No. 132, Original

In the Supreme Court of the United States

STATE OF ALABAMA, ET AL., PLAINTIFFS

v.

STATE OF NORTH CAROLINA

ON MOTION OF NORTH CAROLINA TO DISMISS CLAIMS OF THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee, and the Commonwealth of Virginia entered into the Southeast Low-Level Radioactive Waste Management Compact (Southeast Compact), Pub. L. No. 99-240, 99 Stat. 1878, to provide a regional solution to disposal of certain types of radioactive wastes. The Southeast Compact creates the Southeast Low-Level Radioactive Waste Management Commission (Southeast Commission) to administer that interstate compact. Alabama, Florida, Tennessee, and Virginia, joined by the Southeast Commission, have brought this suit under the Supreme Court's original jurisdiction, alleging that North Carolina has breached its obligations under the Southeast Compact and seeking enforcement of the Southeast Commission's sanctions order. North Carolina has moved to dismiss the Southeast Commission's claims. The question presented by North Carolina's motion to dismiss is:

Whether the Eleventh Amendment bars the Southeast Commission from asserting claims in a Supreme Court original action, jointly with four compacting States, that North Carolina has violated the Southeast Compact and is subject to the Commission's sanctions order.

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This brief is submitted in response to the Special Master's invitation to the Solicitor General to express the views of the United States on the motion of North Carolina to dismiss the claims of the Southeast Interstate Low-level Radioactive Waste Management Commission.

STATEMENT

The Supreme Court has granted the motion of the States of Alabama, Florida, and Tennessee, and the Commonwealth of Virginia (plaintiff States) and the Southeast Interstate Low-level Radioactive Waste Management Commission (Southeast Commission) to file a bill of complaint against the State of North Carolina, seeking a remedy for North Carolina's alleged breach of the Southeast Interstate Low-Level Radioactive Waste Management Compact (Southeast Com-

pact). In conjunction with its answer to the bill of complaint, North Carolina moved to dismiss the Southeast Commission as a plaintiff.

In urging the dismissal of the Southeast Commission, North Carolina asserts that the Eleventh Amendment bars suits against a State by any entity other than another State or the United States unless the State has explicitly consented to such suit. N.C. Mot. to Dismiss 3. The claims of the Southeast Commission are subject to that bar, according to North Carolina, because the Commission is neither a State nor a federal agency, and North Carolina has not consented to the Commission's suit. *Id.* at 4-7. North Carolina acknowledges that the Court "in the past has allowed non-State, non-federal parties to intervene as plaintiffs in original actions against nonconsenting States" when a party with a viable claim is already before the Court. *Id.* at 8 (citing, *e.g.*, *Arizona* v. *California*, 460 U.S. 605, 614 (1983)). North Carolina asserts, however, that a different result should obtain here for two reasons.

First, North Carolina claims that the intervening parties in *Arizona* v. *California*, *supra*, sought substantially the same relief as a party properly before the Court, while the Southeast Commission in this case seeks substantially different relief than that which the plaintiff States may seek. N.C. Mot. to Dismiss 10. In North Carolina's view, the Southeast Commission seeks to recover the $80 million sanction that it imposed on North Carolina for non-compliance with the Southeast Compact, while the plaintiff States can assert only their own rights under the Compact and cannot recover the penalty that the Southeast Commission imposed. *Id.* at 10-11. Second, North Carolina asserts that, even if the Commission's claims are the same as the plaintiff States' claims, the Court's decision in *Arizona* v. *Cali-*

fornia, *supra*, should not be followed, because the Court has since repudiated the theory of jurisdiction upon which the Court allowed the non-state parties to intervene in that case. *Id.* at 13; N.C. Reply Br. 6.

Plaintiffs oppose North Carolina's motion, asserting that the claims of the plaintiff States and the Southeast Commission are identical and that the Court's decision in *Arizona* v. *California*, *supra*, should be followed here. Pl.'s Opp. 4. Plaintiffs also assert that, should the Special Master find the Commission's claims to differ from the plaintiff States' claims, then the Master would be required to address an unsettled question of "the extent of its ancillary jurisdiction in original actions and whether the Commission's claims fall within it." *Id.* at 9. Further, plaintiffs suggest that, should the Master determine its ancillary jurisdiction is insufficient to support the Commission's claims, then he would be required to address the additional undecided question of "whether a member State has Eleventh Amendment immunity from claims made by a Compact entity." *Id.* at 10.

DISCUSSION

THE SPECIAL MASTER SHOULD DENY NORTH CAROLINA'S MOTION TO DISMISS THE SOUTHEAST COMMISSION'S CLAIMS

The Supreme Court's original jurisdiction extends to "all Cases * * * in which a State shall be a party," U.S. Const. Art. III, § 2, and, by statute, is exclusive in "all controversies between two or more States," 28 U.S.C. 1251(a). The Court accordingly may adjudicate the plaintiff States' original action against North Carolina, which seeks to enforce the provisions of the Southeast Compact. The Court has additionally ruled that the Eleventh Amendment does not bar the Court from

allowing a non-state and non-federal party to intervene in such suits, at least in those circumstances in which that party's claims are the same as those of a party that is properly before the Court. See *Arizona* v. *California*, 460 U.S. 605 (1983). The Southeast Commission's claims fit within that description, and the Special Master should accordingly deny North Carolina's motion to dismiss those claims. The Master should decline North Carolina's invitation to examine whether the Court's subsequent decisions, which do not directly address the continued vitality of that principle, have implicitly repudiated the Court's decision in *Arizona* v. *California*, *supra*. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

A. The Plaintiff States' Claims Fall Within The Supreme Court's Original Jurisdiction

The Supreme Court has original and exclusive jurisdiction over a judicial case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). That jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983); see, *e.g.*, *New Jersey* v. *New York*, 523 U.S. 767 (1998); *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Virginia* v. *West Virginia*, 206 U.S. 290, 317-319 (1907). The Eleventh Amendment poses no impediment to the Supreme Court's exercise of its original jurisdiction over suits between States. Article III of the Constitution confers that authority, and the adoption of the Eleventh Amendment left the Court's exercise of that authority "as free as it had been before." *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 731 (1838).

In the prior original action arising out of the same underlying dispute at issue here, the United States, as amicus curiae in response to the Court's request for the federal government's views, took the position that the Court's exclusive original jurisdiction does not extend to a suit, brought solely by the Southeast Commission, seeking enforcement of the Southeast Compact's provisions. See U.S. Amicus Br. in *Southeast Interstate Low-Level Radioactive Waste Management Commission* v. *North Carolina*, 533 U.S. 926 (2001) (No. 131, Original) (motion for leave to file bill of complaint denied). The United States explained that the Southeast Commission could not initiate an original action against North Carolina because the Commission is not a State. See *id.* at 7-13. The United States noted, however, that the Court would have original jurisdiction over a suit, brought by one or more of the compacting States against North Carolina, to enforce the Southeast Compact and to seek appropriate remedies. See *id.* at 7, 10 n.2, 17-18.

The United States has since taken the position, in response to a subsequent request by the Supreme Court for the United States' views in this case, that the compacting States themselves are entitled to bring this original action against North Carolina to enforce the Southeast Compact. See U.S. Amicus Br. in *Alabama* v. *North Carolina*, No. 132, Original (on motion for leave to file complaint). The United States explained:

> The moving States, joined by the Southeast Commission, allege that North Carolina has breached its obligations under that agreement and has failed to submit to the agreement's prescribed remedial mechanisms. Those allegations give rise to a "controvers[y] between two or more States" within the

> reach of this Court's "original and exclusive jurisdiction." 28 U.S.C. 1251.

Id. at 9. The United States reiterated its view that the Southeast Commission, by itself, could not bring the suit. *Id.* at 9-10. But the plaintiff States could initiate the action because they are "asserting their *own* rights under the Southeast Compact." *Id.* at 11. The United States explained:

> The moving States are entitled to pursue any available compact remedy for North Carolina's alleged breach of the Compact, and those States have chosen to seek declaratory relief and enforcement of the Southeast Commission's sanctions order, which imposes a sanction in the nature of a restitutionary remedy.

Ibid. The United States further noted that the plaintiff States specifically "ask the Court to validate their view of the Compact's sanctions provisions by declaring that (1) 'North Carolina is subject to the jurisdiction of the Commission and subject to the Commission's sanctions decisions'; (2) 'the Sanctions Hearing conducted by the Commission was fair and valid'; and (3) 'the sanctions against North Carolina * * * were fair and reasonable and are subject to enforcement.' Compl., Prayer for Relief, paras. 1-3." *Id.* at 11-12. The United States observed:

> If the moving States are correct that the Southeast Compact subjected North Carolina to the described sanctions regime under the facts alleged, then they are entitled, on the basis of their *own* rights under the Compact, to seek appropriate declaratory relief and enforcement of the sanctions that the Commission imposed against North Carolina.

Id. at 12. See *Texas* v. *New Mexico*, 462 U.S. at 567.

The United States adheres to the foregoing views. Contrary to North Carolina's suggestions, the plaintiff States, in the exercise of their own rights, may seek enforcement of the Commission's sanctions order, provided that they can establish that the Southeast Compact authorizes that order. The dispute here does not present a situation in which the plaintiff States are asserting claims on behalf of a private party against another State. See *North Dakota* v. *Minnesota*, 263 U.S. 365 (1923). The compacting States agreed to the Compact's sanctions provisions, and each State may seek their lawful enforcement, just as private parties may seek enforcement of contract provisions that require arbitration of contractual disputes and obligate the parties to abide by the arbitrator's determination of an appropriate remedy. See, *e.g.*, Federal Arbitration Act, 9 U.S.C. 2.[1]

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[1] North Carolina contends that the plaintiff States are foreclosed from seeking enforcement of the Southeast Commission's sanctions order because the Commission stated, in its unsuccessful motion for leave to file a complaint in *Southeast Interstate Low-Level Radioactive Waste Management Commission* v. *North Carolina*, No. 131, Original, that the Commission alone could seek enforcement of that sanctions order. See N.C. Mot. to Dismiss 10; N.C. Reply 10-12. The Southeast Commission's statements in a prior proceeding should not limit the remedies that the plaintiff States can seek here, especially since the Court did not grant the Commission leave to file its complaint. The plaintiff States, who were not parties in that prior proceeding, are not subject to judicial estoppel in these circumstances. See *New Hampshire* v. *Maine*, 532 U.S. 742, 749-751 (2001). And even if the plaintiff States shared the Commission's mistaken understanding of the compacting States' rights, that mistaken understanding cannot alter the terms and operation of the Compact, which has the force of federal law. See *Texas* v. *New Mexico*, 462 U.S. at 564.

The United States accordingly submits that the plaintiff States are proper parties to enforce the Southeast Compact's sanctions provisions. That determination does not resolve, however, the further issue of whether the Compact's sanctions provisions authorize the sanction that the Southeast Commission imposed in this case. As the United States noted, the moving States and North Carolina appear to disagree on two basic interpretive issues:

> (1) whether the Compact empowers the Southeast Commission to impose, as a sanction for North Carolina's failure to construct a waste facility, a requirement that North Carolina return funds that the Commission provided in preparation for construction of that facility; and (2) whether the Compact divested the Commission of authority to impose that sanction when North Carolina withdrew from the Compact before the Commission completed the sanctions process.

U.S. Compl. Amicus Br. at 15-16 (No. 132). The United States expects that those issues would be resolved in future stages of this original action.[2]

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[2] North Carolina and the plaintiff States appear to agree that the Compact may provide the plaintiff States with other forms of relief apart from enforcement of the Commission's sanctions order. See N.C. Mot. to Dismiss 7 (noting that the plaintiff States may have other "jurisdictionally proper claims"); Pl.'s Opp. 6 (suggesting that the available remedies "includes the sanction"). Because North Carolina's motion to dismiss focuses on whether the plaintiff States or the Commission may enforce the sanctions order, the United States does not address those other potential remedies.

B. The Eleventh Amendment Does Not Prevent The Southeast Commission From Joining In The Plaintiff States' Complaint And Asserting Identical Claims In This Original Action

North Carolina contends that the Southeast Commission's claims against North Carolina in this original action should be dismissed because the Eleventh Amendment bars the Commission from suing a State. The United States stated, in its brief as amicus curiae in *Southeast Interstate Low-Level Radioactive Waste Management Commission* v. *North Carolina*, No. 131, Original, that "a suit by a Compact Clause entity against a State would appear to raise a question under the Eleventh Amendment." U.S. Amicus Br. 13. The Supreme Court's decisions recognize, however, that the Eleventh Amendment does not bar a non-state and non-federal party from participating in a suit that is properly instituted under the Court's original jurisdiction, provided that the party does not "bring new claims" against the State. *Arizona* v. *California*, 460 U.S. 605, 614 (1983).

The Eleventh Amendment prohibits federal courts from subjecting a State of the Union to a suit commenced or prosecuted by a citizen of a State or foreign nation. The Eleventh Amendment itself specifically provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The Supreme Court has observed that the Eleventh Amendment reflects a broader principle that "the

States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today * * * except as altered by the plan of the Convention or certain constitutional Amendments." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999).

The Supreme Court has nevertheless recognized that the Eleventh Amendment does not necessarily bar a non-state and non-federal party from participating in a properly commenced action within this Court's original jurisdiction. The Court's decisions in *Arizona* v. *California*, No. 8, Original, are directly on point. The State of Arizona commenced an original action against the State of California to determine their respective rights to the use of the Colorado River. See *Arizona* v. *California*, 373 U.S. 546 (1963) (*Arizona I*). The United States intervened to assert, among other things, claims to water rights held in trust for the benefit of five federally recognized Indian Tribes. *Id.* at 551, 595. The Indian Tribes subsequently moved to intervene in the action to assert those claims on their own behalf. The Supreme Court granted the Tribes leave to intervene. *Arizona* v. *California*, 460 U.S. 605, 613-615 (1983) (*Arizona II*). The Court expressly rejected the States' Eleventh Amendment objections, stating that, in light of the United States' participation in the suit, "the States involved no longer may assert that immunity with respect to the subject matter of this action." *Id.* at 614. The Court reasoned:

> The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not

> enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Ibid. Following that decision, the Indian Tribes participated in the proceedings to determine their individual water rights claims. See *Arizona* v. *California*, 530 U.S. 392 (2000) (*Arizona III*). The proceeding respecting one of those Tribes remains ongoing at this time. See *id.* at 419-420.

North Carolina asserts that the participation of the Southeast Commission in this case is distinguishable from the participation of the Indian Tribes in *Arizona* v. *California*, *supra*, because, unlike the Tribes, the Commission seeks relief "different in quantity and quality" from that sought by the plaintiff States. N.C. Mot. to Dismiss 10. The plaintiff States and the Commission dispute North Carolina's contention and assert that, at least in reference to the enforcement of the Commission's sanctions order, they are "making the same claim and seeking the same relief." Pl.'s Opp. 3. The complaint itself supports that assertion. It identifies the plaintiff States and the Southeast Commission as the plaintiffs (Compl. para. 9), it states the claims therein jointly on behalf of all of the plaintiffs (*id.* paras. 62-86), and it makes no distinctions among the plaintiffs with respect to the relief sought (*id.* Prayer for Relief paras. 1-4).

Given the apparent identity of the plaintiff States' and the Commission's claims, North Carolina's motion to dismiss should be denied. As explained above, the plaintiff States are entitled, as parties to the Southeast Compact, to seek enforcement of the Compact, including the Commission's sanctions order. There is nothing in the complaint suggesting that the Southeast

Commission is asserting claims or seeking relief beyond what the plaintiff States themselves are seeking. The Supreme Court's decision in *Arizona II* accordingly counsels against dismissal of the Southeast Commission's claims. The Southeast Commission does "not seek to bring new claims" against North Carolina, and the Court's "judicial power over the controversy is not enlarged" by the Commission's presence. 460 U.S. at 614. Under the Court's reasoning in *Arizona II*, North Carolina's "sovereign immunity protected by the Eleventh Amendment is not compromised." *Ibid.* See U.S. Amicus Br. in *Alabama* v. *North Carolina*, No. 132, Original (on motion for leave to file complaint), at 12.

C. The Special Master Should Decline North Carolina's Invitation To Treat The Supreme Court's Directly Applicable Precedent As "Effectively Disavowed"

North Carolina asserts that even if the claims brought by the plaintiff States and the Commission are identical, the claims of the Commission are barred by the Eleventh Amendment. N.C. Reply 3. North Carolina acknowledges that the Supreme Court's decision in *Arizona II* would allow the Southeast Commission to press claims that are identical to those of the plaintiff States, but contends that *Arizona II* "has been effectively disavowed by the Court in more recent Eleventh Amendment/sovereign immunity cases." N.C. Reply 4 n.1. North Carolina cites, in particular, the Court's decisions in *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89 (1984), and *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). See N.C. Mot. to Dismiss 8, 9-13; N.C. Reply 4-7.

In *Pennhurst*, the Court held that the Eleventh Amendment barred a private party from suing a state

official in federal court for a violation of state law. See 465 U.S. at 103-125. In the course of reaching that decision, the Court observed:

> We also do not agree with respondents that the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court, see, *e.g.*, *Monaco* v. *Mississippi*, 292 U.S. 313, 329 (1934), the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes.

465 U.S. at 103 n.12. The private party's state law claims were not identical to the claims that the United States asserted. In fact, the Court thought it was "clear that the United States does not have standing to assert the state-law claims of third parties." *Ibid.*

In *County of Oneida*, three Indian Tribes sued two New York counties in federal court, alleging that the State of New York had obtained county lands in violation of the Trade and Intercourse Act of 1793, 1 Stat. 329, and that the transaction was void. 470 U.S. at 229. The counties joined New York as a third-party defendant, asserting that the federal court could exercise ancillary jurisdiction over that cross-claim. *Id.* at 250-251. The Court concluded that the Eleventh Amendment barred the counties' cross- claim for indemnity by the State because that cross-claim raised a question of state law and the counties failed to demonstrate a waiver of the State's immunity from that claim. *Id.* at 251-253. The United States was not a party to the case, and the Court therefore had no occasion to consider the application of the Eleventh Amendment to suits, like *Arizona II*, in which the non-federal parties assert

claims under federal law that are identical to those advanced by the United States.

It thus is far from clear that the Supreme Court would view the *Pennhurst* or *Onieda County* decisions as having "effectively disavowed" *Arizona II*. Neither *Pennhurst* nor *Oneida County* discussed *Arizona II*, and both *Pennhurst* and *Oneida County*, unlike *Arizona II*, addressed the uniquely sensitive issue of federal court enforcement of state law against a State or an arm of the State. See *Pennhurst*, 465 U.S. at 106 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."). Furthermore, the Court's decision in *Arizona II* does not stand in isolation. The Court has ruled, in other situations, that non-state entities may participate as parties in original actions involving States. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 745-746 n.21 (1981); *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922). The Court's decision in *Arizona II* accordingly appears to state a principle of continuing vitality. That decision provides the most directly applicable precedent in assessing whether the Eleventh Amendment bars the Southeast Commission's claims.

The Court has cautioned in the context of its certiorari jurisdiction that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). The United States suggests that, at least on the question of sovereign immunity at issue here, this principle also provides sound guidance in original actions.

The Special Master should follow that advice and treat *Arizona II* as controlling unless and until the Court instructs otherwise.

The principle stated in *Rodriguez de Quijas* is particularly appropriate here, because North Carolina's Eleventh Amendment objection may ultimately have no bearing on the outcome of the case. If it is ultimately determined that the plaintiff States may obtain enforcement of the Southeast Commission's sanctions order, then the Commission's identical claims for enforcement would appear to be of no substantial consequence. Similarly, if it is ultimately determined that the Commission's sanctions order was beyond the Commission's authority, then the Commission's identical claim for enforcement would not alter that outcome. The issue would be significant only if the plaintiff States cannot obtain enforcement of the sanctions order, but the order is nevertheless lawful.[3]

The Special Master accordingly should decline North Carolina's invitation to reexamine clearly applicable Supreme Court precedent. Instead, the Master should apply *Arizona II*'s reasoning in resolving North Caro-

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[3] As a practical matter, there are no substantial burdens, and there are potential benefits, in the Southeast Commission's presence as a party. The plaintiff States and the Southeast Commission assert the same claims in a single complaint, are represented by the same counsel, and appear willing to submit consolidated filings. To the extent that discovery is necessary in this action, North Carolina would seem to benefit from the inclusion of the Commission as party, as compelling discovery from a party is generally easier than compelling it from a non-party. See, *e.g.*, Fed. R. Civ. P. 26 (requiring initial disclosures from parties), 33 (providing that written interrogatories may be served on parties). Compare Fed. R. Civ. P. 34 (providing for production of documents from parties) with Fed. R. Civ. P. 45 (providing for use of subpoena power to compel production of documents from non- parties).

lina's motion to dismiss. If North Carolina wishes the Supreme Court to determine whether the Court's recent Eleventh Amendment decisions have repudiated *Arizona II*—and if the issue ultimately has any practical relevance to the outcome of the case—North Carolina may present that issue to the Court through exceptions to the Master's ultimate recommendations at the appropriate juncture of this case.[4]

CONCLUSION

For the foregoing reasons, North Carolina's motion to dismiss the claims of the Southeast Commission should be denied.

Respectfully submitted.

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[4] There is correspondingly no need to reach the plaintiff States' arguments respecting the reach of the Court's ancillary jurisdiction in original actions or the scope of a State's Eleventh Amendment immunity from a compact commission's claims. See Pl.'s Opp. 9-11.