No. 132, ORIGINAL

IN THE
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Bill of Complaint

PLAINTIFFS' OPPOSITION TO NORTH CAROLINA'S MOTION TO DISMISS

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PLAINTIFFS' OPPOSITION TO NORTH CAROLINA'S MOTION TO DISMISS

INTRODUCTION

In its Motion to Dismiss, North Carolina argues: (a) that States are entitled to Eleventh Amendment immunity in actions brought by Compact-Clause entities; (b) that North Carolina did not waive its Eleventh Amendment immunity in the Southeast Interstate Low-Level Radioactive Waste Compact ("Compact"); and therefore (c) that the Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission") should be dismissed from this original action, because its claims are barred by the Eleventh Amendment and are not identical to those of the States, whose claims are not barred by the Eleventh Amendment.

By granting the Motion for Leave to File a Bill of Complaint, this Court has already rejected North Carolina's argument that the plaintiff States are only nominal parties because they lack any interest in the $80 million owed to the Commission. See North Carolina Opposition to Motion for Leave to File Bill of Complaint ("Opp.") at 12-13. The instant motion to dismiss simply makes that rejected argument in a different form. The premise of the motion – that the Commission's claims do not mirror the States' claims – is wrong. The Commission and the State plaintiffs all stated legal claims for violation of the Compact and breach of contract and sought restitution and other damages. The States clearly have a right to seek enforcement of the Compact, including enforcement of the restitution order imposed as a result of North Carolina's refusal to perform its obligations under the Compact. It is settled law that the claim of a non-State party in an original action may proceed, despite any alleged Eleventh Amendment defense to such a claim, so long as either a State or the United States is making the same claim. *Arizona* v. *California*, 373 U.S. 546, 564 (1963);

Maryland v. *Louisiana*, 451 U.S. 725, 735-44 & n.21 (1981); *Oklahoma* v. *Texas*, 258 U.S. 574, 581-82 (1922). For this reason alone, the Commission's claims may proceed and the motion to dismiss should be denied.

If the Court reads the complaint to allege "different" claims for the Commission and the States, it will have to confront the question whether the Court has ancillary jurisdiction over the Commission's different claim in this original action or, in the alternative, the more fundamental constitutional question whether a State is entitled to Eleventh Amendment immunity from suit by a Compact-Clause entity for violation of a Compact. To avoid having to address these questions, the Court should simply read the Bill of Complaint, as plaintiffs intended, to state the same legal claims for the Commission and the States and deny the motion to dismiss on this non-constitutional ground.

ARGUMENT

I. IN AN ORIGINAL ACTION, A NON-STATE PARTY MAY PROCEED WITH A CLAIM BARRED BY THE ELEVENTH AMENDMENT IF A STATE PLAINTIFF IS MAKING THE SAME CLAIM.

This Court has original jurisdiction to decide and enforce claims by a State against a sister State for money damages and other relief. See, *e.g.*, *Kansas* v. *Colorado*, 533 U.S. 1 (2001); *Texas* v. *New Mexico*, 482 U.S. 124, 130 (1987). This is such an action.

As North Carolina recognizes, see Motion to Dismiss at 8-9, "the presence of non-state parties . . . does not affect the exclusive jurisdiction of the Supreme Court." Stern et al., *Supreme Court Practice* 475 (6th ed. 1986) (citing *Arizona* v. *California*, 460 U.S. 605, 614 (1983), *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21). North Carolina also expressly acknowledges that the claim of a non-State party in an original action

may proceed *despite any alleged Eleventh Amendment defense to such a claim*, as long as either a State or the United States is making the same claim. Motion to Dismiss at 8-9 (citing *Arizona* v. *California*, 460 U.S. at 614, *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21). North Carolina argues, however, that the Commission must be dismissed from this original action because the Commission's claim that the Compact was breached and that North Carolina must pay restitution is barred by the Eleventh Amendment to the Constitution, and because the State plaintiffs are not making the same claim and seeking the same relief.

North Carolina's argument is a house of cards built on the unsound premise that the claims of the Commission and of the States are fundamentally different. The State plaintiffs – Alabama, Florida, Tennessee, and Virginia – are parties to a contract, the interstate Compact, which they seek to enforce. They have filed claims against North Carolina for its breach of their rights under the Compact and for its breach of Contract. See, *e.g.*, Bill of Complaint 11 ("Count I – Violation of the Member States' Rights Under the Compact"); *id.* at 12 ("Count II – Breach of Contract"). The violations of law alleged by the Commission and the States are identical. Moreover, the States have a direct interest in enforcing their rights under a contract and an interstate compact. See, *e.g.*, *Kansas* v. *Colorado*, 533 U.S. 1 (2001); *Nebraska* v. *Iowa*, 406 U.S. 117 (1972). In this case, that means the States have a direct interest in enforcing North Carolina's obligations under the Compact, including its current obligation to make restitution. In addition, the States were directly affected by North Carolina's failure to develop, license, and construct a disposal site pursuant to its statutory and contractual obligation under the Compact. The States lost valuable time, as well as the $80 million that could have been invested to produce a disposal site in another member State or could be used to promote access to a disposal facility elsewhere.

North Carolina contends, however, that the plaintiff States have no direct legal claim to the restitution of the $80 million owed to the Commission, because such restored funds would not be paid directly to the States and never belonged to the States. This contention is wrong for two reasons.

First, like any party to a contract, the States have a direct interest in the enforcement of that contract, whether it calls for payments to the States themselves or to some third party (here, the Commission). Under the Compact, North Carolina now has a legal obligation to pay money to a third party (the Commission) – a third party created by the contract itself – and the member States of the Compact have a right to enforce this obligation. Put differently, there is nothing unique about a contract calling for the payment of money to a third party, and a contracting party has a right to enforce that obligation. Moreover, the Compact's member States plainly have a direct interest in restitution of the money to the Commission so that the Commission can address the States' need for long-term access to alternative disposal facilities – a need that arose as a result of North Carolina's failure to provide such a facility. See also U.S. Brief, No. 131, Orig. at 11 ("[t]he moving States are entitled to pursue any available compact remedy for North Carolina's alleged breach of the Compact," including restitution).

Second, the plaintiff States have a further contract-based interest in the restitution of the payments that went to North Carolina. Leaving aside each State's initial $25,000 contribution, the Compact expressly provides that:

> [e]ach state hosting a regional disposal facility shall annually *levy special fees or surcharges* on all users of such facility . . . the total of which . . . b. *Shall represent the financial commitments of all party states to the Commission*; and c. Shall be paid to the Commission. [Opp. App. 15a-16a (emphasis supplied).]

Under the Compact, accordingly, the funds resulting from the levy are "the financial commitments of all party states to the Commission." *Id.* at 16a.

Thus, North Carolina is wrong on two counts when it asserts that the member States cannot seek restitution because they "never had an ownership interest in the money themselves in the first place." Motion to Dismiss at 12. Under the Compact, the member States did have, and continue to have, an ownership interest in the money paid to North Carolina. In addition, the member States have a right under the Compact – their contract – to enforce their contractual right to North Carolina's payment of restitution to the Commission.

In reality, North Carolina does not argue on the merits that the claims of the Commission and the States are different. It instead cobbles together some citations from the briefing of the Motion for Leave to File a Bill of Complaint not in this case, but in Original No. 131 – a case in which the member States of the Compact were *not* parties. It uses those citations to argue that in Orig. No. 131, the Commission effectively agreed that its claims in that case are different from claims that the States might have made in that case, but did not. Motion to Dismiss at 10-11. The statements certainly do not demonstrate that in this proceeding "the Commission seeks a form of relief substantially different from that which the States could seek on their own." *Id.* at 10.

First and dispositively, the statements were made *by the Commission* in support of the Motion for Leave to File a Bill of Complaint in Orig. No. 131, an action to which *none* of the States were parties. Thus, nothing that the Commission said in urging this Court to grant the Motion in Orig. No. 131 could waive the member States' rights to make whatever claims they deem fit in this subsequent original action. And, here, the States' claims seek relief that mirrors that sought by the Commission. Moreover, that relief redounds to the benefit of the States as plaintiffs.

Second, the statements made in Orig. No. 131 reflect the reality that while the Commission is entitled to enforce the sanction it imposed and to be directly paid restitution, the member States are entitled to enforce the Compact (which now includes the sanction) and to seek the payment of restitution not to themselves, but to the Commission. (The member States can also seek direct payment of their out-of-pocket costs, as the cited statements make clear. Motion to Dismiss at 11.) Thus, the Commission has the right under the Compact to seek to enforce the sanctions and to "'*collect the $ 90 million (plus interest) that is owed to it.*'" *Id.* at 10 (quoting Commission Supp. Br. No. 131, Orig., at 5-6); *id.* at 11 (quoting U.S. Br., No. 131, Orig., at 16-17) (explaining that the restitution would be paid "'*to the Commission*'"). The member States, however, are entitled to seek the same outcome – *viz.*, an order requiring North Carolina to pay restitution to the Commission – although they do not request that North Carolina pay the money directly to them.[1]

In the context of Orig. No. 131, the critical point made by the Commission's cited statements is that the Commission – as the party that imposed and sought to enforce the sanctions and the party to whom the restitution should be paid – should have been permitted to represent the interests of the member States and to invoke this Court's original jurisdiction. This Court *rejected* that argument by denying the Motion for Leave to File A Bill of Complaint in Orig. No. 131, and instead required that the member States become parties and assert their own rights to enforcement of the Compact in order to invoke the original jurisdiction of this Court. In this case,

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[1] Thus, while no State claims "independent entitlement" (Motion to Dismiss at 11) to the restitution at issue here, all member States have a right, as members of the Compact, to seek enforcement of the Compact requiring the payment of restitution to the Commission. That is precisely the relief the States seek; and, accordingly, it is simply wrong to assert, as North Carolina does, that the States seek relief that differs from that sought by the Commission.

accepting this Court's implicit rejection of the Commission's prior arguments, the Commission and the States made the same legal claims and sought the same relief.

In the circumstances presented here, as North Carolina acknowledges, the established rule is that a non-State party such as the Commission may proceed with its claim in an original action. As this Court has stated, "it is not unusual to permit intervention of private parties in original actions." *Maryland* v. *Louisiana*, 451 U.S. at 745-46 n.21.

In *Arizona* v. *California*, the Court allowed Indian tribes to proceed with claims against the defendant State, despite the State's Eleventh Amendment immunity. The Court explained that the tribes' claims were the same as those already brought by the United States, and therefore that the Court's "judicial power over the controversy" would not be enlarged by allowing the tribes to proceed and "the States' sovereign immunity protected by the Eleventh Amendment is not compromised." 460 U.S. 605, 614 (1983). Similarly, in *Maryland* v. *Louisiana*, the Court allowed 17 pipeline companies seeking tax refunds to intervene as plaintiffs in an original case because the challenged state tax had been imposed on these companies and their participation would lead to "a full exposition of the issues." 451 U.S. at 745 n.21.

Finally, in *Oklahoma* v. *Texas*, the Court allowed private parties to intervene in a boundary dispute that affected them, although "independent suits to enforce the claims" would not have been entertained by the Court. 258 U.S. 574, 581 (1922). Indeed, the Court recognized that where the Court assumes jurisdiction over certain property or funds, it has ancillary jurisdiction to resolve non-State parties' claims to such property or funds, and thus to resolve ancillary claims that would otherwise be barred by the Eleventh Amendment.

> It long has been settled that claims to property or funds of which a court has taken possession and control through a receiver or like officer may be dealt with as

> ancillary to the suit wherein the possession is taken and the control exercised – and this although independent suits to enforce the claims could not be entertained in that court. [*Id.*]

Cf. *Maryland* v. *Louisiana*, 451 U.S. at 745 n.21 (allowing oil companies to participate as plaintiffs without expressly barring or authorizing their pursuit of individual tax refund claims).

Under this Court's established jurisprudence, the claims of the Commission may proceed in light of their fundamental identity with the claims of the member States.[2]

The Commission does, of course, have an important role to play in this litigation. It acts on behalf of all member States, not only those who are party plaintiffs. Though not obligated to do so under the Compact, the Commission decided to funnel financial support to North Carolina to develop the region's second disposal site; it also conducted the funding negotiations and the sanctions proceeding and is best situated to provide information on all aspects of low-level radioactive waste disposal pertaining to the Compact and its member States. As noted *supra*, however, North Carolina's motion to dismiss is simply a disguised version of the argument made in opposition to the Motion for Leave to File A Bill of Complaint that the member States of the Compact are only nominal parties and that only the Commission has a real and direct interest in the claims made against North Carolina. The Court implicitly rejected this argument by granting that motion over North Carolina's opposition.

The motion to dismiss should be denied.

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[2] Nothing in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), casts any doubt on this analysis. In that case, which was not within the Court's exclusive, original jurisdiction, the private parties were seeking to proceed with pendent state-law claims wholly independent of any federal constitutional claims raised by the United States. *Id.* at 103 n.12.

II. THE COURT SHOULD INTERPRET THE BILL OF COMPLAINT TO STATE THE SAME CLAIMS FOR ALL PLAINTIFFS TO AVOID THE CONSTITUTIONAL QUESTIONS OTHERWISE POSED.

The question whether North Carolina has Eleventh Amendment immunity arises in an entirely unique context: Congress, in its sole, unfettered discretion, has authorized several States to take action that they otherwise are forbidden to take – *i.e.*, to form a compact. Congress has established the terms of the member States' participation and has expressly created a Compact-Clause entity, granted that entity certain powers, and preserved the right to judicial review and enforcement of the terms of the Compact. North Carolina has voluntarily consented to participate on Congress's terms. See *College Savs. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) ("[u]nder the Compact Clause, States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity"); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (holding that a bistate commission created by an interstate compact, which the Court assumed partook of state sovereign immunity, had consented to suit by reason of a suability provision attached to the congressional approval of the compact).

Although the Court has held that in an original action, it has ancillary jurisdiction over some different, but related claims by non-State parties, see *Oklahoma* v. *Texas*, 258 U.S. at 581, the Court has never precisely defined the scope of this Court's ancillary jurisdiction over such claims in original actions to enforce interstate Compacts. Accordingly, if the Court holds that the Commission and the States are making "different" claims, it will have to determine the extent of its ancillary jurisdiction in original actions and whether the Commission's claims fall within it.

In addition, if the Court were to conclude that it did not have ancillary jurisdiction sufficient for it to address the different claims made by the Commission (whatever those differences are), the Court would have to confront the question whether a member State has Eleventh Amendment immunity from claims made by a Compact entity. This Court has never addressed the question. See *Entergy Ark., Inc.* v. *Nebraska*, 68 F. Supp. 2d 1093, 1096 (D. Neb. 1999) ("[n]one of the [Court's Eleventh Amendment] cases . . . deal with an interstate compact signed by a state-defendant, approved by Congress under the Compact Clause of the Constitution, which is sought to be enforced by a compact-created entity that brings suit against the state-defendant"), *aff'd in part, rev'd in part*, 241 F.3d 979 (8th Cir. 2001). Cases holding that States are entitled to Eleventh Amendment immunity from suit by federal corporations, foreign states, and Indian tribes do not answer the question whether States that voluntarily consent to join Compacts under terms expressly authorized by Congress are immune from the enforcement of those Compacts by entities that are also congressional creatures of the Compact. The only court to address the question held that, in this setting, States do not possess Eleventh Amendment immunity. See *id.* at 1099 (holding that once States "enter into an arena from which they were, at the Founding, specifically barred," the Eleventh Amendment does not presumptively apply, and that under our constitutional structure, states that enter into compacts do not retain sovereign immunity as against the compact entity); cf. also *College Savs. Bank*, 527 U.S. at 686 (suggesting that the question of a State's Eleventh Amendment immunity is "fundamentally different" under the Compact Clause).

Both of these issues – the scope of the Court's ancillary jurisdiction over a different, but related claim by a non-State party in an original action and the scope of a State's Eleventh Amendment immunity from suit by a Compact-Clause entity – present difficult, undecided constitutional questions.

Plaintiffs respectfully submit that this Court should avoid addressing these questions, and should instead construe the Bill of Complaint as it is most naturally read – to state the same claims on behalf of the Commission and the States.

CONCLUSION

The motion to dismiss the Commission from this action should be denied.

Respectfully submitted,

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