Τ	IN THE SUPREME COURT OF THE UNITED STATES	
2	x	
3	SOUTH CAROLINA, :	
4	Plaintiff :	
5	v. : No. 138, Orig.	
6	NORTH CAROLINA. :	
7	x	
8	Washington, D.C.	
9	Tuesday, October 13, 2009	
10		
11	The above-entitled matter came on for o	ral
12	argument before the Supreme Court of the United State	s
13	at 1:00 p.m.	
14	APPEARANCES:	
15	DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf	
16	of the Plaintiff.	
17	ERIC D. MILLER, ESQ., Assistant to the Solicitor	
18	General, Department of Justice, Washington, D.C.;	on
19	behalf of the United States, as amicus curiae,	
20	supporting the Plaintiff.	
21	H. CHRISTOPHER BARTOLOMUCCI, ESQ., Washington, D.C.;	on
22	behalf of the Interveners.	
23	CHRISTOPHER G. BROWNING, JR., Solicitor General,	
24	Raleigh, N.C.; on behalf of the Defendant.	
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1	PROCEEDINGS
2	(1:00 p.m.)
3	CHIEF JUSTICE ROBERTS: We will hear
4	argument this afternoon in Case 138 in our original
5	docket, South Carolina v. North Carolina.
6	Mr. Frederick.
7	ORAL ARGUMENT OF DAVID C. FREDERICK
8	ON BEHALF OF THE PLAINTIFF
9	MR. FREDERICK: Thank you,
L O	Mr. Chief Justice, and may it please the Court:
11	South Carolina seeks an equitable
12	apportionment with North Carolina of the Catawba River.
13	Both States act as parens patriae on behalf of all users
L4	of the river within their boundaries.
15	For three reasons, this Court should not
16	adopt the Special Master's recommendation that
L7	Charlotte, Duke, and the Catawba River Water Supply
18	Project be permitted to intervene as parties in this
19	original action.
20	First, the report articulates the wrong
21	legal test for intervention. Second, under the New
22	Jersey v. New York standard, none of the three entities
23	should be permitted to intervene. And, third, the
24	report's approach to intervention involves this Court in
25	deciding intramural disputes between and among water

- 1 users in one State.
- With respect to the first point, the Special
- 3 Master applied the wrong factors, we would submit, in
- 4 deciding whether or not a party or an intervener should
- 5 be allowed to intervene as a party.
- 6 The Special Master sought to distill from
- 7 this Court's cases three principles that we would submit
- 8 are not the appropriate principles in deciding an
- 9 intervenor's status.
- 10 First, the report overemphasizes the, quote,
- 11 "direct stake," although the master found that the
- 12 equitable apportionment had no specific impact on
- 13 individual users of the water.
- 14 CHIEF JUSTICE ROBERTS: I thought your
- 15 friends agreed that the New Jersey v. New York standard
- 16 applied?
- 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
- intervenor's status, and those three principles, we
- 25 would submit, are incorrect.

Τ	under the New Jersey V. New York Standard,
2	the master did not make findings that would be
3	appropriate to determine the intervener status here as
4	appropriate parties. There was no finding of inadequate
5	representation by either State to support any of the
6	Interveners' request to participate as parties. There
7	was no finding of a compelling interest in the sense
8	that it was truly compelling. It's hard to argue in
9	cases in where there is no case from this Court in
10	the equitable apportionment area that three Interveners
11	would have met the compelling interest standard here.
12	And, finally, the New Jersey v. New York
13	standard talks about having interests that are apart
14	from other interests. But both Charlotte and the
15	Catawba River Water Supply Project are simply acting on
16	behalf of all users of North Carolina water. They
L7	simply happen to be the largest ones.
18	JUSTICE SCALIA: Mr. Frederick, we had a
19	case involving, what, a tax on oil companies, in which
20	it was a State against State case, but we allowed the
21	oil companies who would pay the tax to intervene.
22	Now, why is that any different from this
23	case?
24	MR. FREDERICK: First, the interests were
25	different. They were not an equitable apportionment

- 1 where the water --
- 2 JUSTICE SCALIA: Why does that make any
- 3 difference?
- 4 MR. FREDERICK: This Court has said for 200
- 5 years that water is a unique resource within the
- 6 sovereign control of States.
- 7 In the Maryland case, the Court permitted
- 8 intervention in a situation in which Louisiana had sued
- 9 the pipeline companies in Louisiana State court for a
- 10 declaratory judgment that its tax was constitutional.
- 11 There was also a pending FERC action in Federal court in
- 12 Louisiana raising the same issue, so when Maryland and
- 13 eight other States who were not parens patriae of the
- 14 various pipeline companies who sought to intervene filed
- 15 the original action, I think the Court appropriately
- 16 considered that interests of judicial efficiency called
- 17 for handling the Commerce Clause challenge in the
- 18 original action in this case.
- 19 And finally, the Court only devoted two
- 20 sentences of its opinion and didn't cite the New Jersey
- 21 v. -- New York v. New Jersey case in acting on the
- 22 intervention.
- JUSTICE SCALIA: But these -- these are
- 24 rules that we are making up ourselves, right, as to when
- 25 we are going to allow intervention or not? Is there any

- 1 case -- I think there isn't, but tell me if I'm wrong --
- 2 is there any case in which we have rejected intervention
- 3 that has been recommended by the Special Master?
- 4 MR. FREDERICK: I don't think I can recall a
- 5 case in that factual scenario, but I can point you to
- 6 Kentucky v. Indiana in 1930, in which this Court
- 7 rejected Kentucky's attempt to join individual Indiana
- 8 citizens as parties in their original action over
- 9 Indiana's alleged breach of a contract to build an
- 10 interstate bridge. And --
- 11 CHIEF JUSTICE ROBERTS: I understand your
- 12 basic argument that each State should represent its own
- 13 constituents. But isn't the Catawba River Water Supply
- 14 Project in a different category? Because it straddles
- 15 both States and I think it can reasonably fear that it
- 16 would be treated as a stepchild by both States.
- 17 MR. FREDERICK: No, in fact,
- 18 Mr. Chief Justice, I would submit they have the weakest
- 19 claim to intervention in this case.
- Their argument, fundamentally, is that Union
- 21 County, North Carolina, which is the North Carolina part
- 22 of the joint venture with the Lancaster Water District,
- 23 should be permitted to have water purchased from the
- 24 South Carolina side of the boundary. So what's
- 25 happening with that water project is the water is sucked

- 1 out on the South Carolina side and piped north for Union
- 2 County's consumption under a Union County permit with
- 3 the State of North Carolina. Union County, therefore,
- 4 is acting as any other user of water, along with
- 5 Charlotte and all other users of water in North
- 6 Carolina.
- 7 The Catawba Project is not here to intervene
- 8 to protect its interest on the South Carolina side of
- 9 the boundary. Those are adequately protected, we
- 10 submit, by the attorney general acting on behalf of the
- 11 State. So in effect the Union County, North Carolina
- 12 claim here of 5 million gallons of water per day which
- 13 they are seeking to protect through their intervention
- 14 is no different than the other interests of North
- 15 Carolina water users that they are seeking to protect --
- JUSTICE SCALIA: Well, except that these --
- 17 these three entities are the principal entities that are
- 18 quilty of interbasin transfers, which is essentially
- 19 what the -- what the dispute is about.
- MR. FREDERICK: The dispute is about the
- 21 transfer of water and consumption of water in toto. The
- 22 Court --
- JUSTICE SCALIA: Well, but the focus -- the
- 24 focus of the complaint is upon interbasin transfers,
- 25 isn't it?

1	MR. FREDERICK: The focus of the complaint
2	highlights interbasin transfers to the extent that they
3	are a large quantifiable amount of water being taken out
4	of the Catawba River, that we submit should not be
5	counted on
6	JUSTICE SCALIA: Exactly. And these three
7	entities account for a very large proportion of those
8	interbasin transfers. Isn't it the case that any any
9	decision by by this Court on on this question will
10	necessarily impact directly these three entities?
11	MR. FREDERICK: No.
12	JUSTICE SCALIA: Why not?
13	MR. FREDERICK: Because in an equitable
14	apportionment case, this Court decides which share of
15	the water is allocable to each State. It is a question
16	of State law how each State shall determine the
17	intrastate allocations of the water. So
18	JUSTICE SCALIA: I understand that, but I'm
19	talking about the real world. If if indeed North
20	Carolina has to cut back, and if indeed the opinion of
21	this Court says that it's taking too much because of
22	interbasin transfers, as a practical matter these three
23	entities are going to be out of luck.
24	MR. FREDERICK: We take the real world, Your
25	Honor, as this Court's cases direct us, and those cases

- 1 tell us that in situations where the Court is deciding
- 2 an equitable apportionment between two States -- water,
- 3 of course, is fungible. It's a series of molecules that
- 4 do not accord property rights in any one entity or user.
- 5 They all divine from the State itself.
- 6 So if North Carolina in its exercise of
- 7 parens patriae responsibility determines that Charlotte
- 8 should have a larger share than what it currently has,
- 9 that's a decision for Charlotte -- for North Carolina as
- 10 a political entity to decide among its users. It does
- 11 not necessarily implicate this Court's action in an
- 12 equitable apportionment to say that what the Court will
- 13 ultimately decide is what Charlotte's share is. That is
- 14 not what we are seeking and that's not what an
- 15 injunction from this Court equitably apportioning the
- 16 Catawba River would necessarily decide.
- 17 JUSTICE GINSBURG: Mr. Frederick, if this
- 18 were an ordinary civil case we would be guided by the
- 19 rule on permissive intervention, and appellate courts in
- 20 dealing with that rule give a healthy measure of respect
- 21 to the trial judge's determination.
- 22 So even though the civil rules are not
- 23 binding in original jurisdiction cases, isn't that a
- 24 sound approach that we should adopt? Just as a court of
- 25 appeals would defer to a district judge's decision, so

- 1 we should give a healthy measure of deference to the
- 2 Special Master's evaluation that this will be useful.
- 3 MR. FREDERICK: No, for several reasons,
- 4 Justice Ginsburg. First, in any appellate review
- 5 situation this Court would review de novo the legal test
- 6 that would be applied. Our initial submission is the
- 7 master applied and articulated the wrong legal tests.
- 8 So you would first need to determine, we would submit,
- 9 what is the correct legal test for submission. That is
- 10 a de novo review standard.
- 11 But secondly, the Court has said in numerous
- 12 original cases it does not apply deference, although it
- 13 gives appropriate respect to special masters, and so
- 14 there would be no basis for applying a deference
- 15 standard to a special master ruling on a question of law
- 16 that fundamentally is about what this Court's original
- 17 jurisdiction under Article 3 is supposed to be about.
- 18 JUSTICE SCALIA: But, in fact, we've never
- 19 rejected a special master's desire to -- to have
- 20 interveners in the case.
- MR. FREDERICK: Well, virtually every case,
- 22 Justice Scalia --
- JUSTICE SCALIA: And that oil case that I
- 24 mentioned. I forget the name of it. The tax --
- MR. FREDERICK: Maryland v. Louisiana.

- 1 JUSTICE SCALIA: Yes. What had the special
- 2 master recommended in that case?
- 3 MR. FREDERICK: There was actually no
- 4 special master recommendation in that case. The Court
- 5 decided it on its motion directly to this Court.
- 6 Virtually all of the cases that we cited in
- 7 the blue brief highlight the fact that special masters
- 8 routinely reject motions to intervene. It is the rare
- 9 situation in which a special master would allow
- 10 intervention.
- 11 And the only example that the other side can
- 12 come up with is the Nebraska v. Wyoming case, in which
- 13 finally Basin Electric, after 10 years of participating
- in the original action as an amicus, was allowed to
- 15 intervene because the special master viewed there to be
- 16 tension between the State of Nebraska's interests and
- 17 that that Basin Electric was seeking to vindicate. You
- 18 --
- 19 JUSTICE GINSBURG: Mr. Frederick, can we go
- 20 back a little? I think you just said there was no
- 21 special master's recommendation in
- 22 Maryland v. Louisiana, but I'm looking at page 745. In
- 23 the footnote 21, it said: "The master recommended that
- 24 we grant the motion of 17 pipeline companies to
- 25 intervene as plaintiffs." And then it says: "It is not

- 1 unusual to permit intervention of private parties in
- 2 original actions."
- 3 MR. FREDERICK: And the case that it cited
- 4 is Oklahoma v. Texas, which is a very unusual case from
- 5 this Court's docket in the 1920s. What the Court
- 6 decided in 1932, Justice Ginsburg, in the Wyoming and
- 7 Colorado case was that in situations involving
- 8 interstate allocations of water, the claimants or users
- 9 of a State are deemed to be represented by the State.
- 10 The case on which the Court relied in the Maryland case
- 11 was back into an old era in which it was unclear whether
- 12 States acting as parens patriae had the responsibility
- 13 to act on behalf of all claimants or users of water.
- 14 The Maryland case, as I said before, did not
- 15 analyze the New Jersey v. New York factors, and I would
- 16 submit that in light of the other circumstances of the
- 17 case, the fact that it was a Commerce Clause challenge
- 18 involving Federal, State, and private companies, in
- 19 which there was multiple litigation pending in various
- 20 forums, it was an exercise of the Court's decision to
- 21 efficiently decide the Commerce Clause challenge to
- 22 allow those pipeline companies in, where some of those
- 23 pipeline companies were not represented by States that
- 24 were parties in the case.
- 25 CHIEF JUSTICE ROBERTS: I -- I guess I

- 1 haven't heard yet an answer to Justice Ginsburg's first
- 2 question about whether there was a recommendation from
- 3 the Special Master or not.
- 4 MR. FREDERICK: Well, I -- I will -- I
- 5 obviously forgot about footnote 21 of the Court's
- 6 opinion in Maryland v. Louisiana, Justice Ginsburg. But
- 7 I think --
- 8 JUSTICE SOTOMAYOR: Counsel, I don't know
- 9 that you've actually addressed the operative question of
- 10 what amount of discretion, if any, are we going to give
- 11 to special masters to determine when they require the
- 12 presence of a party to do equity, which is what I read
- 13 the Special Master to be suggesting. These are the
- 14 three biggest users of water, at least one of them
- 15 straddles both States, another has a potential license.
- 16 And so that each of them has a different situation than
- 17 a normal water user.
- So, you're -- all you're begging is the
- 19 question of whether we just say you can't. But why is
- 20 the "you can't" compelled, either by our case law or by
- 21 any original jurisdiction principle?
- 22 MR. FREDERICK: Well, let's start with the
- 23 original jurisdiction principle. Those are actions that
- 24 are brought invoking this Court's original jurisdiction,
- 25 in which this Court could sit without a special master

- 1 and would decide the matter as it sits as a court of
- 2 nine. The fact that it appoints a Special Master to
- 3 assist and facilitate that effort does not imbue the
- 4 actions of that person delegated that responsibility
- 5 with something akin to the deference given to district
- 6 judges in making various fact findings.
- 7 Secondly, on a question of law, as
- 8 intervention fundamentally is -- and ultimately we are
- 9 talking about the scope and contours of this Court's
- 10 exercise of original jurisdiction -- what the Court had
- 11 said is that there are two interests that are ultimately
- 12 being protected. One is the dignity interest of the
- 13 State acting in its sovereign capacity on a subject,
- 14 water, that quintessentially is sovereign; and it is
- 15 doing so for judicial efficiency purposes, because it
- 16 allows the Court to expect each State to represent
- 17 adequately all of the users of water in that State.
- 18 So for those reasons we think that a Special
- 19 Master recommendation ought to be reviewed with the same
- 20 level of scrutiny that all other aspects of a Special
- 21 Master --
- JUSTICE SCALIA: Well, we've -- we've
- 23 allowed private parties to be impleaded by the States.
- 24 We have allowed one State to sue another State and a
- 25 private party.

1 MR. FREDERICK: Not in an equitable 2 apportionment. And -- and I think the -- the scope of 3 the relief is important. And that is because the State 4 seeking the relief is assuming the risk that the relief 5 that it wants to get from that State is an inadequate form of relief. 6 7 Here the form of relief South Carolina seeks 8 goes only against North Carolina. We cannot get an equitable apportionment with Charlotte or the Catawba 9 10 Project. We can only get it from North Carolina. 11 JUSTICE KENNEDY: I see your light's on, but 12 can we take this case on the assumption that nothing 13 that you obtain in the way of relief will affect Duke 14 Power under the comprehensive relicensing agreement? 15 Don't we have to take the case on the assumption that 16 their rights under that agreement might be affected? 17 MR. FREDERICK: They might be affected, but 18 only in an ancillary way. It is an -- part of an 19 application to the FERC. The FERC here is saying it 20 does not affect it because the license itself will not 21 dictate minimum --22 JUSTICE KENNEDY: But are you saying you are 23 not seeking a result that is inconsistent in any way with that agreement? 24 25 MR. FREDERICK: Neither the agreement -- and

- 1 this is at page 51 to 52 of our brief, citing 39 of the
- 2 CRA -- said it doesn't affect water rights. The final
- 3 environmental impact statement from FERC says it doesn't
- 4 affect apportionment interstate issues. Both FERC and
- 5 the CRA itself disclaim any impact on the equitable
- 6 apportionment action pending here.
- 7 If I could save the balance of my time.
- 8 CHIEF JUSTICE ROBERTS: Thank you,
- 9 Mr. Frederick.
- 10 Mr. Miller.
- ORAL ARGUMENT OF ERIC D. MILLER
- 12 ON BEHALF OF THE UNITED STATES,
- AS AMICUS CURIAE,
- 14 SUPPORTING THE PLAINTIFF
- 15 MR. MILLER: Mr. Chief Justice, and may it
- 16 please the Court:
- 17 In order to intervene in an original action
- 18 in this Court, a citizen of a State that is a party to
- 19 the action must show a compelling interest, separate
- 20 from that of other citizens, that is not properly
- 21 represented by the State. In an equitable apportionment
- 22 action, the interest that is at stake is not a private
- 23 property interest in water. Rather it is the sovereign
- 24 interest of the State in a particular share of the
- 25 waters of an interstate river. For that reason, a

- 1 private interest in water is not an appropriate basis
- 2 for intervention in such a proceeding.
- JUSTICE SCALIA: It depends on, I suppose,
- 4 on what you mean by is not properly represented by the
- 5 State. If you think the State does not have a
- 6 sufficient interest to defend that -- that particular
- 7 right vigorously, might that not be -- might that not
- 8 qualify?
- 9 MR. MILLER: Well, I think that the interest
- 10 that the private party has is a State law property
- 11 interest in water, and that is an interest that simply
- 12 isn't at stake in an equitable apportionment action.
- 13 The only thing that this Court is deciding is what share
- 14 of the river does each State get.
- The Court in an equitable apportionment
- 16 action does not decide the purely intrastate question of
- 17 how will that share be allocated.
- 18 JUSTICE SCALIA: I think you could say that
- 19 realistically when you are talking about an individual
- 20 water user, a small potatoes water user, a normal
- 21 resident of Charlotte perhaps. But when you are talking
- 22 about the biggest entities that are going to be affected
- 23 by the apportionment, it really doesn't ring true to me.
- MR. MILLER: Well, that -- I mean, in New
- 25 Jersey v. New York, Philadelphia, which sought to

- 1 intervene in that case, constituted a majority of the
- 2 water users within the State of Philadelphia.
- JUSTICE SCALIA: Did the special master
- 4 think Philadelphia should have been let in?
- 5 MR. MILLER: I don't recall what the special
- 6 master --
- 7 JUSTICE SCALIA: The answer is no.
- 8 MR. MILLER: -- said in that case. But this
- 9 Court has held in, for example, Colorado v. New Mexico
- 10 that even on purely factual questions, the special
- 11 master is -- who makes recommendations, and those
- 12 recommendations are reviewed by this Court de novo. The
- 13 Court is not sitting in an appellate capacity. This is
- 14 a case within the original jurisdiction, and this Court
- 15 has an independent responsibility to make a
- 16 determination, even on factual questions, and a fortiori
- 17 on questions of intervention.
- 18 JUSTICE SCALIA: Yes, but we haven't -- we
- 19 haven't been sitting there trying to figure out what
- 20 would facilitate the proceeding. Much of the discovery
- 21 in the case has already focused on these three entities,
- 22 hasn't it?
- MR. MILLER: That's right. To the extent --
- 24 JUSTICE SCALIA: So to say that they are
- 25 just -- you know, they are just Joe Dokes is -- is

- 1 really very unrealistic.
- 2 MR. MILLER: Well, to the -- I mean, to the
- 3 extent that they have valuable information to provide,
- 4 third party discovery can take account of that, as can
- 5 amicus participation. It would be entirely appropriate
- 6 for parties that have information or a special
- 7 perspective on the case to present an amicus submission
- 8 to the Special Master or to this Court. And it's -- but
- 9 that -- that's not a basis for allowing them to become
- 10 full parties through intervention.
- 11 To the extent that there's a concern about
- 12 the management of this case, I think it's important to
- 13 keep in mind that the rule recommended by the Special
- 14 Master and the rule that the would-be interveners are
- 15 urging this Court to adopt would, of course, apply not
- 16 just in this litigation, but in every equitable
- 17 apportionment action. And not only does it make the
- 18 litigation of those actions much more difficult to have
- 19 additional non-state parties in, but it makes it much
- 20 more difficult for those cases to be settled.
- 21 JUSTICE SCALIA: Well, if that -- if and
- 22 when that is the case, the special master will not want
- 23 them to come in, as the vast majority of special masters
- 24 have not wanted them to come in in the past. I don't
- 25 think that's going to change.

1 MR. MILLER: I -- I -- I guess what I would 2 say is that I don't think that, either in the 3 recommendation of the Special Master in this case or in 4 the submissions of the -- the would-be Interveners, that 5 there is really any logical limiting principle that would not allow, as a matter of routine, large water 6 7 users to come in to equitable apportionment actions. And that's inappropriate for the more 8 fundamental reason that these original actions in this 9 10 Court are not ordinary cases. This Court has said that 11 sitting in judgment between two sovereigns is one of the 12 most grave -- grave and delicate responsibilities this 13 Court has, and it is a sparingly exercised jurisdiction 14 reserved for the most serious of issues, issues of such 15 importance that, if the States were independent 16 countries, would be resolved through treaties --17 JUSTICE SCALIA: But not reserved 18 exclusively to State -- to suits between a State and 19 another State. We've allowed it to cover suits between 20 a State and another State and private citizens of the 21 other State. 22 MR. MILLER: Yes. And when a State brings 23 such an action or seeks to bring such an action, it can't simply file a complaint as of right. It has to 24 25 seek this Court's permission to file the complaint. And

- 1 this Court can review the complaint at that time and
- 2 look at who the parties are and figure out whether it's
- 3 an appropriate case for the exercise of this Court's
- 4 jurisdiction. And that, in our view, is a much more
- 5 appropriate way to proceed, making that determination at
- 6 the outset on the basis of the State's complaint, rather
- 7 than through piecemeal litigation as different non-State
- 8 parties --
- 9 JUSTICE GINSBURG: Well, here the complaint
- 10 was South Carolina's complaint and these Interveners on
- 11 North Carolina's -- on North Carolina's side.
- 12 MR. MILLER: That's where they were seeking
- 13 to intervene on North Carolina's side as defendants,
- 14 that's right.
- 15 JUSTICE GINSBURG: And as representing the
- 16 position of the United States, would you address the
- 17 FERC license that Duke Energy is raising?
- 18 MR. MILLER: Yes, Your Honor. Under section
- 19 27 of the Federal Power Act, which is 16 U.S.C. 821, the
- 20 Power Act does not affect State law water rights. So
- 21 State law water rights are taken as a given and it's up
- 22 to the licensee to have the necessary State water
- 23 rights, and a FERC license does not in any way alter the
- 24 distribution of State law property rights in water.
- 25 And what the commission has said in this

- 1 case in the final environmental impact statement with
- 2 respect to Duke's relicensing application, which is
- 3 available on the commission web site, it cited section
- 4 27 and it said: "Any license that is issued will not
- 5 impose requirements, including minimum flows, that
- 6 infringe on water rights or apportionments." So the
- 7 commission is aware of the pendency of this case.
- 8 JUSTICE SCALIA: Well, it isn't a matter of
- 9 infringing on water rights or apportionments. I mean,
- 10 that does not exclude, it seems to me, the revocation of
- 11 the license or the denial of the renewal of the license
- 12 because Duke Power does not have enough water. That
- 13 wouldn't preclude that, would it?
- MR. MILLER: Well, the -- the nature of this
- 15 proceeding makes that outcome not -- not something that
- 16 would happen even if South Carolina were to prevail,
- 17 because what South Carolina is seeking is to get more
- 18 water flowing downstream to it, and so the -- the
- 19 licensing conditions, which generally impose minimum
- 20 flow requirements at each of the various dams operated
- 21 by Duke, would be easier to satisfy, not harder to
- 22 satisfy, if South Carolina were -- had an entitlement to
- 23 get even more water flowing through --
- 24 JUSTICE SCALIA: I don't -- I don't
- 25 understand that. I don't understand that.

1 JUSTICE SOTOMAYOR: What happens to North Carolina if it has less water? What does it do with 2 3 respect to Duke? 4 MR. MILLER: Well, Duke -- Duke's dams, the 5 licensing condition is that each dam allow a certain 6 amount of water to flow through, under the current 7 license that they are operating under. There are 8 different minimum flow requirements under the renewal license that is being sought. But an order in effect 9 10 declaring that they let more water flow through would not be in conflict with the licensing requirements. 11 12 JUSTICE SCALIA: Well, why --13 CHIEF JUSTICE ROBERTS: Why isn't Duke Power 14 -- why isn't Duke Power on the other side, then? 15 MR. MILLER: I mean, I --16 CHIEF JUSTICE ROBERTS: They have smart 17 lawyers. 18 MR. MILLER: Well, they -- I mean, one 19 possibility is, of course, that Duke is, in addition to 20 obviously being an operator of dams, Duke is a very 21 large consumer of water. In fact, it's the largest 22 consumer of water on the Catawba system because of its coal and nuclear power plants which use water 23 24 evaporatively for cooling of the power plants. 25 JUSTICE SCALIA: Well, it may also mean that

- 1 when it has to increase the outflow, the level of its
- 2 impoundments reduces, and that may affect its ability to
- 3 generate power, which in turn may -- may affect its
- 4 license.
- 5 MR. MILLER: It -- it may have some effect
- 6 on its ability to -- to generate power. But that makes
- 7 it a large industrial user of water, akin to those that
- 8 the Court referred to in New Jersey v. New York which
- 9 were not entitled to intervene.
- 10 I would also point out in further response
- 11 to, Mr. Chief Justice, to your question, that Duke is a
- 12 North Carolina corporation, which may be why it's
- 13 seeking to come in on the North Carolina side of this
- 14 case.
- 15 But I want to return to the idea that these
- 16 kinds of cases are not ordinary cases. They involve
- 17 sovereign interests, and I think what's important about
- 18 that is that the --
- 19 JUSTICE STEVENS: Mr. Miller, if I -- if I
- 20 understood your argument, you are saying that Duke's
- 21 interests are really with South Carolina, or -- to
- 22 increase the flow. I would think then that it would be
- 23 North Carolina who would be objecting to their
- 24 participation in the case rather than South Carolina.
- 25 And they don't. They -- they welcomed them in, as I

- 1 remember the papers.
- 2 MR. MILLER: As I said, Duke is an operator
- 3 of thermal power plants that are large consumers of
- 4 water and some of those are located in North Carolina.
- 5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- 6 Mr. Bartolomucci.
- 7 ORAL ARGUMENT OF H. CHRISTOPHER BARTOLOMUCCI
- 8 ON BEHALF OF THE INTERVENERS
- 9 MR. BARTOLOMUCCI: Thank you,
- 10 Mr. Chief Justice, and may it please the Court:
- 11 The Special Master correctly concluded that
- 12 Charlotte, Duke, and the Catawba River Water Supply
- 13 Project should intervene in this original action. Her
- 14 recommendation deserves some deference because she is in
- 15 the best position to know whether these parties would
- 16 assist her in the adjudication of this complex dispute.
- 17 CHIEF JUSTICE ROBERTS: This is our original
- 18 jurisdiction. I regard the Special Master as more akin
- 19 to a law clerk than a district judge. We don't defer to
- 20 somebody who's an aide that we have assigned to help us
- 21 gather things here. I think on legal questions of
- 22 intervention we have to decide de novo.
- MR. BARTOLOMUCCI: Our claim is not that the
- 24 Special Master should get deference on legal questions,
- 25 but she should get deference on -- on the narrow

- 1 question on whether it would be helpful to her to have
- 2 these Interveners in the case.
- JUSTICE SOTOMAYOR: But tell me what she
- 4 said that makes them helpful. What can they provide
- 5 that couldn't be done by merely an amici submission?
- 6 MR. BARTOLOMUCCI: Well, she pointed out,
- 7 for example, that Duke Energy, which controls the flow
- 8 of this river and is participating in the FERC
- 9 proceedings, would establish a -- a direct link between
- 10 this adjudication and what's going on before the FERC.
- 11 And of course those two proceedings have -- have a lot
- 12 of interaction. I think it's also fair to --
- JUSTICE SOTOMAYOR: Well, your adversary has
- 14 just said none, according to the terms of the license
- 15 and what the FERC has said. So why is -- why don't we
- 16 just take what FERC has said at face value?
- 17 MR. BARTOLOMUCCI: Oh, I think -- I think
- 18 FERC has not said that there will be no effect, that
- 19 there would be no effect upon the licensing proceeding
- 20 from the original action. There could be a conflict
- 21 between the decree that comes down, if one comes down in
- 22 this Court, and the terms of the FERC license.
- JUSTICE SCALIA: Yes, I think all FERC said
- 24 is -- is that nothing in its license would -- would
- 25 require allocation of water by -- by North Carolina.

- 1 And that's quite different from whether -- whether a
- 2 severe reduction in the water that Duke can use would --
- 3 would affect the -- the nature of the license given by
- 4 FERC.
- 5 MR. BARTOLOMUCCI: Well, Duke of course
- 6 pulled together 69 other stakeholders to join the
- 7 comprehensive relicensing agreement to -- to smooth
- 8 FERC's acceptance of -- of the new license. And this
- 9 original action is -- will pit the two Carolinas, each
- 10 of which seeks to maximize their share of the river, and
- 11 those interests work at odds with the CRA which endorses
- 12 a compromise middle flow position that -- that neither
- 13 of the Carolinas seeks to defend in this action.
- 14 CHIEF JUSTICE ROBERTS: Counsel, let me tell
- 15 you what I'm very worried about. This is our original
- 16 jurisdiction, a delicate jurisdiction that allows us to
- 17 resolve disputes between sovereign States. And I look
- 18 out and I see all sorts of private parties intervening
- 19 in a way that would give them party status. And I think
- 20 that's compromising what our original jurisdiction is
- 21 supposed to be about.
- 22 MR. BARTOLOMUCCI: Mr. Chief Justice,
- 23 private parties and cities have intervened in the past
- 24 in original actions and have been named as defendants in
- 25 original actions.

- 1 JUSTICE GINSBURG: But even in the New
- 2 Jersey v. New York decision, the dissenters there that
- 3 would have allowed the intervention did say that in
- 4 general it is unwise to encumber original jurisdiction
- 5 cases with non-State parties. That was even the
- 6 dissenters. So you start out with in general it's not
- 7 wise to let these people come in.
- And following up on the Chief's question, a
- 9 State can't be sued without its consent. And it's true
- 10 here that South Carolina is initiating the action, but
- 11 it's initiating the action against a sister State. The
- 12 Special Master's recommendation would require the State
- 13 to have as its direct adversary three parties who are
- 14 not a sister State, and that kind of dilutes the notion
- 15 of original jurisdiction. It's a controversy between
- 16 two States.
- MR. BARTOLOMUCCI: Well, in -- Justice
- 18 Ginsburg, in the case of New Jersey v. New York, New
- 19 York City was a party defendant, and in this case the
- 20 City of Charlotte occupies the exact same position as
- 21 New York.
- 22 JUSTICE GINSBURG: That's because they chose
- 23 to sue it as a party defendant.
- 24 MR. BARTOLOMUCCI: It did, but of course a
- 25 State can only sue a proper party defendant. Whether

- 1 the question is intervention or whether it's naming a
- 2 city as a defendant in an original action, both have to
- 3 pass the test of is this city or non-State a proper
- 4 party defendant?
- 5 CHIEF JUSTICE ROBERTS: You're -- all of the
- 6 Interveners, prospective Interveners, they want to make
- 7 sure North Carolina doesn't lose water, right?
- 8 MR. BARTOLOMUCCI: That -- that is not their
- 9 exclusive interest.
- 10 CHIEF JUSTICE ROBERTS: Well, their -- they
- 11 want to reduce South Carolina's claim on the water.
- MR. BARTOLOMUCCI: No, Duke Energy, for
- 13 example, doesn't have an interest in maximizing the flow
- 14 on the North Carolina side of the river. Duke -- Duke
- 15 Energy's interest is in preserving the -- the flow
- 16 compromise reflected in the CRA.
- 17 CHIEF JUSTICE ROBERTS: Well -- to the
- 18 extent they have differing interests, why aren't those
- 19 interests fully satisfied by amicus participation?
- MR. BARTOLOMUCCI: Well, when -- when South
- 21 Carolina first opposed, for example, Charlotte's motion
- 22 to intervene, it said: Oh, Charlotte, you can file an
- 23 amicus brief as to any dispositive motion. Well, that
- 24 kind of amicus participation is vastly different from
- 25 being able to shape the record on which the -- the key

- 1 issues in this case are finally decided.
- 2 CHIEF JUSTICE ROBERTS: Shape the record,
- 3 but intervention status would give you the right to
- 4 appeal, right.
- 5 MR. BARTOLOMUCCI: It would allow us to seek
- 6 leave to file exceptions to --
- 7 CHIEF JUSTICE ROBERTS: Right, and appeal
- 8 the normal case.
- 9 MR. BARTOLOMUCCI: Yeah.
- 10 CHIEF JUSTICE ROBERTS: Well, that's my
- 11 question. If we grant intervention in this type of case
- 12 and there is no reason it would be three, I mean, in the
- 13 next case, it could be 20 different interveners, and
- 14 they are filing exceptions every other week that we have
- 15 to review and adjudicate because they are not bound by
- 16 whether or not the State that is on their side wants to
- 17 file exceptions.
- 18 MR. BARTOLOMUCCI: Well, let me say two
- 19 things, Mr. Chief Justice. If the proposed decree
- 20 affects the interest of Charlotte or the joint venture
- 21 or Duke, I think they ought to be allowed to file
- 22 exceptions, which this Court can grant leave or not.
- 23 As to the spectre of 20 possible
- 24 interveners --
- JUSTICE SOTOMAYOR: So how does that get us

- 1 to avoid involvement in interstate -- intrastate
- 2 disputes over water use? That just drags us right into
- 3 your problems among your water users.
- 4 MR. BARTOLOMUCCI: Well, South Carolina and
- 5 the United States present this vision of an equitable
- 6 apportionment action in which the Special Master simply
- 7 divides up the flow of the river, and then it's up to
- 8 each State to subdivide among its users.
- 9 But that is not what has happened in
- 10 equitable apportionment cases. In New Jersey v. New
- 11 York, for example, this Court entered a decree, which
- 12 enjoined the flow of the Delaware River to New York City
- 13 above a specified level. I think 411 cubic feet per
- 14 second.
- 15 And -- and that is the kind of decree that
- 16 South Carolina, I believe, is seeking in this case. If
- 17 you look at paragraph two of South Carolina's prayer for
- 18 relief, they want an injunction against the interbasin
- 19 transfers currently being carried -- carried out by
- 20 Charlotte and the joint venture.
- 21 CHIEF JUSTICE ROBERTS: And North Carolina,
- 22 as a sovereign State, can represent the interests of its
- 23 constituents as it sees fit.
- 24 You and your fellow prospective interveners
- 25 just have to do what citizens do all the time, which is

- 1 convince North Carolina, one, and you can help them, to
- 2 get as much water as they can; and, two, when they get
- 3 it or if they lose it, whatever they are left it, to
- 4 give it to you, rather than the other parties.
- 5 MR. BARTOLOMUCCI: Well, as to Duke --
- 6 Mr. Chief Justice, I have explained, Duke's interest is
- 7 not in maximizing the share -- North Carolina's share of
- 8 the river.
- 9 The joint venture of the Catawba River Water
- 10 Supply Project is not represented by either State
- 11 because it's a bi-State entity. Neither -- and both of
- 12 the Carolinas is -- are affirmatively hostile to part of
- 13 the operations of the joint venture.
- When the joint venture --
- 15 CHIEF JUSTICE ROBERTS: Well, then that -- I
- 16 just wonder why you are here in an original action.
- What you are saying is they have all sorts
- 18 of different interests, and it just -- they get to skip
- 19 district court. They get to skip the court of appeals.
- 20 They can just come right in here, as if they were a
- 21 State, and participate in the case.
- MR. BARTOLOMUCCI: Well, Mr. Chief Justice,
- 23 I think this -- this is not a novel proposition. The
- 24 City of Port Arthur was allowed to intervene in the case
- 25 of Texas v. Louisiana.

- 1 Five Indian tribes intervened in Arizona v.
- 2 California, and New York City was allowed to be a party
- 3 defendant in the New Jersey case, even though the Court
- 4 could have dismissed it from the case, as it did to the
- 5 Indiana citizens in --
- 6 JUSTICE SOTOMAYOR: You are advocating a
- 7 rule that says, almost, you have a right to intervene
- 8 because you have an interest that won't be adequately
- 9 represented.
- 10 MR. BARTOLOMUCCI: We --
- 11 JUSTICE SOTOMAYOR: Is that your position?
- 12 Then what happens to the Special Master who says, no, I
- don't want all you guys here? How do we say that that
- 14 Master abused his or her discretion by saying no?
- 15 MR. BARTOLOMUCCI: We are saying that the
- 16 Special Master got it right, when she said that you have
- 17 to show a compelling interest that's not properly
- 18 represented by a party State, and she applied the New
- 19 Jersey v. New York test, finding, at page 27 of her
- 20 report, that neither Charlotte, nor the joint venture,
- 21 are properly represented.
- 22 JUSTICE SOTOMAYOR: So you see the issue
- 23 before us as being was she right or wrong, even though
- 24 Nevada said -- I'm sorry -- that North Carolina said
- 25 that it was going to adequately represent each of these

- 1 interests, but that just wasn't correct?
- 2 MR. BARTOLOMUCCI: I think the question
- 3 is --
- 4 JUSTICE SOTOMAYOR: That North Carolina is
- 5 not telling us the truth?
- 6 MR. BARTOLOMUCCI: I think the question is
- 7 should the Court accept a Special Master's
- 8 recommendation, and I would disagree with South
- 9 Carolina, when it says that she applied the wrong legal
- 10 test.
- 11 She did apply New Jersey v. New York. She
- 12 did find that the interveners were not properly
- 13 represented by the party States.
- 14 JUSTICE GINSBURG: The interveners -- the
- 15 interveners are users of the water from the river?
- 16 MR. BARTOLOMUCCI: But not mere users. They
- 17 are established as special. Duke, of course, is unique.
- 18 It controls the flow of the river, and there is no one
- 19 else like Duke on the Catawba.
- The other two interveners are the cause of
- 21 the harm for which South Carolina seeks injunctive
- 22 relief.
- JUSTICE GINSBURG: They -- because they use
- 24 a lot of water. And my question is: How do we decide
- 25 once we say -- beyond the Special Master can let these

- 1 people in with party status -- what users can come in
- 2 where, obviously, we are not going to allow all users of
- 3 the river water to come in, so which ones can and which
- 4 ones can't?
- 5 MR. BARTOLOMUCCI: Certainly, our position
- 6 is not that mere users of water or all users of water
- 7 may intervene in original action.
- 8 You have to show a compelling interest that
- 9 is not properly represented, and that's going to depend
- 10 upon the specific facts of the case.
- 11 JUSTICE SCALIA: And is it automatic then?
- 12 Is it automatic then? Or is it just that, when that
- 13 condition is met, the Special Master can permit the
- 14 intervention?
- 15 MR. BARTOLOMUCCI: No, Justice Scalia. I
- 16 would say it's not automatic because there is some other
- 17 consideration that the Special Master can bring to bear.
- 18 For example, timeliness, you can't show up 20 years
- 19 after the litigation has started, like the City of
- 20 Philadelphia, and expect to get in.
- 21 JUSTICE SCALIA: And, also, how helpful the
- intervention will be to the management of the case.
- MR. BARTOLOMUCCI: Correct. And --
- JUSTICE SCALIA: And, of course, the Special
- 25 Master's determination of that is not final. It's,

- 1 ultimately, up to us.
- 2 MR. BARTOLOMUCCI: That's correct.
- JUSTICE SCALIA: But it is a discretionary
- 4 intervention you are arguing for, not a mandatory one.
- 5 MR. BARTOLOMUCCI: It is discretionary, and
- 6 if -- if the Special Master believes that this complex
- 7 multiyear water rights' dispute would be aided by the
- 8 presence of a limited number of interveners who have a
- 9 very special interest in the case, then that's
- 10 something --
- 11 CHIEF JUSTICE ROBERTS: Well, what's special
- 12 about it? I mean, let's say I owned a little farm on
- 13 the banks of the Catawba, and I take water out to -- so
- 14 the cows have something to drink, why does Charlotte get
- 15 a special status just because they take a lot?
- 16 I'm affected by how much water runs through
- 17 there.
- 18 MR. BARTOLOMUCCI: Well, Charlotte has
- 19 special status because South Carolina seeks specific
- 20 relief -- injunctive relief against the Charlotte's
- 21 interbasin transfer.
- 22 CHIEF JUSTICE ROBERTS: Well, and that
- 23 relief will affect how much water is available for me to
- 24 draw out and use on my farm. That's a compelling
- 25 interest.

- 1 You know, in times of drought, this water
- 2 barely trickles by, and, if it's cut back, the farm's
- 3 going to go down. It seems to me that, when you say
- 4 they have a special interest, you are just saying they
- 5 have got a big interest.
- 6 MR. BARTOLOMUCCI: It's not just that it is
- 7 a big interest, and it surely is, but they are singled
- 8 out in South Carolina's complaint, and injunctive relief
- 9 is sought against them, which, I think, brings into the
- 10 play the rule this Court announced in Kentucky v.
- 11 Indiana, which says, if a plaintiff or plaintiff State
- in an original action is seeking relief against a
- 13 citizen of a State, that citizen ought to have an
- 14 opportunity to come into the litigation and defend its
- 15 interests.
- 16 That's what Charlotte is seeking in this
- 17 case. The joint venture, of course, is not represented
- 18 by either State fully because both States are hostile to
- 19 at least part of what the joint venture does.
- 20 CHIEF JUSTICE ROBERTS: Well, let's say the
- 21 interest -- the dispute is really in effect between
- 22 company ABC in North Carolina and company XYZ in South
- 23 Carolina. I mean, do we -- we would not accept an
- 24 original action if they sued each other, right?
- MR. BARTOLOMUCCI: Well --

- 1 CHIEF JUSTICE ROBERTS: Do we just let them
- 2 use the States as -- you know, a facade, to get into
- 3 this Court and have their dispute adjudicated here?
- 4 MR. BARTOLOMUCCI: No. As in Kentucky v.
- 5 Indiana, if there are improper parties in original
- 6 action, they -- they can be dismissed, but I think it's
- 7 noteworthy that the Court allowed the New Jersey
- 8 litigation to proceed, with New York City as a party
- 9 defendant.
- 10 And Charlotte's position is truly
- 11 indistinguishable from the position of New York City in
- 12 that action, with the sole exception that Charlotte
- 13 seeks to intervene, whereas New York City was named as
- 14 party defendant.
- 15 South Carolina invokes the principle that it
- 16 is the master of its complaint, and we would agree with
- 17 that, in part. A plaintiff is the master of the
- 18 allegations and claims it seeks to make, but a plaintiff
- 19 is not a master of the universe of interests that may
- 20 be -- may be affected by the lawsuit they have -- they
- 21 have brought.
- JUSTICE SCALIA: Do you think the same --
- 23 the same test applies to the appropriateness of naming a
- 24 private party defendant, as you would urge for
- intervention by a private party defendant?

1 MR. BARTOLOMUCCI: Yes. I think there would 2 be a very similar analysis. I think that the question 3 whether a proposed defendant -- and of course, you leave 4 from this Court to file an original action or to name 5 someone as a defendant in an original action, I think, in both cases, it raises the question: Is this entity a 6 7 proper defendant, or is the entity a proper intervener? I think it's a similar analysis. 8 9 JUSTICE STEVENS: May I ask this question: 10 In what respect does the relief sought against the city 11 differ from the relief sought against the State? MR. BARTOLOMUCCI: In this respect, Justice 12 13 Stevens, the -- the complaint prays for North Carolina 14 to stop authorizing the interbasin transfers being 15 carried out by Charlotte and the joint venture. But --16 but Charlotte and the joint venture are the entities 17 whose primary conduct, if you will, would be affected by 18 that injunction. They are the parties who are carrying 19 out the interbasin transfers, and they would have to stop those transfers if -- if authorization was 20 21 withdrawn by North Carolina. CHIEF JUSTICE ROBERTS: Would it -- would it 22 23 be surprising if the Special Master recommended that all the issue that she was going to address was the relative 24 25 equitable apportionment between North Carolina and South

- 1 Carolina, and even though South Carolina wanted an
- 2 injunction directed against the City of Charlotte,
- 3 that's up to North Carolina? North Carolina can divvy
- 4 up its water however it wants.
- 5 MR. BARTOLOMUCCI: I think it would not be
- 6 surprising if she came down -- if she were to come down
- 7 with a decree, it would not be surprising that -- that
- 8 it would decide whether or not to allow Charlotte's
- 9 interbasin transfers to continue.
- 10 Because that's -- that was much like what
- 11 was decided, for example, in New Jersey v. New York.
- 12 There was the proposed diversion of water to New York
- 13 City and the court there ultimately entered a partial
- 14 injunction that banned flows to New York City above a
- 15 certain level.
- 16 JUSTICE SCALIA: Well, in -- in deciding
- 17 what's equitable as between the two States, I guess the
- 18 -- the Court ultimately and the Special Master initially
- 19 will have to decide what uses of water by one State or
- 20 the other are not equitable uses.
- 21 MR. BARTOLOMUCCI: And Justice Scalia --
- JUSTICE SCALIA: Go beyond what is
- 23 reasonable. So I don't see how you could decide the
- 24 case without deciding whether especially particularly
- 25 massive uses are appropriate or not.

- 1 MR. BARTOLOMUCCI: Not just massive.
- 2 There's -- it's no accident that South Carolina focuses
- 3 upon these interbasin transfers, because they inflict a
- 4 special injury, in South Carolina's view.
- 5 The interbasin transfers take water out of
- 6 the river basin, and -- so it doesn't come back to South
- 7 Carolina within the basin. Other types of uses of water
- 8 are non-consumptive, in the sense that the water can be
- 9 treated and eventually gets to South Carolina within
- 10 that basin.
- 11 But South Carolina has targeted these
- 12 interbasin transfers because they are entirely,
- 13 100 percent consumptive, in the sense that -- that once
- 14 the water has left the basin --
- 15 JUSTICE SCALIA: Dead losses to South
- 16 Carolina.
- MR. BARTOLOMUCCI: -- it does -- it does not
- 18 come back.
- 19 JUSTICE BREYER: What is the percentage,
- 20 approximately, of the river that flows into South
- 21 Carolina that the three interveners account for?
- 22 MR. BARTOLOMUCCI: I don't think I have done
- 23 that math, Justice Breyer.
- JUSTICE BREYER: Well, about.
- 25 MR. BARTOLOMUCCI: Yes. I can tell you that

- 1 Charlotte's authorization is -- is 33 million gallons a
- 2 day.
- JUSTICE BREYER: Out of what? Out of what?
- 4 MR. BARTOLOMUCCI: Well, the flow of the
- 5 river, the minimum flow of the river, under the -- under
- 6 the CRA is 1100 cubic feet per second, so unfortunately
- 7 you have to -- you would have to confer from CFS to --
- 8 JUSTICE BREYER: Well, I mean, do they
- 9 account for, like -- there is a certain amount of water
- 10 in dispute. There are some people who want to
- 11 intervene. Are the people who intervene, do they
- 12 account more like 1 percent of the water that is in
- 13 dispute, or do they account for more like 50 percent?
- 14 That seems like a pretty relevant question
- 15 to me. You must have some idea.
- MR. BARTOLOMUCCI: Well, I -- it's a
- 17 significant proportion. It's not --
- 18 JUSTICE BREYER: Well, significant, is that
- 19 more like 3 percent, or is it more like 90 percent? I
- 20 mean, nobody has ever bothered to look at that in this
- 21 whole case?
- 22 MR. BARTOLOMUCCI: I have not done that
- 23 calculation. I will say that they are significant
- 24 enough that South Carolina seeks a specific injunction
- 25 against those interbasin transfers.

- 1 JUSTICE SCALIA: And I guess it depends on
- 2 what you mean by the water in dispute. If the main
- 3 gravamen of the complaint is interbasin transfers, they
- 4 occupy a huge proportion of that.
- 5 MR. BARTOLOMUCCI: And as the Special Master
- 6 read it, IBTs are --
- JUSTICE BREYER: Oh, that's -- I agree.
- 8 That's a good point. So what percentage of the
- 9 interbasin transfers do they account for?
- MR. BARTOLOMUCCI: Well, they represent,
- 11 actually, 100 percent of the interbasin transfers being
- 12 carried out.
- JUSTICE BREYER: So insofar as what they are
- 14 after is interbasin transfers, just what Justice Scalia
- 15 said is correct. These are the interbasin transfer
- 16 people.
- MR. BARTOLOMUCCI: These are the -- the IBTs
- 18 at issue.
- 19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
- Mr. Browning.
- ORAL ARGUMENT OF CHRISTOPHER G. BROWNING, JR.
- ON BEHALF OF THE DEFENDANT
- MR. BROWNING: Mr. Chief Justice, and may it
- 24 please the Court:
- Let me turn to two questions that Justice

- 1 Scalia asked Mr. Frederick, and I think his response
- 2 needs clarification from North Carolina's perspective.
- 3 The first question dealt with Maryland v.
- 4 Louisiana, and Mr. Frederick responded that that case,
- 5 in which 17 pipeline companies were permitted to
- 6 intervene, according to Mr. Frederick, the States in
- 7 that case did not serve as parens patriae with regard to
- 8 those 17 pipeline companies. That is factually
- 9 incorrect. In that case, two of those pipeline
- 10 companies -- the Michigan-Wisconsin Pipeline Company was
- 11 a resident of the State of Michigan, one of the
- 12 complaining States in that case, as well as the National
- 13 Gas Pipeline Company of America was an Illinois
- 14 corporation.
- 15 CHIEF JUSTICE ROBERTS: Maryland v.
- 16 Louisiana involved a specific tax on specific companies,
- 17 and they were allowed to intervene. This is not that.
- 18 This is a question of how the equitable apportionment of
- 19 the water is going to be, and North Carolina can do with
- 20 the water whatever it will.
- 21 It strikes me as very different than
- 22 Maryland v. Louisiana.
- MR. BROWNING: Your Honor, in Maryland v.
- 24 Louisiana, that was a taxation case, a case that goes to
- 25 a fundamental interest of the States, the power of

- 1 taxation.
- 2 JUSTICE SCALIA: Did -- did the decree only
- 3 apply to taxing these particular companies? Could the
- 4 -- could the State have taxed other companies after the
- 5 decree issued?
- 6 MR. BROWNING: Yes, Your Honor, as the
- 7 Plaintiff states were seeking to attack the Louisiana
- 8 tax at issue. So it would have general applicability.
- 9 CHIEF JUSTICE ROBERTS: As the allocation
- 10 would in this case, presumably.
- 11 JUSTICE SCALIA: Is that yes or no? I --
- 12 you say yes, it would have general applicability.
- MR. BROWNING: Yes, Your Honor. Yes,
- 14 Justice Scalia.
- 15 Your Honor, South Carolina has said that
- 16 this case is about consumption of water in toto. But
- 17 when you look at their bill of complaint, that is simply
- 18 not the case. When you look at the question presented
- 19 in their leave for -- their motion for leave to file a
- 20 bill of complaint, it starts out whether North
- 21 Carolina's interbasin transfer statute is invalid under
- 22 the Supremacy Clause of the United States Constitution.
- 23 And when you look at the allegations in the bill of
- 24 complaint, it is specifically focused on interbasin
- 25 transfers. It asserts that they are inequitable, and it

- 1 is seeking injunctive relief with respect to those
- 2 interbasin transfers.
- JUSTICE BREYER: How is justice involved?
- 4 Because I am amazed that this is now coming to me for
- 5 the first time. All this case is about is interbasin
- 6 transfers and that you account for 100 percent of them,
- 7 you three. Is that right? Because I suspect in, like,
- 8 five minutes, somebody might tell me it's not right.
- 9 MR. BROWNING: Your Honor, there are --
- 10 there are very few interbasin transfers.
- JUSTICE BREYER: I -- that's not my
- 12 question. I want -- look. If Alaska sued California
- 13 and the complaint was, we want San Francisco back, San
- 14 Francisco might have a right to intervene. But if it
- 15 was about California generally, maybe they wouldn't.
- 16 So what I want to know is, what's the water
- 17 that is at issue in this complaint and how much of the
- 18 water that is at issue in this complaint do the three
- 19 interveners account for? That seems like a fairly
- 20 simple empirical question.
- MR. BROWNING: Yes.
- 22 JUSTICE BREYER: That's what I'm trying to
- 23 get the answer to.
- 24 MR. BROWNING: Yes, Your Honor. The -- the
- 25 two interveners that have interbasin transfers account

- 1 for the vast majority of the water that is consumed as a
- 2 result of an interbasin transfer.
- In the 2006 study that was done by Duke
- 4 Energy, the largest interbasin transfer is the City of
- 5 Charlotte at 9 million gallons per day. The second --
- 6 CHIEF JUSTICE ROBERTS: Counsel, my basic
- 7 concern is that -- and I will let you finish if there is
- 8 more to the answer. I'm sorry.
- 9 Private parties are going to hijack our
- 10 original jurisdiction, and it was highlighted for me
- 11 when I read your motion, the motion of private parties
- 12 for divided argument. Your proposal was that they be
- 13 divided ten, ten, and ten. You didn't even want to be
- 14 here.
- 15 As they view the case and as you view the
- 16 case, it's got so little to do with the State that the
- 17 State didn't even want to come here and argue the case.
- 18 MR. BROWNING: Well, Your Honor, that was an
- 19 accommodation from the State of North Carolina with
- 20 respect to the interveners.
- 21 CHIEF JUSTICE ROBERTS: You thought their
- 22 participation here before this Court on a question in
- 23 original jurisdiction was more important than yours, and
- 24 you represent the State.
- 25 MR. BROWNING: Your Honor, the intervention

- 1 motion directly affects each of these interveners and
- 2 they have a right to be heard with respect to that
- 3 intervention.
- 4 CHIEF JUSTICE ROBERTS: Why can't you
- 5 represent them? They are your constituents. You are
- 6 the State. You are coming here directly, not even going
- 7 to district court, and you seem to be ceding your
- 8 sovereignty over to them.
- 9 MR. BROWNING: Your Honor, we do not believe
- 10 that we are ceding our sovereignty. With respect to
- 11 Duke Energy and the Catawba River Water Supply Project,
- 12 North Carolina does not and cannot adequately represent
- 13 their interests with respect to Duke Energy.
- JUSTICE SOTOMAYOR: Why?
- 15 MR. BROWNING: Okay, with respect to Duke
- 16 Energy: Duke has 11 dams in North and South Carolina.
- 17 As a result of those dams, Duke Energy controls the flow
- 18 of the river into South Carolina.
- 19 JUSTICE SOTOMAYOR: But you are going to
- 20 defend all of their interests as it affects North
- 21 Carolina, right? You are not incapable of protecting
- 22 their North Carolina interests.
- MR. BROWNING: Well, Your Honor, their
- 24 interests are inseparable, specifically with regard to
- 25 Duke Energy.

1	Duke negotiated, over a period of several
2	years, a comprehensive relicensing agreement, with
3	various agencies of North Carolina, various agencies of
4	South Carolina and stakeholders up and down this river.
5	As a result of that negotiated agreement,
6	there was the CRA was put in place, which is
7	essentially a request a FERC issue a license in
8	accordance with the provisions of that agreement.
9	That agreement would set a minimum flow of
10	water into South Carolina that is much, much higher than
11	the previous license. Now, South Carolina has come into
12	Court and has attacked that agreement.
13	Duke has a very real and substantial
14	interest with respect to that agreement.
15	CHIEF JUSTICE ROBERTS: What is North
16	what's the interest of North Carolina?
17	MR. BROWNING: Well
18	CHIEF JUSTICE ROBERTS: You are standing
19	here telling me why Duke has an interest. What is North
20	Carolina's interest?
21	MR. BROWNING: Your Honor, North Carolina
22	will defend these interbasin transfers, but with respect
23	to Duke Energy, we are not aligned with Duke Energy
24	because Duke has a very real interest in preserving
25	CHIEF JUSTICE ROBERTS: So oppose their

- 1 intervention.
- MR. BROWNING: Well, we believe they have a
- 3 right to be heard because of their compelling interests
- 4 that are affected in this case.
- 5 South Carolina is seeking to change the CRA,
- 6 to have a flow of water that is much higher than is set
- 7 out in the CRA, although North Carolina --
- 8 JUSTICE SOTOMAYOR: Isn't your interest
- 9 to -- to resist that?
- 10 MR. BROWNING: Yes, Your Honor, and not only
- 11 are we resisting that --
- 12 JUSTICE SOTOMAYOR: And your interest is not
- 13 to defend the CRA, right?
- MR. BROWNING: Your Honor, North Carolina
- 15 will resist having South Carolina having a greater flow
- 16 of water --
- JUSTICE SOTOMAYOR: You haven't answered my
- 18 question.
- MR. BROWNING: I'm sorry.
- 20 JUSTICE SOTOMAYOR: Is it in your interest
- 21 not to support the CRA?
- MR. BROWNING: Yes, Your Honor. It is in
- 23 our interest because --
- JUSTICE SOTOMAYOR: You would like -- you
- 25 would like, in this litigation against the two States,

- 1 for the Special Master to undo the -- your obligations
- 2 under the CRA?
- 3 MR. BROWNING: That will, ultimately, be our
- 4 request in this case because South Carolina has attacked
- 5 that agreement.
- 6 From North Carolina's perspective, South
- 7 Carolina is receiving much more water under this
- 8 negotiated agreement than they could ever hope to
- 9 achieve in an equitable apportionment action.
- 10 So at the end of the day, we will be asking
- 11 this Court to issue a decree that sets a flow of
- 12 water --
- JUSTICE SOTOMAYOR: So you are prepared to
- 14 tell us, right now -- this is what you are saying to us:
- 15 We will not represent the interest of Duke?
- 16 MR. BROWNING: We will not represent the
- 17 interest of Duke.
- JUSTICE SOTOMAYOR: Are you prepared to say
- 19 the same thing with respect to your city?
- MR. BROWNING: With respect --
- 21 JUSTICE SOTOMAYOR: And to your -- and to
- 22 the CRWSP?
- MR. BROWNING: With respect to the city, we
- 24 have said in our briefs that we will defend this
- 25 interbasin transfer. We believe that we will represent

- 1 the city of Charlotte with respect to that regard, but
- 2 we also support their intervention motions because we do
- 3 not believe that it would result in them impeaching the
- 4 interests of North Carolina.
- 5 And more importantly, the Special Master got
- 6 it right, that there -- this is a specific attack on the
- 7 city of Charlotte and its unique interests. It is
- 8 seeking injunctive relief that will cripple the largest
- 9 cities --
- 10 CHIEF JUSTICE ROBERTS: Well, if it's an
- 11 attack -- if it's an attack on Charlotte, I would expect
- 12 the State to be standing there protecting it and not
- 13 feel that they can't do that without Charlotte, itself,
- 14 coming into the case.
- 15 MR. BROWNING: Your Honor, we will defend
- 16 this interbasin transfer, but the fact of the matter is
- injunctive relief is sought as against Charlotte, and
- 18 there is something to be said for fairness in allowing
- 19 that entity to be present in this Court.
- Now, turning --
- 21 JUSTICE SOTOMAYOR: Are you -- are you
- 22 prepared to say that you are not adequately defending
- the interest of the CRWSP?
- MR. BROWNING: Correct, Your Honor, that
- 25 that is an interstate entity. Its -- its interests have

- 1 been expressly attacked, the interbasin transfer. South
- 2 Carolina singles it out in the bill of complaint.
- 3 What's more important --
- 4 JUSTICE SOTOMAYOR: You haven't answered my
- 5 question. You said that you won't support them.
- 6 MR. BROWNING: Yes.
- 7 JUSTICE SOTOMAYOR: Are you not going to
- 8 support -- support the joint venture property?
- 9 MR. BROWNING: We -- we cannot represent the
- 10 interests of the joint venture. They have an interbasin
- 11 transfer, pursuant to the North Carolina statute for
- 12 Union County.
- 13 What the complaint doesn't disclose is that
- 14 the other half of that joint venture also has an
- 15 interbasin transfer with respect to Lancaster County,
- 16 South Carolina.
- 17 So South Carolina can hardly attack the
- 18 Union County interbasin transfer while, simultaneously,
- 19 defending the Lancaster County, South Carolina,
- 20 interbasin transfer.
- 21 JUSTICE GINSBURG: Let's go back to the
- 22 question of couldn't the Special Master receive the
- 23 information she wants if these three entities come in as
- 24 amici?
- Coming in as interveners, they have full

1	partv	status.	Thev	can	engage	in	discovery	7. The	v can

- 2 protract the case. They can appeal any adverse
- 3 judgment.
- 4 Why isn't the most reasonable accommodation
- 5 to say, well, we will listen to you, but we are not
- 6 going to give you full party status?
- 7 MR. BROWNING: Your Honor, if that were
- 8 the -- the standard, there would never be intervention
- 9 motions in any of these proceedings.
- 10 The fact of the matter is that these
- 11 entities have unique interests, and with respect to two
- 12 of those interests, Duke Energy and the Catawba River
- 13 Water Supply Project, their interests are not
- 14 represented by either State.
- 15 All three of them have been expressly
- 16 attacked in the complaint, and fairness dictates they
- 17 should have an opportunity to be heard.
- 18 Thank you.
- 19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- Mr. Frederick, you have two minutes.
- 21 REBUTTAL ARGUMENT OF DAVID C. FREDERICK
- ON BEHALF OF THE PLAINTIFF
- MR. FREDERICK: I have 4 points,
- 24 Mr. Chief Justice. First --
- JUSTICE SOTOMAYOR: Tell me, are you seeking

- 1 injunctive relief out of any of the three interveners?
- 2 MR. FREDERICK: No. We seek an injunction
- 3 in joining the interbasin transfer statute to the extent
- 4 it exceeds North Carolina's equitable apportionment. We
- 5 are here to get our fair share of the river vis-à-vis
- 6 North Carolina.
- 7 And Duke's CRA application expressly
- 8 disclaims any -- any ability to go into the interbasin
- 9 transfer. That's at page 20, footnote 14, of our motion
- 10 for leave to file exceptions.
- 11 The FERC has said it will not affect, in
- 12 giving its license, the equitable apportionment action
- 13 now pending before you.
- In Duke's CRA, at paragraph 39.9, it says it
- 15 does not affect State water uses. So the only issue
- 16 here is whether or not those expressed disclaimers
- 17 should be given affect when South Carolina is simply
- 18 seeking to determine, as between the two States, the
- 19 rights.
- JUSTICE SCALIA: But it affects the
- 21 agreement on which the license is based. The license
- 22 was based upon a very hard negotiated agreement among a
- 23 number of entities.
- 24 MR. FREDERICK: The license hasn't been
- 25 issued, Justice Scalia. It's still pending.

- 1 And that's what FERC has before it, and FERC
- 2 has said that the CRA will not affect what licenses
- 3 issue, but I want to go back --
- 4 JUSTICE SOTOMAYOR: Are you willing to
- 5 concede that if whatever you ask for here affects that
- 6 license, once its issued, that, then, Duke's
- 7 intervention is proper?
- 8 MR. FREDERICK: No, because the United
- 9 States' interest can affect the interest and represent
- 10 the interest of its licensees.
- 11 Duke's interests is completely derivative of
- 12 the United States' power to confer a license on the
- 13 energy producer. And the United States here is saying,
- 14 no, they should not be allowed to intervene.
- 15 JUSTICE SCALIA: I thought Duke said the
- 16 problem is not the United States -- so much the United
- 17 States granting a license. It's the license we
- 18 requested was based upon a negotiated agreement among a
- 19 number of entities.
- 20 And that agreement goes out the window
- 21 once -- on the basis of this lawsuit.
- MR. FREDERICK: The agreement is a private
- 23 contract among various water users, and it is no
- 24 different than the fact that all users of this river
- 25 will be affected, one way or the other, by whatever

1	decree this Court issues, whether they are on the South
2	Carolina side or the North Carolina side.
3	CHIEF JUSTICE ROBERTS: Thank you, counsel.
4	The case is submitted.
5	(Whereupon, at 2:02 p.m., the case in the
6	above-entitled matter was submitted.)
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