No. 131, Original

# In the Supreme Court of the United States

SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION, PLAINTIFF

*v.*

STATE OF NORTH CAROLINA

*ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTION PRESENTED

Whether this Court has, and should exercise, exclusive original jurisdiction, under 28 U.S.C. 1251(a), over a suit brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission, a body created by an interstate compact and consisting of representatives of several States, against one of the States that is a party to the compact.

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States.

## STATEMENT

Article III, Section 2 of the United States Constitution provides that this Court shall have original jurisdiction over cases "in which a State shall be Party." U.S. Const. Art. III, § 2. Congress has provided for this Court to have original and exclusive jurisdiction over "all controversies between two or more States." 28 U.S.C. 1251(a). The issue in this case is whether the Court has, and should exercise, original jurisdiction over a suit brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission

(Commission), a body created by interstate compact and consisting of representatives of several States, against one of the States that is a party to the compact.

1. The Compact Clause of the Constitution provides that "No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State." U.S. Const. Art. 1, § 10, Cl. 3. See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978). Congress has enacted legislation consenting to the Southeast Interstate Low-Level Radioactive Waste Management Compact (Compact) and a number of other regional compacts for the disposal of low-level nuclear waste. See Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859; see generally *New York* v. *United States*, 505 U.S. 144, 149-154 (1992); U.S. Br. at 2-15, *New York* v. *United States*, *supra* (No. 91-543). The Southeast Compact is an agreement originally among the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Compact, Art. 7(A), 99 Stat. 1878 (Br. in Opp. (Opp.) App. 21a). Each State enacted legislation enabling it to enter into the Compact. *E.g.*, N.C. Gen. Stat. § 104F-1 (1998) (repealed effective July 22, 1999).

The States entered into the Compact for the purpose of, *inter alia*, creating "the instrument and framework for a cooperative effort" to "provide sufficient facilities for the proper management of low-level radioactive waste generated in the region." See Compact, Art. 1, 99 Stat. 1872 (Opp. App. 6a). Under the Compact, a pre-existing facility in Barnwell County, South Carolina, initially provided for the disposal of the region's low-level radioactive waste, but the Compact stated that "in no event shall this disposal facility serve

as a regional facility beyond December 31, 1992." See Compact, Art. 2(10), 99 Stat. 1873 (Opp. App. 8a).

The Compact created the Commission to "develop and adopt * * * procedures and criteria for identifying a party state as a host state for a regional facility" and to choose a host State for that facility. Compact, Art. 4(E)(6), 99 Stat. 1875 (Opp. App. 12a-13a). The Commission consists of two representatives from each party State, each of whom is entitled to one vote. Compact, Art. 4(A) and (B), 99 Stat. 1874 (Opp. App. 11a). Upon becoming a party to the Compact, each State was required to pay $25,000 to the Commission for use in covering the Commission's costs. Compact, Art. 4(H)(1), 99 Stat 1876 (Opp. App. 15a). In addition, the Compact requires each State hosting a regional waste disposal facility to levy "special fees or surcharges on all users of such facility" to be paid to the Commission, to the extent required to cover its annual budget. Compact, Art. 4(H)(2), 99 Stat. 1876 (Opp. App. 15a-16a).

The Compact confers on the Commission various duties and powers. Compact, Art. 4(E), 99 Stat. 1874-1875 (Opp. App. 11a-14a). Among other things, the Commission, upon a majority vote of its members, is authorized:

> To act or appear on behalf of any party state or states, only upon written request of both members of the Commission for such state or states as an intervenor or party in interest before Congress, state legislatures, any court of law, or any federal, state, or local agency, board, or commission which has jurisdiction over the management of wastes.

Compact, Art. 4(E)(10), 99 Stat. 1875 (Opp. App. 14a). The Compact makes clear, however, that the Commis-

sion "is a legal entity separate and distinct from the party states capable of acting in its own behalf and is liable for its actions." Compact, Art. 4(M)(1), 99 Stat. 1877 (Opp. App. 17a). Accordingly, "[l]iabilities of the Commission shall not be deemed liabilities of the party states." *Ibid.*

The Compact also provides that "[a]ny party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission, including suspension of its rights under this compact and revocation of its status as a party state." Compact, Art. 7(F), 99 Stat. 1879 (Opp. App. 23a). Sanctions may be imposed "only upon the affirmative vote of at least two-thirds of the Commission members." *Ibid.*

2. The present controversy arises from the Commission's decision to sanction the State of North Carolina. In 1986, the Commission chose North Carolina as the host State for a regional waste disposal facility. See Mot. for Leave to File Bill of Complaint (Mot.) 7. To assist in developing the facility, the Commission appropriated money from its annual budget for a trust fund for North Carolina's use in creating the facility. Mot. 9; Opp. 4-5. The Commission also adopted a Capacity Assurance Charge on waste sent to the Barnwell County, South Carolina facility "[t]o assure the timely development of the second regional disposal facility in North Carolina." Mot. 9; Opp. 5. In 1990, however, North Carolina notified the Commission that it could not meet the January 1, 1993 target date for completion of the facility. See Mot. 9. The Commission nonetheless continued to help fund the development of the facility through the assessment of additional fees on

waste sent to the Barnwell County facility. See Mot. 9-10.

In December 1994, North Carolina informed the Commission that the opening of the new facility would be postponed until 1998. Mot. 11. In 1995, South Carolina withdrew from the Compact after the Commission rejected that State's proposal to extend the operation of the Barnwell County facility for all of the party States except North Carolina. *Ibid.* After South Carolina's withdrawal, the Commission informed North Carolina that additional Commission funding would be unavailable, because the Commission could no longer obtain fees from the Barnwell County site. See Mot. 11-12. In June 1996, North Carolina notified the Commission that it could not continue developing the second facility without further funding from the Commission. Mot. 12-13. The Commission and North Carolina engaged in further discussions regarding the funding issue, but were unable to resolve their differences. See Mot. 13-16.

On June 21, 1999, the Florida and Tennessee Commission representatives filed with the Commission a sanctions complaint against North Carolina. Mot. 17. The complaint alleged that, by failing to provide the second disposal facility for the region, North Carolina had violated the Compact. *Ibid.* The complaint sought, *inter alia*, the return of nearly $80 million in funding that the Commission had provided to North Carolina to assist in developing the facility. *Ibid.* On July 26, 1999, North Carolina withdrew from the Compact, taking the position that the Commission had violated the Compact by cutting off supplemental funding of the facility and stating that it "had no option but to" withdraw. See Mot. 18. In November 1999, the Commission sent North Carolina notice of a hearing on the sanctions

complaint. *Ibid.* The hearing was held in December 1999, but North Carolina did not participate. Mot. 18-19. North Carolina asserted that the Commission lacked jurisdiction to hold the sanctions hearing because North Carolina had voluntarily withdrawn from the Compact.

After the hearing, the Commission unanimously found that North Carolina had violated the Compact. Mot. 19. It ordered North Carolina to repay $79,930,337 to the Commission, plus interest accruing from January 1, 1998, the date when North Carolina stopped its work on the second facility. *Ibid.* The Commission also ordered North Carolina to pay the Commission's attorney's fees and $10 million for the loss of revenue that the Commission would have received from the facility in North Carolina. *Ibid.* The Commission directed North Carolina to comply with the sanctions order by July 10, 2000. *Ibid.* North Carolina has not complied with the order. See *ibid.*

In its Motion for Leave to File a Bill of Complaint, the Commission asks this Court to determine (1) whether, under the Compact, the Commission had authority to issue the sanctions order against North Carolina, and (2) whether North Carolina is obligated to comply with the sanctions order. Mot. 20. The Commission contends that this Court has exclusive original jurisdiction over the case under Article III, Section 2 of the Constitution and 28 U.S.C. 1251(a) because it involves a dispute between "two or more States." See Mot. 24; Bill of Complaint (Complaint) 1-2. The Commission asserts that it may invoke this Court's exclusive original jurisdiction because it "stands in the shoes of the member States in this action" by virtue of the Compact authorization for the Commission "'[t]o act or appear on behalf of any party state or states' before any

court of law." Mot. 24 n.5 (quoting Compact, Art. 4(E)(10), 99 Stat. 1875 (Opp. App. 14a)).

North Carolina argues that the Commission is not a State and thus cannot invoke this Court's original jurisdiction. Opp. 11-12. North Carolina contends that the Commission instead is "a legal entity separate and distinct from the party states," which is "capable of acting on its own behalf, liable for its own actions, and vested with specific statutory rights and obligations." *Id.* at 12 (citing Compact, Art. 4, 99 Stat. 1874-1877 (Opp. App. 11a-18a)).

The parties thus disagree about (1) whether this Court has exclusive original jurisdiction over the Bill of Complaint, and (2) whether, if so, the present case warrants the Court's exercise of its jurisdiction. See Mot. 24-29; Opp. 11-25.

## DISCUSSION

### THIS COURT SHOULD NOT EXERCISE JURISDICTION OVER THIS SUIT

The Court should deny the Commission's Motion for Leave to File a Bill of Complaint. This Court would have exclusive original jurisdiction over a suit brought by one or more of the States that are parties to the Southeast Interstate Low-Level Radioactive Waste Interstate Compact against North Carolina based on that State's alleged violations of the Compact. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. 673 (1995) (suit by Kansas against Colorado for enforcement of interstate compact). The same cannot be said, however, of a suit brought by the Southeast Interstate Low-Level Radioactive Waste Management Commission against North Carolina. The Commission, which was created by the Compact, is not itself a State under our constitutional

structure. There is, moreover, no reason to believe that, when Congress approved the Compact, it intended to authorize the Commission either to act as a "State" for purposes of invoking this Court's original jurisdiction or to invoke this Court's original jurisdiction on behalf of the States that are parties to the Compact. The present case accordingly does not fall within the Court's exclusive original jurisdiction over "all controversies between two or more States." 28 U.S.C. 1251(a). The Court therefore should deny the Commission's motion for leave to file a bill of complaint, and the dispute should be resolved in another forum or through other means.[1]

**A. The Commission Is Not A State**

The Constitution grants this Court original jurisdiction over suits "in which a State shall be Party," U.S. Const. Art. III, § 2, but Congress has limited the Court's exclusive original jurisdiction to "controversies between two or more States," 28 U.S.C. 1251(a). The Commission itself is plainly not a State, and it should not be treated as one for present purposes. The Commission therefore cannot satisfy the fundamental prerequisite for invoking this Court's exclusive original jurisdiction.

1. "The States, as separate sovereigns, are the constituent elements of the Union." *Hess* v. *Port Auth.*

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[1] Because this case does not fall within the Court's exclusive original jurisdiction, we do not address whether the circumstances of the case present a sufficiently serious matter, and are otherwise appropriate, to warrant this Court's exercise of that jurisdiction. See *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (the Court has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court") (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

*Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994). The Commission, by contrast, is an interstate body created by the Compact. The Commission exists solely for purposes of administering the Compact. The party States entered into the Compact by enacting enabling legislation, and Congress consented to the Compact in the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859. The Commission is a Compact Clause entity that "owe[s] [its] existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States.'" *Hess*, 513 U.S. at 42.

This Court's decisions in *Hess* and *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), are instructive. In each of those cases, a Compact Clause entity sought to invoke the party States' Eleventh Amendment immunity from suit by private individuals, and in each instance the Court rejected that invocation. See *Hess*, 513 U.S. at 40-52; *Lake Country Estates*, 440 U.S. at 401-402. The Court noted that "there is good reason not to amalgamate Compact Clause entities with agencies of 'one of the United States' for Eleventh Amendment purposes." *Hess*, 513 U.S. at 42. There is similarly good reason not to treat a Compact Clause entity as a State for purposes of invoking this Court's original jurisdiction.

The Commission contends that *Hess* and *Lake Country Estates* are inapposite because "[o]riginal 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." Reply Br. 2. But that observation, even if true, misses the point. The Commission is not a State, and it therefore does not face any "dangers inherent in entering the court of

*another* state." *Ibid.* (emphasis added). The Commission, by the terms of the Compact, is a separate entity. See Compact, Art. 4(M)(1), 99 Stat. 1877 (Opp. App. 17a) (the Commission is "a legal entity *separate and distinct* from the party states capable of acting in its own behalf and is liable for its actions") (emphasis added); see also *ibid* (the Commission's liabilities "shall not be deemed liabilities of the party states").[2]

2. The Constitution grants the States access to this Court's original jurisdiction precisely because they are "the constituent elements of the Union." *Hess*, 513 U.S. at 40. The States entered the Union on the understanding that they were separate sovereigns and were surrendering only a portion of their sovereign powers. They retained, through the Compact Clause, a portion of their formerly unfettered authority to resolve interstate disputes through agreement. And they have, through the Eleventh Amendment, a portion of their sovereign immunity from suit. But they agreed to confer on this Court, through Article III's grant of original jurisdiction, judicial power to resolve interstate disputes "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." See *North Dakota* v. *Minnesota*, 263 U.S. 365, 372-373 (1923). See, *e.g.*, *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) ("The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully

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[2] The Commission's inability to invoke the Court's original jurisdiction in its own right as a State in no way suggests that the States that are parties to the Compact may not invoke that jurisdiction on the basis of a proper cause of action.

sovereign.") (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 571 n.18 (1983)).

The States may, with Congress's consent, create Compact Clause entities. But those entities "occupy a significantly different position in our federal system than do the States themselves." *Hess*, 513 U.S. at 40. Compact Clause entities lack the normal sovereign attributes of States, such as the power to enact general legislation, exercise police powers within defined borders, or organize courts of general jurisdiction. Because Compact Clause entities have no separate sovereign identity, they have no inherent claim to sovereign immunity. *Id.* at 39-40. They similarly have no inherent right to invoke this Court's original jurisdiction in the way one of the States might do.[3]

Unlike the States, Compact Clause entities are "creations of * * * discrete sovereigns" that "address 'interests and problems that do not coincide nicely either with the national boundaries or with State lines.'" *Hess*, 513 U.S. at 40 (citation omitted). The States (and sometimes the federal government) exercise cooperative power over the Compact Clause entity's actions for narrowly defined purposes. As a result, the Compact Clause entity's "political accountability is diffuse," and it lacks close ties to an identifiable body of citizens. *Id.* at 42. Furthermore, a

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[3] The Court's decisions make clear that the States are entitled to invoke this Court's original jurisdiction based on their identity as sovereign States, and not on the basis of particular powers that they may exercise. For example, the Court has made clear that even entities that "exercise a slice of state power" (*Lake Country Estates*, 440 U.S. at 401 (internal quotation marks omitted)), such as political subdivisions of a State, are not "States" within the meaning of 28 U.S.C. 1251(a). *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 98 (1972).

Compact Clause entity can be disbanded once it has served its purpose. It therefore has none of the historical, legal, or functional *sovereign* attributes of a State.

Just as this Court has recognized that compact commissions are not entitled to Eleventh Amendment immunity, lower courts have declined to treat compact commissions as States for other judicial purposes. For example, in *Nebraska* v. *Central Interstate Low-Level Radioactive Waste Comm'n*, 974 F. Supp. 762 (D. Neb. 1997), a district court rejected a compact commission's claim that it should be treated like a State for Seventh Amendment purposes. The court concluded that "[a]n examination of the history, purpose, and nature of interstate compacts reveals that the Commission is not a 'quasi-sovereign' as it claims." *Id.* at 764. An interstate compact "does not create a separate sovereign state, and its powers are in no way equivalent to that of an independent sovereign." *Id.* at 765. The compact commission in that case, like its counterpart in the present case, "simply administers a regional waste compact—it exercises authority only in a very narrow sphere and only as an amalgamation of the interests of its member states." *Ibid.*[4] That reasoning applies with

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[4] The State of Nebraska sued the Central Interstate Commission in federal district court on at least two previous occasions as well. *Nebraska ex rel. Nelson* v. *Central Interstate Low-Level Radioactive Waste Comm'n*, 902 F. Supp. 1046 (D. Neb. 1995); *Nebraska ex rel. Nelson* v. *Central Interstate Low-Level Radioactive Waste Comm'n*, 834 F. Supp. 1205 (D. Neb. 1993), aff'd, 26 F.3d 77 (8th Cir.), cert. denied, 513 U.S. 987 (1994). Most recently, the Eighth Circuit affirmed the district court's rejection of Nebraska's challenge to the Central Interstate Commission's authority to establish deadlines for the State to process a waste disposal facility license application. See *Nebraska* v. *Central*

equal force here. The Commission is not a State and should not be considered the equivalent of a State for purposes of invoking this Court's original jurisdiction.

### B. The Commission Cannot Invoke This Court's Exclusive Original Jurisdiction As The Representative Of States That Are Parties To The Compact

The Commission also contends that it "stands in the shoes" of the States that are parties to the Compact and is entitled to invoke this Court's original jurisdiction as a representative of those States for purposes of this action. Mot. 24 & n.5; Reply Br. 2-3. That contention is unsound.

1. The Commission asserts that Congress may authorize an entity created by interstate compact to invoke this Court's original jurisdiction on behalf of the States that are parties to the compact. Reply Br. 2-3. It is not clear, however, that Congress may do so. A Compact Clause entity is not a "State" within the meaning of the Constitution, and the Commission has pointed to no source of authority for Congress to provide that a Compact Clause entity shall have (or be entitled to assert) the constitutional entitlements of a State in an Article III court as against a defendant that *is* one of the States of the Union. In addition, a suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment. See U.S. Const. Amend. XI.[5]

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*Interstate Low-Level Radioactive Waste Comm'n*, 187 F.3d 982 (1999). Under the Commission's argument in the present case, none of these cases could have proceeded in federal district court because this Court would have had *exclusive* original jurisdiction over Nebraska's claims.

[5] This Court's decisions holding that "nonconsenting States are immune from suits brought by federal corporations, foreign

There is no need to reach those constitutional issues here, however, because there is no sound reason to conclude that, when Congress approved the Compact, it intended to allow the Commission to invoke this Court's original jurisdiction as a representative of the States that are parties to the Compact. The Compact allows the Commission to act in a representational capacity for certain purposes, but the Compact does not expressly grant the Commission power to invoke this Court's original jurisdiction or to sue a State.

The Compact provides that the Commission may:

> act or appear on behalf of any party state or states * * * as an intervenor or party in interest before Congress, state legislatures, any court of law, or any federal, state, or local agency, board, or commission which has jurisdiction over the management of wastes.

Compact, Art. 4(E)(10), 99 Stat. 1875 (Opp. App. 14a). The Compact's mere mention that the Commission may appear in various tribunals, including "any court of law," falls far short of providing the Commission authorization to invoke this Court's original jurisdiction to sue a member State and to precipitate the constitutional questions that would arise from such a novel action. Compare *College Sav. Bank* v. *Florida Prepaid*

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nations, or Indian tribes" demonstrate that a State's sovereign immunity in federal court is not limited to "the strict language of the Eleventh Amendment." *Alden* v. *Maine*, 527 U.S. 706, 728 (1999) (citations omitted). Accordingly, although Congress has provided that this Court has original (but not exclusive) jurisdiction over "[a]ll actions or proceedings *by* a State against the citizens of another State" (28 U.S.C. 1251(b)(3) (emphasis added)), it has not provided for original jurisdiction over a suit brought *against* a State.

*Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (citing *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 577-579 (1946)); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 75 (2000).

Congress has consistently confined this Court's original jurisdiction within a narrow compass. See 28 U.S.C. 1251. Furthermore, Congress is undoubtedly aware of what "has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.'" *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972). This Court should not lightly assume that Congress intended to enlarge the category of parties that may invoke this Court's exclusive original jurisdiction on the basis of the faint implication that the Commission seeks to draw from the Compact. Cf. *Mississippi* v. *Louisiana*, 506 U.S. at 76 (noting that the "delicate and grave" character of original jurisdiction renders it "obligatory only in appropriate cases" (citation omitted)).

2. The result is the same if the question of the Commission's authority to invoke this Court's exclusive original jurisdiction is viewed as one of standing. This Court has held that, in appropriate circumstances, an association or organization has standing to sue to redress injuries to its members. The Court has articulated a three-prong test for such "representational" standing, under which an association or comparable entity has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Food & Commercial Workers* v. *Brown Group, Inc.*, 517 U.S. 544, 553 (1996) (quoting

*Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Applying the third prong of that test here, both the nature of the claim asserted (a claim by a number of States that another State has violated an interstate compact) and the relief requested (monetary and other relief against a sister State) ordinarily would require the participation of the party States themselves as plaintiffs in a suit within this Court's exclusive original jurisdiction.

This Court has ruled, in a case against a private defendant, that the third prong of this associational or representational standing test is prudential, not constitutionally required under Article III, and that it therefore may be displaced by an Act of Congress. See *Food & Commercial Workers*, 517 U.S. at 555-558. There is no need here to decide whether the third prong should likewise be regarded as merely prudential where the plaintiff is an organization created by an interstate compact among sovereign States and the defendant is a sister State. As we have noted, 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 and thereby displace an otherwise applicable prudential rule.

3. Even if the foregoing obstacles to suit as a representative of States that are parties to the Compact could be overcome in another case, the Commission would be incorrect in characterizing its role in this case as one of "stand[ing] in the shoes" of the party States. Reply Br. 3. The Commission, in its capacity as the Compact Clause entity responsible for administering the Compact, imposed a sanction on one of the States that is a party to the Compact. The Com-

mission's sanction requires North Carolina to return nearly $80 million (plus interest) to the Commission. The Commission is not suing North Carolina to recoup funds that are owed to the other party States. Indeed, the Commission—and not the States that are parties to the Compact— dispersed the funds to North Carolina in the first place. In accordance with the Compact, the Commission itself generated virtually all of those funds through the assessment of fees on users of the regional waste disposal facility. See Compact, Art. 4(H)(2), 99 Stat. 1876 (Opp. App. 15a). Hence, in seeking to enforce the sanction, the Commission is not acting in a representative capacity, but is instead acting in its own right, as "a legal entity separate and distinct from the party states." Compact, Art. 4(M)(1), 99 Stat. 1877 (Opp. App. 17a).

### C. The Commission Has An Alternative Forum For Pursuing Its Claim

The Commission contends that if this Court does not exercise its original jurisdiction, there is no alternative forum in which it can litigate its claims against North Carolina. See Mot. 27-29; Reply Br. 6-7. That argument is also unsound.

The Commission contends that the present case should not be heard in state court because "[i]t requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally nullified, or given final meaning by an organ of one of the contracting States," and "[a] State cannot be its own ultimate judge in a controversy with a sister State." Mot. 28 (quoting *West Va. ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951)); see Reply Br. 7. The Court's rejection of original jurisdiction over a suit by the Commission would not, however, preclude

one or more States that are parties to the Compact from bringing an original action under 28 U.S.C. 1251(a) against another party State to enforce the Compact and seek an appropriate remedy. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987).

In any event, the Commission's reliance on *Sims* is misplaced even as to the Commission's own claims. The Court's decision in *Sims* arose from an interstate compact reflecting an agreement among eight States to curtail pollution discharges into the Ohio River. 341 U.S. at 24. A controversy arose because of "conflicting views between officials of West Virginia regarding the responsibility of West Virginia under the Compact." *Id.* at 25. The West Virginia Supreme Court resolved that intrastate dispute through a mandamus action, but this Court, on writ of certiorari, reversed that court's interpretation of the compact. *Id.* at 32.

This Court observed that "[a] State cannot be its own ultimate judge in a controversy with a sister State" in the context of this Court's *review* of the state court judgment on certiorari. See *Sims*, 341 U.S. at 28-29. The Court explained that, although the West Virginia Supreme Court of Appeals "is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution," this Court is "free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States." *Id.* at 28. The Court specifically observed that "the fact the compact questions reach us on a writ of certiorari rather than by way of an original action brought by a State does not affect the power of this Court." *Id.* at 30.

Contrary to the Commission's contention, *Sims* demonstrates that state courts *are* appropriate fora for

resolving interstate compact controversies that do not fall within this Court's exclusive original jurisdiction. This Court may review a state court's interpretation of a compact—which is a matter of federal law—through a writ of certiorari. The Eleventh Amendment would pose no bar to the Court's exercise of appellate jurisdiction in that context. See *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation*, 496 U.S. 18, 28 (1990). This Court can accordingly ensure that a state court's initial exercise of jurisdiction over a compact dispute involving a non-State party would not result in a single State being the "ultimate judge" of the federal issues raised in the bill of complaint. See *Sims*, 341 U.S. at 26-30.[6]

[6] The Commission contends that North Carolina "does not even concede that a State's sovereign immunity would not preclude a resolution of this dispute in the North Carolina courts." Reply Br. 8 n.3 (citing *Alden* v. *Maine*, *supra*). North Carolina's brief in opposition indicates, however, that North Carolina courts would be an available and appropriate forum for resolving the dispute. See Opp. 25 ("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"). Furthermore, if this suit is not barred by the Eleventh Amendment, as the Commission's filing of an action against North Carolina in this Court apparently assumes, the Eleventh Amendment likewise presumably would not bar a suit by the Commission against North Carolina in federal district court.

**CONCLUSION**

The motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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