Nos. 11-999, 11-1006, 11-1007

In the Supreme Court of the United States

STATE OF FLORIDA, *et al.*, *Petitioners*,
v.
STATE OF GEORGIA, *et al.*,

STATE OF ALABAMA, *et al.*, *Petitioners*,
v.
STATE OF GEORGIA, *et al.*,

SOUTHEASTERN FEDERAL POWER CUSTOMERS, INC.,
Petitioner,
v.
STATE OF GEORGIA, *et al.*,

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

BRIEF IN OPPOSITION FOR THE GEORGIA RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the River and Harbor Act of 1946 (RHA) authorized the U.S. Army Corps of Engineers to operate the Buford Dam/Lake Lanier project for the purpose of supplying water to the metropolitan Atlanta region, among other purposes (such as hydropower generation, navigation, flood control, and recreation).

2. Whether the court of appeals correctly ruled that the Water Supply Act of 1958 provided additional authority to the Corps to allocate storage for the purpose of water supply and did not restrict any such authority that the Corps had under the RHA.

3. Whether the court of appeals correctly concluded that the federal courts lacked jurisdiction over petitioners' challenges to the Corps' current operations at the Buford project because the Corps has not taken final agency action.

PARTIES TO THE PROCEEDING

This brief is filed on behalf of the State of Georgia; the Atlanta Regional Commission; the City of Atlanta, Georgia; the City of Gainesville, Georgia; the Cobb County-Marietta Water Authority; DeKalb County, Georgia; Fulton County, Georgia; Gwinnett County, Georgia; and the Lake Lanier Association. All of these parties were appellants in the court of appeals. None of these parties issues stock held by members of the public.

The persons and entities represented by the Solicitor General were appellees and cross-appellants in the court of appeals.

Petitioners in all three petitions were appellees below.

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BRIEF IN OPPOSITION FOR THE GEORGIA RESPONDENTS

These cases concern the authority of the Army Corps of Engineers to operate a single water project, Buford Dam, which impounds the Chattahoochee River to form Lake Lanier north of Atlanta, generates hydropower, and provides the metropolitan Atlanta region with its principal source of water. For over twen-

ty years, the parties have contested the scope of the Corps' authority to operate the project to supply water to the Atlanta region. The court of appeals provided a much-needed clarification of the Corps' legal authority to meet the region's water needs under two laws: the River and Harbor Act of 1946, Pub. L. No. 79-525, 60 Stat. 634 (RHA), and the Water Supply Act of 1958, 43 U.S.C. § 390b (WSA). Although the Eleventh Circuit's ruling was partly contrary to the Corps' position—concluding that the Corps actually had broader authority than the Corps thought it had—the Corps did not seek rehearing en banc and now opposes certiorari. The Corps is currently working to implement the court of appeals' decision. *See* Fed. Resp. Br. in Opp. 19 (stating that the Corps will complete its legal analysis by June 2012).

The petitions in these cases seek to prevent the Corps from exercising its technical expertise and determining whether it can and will grant Georgia's request for a partial reallocation of Lake Lanier's storage for water supply. Petitioners do not, however, identify any important legal issue warranting this Court's review. The Eleventh Circuit's ruling on the scope of the Corps' authority under the RHA pertains to only a single water project, and that ruling is entirely faithful to the well-settled framework for judicial review of agencies' interpretations of statutes that they implement. Likewise, there is no circuit split on the proper interpretation of the WSA; the D.C. Circuit and Eleventh Circuit addressed distinct aspects of the Corps' authority concerning storage in Lake Lanier and their decisions do not conflict. Furthermore, the court's ruling on final agency action does not conflict with any decision of this Court or another court of appeals.

Moreover, while the outcome of these cases is undoubtedly important to *Georgia*, as its water supply is at stake, Alabama and Florida can make no such claim. Indeed, their petitions refer only vaguely to infrastructure needs (not addressed by either lower court) and identify no significant interest that would justify this Court's review of a fact-bound decision applicable to only a single project.

The history and current posture of this dispute also weigh against certiorari. After twenty years of litigation, this dispute had gone badly off the rails. The district court granted summary judgment in three cases over which it lacked jurisdiction, made numerous errors of fact and law, and far exceeded its limited authority under the APA. On appeal, the Eleventh Circuit clarified the proper legal framework for the Corps to determine (in the first instance) whether it can meet the Atlanta region's current and future water-supply needs under the combined authority of the RHA and WSA. While that decision paves the way for an overdue resolution of this dispute, the Eleventh Circuit did not decide the ultimate issues in this case; instead, it properly directed the Corps to exercise its expertise and to definitively determine its water-supply authority as it relates to Georgia's request for storage in Lake Lanier in light of the clarified legal framework. If the Corps determines that it has authority to grant Georgia's request for water-supply storage and then undertakes to do so, its final action will be subject to judicial review under the appropriate APA standards. At this stage, however, the Corps has not yet responded with a final determination about the extent to which it can and will operate the project to meet Atlanta's water needs—and this Court's intervention would only further delay the Corps' ability to do so.

STATEMENT

A. Factual Background

The Chattahoochee River rises in northeast Georgia and flows southwest through the Atlanta region to the Alabama border, where it turns south until joining the Flint River to form the Apalachicola River, which flows through Florida and empties into the Gulf of Mexico. The Chattahoochee belongs to Georgia, even along the Alabama border. Georgia has the sovereign right to draw water from the river, and Georgians have done so for two centuries.

Because north Georgia lacks much accessible groundwater, the Chattahoochee historically has been and continues to be Atlanta's primary source of water. In 1946, Congress authorized construction of Buford Dam, a federal multipurpose project, to impound the Chattahoochee above Atlanta. Since its construction, the Corps has had the power to control the flow of the Chattahoochee, which has led Georgians to depend on the Corps to provide regular releases from the dam and to allow withdrawals directly from Lake Lanier. But the water in the Chattahoochee still belongs to Georgia, as the Corps acknowledges. Fed. Resp. Br. in Opp. 31.

Congress's authorization of Buford Dam came after more than a decade of study of Corps plans for development of the Apalachicola-Chattahoochee-Flint (ACF) River Basin. In 1946, the Corps' Division Engineer, Brigadier General James B. Newman, prepared a report describing a comprehensive plan for development of the basin, including construction of a dam and reservoir at Buford, Georgia. H.R. Doc. No. 80-300, at 10

(1947) (RE187-217).[1] The Newman Report concluded that, in addition to power generation, the Buford project would provide other benefits including flood control, supplementing flows for navigation, and "greatly increas[ing] the minimum flow in the river at Atlanta, thereby producing considerable incidental benefits by reinforcing and safeguarding the water supply of the metropolitan area." RE204 ¶ 68.

The Newman Report observed that operating the dam for water supply would entail some cost to its value as a source of hydropower: whereas hydropower value is maximized by conserving water for massive releases at periods of peak power demand, water supply requires more continual releases to maintain the flow in the river. RE211 ¶ 80. In striking a balance between these interests, General Newman proposed a dam with two large turbines that generally would be operated during periods of peak demand, and a smaller third turbine that would be used to release 600 cubic-feet per second (cfs) of water to ensure a steady flow during off-peak periods. The Report estimated that these 600 cfs releases would suffice to meet "existing needs" for water in the region as of 1946, but that 800 cfs would be needed by 1965 (*id.* ¶ 79), and that additional increases would be required as the region developed (*id.* ¶ 80). Even though increased releases for water supply would reduce hydropower, the Newman Report concluded that "the benefits to the Atlanta area from an assured water supply … would outweigh any slight decrease in system power value." *Id.*

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[1] References to "RE" are to the record excerpts filed with the Eleventh Circuit.

The Newman Report was reviewed by the Corps' Chief of Engineers, who prepared a short summary endorsing its recommendations and stating that the Buford project "would assure an adequate supply of water for municipal and industrial purposes in the Atlanta metropolitan area." RE182 ¶ 11(d). The reports were sent to Congress, which held a hearing at which the Corps witness testified that the Buford project would not be a "power project mainly," but rather a "multiple-purpose project" with purposes that included providing "water for the city of Atlanta." *Rivers and Harbors Bill: Hearings on H.R. 6407 Before the H. Committee on Rivers and Harbors*, 79th Cong. 243 (1947) (RE222). Soon thereafter, Congress enacted the River and Harbor Act of 1946, which authorized numerous projects, including development of the "Apalachicola, Chattahoochee and Flint Rivers … in accordance with the report of the Chief of Engineers." 60 Stat. 635.

In the years after Buford Dam was authorized, the Corps recognized on several occasions that Congress had authorized it to operate the project to supply water to Atlanta (among other purposes). In 1949, the Corps, consistent with its regular practice, prepared a Definite Project Report outlining the specifications for construction of Buford Dam; that report stated that the "primary purposes" of Buford Dam were flood control, "hydroelectric power, increased flow for navigation in the Apalachicola River and an increased water supply for Atlanta." RE87 ¶ 48; RE91 ¶ 115. In 1987, the Corps stated in a published regulation that the legislation creating Lake Lanier authorized the Corps to operate it for water supply, 33 C.F.R. § 222.5, App'x E,

and the Corps confirmed that view in a 1994 report to Congress (*see* Pet. App. 62a).[2]

In 1958, Congress enacted the Water Supply Act, which expanded the Corps' authority to provide water from reservoirs. The WSA opens with a declaration that it is "the policy of the Congress" that "the Federal Government should participate and cooperate with States and local interests in developing … water supplies in connection with the … operation of Federal … multiple purpose projects." 43 U.S.C. § 390b(a). The WSA then provides that the Corps may modify a water project to allocate storage—essentially, devote a portion of a reservoir's capacity—to municipal water supply, as long as the locality pays for the cost of any necessary modifications to the project. *Id.* § 390b(b). The Corps' WSA authority is limited: modifications to "include storage as provided in subsection (b) … which would seriously affect the purposes for which the project was authorized … or which would involve major structural or operational changes" require congressional approval. *Id.* § 390b(d).

As General Newman foresaw in his 1946 report, the Atlanta region continued to grow in the decades following construction of Buford Dam and the minimum release of 600 cfs became increasingly inadequate for its water needs. In 1973, the Senate commissioned a comprehensive study to address the long-term water needs of the Atlanta region. Meanwhile, the Corps began to meet then-current needs by rescheduling peak releases to increase the minimum flow in the river and allowing

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[2] References to "Pet." and "Pet. App." are to the petition and appendix in No. 11-999, except as otherwise specified.

withdrawals directly from Lake Lanier. Those accommodations were made pursuant to a series of interim agreements under which certain of the Georgia Parties agreed to pay for the water they were receiving. Those agreements expired in 1990.

The final Senate-commissioned report, issued in 1982, recommended construction of a new "reregulation" dam below Buford that could capture the varying hydropower releases and re-release the water at a steadier rate more suitable for water supply. The Corps ultimately concluded, however, that it would be preferable to reallocate storage in Lake Lanier to water supply permanently rather than build a reregulation dam. To that end, the Corps prepared a draft Post Authorization Change Notification Report (PAC Report), which recommended allocating approximately 20% of Lake Lanier's conservation storage to water supply. RE241-RE269. The Corps' issuance of that draft report prompted this litigation.

B. Procedural History

The Corps' operation of Buford Dam spawned three sets of lawsuits.

1. *Alabama and Florida sue the Corps to stop it from supplying more water to Georgia.* In 1990, Alabama sued to enjoin the Corps from implementing the PAC Report. Florida and Alabama Power Company moved to intervene as plaintiffs, and several of the Georgia Parties moved to intervene as defendants.[3] The case was promptly stayed, and in 1992, Alabama,

[3] The City of Apalachicola, Florida, later filed a parallel suit, which we treat as part of the suit brought by Alabama.

Florida, Georgia, and the Corps entered into a Memorandum of Agreement (MOA) calling for comprehensive studies in the hope of facilitating a settlement. A condition of the MOA was that the Corps withdraw the draft PAC Report. The MOA contained a "live-and-let-live" provision allowing continued water-supply withdrawals and releases to meet the Atlanta region's current needs, including reasonable increases. Pet. App. 21a.

In 1997, the three States entered into an interstate compact establishing a framework for negotiation, which also contained a live-and-let-live provision. Apalachicola–Chattahoochee–Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219. But the Compact negotiations proved unfruitful, the compact expired in August 2003, and the litigation resumed. Since then, pending resolution of this litigation, the Corps has continued to allow withdrawals from Lake Lanier and to make releases from Buford Dam to accommodate downstream withdrawals consistent with the live-and-let-live provision.

Once litigation resumed, the Alabama and Florida plaintiffs shifted their focus from the draft PAC Report (which the Corps had withdrawn) to what they called the "de facto" reallocation of storage in Lake Lanier for the purpose of water supply (*i.e.*, the Corps' interim provision of water to the Georgia Parties).

2. *Power customers sue the Corps to stop it from supplying more water to Georgia.* In December 2000, petitioner Southeastern Federal Power Customers, Inc. (SeFPC) filed suit against the Corps, alleging that the Corps had wrongfully diverted water from hydropower generation to water supply, causing SeFPC members economic injury. Some of the Georgia Parties

intervened as defendants. SeFPC, the Corps, and the intervening Georgia Parties reached a proposed settlement, under which 22% of storage would have been allocated to water supply and the Georgia Parties would have paid higher rates that would be credited against hydropower costs. Alabama and Florida intervened to oppose the settlement. The district court upheld the settlement as a valid exercise of the Corps' WSA authority, and Alabama and Florida appealed.

In their brief to the D.C. Circuit, the settling parties, who had and have differing opinions on the Corps' RHA authority, defended the settlement as a valid exercise of the Corps' authority under the WSA alone and explicitly asked the court not to consider the Corps' authority under the RHA. The D.C. Circuit ruled that the settlement exceeded the Corps' WSA authority because a reallocation of 22% of conservation storage in Lake Lanier constituted a "major operational change" that required congressional authorization under 43 U.S.C. § 390b(d). The court did not address the Corps' independent authority under the RHA. *See Southeastern Federal Power Customers, Inc.* v. *Geren*, 514 F.3d 1316 (D.C. Cir. 2008).

3. *Georgia requests increased storage for the future.* In 2000, Georgia requested a permanent allocation of storage in Lake Lanier sufficient to meet the region's projected needs through 2030 (approximately 34% of the lake's conservation storage). In 2002, the Corps rejected Georgia's request. The rejection was accompanied by a legal memorandum (the 2002 Memo, RE149-163) that concluded that the Corps did not have authority to grant the request because water supply was only an "incidental benefit" of Buford Dam and the size of the reallocation exceeded the Corps' combined authority under the RHA and the WSA. RE154-155.

The Georgia Parties sued the Corps' over its denial of Georgia's request for future water supply, and Florida, Alabama, and SeFPC intervened as defendants.

4. *The litigation is consolidated and resumed.* The Judicial Panel on Multidistrict Litigation consolidated and transferred the cases discussed above to an out-of-circuit judge sitting in the Middle District of Florida. The district court bifurcated the proceedings into two phases. Phase 1, which is pertinent here, relates to the Corps' operation of the Buford project. Phase 2 principally concerns environmental issues and has been litigated separately.

The plaintiffs in each of the Phase 1 suits moved for summary judgment. The Corps opposed and cross-moved for summary judgment in each case. On July 17, 2009, the district court ruled in favor of Alabama, Florida, and SeFPC, and against the Georgia Parties. That ruling concluded that supplying water to the Atlanta region is not an authorized purpose of the Buford project under the RHA, but is merely an incidental by-product of the project's location upstream from Atlanta. The court further ruled that the Corps therefore could allocate storage for water supply, if at all, only under the WSA, not the RHA. Pet. App. 168a.

The district court then made extensive de novo calculations—in the absence of any final determination by the Corps—of the amount of water supply available as an incident to peak-period hydropower releases, the amount of storage needed to supply the region's water demands, and the impact of providing that storage on other purposes. Pet. App. 44a n.16, 171a-182a. Based on those calculations, the court determined, in the first instance, that the Corps' past and present provision of water to the Georgia Parties had caused a "major oper-

ational change" at Buford Dam and had "seriously affect[ed]" the project's authorized purposes, without the congressional approval required by the WSA. The court further reasoned that, since the Corps lacked authority to meet even the region's current needs, it also lacked authority to approve Georgia's water-supply request for storage sufficient to meet future needs. Pet. App. 173a-175a, 177a-179a.

As a remedy, the court ordered the Corps to stop providing the Georgia Parties with any more water than had been provided in the mid-1970s. It then stayed that order, which it described as "draconian" (Pet. App. 185a), for three years to allow the parties to seek a political resolution. The Georgia Parties and the Corps appealed.

5. *The court of appeals clarifies the RHA and WSA.* A unanimous panel of the Eleventh Circuit reversed. That court first ruled that the courts lacked jurisdiction over the Alabama, Florida, and SeFPC suits against the Corps because the Corps had not taken "final agency action" regarding its current water-supply operations at the Buford project. The Eleventh Circuit therefore vacated the district court's rulings in those cases and returned them to the Corps. Pet. App. 43a.

With respect to Georgia's challenge to the Corps' denial of its 2000 water-supply request, the Eleventh Circuit concluded that the Corps had underestimated its authority to operate the Buford project to supply water to the Atlanta region. The court "conclude[d] that water supply was an authorized purpose of the RHA and that the RHA authorized the Corps to allocate storage in Lake Lanier for water supply." Pet. App. 59a. Because the Corps had denied Georgia's re-

quest on the mistaken belief that water supply was not authorized under the RHA, the Eleventh Circuit remanded the case to the agency so that the Corps could "reexamine the request in light of its combined authority under the RHA and WSA" as well as a 1956 Act specific to Gwinnett County. *Id.* at 69a-70a. It also instructed the Corps to perform additional analysis of issues pertinent to the dispute in conjunction with its reconsideration of Georgia' water-supply request so that the "parties will have some further instruction, based on sophisticated analysis, of what the Corps believes to be the limitations on its power." *Id.* at 78a. In recognition of the fact that "[p]rogress towards a determination of the Buford Dam's future operations is of the utmost importance" (*id.* at 84a), and that its decision had not definitively resolved the dispute, the court instructed the Corps to complete its analysis within one year.

Petitioners, but not the Corps, moved for rehearing en banc, which was denied without a single vote.

ARGUMENT

The Eleventh Circuit correctly concluded that (a) federal-court jurisdiction was lacking in all but one of the cases before it; (b) in the RHA, Congress authorized the Corps to operate the project for the purpose of supplying water to the Atlanta region (among other purposes); and (c) the WSA supplements the Corps' authority under the RHA to store water in Lake Lanier for water supply. None of those rulings conflicts with any decision of this Court or any court of appeals or otherwise warrants certiorari review.

Moreover, the court of appeals did not tell the Corps how much water it may or must supply to the

Atlanta region from the Buford project, nor how much storage would require congressional approval under the WSA; it properly left those calculations in the first instance to the expertise of the Corps, which is examining those issues even now. Once the Corps makes those determinations and takes final agency action, any aggrieved party can seek judicial review to challenge the Corps' decision, but at present the Corps has not taken final action.

Nor do the petitions raise any compelling issue concerning state sovereignty or environmental protection that might otherwise warrant this Court's intervention. Certiorari should therefore be denied.

I. THE PETITIONS PRESENT NO ISSUE CONCERNING THE RIVER AND HARBOR ACT OF 1946 THAT WARRANTS CERTIORARI REVIEW

A. The Eleventh Circuit Faithfully Applied *Chevron* To The RHA

Alabama's principal argument is that the Eleventh Circuit misapplied the framework of *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), to the RHA when it concluded that the RHA authorized the Corps to operate Buford Dam for the purpose of water supply (among other purposes). That contention is wrong and does not warrant this Court's review. The Eleventh Circuit faithfully applied *Chevron* and correctly interpreted the RHA to hold that Congress authorized the Corps to operate Buford Dam to accommodate the Atlanta region's growing water needs (including by allocating storage in Lake Lanier).

The court of appeals' ruling on the authorized purposes of Buford Dam is limited to a single statute—

indeed, to a single reservoir—and has no broader implications that would warrant this Court's attention. No other court of appeals has had occasion to address the Buford authorization in the RHA, much less reach a different conclusion. Moreover, the RHA is an unusual type of law: it incorporated the underlying Corps reports recommending the dam's construction upstream from Atlanta, and those reports establish the scope of the congressional authorization for the project. Pet. App. 47a; *see United States ex rel. Chapman* v. *FPC*, 345 U.S. 153, 160 (1953). Few laws share this feature, and none of this Court's *Chevron* cases involves them. Accordingly, the Eleventh Circuit's analysis is unlikely to apply to more conventional statutes in which the controlling question is the meaning of a specific statutory term.

1. In challenging the Eleventh Circuit's "analytical approach," Alabama repeatedly faults the court for engaging in an "independent" or "*de novo*" interpretation of the RHA that "ignor[ed] the Corps' long-held views" at step one of the *Chevron* inquiry. 11-1006 Pet. 4, 12, 14, 16-18. This contention fundamentally misapprehends the two-part *Chevron* framework, under which courts ask: (1) whether Congress has "directly spoken to the precise question at issue," and (2) if not, whether the agency's answer is based on a permissible construction of the law. *Chevron*, 467 U.S. at 842. Step one is a matter of pure statutory construction—an inquiry for the court that does not turn on the prior views of the affected agency. *Id.* at 842-843 & n.9.

The "precise question at issue" for *Chevron* purposes in this case is whether the RHA authorized the Corps to operate the Buford project to supply the Atlanta region with water—*i.e.*, whether water supply is an authorized purpose (along with other purposes, such

as hydropower generation and flood control) of the project. As the court of appeals explained (Pet. App. 46a, 13a), it is necessary to answer that question because the WSA supplements whatever other authority the Corps may have to operate the project for water supply. The court of appeals thus had to determine whether the RHA grants the Corps any authority to supply water that counts towards that WSA baseline, for only then can the Corps' combined authority under the RHA and WSA be assessed.

Alabama now seeks to reframe that question in the narrowest terms possible—"whether the Corps has authority [under the RHA] to *reallocate storage at Lake Lanier* to local water-supply use." 11-1006 Pet. 4; *see also id.* at 11-12, 18. Its briefing to the court of appeals, however, correctly framed the question in broader terms relevant to establishing the WSA baseline: "whether the district court correctly concluded that water supply is not an *authorized purpose* of Lake Lanier, but instead an incidental benefit of the operation of the dam for its authorized purposes" (Pet. C.A. Br. 1, Statement of Issues (emphasis added)). Alabama cannot fault the Eleventh Circuit for answering the very question it presented below. And the court's answer to that question—that Congress did authorize the Corps to operate the Buford project for water supply, and that the Corps could allocate lake storage to meet that purpose, among others—was both correct and properly reached at *Chevron* step one.

The authorization reports incorporated into the RHA provide for a federal reservoir that would "*ensure an adequate water supply for the rapidly growing Atlanta metropolitan area*," and do not subordinate water supply to hydropower interests or those of downstream States. RE205-206 ¶ 73 (emphasis added).

Rather, the Newman Report expressly recognizes that the Corps would meet Atlanta's needs at some cost to maximizing the project's hydropower value, and that meeting those needs would require increasing water-supply releases—at the expense of hydropower—over the life the project. RE211 ¶ 80 ("The benefits to the Atlanta area from an assured water supply for the city … would outweigh any slight decrease in system power value."). In fact, the Report expressly contemplates that water-supply releases would need to be increased from their original levels by 33 percent (from 600 cfs to 800 cfs) by as early as 1965.[4] RE211 ¶ 79.

In addition to its textual and contextual analysis of the authorization record, the court also applied common sense and looked to the physical location and structure of the dam itself. It explained that, before the dam was constructed, the Chattahoochee provided almost all of Atlanta's water supply, and it sensibly concluded that Congress would not have placed a federal project directly upstream from the city in order to deprive it of its historical source of water. Pet. App. 58a. The court further explained (*id.* at 48a-49a) that the addition of a third turbine devoted to off-peak releases demonstrates that the provision of water supply was not

[4] As the Eleventh Circuit explained (Pet. App. 55a-56a), the initial allocation of lake storage, which did not include storage for water supply, does not establish the purposes for which Congress intended the project to be operated over its useful life. No storage was allocated to water supply in 1946 because none was needed then; it does not follow that Congress prohibited any subsequent allocation of storage that would be required for that purpose in the future. Moreover, no storage was allocated to navigation in 1946 either, even though all agree that navigation was an authorized purpose of the project.

merely a byproduct of maximizing the dollar value of hydropower but was itself an authorized purpose of the project.

2. Alabama incorrectly argues (11-1006 Pet. 19-20) that the court of appeals departed from *Chevron* by adopting one controlling reading of a particular word ("incidental" or "incidentally") when another reasonable reading was available and supported by the Corps. The fundamental defect in this argument is that the court of appeals did not rest its ruling solely on the construction of the word "incidental," but on its reading of the Newman Report as a whole.

In the court of appeals, it was *Alabama* that argued that the Newman Report's reference to water supply as an "incidental" benefit of Buford Dam was decisive and could only be understood as precluding the Corps from operating the project for the purpose of water supply. *See* Pet. C.A. Br. 50-57. The court, however, did not treat the words "incidental" and "incidentally" as controlling. Rather, it properly considered those terms in the context of the entire Newman Report to determine Congress's intent for the Buford project. When read in context, the Report's uses of "incidental" and "incidentally" cast no doubt on the intent of Congress in authorizing the Buford project.

As the court explained, the Newman Report clearly reflects a congressional intent to accommodate both Atlanta's water-supply needs and hydropower generation; during periods of peak power demand, Atlanta would receive its water as an incident to hydropower releases, and during non-peak times, hydropower would be generated as an incident to the releases necessary to ensure a steady supply of water downstream. The court properly read the Report as a whole and sensibly con-

cluded that the Report anticipated that the Corps should adjust the operations of Buford Dam over time for water-supply purposes. *See Chapman*, 345 U.S. at 160 ("[T]he decisive question is not what this or that statement in the report or the comments thereon imply but how Congress may fairly be said to have received and read that report in light of the legislative practice in relation to such public works.").

3. The Eleventh Circuit's decision does not conflict with this Court's decisions or create a circuit split on the proper application of *Chevron*. The cases cited by Alabama are step-two cases, where key terms in statutory schemes were left undefined by Congress, and thus left to agencies to define by regulation or practice. There is nothing to suggest that those courts would not have resolved the cases at step one if they had determined a clear congressional intent in the statutes before them, as the Eleventh Circuit did here.

Nor is the first step of the *Chevron* analysis the mechanical exercise suggested by Alabama's petition. Rather, as this Court has instructed, when determining the intent of Congress, "a reviewing court should not confine itself to examining a particular statutory provision in isolation," but should consider the "context" in which the provision appears, "interpret the statute as a symmetrical and coherent" whole, and "be guided by a degree of common sense." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). The Eleventh Circuit did just that.[5] And the possibility

[5] Moreover, Alabama cannot evade the Eleventh Circuit's alternative holding (Pet. App. 61a-62a) that the Corps' interpretation would not be entitled to deference at *Chevron* step two. Contrary to Alabama's assertion that the court "undertook no separate

that a word might have more than one meaning does not prevent a court from concluding that, in context, one rather than another was intended. *See MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 226-228 (1994); *Massachusetts* v. *EPA*, 549 U.S. 497, 531 (2007).

Alabama's real grievance is not with the Eleventh Circuit's mode of analysis but with its conclusion. But that reduces to a disagreement over a narrow ruling involving a single reservoir, not a "patent, unjustified usurpation" of executive authority (11-1006 Pet. 21) that might warrant certiorari review. Indeed, the decision below is consistent with the underlying purpose of *Chevron*, which is to protect agency discretion when Congress has granted the agency authority to address a particular matter. The Eleventh Circuit ruled that the Corps has even greater discretion in operating Buford Dam than it had appreciated. The fact that the Corps itself opposes certiorari is, on this point, quite revealing.

B. Post-Enactment "Legislative History" Does Not Undermine The Eleventh Circuit's Decision

SeFPC contends that, in interpreting the RHA, the Eleventh Circuit failed to give appropriate weight to statements made by the Corps to Congress *after* the RHA's enactment. But as this Court has often explained, post-enactment "legislative history" is of "scant or no value" in interpreting a statute passed by an earlier Congress. *Graham Cnty. Soil & Water Con-*

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analysis" under step two (Pet. 28), the court held that unexplained inconsistencies in the Corps' positions undermined any deference the agency might otherwise be due (Pet. App. 63a-64a & n.29).

serv. Dist. v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1409 (2010). And in any event, the Corps' post-enactment statements support the conclusion that water supply was among the project's authorized purposes.

SeFPC's argument rests on one case, *Chapman* v. *FPC*, which does not bear the weight of the petition. *Chapman* addressed whether congressional "approval" of the Corps' general plan for development of the Roanoke River Basin was tantamount to congressional "authorization" for public (rather than private) development of each of the dams contemplated by the plan. The Court looked to the appropriations process to explain the entire sequence of congressional involvement in matters of public works—from approval of a general plan, to authorization of specific projects, to appropriation of funds for those projects—not to define the Corps' authority over projects that (like Buford) were indisputably authorized. *See* 345 U.S. at 162-164 & n.5.[6]

Moreover, the Corps' statements to Congress surrounding the Buford Dam authorization leave no doubt that water supply was among the project's authorized purposes. Indeed, if one were to look to statements by the Corps to Congress to discern congressional intent, surely the most authoritative would be those made during the 1946 authorization process itself, where the Corps witness told the House Rivers and Harbors

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[6] *Chapman*'s relevance for this case lies elsewhere. It makes clear that (a) congressional authorization of a Corps development plan in accordance with a specifically identified Corps report authorizes project purposes as set forth in the report, and (b) such reports are to be read sensibly and as a whole. *See supra* pp. 15, 19.

Committee that the Buford project was not "a power project mainly," but a "multiple-purpose project" that would provide "water for the city of Atlanta." RE222.

The Corps's statements following enactment of the RHA, if anything, lend additional support to that conclusion. In 1949 (shortly after Buford's authorization but before the appropriations hearings invoked by SeFPC), the Corps prepared a Definite Project Report in which it outlined the specifications for the project. That report stated that the "primary purposes" of the project included "an increased water supply for Atlanta." RE87 ¶ 48. Likewise, at a 1952 appropriations hearing, the Corps testified that "[t]he purpose of the project is flood control, *water supply for the city of Atlanta, which is growing by leaps and bounds*, and the production of power"—and, further, that "water supply is of equal importance" to hydropower and flood control. *Civil Functions, Dep't of the Army Appropriations for 1952: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 82d Cong. 118-119 (1951) (statement of Col. Potter, Corps officer) (emphasis added). Thus, although the Corps has not been entirely consistent over time about whether water supply was an authorized purpose of Buford Dam (as the Eleventh Circuit noted, Pet. App. 61a-62a), the Corps' statements before, during, and after passage of the RHA are in accord with the Eleventh Circuit's interpretation.

II. THE PETITIONS PRESENT NO ISSUE CONCERNING THE WATER SUPPLY ACT THAT WARRANTS THIS COURT'S REVIEW

Congress's enactment of the Water Supply Act did nothing to rescind or restrict the Corps' authority under the RHA to operate Buford Dam for the purpose of water supply. Just the opposite is true—the WSA pro-

vided the Corps with a supplemental source of authority to provide water supply, thereby enhancing the Corps' ability to meet the needs of metropolitan Atlanta. Petitioners' arguments to the contrary find no support in either the text of the WSA or the D.C. Circuit's opinion in *Southeastern Federal Power Customers, Inc.* v. *Geren*, 514 F.3d 1316 (D.C. Cir. 2008). In any event, the WSA is seldom the subject of litigation, and its construction does not present an issue of sufficient importance to warrant this Court's review.

A. The WSA Is A Source Of Supplemental Authority, Not An Independent Limit On The Corps' Ability To Provide Water

The WSA provides the Corps with authority to allocate storage in federal multipurpose water projects to municipal water supply. This authority augments, and does not supersede or restrict, any project-specific authority the Corps has to provide water supply. There are limits to the Corps' authority under the WSA: it does not authorize the Corps to "seriously affect the purposes for which the project was authorized" or make "major structural or operational changes" without congressional approval. 43 U.S.C. § 390b(d). But these limitations apply only to the Corps' additional authority under the WSA itself and do not constrain the Corps' ability to act pursuant to other authority, such as the RHA.

Florida's contrary reading of the WSA, as limiting the Corps' ability to provide water supply under *any* grant of authority, was correctly rejected by both the court of appeals and the district court. *See* Pet. App. 64a, 162a. The plain text of the WSA makes clear that its limitations apply only to modifications "to include storage *as provided in subsection (b)*" (43 U.S.C.

§ 390b(d) (emphasis added))—*i.e.*, modifications made pursuant to the WSA itself, and not under independent sources of authority such as the RHA. Florida's reading is also incompatible with the limitations themselves, which presuppose a pre-existing baseline of Corps authority independent of the WSA. In making clear that WSA authority may not be used to "seriously affect the purposes for which the project was authorized" (*id.*), the statute recognizes a backdrop of congressionally authorized purposes that the WSA does not purport to affect. The text and structure of the WSA thus make clear that the limitations in § 390b(d) do not apply to modifications made pursuant to other authority.

Florida argues that a more expansive reading of the WSA's limitations is necessary to prevent the Corps from usurping the legislative function by allocating storage through a process in which "Congress will have no opportunity to sign off." Pet. 26. But this ignores that, when the Corps acts pursuant to a project-specific authorization, Congress has already "sign[ed] off." When the Corps provides water under the RHA, in which Congress authorized the Corps to safeguard Atlanta's water supply, the Corps is implementing Congress's will rather than evading it. Florida is in essence arguing that the WSA constituted a partial repeal of the RHA, but it provides no support for that argument. And it would be perverse to read such a repeal into a statute with the stated purpose of encouraging the Corps to "participate and cooperate with States and local interests" in providing water supply. 43 U.S.C. § 390b(a).

Florida's argument that "a change is a change" (Pet. 23), even when the change is made pursuant to project-specific authority, misapprehends the structure of the WSA. When the Corps is operating the project

as Congress intended, and doing so independently of the WSA, it is not changing its operations in a sense relevant to the WSA. Congress does not intend multi-purpose projects like Buford Dam to be operated in a static fashion; rather, the Corps is expected to adjust operations to balance multiple project purposes as circumstances change over the life of a project. *See Creppel* v. *U.S. Army Corps of Eng'rs*, 670 F.2d 564, 572-573 (5th Cir. 1982) ("[I]t imparts both stupidity and impracticality to Congress to conclude that the statute impliedly forbids any change in a project once approved, and thus prevents the agency official … from adjusting for changes in physical or legal conditions").[7]

B. The Eleventh Circuit's Construction Of The WSA Is Consistent With The D.C. Circuit's Decision in *Geren*

Florida claims that its construction of the WSA was adopted by the D.C. Circuit in *Geren*, and that the decision below conflicts with *Geren* in other respects as well. But *Geren* was a narrow decision that did not address any of the questions decided below and says nothing whatsoever about the relationship between the WSA and the RHA—a relationship the decision expressly acknowledged was not before the court.

Florida begins from the mistaken premise that the D.C. Circuit in *Geren* "addressed the same question [as the opinion below]—namely, the extent of the Corps'

[7] Contrary to Florida's argument (Pet. 23-24), this reading hardly deprives the WSA limitations of effect, as those limitations still apply to any reallocation made pursuant to WSA authority. Their relevance to Georgia's water-supply request will depend on the Corps' decisions on remand.

authority to unilaterally alter Lake Lanier storage to provide more water supply for Georgia's residents." Pet. 18. But that mischaracterizes *Geren*, which addressed only the far narrower question of whether the Corps had authority *solely under the WSA* to allocate storage under the terms of the parties' 2003 settlement agreement. Indeed, the court explicitly noted that it was not "address[ing] the original Congressional purposes of Lake Lanier." 514 F.3d at 1324 n.4; *see id.* at 1327 (Silberman, J., concurring) (whether Buford Dam was "intended to provide water to the city of Atlanta" was an "open question that has not really been briefed").

The narrow focus of the D.C. Circuit's opinion directly reflects the context in which it arose. The Corps, the Georgia Parties, and SeFPC were adversaries litigating over whether Congress authorized the Corps to operate Buford Dam to provide water supply at the expense of hydropower. While those parties were able to reach a settlement agreement involving the execution of interim contracts that would have provided water to the Georgia Parties and compensation to hydropower interests, they were unable to agree on the source of the Corps' authority to enter into those contracts. All the settling parties agreed that the contracts could be executed under the WSA, but the Georgia Parties also believed the contracts were authorized by the RHA, a position the power customers rejected.

In light of this disagreement, the settling parties agreed for the limited purpose of defending the settlement to rely exclusively on the WSA. Accordingly, in their joint brief defending the settlement in the D.C. Circuit, the settling parties noted that they "sharply disagree as to whether or not Lake Lanier was originally intended for water supply" in the RHA, and that

they had accordingly "agreed to rely collectively on the WSA" alone as authority for the settlement. Br. of Appellees 45-46, *Geren*, Nos. 06-5080, 06-5081 (D.C. Cir. Mar. 20, 2007). The settling parties also stressed that "[t]he Court need not reach a final determination as to whether water supply was included as a 'project purpose' in the original authorization for the Buford project to resolve this appeal—and the Settling Parties expressly request that the Court reserve judgment on this issue." *Id.* at 5-6.

Against this backdrop, it is clear that the D.C. Circuit was not presented with, and did not decide, any question beyond whether the Corps was authorized to allocate 22% of Lake Lanier to water supply solely under its WSA authority. The decision says nothing about whether water supply is an authorized purpose of the Buford Dam project, and accordingly says nothing about the interaction between the RHA and the WSA.[8]

For much the same reason, Florida is also incorrect to suggest (Pet. 19) that the D.C. Circuit concluded that

[8] The D.C. Circuit did hold that, because the parties were not relying on any baseline of authority under the RHA and no storage was initially allocated to water supply, the appropriate assumed baseline for calculating the size of the reallocation solely pursuant to the WSA was zero. 514 F.3d at 1324 & n.4. But the Eleventh Circuit did not disagree with that calculation, which in any event is irrelevant in this case. As the Corps makes clear, the D.C. Circuit did not decide whether the RHA would allow the Corps to reallocate storage to water supply, only that the RHA did not initially allocate storage to water supply. Fed. Resp. Br. in Opp. 24. The Eleventh Circuit also recognized, however, that the RHA authorization was not fixed at any particular point (much less at zero) when the statute was enacted, and that even though no storage was initially allocated to water supply, the RHA authorized the Corps to make such allocations in response to future needs.

the WSA would require the Corps "to obtain Congressional approval before reallocating 34 percent of the lake's storage." Rather, *Geren* held only that an allocation of that size could not be implemented solely under the WSA (which was the only authority at issue). In support of its decision, the D.C. Circuit noted that the Corps had concluded in the 2002 Memo that a 34% reallocation could not be implemented solely under the WSA. But while the D.C. Circuit embraced the WSA analysis from the 2002 Memo, it did not address—and had no cause to address—that memo's RHA analysis. The Eleventh Circuit, by contrast, did not reject that WSA analysis from the 2002 Memo, but rather found that the Corps had started from the erroneous premise that water supply was not an authorized purpose of Buford Dam under the RHA. Since the two circuits focused on different aspects of the 2002 Memo and different statutory bases for providing water supply, there is no conflict between them.

C. There Is No Need For This Court To Construe The WSA At This Time

Florida argues that certiorari is warranted because the WSA is an important statute that this Court has never before construed. Pet. 25. But it should not be surprising that this Court has never had cause to consider the WSA; that statute has seldom been the subject of litigation and has been cited in only a handful of decisions, none of which presents the questions litigated below.[9] Florida provides no compelling explanation

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[9] *See Jicarilla Apache Tribe* v. *United States*, 657 F.2d 1126, 1142-1143 (10th Cir. 1981) (WSA does not allow storage for recreation); *Save Our Invaluable Land (SOIL), Inc.* v. *Needham*, 542 F.2d 539, 543-544 (10th Cir. 1976) (state repayment to the federal

why a question that has arisen only once in the five decades since the statute was enacted is worthy of this Court's review.

This case in any event presents a poor vehicle for a definitive construction of the WSA. The decision below turned centrally on the construction of the RHA, not the WSA. The court did not address or define the meaning of the WSA's requirement that the Corps not use its WSA authority in a way that would "seriously affect the purposes for which the project was authorized" or make "major structural or operational changes." 43 U.S.C. § 390b(d). Those concepts may (or may not) become relevant again once the Corps definitively articulates the scope of its combined authority under the two statutes, but whether the WSA would authorize a specific reallocation of storage entails a technical analysis that is highly fact-dependent and context-specific. The Corps, however, has not yet gathered the relevant hydrological data and determined the impact any reallocation might have on project purposes in light of that data, let alone determined to allocate storage pursuant to the WSA. It is in the process of doing so. Once the Corps has completed its hydrological analysis and reached conclusions about whether it can and will grant Georgia's water-supply request, the Corps' action to implement that determination can be reviewed by the courts and, if necessary, by this Court.

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government for WSA projects); *City of Ukiah* v. *FERC*, 729 F.2d 793, 798-799 (D.C. Cir. 1984) (same); *Hagood* v. *Sonoma Cnty. Water Agency*, 81 F.3d 1465, 1467-1468 (9th Cir. 1996) (same); *Missouri* v. *Andrews*, 787 F.2d 270, 277 (8th Cir. 1986) (WSA does not grant a private right of action).

III. THE PETITIONS PRESENT NO QUESTION OF JURISDICTION THAT WARRANTS REVIEW

As the Corps has explained (Fed. Resp. Br. in Opp. 27-30), the Eleventh Circuit correctly concluded that there had been no final agency action in the suits brought by Alabama, Florida, and SeFPC, and therefore no jurisdictional ground for review. The absence of final agency action was forcefully demonstrated by the district court's de novo fact-finding, which attempted to perform the kind of technical analysis that properly belongs to the Corps. *See* Pet. App. 44a n.16.

SeFPC raises a new contention that 5 U.S.C. §§ 553(b)(2) and 554(b)(2) require the Corps to "announce the statutory basis for its action." 11-1007 Pet. 27-28. Neither provision applies here. Section 553 applies only to proposed agency rulemaking published in the Federal Register, and Section 554 applies only to on-the-record adjudications. *See* 5 U.S.C. §§ 553(b), 554(a). SeFPC does not identify any Corps rule that failed to meet § 553(b)(2) or any adjudication that violated § 554(b)(2). On the contrary, SeFPC challenges the Corps' day-to-day management of Buford Dam and its allocation of storage in Lake Lanier. Any inaction on the Corps' part with respect to the day-to-day operation of the dam falls outside the scope of sections 553 and 554. SeFPC's argument is a failed attempt at artful pleading around the "final agency action" requirement of the APA.

In any event, the appropriate relief for SeFPC's alleged harm would be to identify the statutory basis for the Corps' actions and remand the matter to the Corps for re-evaluation. The Eleventh Circuit's opinion functionally granted this relief: it identified the statutory basis for the Corps' action (Pet. App. 74a (holding that

the Corps has "authority under the RHA as well as the WSA and the 1956 Act")), and remanded to the Corps "to make final determinations pertaining to its current policy for water supply storage allocation." *Id.* at 43a.

IV. Other Factors Do Not Warrant Review

Petitioners also fall short in their arguments that sovereignty and environmental concerns warrant this Court's review.

First, Alabama and Florida point to the critical importance of this case to *Georgia* to suggest that it must have equal importance for the other States. That argument is meritless. An adverse ruling below—especially the district court's "draconian" order reducing Georgia's water supply to levels of decades earlier—could well have been devastating to Georgia, costing it hundreds of thousands of jobs and billions of dollars. But the stakes for the other States are far lower. Alabama now asserts that, as a result of the decision below, "the need for massive infrastructure investments will shift to downstream communities, which will have to undertake unexpected and costly projects to replace the predictable flows from Lake Lanier." 11-1006 Pet. 24. But no evidence in the record supports this contention, which neither court below even addressed, much less credited.

These purported harms are not only unsupported, they are speculative. The Corps has not yet decided whether to grant Georgia's water-supply request and how much (if any) storage to allocate to water supply. Florida and Alabama do not allege injury from the Corps' having authority to grant Georgia's water-supply request, but rather from any reallocation that may ultimately be implemented. *See, e.g.*, Pet. 28-29

(alleging economic harm predicated on the Corp's granting the "reallocation requested by Georgia"). Since no reallocation decision has yet been made, review at this stage would be premature.

Alabama and Florida also argue that this case is akin to an equitable apportionment action within this Court's original jurisdiction. Pet. 27, 30; 11-1006 Pet. 26-27. But that is not the type of action they have brought, and for good reason: in an equitable apportionment action, Alabama and Florida would bear the heavy burden of proving by clear and convincing evidence "that the diversion will cause [] real or substantial injury or damage," *Colorado* v. *New Mexico*, 459 U.S. 176, 186 & n.13 (1982) (internal quotation marks omitted). Florida and Alabama chose not to sue Georgia directly, and instead to sue the Corps. They should not now be able to recast this suit as an interstate dispute over apportionment of water.[10]

Moreover, nothing in the opinion below authorizes Georgia to consume more than its fair share of water or precludes Alabama and Florida from bringing an equitable apportionment action to vindicate any rights they may claim to have in the Chattahoochee. The Eleventh

[10] There is deep irony in Florida's attempt to conflate the present action with a suit within this Court's original jurisdiction (Pet. 27). Earlier in the litigation, Florida resisted Georgia's arguments that an equitable apportionment action would be a more appropriate vehicle for Florida to utilize to protect its purported rights. *See Georgia* v. *U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1254-1255 (11th Cir. 2002). The Eleventh Circuit accepted Florida's arguments, noting that "until there is a proven shortage of water for one or more of the states, it is not clear that the requisite threat of injury would exist to persuade the Supreme Court to exercise its original jurisdiction." *Id.* at 1254-1255 n.10.

Circuit's ruling will potentially make it easier for Georgia to utilize the water to which it is entitled, but Florida and Alabama would have no cause for complaint unless and until Georgia consumed more than its share of the river. At that point—and only at that point—they would be entitled to bring an equitable apportionment action. *See* 28 U.S.C. § 1251(a); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983).

Alabama and Florida also argue that adverse environmental impacts of the decision below warrant this Court's review. This argument overlooks that the environmental impacts of the Corps' operations in the ACF Basin are being separately litigated in Phase 2 of this dispute. *See* Pet. App. 88a (Phase 2 will address claims "that the Corps's operations in the Apalachicola-Chattahoochee-Flint [] river basin violate the Endangered Species Act … and other environmental laws and regulations"). That case is still pending below and has been held in abeyance at Florida's urging. It is also premature to speculate about any environmental impact that would result from a reallocation of storage to water supply. The Corps has not yet gathered the data necessary to determine the extent of such impact, but it will do so. Under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and the Corps' own guidelines (Fed. Resp. C.A. Br. 54), the Corps will consider the relevant environmental concerns and issue an Environmental Impact Statement before it completes any reallocation. That decision, should it occur, will then be subject to review at the appropriate time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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