No. 08-199

In the

Supreme Court of the United States

STATE OF GEORGIA,
Petitioner,

v.

STATE OF FLORIDA AND STATE OF ALABAMA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF STATE OF ALABAMA AND STATE OF FLORIDA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the D.C. Circuit properly determine that water storage reallocation, implemented through contracts that would be in effect for up to twenty years, at a federal reservoir operated by the Corps of Engineers involved a major operational change requiring congressional approval under Section 301 of the Water Supply Act of 1958, 43 U.S.C. § 390b(d), when the Corps conceded that the contracts would involve major operational change if they were implemented on a permanent basis?

2. Did the D.C. Circuit correctly conclude that Alabama and Florida have standing to pursue the major-operational-change issue when it applied the standing analysis in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), to the facts of this case?

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INTRODUCTION

At issue in Georgia's petition is the ruling by the circuit court that the U.S. Army Corps of Engineers lacked the authority to reallocate 240,858 acre-feet of storage at Lake Lanier, a federal reservoir near Atlanta, to a water supply purpose without congressional approval. Section 301 of the Water Supply Act of 1958, 43 U.S.C. § 390b(d), requires congressional approval of such reallocations that involve major operational changes. Significantly, neither the Corps nor the individual federal officials who were its co-defendants in the case have petitioned for a writ of certiorari. The federal defendants' decision not to seek review – and now to oppose Georgia's request for review – is hardly surprising because this case comes nowhere close to meeting the standards for certiorari review by this Court.

The first question presented by Georgia – whether the circuit court improperly decided the major-operational-change issue – does not involve a certworthy issue for several reasons. First, by Georgia's own admission, the legal standard for when a circuit court can address points not ruled upon by a district court is settled, and there is no conflict among the circuits concerning this question. Accordingly, resolution of the question involves nothing more than the factbound application of settled law. Second, Georgia premises its argument on the assertion that Alabama and Florida never raised the major-operational-change argument in the district court – an assertion that is objectively and verifiably false. Third, the record evidence presented to the district court by Alabama and Florida, particularly when combined with two key concessions made by the

federal defendants at oral argument before the D.C. Circuit, left only one possible conclusion for that court to reach, namely that the specific reallocation at issue in this case involved major operational change and thus required congressional approval. In light of these substantial shortcomings, there can be little surprise that the Solicitor General in his brief opposing certiorari agrees that the first question does not present an issue worthy of this Court's review.

Nor does Georgia's second question presented merit this Court's review. Georgia frames the question as whether this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), excuses a State from having to meet the requirements for standing set out in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). But, as the Solicitor General notes in his brief, the D.C. Circuit did not excuse Alabama and Florida from meeting the *Lujan* standard – and indeed cited and relied on *Lujan*. Moreover, the circuit split alleged by Georgia on the question is entirely illusory. In any event, in the D.C. Circuit, Georgia expressly conceded that Alabama and Florida have standing to pursue the major-operational-change argument. Georgia's sudden turnabout here, at the very least, makes this the poorest of poor vehicles for exploring *Massachusetts*' implications.

STATEMENT OF THE CASE

Geography and Background

The Chattahoochee River originates in northern Georgia, flows southward to become part of the border between Georgia and Alabama, and then joins the Flint River to become the Apalachicola River, which flows through northern Florida into Apalachicola Bay. These

three interconnected river systems make up the Apalachicola-Chattahoochee-Flint (ACF) Basin. The ACF Basin includes counties within Alabama and Florida. Pet. App. 3a-4a.

Lake Lanier is a federally owned and operated reservoir formed in the 1950s by the construction of Buford Dam on the Chattahoochee River some 50 miles above Atlanta. Congress authorized federal expenditures to construct Lake Lanier for the purposes of flood control, navigation support, and hydropower generation. *See Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1122 (11th Cir. 2005). Congress has never allocated any portion of the conservation storage pool[1] at Lake Lanier for water supply purposes. *Id.*; Pet. App. 15a.

Litigation History

The Early Stages of the Litigation

This case began in 2000 as a challenge to the actions of the U.S. Army Corps of Engineers ("Corps") and individual federal officers (collectively, the "Federal Defendants") in operating Buford Dam at Lake Lanier. C.A. App. 32-69. The plaintiff, Southeastern Federal Power Customers, Inc. ("Power Customers"), filed suit

[1] Lake Lanier is divided into three parts. At the top is the flood storage pool, the portion of the reservoir's storage capacity that is kept empty so that it is available to hold water in the event of floods. Next is the conservation storage pool, which is the portion of the reservoir's capacity that is used to make releases for hydropower generation and downstream navigation support. Finally, at the bottom of the lake is the inactive storage pool, which is the portion of the reservoir's capacity that is not designed for any specific use.

in the United States District Court for the District of Columbia claiming, among other things, that the Federal Defendants had undertaken major operational change at Buford Dam without seeking congressional approval as required by the Water Supply Act. *Id.* at 58.

The Power Customers' lawsuit paralleled an action that had been filed against the Corps and certain federal officials in the United States District Court for the Northern District of Alabama in 1990. C.A. App. 255. In that case, the State of Alabama had challenged the Corps' proposed reallocation of 207,000 acre-feet of storage in Lake Lanier for water supply. The State of Florida moved to intervene on the side of Alabama, and Georgia moved to intervene on the side of the Corps. *Alabama*, 424 F.3d at 1123 & n.7. Like the Power Customers in this case, Alabama and Florida have alleged in the Alabama case that the Corps has violated federal laws, including the Water Supply Act, and exceeded its authority in operating Buford Dam. *Id.* at 1125 n.11.

Shortly after the Alabama lawsuit began, the parties filed a joint motion to stay the proceedings. The Corps agreed not to execute "any [water withdrawal] contracts or agreements" implicated by the Alabama complaint without the written consent of Alabama and Florida. *Id.* at 1123. The Alabama district court memorialized the terms of the stay in a 1990 order. *Id.* With that stay order in place, the three States and the Corps conducted negotiations that led to the passage in 1997 of the Apalachicola-Chattahoochee-Flint River Basin Compact ("Compact") to "facilitate water storage allocation, planning and dispute resolution for the ACF Basin." Pet. App. 5a (citing Pub. L. No. 105-104, 111

Stat. 2219). In essence, the Compact established a process for the three States to reach agreement on an allocation of water within the ACF Basin.

The Settlement Agreement

While negotiations under the Compact were ongoing, the Power Customers filed this suit. The D.C. district court referred the parties to mediation. C.A. App. 147. The mediation was private, and participation was by invitation only. The Corps committed to the district court that it would ensure participation by "all stakeholders with a real interest" in the litigation. Doc. 27 at 3. Neither Alabama nor Florida, however, was ever invited to participate. Moreover, even though Compact negotiations were ongoing, neither the Corps nor Georgia ever informed Alabama or Florida that a detailed agreement to reallocate storage in Lake Lanier was being negotiated outside the ACF Compact process.

As a result of this private mediation, the Corps signed a Settlement Agreement on January 9, 2003. Pet. App. 54a. The other signatories included the Power Customers, Georgia, and several Atlanta-area water supply providers. *Id.* at 54a, 57a. The Agreement committed the Corps to enter into 10-year water supply and storage contracts with three of those water supply providers, and it provided for an automatic 10-year renewal of the contracts. *Id.* at 60a-61a, 70a; C.A. App. 383-466. The contracts would furthermore have obliged the Corps to reallocate for water supply 240,858 acre-feet of storage in Lake Lanier, and even more if that amount of storage did not yield a guaranteed 537 million gallons per day. Pet. App. 61a-62a, 65a. The Agreement specified that Lake Lanier's total conservation storage

was 1,049,400 acre-feet, so this reallocation would have involved nearly one-fourth of that storage capacity.[2] *Id.* at 62a. The Agreement required this reallocation without congressional approval. *Id.* at 71a-72a.[3]

Alabama and Florida's Challenge to the Settlement Agreement in the District Court

When Alabama and Florida learned of the Settlement Agreement after the fact, both States moved to intervene in the D.C. district court to challenge the Agreement's legality.[4] C.A. App. 189, 197. The Federal

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[2] In a table attached to the Settlement Agreement, the parties to the Agreement calculated the percentage of storage being allocated to water supply by using 1,049,400 acre-feet as the denominator. C.A. App. 399.

[3] The Settlement Agreement provided that the contracts would be executed unless the Corps determined that the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, "precluded" the Corps from entering into the contracts. C.A. App. 360. Contrary to the present position of the Solicitor General, Fed. Defendants' Br. in Opp. 5, nothing in the Settlement Agreement suggested that the Corps would analyze any aspect of the Water Supply Act, including the major-operational-change issue, prior to execution of the contracts. Indeed, the Settlement Agreement recited that the Corps had determined that it had authority to enter into the Agreement under the Water Supply Act and two other federal statutes, Pet. App. 71a. Before the D.C. Circuit, the Federal Defendants and other appellees abandoned reliance on any statute other than the Water Supply Act. Appellees' C.A. Red Br. 27-29. Moreover, in their brief to the D.C. Circuit, the Federal Defendants never suggested that analysis of the major-operational-change issue would occur as part of the NEPA process.

[4] While Georgia had filed a motion to intervene prior to its participation in the mediation, the district court did not grant Georgia's motion until after the Settlement Agreement had been executed. Doc. 10, 114. The Court issued its order allowing Georgia

Defendants did not oppose those intervention motions, which the district court granted. Doc. 92; Doc 114.

Alabama and Florida also filed motions in the Alabama case seeking entry of an injunction against the Corps' implementation of the Settlement Agreement on the ground that the Corps' execution of the Agreement violated the Alabama district court's 1990 stay order. *Alabama*, 424 F.3d at 1124. On October 15, 2003, the Alabama district court entered a preliminary injunction precluding the Corps from implementing the Agreement. *Id.* at 1125.

Notwithstanding that injunction, the district court in this case proceeded with consideration of Alabama's and Florida's objections to the Settlement Agreement. Because Georgia has staked its petition almost entirely on its assertion that "[i]n the district court, Alabama and Florida did not argue that the Settlement Agreement would involve 'major structural or operational changes'" (Pet. 10), it will be useful to canvass the district court's proceedings in some detail.

Contrary to Georgia's repeated suggestions, Alabama and Florida squarely argued in the district court that the reallocation of storage required by the Settlement Agreement amounted to major operational change under the Water Supply Act and thus required congressional approval. Florida quoted the statutory language, underlining the words "major operational changes," in its principal brief in the district court, Doc. 85 at 18, and then discussed the fact that the Settlement

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to intervene at the same time it permitted intervention by Alabama and Florida.

Agreement would involve a major operational change, *id.* at 18-22. Florida returned to the topic in its supplemental memorandum to the district court. Doc. 149 at 23-27. While Georgia correctly notes in its petition that Alabama did not directly discuss the major-operational-change point in its district court briefing, Georgia ignores the fact that Alabama expressly incorporated the arguments made by its co-party Florida. Doc. 147 at 1, n.1.

Georgia also fails to acknowledge in its petition that the parties discussed the major-operational-change issue at oral argument in the district court. At the hearing conducted by the district court, Alabama and Florida repeatedly addressed the issue of major operational change and the effect of the Settlement Agreement on reservoir operations. C.A. App. 1655-56, 1664, 1675-85, 1755, 1757-59. Counsel for the Federal Defendants also participated, arguing that the Settlement Agreement did not involve major operational change only because water supply was an existing use. *Id.* at 1698. Finally, counsel for the water supply providers told the district court that it needed to decide whether "the interim contracts involve major structural or operational changes." *Id.* at 1716.

Far from relying only on written and oral arguments, Alabama and Florida also submitted evidence to the district court that proves that the Settlement Agreement would involve major operational change. This evidence included two key documents prepared by the Federal Government: (1) the 1989 Post Authorization Change Notification Report for the Reallocation of Storage from Hydropower to Water Supply at Lake Lanier, Georgia ("1989 PAC Report")

and (2) a 2002 legal memorandum prepared by the Office of the Army General Counsel ("2002 Army Legal Memorandum"). C.A. App. 324-336, 1549-1586. In the 1989 PAC Report, the Corps proposed to reallocate to water supply an amount of Lake Lanier's storage (207,000 acre-feet) slightly less than that contemplated under the Settlement Agreement. Pet. App. 13a; C.A. App. 1586. The report states that it was prepared under the authority of "Section 216 of the River and Harbor and Flood Control Act of 1970, which allows the Corps to report to Congress on recommendations to *significantly change the operation of an existing project.*" C.A. App. 1560 (emphasis added). The report recognized that congressional approval "may be required," *id.* at 1571, and the Commander of the Corps' Mobile District later confirmed in writing that the Corps in 1989 intended to seek congressional authorization for the reallocation contemplated in the 1989 PAC Report, *id.* at 339.

In the 2002 Army Legal Memorandum, the Army's Office of General Counsel addressed Georgia's request for reallocation to water supply of approximately 35 percent of Lake Lanier's conservation storage pool. *Id.* at 324-36. The Memorandum included an acknowledgement that operational changes under the Water Supply Act include "reallocation of existing storage space from another purpose to a water supply purpose." *Id.* at 330. Recognizing that Congress had allocated no storage space to water supply at Lake Lanier, *id.* at 331 n.2, the Army counsel concluded that the proposed reallocation "would involve a major change in the project's operation" and thus required congressional approval. *Id.* at 331. Among the reasons for this conclusion was the fact that "releases that would normally be made at peak periods for hydropower

generation would be shifted to off-peak periods for the benefit of water supply." *Id.* at 332.

Alabama and Florida also submitted additional evidence in the district court demonstrating that major changes in hydropower operations at Lake Lanier would result from the Settlement Agreement. The Agreement itself makes clear that hydropower customers will have to be compensated nearly $2.5 million per year to make up for the reduced hydropower operations at Buford Dam. *Id.* at 378. In the 1989 PAC Report, the Corps calculated that reallocation of a slightly lesser amount of storage for water supply would result in a reduction of annual dependable electric capacity of 21 megawatts and an annual energy loss of 23,500 megawatt-hours. *Id.* at 1573. The Corps valued this lost hydropower in terms of an updated cost of storage at more than $49 million. *Id.* at 1579. In addition to the 2002 Army Legal Memorandum, other evidence before the district court likewise indicated that major operational change would occur through the shifting of hydropower generation from peak to non-peak time periods. *Id.* at 332, 589, 1192. This shift would be significant because Buford Dam's hydropower operations have been conducted predominantly during periods of peak demand. *Id.* at 1110.

Contrary to Georgia's current contention that there was "no evidence in the record quantifying the reduction in 'flow through'" that would result from implementation of the Settlement Agreement, Pet. 9, Alabama submitted evidence showing that there would be a "substantial and significant impact to downstream

flows" if the Agreement took effect, C.A. App. 1615.[5] Indeed, Alabama presented evidence quantifying this impact as "an average drop of 1 foot and a maximum drop of 3 feet in the lake levels of West Point Lake, downstream of Atlanta." *Id.*[6] Similarly, Florida submitted evidence that "the Settlement Agreement poses a substantial threat to the magnitude, frequency, duration and timing of streamflows upon which Florida's ecosystem depend[s]." *Id.* at 482. Thus, Georgia's contention that it had submitted "uncontradicted evidence" that the Settlement Agreement's effects on flows at the Florida state line would be "nearly imperceptible" is simply false. Pet. 4.

Against that evidentiary backdrop, the district court entered an order conditionally approving the Settlement Agreement on February 10, 2004. Pet. App. 26a. The court rejected the several statutory challenges to the Agreement raised by Alabama and Florida. Although Alabama and Florida had squarely raised the question whether the Settlement Agreement involved major operational change under the Water Supply Act, the district court failed to address the issue. The district

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[5] In addition, it is self-evident that there is a reduction in flow below the dam when hydropower is reduced. The passage of water through turbines to create hydropower is the means by which water is released from the reservoir. When less hydropower is generated, it necessarily means that there is less flow going through the turbines.

[6] Georgia has repeatedly focused throughout this litigation on flow at the Florida state line. *See, e.g.*, Pet. 4. Georgia has offered no explanation as to why impacts to Alabama should be assessed at the Florida state line given that the Chattahoochee River runs along Alabama's eastern border southward from West Point Lake for well over 100 miles before it reaches the Florida state line.

court conditioned its approval of the Settlement Agreement on dissolution of the Alabama district court's injunction. *Id.* at 42a. Two days later, on February 12, 2004, the district court dismissed the case. *Southeast Federal Power Customers, Inc. v. Harvey*, 400 F.3d 1, 3 (D.C. Cir. 2005).

Proceedings Before the D.C. Circuit

Alabama and Florida appealed the district court's order to the D.C. Circuit. The D.C. Circuit dismissed that appeal on finality grounds in light of the conditional nature of the district court's approval of the Settlement Agreement. *Id.* at 5. Thereafter, the Eleventh Circuit dissolved the Alabama district court's injunction, *Alabama*, 424 F.3d at 1136, which led the district court in this case to enter a final judgment against Alabama and Florida on March 9, 2006. C.A. App. 2076. Alabama and Florida then appealed to the D.C. Circuit from that final judgment. *Id.* at 2080, 2084.

In their opening brief in the court of appeals, Alabama and Florida devoted a section in the argument to the major-operational-change issue. Appellants' C.A. Blue Brief 37-39. In particular, Alabama and Florida emphasized that "[t]he Corps has stated that 'operational changes' include 'reallocation of existing storage space . . . to a water supply purpose.'" *Id.* at 37. Alabama and Florida also clearly stated their position that the Settlement Agreement "provide[d] for the initial reallocation of 23 percent of the storage in Lake Lanier." *Id.* at 28. Notably, in its brief to the D.C. Circuit (filed jointly with the Federal Defendants), Georgia never claimed that Alabama and Florida had failed to raise the major-operational-change issue in the district court, nor

did Georgia take issue with the Corps' position that reallocation of existing water storage space to water supply itself constitutes operational change. Nor, finally, did Georgia contest the percentage of storage at issue in the Settlement Agreement.

Oral argument in the D.C. Circuit focused principally on the question whether the Settlement Agreement involved a major operational change. During the discussion, Georgia and the Federal Defendants each made a crucial concession – concessions that effectively resolved the very same two questions that Georgia now presents for this Court's review.

First, on the merits of the major-operational-change issue, the Federal Defendants acknowledged that the Settlement Agreement would require an additional 10 percent (approximately 100,000 acre-feet) of Lake Lanier's conservation storage pool to be allocated to water supply, Opp. App. 37a[7], and, further, that the shift "would be the largest acre-foot reallocation ever undertaken by the Corps without prior Congressional approval," Pet. App. at 15a. They then conceded that such a 10 percent change would constitute major operational change under Section 301 of the Water Supply Act if it were undertaken on a permanent, as opposed to an interim, basis. Opp. App. 45a. In other words, the Federal Defendants agreed that the 10 percent reallocation of Lake Lanier's conservation storage would amount to major operational change, but they argued that the 20-year "interim" nature of the contracts under the Settlement Agreement somehow

[7] The transcript of oral argument before the D.C. Circuit is attached as an appendix to this brief and will be cited as "Opp. App."

excused compliance with the Act's requirement of congressional authorization.[8]

Second, with respect to Alabama and Florida's standing to pursue the major-operational-change argument – the second question presented for review – Georgia itself conceded the issue. In a colloquy with Judge Silberman, counsel for Georgia initially denied that such standing existed, but then conceded the point, stating that Georgia "will accept that [Alabama and Florida] have standing to assert a claim to their injury at the State Line relating to water flows." *Id.* at 47-49.

In an opinion authored by Judge Rogers and joined by Judge Kavanaugh, the circuit court reversed the district court's approval of the Settlement Agreement. (Judge Silberman concurred separately.) The court first held that Alabama and Florida had standing to assert the major-operational-change claim. Although Georgia suggests (despite its earlier concession) that the court in its standing analysis relied

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[8] As to the total percentage of Lake Lanier's conservation storage that would be allocated to water supply under the Settlement Agreement, an issue Georgia now seeks to contest (Pet. 13-14), the Federal Defendants confirmed at oral argument that the number is 23 percent. Opp. App. 35. Counsel for Georgia discussed that percentage figure without disputing it, *id.* at 58a, 61a, and at another point indicated that the amount of water storage being reallocated under the Agreement was "not a contested issue," *id.* at 56a. This 23 percent figure is based on a total conservation pool of 1,049,000 acre-feet. Georgia's acceptance – or initial acceptance, anyway – of this figure was not surprising because the Settlement Agreement itself states, "All Water Supply Agreements shall be based on a share of the conservation storage space in Lake Lanier. Said storage space . . . is estimated to contain 1,049,400 acre-feet of storage after adjustments for sediment deposits. Pet. App. 62a.

on some ethereal "fear" of adverse downstream flow reductions resulting from the Settlement Agreement, Georgia overlooks the court's clear statement, consistent with the record evidence, that "[t]he Agreement does potentially reduce the amount of water flowing downstream" and that "the ACF Basin would thereby be affected by changes to the quantity of water in the Chattahoochee River for as long as twenty years." Pet. App. 12a. Furthermore, although Georgia's petition leaves the impression that the Court's standing conclusion turned solely on an application of *Massachusetts v. EPA*, 549 U.S. 497 (2007), the court, in fact, merely cited that as an "addition[al]" reason to conclude that standing existed. Pet. App. 12a. At the core of the standing analysis, the court, citing *Lujan*, concluded that Alabama and Florida had established imminent injury-in-fact, causation, and redressability. *Id.* at 12a-13a. Applying *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388 (1987), the court also concluded that Alabama and Florida had established prudential standing. Pet. App. 13a.

As for the merits, the D.C. Circuit concluded that the reallocation of water storage contemplated by the Settlement Agreement amounted to a major operational change for which congressional approval was required. Because no water storage at Lake Lanier had ever been allocated by Congress to water supply, the court determined that the appropriate baseline for measuring the impact of the reallocation was zero. *Id.* at 14a-15a. Accordingly, the change that had to be judged under the Water Supply Act was more than 240,000 acre-feet, or more than 22 percent of Lake Lanier's storage capacity. *Id.* Consistent with the Federal Defendants' concession that a 10 percent change would be a major operational

change if it were permanent, the court concluded that a reallocation of 22 percent was major operational change "[o]n its face." *Id.* at 14a.

The circuit court also rejected the Federal Defendants' argument that the technically non-permanent (*i.e.*, 20-year) nature of the reallocation rendered the congressional-approval requirement of the Water Supply Act inapplicable. The court stated that "it is unreasonable to believe that Congress intended to deny the Corps authority to make major operational changes without its assent, yet meant for the Corps to be able to use a loophole to allow these changes as long as they are limited to specific time frames which could theoretically span an infinite period." *Id.* at 16a. The court also focused on the past analyses undertaken by the Corps in the 1989 PAC Report and 2002 Army Legal Memorandum, which signaled the Corps' view that a reallocation of this magnitude would require congressional approval. *Id.* at 13a-14a, 16a.

Based on its conclusion that the reallocation contemplated by the Settlement Agreement would result in major operational change for which congressional approval would be required under the Water Supply Act, the court reversed the district court's approval of the Settlement Agreement.

Neither the Power Customers nor the Federal Defendants sought rehearing in the circuit court. Georgia did, however, file a petition for panel rehearing. In that petition, Georgia contended – notably, for the first time – that Alabama and Florida failed to present the major-operational-change argument in the district court. Jt. Pet. for Panel Rehearing at 4-6. Georgia also contended – again for the first time – that Alabama and

Florida had miscalculated the extent of the reallocation at 23 percent of Lake Lanier's conservation storage pool and that Alabama and Florida had misinterpreted the meaning of "major operational change." *Id.* at 8-9. Georgia admitted its failure to raise these arguments in its merits brief in the circuit court but argued, without citation to any authority, that these omissions were "inevitable" or "understandable." *Id.* at 7. Alabama and Florida countered in their rehearing response not only that Georgia's contentions were incorrect, but also that they were waived under longstanding D.C. Circuit precedent foreclosing arguments raised for the first time on rehearing. Alabama and Florida's Response in Opp. to Jt. Pet. for Panel Rehearing at 3-15. Consistent with its concession at oral argument, Georgia did not claim in its rehearing application, as it does now, that the court had erred in determining that Alabama and Florida had standing to challenge the Settlement Agreement as a major operational change.

Transfer of Case to Multidistrict Litigation Proceedings

Following denial of Georgia's rehearing petition, the Judicial Panel on Multidistrict Litigation ("JPMDL") transferred this case to the United States District Court for the Middle District of Florida. Doc. 223. In that forum, it has been joined with the six other cases raising challenges to the operations of the Corps in the ACF River Basin that had been previously transferred by the JPMDL for consolidated pretrial proceedings, including the aforementioned 1990 Alabama case.[9] The JPMDL

[9] The six cases that had previously been transferred by the JPMDL are as follows: *Alabama v. U.S. Army Corps of Engineers*, Case No. 1:90-1331 (N.D. Ala); *Georgia v. U.S. Army Corps of Engineers*,

designated Judge Paul Magnuson of the United States District Court for the District of Minnesota to preside over these MDL proceedings. Judge Magnuson recently issued a scheduling order indicating that the key issue of the Corps' compliance with applicable federal law in its operations at Lake Lanier will be ready for decision in March 2009.

REASONS FOR DENYING THE WRIT

I. The Court Should Deny Certiorari on the First Question Presented Because It Involves the Factbound Application of Settled Legal Precedent and Because, Particularly in Light of Critical Concessions, the D.C. Circuit Correctly Decided It.

With the first question presented, Georgia seeks, at most, correction of an alleged error in the D.C. Circuit's application of settled law. The standard for when a circuit court may address factual questions not decided by the district court has, as the petition itself acknowledges, been settled for decades. There is not a hint of any conflict of authority among the lower federal courts concerning this issue. Based on an incorrect and incomplete recitation of the record before the circuit court, Georgia argues that the D.C. Circuit misapplied this settled legal standard in the particular circumstances of this case. Even if all of the premises

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Case No. 2:01-26 (N.D. Ga.); *Florida v. U.S. Fish & Wildlife Service*, Case No. 4:06-410 (N.D. Fla.); *Georgia v. U.S. Army Corps of Engineers*, Case No. 1:06-1473 (N.D. Ga.); *City of Columbus v. U.S. Army Corps of Engineers*, Case No. 4:07-cv-125 (M.D. Ga.); *City of Apalachicola v. U.S. Army Corps of Engineers*, Case No. 4:08cv23-RH/WCS (N.D. Fla.).

for Georgia's argument were true – which, as demonstrated herein, they are not – this would be a request for factbound error correction that is not the stuff of which cases before this Court are made. As the Solicitor General correctly notes in his brief, "the decision below does not present a question of substantial importance requiring this Court's review." Fed. Defendants' Br. in Opp. 10. *See Yee v. City of Escondido*, 503 U.S. 519, 536 (1992) ("To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions."). Apparently recognizing how far short it falls from the established grounds for review by this Court, Georgia refers in passing to the potential for summary reversal (without actually asking for such relief), *see* Pet. 17. But there is no basis for any expenditure of this Court's resources on this settled question, nor is there any error (let alone clear error) to be summarily reversed.

Georgia's request for review of its first question rests on a faulty premise. Throughout its petition, Georgia claims that Alabama and Florida never raised the issue of major operational change in the district court. Its argument in that regard is both waived and flatly wrong. As a threshold matter, Georgia waived this argument by failing to raise it in a timely fashion in the D.C. Circuit. It is undisputed that Alabama and Florida addressed the major-operational-change issue in their opening brief in the circuit court. In its answering brief, Georgia never so much as suggested that the issue had not been properly presented to the district court. Only after the circuit court ruled against Georgia on the merits did Georgia first contend in its petition for rehearing that Alabama and Florida had failed to raise

the issue. Under settled precedent – in the D.C. Circuit and elsewhere – an argument raised for the first time on rehearing is waived. *See, e.g., Keating v. FERC*, 927 F.2d 616, 625-26 (D.C. Cir. 1991); *Easley v. Reuss*, 532 F.3d 592, 594 (7th Cir. 2008); *Peter v. Hess Oil Virgin Islands Corp.*, 910 F.2d 1179, 1181 (3rd Cir.1990); *Holley v. Seminole County Sch. Dist.*, 763 F.2d 399, 400-01 (11th Cir.1985).

Even if Georgia had not waived the argument, its contention that Alabama and Florida failed to raise and present evidence on the major-operational-change point is objectively and verifiably false. As detailed above, Alabama and Florida raised the issue in their district court briefs, addressed it at the district court's oral argument, and submitted evidence in support of it. *See supra* at 7-11. Thus, the fundamental premise of Georgia's petition – that the circuit court just reached out and decided an issue that had never been argued in the district court – is wrong.

Waivers and misstatements aside, the petition for review of the first question also comes up short because the circuit court committed no error in deciding the major-operational-change issue. As Georgia acknowledges, a circuit court may rule on factual questions not resolved by the district court when "'the record permits only one resolution of the factual issue.'" Pet. 15 (quoting *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1146 n.3 (2008)). That is just what happened here. Based on the record before it and the critical concessions made by the Federal Defendants, it was entirely consistent with this Court's precedents for the D.C. Circuit to decide that the Settlement Agreement would result in major operational change.

In the D.C. Circuit, the Federal Defendants conceded that the reallocation of ten percent of Lake Lanier's conservation storage pool pursuant to the Settlement Agreement would be major operational change requiring congressional approval under Section 301 of the Water Supply Act if the reallocation were permanent.[10] In part of the D.C. Circuit's decision that Georgia does not challenge in its petition, the court of appeals correctly rejected the Federal Defendants' assertion that the technically non-permanent nature of the reallocation under the Settlement Agreement excused the need for congressional approval. Pet. App. 16a. Having rejected the sole basis on which the Federal Defendants had attempted to evade the requirement of Section 301, the D.C. Circuit was compelled by the Federal Defendants' concession to conclude that the Settlement Agreement violated Section 301.[11]

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[10] Although Georgia attacks the D.C. Circuit for making an "astonishingly simplistic comparison of the percentage of storage that would be shifted to water supply storage if the Settlement Agreement were implemented," Pet. 13, that analysis follows straightaway from the Corps' concession. Furthermore, Alabama and Florida had noted in their opening brief in the circuit court that the Corps viewed the reallocation of storage space to a water supply purpose in and of itself to be an operational change. Appellants' C.A. Blue Br. 37 (citing C.A. App. 330). Georgia (and the Federal Defendants) never disputed that until Georgia petitioned for rehearing in the circuit court and, thus, waived the argument.

[11] Counsel for the Federal Defendants sent a letter to the circuit court several weeks after the oral argument purporting to withdraw the concession as having been made "in error." Judge Silberman, in his concurring opinion, noted this effort to retract the concession, but stated that "the logic of this concession was ineluctable." Pet. App. 24a.

Indeed, the Federal Defendants made a second concession in the D.C. Circuit which, along with the record evidence, left the court with only one possible resolution of the major-operational-change question. At oral argument, the Federal Defendants admitted that no reallocation of this magnitude had ever been undertaken by the Corps without congressional approval. That concession squared with the record evidence, highlighted by the circuit court, that the Corps in the 1989 PAC Report and the 2002 Army Legal Memorandum had taken the view that "operational changes on a similar scale would require Congressional approval." Pet. App. 11a, 13a-14a; *see supra* at 8-10. Because the record before the court of appeals clearly "permit[ted] only one resolution" of the question whether the Settlement Agreement involved major operational change, *Sprint*, 128 S. Ct. at 1146 n.8, that court's decision fits hand-in-glove with this Court's precedents.

As a last-gasp argument in support of its position, Georgia incorrectly claims that the D.C. Circuit's ruling is "decidedly unfair" because Georgia "had no opportunity or need in the district court to build [its] own factual record on the issue." Pet. 11. There is no unfairness here. Georgia's decision not to present anything in response to the evidence put forward by Alabama and Florida was a tactical litigation decision for which Georgia must bear the consequences. Thus, Georgia's criticism of the circuit court for failing "to review or consider any computer modeling results" rings hollow; Georgia had every opportunity to introduce evidence on those points before the district court, but simply failed to do so. Pet. 12-13. What Georgia wants is a "do-over" – a chance to make a record on remand that it did not make the first time around. This Court's

certiorari jurisdiction should not be employed for such a purpose. *See Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The [certiorari] jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.")

Finally, Georgia's assertion that the D.C. Circuit miscalculated the percentage of storage being reallocated under the Settlement Agreement amounts to a classic "bait and switch." In its petition, Georgia contends that the circuit court used the wrong denominator in calculating the reallocation percentage. The D.C. Circuit compared the 240,858 acre-feet being reallocated to the total conservation storage of 1,049,000 acre-feet to reach its 22 percent figure, while Georgia contends that the court should have compared the amount being reallocated against some number equaling the total storage in Lake Lanier.[12] Not only has Georgia waived this argument by failing to address it prior to rehearing in the circuit court, *see supra* at 20, but Georgia also affirmatively indicated its acceptance of the conservation storage pool as the proper denominator for the equation at least twice. First, in the Settlement Agreement itself, Georgia agreed that the conservation storage pool would be the number upon which the agreements arising from the Agreement would be based.

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[12] In its argument, Georgia claims that the total conservation storage space at Lake Lanier exceeds 2.5 million acre-feet, but there is no support for that contention anywhere in the record. Georgia also contends that "[t]he Corps has authoritatively confirmed" that the total storage capacity for project purposes is 1,685,400 acre-feet, but Georgia cites only to the response filed by the Federal Defendants to Georgia's rehearing application in the circuit court. Pet. 13. Like Georgia, the Federal Defendants never contested the correctness of the 22 percent calculation prior to rehearing.

Pet. App. 62a. Second, at oral argument in the D.C. Circuit, Georgia's counsel discussed the percentage figure on which the court ultimately relied without disputing it and, indeed, indicated that the amount of water storage being reallocated under the Agreement was "not a contested issue." Opp. App. 56a, 61a. Georgia's claim that a different denominator should be used in making these calculations, therefore, simply comes too late and provides no basis for granting the writ.[13]

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[13] The Solicitor General includes a discussion in his brief of what an appropriate remedy would be if Georgia were to prevail with its petition. Those issues of remedy, however, have no relevance to the questions presented in the petition. In his discussion of these points, the Solicitor General incorrectly suggests that the D.C. Circuit should have waited until the contracts under the Settlement Agreement were actually executed in order to reach the merits of the major-operational-change issue. Not only did the Federal Defendants fail to raise that point before the D.C. Circuit, *see supra* at 6 n.3, but the argument also flies in the face of settled precedent concerning the appropriate scope of review of a settlement agreement. As the D.C. Circuit recognized, Pet. App. 9a, and the Solicitor General concedes, Fed. Defendants' Br. in Opp. 9, a settlement agreement cannot be approved if it is illegal. Having determined based upon the record that there was no way that the actions of the Federal Defendants under the Settlement Agreement could possibly be legal under the Water Supply Act, the D.C. Circuit correctly found the Agreement to be invalid.

II. This Court Should Deny Certiorari as to the Second Question Presented Because Georgia Expressly Conceded in the D.C. Circuit That Alabama and Florida Have Standing and Because the Question Is Based Upon a Misstatement of the Circuit Court's Holding.

The second question presented does not warrant review because Georgia premises the question on a misstatement of the D.C. Circuit's standing analysis and because the alleged conflict of authority is illusory. The circuit court's decision involved a factbound application of this Court's settled standing jurisprudence as summarized in *Lujan*.

As the Solicitor General recognizes in his brief opposing Georgia's petition, Georgia grossly mischaracterizes the D.C. Circuit's ruling on standing in order to bolster its argument that a certworthy question exists. Contrary to Georgia's suggestion, the circuit court did not ignore the standing analysis set out in *Lujan*. Not even close. In fact, the circuit court cited *Lujan* and expressly stated that each of the three requirements for standing identified in *Lujan*—injury-in-fact, causation, and redressability—had been satisfied. Pet. App. 12a-13a. Ignoring the court's *Lujan* analysis, Georgia contends that the D.C. Circuit's standing conclusion was based entirely on *Massachusetts v. EPA*. But words can only be stretched so far, and Georgia has stretched the D.C. Circuit's words beyond the breaking point. Far from being the sole basis for the circuit court's standing conclusion, the reference to *Massachusetts v. EPA* is identified merely as an "addition[al]" reason – additional, that is, to its traditional *Lujan* analysis – to support the

determination that standing exists. *Id.* at 12a. The D.C. Circuit's fleeting citation to *Massachusetts v. EPA* broke no new ground and merely restated this Court's own words. *Compare Massacusetts v. EPA*, 127 S. Ct. at 1454-55 ("[T]he Commonwealth is entitled to special solicitude in our standing analysis.") *with* Pet. App. 12a ("In addition, the states' quasi-sovereign interests entitles them to special solicitude in standing analysis." (internal quotations omitted)).

Georgia's description of other key aspects of the D.C. Circuit's standing analysis is likewise misleading. Georgia engages in a selective reading of the opinion to bolster its argument that the court based its standing decision only on a view that Alabama and Florida feared downstream flow reductions. In fact, in the sentence immediately following the statement that Alabama and Florida "credibly claim to fear that the proposed reallocation of water storage will result in diminish[ed] [] flow of water reaching the downstream states," *Id.* at 11a-12a (quoting Appellants' Br. at 2), the circuit court stated that "[t]he Agreement does potentially reduce the amount of water flowing downstream, and the ACF Basin would thereby be affected by changes to the quantity of water in the Chattahoochee River for as long as twenty years." Pet. 12a (internal citations omitted). As explained above, this conclusion by the circuit court is entirely consistent with the record evidence. *See supra* at 10-11.[14] In sum, Georgia's description of the D.C.

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[14] In a lengthy footnote, Georgia argues that evidence of diminished downstream flows in Alabama and Florida cannot be considered in the standing analysis without violating the Constitution's command that this Court have original jurisdiction of actions between two States. Pet. 19 n.14. The problem with Georgia's argument is that it fails to recognize that the diminished flows would result from the

Circuit's analysis of standing is a caricature. The reality is that the court applied the analysis of *Lujan* in reaching its sensible determination that standing exists.

When one takes a clear-eyed view of the standing analysis actually employed by the circuit court, the contrived nature of the second question presented by Georgia becomes apparent. This case presents no vehicle to consider "how and to what extent *Massachusetts v. EPA* excuses a state from proving – with evidence commensurate with the stage of the proceeding – the three elements of standing restated by the Court in *Lujan*." Pet. 18. The D.C. Circuit in no way suggested that it had "excuse[d]" Alabama and Florida from proving the three elements of *Lujan*. Georgia's contention that the circuit court "appeared to hold" that "*Massachusetts v. EPA* excuse[s] a state's failure to measure up to the *Lujan* test generally" is simply not true, Pet. 18, and the foundation for Georgia's argument collapses under the weight of its incorrect statement of the court's holding.

Georgia's suggestion of a circuit split cannot withstand scrutiny, in any event. The decision of the Seventh Circuit identified by Georgia – *Citizens Against*

Corps' failure to comply with applicable federal law, not from any dispute about the apportionment of flows between the States. Georgia made the same argument to the Eleventh Circuit in a parallel case, and the Eleventh Circuit rejected it, noting that "Alabama and Florida [were] not attempting to litigate their right to a certain amount of water in the ACF Basin," but were merely "seek[ing] to ensure the Corps' compliance with federal law governing the management of projects in the ACF Basin." *Alabama*, 424 F.3d at 1130; *accord Missouri v. Andrews*, 787 F.2d 270, 278 n.7 (8th Cir. 1986).

Ruining the Environment (CARE) v. EPA, 535 F.3d 670 (7th Cir. 2008) – does not conflict with the D.C. Circuit's decision in this case. The two decisions are entirely consistent in that they both apply *Lujan* to determine whether standing exists. *Id.* at 675-76. Furthermore, the application of *Massachusetts v. EPA* arose in *CARE* in entirely different circumstances. *CARE* involved "an internal conflict between an office and an agency under the executive branch of the same state government" over whether certain permits had been properly issued under the Clean Air Act – an unusual intra-branch dispute in which "standing was clearly going to be an uphill battle." *Id.* at 676. It was not one of the "many cases [in which] a petitioner's standing is self-evident." *Id.* at 675. The Illinois attorney general presented no evidence to support his standing argument, instead claiming that *Massachusetts v. EPA* established standing by itself. *Id.* at 675-76. The Seventh Circuit disagreed that *Massachusetts v. EPA* had such sweeping force. While recognizing that this Court had in *Massachusetts v. EPA* accepted that a State has standing to assert its rights under federal law if the injury is to the State itself, the Seventh Circuit determined that "the alleged injury [was] unclear" because there was no evidence of injury to one arm of the Illinois executive branch vis-à-vis another. *Id.* at 676. That is a long way from what happened in this case, where there is ample evidence in the record supporting the circuit court's standing decision. Thus, there is no conflict between the opinion below and *CARE*.

Far from any conflict of authority, there is actually a great consistency in circuit courts' holdings that downstream states have standing to challenge the Corps of Engineers' compliance with federal law in

operating upstream federal reservoirs. As the Solicitor General notes in his brief, in the parallel case to this one in which Alabama filed suit challenging the legality of the Corps' operations at Buford Dam, *see supra* at 4, the Eleventh Circuit likewise concluded that Alabama and Florida had standing to "seek to ensure the Corps' compliance with federal law governing the management of projects in the ACF Basin, particularly Lake Lanier." *Alabama*, 424 F.3d at 1130; *see also Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1250-56 (11th Cir. 2002) (holding in another parallel matter that Florida could intervene as of right in case filed by Georgia challenging Corps' refusal to reallocate water in Lake Lanier to Georgia). The Eleventh Circuit's decision in that case preceded *Massachusetts v. EPA*. The Eighth Circuit, too, affirmed downstream states' standing to challenge the actions of the Corps without relying on any perceived loosening of the standard for State standing. *See Missouri v. Andrews*, 787 F.2d 270, 276-77 (8th Cir. 1986).

As an additional indication of the thinness of the argument that a circuit split exists, Georgia indiscriminately mentions additional cases whose only apparent relevance is that *Massachusetts v. EPA* is cited somewhere in each case. In *National Association of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1226-28 (D.C. Cir. 2007), the D.C. Circuit went through a lengthy analysis explaining why the plaintiff satisfied the standing requirements in *Lujan*, and then, at the end of that analysis, used a "see also" cite to *Massachusetts v. EPA*. Similarly, the Tenth Circuit in *Utah Division of Forestry, Fire & State Lands v. United States*, 528 F.3d 712, 720-22 (10th Cir. 2008), cited the *Lujan* standard and described in detail the facts justifying the State's

standing in the case. As had the D.C. Circuit in *Clean Air Agencies*, the Tenth Circuit did cite to *Massachusetts v. EPA*, *id.* at 721, but there was nothing in either court's decision to suggest that it had affected the analysis in any way. In essence, Georgia's argument is that the mere citation of *Massachusetts v. EPA* without further discussion proves that there is widespread misunderstanding of the decision that compels certiorari review of it. If that were the standard for certiorari, the supply of cases worthy of review would of course be limitless.[15]

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[15] As part of this creative approach to arguing a circuit split, Georgia also cites three district court decisions to suggest that certiorari review is warranted. Given that *Massachusetts v. EPA* was only decided two years ago, it is not surprising that Georgia could not marshal more circuit court opinions in support of its position, and, to the extent that there is any uncertainty about the meaning of *Massachusetts v. EPA*, the need for further percolation of the issue in the circuit courts is self-evident. Even if the three district court decisions were relevant to considering whether there is a conflict of authority among the circuit courts, the three decisions do not support the claim that there is a certworthy question here. In one of the decisions cited by Georgia, the court discussed *Massachusetts v. EPA* in its analysis of whether the action before the court involved a nonjusticiable political question, not whether any party had standing. *See California v. General Motors Corp.*, 2007 WL 2726871, *10-12 (N.D. Calif. Sept. 17, 2007). In the other two decisions, the circumstances were quite different from those in this case because, unlike here, the courts determined that *Lujan* had not been satisfied, so the argument for standing turned entirely on *Massachusetts v. EPA*. *See Colorado v. Gonzales*, 558 F. Supp. 2d 1158, 1162-64 (D. Colo. 2007); *Louisiana Environmental Action Network v. McDaniel*, 2008 WL 803407, *3 (E.D. La. March 12, 2008). Even if one read the latter two decisions as limiting the application of *Massachusetts v. EPA* to situations where a federal statute accorded a procedural right to a State, Georgia does not cite a single court of appeals as having adopted that view.

As a final matter, Georgia's decision to seek certiorari review on the standing of Alabama and Florida to assert the major-operational-change claim cannot be squared with Georgia's concession in the D.C. Circuit that Alabama and Florida in fact do have standing to assert the claim. *See supra* at 14. Asked point-blank by Judge Silberman, Georgia's counsel expressly "accept[ed]" that Alabama and Florida "have standing to assert a claim to their injury at the State line relating to water flows." Opp. App. 50a. While it is, of course, true that the question of standing can be raised at any point, it is highly anomalous for Georgia to seek this Court's review of a circuit court's holding that it invited.[16]

CONCLUSION

For these reasons, the Court should deny the petition.

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[16] In Georgia's D.C. Circuit briefing, it never suggested that Alabama and Florida lacked standing to raise the major-operational-change issue, instead limiting its argument about standing to a separate legal claim advanced by Alabama and Florida.

Respectfully submitted,

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