No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To Intervene

BRIEF OF THE STATE OF SOUTH CAROLINA IN OPPOSITION TO MOTION OF THE CATAWBA RIVER WATER SUPPLY PROJECT FOR LEAVE TO INTERVENE

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INTRODUCTION

This original action by South Carolina against North Carolina seeks an equitable apportionment of the Catawba River, which flows from North Carolina into South Carolina. South Carolina alleges that North Carolina has taken and is taking more than its fair share of the river waters, through a series of interbasin water transfers from the Catawba River. South Carolina requests that the Court determine each State's equitable share of the river and enjoin North Carolina from authorizing interbasin transfers and other consumptive uses inconsistent with that apportionment.

The Catawba River Water Supply Project (the "Project"), a joint venture of two municipalities – the Lancaster County Water and Sewer District, in South Carolina, and Union County, North Carolina – now moves to intervene on the ground that those municipalities' water rights will be "directly affected" by the apportionment in this case. Project Mot. 10. Intervention by the Project is both unprecedented and foreclosed by *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), in which this Court held that municipalities may not intervene in equitable apportionment actions because, in such "matter[s] of sovereign interest," the party States "'must be deemed to represent all [their] citizens.'" *Id.* at 372-73 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)).

Although the Project emphasizes that it is composed of two municipalities across state lines, municipalities cannot join forces to form a sovereign. Rather, the municipalities are creatures of state law, and any rights they enjoy "can rise no higher than those of [the party State]." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). The Project, therefore, cannot

demonstrate a "concrete" and "compelling interest in [its] own right, *apart from [its] interest in a class with all other citizens and creatures of the state*, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373-74 (emphasis added). The Project's motion to intervene should be denied.[1]

ARGUMENT

THE COURT SHOULD DENY THE PROJECT'S MOTION TO INTERVENE

A. The Project's Interests Are Conclusively Represented By The Party States

It is fundamental that original actions seeking the equitable apportionment of an interstate stream serve to adjudicate the rights of the party States *as between each other* and not among individual water users within those States. Indeed, this Court has "said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who none-

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[1] To facilitate the Court's consideration of the Project's motion in tandem with Duke Energy's motion to intervene, South Carolina files this opposition seven days earlier than is required by the Court's rules. Both Duke's and the Project's motions to intervene were filed on November 30, 2007. South Carolina received Duke's motion on December 1 and filed its opposition 10 days later. But South Carolina did not receive the Project's motion until December 10, 2007 – 10 days after it was filed. Accordingly, South Carolina's opposition is not due under the Court's rules until December 20, 2007. *See* Sup. Ct. R. 21.4 (response to motion due "within 10 days of receipt"). Despite having filed its motion with the Court on November 30, 2007, presumably in person, the Project served its motion only by first-class mail. *See* Sup. Ct. R. 29.3 (requiring service "by a manner at least as expeditious as the manner used to file the document with the Court"). A hand-stamped service copy is on file with the Office of the Attorney General.

theless are bound by the result reached through representation by their respective States." *Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-08 (1938); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932).

This Court appears never to have permitted a private person or non-sovereign entity, including municipal entities that supply water to local residents, to intervene in an original equitable apportionment action. *See, e.g., Nebraska v. Wyoming*, 296 U.S. 548 (1935) (order denying motion of Platte Valley Public Power & Irrigation District for leave to intervene); *Arizona v. California*, 345 U.S. 914 (1953) (denying motion of Sidney Kartus *et al.* for leave to intervene). Rather, equitable apportionment cases present "matter[s] of sovereign interest," and, as to such matters, it "is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration," that a State "must be deemed to represent all its citizens." *New Jersey v. New York*, 345 U.S. at 372-73 (internal quotation marks omitted). "Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* at 373.

In *New Jersey v. New York*, the Court denied Philadelphia's motion for leave to intervene, reasoning:

> The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the

> separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. Furthermore, we are told by New Jersey that there are cities along the Delaware River in that State which, like Philadelphia, are responsible for their own water systems, and which will insist upon a right to intervene if Philadelphia is admitted. . . . Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions.

Id. (footnote omitted).[2]

Those considerations compel denial of intervention here. The municipalities composing the Project represent only a discrete subset of interests in either State. They compete, within their respective States, for allocation of water *from* each State. This Court has made clear, however, that allocations *within a State* are necessarily constrained by the apportionment decrees dividing river water *between States*. *See Hinderlider*, 304 U.S. at 106 (holding that an "apportionment [by this Court] is binding upon the citizens of each State and all water claimants," even where the State had previously allocated state-law water rights among individual claimants); *see also Nebraska v. Wyoming*, 515 U.S. at 22. Thus, as to the equitable share between the party States, municipalities' rights – regardless of their authority granted under state law – "can rise no higher than

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[2] The Court denied Philadelphia's motion to intervene despite a "Home Rule Charter" granted by the Commonwealth, making "Philadelphia . . . responsible for her own water system." 345 U.S. at 374. As the Court explained, "that responsibility is invariably served by the Commonwealth's position." *Id.*

those of [the party State], and an adjudication of the [State's] rights will necessarily bind [them]." *Nebraska v. Wyoming*, 295 U.S. at 43.

Kentucky v. Indiana, on which the Court relied in *New Jersey v. New York*, is particularly instructive here. *See* 281 U.S. at 173. In that case, the party States had agreed to an interstate compact to build a bridge across the Ohio River. Indiana citizens sought to enjoin construction of the bridge in Indiana state court, and the resulting delay caused Indiana to breach the compact. After Kentucky invoked this Court's original jurisdiction to seek specific performance. Indiana answered that "[t]he State of Indiana believes said contract is valid" and that the "only excuse" it had for delaying its performance was the state-court litigation its citizens brought. *See id.* at 169-71. This Court granted Kentucky's requested relief, including enjoining the Indiana state-court litigation, holding that

> [a] state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point.

Id. at 173. Were it "[o]therwise," the Court explained, "all the citizens of both states, as one citizen, voter and taxpayer has as much right as another in this respect, would be entitled to be heard." *Id.*

The principles set forth in these cases foreclose the Project's arguments for intervention. As *Kentucky v. Indiana* makes clear, the Project's own view as to the scope of its state-law rights – in either State – would have no bearing on the Court's resolution of this case,

for the position taken by the party States as to the content of their own law, and the Project's rights thereunder, will be conclusive. Moreover, the municipalities that compose the Project are by no means unique in their dependence on the Catawba River for water. Indeed, hundreds – if not thousands – of entities in both States depend on the Catawba River, including numerous municipalities. If the Court were to grant the Project's motion, "there would be no practical limitation on the number of [water users], as such, who would be entitled to be made parties." *New Jersey v. New York*, 345 U.S. at 373.

Notably, *both* of the water users that have sought thus far to intervene in this matter have claimed "unique" interests in the Catawba River because they use water on both sides of the boundary. *See* Project Mot. 12 (claiming "one-of-a-kind presence on both sides of the . . . border"); Duke Mot. 3 (claiming "unique" interests, among other reasons, because of "facilities located in *both* Carolinas"). Each disproves the other and "demonstrates the wisdom of the rule" against intervention in equitable apportionment actions. *New Jersey v. New York*, 345 U.S. at 373.

B. Two Municipalities Cannot Reach Across State Lines To Create Sovereign Rights

The Project does not argue that either of its member municipalities would itself be permitted to intervene – nor could it. Rather, the Project seeks to avoid the clear force of this Court's precedents by pointing out that its members are from different States. But that does nothing to change the character of the municipalities' inherently state-law interests. Indeed, there is no basis in American law for the proposition that two or more municipalities, by

reaching across state lines in a joint venture, can create rights that are on a par with the sovereign States under whose authority the municipalities exist. The Constitution recognizes that States may enter into legally cognizable compacts with each other – subject to approval by Congress – but municipalities plainly have no such authority on their own. *See* U.S. Const. art. I, § 10, cl. 3 ("[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State").

Indeed, that the Project is a cross-boundary joint venture between local municipalities only amplifies the reasons for denying intervention. Rather than being drawn into a potential intramural dispute over water use between *one* State and its municipality, intervention here would effect that result in *two* States. Moreover, the Project itself consists of municipalities that may have differing interests even among themselves because they are located in different States; if the Project is permitted to intervene and takes a position that either of its members disagrees with, then the Court could be faced with yet another motion to intervene from either or both of those municipalities to set the record straight. There is no precedent at all for permitting intervention by municipalities or private water users, and allowing it here would open up the floodgates for numerous others to argue for intervention as well – upsetting decades of this Court's settled precedents.

Like Duke, the Project points to *Arizona v. California*, 460 U.S. 605, 614-15 (1983), and *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981), in support of its motion, but those cases – and an additional one the Project cites, *Texas v. New Jersey*, 379 U.S. 674, 677 n.6 (1965) – are inapposite for the reasons set forth at pages 11-12 of South Carolina's opposition to

Duke's motion. Namely, *Arizona v. California* and *Texas v. New Jersey* involved intervention by sovereign or quasi-sovereign entities separate from the original state parties; the municipalities comprising the Project are neither. And *Maryland v. Louisiana*, a tax case, has no application to the special circumstances presented by equitable apportionment cases.

The Project also relies on *Utah v. United States*, 394 U.S. 89 (1969), but the Court there *denied* a private landowner's motion to intervene. Although the Court noted, in a dictum, that, on facts not presented in that case, the private landowner's motion "would have had a substantial basis," *id.* at 92, the Court did not state that it would have granted that motion. In any event, *Utah v. United States* was not an equitable apportionment case.

C. The Project's Interests Can Be Protected In Ways Short Of Full Party Status

Like Duke, the Project contends that it has relevant knowledge and expertise that will be helpful in resolving the issues that will be in play in this case. As set forth in South Carolina's opposition to Duke's motion at pages 13-14, mere possession of relevant information is not a proper basis for intervention, and the party States will have access to any such information through third-party discovery in any event. Furthermore, the Project, like Duke, cannot demonstrate why participation as *amicus curiae* would be insufficient to assert its interests. *See id.*

CONCLUSION

The Catawba River Water Supply Project's motion for leave to intervene should be denied.

Respectfully submitted,

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