No. 131, ORIGINAL

In The

Supreme Court of the United States

THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion For Leave To File Bill Of Complaint

REPLY BRIEF

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This case clearly warrants the exercise of this Court's original jurisdiction under United States Constitution, Article III, § 2 and 28 U.S.C. § 1251(a). The Southeast Interstate Low-Level Radioactive Waste Management Commission, pursuant to a Compact initially agreed to by eight states and formally ratified by Congress, currently represents six states in this Court seeking to enforce the sanctions levied on their neighbor state, North Carolina. In light of the paramount interests of federalism and public health and safety implicated by the Commission's imposition of sanctions occasioned by North Carolina's refusal to fulfill its responsibilities under the Compact, this case squarely fits within the Court's original jurisdiction over controversies among States.

I. THE COURT HAS ORIGINAL JURISDICTION OVER THIS MATTER.

Article III, § 2 of the United States Constitution grants this Court original jurisdiction over those cases "in which a State shall be a Party." Congress has declared this authority exclusive in "controversies between two or more States." 28 U.S.C. § 1251(a). Defendant argues that because the Commission is a "distinct legal entity" (Opp. 9), created by the States to the Compact rather than itself a State, or a collection of States, this action falls outside the Court's original jurisdiction. The Court should reject this argument and grant leave to file the complaint in this case.

The cases that Defendant cites in support of its line of reasoning are inapposite. Drawn solely from the Court's Eleventh Amendment jurisprudence, they stand for no more than the proposition that the Commission is not a State for purposes of the Eleventh Amendment. This proposition, albeit correct, is so for reasons entirely irrelevant here. In a portion of *Hess* v. *Port Authority Trans-*

Hudson Corp. not quoted by Defendant, the Court clarified why the immunity traditionally accorded a sovereign state should not be accorded a Commission:

> Suit in federal court is not an affront to the dignity of a Compact Clause entity, for the federal court, in relation to such an enterprise, is hardly the instrument of a distant, disconnected sovereign; rather, the federal court is ordained by one of the entity's founders. Nor is the integrity of the compacting States compromised when the Compact Clause entity is sued in federal court.

513 U.S. 30, 41-42 (1994) (footnote omitted). By contrast, the principle underlying original jurisdiction is that "no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971) (citation omitted). Original jurisdiction, unlike sovereign immunity, spares states not from the indignity of being brought into *federal* court, but rather from the dangers inherent in entering the court of another state for relief. Under the Compact, the Commission stands in the shoes of the six party States and its ability to litigate on their behalf exposes their interest to the precise concerns that animated adoption of original jurisdiction in Article III.

Moreover, even if a Commission is not considered a State for purposes of the Eleventh Amendment, nothing prevents Congress and the States from vesting it with that immunity. See *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) (stating that the Compact does not qualify for Eleventh Amendment immunity "[u]nless there is good reason to believe the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose"). It follows, *a fortiori*, that Congress, which has legislated that all

controversies among States are subject to the Court's exclusive original jurisdiction, can include the Commission acting on behalf of the States within that grant. In providing its consent to the States to enter into the Compact, Congress ensured that the Commission would be treated no differently than its component States, expressly authorizing the Commission "[t]o act or appear on behalf of any party state or states . . . [before] any court of law," including of course this one. Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Art. 4 (E)(10), 99 Stat. 1859, 1874 (1986) (hereinafter cited as "Compact"). This is consistent with Congress's goal in enacting § 1251(a) that the original jurisdiction should be vested in this Court when the interests of federalism demand it, including when one of the United States seeks to bring another State into court, or even more so in the case herein presented in which six States seek to assert their rights against one as provided for in the documents agreed to by all seven.

The Commission's decision under review is the result of two member States initiating a complaint to impose sanctions on a fellow State, and a unanimous finding that that State failed to fulfill its obligations under the Compact. Now, in conformity with the procedures laid out in the Compact, the States, each represented by two Commissioners appointed according to each State's law, have formally authorized the Commission to bring suit in their stead. These circumstances, in which the Compact States seek to enforce sanctions they imposed on another State, undeniably call for the Court to exercise its jurisdiction and resolve this conflict. At a minimum the Court should entertain full briefing and argument on the motion before depriving the Compact of an appropriate remedy in the absence of clear authority from this Court that jurisdiction is lacking.

II. THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION.

This Court has historically considered two factors in determining whether an action within its jurisdiction is "appropriate" for original review: "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim" and "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) (citations and internal quotation marks omitted). Despite Defendant's protestations to the contrary, this case more than meets these standards.

A. The Nature Of The States' Interest Is Of Sufficient "Seriousness And Dignity" To Warrant The Court's Exercise Of Original Jurisdiction.

The Compact was enacted by eight states and consented to by Congress for the express purpose of "promot[ing] the health and safety of the region." Compact, Art. 1, 99 Stat. at 1872. In enacting the Compact the States and Congress recognized that the interests of public health and safety would not be best-served by each State bearing the responsibility of its radioactive waste alone; rather, "the management of low-level radioactive waste is handled most efficiently on a regional basis." *Id.* at 1871.

The public health concerns surrounding the continuing vitality of the Southeast Compact are apparent. Since South Carolina's withdrawal from the Compact in 1995,[1] resulting solely from North Carolina's failure to develop a disposal facility, the states have been without such a

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[1] North Carolina baldly asserts that South Carolina violated the Compact when it withdrew and closed the Barnwell site in 1995 without adequate notice. In fact, South Carolina gave four years notice before acting and thus did nothing to violate the Compact. Thus, there was no basis for any Commission action against South Carolina.

regional facility. Without the requisite funds to obtain disposal capacity, the Compact faces "a prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive materials due to the lack of disposal facility." Tr. at 13 (Mot. App. 119a). North Carolina's bland observation that no facility has been built in 14 years does not detract from the urgency of the problem; instead, it shows why further delay could be catastrophic.[2]

Thus, Defendant blatantly obscures the magnitude of Plaintiff's claim by framing it as "little more than a contract dispute" (Opp. 20). Consented to by Congress as required by the Compact Clause of the Constitution, Article I, § 10, the Southeast Compact is no ordinary contract. Rather it is a "law of the United States," and its construction presents a federal question. *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981). This is no mere breach of contract case, but rather an attempt by one group of States to sanction another State for its violation of federal law and the injury that it imposed on them. As the Court explained in *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901), in instances when "the health and comfort of the inhabitants of a State are threatened," the State must be allowed a remedy. And given that "[d]iplomatic powers and the right to make war having been surrendered to the general government," the remedy must be found in the constitutional

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[2] A current brochure from the U.S. Environmental Protection Agency states as follows:

> Because it can be so hazardous and can remain radioactive for so long, finding suitable disposal for radioactive waste is difficult. . . . Proper disposal is essential to ensure protection of the health and safety of the public and quality of the environment including air, soil, and water supplies.

U.S. Envtl. Protection Agency, No. 402-K-94-001, *Radioactive Waste Disposal: An Environmental Perspective* 1 (1994).

provision of original jurisdiction in this Court. *Id.* Thus, when the substance of the contract strikes at the heart of questions of federalism, and implicates paramount public health interests, it is only appropriate that it be considered, in the first instance, by the highest federal Court.

Defendant's contention that the Court should deny jurisdiction because Plaintiff seeks "purely monetary compensation to be returned to the Commission treasury" (Opp. 21), improperly belittles the import of this action. Although any compensation would immediately return to the Commission, it would just as quickly be used to fund the sort of waste management facility that North Carolina was committed to construct before it repudiated the Compact. Moreover, the sanctions ordered in this case provide the Commission with its only means of enforcing the Compact. Contrary to Defendant's assertion, the Court has recognized that federalism interests are similarly implicated even when no injunctive relief is sought, stating that it will exercise jurisdiction in "controversies arising upon pecuniary demands . . . just as in those for the prevention of the flow of polluted water from one State along the borders of another State." *Virginia* v. *West Virginia*, 206 U.S. 290, 319 (1907).

B. Plaintiff Lacks An Adequate Alternative Forum In Which To Seek Relief.

There is no pending litigation that would resolve this matter, nor is any alternative forum available in which to do so. Defendant cites three cases for the proposition that State courts can provide alternative available forums in cases in which States are involved; however, none is pertinent here when both parties to the lawsuit effectively are States and no pending litigation capable of resolving the controversy between the States exists. See Opp. 24.

In *Arizona* v. *New Mexico*, 425 U.S. 794, 796-97 (1976) (per curiam), litigation was not only available in state

court but already pending, brought not by the State itself but by the utilities within the State, upon which the allegedly discriminatory electrical energy tax was levied. In this case, the States and their citizens are clearly the parties who suffer from delays in the implementation of the Compact caused by North Carolina's repudiation. Moreover, no other parties can adequately represent the Commission and its member States in another forum. See *Missouri* v. *Illinois*, 180 U.S. at 241 ("[I]t must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.").

In *Massachusetts* v. *Missouri*, 308 U.S. 1 (1939), the Court found that another suitable forum existed, but only after concluding that the putative controversy between the two States was nonjusticiable and that the sole basis for jurisdiction was the existence of a controversy between a state and nonresident citizens. Cf. *Arizona* v. *New Mexico*, 425 U.S. at 799 (Stevens, J., concurring). North Carolina makes no claim that this case is not justiciable. Finally, *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), the third case cited by Defendant, presented a controversy not between two or more States at all, but rather between a State and a private party.

The Compact States comes to this Court only after their failed attempt to resolve this dispute within the Commission, following procedures laid out in the congressionally-approved Compact. Defendant now suggests that this dispute can and should be settled in North Carolina's state courts. It is this precise "alternative" that the constitutional grant of original jurisdiction attempted to avoid. See *Wyandotte Chems. Corp.*, 401 U.S. at 500 ("[N]o State should be compelled to resort to the tribunals of other States for redress . . . . "); *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State."). Under the logic of those cases, the Court should exercise

its jurisdiction to resolve a fundamental dispute among the seven states of the Southeast Compact.[3]

III. THE COMMISSION'S IMPOSITION OF SANCTIONS WAS FULLY WITHIN ITS JURISDICTION AS ESTABLISHED BY THE COMPACT.

Defendant presents a stretched reading of the plain language of the Compact to support its extraordinary assertion that North Carolina, by withdrawing unilaterally, successfully blocked all future enforcement proceedings by the Commission for violations of the Compact committed while North Carolina was a party State. In sum, North Carolina asserts that it is permitted to take $80 million, renege on its obligations, and avoid sanctions for this misconduct by following the expedient of withdrawing. This suggestion makes a mockery of the Compact.

Nowhere does the Compact suggest that the possibility of sanctions for obligations that are incurred while a State is party to the Compact ceases when the State withdraws from the Compact: "*Any party state* which fails to comply with the provisions of this compact or to fulfill its obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission . . . . " Compact, Art. 7(F), 99 Stat. at 1879 (emphasis added). In fact, contrary to Defendant's assertion, the rights and obligations of party states do not terminate

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[3] Moreover, Defendant does not even concede that a State's sovereign immunity would not preclude a resolution of this dispute in the North Carolina courts. *See Alden* v. *Maine*, 527 U.S. 706 (1999) (holding that a State cannot be subjected to a suit in its own court under federal law absent clear waiver of its sovereign immunity). Instead, it relies upon Plaintiff's motion. Opp. 23. Thus, it remains an open issue whether North Carolina can be sued by this Commission anywhere except in this Court to enforce the Compact.

immediately but rather upon "the effective date of the sanction or as provided in the resolution of the Commission imposing the sanction." *Id.* On this point, the Commission's resolution is clear: "[T]he rights and obligations incurred by the State of North Carolina as a party state to the Compact, including those incurred as a host state, shall remain in full force and effect until the terms of the sanction are complied with and satisfied in full . . . . " Mot. App. 132a. Thus, North Carolina's obligations to the Commission continue until they are fulfilled, and North Carolina remains within the Commission's jurisdiction to enforce those obligations until that time.

On the merits, the Defendant's assertion that it has "at all times acted in good faith" (Opp. 28), is clearly belied by the facts as alleged. Repeatedly, North Carolina has attempted to put the burden of funding on the Commission, contrary to the agreed-upon terms of the Compact: "The Commission shall not be responsible for any costs associated with . . . the creation of any facility . . . . " Compact, Art. 4(K), 99 Stat. at 1876. In response to North Carolina's refusal to fulfill its obligation to pay the project costs, the Commission provided North Carolina with a proposed Memorandum of Understanding in August 1997, offering North Carolina a source of funding for creation of the facility. North Carolina declined to accept the proposal or to offer an alternative by the December 1, 1997 deadline, after which all funding would halt. At that point North Carolina shut down the project, despite being notified that such action would violate the Compact. In April 1999, the Commission provided North Carolina with an opportunity to bring itself into compliance, but to no avail. And now, after being unanimously sanctioned by the Commission, North Carolina refuses to pay the imposed sanctions or even to repay the funds it has received from the Commission for the creation of a disposal facility that ultimately was never built. It is flatly

wrong for North Carolina to suggest that the Compact or the Commission ever attempted to "shift[ ] the total economic burden" onto North Carolina. Opp. 7. Instead, Plaintiff and the States at all times cooperated with North Carolina right up to the minute it rejected once and for all its duties under the Compact.

Finally, Defendant argues that "the nature of Plaintiff's allegations may also require presentation of extensive technical evidence and the development of factual findings and conclusions . . . which will unduly burden the primary responsibilities of this Court." Opp. 10. On the contrary, the "nature" of Plaintiff's primary claim seeks enforcement of a sanction order already duly issued pursuant to the Compact. The only issue that need be addressed in Plaintiff's request for summary affirmance of the Commission's decision is whether the Commission acted within its jurisdiction to impose its sanction. The answer is clearly "yes." All that remains is for the Court to order that sanction to be judicially enforceable.

CONCLUSION

For the foregoing reasons and those stated in the Motion, the Court should grant Plaintiff's motion for leave to file the Complaint.

Respectfully submitted,

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