No. 120, Original

In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF NEW JERSEY, PLAINTIFF

v.

STATE OF NEW YORK

ON MOTION FOR LEAVE TO FILE COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

The State of New Jersey seeks leave to file an original action to resolve the allocation of political jurisdiction between it and the State of New York in relation to the artificially filled portions of Ellis Island. Ellis Island is located in Upper New York Bay, west of the line representing the middle of the Bay. The original island of approximately three acres was granted to the United States in 1808 by the State of New York for fortification purposes. Commencing after 1880, the island was used as a reception center for immigrants entering the United States at New York. In connection with that use, the United States filled approximately 24.5 acres of sur-

rounding water bottoms, and, as a result, the present island comprises 27.5 acres. The United States ceased using Ellis Island as an immigration station in 1954 and has since included it within the Statue of Liberty National Monument, which is administered by the National Park Service. The United States' title to the entire island is not in dispute. A map showing the original island and the filled portions is appended to *Collins* v. *Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992). *Id.* at 390.

1. Since the founding of the United States, the States of New York and New Jersey have disputed their political boundary in the area of New York Bay and the Hudson River. In the early 1800s, New York relied upon colonial documents to assert that the boundary lay at the low water mark on the New Jersey side along the entire length of the adjacent States. New Jersey asserted that the boundary lay at the midpoint of the water bodies. After several attempts to resolve those conflicting claims through negotiation, New Jersey filed an original action in this Court for a judicial resolution. See *New Jersey* v. *New York*, 28 U.S. (3 Pet.) 461 (1830). While that action was pending before this Court, state-appointed commissioners reached an agreement, embodied in a compact, that was ratified by both States and the United States Congress in 1834. Act of June 28, 1834, ch. 126, 4 Stat. 708. See *Collins*, 956 F.2d at 384-385.

Article First of the 1834 Compact provides:

> The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of the said river, of the Bay of New York, of the waters between Staten Island and

> New Jersey, and of Raritan Bay, to the main sea; except as hereinafter otherwise particularly mentioned.

4 Stat. 709. It is not disputed that Ellis Island, including the filled land at issue here, is on the New Jersey side of the line described in Article First.

Articles Second and Third provide exceptions to the allocation of jurisdiction that would ordinarily be expected to follow from the drawing of the "boundary line" between the two States as provided in Article First. Article Second provides:

> The state of New York shall retain its present jurisdiction of and over Bedlow's and Ellis's islands; and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned and now under the jurisdiction of that state.

4 Stat. 709. Article Third provides in pertinent part:

> The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York; * * * and of and over the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof; subject to the following rights of property and of jurisdiction of the state of New Jersey, that is to say:
>
> 1. The state of New Jersey shall have the exclusive right of property in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan island and New Jersey.

4 Stat. 709-710.

This Court construed the 1834 Compact in *Central R.R.* v. *Jersey City*, 209 U.S. 473 (1908), a suit in which the City of Jersey City, New Jersey, sought to tax submerged land below the low-water mark on the New Jersey side of New York Bay. The Court held that the State of New Jersey has sovereignty over the submerged lands in New York Bay to the middle of the Bay, pursuant to Article First of the 1834 Compact, and that this sovereignty permitted New Jersey to levy taxes on the submerged land. The Court also suggested that Article Third's reference to New York's "exclusive" jurisdiction over the waters and submerged lands conferred "something less" than "sovereignty," but the Court did not elaborate on that point. See 209 U.S. at 479.[1]

2. Pursuant to Article I, Section 8, Clause 17 of the United States Constitution, Congress has the power to exercise "exclusive Legislation" over "all Places purchased by the Consent of the Legislature of the State * * * for the Erection of Forts * * * and other needful Buildings." A State, however, may cede partial jurisdiction to the United States, retaining specific rights, such as the right to effect service of process. *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 539-542 (1885); *Paul* v. *United States*, 371 U.S. 245, 264-265 (1963). Both New

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[1] The Court was not called upon to address the status of Ellis Island or the filled land surrounding the original Ellis Island. The Court, however, referred to Article Second in dictum, stating:

> It is suggested that jurisdiction is used in a broader sense in the second article, and that may be true so far as concerns Bedlow's and Ellis Islands. But the provision there is that New York shall retain its "present" jurisdiction over them, and would seem on its face simply to be intended to preserve the *status quo ante*, whatever it may be.

Central R.R., 209 U.S. at 479.

York and New Jersey have ceded interests in Ellis Island to the United States.

In 1808, the State of New York conveyed to the United States "all the right, title and interest of" New York in Ellis Island, for the purposes mentioned in chapter 51 of the 1808 Laws of New York. See New York's Br. in Opp. 3. Under that statute, the lands were granted "for the purpose of providing for the defence and safety of the city and port aforesaid," and the ownership of those lands was to revert to the State in the event they were not "applied to [those] purposes." 1808 N.Y. Laws ch. 51.

In 1880, New York enacted a statute ceding its "right and title" to and "jurisdiction over" specified submerged land surrounding various islands, including Ellis Island, "for the purpose of erecting and maintaining docks, wharves, boat-houses, sea walls, batteries and other needful structures and appurtenances." 1880 N.Y. Laws ch. 196. The cession of jurisdiction was to continue only as long as the United States owned the island, and New York reserved the right to serve process on the ceded land. *Ibid.*

In 1904, New Jersey conveyed to the United States "all the right, title, claim and interest of every kind, of the State of New Jersey" to specified land beneath the waters around Ellis Island. See New York's Br. in Opp. 6-7. New York and New Jersey agree that the filled lands at issue in this case are located within the areas described in New Jersey's 1904 conveyance. New Jersey's Br. in Support of Mot. to File Compl. 9; New York's Br. in Opp. 7.

3. On April 26, 1993, New Jersey filed with this Court a Motion for Leave to File Complaint, together with the complaint and a brief in support of the motion. The complaint and the brief describe the continuing disagreement between the States of New York and New Jersey

regarding jurisdiction over the filled land at Ellis Island. See Compl. 7-15; New Jersey's Br. in Support of Mot. to File Compl. 10-19. In particular, the complaint alleges:

(a) The filled land at Ellis Island has been carried on the tax roles of the City of Jersey City during the entire period that the land has been filled;

(b) In 1963, the City of Jersey City enacted a zoning ordinance that purported to apply to Ellis Island in the event that the island were sold to private interests;

(c) In 1986, the Governors of New York and New Jersey entered into a memorandum of agreement proposing that the two States equally divide state and local taxes collected on Ellis Island. Although New Jersey incorporated that agreement into its state law, N.J. Stat. Ann. §§ 32:32-1 *et seq.* (West 1990), New York has not taken similar action, despite New Jersey's requests that New York do so;

(d) New York includes Ellis Island within its County of Manhattan for the purposes of congressional and state legislative districts and for other purposes; and

(e) The Center Development Corporation may propose the renovation of three existing buildings on the filled portions of Ellis Island, and the financing of those renovations would be undertaken with the proceeds from bonds issued by the Dormitory Authority of the State of New York. As a related matter, New York City has taken steps to have the entire island declared a New York City Landmark.

Compl. 7-15; see also New Jersey's Supp. Br. in Support of Mot. for Leave to File Compl. 10-19. The complaint seeks declaratory and injunctive relief holding that the filled land and surrounding waters at Ellis Island are "within the territory and jurisdiction of the State of New Jersey." New Jersey does not contest that the original three acres of Ellis Island are within the jurisdiction of New York. See Compl. 15.[2]

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[2] New Jersey's complaint also describes past conflicts as to jurisdiction over Ellis Island that do not present a current controversy between those States, including assertions that:

(a) In 1934 certain New Jersey labor unions claimed that New Jersey had jurisdiction over the filled land in conjunction with the construction of several buildings on that land;

(b) Between 1955 and 1962, a number of New Jersey political leaders made statements, including testimony before congressional committees, claiming that New Jersey had jurisdiction over the filled areas of Ellis Island;

(c) In 1984, a lawsuit was filed in a New Jersey state court against the States of New Jersey and New York, in which the argument was made that the filled land on Ellis Island was within the jurisdiction of New Jersey. That suit was dismissed on the premise that only this Court had jurisdiction to decide boundary issues between States;

(d) The United States Court of Appeals for the Second Circuit rendered a decision in *Collins* v. *Promark Products, Inc.*, 956 F.2d 383 (1992), holding that the New York compensation law would be applied to resolve a contribution claim against the United States for damages sustained on the filled areas of Ellis Island, relying on Article Second of the 1833 compact. The States of New Jersey and New York each participated as amicus curiae before the Second Circuit in that case. The United States argued, contrary to the position adopted by the Second Circuit, that New Jersey law governed the contribution issue because the filled areas were subject to the jurisdiction of New Jersey.

See Compl. 7-13.

DISCUSSION

This Court has original and exclusive jurisdiction over a suit between two States. 28 U.S.C. 1251(a); see U.S. Const. Art. III, § 2, Cl. 2 (vesting this Court with original jurisdiction in all cases "in which a State shall be Party"). The Court has ruled, however, that its original jurisdiction should be invoked "sparingly," *Utah* v. *United States*, 394 U.S. 89, 95 (1969), so that the Court's "increasing duties with the appellate docket will not suffer," *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93-94 (1972). Among the factors the Court considers in granting or denying leave to file a complaint are the "seriousness and dignity of the claim" and the existence of another forum where the matter may be litigated. *Id.* at 93. See *Mississippi* v. *Louisiana*, 113 S. Ct. 549, 552-553 (1992); cf. *Louisiana* v. *Mississippi*, 488 U.S. 990 (1988) (opinion of Justice White, joined by Justices Stevens and Scalia, dissenting from the Court's denial of leave to file a complaint to determine a river boundary between Louisiana and Mississippi, where no other court had jurisdiction over the suit).

1. The area of filled land at issue in this case—approximately 24.5 acres—is quite small. More importantly, all of the land at issue is owned by the United States and is part of the Statue of Liberty National Monument. As set out above, in 1880, the State of New York ceded to the United States all of its jurisdiction and title to specified submerged lands surrounding Ellis Island. In 1904, New Jersey likewise ceded "all the right, title, claim and interest of every kind, of the State of New Jersey" to specified land beneath the waters around Ellis Island. To the extent that the States of New York and New Jersey have ceded jurisdiction to the United States over the lands in question, the federal government's jurisdiction is exclu-

sive. See *United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363, 370-371 (1973); *Paul* v. *United States*, 371 U.S. 245, 264 (1963).

In any event, even if the United States has not acquired exclusive jurisdiction over the lands in question pursuant to Article I, Section 8, Clause 17 of the Constitution, the United States nonetheless owns all of the real property constituting Ellis Island. The Property Clause of the Constitution therefore gives the United States broad authority to manage and regulate the property. U.S. Const. Art. IV, § 3, Cl. 2. Under the Supremacy Clause (Art. VI, Cl. 2), inconsistent state laws or regulations are ineffective. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976).[3]

2. a. Given the United States' ownership and use of Ellis Island, there currently is very little, if any, practical conflict between New York and New Jersey arising from activities on the island. For example, New Jersey alleges that the City of Jersey City has carried Ellis Island on its real estate tax rolls for many years, and has zoned the island. The effectiveness of either of those measures, however, depends on the United States' relinquishing its ownership of the land comprising the island—an occurrence that no one suggests is likely. Similarly, although some of the buildings on the island might in the future be developed in a manner that would give rise to taxable interests in or activities on the island, such development has not occurred, and the prospects for future development are uncertain.

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[3] Indeed, New Jersey acknowledges that the federal government's control over Ellis Island has been so extensive that neither New Jersey nor New York has had a substantial opportunity to exercise sovereign power over the island. See New Jersey's Reply Br. in Support of Mot. for Leave to File Compl. 5.

New Jersey states that the Center Development Corporation may propose the renovation of three existing buildings on the filled portions of Ellis Island, and that the financing of those renovations will be undertaken with the proceeds of bonds issued by the Dormitory Authority of the State of New York. Compl. 14-15. If that project should proceed, it is difficult to see how New Jersey would be harmed, because New Jersey does not own any of the property involved. In any event, whether that proposal will materialize is speculative at this time. On January 21, 1988, pursuant to 16 U.S.C. 470h-3 and 16 U.S.C. 20 *et seq.*, the Secretary of the Interior entered into an Agreement to Lease with the Center for Housing Partnerships (now the Center Development Corporation), under which the Secretary is negotiating a final lease of the south portions of Ellis Island to the Center Development Corporation for adaptive reuse. The Agreement to Lease requires the Center Development Corporation to submit to the Secretary a variety of information and plans, which the Secretary must approve as a condition to execution of a final lease. The Agreement to Lease has been amended and/or extended several times. It expires in July 1994, unless it is further extended by the Secretary or the Center Development Corporation submits in a timely manner information and plans of the Corporation's adaptive reuse proposal that are acceptable to the Secretary. If the Secretary and the Center Development Corporation come to agreement on a final lease under the Agreement to Lease, the final lease must be submitted to Congress for a 30-day period prior to implementation with appropriated funds. See Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1387.

b. New Jersey also alleges injury as a result of New York's failure to enact a statute dividing the taxes generated by activities on Ellis Island in accordance with the memorandum of agreement between the Governors of the two States. It is unclear, however, whether or to what extent actual tax payments are in dispute and whether any events generating sales or use taxes are occurring in the filled areas of the island. Indeed, the Department of the Interior has suggested to us that all events currently generating such taxes occur on the original three-acre portion of the island, over which New Jersey concedes that New York has jurisdiction. See page 7, *supra*. If, in fact, there are no active disputes as to taxation on the filled portions of the island, there would seem to be no present case or controversy.

Although a decision by this Court resolving all aspects of sovereignty over the filled land on the island would control the issue of whether New Jersey or New York may collect taxes on the island, the Court should, in our view, be reluctant to expend its resources to resolve the matter when the existence of a concrete dispute appears so uncertain. That reluctance is particularly justified here, because New Jersey has other mechanisms at its disposal to resolve whether any Ellis Island entity is subject to that State's tax laws.

For example, New Jersey could seek to collect a tax payment from an identifiable entity doing business on Ellis Island that the State believes is subject to its taxation power.[4] Such action would either resolve the issue

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[4] The Buck Act (Act of July 30, 1947, ch. 389, § 105(a), 61 Stat. 644) states:

> No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein,

or clarify the contours of the alleged dispute. If the business entity contested New Jersey's tax assessment, the matter would be litigated in the New Jersey state courts. If the New Jersey courts agreed with the United States Court of Appeals for the Second Circuit that the State of New York has sovereignty over all of Ellis Island—and further concluded that New Jersey has no taxing authority on the island as a result—then there would be little occasion for this Court to consider the matter further. See *Central R.R.*, 209 U.S. at 479. But if the New Jersey Supreme Court reached a conclusion that conflicted with the decision of the Second Circuit and the business entity filed a petition for a writ of certiorari, then this Court could determine whether the state court decision presented an issue warranting its review. Alternatively, the States could then invoke this Court's orginal jurisdiction to address the question, and this Court could determine whether that specific controversy warranted the Court's attention in an original action. In either event, the Court would be in a position to address a specific concrete dispute that has been illuminated by a fully developed record. See Sup. Ct. R. 10.1(a).

3. In sum, we see no present need for this Court to exercise its original jurisdiction to resolve any question of New Jersey's authority to tax Ellis Island entities. Nor, from the United States' perspective, are there any

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having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

4 U.S.C. 105(a).

other circumstances with respect to its administration of Ellis Island that suggest a present need for the Court to exercise its original jurisdiction to resolve any competing claims of New York and New Jersey to assert whatever residuum of state authority might in the future remain over one subject matter or another on the filled portions of the island.

We note as well the possibility that not all issues concerning the application of state law or jurisdiction would necessarily be answered in the same way—that, *e.g.*, New Jersey might be held to have the power to tax some or all property or transactions, not exempt under federal law, while New York might be held to have a measure of "police power" jurisdiction over the filled portions of the island. Cf. *Central R.R.*, 209 U.S. at 479-480. That possibility would weigh against an attempt by this Court to resolve all such issues in a single original action, at least in the absence of a more concrete controversy respecting some aspect of state authority.

CONCLUSION

The Motion for Leave to File Complaint should be denied.

Respectfully submitted.

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