No. 132, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, *et al.*,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS CLAIMS OF SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant State of North Carolina has moved to dismiss the claims of plaintiff Southeast Interstate Low-Level Radioactive Waste Commission ("Commission") on the ground that the Commission's claims are barred by the Eleventh Amendment and by the constitutional and common-law principles of sovereign immunity embodied in that Amendment.

In their response plaintiffs concede most of what is necessary for this Court to dismiss the Commission's claims. Plaintiffs do not argue that the Commission is a "State" and therefore entitled to sue despite the Eleventh Amendment. Plaintiffs do not seriously contend that the sovereign immunity embodied in the Eleventh Amendment is categorically inoperative against claims by the Commission. Neither do plaintiffs argue that North Carolina has actually waived its immunity from suit in federal court or that Congress unambiguously abrogated that immunity.

Plaintiffs offer only a single argument as to why the Commission's claims should be allowed to proceed: the Commission's claims are the same as the co-plaintiff States' claims, which are not barred by Eleventh Amendment/sovereign immunity, and therefore North Carolina can be forced to defend against the Commission's claims as well as the States'. This argument is meritless.

To begin with, plaintiffs' suggestion that the exercise of federal "ancillary jurisdiction" over the identical claims of non-State entities suffices to strip a State of its sovereign immunity from those claims cannot be reconciled with this Court's Eleventh Amendment/sovereign immunity jurisprudence, which holds that a State is entitled to assert such immunity *even if* a federal court otherwise has jurisdiction over the claim. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) ("The Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pen-

dent jurisdiction where claims are pressed against the State."). Although the Motion to Dismiss carefully elaborated this point, Mot. to Dismiss 13-16, plaintiffs offer no response. By applying its now settled Eleventh Amendment/sovereign immunity jurisprudence to the Commission's claims against North Carolina, the Court can easily dispense with the Commission's claims, without delving into the plaintiffs' back-and-forth stories about whether the States are entitled to seek the same recovery sought by the Commission, *viz.*, direct payment to the Commission of the $80 million the Commission awarded itself in its rump "hearing."

Should the Court find itself compelled to explore the shifting grounds beneath plaintiffs' argument, however, it will discover that the plaintiffs were correct the first time: the States *do not* state the same claims as the Commission because they *cannot* state the same claims as the Commission. Plaintiffs now argue that the claims are the same because the States, like the Commission, are simply suing to see that the Commission gets paid. But the States very specifically and repeatedly disavowed their ability to obtain such relief in the last action. Make no mistake about it: the arguments made to this Court all along have been those of the Commission *and* the States. In the last action the Commission was explicitly acting as the agent of the States in this Court, and the States cannot now legitimately disclaim the positions the Commission took on their behalf, with their knowledge and consent. And the States sent the Commission to litigate on their behalf last time because they surely knew that a State cannot obtain relief on behalf of another party whose own claim would be barred. *Compare* Comm. Reply, No. 131, Orig., at 6 ("any compensation would immediately return to the Commission") *with North Dakota v. Minnesota*, 263 U.S. 365, 375 (1923) (dismissing claim where State plaintiff "intend[ed] to pay over" any recovery to private parties). The injuries the States assert, and the recoveries they seek, must be their own. Because the injuries

and recoveries that are personal to the States are very different from – a "small fraction" of, Comm. Supp. Br., No. 131, Orig. at 6 – the injuries asserted and recovery sought by the Commission *qua* Commission, the Commission's effort to ride piggy-back on the claims of the States must fail.

I. A STATE DOES NOT LOSE ITS SOVEREIGN IMMUNITY FROM SUIT BY A NON-STATE ENTITY MERELY BECAUSE THAT PARTY'S CLAIMS ARE THE SAME AS THE CLAIMS OF A STATE CO-PLAINTIFF

Plaintiffs' brief in opposition starts from the premise that North Carolina "expressly acknowledges" (Pls. Opp. 2-3) that Eleventh Amendment immunity is inoperative whenever a claim barred by the Eleventh Amendment is joined with an identical claim that is not so barred. The balance of plaintiffs' brief then argues that the Commission's claims are identical to those of the States.

Plaintiffs' starting premise is incorrect, indeed baffling: North Carolina assuredly did *not* acknowledge that it cannot claim immunity from the Commission's claims if they are identical to those of the States. To the contrary, the Motion to Dismiss made quite clear our position that Eleventh Amendment-barred claims cannot proceed against a non-consenting State *even if* the claims are redundant of claims asserted by a State or the United States. *See* Mot. Dismiss 13-16. "To say that the invocation of this Court's jurisdiction by the United States or a sister State automatically opens the door to private claims against a State," we explained, "contradicts the structural consent reflected in the plan of the convention." Mot. Dismiss 16. "[E]ven if the moving States are entitled to proceed against North Carolina on whatever claims they can sustain, North Carolina remains immune from suit by the Commission, unless and until North Carolina consents to such suit. It has not done so." *Id.*

The only point North Carolina "expressly acknowledge[d]" is that in two cases claims otherwise barred by the Eleventh Amendment were allowed to proceed when they were joined with identical, non-barred claims. Mot. Dismiss 8-9.[1] But North Carolina has specifically argued that the principle suggested in those cases should *not* be followed here. Mot. Dismiss 13. Rather, we argued, the Court should follow the more recent precedent in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103 n.12 (1984), and recognize that the mere presence of claims by sister States does not strip North Carolina of its sovereign immunity from claims of the Commission.

As plaintiffs themselves describe it, the principle adopted in the pre-*Pennhurst II* cases is that so long as the claims of a non-State, non-federal entity are "ancillary" to the claims of a State or the United States, then this Court may assert its "ancillary jurisdiction" over the otherwise barred claims. Pls. Opp. 7-10. As previously explained in the Motion to Dismiss, the problem is that other precedents of this Court –

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[1] Plaintiffs cite a third case also mentioned in the Motion to Dismiss, *Oklahoma v. Texas*, 258 U.S. 574, 582-82 (1922), but the Eleventh Amendment does not appear to have been raised as a defense by the State in this case, as it is not mentioned in the Court's opinion. In one of the only two cases in which the Eleventh Amendment *was* raised in this situation, *Maryland v. Louisiana*, 451 U.S. 725 (1981), a citation to *Oklahoma v. Texas* was the sole basis for rejecting the State's claim of Eleventh Amendment immunity. *Id.* at 745 n.21. Since neither case proposes any actual principle or rule for overcoming a State's sovereign immunity in this situation, they provide an extremely weak basis for stripping North Carolina of its immunity here. The other case, *Arizona v. California*, 460 U.S. 605 (1983), does offer a two-sentence explanation for rejecting the State's claim of immunity, *see id.* at 614, which is that so long as this Court has adequate jurisdiction over some claims against a State, a State cannot claim immunity against other, identical claims. As explained in the Motion to Dismiss and in the text here, *infra* at 4-7, that theory has been effectively disavowed by the Court in more recent Eleventh Amendment/sovereign immunity cases.

and especially key recent precedents – have made clear that the Eleventh Amendment is not just a restriction on the jurisdiction of this Court. Rather, the Amendment embodies a broader rule of sovereign immunity, pursuant to which the State itself is empowered to decide who may sue it and where. *See, e.g., Alden v. Maine*, 527 U.S. 706, 713, 730 (1999). And while the members of this Court have disagreed over whether that immunity is implicit in the constitutional design or embedded in the common law, all have agreed that sovereign immunity, whatever its theoretical foundation, operates in practice to shield States from suit in federal court, unless the immunity is unambiguously waived by the State or validly abrogated by Congress. *See* Mot. Dismiss 14-15. No party to this action seriously contends that such immunity has been waived or abrogated.

It is thus beside the point whether this Court might have jurisdiction over a given claim that is "ancillary" to its original jurisdiction. Under this Court's Eleventh Amendment jurisprudence, it makes no difference whether a federal court has "jurisdiction" *of any kind* over a given claim against a State. All that matters is whether the State decides to invoke its immunity against that claim. *See Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985) ("whether the State has consented to waive its constitutional immunity is the critical factor in whether the federal courts properly exercised ancillary jurisdiction"). If the State does not invoke that immunity, then the federal court may exercise its jurisdiction and the claim may proceed to judgment. *See Wisconsin Dep't of Corrections v. Schact*, 524 U.S. 381, 389 (1998) ("The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . . Nor need a court raise the defect on its own. Unless the State raises the matter, the court can ignore it."). But if the State does invoke its immunity

against a claim, then the court loses its power to adjudicate *that* claim. *See id.* at 392-93 ("A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim. But that circumstance does not destroy removal jurisdiction over the remaining claims in the case before us. A federal court can proceed to hear those other claims . . . ."); *see generally Pennhurst II*, 465 U.S. at 121 ("A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment."). The mere existence of federal jurisdiction – be it original or removal or the more ephemeral "ancillary" jurisdiction – is not enough to force a sovereign State to submit to the claims of an unwanted suitor.

Indeed, this Court specifically recognized this point and effectively disavowed the ancillary jurisdiction theory of the pre-*Pennhurst II* cases in *Oneida County*, *supra*. In that case, a party whose claims against a State were otherwise barred by the Eleventh Amendment argued that the claims could be heard because they fit within the normal "ancillary jurisdiction" of the federal court. This Court agreed that the claims "raise[] a classic case of ancillary jurisdiction," 470 U.S. at 251, but held, relying on *Pennhurst II*, that such jurisdiction did not suffice to overcome the State's sovereign immunity:

> The Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). As we held in *Pennhurst:* "[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Id.*, at 121. The indemnification claim here, whether cast as a question of New

> York law or federal common law, is a claim against the State for retroactive monetary relief. In the absence of the State's consent, *id.* (citing *Clark v. Barnard,* 108 U.S. 436, 447 (1883)), the suit is barred by the Eleventh Amendment. Thus, as the Court of Appeals recognized, whether the State has consented to waive its constitutional immunity is the critical factor in whether the federal courts properly exercised ancillary jurisdiction over the counties' claim for indemnification. *Pennhurst, supra.*

Oneida County, 470 U.S. at 251. The decisions in *Oneida County* and *Pennhurst II* foreclose continued reliance on the ancillary jurisdiction theory suggested in earlier cases.

The fact is that not even plaintiffs propose any viable theory for why the Commission's claims should be allowed to proceed. They simply point to the pre-*Pennhurst II* cases, but make no effort to explain how the ancillary jurisdiction principle in those cases can be reconciled with this Court's other cases establishing that such jurisdiction cannot override the assertion of a State's sovereign immunity.

Rather than actively defend the application of ancillary jurisdiction, plaintiffs haltingly suggest that perhaps Eleventh Amendment/sovereign immunity might be *categorically inapplicable* to the claims of a Compact Clause entity such as the Commission. Pls. Opp. 10. Plaintiffs decline to argue the point, however, asserting only that it is a "difficult" question not presented here, because (they say) the Complaint can be read as stating identical claims on behalf of the Commission and the States, which they assert creates ancillary jurisdiction. *Id.* This dodge is inadequate, however, because the fundamental point is that *even if* the claims are identical, the Commission's claims cannot proceed. Thus the question whether Eleventh Amendment immunity applies to claims by Compact Clause entities cannot be avoided. Fortunately it is not a difficult one.

As all parties appear to agree, the Commission is not a State for Eleventh Amendment purposes. As explained in the Motion to Dismiss, this Court has held the Eleventh Amendment to be categorically inapplicable to only two types of claims: those by the federal government, and those by other States – the two types of claims explicitly contemplated in the plan of the Convention that underlies our constitutional structure. Mot. Dismiss 3-4 (citing cases). The Court would thus have to add a third category of claims – claims by Compact Clause entities – to the short list of claims exempted from the Eleventh Amendment. Plaintiffs' suggestion that it might be "difficult" to decide whether to do so is based loosely on three points.

The first is the confusing assertion that "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." Pls. Opp. 9. Plaintiffs evidently mean this as a suggestion that the Compact either abrogates its member States' immunity or reflects their consent to be sued in federal court, but the suggestion is confusing because the premise is utterly false: *nowhere* does this Compact "preserve[] the right to judicial review." To the contrary, the Compact is entirely silent on judicial enforcement of its terms. In fact, the only penalties and enforcement mechanisms explicitly set forth in the Compact are self-executing: suspension or termination by the Commission of a member-State's disposal privileges under the Compact. Compact art. IV(e)(7),(11), art. VII(f), NC Opp. App. 13a, 14a, 23a. In any event, whatever may be inferred from the Compact's silence on judicial enforcement, certainly neither abrogation nor waiver of sovereign immunity can be inferred from such silence. Unless the Compact specifically says that its member States are subject to suit by the Commission in federal court, the States' immunity remains intact. Mot. Dismiss 6-7 & nn.2-3 (discussing re-

quirements for waiver and abrogation). Far from including any specific statement waiving sovereign immunity, the Compact actually includes its opposite: "The rights granted to the party states by this compact are additional to the rights enjoyed by sovereign states, and *nothing in this compact shall be construed to infringe upon, limit or abridge those rights.*" Compact, art. III, NC Opp. App. 9a (emphasis added).

Second, plaintiffs cite a single district court decision, *Entergy Ark., Inc. v. Nebraska*, 68 F. Supp. 2d 1093 (D. Neb. 1999), *aff'd in part, rev'd in part*, 241 F.3d 979 (8th Cir. 2001). But in that case, the State of Nebraska had unambiguously waived its immunity in the terms of that Compact:

> When it signed the Compact, Nebraska consented to a suit brought by the Commission in federal court. The words and structure of the Compact and the Congressional enabling legislation plainly authorize the Commission's suit. In fact, the Commission is "required" to sue Nebraska in "any forum" and in "any court of law" chosen by that body. Still further, the Compact specifically provides that the federal court has the power to review disputes between the Commission and Nebraska.

68 F. Supp. 2d at 1103; *see also* 241 F.3d at 986 (court of appeals opinion in same case: "Based on the nature of the Compact and the language of Article IV(e), we held 'that by entering into the Compact, Nebraska waived its [Eleventh Amendment] immunity from suit in federal court by the Commission to enforce its contractual obligations.'"). *Entergy* thus establishes, at most, that a State *can* waive its immunity by joining a Compact that clearly provides for its enforcement through federal court actions against member States. Because the Compact here includes no such provision, *Entergy* indirectly confirms that North Carolina remains immune.

Finally, plaintiffs cite this Court's statement in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), that "[u]nder the Compact Clause, States *cannot* form an interstate compact without first obtaining the express consent of Congress." *Id.* at 686. Again, the citation appears to suggest a waiver or abrogation argument, but here the Compact includes no language of waiver or abrogation at all.

All parties agree that Congress approved the terms of the Compact, and that North Carolina consented to them. Although plaintiffs are inexplicably resistant, the parties should also be able to agree that the Compact does not include any provision for consent to suit by the Commission in federal court. That should end the Court's inquiry. North Carolina has not consented to suit by the Commission, so this Court cannot exercise jurisdiction – original, ancillary, or otherwise – over the Commission's claims.

II. THE STATES CANNOT SEEK RELIEF ON BEHALF OF THE COMMISSION

As the Motion to Dismiss explained, in the very few cases in which non-State, non-federal entities were allowed to intervene in original actions against States, the claims were substantially identical to others properly before the Court, and thus were within what the Court apparently deemed its "ancillary jurisdiction." While subsequent cases have effectively disavowed that principle, *see supra* at 4-7, it has no application here in any event. Contrary to the one argument plaintiffs affirmatively make in their brief – but consistent with what they repeatedly have said to the Court until now – the claims of the Commission are not identical to those of the States. In short, the Commission seeks restitution for itself, a claim the States cannot make.

Plaintiffs contend that the claims of the States and the Commission are identical because each seeks the payment of $80 million (plus interest) directly to the Commission. As

noted in the Motion to Dismiss, however, the proposition that the States may validly seek on their own behalf a payment of money directly to the Commission is 180 degrees opposite from the proposition advanced aggressively by the Commission in No. 131, Original. In that case, the Commission repeated as often as it could its position that the Compact's member-States "cannot enforce directly the full sanction against North Carolina." Comm. Supp. Br., No. 131, Orig., at 6; *see id.* ("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"); *id.* (emphasizing the "disconnect between the relief that the States and the Commission can seek"); *id.* (distinguishing between "the States' great interest in the enforcement of the Commission's sanction, and the more minor relief that they can seek individually"); *id.* at 7 (action by one or more individual States "would not . . . provide the Commission, or its member States, with an adequate remedy"); *id.* at 8 ("there is no significant monetary recovery available to th[e] State[s] from this Court").

Plaintiffs make no effort to explain why the Commission's carefully articulated position in No. 131 was wrong; instead they merely scoff at the suggestion that it bears any relevance here, simply because the States were not parties to that case. Pls. Opp. 5. But of course *the Commission* was a party, and what it said then it flatly contradicts now, without explanation or apology. More importantly, the States themselves cannot evade responsibility for the positions asserted in No. 131. Contrary to their current pleas of innocence, the States were in fact active participants in that case – except that rather than file the action themselves, as they did this time, the States in that case, "exercising their sovereign powers," Comm. Supp. Br., No. 131, Orig., at 8, formally appointed the Commission to file the action *on their behalf.* As the Commission's brief represented to this Court: "the States, each represented by Commissioners appointed ac-

cording to each State's law, have formally authorized the Commission to bring suit in their stead." Comm. Reply Br., No. 131, Orig., at 3. Thus, it was repeatedly argued, "the Commission stands in the shoes of the six party States." *Id.* at 2; *see id.* at 1 (Commission "represents six states in this Court"). Accordingly, *none* of the plaintiffs is in a position to contend credibly that the States can now seek relief for the direct benefit of the Commission – relief they were positive they could *not* seek when they sent the Commission itself here to seek enforcement of the sanctions in No. 131.

The conclusion that the States could not seek restitution to be paid directly to the Commission is as sound now as it was then. In fact, the States likely did not initially bring this action themselves because they did not believe they could, given this Court's decision in *North Dakota v. Minnesota*, 263 U.S. 365 (1923). The Court held in that case that the Eleventh Amendment precluded it from maintaining jurisdiction over a claim by one State against another, where the plaintiff State was merely seeking damages to be paid directly to private persons whose own claims were barred by the Eleventh Amendment. *Id.* at 375-76. Because it was "inconceivable" that the plaintiff State was suing "without intending to pay over" its entire recovery directly to the private parties, the defendant State was entitled to assert Eleventh Amendment immunity against the claim of the State.

So it is here. In this case "any compensation would immediately return to the Commission." Comm. Reply, No. 131, Orig., at 6; *see* Pls. Opp. 6 & n.1. All parties agree that the States can seek to recover their out-of-pocket expenses and other direct losses, but that *only* the Commission can assert any claim to the restitution at issue here. Pls. Opp. 6 & n.1.[2] *North Dakota v. Minnesota* makes clear, however, that

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[2] In view of plaintiffs' concession that only the Commission can receive "the payment of restitution," Pls. Opp. 6 n.1, it is unclear what point the States are making by claiming some actual ownership interest

the States may not seek a remedy on behalf of a party that may not seek the remedy itself. The States may only pursue that to which *they* may be entitled – here, their out-of-pocket expenses, just as the Commission explained in No. 131.[3]

CONCLUSION

For the foregoing reasons, the motion to dismiss the claims of the Commission should be granted.

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in the funds resulting from the levy on *private* waste facility users, Pls. Opp. 4-5. If plaintiffs mean only to argue that the States have an *interest* in enforcing the Compact, the point is unexceptional but irrelevant: a State may well have a very strong interest in advancing some private party's claims, but a State can only assert its *own* claims consistent with the Eleventh Amendment. In any event, the asserted basis for the States' claim of ownership interest is nonexistent. Plaintiffs argue that, because the funds resulted from the "annual levy" of special fees and surcharges, the funds are "the financial commitments of all the party states" which constitutes an ownership interest. But plaintiffs misread the Compact. As clearly indicated in the introductory language of Article IV and paragraph (h), the text quoted by plaintiffs addresses funding of the Commission's "annual budget" through an annual surcharge levied by the host state. NC Opp. App. 15a-16a. This language does not address the multiple surcharges levied by the Commission through the first regional disposal facility for the express purpose of assisting North Carolina with the efforts to site, license, and construct the second regional disposal facility *outside* of the "annual budget."

[3] It is incorrect to say that this Court, in declining to exercise jurisdiction in No. 131, *must* have *rejected* the argument that the States cannot themselves seek restitution for the Commission. Pls. Br. 6-7. Rather, inherent in the Court's action in No. 131 was the conclusion that because a Compact Clause entity is not a State, such an entity cannot invoke this Court's original jurisdiction. That would be true even if, as the Commission argued, the Compact Clause entity is the only party that can properly bring a particular claim in which the States have an interest. Accordingly, the Court's refusal to exercise jurisdiction in No. 131 does not reflect a necessary rejection of the Commission's argument that the States' own claims would differ from the Commission's. The fact that this Court allowed the States to proceed with their own claims in this action means exactly that: the States are allowed to proceed *with their own claims*.

Respectfully submitted,

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