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 FOR LEAVE TO INTERVENE OF THE CITY OF CHARLOTTE, NORTH CAROLINA

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INTRODUCTION

This is a dispute between two States. South Carolina seeks an equitable apportionment of the Catawba River and an injunction preventing North Carolina from authorizing transfers out of that river and other uses inconsistent with that apportionment. The City of Charlotte, North Carolina, is now the third user of water from the Catawba River that seeks to intervene in this case. If Charlotte's motion were granted, it surely will not be the last, as more of the entities that rely upon water from the Catawba River decide that they, too, have "unique" interests that put them "in a class by [them]sel[ves]." *See* Catawba River Water Supply Project Mot. 12; Duke Mot. 3; Charlotte Mot. 17.

But this Court has already rejected precisely the same claims, holding in *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), 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)). The City of Charlotte – like Duke Energy Carolinas, LLC ("Duke") and the Catawba River Water Supply Project (the "Project") – has provided no basis for departing from that rule. Allowing Charlotte to intervene would leave the Court with no principled or practical stopping point to exclude the countless other water users in North Carolina and South Carolina that rely upon the Catawba River. Such interventions significantly expand the administrative complexity of this original case "to the dimensions of [an] ordinary class action[]." *Id.* at 373. Because Charlotte's interests are conclusively represented by North Carolina, the motion to intervene should be denied.

ARGUMENT

THE COURT SHOULD DENY CHARLOTTE'S MOTION TO INTERVENE

A. Charlotte's Interests Are Conclusively Represented By North Carolina

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 nonetheless 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 the City of 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).[1]

Those considerations compel denial of Charlotte's motion. Indeed, Charlotte invites the Court to take up precisely the kind of "intramural dispute over the distribution of water within" a State that the Court

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[1] 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.*

refused to entertain in *New Jersey v. New York*. *Id.* In attempting to establish that its interests cannot be adequately represented by North Carolina, Charlotte points out only "one clear difference" between its own interests and North Carolina's: "North Carolina . . . must balance the multiple interests of all upstream and downstream users of the River in the State whereas Charlotte's interests are exclusively downstream." Mot. 19 (internal quotation marks omitted). That "difference" of interests, however, represents a purely intrastate struggle. *New Jersey v. New York* holds that a municipality's interest in winning that kind of intramural dispute is not a proper basis upon which to intervene in an original action.[2]

Rather, this Court has made clear that allocations of water *within a State* are necessarily constrained by the apportionment decrees dividing river water *between States*. *See Hinderlider*, 304 U.S. at 106

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[2] The lower court decisions upon which Charlotte relies are inapposite, as those cases did not involve the proper scope of this Court's original jurisdiction. Indeed, as the district court acknowledged in *Alabama v. United States Army Corps of Engineers*, 229 F.R.D. 669 (N.D. Ala. 2005), upon which Charlotte relies, the jurisdiction of the district and circuit courts long has been "expanded to the dimensions of ordinary class actions," *New Jersey v. New York*, 345 U.S. at 373, and thus "a party seeking to intervene in a suit before a district court need only make a 'minimal' showing of inadequate representation." 229 F.R.D. at 674. Moreover, the Eighth Circuit's decision in *South Dakota v. Ubbelohde*, 330 F.3d 1014 (8th Cir. 2003), held that the Army Corps of Engineers could not adequately represent, *parens patriae*, the interests of the State of Nebraska because the Corps was charged with representing *both* the upstream interests of South Dakota and the downstream interests of Nebraska. No question was presented as to whether Nebraska could properly represent the water rights of its own citizens.

(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, the rights of a municipality – regardless of its authority granted under state law – "can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind [it]." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935).

In rejecting Philadelphia's intervention motion in *New Jersey v. New York*, 345 U.S. at 373, this Court relied on *Kentucky v. Indiana*, which provides especially pertinent guidance here. *See* 281 U.S. at 173. In the *Kentucky* 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 initiated by its citizens. *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.*

As with the Project's motion, the principles set forth in these cases foreclose Charlotte's arguments for intervention. As *Kentucky v. Indiana* makes clear, Charlotte's own view of how water should be allocated within North Carolina would have no bearing on the Court's resolution of this case, for the position taken by North Carolina as to the content of its own law, and Charlotte's rights thereunder, will be conclusive. Notably, the State of North Carolina, for its part, disagrees with Charlotte's submission that the State "cannot, or will not[,] represent the interests of Charlotte in this litigation." Brief of North Carolina in Response to Charlotte's Motion for Leave To Intervene 2 ("NC Br."). That alone disposes of Charlotte's claimed need to intervene; the only remaining purpose to be served by Charlotte's intervention would be to provide duplicative support for North Carolina's defense.

Moreover, although Charlotte claims (at 17) that its sheer "size and [Interbasin Transfer] Certificate place [it] in a class by [it]self," Charlotte is by no means unique in its dependence upon the Catawba River for water. Charlotte is now the *third* would-be intervenor to claim a unique interest in the waters of the Catawba River. *See* Project Mot. 12; Duke Mot. 3. If the Court were to grant Charlotte's motion, then it would seem inevitable that many more such motions will follow; "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. (And Charlotte's size hardly provides a principled basis for denying inter-

vention to otherwise similarly situated municipalities.) Thus, Charlotte's motion, like those of the Project and Duke, "demonstrates the wisdom of the rule" against intervention in equitable apportionment actions. *Id.*

B. The Precedents Cited By Charlotte Are Inapposite

Charlotte, like Duke and the Project, has not cited a single equitable apportionment action in which a municipality or private party has been permitted to intervene. Rather, Charlotte relies on cases in which cities "have been parties in original actions commenced by States." Mot. 10-11, 14 (citing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *New Jersey v. New York*, *supra*; *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Wisconsin v. City of Duluth*, 96 U.S. 379 (1877)). But, as Charlotte acknowledges (at 14), in these cases the cities were not permitted to intervene, but rather were named by the plaintiff as party defendants and were thus *compelled* to join. In *New Jersey v. New York*, the Court found that difference to be of critical importance:

> The presence of New York City in this litigation is urged as a reason for permitting Philadelphia to intervene. But the argument misconstrues New York City's position in the case. New York City was not admitted into this litigation as a matter of discretion at her request. She was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey.

345 U.S. at 374-75.

Charlotte emphasizes that it is the holder of one of the interbasin transfer permits to which South Carolina objects and that, like New York City in *New Jersey v. New York*, it is thus an agent of the injury complained of here. But the Court in *New Jersey v. New York* gave no indication that status as an agent of injury would provide a ground for intervention "as a matter of discretion," *id.*, nor does any such indication appear in *Missouri v. Illinois*, 180 U.S. at 242, which Charlotte also cites (at 14). To the contrary, the Court's opinion in *New Jersey v. New York* strongly implies that New York City would not have been permitted to *intervene*, even though because it was named as a defendant it was allowed to remain a party "subordinate to the parent state as the primary defendant," given that its presence "raise[d] no problems under the Eleventh Amendment." 345 U.S. at 375.

Moreover, contrary to Charlotte's argument (at 14) that "[t]he instant action is incomplete without Charlotte," South Carolina had no reason to name Charlotte as a defendant in this case. When *New Jersey v. New York* was filed in 1929 (as when *Missouri v. Illinois* was filed in 1900), it was unclear whether individual water-rights claimants would be bound by the results of an original action if they were not joined by the plaintiff as party defendants. *See Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (raising but not deciding whether individual water-rights claimants in the defendant State should be joined as party defendants by the plaintiff State). "Not surprisingly, the practice soon developed of joining persons or entities within the defendant state whose claims appeared to be at stake." 4 Robert E. Beck et al., *Waters and Water Rights* § 45.03(b), at 45-20 (1991 ed., 2004 replace. vol.) ("Beck"). In 1932, how-

ever, the Court's decision in *Wyoming v. Colorado* resolved that issue, holding that an apportionment by this Court is binding upon all "water claimants" in both of the party States. *See Wyoming v. Colorado*, 286 U.S. at 508-09; *Nebraska v. Wyoming*, 295 U.S. at 43. Since then, "individual water claimants usually have not been joined in equitable apportionment suits." 4 Beck § 45.03(b), at 45-21. Thus, the now-outdated precautionary practice of naming municipalities as defendants provides Charlotte no justification for seeking permission to intervene here.

Charlotte points to only one original action in which a city has been permitted to intervene, *see Texas v. Louisiana*, 416 U.S. 965 (1974), but in that case the motion to intervene was unopposed, *see* Brief of the United States in Opposition to the City of Port Arthur's Motion for a More Definite Statement at 2, No. 36, Orig. (filed Apr. 23, 1974). The Court there disposed of the motion in a one-line order and without explanation. In any event, *Texas v. Louisiana* did not involve an equitable apportionment of an interstate stream; rather, as the Court later explained, the City of Port Arthur "was permitted to intervene for purposes of protecting its interests in [certain real property]," to which the United States also claimed title. *Texas v. Louisiana*, 426 U.S. 465, 466 (1976) (per curiam). In that circumstance, the United States's non-opposition to Port Arthur's motion likely was dispositve. *Texas v. Louisiana* provides no suggestion that the Court intended to depart from the rule established in *New Jersey v. New York*, which controls in this equitable apportionment action.

C. Charlotte's Claimed Rights Under The CRA Are Irrelevant

Charlotte's claimed rights under the Comprehensive Relicensing Agreement ("CRA") pursuant to which Duke has applied for a new license for its hydroelectric projects on the Catawba River do not support Charlotte's intervention motion. As South Carolina explained at pages 6-7 of its opposition to Duke's motion, the CRA expressly disclaims resolution of the water rights issues raised in this case. Moreover, as Charlotte acknowledges (at 9), there are "68 other parties" to the CRA and, under Charlotte's reasoning, each may be presumed to claim an entitlement to intervene. Perhaps attempting to mitigate the inevitable extension of its argument, Charlotte notes (at 10) that "South Carolina has brought this action in *parens patriae*, and therefore represents all of the 28 South Carolina parties to the CRA." The truth of that statement also establishes that North Carolina similarly represents Charlotte's interests here.

Charlotte's argument as to how its interests under the CRA diverge from North Carolina's stretches logic to the breaking point. Charlotte argues (at 19-20) that it should be permitted to intervene because it is "not constrained," as is the State of North Carolina, by section 401 of the Clean Water Act – which requires North Carolina to certify that discharges into navigable waters will not violate water-quality standards, 33 U.S.C. § 1341. North Carolina itself disagrees with that assertion. *See* NC Br. 2. It would be anomalous to suppose that any asserted interest Charlotte could claim in *violating* the water-quality standards under the Clean Water Act forms a legitimate basis for the City to intervene in this action.

D. Charlotte's Interests Can Be Protected In Ways Short Of Full Party Status

Like the other would-be intervenors, Charlotte fails to explain why its participation as *amicus curiae* would be insufficient to assert its interests. If its interests are as significant as it asserts, the City will surely exercise important influence over North Carolina in the litigation of this action. And such influence will not come at the expense of any *amicus* brief Charlotte might file as to any appropriate dispositive motion. The Court need not grant Charlotte full party status in this original action for the City to protect any interests not fully represented by North Carolina. *See also* Brief of South Carolina in Opp. to Duke Motion To Intervene 14.

CONCLUSION

The City of Charlotte's motion for leave to intervene should be denied.

Respectfully submitted,

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