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

SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL

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SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL

The United States' brief is remarkable on a number of fronts. First, the government completely ignores the vital context in which this case arises. The question of how properly to dispose of low-level radioactive waste in the southeastern United States is not a matter of mere academic curiosity. It is a fundamental health, safety and economic problem that Congress addressed in 1980 and 1986, and yet the United States treats it as mere background in its otherwise largely sterile legal analysis of this case. Part of Congress's mandate, which the government's brief disregards, is that every "federal agenc[y] will actively assist the Compact Commission ... by ... expeditious enforcement of federal ... laws ... imposing sanctions against those found to be in violation of federal ... laws." Compact, Art. 1, 99 Stat. 1859, 1872 (1986). The only way effectively to devise a long-term solution to the problem of radioactive waste disposal is to ensure that Compacts are efficiently enforced. How the Acting Solicitor General can square her recommendation here to have this matter resolved in a North Carolina state court rather than in this Court with Congress's command to "actively assist" the Commission in the "expeditious enforcement" of a sanction is a mystery to the Commission. Whatever else might attend the government's proposal to deny the Commission's motion for leave to file its complaint, it is at least doubtful that the process in state court would be "expeditious."

Second, given Congress's express command, it would be reasonable to expect that the Justice Department would support the Commission here, absent the clearest evidence that this Court lacks jurisdiction to decide this dispute. But the Government does not make a plain meaning argument that the Court lacks jurisdiction; nor could it. Article III, which the government nowhere quotes, grants this Court jurisdiction

"[i]n all Cases ... in which a State shall be a Party." U.S. Const. art. III, § 2. The statute implementing this language confers jurisdiction exclusively on this Court over "*all controversies* between two or more States." 28 U.S.C. § 1251(a) (emphasis added). Although the United States seems to assume that this language is inherently limited to disputes involving States qua States, that is certainly not the only way to read that provision. It is equally susceptible to an interpretation that would include the situation here, involving a dispute between a party that Congress has authorized to stand in the shoes of a State and another State.[1] That would still be a "controversy" between States and the statute does expansively apply to "all" such controversies. At the end of the day, all the government does is beg the question as to whether this case falls within these provisions. It certainly does not offer any case law or other authority to support its crabbed interpretation.

Third, the Government devotes more than 25% of its brief (Gov't Br. 8-13) to the proposition that the Southeast Compact Commission "Is Not A State." It is difficult to imagine that the United States really required seven months to establish this undisputed proposition. Nor does it seem likely that the Court invited the views of the Solicitor General for assistance on that not-so-thorny issue. Instead, the issue here is the interplay between this Court's original jurisdiction and the language of the Compact. On that score, the government's prolonged efforts produced a scant three pages of briefing (*id.* at 13-15) without even quoting Article III or providing any insights into the history or the purpose of

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[1] Nor does this interpretation dramatically expand this Court's jurisdiction because the Court certainly could insist that it be clear that Congress intended to create a special symbiotic relationship between the States and a Compact Commission before the Court exercises its original jurisdiction. Moreover, the Court retains discretion to decline to hear cases even when they fall within its exclusive jurisdiction. *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992).

Section 1251(a) or the Compact that Congress ratified. Instead, the government speculates about the interesting constitutional issues that serve as a platform for the jurisdictional issue presented and ask the Court to decline jurisdiction to avoid those issues. But the rule of constitutional avoidance is not triggered merely by identifying a constitutional issue. The Compact's inclusive language should be narrowed only to avoid a "grave" constitutional problem. *Jones* v. *United States*, 526 U.S. 227, 239-40 (1999). Not only does the government not come close to making that showing in its cursory treatment, but the interpretation it proposes would itself have dangerous, wide-reaching precedential effects. Failure by this Court to recognize the Commission's ability to sue "on behalf" of its member States when the Compact so expressly provides, Compact, Art. 4(E)(10), 99 Stat. at 1875, would severely hamper the ability of Commissions generally to ensure effective compliance with their Compacts.

In sum, the government's seven-month odyssey raises far more questions than it answers and certainly provides woefully inadequate support for dismissing this case without a full opportunity to brief and argue these issues. For the reasons that follow, the Court at a minimum should either grant the motion to file the bill of complaint and set the jurisdictional argument for briefing and argument or postpone probable jurisdiction to allow the parties fully to brief and argue the questions raised but not adequately addressed by the United States.

1. The government's abstract argument that the Commission is legally distinct from its member States and thus lacks the "inherent right to invoke this Court's original jurisdiction," Gov't Br. 11, is not only beside the point but also legally erroneous. In arguing that the Commission lacks the status of "State" for purposes of Article III and 28 U.S.C. § 1251, the government, like North Carolina (Opp. Br. 12-14), incorrectly relies on the Eleventh Amendment line of

cases. As the Commission has previously explained, see Reply Br. 2, these cases are inapposite because the Eleventh Amendment protects States from the indignity of being brought into federal court, and no such indignity attaches to the Commission, which is itself a creature of the States' agreement and of the federal government. The Commission, standing in the shoes of six of its member States, nevertheless should be allowed to invoke this Court's original jurisdiction, for the same reason that any State, or collection of States, can: to avoid the dangers of seeking relief from a neighbor State in that State's courts.

The fact that the Commission is a "'legal entity separate and distinct from the party states,'" Govt. Br. 10 (emphasis in original omitted) (quoting Compact, Art. 4(M)(1), 99 Stat. at 1877), does not render this Court's jurisdiction any less appropriate. First, the government's argument that the Commission will not face prejudice in North Carolina's courts, see *id.* at 9-10 ("The Commission is not a State, and it therefore does not face any 'dangers inherent in entering the court of *another* state.'" (quoting Reply Br. 2)), falls prey to its own circularity. An abstract determination by this Court that the Commission, which seeks to collect roughly $100 million from North Carolina on behalf of six neighboring States, is not a "State" would surely not cure the real potential for prejudice in North Carolina's courts.

Second, as the government recognizes, this Court's original jurisdiction serves "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force," *id.* at 10 (quoting *North Dakota* v. *Minnesota*, 263 U.S. 365, 372-73 (1923)), and this is no less true when the States, with Congress's express approval, have, in an attempt to forge a diplomatic solution, created a Commission to pursue their interests. Congress extended the Court's exclusive original jurisdiction to "*all* controversies between two or more States," 28 U.S.C. § 1251(a) (emphasis added). And, although in the ordinary case this will entail actual

litigation between two States, this case equally presents an interstate "controversy," as it involves a federal Compact of States, created to address a problem concerning all States in the region, and a State that failed to comply with the Compact's resolution of the problem.

2. Even were the government's citation of Eleventh Amendment principles apt, its argument that the Commission has no "*inherent* claim to sovereign immunity," and likewise no "*inherent* right to invoke this Court's original jurisdiction," Gov't Br. 11 (emphases added), ignores the basic thrust of the Commission's contention: Congress, in consenting to the Compact, vested the Commission with the authority to invoke the jurisdiction of this Court. The Court has clearly recognized that in creating a Compact, Congress and the States can go beyond the "inherent" authority of the Eleventh Amendment, and can structure the Compact in such a way as to extend to it the protections of sovereign immunity. See *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979); Reply Br. 2. *A fortiori*, Congress, which itself defined this Court's exclusive original jurisdiction to include "*all* controversies between two or more States," has the power to include a Commission, acting on behalf of several States, within that grant.

Congress and the Compact States sought to ensure that the Commission would "stand in the shoes" of the States precisely to avoid the course that the government now urges: that member States must individually bring original actions in this Court. Gov't Br. 10 n.2; see also *id.* at 16 (arguing that the Commission would not have representational standing to bring suit because the suit "would require the participation of the party States themselves").[2] Although any of the member

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[2] The government's analysis of associational standing is also erroneous. There is no need to have the States involved in this litigation. Their dispute with North Carolina concerning the Compact can be fully litigated by the Commission with the States' express authorization.

States could seek a declaratory judgment from this Court that North Carolina violated the terms of the Compact, only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it. By the government's own admission, the States could sue only to recoup their out-of-pocket costs, a small fraction of the total funds that North Carolina received from the Commission, which were generated from fees levied by the Commission on users of the South Carolina waste facility. *Id.* at 17.

Although the government points to this disconnect between the relief that the States and the Commission can obtain as support for the government's argument that the Commission does not actually stand in the shoes of the party States, *id.* at 16-17, it is precisely because of this disconnect that Congress granted the Commission authority to act on behalf of the party States in "*any* court of law." Even though they cannot enforce directly the full sanction against North Carolina, the individual States surely have an interest in its enforcement, as they stand to benefit from the ongoing vitality of the Commission and, more directly, because the States are ultimately entitled to Commission assets if it were disbanded. By authorizing the Commission to "act or appear on behalf of any party state or states ... before ... any court of law," Compact, Art. 4(E)(10), 99 Stat. at 1875, Congress sought to bridge this disconnect between the States' great interest in the enforcement of the Commission's sanction, and the more minor relief that they can seek individually.

3. The government disputes the Commission's contention that Congress, in approving the Compact, sought to allow the Commission to invoke this Court's original jurisdiction, and in doing so urges the Court to extend its exclusive original jurisdiction only when Congress is exquisitely precise in providing for original jurisdiction. See, *e.g.*, Gov't Br. 14 ("the Compact does not *expressly grant* the Commission power to invoke this Court's original jurisdiction" (emphasis

added)); *id.* at 16 ("the general terms of the Compact at issue in this case are insufficient to constitute the requisite statutory authorization for the Commission to bring such a suit under this Court's exclusive original jurisdiction"). On the basis of this "clear statement rule," which the United States created out of whole cloth, the government interprets the Compact purportedly to avoid several constitutional issues, such as whether an attempt by Congress to treat a Compact like a State for purposes of this Court's original jurisdiction would contravene Article III or the Eleventh Amendment.

It is at best dubious whether this Court should adopt such a "clear statement rule," given the important national interests in ensuring that interstate compacts, which provide an effective means of resolving pressing regional problems, remain enforceable. Putting the merits of such a rule of construction aside, however, it is clear that it would be inappropriate for this Court to decide this question on a summary basis. Given the precedential value that such a rule would carry for all current and future interstate compacts, as well as the major constitutional issues that the government has identified as intertwined with this question, the Court should entertain full briefing and provide an opportunity for the parties to argue their positions. The Commission's motion to file its bill of complaint does not present an all-or-nothing question that must be resolved immediately; instead, the Court should grant the motion subject to a subsequent jurisdictional determination.

4. Contrary to the government's assertion, the Commission has no adequate, alternative forum in which to litigate its claims. The government's suggestion that "one or more States that are parties to the Compact ... bring[] an original action under 28 U.S.C. § 1251(a) against another party State to enforce the Compact," Gov't Br. 18, would not, by its own concession, see *supra* at 6, provide the Commission, or its member States, with an adequate remedy. The United States makes no effort to explain why a State would incur the

substantial expense of bringing a lawsuit seeking a declaration that North Carolina violated the Compact when there is no significant monetary recovery available to that State from this Court. Moreover, the Government ignores the significant sovereign actions already taken by the States to put this litigation in motion. First, Florida and Tennessee filed formal complaints with the Commission alleging a violation of the Compact and asking the Commission to impose sanctions. Second, all of the Member States (except North Carolina) formally authorized the Commission to bring this action in this Court on their behalf. These extraordinary actions by the States, exercising their sovereign powers, will be vitiated if the Court were to dismiss the complaint.

Alternatively, it is difficult to take seriously the United States' assertion that the North Carolina state courts are a suitable forum for resolution of this dispute among the several States. In the first place, it remains an open issue whether the North Carolina courts will even entertain this claim directly against the State. Although the government points to North Carolina's bland statement that "'there is no merit in Plaintiff's contention that a contract dispute between the Commission and North Carolina *cannot* be fully and fairly heard in North Carolina state courts,'" Gov't Br. 19 n.6 (emphasis added) (quoting Opp. Br. 25), North Carolina did not expressly concede that it has waived its sovereign immunity. Should this case proceed to state court, North Carolina surely will move to dismiss on this ground.

More fundamentally, it is a central principle underlying this Court's exclusive original jurisdiction 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, 500 (1971). Although the government attempts to discount this principle by noting that the Court's decision in *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22 (1951), arose on appellate review

from a state supreme court, Gov't Br. 18, the principle expressed in that case – that "[a] State cannot be its own ultimate judge in a controversy with a sister State," 341 U.S. at 28 – remains true. It still reflects the common sense judgment that an entity that is the product of a Compact among the States that is ratified by Congress and that seeks to enforce its rights under federal law should not have to resort to the courts of the State from which it seeks relief. It is difficult to imagine why States would enter into Compacts if the only mechanism for enforcing them when the injury is suffered by the entity administering the Compact is to sue in the offending State's home courts.

To be sure, certiorari is available in this Court to ensure a correct interpretation of the Compact, but the question remains when will this case be resolved. There is strong reason to wonder how expeditiously a North Carolina court would entertain and resolve the issue of North Carolina's liability for $100 million to be paid for the benefit of its neighboring States. Because of the regional interests in health and safety that are at issue in this case and because of the awful delay already suffered at the hands of North Carolina, the Commission simply cannot wait. It may be cliché to suggest that justice delayed is justice denied, but the Court should at least hesitate before declining to serve as the "court of law" best suited for efficiently adjudicating this "controvers[y] between two or more States."

CONCLUSION

For the foregoing reasons and those stated in the Motion and Reply Brief, the Court should grant Plaintiff's motion for leave to file the Complaint. Alternatively, the Court should set the jurisdictional issue for full briefing and argument.

Respectfully submitted,

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