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

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PETITION FOR A WRIT OF CERTIORARI

THURBERT E. BAKER
Attorney General
State of Georgia

ROBERT S. BOMAR
ISAAC BYRD
Deputy Attorneys General
State of Georgia

BRUCE PERRIN BROWN *
ROBERT TODD SILLIMAN
JOHN CURTIS ALLEN
McKENNA LONG & ALDRIDGE LLP
303 Peachtree Street, NE
Atlanta, GA 30308
(404) 527-4000
* Counsel of Record

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Section 301 of the Water Supply Act of 1958 grants authority to the United States Army Corps of Engineers to allocate for municipal water supply use storage space in Corps reservoirs that Congress did not originally authorize for water supply use, provided that allocations of storage that would "seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law." 43 U.S.C. § 390b(d).

The questions presented are:

1. If the district court has not addressed the issue, may the court of appeals make factual findings in the first instance on the kind and degree of "operational changes" that the Corps would make to implement certain reservoir storage contracts under the Act, and on the basis of those findings rule on whether implementing those contracts would "involve major structural or operational changes" under the Act?

2. Whether the "special solicitude" accorded states under *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), excuses a state from establishing the elements of standing required under previously established precedent of this Court, including *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)?

PARTIES TO THE PROCEEDING

Petitioner, an appellee in the court below, is the State of Georgia (acting by and through Attorney General Thurbert E. Baker).

Respondents include the States of Alabama and Florida, intervenors in the district court and appellants in the court below. Other parties include the Southeastern Federal Power Customers, Inc.; the United States Army Corps of Engineers, Peter Geren, Secretary of the United States Department of the Army, John Paul Woodley, Assistant Secretary of the Army (Civil Works), Lieutenant General Robert L. Van Antwerp, Commander and Chief of Engineers, United States Army Corps of Engineers, Brigadier General Joseph Schroedel, Division Commander for the South Atlantic Division of the United States Army Corps of Engineers, and Colonel Byron Jorns, District Commander for the Mobile District of the United States Army Corps of Engineers; the Atlanta Regional Commission; DeKalb County, Georgia; Cobb County-Marietta Water Authority; the City of Gainesville, Georgia; and Gwinnett County, Georgia.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner the State of Georgia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A) are reported at 514 F.3d 1316. The court of appeals' denial of petitioner's petition for rehearing is reproduced in the appendix (Pet. App. C). The opinion of the district court (Pet. App. B) is reported at 301 F. Supp. 2d 36.

JURISDICTION

The court of appeals entered its judgment on February 5, 2008. On May 15, 2008, the court of appeals denied petitioner's timely petition for rehearing. The United States is a party to this case, and jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301 of the Water Supply Act of 1958, 43 U.S.C. § 390b(d), states:

> (d) Approval of Congress of modifications of reservoir projects: Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law.

In prescribing the jurisdiction of the United States Supreme Court, 28 U.S.C. § 1251(a) provides:

> (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

STATEMENT

This case concerns the allocation of storage in Lake Sidney Lanier, the primary source of water supply for millions of residents of the greater metropolitan Atlanta and North Georgia area. Lake Lanier is operated by the U.S. Army Corps of Engineers. Located just north of Atlanta, Lake Lanier is formed by Buford Dam on the Chattahoochee River. More than 150 miles downstream, the Chattahoochee River forms, at its western bank, the boundary between Alabama and

Georgia and then, in extreme southwest Georgia, joins the Flint River and crosses into Florida, where it becomes the Apalachicola River. The three rivers make up the Apalachicola-Chattahoochee-Flint River Basin ("the ACF").

The Corps has operated Lake Lanier for water supply and hydroelectric power generation since it was built in the mid-1950s. Power generated by Buford Dam is marketed by the Southeastern Power Administration to "preferred" power customers, including those represented by the original plaintiff in this case, the Southeastern Federal Power Customers, Inc. ("the Power Customers"). The cost of the power includes charges assessed by the Corps for reservoir storage, which in turn is driven by the percentage of reservoir storage dedicated for hydropower production. The cost of reservoir storage allocated to hydropower production is offset by the amount the Corps receives from other users of the reservoir, including a group of local governments and water utilities that are referred to in this litigation as the Water Supply Providers.

In 2000, the Power Customers filed this case against the Corps in the district court, complaining that the rates the Corps was charging the Power Customers at Lake Lanier were too high because the Corps had failed to allocate sufficient costs to the Water Supply Providers for their water supply use. Shortly after the lawsuit was filed, the Power Customers and the Corps obtained a stay of the case for the purpose of pursuing mediation. The State of Georgia and the Water Supply Providers

immediately moved to intervene and eventually joined the mediation.

After over a year of intense negotiation, the parties to the mediation reached a detailed settlement ("the Settlement Agreement"). (Pet. App. E). The Settlement Agreement provides for the Corps to enter into new water supply storage contracts with the Water Supply Providers and to credit the increased revenues from the new contracts against hydroelectric power rates.[1] The Settlement Agreement provides that the Water Supply Providers had the responsibility "to obtain in accordance with state laws and regulations all permits needed for withdrawal of waters of the State of Georgia." (Pet. App. 62a.)

As the district court found, the States of Alabama and Florida "were aware of the mediation but made no effort to participate." (Pet. App. 31a.) Florida and Alabama thus were not parties to the Settlement Agreement, and the Settlement Agreement does not bind Florida or Alabama, or impose any obligations upon either of them, in any way. Further, the uncontradicted evidence showed that the Settlement Agreement, even by the year 2013, would have at most a "nearly imperceptible" impact on the flows at the Florida state line. (C.A.

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[1] The full implementation of the Settlement Agreement and the execution of the new water storage contracts was expressly contingent upon the completion by the Corps of an appropriate analysis of the contracts as required by the National Environmental Policy Act ("NEPA"). (Pet. App. 60a, 76a-77a.)

1167.) There is no evidence describing any injury that this minute reduction in flows would have upon Florida or Alabama.

Florida and Alabama nevertheless moved to intervene in the case below to challenge the Settlement Agreement. The district court allowed Florida and Alabama to intervene and to submit evidence and argument on the issue of whether he should approve the Settlement Agreement. After extensive briefing and oral argument, the district court rejected Florida and Alabama's challenges to the Settlement Agreement under the Flood Control Act, NEPA, the Water Supply Act, other federal statutes, and internal Corps regulations. (Pet. App. 39a-41a.)

This petition concerns only the district court's rejection of Alabama and Florida's challenges to the Settlement Agreement under the Water Supply Act of 1958. The Water Supply Act authorizes the Corps, without additional congressional action, to modify a previously authorized project "to include" water supply storage unless such storage (1) would "seriously affect the purposes for which the project was authorized, surveyed, planned or constructed," or (2) would "involve major structural or operational changes."[2] In the district court, Alabama and

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[2] The settling parties decided jointly to rely upon the Water Supply Act as the source of authority for the Settlement Agreement. While all of the settling parties agreed that the Water Supply Act provides sufficient authority, not all parties believe that it is the exclusive (or necessary) source of authority for water storage contracts like those created under the

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Florida—though professing no interest in the generation of hydroelectric power at Lake Lanier—argued that the Settlement Agreement violated the first part of the Water Supply Act because, they alleged, the shift in reservoir storage from hydroelectric power to water supply storage would "seriously affect" the generation of hydroelectric power, one of the authorized purposes of the reservoir. The district court rejected Alabama and Florida's claim relating to the impact on hydroelectric power, a holding that was not disturbed on appeal.

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Settlement Agreement. Georgia believes that Congress authorized the Corps to include water supply storage in Lake Lanier when it passed the Rivers and Harbors Acts of 1945, Pub. L. No. 79-14, and 1946, Pub. L. No. 79-525, the organic legislation for Lake Lanier. Other parties to the Settlement Agreement, most notably the Power Customers, do not agree that the 1945 and 1946 Acts provide sufficient authority for the Settlement Agreement and therefore opposed relying solely upon them. All of the settling parties agree, however, that the Water Supply Act provides a general, supplemental authority to include storage for water supply as a project purpose in any existing project, even if the project was not originally planned and constructed for that purpose, and, therefore, that the Corps could enter into the Settlement Agreement without the parties or the courts having decided whether Lake Lanier was originally planned and constructed for water supply. The Settlement Agreement expressly reserves the right of Georgia and the Water Supply Provders to litigate elsewhere the Corps' authority to reallocate storage to water supply under the 1945 and 1946 Acts. (Pet. App. 78a.)

As Alabama and Florida have conceded, the district court did not address the issue that would become dispositive on appeal: Whether the Settlement Agreement violated the second part of the Water Supply Act because it would require the Corps to make "major structural or operational changes." The district court did not address the operational[3] change issue because Alabama and Florida failed to raise it.[4] There is nothing in the district court record describing the changes that the Corps would make to its operations to implement the Settlement Agreement or shedding light on whether such an operational change would be "major."

The United States Court of Appeals for the District of Columbia Circuit reversed, reaching the issue the district court did not address and finding that the proposed storage contracts would in fact result in major changes to the Corps' operation of

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[3] There is no claim that the Settlement Agreement would require "structural" changes to the reservoir.

[4] In fact, the words "operational change" do not even appear in Alabama's briefs or in Florida's principal brief in the district court. *See* Doc. 83 (Alabama's August 12, 2003 brief); Doc. 147 (Alabama's November 17, 2003 brief); Doc. 88 (Florida's September 15, 2003 brief). Alabama went so far as to excise references to "major operational change" when it quoted what it believed to be the relevant portions of the Water Supply Act. (Doc. 83, at 17.) Florida did quote the relevant statutory language in a supplemental brief, Doc. 149 at 21-24, but in support of a different legal claim—that the Settlement Agreement violated an internal Corps regulation—an argument summarily rejected by the district court and not advanced by Florida on appeal.

Lake Lanier. Judge Rogers, in an opinion joined by Judge Kavanaugh, wrote that Florida and Alabama had standing to challenge the Agreement insofar as it constituted a major operational change. Citing Alabama and Florida's appellate brief, Judge Rogers found that Alabama and Florida "credibly claim to fear" that the proposed reallocation of water storage would result in diminished flow of water reaching the downstream states, and Florida "alleged various negative environmental impacts from reduced water flow." (Pet. App. 11a-12a.)

On the merits, the court of appeals did not address or describe the operational changes that the Corps would need to make to implement the Settlement Agreement. Instead, based upon its own calculations (which were incorrect, *see infra* at 13-14), the court of appeals concluded that reallocating more than twenty-two percent of Lake Lanier's total storage capacity "constitutes the type of major operational change referenced by the WSA."[5] (Pet. App. 14a.) The court of appeals also found that a major operational change would occur as a result of the Settlement Agreement "because there is less flow through as a result of increased water storage for

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[5] The court of appeals relied heavily on its conclusion that the Corps' position in this case on operational change was inconsistent with statements the Corps had made on other occasions. (Pet. App. 17a.) These other statements were distinguishable; more to the point, the issue is not whether the Corps has taken consistent positions, but whether the position the Corps is taking in this case is the correct one—an issue not addressed by the district court or in any meaningful way by the court of appeals.

local use." (Pet. App. 16a.) The court of appeals did not cite any evidence supporting this factual finding. *Id.* There is no evidence in the record quantifying the reduction in "flow through" or assessing what operational changes such a reduction in "flow through" would entail.[6]

In a petition for panel rehearing, the State of Georgia and the Water Supply Providers, citing *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982), urged the court of appeals to remand the case to the district court so that court could make findings of fact on the operational change issue in the first instance. The Corps, in its response to the petition for panel rehearing, agreed with Georgia and the Water Supply Providers that the court of appeals' calculations were in error, but urged the court of appeals simply to affirm the district court ruling because Alabama and Florida had failed to carry their burden of demonstrating that the Settlement Agreement would result in a major operational change.

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[6] The Panel Opinion, having concluded that the Settlement Agreement violated the "major structural or operational changes" part of the Water Supply Act, stated that it had "no occasion to consider whether Alabama and Florida would have standing to challenge the Agreement as 'seriously affect[ing]' the originally Congressionally authorized purposes of Lake Lanier." (Pet. App. 11a n.2.) Judge Silberman, who concurred in the judgment, concluded that Florida and Alabama did not have standing to challenge the Agreement as having a serious affect on hydroelectric power because the "two states have not identified any cognizable injury attributable to this claim." (Pet. App. 21a.)

The court denied the petition for a panel rehearing without comment. (Pet. App. 43a.)

REASONS FOR GRANTING THE PETITION

I. The Petition Should Be Granted Because the Court of Appeals Clearly Departed from the Accepted Role of a Court of Appeals By Making De Novo Findings of Fact on an Outcome-Determinative Issue That the District Court Did Not Address

The court of appeals reversed the district court's approval of the Settlement Agreement based upon the court of appeals' de novo findings of fact on an issue that the district court did not address: Whether the Corps, to implement the Settlement Agreement, would have to make "major structural or operational changes" under the Water Supply Act of 1958. In the district court, Alabama and Florida did not argue that the Settlement Agreement would involve "major structural or operational changes," instead opting to argue that the Settlement would "seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed" under the Act. As a result, there is no evidence in the record to identify the specific operational changes that would be required to implement the Settlement Agreement—let alone any evidence shedding any light upon whether such changes are "major."

Given this state of the record, the court of appeals had two options. The most obvious (and appropriate) resolution would be to affirm the judgment of the district court because Alabama and Florida (a) had not raised the argument below[7] or (b) had plainly failed to meet their burden of proving that the Corps had violated the law. The other arguably acceptable resolution would be to remand the case to the district court for factual findings necessary to resolve the new issue raised on appeal.

The court of appeals instead chose a third option: to take it upon itself to make de novo findings of fact on the issue. This was decidedly unfair to the settling parties, who had no opportunity or need in the district court to build their own factual record on the issue.

Worse, whether a reallocation of storage in a large federal reservoir would result in major operational changes is an extremely fact-bound and technical question. To make a proper determination of this issue, the Corps, clearly more accustomed to making such assessments than the court of appeals, would, among other things, need to review computer simulations of reservoir operations.[8] The computer

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[7] *See Grant v. United States Air Force,* 197 F.3d 539, 542 (D.C. Cir. 1999) ("Absent 'exceptional circumstances,' the court of appeals is not a forum in which a litigant can present legal theories that it neglected to raise in a timely manner in proceedings below.").

[8] According to the Corps' "Scoping Report" prepared in connection with the preparation of the Environmental Impact Statement for the Settlement Agreement: "Conducting the EIS

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model that the Corps uses in analyzing its operations in the ACF Basin was developed by the Corps' Hydrologic Engineer Center in Davis, California and, with input from the States of Alabama, Florida, and Georgia, tailored specifically to the ACF.[9] The Corps and the three States have used this model (the current version of which is called "HEC-5 (Simulation of Flood Control and Conservation Systems)") extensively in interstate water allocation negotiations and in litigation.[10] There are no Corps HEC-5 simulations in the record showing what operational changes the Corps would make to implement the Settlement Agreement.

The court of appeals made none of the calculations necessary to determine what operational changes the Corps would make to

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will require using a number of models to simulate the effects of the interim storage contracts in the settlement agreement on reservoir operations, project purposes, and socioeconomic and environmental resources." U.S. Army Corps of Engineers, Scoping Report: Environmental Impact Statement-Proposed Interim Water Storage Contracts Lake Sidney Lanier, Buford Dam, Georgia (January 2007).

[9] *See* Declaration of Harold F. Reheis (C.A. App. 1478); Declaration of Dr. George McMahon (C.A. App. 1164).

[10] The only HEC-5 modeling in the record of this case was submitted by the State of Georgia and the Water Supply Providers with two expert declarations. These modeling results measure the impact the Settlement Agreement would have upon Alabama and Florida, a factual issue germane to the standing issue discussed below.

implement the Settlement Agreement, let alone consider the host of factual and policy issues that would have an impact on the Corps' operations. The court of appeals did not review or consider any computer modeling results or expert testimony about what operational changes might be expected.

Instead, the court of appeals made an astonishingly simplistic comparison of the percentage of storage that would be shifted to water supply storage if the Settlement Agreement were implemented. Focusing exclusively on the size of the reallocation, the court of appeals found that "the reallocation constitutes more than twenty-two percent (22%) of the total storage space in Lake Lanier and approximately nine percent (9%) more of the total storage space than was being allocated for local use in 2002." The court of appeals then concluded that, "on its face," such a reallocation constituted the type of major operational change reference by the WSA. (Pet. App. 14a.)

As might be expected from such ad hoc appellate fact-finding, the court of appeals' numbers are just wrong. Based on information available to Georgia, the "total storage space in Lake Lanier" is in excess of 2.5 million acre-feet, more than double the figure that court of appeals used in its calculations. The Corps has authoritatively confirmed[11] that even the total storage capacity available for project purposes is 1,685,400 acre-feet,

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[11] Federal Appellees' Response to Petition for Panel Rehearing at 4-5.

well in excess of the 1,049,400 acre-feet figure that the court of appeals used.[12] Thus, the proposed reallocation would be only 9% of the total storage capacity of Lake Lanier and 14.28% of the total storage space available for project purposes. This constitutes an increase of just 3% more of the total storage capacity, and 5% more of the capacity allocated to authorized purposes, than was being used in 2002 (which the court viewed as a status quo baseline). Further, even if the court of appeals had correctly quantified the shift in storage, there was no evidence or analysis of how such a shift would change Corps operations.

The point, however, is not that the court of appeals made a factual mistake or even that it did not appreciate the complexity of the factual issues that it was trying to resolve. The point here is that the court of appeals had no business addressing these factual issues in the first place. By making these factual findings on appeal, the court of appeals not only ignored the role of the district court, it deprived the settling parties the opportunity to present, in an orderly and systematic fashion, the hard data and expert testimony to support their position and deprived the district court of the opportunity to make careful, on the record findings of fact that could then be reviewed, with appropriate deference, by the court of appeals.

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[12] The capacity of Lake Lanier's conservation storage pool is 1,049,400 acre-feet. This apparently is the number that the court of appeals was referencing.

The court of appeals' decision to make its own factual findings in the first instance is in clear conflict with established precedent of this Court. As the Court has recognized repeatedly, "factfinding is the basic responsibility of district courts, rather than appellate courts" and the courts of appeal should not resolve "in the first instance [a] factual dispute which has not been considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450 (1974). As the Court held in *Pullman-Standard v. Swint*: "When an appellate court discerns that a district court has failed to make a factual finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." 456 U.S. at 291-92.

As recently as earlier this Term, the Court reversed the United States Court of Appeals for the Tenth Circuit and directed a remand to the district court because the Tenth Circuit did exactly what the court of appeals did in this case: It assessed for itself factual issues not addressed in the court below. *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140, 1146 (2008). The Court quoted the above rule that it had announced in *Swint* and stated, "The only exception to this rule is when 'the record permits only one resolution of the factual issue.'" *Sprint,* 128 S.Ct. at 1146 n.3 (quoting *Swint*, 456 U.S. at 292). *See also* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 52.12 (3d ed. 1999) ("When the trial court completely fails to make the necessary findings of fact, or fails to make findings on a material issue, the appellate court is entitled to

vacate the judgment and remand to the district court so that appropriate findings may be made.").

When a court of appeals commits clear error by making independent findings of fact that were not developed in the district court, an efficient and fair disposition that this Court has employed in other cases is to summarily vacate the appellate court's decision with instructions to remand the case to the district court for further findings of fact. *See Lehman v. Trout*, 465 U.S. 1056 (1984) (remanding to the court of appeals, with instructions to remand to the district court for additional findings of fact in light of the court of appeals' conclusions of law); *INS v. Ventura*, 537 U.S. 12, 13-14 (2002) (vacating decision of the court of appeals after circuit court ruled on an alternative claim not considered by the administrative agency).

Lake Lanier is the major source for water supply for millions of Georgians. How the storage capacity of Lake Lanier is to be allocated between conflicting interests is an issue of vital importance to the State of Georgia, the Water Supply Providers, the Power Customers, and the Corps. The Settlement Agreement is a mechanism for resolving all of these conflicting interests. Alabama and Florida had a full and fair opportunity to litigate in the district court all of their arguments against the Settlement Agreement. Nevertheless, they failed to argue or present evidence on the operational change issue. It was beyond the authority of the court of appeals to reach for and decide issues of fact on the operational change issue when that issue was not litigated in the district court. If the district court

erred in not ruling on the operational change issue, then, at the very least, the court of appeals' decision should be reversed with instructions to remand to the district court for trial on that issue.

If this case did not also present the standing issue that is independently worthy of this court's consideration, it would be appropriate for the Court to grant the petition for the purpose of vacating summarily the judgment of the court of appeals.

II. The Petition Should Be Granted to Resolve Whether and to What Extent *Massachusetts v. EPA* Excuses a State from Establishing the "Irreducible Constitutional Minimum of Standing" Set Forth in Prior Cases Such as *Lujan v. Defenders of Wildlife.*

As explained above, the Settlement Agreement does not impose any obligations on Florida or Alabama and, even by 2013, would have at most a "nearly imperceptible" impact upon flows at the state lines. The court of appeals nevertheless concluded that Florida and Alabama had standing because they "credibly claim to fear" that the proposed reallocation would reduce flows downstream, and Florida had "*alleged* various negative environmental impacts from reduced water flow." (Pet. App. 11a-12a.) As if recognizing that its own analysis fell short of showing that Florida and Alabama had Article III standing, the court of appeals concluded: "In addition, the states' quasi-sovereign interests entitled them to 'special

solicitude' in standing analysis. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455 (2007)." (Pet. App. 12a.)

In contrast to at least one other court of appeals decision, discussed below, the decision in this case reflects the belief that, after *Massachusetts v. EPA*, standing is no longer important to the United States Supreme Court in big federal agency cases. At oral argument, Judge Silberman reflected on this apparent relaxation of standing requirements, stating that the only showing necessary 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." Transcript of Oral Argument, 72.

This case gives the Court the clear opportunity to address 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 v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992): (1) injury in fact to a legally protected interest that is both "concrete and particularized" and "actual or imminent," not "conjectural" or "hypothetical"; (2) a causal connection between the injury and the challenged action of the defendant; and (3) that the injury can be redressed by a favorable decision from the court. Does *Massachusetts v. EPA* excuse a state's failure to measure up to the *Lujan* test generally, as the court of appeals appeared to hold? Or, in contrast to the court of appeals' decision in this case, does

Massachusetts v. EPA require the same application of the *Lujan* test, but with a special recognition of the unique ways in which federal action may cause actual injury to the sovereign and quasi-sovereign interests of the states?

This case presents an excellent vehicle for addressing this issue because the Court's decision on the issue is outcome determinative in this case. Florida and Alabama clearly failed to pass the *Lujan* test because they did not prove standing commensurate with the stage of the proceedings. Even if their allegations of injury would allow them to survive a motion to dismiss, under *Lujan*, to obtain judgment on the merits, Florida and Alabama's allegations of injury resulting from the Corps' conduct had to be "'supported adequately by the evidence adduced at trial.'" *Lujan,* 504 U.S. at 561 (quoting *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 115, n. 31 (1979)). Instead of examining the evidentiary record for proof of injury, however, the court of appeals relied exclusively upon Florida and Alabama's allegations[13] of "fear" of reduced downstream flows and allegations of "various negative environmental impacts."[14]

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[13] For example, in support of its erroneous conclusion that the Settlement Agreement would result in reduced downstream flows, the court of appeals cites only to an introductory paragraph in Alabama and Florida's appellate brief, which itself cites to no supporting facts. (Pet. App. 11a-12a.)

[14] In addition to this obvious conflict with *Lujan*'s requirement that the plaintiff support allegations of standing with actual evidence, the uncritical acceptance by the court of appeals of

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This issue is further ripe for this Court's resolution because it has already generated conflict in the court of appeals and the district courts. In a case directly contrary to the court of appeals'

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Florida and Alabama's contention that a "diminished flow" of water at the state line is sufficient to establish standing confuses the respective roles of the Corps, the lower federal courts, and this Court in the equitable apportionment of water between the states. How the waters of the ACF should be apportioned between the three states is a question that only this Court, and not the lower courts, can answer in the exercise of its original and exclusive jurisdiction of "all controversies between two or more states." 28 U.S.C. § 1251. *See Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992); *Colorado v. New Mexico*, 459 U.S. 172, 183 (1982) ("Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use water of an interstate stream."). Therefore, whether "diminished flows" are causing cognizable injuries to Florida's or Alabama's right to an equitable share of water is an issue that only this Court can decide.

There does not, therefore, seem to be any circumstance in which the allegation of "diminished flow" could form the basis for the invocation of Article III jurisdiction in the district court because only this Court may make the factual findings necessary to determine whether Alabama or Florida has established the touchstone of Article III standing—the "invasion of a legally protectable interest." *Lujan*, 504 U.S. at 561. Or, to put it another way: Because there has been no equitable apportionment of the ACF, it is just as likely that Florida and Alabama, even with "diminished flow" resulting from the Settlement Agreement, are receiving more than their fair share of the water according to principles of equitable apportionment, and, therefore, are suffering no injury to their legally protectable interests.

decision in this case, the Seventh Circuit recently concluded that *Massachusetts v. EPA* did not excuse the State of Illinois' failure to present evidence, in the form of supporting declarations in the record, supporting the alleged injury to Illinois. *Citizens Against Ruining the Environment (CARE) v. EPA*, 2008 WL 2877516 (7th Cir. July 28, 2008). In *CARE*, Illinois and others brought a direct appeal from the EPA's failure to object to certain operating permits under the Clean Air Act. In support of its standing argument, Illinois relied upon *Massachusetts v. EPA* and cited the opinion of the court of appeals in this case. Reaching a decision directly contrary to the decision below, the Seventh Circuit applied *Lujan's* holding that the party seeking to invoke federal court jurisdiction had the burden of alleging or proving standing commensurate with the stage of the proceeding. Like Alabama and Florida in this case, Illinois in *CARE* relied on the allegations of injury contained in its brief. Unlike the court of appeals in this case, the Seventh Circuit flatly rejected Illinois' standing to challenge the EPA's decision.

Also contrary to the court of appeals' decision in this case, district courts in Colorado, Louisiana, and California have rejected states' reliance on *Massachusetts v. EPA* where, as here, there was no Act of Congress granting the state the procedural right to protect its interests. In *Colorado v. Gonzales*, 2008 WL 2788603 (D. Colo., Sept. 21, 2007), the district court captured this line of reasoning as follows:

> In addressing the respondents' challenge to the petitioners' standing, the Supreme Court [in *Massachusetts v. EPA*] recognized that a litigant to whom Congress has granted a procedural right to protect his interest, such as the right to challenge agency action unlawfully withheld under Section 7607(b)(1) of the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, can assert that right without meeting all the general standards for redressability and immediacy. . . . Thus, the Supreme Court's redressability analysis in Massachusetts is of limited applicability in this case where no comparable procedural right to protect Plaintiff's interest is present.

Id. at *5. *See also Louisiana Environmental Action Network v. McDaniel,* 2008 WL 803407 (E.D. La., March 12, 2008) (distinguishing *Massachusetts v. EPA* because, inter alia, plaintiff did not seek to vindicate procedural rights that protect against "unexamined threats of increased risks"); *California v. General Motors Corp.*, 2007 WL 2726871 (N.D. Cal., Sept. 17, 2007) (declining to grant standing to a state, based on the reasoning in *Massachusetts*, in a tort action involving global warming).

Further confirming the need for authoritative guidance, many other courts have cited *Massachusetts v. EPA* without any analysis as to why a state should be granted special consideration or how such special consideration should influence

the application of other standing factors. *See National Association of Clean Air Agencies v. EPA*, 489 F.3d 1221 (D.C. Cir. 2007) (citing without analysis *Massachusetts v. EPA* in support of holding that states had standing in the case). The court in *Utah Division of Forestry, Fire, and State Lands v. U.S.*, 528 F.3d 712, 721 (10th Cir. 2008), without analysis, cited *Massachusetts v. EPA* in granting the state standing to pursue a quiet title action under state law.

The importance and timeliness of this issue is further reflected in the literature, which has echoed the need for the Court to address more precisely the interplay between *Lujan* and *Massachusetts v. EPA*.[15] One critical commentator stated that, in *Massachusetts v. EPA*, the Court appeared to give, "for the first time, greater rights to states than ordinary citizens," but also "failed to explain to what extent or when states are entitled to more lenient standing." Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for*

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[15] *See* Amy Wildermuth, *Why State Standing in Massachusetts v. EPA Matters*, 27 J. LAND RESOURCES & ENVTL. LAW 273 (2007); Jonathon H. Adler, *Warming up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63 (2007); Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. IN BRIEF 73 (2007); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise* (2007), http://ssrn.com/abstract=1008906; Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking Ground on Issues Other Than Global Warming*, 102 NW. U.L. REV. COLLOQUY 1 (2007).

States, 48 WM. & MARY L. REV. 1701, 1704 (2007-2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thurbert E. Baker
Attorney General
Robert S. Bomar
Isaac Byrd
Deputy Attorneys General
State of Georgia
Attorney General's Office
40 Capitol Square, SW
Atlanta, GA 30334
(404) 656-3383

Bruce P. Brown*
R. Todd Silliman
John C. Allen
McKenna Long & Aldridge, LLP
303 Peachtree Street, N.E.
Suite 5300
Atlanta, Georgia 30308
(404) 527-4000
*Counsel of Record
Counsel for the State of Georgia

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