No. 08-199

In the Supreme Court of the United States

STATE OF GEORGIA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a settlement agreement establishing a framework for the interim reallocation of water storage to municipal and industrial uses at Lake Sidney Lanier in Georgia constituted a "major * * * operational change[]" of the reservoir without congressional approval, in violation of the Water Supply Act of 1958, 43 U.S.C. 390b(d).

2. Whether the States of Florida and Alabama have standing to challenge a settlement agreement among the State of Georgia and local governmental entities, the United States Army Corps of Engineers, and Southeastern Federal Power Customers, Inc., relating to the use of water in the Chattahoochee River.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 514 F. 3d 1316. The memorandum opinion of the district court (Pet. App. 26a-42a) is reported at 301 F. Supp. 2d 26.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2008. A petition for rehearing was denied on May 15, 2008 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on August 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the River and Harbor Act of 1945, ch. 19, §§ 1, 2, 59 Stat. 10-11, 17, and the Act of July 24, 1946, ch. 595, § 1, 60 Stat. 634-635, Congress authorized the United States Army Corps of Engineers (Corps) to build the Buford Dam on the Chattahoochee River northeast of Atlanta, to form the reservoir known as Lake Sidney Lanier. Pet. App. 4a, 27a. Under the Water Supply Act of 1958 (Water Supply Act), 43 U.S.C. 390b *et seq.*, the Corps has discretion to reallocate storage in Lake Lanier for municipal and industrial water supply purposes. If, however, a reallocation would "seriously affect the purposes for which the project was authorized" or would "involve major structural or operational changes," then congressional approval is required. 43 U.S.C. 390b(b) and (d).

2. Southeastern Federal Power Customers, Inc. (Southeastern) represents beneficiaries of hydropower generation at Buford Dam. Its members purchase power from the Southeastern Power Administration, a federal agency, and the rate Southeastern members are charged is affected by the revenue from water-supply storage, which indirectly offsets the costs of hydropower. Southeastern wanted the Corps to increase the charges it imposed on the State of Georgia and several local governmental entities (the Water Supply Providers) for municipal and industrial water storage in Lake Lanier. Southeastern therefore brought this action against the Corps, and Georgia and the Water Supply Providers intervened. Pet. App. 30a-31a.

After extensive negotiations, the Corps and Southeastern, along with Georgia and the Water Supply Providers, signed a settlement agreement to resolve the litigation. Pet. App. 49a-84a. The Corps agreed to a

process that could lead to "interim contracts" under which the Water Supply Providers would pay updated prices that would allow for an increase in the credit applied to hydropower rates charged to Southeastern members by the Southeastern Power Administration. *Id.* at 60a-71a. The agreement provided that the Corps first would engage in a review of the potential environmental impact of the interim contracts under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Pet. App. 76a-77a. If, based on that review, the Corps decided not to enter into the interim contracts, the settlement agreement would be void, allowing the litigation to resume. *Id.* at 77a.

3. Although Alabama and Florida had been "aware of the mediation" that led to the settlement, they had "made no effort to participate." Pet. App. 31a. After the agreement was reached, however, Alabama and Florida moved to intervene in the district court litigation in order to oppose the settlement. The district court allowed Alabama and Florida to intervene. They sought to have the case transferred to the Northern District of Alabama (where related litigation was ongoing), but that motion was denied. The district court then issued an order approving the settlement agreement, concluding that the agreement complied with the Water Supply Act, NEPA, and the Corps' regulations. *Id.* at 26a-42a.

4. The court of appeals reversed. Pet. App. 1a-25a.

a. The court of appeals first concluded that Alabama and Florida had standing to challenge the settlement agreement's impact on the Corps' operations at Lake Lanier. The court noted that the settlement agreement "potentially reduce[s] the amount of water flowing downstream," and, as a result, Alabama and Florida would "be directly impacted by the Agreement's proposed

changes to water storage uses." Pet. App. 12a. A decision vacating the settlement agreement would therefore redress their alleged injury. *Ibid*. In addition, the court noted, the States' "[']quasi-sovereign interests' entitle[d] them to 'special solicitude' in standing analysis." *Ibid.* (quoting *Massachusetts* v. *EPA*, 127 S. Ct. 1438, 1454-1455 (2007)).

The court of appeals then concluded that the settlement agreement, if implemented fully, would violate the Water Supply Act because it would require a "major operational change" at Lake Lanier. The court began with the premise that "the appropriate baseline for measuring the impact of the Agreement's reallocation of water storage is zero, which was the amount allocated to storage space for water supply when the lake began operation." Pet. App. 15a. The court found that the settlement agreement would reallocate approximately 22% of Lake Lanier's storage capacity to municipal and industrial purposes for 20 years, a reallocation that would, "[o]n its face," constitute a "major operational change" at the reservoir. *Id*. at 14a. In the alternative, the court stated that even a 9% reallocation of Lake Lanier's storage space—the percentage change the court calculated using the existing municipal and industrial consumption level, rather than zero, as a baseline—"is still significant" and would be unlawful. *Id.* at 15a.

b. Judge Silberman concurred in the judgment. Pet. App. 19a-25a. He disagreed with the majority's conclusion "that the appropriate baseline for measuring the impact of the Agreement's reallocation of water storage is zero." *Id*. at 21a. Instead, he concluded that the agreement "constitute[d] a 'major operational change' because it substantially increase[d] the amount of reservoir space allocated to the water supply compared to the

allocation *in 2002*, which is all we have to conclude." *Id.* at 23a.

ARGUMENT

1. a. Petitioner contends (Pet. 10-17) that the court of appeals erred by making its own findings of fact about the percentage of Lake Lanier's water storage that would be devoted to municipal and industrial purposes under the settlement agreement. Petitioner is correct that the court of appeals inaccurately determined the percentage change in the allocation of water at the reservoir. The court of appeals also improperly resolved an intensely factual question—whether the implementation of the agreement would result in a major operational change—as a matter of law. The factual details necessary to determine the operational changes required at the reservoir are not in this record, but they would have been developed by the Corps as part of the process set out in the settlement agreement. The court of appeals erred in setting aside the agreement rather than allowing that process to continue.

Although the decision below is incorrect, it is limited to the particular circumstances of this case. The court's interpretation of the Water Supply Act does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

b. Petitioner is correct (Pet. 13-14) that the court of appeals inaccurately described the percentage of the proposed reallocation at Lake Lanier. The court appears to have confused the conservation storage in Lake Lanier with the total storage in the reservoir. As a result, the court incorrectly stated that the proposed reallocation constituted either 22% or 9%, depending on the baseline, of Lake Lanier's "water storage," "storage ca-

pacity," or "total storage." Pet. App. 3a-18a. In fact, the 22% and 9% figures refer to percentages of "conservation storage" (1,049,400 acre-feet), which is a subset of the "usable storage" (1,686,400 acre-feet), which in turn is a subset of the total water volume contained in the reservoir. C.A. App. 399. The appropriate measure by which to evaluate the percentage of reallocation is the "usable storage" at the reservoir, because that is the storage devoted to all project purposes. Using a baseline of zero, the proposed reallocation would have constituted only about 14%, not 22%, of usable storage. Similarly, using the 2002 allocation as a baseline, the proposed reallocation would have been less than 6%, rather than 9%, of usable storage.

The court of appeals therefore erred in calculating the percentage of storage in Lake Lanier that would be devoted to water supply storage under the settlement agreement. More fundamentally, however, the court erred in assuming that to reallocate storage at that percentage would require a major operational change at the reservoir. The percentage of storage reallocated is not, by itself, an appropriate metric for determining whether a reallocation would involve a major operational change. The Water Supply Act requires congressional approval for a modification to a reservoir project if the modification "would seriously affect [project] purposes," or "involve major structural or operational changes." 43 U.S.C. 390b(d). Thus, when assessing whether a reallocation involves a major operational change, the relevant inquiry is not whether the *reallocation* is "major" according to a fixed numerical standard; instead, it is whether any *operational changes* involved with the reallocation are major. In this case, the record was insufficient for the court of appeals to determine that the pro-

posed reallocation would involve a major operational change as a matter of law, and the court's approach of looking only to percentages of reallocation of storage capacity was inappropriate.

Whether the reallocation proposed in the settlement agreement would involve a major operational change at Lake Lanier is a highly fact-intensive inquiry. As petitioner notes (Pet. 10), Florida and Alabama did not raise that issue in the district court or provide any facts on the basis of which that court could determine whether the proposed reallocation would involve a major operational change. The issue was only a minor one in the appellate briefs, and of course there was no further factual development on appeal. The court of appeals therefore erred by resolving the issue as a matter of law.

c. Contrary to petitioner's suggestion (Pet. 17), however, the appropriate remedy would not be a remand to the district court for further factfinding. Instead, the court of appeals should have affirmed the judgment of the district court and allowed the administrative process specified in the settlement agreement to go forward.

The court of appeals appears to have assumed that the settlement agreement reallocates storage in Lake Lanier. That is incorrect. The settlement agreement does not itself reallocate any storage. Instead, it sets up a process by which the Corps can determine whether to make a proposed reallocation. That process begins with a review of the proposed reallocation contracts under NEPA. It ends when the Corps issues a Record of Decision choosing either to sign, or not sign, the proposed contracts in light of its NEPA analysis. Pet. App. 77a.

Thus, the Corps has not yet taken any final agency action to reallocate storage in Lake Lanier. If, after its NEPA review, the Corps were to implement the pro-

posed interim contracts, it would then take a final agency action to reallocate storage, and that action would be subject to challenge under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* One potential challenge would be that the Corps lacks authority under the Water Supply Act to make the reallocation. In the context of that challenge, the Corps would need to support, by reference to the administrative record, its determination that it has the authority to make the reallocation in the proposed interim contracts. See 5 U.S.C. 706. At this point, however, there is no such final agency action or accompanying administrative record to review.

If the settlement-agreement process had been allowed to continue, the result would have been a full administrative process resulting in a challengeable final agency action based on an administrative record exploring the factual question whether the reallocation would involve a major operational change at Lake Lanier. And the factual development of that issue would have taken place exactly where it is intended to take place: with the Corps, which is the agency charged with the responsibility to manage Lake Lanier and other federal reservoirs, and which has the discretion to determine in the first instance whether to reallocate storage in reservoirs to municipal and industrial purposes. 43 U.S.C. 390b(b).

Attempting to explore the factual question of whether the proposed reallocation of storage would involve a major operational change at Lake Lanier in an evidentiary hearing in this litigation, by contrast, would be inconsistent both with normal principles of judicial review of agency action and with the scope of a court's review of a settlement agreement. Generally, if Congress gives an agency the discretion to manage a federal resource, as it has here, and the agency fails adequately to

explain the basis for its action, the remedy is to remand to the agency for further explanation. See *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (per curiam); *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973) (per curiam). Here, the Corps has not actually taken a final agency action to reallocate storage and there is no administrative record; a remand to the Corps for explanation of an action not yet taken, in the context of a settlement agreement that merely *proposes* that action, would therefore be both unnecessary and premature.

Substituting a district-court evidentiary hearing for factual development by the agency, as petitioner suggests, would not be the correct disposition either. A court's review of a settlement agreement—especially one that merely sets up a process by which there will be further factual development by a federal agency before that agency decides on a final course of action—is limited to whether the agreement is illegal, in other words, whether it necessarily violates the law. See *United States* v. *Trucking Employers, Inc.*, 561 F.2d 313, 317-318 (D.C. Cir. 1977). Thus, unless Alabama and Florida could demonstrate that there was no way to carry out the settlement agreement in compliance with the law, the district court's decision should have been affirmed and the process put in place by the settlement agreement allowed to go forward. *Ibid.* An extensive evidentiary hearing on the complex factual question whether a proposed reallocation would involve a major operational change if implemented, a question raised by an agreement entered into precisely to avoid extensive litigation, is inconsistent with the appropriate scope of judicial review. That is especially so here because, if the settlement agreement had not been set aside by the court of

appeals, the Corps would have developed a factual record that could be the subject of later review.

d. Although the decision of the court of appeals is incorrect, this Court's review is not warranted. There is no conflict among the courts of appeals on the requirements of the Water Supply Act or on the definition of a "major * * * operational change[]." And given the unique factual circumstances of this case, as well as the posture of the case as a review of a conditional settlement agreement, the precise issues presented here are very unlikely to recur. Other cases considering whether a reallocation would cause a "major * * * operational change[]" under the Water Supply Act will most likely occur in the context of judicial review of an administrative record developed by the Corps, a context in which the Corps will have resolved the relevant factual questions and will be entitled to substantial deference. Thus, the decision below does not present a question of substantial importance requiring this Court's review.

2. Petitioner also contends (Pet. 17-24) that review is warranted to consider whether and to what extent this Court's decision in *Massachusetts* changes the traditional standing analysis with respect to claims asserted by States. That is incorrect. Contrary to petitioner's suggestion (Pet. 18), the court of appeals did not "excuse a state's failure to measure up to the" test for standing articulated in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). On the contrary, the court applied *Lujan*, and it determined that Florida and Alabama had sufficiently demonstrated their standing because the agreement would "potentially reduce the amount of water flowing downstream," and therefore Alabama and Florida, as downstream States, "would be directly impacted by the Agreement's proposed changes to water storage

uses." Pet. App. 12a; see *ibid.* (noting that "Florida alleged various negative environmental impacts from reduced water flow"). After reaching that conclusion, the court noted that the States were also entitled to "special solicitude" under *Massachusetts*. *Ibid*. But it did not say that the "special solicitude" was necessary for standing.

Petitioner errs in suggesting (Pet. 21) that the decision below conflicts with *Citizens Against Ruining the Environment* v. *EPA*, 535 F.3d 670 (2008). In that case, the Seventh Circuit held that the Illinois Attorney General lacked standing to challenge the Environmental Protection Agency's decision not to object to the issuance, by another Illinois agency, of certain operating permits under the Clean Air Act, 42 U.S.C. 7401 *et seq.* In the context of that "rather unusual antagonistic relationship between an office and an agency that are both part of the executive branch of the state of Illinois," the court held that the Illinois Attorney General had failed to satisfy the *Lujan* test. 535 F.3d at 676. The court's reasoning was entirely consistent with that of the court below, which found that the *Lujan* test was satisfied on the facts of this case.

Significantly, the Eleventh Circuit, which also considered Alabama and Florida's standing to object to the settlement agreement before this Court's decision in *Massachusetts* was issued, "readily conclude[d]" that Alabama and Florida have standing to pursue their claims. *Alabama* v. *United States Army Corps of Eng'rs*, 424 F.3d 1117, 1130 (2005), cert. denied, 547 U.S. 1192 (2006). Like the court below, the Eleventh Circuit emphasized that "Corps management of Lake Lanier that violates federal law may adversely impact the environment and economy downstream * * * thereby in-

juring Alabama and Florida." *Ibid.* Thus, the only two courts of appeals to consider the precise question presented in this case have agreed that Alabama and Florida have standing to challenge the settlement agreement. Further review is not warranted.

CONCLUSION

Although the decision of the court of appeals is incorrect, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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