No. 138, Original

IN THE
Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To File Exceptions to First Interim Report of the Special Master

REPLY BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF ITS MOTION TO FILE EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER

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This Court has long been quite sparing in permitting intervenors in *any* original actions and has developed a stringent test for determining when a non-state entity can force its way into a suit over the objection of a party State. Indeed, in applying that test to water disputes, this Court has never upheld an intervention in an equitable apportionment action, because such suits are *not* the proper forum to adjudicate individual water users' competing rights within a State. In permitting intervention by three non-state entities, the Report adopted an unprecedented theory that intervention is appropriate when the "authorized agents" of the defendant State have been cited in the Complaint as responsible for complained-of harm. If ultimately adopted by this Court, such a test in the water-use context would open the door for dozens, if not hundreds, of non-state persons and entities to intervene in future equitable apportionment actions to defend their individual water-use interests. Recognizing the irreparable costs and risks of such an erroneous decision in this case, the Special Master has stayed intervenor discovery until the Court rules on this critical issue.

Proposed intervenors themselves appear to recognize the importance of the Court's proper resolution of the question raised in South Carolina's motion. They do not challenge South Carolina's right to except from the Special Master's Report and offer scant defense of the merits of her decision to permit intervention. Rather, they ask the Court not to permit such exceptions *now*, so that the case may proceed to completion before the Court rules on the propriety of intervention. In a change of position that does not appear to be grounded in principle, North Carolina

has now abandoned its previous stance and endorsed proposed intervenors' position.

The Court should reject proposed interveners' request, which would permit them to participate as parties without review from the Court until after discovery, trial, and the Special Master's submission of a recommendation on merits issues. Proposed intervenors do not dispute that, if the interventions are later held unlawful, South Carolina will have been impermissibly burdened with additional costs and delay from the unnecessary complexity of the proceedings, for which there will be no remedy at the conclusion of the initial merits phase of the case. Accordingly, both the strong likelihood of error in the intervention recommendation and the serious harm that will occur if the Court waits to review it warrant immediate review.

1. Proposed intervenors erroneously assert (at 6) that the Court should decline to review the recommended interventions now because "their participation does not expand the scope of the equitable-apportionment claim." That argument, however, misunderstands this Court's test for intervention. Each non-state entity seeks to intervene to protect its *own* parochial water use rights. *See*, *e.g.*, Report at 25 (recommending that Charlotte may intervene to defend "its own permit in particular"). Such participation by individual water users will thus substantially alter the proper focus of equitable apportionment actions from apportionment of water *between* States to apportionment of water among certain users *within* a single State. *See* SC Br. 2, 11-17.

Although proposed intervenors initially claim (at 1) to abstain from discussing the merits of the Report, they assert (at 3-5, 13-14) that the Special Master

correctly concluded that intervention is proper for any non-state "authorized agent" of the alleged injury. That contention contradicts this Court's clear precedent and eviscerates the well-settled principle that a State defending a matter of sovereign interest must be deemed to represent all of its citizens as *parens patriae*. The Court should not allow authorized water users within a disputed interstate river basin to intervene in defense of their individual interests in the water at issue.[1]

Under this Court's prevailing standard, proposed intervenors must demonstrate that North Carolina cannot adequately represent their interests as this Court held in *New Jersey v. New York*, 345 U.S. 369,

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[1] Proposed intervenors seek (at 3) to justify CRWSP's intervention because it is "an interstate entity," but the Special Master properly rejected that rationale. *See* Report at 27 ("CRWSP's dual citizenship status does not provide an independent basis for intervention"). CRWSP has not sought to file exceptions challenging that reasoning and has thus waived its opportunity to do so. Similarly, to the extent Duke's federal license may be implicated here in any way (*see* Opp. 4), the proper party to intervene to protect that federal public interest would be the United States, not a non-sovereign corporation charged with maximizing shareholder value. *See Maryland v. Louisiana*, 451 U.S. 725, 745 (1981) (allowing permissive intervention based on the "United States' interests in the operation of the [Outer Continental Shelf Lands] Act and FERC's interests in the operation of the Natural Gas Act"); Report at 31-32 n.3 (rejecting Duke's reliance on "public interests" "protected by Duke's license under the Federal Power Act"); *cf.* SC Br. 19-23; *California v. Nevada*, 447 U.S. 125, 133 (1980) (rejecting intervention for individual title holders along a disputed interstate boundary). Duke likewise has waived any objection to the Special Master's conclusion on that point by its failure to seek leave to file exceptions.

373 (1953) (per curiam).[2] In their discussion of this controlling case (at 14), proposed intervenors ignore the Court's standard for determining *intervention* and instead rely on the fact that the Court did not expel (and apparently was not asked to expel) the City of New York as a named *defendant*. In so doing, they advocate the errant conclusion of the Special Master, which functionally strips the *parens patriae* doctrine of its importance in original jurisdiction cases. *See* SC Br. 12-14.

In advancing their arguments, neither proposed intervenors nor North Carolina show that North Carolina is unable adequately to represent the interests of proposed intervenors. Their focus on the putative "authorized agents" instead vastly expands this Court's original jurisdiction, because the alleged harms by one State against another inevitably result from the actions of persons or entities within the defendant State. Proposed intervenors are simply among a larger set of those who use an increasingly scarce public resource at the expense of South Carolina and its citizens. Although South Carolina's Complaint provided illustrative examples of a handful of the authorized water users in North Carolina, in fact there are more than 40 significant authorized North Carolina water withdrawers in the Catawba River Basin, including public water supplies, hydropower operations, industries, agricultural operations,

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[2] *See also* Robert L. Stern et al., *Supreme Court Practice* 572 (8th ed. 2002) (discussing strict test for intervention set out in *New Jersey v. New York*). Proposed intervenors rely (at 7) on a different passage from this treatise, but the point made there is that the Court's exclusive original jurisdiction is not ousted by "the presence of non-state parties," not that their presence is typically permissible. Stern, *Supreme Court Practice* at 554.

and other users.[3] Each of those entities would appear to satisfy the Special Master's novel "authorized agent" theory, contrary to this Court's longstanding limits on non-state participation in original actions generally and equitable apportionment actions in particular.[4]

In any event, the Report's (and proposed intervenors') reliance on the identification by South Carolina's Complaint of selected water withdrawals misperceives the nature of an equitable apportionment action. South Carolina's Complaint challenges the cumulative impact of *all* water uses and other activities in North Carolina affecting the Catawba River Basin. A plaintiff's decision to include concrete examples of harm in its complaint cannot be used as justification to permit intervention by those few

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[3] *See* Duke Energy, *Water Supply Study – Final Report: Catawba-Wateree Hydroelectric Relicensing Project*, App. C (Apr. 2006). Proposed intervenors misleadingly claim (at 3) that "Charlotte is the only entity in North Carolina currently executing a substantial interbasin transfer of water from the North Carolina portion of the Catawba River pursuant to a Certificate issued by North Carolina." In addition to Charlotte's interbasin transfer permit of 33 mgd (million gallons per day), North Carolina has authorized additional interbasin transfers of 39.54 mgd, through either permits or a grandfathering provision in its interbasin transfer statute, to at least five additional users (the cities or towns of Concord, Kannapolis, Mooresville, and Statesville, and Union County). *See* SC Reply (Aug. 22, 2007); NC App. 48a-49a (Aug. 7, 2007). Available data suggest that North Carolina's recent consumption of water from the Catawba River Basin has been approximately 170 mgd, and is projected to increase by more than 275% over the next 50 years.

[4] North Carolina, having taken no position on the interventions before the Special Master, now supports intervention because proposed intervenors' "conduct is expressly referenced in the Bill of Complaint." NC Opp. 3. That argument fails for the same reason as does proposed intervenors' identical argument.

entities (at the relative expense of other similarly situated water users) identified as citizen participants in the alleged injuries. Such a rule would significantly (and potentially dispositively) dilute standards for intervention and also discourage future plaintiffs from identifying concrete examples of harm so as to avoid inviting all citizen "agents" of alleged harm to participate as intervenor-adversaries.

2. These considerations underscore the need to review the intervention recommendation now, before the participation of non-state entities fundamentally alters the nature of South Carolina's complaint. Proposed intervenors cite no case permitting intervenors to alter fundamentally the nature of a suit brought by a plaintiff State, yet that is precisely what intervention threatens to do in this case by transforming South Carolina's suit for equitable apportionment into an action about Charlotte's, Duke's, and CRWSP's interests. Instead of a focus on the collective water uses in North Carolina that overburden the Catawba River and further diminish South Carolina's access to water, proposed intervenors seek to transform this suit into an action about *their* individual needs, to the exclusion of other water users not identified by name in South Carolina's Complaint, or smaller water users without the resources to litigate in this case.

This Court's review now is also necessary to avoid the substantially increased costs imposed on South Carolina by proposed intervenors' participation. Their claim (at 8-10) that litigation costs will not be materially affected discusses only document discovery, and they do not dispute that permitting their participation in depositions and allowing them to file multiple additional sets of expert reports will

dramatically increase the costs and the complexity of this original action. *See* SC Br. 2, 5. Proposed intervenors offer the faulty contention (at 9) that South Carolina somehow is to blame because such increased costs are the "inevitable and direct result" of its own Complaint, which mentions the three proposed intervenors (as well as the Cities of Concord and Kannapolis, which thus far have not sought to intervene). Yet this Court's cases provide no support for the notion that providing greater notice to North Carolina of some examples of objectionable water use entitles those individual offending water users to intervene in the case, thereby driving up South Carolina's litigation costs.[5]

Indeed, the Special Master's handling of the Report reflects her judgment that the issue *should* be resolved now, before further significant proceedings occur. The Special Master stayed participation by proposed intervenors, save for document discovery, pending this Court's review of the intervention issue. Permitting intervenor participation through trial, on the other hand, would result in substantial irreparable injury in the event the interventions are later held unlawful. *See* SC Br. 9 n.6.

Accordingly, the Court's preferred practice based on the *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* and cases cited therein is to review recommendations concerning intervention near the beginning of the case. *See* SC Br. 7-8. Proposed intervenors claim that, because the Court in the cited cases ruled on

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[5] Proposed intervenors illogically suggest (at 10) that South Carolina's taxpaying citizens should be made to suffer these burdens so long as they are caused in part by other public entities that rely on tax revenues.

the proposed intervention denials without briefing on exceptions, South Carolina's request here should be rejected. That argument misses the point: the main issue here is whether to decide the intervention question *now*, rather than to wait for potentially several years after discovery, hearings, and submission of a Special Master report on the merits when South Carolina would raise again the propriety of intervention. In other original cases, the Court has ruled on intervention early on, without briefing on exceptions (where apparently no such briefing on exceptions was requested). That history is no cause for deferring a ruling here.[6]

Finally, proposed intervenors claim (at 8) that briefing and deciding the intervention issue on exceptions will have the effect of "delaying, rather than expediting, the factual development and disposition of this case." The document discovery phase, how-

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[6] The other cases relied on by proposed intervenors (at 11-12) are inapposite. Two cases concerned review of intervention recommendations later in an original case where it appears that the Court was never asked to review them earlier. *See Nebraska v. Wyoming*, 507 U.S. 584, 589-90 (1993) (recommended denial of intervention); *South Carolina v. Baker*, 485 U.S. 505, 510-11 (1988) (apparently uncontested grant of intervention to the National Governors' Association, in a case alleging unconstitutional federal taxation of state bonds). And *Arizona v. California*, 460 U.S. 605, 612-13 (1983), concerned intervention in an original case by Indian Tribes, which this Court has consistently treated as sovereign entities entitled to intervene in original actions. *See* SC Br. 14. The Court's disinclination to engage in interim review in that case is thus not instructive here. The remainder of proposed intervenors' cases (at 11-12; also cited in CRWSP's Letter Br. 2) concern review of intervention decisions in non-original cases and are thus inapposite. *See* SC Br. 9 n.6; *cf. id.* at 17 n.11 (even in non-original cases, a State is generally presumed to represent all of its citizens for purposes of intervention analysis).

ever, will likely extend in any event to near the end of the Court's October Term 2008, and it is unlikely that either of the party States would seek to take depositions until after June 2009. During the same period, the party States may also serve interrogatories and requests for admissions. A decision by this Court this Term on the intervention motions after full briefing and argument on exceptions would not unduly delay the progress by the party States of their discovery efforts. However, giving proposed intervenors full discovery and other litigation rights will cause far more delay due to the increased scope of the proceedings, litigation burdens, and complexity in coordinating all such events among the multiple parties. And, if later held to have been contrary to law, the interventions will have irreparably injured South Carolina in prosecuting its case. Accordingly, now is naturally the best and most efficient time to review the intervention recommendation. Any relatively small delays in case progress will pale in comparison to the additional burdens and delays that South Carolina would have to bear from litigating until the Special Master decides sufficient issues on the merits to warrant this Court's review.

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The motion of the State of South Carolina for leave to file exceptions to the First Interim Report of the Special Master should be granted, and briefing on those exceptions to be filed should be expedited to ensure a decision before the close of the October Term 2008. In the alternative, the Court should deny the motions for leave to intervene for the foregoing reasons and those stated in South Carolina's previously filed oppositions to the motions for leave to intervene.

Respectfully submitted,

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