No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

CATAWBA RIVER WATER SUPPLY PROJECT
AND
DUKE ENERGY CAROLINAS, LLC,

Intervenors.

Before Special Master Kristin Linsley Myles

INTERVENORS' REPLY BRIEF IN OPPOSITION TO PLAINTIFF'S REQUEST TO REVERSE ORDER BIFURCATING PROCEEDINGS

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Intervenors respectfully submit this Reply Brief in order to demonstrate that, contrary to South Carolina's submission: (i) bifurcation is commonplace, (ii) the Supreme Court routinely employs bifurcation to streamline water-rights cases; and (iii) bifurcation is the most efficient mechanism for litigating and potentially settling this case.

I.

It is common ground that Fed. R. Civ. P. 42(b) authorizes bifurcation "for convenience, to avoid prejudice, or to expedite and economize." Bifurcation is a "powerful legal tool[] which, by effectively isolating the issues to be resolved, avoid[s] lengthy and perhaps needless litigation." *United States v. Alcan Aluminum Corp.,* 990 F.2d 711, 720 (2d Cir. 1993). Bifurcation is routinely granted where it presents the prospect that a dispositive ruling would materially narrow the case.

For example, in *Beeck v. Aquaslide 'N' Dive Corp.,* 562 F.2d 537 (8th Cir. 1977), a plaintiff sued a water slide manufacturer for injuries incurred while using the slide. The court of appeals affirmed the district court's decision to bifurcate the case "on the issue of whether the slide was manufactured by Aquaslide," recognizing that "[j]udicial economy, beneficial to all the parties, was obviously served by the trial court's grant of a separate trial." *Id*. at 541, 542.[1]

[1] *See also Chapman v. Bernard's Inc.*, 167 F. Supp. 2d 406, 417 (D. Mass. 2001) (ordering bifurcation when "a separate trial may be appropriate to avoid prejudice or where a single issue could be dispositive of the entire case" (citing 9 Wright & Miller, *Federal Practice & Procedure: Civ. 2d,* § 2388 (1995)); *id.* (finding that the "advantages" of bifurcation "were not outweighed by the possibility that the same witnesses may have to testify at both trials"); *Preferred Mut. Ins. Co. v. Meggison*, 53 F. Supp. 2d 139, 144 (D. Mass. 1999) ("resolution of the declaratory judgment action may determine the outcome of the entire proceeding and obviate the necessity of considering evidence that is only relevant to defendants' unfair settlement counterclaims"); *Cook v. U.S. Auto. Ass'n*, 169 F.R.D. 359, 361 (D. Nev. 1996) ("[b]ifurcation is particularly appropriate when resolution of a single claim or issue could be dispositive of the

Similarly, in *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), mothers who had ingested an anti-nausea drug during pregnancy brought a products liability action against its maker. *Id.* at 293. Citing the case's complexity, the court of appeals upheld the district court's decision to bifurcate trial on the issues of liability and causation, explaining that "the initial trial on the proximate causation issue was a separate issue, promoted efficiency, and did not unduly prejudice plaintiffs." *Id.* at 320.

All of the reasons militating in favor of bifurcation in these other cases apply here.

II.

As opposed to a single proceeding, bifurcation is more consistent with the Supreme Court's exercise of its original jurisdiction, which is restrictive and viewed as an "extraordinary power to control the conduct of one State at the suit of another." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931). South Carolina has repeatedly advocated this very point: its suit is directed at another sovereign, not an ordinary civil defendant. South Carolina fails to recognize, however, the inherent corollary principle that this original case ought to be sharply focused and efficiently brought to a close. Because it creates the realistic prospect of ending or at least narrowing the litigation, see *infra*, bifurcation is even more appropriate in the context of original actions than it is in ordinary civil litigation.

Indeed, South Carolina cites no authority recognizing a supposed practice of adjudicating original water-rights cases based on "a full record developed during a *single* proceeding." SC Br. 12 (emphasis added). The practice in original water-rights actions has been the opposite. Thus, in the most recent original water-rights action to be tried, "[t]he Special Master bifurcated

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entire case"); *Boyd v. City & County of San Francisco*, No. C-04-5459 MMC, 2006 WL 680556, at *2 (N.D. Cal. March 14, 2006) (same); *Honican v. Stonebridge Life Ins. Co.*, No. Civ.A. 05-73-DLB, 2005 WL 2614904, at *2 (E.D. Ky. Oct. 13, 2005) (same).

the trial into a liability phase and a remedy phase." *Kansas v. Colorado*, 514 U.S. 673, 680 (1995). Notably, "the liability phase of the trial" substantially narrowed the case, *id.* at 675, as the Special Master recommended rejecting Kansas' challenges to Colorado's Winter Water Storage Program and its operation of the Trinidad Reservoir, *id.* at 680. The Court "agree[d] with the Special Master's disposition of the liability issues," *id.* at 675, allowing the case to proceed on the more limited "unresolved issues" relating to the remedy for claims in which liability had been established, *id.* at 694. *See also* Report of the Special Master, *Oklahoma v. New Mexico*, No. 109, Orig. at 3 (Nov. 5, 1990) (bifurcated liability and remedy phases); *Texas v. New Mexico*, 462 U.S. 554 (1983) (bifurcated into preliminary legal questions and compliance with interstate compact, *see* n.1, Intervenors' Opening Brief (describing interim reports)).[2]

III.

Bifurcation is appropriate here because "the litigation of the first issue might eliminate the need to litigate the second issue." *Amato v. City of Saratoga Springs, N.Y.*, 170 F.3d 311, 316 (2d Cir. 1999). South Carolina's case-specific arguments for reversal of the Special Master's order approving the parties' agreement to bifurcate this litigation are not persuasive.

South Carolina correctly states that, even if the case is bifurcated, there will be some overlapping discovery. SC Br. 19. That is not unusual in bifurcated proceedings, and the CMP addresses this concern by allowing discovery on both Phases whenever it is convenient to do so. Thus, in issuing subpoena duces teca, North Carolina has not burdened a recipient with multiple demands, where possible. The same course will be followed on depositions. With some third parties, expert witnesses, and party witnesses, however, there will be considerable efficiencies in

[2] The only case in the last sixty-five years that South Carolina cites is *Colorado v. New Mexico*, 459 U.S. 176 (1982), but it omits that it correctly previously advised the Special Master that the case was "functionally" bifurcated, as the matter was remanded to the Special Master for further factual findings. SC's June 16, 2008 Phasing Br. 15.

taking discovery in Phases. For example, expert testimony related to the uses of the Catawba River in North Carolina, the benefits of those uses, and their value relative to the use of additional water in South Carolina should be postponed until Phase II and will be unnecessary if South Carolina cannot carry its initial burden. The overlap South Carolina now decries actually shows the wisdom of the CMP that it, North Carolina, and Intervenors crafted.

South Carolina specifically ignores the voluminous discovery and other fact finding that is relevant only to Phase II. This massive undertaking may be avoided if the case is bifurcated. There is a substantial prospect that South Carolina will not prove substantial injury caused by North Carolina. South Carolina has only recently provided its initial and admittedly incomplete disclosure of its harms; nothing in South Carolina's preliminary disclosure addressed the massive weighing of equities required in Phase II.[3]

Even assuming that the case proceeds to Phase II, bifurcation still provides important benefits. The Phase I litigation will substantially narrow South Carolina's theories of harm (which South Carolina's preliminary disclosures suggest South Carolina itself has not yet completely framed), and thus narrow the issues in balancing equities and determining remedies in Phase II. Phase I discovery and motions will require South Carolina to present evidence of, and the Special Master to delineate, its substantial harms and their causation by North Carolina. Once the scope, nature and causation of those harms are determined, Phase II discovery can be directed weighing the equities of uses in the two States. That is, after Phase I, the parties will know how much water South Carolina contends that North Carolina is taking in excess of its

[3] South Carolina also frets that if the case is bifurcated, the Special Master will have to waste time and resources resolving what belongs in Phase I and what does not. SC Br. 13. The Special Master will be required to do so whether or not the matter is bifurcated, because the parties will cross move for summary judgment on South Carolina's threshold showing at the end of discovery whether it is unitary or bifurcated; and to resolve that motion, the Special Master will have to determine what is relevant.

share, under what flow conditions and what, if any, harms result from that "missing" water; and then, in Phase II, take discovery on the uses of water in North Carolina, the value of those uses, and the relative value of uses in South Carolina. In contrast, if discovery is unitary, it is likely to continue for three to five *years* and to delve into areas shown subsequently to be irrelevant to any Phase, before the parties are required to focus their cases and make or address a dispositive motion.

In addition, contrary to South Carolina's view (SC Br. 22), bifurcation makes settlement far more likely. Until all parties know what harms South Carolina can prove, there is no prospect of settlement. Indeed, settlement is far more likely once all parties know whether South Carolina can meet Phase I's threshold requirements and demonstrate substantial harm caused by North Carolina. Unitary discovery will result in a lengthy period of time during which massive amounts of undifferentiated and probably irrelevant information will be exchanged among the parties without either narrowing the parties' differences or focusing attention on the precise extent of their differences. Discovery and cross-motions for summary judgment on Phase I will do both.

The Special Master's decision to approve the parties' agreement to bifurcate should be reaffirmed.

Respectfully submitted,

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