No. 142, Original

In The
Supreme Court of the United States

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

STATE OF FLORIDA'S BRIEF IN OPPOSITION TO STATE OF GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY

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INTRODUCTION

Georgia's motion to dismiss for failure to join a required party is premised on the same arguments that it made to the Supreme Court in urging the Court to prevent this action from proceeding at all. For two overriding reasons, the arguments did not work before the Supreme Court, and they do not work in their recycled form here.

First, Georgia mischaracterizes the relief that Florida seeks in this action. Florida is not asking the Court to impose any "minimum flow" regime on the U.S. Army Corps of Engineers (Corps or USACE), either at the Woodruff Dam or any other facility operated by the Corps in the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin). Rather, Florida is seeking "a decree equitably apportioning the waters of the ACF Basin" among the States of Georgia and Florida, along with a cap on consumption and an injunction barring *Georgia* from interfering with that equitable apportionment. Compl. 21. Florida is not seeking relief against the Corps, or the United States. As the United States has observed, Florida "does not complain merely of insufficient 'minimum' flows, but of reduced *overall* flows." U.S. Opp. 16 (Mar. 11, 2015) (emphasis added). Florida's complaint, as the United States recognizes, therefore "eschews seeking relief that could affect the Corps' projects." *Id.* at 6.

Second, Georgia misconceives the relevance of Corps' operations in the ACF Basin to the relief sought by Florida in this case. To begin with, the Flint River—one of the two Georgia waterways at issue—is "unregulated by the Corps." *Id.* at 19. As for the other waterway—the Chattahoochee River—the United States itself has explained that "the United States does not own the water in the [ACF Basin]"; "the Corps has no

authority to apportion water among the States or determine water rights"; the Corps' Master Manual does not, and will not, resolve those rights; and the Supreme Court, in an original action, "is thus ultimately the appropriate body to address Florida's pending claims." U.S. S. Ct. Amicus Br. 19 (Sept. 18, 2014); *accord* U.S. Opp. 4 ("The United States does not own the water in the ACF Basin and the Corps has no authority to apportion water among States or determine water rights.").

Georgia itself used to appreciate this. In prior litigation challenging various administrative decisions, Georgia recognized that the Corps lacked authority to allocate water rights and that Florida's claims thus could be decided only through an original action in the Supreme Court. *See infra* p. 27. Georgia may wish to overlook those arguments today, but it provides no basis—under Federal Rule of Civil Procedure 19, or any other authority—for this Court to take the extraordinary step of dismissing this action for failure to join a required party. Georgia's motion to dismiss should be denied.

BACKGROUND

Water flows from north to south in the ACF Basin and simply cannot reach Florida if Georgia consumes it first. The Apalachicola Basin in Florida—one of the Nation's most unique and treasured ecosystems—is being slowly strangled as a result of Georgia's ever increasing consumption of water from the Chattahoochee and Flint River Basins in upriver Georgia. Georgia has continually increased its consumptive uses over the last three decades despite Florida's repeated attempts to slow Georgia's unchecked use of water and stop degradation of the Apalachicola Region. Georgia's usage is projected to keep growing—and, indeed, double by 2040—necessarily reducing

the amount of water entering Florida and causing harm to the Apalachicola Region. After numerous efforts to reach a compromise solution failed, Florida filed this action in the Supreme Court to obtain an equitable apportionment of the waters connected to the Chattahoochee and Flint Rivers and to limit overall depletive water uses upstream. The United States, and even Georgia itself, previously recognized that an original action is the only way in which Florida can secure the relief it seeks.

A. The Waterways And Ecosystem At Issue

The Apalachicola River and Bay rely upon essential inflows from the Chattahoochee and Flint River Basins. Compl. ¶ 3. The Chattahoochee River arises in northern Georgia and flows south through Atlanta to the Georgia-Florida border. *Id.* ¶ 17. The Chattahoochee River and its tributaries are a major source of municipal and industrial water for metropolitan Atlanta and the city of Columbus, Georgia. *Id.* The Flint River arises just south of Atlanta, and to the east of the Chattahoochee, and flows through Georgia until it joins the Chattahoochee River at the Georgia-Florida border. *Id.* ¶¶ 18, 20. Its waters are used primarily for irrigation, serving hundreds of thousands of acres of irrigated land in southern Georgia. *Id.* ¶ 18. The Apalachicola River is formed at the confluence of the Chattahoochee and Flint Rivers, now located at Lake Seminole. *Id.* ¶ 20. The Apalachicola River lies in Florida and flows, unimpeded by any dam, into the Apalachicola Bay at the Gulf of Mexico. *Id.* These rivers, their tributaries, and hydrologically connected waters, comprise the ACF Basin. *Id.* ¶ 2.

The Apalachicola Basin—including the river, bay, and floodplains—is a true national treasure, widely recognized for ecological diversity and social and cultural

significance. *Id.* ¶ 27. The Basin includes a congressionally designated National Estuarine Research Reserve, which the United Nations has designated a Biosphere Reserve, as well as Outstanding Florida Waters and an Aquatic Preserve designated under Florida law. *Id.* ¶¶ 27, 37. The area's extraordinarily rich biodiversity is evidenced by 142 fish species, 26 mussel species, and over 1,600 plant species including the principal source of tupelo honey. *Id.* ¶¶ 25, 26. More than 100 species designated by the federal or State government as endangered, threatened, or species of concern rely upon the Basin for habitat. *Id.* ¶ 29; App. 32-34 (J. David Allan Decl.).[1] The Basin is also home to one of the most productive estuarine systems on the Gulf Coast, and a culturally rich community that has evolved around its seafood and coastal industries. Compl. ¶¶ 27, 30, 32. The many tourists and outdoor enthusiasts drawn to the Basin provide additional economic benefits to the State and region. *Id.* ¶ 33.

Georgia's ever increasing water consumption necessarily diminishes Apalachicola River flows. In addition to federal reservoirs, Georgia's portion of the ACF Basin contains over 20,000 non-federal impoundments, such as smaller storage areas for irrigation uses, that cumulatively have a significant impact on total waters available downstream in Florida. *Id.* ¶¶ 18, 49. These non-federal impoundments continue to be constructed. *Id.* ¶ 49. Atlanta is projected to nearly double its current use of 360 million gallons per day ("mgd") from the Chattahoochee River to 705 mgd by 2040. *Id.* ¶ 45. Moreover, Georgia has approved new applications for irrigation from the Flint

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[1] "App. __" refers to Appendix to Florida Brief in Supp. of Mot. for Leave to File a Compl. (Oct. 1, 2013); "App. __a" refers to Appendix to Georgia Opposition to Mot. for Leave to File a Compl. (Jan. 31, 2014) (Georgia Opp.).

River Basin's groundwater and surface water that will increase the total amount of land irrigated from 563,000 acres to 843,000 acres. *Id.* ¶ 46. Water users also withdraw 120 mgd from the Flint River Basin for municipal and industrial uses. *Id.* ¶ 48.

Georgia's existing water depletion has already harmed the Apalachicola River and Bay. But this case concerns not only preventing the future depletion of waters that will further damage this fragile ecosystem but also remedying harm that has already been inflicted. Compl. ¶¶ 5-6. Apalachicola River flows averaged less than 5,500 cubic feet per second throughout the entire May through December period in recent drought years—a long duration of extremely low flows that was unprecedented before 2000. *Id.* ¶ 50. The harm is especially pronounced in the summer and fall, when flows are naturally low; Georgia's water usage has depleted spring and summer flows into the Apalachicola by as much as 3,000 to 4,000 cubic feet per second. *Id.* ¶¶ 21, 50. Low flows, especially sustained minimal flows, alter the ecosystem: aquatic species receive less nutrients from the River, spawning habitats in sloughs are cut off from the main stream, the floodplain vegetation does not receive enough water, and the Bay becomes more saline. *Id.* ¶¶ 28, 31, 42-43, 52, 53, 56-59; App. 32-35 (Allan Decl.).

The resulting harm to plants and wildlife is devastating to both the ecosystem and local economy and residents, as evidenced, for example, by substantial changes in the floodplain habitats throughout the Apalachicola River, Compl. ¶ 52; the death of thousands of threatened and endangered mussels, *id.* ¶ 58; adverse effects on the threatened Gulf sturgeon's spawning habitat, *id.*; and adverse impacts on oyster fisheries, *id.* ¶¶ 54, 56; App. 37-38 (Paul A. Montagna Decl.). The situation already has

become "dire and the need for relief immediate." Compl. ¶ 60. But if Georgia's water uses continue to explode—as they are projected to do—"the amount of water entering Florida will continue to decrease, essential fish and wildlife habitats will constrict, and Florida will suffer additional irreparable harm." *Id.* ¶ 59.

B. U.S. Army Corps Operations On The Chattahoochee River

The Flint River, one of the two major waterways in Georgia at issue in this case, is "unregulated by the Corps" (U.S. Opp. 19)—a fact that (as explained below) in itself warrants rejection of Georgia's motion. The Corps operates five dams on the Chattahoochee River (Compl. ¶ 22), the other major waterway at issue. The Corps' job on the Chattahoochee, in a nutshell, is to manage the outflow of water that reaches its facilities to achieve certain statutory objectives. What comes out of the Corps' facilities depends on "basin *inflows*." U.S. Opp. 19 (emphasis added); *see id.* at 16-17. The Corps has no control over the amount of water that comes *into* its facilities; it just regulates the flow of water that comes *out*. As Georgia puts it, the Corps' determines "*how* water is released" within its reservoirs. Mot. 22-23 (emphasis added). The Corps has no control over water that never reaches its facilities because Georgia consumed it first.

Furthest upstream of the Corps facilities is the Buford Dam, which creates Lake Lanier near Atlanta, Georgia. Compl. ¶¶ 8, 22. Furthest downstream, on the Georgia-Florida border where the Chattahoochee and Flint Rivers converge to form the Apalachicola River, is Woodruff Dam. *Id.* ¶ 20. Three of the dams impound reservoirs. Georgia Opp. 5. The Corps determines how much water to release from its reservoirs and at Woodruff Dam based in part on calculated inflows to the ACF Basin, which are

necessarily reduced by Georgia's storage and consumption. Compl. ¶ 23; *see* U.S. Opp. 19. Calculated inflows decrease as Georgia uses more water upstream, causing decreased water releases from the Corps' reservoirs. *Id.*

A central premise of Georgia's motion is that the amount of water that flows into the Apalachicola River is controlled by the United States through its operation of the Woodruff Dam. But Georgia itself recognizes that Woodruff Dam—including Lake Seminole—lacks any "significant storage capacity." Mot. 6. Instead, Woodruff Dam is operated as a "pass through" facility (*id.* at 8) or, as the United States calls it, a "run-of-river project" (U.S. Opp. 19). Because of the limited storage capacity at Lake Seminole, the Corps has no significant ability to regulate water flow from Woodruff Dam into the Apalachicola River. USACE Scoping Report 8-9 (Mot. Ex. A) (Scoping Report); *id.* at 5 ("Because . . . Jim Woodruff Dam/Lake Seminole [is] operated as a run-of-river project[], only very limited storage is available to support project purposes."); App. 13a (FWS 2012 Biological Op.) ("[W]hat goes in [to the Woodruff facility] comes out without being stored for any substantial amount of time.").

C. Florida's Equitable Apportionment Action

Given the vital importance of the waters at issue, Florida, Georgia, and Alabama quarreled for decades over their water use and consumption. More than two decades ago, the States attempted to resolve their differences through negotiation.

In 1992, the States commenced a process to study the needs of the ACF Basin, and then memorialized their intent to settle their differences in a Memorandum of Agreement that was approved by the U.S. District Court for the Northern District of

Alabama in a case Alabama had initiated against the Corps. Compl. ¶ 9; Memorandum of Agreement (Ex. 17 to Joint Consol. Opp. to Mots. to Dismiss, *Alabama v. USACE*, No. CV-90-BE-01331-E (N.D. Ala.)), ECF No. 762-19 (MOA). In 1997, following the completion of the study, the States entered into a compact (the ACF Basin Compact) approved by Congress. Compl. ¶ 10; *see* ACF Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997). The parties agreed to develop a formula for equitably apportioning the waters of the ACF Basin, but the compact's terms were essentially aspirational (only) and the compact expired by its terms in 2003. Compl. ¶ 10.

The States also have been involved in decades of litigation in various courts over the ACF Basin waters. These suits have involved many claims directed generally to various administrative decisions by the federal government, but no equitable apportionment of water rights. *See* Compl. ¶ 8. In multiple suits challenging aspects of Corps operations, Georgia and the Corps have consistently maintained that the Corps has no authority to allocate water rights and that equitable apportionment could only be decided by means of an original action in the Supreme Court. *See infra* p. 27.

By 2013, Florida had experienced increasingly grave and irreparable harm to the Apalachicola Basin as a result of diminishing water due to Georgia's increasing consumption. Left with no other option to address Georgia's exploding consumption of waters in the ACF Basin, Florida filed a motion for leave to file the instant complaint with the Supreme Court to obtain the equitable apportionment that the United States and Georgia agreed the prior litigation involving the Corps could not address. Florida's

complaint challenged not only Georgia's increasing diversion of waters from the Chattahoochee River Basin, but also from the Flint River Basin. Compl. ¶¶ 17-41.

Florida's complaint included the following prayer for relief:

> Florida prays that the Court require Georgia to answer Florida's complaint, appoint a special master, and after due proceedings, enter a decree equitably apportioning the waters of the ACF Basin.
>
> Florida further prays that the Court enter an order enjoining Georgia, its privies, assigns, lessees, and other persons claiming under it, from interfering with Florida's rights, and capping Georgia's overall depletive water uses at the level then existing on January 3, 1992.
>
> Florida also prays that the Court award Florida any other relief that the Court may deem just and appropriate.

Compl. 21 (Prayer for Relief).[2]

Georgia opposed Florida's motion, arguing that "[a]ll of Florida's alleged harms concern the flow from dams operated by the Corps," Georgia Opp. 4, that the "Corps is reexamining those operations," and that the proper (and only) remedy for Florida was simply to await the conclusion of the Master Manual revision process and challenge the *manual* under the Administrative Procedure Act. *See id.* at 16-25. Key to this argument was Georgia's statement that "[n]o water flows from Georgia into the Apalachicola unless and until the Corps releases it from Woodruff Dam." *Id.* at 18. Georgia also argued that allowing this action to proceed would interfere with the Corps'

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[2] The January 3, 1992 date accords with the MOA that Florida, Georgia, and Alabama signed to provide for a comprehensive study of water issues in the ACF Basin. MOA 7. The MOA contained a "live-and-let-live" provision that allowed the States to withdraw water from the ACF Basin for water supply and to make reasonable increases in those withdrawals, but the parties agreed that the MOA "shall [not] be construed as changing the status quo as the Army's authorization of water withdrawals." *Id.* at 4. The MOA was replaced by the ACF Basin Compact in 1997.

ability to meet its statutory objectives, and that Florida had not adequately alleged any harm warranting the exercise of the Supreme Court's original jurisdiction. *Id.* at 19-31.

The Supreme Court called for the views of the Solicitor General. In his brief, the Solicitor General recognized that Florida had adequately alleged harm warranting the exercise of the Supreme Court's original jurisdiction, and that "[t]here is no alternative forum [to the Supreme Court] in which this precise legal dispute can be definitively resolved." U.S. S. Ct. Amicus Br. 15-16. The Solicitor General further stated:

> [T]he United States does not own the water in the ACF Basin and the Corps has no authority to apportion water among the States or determine water rights. That is not part of the manual revision process in which the Corps is engaged, and this Court is thus ultimately the appropriate body to address Florida's pending claims.

Id. at 19. But the Solicitor General nevertheless urged the Court to deny Florida's motion and postpone the commencement of this action based on "practical considerations" (*id.* at 17)—namely, an interest in "completing [the Corps'] Master Manual revision uninterrupted by continued litigation distractions" (*id.* at 20).

The Supreme Court granted Florida leave to file its complaint and appointed the Special Master to oversee the conduct of this litigation.

ARGUMENT

Florida agrees that Federal Rule of Civil Procedure 19 establishes the general framework for considering Georgia's motion to dismiss for failure to join a required party. That Rule sets forth a two-step inquiry. First, a court must determine if the absent entity (the United States, here) is a "Person[] Required to Be Joined" as a party "if [f]easible," applying the criteria of Rule 19(a). Fed. R. Civ. P. 19(a). If the absent

party is not such a required party, that is the end of the inquiry. Second, if the absent party is a required person who cannot be joined, then the court must determine "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id.* 19(b); *see Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1067 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 498 (2011); U.S. Opp. 6.

Courts are "reluctant" to grant a motion to dismiss under Rule 12(b)(7) for failure to join a party. U.S. Opp. 10. "Thus, a Rule 12(b)(7) motion will not be granted because of a vague possibility that persons who are not parties may have an interest in the action. In general, dismissal is warranted only when the defect is serious and cannot be cured." 5C Charles Alan Wright et al., *Federal Practice & Procedure* § 1359 (3d ed. 2004) (footnote omitted). In addition, "the burden is on the party moving under Rule 12(b)(7) to show the nature of the unprotected interests of the absent individuals or organizations and the possibility of injury to them or that the parties before the court will be disadvantaged by their absence." *Id.* "For purposes of a motion to dismiss for failure to join a party under Rule 19, [a court] accept[s] the allegations in the complaint as true." *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 479 n.2 (7th Cir. 2001).

As explained below, Georgia has failed to meet its heavy burden of establishing that the United States is an indispensable party under Rule 19.

I. GEORGIA HAS FAILED TO ESTABLISH THAT THE UNITED STATES IS A REQUIRED PARTY TO THIS LITIGATION

Rule 19(a) lists factors to be used to identify "Persons Required to Be Joined" as parties to a case "if [f]easible." The Rule requires joinder of 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). If a party is not required under Rule 19(a), "the inquiry is at an end, and the motion to dismiss for failure to join the party in question must be denied." *Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1016 (8th Cir. 1984).

Georgia has failed to show that the United States is a required party under Rule 19(a), and its motion may be denied on that basis alone.

A. Florida Can Be Granted "Complete Relief" Without The United States As A Party

There is little question that Florida can obtain "complete relief" in this case without joining the United States as a party. As set forth in its complaint, Florida seeks a decree against Georgia (only) "equitably apportioning the waters of the ACF Basin," and seeks an injunction preventing Georgia (only) "from interfering with Florida's rights" and an order "capping Georgia's overall depletive water uses at the level then existing on January 3, 1992." Compl. 21 (Prayer For Relief). Florida does not seek any relief against the United States, the Corps, or any federal officer.

Nor does this lawsuit seek to impose any "minimum flow" requirement on the Corps, as Georgia repeatedly contends. Mot. 11-14. What Florida complains about is

"reduced flows *overall*." U.S. Opp. 16 (emphasis added). Florida seeks to increase upstream *inflows* into the ACF Basin by halting (or at least stemming) Georgia's ever increasing depletion of upstream flows. But this action is not seeking the imposition of any "minimum flow" requirement at the Woodruff Dam or any other facility operated by the Corps. Florida seeks an equitable apportionment of upstream waters before they reach any Corps facility so that by the time the waters at issue reach the Corps facilities along the Chattahoochee River and ultimately reach the Apalachicola Basin in Florida, Georgia has not already depleted Florida's equitable share of those waters.

Neither the United States nor the Corps is a required party to that equitable apportionment. The water at issue in this case is not federal project water. As the United States has represented, "the United States does not own the water in the ACF Basin," so "the Corps has no authority to apportion water among States or determine water rights." U.S. S. Ct. Amicus Br. 19; *accord* U.S. Opp. 4, 11-13. Even Georgia acknowledges that "[t]he Corps does not own, and cannot equitably apportion, the waters in the ACF Basin." Mot. 6. The participation of the United States is therefore unnecessary to equitably apportion the waters of the ACF Basin among the States.

Overlooking the relief that Florida actually seeks in its complaint, Georgia makes the crux of its motion its claim that the United States' participation as a party is nevertheless necessary because water flows into the Apalachicola Basin only after passing through the Woodruff Dam or (for waters on the Chattahoochee) upstream Corps facilities. That argument is based on a fundamental misconception of not only the relief that Florida seeks, but also the relationship between the waters at issue and the

Corps' operations. Once those errors are corrected, it is clear that complete relief—in the form of an equitable apportionment between Florida and Georgia—can readily be accorded among the existing parties without joining the United States.

Georgia's assertion that the United States "control[s]" "the amount of water that flows into the Apalachicola River," Mot. 1; *see id.* at 13, is misleading at best. The United States controls the amount of water that flows *out of* its facilities, but it has no control over what waters *reach* its facilities—and what waters do not because they are consumed or diverted by Georgia before they get there. In that respect, it is important to keep in mind that the Woodruff Dam—on which Georgia focuses—is a "run-of-the-river project." U.S. Opp. 19. That is undisputed. *See* Mot. 6 (recognizing that "Woodruff Dam does not have significant storage capacity"); App. 13a (FWS 2012 Biological Op.); Scoping Report at 5. This litigation, as discussed, concerns the amount of water that reaches Woodruff Dam (without being consumed by Georgia), not how the Corps decides to calibrate the levers that control what comes *out*.

There is a direct connection between the amount of water Georgia consumes before it reaches the Corps facilities and the amount of water that reaches the Apalachicola Basin. As Florida explained in its complaint, "as Georgia's [water] uses increase, the calculated inflows to the ACF Basin decline, and even less water is released from the Corps' reservoirs." Compl. ¶ 23. "The net result of Georgia's unmitigated water use is that less water reaches Florida due to both hydrologic depletions and the Corps' operational protocols." *Id.* That phenomenon is exacerbated in low flow periods (usually the summer), when the need for water is particularly acute.

Id. ¶ 21. Georgia is entitled to dispute that allegation and attempt to show that, counter-intuitively, its consumption of upstream waters does not impact the waters that ultimately reach the Apalachicola Basin. But for purposes of resolving this motion, Florida's allegations must be presumed to be true. *See supra* p. 11.

In its motion, Georgia itself recognizes that the relief that Florida seeks would result in "extra water" in the Corps' system. Mot. 12. Exactly. But Georgia then surmises that the Corps' "statutory obligations *might* well require the Corps to impound *much* of the increased inflow created by Georgia's reductions." *Id.* (emphases added). There are three problems with this argument. First, speculation about what the Corps *might* do with the extra water is insufficient, as a matter of law, to satisfy Rule 19's indispensability requirement.[3] Second, even accepting that speculation, Georgia itself recognizes that not *all* of the extra water would be diverted by the Corps, meaning that *more* water necessarily would flow out of the system—and into Florida. That is precisely the result that Florida seeks in this action. And third, the United States recognizes that "less consumption by Georgia could *facilitate* the Corps' efforts to meet current and future requirements." U.S. Opp. 16-17 (emphasis added).

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[3] *See, e.g.*, *School Dist. of Pontiac v. Secretary of U.S. Dep't of Educ.*, 584 F.3d 253, 266 (6th Cir. 2009) (declining to "speculate" as to the absent party's particular interests), *cert. denied*, 560 U.S. 952 (2010); *General Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 315 & n.13 (3d Cir. 2007) (failure of plaintiff to name absent insurers to its suit would not result in "partial" or "hollow" relief under Rule 19(a)(1) where it was "completely speculative" that the plaintiff would ever bring additional coverage actions against any other insurers); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir.) ("Speculation about the occurrence of a future event ordinarily does not render all parties potentially affected by that future event necessary or indispensable parties under Rule 19."), *cert. denied*, 464 U.S. 849 (1983); *see id.* at 1045-46 (rejecting the government's "hypothetical interest" as insufficient to render it indispensable under Rule 19(a)(2)(ii)).

For similar reasons, the Corps' Master Manual revision process will not affect the relief that Florida seeks. The manual revision process will identify the means by which the Corps will satisfy its multiple federal obligations with respect to the water that reaches its facilities. The manual revision process will not, and cannot, address Georgia's unchecked upstream consumption and use of as much water as it wants before that water ever reaches the Corps' facilities. Nor will that process "apportion water among the States or determine water rights," U.S. S. Ct. Amicus Br. 19—the relief that Florida seeks in this action. That is beyond question. As the United States has declared, "[t]hat is not part of the manual revision process in which the Corps is engaged, and [the Supreme Court] is thus ultimately the appropriate body to address Florida's pending claims." *Id.*

Georgia also gives "short shrift" (U.S. Opp. 19) to the Flint River Basin—a key feature of this case. As Georgia tacitly recognizes (in a footnote), the Flint River "is not impounded by *any* federal dams or reservoirs." Mot. 13 n.4; *see* U.S. S. Ct. Amicus Br. 23 (recognizing that "there are no federal projects on the Flint [River Basin]"); U.S. Opp. 19 (Flint River "is unregulated by the Corps"). The Flint River could alone be critical to an equitable apportionment. *See* U.S. Opp. 19. The United States is certainly not a required party with respect to that essential portion of this case. And to that end, Florida need not establish that it will prevail on its claims as to *all* the waters at issue, or that it will secure the precise apportionment it would like in order to obtain "'complete relief.'" Mot. 13 (quoting Fed. R. Civ. P. 19(a)(1)). It is enough to show that

the United States' intervention is not necessary for the Court to undertake an equitable apportionment of the waters at issue. That is clearly true.

B. Allowing This Action To Proceed Would Not Impair The United States' Ability To Protect Its Own Interests

Georgia next contends that "[m]any of the fundamental issues raised by Florida's complaint" overlap with issues the Corps will consider in its manual revision process, and thus resolution of this action will "necessarily impact" federal interests. Mot. 2. The United States similarly contends that it is a "required" (though not indispensable) party because there is a "*possibility*" that relief in this case may impair or impede its interests. U.S. Opp. 9 (emphasis added). That argument lacks merit, though the Court need not reach it if it agrees with Florida and the United States that "equity and good conscience" require that this action proceed in any event. *See infra* pp. 21-28.

Neither the Solicitor General nor the Corps has argued that the United States cannot protect its interests without becoming a party. To the contrary, in its Statement of Participation, the United States disclaimed any need to participate as a party in this case to protect its interests. U.S. Statement of Participation 4 (Feb. 9, 2015). In opposing Georgia's motion, the United States contends that the *possibility* that the entry of relief might "regulate, limit, or define the volume or rate of flow through the Corps' projects" makes it a required party under Rule 19(a). U.S. Opp. 9. But the United States acknowledges that it is not an indispensable party and that its participation is not necessary to grant Florida the relief it seeks. *See id.* at 10-22. The fact that "the United States does not want to become a party to the suit[] strongly

suggest[s] that its interests will not be impeded if the suit goes forward without it." *Gardiner v. Virgin Islands Water & Power Auth.*, 145 F.3d 635, 641 (3d Cir. 1998).

The United States asserts the "possibility" that, as a result of a decree in this case, "the Corps might be confronted by a conflict between the federal statutory purposes of its projects and Florida's right to flows under the decree." U.S. Opp. 9. The United States' argument is based solely on the "possibility" that "the Court may impose relief that establishes a minimum flow at the Georgia-Florida border." *Id.* at 8. As explained above, that is not the relief Florida seeks. Florida is not asking the Court to impose any "minimum flow" regime, but is seeking "a decree equitably apportioning the waters of the ACF Basin" and an injunction barring Georgia from interfering with that equitable apportionment. Compl. 21. As the United States recognizes, that relief would not impact the United States' interests. U.S. Opp. 11.

Any "possibility" of a practical impairment of the United States' interests here is also far more remote than the "possibility" that existed in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968), on which the United States relies. There, the absent party was the owner of a car who was in a fatal accident and a key issue in the litigation was whether the driver in the accident had the owner's permission to drive the car. *Id.* at 105-06. The owner was a defendant in a separate pending tort lawsuit by two men who were killed in the accident. *Id.* at 104-05. The Court "assume[d]" that the owner was a required party because of the "possibility that a judgment might impede [the owner's] ability to protect his interest" (*id.* at 108) in the parallel litigation because it might reduce the amount of funds available from an

automobile liability insurance policy (*id.* at 106). The direct effect that a judgment in that case was likely to have in the owner's parallel lawsuit (there being a fixed upper limit of insurance funds available) was much more of a realistic "possibility" than the remote possibility the Court here will issue relief that Florida has not even requested.

Moreover, as the United States itself agrees (U.S. Opp. 11-14), this case is distinguishable in critical respects from *Arizona v. California*, 298 U.S. 558 (1936), the primary case relied on by Georgia in arguing that the United States is a required party. Mot. 17-18. In *Arizona*, the U.S. Bureau of Reclamation had constructed two dams pursuant to a statute that authorized the United States to "dispose of the water stored above the dam[s] for irrigation and for the development of power." 298 U.S. at 563. Pursuant to this authority, the Secretary of the Interior entered into contracts with California entities for the delivery and use of millions of acre feet of project water. *Id.* at 564. Arizona filed a complaint charging that California, with the aid of the United States, had proposed to divert a great deal more water from the river than California was entitled to divert under the governing compact and state law. *Id.*

Importantly, it was undisputed that all natural flow in the Colorado River Basin had been fully appropriated by the federal government by the time the compact had been entered. *Id.* at 570. In other words, the water at issue in *Arizona* was necessarily *federal project water* within the United States' direct control—"the Federal Government already had exercised its authority to impound the water and to control its disposition." *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 391 (1980) (discussing and distinguishing *Arizona*). Because the water Arizona sought to be equitably apportioned

was *the very same water* that the United States had statutory authority to dispose of in aid and support of its projects, the Supreme Court concluded that Arizona's complaint could not be considered "without the adjudication of the superior rights asserted by the United States." *Arizona*, 298 U.S. at 571. As the United States has explained in its opposition brief, the federal role here is "quite different." U.S. Opp. 14.

Here, the water at issue is indisputably *not* federal project water. The Corps does not possess—and Florida does not seek to apportion—federal project water in the ACF Basin. *See id.* at 13. Instead, Florida seeks to constrain Georgia's use of water within Georgia *before it reaches* the federal reservoirs. This equitable apportionment action thus does not threaten the United States' interests. In other words, unlike in *Arizona*, "the relief sought here would not necessarily require actions by the Corps." U.S. Opp. 12; *compare, e.g.*, *Idaho*, 444 U.S. at 391 (United States is not an indispensable party where it "has made no attempt to control apportionment of the in-river harvest of anadromous fish" at issue in the case), *with Arizona*, 298 U.S. at 570 (United States is a required party where the United States "has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated").

This litigation also will not impair the ability of the Corps to meet its statutory objectives. The Master Manual governs only the *manner* in which the Corps operates the federal reservoirs on the Chattahoochee based on the water *within* the Corps' facilities. As the Corps has advised Congress, "these updated Water Control Plans will not allocate or reallocate water rights within the . . . ACF river basin[]." Add. 2a

(Letter from John P. Woodley Jr., Addendum to Florida Suppl. Br. (Oct. 8, 2014)). A favorable outcome for Florida can only result in *more* water reaching the Corps' facilities and thus additional water for the Corps. Naturally, more water can only make it *easier* for the Corps to satisfy its congressionally authorized purposes. *See* U.S. Opp. 16-17 (recognizing that "less consumption by Georgia could facilitate the Corps' efforts to meet" its statutory responsibilities).

II. IN ANY EVENT, "EQUITY AND GOOD CONSCIENCE" WEIGH STRONGLY IN FAVOR OF ALLOWING THIS ACTION TO PROCEED

Even if the United States were deemed a required party, this action can readily proceed in the absence of the United States within the terms of Rule 19(b).

Rule 19(b) lists four factors to aid the court in determining whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). They are:

> (1) the extent to which a judgment rendered in the party's absence might be prejudicial to that party or those already parties;
>
> (2) the extent to which the court could lessen or avoid such prejudice by shaping the judgment or relief;
>
> (3) the court's ability to render an adequate judgment in the party's absence; and
>
> (4) the adequacy of remedies available to the plaintiff should the suit be dismissed.

Idaho, 444 U.S. at 386 (describing Fed. R. Civ. P. 19(b)). No one factor is dispositive; instead, courts engage in a balancing of such factors in deciding whether dismissal is appropriate. *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 862-63 (2008).

Here, as the United States itself recognizes, these factors point decisively to allowing this action to proceed. *See* U.S. Opp. 10-22.

A. An Equitable Apportionment Decree Would Not Result In Prejudice

Georgia claims that adjudicating this equitable apportionment action without the United States' participation as a party "would prejudice the interests of Florida, Georgia, and the United States itself." Mot. 22. That is incorrect.

First, Georgia's remarkable assertion of prejudice on *Florida's* behalf is based on the premise that Florida seeks relief against the United States. *Id.* at 22. But as discussed, and as the United States itself acknowledges, Florida does not. U.S. Opp. 14.

Second, the nature of the relief Florida actually seeks undermines Georgia's claims of prejudice on its own behalf. *See* Mot. 23. Because an equitable apportionment here would not impose "minimum flow" requirements—but instead would address "Georgia's overall depletive water uses" (Compl. 21 (Prayer for Relief))—it is not true that Georgia risks "be[ing] in violation of any decree entered by this Court through no fault of its own" (Mot. 23). Under the decree sought by Florida, Georgia would be responsible only for its *own* consumption or use of water; it would not be responsible for the Corps' decisions to divert "additional water to serve other federal objectives in the ACF Basin" (*id.*)

Third, and again as explained above, issuance of an equitable apportionment here would not prejudice the United States. *See* U.S. Opp. 11-18; *see also id.* at 11 ("[A] judgment in this case would not necessarily prejudice the United States or other parties."). The relief that Florida seeks differs fundamentally from anything that will

be accomplished through the Corps' manual revision process. *See id.* at 16 ("Florida does not contend at this stage in the proceedings that any of the Corps' dams needs to be operated any differently than it is now or might be under the revised Master Manual."). Accordingly, the United States has expressly disavowed the "substantial [sovereign] interests" that Georgia claims on its behalf (Mot. 24). *See* U.S. Opp. 17.

Georgia emphasizes the fact that the United States cannot be bound by a decree in this case. Mot. 3. But rather than weighing in favor of dismissal, this fact only underscores the lack of prejudice to the United States here. As the Supreme Court acknowledged in *Idaho*, "[b]ecause the United States could not be bound by any judgment rendered in its absence, and because Idaho was seeking no relief against [the United States], no absent party would be prejudiced by the relief sought by Idaho." 444 U.S. at 386 (discussing with approval the Special Master's holding on this factor).

Georgia also points to the manner in which the United States seeks to participate as an amicus in this case as evidence that the United States would be prejudiced if this action were allowed to proceed. But the United States has not sought a "pseudo-party status." Mot. 3. As an amicus curiae, the United States lacks the fundamental attributes as a party. Listening in on status conferences or receiving copies of pleadings does not change that conclusion. And in any event, as the Solicitor General has explained (Statement of Participation 3), the United States has undertaken the same role in participating as an amicus in other original actions. *See, e.g.*, U.S. Statement of Participation 2, *Kansas v. Nebraska*, No. 126, Original (May 31, 2011); *see* U.S. Opp. 20-22 (discussing other original actions).

B. The Court Can Order "Adequate" Equitable Apportionment Without The United States

Georgia contends that an equitable apportionment in this case would not be "'adequate'" because "there would be no mechanism for the Court to ensure that the Corps released adequate water into the Apalachicola to address Florida's alleged injuries during all periods of the year." Mot. 25-26 (quoting Fed. R. Civ. P. 19(b)(3)). This argument is again based on the mistaken premise that Florida seeks to impose a "minimum flow" regime on the Corps. But in any event, the Supreme Court's decision in *Idaho ex rel. Evans v. Oregon* refutes Georgia's argument.

In *Idaho*, the State of Idaho invoked the Supreme Court's original jurisdiction in a suit against Oregon and Washington to obtain an equitable apportionment of "various runs of anadromous fish migrating between spawning grounds in Idaho and the Pacific Ocean." 444 U.S. at 381. Although the United States operated eight dams that separated the hatching grounds in Idaho from the Pacific Ocean, Idaho did not name the United States as a defendant. When the Supreme Court granted Idaho leave to file its complaint, it specifically "left open" the question "whether the United States was an indispensable party to the action." *Id.* After considering the issue, the Special Master recommended that the action be dismissed, after looking to Rule 19(b). Although the Special Master determined that Rule 19(b) factors (1), (2), and (4) weighed in favor of allowing Idaho to pursue its lawsuit, he held that under factor (3), the "federal interests were so intertwined in this suit that th[e] Court could not possibly render an adequate judgment in the absence of the United States as a party." *Id.* at 386-87.

The Supreme Court rejected the Special Master's conclusion. *Id.* at 389. In particular, the Court rejected the Special Master's view that "federal interests" "render[ed] impossible an adequate judgment without the United States." *Id.* at 387. The Special Master had relied heavily on the United States' responsibility for operating the eight dams that separated the hatching grounds in Idaho from the Pacific Ocean and noted that "at each dam, the Corps of Engineers must allocate water" among competing uses including "the generation of power and the survival of migrating fish." *Id.* at 388. "The Special Master felt that, without authority to bind the United States to whatever judgment was entered in [the] case, he could not ensure that any additional fish allowed to pass through the first five fishing zones would ever reach the State of Idaho." *Id.* The Court rejected the Special Master's conclusion, emphasizing that Idaho "has no quarrel with the operation of the various dams" and approving of Idaho's argument that "greater numbers of fish reaching each dam will, under all but the most adverse river conditions, result in greater numbers of fish crossing each dam." *Id.* at 388-89.

The Court similarly rejected the Special Master's reliance on the fact that "the United States controls the *ocean* fishery on the runs of anadromous fish at issue here during [one] portion of their lifespan." *Id.* at 387-88 (emphasis added). The Court found this "control" insufficient to require dismissal for failure to join the United States as a party. As the Court explained, "[w]hile regulation of the ocean fishery may have some effect upon the total number of anadromous fish returning to the Columbia River, it has *little to do with proper allocation of the rights to take those fish once they have entered the river*"—the relief that Idaho sought in the case. *Id.* at 388 (emphasis added).

The parallels to Georgia's arguments in this case are striking. *See* U.S. Opp. 15 ("[T]he current posture of this case is closer to *Idaho v. Oregon* . . . than it is to *Arizona v. California*."). Florida's suit—like Idaho's—"has no quarrel" with the Corps' operation of dams, and this lawsuit is not seeking to impose a "minimum flow" regime on the Corps. *Cf.* Mot. 25-26. Rather, just as was true for the fish in *Idaho*, Florida seeks to increase the amount of water that *reaches* each dam in order to increase the amount of water that ultimately passes through each dam and into the Apalachicola. Likewise, the fact that the Corps regulates the flow of water that reaches its dams has nothing to do with the "proper allocation of the rights" to the water before it even reaches the dams. *Idaho*, 444 U.S. at 388. The case *against* dismissing this action is even stronger than it was in *Idaho*. In *Idaho*, the Court found that the United States' control over the ocean fishery could have "some effect upon the total number of anadromous fish returning to the Columbia River." *Id.* But here, the Corps' operations of the dams along the Chattahoochee can have *no* effect on the water at issue—*i.e.*, the water that Georgia consumes or diverts *before* it even reaches those facilities.

Georgia suggests that the possibility that limiting Georgia's consumption of water going forward will not entirely reverse *all* the ecological and other damage that already has been inflicted is a reason to dismiss this case. But that possibility is no reason to deny Florida its right to an equitable apportionment of the waters at issue, to allow Georgia's increasing consumption of water to continue unabated into the 21st Century, and to invite an even greater environmental and economic catastrophe.

C. There Is No Other Adequate Remedy Available To Florida

The fourth Rule 19(b) factor, "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder," weighs against dismissal as well. If this action were dismissed, history—*i.e.*, decades of prior administrative litigation between the parties—proves that Florida would not have an adequate remedy.

Georgia now argues that "Florida's Claims May Be Addressed Through The Administrative Process." Mot. 26. But throughout the prior lower court actions challenging aspects of Corps operations, Georgia consistently maintained that the Corps has no authority to allocate water rights and that Florida's claims could only be decided through an original action in the Supreme Court. *E.g.*, Petition for Writ of Certiorari 20 n.14, *Georgia v. Florida*, 555 U.S. 1097 (2009) (No. 08-199) ("[W]hether 'diminished flows' are causing cognizable injuries to Florida's . . . right to an equitable share of water is an issue that only this Court can decide."); Georgia Br. 9, *Georgia v. USACE*, 302 F.3d 1242 (11th Cir. 2002) (No. 02-10135D) ("Whether or not Georgia obtains additional water supply [storage space] from Lake Lanier, . . . Florida will still be entitled to its equitable apportionment of waters flowing from Georgia and could still file an equitable apportionment case in the United States Supreme Court."); *see also* U.S. Opp. 31, *Florida v. Georgia*, 133 S. Ct. 25 (2012) (Nos. 11-999 *et al.*) (United States: If Florida believes that "Georgia is using, or storing, more than the equitable share of the waters of the ACF Basin to which it is entitled, then the[] remedy is . . . to seek leave to file an original action in this Court to resolve that issue.").

Especially in light of Georgia's arguments in prior lower court litigation that an equitable apportionment action before the Supreme Court was the only way to redress Florida's claim to an allocation of water rights, it would be the height of *in*equity to dismiss this action now based on Georgia's argument—to suit its interests today—that Florida must instead pursue relief through an administrative action.

In short, even if the United States were somehow a "required party" to this action, "equity and good conscience" require allowing this action to proceed.

CONCLUSION

For the foregoing reasons, the State of Georgia's motion to dismiss for failure to join a required party should be denied.

Respectfully submitted,

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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

CERTIFICATE OF SERVICE

This is to certify that STATE OF FLORIDA'S BRIEF IN OPPOSITION TO STATE OF GEORGIA'S MOTION TO DISMISS FOR FAILURE TO JOIN A REQUIRED PARTY have been served on this 18th day of March 2015, in the manner specified below:

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