No. 128, Original

IN THE
Supreme Court of the United States

STATE OF ALASKA,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

On Exceptions to Report of Special Master on Motions for Summary Judgment

REPLY IN SUPPORT OF MOTION OF PLAINTIFF STATE OF ALASKA FOR LEAVE TO FILE SUR-REPLY

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The United States seeks to prevent the Court from considering any response from Alaska to any arguments of the United States or its amicus. While it is not surprising that the United States would fear a brief answering those arguments, it advances no good reason why the Court should decline even to consider Alaska's responsive brief.[1]

[1] The Court's practice, including in this case, is to consider replies in support of motions. *See, e.g.*, *Alaska* v. *United States*, No. 128 Orig. (reply in support of motion to intervene) (filed Apr. 18, 2001); *United States* v. *Booker*, No. 04-104 (reply of United States in support of motion) (filed July 29, 2004); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 16.6, at 748 n.5 (8th ed. 2002). As explained in the motion and below, Alaska asks that a similar procedure be followed for the important substantive issues in this case.

1. The United States argues that Alaska's sur-reply—in reality an initial reply brief—is "inconsistent with the Court's Rules and customary practice." U.S. Reply in Opp. to Mot. for Leave to File Sur-Reply ("Opp.") at 1. But nothing in the rules forbids responsive briefs by a party raising exceptions. And the United States' own citations show that Alaska's brief is consistent with the Court's customary practice.

The fact that some parties raising exceptions have not seen a need to file responsive briefs, *id.* at 3, says nothing about the Court's customary practice when leave *is* sought, or the propriety of Alaska's brief here. In fact, the United States concedes that the Court has granted leave more often than not. *Id.* at 3-4. That motions may not have been opposed in other cases is also immaterial, for the Court nevertheless found the responsive briefs proper and accepted them. The United States in effect proposes a self-serving rule that allows responsive briefs only when the United States or other opposing parties choose to consent—a plainly inappropriate procedure. The Court should decide for *itself* whether allowing Alaska one responsive brief in this case is "fair and efficient," *id.* at 6, rather than ceding that role to a party with a vested interest in seeing its assertions go unchallenged.

The United States cites only two instances in which leave to file a sur-reply was denied in an original action. *See* Opp. 4.[2] But in both cases, the opposing parties had each filed exceptions, which ensured that each would have at least some opportunity to respond to the related arguments of the other. *See New Jersey* v. *New York*, 523 U.S. 769 (1998); *Nebraska* v. *Wyoming*, 507 U.S. 584 (1993). It is understandable that the Court might decline to accept a party's *third* brief on the

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[2] The United States also wrongly cites instances where the Court denied *true* sur-replies—responses to reply briefs by parties that had *already* filed their own responsive briefs. *See* Opp. 4 n.5. In each of those cases, a respondent or defendant had attempted to file a further responsive brief after having already filed an opposition brief. Here, Alaska has had no responsive brief at all.

same related issues already briefed twice by each party. Moreover, the Court was already very familiar with the *Nebraska* dispute, which primarily involved the interpretation of a prior decree and had been before the Court many times in its 59-year history. *See Nebraska*, 507 U.S. at 587-590. Here, by contrast, Alaska has had no prior opportunity to file any responsive brief.

2. The United States does not explain why it is fair or equitable to forbid Alaska any opportunity to respond to any arguments of the United States or its amicus. Without denying that its amicus has raised new arguments to which Alaska has never been able to respond, the United States notes only that there were amicus briefs in the *New Jersey* and *Nebraska* cases. Opp. 6. But unlike the situation here, *both* parties in those cases filed exceptions. That is important because it allowed each party to file two briefs: an opening brief and a responsive brief in which arguments raised by opposing amici could be addressed. *See, e.g.*, Reply Brief of the State of New Jersey at *8-15, 48-49 & nn. 22 & 23, *New Jersey* v. *New York*, No. 120 Orig., 1997 WL 915795 (Aug. 29, 1997).

The United States also does not deny that it has raised challenges to the Master's report without filing exceptions, or that this strategy has short-circuited Alaska's opportunity to respond. Instead, it argues that the Court "need not reach" these challenges. Opp. 5 n.7. Obviously, the United States included these and other arguments in its brief for a reason—to influence the Court's deliberations. Simple fairness, if not due process itself, should permit Alaska a response.

Finally, the United States makes the contradictory assertions that Alaska's brief is "repetitive and unnecessary" but also raises "arguments that the United States could readily answer if it had the opportunity." Opp. 8, 9. In fact, the brief is neither unnecessary nor unfair. It is simply an initial reply brief that responds directly to the arguments of the United States and its amicus without raising any new arguments.

That brief is just as proper, and just as important, as any merits reply brief in an appellate case.

Similar to its practice in other cases, the Court requires exceptions and new briefs in original actions and does not just rest on the briefing filed with the Master. Alaska therefore properly limited its opening brief to a clear explanation of why the Master's reasoning was erroneous. The United States now contends that Alaska should have had the clairvoyance to divine every alternative argument the United States might choose to raise in response—including how it might mischaracterize Alaska's arguments, the Master's report, or the record—and preemptively address each such hypothetical argument in its opening brief. *Id.* Such prophecy is neither possible nor efficient. Moreover, the United States has *not* simply limited its brief to defending the Master's reasoning or repeating the precise arguments raised below. Rather, it has raised new arguments as well as arguments that the Master had specifically rejected.[3]

Alaska now asks only that the Court consider its rebuttals to the arguments of the United States and its amicus, just as the Court normally does where one party has challenged a decision and the other party has responded. The issues here are significant and complex, they directly implicate Alaska's sovereignty, and Alaska should be able to defend itself against arguments seeking to divest the State of its presumptively sovereign lands.

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[3] For example, on Count IV the United States raises the new (and incorrect) argument—never before raised—that two wildlife refuges identified as falling within the proviso to Section 6(e) of the Statehood Act were not created under the laws identified in the main clause. *See* Sur-Reply 3. *See also, e.g., id.* at 12 (correcting new mischaracterization of Report); *id.* at 15 (correcting new mischaracterization of record); *id.* at 19-20 (responding to assertions that the Master had rejected); *id.* at 7 n.6, 8-9 n.8, 13 n.12, 18 n.18, 19 n.19 (responding to arguments challenging Report).

CONCLUSION

For the foregoing reasons and those in the motion, the Court should grant Alaska leave to file its sur-reply brief.

Respectfully submitted,

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