No. 11-999

IN THE
Supreme Court of the United States

IN RE: MDL-1824 TRI-STATE WATER RIGHTS LITIGATION

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

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SUMMARY OF ARGUMENT

The briefs filed by the Solicitor General and Georgia are briefs in opposition only in name; for each ultimately underscores why certiorari review is appropriate. The Solicitor General agrees that the Eleventh Circuit's decision is wrong. S.G. Opp. 16. Georgia agrees that the case is of extraordinary importance, at least to Georgia, and that an adverse decision "could well have been devastating," "costing it hundreds of thousands of jobs and billions of dollars." Ga. Opp. 31. And while both respondents deny that the decision creates a circuit split with respect to the Water Supply Act ("WSA"), their briefing betrays them: Georgia's brief shows exactly why there *is* a split, and respondents cannot even agree among themselves what the WSA means.

The Court is faced, in short, with a divide between the circuits—and a flawed statutory interpretation only reviewable by this Court—in a case with massive ramifications for multiple states and billions of

dollars on the line. The issues are ripe for resolution. Further percolation would add nothing. And the case implicates the sort of square conflict among States that has traditionally warranted this Court's attention. The writ should be granted.

ARGUMENT

I. RESPONDENTS FAIL TO EXPLAIN AWAY THE CIRCUIT SPLIT.

1. Respondents argue that the circuits cannot be split on the WSA's meaning because the D.C. Circuit considered "whether the Corps had authority *solely under the WSA* to allocate storage" to water supply at Lake Lanier, while the decision below considered the Corps' combined authority under the WSA and the Rivers and Harbors Act ("RHA"). Ga. Opp. 26 (emphasis in original); S.G. Opp. 23-26. But the divergence between the circuits is not about the interaction between the WSA and RHA. It is about whether the WSA's explicit requirement that Congress authorize "major * * * operational changes" involving water-supply storage, 43 U.S.C. § 390b(d), applies across the board to all Corps projects. The D.C. Circuit concluded, based on the WSA's plain language, that the Congressional-approval provision applies across the board, to all projects, and thus that the Corps' underlying authorization *vel non* to reallocate storage was irrelevant. App. 202a-204a; *Southeastern Fed. Power Customers, Inc.* v. *Geren*, 514 F.3d 1316, 1324 & n.4 (D.C. Cir. 2008) (rejecting relevance of any underlying authorization and holding that "[o]n its face," a 22 percent reallocation "constitutes the type of major operational change referenced by the WSA"). The Eleventh Circuit, in direct contrast, concluded that the Congressional-

approval provision only applies where the Corps *does not* have underlying reallocation authority, and thus that the Corps' underlying RHA authorization was key. App. 75a-79a. That is a circuit split—and an important one—on the power Congress kept for itself when it enacted the WSA.

Georgia's own brief illustrates the point perfectly. As Georgia explains, the Eleventh Circuit held that the WSA merely "supplements whatever other authority the Corps may have to operate the [Buford] project for water supply" and that the WSA's Congressional-approval requirement applies only to the agency's use of that supplemental authority. Ga. Opp. 16. Once it reached that conclusion, the Eleventh Circuit found it inescapably "necessary" to answer the question "whether the RHA authorized the Corps to operate the Buford project to supply the Atlanta region with water." *Id.* That was so because if the WSA is merely supplemental, then "[t]he court of appeals * * * had to determine whether the RHA grants the Corps any authority to supply water that counts towards that WSA baseline[.]" *Id.*

Holding that reasoning up to *Geren*, the split is apparent. If *Geren* had concluded that the WSA was merely "supplemental," then the court would have found it absolutely "necessary"—as the Eleventh Circuit did—to determine whether the Corps had some underlying authorization to allocate storage to water supply. After all, to the extent the Corps had such authorization, the "supplemental" WSA and its associated limits would not even apply. But the D.C. Circuit did not find it "necessary" to undertake that inquiry. Quite the contrary: It rejected the inquiry as irrelevant, explaining that it "ha[d] no occasion to opine" on the Corps' underlying authority, or lack

thereof, to reallocate storage. App. 202a & n.4. The D.C. Circuit could not have forgone that occasion if it found the WSA to be merely "supplemental."

That is especially so given the task the D.C. Circuit set out for itself in *Geren*—to "review[ ] the fairness of a settlement agreement," which "the district court could hardly approve" if it "violate[d] a statute." App. 197a. If the WSA provided only supplemental authority, then the settlement agreement could not violate that statute unless no other authority existed, and the D.C. Circuit could not have invalidated the settlement, as it did, solely on WSA grounds.[1]

Geren, in short, concluded that 43 U.S.C. § 390b(d) requires the Corps to obtain Congressional authorization for all "major operational changes" reallocating storage to local water supply, regardless of the Corps' underlying authority, and the decision below concluded exactly the opposite. That conflict merits review, particularly given its implications for the division of power between Congress and a federal

[1] For these reasons, the settling parties' request that the D.C. Circuit consider only the WSA, Ga. Opp. 26-27, changes nothing. To begin with, the settlement in *Geren* relied on the RHA, see Docket No. 19 Exh. A at 11, *Alabama* v. *U.S. Army Corps of Eng'rs*, No. 3:07-md-00249 (M.D. Fla.), and there is no indication in *Geren* that the D.C. Circuit accepted the parties' request to ignore that statute. But even if it did, the court still had to decide whether the WSA applied. And had the court agreed with the Eleventh Circuit that the WSA is merely "supplemental," it could not have determined whether the WSA applied without asking what other authority the Corps could muster to reallocate water supply. But the D.C. Circuit never asked that question. Instead, it acknowledged that the Corps had been providing water supply from Lanier and still reiterated that "the WSA plainly states that a major operational change * * * requires prior Congressional approval." App. 200a-201a.

agency, *see* Pet. 25-26, and its significance to multiple states and millions of people, *see infra* 10-12.

2. Respondents argue that the Eleventh Circuit was right on the merits because the WSA *is* only "supplemental." S.G. Opp. 26-27; Ga. Opp. 23-25. But tellingly, respondents themselves do not even agree how to interpret the WSA. And neither of their proffered interpretations withstands scrutiny.

a. The Solicitor General observes that the WSA's Congressional-approval requirement applies only when the Corps undertakes "modification[ ]" of a reservoir "to include storage" for water supply. 43 U.S.C. § 390b(d). Seizing on the word "include," the Solicitor General argues:

> When storage *is already authorized*, there is no need to invoke the Water Supply Act to "include" such storage in the project. * * * To the extent water supply is already an authorized purpose, then reallocating storage to water supply to that extent is not a "modification" of the project "to include storage" for water supply at all. [S.G. Opp. 26-27 (emphasis added)].

The Solicitor General conflates *authorization* to include storage with the storage allocation itself. For example, even if the Corps had been authorized from the get-go to allocate Lake Lanier's storage to water supply—which it was not—that does not mean the Corps actually "include[d]" such storage in the reservoir. 43 U.S.C. § 390b(d). In fact, all parties agree that Lanier originally "did *not* include storage for water supply." Ga. Opp. 17 n.4 (emphasis added); S.G. Opp. 25. When the Corps moves to add such storage, that is a "modification[ ] * * * to include storage." 43 U.S.C. § 390b(d). The Solicitor Gen-

eral's reading is plainly wrong—which no doubt explains why the decision below did not advance it and Georgia does not adopt it.

b. Georgia finds a different statutory hook for the same interpretation. According to Georgia, the WSA "makes clear that its limitations apply only to modifications 'to include storage *as provided in subsection (b)*'—*i.e.*, modifications made pursuant to the WSA itself, and not under independent sources of authority such as the RHA." Ga. Opp. 23-24 (quoting 43 U.S.C. § 390b(d)). Georgia overreads the highlighted words. Viewed in context, they simply identify the kind of "storage" at issue—water supply—which is the sole topic addressed in subsection (b). Absent the highlighted words, the WSA would have created a Congressional-approval requirement applicable to *every* kind of storage—clearly not what Congress had in mind.

c. Respondents argue that Florida's interpretation of the WSA—*i.e.*, the interpretation adopted in *Geren*—is too broad because it "would impliedly repeal express congressional authorizations (applicable to specific projects) to provide water-supply storage." S.G. Opp. 27; Ga. Opp. 24. Not so. As we have explained (Pet. 23-24), the WSA can easily be harmonized with a project-specific statute giving the Corps some unspecified authority to reallocate storage to water supply: The statutes, read together, would not require Congressional approval for run-of-the-mill operational changes involving water-supply storage, but would require Congressional approval for "*major* * * * operational changes" involving such

storage. 43 U.S.C. § 390b(d) (emphasis added).[2] If statutes can be harmonized in this way, they must be. *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2674 (2009).

In any event, the notion that any such conflict could arise is ahistorical. After all, until the Eleventh Circuit conducted a *de novo* review of musty engineering reports and interpreted them against the Corps,[3] the Corps itself had long maintained that it had *no* authority, under *any* statute, to reallocate storage to water supply before the WSA: "As a general matter, the Army did not have authority to expend federal appropriations for water supply storage in its projects until the Water Supply Act of 1958." Docket No. 14-2 at 8 n.1, *In re Tri-State Water Rights Litigation*, No. 3:07-md-01 (M.D. Fla. June 6, 2007). Respondents' concern that the WSA will override phantom statutes is groundless.

* * *

In sum, the Eleventh Circuit has created a "conflict among the Circuits" on the WSA's meaning, *Watson* v. *United States*, 552 U.S. 74, 78 (2007), and its approach bears on "the scope of [an agency's] authority," *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 482 (2004), and contradicts the agency's "long established" understanding of that authority. *Morton* v. *Ruiz*, 415 U.S. 199, 202 (1974). The Court

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[2] For the same reason, Georgia's suggestion that our interpretation would "forbid[ ] any change in a project once approved," Ga. Opp. 25 (citation omitted), is specious. The Corps merely would need Congressional approval for "*major* operational changes" involving water-supply storage—precisely what Congress requires.

[3] This flawed *Chevron* analysis appropriately forms the basis for Alabama's petition. *See infra* at 8.

should grant review to resolve the split and clarify the reach of the agency's powers.

II. REVIEW IS ESSENTIAL.

Florida's petition argued, and Alabama's petition in No. 11-1006 explained at length, that the Eleventh Circuit was wrong to hold that the RHA unambiguously authorizes the Corps to allocate storage to water supply. Pet. 24-25; Ala. Pet. 16-22. The Solicitor General agrees: "[T]he court of appeals erred in holding that the 1946 RHA admits of only one permissible construction." S.G. Opp. 17. And yet Respondents claim that review by this Court is either premature or unnecessary.

But the reasons Respondents offer for delay do not stand up to examination, and their attempts to explain away the case's importance fall flat. Even setting aside the WSA circuit split, the Eleventh Circuit's erroneous understanding of the RHA has significant structural consequences; it enhances the Corps' authority over a major federal project at Congress' expense. *See Alaska*, 540 U.S. at 482. It cannot be revisited by any court except this one because all cases involving Lake Lanier are consolidated in this multi-district litigation. And the error will affect millions of water users in three states—not just in this case, but future cases, where Georgia predictably will argue that the Eleventh Circuit's holding is entitled to collateral-estoppel effect. This Court's timely review is essential.

1. Respondents argue that review is premature because the Corps is still evaluating its authority on remand. The Solicitor General, for example, asserts that the court below "did not definitely resolve the scope of the Corps' authority and discretion. * * * The

Corps now has the opportunity to address *the proper balance among all of the Project's purposes, properly understood*." S.G. Opp. 19 (emphasis added).

But the Solicitor General's own brief explains exactly why the Corps on remand *cannot* balance the project's purposes, "properly understood": The Eleventh Circuit has given the Corps erroneous, binding guidance on those purposes. S.G. Opp. 17-18. That erroneous guidance necessarily will infect whatever conclusions the Corps reaches about its authority under the relevant statutes. And while it is true that the Corps could "den[y] Georgia's request" on remand, S.G. Opp. 20, the Solicitor General is wrong to assert that petitioners then would have no more cause for concern about the RHA holding below. The Eleventh Circuit's erroneous interpretation will constrain courts in future litigation—and that interpretation would cut, in every case, in favor of more water-supply storage and less fidelity to the reservoir's original purposes.

2. The Solicitor General and Georgia argue that if petitioners want to solve the underlying water-allocation problem, they should file an original action. S.G. Opp. 31; Ga. Opp. 32. They miss the point. While this case, just like an original action, involves "controvers[y] between sovereigns" about "issues of high public importance," *United States* v. *Texas*, 339 U.S. 707, 715 (1950), it is not about equitable apportionment. It is about duly enacted law governing a federal agency. That law requires the Corps to refrain from allocating vast portions of Lake Lanier to local water supply—and harming downstream states in the process—unless Congress authorizes such a change. *See* 43 U.S.C. § 390b(d). Florida and Alabama seek to enforce that law be-

cause it will prevent them from suffering serious harms. *See infra* at 11-12. Apportionment is a question for another day.

3. The Solicitor General suggests that this case is not really so important, and that a favorable ruling would not do petitioners much good, because if this Court were to reverse "Georgia would still legally be able to withdraw the water it seeks, depriving Alabama and Florida of flows downstream; it just would not be able to use the Buford Project to store the water." S.G. Opp. 31. That is quite wrong. Storage allocations are crucial—and will go far to determine how much water Georgia can withdraw—because they force the Corps to operate the reservoir in a way that makes water available to the allocated use. App. 10a. And when the Corps operates the reservoir for hydropower, as it is supposed to, water releases come in bursts and Georgia cannot always capture the massive, uninterrupted quantities of water it seeks. App. 14a, 58a, 124a. That is an established fact. The Corps itself says that when it operates the dam for power-generating purposes, downstream users are only able to withdraw about 327 million gallons per day—an amount that does not meet current water-supply demands. App. 18a. And users upstream of Buford Dam have almost no opportunity to utilize water from the Chattahoochee without tapping reservoir storage.

But this Court need not comb the record to reject the Solicitor General's argument; nothing more than common sense is needed to recognize that it cannot be correct. The parties, after all, have been fighting over storage allocations for *22 years*. And Georgia has told this Court that an adverse decision regarding those allocations could be "devastating to Geor-

gia, costing it hundreds of thousands of jobs and billions of dollars." Ga. Opp. 31. That could not be, and this litigation would have ended long ago, if Georgia could "withdraw the water it seeks" regardless of storage allocations. S.G. Opp. 31. The Solicitor General badly understates the importance of this case.

4. Georgia, for its part, argues that the case is not sufficiently important to warrant review because while "[a]n adverse ruling below * * * could well have been devastating to Georgia," "the stakes for the other States are far lower." Ga. Opp. 31. That is both incorrect and irrelevant.

It is incorrect because storage reallocation enables Georgia to withdraw more water from the Chattahoochee, and the resulting decline in downstream flows causes Florida severe harms. That is not some bald assertion; it is the conclusion of multiple courts. *See*, *e.g.*, App. 157a (Corps operations cause "low flows" in the Apalachicola River, which "cause harm to the creatures that call the Apalachicola home"); *id.* (low flows harm "navigation, recreation, water supply, water quality, and industrial and power uses downstream"); *Georgia* v. *U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1251-52 (11th Cir. 2002) (withdrawals "have a practical effect" on downriver flows); *Geren*, 514 F.3d at 1322 (Florida and Alabama "would be directly impacted" by "proposed changes to water storage"). And Georgia's argument is irrelevant because the case is of massive importance to the region, regardless of which party has more to lose. This Court regularly grants certiorari in light of the "importance of the[ ] case[ ]," *Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 188 (2008), and the "economic interests at stake." *Mobil Oil Exploration*

& Producing Se. Inc. v. *United Distrib. Cos.*, 498 U.S. 211, 214 (1991). Here, as the court below recognized, this dispute among sovereigns "is of the utmost importance" to "millions of power customers and water users" throughout Florida, Alabama, Georgia, and the Gulf Coast, App. 84a, and billions of dollars are at stake. Ga. Opp. 31. The case is eminently worthy of review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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