No. 129, Original

IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

BEFORE THE SPECIAL MASTER
THE HON. RALPH I. LANCASTER, JR.

VIRGINIA'S OPPOSITION TO THE MOTION OF THE AUDUBON NATURALIST SOCIETY FOR REVIEW OF THE SPECIAL MASTER'S FINDING OF SUBJECT MATTER JURISDICTION AND REQUEST FOR COSTS

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PRELIMINARY STATEMENT

Presenting its jurisdictional arguments for the *fourth* time since this case began, the Audubon Naturalist Society ("ANS"), a non-party, now requests that this Court intervene in the Special Master's handling of this case in order to "direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction before addressing the merits of the parties' claims." (ANS Motion at 11). Having been denied even *amicus curiae* status by the Special Master, ANS is a pure interloper. It should not be permitted to dictate the manner in which the Master conducts the proceedings that this Court has entrusted to his care.

STATEMENT OF THE CASE

A. Nature of the Controversy Between Maryland and Virginia

This case concerns the Commonwealth of Virginia's sovereign right to have access to, and use of, the Potomac River, a vital interstate river that provides the single largest source of drinking water for the Washington Metropolitan area. This controversy has arisen because the State of Maryland has recently applied its state permitting laws in a manner that interferes with Virginia's access rights in the non-tidal portion of the Potomac River.

Maryland has blocked and continues to block the efforts of the Fairfax County Water Authority (the "FCWA") to build an offshore drinking water intake that Virginia considers to be an essential public health initiative. In addition, Maryland enacted legislation in May 2000, while this case was pending, that forbids the construction by Virginia of any new water

intake structures in the non-tidal portion of the Potomac River prior to January 1, 2003. 2000 Md. Laws c. 557 (S.B. 729). The legislation was publicly announced by its sponsor as a way to control development in Virginia and to force Virginia to obtain Maryland's permission before it can withdraw any more water from the River in the future.[1]

These actions, intentionally targeted at Virginia, have interfered with and imperiled the efforts of several Northern Virginia municipalities, including the FCWA, the Loudoun County Sanitation Authority, and others, to plan for and provide a safe and adequate municipal water supply to the public. Maryland's actions also violate Virginia's rights to use the River and to build improvements appurtenant to the shoreline. Those rights are protected not only by federal common law governing access to interstate streams, but by Article VII of the Compact of 1785, Clause IV of the Black-Jenkins Award of 1877, and Article VII of the Potomac River Compact of 1958.

B. Relevant Proceedings and Developments to Date

Virginia instituted this action on February 18, 2000, by filing a motion for leave to file a Bill of Complaint against Maryland. Virginia's Bill of Complaint set forth the past and ongoing injury to the Commonwealth, its political subdivisions, and its citizens, resulting from Maryland's use of its permitting laws to deny Virginia's lawful access to the River. (Bill of Comp. ¶¶ 15-48). The injury is both economic

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1. *See* Commonwealth of Virginia, Reply Brief at 18a-19a (Declaration of Mark Kronenthal, filed May 2, 2000).

(the expenditure of millions of dollars in unnecessary solids handling costs, ¶¶ 20, 43), and non-economic (the exposure of the public to unnecessary health risks, ¶¶ 22-25, 43). The Bill of Complaint also detailed some of the politically influenced decisions by Maryland officials who have used that State's permitting laws to obstruct Virginia's access to the River. (*Id.* ¶¶ 31-35, 40-42).

The Loudoun County Sanitation Authority and other municipalities in Northern Virginia filed an *amicus curiae* brief in support of Virginia's motion. They explained that Maryland's policies and practices are presently interfering with their plans to use the River as a drinking water source. (Loudoun Br. at 3-5).

On April 21, 2000, Maryland filed its opposition to Virginia's motion for leave to file the complaint, contending, among other things, that no case or controversy existed because Maryland had not yet conclusively refused permission to the FCWA to build the offshore intake.[2] Maryland also argued that the existing Maryland state administrative process (in which the FCWA's permit application has been pending since January 1996), and subsequent state judicial appeals, provide an adequate forum for the interstate compact issues to be resolved, whether the issue concerns construction in the River,[3] or withdrawal of water from the River.[4]

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2. Maryland, *Brief in Opposition to Motion for Leave to File Bill of Complaint* at 7.

3. *Id.* at 10.

4. *Id.* at 15.

Also on April 21, 2000, ANS requested leave to file an *amicus curiae* brief in support of Maryland's position. In its accompanying brief, ANS set forth many of the same arguments raised by Maryland, and the same arguments raised in ANS' present motion: that the Commonwealth's claims are not ripe and that the Commonwealth lacks standing to enforce rights under the interstate compacts in question.[5]

Virginia filed its Reply Brief on May 2, 2000, describing additional hostile actions by Maryland in the months following Virginia's commencement of this action. (Virginia Reply Brief at 1-3). Virginia also responded to Maryland and ANS' arguments concerning justiciability, ripeness and standing. (*Id.* at 3-4).

On May 30, 2000, this Court entered an order granting ANS' motion for leave to file its *amicus curiae* brief, granting Virginia's motion for leave to file the Bill of Complaint, and allowing Maryland 60 days in which to file an answer. 120 S. Ct. 2192 (2000).

On July 31, 2000, Maryland filed an Answer, Counterclaim, and Motion for Appointment of Special Master. On August 24, 2000, Virginia filed an Answer to the Counterclaim and concurred in Maryland's request for the appointment of a Special Master.

On October 10, 2000, the Court granted the parties' request and appointed the Hon. Ralph I. Lancaster, Jr. as Special Master. 121 S. Ct. 294 (2000). The Master was

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5. Motion of ANS for Leave to File an *Amicus Curiae* Brief Opposing the Commonwealth of Virginia's Motion for Leave to File a Bill of Complaint and Amicus Brief of the Audubon Naturalist Society 10-17 (Apr. 21, 2000).

granted authority, among other things, "to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings," and "to submit such Reports as he may deem appropriate." *Id.*

On October 18, 2000, the Master conducted a telephone conference with counsel for the parties and the *amici* who had filed briefs in connection with Virginia's motion for leave to file the bill of complaint: ANS, Loudoun County, the Loudoun County Sanitation Authority, and the Prince William County Service Authority. (App. A). The parties agreed to a briefing schedule for dispositive motions and for any motions seeking *amicus curiae* status in proceedings before the Master. (*Id.*).

Maryland's counsel of record advised the Master that the Maryland Department of Environment ("MDE") planned to issue a final decision on the FCWA permit application by November 6, 2000, and stated his belief that a decision in favor of the FCWA could moot this case. Virginia disagreed. Accordingly, Special Master Lancaster directed Maryland to file a motion to dismiss this action by December 8, 2000, if Maryland believed that the case had been rendered moot. (*Id.*).

On November 6, 2000, MDE, through its appointed "Final Decision Maker," issued a Final Decision ordering the agency to issue a waterway construction permit to the FCWA. However, pursuant to Maryland's recently enacted "Potomac River Protection Act," 2000 Md. Laws c. 557 (S.B. 729), MDE imposed a permit condition on the FCWA that the offshore intake be constructed with a *permanent restriction* limiting the amount of water that could be withdrawn to the amount allowed by the FCWA's current Maryland water appropriation permit. MDE expressly declined to address the FCWA's arguments that the interstate compacts between Maryland and Virginia entitled it to build the project without a Maryland permit,

and that the restrictions of the Potomac River Protection Act violated those same interstate compacts.

On November 7, 2000, Maryland Governor Parris N. Glendening issued an official press release stating that "Maryland continues to vigorously object to the issuance of a permit for the proposed intake pipe," which he stated could "cause irreparable environmental damage by encouraging sprawl" (App. B). The Governor further stated that he had directed MDE and the Attorney General for Maryland "to aggressively pursue every option to ensure that the Potomac River is protected. . . ." (*Id.*).

On November 8, 2000, Maryland's Assistant Attorney General advised Special Master Lancaster of MDE's decision, without mentioning Governor Glendening's press release of the previous day. (App. C). The letter stated:

> While Maryland believes, as I previously stated in our October 8 [sic] conference call, that such a decision may affect the justiciable nature of our case with Virginia, we need to study the permit decision more fully before determining whether to pursue such an argument. In the event that we decide to do so, Maryland will file a cross-motion raising that issue at the same time Virginia files its summary judgment motion on December 8, 2000.

(App. C).[6]

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6. The letter erroneously referred to the decision by the "Maryland Administrative Law Judge" ("ALJ"), rather than by the Final Decision Maker for MDE. The Maryland ALJ had previously

(Cont'd)

On December 5, 2000, MDE filed an action for judicial review in the circuit court for the City of Baltimore, challenging its own final decision maker's November 6, 2000 decision to issue a permit to the FCWA.[7] MDE also filed a motion to stay its previous permit decision, pending appeal. MDE advised the FCWA that it was withholding the permit, notwithstanding the final decision, based on the mere pendency of the motion to stay that MDE had filed.

On December 8, 2000, the date for dispositive motions to be filed with the Master in this case, Virginia filed a motion for partial summary judgment, seeking a ruling that Virginia's compact rights apply above the tidal reach of the Potomac River, where the recent controversy has arisen.[8]

(Cont'd)
recommended on May 10, 2000, that MDE issue the waterway construction permit, declining to consider the interstate compact questions.

7. Maryland state law is unique in apparently allowing an executive agency of that state to seek judicial review of its own final decision. *See* Md. Code Ann., State Gov't § 10-222(a)(2) (1999). This peculiar feature has not gone unnoticed by Maryland courts. *See State Comm'n on Human Relations v. Anne Arundel County*, 664 A.2d 400, 409 (Md. Ct. Spec. App. 1995) ("Nonetheless, it struck us as incongruous that the Commission would be appealing from its own final administrative decision, § 10-222(a) of the APA notwithstanding.").

8. One of Maryland's principal arguments against recognizing Virginia's claims is that two Maryland state court decisions, to which Virginia was not a party, concluded that the Compact of 1785 was inapplicable above the tidal reach of the Potomac River, where the FCWA seeks to build the offshore intake. *See* Bill of Comp. ¶ 44 (second sentence); Answer ¶ 44 (admitted); Maryland Brief in Opp. to Virginia's Motion for Leave to File Bill of Complaint at 22.

Maryland did not file any cross-motions for summary judgment, nor any motion to dismiss for lack of subject matter jurisdiction.

On January 16, 2001, the circuit court for the City of Baltimore denied MDE's motion to stay the permit for the FCWA's offshore intake project, based on MDE's prior findings that the project would not cause any significant adverse environmental impact. The circuit court ordered MDE to issue the permit forthwith, in accordance with MDE's final decision of November 6, 2000. The circuit court imposed a briefing schedule on the FCWA and MDE, and has scheduled a hearing on MDE's appeal for April 2, 2001.[9]

On January 24, 2001, MDE issued a waterway construction permit to the FCWA for the offshore intake project, as ordered by the circuit court. However, in addition to objectionable permit conditions limiting Virginia's right to withdraw water from the River in the future without Maryland's prior approval, the permit also contained additional conditions that purport to regulate conduct *in Virginia territory*, above the low-water mark, such as where staging areas and equipment used for the construction may be located. Simultaneously with the issuance of the permit, MDE issued a press release stating that it had been forced to issue the permit only because of the order of the Baltimore City circuit court, but that MDE would continue to press its appeal and to seek to overturn the permit in Maryland state court.

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9. The Commonwealth is not a party to that proceeding.

Although the FCWA plans to begin construction of the project shortly,[10] the pending Maryland state court appeal of the MDE permit and the stated opposition to the project by Maryland's highest officials leave the future of that project legally uncertain. In addition, the permit that MDE has issued to the FCWA contains onerous conditions that violate Virginia's compact rights and that subject Virginia to Maryland's continued control over its access to the River. Furthermore the politically influenced administration of Maryland's permitting system, and the moratorium on new intake construction imposed by Maryland's "Potomac River Protection Act," continue to thwart and obstruct the planning efforts of several other Virginia municipalities.

C. ANS' Motions Before the Master

On October 31, 2000, ANS filed with the Master a Motion for Leave to Participate as an *Amicus Curiae* and Motion for Leave to File a Motion to Dismiss for Lack of Subject Matter Jurisdiction (ANS' "Motion for Leave") (App. D).[11] Motions for leave to participate as *amicus curiae* were also filed by Loudoun County and the Loudoun County Sanitation Authority.

ANS included with its Motion for Leave a 21-page brief entitled Motion to Dismiss for Lack of Subject Matter Jurisdiction.[12] Virtually the entire brief was copied *verbatim*

10. Contrary to ANS' representation at page 8 of its Motion for Review that the FCWA lacks federal authorization for the project, the U.S. Army Corps of Engineers is in the process of reinstating the FCWA's federal permit, which was previously suspended solely based on Maryland's decision to withhold the state approvals.

11. ANS did not attach a copy of that motion to its papers before this Court.

12. A copy of that motion is attached as Appendix A to ANS' Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, 1a-28a.

from ANS' *amicus curiae* brief previously filed with this Court on April 21, 2000.

On December 11, 2000, the Master issued Memorandum of Decision No. 1 (Subject: *Amicus Curiae* Motions).[13] The Master denied all three motions for leave to participate as *amicus curiae* without prejudice.[14] The Master stated that "[a]ny movant may renew its motion if new, compelling reasons develop hereafter to support its participation as an *amicus curiae*."[15]

The Master further addressed ANS' motion for leave to file a motion to dismiss for lack of subject matter jurisdiction as follows:

> Finally, ANS has asked for leave to file a motion to dismiss for lack of subject matter jurisdiction. It is unclear whether ANS believes that, independent of *amicus* status, it somehow has a right to file a motion to dismiss. So that there is no misunderstanding, it must be restated that *ANS is neither a party nor an amicus curiae in this proceeding. It clearly, therefore, has no standing to seek leave to file any such motion.*
>
> For the sake of completeness, it should be noted that in its motion before the Supreme Court of the United States for leave to file an *amicus*

13. A copy of that decision is attached as Appendix B to ANS' Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, 29a-38a.

14. *Id.* at 32a.

15. *Id.*

> *curiae* brief opposing Virginia's motion for leave to file a bill of complaint, ANS has already argued that Virginia's claim against Maryland is not ripe and that there is no evidence that a controversy exists between Virginia and Maryland. The Supreme Court implicitly rejected these arguments by granting the ANS motion to file its *amicus* brief and subsequently granting Virginia's motion for leave to file a complaint. There is no reason for me to consider them anew.[16]

Accordingly, the Master denied ANS' motion for leave to file the motion to dismiss for lack of subject matter jurisdiction.[17]

Dissatisfied, on December 13, 2000, ANS filed a motion for reconsideration of the Master's Memorandum of Decision No. 1.[18] ANS requested that the Master modify his previous order "to specify that the jurisdictional issues raised by ANS in its proposed motion to dismiss be briefed by the parties."[19]

On December 28, 2000, the Master issued Memorandum of Decision No. 2 (Subject: ANS Motion for Reconsideration of the Denial of its Motion to Dismiss for Lack of Subject Matter Jurisdiction).[20] The Master found that,

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16. *Id.* at 35a-36a.

17. *Id.* at 36a.

18. A copy of that motion is attached as Appendix C to ANS' Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, 39a-44a.

19. *Id.* at 44a.

20. A copy of that decision is attached as Appendix D to ANS' Motion for Review of the Special Master's Finding of Subject Matter Jurisdiction, 45a-51a.

notwithstanding any obligation to consider the question of subject matter jurisdiction *sua sponte*, the pleadings filed by the States demonstrate "an actual controversy between them."[21] He further observed that ANS and Maryland had previously raised the same jurisdictional and standing arguments before this Court in opposition to Virginia's motion for leave to file the complaint, and that the Court nonetheless decided to exercise its original jurisdiction.[22] Finally, the Master pointed out:

> The only factual development since the Supreme Court's grant of the Virginia motion is the Maryland Administrative Law Judge's grant of a permit to Virginia. A letter to the Special Master dated November 8, 2000, from counsel of record for Maryland states that if Maryland decided that the decision ordering issuance of the permit affected the justiciable nature of this matter, Maryland would file a motion raising that issue by December 8, 2000. Maryland filed no such motion. Under these circumstances, there is no need to have the parties brief the subject matter jurisdiction issue as ANS has requested in its motion for reconsideration.[23]

Accordingly, the Master denied ANS' motion.[24]

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21. *Id.* at 47a.

22. *Id.* at 48a-49a.

23. *Id.* at 49a.

24. *Id.*

ANS subsequently filed with this Court the instant "motion for review," seeking to compel the Master to order the parties to brief ANS' jurisdictional arguments. ANS did not seek leave of Court before filing this motion. Nor did ANS request that the Master file either Memorandum of Decision with this Court before ANS filed its "motion for review" of his decisions.

ARGUMENT

A. While the Court has a Duty to Consider a Jurisdictional Defect, Procedural Rules Exist that Govern How the Parties Bring Such Matters to the Court's Attention. ANS is Not a Party Nor an *Amicus Curiae*, and its Motion Violates Those Rules.

ANS is certainly correct that every federal court, including this one, has an obligation to address the absence of subject matter jurisdiction *sua sponte* when such a defect appears, even if the parties fail to raise the issue themselves. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990). On a rare occasion, notwithstanding the general rule that the Court will not consider arguments raised only by an *amicus curiae*,[25] this Court has considered a challenge to standing raised only by an *amicus*. *Regents of the University of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978).

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25. *See Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995); *Department of Taxation & Fin. v. Milhelm Attea & Bros.*, 512 U.S. 61, 77 n.11 (1994); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991); *Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960).

However, the Court's duty to examine the existence of subject matter jurisdiction does not mean that the Court must jump into action whenever any intermeddler, worried about such questions, notifies the clerk about its concerns. If this Court were to entertain ANS' motion on the theory that it is required to consider and rule upon a jurisdictional challenge whenever *a non-party* objects to jurisdiction, the Court will invite a flood of similar challenges from non-parties in other cases.

Rules exist that govern how a party can bring a subject matter jurisdiction objection to the Court's attention. Rules also exist that govern how a *non-party* can become a participant in the proceedings and thereupon bring such matters to the Court's attention.

ANS is not a party in this case. The Master also denied leave to ANS to participate as an *amicus curiae*, and ANS is not seeking to "appeal" that ruling.[26] As a non-party, ANS simply has no standing to "appeal" from the Master's ruling rejecting ANS' demand that the parties brief the jurisdictional question. Nor does ANS have standing to dictate the rules under which the Master's recommendations come to this Court for review.

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26. The decision whether to grant *amicus curiae* status rests within the sound discretion of the trial court. *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903); *National Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000) (Posner, C.J); *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991). *See also United States v. California Co-Operative Canneries*, 279 U.S. 553, 556 (1929) (collecting cases holding that "an order denying leave to intervene is not appealable, except where he who seeks to intervene has a direct and immediate interest in a res which is the subject of the suit").

This Court stated long ago that "[o]ne who is not a party to a record and judgment is not entitled to appeal therefrom." *In re Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911) (per curiam); *United States ex rel. Louisiana v. Jack*, 244 U.S. 397, 402 (1917) (describing the holding of *In Re Leaf Tobacco* as "a subject no longer open to discussion."); *Ex parte Cutting*, 94 U.S. 14, 20-22 (1877). Writing for the Court in *Karcher v. May*, 484 U.S. 72 (1987), Justice O'Connor put it this way:

> One who is not an original party to a lawsuit may of course become a party by intervention, substitution, or third-party practice. But we have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom.

Id. at 77 (citations omitted).

In this case, ANS did not seek to become a party by intervention, substitution, or third-party practice. ANS tried unsuccessfully to become an *amicus curiae*. Even as an *amicus* — which ANS assuredly is not — it would not be allowed to file any paper with this Court where no party has done so; to file a motion with this Court without first seeking its permission, Rule 37.3; or to "appeal" a Master's ruling. *See International Union, Local 283 v. Scofield*, 382 U.S. 205, 209 (1965) ("Because an *amicus* is not a 'party' to the case, it would not have been entitled to file a petition to review a judgment on the merits by the Court of Appeals.") (citing *In re Leaf Tobacco Board*, 222 U.S. at 581; *Ex parte Cutting*, 94 U.S. at 20-22); *see also* Robert Stern, *et al*, *Supreme Court Practice* 627 (7th Ed. 1993) ("Since only an aggrieved party has standing to seek review of a

denial of certiorari or of an adverse decision on the merits, an *amicus curiae* may not do so.") (citing *Fri v. Sierra Club*, 414 U.S. 884 (1973)).

B. ANS Should Not Be Permitted to Interfere with the Master's Handling of the Reference.

This Court's order of October 10, 2000 delegated to the Master the "authority to fix the time and conditions for the *filing of additional pleadings* and to *direct subsequent proceedings*," directing him "to submit such Reports *as he may deem appropriate*." 121 S. Ct. 294 (emphasis added). ANS' motion for review seeks to interfere with the Master's handling of this case in two ways. First, ANS seeks immediate judicial review of the Master's first two rulings even though the Master has not deemed it necessary or "appropriate" to file either memorandum with this Court. Second, ANS asks this Court to compel the Master to direct the parties to brief a jurisdictional question that ANS perceives to be important, even though the Master determined that such additional pleadings and proceedings were unnecessary under the circumstances of this case.

We have been unable to identify any previous case in which a non-party like ANS has filed a motion requesting the Court to review a special master's ruling, much less to direct the master to conduct the proceedings in a specific fashion. Presumably, such a motion would be disfavored even if a *party* had filed it. As one treatise notes:

> The *parties* to the litigation may apply to the court for instructions to the master on how to proceed with the reference. District judges are *reluctant, however, to instruct the master on how to conduct the proceedings since this interference would*

> *defeat the very purpose of making a reference. The object, of course, is to give the master as much latitude as possible in achieving the objectives of the reference with a minimum of judicial intervention.*

9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2609 at 687 (1995) (emphasis added). That judicial reluctance should be even greater where, as here, *a non-party* takes it upon itself to object to the master's handling of the reference.

C. The Master Properly Declined to Require that the Parties Brief the Question of Subject Matter Jurisdiction.

The relief sought by ANS before the Master was to require that Virginia and Maryland "brief" the question of subject matter jurisdiction. Similarly, in its "motion for review," ANS wants this Court to "direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction before addressing the merits of the parties' claims." (ANS' Motion at 11).

As noted above, Maryland *had* a briefing schedule for such a motion. The Master directed Maryland to file a motion to dismiss by December 8, 2000, if it believed the case to have been rendered moot. (App. A). Maryland agreed to that schedule. (App. C).[27] On November 7, 2000, however, Maryland's governor declared a state of war on the offshore intake project, vowing to fight against it as a way of combating urban "sprawl" in Virginia. (App. B).

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27. Indeed, Maryland previously represented to this Court that a decision in favor of the FCWA in that administrative case would render it unnecessary for the Court to exercise its original jurisdiction. State of Maryland, *Brief in Opposition to Motion for Leave to File Bill of Complaint* at 10-11.

As part of that concerted opposition, MDE filed suit on December 5, 2000 in Maryland state court to overrule its own final decision to permit the project to go forward. It is understandable, therefore, that Maryland's Attorney General could not have filed, in good faith, any motion with the Master on December 8, 2000 questioning the existence of an actual controversy between the States. *See also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) ("Voluntary cessation of challenged conduct moots a case, however, only if it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' And the 'heavy burden of persuad[ing]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.") (citations omitted).[28]

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28. MDE's grudging issuance of the FCWA permit does not moot any of the Compact issues in this case. First, MDE refused to consider the FCWA's argument that the interstate compacts in question allow it to construct the project without obtaining a Maryland permit. That issue will not be litigated in the circuit court for the City of Baltimore. Second, the permit that MDE issued to the FCWA contains numerous, objectionable conditions that seek permanently to limit Virginia's ability to withdraw water from the River and that purport to regulate conduct in Virginia territory. Third, MDE continues to appeal the permit decision in Maryland state court, seeking to overturn it and to force the FCWA to remove the offshore intake even after it is installed. Fourth, existing Maryland law bans any new intakes from Virginia at least until January 1,2003, directly interfering with the plans of other Virginia municipalities, including the Loudoun County Sanitation Authority. And finally, nothing in the FCWA permit decision addresses Virginia's claim that the interstate compacts at issue simply prevent Maryland in the first place from subjecting the FCWA or any other Virginia municipality to Maryland's lengthy and hostile permitting process. That point would not be rendered moot, even if Maryland were to issue a permit to the FCWA without reservation. Thus, Maryland cannot show that it has ceased its objectionable conduct towards Virginia, much less carry the "heavy burden" of proving that the challenged conduct cannot reasonably be expected to resume in the future. *Adarand Constructors*, 528 U.S. at 222.

Under these circumstances, and having concluded from his own review of the pleadings that there is, in fact, an actual case or controversy,[29] the Master did not err in declining to order the parties to brief the question. The fact that ANS is dissatisfied with this result and prefers more briefing is simply not grounds to interfere with the Master's handling of the reference.

D. The Master Correctly Inferred that this Court Rejected ANS' Jurisdictional Challenges When It Granted Virginia's Motion for Leave to File the Complaint.

ANS does the Master a disservice by suggesting that he blithely concluded that subject matter jurisdiction existed here simply because the Court granted Virginia's motion for leave to file the complaint and referred the case to him. Rather, the Master explained as follows:

> ANS is correct that referral of a matter to a special master does not, *ipso facto*, conclusively resolve the jurisdiction question. However, *under the circumstances of this case,* ANS understates the significance of that referral. In its proposed motion to dismiss filed with the Special Master, ANS makes arguments that are in most respects *identical* to the *amicus* brief it filed with the Court in opposition to Virginia's motion for leave. In addition, Maryland raised *the same concerns* in its opposition to the Virginia motion for leave, and Virginia responded to those concerns. After consideration of those briefs, the Supreme Court decided to grant the Virginia motion for leave to

29. Memorandum of Decision No. 2, ANS Motion for Review, App. D at 47a.

> file a complaint. This is a step that the Supreme Court takes not automatically or as a matter of course, but only when it finds that the matter meets the criteria the Court has established for the exercise of its original jurisdiction.[30]

It is insulting to suggest that this Court, when it granted Virginia's motion for leave, somehow failed to think about the jurisdictional challenges that Maryland and ANS both identified as a *principal* reason the Court should decline jurisdiction.

ANS cites the dissenting opinion in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), for the proposition that it is the Court's "normal practice" when it takes an original action case to refer all questions, including standing, to a special master. *Id.* at 463. However, the *majority* pointed out that Oklahoma raised the question of standing in opposition to Wyoming's motion for leave to file the complaint, and that the Court implicitly rejected that claim when it decided to take the case:

> Over Oklahoma's objection, which is repeated here, the Special Master also concluded that this case was an appropriate one for the exercise of our original jurisdiction. We agree, and *we obviously shared this thought when granting Wyoming leave to file its complaint in the first instance*. We have generally observed that the Court's original jurisdiction should be exercised "sparingly," *Maryland v. Louisiana*, 451 U.S., at 739; *United States v. Nevada*, 412 U.S. 534, 538

30. *Id.* at 48a-49a (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)).

> (1973), and this Court applies discretion when accepting original cases, even as to actions between States where our jurisdiction is exclusive.

Id. at 450 (emphasis added). Just as in *Wyoming v. Oklahoma*, the jurisdictional issues in this case were briefed by the parties and the *amici* before this Court granted Virginia's motion for leave to file the complaint. The Master reasonably concluded that the Court evaluated those issues when it decided to exercise its original jurisdiction.

The Master's finding of jurisdiction from his own reading of the pleadings, his reasonable inference from the Court's acceptance of jurisdiction, and his offer to Maryland to brief the question if it disagreed, amply supported his decision to reject ANS' demand that he nonetheless direct the parties to brief the issue once again.

E. The Court Should Impose Costs on ANS.

Although represented by a well-respected law firm, ANS cannot cite any authority or rule of court allowing it — as a non-party — to file a "motion for review" of the Special Master's rulings. This frivolous motion has imposed unnecessary costs and expenses on Virginia in having to respond to it. Accordingly, Virginia respectfully requests that the Court direct the Master to determine the amount of reasonable costs and attorneys' fees to be imposed on ANS.

While there appears to be no direct precedent for doing this, that is likely because a non-party has never before attempted to do what ANS has done here. However, in *Nebraska v. Wyoming*, 504 U.S. 982 (1992), the Court approved the Master's decision to impose a portion of the

costs on the *amici*, where the Master had found, and the *amici* conceded, that the proceedings were "expanded and made more costly by reason" of their participation. *Id.* at 982.

ANS certainly cannot dispute that its actions here have imposed the same type of burden and cost on the parties. The Court should send a strong message that non-parties simply may not file motions with this Court whenever they disapprove of how the Court or one of its appointed masters is conducting a case.

CONCLUSION

ANS' motion for review of the Special Master's Memorandum of Decision Nos. 1 and 2 should be denied, and the Court should direct the Master to determine appropriate costs and attorneys' fees to be assessed against ANS for filing this motion.

Respectfully submitted,

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JILL M. DENNIS
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McLean, Virginia 22102
(703) 714-7400

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Richmond, Virginia 23219
(804) 786-3870

* *Counsel of Record*

Counsel for Plaintiff

APPENDIX

APPENDIX A — LETTER OF THE SPECIAL MASTER DATED 10/19/2000 AND CASE MANAGEMENT ORDER NO. 1

RALPH I. LANCASTER
Pierce Atwood
One Monument Square
Portlane, Maine 04101-1110

SPECIAL MASTER
Virginia v. Maryland,
Supreme Court of the
United States
No. 129, Original

Telephone: 207-791-1100
Facsimile: 207-791-1350

E-mail:
rlancaster@pierceatwood.com

October 19, 2000

VIA FACSIMILE and U.S. MAIL

The Honorable Frederick S. Fisher
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

The Honorable Andrew H. Baida
Assistant Attorney General
200 St. Paul Place
Baltimore, MD 21202

Appendix A

E. Duncan Getchell, Jr., Esq.
McGuire, Woods, Battle & Boothe LLP
One James Center
901 East Cary Street
Richmond, VA 23219

Christopher D. Man, Esq.
Arnold & Porter
555 12th Street N.W.
Washington, D.C. 20004

Re: *Virginia v. Maryland,* Supreme Court of the United States, No. 129, Original

Dear Counsel:

Thank you for your courtesies during yesterday's telephone conference.

I had originally planned to arrange for a meeting of counsel in December in Washington in order to establish discovery rules and a schedule for getting the matter to trial and resolution as expeditiously as possible. However, in view of the importance of the underlying legal issues which may be dispositive of this matter, I am persuaded that we should proceed as we agreed yesterday.

To that end, I enclose Case Management Order No. 1 which encompasses the schedule you suggested. I assure you that I will address the issues raised by any dispositive motions as soon as briefing is completed and will rule as promptly as possible.

Appendix A

Please notify me as soon as possible of the ruling by the Maryland Administrative Law Judge on November 6. If the parties agree that that moots this matter, I can so report to the Supreme Court. If the parties do not so agree, we will adhere to the schedule contained in the enclosed order.

I suggest that the stakes for both sides in this proceeding are very high. I again urge the parties to put politics to one side and think seriously about a negotiated resolution.

Rest assured that if the matter is not resolve by the parties I will do everything I can to move the matter to a rapid resolution.

As the matter proceeds, please feel free to call on me or Steve Scott if we can be of any help in resolving uncertainties.

Sincerely,

/s/

Ralph I. Lancaster, Jr.

RIL/wjo
Enclosure

Appendix A

No. 129, Original

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

CASE MANAGEMENT ORDER NO. 1

RALPH I. LANCASTER, JR
Special Master
One Monument Square
Portland, Maine 04101
(207) 791-1199

October 19, 2000

Appendix A

CASE MANAGEMENT ORDER NO. 1

For purposes of further proceedings in this case it is hereby ORDERED that:

1. Any dispositive motions and briefs in support thereof shall be filed on or before December 8, 2000

2. Responses to said motions and briefs in support thereof shall be filed on or before February 7, 2001.

3. Reply briefs to the briefs filed as aforesaid shall be filed on or before February 28, 2001.

4. Motions seeking amicus status shall be filed on or before November 1, 2000.

5. Responses and briefs in support thereof shall be filed on or before November 10, 2000.

6. Reply briefs addressed to the amicus applications shall be filed on or before November 17, 2000.

7. All pleadings, papers and other documents may be filed with the Special Master on 8 ½ x 11 inch paper. The parties and applicants for amicus status shall make filings with the Special Master and service upon the other parties or any amicus by facsimile or by some means of overnight delivery with duplicate copies of any materials transmitted by facsimile also sent by first class mail. All pleadings, papers and documents submitted to the Special Master shall be served on counsel for all state parties and any amicus in time

for receipt on the same day that the Special Master receives them. Distribution must be made only to counsel of record on the distribution list attached hereto as Appendix A. All pleadings, papers and documents submitted to the Special Master must indicate, in the certificate of service or elsewhere, the means by which service or transmittal has been accomplished.

/s/
Ralph I. Lancaster, Jr.
Special Master

APPENDIX B — GOVERNOR PARRIS N. GLENDENING, PRESS RELEASE DATED 11/7/2000

STATE OF MARYLAND
OFFICE OF THE GOVERNOR

FOR IMMEDIATE RELEASE

CONTACT: Michelle Byrnie
Raquel Guillory
Governor's Press Office
410-974-2316

GOVERNOR'S PRESS OFFICE

GOVERNOR GLENDENING RESPONDS TO DECISION ON WATER INTAKE PIPE

ANNAPOLIS, MD (November 7, 2000) — Governor Parris N. Glendening released the following statement regarding the recommendation that Maryland's Department of Environment issue a permit to Fairfax County to extend its water intake pipe in the Potomac River.

"Maryland continues to vigorously object to the issuance of a permit for the proposed intake pipe which could seriously threaten the public's health and the health of the Potomac River. I have requested the Department of the Environment and the Attorney General to aggressively pursue every option to ensure the Potomac River is protected and Maryland's high standards of stewardship are maintained.

Appendix B

"We have serious concerns that extension of the intake pipe would cause irreparable environmental damage by encouraging sprawl and seriously compromise water quality for thousands of residents in both Virginia and Maryland.

"Maryland is successfully balancing growth and economic development with strong environmental policies. We have the highest household income in the nation, the lowest overall poverty rate and lowest child poverty rate in the country, and record low employment.

"Under a 1632 land grant by King Charles I of England, Maryland owns the entire Potomac River. I firmly believe that Maryland's historic stewardship of the Potomac River is in the best interest of the both [sic] states, the environment and future generations."

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APPENDIX C — LETTER FROM MARYLAND'S COUNSEL OF RECORD TO THE SPECIAL MASTER DATED 11/8/2000

(On letterhead of the State of Maryland Office of the Attorney General)

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

Telecopier No.
(410) 576-6955

Writer's Direct Dial. No.
(410) 576-6318

November 8, 2000

VIA FACSIMILE

The Honorable Ralph I. Lancaster, Jr.
Pierce Atwood
One Monument Square
Portland, Maine 04101-1110

Re: *Virginia v. Maryland*, Supreme Court, No. 129, Original

Dear Special Master Lancaster:

I am writing to notify you that the Maryland Administrative Law Judge has issued a final decision ordering the issuance of a waterway construction permit to the Fairfax County Water Authority. While Maryland believes, as I previously stated in our October 8 conference call, that such a decision may affect the justiciable nature of

our case with Virginia, we need to study the permit decision more fully before determining whether to pursue such an argument. In the event that we decide to do so, Maryland will file a cross-motion raising that issue at the same time Virginia files its summary judgment motion on December 8, 2000.

Thank you for your consideration.

Sincerely,

/s/
ANDREW H. BAIDA
Assistant Attorney General

cc: Frederick S. Fisher, Assistant Attorney General (via facsimile)
Christopher D. Man, Esq. (via facsimile)
E. Duncan Getchell, Esq. (via facsimile)
Stuart A. Raphael, Esq. (via facsimile)

APPENDIX D — EXCERPTS — ANS' MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* AND FOR LEAVE TO FILE A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

No. 129 Original

IN THE

SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

STATE OF MARYLAND,

Defendant.

Motion of the Audubon Naturalist Society for Leave to Participate as an Amicus Curiae in Proceedings Before the Special Master and Motion of the Audubon Naturalist Society for Leave to File a Motion to Dismiss for Lack of Subject Matter Jurisdiction

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Appendix D

KATHLEEN A. BEHAN
CHRISTOPHER D. MAN*
ARNOLD & PORTER
555 12TH Street N.W.
Washington, D.C. 20004
(202) 942-5000

Counsel for Audubon Naturalist Society

* Counsel of Record

October 31, 2000

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Appendix D

INTEREST OF *AMICUS CURIAE*

The Audubon Naturalist Society ("ANS") respectfully moves the Special Master to grant it leave to participate as an *amicus curiae* in proceedings before him.[1] ANS also respectfully moves for leave to file the attached motion to dismiss this case for a lack of subject matter jurisdiction. With regard to ANS' request to participate in proceedings before the Special Master, ANS asks it be allowed to brief issues raised by the parties and, if appropriate, be allowed further rights of participation upon the filing of a motion establishing good cause.

. . .

[1] Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae* or counsel, has made a monetary contribution to the preparation or submission of this brief. The State of Maryland has consented to ANS participating as an *amicus curiae* in proceedings before the Special Master, (Letter from Baida to Man of 10/23/00 (App. A)), but the Commonwealth of Virginia has refused to give its consent. (Letter from Fisher to Man of 10/23/00 (App. B).)

Appendix D

CONCLUSION

For the foregoing reasons, the Audubon Naturalist Society respectfully requests that the Special Master grant its motion to participate as an *amicus curiae*, grant its motion for leave to file a motion to dismiss for a lack of subject matter jurisdiction and dismiss this case for a lack of subject matter jurisdiction.

Respectfully submitted,

/s/
Kathleen A. Behan
Christopher D. Man*
ARNOLD & PORTER
Attorneys for Amicus Curiae
Audubon Naturalist Society
555 Twelfth Street, N.W.
Washington, D.C. 20004

**Counsel of Record*