Nos. 10-196 & 10-252

In The
Supreme Court of the United States

FRIENDS OF THE EVERGLADES, ET AL.,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CAROL WEHLE

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SUPPLEMENTAL BRIEF FOR RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CAROL WEHLE

It is telling that the federal government stands alone in its attempt to dissuade review. The arguments it enlists and its very reason for making them belie that aim. But first it is worth noting two points that the United States does not argue. It makes no pretense that the question presented is not of paramount national importance. The *amicus* briefs filed here and in *Miccosukee*, hundreds of comments submitted to EPA during its rulemaking and dozens of Petitions challenging EPA's rule, by groups representing thousands, attest to the fundamental concerns at stake. Nor is there any pretense that the question presented – the well warmed subject of several prior and pending suits – has not percolated long enough. Unlike *Miccosukee*, the parties' arguments here were honed well below and crystallized into a clear and focused point of interpretive law. In short, this matter indisputably presents a critically important and concise, albeit sharply divisive, interpretive question that is plainly ripe for review.

The arguments made to escape review and maintain EPA's newfound discretion to extend NPDES over state water managers are troubling. In essence, the government capitulates to finding the distinct-waters approach a "plausible" reading by abandoning core principles and traditional tools of statutory construction that had grounded its previously steadfast and stern rejection of it. In the end, its arguments

should have the effect of encouraging not discouraging review.

1. The government's superficial summary of textual and structural arguments in support of both approaches is not helpful as it fails to confirm the plausibility of either (at 11). It rather epitomizes the "uncritical use of interpretive rules" reproached by the Court in *S.D. Warren*.[1] It is also not what the Solicitor General presented this Court in *Miccosukee*. There, the United States recognized that the distinct-waters test "reaches far beyond the Clean Water Act's terms."[2] It further acknowledged that "[t]he text and structure of the Clean Water Act *make clear* that Congress had no intention to subject [water-transfers] * * * to the NPDES permitting regime"[3] and that the CWA's defining language "*cannot reasonably be understood* to include" water transfers.[4] (emphasis supplied).

The government's juxtaposition of statutory arguments attempts to fog the clarity of its otherwise longstanding position. But the facial complexity of the CWA provides more, not less, reason to critically

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[1] 547 U.S. 370, 380 (2006) ("It should go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statue like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process").

[2] Brief of the U.S. in *Miccosukee*, 2003 WL 22137034 at *13.

[3] *Id.* at *15.

[4] *Id.* at *16.

scrutinize it for meaning and congressional intent. At bottom, the government's new stance, like the opinion below, cannot be reconciled with its past positions or withstand the critical scrutiny expected by decisions of this Court.

2. Starkly absent from the government's analysis are the fundamental federalism principles that drove its longstanding adherence to the unitary waters approach. Both the United States' brief in *Miccosukee* and the preamble of the water-transfer rule confirm the relevance and importance of those abandoned values.

The United States used to share Congress' respect for State rights and responsibilities expressed in the CWA's statements of policy and exercised by the States through water-transfers. In its preamble, EPA explained the current water-transfers rule "appropriately defers to congressional concerns that the statute not unnecessarily burden water quantity management activities" in excluding water transfers from NPDES.[5] It continues:

> A holistic approach to the text of the CWA is needed here in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters. The purpose of the CWA is to protect water quality.

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[5] NPDES Water Transfers Rule, 73 Fed. Reg. 33697, 33700 col. 1.

> Congress nonetheless recognized that programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and State and local programs.[6]

The rule's preamble also openly respected the very principles of federalism and canons of construction upon which the non-federal respondents rely and which belie the United States current position.

> Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, [Section 101(g), 33 U.S.C. 1251(g)] provides additional support for the Agency's interpretation that, absent a clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers. *See United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.")[7]

In *Miccosukee*, the United States proposed that if Congress intended to prohibit unpermitted water-transfers "it would have made that extraordinary intention manifest."[8] Instead, "Congress recognized

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[6] *Id.* at 33701 col. 3.

[7] *Id.* at 33702 col. 1-2.

[8] Brief of the U.S. in *Miccosukee*, 2003 WL 22137034 at *19.

that the States have important responsibilities in distributing and allocating water and that the Clean Water Act's requirements should not unduly interfere with those responsibilities."[9]

Even if the Court viewed the distinct-waters approach as plausible, these principles of federalism make that approach nonetheless impermissible and, therefore, preclude deference. The government does not explain its failure to pay them any respect in this case.

3. The government's brief serves only to exacerbate the already intolerable regulatory uncertainty that led these respondents and their supporting *amici* to this Court, despite concurring with the judgment below. EPA initiated rulemaking after *Miccosukee* because the Court "left unresolved the uncertainty many felt about the need for an NPDES permit."[10] The water transfers rule was issued to "resolve the confusion created by [the courts'] conflicting approaches."[11] What certainty was provided is plainly gone.

By reaffirming that EPA is intent and remains "in the process of reconsidering its water-transfers rule" (at 9), the government has abandoned its supporters and only promised the nation many more years of contentious rulemaking and litigation. The analysis

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[9] *Id.* at *14.

[10] *See, e.g.*, EPA Press Release at http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/66d1aca0a9c7030d852574630051e99b!OpenDocument.

[11] Water Transfers Rule at 33701 col. 2.

it now presents demonstrates its willingness to abandon fundamental principles to achieve that end.

These respondents have shown that this case in particular implicates public works that are subject of the world's largest restoration program. Projects that are already suffering from significant delays and billion dollar cost overruns and that the government has conceded would be hindered by the extension of NPDES. At the end of the day, the United States offers no reason that the nation should be left with continued uncertainty and the inevitable litigation to come. There is nothing hypothetical about the chilling effect of the government's ongoing conduct.

Respectfully submitted,

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