No. 94, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA

REPORT OF SPECIAL MASTER ON MOTION OF NATIONAL GOVERNORS' ASSOCIATION FOR LEAVE TO INTERVENE AS PLAINTIFF

SAMUEL J. ROBERTS
Court House
Erie, Pennsylvania 16501

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INTRODUCTION

On February 9, 1983, the State of South Carolina sought leave to file a complaint invoking the Supreme Court's original jurisdiction and challenging the constitutionality of Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. No. 97-248, 96 Stat. 596. In *South Carolina v. Regan*, —— U.S. ——, 104 S. Ct. 1107 (1984), after briefing and argument, the Court granted leave to file the complaint, and by its Order of April 23, 1984, it appointed the undersigned, Samuel J. Roberts, to serve as Special Master.

On May 17, 1984, the Special Master held a status conference at which the parties agreed on a schedule of

further proceedings. The Secretary of the Treasury filed his answer to the complaint on June 1, 1984, and South Carolina submitted a statement of position, an outline of its evidence and a proposed witness list on July 30. The Secretary of the Treasury submitted his issues and witness list on September 21.

On June 22, 1984, the National Governors' Association ("NGA") moved for leave to intervene as plaintiff. The original parties have submitted briefs in opposition to this motion, asserting a number of grounds for denying NGA's motion. The Court referred this motion to the Special Master for his recommendation by its Order of August 16, 1984. The Special Master heard oral argument on the motion on October 8, 1984.

For the reasons discussed below, the Special Master recommends that the motion for leave to intervene should be granted, as conditioned herein. The Special Master respectfully suggests, in accordance with previous practice,[1] and with the concurrence of all the parties, that the Court postpone its review of this recommendation until the conclusion of the case when the Special Master's final Report is submitted. In the interim, the Special Master recommends that the Court should simply order this Report filed, allowing the parties, if they so desire, to file exceptions to this recommendation at the conclusion of the case when the Special Master's final Report is submitted.

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[1] *See* Report of Special Master on Motion of Inupiat Community of the Arctic Slope and Ukpeagvik Inupiat Corporation for Leave to Intervene, *United States v. Alaska*, No. 84, Original (Jan. 10, 1984) at 1; *Arizona v. California*, 444 U.S. 1009, 1010 (denying Arizona leave to file exceptions to Special Master's preliminary report on, *inter alia*, intervention). *Cf. Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) ("Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented.").

DISCUSSION

In granting South Carolina leave to file its complaint in this original action, the Supreme Court recognized the breadth and magnitude of the federalism concerns it raised. Justice Brennan, in an opinion joined by Chief Justice Burger, Justice White, and Justice Marshall declared "[u]nquestionably, the manner in which a State may exercise its borrowing power is of vital importance to all fifty States." *South Carolina v. Regan*, slip opinion at 13 (plurality opinion of Brennan, J.). Justice Blackmun, concurring in the judgment, agreed that "[t]he issue presented is a substantial one, and is of concern to a number of States." Slip opinion at 3 (concurring opinion of Blackmun, J.). Justice O'Connor, in an opinion joined by Justice Powell and Justice Rehnquist, concurring in the judgment, first noted that South Carolina had demonstrated by clear and convincing evidence that it had suffered an injury of serious magnitude, and then observed that the fact that twenty-four states had filed a joint brief *amicus curiae* further "attest[ed] to the 'serious magnitude' of the federalism concerns at issue." Slip opinion at 17-18 (concurring opinion of O'Connor, J.).

Because of the complexity, national scope and public importance of the questions presented by South Carolina's complaint, the Court deemed the record insufficiently developed to permit it to address the merits. *See South-Carolina v. Regan*, slip opinion at 13 (plurality opinion of Brennan, J.); slip opinion at 19 (concurring opinion of O'Connor, J.). Its subsequent appointment of a Special Master comports with its traditional handling of such cases: "[t]he Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950).

The NGA is an incorporated instrumentality of the States, the members of which are the chief executives of

the fifty States, two Commonwealths and three territories. *Brief of NGA* at 13. Its purpose is to represent the States in the federal system. *Id.* It seeks to intervene in this action in order "to represent the collective interests of the States and to assist in the development of the complete factual record necessary for disposition of this case." *Id.* at 9-10. The original parties do not dispute that NGA's claims have a question of law or fact in common with South Carolina's; indeed, as the NGA asserts, those claims are identical. *NGA's Brief* at 15-16; *Defendant's Brief* at 5; *Plaintiff's Brief* at 2. The NGA is the only party that has sought leave to intervene to date, notwithstanding the fact that South Carolina sought leave to file a complaint 21 months ago, the Court granted leave nine months ago and five months have elapsed since NGA sought to intervene.

In these circumstances, the Special Master believes that permitting the NGA to intervene, with appropriate conditions, will be an efficient way to ensure that the views of all the States on the truly national questions involved here will be heard with a minimum of duplication and delay. Since the NGA is a single party, its intervention will not expand this cause "to the dimensions of ordinary class actions." *New Jersey v. New York*, 345 U.S. 369, 373 (1953). Instead, its participation will allow a consolidated presentation of a broader spectrum of views than would be potentially available were South Carolina the only party plaintiff.

Moreover, since the purpose of appointing a Special Master is to ensure the development of a complete record, allowing the NGA to intervene will facilitate the requisite full factual development. The NGA's interests, constituencies and resources are necessarily broader than those of any one State. Therefore, the NGA is well situated to address both the nationwide fiscal impact of Section 301(b)(1) of TEFRA and its effects on the decision-making processes of State governments.

In order to ensure that permitting the NGA to intervene does not delay or prejudice the adjudication of the rights of the original parties, the Special Master recommends that the Supreme Court condition the exercise of its discretion as follows:

1. The NGA will submit its statement of position, outline of proposed proof, and tentative witness list within 30 days after the Supreme Court orders this Report filed.[2]

2. The NGA will coordinate its presentation with that of South Carolina. The order of proof and testimony of the original plaintiff and of the intervenor must be structured in a logical sequence which avoids duplication or accumulation; where they are not so structured, the United States will be entitled to object appropriately.[3]

3. No further motions to intervene will be entertained by the Special Master at this late date.[4]

South Carolina and the Secretary of the Treasury raise a number of objections to the NGA's participation as a

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[2] In its *Reply Brief* at 8, the NGA stated that if permitted to intervene, it would be prepared to adhere to any schedule set by the Special Master for South Carolina.

[3] *Accord* Memorandum and Report on Preliminary Issues, *Arizona v. California*, No. 8, Original (August 28, 1979), at 15-16 (Tuttle, J., Special Master).

[4] The Secretary of the Treasury expresses his concern that, if the NGA is allowed to intervene, it would be difficult to articulate a principled basis for denying intervention by other groups. *Defendant's Brief* at 12. I am not similarly troubled. During the pendency of NGA's motion to intervene, no other potential intervenor has stepped forward; indeed, a number of representative organizations have disclaimed any intention to intervene. Twenty months have now elapsed from South Carolina's initial request for leave to file a complaint. Any future motion to intervene will be dismissed as untimely. *See* Fed. R. Civ. P. 24(a) and (b); Supreme Court Rule 9.2 (Federal Rules of Civil Procedure may be taken as a guide to procedure in original actions where appropriate).

party. They suggest that the NGA can participate most effectively and expeditiously by filing a brief *amicus curiae*. The role of an *amicus*, however, is limited to providing the Court with more or less neutral advice on questions of law; it generally does not extend to partisan presentation of facts, or participation in evidentiary proceedings. *See, e.g., New England Patriots v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979); *Allen v. County School Board of Prince Edward County*, 28 F.R.D. 358, 362 n.2 (E.D. Va. 1961). NGA's legal contentions do not differ in any respect from South Carolina's. The role it envisions for itself, and the lacuna which the Special Master believes it can fill, is to enhance the evidentiary record with a broad national perspective on Section 310(b)(1)'s impact both on the States' fiscs and on their internal decision-making processes.[5] It will do this efficiently by presenting the views of the other 49 states in a unitary manner.

Second, and more fundamentally, the original parties urge that intervention be denied because the NGA fails to meet the requirements for permissive intervention under Fed. R. Civ. P. 24(b)(2). They argue that since the NGA is not a State, it can assert no independent jurisdictional grounds for invoking the Court's original jurisdiction. In these circumstances, the parties assert that permitting the NGA to intervene would be an unwarranted expansion of the Court's original jurisdiction, which should be exercised "sparingly." *United States v. Nevada*, 412 U.S. 534, 538 (1973).

This argument fails for two reasons. First, and most importantly, Supreme Court precedent simply does not

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[5] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), is not to the contrary. In that case, "of urgent concern to the entire country," the Court invited all of the States to participate as friends of the Court. *Id.* at 307. The Court explicitly recognized that "no issues of fact were raised in the complaint," and therefore deemed the *amicus* role to be most appropriate. *Id.*

support the mechanical transplantation of the "independent jurisdictional basis" requirement of Fed. R. Civ. P. 24(b)(2) into the original jurisdiction context. The Court has repeatedly sanctioned permissive intervention in original jurisdiction cases by non-sovereign parties who are inherently unable to establish independent jurisdictional grounds. In *Arizona v. California*, 460 U.S. 605 (1983), for example, the Court allowed five Indian Tribes to intervene in an original action between two States. Rejecting the States' argument that the prerequisites for intervention of right under Fed. R. Civ. P. 24(a)(2) had not been satisfied, the Court declared:

> Aside from the fact that our own Rules make clear that the Federal Rules are only a guide to procedures in an original action, see this Court's Rule 9.2; *Utah v. United States*, 394 U.S. 89, 95 (1969), it is obvious that the Indian Tribes, at a minimum, satisfy the standards for *permissive intervention* set forth in the Federal Rules. The Tribes' interests in the water of the Colorado basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. . . . Moreover, the Indians are entitled 'to take their place as independent qualified members of the modern body politic.' . . . Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged. The States have failed to present any persuasive reason why their interests would be prejudiced or this litigation unduly delayed by the Tribes' presence. The Tribes' motions to intervene are sufficiently timely with respect to this phase of the litigation. . . . The motions to intervene are granted.

Id. at 614-15 (emphasis supplied and citations omitted).[6]

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[6] The Supreme Court's refusal to import the independent jurisdictional grounds requirement wholesale into its original jurisdiction cases is not surprising. The independent jurisdictional basis

Similarly, in *South Dakota v. Nebraska*, 434 U.S. 948 (1977), the Special Master, Oren Harris, J., permitted South Dakota citizens to intervene on the side of the defendant, Nebraska, over the objections of South Dakota. The Special Master reasoned that "[t]he intervenors' claims and defenses as to the major questions of law or fact are in common with those asserted by the defendant and . . . the exercise of the Court's discretion in permitting intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." Report of Special Master on Motion of Robert J. Foley for Leave to Intervene, June 8, 1977, *South Dakota v. Nebraska*, No. 72, Original at 3. The Supreme Court overruled exceptions to this recommendation and granted the motions for leave to intervene. *South Dakota v. Nebraska*, 434 U.S. 948 (1977).

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requirement has been developed to preserve the limitations upon diversity jurisdiction applicable to United States district courts. As Professors Wright and Miller explain, "[t]he rule of complete diversity would be virtually obliterated, and the federal courts would be burdened with the decision of many matters that are properly the business of the state courts, if so tenuous a relationship as the existence of a common question of fact or law were enough to dispense with ordinary requirements of jurisdiction and permit litigants to have their independent claims or defenses tried in federal court though, absent intervention, they would not have been able to do so. . . . [T]o permit this would allow an unjustifiable expansion of federal jurisdiction." 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1917, at 593, 596 (1972). This concern is simply inapposite where a non-sovereign litigant seeks to intervene in an original jurisdiction action to litigate or defend the identical claims as a sovereign party. Even if a non-sovereign is permitted to intervene, the purpose underlying original jurisdiction where two sovereigns are involved remains intact. Such a non-sovereign intervenor works no expansion of the Court's original jurisdiction, a jurisdiction that it remains powerless to invoke in the first instance. *Cf. Arizona v. California*, 460 U.S. at 614 (Indian Tribes' efforts to intervene, without asserting new claims or issues, does not enlarge Supreme Court's judicial power over the controversy).

Rather than rigidly imposing the Federal Rules of Civil Procedure where they may be inappropriate, the Court has adapted those rules to conform to the ends of justice in its original jurisdiction cases. Thus, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court adopted the Special Master's suggestion that 17 private pipeline companies be permitted to intervene in a dispute over the constitutionality of a tax on natural gas. Instead of engaging in an inquiry into the adequacy of the representation of the private intervenors' interests by the sovereign parties, the Court simply held: "those companies have a direct stake in this controversy and *in the interest of a full exposition of the issues*, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of private parties in original actions." *Id.* at 745 n.21 (emphasis supplied).

Thus, where, as here, both the ends of justice and the convenience of the Court would be served by permitting the intervention of the NGA, a non-sovereign party, no rigid rules either of common law or of civil procedure should be allowed to tie the Court's hands. *Arizona v. California*, 460 U.S. at 614-15; *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973); *Utah v. United States*, 394 U.S. 89, 95 & n.5 (1969). As Chief Justice Taney declared in an early original jurisdiction proceeding, it is

> the duty of the court to mold its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this, it [is] without doubt one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained.

Florida v. Georgia, 58 U.S. (17 How.) 478, 492 (1854).

RECOMMENDATIONS

It is *RECOMMENDED* that the motion for leave to intervene of NGA be *GRANTED*, on the conditions herein specified.

As stated at the outset, the Special Master, with the concurrence of the parties, recommends that the Court defer review of these recommendations until the conclusion of the case and the submission of the final Report, reserving to the parties the right to file exceptions thereto at that time if so advised.

Respectfully submitted,

SAMUEL J. ROBERTS
Special Master
Court House
Erie, Pennsylvania 16501

November 16, 1984