No. 08-199

IN THE

Supreme Court of the United States

THE STATE OF GEORGIA,
Petitioner,

v.

THE STATE OF FLORIDA AND THE STATE OF ALABAMA,
Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

At issue in this case is the enforceability of a Settlement Agreement that addresses water supply for millions of Georgians. The Settlement Agreement resolves a complex and long-standing dispute among federal preferred power customers, the Corps of Engineers, and local water supply providers regarding the terms for storage in Lake Lanier. The court of appeals decided the case on a factual issue that had never been addressed by the district court. Worse, as the Solicitor General confirms, the court of appeals' factual finding, upon which the entire decision rests, was objectively and verifiably incorrect. The Respondents contend, however, that such a mistake, even though clearly outcome-determinative, is not worthy of this Court's attention. The State of Georgia disagrees. So clear a departure from accepted appellate practice and so clear an error in fact-finding, in a case of this importance, is worthy of this Court's attention. Consistent with other cases in which the court of appeals has engaged in appellate fact-finding in violation of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court should reverse summarily with instructions to remand the case to the district court for findings of fact.

In addition, there is now an even more clear conflict between the circuits as to whether *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007),

excuses a state from meeting the requirements set out by this Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). The Tenth Circuit has now followed the D.C. Circuit, and not the Seventh Circuit, and allowed a state plaintiff to establish standing with mere allegations of injury. *Wyoming v. United States Bureau of Alcohol, Firearms, and Explosives*, 539 F.3d 1236, 1241 (10th Cir. 2008).

I. First Question Presented: Court of Appeals' Blatant Departure from *Pullman-Standard v. Swint* Warrants Summary Reversal

The first issue is whether the court of appeals should have taken it upon itself to make de novo findings of fact on the dispositive issue – major operational change. All parties agree that the district court did not address the issue and that the court of appeals, in reversing the district court, made its own findings of fact. Brief for the Federal Respondents ("Fed. Brief"), at 5; Brief of State of Alabama and State of Florida ("States' Brief"), at 11, 16. All parties agree that where the district court does not address an issue that the court of appeals deems potentially dispositive, "the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings," with an exception in those rare instances in which "the record permits only one resolution of the factual issue." *Pullman*, 456 U.S. at 291-92; States' Brief 20.

This Court's decision in *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709 (1986), is directly on point. In *Icicle Seafoods,* the court of appeals determined that the district court did not make essential findings of fact. Rather than remanding the case, the court of appeals in *Icicle Seafoods*, as here, took it upon itself to make de novo findings of fact. Even though it was not clear that the court of appeals had even made an incorrect finding of fact,[1] this Court, in an opinion authored by then-Justice Rehnquist, reversed:

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of it could have set them aside on that basis. If it believed that the District Court's factual findings were

[1] *See* 475 U.S. at 715 (Stevens, J., dissenting).

> unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

475 U.S. at 714.

Respondents contend that even if the court of appeals should never have reached out to decide the facts, this case is not worthy of this Court's plenary review on the *Pullman* issue. In those instances in which the court of appeals has violated the *Pullman* rule, however, this Court has summarily vacated the decision of the court of appeals, with instructions to remand the case to the district court or the agency for factual findings. *E.g. INS v. Ventura*, 537 U.S. 12, 13-14 (2002); *Lehman v. Trout*, 465 U.S. 1056 (1984). Here, summary reversal is warranted because the exception to *Pullman* for cases in which the evidence "permits only one resolution of the factual issue" does not apply, for two independently adequate reasons:

1. *Incorrect percentage reallocation.* As the Solicitor General explains, the court of appeals'

factual findings are materially and verifiably incorrect. Fed. Brief 5-7. In its decision, the court of appeals finds that current (pre-settlement) water supply storage constitutes 13.9% of the "total storage capacity" of the reservoir (which the court of appeals says is 1,049,000 acre-feet), and that the Settlement Agreement would shift another 9% of the "total storage capacity" to water supply, for a total of 22.9%. Pet. 25a. This de novo factual finding is the *sole* basis for the court of appeals' reversal of the district court. But, as the Solicitor General explains, and as Alabama and Florida do not refute, the "total storage capacity of Lake Lanier" *is not 1,049,000 acre-feet.* The 1,049,000 figure is the "conservation storage pool," a subset of the "usable storage" of Lake Lanier (which is 1,686,400 acre-feet), which itself is a subset of the total water volume contained in the reservoir (which is over 2.5 million acre-feet). Thus, using the correct figures, the actual shift in storage associated with the Settlement Agreement would be less than 3.8% of total storage volume, or less than 6% of usable storage. Fed. Br. 6.

To their credit, Alabama and Florida do not defend the court of appeals' calculations, but instead raise three waiver arguments. States' Brief, 23-24. First, Alabama and Florida contend that Georgia waived the argument "by failing to address it prior to rehearing in the circuit court." *Id. at* 23. Yet Georgia had no opportunity to correct the court of appeals' erroneous de novo findings on the issue until the court of appeals reached out and

made those findings in its decision. Indeed, a *Pullman* claim, by its very nature, cannot even arise until after the court of appeals has rendered a decision making factual findings that the district court did not address.

Second, Alabama and Florida contend that Georgia invited the error by using the conservation pool figure (1,049,000) in the Settlement Agreement itself. The mistake that the court of appeals made was not in using the wrong figure for the conservation pool (all agree that the size of the conservation pool is 1,049,000 acre feet), however, but in confusing the conservation pool with the total storage capacity of the reservoir (which is not 1,049,000 acre feet, but 2.5 million acre feet, of which 1,685,000 acre feet is usable for project purposes). The court of appeals did not refer to, and presumably did not mean to refer to, the conservation storage pool; instead, it referred to, and presumably meant, the total storage capacity of the reservoir, but in doing so it used the wrong number. Pet. 13a, 14a (using 1,049,000 acre-foot figure for calculation of "total storage," "total current storage," and "storage capacity"). The possibility that the court of appeals did not understand the difference between the conservation pool and the total storage capacity of the reservoir may explain the mistake, but would further confirm the wisdom of the rule prohibiting courts of appeal from attempting to make findings of fact de novo on appeal.

Third, Florida and Alabama contend that counsel for Georgia at oral argument conceded that the amount of water storage being reallocated by the Settlement Agreement. This misses the point entirely. The *amount* of storage covered by the new contracts was not in dispute, but it takes two correct numbers to make a correct percentage. The court of appeals unquestionably erred in selecting the wrong amount for total reservoir storage, and accordingly badly miscalculated the *percentage* of total storage reallocated, and it was this percentage that formed the entire basis of the court of appeals' reversal of the district court's approval of the Settlement Agreement.

In sum, the circuit court's holding is explicitly based upon a plan and clear error of fact that cannot be allowed to stand.

2. *No evidence of impact of reallocation upon operations.* As the Solicitor General cogently explains, the court of appeals made an even more fundamental mistake by "assuming that to reallocate storage at that percentage would require a major operational change at the reservoir." Fed. Brief 6. The issue is not whether the reallocation – whatever the percentage – is "major," but "whether any operational changes involved with the reallocation are major." *Id.* As to this issue, the court of appeals' decision is completely silent. The decision is limited to quantifying the size of the reallocation (which it does incorrectly); there is no

attempt to measure the impact such a reallocation would have upon Corps operations.

Alabama and Florida contend that there was evidence before the district court on the issue of operational change. Yet they argued the opposite in their opening brief before the court of appeals:

> The pertinent inquiry, therefore, is whether the Corps' operational change is "major" under the WSA. *The district court never developed a record on this issue* or addressed Florida and Alabama's contentions that this criterion poses an insurmountable obstacle to approval of the Agreement.

Opening Br. of Appellants, p. 38 (emphasis added). After blaming the district court for not developing an evidentiary record (when it was, in fact, their burden to do so), Florida and Alabama reverse course, contending here that because an evidentiary record *had* been developed by the district court, the court of appeals was authorized to make findings of fact based upon that evidence. This about-face is not persuasive in the least.

The only evidence Alabama and Florida can find relating to operational change is this: In evaluating plans for other reallocations, the Corps had noted in 1989 and in 2002 that such reallocations would involve, on occasion, shifting releases for hydropower generation from peak to

non-peak periods. States' Brief 7-10. This evidence – which the court of appeals did not address – does not include any assessment of whether such operational changes would be a "major" or "minor," and therefore provides absolutely no support for the court of appeals' factual finding the Corps exceeded its authority by making a "major operational change."

3. *Concessions Insufficient.* In the end, Alabama and Florida contend that the evidentiary gaps facing the court of appeals were bridged by "concessions" made by the Department of Justice at the oral argument in this case. These concessions were insufficient to give the court of appeals the authority to make findings of fact in this case for two basic reasons. First, the Department of Justice lawyer merely answered a series of hypothetical question based upon the court of appeals' (ultimately incorrect) calculations on factual matters that had never been presented in the district court, answers that were quickly retracted by the Department of Justice after oral argument in a submission to the court of appeals. Moreover, the other parties aligned with the United States Georgia and Plaintiff SeFPC, at oral argument, explicitly refused to go along with any purported concession. States' Brief 52a, 68a.

Second, the issue under *Pullman* is not whether the factual record *as developed by the court of appeals* is sufficient to support the circuit court's findings of fact, but whether the evidence before *the*

district court permits only one factual conclusion. By relying upon alleged concessions by the Department of Justice at oral argument, Alabama and Florida appear to contend that circuit courts should plug evidentiary holes in a district court record by exacting concessions at oral argument or otherwise developing an *appellate* factual record. To the contrary: The district court, and only the district court, may engage in this kind of fact-finding; the narrow exception recognized by *Pullman* applies only where the evidentiary record, as developed in the district court, requires a certain finding as a matter of law.

This Court has in case after case reversed courts of appeals for making far less aggressive findings of fact, including those that were not so clearly incorrect. *See Icicle Seafoods,* 475 U.S. at 714. Since the court of appeals far exceeded its role by findings of fact on contested issues, the court of appeals' decision must be summarily reversed.

II. Second Question Presented: On Standing, The Petition Should be Granted Because the D. C. Circuit's Decision Conflicts with *Lujan* and the Seventh Circuit

The second issue presented is whether and to what extent *Massachusetts v. EPA* excuses a state from establishing standing with allegations or proof *commensurate with the stage of the proceeding*. *See Lujan,* 504 U.S. at 561. In this case, the court of

appeals accepted Alabama and Florida's *allegations* of standing as sufficient, where *Lujan* would require actual proof, and then cited *Massachusetts v. EPA* for the proposition that the states' quasi-sovereign interests' entitles them to "'special solicitude'" in the standing analysis. Pet. 12a.

Initially, Alabama and Florida's repeated contention that counsel for Georgia conceded the standing issue at oral argument is totally without merit. In a passage that Alabama and Florida do not bring to this Court's attention, the court of appeals specifically asked counsel whether Georgia would "concede that Florida and Alabama have a standing to assert a violation of the agreement based on major structural operational change." Counsel for Georgia replied: "Not in the least, Your Honor. We're not conceding that." States' Brief 48a. There was no concession.

1. The Solicitor General takes the position that the court of appeals followed *Lujan*, but does not even address Georgia's specific argument about *Lujan's* requirement that the elements of standing be established with actual evidence. Instead, the Solicitor General quotes approvingly the circuit court's statement that "'Florida *alleges* various negative environmental impacts from reduced water flow.'" Fed. Brief 11 (emphasis added). The point raised by the Petition is whether, after *Massachusetts v. EPA*, such an *allegation* is

sufficient to establish standing, an issue the Solicitor General does not address.

2. Alabama and Florida come closer to addressing the issue, and argue that Georgia mischaracterizes the court of appeals' decision. It is true, as Alabama and Florida explain, that the court of appeals based its standing conclusion on more than Alabama and Florida's allegations of "fear" of a reduction in downstream flows. But the court still based its holding on allegations of injury, not any kind of evidence. After noting the states' "fear," the court of appeals explained that Florida *had alleged in its complaint* that this diminished flow would cause Florida environmental harm. Pet. 12a. Allegations of injury, like allegations of fear, are insufficient to establish standing. Alabama and Florida do not contend that the court of appeals followed *Lujan* by requiring Alabama and Florida to establish with evidence each of the elements of the *Lujan* test.

3. Respondents state that there is no circuit conflict because *Citizens Against Ruining the Environment (CARE) v. EPA*, 535 F.3d 670 (7th Cir. 2008), is factually distinguishable. *CARE* does present a different fact pattern, but the Seventh Circuit's approach and holding on the standing issue nevertheless is directly contrary to the approach and holding of the D.C. Circuit in this case. In *CARE,* the Seventh Circuit did exactly what the D.C. Circuit should have done here: It

looked beyond the pleadings and determined that Illinois had failed to establish, with evidence, the elements of constitutional standing. *Id.* at 676-77.

4. Since the filing of Georgia's Petition, the Tenth Circuit has joined the D.C. Circuit in citing the "special solicitude" afforded states under *Massachusetts v. EPA* to excuse States from proving their standing with evidence. In *Wyoming v. United States Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 539 F.3d 1236, 1241 (10th Cir. 2008), the Tenth Circuit cited *Massachusetts v. EPA* for the proposition that "the States constitute a special class of plaintiffs for federal jurisdictional purposes." *Id.* In sharp contrast to the Seventh Circuit in *CARE,* and exactly like the D.C. Circuit in this case, the Tenth Circuit held that because "Wyoming *alleges* that it has suffered an injury in fact" and because of "the 'special solitude' the *Massachusetts* Court afforded to states in our standing analysis," Wyoming had Article III standing in the case. *Id.* at 1242 (emphasis added).

5. The conflicting decisions of the Seventh, Tenth, and D.C. Circuits confirm that the lower courts need guidance on how to apply the "special solicitude" accorded states in *Massachusetts v. EPA.* Further, the D.C. Circuit's abandonment of any rigor in its standing jurisprudence warrants review by this Court. Judge Silberman reflected from the bench at oral argument that the only

showing necessary to establish standing is an "identifiable trifle," and, therefore, "all you have to do is say there's some diminution in the water flowing downstream and Alabama and Florida have standing particularly on the recent Supreme Court cases." States' Brief 75a. This sentiment, and the court's holding, conflicts with the analysis and holding of the Seventh Circuit and reflects a fundamental misreading of this Court's decision in *Massachusetts v. EPA*. If the court of appeals' decision is not summarily reversed on the *Pullman* claim, this case provides an appropriate vehicle for addressing the relationship between *Massachusetts v. EPA* and *Lujan*.

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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