

No. 142, Original

**In The
Supreme Court of the United States**

STATE OF FLORIDA,

Plaintiff

v.

STATE OF GEORGIA,

Defendant

Before the Special Master

Honorable Ralph I. Lancaster

AMICUS BRIEF SUBMITTED ON BEHALF OF
THE METRO ATLANTA CHAMBER OF COMMERCE, INC.; REGIONAL BUSINESS COALITION
OF METROPOLITAN ATLANTA, INC.; AND GEORGIA CHAMBER OF COMMERCE, INC.
IN SUPPORT OF THE DEFENDANT STATE OF GEORGIA

Susan A. Cahoon
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
Tel.: (404) 815-6325
scahoon@kilpatricktownsend.com

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF INTEREST OF THE *AMICI* METRO
ATLANTA BUSINESS COMMUNITY REPRESENTATIVES2

III. MATERIAL FACTS THAT DEMONSTRATE WHY METRO
ATLANTA IS A CRUCIAL REGIONAL, NATIONAL AND
GLOBAL CENTER.....2

 A. The Ninth Largest Metro Area.3

 B. Metro Atlanta Supports a Major Economic Area4

 C. The Primary Southeastern Regional Transportation Hub9

 D. University and Cultural Center.10

 E. Recreation.....12

 F. Conventions and Tourism.12

 G. Metro Atlanta’s Horticulture and Landscaping Industry Is
 Larger than Florida’s Apalachicola Oyster Industry13

 H. Metro Atlanta Is Aggressively Conserving Water14

IV. ARGUMENT 15

V. CONCLUSION.....23

TABLE OF AUTHORITIES

Cases

Colorado v. Kansas, 320 U.S. 383 (1943)..... 21

Colorado v. New Mexico, 467 U.S. 310 (1984)..... 20, 21

Evans ex rel Idaho v. Oregon, 422 U.S. 1017 (1983)..... 21, 22

Greene v. Pennsylvania Bd. of Law Examiners, 751 F. Supp. 536 (E.D. Pa. 1990) 3

Kansas v. Colorado, 206 U.S. 46 (1907)..... 18

LeMaire v. Maass, 745 F. Supp. 623 (D. Or. 1990) 3

Liberty Mut. Ins. Co. v. Pardis, 764 F. Supp. 13 (D.R.I. 1991)..... 3

Reynolds v. Sims, 377 U.S. 533 (1963)..... 2

Steelworkers v. Weber, 443 U.S. 193 (1979)..... 2

Rules

Connecticut v. Massachusetts, 282 U.S. 660 (1931) 16

Fed. R. Evid. 201(b)(2)..... 2

I. INTRODUCTION

This *amicus* brief is submitted in support of the State of Georgia on behalf of the Metro Atlanta Chamber of Commerce, Inc. (“MAC”); the Regional Business Coalition of Metropolitan Atlanta, Inc. (“RBC”); and the Georgia Chamber of Commerce, Inc. (collectively, “the Metro Atlanta Business Community”).¹

The Metro Atlanta Business Community has a unique perspective on the importance of the Metro Atlanta community to the Southeastern United States, the Nation and the international community. Our perspective touches upon all of the crucial contributions Metro Atlanta provides and will continue to provide unless its access to water resources is constrained. A secure and abundant water supply is critical to the continued vitality of the Metro Atlanta region. Water influences all aspects of our community and its availability is essential to our efforts to sustain the quality of life that has drawn, and continues to draw, citizens and businesses to our community.

Metro Atlanta is a thriving 29-county region that has grown in population and economic activity while at the same time cutting its consumptive use of water. Any remedy that would impose a consumption cap on Metro Atlanta water usage would be devastating to its citizens and the economy. Moreover, it would be inequitable. The region is recognized as a leader in its stewardship of water resources. Yet, Florida seeks to roll back Metro Atlanta’s water usage to 1992 levels or cap usage below current levels. Either remedy is unprecedented. The Metro Atlanta Business Community is not aware of any equitable apportionment decision by the United States Supreme Court that directed a thriving metropolis to cap its water usage at current levels,

¹ Pursuant to Supreme Court Rule 37.6, the Metro Atlanta Business Community *amicis* declare that the State of Georgia and its counsel did not author or pay for any part of this brief and that they have paid the fees for the brief.

let alone imposed a draconian remedy of rolling back water usage to levels last seen over two decades ago. The Metro Atlanta Business Community respectfully asks that the Special Master decline to set precedent by granting Florida the relief it requests.

II. STATEMENT OF INTEREST OF THE *AMICI* METRO ATLANTA BUSINESS COMMUNITY REPRESENTATIVES

MAC is a 501(c)(6) nonprofit corporation that represents the interests of approximately 3,000 businesses in promoting the development of the Atlanta MSA (Metropolitan Statistical Area) as a place to locate and grow businesses in an environment that provides top tier quality of life for those they employ and their families. RBC is a 501(c)(6) corporation, founded in 1998, whose mission is to promote the common business interests of its members and provide business leadership in resolving regional issues in the Atlanta MSA. RBC membership is comprised of 16 local Chambers of Commerce throughout the Metro Atlanta area. The Georgia Chamber is a 501(c)(6) nonprofit corporation that represents business interests throughout Georgia. Its approximately 40,000 members employ over 2 million workers in businesses ranging from storefronts to Fortune 500 companies.

III. MATERIAL FACTS THAT DEMONSTRATE WHY METRO ATLANTA IS A CRUCIAL REGIONAL, NATIONAL AND GLOBAL CENTER

Under Rule 201 of the Federal Rules of Evidence, the Special Master “may judicially notice a fact that is not subject to reasonable dispute because that fact “can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.” Fed. R. Evid. 201(b)(2). Federal courts routinely apply Rule 201 to take judicial notice of economic data and statistics, information in government reports and newspaper accounts of events.²

² See, e.g., *Steelworkers v. Weber*, 443 U.S. 193, 255 n.1 (1979) (“Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice.”) *Reynolds v. Sims*, 377 U.S. 533 (1963) (upheld district court’s taking judicial notice of census data and population growth); *Liberty Mut. Ins. Co. v. Pardis*, 764 F. Supp. 13

The Metro Atlanta Business Community submits information about Metro Atlanta that highlights the importance of that community to global commerce, the Nation generally, and the Southeast, specifically. The sources of this information are government reports, media accounts and non-profit community organizations. These sources and the cited information are the types of information for which courts routinely take judicial notice in resolving disputes. Courtesy copies of the source documents are provided for the benefit of the Special Master and the parties.

The following paragraphs highlight for the Special Master's consideration salient facts about the importance of the Atlanta MSA as a global, national, and regional center.³

A. The Ninth Largest Metro Area.

The Atlanta MSA consists of 29 counties in north Georgia. In 1990, the Atlanta MSA had a population of 3.1 million people. Today, it is the ninth largest metropolitan region in the United States and is home to approximately 5.7 million people. If Metro Atlanta were a stand-alone state, it would be the twenty first largest state by population and comparable in population to the state of Wisconsin, based on 2010 census data.⁴ By 2050, the population in the MSA is expected to grow to 9.5 million.⁵ Fourteen of its 29 counties draw their potable water from the

(D.R.I. 1991) (judicial notice of 10-year cost of living index data); *LeMaire v. Maass*, 745 F. Supp. 623, 636 n.8 (D. Or. 1990) (judicial notice of media accounts of events); *Greene v. Pennsylvania Bd. of Law Examiners*, 751 F. Supp. 536, 539 n.10 (E.D. Pa. 1990) (judicial notice of press releases).

³ MAC as part of its efforts to PROMOTE Metro Atlanta has prepared and published a summary of key attributes and features of the area, which is available at http://www.metroatlantachamber.com/docs/default-source/2016-One-Pagers/2016-ytd-atlanta-rankings_10_2016.pdf?sfvrsn=2. Ex. 1

⁴ United States Census Bureau Population Data, <http://www.census.gov/popest/data/state/totals/2015/index.html>. Ex. 2.

⁵ Ex. B; Woods & Poole Economics, Inc. 2016 Complete Economic and Demographic Data Source (CEDDS). Ex. 3.

Apalachicola-Chattahoochee-Flint (“ACF”) basin.⁶ The other fifteen counties rely on the Coosa, Ocmulgee, Tallapoosa or Oconee basins.⁷

B. Metro Atlanta Supports a Major Economic Area

The Atlanta MSA is a major economic engine for global commerce and the Nation as a whole, and more particularly, the Southeast.⁸ Measured by the number of jobs, there were approximately 2.7 million people employed in Metro Atlanta at the end of 2015.⁹ Measured by economic activity, the U.S. Bureau of Economic Analysis estimated this MSA had a gross domestic product (“GDP”) of \$339.2 billion in 2015.¹⁰ The GDP is expected to grow to \$659 billion by 2050.¹¹ The economy has grown enormously over the last 20 years. In 1992, the year

⁶ The Atlanta MSA counties drawing some or all of their drinking water from the ACF are Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Heard, Lamar, Meriwether, Pike and Spalding.

⁷ These counties include Barrow, Bartow, Butts, Carroll, Cherokee, Dawson, Haralson, Henry, Jasper, Morgan, Newton, Paulding, Pickens, Rockdale and Walton.

⁸ Florida’s complaint relies heavily on harm that Georgia’s use of water allegedly has caused to Florida’s \$10 million oyster industry in Apalachicola Bay to justify its demand that that water used to support a current \$339 billion economy be reduced to a 1992 usage level. That does not make sense. If the stark contrast in economic activity were not enough, Florida’s ability to protect this oyster industry as it has been practiced is far from assured no matter what the outcome of this litigation. That industry is expected to face increased competition from the thriving oyster aquaculture industry that is growing along the southeastern Atlantic coast. *See* “Why The Southeast Could Become The Napa Valley Of Oysters” <http://www.npr.org/sections/thesalt/2016/01/27/462929374/why-the-southeast-could-become-the-napa-valley-of-oysters> (“NPR Oysters Report”) Ex. 4; *see also* USDA Aquaculture Census (2013) , which is available through the University of Florida website at <http://shellfish.ifas.ufl.edu/wp-content/uploads/2013-Census-of-Aquaculture.pdf>. Ex. 5.

⁹ U.S. Department of Labor Bureau of Labor Statistics, http://www.bls.gov/eag/eag.ga_atlanta_msa.html. Ex. 6.

¹⁰ U.S. Bureau of Economic Analysis GDP Data, Ex. 7.

¹¹ Ex. 3.

at which Florida’s complaint has pegged its request for relief, the Atlanta MSA GDP was \$153.8 billion.¹²

Metro Atlanta is recognized as a business powerhouse for several reasons. The region offers competitive business costs through low taxes, balanced regulations and state and local incentives such as loans and grants. The region provides an enjoyable lifestyle, with temperate weather, and a full array of community, food, recreation, cultural and educational experiences, described in further detail below. Atlanta also has a relative low cost of living for major expenses such as housing, food, gasoline and clothing. Growth in Georgia job postings over the last five years has exploded, increasing by 154 percent. This job growth ranks fourth nationally.¹³ Having such a vibrant, growing economy draws younger adults – millennials – which in turn attracts investment capital and businesses looking for a young and motivated workforce.¹⁴

The Atlanta MSA is home to a critical life sciences industry. The Center for Disease Control and Prevention (“CDC”), which is located here, provides essential services in combating infectious disease wherever it occurs in the world (as evidenced by its role in addressing the recent crises involving the *ebola* and *zika* virus outbreaks) and contributing to the overall health of the nation and the world through research and education. This work often involves cooperation with Atlanta area educational institutions such as Emory University and its highly ranked School of Medicine and Rollins School of Public Health. In coming years, fast-growing

¹² Ex. 7 adjusted to 2016 dollars.

¹³ Burning Glass, <http://burning-glass.com/labor-insight/>. Ex. 8.

¹⁴ See Jenkins, “8 Reasons This City Is a Powerhouse” Inc.com, June 20, 2016, <http://www.inc.com/ryan-jenkins/why-atlanta-is-the-best-city-to-base-your-company.html>. Ex. 9; Dill, “The Top 10 Cities For Relocation,” Forbes, May 23, 2014, <http://www.forbes.com/sites/kathryndill/2014/05/23/the-top-10-cities-for-relocation/#30f22bd257ab>. Ex. 10.

Georgia State University, located in downtown Atlanta, will also increasingly be involved in the Life Sciences through its recently announced plan to build a \$35 million, 55,000 square-foot center for infectious disease research.¹⁵

Based on 2010 data, the CDC, by itself, generates 7,551 jobs in the State of Georgia and contributes \$1.4 billion for the state's economy. The CDC also is a magnet for research and development by universities and colleges, as well as private sector companies. When the CDC, academic R&D and life science companies are combined, the economic impact includes 33,359 direct jobs and 94,106 total jobs. These jobs generate \$9.3 billion in state GDP, \$5.6 billion in earnings; and \$557 million in state and local tax revenues.¹⁶ This industry also includes pharmaceutical and medical device manufacturing, R&D in biotechnology, and testing and diagnostics companies. The jobs in this industry are well paying: average wage in the manufacturing segment is over \$64,000 per year; the average salary in biotech R&D is over \$72,000.¹⁷

Another rapidly growing segment of the metro area's economy, attracting high paying technology jobs to the region, is the financial technology industry. More than 60 percent of transaction processing companies are based in Atlanta (over 100 companies) and 70 percent of all payments in the United States run through Georgia.¹⁸ These companies employ 30,000 in Georgia and 130,000 globally.¹⁹ These companies include: Equifax, Inc.; Kabbage;

¹⁵ See <http://www.bizjournals.com/atlanta/news/2016/10/11/georgia-state-university-plans-35-million.html>. Ex. 11.

¹⁶ *Shaping Infinity*, 2012 Georgia Life Sciences Industry Analysis (Georgia Bio and the University of Georgia Terry School of Business) ("Shaping Infinity"), at 1. Ex. 12.

¹⁷ Ex. 12, at 2.

¹⁸ American Transaction Processing Coalition <http://www.atpcoalition.org/georgia-impact>. Ex. 13.

¹⁹ Metro Atlanta Fintech Fact Sheet. Ex. 14.

Groundfloor; bitpay; ADP, Inc.; Fiserv, Inc.; LexisNexis RIAG; Macy's Systems & Technology; RBS WorldPay; NCR; Cardlytics; First Data Corp.; GE Money; Elavon; Global Payments, Inc.; S1 Corp.; TSYS (Total Systems Services, Inc.) and Fidelity National Information Services.²⁰ Nicknamed "Transaction Alley," Metro Atlanta and Georgia processes over 118 billion transactions annually, with a value of over \$2 trillion dollars, on behalf of 4 million merchants.²¹

Overall, Metro Atlanta's technology industry is thriving with a well-developed telecommunications infrastructure, including an extensive fiber optics network. More than 189,000 workers are employed in the tech industry at 14,000 tech establishments.²² Leading technology companies include AirWatch (software developer for device security), Manhattan Associates (logistics software), Secure Works (internet security services) and many others.²³ Metro Atlanta ranks as the fourth most competitive metro area in North America for the IT and communications industry and as such is a top ten market for that talent.²⁴

The television and motion picture industries also have found a home in Metro Atlanta. Georgia now ranks third behind California and New York as the location for original television and motion picture production with an economic impact topping \$7 billion. Atlanta has played backdrop to over 140 films and television shows over the past eight years. In 2014, production

²⁰ See <http://www.metroatlantachamber.com/business/technology/payment-processing>. Ex. 15.

²¹ <http://tsys.com/payments-hub/featured/georgias-fintech-community-touts-growth-influence.html>. Ex. 16.

²² Technology Association of Georgia, <http://www.tagonline.org/files/documents/FinTech/tag-fintech-ecosystem-report-2016.pdf>. Ex. 17.

²³ See <http://www.tagonline.org/news-press/tag-names-top-40-innovative-technology-companies-in-georgia-2/> (partial list of Atlanta technology companies). Ex. 18.

²⁴ See "Atlanta makes the latest list of tech hubs (number four?)" <http://www.ajc.com/business/atlanta-makes-the-latest-list-tech-hubs-number-four/KvhyCTq4UDtd0Yi8cGZNXI/>; "ATL Named 6th Fastest Growing Market for Talent" <http://hypepotamus.com/news/atl-6th-fastest-growing-market-tech-talent/>. Ex. 19.

companies spent \$1.3 billion in Metro Atlanta. Last year, in 2015, that number increased to \$1.7 billion for 248 projects. The film and television industry is expected to continue growing.²⁵ For example, actor Tyler Perry is currently completing a major production facility on the site formerly occupied by Ft. McPherson that will add an estimated 8,300 new jobs.²⁶

Through these and other growing businesses, Metro Atlanta now is home to the corporate headquarters of 25 Fortune 1000 companies, of which 16 are Fortune 500 companies.²⁷ These Fortune 1000 companies represent global brands from many business sectors including Delta Air Lines, The Coca-Cola Company, The Home Depot, UPS and Newell Brands. The Atlanta MSA also is home to the regional headquarters and major divisions of many other corporations, including AT&T Wireless and GE Energy. The American Cancer Society and CARE, two world renowned charitable organizations, call Atlanta home. In addition, more than 80 consulates and trade offices, and 34 bi-national chambers of commerce are located in Metro Atlanta.²⁸

Collectively, enterprises such as these have drawn a diverse and highly skilled work force to live in the Atlanta MSA, to enjoy its quality of life and to raise their families here. Approximately one-third of Metro Atlanta adults hold a bachelor's degree (compared to a national average of 27 percent).²⁹ Importantly, these companies and industries described above

²⁵ See "Atlanta's Explosive Film and TV Growth By The Numbers," Atlanta Journal Constitution, Aug. 21, 2015, <http://www.ajc.com/entertainment/movies/atlanta-explosive-film-and-growth-the-numbers/vJ5qcYzqz37YQDcRxOY48L/>. Ex. 20.

²⁶ See <http://www.bizjournals.com/atlanta/news/2015/08/05/tyler-perrys-new-studio-could-create-up-to-8-300.html>. Ex. 21.

²⁷ FORTUNE magazine, June 6, 2016; Metro Atlanta Chamber <http://www.metroatlantachamber.com/docs/default-source/2016-One-Pagers/2016-fortune-500-and-1000-companies22A1C52BAC79.pdf?sfvrsn=2>. Ex. 22.

²⁸ Atlanta.net at p. 16.

²⁹ "Fast Facts About Higher Education in the Atlanta Region," Atlanta Regional Council for Higher Education,

are not intensive consumers of water resources. That, together with water conservation efforts discussed below, is why Atlanta has been able to reduce water usage even as its population and economy have grown so significantly. As Metro Atlanta continues to thrive and grow, the impact of growth on the region's need for water is primarily increased usage needed to support population increases.

C. The Primary Southeastern Regional Transportation Hub

Metro Atlanta is a primary hub in the nation's hub and spoke transportation and distribution system, with its central location in the Southeastern region and its well-developed interstate highway and railroad transportation links to neighboring states and beyond. Eighty (80) percent of the entire U.S. population is within a two-hour flight from Atlanta³⁰ and forty (40) percent of the manufacturing and distribution centers are within 500 miles.³¹

Atlanta is home to Hartsfield – Jackson Atlanta International Airport, the busiest and most efficient airport in the world which provided service to approximately 101.5 million passengers in 2015, of whom over 11 million were international travelers. Flights from Hartsfield-Jackson include non-stop flights to 150 U.S. destinations and nearly 70 international destinations in more than 45 countries.

Metro Atlanta's rails and highways also serve as a gateway for cargo exported and imported through the Georgia Ports Authority ports in Savannah and Brunswick, Georgia. The

<http://atlantahighered.org/Reports/FastFactsAboutHigherEducation/tabid/732/Default.aspx>. Ex. 23.

³⁰ “*Know Atlanta*” The Relocation Guide, <http://www.knowatlanta.com/atlanta-airport-hartsfield-jackson-interntional/airport/>. Ex. 24.

³¹ “Where to Warehouse: The Top 10 for 2009”, *Feb 24, 2009*, <http://multichannelmerchant.com/mcm/where-to-warehouse-the-top-10-for-2009-24022009/>. <http://multichannelmerchant.com/mcm/where-to-warehouse-the-top-10-for-2009-24022009/>. Ex. 25; Material Handling Brings New Show to Atlanta in 2012, <http://www.tsnn.com/news-blogs/material-handling-brings-new-show-atlanta-2012>. Ex. 26.

Metro Atlanta area relies on its proximity to the Georgia ports to attract business and people. The Georgia Ports Authority has gathered data about the economic activity attributed to its ports, including data for a multi-county region that the Authority calls “Metro Atlanta”(a subset of the full Atlanta MSA).³² As to these counties, exports and imports via the ports help contribute to 167,394 jobs.³³

D. University and Cultural Center.

The Brookings Institute recently named metro Atlanta as a global knowledge capital.³⁴ The designation is appropriate. Metro Atlanta is home to 70 colleges and universities, including the Georgia Institute of Technology (Georgia Tech); Emory University; Georgia State University; and several Historically Black Colleges and Universities (“HBCU”) such as Morehouse, Spelman and Clark-Atlanta University. Annually, more than 275,000 students attend Metro Atlanta colleges and universities.³⁵ This large enrollment ranks Metro Atlanta as eighth in student enrollment among the nation’s largest metro areas and seventh in degrees conferred annually (bachelor degrees or higher).³⁶ STEM degrees comprise a significant number of the degrees awarded and have grown approximately 40 percent from 2005-2014. Metro Atlanta ranks among the top eight metro areas in the number of degrees awarded (bachelors or

³² The counties include Cherokee, Clayton, DeKalb, Douglass, Fayette, Fulton, Gwinnett, Henry, and Rockdale.

³³ The Georgia Ports Authority maintains this information and makes it available to the public through its website, <http://www.gaports.com/moreimpact/#/intro>. Ex. 27.

³⁴ “Brookings Institute names Atlanta a 'Knowledge Capital’”, Atlanta Business Chronicle, October 2, 2016, <http://www.bizjournals.com/atlanta/news/2016/10/02/brookings-institute-names-atlanta-a-knowledge.html>. Ex. 28

³⁵ “Metro Atlanta’s Future: Educate. Innovate. Collaborate.” Metro Atlanta Chamber, November 2013, p. 3 <http://www.metroatlantachamber.com/docs/default-source/business-higher-educatin/bhe-rankings-book.pdf?sfvrsn=2>. Ex. 29. The National Center for Education Statistics, <http://nces.ed.gov/collegenavigator/> provides the data for the number of colleges and universities. Ex. 30. The current data shows 70 colleges and universities in Metro Atlanta.

³⁶ Ex. 29, p. 5.

higher) in the fields of business, engineering, computer sciences, math, physical and biological/biomedical sciences.³⁷ These colleges and universities generate R&D across all industries and attract college-educated 25 to 34 year olds to Metro Atlanta.³⁸

The colleges and universities in Metro Atlanta are a major source of employment and economic activity. This sector generates \$10.8 billion for the Georgia economy, which is 3.2 percent of its annual gross product. There are nearly 5.7 million visits annually, 1.5 million overnight stays, campus tours, commencement, alumni events, conferences and other educational and cultural activities associated with the colleges and universities. More important is research. In 2011, research and development expenditures in Metro Atlanta were nearly \$1.5 billion.³⁹

Atlanta has been chosen as the location for important centers for social and political change that honor Nobel Peace Laureates. The King Center for Nonviolent Social Change pays homage to the Reverend Martin Luther King, Jr. and continues his work for justice through non-violence. The Carter Center is home to the Presidential Library of President Jimmy Carter and serves as the operational base for his international and national civic works.

Metro Atlanta is a thriving hub for the arts. The Woodruff Arts Center, the nation's third largest arts center, includes the High Museum, the multiple Grammy award winning Atlanta Symphony and venues for concerts, theater and creative arts education that reach over 200,000 students. Other notable museums and educational venues include the Booth Museum of Western Art, the Atlanta History Center, the Tellus Science Museum, the National Center for Civil and

³⁷ Metro Atlanta Chamber Press Release titled "Higher Education Report shows Metro Atlanta is a national leader in several higher education indicators", dated 8/11/2013, <http://www.metroatlantachamber.com/news/items/2013/11/08/higher-education-report-shows-metro-atlanta-is-a-national-leader-in-several-higher-education-indicators>. Ex. 31.

³⁸ <http://atlantahighered.org/Reports/FastFactsAboutHigherEducation/tabid/732/Default.aspx>; <http://www.atlanta.net/explore/colleges-universities>. Ex. 32.

³⁹ Ex. 29, p. 9.

Human Rights, Fernbank Museum of Natural History and Science Center, Zoo Atlanta, the College Football Hall of Fame, and the Georgia Aquarium.

Recently, the American Planning Association, a professional association of urban and community planners, named one of Atlanta's neighborhoods, the City of Atlanta's Midtown community, as one of five "Great Places" in the country in part because of its proximity to the cultural attractions in Atlanta. The Association was impressed by Midtown's "planning initiatives, colorful history, vibrant arts and cultural scene, connected street grid and investments in walkability."⁴⁰ Midtown is a great place that is part of a larger and great metropolitan region that is growing and should be allowed to continue to thrive and support the millions of people who call Atlanta home and who visit the region each year.

E. Recreation.

From professional sports teams in baseball, basketball, football, lacrosse and soccer to public parks such as Stone Mountain, Kennesaw Mountain, the Chattahoochee National Recreational Area, Lake Lanier Islands, Piedmont Park (home of the Atlanta Botanical Gardens) and the biking paths of the Silver Comet Trail or the Atlanta Beltline, the metro area provides numerous recreational outlets for locals and for tourists – especially those coming from areas in neighboring states who do not have a professional team closer to their homes to watch.

F. Conventions and Tourism.

Metro Atlanta draws hundreds of thousands of visitors to conventions at the space offered in the Georgia World Congress Center (GWCC), which can accommodate most of the largest national and international tradeshows and expositions, and in the many hotels and local meeting

⁴⁰ "Which Atlanta Neighborhood is Ranked One of Five "Great Places" in the Country?", Atlanta Business Chronicle, October 4, 2016, <http://www.bizjournals.com/atlanta/news/2016/10/03/which-atlanta-neighborhood-is-ranked-one-five.html>. Ex. 33.

spaces. GWCC is the world's largest LEED certified convention center. For years, Atlanta has ranked in the top five convention destinations because of its convention and tourism infrastructure, as well as the restaurants and attractions that occupy the visitors outside of meeting hours.

In 2015, 49 million people visited Metro Atlanta: 35 million visited for leisure; 14 million visited for business. The Atlanta Convention and Visitors Bureau hosted more than 800 meetings in 2015, including 21 major conventions. Overall, tourism and conventions generated approximately \$13 billion for the economy and employed 240,000 workers.⁴¹

The downtown area next to the GWCC is attractive to residents, conventioners and tourists alike. Centennial Olympic Park is the centerpiece of many educational, cultural and entertainment opportunities. Adjacent to Centennial Olympic Park are the College Football Hall of Fame, the National Center for Civil and Human Rights, the Georgia Aquarium, the World of Coca-Cola, and the CNN studio (which hosts tours).

G. Metro Atlanta's Horticulture and Landscaping Industry Is Larger than Florida's Apalachicola Oyster Industry

Florida is seeking to protect its \$10 million oyster industry by imposing draconian water use restrictions on Metro Atlanta. One of Florida's proposed experts to explain what remedies it seeks opines that this region should cut back outdoor water usage that he attributes to landscaping and horticulture activities by 50% at all times and by 75% during drought periods, claiming that while such reductions would adversely affect the quality of life in this region, they would have no direct economic impact.⁴² Florida fails to recognize there is a significant direct economic impact from these activities. Dr. Stavins, one of Georgia's proposed expert witnesses,

⁴¹ Atlanta Convention and Visitors Bureau 2015 Annual Report. Ex. 34.

⁴² Expert Report of Dr. David Sunding, May 20, 2016, at 1-4. Ex. 35.

presents data showing that 13,810 persons were employed in 2013 in Upper Chattahoochee based landscape and horticultural services.⁴³ These persons contributed \$621 million to GDP and \$910 million in output. Another 526 were employed in greenhouse, nursery and floriculture production, generating \$37 million in GDP and \$54 million in output. These activities individually, and combined, are significantly more than the figures Florida has offered about the economic impact of the Apalachicola oyster and Tupelo honey industries on the Florida economy. With greatly reduced water available to support residential horticultural activities, these industries inevitably have less demand for their services and will be harmed significantly. Many of their employees are relatively unskilled laborers and among those least able to find alternative employment if they are no longer needed in this segment of the region's economy.

H. Metro Atlanta Is Aggressively Conserving Water

Even though the population of Metro Atlanta has increased by 2.6 million since 1990, its total consumptive water usage has been relatively flat. The State of Georgia created the Metropolitan North Georgia Water Planning District in 2001 to develop water conservation plans. The Planning District includes most of the counties in the Atlanta MSA. According to the Metropolitan North Water Planning District, since 2000 the per capita water demand has dropped thirty percent. The Metro Atlanta population and economy are projected to grow, as noted. Yet, because of conservation, current projections for water usage needs in 2050 are now 25 percent lower than prior projections, while still showing a need for increased water usage to service the growing population and economy.⁴⁴ This relatively flat total consumptive water usage as the population has grown thus far is the result of deliberate policies and planning. Over the past

⁴³ Expert Report of Dr. Stavins, May 20, 2016, at 29 (Ex. 43 to Georgia's Trial Brief). Ex. 36.

⁴⁴ 2015 Activities & Progress Report, Metropolitan North Georgia Water Planning District, pages 1 and 5. Ex. 37.

fifteen years, the water utilities in the Planning District have implemented an aggressive conservation program that includes:

- A tiered pricing structures that charge higher rates the more water that is used to provide a direct economic incentive for conservation;
- A sophisticated leak detection program that has enabled water utilities to detect and repair over 23,000 leaks in the past four years;
- A toilet rebate program that has replaced over 110,000 fixtures with high efficiency models; and
- Water use restriction programs during periods of drought.⁴⁵

Metro Atlanta has stepped up as a water resource steward. Those efforts should be recognized and provide sufficient grounds to reject any caps on consumptive use whether at 1992 levels or even at current use levels. A net reduction in available water can only impede the predicted further growth in the Atlanta MSA, which depends on water from the Chattahoochee for its citizens to drink at home or at their places of business and use in everyday life, for its businesses to use that require water for their processes and also, for the millions of visitors to the region each year, to provide them with the water they need while they are here.

IV. ARGUMENT

The MAC, RBC and Georgia Chamber as *amicus* submit that the Special Master should reject any remedy for Florida that directly or indirectly imposes a cap on Metro Atlanta's water usage, whether retroactively to 1992 levels or even a cap at current levels. The Metro Atlanta Business Community is not aware of any equitable apportionment decision by the United States Supreme Court that would impose a consumptive use cap on a metropolitan region, with its inevitable adverse impact on the region's ability to support a growing population's needs for

⁴⁵ "Consumers, water suppliers need to conserve," Atlanta Journal Constitution, October 16, 2016, page A20. Ex. 38.

water for drinking and other domestic purposes, let alone a retroactive cap set at 20-year old levels. As explained below, the facts here do not support creation of such a draconian precedent.

As an initial matter, the Metro Atlanta Business Community believes that the State of Georgia's Pretrial Brief has properly analyzed the burden of proof that Florida must bear in seeking to change Georgia's existing use of water from the ACF basin by capping the total amount of water that Georgia may use at a level below current consumptive usage, and also imposing additional caps during peak months of drought periods.⁴⁶ Georgia has also demonstrated why Florida's evidence will not satisfy its heavy burden of proving by clear and convincing evidence (a) that Georgia's current use of water is unreasonable, (b) that Georgia has not taken reasonable measures to conserve water resources and (c) that the harm to Georgia from reducing its current usage to a level capped below its current usage is outweighed by the benefits to Florida from whatever increase in the flow of the Apalachicola might result. However, there are several principles that are particularly significant as they pertain to Florida's claim with respect to Georgia's use of water in the Atlanta MSA that the Metro Atlanta Business Community highlights in the following portion of its brief.

First, within the Atlanta MSA, direct human consumption constitutes the overwhelming preponderance of consumptive use. The Supreme Court has recognized that using water for "drinking and other domestic purposes" is the highest priority use in any equitable apportionment analysis for water. *See Connecticut v. Massachusetts*, 282 U.S. 660, 673 (1931).

⁴⁶ It is unclear from Florida's pretrial brief precisely what remedy Florida will seek at trial. Its complaint, which has never been amended, sought to cap Georgia's usage at the 1992 level. The pretrial brief indicates Florida will rely on its purported experts' trial testimony to explain what remedies it will seek. *See Florida Pretrial Br.*, at 37-39. From some of the calculations used by one of Florida's proposed expert witnesses, it appears that the consumption level as of 2011 is a baseline, at least for his attempt to demonstrate ways to reduce usage to achieve the drought year cap he proposes. *See Ex. 35*, at 1, ¶ 2.

Application of *Connecticut v. Massachusetts* to the facts shown in Part III of this brief support summary denial of Florida's request for a consumption cap – whether set at 1992 consumption usage or at current consumption usage levels – that would affect Metro Atlanta's use of the Chattahoochee River. The usage by Metro Atlanta is the highest use of water and the level of consumption is reasonable and appropriate.

As the facts presented earlier demonstrate, even those who live in counties within the Atlanta MSA who do not draw residential drinking and domestic water from the Chattahoochee often work at locations within the MSA whose water comes from the Chattahoochee, and they attend events, visit outdoor recreational sites and patronize restaurants within the MSA that rely on water from the Chattahoochee. The number of people who depend directly on water from the Chattahoochee is growing rapidly. Yet, despite this high priority on the use of water for human domestic purposes, Florida seeks a fixed cap on consumptive use at levels below recent annual average total consumption. Florida tries to skirt the impact of such a cap on Metro Atlanta, which already has implemented numerous conservation programs (discussed briefly in Part III, but elaborated upon by Georgia and other *amici* in more detail) and has succeeded in achieving a generally flat total consumption in comparison to earlier time periods and a reduction in average per capita consumption, despite the explosive growth in population. Florida effectively asks the factfinder to assume that continued population growth can be similarly sustained without more water, merely through continuing types of conservation measures that already have been implemented, without any recognition that only finite effects can be achieved through such measures. Florida also argues that because it appears that 21% of the water from a sample of residential users is used outdoors, that usage can be drastically reduced without harming Metro Atlanta's growth. Yet, even Florida concedes that reducing outdoor uses of water affects the

quality of life,⁴⁷ and as the facts about Metro Atlanta's growth provided earlier demonstrate, the quality of life in this region has been a key driver in that dramatic growth.

Second, all of the Supreme Court cases dealing with issues of allocating water between sovereign states that have examined existing uses of water by one versus a proposed increased use by the other have done so in a context in which both existing and proposed uses had a direct and largely quantifiable economic impact on persons or businesses located in the competing states, each of which would physically use the water in some manner. Even where one competing state argued that an upstream state's diversion of water prevented naturally occurring flooding downstream, the harm that was argued (in that case, unsuccessfully) was not the mere change in flow from that which nature would have produced downstream, but rather the interference with human reliance on natural flooding to irrigate crops located adjacent to the river. *See Kansas v. Colorado*, 206 U.S. 46, 117 (1907). The Supreme Court has never recognized a "non-use" of water by one state as a basis for depriving another state of beneficial use of water that passes through its boundaries, and certainly never indicated any inclination to do so when the defendant state is using water for domestic purposes, as is the case with Metro Atlanta's use of water. Yet, the arguments being made here by Florida with respect to preserving the "natural" ecosystem of portions of the Apalachicola River (an ecosystem already altered by man as a result of the construction of dams and other physical alterations to the river's flow) require an unprecedented recognition of intangible benefit from the absence of any physical use of water by the claimant state as an equitable allocation factor. The issue for the Court heretofore has always focused on actual economic uses that each state and its citizens derived from the water in question, not an unquantifiable and highly subjective opinion about the value

⁴⁷See Sunding Report, 2/29/2016 at 76, ¶ 134, Ex. 39; *see also* Ex. 35 at 4, ¶ 12.

of preserving nature or natural beauty, or comparing natural beauty with man-made beauty that might be compromised by reducing water needed to sustain it.⁴⁸

To the extent that there are federal policies to protect endangered species and to conserve and preserve wild spaces, there are federal statutes and regulations expressing those policies to which both Florida and Georgia are subject. If actions by Georgia are implicated in violating federal law, there are remedies the United States and its agencies charged with enforcing those laws may impose. However, the federal common law of equitable apportionment between states as to use of water has never been the blunt instrument with which to address these types of policy judgments, and should not become one in this dispute between Georgia and Florida.

The Court's jurisprudence highlights the seriousness of water disputes between states, for each state comes before the Court as a sovereign, on equal footing, seeking in the forum constitutionally provided to resolve disputes between them to obtain a just adjudication. Neither state's state law controls the outcome; rather, federal common law as developed in the cases cited in both parties' pretrial briefs has developed the standards that govern equitable apportionment.

Were consideration now to be given to the novel argument made about protecting an ecosystem as a factor to weigh in assessing harm or benefit, then as noted above, an equally novel argument about intangible quality of life factors affecting a community would also have relevance, especially given the direct impact on the humans living and working in an area such as Metro Atlanta who experience that quality of life impact every day, whereas only those

⁴⁸ Ironically, while Florida's experts have offered no quantification for the subjective value of preserving the Apalachicola ecosystem for its natural beauty, Dr. Sunding does provide a "welfare cost" of over \$121 million to Metro Atlanta users of a 30% reduction in their outdoor water use from their 2011 usage levels - not the 50% to 75% reduction that his report requires in drought conditions. Ex. 39, at 76, Table 13.

relatively few who visit the areas of the Apalachicola River discussed in Florida's brief experience the natural beauty of those areas.

Third, the Court's jurisprudence requires comparing any harm Florida can prove by clear and convincing evidence to be caused by Georgia's water usage with the benefits of Georgia's use and the adverse effects of reducing that use to determine whether the equities favor Florida's request. *Colorado v. New Mexico*, 467 U.S. 310, 317-18 (1984) ("*Colorado II*"). Under that analysis, on the one hand Florida argues Georgia's usage of water and consumption reduces fresh water flows into the Apalachicola Bay and adversely impacts wild oyster habitat, which in turn has harmed the oystermen who for generations have harvested oysters from that area. But those arguments must be weighed against other factors that have adversely affected the oyster industry, such as red tide and competition from aquaculture. Even if one accepts Florida's data about causation and the economic impact on the affected individuals and on the oyster industry completely, its quantifiable impact appears to be significantly less than the economic impact of drastically curtailing the outdoor watering in Metro Atlanta during summer months that is essential to maintain lawns, provide sufficient water for flowering plants, nurture shrubs and keep newly planted trees alive. Without sufficient water for those purposes, the home gardening and landscaping industries will be harmed. As explained in Part III, more people are employed in the home garden and landscaping related industries in Metro Atlanta than there are oystermen, and the value of the goods and services generated by the gardening and landscaping business in Metro Atlanta is substantially greater than the entire amounts claimed for the Apalachicola oyster industry, the Tupelo honey industry, or any other economic impact cited by Florida as the harm it purports to have incurred as the result of Georgia's water usage.

Fourth, the need for equitable apportionment is assessed as of the time of the complaining state's complaint. *Colorado v. Kansas*, 320 U.S. 383, 394-95 (1943); *see also Evans ex rel Idaho v. Oregon*, 422 U.S. 1017, 1025-29 (1983). Yet, much of Florida's trial brief is devoted to complaints about Georgia's conduct in 1992 and thereafter. While Florida complains that it suffered for years in the 1990s and thereafter because Georgia was slow to implement conservation measures, the Court's precedent makes clear that a request for an equitable apportionment of a natural resource is not a vehicle for punishing a state for something it may have done in the past, even if that may have harmed the claimant state. *See Evans ex rel Idaho v. Oregon, supra*, 422 U.S. at 1029-30. Thus, the starting point for assessing Florida's claims must be the status quo as of no earlier than October 1, 2013, when Florida filed its motion for leave to file a bill of complaint. By then, Georgia, and especially the Metropolitan North Georgia Water Planning District, had developed and implemented significant, successful programs to conserve water resources, as previously discussed.

Fifth, where the challenged use of water is associated with harm to established existing economies as is the case here, the Court also has made it clear that the equities supporting protecting those existing economies are compelling factors in any equitable apportionment analysis. *See Colorado II* at 317. Moreover, where, as here, there is evidence that the defending state has recognized and implemented conservation measures to preserve and protect water resources, the Court also has placed an additional, heavy burden on the claimant state to demonstrate by clear and convincing evidence that the efforts to use water responsibly were not financially and physically, within practicable limits, given alternatives available. *Id.* at 318-19. Indeed, even where a state in the past may have made relatively little effort to conserve natural resources, if at the time the claim is brought it is actively pursuing reasonable conservation

measures, the factfinder in an equitable apportionment case cannot find that the claimant has satisfied its burden of demonstrating substantial likelihood of future injury sufficient to warrant the invocation of the equitable apportionment remedy. *See Evans ex rel Idaho v. Oregon, supra*, 422 U.S. at 1029-30 (discussing defendant's current efforts to reduce the catch allowed of certain fish species before the fish could return to Idaho waters to spawn).

Whatever complaints Florida may have about Georgia's behavior in the 1990s, there is no clear and convincing evidence that Georgia currently is ignoring reasonable conservation measures or that it is likely to do so in the future. There may be disagreements at times between Florida and Georgia about whether, for example, particular drought conditions have occurred sufficient to trigger Georgia's mandatory restrictions on water usage that are discussed in the evidence and briefing from others. But it is evident that Georgia has established a serious approach to water conservation and that the Metro Atlanta region in particular has focused on being a good steward of water, as evidenced by its active programs to require new developments to use more water efficient plumbing, to reward people for changing to low flow toilets, to detect and fix water leaks, to restrict outdoor watering in serious drought conditions and a host of other measures described briefly above and discussed in Georgia's trial brief and by other *amici*. Yet Florida would require ever more, with no basis for any comfort that imposing a reduced consumptive use cap generally (not even limited to drought conditions) would enable this region to address and fill the needs of its ever growing population for potable water and other domestic uses.

Sixth, the cap on water usage remedy sought by Florida – whether set at current levels or rolled back to 1992 levels – effectively would impose a moratorium throughout Metro Atlanta and impede further growth, for growth requires more, not less water. A moratorium would

create uncertainty for businesses and residents because communities that do not grow recede. The moratorium would prevent, or at least discourage, new businesses from coming to Metro Atlanta and people from choosing Metro Atlanta as the place to live. These developments would have impacts throughout the region. Instead of being a growing, vibrant region requiring new construction, both residential and commercial, and the related services associated with construction, the construction industry would stagnate as it did during recent recessionary periods. Without new, increasing demand for housing, homeowners' property values decline and resale opportunities decrease. Lower income service industry workers especially struggle and have difficulty making ends meet when an economy feels the impact of a recession. When that recession is localized, those who are best equipped financially and by education to find other places to live and work do so, while the poorest and least educated remain and must bear an ever increasing share of the cost of governmental services.

V. CONCLUSION

Thus, based on Supreme Court precedent for resolving disputes between states about the use of water, and given the importance not only to those who live and work in Metro Atlanta, but to a much broader regional, national and even global community of having the Atlanta SMA continue to grow and have the quality of life that sustains such a vibrant community, and for the many reasons explained in Georgia's pretrial brief that will not be repeated here, MAC, RBC and the Georgia Chamber urge the Special Master upon hearing all of the evidence to reach the conclusion that we believe will be fully supported by the evidence: Florida has failed to carry its heavy burden of proof and its claim for an equitable apportionment must be dismissed.

Respectfully submitted this 21st day of October, 2016.

s/ Susan A. Cahoon
Susan A. Cahoon
KILPATRICK TOWNSEND & STOCKTON
LLP
1100 Peachtree Street N.E., Suite 2800
Atlanta, GA 30309-4528
Telephone: (404) 815-6500
Facsimile: (404) 815-6555

CERTIFICATE OF SERVICE

This is to certify that Metro Atlanta Chamber of Commerce, Inc.; Regional Business Coalition of Metropolitan Atlanta, Inc.; and Georgia Chamber of Commerce, Inc.'s Motion for Leave to File an Amicus Brief on Their Behalf in Support of the Defendant State of Georgia has been served on October 21, 2016, in the manner specified below:

<u>For State of Florida</u>	<u>For United States of America</u>
<p><u>By U.S. Mail and Email:</u></p> <p>Gregory Garre <i>Counsel of Record</i> Latham & Watkins LLP 555 Eleventh Street, NW Suite 1000 Washington, DC 20004 T: 202-637-2207 gregory.garre@lw.com</p> <p>Jonathan L. Williams Deputy Solicitor General Office of Florida Attorney General The Capital, PL-01 Tallahassee, FL 32399 T: 850-414-3300 Jonathan.Williams@myfloridalegal.com</p>	<p><u>By U.S. Mail and Email:</u></p> <p>Donald J. Verrilli Solicitor General <i>Counsel of Record</i> Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530 T: 202-514-7717 supremectbriefs@usdoj.gov</p>
<p><u>By Email Only:</u></p> <p>Pamela Jo Bondi Craig Varn Christopher M. Kise James A. McKee Adam C. Losey Matthew Z. Leopold Philip J. Perry Abid R. Qureshi Claudia M. O'Brien Paul N. Signarella Donald G. Blankenau Thomas R. Wilmoth floridaacf.lwteam@lw.com floridawaterteam@foley.com</p>	<p><u>By Email Only:</u></p> <p>Michael T. Gray Michael.Gray2@usdoj.gov</p> <p>James DuBois James.Dubois@usdoj.gov</p>

For State of Georgia

By U.S. Mail:

Craig S. Primis, P.C.
Counsel of Record
Kirkland & Ellis LLP
655 15th Street, N.W.
Washington, D.C. 20005
T: 202-879-5000
Craig.primis@kirkland.com

By Email Only:

Samuel S. Olens
Britt Grant
Seth P. Waxman
K. Winn Allen
Sarah H. Warren
Georgiawaterteam@kirkland.com

Respectfully Submitted,

/s/ Susan A. Cahoon
Susan A. Cahoon
Kilpatrick Townsend & Stockton LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
Tel: (404) 815-6325
scahoon@kilpatricktownsend.com

October 21, 2016