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PRO C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this afternoon in Case 138 in our original docket, South Carolina v. North Carolina. Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK
ON BEHALF OF THE PLAINTIFF

MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court:

South Carolina seeks an equitable apportionment with North Carolina of the Catawba River. Both States act as *parens patriae* on behalf of all users of the river within their boundaries.

For three reasons, this Court should not adopt the Special Master's recommendation that Charlotte, Duke, and the Catawba River Water Supply Project be permitted to intervene as parties in this original action.

First, the report articulates the wrong legal test for intervention. Second, under the *New Jersey v. New York* standard, none of the three entities should be permitted to intervene. And, third, the report's approach to intervention involves this Court in deciding intramural disputes between and among water

1 users in one State.

2 With respect to the first point, the Special
3 Master applied the wrong factors, we would submit, in
4 deciding whether or not a party or an intervener should
5 be allowed to intervene as a party.

6 The Special Master sought to distill from
7 this Court's cases three principles that we would submit
8 are not the appropriate principles in deciding an
9 intervenor's status.

10 First, the report overemphasizes the, quote,
11 "direct stake," although the master found that the
12 equitable apportionment had no specific impact on
13 individual users of the water.

14 CHIEF JUSTICE ROBERTS: I thought your
15 friends agreed that the New Jersey v. New York standard
16 applied?

17 MR. FREDERICK: Your Honor, part of what *you*
18 will be deciding in this case is the appropriate
19 standard for intervention, and the Special Master, we
20 respectfully submit, did not apply the New Jersey v. New
21 York factors. Instead, the report distilled from other
22 cases, not the New Jersey v. New York case, the
23 principles that she thought should apply to govern an
24 intervenor's status, and those three principles, we
25 would submit, are incorrect.

1 Under the New Jersey v. New York standard,
2 the master did not make findings that would be
3 appropriate to determine the intervener status here as
4 appropriate parties. There was no finding of inadequate
5 representation by either State to support any of the
6 Interveners' request to participate as parties. There
7 was no finding of a compelling interest in the sense
8 that it was truly compelling. It's hard to argue in
9 cases in -- where there is no case from this Court in
10 the equitable apportionment area that three Interveners
11 would have met the compelling interest standard here.

12 And, finally, the New Jersey v. New York
13 standard talks about having interests that are apart
14 from other interests. But both Charlotte and the
15 Catawba River Water Supply Project are simply acting on
16 behalf of all users of North Carolina water. They
17 simply happen to be the largest ones.

18 JUSTICE SCALIA: Mr. Frederick, we had a
19 case involving, what, a tax on oil companies, in which
20 it was a State against State case, but we allowed the
21 oil companies who would pay the tax to intervene.

22 Now, why is that any different from this
23 case?

24 MR. FREDERICK: First, the interests were
25 different. They were not an equitable apportionment

1 where the water

2 JUSTICE SCALIA: Why does that make any
3 difference?

4 MR. FREDERICK: This Court has said for 200
5 years that water is a unique resource within the
6 sovereign control of States.

7 In the Maryland case, the Court permitted
8 intervention in a situation in which Louisiana had sued
9 the pipeline companies in Louisiana State court for a
10 declaratory judgment that its tax was constitutional.
11 There was also a pending FERC action in Federal court in
12 Louisiana raising the same issue, so when Maryland and
13 eight other States who were not *parens patriae* of the
14 various pipeline companies who sought to intervene filed
15 the original action, I think the Court appropriately
16 considered that interests of judicial efficiency called
17 for handling the Commerce Clause challenge in the
18 original action in this case.

19 And finally, the Court only devoted two
20 sentences of its opinion and didn't cite the New Jersey
21 v. -- New York v. New Jersey case in acting on the
22 intervention.

23 JUSTICE SCALIA: But these -- these are
24 rules that we are making up ourselves, right, as to when
25 we are going to allow intervention or not? Is there any

1 case -- I think there isn't, but tell me if I'm wrong --
2 is there any case in which we have rejected intervention
3 that has been recommended by the Special Master?

4 MR. FREDERICK: I don't think I can recall a
5 case in that factual scenario, but I can point you to
6 Kentucky v. Indiana in 1930, in which this Court
7 rejected Kentucky's attempt to join individual Indiana
8 citizens as parties in their original action over
9 Indiana's alleged breach of a contract to build an
10 interstate bridge. And--

11 CHIEF JUSTICE ROBERTS: I understand your
12 basic argument that each State should represent its own
13 constituents. But isn't the Catawba River Water Supply
14 Project in a different category? Because it straddles
15 both States and I think it can reasonably fear that it
16 would be treated as a stepchild by both States.

17 MR. FREDERICK: No, in fact,
18 Mr. Chief Justice, I would submit they have the weakest
19 claim to intervention in this case.

20 Their argument, fundamentally, is that Union
21 County, North Carolina, which is the North Carolina part
22 of the joint venture with the Lancaster Water District,
23 should be permitted to have water purchased from the
24 South Carolina side of the boundary. So what's
25 happening with that water project is the water is sucked

1 **lout** on the South Carolina side and piped north for Union
2 County's consumption under a Union County permit with
3 the State of North Carolina. Union County, therefore,
4 is acting as any other user of water, along with
5 Charlotte and all other users of water in North
6 Carolina.

7 The Catawba Project is not here to intervene
8 to protect its interest on the South Carolina side of
9 the boundary. Those are adequately protected, we
10 submit, by the attorney general acting on behalf of the
11 State. So in effect the Union County, North Carolina
12 claim here of 5 million gallons of water per day which
13 they are seeking to protect through their intervention
14 is no different than the other interests of North
15 Carolina water users that they are seeking to protect

16 JUSTICE SCALIA: Well, except that these
17 these three entities are the principal entities that are
18 guilty of interbasin transfers, which is essentially
19 what the -- what the dispute is about.

20 MR. FREDERICK: The dispute is about the
21 transfer of water and consumption of water in toto. The
22 Court--

23 JUSTICE SCALIA: Well, but the focus -- the
24 focus of the complaint is upon interbasin transfers,
25 isn't it?

1 MR. FREDERICK: The focus of the complaint
2 highlights interbasin transfers to the extent that they
3 are a large quantifiable amount of water being taken out
4 of the Catawba River, that we submit should not be
5 counted on

6 JUSTICE SCALIA: Exactly. And these three
7 entities account for a very large proportion of those
8 interbasin transfers. Isn't it the case that any -- any
9 decision by -- by this Court on -- on this question will
10 necessarily impact directly these three entities?

11 MR. FREDERICK: No.

12 JUSTICE SCALIA: Why not?

13 MR. FREDERICK: Because in an equitable
14 apportionment case, this Court decides which share of
15 the water is allocable to each State. It is a question
16 of State law how each State shall determine the
17 intrastate allocations of the water. So--

18 JUSTICE SCALIA: I understand that, but I'm
19 talking about the real world. If -- if indeed North
20 Carolina has to cut back, and if indeed the opinion of
21 this Court says that it's taking too much because of
22 interbasin transfers, as a practical matter these three
23 entities are going to be out of luck.

24 MR. FREDERICK: We take the real world, Your
25 Honor, as this Court's cases direct us, and those cases

1 tell us that in situations where the Court is deciding
2 an equitable apportionment between two States -- water,
3 of course, is fungible. It's a series of molecules that
4 do not accord property rights in anyone entity or user.
5 They all divine from the State itself.

6 So if North Carolina in its exercise of
7 *parens patriae* responsibility determines that Charlotte
8 should have a larger share than what it currently has,
9 that's a decision for Charlotte for North Carolina as
10 a political entity to decide among its users. It does
11 not necessarily implicate this Court's action in an
12 equitable apportionment to say that what the Court will
13 ultimately decide is what Charlotte's share is. That is
14 not what we are seeking and that's not what an
15 injunction from this Court equitably apportioning the
16 Catawba River would necessarily decide.

17 JUSTICE GINSBURG: Mr. Frederick, if this
18 were an ordinary civil case we would be guided by the
19 rule on permissive intervention, and appellate courts in
20 dealing with that rule give a healthy measure of respect
21 to the trial judge's determination.

22 So even though the civil rules are not
23 binding in original jurisdiction cases, isn't that a
24 sound approach that we should adopt? Just as a court of
25 appeals would defer to a district judge's decision, so

1 we should give a healthy measure of deference to the
2 Special Master's evaluation that this will be useful.

3 MR. FREDERICK: No, for several reasons,
4 Justice Ginsburg. First, in any appellate review
5 situation this Court would review de novo the legal test
6 that would be applied. Our initial submission is the
7 master applied and articulated the wrong legal tests.
8 So *you* would first need to determine, we would submit,
9 what is the correct legal test for submission. That is
10 a de novo review standard.

11 But secondly, the Court has said in numerous
12 original cases it does not apply deference, although it
13 gives appropriate respect to special masters, and so
14 there would be no basis for applying a deference
15 standard to a special master ruling on a question of law
16 that fundamentally is about what this Court's original
17 jurisdiction under Article 3 is supposed to be about.

18 JUSTICE SCALIA: But, in fact, we've never
19 rejected a special master's desire to -- to have
20 interveners in the case.

21 MR. FREDERICK: Well, virtually every case,
22 Justice Scalia --

23 JUSTICE SCALIA: And that oil case that I
24 mentioned. I forget the name of it. The tax --

25 MR. FREDERICK: Maryland v. Louisiana.

1 JUSTICE SCALIA: Yes. What had the special
2 master recommended in that case?

3 MR. FREDERICK: There was actually no
4 special master recommendation in that case. The Court
5 decided it on its motion directly to this Court.

6 Virtually all of the cases that we cited in
7 the blue brief highlight the fact that special masters
8 routinely reject motions to intervene. It is the rare
9 situation in which a special master would allow
10 intervention.

11 And the only example that the other side can
12 come up with is the Nebraska v. Wyoming case, in which
13 finally Basin Electric, after 10 years of participating
14 in the original action as an amicus, was allowed to
15 intervene because the special master viewed there to be
16 tension between the State of Nebraska's interests and
17 that that Basin Electric was seeking to vindicate. You
18

19 JUSTICE GINSBURG: Mr. Frederick, can we go
20 back a little? I think you just said there was no
21 special master's recommendation in
22 Maryland v. Louisiana, but I'm looking at page 745. In
23 the footnote 21, it said: "The master recommended that
24 we grant the motion of 17 pipeline companies to
25 intervene as plaintiffs." And then it says: "It is not

1 unusual to permit intervention of private parties in
2 original actions."

3 MR. FREDERICK: And the case that it cited
4 is Oklahoma v. Texas, which is a very unusual case from
5 this Court's docket in the 1920s. What the Court
6 decided in 1932, Justice Ginsburg, in the Wyoming and
7 Colorado case was that in situations involving
8 interstate allocations of water, the claimants or users
9 of a State are deemed to be represented by the State.
10 The case on which the Court relied in the Maryland case
11 was back into an old era in which it was unclear whether
12 States acting as *parens patriae* had the responsibility
13 to act on behalf of all claimants or users of water.

14 The Maryland case, as I said before, did not
15 analyze the New Jersey v. New York factors, and I would
16 submit that in light of the other circumstances of the
17 case, the fact that it was a Commerce Clause challenge
18 involving Federal, State, and private companies, in
19 which there was multiple litigation pending in various
20 forums, it was an exercise of the Court's decision to
21 efficiently decide the Commerce Clause challenge to
22 allow those pipeline companies in, where some of those
23 pipeline companies were not represented by States that
24 were parties in the case.

25 CHIEF JUSTICE ROBERTS: I -- I guess I

1 haven't heard yet an answer to Justice Ginsburg's first
2 question about whether there was a recommendation from
3 the Special Master or not.

4 MR. FREDERICK: Well, I -- I will -- I
5 obviously forgot about footnote 21 of the Court's
6 opinion in *Maryland v. Louisiana*, Justice Ginsburg. But
7 I think

8 JUSTICE SOTOMAYOR: Counsel, I don't know
9 that you've actually addressed the operative question of
10 what amount of discretion, if any, are we going to give
11 to special masters to determine when they require the
12 presence of a party to do equity, which is what I read
13 the Special Master to be suggesting. These are the
14 three biggest users of water, at least one of them
15 straddles both States, another has a potential license.
16 And so that each of them has a different situation than
17 a normal water user.

18 So, you're -- all you're begging is the
19 question of whether we just say *you can't*. But why is
20 the "*you can't*" compelled, either by our case law or by
21 any original jurisdiction principle?

22 MR. FREDERICK: Well, let's start with the
23 original jurisdiction principle. Those are actions that
24 are brought invoking this Court's original jurisdiction,
25 in which this Court could sit without a special master

1 and would decide the matter as it sits as a court of
2 nine. The fact that it appoints a Special Master to
3 assist and facilitate that effort does not imbue the
4 actions of that person delegated that responsibility
5 with something akin to the deference given to district
6 judges in making various fact findings.

7 Secondly, on a question of law, as
8 intervention fundamentally is -- and ultimately we are
9 talking about the scope and contours of this Court's
10 exercise of original jurisdiction -- what the Court had
11 said is that there are two interests that are ultimately
12 being protected. One is the dignity interest of the
13 State acting in its sovereign capacity on a subject,
14 water, that quintessentially is sovereign; and it is
15 doing so for judicial efficiency purposes, because it
16 allows the Court to expect each State to represent
17 adequately all of the users of water in that State.

18 So for those reasons we think that a Special
19 Master recommendation ought to be reviewed with the same
20 level of scrutiny that all other aspects of a Special
21 Master--

22 JUSTICE SCALIA: Well, we've -- we've
23 allowed private parties to be impleaded by the States.
24 We have allowed one State to sue another State and a
25 private party.

1 MR. FREDERICK: Not in an equitable
2 apportionment. And -- and I think the -- the scope of
3 the relief is important. And that is because the State
4 seeking the relief is assuming the risk that the relief
5 that it wants to get from that State is an inadequate
6 form of relief.

7 Here the form of relief South Carolina seeks
8 goes only against North Carolina. We cannot get an
9 equitable apportionment with Charlotte or the Catawba
10 Project. We can only get it from North Carolina.

11 JUSTICE KENNEDY: I see your light's on, but
12 can we take this case on the assumption that nothing
13 that you obtain in the way of relief will affect Duke
14 Power under the comprehensive relicensing agreement?
15 Don't we have to take the case on the assumption that
16 their rights under that agreement might be affected?

17 MR. FREDERICK: They might be affected, but
18 only in an ancillary way. It is an -- part of an
19 application to the FERC. The FERC here is saying it
20 does not affect it because the license itself will not
21 dictate minimum

22 JUSTICE KENNEDY: But are you saying you are
23 not seeking a result that is inconsistent in any way
24 with that agreement?

25 MR. FREDERICK: Neither the agreement -- and

1 this is at page 51 to 52 of our brief, citing 39 of the
2 CRA -- said it doesn't affect water rights. The final
3 environmental impact statement from FERC says it doesn't
4 affect apportionment interstate issues. Both FERC and
5 the CRA itself disclaim any impact on the equitable
6 apportionment action pending here.

7 If I could save the balance of my time.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Frederick.

10 Mr. Miller.

11 ORAL ARGUMENT OF ERIC D. MILLER

12 ON BEHALF OF THE UNITED STATES,

13 AS AMICUS CURIAE,

14 SUPPORTING THE PLAINTIFF

15 MR. MILLER: Mr. Chief Justice, and may it
16 please the Court:

17 In order to intervene in an original action
18 in this Court, a citizen of a State that is a party to
19 the action must show a compelling interest, separate
20 from that of other citizens, that is not properly
21 represented by the State. In an equitable apportionment
22 action, the interest that is at stake is not a private
23 property interest in water. Rather it is the sovereign
24 interest of the State in a particular share of the
25 waters of an interstate river. For that reason, a

1 private interest in water is not an appropriate basis
2 for intervention in such a proceeding.

3 JUSTICE SCALIA: It depends on, I suppose,
4 on what you mean by is not properly represented by the
5 State. If you think the State does not have a
6 sufficient interest to defend that -- that particular
7 right vigorously, might that not be -- might that not
8 qualify?

9 MR. MILLER: Well, I think that the interest
10 that the private party has is a State law property
11 interest in water, and that is an interest that simply
12 isn't at stake in an equitable apportionment action.
13 The only thing that this Court is deciding is what share
14 of the river does each State get.

15 The Court in an equitable apportionment
16 action does not decide the purely intrastate question of
17 how will that share be allocated.

18 JUSTICE SCALIA: I think you could say that
19 realistically when you are talking about an individual
20 water user, a small potatoes water user, a normal
21 resident of Charlotte perhaps. But when you are talking
22 about the biggest entities that are going to be affected
23 by the apportionment, it really doesn't ring true to me.

24 MR. MILLER: Well, that -- I mean, in New
25 Jersey v. New York, Philadelphia, which sought to

1 intervene in that case, constituted a majority of the
2 water users within the State of Philadelphia.

3 JUSTICE SCALIA: Did the special master
4 think Philadelphia should have been let in?

5 MR. MILLER: I don't recall what the special
6 master--

7 JUSTICE SCALIA: The answer is no.

8 MR. MILLER: said in that case. But this
9 Court has held in, for example, Colorado v. New Mexico
10 that even on purely factual questions, the special
11 master is who makes recommendations, and those
12 recommendations are reviewed by this Court de novo. The
13 Court is not sitting in an appellate capacity. This is
14 a case within the original jurisdiction, and this Court
15 has an independent responsibility to make a
16 determination, even on factual questions, and a fortiori
17 on questions of intervention.

18 JUSTICE SCALIA: Yes, but we haven't -- we
19 haven't been sitting there trying to figure out what
20 would facilitate the proceeding. Much of the discovery
21 in the case has already focused on these three entities,
22 hasn't it?

23 MR. MILLER: That's right. To the extent

24 JUSTICE SCALIA: So to say that they are
25 just -- you know, they are just Joe Dokes is -- is

1 really very unrealistic.

2 MR. MILLER: Well, to the -- I mean, to the
3 extent that they have valuable information to provide,
4 third party discovery can take account of that, as can
5 amicus participation. It would be entirely appropriate
6 for parties that have information or a special
7 perspective on the case to present an amicus submission
8 to the Special Master or to this Court. And it's -- but
9 that -- that's not a basis for allowing them to become
10 full parties through intervention.

11 To the extent that there's a concern about
12 the management of this case, I think it's important to
13 keep in mind that the rule recommended by the Special
14 Master and the rule that the would-be interveners are
15 urging this Court to adopt would, of course, apply not
16 just in this litigation, but in every equitable
17 apportionment action. And not only does it make the
18 litigation of those actions much more difficult to have
19 additional non-state parties in, but it makes it much
20 more difficult for those cases to be settled.

21 JUSTICE SCALIA: Well, if that -- if and
22 when that is the case, the special master will not want
23 them to come in, as the vast majority of special masters
24 have not wanted them to come in in the past. I don't
25 think that's going to change.

1 MR. MILLER: I -- I -- I guess what I would
2 say is that I don't think that, either in the
3 recommendation of the Special Master in this case or in
4 the submissions of the -- the would-be Interveners, that
5 there is really any logical limiting principle that
6 would not allow, as a matter of routine, large water
7 users to come in to equitable apportionment actions.

8 And that's inappropriate for the more
9 fundamental reason that these original actions in this
10 Court are not ordinary cases. This Court has said that
11 sitting in judgment between two sovereigns is one of the
12 most grave -- grave and delicate responsibilities this
13 Court has, and it is a sparingly exercised jurisdiction
14 reserved for the most serious of issues, issues of such
15 importance that, if the States were independent
16 countries, would be resolved through treaties

17 JUSTICE SCALIA: But not reserved
18 exclusively to State -- to suits between a State and
19 another State. We've allowed it to cover suits between
20 a State and another State and private citizens of the
21 other State.

22 MR. MILLER: Yes. And when a State brings
23 such an action or seeks to bring such an action, it
24 can't simply file a complaint as of right. It has to
25 seek this Court's permission to file the complaint. And

1 this Court can review the complaint at that time and
2 look at who the parties are and figure out whether it's
3 an appropriate case for the exercise of this Court's
4 jurisdiction. And that, in our view, is a much more
5 appropriate way to proceed, making that determination at
6 the outset on the basis of the State's complaint, rather
7 than through piecemeal litigation as different non-State
8 parties--

9 JUSTICE GINSBURG: Well, here the complaint
10 was South Carolina's complaint and these Interveners on
11 North Carolina's -- on North Carolina's side.

12 MR. MILLER: That's where they were seeking
13 to intervene on North Carolina's side as defendants,
14 that's right.

15 JUSTICE GINSBURG: And as representing the
16 position of the United States, would you address the
17 FERC license that Duke Energy is raising?

18 MR. MILLER: Yes, Your Honor. Under section
19 27 of the Federal Power Act, which is 16 U.S.C. 821, the
20 Power Act does not affect State law water rights. So
21 State law water rights are taken as a given and it's up
22 to the licensee to have the necessary State water
23 rights, and a FERC license does not in any way alter the
24 distribution of State law property rights in water.

25 And what the commission has said in this

1 case in the final environmental impact statement with
2 respect to Duke's relicensing application, which is
3 available on the commission web site, it cited section
4 27 and it said: "Any license that is issued will not
5 impose requirements, including minimum flows, that
6 infringe on water rights or apportionments." So the
7 commission is aware of the pendency of this case.

8 JUSTICE SCALIA: Well, it isn't a matter of
9 infringing on water rights or apportionments. I mean,
10 that does not exclude, it seems to me, the revocation of
11 the license or the denial of the renewal of the license
12 because Duke Power does not have enough water. That
13 wouldn't preclude that, would it?

14 MR. MILLER: Well, the -- the nature of this
15 proceeding makes that outcome not -- not something that
16 would happen even if South Carolina were to prevail,
17 because what South Carolina is seeking is to get more
18 water flowing downstream to it, and so the -- the
19 licensing conditions, which generally impose minimum
20 flow requirements at each of the various dams operated
21 by Duke, would be easier to satisfy, not harder to
22 satisfy, if South Carolina were -- had an entitlement to
23 get even more water flowing through --

24 JUSTICE SCALIA: I don't I don't
25 understand that. I don't understand that.

1 JUSTICE SOTOMAYOR: What happens to North
2 Carolina if it has less water? What does it do with
3 respect to Duke?

4 MR. MILLER: Well, Duke -- Duke's dams, the
5 licensing condition is that each dam allow a certain
6 amount of water to flow through, under the current
7 license that they are operating under. There are
8 different minimum flow requirements under the renewal
9 license that is being sought. But an order in effect
10 declaring that they let more water flow through would
11 not be in conflict with the licensing requirements.

12 JUSTICE SCALIA: Well, why --

13 CHIEF JUSTICE ROBERTS: Why isn't Duke Power
14 -- why isn't Duke Power on the other side, then?

15 MR. MILLER: I mean, I

16 CHIEF JUSTICE ROBERTS: They have smart
17 lawyers.

18 MR. MILLER: Well, they -- I mean, one
19 possibility is, of course, that Duke is, in addition to
20 obviously being an operator of dams, Duke is a very
21 large consumer of water. In fact, it's the largest
22 consumer of water on the Catawba system because of its
23 coal and nuclear power plants which use water
24 evaporatively for cooling of the power plants. So--

25 JUSTICE SCALIA: Well, it may also mean that

1 when it has to increase the outflow, the level of its
2 impoundments reduces, and that may affect its ability to
3 generate power, which in turn may -- may affect its
4 license.

5 MR. MILLER: It -- it may have some effect
6 on its ability to -- to generate power. But that makes
7 it a large industrial user of water, akin to those that
8 the Court referred to in New Jersey v. New York which
9 were not entitled to intervene.

10 I would also point out in further response
11 to, Mr. Chief Justice, to your question, that Duke is a
12 North Carolina corporation, which may be why it's
13 seeking to come in on the North Carolina side of this
14 case.

15 But I want to return to the idea that these
16 kinds of cases are not ordinary cases. They involve
17 sovereign interests, and I think what's important about
18 that is that the --

19 JUSTICE STEVENS: Mr. Miller, if I -- if I
20 understood your argument, you are saying that Duke's
21 interests are really with South Carolina, or -- to
22 increase the flow. I would think then that it would be
23 North Carolina who would be objecting to their
24 participation in the case rather than South Carolina.
25 And they don't. They -- they welcomed them in, as I

1 remember the papers.

2 MR. MILLER: As I said, Duke is an operator
3 of thermal power plants that are large consumers of
4 water and some of those are located in North Carolina.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Bartolomucci.

7 ORAL ARGUMENT OF H. CHRISTOPHER BARTOLOMUCCI

8 ON BEHALF OF THE INTERVENERS

9 MR. BARTOLOMUCCI: Thank you,
10 Mr. Chief Justice, and may it please the Court:

11 The Special Master correctly concluded that
12 Charlotte, Duke, and the Catawba River Water Supply
13 Project should intervene in this original action. Her
14 recommendation deserves some deference because she is in
15 the best position to know whether these parties would
16 assist her in the adjudication of this complex dispute.

17 CHIEF JUSTICE ROBERTS: This is our original
18 jurisdiction. I regard the Special Master as more akin
19 to a law clerk than a district judge. We don't defer to
20 somebody who's an aide that we have assigned to help us
21 gather things here. I think on legal questions of
22 intervention we have to decide de novo.

23 MR. BARTOLOMUCCI: Our claim is not that the
24 Special Master should get deference on legal questions,
25 but she should get deference on -- on the narrow

1 question on whether it would be helpful to her to have
2 these Interveners in the case.

3 JUSTICE SOTOMAYOR: But tell me what she
4 said that makes them helpful. What can they provide
5 that couldn't be done by merely an amici submission?

6 MR. BARTOLOMUCCI: Well, she pointed out,
7 for example, that Duke Energy, which controls the flow
8 of this river and is participating in the FERC
9 proceedings, would establish a -- a direct link between
10 this adjudication and what's going on before the FERC.
11 And of course those two proceedings have -- have a lot
12 of interaction. I think it's also fair to

13 JUSTICE SOTOMAYOR: Well, your adversary has
14 just said none, according to the terms of the license
15 and what the FERC has said. So why is why don't we
16 just take what FERC has said at face value?

17 MR. BARTOLOMUCCI: Oh, I think -- I think
18 FERC has not said that there will be no effect, that
19 there would be no effect upon the licensing proceeding
20 from the original action. There could be a conflict
21 between the decree that comes down, if one comes down in
22 this Court, and the terms of the FERC license.

23 JUSTICE SCALIA: Yes, I think all FERC said
24 is is that nothing in its license would would
25 require allocation of water by -- by North Carolina.

1 And that's quite different from whether -- whether a
2 severe reduction in the water that Duke can use would
3 would affect the the nature of the license given by
4 FERC.

5 MR. BARTOLOMUCCI: Well, Duke of course
6 pulled together 69 other stakeholders to join the
7 comprehensive relicensing agreement to -- to smooth
8 FERC's acceptance of -- of the new license. And this
9 original action is -- will pit the two Carolinas, each
10 of which seeks to maximize their share of the river, and
11 those interests work at odds with the CRA which endorses
12 a compromise middle flow position that -- that neither
13 of the Carolinas seeks to defend in this action.

14 CHIEF JUSTICE ROBERTS: Counsel, let me tell
15 you what I'm very worried about. This is our original
16 jurisdiction, a delicate jurisdiction that allows us to
17 resolve disputes between sovereign States. And I look
18 out and I see all sorts of private parties intervening
19 in a way that would give them party status. And I think
20 that's compromising what our original jurisdiction is
21 supposed to be about.

22 MR. BARTOLOMUCCI: Mr. Chief Justice,
23 private parties and cities have intervened in the past
24 in original actions and have been named as defendants in
25 original actions.

1 JUSTICE GINSBURG: But even in the New
2 Jersey v. New York decision, the dissenters there that
3 would have allowed the intervention did say that in
4 general it is unwise to encumber original jurisdiction
5 cases with non-State parties. That was even the
6 dissenters. So you start out with in general it's not
7 wise to let these people come in.

8 And following up on the Chief's question, a
9 State can't be sued without its consent. And it's true
10 here that South Carolina is initiating the action, but
11 it's initiating the action against a sister State. The
12 Special Master's recommendation would require the State
13 to have as its direct adversary three parties who are
14 not a sister State, and that kind of dilutes the notion
15 of original jurisdiction. It's a controversy between
16 two States.

17 MR. BARTOLOMUCCI: Well, in Justice
18 Ginsburg, in the case of New Jersey v. New York, New
19 York City was a party defendant, and in this case the
20 City of Charlotte occupies the exact same position as
21 New York.

22 JUSTICE GINSBURG: That's because they chose
23 to sue it as a party defendant.

24 MR. BARTOLOMUCCI: It did, but of course a
25 State can only sue a proper party defendant. Whether

1 the question is intervention or whether it's naming a
2 city as a defendant in an original action, both have to
3 pass the test of is this city or non-State a proper
4 party defendant?

5 CHIEF JUSTICE ROBERTS: You're -- all of the
6 Interveners, prospective Interveners, they want to make
7 sure North Carolina doesn't lose water, right?

8 MR. BARTOLOMUCCI: That -- that is not their
9 exclusive interest.

10 CHIEF JUSTICE ROBERTS: Well, their -- they
11 want to reduce South Carolina's claim on the water.

12 MR. BARTOLOMUCCI: No, Duke Energy, for
13 example, doesn't have an interest in maximizing the flow
14 on the North Carolina side of the river. Duke -- Duke
15 Energy's interest is in preserving the -- the flow
16 compromise reflected in the CRA.

17 CHIEF JUSTICE ROBERTS: Well -- to the
18 extent they have differing interests, why aren't those
19 interests fully satisfied by amicus participation?

20 MR. BARTOLOMUCCI: Well, when -- when South
21 Carolina first opposed, for example, Charlotte's motion
22 to intervene, it said: Oh, Charlotte, you can file an
23 amicus brief as to any dispositive motion. Well, that
24 kind of amicus participation is vastly different from
25 being able to shape the record on which the -- the key

1 issues in this case are finally decided.

2 CHIEF JUSTICE ROBERTS: Shape the record,
3 but intervention status would give you the right to
4 appeal, right.

5 MR. BARTOLOMUCCI: It would allow us to seek
6 leave to file exceptions to --

7 CHIEF JUSTICE ROBERTS: Right, and appeal
8 the normal case.

9 MR. BARTOLOMUCCI: Yeah.

10 CHIEF JUSTICE ROBERTS: Well, that's my
11 question. If we grant intervention in this type of case
12 and there is no reason it would be three, I mean, in the
13 next case, it could be 20 different interveners, and
14 they are filing exceptions every other week that we have
15 to review and adjudicate because they are not bound by
16 whether or not the State that is on their side wants to
17 file exceptions.

18 MR. BARTOLOMUCCI: Well, let me say two
19 things, Mr. Chief Justice. If the proposed decree
20 affects the interest of Charlotte or the joint venture
21 or Duke, I think they ought to be allowed to file
22 exceptions, which this Court can grant leave or not.

23 As to the spectre of 20 possible
24 interveners

25 JUSTICE SOTOMAYOR: So how does that get us

1 to avoid involvement in interstate -- intrastate
2 disputes over water use? That just drags us right into
3 your problems among your water users.

4 MR. BARTOLOMUCCI: Well, South Carolina and
5 the United States present this vision of an equitable
6 apportionment action in which the Special Master simply
7 divides up the flow of the river, and then it's up to
8 each State to subdivide among its users.

9 But that is not what has happened in
10 equitable apportionment cases. In New Jersey v. New
11 York, for example, this Court entered a decree, which
12 enjoined the flow of the Delaware River to New York City
13 above a specified level. I think 411 cubic feet per
14 second.

15 And -- and that is the kind of decree that
16 South Carolina, I believe, is seeking in this case. If
17 you look at paragraph two of South Carolina's prayer for
18 relief, they want an injunction against the interbasin
19 transfers currently being carried -- carried out by
20 Charlotte and the joint venture.

21 CHIEF JUSTICE ROBERTS: And North Carolina,
22 as a sovereign State, can represent the interests of its
23 constituents as it sees fit.

24 You and your fellow prospective interveners
25 just have to do what citizens do all the time, which is

1 convince North Carolina, one, and you can help them, to
2 get as much water as they can; and, two, when they get
3 it or if they lose it, whatever they are left it, to
4 give it to you, rather than the other parties.

5 MR. BARTOLOMUCCI: Well, as to Duke
6 Mr. Chief Justice, I have explained, Duke's interest is
7 not in maximizing the share -- North Carolina's share of
8 the river.

9 The joint venture of the Catawba River Water
10 Supply Project is not represented by either State
11 because it's a bi-State entity. Neither -- and both of
12 the Carolinas is -- are affirmatively hostile to part of
13 the operations of the joint venture.

14 When the joint venture

15 CHIEF JUSTICE ROBERTS: Well, then that -- I
16 just wonder why you are here in an original action.

17 What you are saying is they have all sorts
18 of different interests, and it just -- they get to skip
19 district, court. They get to skip the court of appeals.
20 They can just come right in here, as if they were a
21 State, and participate in the case.

22 MR. BARTOLOMUCCI: Well, Mr. Chief Justice,
23 I think this this is not a novel proposition. The
24 City of Port Arthur was allowed to intervene in the case
25 of Texas v. Louisiana.

1 Five Indian tribes intervened in Arizona v.
2 California, and New York City was allowed to be a party
3 defendant in the New Jersey case, even though the Court
4 could have dismissed it from the case, as it did to the
5 Indiana citizens in

6 JUSTICE SOTOMAYOR: You are advocating a
7 rule that says, almost, you have a right to intervene
8 because you have an interest that won't be adequately
9 represented.

10 MR. BARTOLOMUCCI: We--

11 JUSTICE SOTOMAYOR: Is that your position?
12 Then what happens to the Special Master who says, no, I
13 don't want all you guys here? How do we say that that
14 Master abused his or her discretion by saying no?

15 MR. BARTOLOMUCCI: We are saying that the
16 Special Master got it right, when she said that you have
17 to show a compelling interest that's not properly
18 represented by a party State, and she applied the New
19 Jersey v. New York test, finding, at page 27 of her
20 report, that neither Charlotte, nor the joint venture,
21 are properly represented.

22 JUSTICE SOTOMAYOR: So you see the issue
23 before us as being was she right or wrong, even though
24 Nevada said -- I'm sorry -- that North Carolina said
25 that it was going to adequately represent each of these

1 interests, but that just wasn't correct?

2 MR. BARTOLOMUCCI: I think the question
3 is

4 JUSTICE SOTOMAYOR: That North Carolina is
5 not telling us the truth?

6 MR. BARTOLOMUCCI: I think the question is
7 should the Court accept a Special Master's
8 recommendation, and I would disagree with South
9 Carolina, when it says that she applied the wrong legal
10 test.

11 She did apply New Jersey v. New York. She
12 did find that the interveners were not properly
13 represented by the party States.

14 JUSTICE GINSBURG: The interveners -- the
15 interveners are users of the water from the river?

16 MR. BARTOLOMUCCI: But not mere users. They
17 are established as special. Duke, of course, is unique.
18 It controls the flow of the river, and there is no one
19 else like Duke on the Catawba.

20 The other two interveners are the cause of
21 the harm for which South Carolina seeks injunctive
22 relief.

23 JUSTICE GINSBURG: They -- because they use
24 a lot of water. And my question is: How do we decide
25 once we say -- beyond the Special Master can let these

1 people in with party status -- what users can come in
2 where, obviously, we are not going to allow all users of
3 the river water to come in, so which ones can and which
4 ones can't?

5 MR. BARTOLOMUCCI: Certainly, our position
6 is not that mere users of water or all users of water
7 may intervene in original action.

8 You have to show a compelling interest that
9 is not properly represented, and that's going to depend
10 upon the specific facts of the case.

11 JUSTICE SCALIA: And is it automatic then?
12 Is it automatic 'then? Or is it just that, when that
'13 condition is met, the Special Master can permit the
14 intervention?

15 MR. BARTOLOMUCCI: No, Justice Scalia. I
16 would say it's not automatic because there is some other
17 consideration that the Special Master can bring to bear.
18 For example, timeliness, *you* can't show up 20 years
19 after the litigation has started, like the City of
20 Philadelphia, and expect to get in.

21 JUSTICE SCALIA: And, also, how helpful the
22 intervention will be to the management of the case.

23 MR. BARTOLOMUCCI: Correct. And

24 JUSTICE SCALIA: And, of course, the Special
25 Master's determination of that is not final. It's,

1 ultimately, up to us.

2 MR. BARTOLOMUCCI: That's correct.

3 JUSTICE SCALIA: But it is a discretionary
4 intervention you are arguing for, not a mandatory one.

5 MR. BARTOLOMUCCI: It is discretionary, and
6 if -- if the Special Master believes that this complex
7 multiyear water rights' dispute would be aided by the
8 presence of a limited number of interveners who have a
9 very special interest in the case, then that's
10 something

11 CHIEF JUSTICE ROBERTS: Well, what's special
12 about it? I mean, let's say I owned a little farm on
13 the banks of the Catawba, and I take water out to -- so
14 the cows have something to drink, why does Charlotte get
15 a special status just because they take a lot?

16 I'm affected by how much water runs through
17 there.

18 MR. BARTOLOMUCCI: Well, Charlotte has
19 special status because South Carolina seeks specific
20 relief -- injunctive relief against the Charlotte's
21 interbasin transfer.

22 CHIEF JUSTICE ROBERTS: Well, and that
23 relief will affect how much water is available for me to
24 draw out and use on my farm. That's a compelling
25 interest.

1 You know, in times of drought, this water
2 barely trickles by, and, if it's cut back, the farm's
3 going to go down. It seems to me that, when you say
4 they have a special interest, you are just saying they
5 have got a big interest.

6 MR. BARTOLOMUCCI: It's not just that it is
7 a big interest, and it surely is, but they are singled
8 out in South Carolina's complaint, and injunctive relief
9 is sought against them, which, I think, brings into the
10 play the rule this Court announced in Kentucky v.
11 Indiana, which says, if a plaintiff or plaintiff State
12 in an original action is seeking relief against a
13 citizen of a State, that citizen ought to have an
14 opportunity to come into the litigation and defend its
15 interests.

16 That's what Charlotte is seeking in this
17 case. The joint venture, of course, is not represented
18 by either State fully because both States are hostile to
19 at least part of what the joint venture does.

20 CHIEF JUSTICE ROBERTS: Well, let's say the
21 interest -- the dispute is really in effect between
22 company ABC in North Carolina and company XYZ in South
23 Carolina. I mean, do we -- we would not accept an
24 original action if they sued each other, right?

25 MR. BARTOLOMUCCI: Well--

1 CHIEF JUSTICE ROBERTS: Do we just let them
2 use the States as -- you know, a facade, to get into
3 this Court and have their dispute adjudicated here?

4 MR. BARTOLOMUCCI: No. As in Kentucky v.
5 Indiana, if there are improper parties in original
6 action, they -- they can be dismissed, but I think it's
7 noteworthy that the Court allowed the New Jersey
8 litigation to proceed, with New York City as a party
9 defendant.

10 And Charlotte's position is truly
11 indistinguishable from the position of New York City in
12 that action, with the sole exception that Charlotte
13 seeks to intervene, whereas New York City was named as
14 party defendant.

15 South Carolina invokes the principle that it
16 is the master of its complaint, and we would agree with
17 that, in part. A plaintiff is the master of the
18 allegations and claims it seeks to make, but a plaintiff
19 is not a master of the universe of interests that may
20 be -- may be affected by the lawsuit they have -- they
21 have brought.

22 JUSTICE SCALIA: Do you think the same --
23 the same test applies to the appropriateness of naming a
24 private party defendant, as you would urge for
25 intervention by a private party defendant?

1 MR. BARTOLOMUCCI: Yes. I think there would
2 be a very similar analysis. I think that the question
3 whether a proposed defendant -- and of course, you leave
4 from this Court to file an original action or to name
5 someone as a defendant in an original action, I think,
6 in both cases, it raises the question: Is this entity a
7 proper defendant, or is the entity a proper intervener?

8 I think it's a similar analysis.

9 JUSTICE STEVENS: May I ask this question:
10 In what respect does the relief sought against the city
11 differ from the relief sought against the State?

12 MR. BARTOLOMUCCI: In this respect, Justice
13 Stevens, the -- the complaint prays for North Carolina
14 to stop authorizing the interbasin transfers being
15 carried out by Charlotte and the joint venture. But
16 but Charlotte and the joint venture are the entities
17 whose primary conduct, if you will, would be affected by
18 that injunction. They are the parties who are carrying
19 out the interbasin transfers, and they would have to
20 stop those transfers if -- if authorization was
21 withdrawn by North Carolina.

22 CHIEF JUSTICE ROBERTS: Would it -- would it
23 be surprising if the Special Master recommended that all
24 the issue that she was going to address was the relative
25 equitable apportionment between North Carolina and South

1 Carolina, and even though South Carolina wanted an
2 injunction directed against the City of Charlotte,
3 that's up to North Carolina? North Carolina can divvy
4 up its water however it wants.

5 MR. BARTOLOMUCCI: I think it would not be
6 surprising if she came down if she were to come down
7 with a decree, it would not be surprising that -- that
8 it would decide whether or not to allow Charlotte's
9 interbasin transfers to continue.

10 Because that's -- that was much like what
11 was decided, for example, in New Jersey v. New York.
12 There was the proposed diversion of water to New York
13 City and the court there ultimately entered a partial
14 injunction that banned flows to New York City above a
15 certain level.

16 JUSTICE SCALIA: Well, in in deciding
17 what's equitable as between the two States, I guess the
18 -- the Court ultimately and the Special Master initially
19 will have to decide what uses of water by one State or
20 the other are not equitable uses.

21 MR. BARTOLOMUCCI: And Justice Scalia

22 JUSTICE SCALIA: Go beyond what is
23 reasonable. So I don't see how you could decide the
24 case without deciding whether especially particularly
25 massive uses are appropriate or not.

1 MR. BARTOLOMUCCI: Not just massive.
2 There's -- it's no accident that South Carolina focuses
3 upon these interbasin transfers, because they inflict a
4 special injury, in South Carolina's view.

5 The interbasin transfers take water out of
6 the river basin, and -- so it doesn't come back to South
7 Carolina within the basin. Other types of uses of water
8 are non-consumptive, in the sense that the water can be
9 treated and eventually gets to South Carolina within
10 that basin.

11 But South Carolina has targeted these
12 interbasin transfers because they are entirely,
13 100 percent consumptive, in the sense that -- that once
14 the water has left the basin

15 JUSTICE SCALIA: Dead losses to South
16 Carolina.

17 MR. BARTOLOMUCCI: -- it does -- it does not
18 come back.

19 JUSTICE BREYER: What is the percentage,
20 approximately, of the river that flows into South
21 Carolina that the three interveners account for?

22 MR. BARTOLOMUCCI: I don't think I have done
23 that math, Justice Breyer.

24 JUSTICE BREYER: Well, about.

25 MR. BARTOLOMUCCI: Yes. I can tell you that

1 Charlotte's authorization is -- is 33 million gallons a
2 day.

3 JUSTICE BREYER: Out of what? Out of what?

4 MR. BARTOLOMUCCI: Well, the flow of the
5 river, the minimum flow of the river, under the -- under
6 the CRA is 1100 cubic feet per second, so unfortunately
7 you have to -- you would have to confer from CFS to

8 JUSTICE BREYER: Well, I mean, do they
9 account for, like -- there is a certain amount of water
10 in dispute. There are some people who want to
11 intervene. Are the people who intervene, do they
12 account more like 1 percent of the water that is in
13 dispute, or do they account for more like 50 percent?

14 That seems like a pretty relevant question
15 to me. You must have some idea.

16 MR. BARTOLOMUCCI: Well, I -- it's a
17 significant proportion. It's not --

18 JUSTICE BREYER: Well, significant, is that
19 more like 3 percent, or is it more like 90 percent? I
20 mean, nobody has ever bothered to look at that in this
21 whole case?

22 MR. BARTOLOMUCCI: I have not done that
23 calculation. I will say that they are significant
24 enough that South Carolina seeks a specific injunction
25 against those interbasin transfers.

1 JUSTICE SCALIA: And I guess **it** depends on
2 what you mean by the water in dispute. If the main
3 gravamen of the complaint is interbasin transfers, they
4 occupy a huge proportion of that.

5 MR. BARTOLOMUCCI: And as the Special Master
6 read **it**, IBTs are --

7 JUSTICE BREYER: Oh, **that's** -- I agree.
8 **That's** a good point. So what percentage of the
9 interbasin transfers do they account for?

10 MR. BARTOLOMUCCI: Well, they represent,
11 actually, 100 percent of the interbasin transfers being
12 carried out.

13 JUSTICE BREYER: So insofar as what they are
14 **after** is interbasin transfers, just what Justice Scalia
15 said is correct. These are the interbasin transfer
16 people.

17 MR. BARTOLOMUCCI: These are the -- the IBTs
18 at issue.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

20 Mr. Browning.

21 ORAL ARGUMENT OF CHRISTOPHER G. BROWNING, JR.

22 ON BEHALF OF THE DEFENDANT

23 MR. BROWNING: Mr. Chief Justice, and may **it**
24 please the Court:

25 Let me turn to two questions that Justice

1 Scalia asked Mr. Frederick, and I think his response
2 needs clarification from North Carolina's perspective.

3 The first question dealt with Maryland v.
4 Louisiana, and Mr. Frederick responded that that case,
5 in which 17 pipeline companies were permitted to
6 intervene, according to Mr. Frederick, the States in
7 that case did not serve as *parens patriae* with regard to
8 those 17 pipeline companies. That is factually
9 incorrect. In that case, two of those pipeline
10 companies -- the Michigan-Wisconsin Pipeline Company was
11 a resident of the State of Michigan, one of the
12 complaining States in that case, as well as the National
13 Gas Pipeline Company of America was an Illinois
14 corporation.

15 CHIEF JUSTICE ROBERTS: Maryland v.
16 Louisiana involved a specific tax on specific companies,
17 and they were allowed to intervene. This is not that.
18 This is a question of how the equitable apportionment of
19 the water is going to be, and North Carolina can do with
20 the water whatever it will.

21 It strikes me as very different than
22 Maryland v. Louisiana.

23 MR. BROWNING: Your Honor, in Maryland v.
24 Louisiana, that was a taxation case, a case that goes to
25 a fundamental interest of the States, the power of

1 **taxation.**

2 **JUSTICE SCALIA:** Did -- did the decree only
3 **apply to taxing these particular companies? Could the**
4 **-- could the State have taxed other companies after the**
5 **decree issued?**

6 **MR. BROWNING:** Yes, Your Honor, as the
7 **Plaintiff states were seeking to attack the Louisiana**
8 **tax at issue. So it would have general applicability.**

9 **CHIEF JUSTICE ROBERTS:** As the allocation
10 **would in this case, presumably.**

11 **JUSTICE SCALIA:** Is that yes or no? I
12 **you say yes, it would have general applicability.**

13 **MR. BROWNING:** Yes, Your Honor. Yes,
14 **Justice Scalia.**

15 Your Honor, South Carolina has said that
16 **this case is about consumption of water in toto. But**
17 **when you look at their bill of complaint, that is simply**
18 **not the case. When you look at the question presented**
19 **in their leave for their motion for leave to file a**
20 **bill of complaint, it starts out whether North**
21 **Carolina's interbasin transfer statute is invalid under**
22 **the Supremacy Clause of the United States Constitution.**
23 **And when you look at the allegations in the bill of**
24 **complaint, it is specifically focused on interbasin**
25 **transfers. It asserts that they are inequitable, and it**

1 is seeking injunctive relief with respect to those
2 interbasin transfers.

3 JUSTICE BREYER: How is justice involved?
4 Because I am amazed that this is now coming to me for
5 the first time. All this case is about is interbasin
6 transfers and that you account for 100 percent of them,
7 you three. Is that right? Because I suspect in, like,
8 five minutes, somebody might tell me it's not right.

9 MR. BROWNING: Your Honor, there are --
10 there are very few interbasin transfers.

11 JUSTICE BREYER: I -- that's not my
12 question. I want -- look. If Alaska sued California
13 and the complaint was, we want San Francisco back, San
14 Francisco might have a right to intervene. But if it
15 was about California generally, maybe they wouldn't.

16 So what I want to know is, what's the water
17 that is at issue in this complaint and how much of the
18 water that is at issue in this complaint do the three
19 interveners account for? That seems like a fairly
20 simple empirical question.

21 MR. BROWNING: Yes.

22 JUSTICE BREYER: That's what I'm trying to
23 get the answer to.

24 MR. BROWNING: Yes, Your Honor. The -- the
25 two interveners that have interbasin transfers account

1 for the vast majority of the water that is consumed as a
2 result of an interbasin transfer.

3 In the 2006 study that was done by Duke
4 Energy, the largest interbasin transfer "is the City of
5 Charlotte at 9 million gallons per day. The second

6 CHIEF JUSTICE ROBERTS: Counsel, my basic
7 concern is that -- and I will let *you* finish if there is
8 more to the answer. I'm sorry.

9 Private parties are going to hijack our
10 original jurisdiction, and it was highlighted for me
11 when I read your motion, the motion of private parties
12 for divided argument. Your proposal was that they be
13 divided ten, ten, and ten. You didn't even want to be
14 here.

15 As they view the case and as *you* view the
16 case, it's got so little to do with the State that the
17 State didn't even want to come here and argue the case.

18 MR. BROWNING: Well, Your Honor, that was an
19 accommodation from the State of North Carolina with
20 respect to the interveners.

21 CHIEF JUSTICE ROBERTS: You thought their
22 participation here before this Court on a question in
23 original jurisdiction was more important than yours, and
24 *you* represent the State.

25 MR. BROWNING: Your Honor, the intervention

1 motion directly affects each of these interveners and
2 they have a right to be heard with respect to that
3 intervention.

4 CHIEF JUSTICE ROBERTS: Why can't you
5 represent them? They are your constituents. You are
6 the State. You are coming here directly, not even going
7 to district court, and you seem to be ceding your
8 sovereignty over to them.

9 MR. BROWNING: Your Honor, we do not believe
10 that we are ceding our sovereignty. With respect to
11 Duke Energy and the Catawba River Water Supply Project,
12 North Carolina does not and cannot adequately represent
13 their interests with respect to Duke Energy.

14 JUSTICE SOTOMAYOR: Why?

15 MR. BROWNING: Okay, with respect to Duke
16 Energy: Duke has 11 dams in North and South Carolina.
17 As a result of those dams, Duke Energy controls the flow
18 of the river into South Carolina.

19 JUSTICE SOTOMAYOR: But you are going to
20 defend all of their interests as it affects North
21 Carolina, right? You are not incapable of protecting
22 their North Carolina interests.

23 MR. BROWNING: Well, Your Honor, their
24 interests are inseparable, specifically with regard to
25 Duke Energy.

1 Duke negotiated, over a period of several
2 years, a comprehensive relicensing agreement, with
3 various agencies of North Carolina, various agencies of
4 South Carolina and stakeholders up and down this river.

5 As a result of that negotiated agreement,
6 there was -- the CRA was put in place, which is
7 essentially a request a FERC issue a license in
8 accordance with the provisions of that agreement.

9 That agreement would set a minimum flow of
10 water into South Carolina that is much, much higher than
11 the previous license. Now, South Carolina has come into
12 Court and has attacked that agreement.

13 Duke has a very real and substantial
14 interest with respect to that agreement.

15 CHIEF JUSTICE ROBERTS: What is North --
16 what's the interest of North Carolina?

17 MR. BROWNING: Well--

18 CHIEF JUSTICE ROBERTS: You are standing
19 here telling me why Duke has an interest. What is North
20 Carolina's interest?

21 MR. BROWNING: Your Honor, North Carolina
22 will defend these interbasin transfers, but with respect
23 to Duke Energy, we are not aligned with Duke Energy
24 because Duke has a very real interest in preserving

25 CHIEF JUSTICE ROBERTS: So oppose their

1 intervention.

2 MR. BROWNING: Well, we believe they have a
3 right to be heard because of their compelling interests
4 that are affected in this case.

5 South Carolina is seeking to change the CRA,
6 to have a flow of water that is much higher than is set
7 out in the CRA, although North Carolina --

8 JUSTICE SOTOMAYOR: Isn't your interest
9 to -- to resist that?

10 MR. BROWNING: Yes, Your Honor, and not only
11 are we resisting that --

12 JUSTICE SOTOMAYOR: And your interest is not
13 to defend the CRA, right?

14 MR. BROWNING: Your Honor, North Carolina
15 will resist having South Carolina having a greater flow
16 of water --

17 JUSTICE SOTOMAYOR: You haven't answered my
18 question.

19 MR. BROWNING: I'm sorry.

20 JUSTICE SOTOMAYOR: Is it in your interest
21 not to support the CRA?

22 MR. BROWNING: Yes, Your Honor. It is in
23 our interest because --

24 JUSTICE SOTOMAYOR: You would like -- *you*
25 would like, in this litigation against the two States,

1 for the Special Master to undo the -- your obligations
2 under the CRA?

3 MR. BROWNING: That will, ultimately, be our
4 request in this case because South Carolina has attacked
5 that agreement.

6 From North Carolina's perspective, South
7 Carolina is receiving much more water under this
8 negotiated agreement than they could ever hope to
9 achieve in an equitable apportionment action.

10 So at the end of the day, we will be asking
11 this Court to issue a decree that sets a flow of
12 water--

13 JUSTICE SOTOMAYOR: So you are prepared to
14 tell us, right now -- this is what you are saying to us:
15 We will not represent the interest of Duke?

16 MR. BROWNING: We will not represent the
17 interest of Duke.

18 JUSTICE SOTOMAYOR: Are you prepared to say
19 the same thing with respect to your city?

20 MR. BROWNING: With respect --

21 JUSTICE SOTOMAYOR: And to your -- and to
22 the CRWSP?

23 MR. BROWNING: With respect to the city, we
24 have said in our briefs that we will defend this
25 interbasin transfer. We believe that we will represent

1 the city of Charlotte with respect to that regard, but
2 we also support their intervention motions because we do
3 not believe that it would result in them impeaching the
4 interests of North Carolina.

5 And more importantly, the Special Master got
6 it right, that there -- this is a specific attack on the
7 city of Charlotte and its unique interests. It is
8 seeking injunctive relief that will cripple the largest
9 cities--

10 CHIEF JUSTICE ROBERTS: Well, if it's an
11 attack -- if it's an attack on Charlotte, I would expect
12 the State to be standing there protecting it and not
13 feel that they can't do that without Charlotte, itself,
14 coming into the case.

15 MR. BROWNING: Your Honor, we will defend
16 this interbasin transfer, but the fact of the matter is
17 injunctive relief is sought as against Charlotte, and
18 there is something to be said for fairness in allowing
19 that entity to be present in this Court.

20 Now, turning --

21 JUSTICE SOTOMAYOR: Are you -- are you
22 prepared to say that you are not adequately defending
23 the interest of the CRWSP?

24 MR. BROWNING: Correct, Your Honor, that
25 that is an interstate entity. Its -- its interests have

1 been expressly attacked, the interbasin transfer. South
2 Carolina singles it out in the bill of complaint.

3 What's more important --

4 JUSTICE SOTOMAYOR: You haven't answered my
5 question. You said that you won't support them.

6 MR. BROWNING: Yes.

7 JUSTICE SOTOMAYOR: Are you not going to
8 support -- support the joint venture property?

9 MR. BROWNING: We -- we cannot represent the
10 interests of the joint venture. They have an interbasin
11 transfer, pursuant to the North Carolina statute for
12 Union County.

13 What the complaint doesn't disclose is that
14 the other half of that joint venture also has an
15 interbasin transfer with respect to Lancaster County,
16 South Carolina.

17 So South Carolina can hardly attack the
18 Union County interbasin transfer while, simultaneously,
19 defending the Lancaster County, South Carolina,
20 interbasin transfer.

21 JUSTICE GINSBURG: Let's go back to the
22 question of couldn't the Special Master receive the
23 information she wants if these three entities come in as
24 amici?

25 Coming in as interveners, they have full

1 party status. They can engage in discovery. They can
2 protract the case. They can appeal any adverse
3 judgment.

4 Why isn't the most reasonable accommodation
5 to say, well, we will listen to you, but we are not
6 going to give you full party status?

7 MR. BROWNING: Your Honor, if that were
8 the -- the standard, there would never be intervention
9 motions in any of these proceedings.

10 The fact of the matter is that these
11 entities have unique interests, and with respect to two
12 of those interests, Duke Energy and the Catawba River
13 Water Supply Project, their interests are not
14 represented by either State.

15 All three of them have been expressly
16 attacked in the complaint, and fairness dictates they
17 should have an opportunity to be heard.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Frederick, you have two minutes.

21 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

22 ON BEHALF OF THE PLAINTIFF

23 MR. FREDERICK: I have 4 points,

24 Mr. Chief Justice. First--

25 JUSTICE SOTOMAYOR: Tell me, are you seeking

1 injunctive relief out of any of the three interveners?

2 MR. FREDERICK: No. We seek an injunction
3 in joining the interbasin transfer statute to the extent
4 it exceeds North Carolina's equitable apportionment. We
5 are here to get our fair share of the river vis-a-vis
6 North Carolina.

7 And Duke's CRA application expressly
8 disclaims any -- any ability to go into the interbasin
9 transfer. That's at page 20, footnote 14, of our motion
10 for leave to file exceptions.

11 The FERC has said it will not affect, in
12 giving its license, the equitable apportionment action
13 now pending before you.

14 In Duke's CRA, at paragraph 39.9, it says it
15 does not affect State water uses. So the only issue
16 here is whether or not those expressed disclaimers
17 should be given affect when South Carolina is simply
18 seeking to determine, as between the two States, the
19 rights.

20 JUSTICE SCALIA: But it affects the
21 agreement on which the license is based. The license
22 was based upon a very hard negotiated agreement among a
23 number of entities.

24 MR. FREDERICK: The license hasn't been
25 issued, Justice Scalia. It's still pending.

1 And **that's** what FERC has before it, and FERC
2 has said that the CRA will not affect what licenses
3 issue, but I want to go back --

4 JUSTICE SOTOMAYOR: Are you willing to
5 concede that if whatever you ask for here affects that
6 license, once its issued, that, then, Duke's
7 intervention is proper?

8 MR. FREDERICK: No, because the United
9 States' interest can affect the interest and represent
10 the interest of its licensees.

11 Duke's interests is completely derivative of
12 the United States' power to confer a license on the
13 energy producer. And the United States here is saying,
14 no, they should not be allowed to intervene.

15 JUSTICE SCALIA: I thought Duke said the
16 problem is not the United States -- so much the United
17 States granting a license. **It's** the license we
18 requested was based upon a negotiated agreement among a
19 number of entities.

20 And that agreement goes out the window
21 once -- on the basis of this lawsuit.

22 MR. FREDERICK: The agreement is a private
23 contract among various water users, and **it** is no
24 different than the fact that all users of this river
25 will be affected, one way or the other, by whatever

1 decree this Court issues, whether they are on the South
2 Carolina side or the North Carolina side.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 2:02 p.m., the case in the
6 above-entitled matter was submitted.)

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