No. 11-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Water Supply Act of 1958 ("WSA"), 43 U.S.C. § 390b, authorizes the Army Corps of Engineers to reallocate federal reservoir storage to support local water supply demands, but requires the Corps to obtain Congressional approval if a reallocation would constitute a "major * * * operational change." *Id.* § 390b(d). Two circuits have rendered conflicting decisions with respect to the WSA as it applies to Lake Lanier, a federal reservoir upstream of Atlanta whose waters flow through the Southeast and have sparked a three-decade water conflict among Georgia, Alabama, and Florida. The D.C. Circuit held that the Corps could not unilaterally reallocate 22 percent of Lanier's storage to Atlanta-area water supply because that would be a "major operational change." In the case below, by contrast, the Eleventh Circuit held that the Corps may be able to reallocate an even larger portion of the reservoir—34 percent—*without* Congressional approval, and that the WSA's "major operational change" limitation may be circumvented by relying on a project's underlying authorization.

The question presented is: Whether the Corps must comply with the explicit statutory limit in the WSA that requires Congressional approval before the Corps undertakes a major reallocation of federal reservoir storage to provide local water supply.

PARTIES TO THE PROCEEDINGS

The Petitioners are the State of Florida and the City of Apalachicola, Florida. Both were appellees below.

Respondents which were appellants/cross-appellees below are the State of Georgia; the City of Atlanta; Fulton County; DeKalb County; the Cobb County-Marietta Water Authority; the City of Gainesville; the Atlanta Regional Commission; the Lake Lanier Association; and Gwinnett County, Georgia. Respondents which were appellees below are the State of Alabama; Alabama Power Company; and Southeast Federal Power Customers, Inc. Respondents which were appellees/cross-appellants below are the U.S. Army Corps of Engineers; John McHugh, in his official capacity as Secretary of the United States Army; Jo-Ellen Darcy, in her official capacity as the Assistant Secretary of the Army-Civil Works; Major General Merdith W.B. Temple, in his official capacity as Acting Chief of Engineers, U.S. Army Corps of Engineers; Brigadier General Todd T. Semonite, in his official capacity as Commander, South Atlantic Division, U.S. Army Corps of Engineers; and Colonel Steven J. Roemhildt, Commander, Mobile District, U.S. Army Corps of Engineers.

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PETITION FOR A WRIT OF CERTIORARI

The State of Florida and City of Apalachicola respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit (App. 1a-86a) is reported at 644 F.3d 1160. The opinion of the District Court (App. 87a-187a) is reported at 639 F. Supp. 2d 1308.

JURISDICTION

The Eleventh Circuit entered judgment on June 28, 2011. App. 1a. Rehearing was denied on September 16, 2011. App. 188a. On November 9, 2011, Justice Thomas extended the time to file this petition to February 13, 2011. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Water Supply Act, 43 U.S.C. § 390b (1958), provides in relevant part:

> (b) *Storage in reservoir projects; agreements for payment of cost of construction or modification of projects*. In carrying out the policy set forth in this section, it is provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water * * * .
>
> * * *
>
> (d) *Approval of Congress of modifications of reservoir projects*. Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law.

INTRODUCTION

Two Courts of Appeals have issued diametrically opposed decisions with respect to the same body of water—a massive federal reservoir whose outflows serve three states and have triggered a decades-long interstate water war. The divergent decisions were driven by the courts' conflicting interpretations of an important federal statute that this Court has never construed. The Court should grant the writ to resolve the split and clarify the fate of a water source that "is of the utmost importance to * * * millions of power customers and water users" throughout Florida, Alabama, Georgia, and the Gulf Coast. App. 84a.

The case concerns Lake Sidney Lanier, one of the nation's largest federal reservoirs. Lake Lanier sits on the Chattahoochee River above Atlanta. South of the lake, the Chattahoochee runs past Atlanta, along the Georgia-Alabama border, into the Apalachicola River in Florida, and thence to Apalachicola Bay. The waters stored in Lake Lanier are important to generate power, facilitate navigation, and ensure the survival of ecologically sensitive resources downstream in Florida and Alabama. But localities in Georgia seek to use those same waters for local water supply. Those divergent interests have spawned a cross-border water dispute that has produced 13 different decisions in six federal courts.

The essence of the dispute is whether the Army Corps of Engineers may, without Congressional approval, reallocate Lake Lanier's water storage[1] away from its original uses—downstream flows for power generation and navigation—and toward direct withdrawals and releases from the lake for local water supply. Any such reallocation would have a profound effect on downstream interests because water reserved in storage for direct withdrawal is not available for downstream release when needed. It also would unilaterally rebalance the interests weighed by Congress in authorizing the reservoir.

In 2002, the Corps agreed to reallocate to local water supply some 22 percent of Lanier's storage capacity—enough to cover the entire National Mall in water almost 800 feet deep. Florida and Alabama protested, and the D.C. Circuit rejected the plan as

[1] In this context, "storage" refers to the amount of space in Lake Lanier allocated to a particular project purpose. App. 10a. As we discuss below, the Corps releases water from the reservoir to serve the purpose for which the space has been allocated.

unlawful under the Water Supply Act ("WSA"). The WSA authorizes the Corps to modify reservoir allocations to allot storage for local water supply. *Id.* § 390b(b). However, it requires Congressional approval if the reallocation would work a "major * * * operational change[ ]" to the reservoir. *Id.* § 390b(d). The D.C. Circuit concluded that a 22 percent reallocation was a major operational change and that the plan accordingly required Congressional approval. *Southeastern Fed. Power Customers, Inc.* v. *Geren*, 514 F.3d 1316 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 898 (2009); App. 190a-212a.

The Eleventh Circuit has now issued a decision that contradicts *Geren* and provides the Corps broad discretion to reallocate storage without Congress's approval. Georgia asked the Corps to reallocate *34 percent* of Lanier's storage—a much larger reallocation than the one disapproved in *Geren*—to satisfy Atlanta's water demands. App. 66a. Consistent with its longstanding interpretation of its authority, the Corps refused. It found that such a large reallocation would "involve * * * major operational changes" and required Congress's approval under the WSA. App. 25a. But the Eleventh Circuit has now rejected that view. It held that the Corps has some measure of authority under an earlier statute to reallocate Lanier's storage; that the WSA merely "supplement[s]" that authority; and that the WSA provision requiring Congressional approval for "major operational changes" may be circumvented. App. 64a-67a, 76a-80a. It remanded, having given the Corps a green light to reallocate massive amounts of storage without obtaining Congress's imprimatur.

The decision below directly conflicts with that of the D.C. Circuit. It undercuts Congress's power to

control the Nation's reservoirs. It affects the competing interests of three states to a single stream of water—"a necessity of life that must be rationed among those who have power over it." *New Jersey* v. *New York*, 283 U.S. 336, 342 (1931). It will adversely impact important downstream ecologies in the river basin and limit the extent to which downstream states can benefit from hydropower and river navigation. And like an original action, it implicates "the manner of use" of "interstate lakes and rivers." R. Stern et al., *Supreme Court Practice* 242 (9th ed. 2007). This Court should grant the writ and hold that the D.C. Circuit was correct: Before the Corps can fundamentally reallocate a major federal water source to local supply at the expense of downstream needs, it must obtain the approval of Congress.

STATEMENT

A. The Affected Rivers and Lake Lanier.

1. The Chattahoochee River begins as a mountain spring on the Appalachian Trail in northeastern Georgia. App. 5a. Emerging from the Blue Ridge Mountains, the river flows past Atlanta and along the Georgia-Alabama border. *Id.* "At the Florida-Georgia border the Chattahoochee joins the Flint River and they become the Apalachicola River, which eventually flows into the Apalachicola Bay and the Gulf of Mexico." *Alabama* v. *U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1122 (11th Cir. 2005). The rivers and the areas they drain are referred to as the Apalachicola-Chattahoochee-Flint, or "ACF," Basin.[2]

The Chattahoochee is Atlanta's primary water source. But it is just as important to Florida and

[2] *See* www.sam.usace.army.mil/pa/acf-wcm/pdf/acf_map.pdf.

Alabama as a source of drinking water, water supply, hydroelectric power, recreation, and sustenance for riverine ecologies. "Southeastern Alabama relies upon the Chattahoochee for much of its water supply[.]" D. Stephenson, *The Tri-State Compact: Falling Waters & Fading Opportunities*, 16 J. Land Use & Envtl. L. 83, 85 (2000). The Apalachicola River "empties into the Apalachicola Bay, which provides approximately 90% of Florida's oyster harvest." *Id.* The Bay, in turn, is a critical nursery for the Gulf of Mexico—and one whose productivity depends on robust river flows. *See infra* 29. And the Apalachicola "has the highest species density of amphibians and reptiles in the North American Continent north of Mexico"; it is home to numerous protected species. *Georgia* v. *U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1250 n.6 (11th Cir. 2002).

2. Lake Lanier's history dates to 1925, when Congress asked the Corps to consider hydroelectric projects in the area. App. 5a. That led to the idea of a reservoir (Lake Lanier) and dam (the Buford Dam) on the Chattahoochee above Atlanta. App. 5a-6a.

Congress approved the reservoir plan, among hundreds of other reservoir projects, in omnibus authorizing legislation in 1945 and 1946. The second of those acts, the 1946 Rivers and Harbors Act ("RHA"), provided that the Buford project would be "prosecuted * * * in accordance with the report of the Chief of Engineers, dated May 13, 1946." Pub. L. No. 79-525, 60 Stat. 634, 635 (1946). That report, in turn, incorporated a Corps report by Brigadier Gen. James B. Newman Jr., known as the "Newman Report," that set out the details. App. 6a; *see* Docket No. 4 Exh. B, *Georgia* v. *U.S. Army Corps of Eng'rs*, No. 3:07-md-00252 (M.D. Fla. Apr. 12, 2007) (Newman Report's

text). The report observed that "[t]he principal value of the Chattahoochee River is as a source of power." App. 93a. It concluded that the Buford site was the best spot for "a large storage-power reservoir[.]" *Id.*

The report noted other "incidental" benefits of a reservoir, *id.*, including water supply for Atlanta. It observed that "[i]f the regulating storage reservoir * * * could be located above Atlanta, it would greatly increase the minimum flow in the river at Atlanta, thereby producing considerable incidental benefits by reinforcing and safeguarding the water supply[.]" App. 94a. Nothing in the report suggested that Congress or the Corps ever contemplated that water supply would be made available through direct withdrawals from storage at Lake Lanier.

3. Lake Lanier was completed in 1957. It had 692 miles of shoreline and conservation storage capacity[3] of 1,049,000 acre-feet—*i.e.*, enough to hold the quantity of water that would submerge 1,049,000 acres of land to a depth of one foot. App. 11a. None of that space was allocated to local water supply. App. 113a. On the contrary, as the District Court found, "both before and during construction of Buford Dam, the Corps consistently described the primary purposes of the project as flood control, navigation, and hydropower," and "the water-supply benefit discussed throughout the legislative history was the regulation of the river's flow." App. 113a, 163a.

B. The Water Supply Act.

In 1958, a year after Lanier was completed, Congress enacted the WSA. The Nation's federally-

[3] Lanier has *total* capacity of 2,554,000 acre-feet. The rest is for flood containment and so-called "inactive" storage.

owned reservoirs historically had not been used to store water for local supply; that was considered a parochial use, and the Corps did not think itself authorized to dedicate space in reservoirs for local use. *See* 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) ("*2002 Corps Memorandum*"). The WSA ushered in a sea change in federal water policy, authorizing the Corps to provide storage space for local water supply. 43 U.S.C. § 390(b). But Congress was careful not to give the Corps free rein. Instead, it required that the Corps obtain Congress's approval before agreeing to any storage plan that would effect "major * * * operational changes" at a reservoir:

> *Modifications of a reservoir project* heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b) of this section which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or *which would involve major structural or operational changes* shall be made only upon the approval of Congress as now provided by law. [*Id.* § 390b(d) (emphases added)].

C. The Shift To Direct Withdrawals at Lanier.

1. The Corps controls water-storage allocations at Lake Lanier, as it does at more than 500 reservoirs nationwide. *See* 33 C.F.R. § 222.5(o), & App. E (2011). The Corps' authority over storage allocations does not mean it owns the water or directly controls who can withdraw it downstream. It means, instead, that the Corps can assign reservoir space to given uses and operate the reservoir to support those uses—but only within limits specified by Congress.

Acting within those limits, the Corps retains or releases water according to plans designed to ensure that users with storage allocations will have water when they need it. App. 137a-138a.

2. For years (and with minor exceptions not relevant here),[4] none of Lake Lanier's storage capacity was dedicated to water supply. App. 113a. Indeed, the Corps explicitly recognized that no storage could be allocated to water supply under the RHA without "additional Congressional authorization." App. 145a. In 1955, for example, Gwinnett County, Georgia, a county northeast of Atlanta, asked permission to make withdrawals from Lanier. The Corps refused. Consistent with its longtime recognition that the intended water-supply benefit of Lanier was merely the regulation of the river's flow, App. 113a, the Corps concluded "that such withdrawals would affect the project's authorized purposes" and that the county "would have to seek permission from Congress for the withdrawals." App. 139a-140a.

Beginning in the 1970s, however, "the Corps's and the Georgia parties' definition of water supply in the Buford project changed considerably." App. 114a. Despite its previous acknowledgment that it could not do so, the Corps began making changes to storage at Lake Lanier, giving priority to local municipalities so they could make direct withdrawals from the lake and withdraw more water downstream. In 1973, the Corps agreed to let Gwinnett County withdraw up to 40 million gallons per day—an amount requiring about 40,000 acre-feet of storage—directly from Lake Lanier. App. 140a. The Corps

[4] Two cities were granted the right to withdraw comparatively small amounts from the lake because the reservoir inundated their existing water-intake facilities. App. 139a.

subsequently agreed to let two other Georgia cities, Cumming and Gainesville, withdraw 10 million and 20 million gallons per day, respectively. App. 141a-142a. And in the 1980s, the agency agreed to alter its operations so the Atlanta Regional Commission ("ARC") could withdraw 377 million gallons per day downstream. App. 141a. That contract was based on the Corps' determination that it could provide, incidental to power generation, 327 million gallons per day with no impact on hydropower. App. 170a-171a. The Corps agreed to provide releases sufficient to accommodate up to 50 million gallons per day *above* that threshold, thus effectively reallocating that amount from hydropower to water supply. *Id.* All of these contracts expired in 1989 but have continued as holdover arrangements. App. 142a.

Meanwhile, the Corps was studying how to meet Atlanta's growing water needs. In a 1989 report, the "draft PAC Report," it suggested formally allocating a massive amount of Lanier's storage—207,000 acre-feet—to local water supply. App. 136a. That would allow localities to withdraw 151 million gallons per day from the lake. It also would provide releases so that localities could withdraw 378 million gallons per day downstream. App. 175a-176a. The report noted the Corps' authority under the WSA, but stated that approval from Congress might be required because the allocation exceeded 50,000 acre-feet. App. 18a. The Corps intended to submit the report to Congress for approval under the WSA. App. 135a.

The draft PAC Report included a water-control plan that illustrates the practical effect of such a dramatic storage reallocation. The plan divided Lake Lanier's conservation storage pool into four levels, or "zones," by depth. App. 138a. In the zone

corresponding to the lowest lake levels—*i.e.,* drought periods—local water supply would be the dominant purpose, while hydropower was relegated to a "minimum level." *Id.* In other words, at the very times when water flow was most critical for downstream users, the Corps would be operating the reservoir to benefit Atlanta-area localities instead—a 180-degree change from Lanier's original operations.

D. The D.C. Circuit's Decision in *Geren*.

In 1990, Alabama filed suit in the Northern District of Alabama to challenge the draft PAC Report and Georgia localities' use of Lanier's storage. App. 143a. More litigation followed. In 2000, a group of federal power customers filed suit in Washington, D.C., alleging that the Corps had wrongfully diverted storage from hydropower generation. App. 145a. In 2001, Georgia sued the Corps in the Northern District of Georgia, seeking to compel the agency to agree to an even larger reallocation than that in the draft PAC Report. *Id.* And in 2008, the City of Apalachicola sued the Corps in the Northern District of Florida, alleging that the Corps' allocation changes were reducing flows into Florida and damaging Apalachicola Bay. App. 148a.

The D.C. Circuit's decision in *Geren* arose out of the federal power customers' lawsuit in D.C. federal court. In 2003, the Corps, the power customers, Georgia, and parties aligned with Georgia reached a proposed settlement in that case. App. 145a-146a. The settlement would have formally allocated storage in Lake Lanier for Gwinnett County, Gainesville, and ARC. App. 146a. Under its terms, those three entities would purchase some 240,000 acre-feet of storage, some for withdrawals directly from the lake

and some to enable downstream withdrawals in amounts greater than those incident to hydropower generation. *Id.* The settling parties relied on the WSA for authority, arguing that the WSA authorized reallocation for water supply storage and that the proposed reallocation neither "seriously affect[ed] the purposes for which the project was authorized" nor amounted to a "major * * * operational change[.]" 43 U.S.C. § 390b(d); *see* App. 24a. The D.C. District Court approved the settlement in 2004 over Florida and Alabama's vehement objections. App. 147a.

The D.C. Circuit reversed. *Geren*, 514 F.3d 1316; App. 190a-212a. The court observed that the settlement required the Corps to allocate up to "240,858 acre-feet of Lake Lanier's water storage" to local use. App. 194a. That was a reallocation of 22 percent if the water-storage baseline was zero—which the court concluded it was, given that zero was the amount allocated to water supply when the lake began operation—or 9 percent if the baseline was the existing withdrawals under holdover arrangements. App. 202a-203a. Either way, such a large reallocation was a "major * * * operational change" requiring Congressional approval. *Id.* The court wrote that "the WSA plainly states that a major operational change to a project falling within its scope requires prior Congressional approval." App. 200a-201a. And it concluded that "[o]n its face," reallocating more than 22 percent of storage "constitutes the type of major operational change referenced by the WSA[.]" App. 202a. The same conclusion would obtain if the reallocation amounted to 9 percent. App. 203a.

The D.C. Circuit reached this conclusion at Chevron step 1, based on the statute's plain terms, but it also cited other data points to confirm its holding.

First, the Corps had acknowledged at oral argument that a 22 percent reallocation "would be the largest acre-foot reallocation ever undertaken by the Corps without prior Congressional approval." App. 203a. Second, the Corps itself repeatedly had cast doubt on, or flatly rejected, the notion that it could make such massive reallocations without Congressional approval. The Corps acknowledged in the draft PAC Report, for example, "that Congressional approval might be required for reallocation of 207,000 acre-feet"—a smaller reallocation than the one proposed in the settlement. App. 201a. And in 2002, "the Corps rejected Georgia's request" that about 34 percent of Lanier's storage be reallocated to local use, concluding that "Georgia's request was of a magnitude that would 'involve * * * major operational changes' and therefore required prior Congressional approval." *Id.*; *see 2002 Corps Memorandum* at 1. That conclusion, the *Geren* court found, was "consistent with th[e] plain text" of the WSA. *Id.* The court concluded:

> [R]eallocation of over twenty-two percent (22%) of Lake Lanier's storage space * * * is large enough to unambiguously constitute the type of major operational change for which section 301(d) of the WSA requires prior Congressional approval. The same conclusion applies to a reallocation of approximately nine percent (9%) of Lake Lanier's storage space, for it too presents no ambiguity. [App. 205a].

Judge Silberman concurred. He would have found that the baseline water storage amount was 13.9 percent—*i.e.*, the amount Atlanta-area localities had been withdrawing under the holdover arrangements. App. 211a. He nonetheless found, as the majority

did in the alternative, that a 9 percent reallocation was a major operational change. App. 212a.

Georgia sought certiorari, arguing that the D.C. Circuit had made inappropriate factual findings. The Corps opposed, pointing out that the D.C. Circuit's "interpretation of the Water Supply Act does not conflict with any decision of * * * any other court of appeals." Br. for the Federal Respondents in Opposition, No. 08-199 (Nov. 17, 2008), 2008 WL 4918013, at *5. Certiorari was denied.

E. The Decision Below.

Meanwhile, the three other Lanier-related lawsuits were transferred to the Middle District of Florida by the Judicial Panel on Multi-District Litigation. App. 24a. Following the D.C. Circuit's remand in *Geren*, that action was consolidated with the others.

One of the issues before the District Court was Georgia's challenge to a related Corps decision involving Lake Lanier water storage. Georgia's governor asked the Corps in 2000, while two of the four Lanier-related lawsuits were pending, to reallocate 34 percent of Lanier's storage to local water supply—a much larger reallocation than the one the D.C. Circuit rejected in *Geren*. App. 178a. The Corps denied the request. *Id.*; *see 2002 Corps Memorandum* at 1. It found that Congress did not include water supply as an authorized purpose at Lanier, and that "Corps analysis of Georgia's request indicates that granting it would seriously affect the purposes for which the project was authorized and would involve major operational changes." App. 25a; *2002 Corps Memorandum* at 2. It accordingly could not "be accommodated without additional Congressional authorization." App. 145a.

The District Court approved the Corps' decision. As it explained, the "fundamental question" was whether a unilateral Corps decision granting Georgia's request would have violated the WSA. App. 89a. The court concluded that it would. After a detailed analysis of the legislative history, the court agreed that Congress did not include water supply as an authorized purpose at Lake Lanier. App. 168a. It also concluded that *Geren* was entitled to collateral estoppel effect as to what constituted a "major operational change": Because the D.C. Circuit had held that a 22 percent reallocation would violate the WSA without Congressional approval, it followed *a fortiori* that a 34 percent reallocation required Congressional approval too. App. 174a-175a.

The Eleventh Circuit reversed. The panel concluded that the Newman Report and similar documents contemplate that Lanier would be used for water supply, and that the amount of water supply might need to be adjusted over time. App. 45a-57a. From that premise, the panel concluded that Brigadier General Newman "intended for water supply to be an authorized, rather than incidental, use of the water stored in Lake Lanier." App. 51a. And because Lake Lanier's authorizing statute—the RHA—referred to a Corps report, and the Corps report in turn incorporated the Newman Report, the panel concluded that Congress shared Brigadier General Newman's intent. App. 47a. Indeed, the panel referred to the Newman Report *itself* as the "statutory language" governing Lake Lanier's operations. App. 50a.

The Eleventh Circuit then took the leap that set it at odds with *Geren*. While *Geren* had held that the WSA requires Congressional approval for "major operational changes," regardless of the Corps' under-

lying authority to adjust allocations, *see* App. 202a-203a & n.4, the Eleventh Circuit held just the opposite: that to the extent the Corps had underlying authority to adjust allocations, those changes would not count as "changes" at all—much less major operational changes requiring Congressional approval. App. 65a-67a, 76a-80a. Thus, for example, the panel wrote that the Corps erred in rejecting Georgia's request for a 34 percent reallocation because "[i]t failed to recognize that the [RHA] * * * explicitly contemplated that the Corps was authorized to increase water supply usage over time as the Atlanta area grew *and that this increase would not be a change from Congressionally contemplated operations at all*." App. 65a (emphasis added). And it wrote that the Corps should consider only reallocations made "pursuant solely to the WSA"—not reallocations made using the Corps' purported RHA authority—in deciding whether a change constituted a "major operational change." App. 76a n.35. The panel so concluded based on its view that the WSA merely "constitutes a supplement to any authority granted by the 1946 RHA." App. 13a.

According to the Eleventh Circuit panel, then, the WSA—and its mandates, such as the Congressional approval requirement—are a mere second layer of authority; to the extent the Corps may make operational changes at Lanier under the RHA, the WSA is never triggered. Indeed, the panel attempted to distinguish *Geren* on that very basis. It wrote that *Geren*'s 22-percent-reallocation holding was not entitled to collateral-estoppel effect because *Geren* did not consider the extent of the Corps' authority under the RHA. App. 79a. According to the Eleventh Circuit, "this difference means that any water

the Corps finds it is authorized to supply pursuant to the RHA is separate from the water it is authorized to supply pursuant to the WSA, *and that this RHA-authorized water supply would not count against the Geren court's 22% limit*." *Id.* (emphasis added).

The Eleventh Circuit remanded to the Corps for a determination of precisely how much reallocation authority the agency has when its purported RHA authority is added to its "supplemental" WSA authority. App. 83a-84a. The court ordered the agency to make that decision within one year. App. 85a.

REASONS FOR GRANTING THE PETITION

1. The Court should grant the writ, and reverse the erroneous decision below, because the Eleventh Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"—indeed, a decision with respect to the same body of water. S. Ct. R. 10(a). The Eleventh Circuit's decision cannot be reconciled with the D.C. Circuit's decision in *Geren*. It is in conflict with this Court's cases. And the divide between the circuits is one that time alone will not repair; the conflict will percolate no further because all cases regarding Lanier have been consolidated in the Eleventh Circuit. Instead, without this Court exercising its jurisdiction, the conflict between three sovereign states as to this body of water will fester.

2. Review also is warranted because the issue on which the circuits have divided is an important question of first impression for this Court. The WSA is of national importance: It fundamentally changed the way federal reservoirs are used, and the Corps relies on it to justify water allocations across the nation. This Court has never construed the WSA.

And the Eleventh Circuit has now inappropriately limited it, truncating a provision designed to maintain Congressional control over an important national resource and handing that control to the Corps. This Court's guidance is needed.

3. Nor can there be any doubt that this case carries public ramifications sufficiently important to warrant the exercise of certiorari jurisdiction. The case has driven a wedge between three states. As the court below recognized, "[t]he stakes are extremely high" and the case "is of the utmost importance to the millions of power customers and water users that are affected by the operations of the project." App. 84a. Indeed, if the decision below stands, it will have a profound effect on the ACF Basin because water reserved for direct withdrawal is not available for release to support downstream hydropower, navigation, and ecologies. The writ should be granted.

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND CANNOT BE RECONCILED WITH THIS COURT'S CASES.

A. The Decision Below Conflicts With *Geren*.

1. Certiorari review is warranted here "to resolve a conflict among the Circuits." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011); S. Ct. R. 10(a). *Geren* and the decision below addressed the same question—namely, the extent of the Corps' authority to unilaterally alter Lake Lanier's storage to provide more water supply for Georgia residents. And they reached diametrically opposed conclusions:

- The D.C. Circuit held that WSA Section 301(d) requires the Corps to obtain Congressional approval for a "major * * * operational change[ ]" in-

volving water supply, regardless of the Corps' authority to adjust water storage allocations as a general matter. App. 201a-203a. The Eleventh Circuit, in direct contrast, held that WSA Section 301(d) imposes no such requirement where the Corps has some independent measure of authority to adjust storage allocations. App. 75a-76a, 79a.

- The D.C. Circuit held that the WSA restricts the Corps' authority to make significant changes from a reservoir's original storage allocation without Congressional approval. App. 201a-203a. The Eleventh Circuit, in direct contrast, held that the WSA is nothing more than a source of "supplemental" authority for the Corps to take such actions. App. 64a, 83a.

- The D.C. Circuit found that the Corps correctly concluded that the WSA required it to obtain Congressional approval before reallocating 34 percent of the lake's storage. App. 201a-202a. The Eleventh Circuit held that the Corps was wrong to so conclude. App. 63a-65a. Indeed, the D.C. Circuit accepted as a correct understanding of the WSA the very Corps analysis—the 2002 Army memorandum—that the Eleventh Circuit *rejected and vacated* in the decision below. *Compare* App. 201a-202a (*Geren*) *with* App. 63a-65a (opinion below).

That is a "direct conflict." *Stern & Gressman* 242. And it has important implications for the division of authority between Congress and an agency, as we discuss *infra* at 25. That sort of disagreement among the circuits about the distribution of federal authority warrants this Court's review.

2. The Eleventh Circuit attempted to distinguish *Geren*, asserting that "a different issue" was presented in that case because "the *Geren* court considered only the Corps' authority under the WSA, not its authority under the RHA." App. 79a. The panel misunderstood the D.C. Circuit's opinion. *Geren* recognized that the Corps might be able to muster authority to make some limited water storage reallocations, but it explicitly declined to consider the question, explaining that it "ha[d] no occasion to opine whether the Corps' previous storage reallocations were unlawful." App. 203a & n.4. Whether the Corps enjoyed such authority was irrelevant because, regardless, the WSA was clear: If the Corps desired to make a *major* operational change, it needed Congressional approval. App. 200a-203a. The D.C. Circuit's conclusion is quite correct, as we discuss *infra* at 21. More important for present purposes, the D.C. Circuit's analysis is squarely at odds with the Eleventh Circuit's holding that the WSA's "major operational change" provision is not implicated to the extent that the Corps has a separate source of authority for water reallocation. Under the Eleventh Circuit's decision, the D.C. Circuit engaged in a pointless exercise in rejecting the far smaller 2004 proposed water reallocation.

3. Review of this circuit split is warranted now because it is already fully articulated and is unlikely to deepen or disappear. This is not a situation where similar cases are working their way through the Courts of Appeals, making it worthwhile for this Court to await " 'further study' " by those intermediate tribunals. *Stern & Gressman* 246 (quoting *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J.)). On the contrary, all cases relating to the

Corps' WSA authority over Lake Lanier—including the case on remand from the D.C. Circuit's decision in *Geren*—have been consolidated in the Eleventh Circuit. App. 26a. That court is the one that created the circuit split, and it has denied a petition for rehearing en banc. The divide between the circuits on the WSA's scope—and accordingly on the degree of control Congress can exercise over federally operated waters—will not be resolved unless this Court resolves it.[5]

B. The Decision Below Is Incorrect And In Conflict With This Court's Cases.

1. Certiorari review is particularly appropriate here because the decision below is incorrect and in conflict with this Court's teachings. The WSA provides that storage-related reservoir modifications for water supply "which would involve major * * * operational changes shall be made *only* upon the approval of Congress as now provided by law." 43 U.S.C. § 390b(d) (emphasis added). That command is simple and broad, as the D.C. Circuit recognized: Any time a storage reallocation to water supply involves "major operational changes," the Corps must obtain Congressional approval, full stop. App. 200a-203a. But the Eleventh Circuit held that the WSA merely "supplement[s]" purported pre-existing Corps authority to allocate reservoir storage for local water supply, and that any changes the Corps was authorized to make under that pre-existing authority

[5] Nor could the issue disappear on remand from the Eleventh Circuit to the Corps. The Corps has been instructed that it possesses the authority to allocate water under the RHA, potentially unconstrained by the WHA's "major operational change" limitation. That instruction renders whatever the agency may do on remand necessarily deficient.

"would not count" in determining whether a major operational change occurred. App. 79a, 83a. It held, in other words, that the Corps must seek Congressional approval for a subset of major operational changes, but not for all of them.

That was error. It is, of course, a "settled principle[ ] of statutory construction" that if "statutory text is plain and unambiguous," courts "must apply the statute according to its terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009). Thus where "[n]othing in the statutory context requires a narrowing construction," none is appropriate; the courts "must give effect to the text congress enacted." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227 (2008). Here the WSA requires Congressional approval for "major * * * operational changes" involving local water-supply storage. 43 U.S.C. § 390b(d). That means *all* major operational changes, not some. As this Court said in *Maine* v. *Thiboutot*, 448 U.S. 1, 4 (1980): "The question before us is whether the phrase * * * means what it says, or whether it should be limited to some subset[.] * * * Given that Congress attached no modifiers to the phrase, the plain language of the statute" must govern.

2. The Eleventh Circuit's contrary conclusion rests on the notion that if the Corps enjoys authority to change water allocation to some extent, then any change it chooses to make using that authority cannot be "major," and does not count toward any calculus of whether a larger change is "major." App. 65a, 79a; *see supra* at 15-17. That is simply not so. As the D.C. Circuit recognized in *Geren*, whether a change is "major" is a matter of degree having nothing to do with whether some quantum of change was *authorized*. App. 200a-203a.

The Eleventh Circuit also went further, asserting that if the RHA authorizes the Corps to reallocate some storage to water supply, then "such reallocations to water supply *arguably do not actually constitute a 'change' of operations at all*." App. 80a (emphasis added); *see also* App. 65a (asserting that the RHA "explicitly contemplated" that Corps increases to water-supply storage at Lake Lanier "would not be a change from Congressionally contemplated operations at all"). But a change is a change. If the Corps alters the allocation of storage in a reservoir, that is a "change," even if the Corps enjoyed authority under a pre-WSA statute to order it. The Eleventh Circuit's attempt to conflate change with authority is nonsensical. Under the court's reasoning, someone who changes his name has not actually "changed" it, so long as he received prior permission to do so.

The Eleventh Circuit thought its truncated reading of the WSA appropriate because—according to that court—the WSA merely provides additional reallocation authority on top of that provided by the RHA. App. 13a, 68a. The Eleventh Circuit was incorrect about the reallocation authority provided by the RHA, as we discuss below. But assuming *arguendo* that the RHA *did* provide the Corps with reallocation authority, the Eleventh Circuit's conclusion still would not follow. Imagine that the RHA were far more explicit than it actually is about the Corps' authority—that it provided, for example, that "the Corps is authorized to allocate storage to water supply at Lake Lanier." In that scenario the Corps might not need Congressional approval to make operational changes, but it still would need Congressional approval for "*major* * * * operational changes." 43 U.S.C. § 390b(d) (emphasis added). The code

could be read to "give effect to both provisions," and accordingly it *must* be so read. *Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2674 (2009); *accord Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective."). The Eleventh Circuit's contrary conclusion was error.

3. The opinion below also is erroneous for a second reason: The RHA does not confer on the Corps the authority to reallocate Lake Lanier's storage for water supply, as the District Court correctly recognized. In an exercise of legislative history run riot, the Eleventh Circuit plucked snippets from various Army Corps reports—which it referred to, inaccurately, as the "statutory language"—and concluded that local water supply was an "authorized * * * use of the water stored in Lake Lanier." App. 50a-51a. But even if the Eleventh Circuit were correct about that—which it was not—it would not follow that the RHA provides the Corps the authority to reallocate water storage for that use. In fact, as the District Court found, a fair reading of the contemporaneous Corps documents reveals that "the water-supply benefit discussed throughout the legislative history" is merely "*the regulation of the river's flow*." App. 113a (emphasis added). The RHA, in other words, contemplated that Atlanta would receive a more regular supply of water from the Chattahoochee River due to the Corps' regular releases from Buford Dam for electrical power generation. That is a far cry from providing the Corps authority to alter storage allocations and to thereby enable massive withdrawals of reservoir water for local water-supply uses. The RHA and the reports to which it refers say nothing about storage for water supply, as the Corps

itself consistently recognized in the decades after the RHA's enactment. *See supra* at 9.

II. THE QUESTION PRESENTED IS AN ISSUE OF FIRST IMPRESSION INVOLVING AN IMPORTANT FEDERAL STATUTE.

Certiorari review is appropriate to resolve "important" statutory questions "of first impression in this Court," *Reading Co.* v. *Brown*, 391 U.S. 471, 475 (1968)—especially when the lower court's decision bears directly on "the scope of the [agency's] authority," *Hodgson* v. *Local Union 6799*, 403 U.S. 333, 336 (1971), and runs counter to the agency's long-held view of its statutory powers. *See*, *e.g.*, *Morton* v. *Ruiz*, 415 U.S. 199, 202 (1974) (granting certiorari "because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established [agency] policy").

This case meets that description in full. The WSA is an important statute—it ushered in a fundamental change in federal water-supply policy, and the Corps has relied on it to reallocate storage at nearly four dozen reservoirs[6]—and yet this Court has never construed it. And the decision below certainly bears on "the scope of the [Corps'] authority" under the WSA. *Hodgson*, 403 U.S. at 336. Indeed, it dramatically expands that authority, altering the balance of power between Congress and a federal agency. Under the WSA as written, Congress must ensure that storage reallocations that constitute a "major operational change" always meet with its approval—a sensible approach, given the sweeping significance

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[6] Congressional Research Serv., *Using Army Corps of Engineers Reservoirs for Municipal & Industrial Water Supply: Current Issues* 2 (Jan. 4, 2010).

of water-storage policies, the intricate balancing that must take place between a variety of interests, and the impacts on downstream states. But under the Eleventh Circuit's novel interpretation, there will be a subset of reallocations that work a "major operational change" under the plain meaning of that term—and yet Congress will have no opportunity to sign off. That approach allows "the administrative agency [to] usurp[ ] the legislative function" by arrogating to itself a decision-making role Congress explicitly chose *not* to delegate. *Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S. 326, 338 (1941).

Finally, the judgment of the Court of Appeals is "inconsistent with long-established [agency] policy." *Morton*, 415 U.S. at 202. For more than four decades, the Corps consistently explained that a reallocation to local water supply at Lake Lanier—and especially a reallocation of the magnitude sought by Georgia here—"would require Congress's approval" under the WSA. App. 166a; *see also* App. 140a. It reiterated that conclusion in the 2002 memorandum rejecting Georgia's request. App. 25a. The Eleventh Circuit's decision is manifestly at odds with that longtime agency understanding of its own authority. And the court's novel approach has the potential to upset settled expectations across the country: If the Corps can rely on snippets from yellowed engineering reports to blow past the WSA's limits, then it can fundamentally alter storage allocations at reservoirs nationwide without seeking Congress's imprimatur. That is not what Congress envisioned when it carefully calibrated how reservoirs were to be used and placed a hard cap on the Corps' authority to make unilateral changes.

III. THE COURT SHOULD RESOLVE THIS MASSIVE CROSS-BORDER DISPUTE INVOLVING THREE SOVEREIGN STATES AND MILLIONS OF WATER USERS.

Even aside from the stark—and static—conflict between two appellate courts over the extent of the Corps' authority to reallocate water storage, this case is sufficiently important to warrant the Court's exercise of certiorari jurisdiction. Three states have been fighting over a critical resource for decades, billions of dollars are at stake, and there is no end in sight. The Court's guidance is necessary here, just as it is in original-jurisdiction cases involving water rights, to resolve a "controvers[y] between sovereigns which involve[s] issues of high public importance." *United States* v. *Texas*, 339 U.S. 707, 715 (1950).

1. This Court often grants certiorari where the case presents a dispute of public importance. *Pharmaceutical Research & Mfrs.* v. *Walsh*, 538 U.S. 644, 650 (2003); *McGee* v. *Int'l Life Ins. Co.*, 355 U.S. 220 (1957). Specifically, the Court has long recognized that cases involving allocation of natural resources, including land and water, merit its careful review. *United States* v. *Coleman*, 390 U.S. 599, 601 (1968).

This is such a case. Millions of people rely on the water flowing from Lake Lanier. That water is "critically important to communities throughout the region as a primary source of drinking water, hydroelectric power, and local impoundment, as well as industrial transportation, recreation and many other uses." Stephenson, *supra*, at 84. It presently provides the primary water source for metro Atlanta's 4.5 million people. *See supra* at 5. It is a crucial resource for southeastern Alabama. *See supra* at 6.

And in Florida, it is the lifeblood of the highly productive Apalachicola River and Apalachicola Bay.

The Apalachicola River requires vigorous flows to support a diverse array of wildlife, including commercially important fish populations and a number of endangered and threatened species. *See* Docket No. 193 Exh. 2 at 4-8, *In re MDL-1824 Tri-State Water Rights Litigation*, No. 3:07-md-01 (M.D. Fla. Jan. 23, 2009) ("*Light Declaration*"). The Bay, for its part, "is an exceptionally important nursery area for the Gulf of Mexico." Florida Dep't of Envtl. Protection, *About the Apalachicola National Estuarine Research Reserve & Associated Sites*.[7] "Over 95% of all species harvested commercially and 85% of all species harvested recreationally in the open Gulf have to spend a portion of their life in estuarine waters." *Id.* And that productivity "is dependent on the Apalachicola River to carry fresh water and essential nutrients downstream to feed estuarine organisms." Apalachicola Riverkeeper, *Apalachicola River & Bay Facts*.[8] As one commentator observed, "the recreational fishing industry in the eastern Gulf, which accounts for an economy of several billion dollars annually, owes much of its success" to the conditions created by the Apalachicola's flows. J.B. Ruhl, *Water Wars, Eastern Style: Divvying Up the Apalachicola-Chattahoochee-Flint River Basin*, J. Contemp. Water Res. & Educ. (June 2005), at 47. That is why Florida has invested hundreds of millions of dollars to protect the ecological integrity of the River and Bay. *See*, Docket No. 193 Exh. 3 at 3-

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[7] *Available at* http://www.dep.state.fl.us/coastal/sites/ apalachicola/info.htm.

[8] *Available at* http://www.apalachicolariverkeeper.org/ Apalachicola%20River%20and%20Bay%20Facts.pdf.

4, *In re MDL-1824 Tri-State Water Rights Litigation*, No. 3:07-md-00001 (M.D. Fla. Jan. 23, 2009).

The reallocation requested by Georgia would severely strain these resources and undermine Florida's investment. The Eleventh Circuit itself has recognized that much of the "water released for municipal purposes is consumed and not discharged into the river," and that such withdrawals "have a practical effect" upon flows at points south. *Georgia*, 302 F.3d at 1251-52. The District Court in this case found that "low flows in the Apalachicola River are at least to some extent caused by the Corps's operations in the [river] basin" and that "those low flows cause harm to the creatures that call the Apalachicola home." App. 157a. Indeed, those low flows "harm not only wildlife," but also "navigation, recreation, water supply, water quality, and industrial and power uses downstream." *Id.*

It also is not simply Georgia's *use* of Lake Lanier's reallocated water that causes ill effects downstream; it is the storage reallocation itself. When the Corps structures its operations to retain water in Lake Lanier and release it for local water supply instead of for hydropower, that affects how much water flows downstream, and at what intervals. The resulting low-flow conditions lead to devastating consequences for the ecology and species of the Apalachicola River and Bay. Among other things, they eliminate those water bodies' hydrologic connections to stream and marshland habitats—thus cutting many species of fish off from habitats they must access to survive—and increase salinity in the Bay and portions of the River. *Light Declaration* at 4-7.

2. These sorts of impacts explain why all parties agree this is a singularly important case. Respondent Georgia told this Court, in the course of seeking review in *Geren*, that "[h]ow the storage capacity of Lake Lanier is to be allocated between conflicting interests is an issue of vital importance to the State of Georgia, the Water Supply Providers, the Power Customers, and the Corps." Pet. for a Writ of Certiorari, No. 08-199 (Aug. 13, 2008), 2008 WL 3833287, at *16. Georgia told the court below that "a failure to allocate storage in Lake Lanier to water supply would cost Georgia 680,000 jobs, $127 billion in wages, and $8.2 billion in state revenues." Br. for Appellants 81, *In re: MDL-1824 Tri-State Water Rights Litigation*, Nos. 09-14657-G *et seq.* (11th Cir. Mar. 31, 2010). And Georgia asserted that any ruling requiring the Corps to go to Congress for reallocation approval would impose "massive," "devastating," "staggering," and "crippling" harm on the Georgia parties. *Id.* at 77-78. Respondents thus can hardly deny that this case has "importance warranting certiorari review." *Stern & Gressman* 268.

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This is a momentous case for all concerned. If it involved a direct contest among the three States for equitable allocation, there is little doubt that the Court would view it as justifying invocation of this Court's original jurisdiction, for it is "a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *South Carolina* v. *North Carolina*, 130 S. Ct. 854, 869 (2010) (Roberts, C.J., concurring in part and dissenting in part) (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983)). The same rationale militates in favor of certiorari review here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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