No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY OF THE UNITED STATES IN OPPOSITION TO THE MOTION OF THE STATE OF ALASKA FOR LEAVE TO FILE A SUR-REPLY BRIEF

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 128, ORIGINAL

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY OF THE UNITED STATES IN OPPOSITION TO THE MOTION OF THE STATE OF ALASKA FOR LEAVE TO FILE A SUR-REPLY BRIEF

ARGUMENT

When this Court receives a report of a special master in an original action, it typically invites the parties to file exceptions. See, *e.g.*, *Alaska* v. *United States*, 124 S. Ct. 2093 (2004). The Rules of this Court govern the form and length of the parties' briefs. See Sup. Ct. R. 33.1(g). Those Rules provide that the party filing exceptions may submit a 50-page brief in support of its exceptions, Sup. Ct. R. 33.1(g)(vi), while a party opposing the exceptions may submit a 50-page reply, Sup. Ct. R. 33.1(g)(viii) and (ix). Alaska, which has filed three exceptions to the Special Master's report in this case, has now moved for leave to file a "sur-reply brief" in response to the United States' reply brief. The United States opposes Alaska's motion because: (1) Alaska's proposal is inconsistent with the Court's Rules and customary practice in original cases; (2) Alaska has not provided an adequate justification for departing from this Court's normal briefing practice; and (3) granting Alaska's motion would not promote the fair and efficient presentation of the issues in this case.

1. This Court's Rules And Its Customary Practice In Original Actions Do Not Provide For A Sur-Reply

The Rules of this Court make no provision for a party to file a sur-reply brief in any circumstance, and this Court does not, as a matter of customary practice, allow such a brief in original actions. For at least 70 years, in dozens of original actions involving a wide range of issues, this Court has followed the practice of reviewing a special master's report by allowing "exceptions" with supporting briefs and "reply briefs" in response to the exceptions. *E.g.*, *United States* v. *Oregon*, 293 U.S. 524 (1934).[1] The Court formalized that practice in its July 26, 1995, amendments to Rule 33.1(g) of the Rules of this Court. See 28 U.S.C. App. at 510-511 (Supp. I 1995). The Court's decision to revise its Rules to formalize its practice expresses a judgment that the long-standing procedure ordinarily provides the Court with appropriate briefing when a party raises a challenge to a special master's recommendations.[2]

---

[1] See, *e.g.*, *Alaska* v. *United States*, 124 S. Ct. 2093 (2004); *Kansas* v. *Colorado*, 124 S. Ct. 951 (2003); *Arizona* v. *California*, 528 U.S. 803 (1999); *Nebraska* v. *Wyoming*, 513 U.S. 923 (1994); *Virginia* v. *Maryland*, 537 U.S. 1102 (2003); *Oklahoma* v. *New Mexico*, 498 U.S. 956 (1990); *South Carolina* v. *Baker*, 479 U.S. 1078 (1987); *Texas* v. *New Mexico*, 465 U.S. 1063 (1984); *Tennessee* v. *Arkansas*, 451 U.S. 968 (1981); *United States* v. *California*, 444 U.S. 816 (1979); *Utah* v. *United States*, 425 U.S. 948 (1976); *United States* v. *Louisiana*, 419 U.S. 814 (1974); *Arkansas* v. *Tennessee*, 396 U.S. 873 (1969); *Louisiana* v. *Mississippi*, 381 U.S. 947 (1965); *Texas* v. *New Jersey*, 375 U.S. 928 (1963); *United States* v. *California*, 341 U.S. 946 (1951); *Arkansas* v. *Tennessee*, 308 U.S. 511 (1939).

[2] The United States has not discovered any instance in which the Court, on its own initiative, has directed a party to file a sur-reply in the course of briefing exceptions to a special master's report. The United States has discovered one instance in which the Court directed a party to filed a reply to a response opposing leave to file a bill of complaint. *Illinois* v. *Missouri*, 380 U.S. 901 (1965). The Rules of this Court currently allow a party to file a reply in response to a brief opposing a motion for leave to file a complaint. See Sup. Ct. R. 17.5.

In the vast majority of original actions, including important disputes that have prompted participation by amici curiae, the parties do not seek leave to file sur-reply briefs. See, *e.g.*, *Virginia* v. *Maryland*, 540 U.S. 56 (2003).[3] Nevertheless, in a few instances, a party has requested and received leave to file a sur-reply or its equivalent. See AK Mot. 2. In four of the five instances that Alaska cites, however, no party objected to the filing of the sur-reply.[4] In the fifth instance, a prior original action involving the United States and Alaska, the parties *jointly requested*, at the time the special master filed his report, that the Court enter a stipulated briefing schedule allowing each party to file a sur-reply. See *United States* v. *Alaska*, 517 U.S. 1207 (1996); Letter from Solicitor General Days to Francis J. Lorson, Deputy Clerk (May 14, 1996). Alaska has not cited, and the United States has not uncovered, any case in which the Court has allowed the filing of a sur-reply on exceptions over the objections of a party. During the same period, in other important and complex original actions, the Court has denied

---

[3] In *Virginia* v. *Maryland*, No. 129, Original, the Court's docket entries show that Virginia filed a motion on July 22, 2003, requesting the Court to take judicial notice of certain matters, and that the Court denied that motion on October 6, 2003. See 124 S. Ct. 371 (2003).

[4] In *Kansas* v. *Colorado*, 124 S. Ct. 2433 (2004) (No. 105, Original), the United States did not object to Kansas's filing of a sur-reply limited to addressing the United States' arguments respecting Kansas's exceptions, where the United States, although a party to that action, did not participate in the proceedings before the Special Master but filed a brief opposing two of Kansas's exceptions. See KS Mot. for Leave to File Sur-Reply 1 (Apr. 23, 2004). In *Kansas* v. *Colorado*, 531 U.S. 1122 (2001) (No. 105, Original), the United States likewise did not object to Colorado's filing of a sur-reply in response to the United States' arguments in similar circumstances. This Court's docket entries in *Texas* v. *New Mexico*, 485 U.S. 388 (1988) (No. 65, Original), do not record any opposition to New Mexico's March 11, 1988, motion for leave to file a reply to Texas's reply, and the Court's docket entries in *Arizona* v. *California*, 459 U.S. 811 (1982) (No. 8, Original), do not record any opposition to Arizona's August 10, 1982, motion for leave to file a brief in response to the reply brief of the United States.

unilateral motions for leave to file a sur-reply brief in response to a reply to exceptions. See *New Jersey* v. *New York*, 521 U.S. 1149 (1997) (Ellis Island); *Nebraska* v. *Wyoming*, 506 U.S. 938 (1992) (enforcement of the Platte River Decree). The Court's decisions demonstrate that in reviewing exceptions, as in other contexts, the Court disfavors sur-replies and allows them only when there is a strong justification.[5]

2. Alaska Has Not Provided A Persuasive Justification For This Court To Depart From Its Normal Briefing Practice

Alaska provides five arguments in support of its motion for leave to file a sur-reply. Those justifications, whether viewed individually or in combination, are unpersuasive.

a. Alaska first contends (AK Mot. 3) that the Court should allow a reply brief because this case presents "very important" and "complex" questions that will dispositively resolve sovereign issues. But those features are common to most original actions, including cases in which neither party seeks to file a sur-reply, *e.g.*, *Virginia* v. *Maryland*, *supra*, and cases in which the Court has denied motions for leave to file a reply brief, *e.g.*, *New Jersey* v. *New York*, *supra*.[6]

b. Alaska next contends (AK Mot. 4) that it should be granted leave to file a sur-reply because the United States did not file exceptions to the Special Master's report and

---

[5] The Court summarily denies motions for leave to file a sur-reply in other contexts. See *Stewart* v. *Dutra Constr. Co.*, No. 03-814, 2004 WL 2157976 (Sept. 28, 2004) (certiorari jurisdiction); *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 528 U.S. 984 (1999) (certiorari jurisdiction); *Kansas* v. *Nebraska*, 525 U.S. 1101 (1999) (motion for leave to file complaint); *C & A Carbone, Inc.* v. *Town of Clarkstown*, 510 U.S. 961 (1993) (certiorari jurisdiction); *New Jersey* v. *New York*, 510 U.S. 805 (1993) (motion for leave to file complaint).

[6] Alaska also asserts that, as a matter of "simple fairness," it should have an opportunity to respond to the United States' reply. AK Mot. 4. The United States addresses that assertion in the third point of its submission, at pp. 6-9 *supra*.

therefore Alaska will not have an opportunity for "further reply." But even if the United States had filed exceptions, Alaska's reply would have been limited to responding to *those exceptions*. The absence of exceptions by the United States has no bearing on Alaska's request for leave to file a sur-reply respecting Alaska's *own* exceptions. See *Virginia* v. *Maryland*, *supra* (Maryland alone filed exceptions and did not request leave to file a sur-reply).[7]

c. Alaska contends (AK Mot. 5) that it should be granted leave to file a sur-reply because the sur-reply serves the same function as a reply brief within the Court's certiorari jurisdiction, allowing a petitioner to "respon[d] to the respondent's arguments." The Court, however, has adopted a different approach to briefing exceptions in original actions, which limits the parties to one brief apiece and requires the parties to focus their arguments on excepting to or defending the master's report. As Alaska notes, the Master's extensive report in this case provides recommendations drawn from 18 briefs and more than 560 exhibits. *Ibid.* The Court's Rules and customary practice properly direct the parties to focus their attention squarely on why they believe the Master's recommendations are right or wrong. Alaska has not suggested that the Court's Rules and customary practice should be changed.

d. Alaska contends (AK Mot. 5-6) that it should be granted leave to file a sur-reply to address the amicus curiae brief of the National Parks Conservation Association

---

[7] Alaska observes that, while the United States did not file exceptions, it noted in three footnotes its disagreement with some of the Master's statements on nondispositive matters. See U.S. Reply Br. 14 n.7, 24 n.12, 28 n.17. The United States did not file exceptions because it fully supports the Master's ultimate recommendations. As the United States made clear, the statements that the United States questioned involve matters that the Court need not reach and that, in any event, would not affect the outcome of this case. *Ibid.* Alaska has no need to respond to matters that cannot affect the resolution of its exceptions.

(NPCA). Alaska devotes, however, a scant three pages of its proposed sur-reply to the NPCA's arguments, stating—contrary to its claim that it needs to address the NPCA's "new arguments" (AK Mot. 6)—that "[t]he Court cannot consider the arguments of the amicus that the United States has never raised." Sur-Reply 9. In any event, the Court's Rules do not provide that a party filing exceptions is entitled to respond to an amicus curiae supporting the master's report. The Court has previously declined to allow a sur-reply in original actions, notwithstanding the filing of amicus curiae briefs. See *New Jersey* v. *New York*, 521 U.S. 1149 (1997); *Nebraska* v. *Wyoming*, 504 U.S. 905 (1992); 506 U.S. 938 (1992). It would be unwise to set a contrary precedent that would invite a sur-reply whenever an amicus curiae brief supporting a master's report is filed.[8]

e. Finally, Alaska contends (AK Mot. 6) that its proposed sur-reply "conforms" with the Court's Rules governing reply briefs filed under the Court's certiorari jurisdiction. But that observation is inapposite, because the Court's Rules provide for certiorari jurisdiction reply briefs, but do not provide for the filing of a sur-reply. Moreover, as described below, the proposed sur-reply seeks to reargue matters that have already received full briefing and consideration by the Special Master.

3. Allowing Alaska To File A Sur-Reply Would Not Promote The Fair And Efficient Presentation Of The Issues In This Case

The United States has consented to the filing of a sur-reply in those instances in which the United States has a basis for concluding that the additional briefing is likely to benefit the Court by providing a fair and efficient presenta-

---

[8] The United States, like Alaska, has had no opportunity to respond to the NPCA brief, and the Court cannot assume that the United States would necessarily agree with any new argument that an amicus curiae might raise.

tion of the issues. See *Kansas* v. *Colorado*, *supra*; *United States* v. *Alaska*, *supra*; p. 3, *supra*. Alaska' proposed sur-reply does not meet that test.

Alaska describes its proposed sur-reply as "Alaska's first opportunity before this Court to respond to any arguments raised against the State." AK Mot. 2. The predominant theme of the proposed sur-reply itself, however, is that the United States' reply has "nothing to say" about the matters at issue, "does not answer" Alaska's contentions, and simply "parrots the Master's view." Sur-Reply 4, 13, 17. The Court can judge for itself whether the United States has responded to Alaska's exceptions; Alaska does not need a 20-page sur-reply to argue that the United States' reply is unresponsive. But setting Alaska's hyperbole to one side, the parties thoroughly briefed the decisive matters before the Master, who comprehensively addressed them in his lengthy report. For example, the Master's report specifically identifies and exhaustively examines the parties' respective positions on the historic inland waters issue. See Rep. 9-138. Alaska's proposed sur-reply would simply revisit the competing contentions.[9] The Master likewise decided all the issues

---

[9] Alaska's proposed sur-reply would revisit seven subjects that received extensive attention before the Master: (1) the nature of the authority the United States must exercise to establish historic inland waters (compare Sur-Reply 12-13, with US-I Memo. 6-7, 43-44; US-I Opp. 3-5; US-I Reply 15-17; Rep. 14, 109-129); (2) comments made at, and references to, the 1903 Arbitration (compare Sur-Reply 13, with US-I Memo. 22-24, 40-42; US-I Opp. 17, 27-30; US-I Reply 18; Rep. 62 n.26, 115-119); (3) the Marguerite incident (compare Sur-Reply 14, with US-I Opp. 19-21; Rep. 21, 66-68); (4) the assertions of authority necessary to support an historic inland water claim (compare Sur-Reply 14, with US-I Memo. 7; US-I Opp. 18-19; Rep. 119-122); (5) Russia's alleged assertions of authority and the United States' alleged claims after 1867 (compare Sur-Reply 15-16, with US-I Memo. 19, 31-38, 42 n.21; US-I Opp. 3, 6-11, 15-26, 30, 35-40; US-I Reply 5-9, 12-15, 16 n.9; Rep. 45-114, 126-127); (6) the time period required for an historic water claim to ripen (compare Sur-Reply 16, with US-I Memo. 8-9, 33-40; US-I Opp. 43; Rep. 133-135); and (7) the vital interest of the United States in discouraging expansive historic inland water claims

placed before him respecting juridical bays. See Rep. 138-226. Alaska's proposed sur-reply would merely attempt to recapitulate past arguments and revive forfeited contentions.[10] And the Master gave careful attention to the status of Glacier Bay. Alaska's proposed sur-reply, again, replays disputes before the Master.[11]

Alaska's proposal to file a repetitive and unnecessary sur-reply brief is not only inefficient, but it is also unfair to the

---

(compare Sur-Reply 16, with US-I Memo. 2-5; US-I Opp. 40-44; US-I Reply 20-22; Rep. 133-135).

[10] Alaska's proposed sur-reply repeats Alaska's prior arguments respecting the status of Rocky Pass and Wrangell Narrows that Alaska could have made, but did not, in its exceptions brief. Compare Sur-Reply 16-18, with US-II Memo. 24-41; US-II Opp. 4-22, 24-30; US-II Reply 11-21; Rep. 147-198. The proposed sur-reply additionally argues, for the first time, that Dry Island should be assimilated to the mainland under the test set out in *United States* v. *Maine*, 469 U.S. 504 (1985). Sur-Reply 18. The United States explained in its reply brief in this Court (at 27) that the State had forfeited such arguments because it did not raise them before the Master. The Master declined to make a recommendation on the point for that same reason. Rep. 192-193. The proposed sur-reply also addresses the issue of "geographic obviousness," again making arguments that it could have made, but did not, in its exceptions brief. See Sur-Reply 18-19. In particular, Alaska quarrels with the Master's use of "geographic obviousness" as a minimum requirement for juridical bay status despite the fact that the requirement is set out by Alaska's expert. Sur-Reply 18-19. See Gayl S. Westerman, *The Juridical Bay* 85 (1987); compare AK-II Memo. 29, 37-39, with US-II Memo. 18-22; US-II Reply 6; Rep. 212-213. The parties extensively briefed the specific requirements of Article 7. Compare AK-II Memo. 28-44 and AK-II Reply 14-24 with US-II Opp. 33-41. The Master carefully considered the parties' arguments in resolving whether the features at issue qualify as juridical bays. Rep. 198-226.

[11] The proposed sur-reply addresses four previously briefed points: (1) the scope of Section 6(e) of the Alaska Statehood Act (compare Sur-Reply 1-5, with US-IV Reply 20-24; Rep. 267-272); (2) the legislative history of Section 6(e) (compare Sur-Reply 5-6, with US-IV Memo. 37-39; US-IV Reply 20-24); (3) the relevance of *United States* v. *Alaska*, 521 U.S. 1 (1997) (compare Sur-Reply 6-7, with US-IV Memo. 37; US-IV Reply 20); Rep. 266-272; (4) the setting apart of Glacier Bay National Monument for the protection of wildlife (compare Sur-Reply 7-8, with US-IV Memo. 14-20, 38-39; US-IV Reply 12, 14-25; Rep. 253-264).

United States. Alaska had complete latitude in selecting its exceptions to the Special Master's report. Alaska knew that the United States would rely on the same arguments that it presented to the Master in defending the Master's report. Alaska also knew that, unlike in *United States* v. *Alaska*, *supra*, the parties had made no provision in advance for any sur-reply. Alaska should therefore have presented every argument it intended to make in its exceptions brief, so that the United States could respond to those arguments in its reply. Alaska instead proposes to burden the Court with a sur-reply containing arguments that the United States could readily answer if it had the opportunity.

This Court's Rules contemplate that the parties will brief cases under the constraints that those Rules impose. It is neither efficient nor fair to alter the briefing rules, contrary to customary practice, after the prescribed briefs have been filed, to one party's detriment. The United States accordingly opposes Alaska's motion for leave to file a sur-reply.

CONCLUSION

The motion of the State of Alaska for leave to file a sur-reply should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

OCTOBER 2004