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P R O 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 intervenor 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 intervenor status here as  
4 appropriate parties. There was no finding of inadequate  
5 representation by either State to support any of the  
6 intervenor's 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 intervenors  
11 would have met the compelling interest standard here.

12 And, finally, the New York-New Jersey  
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 -- we had  
19 a case involving, what, a tax on -- on oil companies, in  
20 which it was a State against State case, but we allowed  
21 the 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: Yes, well, these - these  
24 are rules that we are making up ourselves, right, as to  
25 when we are going to allow intervention or not? Do --

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

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

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

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

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

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

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

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

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

24           JUSTICE SCALIA: Well, but the focus -- the  
25 focus of the complaint is upon interbasin transfers,



1 isn't it?

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

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

12 MR. FREDERICK: No.

13 JUSTICE SCALIA: Why not?

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

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

25 MR. FREDERICK: We take the real world, Your

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

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

18           JUSTICE SCALIA: Are you --

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

24           So even though the civil rules are not  
25 binding in original jurisdiction cases, isn't that a

1 sound approach that we should adopt? Just as a court of  
2 appeals would defer to a district judge's decision, so  
3 we should give a healthy measure of deference to the  
4 Special Master's evaluation that this will be useful.

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

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

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

23 MR. FREDERICK: Well, virtually every case,  
24 Justice Scalia --

25 JUSTICE SCALIA: And that oil case that I

1 mentioned. I forget the name of it. The tax --

2 MR. FREDERICK: Maryland v. Louisiana.

3 JUSTICE SCALIA: Yes. What had the Special  
4 Master recommended in that case?

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

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

13 And the only example that the other side can  
14 come up with is the Nebraska v. Wyoming case, in which  
15 finally Basin Electric, after 10 years of participating  
16 in the original action as an amicus, was allowed to  
17 intervene because the Special Master viewed there to be  
18 tension between the State of Nebraska's interest and  
19 that that Basin Electric was seeking to vindicate. You  
20 --

21 JUSTICE GINSBURG: Mr. Frederick, can we go  
22 back a little? I think you just said there was no  
23 special master's recommendation in  
24 Maryland v. Louisiana, but I'm looking at page 745. In  
25 the footnote 21, it said: "The master recommended that

1 we grant the motion of 17 pipeline companies to  
2 intervene as plaintiffs." And then it says: "It is not  
3 unusual to permit intervention of private parties in  
4 original actions."

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

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

1 were parties in the case.

2 CHIEF JUSTICE ROBERTS: I -- I guess I  
3 haven't heard yet an answer to Justice Ginsburg's first  
4 question about whether there was a recommendation from  
5 the Special Master or not.

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

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

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

24 MR. FREDERICK: Well, let's start with the  
25 original jurisdiction principle. Those are actions that

1 are brought invoking this Court's original jurisdiction,  
2 which this Court could sit without a special master  
3 and would decide the matter as it sits as a court of  
4 nine. The fact that it appoints a special master to  
5 assist and facilitate that effort does not imbue the  
6 actions of that person delegated that responsibility  
7 with something akin to the deference given to district  
8 judges in making various fact findings.

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

20           So, for those reasons, we think that a  
21 special master recommendation ought to be reviewed with  
22 the same level of scrutiny that all other aspects of a  
23 special master's --

24           JUSTICE SCALIA: Well, we've -- we've  
25 allowed private parties to be impleaded by the States.

1 We have allowed one State to sue another State and a  
2 private party.

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

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

13 JUSTICE SCALIA: I don't --

14 JUSTICE KENNEDY: I see your light's on, but  
15 can we take this case on the assumption that nothing  
16 that you obtain in the way of relief will affect Duke  
17 Power under the comprehensive relicensing agreement?

18 MR. FREDERICK: Yes --

19 JUSTICE KENNEDY: Don't we have to take the  
20 case on the assumption that their rights under that  
21 agreement might be affected?

22 MR. FREDERICK: They might be affected, but  
23 only in an ancillary way. It is an -- part of an  
24 application to the FERC. The FERC here is saying it  
25 does not affect it because the license itself will not



1 dictate minimum --

2 JUSTICE KENNEDY: But are you saying you are  
3 not seeking a result that's inconsistent in any way  
4 with that agreement?

5 MR. FREDERICK: Neither the agreement -- and  
6 this is at page 51 to 52 of our brief, citing 39 of the  
7 CRA -- says it doesn't affect water rights. The final  
8 environmental impact statement from FERC says it doesn't  
9 affect apportionment interstate issues. Both FERC and  
10 the CRA itself disclaim any impact on the equitable  
11 apportionment action pending here.

12 If I could save the balance of my time.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 Mr. Frederick.

15 Mr. Miller.

16 ORAL ARGUMENT OF ERIC D. MILLER

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE,

19 SUPPORTING THE PLAINTIFF

20 MR. MILLER: Mr. Chief Justice, and may it  
21 please the Court:

22 In order to intervene in an original action  
23 in this Court, a citizen of a State that is a party to  
24 the action must show a compelling interest, separate  
25 from that of other citizens, that is not properly

1 represented by the State. In an equitable apportionment  
2 action, the interest that is at stake is not a private  
3 property interest in water. Rather, it is the sovereign  
4 interest of a State in a particular share of the  
5 waters of an interstate river. For that reason, a  
6 private interest in water is not an appropriate basis  
7 for intervention in such a proceeding.

8 JUSTICE SCALIA: It depends on, I suppose,  
9 on what you mean by "is not properly represented by the  
10 State." If you think the State does not have a  
11 sufficient interest to defend that -- that particular  
12 right vigorously, might that not be -- might not that  
13 qualify?

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

20 The Court in an equitable apportionment  
21 action does not decide the purely intrastate question of  
22 how will that share be allocated.

23 JUSTICE SCALIA: I think you could say that  
24 realistically when you are talking about an individual  
25 water user, a small potatoes water user, a normal

1 resident of Charlotte perhaps. But when you are talking  
2 about the biggest entities that are going to be affected  
3 by the apportionment, it really doesn't ring true to me.

4 MR. MILLER: Well, that -- I mean, in New  
5 Jersey v. New York, Philadelphia, which sought to  
6 intervene in that case, constituted a majority of the  
7 water users within the State of Philadelphia.

8 JUSTICE SCALIA: Did the special master  
9 think Philadelphia should have been let in?

10 MR. MILLER: I don't recall what the special  
11 master --

12 JUSTICE SCALIA: The answer is no.

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

23 JUSTICE SCALIA: Yes, but we haven't -- we  
24 haven't been sitting there trying to figure out what  
25 would facilitate the proceeding. Much of the discovery

1 in the case has already focused on these three entities,  
2 hasn't it?

3 MR. MILLER: That's right. And to the  
4 extent --

5 JUSTICE SCALIA: So to say that they are  
6 just -- you know, they are just Joe Dokes is -- is  
7 really very unrealistic.

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

17 And then, to the extent that there's a  
18 concern about the management of this case, I think it's  
19 important to keep in mind that the rule recommended by  
20 the Special Master and the rule that the would-be  
21 intervenors are urging this Court to adopt would, of  
22 course, apply not just in this litigation, but in every  
23 equitable apportionment action. And not only does it  
24 make the litigation of those actions much more difficult  
25 to have additional non-State parties in, but it makes it

1 much more difficult for those cases to be settled.

2 JUSTICE SCALIA: Well, if that -- if and  
3 when that is the case, the Special Master will not want  
4 them to come in, as the vast majority of special masters  
5 have not wanted them to come in, in the past. I don't  
6 think that's going to change.

7 MR. MILLER: I -- I guess what I would  
8 say is that I don't think that, either in the  
9 recommendation of the Special Master in this case or in  
10 the submissions of the -- the would-be intervenors, that  
11 there's really any logical limiting principle that  
12 would not allow, as a matter of routine, large water  
13 users to come in to equitable apportionment actions.

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

23 JUSTICE SCALIA: But not reserved  
24 exclusively to State -- to suits between a State and  
25 another State. We've allowed it to cover suits between

1 a State and another State and private citizens of the  
2 other State.

3 MR. MILLER: Yes. And when a State brings  
4 such an action or seeks to bring such an action, it  
5 can't simply file a complaint as of right. It has to  
6 seek this Court's permission to file the complaint. And  
7 this Court can review the complaint at that time and  
8 look at who the parties are and figure out whether it's  
9 an appropriate case for the exercise of this Court's  
10 jurisdiction. And that, in our view, is a much more  
11 appropriate way to proceed, making that determination at  
12 the outset on the basis of the State's complaint, rather  
13 than through piecemeal litigation as different non-State  
14 parties --

15 JUSTICE GINSBURG: Well, here the complaint  
16 was South Carolina's complaint, and these are  
17 intervenors on North Carolina's -- on North Carolina's  
18 side.

19 MR. MILLER: That's where they were seeking  
20 to intervene on North Carolina's side as defendants.  
21 That's right.

22 JUSTICE GINSBURG: And as representing the  
23 position of the United States, would you address the  
24 FERC license that Duke Energy is raising?

25 MR. MILLER: Yes, Your Honor. Under section

1 27 of the Federal Power Act, which is 16 U.S.C. 821, the  
2 Power Act does not affect State law water rights. So  
3 State law water rights are taken as a given, and it's up  
4 to the licensee to have the necessary State water  
5 rights, and a FERC license does not in any way alter the  
6 distribution of State law property rights in water.

7           And what the commission has said in this  
8 case in the final environmental impact statement with  
9 respect to Duke's relicensing application, which is  
10 available on the commission Web site, it cited section  
11 27 and it said: "Any license that is issued will not  
12 impose requirements, including minimum flows, that  
13 infringe on water rights or apportionments." So the  
14 commission is aware of the pendency of this case.

15           JUSTICE SCALIA: Well, it isn't a matter of  
16 infringing on water rights or apportionments. I mean,  
17 that does not exclude, it seems to me, the revocation of  
18 the license or the denial of a renewal of the license  
19 because Duke Power does not have enough water. That  
20 wouldn't preclude that, would it?

21           MR. MILLER: Well, the -- the nature of this  
22 proceeding makes that outcome not -- not something that  
23 would happen even if South Carolina were to prevail,  
24 because what South Carolina is seeking is to get more  
25 water flowing downstream to it, and so the -- the

1 licensing conditions, which generally impose minimum  
2 flow requirements at each of the various dams operated  
3 by Duke, would be easier to satisfy, not harder to  
4 satisfy, if South Carolina were -- had an entitlement to  
5 get even more water flowing through --

6 JUSTICE SCALIA: I don't -- I don't  
7 understand that. I don't understand that.

8 JUSTICE SOTOMAYOR: What happens to North  
9 Carolina if it has less water? What does it do with  
10 respect to Duke?

11 MR. MILLER: Well, Duke -- Duke's dams --  
12 the licensing condition is that each dam allow a certain  
13 amount of water to flow through, under the current  
14 license that they are operating under, and there are  
15 different minimum flow requirements under the renewal  
16 license that is being sought. But an order in effect  
17 requiring that they let more water flow through would  
18 not be in conflict with the licensing requirement, but  
19 --

20 JUSTICE SCALIA: Well, why --

21 CHIEF JUSTICE ROBERTS: And why isn't Duke  
22 Power -- why isn't Duke Power on the other side, then?

23 MR. MILLER: I mean, I --

24 CHIEF JUSTICE ROBERTS: They have smart  
25 lawyers.



1           MR. MILLER: Well, they -- I mean, one  
2 possibility is, of course, that Duke is -- in addition  
3 to obviously being an operator of dams, Duke is a very  
4 large consumer of water. In fact, it's the largest  
5 consumer of water on the Catawba system because of its  
6 coal and nuclear power plants which use water  
7 evaporatively for cooling of the power plants. So --

8           JUSTICE SCALIA: Well, it may also mean it  
9 when it has to increase the outflow, the level of its  
10 impoundments reduces, and that may affect its ability to  
11 generate power, which in turn may -- may affect its  
12 license.

13          MR. MILLER: It -- it may have some effect  
14 on its ability to -- to generate power. But that makes  
15 it a large industrial user of water, akin to those that  
16 the Court referred to in *New Jersey v. New York*, which  
17 were not entitled to intervene.

18           I would also point out in further response,  
19 Mr. Chief Justice, to your question, that Duke is a  
20 North Carolina corporation, which may be why it's  
21 seeking to come in on the North Carolina side of this  
22 case.

23           But I -- I want to return to the idea that  
24 these kinds of cases are not ordinary cases. They  
25 involve sovereign interests, and I think what's

1 important about that is that the interest --

2 JUSTICE STEVENS: Mr. Miller, if I -- if I  
3 understood your argument, you are saying that Duke's  
4 interests are really with South Carolina, or -- to  
5 increase the flow. But I would think then it would be  
6 North Carolina who would be objecting to their  
7 participation in the case rather than South Carolina.  
8 And they don't. They -- they welcomed them in, as I  
9 remember the papers.

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

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
14 Mr. Bartolomucci.

15 ORAL ARGUMENT OF H. CHRISTOPHER BARTOLOMUCCI

16 ON BEHALF OF THE INTERVENORS

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

19 The Special Master correctly concluded that  
20 Charlotte, Duke, and the Catawba River Water Supply  
21 Project should intervene in this original action. Her  
22 recommendation deserves some deference because she is in  
23 the best position to know whether these parties would  
24 assist her in the adjudication of this complex dispute.

25 CHIEF JUSTICE ROBERTS: This is our original

1 jurisdiction. I regard the Special Master as more akin  
2 to a law clerk than a district judge. We don't defer to  
3 somebody who's an aide that we have assigned to help us  
4 gather things here. I think on legal questions of  
5 intervention we have to decide de novo.

6 MR. BARTOLOMUCCI: Our claim is not that the  
7 Special Master should get deference on legal questions,  
8 but she should get deference on -- on the narrow  
9 question of whether it would be helpful to her to have  
10 these intervenors in the case. She has --

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

14 MR. BARTOLOMUCCI: Well, she pointed out,  
15 for example, that Duke Energy, which controls the flow  
16 of this river and is participating in the FERC  
17 proceedings, would establish a -- a direct link between  
18 this adjudication and what's going on before the FERC.  
19 And of course those two proceedings have -- have a lot  
20 of interaction. I think it's also fair to --

21 JUSTICE SOTOMAYOR: Well, your adversary has  
22 just said none, according to the terms of the license  
23 and what the FERC has said. So why is -- why don't we  
24 just take what FERC has said --

25 MR. BARTOLOMUCCI: Oh, I think --

1 JUSTICE SOTOMAYOR: -- at face value?

2 MR. BARTOLOMUCCI: I think FERC has not said  
3 that there will be no effect, that there would be no  
4 effect upon the licensing proceeding from the original  
5 action. There could be a conflict between the decree  
6 that comes down, if one comes down in this Court, and  
7 the terms of the FERC license.

8 JUSTICE SCALIA: Yes, I think all FERC said  
9 is -- is that nothing in its license would -- would  
10 require allocation of water by -- by North Carolina.  
11 And that's quite different from whether -- whether a  
12 severe reduction in the water that Duke can use would --  
13 would affect the -- the nature of the license given by  
14 FERC.

15 MR. BARTOLOMUCCI: Well, Duke of course  
16 pulled together 69 other stakeholders to join the  
17 comprehensive relicensing agreement to -- to smooth  
18 FERC's acceptance of -- of the new license. And this  
19 original action is -- will pit the two Carolinas, each  
20 of which seeks to maximize their share of the river, and  
21 those interests work at odds with the CRA, which  
22 endorses a compromise middle flow position that -- that  
23 neither of the Carolinas seeks to defend in this action.

24 CHIEF JUSTICE ROBERTS: Counsel, let me tell  
25 you what I'm very worried about. This is our original

1 jurisdiction, a delicate jurisdiction that allows us to  
2 resolve disputes between sovereign States. And I look  
3 out and I see all sorts of private parties intervening  
4 in a way that would give them party status. And I think  
5 that's compromising what our original jurisdiction is  
6 supposed to be about.

7 MR. BARTOLOMUCCI: Mr. Chief Justice,  
8 private parties and cities have intervened in the past  
9 in original actions and have been named as defendants in  
10 original actions.

11 JUSTICE GINSBURG: But even in the New  
12 Jersey v. New York decision, the dissenters there that  
13 would have allowed the intervention did say that in  
14 general it is unwise to encumber original jurisdiction  
15 cases with non-State parties. That was even the  
16 dissenters. So you start out with in general it's not  
17 wise to let these people come in.

18 And following up on the Chief's question, a  
19 State can't be sued without its consent. And it's true  
20 here that South Carolina is initiating the action, but  
21 it's initiating the action against a sister State. The  
22 Special Master's recommendation would require the State  
23 to have as its direct adversary three parties who are  
24 not a sister State, and that kind of dilutes the notion  
25 of original jurisdiction. It's a controversy between

1 two States.

2 MR. BARTOLOMUCCI: Well, in -- Justice  
3 Ginsburg, in the case of New Jersey v. New York, New  
4 York City was a party defendant, and in this case the  
5 City of Charlotte occupies the exact same position as  
6 New York City.

7 JUSTICE GINSBURG: That's because the State  
8 chose  
9 to sue it as a party defendant.

10 MR. BARTOLOMUCCI: It did, but of course a  
11 State can only sue a proper party defendant. Whether  
12 the question is intervention or whether it's naming a  
13 city as a defendant in an original action, both have to  
14 pass the test of is this city or non-State a proper  
15 party defendant?

16 CHIEF JUSTICE ROBERTS: You're -- all of the  
17 intervenors, prospective intervenors, they want to make  
18 sure North Carolina doesn't lose water, right?

19 MR. BARTOLOMUCCI: That -- that is not their  
20 exclusive interest.

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

23 MR. BARTOLOMUCCI: No. Duke Energy, for  
24 example, doesn't have an interest in maximizing the flow  
25 on the North Carolina side of the river. Duke's -- Duke

1 Energy's interest is in preserving the -- the flow  
2 compromise reflected in the CRA.

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

6 MR. BARTOLOMUCCI: Well, when -- when South  
7 Carolina first opposed, for example, Charlotte's motion  
8 to intervene, it said: Oh, Charlotte, you can file an  
9 amicus brief as to any dispositive motion. Well, that  
10 kind of amicus participation is vastly different from  
11 being able to shape the record on which the -- the key  
12 issues in this case are finally decided.

13 CHIEF JUSTICE ROBERTS: Shape the record,  
14 but intervention status would give you the right to  
15 appeal, right?

16 MR. BARTOLOMUCCI: It would allow us to seek  
17 leave to file exceptions to an --

18 CHIEF JUSTICE ROBERTS: Right, and appeal  
19 the normal case.

20 MR. BARTOLOMUCCI: Yes.

21 CHIEF JUSTICE ROBERTS: Well, that's my  
22 question. If we grant intervention in this type of case  
23 and there is no reason it would be three -- I mean, in  
24 the next case, it could be 20 different intervenors, and  
25 they are filing exceptions every other week that we have

1 to review and adjudicate because they are not bound by  
2 whether or not the State that is on their side wants to  
3 file exceptions.

4 MR. BARTOLOMUCCI: Well, let me say two  
5 things, Mr. Chief Justice: If the proposed decree  
6 affects the interests of Charlotte or the joint venture  
7 or Duke, I think they ought to be allowed to file  
8 exceptions, which this Court can grant leave or not.

9 As to the specter of 20 possible  
10 intervenors --

11 JUSTICE SOTOMAYOR: So how does that get us  
12 to avoid involvement in interstate -- intrastate  
13 disputes over water use? That just drags us right into  
14 your problems among your water users.

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

20 But that is not what has happened in  
21 equitable apportionment cases. In *New Jersey v. New*  
22 *York*, for example, this Court entered a decree, which  
23 enjoined the flow of the Delaware River to New York City  
24 above a specified level. I think 411 cubic feet per  
25 second.



1           And -- and that is the kind of decree that  
2 South Carolina, I believe, is seeking in this case. If  
3 you look at paragraph 2 of South Carolina's prayer for  
4 relief, they want an injunction against the interbasin  
5 transfers currently being carried -- carried out by  
6 Charlotte and the joint venture. So this --

7           CHIEF JUSTICE ROBERTS: And North Carolina,  
8 as a sovereign State, can represent the interests of its  
9 constituents as it sees fit.

10           You and your fellow prospective intervenors  
11 just have to do what citizens do all the time, which is  
12 convince North Carolina, one, and you can help them, to  
13 get as much water as they can; and, two, when they get  
14 it or if they lose it, whatever they are left it, to  
15 give it to you, rather than the other parties.

16           MR. BARTOLOMUCCI: Well, as to Duke --  
17 Mr. Chief Justice, I have explained, Duke's interest is  
18 not in maximizing the share -- North Carolina's share of  
19 the river.

20           The joint venture of the Catawba River Water  
21 Supply Project is not represented by either State  
22 because it's a bi-State entity. Neither -- and both of  
23 the Carolinas is -- are affirmatively hostile to part of  
24 the operations of the joint venture.

25           When the joint venture --

1 CHIEF JUSTICE ROBERTS: Well, then that's --  
2 then I just wonder why you are here in an original  
3 action.

4 What you are saying is they have all sorts  
5 of different interests, and it just -- they get to skip  
6 district court. They get to skip the court of appeals.  
7 They can just come right in here, as if they were a  
8 State, and participate in the case.

9 MR. BARTOLOMUCCI: Well, Mr. Chief Justice,  
10 I think this -- this is not a novel proposition. The  
11 City of Port Arthur was allowed to intervene in the case  
12 of Texas v. Louisiana.

13 Five Indian tribes intervened in Arizona v.  
14 California, and New York City was allowed to be a party  
15 defendant in the New Jersey case, even though the Court  
16 could have dismissed it from the case, as it did to the  
17 Indiana citizens in --

18 JUSTICE SOTOMAYOR: You are advocating a  
19 rule that says, almost, you have a right to intervene  
20 because you have an interest that won't be adequately  
21 represented.

22 MR. BARTOLOMUCCI: We --

23 JUSTICE SOTOMAYOR: Is that your position?  
24 Then what happens to the Special Master who says, no, I  
25 don't want all you guys here? How do we say that that

1 master abused his or her discretion by saying no?

2 MR. BARTOLOMUCCI: We are saying that the  
3 Special Master got it right, when she said that you have  
4 to show a compelling interest that's not properly  
5 represented by a party State, and she applied the New  
6 Jersey v. New York test, finding, at page 27 of her  
7 report, that neither Charlotte nor the joint venture  
8 are properly represented.

9 JUSTICE SOTOMAYOR: So you see the issue  
10 before us as being was she right or wrong, even though  
11 Nevada said -- I'm sorry -- that North Carolina said  
12 that it was going to adequately represent each of these  
13 interests, but that just wasn't correct?

14 MR. BARTOLOMUCCI: I think the question  
15 is --

16 JUSTICE SOTOMAYOR: That North Carolina is  
17 not telling us the truth?

18 MR. BARTOLOMUCCI: I think the question is,  
19 should the Court accept the Special Master's  
20 recommendation? And I would disagree with South  
21 Carolina, when it says that she applied the wrong legal  
22 test.

23 She did apply New Jersey v. New York. She  
24 did find that the intervenors were not properly  
25 represented by the party States.

1 CHIEF JUSTICE ROBERTS: You don't --

2 JUSTICE GINSBURG: The intervenors -- the  
3 intervenors are users of the water from the river?

4 MR. BARTOLOMUCCI: But not mere users. Their  
5 status is special. Duke, of course, is unique.  
6 It controls the flow of the river, and there's no one  
7 else like Duke on the Catawba.

8 The other two intervenors are the cause of  
9 the harm for which South Carolina seeks injunctive  
10 relief.

11 JUSTICE GINSBURG: They -- because they use  
12 a lot of water. And my question is: How do we decide  
13 once we say -- beyond the Special Master can let these  
14 people in with party status -- what users can come in  
15 where, obviously, we are not going to allow all users of  
16 the river water to come in, so which ones can and which  
17 ones can't?

18 MR. BARTOLOMUCCI: Certainly, our position  
19 is not that mere users of water or all users of water  
20 may intervene in original action.

21 You have to show a compelling interest  
22 that's not properly represented, and that's going to  
23 depend upon the specific facts of the case.

24 JUSTICE SCALIA: And is it automatic then?  
25 Is it automatic then? Or is it just that, when that

1 condition is met, the Special Master can permit the  
2 intervention?

3 MR. BARTOLOMUCCI: No, Justice Scalia. I  
4 would say it's not automatic because there are some  
5 other considerations the Special Master can bring to  
6 bear.

7 For example, timeliness -- you can't show up 20 years  
8 after the litigation has started, like the City of  
9 Philadelphia, and expect to get in. You --

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

12 MR. BARTOLOMUCCI: Correct. Or, conversely,  
13 how --

14 JUSTICE SCALIA: And, of course, the Special  
15 Master's determination of that is not final. It's  
16 ultimately up to us.

17 MR. BARTOLOMUCCI: That's correct.

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

20 MR. BARTOLOMUCCI: It is discretionary, and  
21 if -- if the Special Master believes that -- that this  
22 complex multiyear water rights dispute would be aided by  
23 the presence of a -- of a limited number of intervenors  
24 who have a very special interest in the case, then  
25 that's something that, for institutional --

1 CHIEF JUSTICE ROBERTS: Well, what's special  
2 about it? I mean, let's say I own a little farm on  
3 the banks of the Catawba, and I take water out to -- so  
4 the cows have something to drink, why does Charlotte get  
5 a special status just because they take a lot?

6 I'm affected by how much water runs through  
7 there.

8 MR. BARTOLOMUCCI: Well, Charlotte has  
9 special status because South Carolina seeks specific  
10 relief -- injunctive relief -- against Charlotte's  
11 interbasin transfer.

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

16 I -- you know, in times of drought, this  
17 water barely trickles by, and, if it's cut back, the  
18 farm is going to go down. It seems to me that, when you  
19 say they have a special interest, you are just saying  
20 they have got a big interest.

21 MR. BARTOLOMUCCI: It's not just that it's  
22 -- it's a big interest, and it surely is, but they are  
23 singled out in South Carolina's complaint, and  
24 injunctive relief is sought against them, which, I  
25 think, brings into the play the rule this Court

1 announced in Kentucky v. Indiana, which is that, if a  
2 plaintiff or plaintiff State in an original action is  
3 seeking relief against a citizen of a State, that  
4 citizen ought to have an opportunity to come into the  
5 litigation and defend its interests.

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

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

15 MR. BARTOLOMUCCI: No -- well, of course --

16 CHIEF JUSTICE ROBERTS: Do we let them just  
17 use the States as, you know, a façade to get into  
18 this Court and have their dispute adjudicated here?

19 MR. BARTOLOMUCCI: No. As in Kentucky v.  
20 Indiana, if there are improper parties in original  
21 action, they -- they can be dismissed, but I think it's  
22 noteworthy that the Court allowed the New Jersey  
23 litigation to proceed with New York City as a party  
24 defendant.

25 And Charlotte's position is truly

1 indistinguishable from the position of -- of New York  
2 City in that action, with -- with the sole exception  
3 that Charlotte seeks to intervene, whereas New York City  
4 was named as a party defendant.

5           South Carolina invokes the principle that it  
6 is the master of its complaint, and we would agree with  
7 that, in part. A plaintiff is the master of the  
8 allegations in claims it seeks to make, but a plaintiff  
9 is not a master of the universe of -- of interests that  
10 -- that may be affected by the lawsuit they have -- they  
11 have brought. That's --

12           JUSTICE SCALIA: Do you think the same --  
13 the same test applies to the appropriateness of naming a  
14 private party defendant, as you would urge for  
15 intervention by a private party defendant?

16           MR. BARTOLOMUCCI: Yes. I think there would  
17 be a very similar analysis. I think that the question  
18 whether a proposed defendant -- and of course, you need  
19 leave from this Court to file an original action or to  
20 name someone as a defendant in an original action. I  
21 think, in both cases, it raises the question: Is -- is  
22 this entity a proper party defendant or is the entity a  
23 proper  
24 intervenor?

25           I think it's a similar analysis.



1 JUSTICE STEVENS: May I ask this question:  
2 In what respect does the relief sought against the city  
3 differ from the relief sought against the State?

4 MR. BARTOLOMUCCI: In this respect, Justice  
5 Stevens: The -- the complaint prays for North Carolina  
6 to stop authorizing the interbasin transfers being  
7 carried out by Charlotte and the joint venture. But --  
8 but Charlotte and the joint venture are the entities  
9 whose primary conduct, if you will, would be affected by  
10 that injunction. They are the parties who are carrying  
11 out the interbasin transfers, and they would have to  
12 stop those transfers if -- if authorization was  
13 withdrawn by North Carolina.

14 CHIEF JUSTICE ROBERTS: Wouldn't it - would  
15 it be surprising if the Special Master recommended that  
16 all the issue that she was going to address was the  
17 relative equitable apportionment between North Carolina  
18 and South Carolina, and even though South Carolina  
19 wanted an injunction directed against the City of  
20 Charlotte, that's up to North Carolina? North Carolina  
21 can divvy up its water however it wants.

22 MR. BARTOLOMUCCI: I think it would not be  
23 surprising if she came down -- if she were to come down  
24 with a decree, it would not be surprising that -- that  
25 it would decide whether or not to allow Charlotte's

1 interbasin transfers to continue.

2           Because that's -- that was much like what  
3 was decided, for example, in New Jersey v. New York.  
4 There was the proposed diversion of water to New York  
5 City, and the Court there ultimately entered a partial  
6 injunction that banned flows to New York City above a  
7 certain level. So --

8           JUSTICE SCALIA: Well, in -- in deciding  
9 what's equitable as between the two States, I guess the  
10 -- the Court, ultimately, and the Special Master,  
11 initially, will have to decide what uses of water by one  
12 State or the other are not equitable uses --

13           MR. BARTOLOMUCCI: And, Justice Scalia --

14           JUSTICE SCALIA: -- and go beyond what is  
15 reasonable. So I don't see how you could decide the  
16 case without deciding whether especially particularly  
17 massive uses are appropriate or not.

18           MR. BARTOLOMUCCI: Not just massive.  
19 There's -- it's no accident that South Carolina focuses  
20 upon these interbasin transfers, because they inflict a  
21 special injury, in South Carolina's view.

22           The interbasin transfers take water out of  
23 the river basin, and -- and so it doesn't come back to  
24 South Carolina within the basin. Other types of uses of  
25 water are non-consumptive, in the sense that the water

1 can be treated and eventually gets to South Carolina  
2 within that basin.

3 But South Carolina has targeted these  
4 interbasin transfers because they are entirely,  
5 100 percent consumptive, in the sense that -- that once  
6 the water has left the basin --

7 JUSTICE SCALIA: Dead losses to South  
8 Carolina.

9 MR. BARTOLOMUCCI: -- it does -- it does not  
10 come back.

11 JUSTICE BREYER: What is the percentage,  
12 approximately, of the river that flows into South  
13 Carolina that the three intervenors account for?

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

16 JUSTICE BREYER: Well, about.

17 MR. BARTOLOMUCCI: Yes. I can tell you that  
18 Charlotte's authorization is -- is 33 million gallons a  
19 day.

20 JUSTICE BREYER: Out of what? Out of what?

21 MR. BARTOLOMUCCI: Well, the flow of the  
22 River -- the minimum flow of the river, under the --  
23 under the CRA is 1100 cubic feet per second, so  
24 unfortunately you'd have to -- you'd have to convert from  
25 cfs to --

1 JUSTICE BREYER: Well, I mean, do they  
2 account for, like -- there's a certain amount of water  
3 in dispute. There are some people who want to  
4 intervene. Are the people who intervene -- do they  
5 account more like 1 percent of all the water that's in  
6 dispute, or do they account for more like 50 percent?

7 That seems like a pretty relevant question  
8 to me.

9 MR. BARTOLOMUCCI: Well, I -- it's a  
10 significant proportion.

11 JUSTICE BREYER: You must have some idea.

12 MR. BARTOLOMUCCI: It's a significant  
13 proportion. It's not --

14 JUSTICE BREYER: Well, significant - is  
15 that more like 3 percent, or is it more like 90 percent?  
16 I mean, nobody has ever bothered to look at that in this  
17 whole case?

18 MR. BARTOLOMUCCI: Well, I haven't done that  
19 calculation. I will say that they are significant  
20 enough that South Carolina seeks a specific injunction  
21 against those interbasin transfers.

22 JUSTICE SCALIA: And I guess it depends on  
23 what you mean by the water in dispute. If the main  
24 gravamen of the complaint is interbasin transfers, they  
25 -- they occupy a huge proportion of that.

1 MR. BARTOLOMUCCI: And as the Special Master  
2 read it, IBTs are --

3 JUSTICE BREYER: Oh, that's -- I agree.  
4 That's a good point, but -- so what percentage if --  
5 what percentage of the interbasin transfers do they  
6 account for?

7 MR. BARTOLOMUCCI: Well, they represent,  
8 actually, 100 percent of the interbasin transfers --

9 JUSTICE BREYER: Okay.

10 MR. BARTOLOMUCCI: -- being carried out.

11 JUSTICE BREYER: So insofar -- so insofar as  
12 what they are after is interbasin transfers, just what  
13 Justice Scalia said is correct. These are the  
14 interbasin transfer people.

15 MR. BARTOLOMUCCI: These are the -- the IBTs  
16 at issue.

17 JUSTICE BREYER: That's helpful.

18 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

19 MR. BARTOLOMUCCI: Thank you.

20 CHIEF JUSTICE ROBERTS: 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, but 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 -- as the  
10 allocation would in this case, presumably.

11 MR. BROWNING: Well, I don't -- and that  
12 question --

13 JUSTICE SCALIA: Is that yes or no? I --  
14 you say yes, it would have general applicability.

15 MR. BROWNING: Yes, Your Honor. Yes,  
16 Justice Scalia.

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

1 complaint, it is specifically focused on interbasin  
2 transfers. It asserts that they are inequitable, and it  
3 is seeking injunctive relief with respect to those  
4 interbasin transfers. We --

5 JUSTICE BREYER: Well, how is just this  
6 involved? Is there -- because I am amazed that this is  
7 now coming to me for the first time. All this case is  
8 about is interbasin transfers and that you account for  
9 100 percent of them, you three. Is that -- is that  
10 right? Because I suspect in, like, 5 minutes, somebody  
11 might tell me it's not right.

12 (Laughter.)

13 MR. BROWNING: Your Honor, there are --  
14 there are very few interbasin transfers.

15 JUSTICE BREYER: I -- that's not my  
16 question.

17 MR. BROWNING: Yes. Yes.

18 JUSTICE BREYER: I want -- I'm trying --  
19 look, if Alaska sued California and the complaint was we  
20 want San Francisco back, San Francisco might have a  
21 right to intervene. But if it was about California  
22 generally, maybe they wouldn't.

23 So what I want to know is, what's the water  
24 that is at issue in this complaint and how much of the  
25 water that is at issue in this complaint do the three



1 intervenors account for? That seems like a fairly  
2 simple empirical question.

3 MR. BROWNING: Yes.

4 JUSTICE BREYER: That's what I'm trying to  
5 get the answer to.

6 MR. BROWNING: Yes, Your Honor. The -- the  
7 two intervenors that have interbasin transfers account  
8 for the vast majority of the water that is consumed as a  
9 result of an interbasin transfer.

10 In the 2006 study that was done by Duke  
11 Energy, the largest interbasin transfer is the City of  
12 Charlotte at 9 million gallons per day. The second --

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

16 Private parties are going to hijack our  
17 original jurisdiction, and it was highlighted for me  
18 when I read your motion, the motion of private parties  
19 for divided argument. Your proposal was that they be  
20 divided 10, 10, and 10. You didn't even want to be  
21 here.

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

25 MR. BROWNING: Well, Your Honor, that was an

1 accommodation from the State of North Carolina with  
2 respect to the intervenors.

3 CHIEF JUSTICE ROBERTS: You thought their  
4 participation here before this Court on a question in  
5 original jurisdiction was more important than yours, and  
6 you represent the State.

7 MR. BROWNING: Your Honor, the intervention  
8 motion directly affects each of these intervenors, and  
9 they have a right to be heard with respect to that  
10 intervention motion.

11 CHIEF JUSTICE ROBERTS: Why can't you  
12 represent them?

13 MR. BROWNING: Well --

14 CHIEF JUSTICE ROBERTS: They are your  
15 constituents. You are the State. You are coming here  
16 directly, not even going to district court, and you seem  
17 to be ceding your sovereignty over to them.

18 MR. BROWNING: Your Honor, we do not believe  
19 that we are ceding our sovereignty. With respect to  
20 Duke Energy and the Catawba River Water Supply Project,  
21 North Carolina does not and cannot adequately represent  
22 their interests with respect to Duke Energy.

23 JUSTICE SOTOMAYOR: Why?

24 MR. BROWNING: Okay, with respect to Duke  
25 Energy: Duke is -- has 11 dams in North and South

1 Carolina. As a result of those dams, Duke Energy  
2 controls the flow of the river into South Carolina. As  
3 --

4 JUSTICE SOTOMAYOR: But you are going to  
5 defend all of their interests as it affects North  
6 Carolina, right? You are not incapable of protecting  
7 their North Carolina interests.

8 MR. BROWNING: Your Honor, their  
9 interests are inseparable, specifically with regard to  
10 Duke Energy.

11 Duke negotiated, over a period of several  
12 years, a comprehensive relicensing agreement, with  
13 various agencies of North Carolina, various agencies of  
14 South Carolina, and stakeholders up and down this river.

15 As a result of that negotiated agreement,  
16 there was -- the CRA was put in place, which is  
17 essentially a request that FERC issue a license in  
18 accordance with the provisions of that agreement.

19 That agreement would set a minimum flow of  
20 water into South Carolina that is much, much higher than  
21 the previous license. Now, South Carolina has come into  
22 Court and has attacked that agreement.

23 Duke has a very real and substantial  
24 interest with respect to that agreement. But --

25 CHIEF JUSTICE ROBERTS: What is -- what's

1 the interest of North Carolina?

2 MR. BROWNING: Well --

3 CHIEF JUSTICE ROBERTS: You are standing  
4 there telling me why Duke has an interest. What's North  
5 Carolina's interest?

6 MR. BROWNING: Your Honor, North Carolina  
7 will defend these interbasin transfers, but with respect  
8 to Duke Energy, we are not aligned with Duke Energy  
9 because Duke has a very real interest in preserving --

10 CHIEF JUSTICE ROBERTS: So oppose their  
11 intervention.

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

15 South Carolina is seeking to change the CRA,  
16 to have a flow of water that is much higher than is set  
17 out in the CRA. Although North Carolina supports --

18 JUSTICE SOTOMAYOR: Isn't it your interest  
19 to -- to resist that?

20 MR. BROWNING: Yes, Your Honor. Not only  
21 are we resisting that --

22 JUSTICE SOTOMAYOR: And your interest is  
23 to defend the CRA, right?

24 MR. BROWNING: Your Honor, North Carolina  
25 will resist having South Carolina have a greater flow

1 of water than --

2 JUSTICE SOTOMAYOR: You haven't answered my  
3 question.

4 MR. BROWNING: I'm sorry.

5 JUSTICE SOTOMAYOR: Is it in your interest  
6 not to support the CRA?

7 MR. BROWNING: Yes, Your Honor. It is in  
8 our interest because even --

9 JUSTICE SOTOMAYOR: You would like -- you  
10 would like, in this litigation against the two States,  
11 for the Special Master to undo the -- your obligations  
12 under the CRA?

13 MR. BROWNING: That will, ultimately, be our  
14 request in this case because South Carolina has attacked  
15 that agreement.

16 From North Carolina's perspective, South  
17 Carolina is receiving much more water under this  
18 negotiated agreement than they could ever hope to  
19 achieve in an equitable apportionment action.

20 So at the end of the day, we will be asking  
21 this Court to issue a decree that sets a flow of  
22 water less than --

23 JUSTICE SOTOMAYOR: So you are prepared to  
24 tell us right now -- this is what you are saying to us:  
25 We will not represent the interest of Duke?

1                   MR. BROWNING: We will not represent the  
2 interest of Duke, given their --

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

5                   MR. BROWNING: With respect --

6                   JUSTICE SOTOMAYOR: And to your -- and to  
7 the CRWSP?

8                   MR. BROWNING: With respect to the city, we  
9 have said in our briefs that we will defend this  
10 interbasin transfer. We believe that we will represent  
11 the City of Charlotte with respect to that regard, but  
12 we also support their intervention motions because we do  
13 not believe that it would result in them impeaching the  
14 interests of North Carolina.

15                   And more importantly, the Special Master got  
16 it right, that there is -- this is a specific attack on  
17 the City of Charlotte and its unique interests. It is  
18 seeking injunctive relief that will cripple the largest  
19 city in North and South Carolina.

20                   CHIEF JUSTICE ROBERTS: Well, if it's an  
21 attack on -- if it's an attack on Charlotte, I would  
22 expect the State to be standing there protecting it and  
23 not feel that they can't do that without Charlotte,  
24 itself, coming into the case.

25                   MR. BROWNING: Your Honor, we will defend

1 this interbasin transfer, but the fact of the matter is  
2 injunctive relief is sought as against Charlotte, and  
3 there is something to be said for fairness in allowing  
4 that entity to be present in this Court.

5 JUSTICE SOTOMAYOR: Are you --

6 MR. BROWNING: Now, turning --

7 JUSTICE SOTOMAYOR: Are you prepared to say  
8 that you are not adequately defending the interest of  
9 the CRWSP?

10 MR. BROWNING: Correct, Your Honor, that  
11 that is an interstate entity. It -- its interests have  
12 been expressly attacked, the interbasin transfer. South  
13 Carolina singles it out in the bill of complaint.  
14 What's more important --

15 JUSTICE SOTOMAYOR: You haven't answered my  
16 question. You said, with Duke, that you won't support  
17 --

18 MR. BROWNING: Yes. We --

19 JUSTICE SOTOMAYOR: -- them. Are you not  
20 going to support this -- the joint venture in property?

21 MR. BROWNING: We -- we cannot represent the  
22 interests of the joint venture. They have an interbasin  
23 transfer, pursuant to the North Carolina statute for  
24 Union County.

25 But what the complaint doesn't disclose is

1 that the other half of that joint venture also has an  
2 interbasin transfer with respect to Lancaster County,  
3 South Carolina.

4 So South Carolina can hardly attack the  
5 Union County interbasin transfer while simultaneously  
6 defending the Lancaster County, South Carolina,  
7 interbasin transfer.

8 JUSTICE GINSBURG: Let's go back to the  
9 question of couldn't the Special Master receive the  
10 information she wants if these three entities come in as  
11 amici?

12 Coming in as intervenors, they have full  
13 party status. They can engage in discovery. They can  
14 protract the case. They can appeal any adverse  
15 judgment.

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

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

22 The fact of the matter is that these  
23 entities have unique interests, and with respect to two  
24 of those interests -- Duke Energy and the Catawba River  
25 Water Supply Project -- their interests are not



1 represented by either State.

2 All three of them have been expressly  
3 attacked in the complaint, and fairness dictates they  
4 should have an opportunity to be heard.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Frederick, you have 2 minutes.

8 REBUTTAL ARGUMENT OF DAVID C. FREDERICK

9 ON BEHALF OF THE PLAINTIFF

10 MR. FREDERICK: I have four points,

11 Mr. Chief Justice. First --

12 JUSTICE SOTOMAYOR: Tell me, are you seeking  
13 injunctive relief out of any of the three intervenors?

14 MR. FREDERICK: No. We seek an injunction  
15 enjoining the interbasin transfer statute to the extent  
16 it exceeds North Carolina's equitable apportionment. We  
17 are here to get our fair share of the river vis-à-vis  
18 North Carolina.

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

23 The FERC has said it will not affect, in  
24 giving its license, the equitable apportionment action  
25 now pending before you.

1           In Duke's CRA, at paragraph 39.9, it says it  
2 does not affect State water uses. So the only issue  
3 here is whether or not those expressed disclaimers  
4 should be given effect when South Carolina is simply  
5 seeking to determine, as between the two States, the  
6 rights.

7           JUSTICE SCALIA: But it affects the  
8 agreement on which the license is based. The license  
9 was based upon a very hard negotiated agreement among a  
10 number of entities.

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

13           And that's what FERC has before it, and FERC  
14 has said that the CRA will not affect what license is  
15 issued, but I want to go back to a fundamental --

16           JUSTICE SOTOMAYOR: Are you willing to  
17 concede that if whatever you ask for here affects that  
18 license, once its issued, that then Duke's  
19 intervention is proper?

20           MR. FREDERICK: No, because the United  
21 States can enter -- can affect the interests and  
22 represent the interests of its licensees.

23           Duke's interest is completely derivative of  
24 the United States' power to confer a license on an  
25 energy producer. And the United States here is saying,

1 no, they should not be allowed to intervene.

2 JUSTICE SCALIA: I thought Duke said the  
3 problem is not the United States -- so much the United  
4 States granting a license. It's the license we  
5 requested was based upon a negotiated agreement among a  
6 number of entities, and that agreement goes out the  
7 window once -- on the basis of this lawsuit.

8 MR. FREDERICK: The agreement is a private  
9 contract among various water users, and it is no  
10 different than the fact that all users of this river  
11 will be affected, one way or the other, by whatever  
12 decree this Court issues, whether they are on the South  
13 Carolina side or the North Carolina side.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
15 The case is submitted.

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

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