No. 10- 10-196 AUG 5 - 2010

IN THE
Supreme Court of the United States

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, and FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT; CAROL WEHLE, Executive Director; UNITED STATES; UNITED STATES SUGAR CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID G. GUEST
MONICA K. REIMER
EARTHJUSTICE
P.O. Box 1329
Tallahassee, FL 32302
(850) 681-0031

JOHN E. CHILDE
150 Indian Mound Trail D
Tavernier, FL 33070
(305) 712-0172

SEAN H. DONAHUE
Counsel of Record
DONAHUE & GOLDBERG, LLP
2000 L St., NW, Ste 808
Washington, DC 20036
(202) 277-7085
sean@donahuegoldberg.com

DAVID. T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
(212) 334-8813

Attorneys for Petitioners

(Additional Counsel for Petitioners Listed on Inside Cover)

DAVID REINER
REINER & REINER, PA
9100 S. Dadeland Blvd.
Suite 901
Miami, FL 33156
(305) 670-8282

QUESTION PRESENTED

The Clean Water Act prohibits "the discharge of any pollutant by any person" without a permit issued pursuant to specified provisions of the Act, 33 U.S.C. 1311(a), and defines "the discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," *id.* 1362(12). The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." *Id.* 1362(7).

The question presented, discussed but left undecided in *South Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians of Florida*, 541 U.S. 95 (2005), is whether all waters of the United States may be treated as a "unitary" whole for purposes of the Act's provisions requiring permits for point source discharges, so that transferring pollutants from one distinct water body to another – in this case, pumping contaminated water from drainage canals into an ecologically sensitive lake used for drinking water – does not constitute an "addition" of the pollutants to navigable waters and therefore does not require a permit.

PARTIES TO THE PROCEEDING

Petitioners are Friends of the Everglades, Florida Wildlife Federation, and Fishermen Against Destruction of the Environment. All three petitioners were plaintiffs in the United States District Court for the Southern District of Florida and were appellees before the United States Court of Appeals for the Eleventh Circuit. Friends of the Everglades and Florida Wildlife Federation were also cross-appellants in the Eleventh Circuit.

The Miccosukee Tribe of Indians of Florida was an intervenor in support of plaintiffs in the district court and an appellee and cross-appellant in the court of appeals.

Respondent South Florida Water Management District, was a defendant in the district court, and appellant and cross-appellee in the court of appeals. Carol Wehle, its Executive Director, was, in her official capacity, a defendant in the district court, and an appellant in the court of appeals. The United States Sugar Corporation and the United States of America were intervenors in support of defendants in the district court, and appellants in the court of appeals.

RULE 29.6 STATEMENT

None of petitioners has a parent company, and none has issued stock.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases:

Statutes:

Title 33, U.S.C. 33:

Regulations:

OPINIONS BELOW

The opinion of the court of appeals is published at 570 F.3d 1210 and reproduced in the appendix at 1a-38a. The court of appeals' unpublished order denying rehearing en banc is reproduced at 203a-204a. The district court's unreported opinion is reproduced at 53a-202a, and its unreported remedial order is reproduced at 41a-51a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331 and 33 U.S.C. 1365(a). The court of appeals had jurisdiction under 28 U.S.C. 1291.

The court of appeals' judgment was entered on June 4, 2009. The court denied petitions for rehearing en banc on May 7, 2010.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Clean Water Act (Act or CWA) prohibits "the discharge of any pollutant by any person" except as provided in the Act, 33 U.S.C. 1311(a), and defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source," *id.* 1362(12)(A). Other pertinent provisions of the Act are set forth in the appendix at 205a-212a.

STATEMENT OF THE CASE

A. The Clean Water Act. Congress enacted the Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a)(1), the "'national goal' being to achieve 'water quality which provides for

the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water,'" *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370, 384 (2006) (quoting 33 U.S.C. 1251(a)(2)). The Act's "comprehensive program for controlling and abating water pollution," *Train v. City of New York*, 420 U.S. 35, 37 (1975), applicable to all "navigable waters," broadly defined to mean "the waters of the United States, including the territorial seas," 33 U.S.C. 1362(7) – combines a system of permit requirements and technology-based controls for "point sources," with a system of water quality standards for individual water bodies based upon their biological characteristics and designated uses. See *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 704 (1994).

The Act makes unlawful "the discharge of any pollutant by any person," 33 U.S.C. 1311(a), except in compliance with specified provisions of the Act, including Sections 402 and 404. The National Pollutant Discharge Elimination System (NPDES) permit program set forth in Section 402, 33 U.S.C. 1342, is the "primary means" for protecting and improving water quality within the "comprehensive regulatory regime" established by Congress. *Arkansas v. Oklahoma*, 503 U.S. 91, 99, 101 (1992). NPDES permits, issued by states or EPA, set forth the conditions for the discharge of pollutants consistent with various other applicable provisions of the Act, and must be calibrated to "water quality standards" applicable to the specific water body into which the source discharges. See 33 U.S.C. 1311(b)(1)(C), 1312(a), 1313(a)-(c); *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981); *EPA* v. *California*, 426 U.S. 200, 204-205 (1976).

B. The Disputed Discharges. Respondent South Florida Water Management District's three large pumping stations – known as S-2, S-3, and S-4 – convey very large volumes of water from canals south of Lake Okeechobee, through large pipes, against gravity and through a dike, into the Lake. See Pet. App. 84a-87a.[1] "The flow rate from just one of the pump stations operating at full capacity" is "comparable to the flow of a medium-sized Florida river." *Id.* at 86a. The pump stations convey phosphorous and numerous other pollutants – in what the court below called a "loathsome concoction of chemical contaminants," *id.* at 4a – into the Lake, which is a drinking water reservoir and of great importance to South Florida's natural environment.

In 2002, petitioners Friends of the Everglades, Fishermen Against Destruction of the Environment, and Florida Wildlife Federation filed suit pursuant to the citizen enforcement provisions of the Act, 33 U.S.C. 1365(a), asserting that the District's release of pollutants without a NPDES permit violated the Act.[2] The District defended on the basis, *inter alia*, that the Act's prohibition should not apply because its pump stations were not themselves the origin of pollutants, but instead merely transferred already-polluted water.

---

[1] The "central feature of the Everglades ecosystem," the Lake, 730 square miles in area, "suppl[ies] water to the urban, agricultural and natural systems throughout the southern Florida peninsula." Pet. App. 70a, 72a.

[2] The Miccosukee Tribe of Indians of Florida intervened as a plaintiff; the United States Sugar Corporation and the United States intervened as defendants.

C. The *Miccosukee* Case. The district court entered a stay pending this Court's ruling in another enforcement suit under the Act, involving essentially the same parties and another South Florida pumping station known as "S-9," in which the Eleventh Circuit had ruled that the District was obligated to obtain a NPDES permit for the discharges. 280 F.3d 1364 (2002).

In the S-9 case, this Court unanimously rejected the District's argument that its pumping stations are not "point sources" because the stations do not generate pollutants, which the District "appear[ed] to have abandoned. * * * in its reply brief." *South Fla. Water Mgt. Dist. v. Miccosukee Tribe of Indians of Florida*, 541 U.S. 95, 105 (2005) (*Miccosukee*). The Court explained that the Act's definition of point source as a "discernible, confined, and discrete conveyance," 33 U.S.C. 1362(14), "makes plain that a point source need not be the original source of a pollutant." 541 U.S. at 105.

Although it upheld the Eleventh Circuit's resolution of "the precise question" on which review had been granted, the *Miccosukee* Court vacated and remanded for further proceedings because the court below had granted summary judgment despite a genuine factual dispute on a material issue: the District's argument that the waters upstream and downstream of the pumping station were "not distinct water bodies at all," but instead two "hydrologically indistinguishable parts of a single water body," meaning that no "addition" was occurring within the statutory definition of "discharge of a pollutant." 541 U.S. at 108-109. Noting the parties' agreement that if the waters on either side of the District's pump station "are simply two parts of the same water body," no NPDES

permit would be required, *id.* at 109, the Court borrowed a metaphor from the Second Circuit: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskills Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (*Catskills I*)).

The *Miccosukee* Court also noted, but declined to conclusively resolve, a broader argument advanced by the United States as amicus curiae, namely that "all the water bodies that fall within the Act's definition of 'navigable waters'" should be "viewed unitarily for purposes of NPDES permitting requirements." 541 U.S. at 105-106. If the statute were read that way, the Court noted, no permit would be required when water from one navigable water body is "discharged, unaltered, into another navigable water body," even if the two bodies are "distinct" in every "meaningful" way, and "even if one water body were polluted and the other pristine, and the two would not otherwise mix." *Id.* at 106 (citing *Catskills I,* 273 F.3d at 492, and *Dubois v. United States Dept. of Agriculture,* 102 F.3d 1273 (1st Cir. 1996)).[3]

Although leaving the argument open on remand, the Court paused to note "several NPDES provisions

---

[3] The Eleventh Circuit had concluded that "in determining whether pollutants are added to navigable waters for purposes of the [NPDES requirement], the receiving body of water is the relevant body of navigable water," and that S-9 had "added" pollutants because it put pollutants in the receiving water body that would not otherwise have ended up there. 280 F.3d at 1368-69.

that might be read to suggest a view contrary to the unitary waters approach," 541 U.S. at 107 (citing, *inter alia*, 33 U.S.C. 1313(c)(2), 1313(d)); found no support for the Government's claim that the "unitary waters" approach reflected a "longstanding EPA view," *id.* (citing *In re Riverside Irrigation Dist.*, 1975 WL 23864 (EPA Office of General Counsel); noted that certain EPA regulations seemed to conflict with the "unitary waters" concept, *id.* at 107-108 (citing 40 C.F.R. 122.45(g)(4)); and questioned assertions that there would be dire consequences for state water management, *id.* at 108.

On remand, the *Miccosukee* case was stayed by the district court pending the current respondents' appeal (in the instant case) of the district court's ruling in favor of the petitioners and the Miccosukee Tribe. See 559 F.3d 1191, 1197-98 (11th Cir. 2009) (declining to overturn the stay, noting that the "unitary waters theory" was "the central argument" of the District). Therefore, the instant case – involving essentially the same parties, although different pumping stations and water bodies – became the proceeding in which the lower courts addressed the "unitary waters" theory.

D. The District Court's Decision. After *Miccosukee* was decided, the district court lifted the stay in this case and conducted a more than two-month bench trial, ultimately determining that operation of the S-2, S-3, and S-4 pump stations without a NPDES permit violated the Act. Addressing the question highlighted by this Court in *Miccosukee*, the court found that the canals from which the District's pumps draw water are "meaningfully distinct" from the Lake into which they discharge. On the latter point, the court noted that the water in the canals is chemically and

biologically different from that in the Lake; that pumping of contaminated drainage canal water harms the Lake; that the waters are "classified differently under the CWA (the Lake is a Class I water body and the canals are Class III water bodies)"; and that "the waters that are backpumped into the Lake would not otherwise reach the Lake (in any significant amount, much less in the same quantities) but for the backpumping activities." Pet. App. 174a.

The court then turned to the District's argument, echoing the government's "unitary waters" submission in *Miccosukee* (and thereafter embraced in an EPA regulatory proposal to exempt "water transfers" from NPDES permitting, 71 Fed. Reg. 32889 (June 7, 2006)) that no permit was required because the canals from which the pumping stations draw are themselves "navigable waters" under the Act. The district court found it "evident" that "'addition * * * to the waters of the United States' contemplates an addition from anywhere outside of the receiving water, including from another body of water," Pet. App. 159a (citing *Miccosukee*, 280 F.3d at 1368, and *Catskills Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 84 (2d Cir. 2006) (*Catskills II*)); and rejected EPA's contrary interpretation in its proposed rule, declaring that because congressional intent was "unambiguous" on the point, "no agency interpretation" could alter that intent. Pet. App. 170a. After taking further briefing on remedies, the district court entered an injunction requiring the District to apply for a NPDES permit, relying largely on unchallenged evidence that the unpermitted pumping "created a significant risk of triggering a toxic algal bloom that could cause serious injury to

humans and death to wildlife"; that backpumping creates "toxic disinfection byproducts that can sicken humans," and "causes irreparable ecological harm to Lake Okeechobee." Pet. App. 45a-46a.

E. EPA's Water Transfers Rule. After briefing in respondents' Eleventh Circuit appeal was complete, EPA issued a regulation in essentially the form proposed two years earlier, exempting "water transfers" from the NPDES permitting requirement. 73 Fed. Reg. 33697 (June 13, 2008). In the preamble, EPA explained that "the United States has taken the position that the Clean Water Act generally does not subject water transfers to the NPDES program," and quoted from the United States' Eleventh Circuit brief in this case:

> When the statutory definition of "'navigable waters'"—*i.e.*, "the waters of the United States," 33 U.S.C. 1362(7)—is inserted in place of "navigable waters," 33 U.S.C. 1362(12) provides that NPDES applies only to the "addition of any pollutant to the waters of the United States." Given the broad definition of "pollutant," transferred (and receiving) water will always contain intrinsic pollutants, but the pollutants in transferred water are already in "the waters of the United States" before, during, and after the water transfer. Thus, there is no "addition"; nothing is being added "to" "the waters of the United States" by virtue of the water transfer, because the pollutant at issue is already part of "the waters of the United States" to begin with.

73 Fed. Reg. at 33701 (quoting brief). EPA expressed its own view that "taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress generally did not intend

to subject water [transfers] to the NPDES program," and that "such transfers between navigable waters do not constitute an 'addition' to navigable waters to be regulated under the NPDES program." *Id.*

Recognizing that some courts of appeals had held that NPDES permits were required for "movement of pollutants between distinct waterbodies," EPA stated that those courts had not "view[ed] the statutory interpretation [question] through the lens of *Chevron* deference." 73 Fed. Reg. at 33700 n.4, 33701. EPA explained that that a "holistic approach to the text of the CWA was needed" because of "the balance Congress created between federal and State oversight of activities affecting the nation's waters," *Id.* at 33701-02 (citing CWA Sections 101(g), 102(h), 304(f) and 510(2)), and that "water transfers are unlike the types of discharges that were the primary focus of Congressional attention." *Id.* at 33702.

EPA's resulting regulation creates a new NPDES "exclusion" for "water transfers," defined as "any activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use," but not including "pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. 122.3(i).[4]

---

[4] Petitioners and other parties filed petitions for review challenging the regulation. Due to uncertainty concerning the proper forum for reviewing this regulation, actions were also filed in federal district courts in Florida and New York. Pursuant to 28 U.S.C. 2112(a)(3), the Judicial Panel on Multidistrict Litigation ordered that the petitions, which had been filed in three the First, Second and Eleventh Circuits, be litigated in the Eleventh Circuit, where the petitions were consolidated under

F. The Court of Appeals' Decision. The Eleventh Circuit reversed and held that, in light of EPA's rule, the District's pumping stations were not subject to the NPDES permit requirement. The court noted that it was "undisputed" that water pumped from the three pumping stations contained "pollutants"; that both the canals and the Lake were "navigable waters"; and that the three pump stations are "point sources." Pet. App. 10a. Instead, and noting that respondents had not even challenged the district court's finding that the drainage canals and Lake Okeechobee were "meaningfully distinct" waters, *id.* at 10a-11a & n.4, the court turned to whether the District could nonetheless escape a NPDES obligation by reference to the "unitary waters" theory, *i.e.*, that conveying pollutants from one distinct navigable water body to another is not an "addition ... to navigable waters."

The panel noted that "[t]he unitary waters theory has a low batting average," and, "[i]n fact, it has struck out in every court of appeals where it has come up to the plate." Pet. App. 12a (citing *Catskills I,* 273 F.3d at 491; *Catskills II,* 451 F.3d at 83; *Dague v. City of Burlington,* 935 F.2d 1343, 1354-55 (2d Cir.1991); *Dubois,* 102 F.3d at 1296; and *N. Plains Res. Council v. Fidelity Exploration*

Friends of the Everglades v. EPA, No. 08-13652-C (11th Cir.), and stayed pending the decision in this appeal. (The district court lawsuits have also been stayed, see *Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA*, 630 F. Supp. 2d 295 (S.D.N.Y. 2009)). On September 10, 2008, the court of appeals denied a motion by the United States, which was opposed by all other parties, to stay this appeal and consider it together with the petitions for review of the Water Transfer Rule.

and Dev., 325 F.3d 1155, 1163 (9th Cir. 2003)) – and noted that "[e]ven the Supreme Court has called a strike or two on the theory, stating in *Miccosukee* that 'several NPDES provisions might be read to suggest a view contrary to the unitary waters approach.'" Pet. App. 13a (quoting 541 U.S. at 107).

"In sum," the court of appeals stated, "all of the existing precedent" was "against the unitary waters theory," and for the view "that the transfer of pollutants from one meaningfully distinct navigable body of water to another is an 'addition ... to navigable waters' for Clean Water Act permitting purposes." Pet. App. 14a-15a. The court turned to whether EPA's new regulation was entitled to deference under *Chevron USA, Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984), a question turning on "whether 'addition ... to navigable waters' - meaning addition to 'the waters of the United States' - refers to waters in the individual sense or as one unitary whole." Pet. App. 26a.

The court of appeals considered the "common meaning of the term 'waters'" to be unhelpful, because "[i]n ordinary usage 'waters' can collectively refer to several different bodies of water such as 'the waters of the Gulf coast,' or can refer to any one body of water such as '"the waters of Mobile Bay. '" Pet. App. 26a-27a. More decisive, in the court's view, was the "conspicuous absence of 'any' before 'navigable waters' in § 1362(12)," which "supports the unitary waters theory because it implies that Congress was not talking about *any* navigable water, but about *all* navigable waters as a whole." *Id.* at 28a. Petitioners' view of the statute, the court reasoned (*id.*),

> effectively asks us to add a fourth "any" to the statute so that it would read: "Any addition of

> any pollutant to *any* navigable waters from any point source."

The court stated that "if the meaning of language is plain, no alteration should be necessary to clarify it," and that "[t]he addition or subtraction of words indicates that the unaltered language is not plain." Pet. App. 28a. Observing that the Act sometimes says "any navigable waters," while elsewhere using "the unmodified 'navigable waters' to mean the same thing," the court concluded that the text was not "clear" in favor of the "unitary" reading, either. *Id.* at 30a.

The panel acknowledged that accepting the respondents' interpretation would have a tendency to undermine the Act's provisions targeting water quality in particular water bodies, and could lead to "results even more absurd than pumping dirty canal water into a reservoir of drinking water":

> If an "addition ... to navigable waters" occurs only at a pollutant's first entry into navigable waters, and not when it is transferred to a different water body, then the NPDES program-the centerpiece of the Clean Water Act-would require no permit to pump the most loathsome navigable water in the country into the most pristine one.

Pet. App. 33a. The court declared that such a prospect was "frightening enough that we might agree with the Friends of the Everglades that the unitary waters theory does not comport with the broad, general goals of the Clean Water Act," but explained that its obligation was to "interpret and apply statutes, not congressional purposes." *Id.* (citations and internal quotation marks omitted).

The court stated that "there are other provisions of the Clean Water Act that do not comport with its broad purpose of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters," explaining that while non-point source pollution is a "serious water quality problem, * * * the NPDES program does not even address it," and that "Congress even created a special exception to the definition of 'point source' to exclude agricultural storm water discharges and return flows from irrigation, despite their known, substantially harmful impact on water quality." Pet. App. 34a (citing 33 U.S.C. 1362(14)). "The point is," the court explained, "that it may seem inconsistent with the lofty goals of the Clean Water Act to leave out of the permitting process the transfer of pollutants from one navigable body of water to another, but it is no more so than to leave out all non-point sources, allowing agricultural run-off to create a huge 'dead zone' in the Gulf of Mexico." *Id.* at 35.

"Having concluded that the statutory language is ambiguous," the Court concluded that "EPA's regulation, which accepts the unitary waters theory," was permissible, because EPA's construction was "one of the two readings" that the court had "found * * * reasonable." App. 36a.

The court concluded with a hypothetical designed to help analyze the question of the consistency of the unitary waters theory with the Act in an "abstract" manner and free of "contentious policy interests":

> Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting "any addition of any marbles to buckets by any person." A person comes along, picks up two marbles from the first bucket, and

> drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets"? * * * Whatever position we might take if we had to pick one side or the other we cannot say that either side is unreasonable.

Pet. App. 37a. "Like the marbles rule," the court concluded, the section 1362(12) definition was "ambiguous," and EPA's regulation was "a reasonable, and therefore permissible, construction of the language." *Id.*

REASONS FOR GRANTING THE WRIT

This case squarely presents an issue of great national importance concerning the scope of the Clean Water Act's pivotal permitting program. The decision below upheld an interpretation of the Act this Court, in *Miccosukee*, treated with pronounced skepticism, and that has been rejected by "all of the existing precedent," Pet. App. 14a.

The decision urgently warrants this Court's review. The court of appeals disregarded (and denigrated as ethereal and unenforceable statutory "purposes") the very materials – text, structure, and *express* legislative objectives – necessary for a court to carry out its tasks of determining whether a statute is ambiguous and whether any ambiguity has been reasonably resolved by the agency. The court fundamentally misunderstood core provisions of the Act, turning statutory language designed to ensure that the waters affected by a discharge are subject to federal jurisdiction into grounds for a major new exception to the Act's comprehensive point source discharge program. The "unitary waters" construction the court approved is irreconcilable – even obviously so – with the Act's

plain language, including its express ban on discharges of a "pollutant" ("dredged spoil," 33 U.S.C. 1362(6)) that *inherently* comes from navigable waters, and its elaborate provisions for protecting individual water bodies.

The consequences of the decision are far-reaching. This case (like *Miccosukee*) illustrates the importance of the permit coverage issue for one of the United States' most important and imperiled natural resources; as the district court found, discharges like those at issue here have been significant contributors to chronic environmental problems in a Lake that is an important drinking water reservoir.

All courts to have considered the unitary waters theory have remarked upon its jarring implications for administration of the Act; as the Eleventh Circuit here acknowledged, the theory has the "absurd" consequence of "requir[ing] no permit to pump the most loathsome navigable water in the country into the most pristine one." Pet. App. 33a. The NPDES permitting scheme is a critical part of the Act and the newly minted exemption approved here would substantially restrict its scope.

This case, moreover, is the appropriate vehicle to address the issue: Whereas in *Miccosukee* the "unitary waters" argument was belatedly raised (and only by an amicus), and there were unresolved factual issues, here the issue was exhaustively treated in the lower courts, and the district court entered exhaustive factual findings after a trial.

I. CERTIORARI IS WARRANTED BECAUSE THE COURT BELOW APPROVED A SWEEPING STATUTORY EXEMPTION THAT IS CONTRARY TO THE ACT AND HAS BEEN REJECTED BY OTHER COURTS OF APPEALS

Chevron does not immunize agency interpretations that are inconsistent with the relevant statute, 467 U.S. at 843-44 & n.9, and a court "need 'accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.'" *Morrison v. National Australia Bank, Ltd*, 130 S. Ct. 2869, 2887 (2010) (citation omitted). See also *Clark v. Martinez*, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting).

Here, the construction approved by the Eleventh Circuit badly fails that test. Seizing on the semantic possibilities of a few words (together with an ostensibly "missing" word), the court found itself duty-bound to uphold an interpretation of the Act that is inconsistent with prominent features of the CWA. But ambiguity is "a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

The court of appeals' error is exemplified in its closing marbles-and-buckets analogy, which "abstract[s]" away (Pet. App. 37a) *all* the relevant statutory context and recasts the case as an examination of the semantic possibilities presented by an isolated bit of text of an imaginary statute whose content and purposes are unknown. The hypothetical fails: The real statutory definition here does not exist in isolation, but as part of a complex regulatory statute the provisions of which rule out this interpretation, including (as the *Miccosukee*

Court suggested) the entire Water Quality Standards regime, which establishes standards tailored to individual water bodies and predicates permit conditions on the specific characteristics of the receiving water bodies, and the express inclusion of "dredged spoil" (a pollutant that inherently comes from navigable waters) as a "pollutant" governed by the same statutory "discharge" definition that governs here. *Infra*, pp. 23-24.

To make the Eleventh Circuit's marbles-and-buckets hypothetical minimally apt, the hypothetical would need to posit specific "marble concentration standards" for individual buckets, see 33 U.S.C. 1313, 1314(a) (water quality standards and criteria); to require that marbles placed in buckets be consistent with those standards, see *id.* 1312, 1342(a), and to define "marbles" to include "marbles-extracted-from-buckets," *id.* 1362(14) ("dredged spoil"). The "unitary waters" construction is simply not consonant with the provisions of the non-hypothetical Clean Water Act.

A. The Act's Definition of a "Discharge of a Pollutant" Does Not Support the Unitary Waters Theory

It is undisputed that the District's pumping stations are "point sources," that the chemical contaminants in the water pumped into Lake Okeechobee are "pollutants," and that the Lake is "navigable." Pet. App. 10a. And as the district court found, and respondents did not seriously dispute, the canals from which the water is pumped are "meaningfully distinct" from the Lake. *Id.* at 10a-11a & n.4, 174a. The court of appeals held, however, a permit was not required because EPA could permissibly read "navigable waters" in 33 U.S.C.

1362(12) to refer collectively to *all* CWA jurisdictional waters in the Nation, so that a point source that conveys pollutants from one particular body to another is not "adding" pollutants to "navigable waters," considered unitarily.

The court found the CWA ambiguous, and hence grist for deference, almost exclusively because of the *absence* of the word "any" before the phrase "navigable waters" in the definition of "discharge of a pollutant" in section 1362(12). See Pet. App. 28a-30a. Given the *presence* of "any" before three other nouns in the definition ("addition," "pollutant," and "point source"), the Court concluded, the statute could be read to support a reference, not to individual water bodies, but to "navigable waters as a collective whole." *Id.* at 29a.

The "absent-any" argument is not persuasive on its own terms.[5] To be sure, the bare phrase

---

[5] While the "absent-any" argument was a staple of the United States' briefing below, *e.g.*, U.S. Br. as Appellant 25-26; see also *Miccosukee*, 541 U.S. at 96 (citing it as the textual "focus" of unitary-waters argument urged by United States); EPA's rulemaking preamble and the proposed rule before it, 71 Fed. Reg. 32887, do not rely upon, or even mention, the argument. The court of appeals, that is, predicated its approval of the agency's construction almost entirely on a statutory argument not made by the agency itself. See *Chevron*, 467 U.S. at 844 (calling for deference to "a reasonable interpretation *made by the administrator of [the] agency*") (emphasis added); see also, *e.g.*, *City of Kansas City v. Dept. of Housing and Urban Dev.*, 923 F.2d 188, 192 (D.C. Cir. 1991) (under *Chevron*, "the object of our deference is the result of agency decisionmaking, and not some *post hoc* rationale developed as part of a litigation strategy").

"navigable waters" can be considered "singular" or "collective," Pet. App. 29a; see also 1 U.S.C. 1 (Dictionary Act provision that all singular terms presumptively import the plural, and vice versa), and "any" (and its absence) can mean "different things depending upon the setting," *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004). (As the decision itself recognizes, Pet. App. 30a, the Act repeatedly uses and omits the term "any" as a modifier to "navigable waters" without holding to a consistent pattern regarding whether individual, or plural, bodies of water are referenced). But while "waters" can certainly refer either to a water body or to a collection of water bodies, the meaning of the reference in the case of the section 1362(12) definition "is clarified by the remainder of the statutory scheme" because "'only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'" *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001) (quoting *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)).

Section 1362(12)'s text itself undermines the "unitary waters" theory: The definition speaks of pollutants going "*from*" a point source and "*to*" navigable waters. This directional language demonstrates that (as several courts of appeals have concluded, *e.g*, *Northern Plains Resource Council*, 325 F.3d at 1162), what matters under the Act is the "navigability" *vel non* of the *receiving water* – the water that is located on the "outflow" side of the point source.

This conclusion is consistent with the well understood purpose of the reference to "navigable waters" in the definition: to require that the

receiving water body be one that is *subject to federal regulatory jurisdiction under the Act* (and the Interstate Commerce Clause). "Navigable waters," of course, is a jurisdictional term of art with deep historical roots, that, throughout the statute, serves to identify those *water bodies* that are properly subject to federal regulation. See *Rapanos v. United States*, 547 U.S. 715, 734 (2006) (plurality opinion) ("On the traditional understanding, 'navigable waters' included only discrete *bodies* of water"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 212, 131 (1985) (determining adjacent wetlands to be sufficiently close to "rivers, streams, and other hydrographic features" to be classifiable as "navigable waters"). The Act requires that the waters into which a point source discharges be "navigable" (that is, that they be "waters of the United States") in order to ensure that the various obligations the statute imposes fall within Congress's authority under the Commerce Clause. See *id.* at 133. Nothing in the statute turns on the status of waters in which pollutants are suspended *before* they enter the point source. Indeed, it is irrelevant whether the pollutant entering the point source comes from a navigable water, a nonnavigable water, or enters the point source in an entirely dry state.[6]

---

[6] The term "addition" requires a baseline against which any new ("additional") pollutants are identified; as this Court explained in *Miccosukee*, following the Second Circuit in *Catskill I*, there is no "addition" if the point source merely returns water to the same water body. 541 U.S. at 110; see also *S.D. Warren*, 547 U.S. at 384-85; cf. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). But, as the *Miccosukee* Court

To assert, as did the portion of the United States' brief quoted by the EPA preamble, see 73 Fed Reg. at 33701, that the definition of "navigable waters" as "waters of the United States" operates to *exempt* from regulation activities that are obviously subject to federal jurisdiction, is to assign a surprising role to a statutory definition that was intended to expand regulatory jurisdiction, *Riverside Bayview Homes,* 474 U.S. at 133.[7] Such a peculiar reliance on the

---

recognized, the unitary waters theory's claim is far more ambitious, *i.e.*, that discharging pollutants from an entirely different water body (perhaps from another drainage basin, or from the "territorial seas," 33 U.S.C. 1362(7), into a freshwater stream) is categorically not an "addition" *simply because the source waters meet the standard for CWA jurisdiction*. The term "addition" is not so elastic as to exclude, say, the piping of oil-laden salt water into a pure freshwater stream. See *Cuomo v. Clearing House*, 129 S Ct. 2710, 2715 (2009) ("the presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation"); *MCI Tel. Corp. v. Amer. Tel. & Tel.*, 512 U.S. 218, 229 (1994) (no deference to interpretation that "goes beyond the meaning that the statute can bear"). EPA did not even have the colorable textual warrant of the court of appeals' "absent 'any,'" relying instead upon transparently inadequate "holistic" spinning of provisions on water management and federalism – arguments pointedly not relied upon by the court below, and rejected in *Catskill I,* 273 F.3d at 494, and *II*, 451 F.3d at 81-82. See also *Miccosukee*, 541 U.S. at 108.

[7] EPA made this point decades ago in rejecting pleas for an exemption for irrigation return flows that had raised a unitary waters argument. *In re Riverside Irrigation Dist.*, 1975 WL 23864 at *4 ("the broad definition of 'navigable

jurisdictional concepts to narrow the Act's application as to activities clearly within EPA's regulatory jurisdiction would be particularly unlikely given that the Act contains straightforward and express exemptions for various activities, *e.g.*, 33 U.S.C. 1342(*l*), (r).

The "unitary waters" theory is bizarre for another reason: The Clean Water Act is not concerned with maintaining some *aggregate*, national quantum of pollutants in all "waters of the United States." See *Rapanos*, 547 U.S. at 732 (plurality opinion) ("The use of the definite article ('the') and the plural number ('waters') shows plainly that § 1362(7) does not refer to water in general."); see also 33 U.S.C. 1362(6) (definition of "pollutant" includes "heat"). While such an aggregated national limit may make sense for certain forms of air pollution, the Clean Water Act is intensely concerned with protecting local water quality, local biota, and local uses. See *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in judgment) (Act is concerned "with downstream water quality"). The unitary waters theory is fundamentally at odds with the statute.

B. Numerous Provisions of the Act Refute the Unitary Waters Theory

1. *The Definition of "Pollutant"* In *Miccosukee*, this Court observed that the statutory definition of "point source," 33 U.S.C. 1362(14) – with its references to "pipes," "ditches," "tunnels," and "conduits," made it "plain" that "a point source need not be an original source of the pollutant." 541 U.S. at 105.

---

waters' serves to expand the application of the Act and the permit program, not narrow it").

Here, the Act's express definitions make plain that the alternative argument for permit avoidance proffered here is at least as "untenable," *id.*, as the District's principal argument in *Miccosukee*. The very first item listed in the statutory "pollutant" definition is "dredged spoil," 33 U.S.C. 1362(6). Dredged spoil inherently comes from navigable water bodies. See 40 C.F.R. 232.2 (defining dredged material as "material that is excavated or dredged *from the waters of the United States*") (emphasis added); accord 33 C.F.R. 323.2(c); see also 73 Fed. Reg. at 33703 (EPA's observation that dredged spoil "by its very nature comes from a waterbody") (citations omitted).

The Act's "pollutant" definition shows that Congress rejected the "unitary waters" theory (or rather Congress made choices inconsistent with the theory, which was not devised until thirty years after the Act became law). The "discharge" of dredged fill requires a permit by virtue of 33 U.S.C. 1311(a), the broad prohibition against unpermitted discharges, and is governed by the same "discharge of a pollutant" definition in section 1362(12). If these provisions are construed to mean that the transfer of pollutants from one navigable water to another is not a "discharge of a pollutant," the result would be to render nugatory the express definition of "dredged fill" as a pollutant, and to render the entire Section 404 program, 33 U.S.C. 1344, irrelevant.

In the preamble to its Water Transfers Rule, EPA stated that Rule "will not have an effect on the 404 program" because "Congress explicitly forbade discharges of dredged material" without a permit. *Id.* at 33703. But that is exactly the point: The Act's express inclusion of a pollutant that inherently comes from navigable waters shows that an

interpretation of section 1362(12) that excludes pollutants from navigable waters is incompatible with the statute. The prohibition on the "discharge of a pollutant," 33 U.S.C. 1311(a), and the section 1362(12) definition of that phrase govern *both* discharges of dredged material (subject to Section 404) *and* discharges of other pollutants (subject to Section 402). EPA cannot, therefore, ignore the statute's inclusion of "dredged fill." This Court has "never" approved "giving the same [statutory] word, *in the same statutory provision*, different meanings *in different factual contexts.*" *Santos v. United States*, 128 S. Ct. 2020, 2030 (2008) (plurality opinion). See *Clark*, 543 U.S. at 386 (rejecting "the dangerous principle that judges can give the same statutory text different meanings in different cases"); *id.* at 382 (such an approach would "render every statute a chameleon").

2. *The Act's Focus on Protecting Specific Water Bodies.* The "unitary waters" concept is irreconcilable with the numerous prominent provisions of the Act that focus on protecting the quality of individual bodies of water, and that predicate the stringency of permit requirements on the characteristics of the particular receiving waters in question. Indeed, in *Miccosukee*, this Court cited the Act's "individualized ambient water quality standards" as among the provisions "suggest[ing] a view contrary to the unitary waters approach." 541 U.S. at 107 (citing 33 U.S.C. 1313(c)(2)(A)). See also *id.* 1313(d) (requiring states to establish a "priority ranking" of waters for which effluent standards are "not stringent enough to implement any water quality standard applicable to such waters").

Water quality standards are developed by the states (or EPA, 33 U.S.C. 1313(c)(3)), and must,

among other things, protect designated uses of each water body and set forth water quality criteria for each water body. *Id.* 1313(c)(2). See also EPA, Water Quality Standards Handbook: Second Edition, Ch. 2 (1994, rev. 2007). States establish a hierarchy of classifications of water bodies, corresponding to different categories of uses and different ecological characteristics of various waters.[8] Water quality criteria are "expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). See Handbook, Ch. 3.

As this Court noted in *Miccosukee*, the water quality standards of the receiving water "directly affect local NPDES permits; if standard permit conditions fail to achieve the water quality goals for a given water body, the state must determine the total pollutant load that the water body can sustain and then allocate that load among permit holders who discharge to the water body." 541 U.S. at 107 (citing 33 U.S.C. 1313(d)). See also 33 U.S.C. 1311(b)(1)(C), 1313(d); 40 C.F.R. 131.3(f). See also *PUD No. 1*, 511 U.S. at 713. For each discharge of a pollutant, NPDES permits must include provisions to ensure compliance with the receiving water's water quality standards. 33 U.S.C. 1311(b)(1)(C), 1342(a)(1-2). The Act also contains an "antidegradation" provision designed to preserve

---

[8] For example, Florida has five classifications, ranging from potable water supplies to agricultural and industrial uses. See, *e.g.*, Fla. Admin. Code 62-302.400.

water quality in waters meeting applicable standards. 33 U.S.C. 1313(d)(4)(B).

Other key provisions of the Act illustrate the waterbody-specific approach. Proposed activities "which may result in any discharge into the navigable waters," 33 U.S.C. 1341(a), require a certification from the state attesting that the project will not violate applicable water quality standards. See *S.D. Warren Co.*, 547 U.S. at 375-76; *PUD No. 1*, 511 U.S. at 704-705. See also 33 U.S.C. 1312 (water quality-related effluent limitations).

By treating distinct "navigable waters" (whether fresh or salt, pristine or putrid) as fungible and by allowing unpermitted transfers of pollutants from the dirtiest waters to the cleanest ones, the "unitary waters" view ignores these fundamental features of the Act, and sets the Act's two complementary regulatory approaches – water quality standards, and point source controls – against each other.[9] The provisions for establishing and implementing water quality standards are not, as the court below inexplicably classified them, mere reflections of vague statutory "purposes," Pet. App. 33a; they are a set of concrete, detailed regulatory devices – the operative core of the Act. The *Miccosukee* Court was correct to note the inconsistency of the unitary waters theory with the water quality standards and related provisions.

---

[9] The pipes at issue here discharge polluted water from Class III canals into a Class I lake that is a source of drinking water. See Pet. App. 100a. See also *Dubois*, 102 F.3d at 1277-79 (holding that NPDES permit required for transfer from "relatively unprotected Class B waterway" to "pristine" Class A pond used for drinking water).

3. *Express Statutory Objectives and Exemptions.* The court of appeals reasoned (Pet. App. 35a) that although a "unitary waters" construction might seem "inconsistent with the lofty goals of the Clean Water Act," it was "no more so" than other features of the Act that, in the court's view, *also* undercut the Act's environmental goals. The flaws in this line of argument are apparent: First, as we have just noted, the conflict between respondents' construction and the Act are not just over "goals," but over basic statutory *programs* and *mechanics* – among them the detailed provisions on water quality standards – that are incompatible with a "unitary waters" interpretation.

Second, the court's reasoning – that express statutory exemptions deemed to be in derogation of express statutory objectives allow courts to disregard those objectives when interpreting other substantive provisions – would make explicit statutory statements of purpose, intent, or objective irrelevant to judicial construction, contrary to settled practice, *e.g.*, *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 698, 700 (1995) (relying on Endangered Species Act's "broad purposes" as expressed by Congress); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740-741 (1989) (relying on Copyright Act's "express objective"); *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) (considering statute's "'express language'" and "'objectives'" in reviewing scope of administrative authority) (citation omitted); *E.I. Du Pont De Nemours & Co. v. Train,* 430 U.S. 112, 133 (1977) (construing EPA's authority under CWA in light of "the statutory goals"). Judges are no more entitled to ignore express statutory purposes, goals and objectives than they are to ignore any other

statutory provisions, and "the statutory text" is of course "the best evidence" of those, *West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

The conclusion the court drew from its discussion of the Act's loopholes was not sound. Whether or not it is true that those exemptions have weakened the Act, *Congress*'s decision to impose various express limitations demonstrates that it knew how to create exemptions from the generally comprehensive nature of the Act's permitting provisions when it so intended. Indeed, the irrigation return flows exemption cited by the court, see 33 U.S.C. 1362(14); see also *id.* 1342(*l*)(1), severely undercuts its conclusion. That exemption was enacted by Congress in response to a judicial ruling that the Act did not exempt return flows. See S. REP. NO. 95-370 at 31 (1977) (explaining that "[p]ermit requirements under section 402 of the act have been construed to apply to discharges of return flows from irrigated agriculture," and that amendment was intended to exempt such flows); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1376-1377 (D.C. Cir. 1977) (striking down administrative exemption for irrigation return flows as contrary to "clear intent" of Act). Furthermore, irrigation return flows were the subject of the 1975 EPA General Counsel Memorandum expressly rejecting a unitary waters argument, as was noted in *Miccosukee*, 541 U.S. at 107 (discussing *In re Riverside Irrigation District* and Brief of *Amici Curiae* Former Administrator Carol M. Browner, *et al.*, No. 02-626).

Nor did Congress's decision to "leave out" nonpoint sources (Pet. App. 35a) from the NPDES program justify overlooking the "inconsistency" between the unitary waters construction and the statutory goals. The Act treats nonpoint sources

differently for a variety of practical, technological, and institutional reasons, see Pet. App. 158a, that do not, as the court of appeals inferred, in any way impugn the seriousness of Congress's intent to meet statutory objectives, see generally William H. Rodgers, Jr., ENVIRONMENTAL LAW § 4.5 (2d Ed.1994) – and the Act did not leave nonpoint sources unaddressed, *e.g.*, 33 U.S.C. 1288, 1313(d), 1329. The shortcomings of the CWA's regime for nonpoint sources (attributable in part to chronic governmental delays in implementing key nonpoint provisions, *e.g.*, *Alaska Ctr for the Environment v. Reilly*, 762 F. Supp. 1422, 1426-27 (W.D. Wash. 1991)), is no authority at all for creating extratextual exemptions to the *point source* regime.

II. THIS CASE PRESENTS THE PROPER OCCASION FOR THE COURT TO ADDRESS THE IMPORTANT QUESTION LEFT OPEN IN *MICCOSUKEE*

The issues presented here are of great national importance. They go to the scope of one of our most important and broadly applicable federal statutes. At issue here is the basic operation of CWA provisions determining whether given activities trigger the key prohibition in Section 301(a), 33 U.S.C. 1311(a), and therefore require permits.

In *Miccosukee*, this Court recognized the importance of these issues, first in granting review on a closely related issue – an alternative argument for why, supposedly, point sources that are not themselves the generator of pollutants, but that transfer waters that contain pollutants, were claimed to be exempt from NPDES permitting. In discussing the unitary waters theory that emerged

as an alternative argument for the District and its supporters, this Court noted the high stakes. See also 541 U.S. at 108-109 (discussing claims by petitioners' amici of "significant practical consequences" if NPDES permit were required, but also observing that "it may be that such permitting authority is necessary to protect water quality"). The large number of amicus briefs submitted in that case, on both sides, was a testament to the importance of the issues presented.

Other courts that have rejected the "unitary waters" thesis have also emphasized its broad significance for CWA administration and its consequences for water quality. See, *e.g.*, *Catskills II*, 451 F.3d at 81 (unitary waters theory "would lead to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants and would not be subject to the CWA's NPDES permit requirement") (citing *Catskills I*); *Dubois*, 102 F.3d at 1297.[10] Indeed, the

---

[10] EPA hastened to point out, 73 Fed. Reg. at 33700 n.4, that the decisions rejecting the "unitary waters" theory preceded the finalization of the Water Transfers Rule. While *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982-983 (2005), makes clear that judicial decisions do not confine an agency unless they are based upon a judicial determination of unambiguous command. Certainly EPA at least tested the limits here: The district court, after all, had held that "the statute is unambiguous" and that no "agency interpretation" could "alter the unambiguous congressional intent." Pet. App. 141. The First and Second Circuit decisions, while not under *Chevron*, had been quite firm in declaring EPA's view inconsistent with the Act. See *Dubois*, 102 F.3d at 1296 ("There is no basis

Eleventh Circuit panel in this case characterized the implications of the interpretation it approved as "absurd" and "frightening." Pet. App. 32a, 33a. And as the court also acknowledged, the interpretation has been forcefully rejected by other courts of appeals, and was subjected to strong criticism by this Court in *Miccosukee*. The decision below, and the EPA construction it approves, are contrary to a large body of authority, which explains the incompatibility of the construction with the statute.

The facts set forth in the district court's opinion provide a measure of the considerable practical stakes: the pollutants emanating from the three huge pumping stations at issue are a major factor in the degradation of Lake Okeechobee and pose serious public health hazards. See Pet. App. 45a-46a; see also *Miccosukee*, 541 U.S. at 101 (noting that "[t]he phosphorous-related impacts of the Project are well known and have received a great deal of attention from state and federal authorities for more than 20 years").

This case presents the proper vehicle for the Court to take up the "unitary waters" interpretation that was criticized, but ultimately left for the lower courts, in *Miccosukee*. Here the issues of whether the receiving water and the source waters are "meaningfully distinct" has been clearly resolved, meaning that the "unitary waters" issue – the final of the three alternative bases for avoiding permitting

---

in law or fact for the district court's 'singular entity' theory."); *Catskill I*, 273 F.3d. at 494 (relying on "plain meaning of [Act's] text"); *Catskill II*, 451 F.3d at 84 (arguments resisting permit requirement "simply overlook" Act's "plain language").

that were urged in *Miccosukee* – is squarely presented and dispositive. Unlike *Miccosukee*, where unresolved factual and legal issues ultimately precluded a definitive disposition from this Court, here there has been a two-month trial, yielding extensive and meticulous factual findings that allow the Court to consider the pure question of law presented in a well-defined factual context.

As the majority saw things in *Miccosukee*, the "unitary waters" theory had been interposed belatedly only in an amicus brief and not ruled on below – a characterization that prompted a dissent. See 541 U.S. at 112 (Scalia, J., concurring in part and dissenting in part) (expressing view that the Eleventh Circuit "already rejected" the theory and that remand was improper) (citing 280 F.3d at 1368, n. 5); Pet. App. 13a (panel in this case, also reading that Eleventh Circuit's opinion in the S-9 case to have "reject[ed]" the unitary waters theory). Here, there is no question the issue was fully aired in the lower courts. As noted, this case functioned as the stand-in for the remanded *Miccosukkee* proceedings, which was stayed pending decision on essentially identical issues here.

Nor does the pendency of various suits seeking judicial review of the Water Transfers Rule counsel against certiorari here. The petitions for review are all consolidated in the Eleventh Circuit itself, which stayed them pending resolution of this appeal.[11]

---

[11] EPA's preamble asserts (73 Fed. Reg. at 33697) that the exclusive forum for review of the Water Transfers Rule is a court of appeals under 33 U.S.C. 1369(b), although the Rule appears not to fall within the enumerated categories of secretarial action reviewable under that subsection – and the Ninth Circuit has held

Indeed, the advent of EPA's Water Transfers Rule only militates in favor of review. The "unitary waters" theory now comes clad in the attire of a final EPA regulation, but the underlying construction of the statute suffers from obvious and fatal flaws, some of which this Court already identified in *Miccosukee*, and more of which were addressed by other courts. An obvious, grievous and consequential misreading of a major federal statute has now, in the face of strong condemnation from all courts, received the imprimatur of a court of appeals and of the agency principally charged with enforcing the Act and of a court. Despite please for deference and new perspectives afforded by "lens of *Chevron*," the unitary waters theory has not stopped being manifestly and hopelessly inconsistent with the statute. The Court should call the "third strike" (cf. Pet. App. 13a) here and now.

---

that original circuit court jurisdiction does not lie in analogous circumstances. See *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006, 1016-18 (9th Cir. 2008). And of course, if the EPA's position on jurisdiction is correct – and no court has yet ruled on the proper forum for the freestanding challenges to the Rule – then the review proceedings would be held in a court that has already held that EPA's regulation is consistent with the Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

David G. Guest
Monica K. Reimer
Earthjustice
P.O. Box 1329
Tallahassee, FL 32302
Tel: (850) 681-0031

John E. Childe
150 Indian Mound Trail
Tavernier, Fl. 33070
Tel: (305) 712-0172

David Reiner
Reiner & Reiner, PA
9100 S. Dadeland Blvd.
Suite 901
Miami, FL 33156
(305) 670-8282

Sean H. Donahue
Counsel of Record
Donahue & Goldberg, LLP
2000 L St., NW, Ste 808
Washington, DC 20036
Tel: (202) 277-7085

David. T. Goldberg
Donahue & Goldberg, LLP
99 Hudson Street, 8th Floor
New York, NY 10013
Tel: (212) 334-8813