steps, including litigation, to protect its citizens from decreased flows that resulted from violations of the law. In that litigation—in which Florida, Georgia, and the United States Army Corps of Engineers played roles—Alabama described its interests in the ACF Basin in considerable detail. The pages that follow summarize these interests, and the harm Alabama suffers from reduced flows in the ACF Basin, more generally.

A. Navigation

Alabama and its citizens have important navigational interests in the ACF Basin. A 9-by-100 foot navigation channel runs through the Chattahoochee River from Phenix City, Alabama, to the Gulf Intracoastal Waterway in Florida. Alabama's government owns and maintains three dock and terminal facilities along this channel. The facilities hold grain elevators,

warehouses, and operations for transferring freight to other modes of transport. Various businesses have leased these premises over the years. Still more businesses, such as Alabama Power Company and MeadWestvaco Corporation, have operations on the Chattahoochee and use the waterway to transport items to and from their plants.

Decreased flows have adversely impacted at least some of these interests. Beginning in the 1990s, an absence of reliable flows caused substantial reductions in shipments at the state docks. Alabama believes that if reliable navigation flows were restored, shipments through the docks would increase.

B. Municipal, industrial, and agricultural water supply

The ACF Basin also serves important water-supply functions in Alabama. A number of local governments, farms, and companies have used the basin's water in the past, and Alabama believes that these entities may need more water from this source in the future. Alabama Power Company's facility on the Chattahoochee, the Farley Nuclear Plant in Columbia, uses the Chattahoochee's water to cool its nuclear operations. MeadWestvaco and Alabama municipalities also use water from the ACF Basin.

Decreased flows can harm these interests in various ways. The less water that flows through the ACF Basin, the more difficult it is for the

entities that use its waters to make discharges without violating state and federal water-quality standards. As a result, entities may incur increased costs when they treat water they withdraw and discharge. Likewise, the Alabama Department of Environmental Management may be able to issue fewer discharge permits, which can stunt economic growth within the State. Specifically as to the Farley Nuclear Plant, decreased flows could increase the costs of generating power and otherwise disrupt operations. Decreased flows could also increase costs for MeadWestvaco and Alabama municipalities.

C. Recreation and tourism

Alabama also has substantial recreational and tourism-related interests in the ACF Basin. Lake G.W. Andrews, Walter F. George Lake, and West Point Lake, which include waters riparian to Alabama, provide significant tourism opportunities and economic benefits. Alabama maintains a significant park, Lakepoint Resort State Park, at Walter F. George Lake. The public has access to the Chattahoochee through five boat ramps owned and operated by Alabama's Department of Conservation and Natural Resources.

Decreased flows and water levels negatively impact these interests. Historically, reductions in river and lake elevations have rendered boat ramps unusable and have decreased revenues at Lakepoint Resort State

Park. Water fluctuations and accompanying loss of water quality have adversely affected fisheries at places like West Point Lake and Walter F. George Lake.

D. Alabama's previous involvement in ACF litigation

Alabama has been a party to litigation concerning the ACF Basin in the past. More than two decades ago, Alabama first challenged the Corps of Engineers' operations in the ACF Basin. Florida, Georgia, and the United States eventually entered into a compact concerning the ACF. But when that compact expired in 1997, litigation resumed, with Alabama arguing among other things that the Corps' *de facto* reallocation of water in the ACF Basin to Georgia's water supply violated federal law. Although the district court granted summary judgment in substantial part to Alabama and Florida, the Eleventh Circuit ultimately held that, with respect to Alabama and Florida's claim of *de facto* water reallocations, the action was premature because the Corps had not yet taken final agency action. *See In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1166 (11th Cir. 2011).

Alabama's approach since the Eleventh Circuit's decision reflects its understanding that flows into Alabama are affected by the actions of both the Corps of Engineers, in administering its reservoirs, and Georgia, in withdrawing water and making water-supply requests from the Corps.

Alabama's approach also reflects its intent to ensure that any actions taken with respect to the ACF Basin are consistent with the law and do not undermine Alabama's interests. Thus, when the Corps issued draft and final proposed manuals in 2014 for its operations in the Alabama-Coosa-Tallapoosa Basin, Alabama submitted comments, through the administrative process, expressing the State's concerns about flaws in the Corps' approach and the effect that those errors could have on downstream flows in Alabama. If the Corps does not correct those issues with respect to its ACT manuals, Alabama may seek judicial review. Alabama intends to follow a similar path with respect to the final agency action the Corps plans to take on its ACF manuals and Georgia's pending water-supply requests. Because those processes are ongoing and judicial review will be available, the State currently has not filed any action directly against either the Corps or Georgia relating to these matters. Alabama could re-evaluate that decision in the future if relevant factual or legal circumstances change.

Meanwhile, based on the representations Florida and Georgia have made to the Court and the Special Master, it is not apparent that Alabama's presence in this action is either necessary or prudent at this time. Florida has represented that it is not making any claim against Alabama. Georgia likewise has expressed no intent to seek a remedy against Alabama in this case, and stated at the April 7 status conference that it does not believe that

Alabama is a required party. *See* Tr. of 4-7-15 Telephone Conference at 15. Alabama is aware of no claim by Florida, Georgia, or any party, that Alabama's uses of the ACF Basin have been unreasonable, inequitable, contrary to the law, or harmful in any way.

ARGUMENT

Alabama has substantial interests in the ACF Basin, but Alabama does not wish to become a party to this litigation at this point in time, and Florida's and Georgia's representations appear to make Alabama's presence unnecessary for now. The most critical factor in this analysis may be Florida's response to Georgia's motion to dismiss, in which Georgia has argued that the United States is an indispensable party. The disposition of that motion would appear to turn on whether Florida is right when it says it can disclaim any request for a "'minimum flow' requirement" and can limit its requested relief to "an order capping Georgia's overall depletive water uses at the level then existing on January 3, 1992." Fla. Br. in Opp. to Ga. Mot. to Dismiss 12 (internal quotation marks omitted). Because the United States has not consented to its joinder in this case, the United States' indispensability is a threshold question that will determine whether the Court can proceed with this litigation at all. This Court thus should resolve that question first, before it considers whether Alabama's presence also would be required. To the extent that the Court allows Florida to go forward because it is seeking only a cap against Georgia, Alabama does not believe that its presence as a party would be essential for the Court to resolve that issue.

The parties' previous briefing accurately sets out the background principles governing this analysis. *See* Ga. Mot. to Dismiss 9-10; Fla. Br. in Opp. to Ga. Mot. to Dismiss 12; U.S. Br. in Opp. to Mot. to Dismiss 7-8. As Florida, Georgia, and the United States have observed, Rule 19 of the Federal Rules of Civil Procedure serves as an instructive "guide[]" when the Court exercises its original jurisdiction. SUP. CT. R. 17.2; *see also California v. Arizona*, 440 U.S. 59, 62 n.3 (1979). The rule provides:

> (1) *Required party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1). As set forth below, none of these principles would require Alabama's joinder in an action where Florida is seeking a cap on Georgia's withdrawals. And considerations of federalism and comity, equally "appropriate" to the analysis, *Utah v. United States*, 394 U.S. 89, 95 (1969), counsel restraint before holding that Alabama must become a party when neither it nor Florida and Georgia currently wish for it to assume that role.

A. In Alabama's absence, the Court can grant Florida the relief it is requesting against Georgia.

As an initial matter, to the extent Florida is seeking relief only against Georgia, the Court does not need to make Alabama a party to "accord" Florida, in the words of Rule 19(a)(1)(A), the "complete relief" it seeks. FED. R. CIV. P. 19(a)(1)(A). Florida has repeatedly stated that it is not seeking any relief against Alabama, and Alabama does not understand Florida to be seeking any relief that could block Alabama from using the ACF Basin in any way. To this end, the complaint says that Florida "asserts no wrongful act by Alabama and seeks no affirmative relief against Alabama." Compl. ¶ 14. In a previous case, a similar disclaimer led the Court to conclude that a State with interests in a river basin was not a required party to an equitable-appointment action between two other States. *See Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935).

If the disclaimer in Florida's complaint left any doubt about whether it could obtain the relief it was seeking without Alabama's presence, Florida's response to Georgia's motion to dismiss would eliminate that doubt. Florida does not need Alabama to be a party if Florida, as it previously has represented, is seeking no "'minimum flow' requirement" and instead is limiting its requested relief to an equitable apportionment exclusively against Georgia and "an order capping Georgia's overall depletive water uses

at the level then existing on January 3, 1992." Fla. Resp. to Ga. Mot. to Dismiss 12 (internal quotation marks omitted). Because Florida makes no claim against Alabama, it is unclear what relief Florida would seek from Georgia besides a cap on Georgia's withdrawals. Georgia appears to have read Florida's representations to limit its requested relief to a cap alone, and the United States has suggested that this action could proceed only if the exclusive remedy Florida seeks is a cap. *See* Ga. Reply in Support of Mot. to Dismiss 2, 10; U.S. Br. in Opp. to Mot. to Dismiss 7-8. If Georgia's characterizations are correct—or if this Court proceeds in this case on the theory offered by the United States—then Rule 19(a)(1)(A) would not require Alabama's presence in this case.

B. Awarding Florida relief against Georgia's withdrawals would not impair or impede Alabama's ability to protect its interests in the ACF Basin.

Likewise, although Alabama has strong "interest[s]" in the ACF Basin and thus the "subject of the action," FED. R. CIV. P. 19(a)(1)(B), the limitations Florida appears to have placed on its requested relief are such that neither of Rule 19(a)(1)(B)'s two subsections should require Alabama's presence for now.

1. Florida would not impair Alabama's ability to protect its interests by obtaining an order requiring Georgia to cap its withdrawals.

First, Alabama has conceived of no currently apparent scenario in which Florida, by obtaining a cap on Georgia's withdrawals or other relief exclusively against Georgia, could "impair or impede" Alabama's "ability to protect" its interests in the ACF Basin through some later action. FED. R. CIV. P. 19(a)(1)(B)(i). Alabama generally benefits from greater downstream flows, and Alabama generally is harmed when flows are reduced. *See supra* at 2-7. So an order capping Georgia's withdrawals in all likelihood would work to Alabama's benefit, not its disadvantage. Moreover, if Alabama eventually decided that it needed to protect its interests in the ACF Basin by seeking relief of its own—whether against Georgia, the Corps, or some other party—the existence of an order capping Georgia's withdrawals would not, as a practical matter, "impair or impede" Alabama's ability to proceed with its own case. FED. R. CIV. P. 19(a)(1)(B)(i). As a nonparty to this case, Alabama would not be bound by the Court's judgment against Georgia. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 871 (2008). It thus would not be precluded, as a matter of *res judicata*, from seeking whatever relief Alabama deemed to be appropriate at that time. Rule 19(a)(1)(B)(i) does not require Alabama's presence in this case.

2. Georgia would not be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations if Alabama were not a party to this case.

Second, it is not apparent that Alabama's absence would leave Georgia, in the words of Rule 19(a)(1)(B)(ii), "subject to a substantial risk of incurring . . . obligations" in some future action that would be "double, multiple, or otherwise inconsistent" with the cap Florida is asking the Court to place on Georgia's withdrawals. FED. R. CIV. P. 19(a)(1)(B)(ii). If Alabama eventually decided that it was appropriate to bring its own action seeking a lower cap on Georgia's withdrawals than the one Florida currently is seeking, that relief would not be "double, multiple, or otherwise inconsistent" with the cap the Court had imposed at Florida's request. *Id.* It instead would operate *in addition to* the preexisting cap. Georgia has taken the position that Alabama is not a required party, and because the Court's original jurisdiction is "invoked sparingly," the Court has tended to defer to a party's assessment, like Georgia's, that it will not be subjected to inconsistent obligations if another party is not joined. *Utah v. United States*, 394 U.S. 89, 95 (1969). So Rule 19(a)(1)(B)(ii), like the rest of Rule 19, does not suggest that Alabama's presence here is required.

C. Requiring Alabama's presence would create federalism and comity concerns.

Additional considerations, above and beyond the language of Rule 19, cement this conclusion. A critical guide in the Court's exercise of original jurisdiction is "[r]espect for state sovereignty." *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010). Any controversy between States will be "delicate and grave." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). Original actions also "take considerable time" and consume scarce state resources. *South Carolina*, 558 U.S. at 287 (Roberts, C.J., concurring in the judgment in part and dissenting in part). Considerations of federalism and comity thus counsel heavily against compelling Alabama to become a party to this action. The two States that already are parties do not believe that a third needs to take part, and Alabama itself has made the careful decision not to enter this particular fray at this particular time. It instead is focusing on other fora where it believes it can protect its interests. The "necessary recognition of sovereign dignity" that underlies this Court's exercise of original jurisdiction mandates respect for Alabama's choice. *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam).

To be clear, the same respect for sovereign dignity counsels in favor of respecting Alabama's future choice, if relevant circumstances change, to adapt its position with respect to this litigation. Alabama's current position

rests on its respect for its fellow sovereigns and the good-faith representations they have made about the case not implicating Alabama's interests. Yet Alabama recognizes that "the relationship of an absent person to the action" and the "practical effects" of the requested remedy "may not be sufficiently revealed at the pleading stage," and this litigation eventually may reveal additional circumstances that require a different approach. FED. R. CIV. P. 19 advisory committee note to 1996 amendment. Alabama thus reserves its right to assert its interests, in an appropriate manner, if later developments in the litigation reveal that Alabama's relationship to this action is different from what it currently perceives.

CONCLUSION

Alabama is not a required party to this litigation at this time, but any consideration of this question should come only after the Special Master has determined whether the United States is an indispensable party.

Respectfully submitted,

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Before the Special Master
Hon. Ralph I. Lancaster

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief of Alabama as Amicus Curiae Regarding Non-Joinder of Alabama has been served this 1st day of May, 2015, in the manner specified below:

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