No. 120, Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF NEW JERSEY,
Plaintiff,
v.
STATE OF NEW YORK,
Defendant.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF NEW YORK AND BRIEF OF *AMICI CURIAE*

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MOTION OF NATIONAL TRUST FOR HISTORIC PRESERVATION AND MUNICIPAL ART SOCIETY FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of this Court, the National Trust for Historic Preservation in the United States, and the Municipal Art Society of New York ("Amici") respectfully move for leave to file the accompanying brief as *amici curiae* in support of the Exceptions of the State of New York to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R."). The State of New York has consented to the filing of this Brief. The consent of the State of New Jersey has been requested and refused.

Amici are national and local organizations dedicated to historic preservation. This action concerns whether the State of New York or the State of New Jersey has "sovereign" jurisdiction over Ellis Island. The dispute turns on the interpretation of the terms of a compact entered into between

New York and New Jersey in 1834 concerning their Hudson River/New York Harbor boundary (the "Compact"), and the course of conduct of the two States and the Federal Government with regard to this boundary in the ensuing century and a half.

The National Park Service, as the Report recognizes (R. 8-9), currently holds legal title to and exercises exclusive jurisdiction over Ellis Island. So long as that remains the case, the Island's historic sites and buildings will remain subject to a single and responsible preservation program, as required by federal law. Federal law will govern preservation of these sites and buildings and federal officials will ensure that these laws are effectively implemented. If, however—in the scenario envisioned by the Special Master—the Federal Government were to relinquish control of all or part of the Island and the Report's "split sovereignty" remedy were adopted, the integrity of Ellis Island's historic character would be in jeopardy. Thus, this action, and the result recommended by the Report, raise issues as to whether the landmark buildings of Ellis Island can be adequately protected if sovereignty over the Island is divided between New York and New Jersey.

Amici possess a unique store of knowledge about historic preservation generally and Ellis Island in particular, and can offer a distinct perspective on the landmark preservation issues raised in this case:

NATIONAL TRUST FOR HISTORIC RESERVATION

The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 as a private not-for-profit organization to facilitate public participation in the preservation of our nation's historic resources. 16 U.S.C. § 468. The National Trust's mission is to provide leadership, education, and advocacy to save America's diverse historic places and revitalize our communities. With more than 280,000 individual

members throughout the country, including 25,000 members in New York and 11,000 members in New Jersey, the Trust has a vital interest in safeguarding the integrity of local historic preservation ordinances as essential tools to encourage the preservation of significant historic, cultural and aesthetic resources. To that end, the National Trust has participated in more than 100 cases of local, state and national importance in the last 25 years, including 5 cases involving the interpretation and enforcement of the New York City Landmarks Preservation ordinance.

THE MUNICIPAL ART SOCIETY OF NEW YORK

The Municipal Art Society of New York is a 105-year old civic organization dedicated to improving the physical environment of New York City and the quality of its urban life through planning and preservation. The Society has several thousand members. Its efforts over the years led to the creation of New York's first zoning ordinance, air quality and noise controls, as well as the establishment of the New York City Planning Commission and the New York City Landmarks Preservation Commission. As a constant advocate for careful planning and the preservation of the great structures, spaces and historic districts of the city throughout its history, the Society has often participated as an *amicus curiae* in cases regarding landmarks issues, including appearances before this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *City of Boerne v. Flores*, No. 95-2074, 1997 WL 345322 (U.S. June 25, 1997).

As organizations dedicated to the preservation of landmarks, Amici also have a significant interest in the outcome of this litigation. Few landmarks have touched the lives of more Americans than Ellis Island. Ellis Island forms an integral ensemble of historic buildings, and it should be

treated as such, subject to a single set of preservation laws and comprehensive preservation planning and administration. Any other solution would, if the Federal Government relinquished control over Ellis Island, raise issues of administrative impracticality, frustrate effective preservation and planning on the Island, and likely result in the dispute reappearing in this Court.

It would also ignore the symbolic significance of the Island. This Court cannot turn the clock back to 1834, when only a small fort stood on a much smaller Island. It should look at Ellis Island, as it exists today, after a federal presence of more than a century, and in the context of the "immigrant" experience that has transformed a federal installation into an icon of American history and culture and a unit of the National Park System. It should recognize that it is Ellis Island as a whole, and not just its individual buildings, that is etched into the memories of millions of Americans as the Gateway to America. The Island's buildings *could*, as the Report recommends, be partitioned; the memories of millions of Americans *should* not be.

Amici are in a unique position to fully present the various aspects of these important issues to the Court. Amici participated at trial and in summary judgment and post-trial briefing before the Special Master,[1] *see* Docket Nos. 256 & 368, and offer in the accompanying brief precisely what they have offered throughout the course of these proceedings, *i.e.*, to "bring to the attention of the Court relevant matter not already brought to its attention by the parties." Sup. Ct. Rule 37.1. The issue of landmark preservation is, as the Special

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[1] Amici participated in the proceedings before the Special Master in an amicus group that also included the New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council. These latter organizations are filing a separate Brief in support of the Exceptions of the State of New York, in which the National Trust and the Municipal Art Society elected not to join.

Master acknowledged, plainly relevant to a case, such as the present one, involving the future of a recognized national treasure. (R. 163-67.) The parties are unlikely to address this issue in their Briefs, but Amici are ready and willing to furnish the Court with an independent and informed assessment of how the outcome recommended by the Report would affect the preservation future of Ellis Island.

WHEREFORE, Amici respectfully move this Court that leave be granted to file the annexed brief as *amici curiae*.

Dated: New York, New York
July 30, 1997

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IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF *AMICI CURIAE* NATIONAL TRUST FOR HISTORIC PRESERVATION AND MUNICIPAL ART SOCIETY IN SUPPORT OF THE EXCEPTIONS OF THE STATE OF NEW YORK

The National Trust for Historic Preservation in the United States and the Municipal Art Society of New York (the "Preservation Amici")[1] submit this brief, as *amici curiae*, in support of the exceptions of the State of New York to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R.").

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1 Pursuant to Rule 37.6 of this Court, the Preservation Amici state that this Brief was not authored in whole or in part by counsel for a party, and no person or entity other than the Amici and their counsel made a monetary contribution to the preparation of this Brief.

INTEREST OF *AMICI CURIAE*

Amici are national and local organizations dedicated to historic preservation. This action concerns whether the State of New York or the State of New Jersey has "sovereign" jurisdiction over Ellis Island. The dispute turns on the interpretation of the terms of a compact entered into between New York and New Jersey in 1834 concerning their Hudson River/New York Harbor boundary (the "Compact"), and the course of conduct of the two States and the Federal Government with regard to this boundary in the ensuing century and a half. More important, however, this action, and the result recommended by the Special Master in the Report, raise issues as to whether the historic integrity of Ellis Island can be effectively protected if sovereignty over the Island, which is currently exercised solely by the Federal Government through the National Park Service, is divided between New York and New Jersey.

Amici possess a unique store of knowledge about historic preservation generally and Ellis Island in particular, and can offer a distinct perspective on the issues raised in this case. As organizations dedicated to the preservation of national and local landmarks, Amici also have a significant interest in the outcome of this litigation. Few landmarks have touched the lives of more Americans than Ellis Island.

SUMMARY OF ARGUMENT

The original jurisdiction bestowed on this Court by Article III, § 2 of the Constitution was intended to be used to *resolve* rather than *create* boundary disputes between States. Yet the Report filed by the Special Master in this case asks this Court to endorse an outcome that, under circumstances where the Federal Government relinquished legal title and control over Ellis Island, would engender more disputes than it would settle. The Report recommends that sovereignty

over Ellis Island be split between New York and New Jersey, but it makes no meaningful attempt to take into account or obviate in any way the adverse consequences that the "split sovereignty" remedy it proposes will have on Ellis Island as a National Historic Landmark.

The National Park Service, as the Report recognizes (R. 8-9), currently holds legal title to and exercises exclusive jurisdiction over Ellis Island. So long as that remains the case, the Island's historic sites and buildings will remain subject to a single and responsible preservation program, as required by federal law. Federal law will govern preservation of these sites and buildings and federal officials will ensure that these laws are effectively implemented. If, however—in the scenario envisioned by the Special Master—the Federal Government were to relinquish control of all or part of the Island, and the Report's "split sovereignty" remedy were adopted, the integrity of Ellis Island's historic character could be in jeopardy. Under the Solomon-like resolution proposed by the Special Master, the Island—which will undeniably experience further private development pressure in the near term—would be split between the two States along a jagged and irregular border likely to spark serious practical and legal conflicts.

The Special Master pays lip service to these concerns by "equitably reconstituting" the "original island" so as not to split the Main Building into several pieces, but this half-measure falls far short of a satisfactory solution. Ellis Island forms an integral ensemble of historic buildings, and it should be treated as such, subject to a single set of preservation laws and comprehensive preservation planning and administration. Any other solution, including the Special Master's "reconstitution," would, in the event of federal relinquishment of control, raise issues of administrative impracticality and the impossibility of applying two sets of laws and regulations to different components of the same

structural compound. It would also ignore the symbolic significance of the Island. This Court cannot turn the clock back to 1834, when only a small fort stood on a much smaller Island. It must look at Ellis Island, as it exists today, after a federal presence of more than a century, and in the context of the "immigrant" experience that transformed a federal installation into an icon of American history and culture and a unit of the National Park System. It must recognize that it is Ellis Island as a whole, and not just its individual buildings, that is etched into the memories of millions of Americans as the Gateway to America.

Nothing in the record suggests that splitting sovereignty over Ellis Island would have anything but deleterious effects on the Island's historic resources. This is so for at least two reasons. *First*, as a matter of administration, dividing the Island would create, as the Second Circuit has already found, an impractical, indeed nonsensical, situation. *Collins v. Promark Prods., Inc.*, 956 F.2d 383, 388 (2d Cir. 1992). As the May 14, 1997 "remedy" hearing on Ellis Island demonstrated, the solution recommended by the Report would cause portions of the Island's historic core (the complex of structures including the Main Building, the Kitchen & Laundry Building, the Baggage & Dormitory Building, several connecting structures and stairways, and unexcavated portions of Fort Gibson) to straddle the proposed boundary between the two States, compelling both States to share a responsibility for the complex's preservation, which history suggests could not be allocated amicably or effectively. *Second*, even assuming that an allocation could be agreed to, those responsible for managing and maintaining the Island's buildings would be saddled with the burden of answering to two historic preservation commissions with disparate resources and inconsistent landmarks laws. New York's landmarks laws are well-established and consistently enforced; the corresponding

New Jersey laws, on both the local and state levels, are neither as proven nor as extensively developed. In the absence of federal control, conflicts between the two States' laws and policies would be certain to arise in connection with reuse and further restoration of the Island, and these conflicts would likely lead the States to seek further relief in this Court. The landmark structures and overall historic integrity of Ellis Island would be the victims of such protracted and contentious disputes.

Thus, in addition to all the other reasons for rejecting the Report proffered by the State of New York and the other amici, the Court should reject the Report because the remedy recommended by the Special Master is impractical and unworkable. In the alternative, to the extent that "equity" can be properly invoked in this case, it should be invoked to protect Ellis Island's historic past by keeping it subject to a single sovereign. If that sovereign does not continue to be the Federal Government, it should be the State of New York.

POINT I

SPLITTING SOVEREIGNTY OVER ELLIS ISLAND WOULD BE IMPRACTICAL AND WOULD, IN THE EVENT OF FEDERAL RELINQUISHMENT OF JURISDICTION, IMPROPERLY ENGAGE THIS COURT IN A ROLE OF "CONTINUING SUPERVISION" OVER THE ISLAND

Adopting the remedy recommended by the Report would, in the event that the Federal Government relinquished control of Ellis Island, violate one of this Court's cardinal tenets in exercising its original jurisdiction over disputes between the States. In such cases, any need for "continuing Court supervision over decrees" has long been deemed "undesirable." *Vermont v. New York*, 417 U.S. 270, 277 (1974). Engaging in such an oversight role,

> [W]ould materially change the function of the Court in these interstate contests. Insofar as [the Court] would be supervising the execution of the consent decree, [it] would be acting more in an arbitral rather than a judicial manner. [The Court's] original jurisdiction heretofore has been deemed to extend to adjudication of controversies between States according to principles of law, some drawn from the international field, some expressing a "common law" formulated over the decades by this Court.

Id. at 277.

The record in this case conclusively demonstrates that, if the Report's recommendations were adopted, and the Federal Government relinquished control over Ellis Island, such "continuing supervision" by the Court would be difficult to avoid. Hence, this Court should reject the Report's recommendation to split Ellis Island along a jagged and irregular boundary, just as it has rejected similarly unmanageable remedies in the past. *See Texas v. New Mexico*, 462 U.S. 554, 566 (1983) (continuing supervision of decrees would test the limits of proper judicial functions); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) (continuing Court supervision over decrees between States was undesirable); *Wyoming v. Colorado*, 298 U.S. 573, 585-86 (1936) (refusing to order water measuring devices or to appoint "water master" to keep records); *Wisconsin v. Illinois*, 289 U.S. 395, 412 (1933) (denying request to appoint commissioner to execute decree between States).

There can be little doubt that adopting the "strange and difficult" boundary proposed by the Report would entangle the Court in mediating numerous collateral disputes between New York and New Jersey. *Collins v. Promark Prods., Inc.*, 956 F.2d 383, 388 (2d Cir. 1992). Indeed, in *Collins*, which concerned a suit by a private plaintiff against, *inter alia*, the

Federal Government—rather than a suit between two States—the Second Circuit rejected as inherently controversial and ultimately unworkable the very solution that the Report currently proposes. The Second Circuit feared that the "haphazard and uneven" boundary, proposed there by the Federal Government in seeking dismissal of a tort action on Ellis Island, would "make it necessary for every person injured on Ellis Island to engage in litigation to establish the exact spot on the island where the injury was sustained." *Id.* at 388. The dilemma would be even more acute in a preservation context: tort victims happen along relatively infrequently; but the maintenance and development of landmark sites invariably entails frequent decisions about proper design, rehabilitation, demolition, and use. Such decisions would likely involve state and local government scrutiny, necessarily transforming any disagreements into disputes between sovereigns.

The Court's reluctance to engage in "continuing supervision" in boundary cases is a specific application of the principle that courts should undertake to grant only such relief as can be effectively administered without undue cause for additional disagreement or need for judicial oversight. *See Nebraska v. Iowa*, 406 U.S. 117, 119 (1972) (courts should not grant relief that is likely to "prove[] impossible to apply in all cases").[2] More broadly speaking, the solution put

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2 *See also King County v. Washington State Boundary Review Bd.*, 860 P.2d 1024, 1040 (Wash. 1993) (courts should not uphold administratively-determined boundaries that are "abnormally irregular" and thus administratively "impractical"); *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975); *Yonan v. Oak Park Fed. Sav. & Loan Ass'n*, 326 N.E.2d 773 (Ill. App. 1975); *United Coin Meter*

forward by the Report is similar to what this Court has elsewhere (in the context of Indian reservation territorial disputes) condemned as "checkerboard" jurisdiction. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). In *Moe*, *Seymour*, and their progeny, the fear concerning such "checkerboard" jurisdiction was that "law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, was in the State or Federal government." *Seymour*, 368 U.S. at 358; *see Moe*, 425 U.S. at 478 (applying same principle in civil taxation context).[3]

On Ellis Island, absent the presence of the Federal Government, those responsible for and affected by the Island's preservation (*e.g.*, preservation commissioners, staff, and private applicants) would need to overlay and scrutinize jurisdictional and historical maps of Ellis Island, as well as individual building floor plans, in order to ascertain which State's preservation law should govern maintenance, construction, reconstruction, alterations, and demolition on the Island. The Report's description of the proposed boundary and the difficulties already encountered by both States in undertaking to map it out across and around the Island's historic structures is a harbinger of problems to

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Co. v. Johnson-Campbell Lumber Co., 493 S.W.2d 882 (Tex. App. 1973).

3 *See also DeCoteau v. District County Court*, 420 U.S. 425, 466 (1975) (Douglas, J., dissenting) (discussing problems with "crazy quilt" or "checkerboard jurisdiction"); *Cardinal v. United States*, 954 F.2d 359 (6th Cir. 1992).

come. (Supplement to Final Report dated May 30, 1997; Transcript of Hearing on May 14, 1997). Should the Report's recommendations be adopted, such trial and error speculation could become a frequent occurrence, thereby providing numerous occasions for further disputes between New York and New Jersey—which (as controversies between States) would likewise fall within the original jurisdiction of this Court. *See Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (Supreme Court jurisdiction over dispute between States concerning impact of one State's statute on other State's citizens); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (same); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (same). That is exactly the result this Court has sought to avoid in the past. *Vermont*, 417 U.S. at 277; *Texas*, 462 U.S. at 566. It should do no less in this case.[4]

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4 On the rare occasion when the Court has consented to anything resembling an "ongoing supervision" role, it has done so through functionaries with purely ministerial powers. *See, e.g., New Jersey v. New York*, 347 U.S. 995, 1002-03 (1954) (river master appointed to measure diversions, compile data, and apply computational formulae); *Texas v. New Mexico (II)*, 482 U.S. 124, 134 (1987) (river master appointed whose sole purpose was to "make the calculations provided for in this decree, annually and as promptly as possible as data are available, and to report the calculations to appropriate representatives of New Mexico and of Texas"). By contrast, the Court or a Court-appointed administrator in this case would have to do more than simply make calculations and compile data. The Court or an administrator would have to determine the applicable law in each specific dispute and to determine the rights of the parties involved. Thus, the result recommended by the Report would place the Court in the position of acting as an arbitrator—a position which the Court has said has "no relation to [the]

The prior history of relations between New York and New Jersey strongly suggests that further resort to this Court would be likely. History shows that, even where cooperative arrangements have been put into place, productive alliances have been difficult. For example, the disputes between New York and New Jersey over the affairs of the Port Authority of New York and New Jersey (a bi-state agency created by compact in 1921 to develop and manage joint transportation facilities) have been long-standing and well-publicized. *See City of New York v. Willcox*, 189 N.Y.S. 724 (Sup. Ct. 1921); *Mayor Seeks $400 Million For Airports*, N.Y. TIMES, Jan. 16, 1996 (Appendix, Tab I)[5]; *Giuliani Seeks Arbitration With N.Y.-N.J. Port Agency*, BOND BUYER, Dec. 12, 1995 (Appendix, Tab J); *$7 Toll To Cross Hudson River? Report Sparks Border Feud*, THE RECORD (Northern New Jersey), Aug. 24, 1995 (Appendix, Tab K); *Board Backs Pataki Appointment To Port Authority on Split Vote*, A.P., Feb. 9, 1995 (Appendix, Tab L); *see generally* Note, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416, 1419 (1966). The very fact that a suit was filed in this matter, for what appear to be symbolic rather than practical motivations, leaves little room for doubt that a return to the courtroom could occur.

Conflicts between the two local preservation programs concerning Ellis Island are likely to occur even if the Federal

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performance of [its] Article III functions." *Vermont*, 417 U.S. at 277.

5 Citations to "Appendix, Tab __" refer to the Appendix filed by the Preservation Amici in connection with their Post-Trial Brief filed with the Special Master on October 3, 1996 (Docket No. 368).

Government does not relinquish its control of the Island in the near future. The New York City or Jersey City landmark laws could apply to any private developer who enters into a long-term lease (depending on its terms) with the Federal Government for development of any portion of the Island. *See S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 565 (1946) (private entity developing federal property held under an executory contract of sale subject to state taxation); *Offutt Hous. Co. v. County of Sarpy*, 351 U.S. 253, 260 (1956) (value of housing project built by private developer on land leased from Federal Government subject to state taxation); *cf. United States v. Johnson*, 994 F.2d 980, 986 (2d Cir.) (Federal Government can continue to exercise jurisdiction over ceded land only so long as used for purposes ceded), *cert. denied*, 510 U.S. 959 (1993). Past development efforts—and the dearth of federal resources—suggest that such private development is an unfortunate but plausible scenario for the Island's future. In the event that the Federal Government were to relinquish control of the Island, the conflict would devolve into a two-way contest concerning whose law and administrative process should control further development decisions.[6]

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6 Even if private development was deferred or precluded, consistent, comprehensive planning could be difficult, if not impossible. As a matter of comity, the Federal Government currently consults with *both* New York and New Jersey concerning matters affecting Ellis Island *as a whole*, even when it is not required to do so by federal statute or regulation. *See, e.g., Ellis Island Rehabilitation Project-Phase II*, NPS Document (Dec. 17, 1991) (Appendix, Tab M); *cf.* National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470a(b)(3)(1995); 36 C.F.R. §§ 800.1(c)(1)(ii), (c)(2)(i) (requiring federal officials to review and consult with "State Historic Preservation Officer" and local

Either way, the historic buildings of Ellis Island and the United States citizens who cherish them would be the victims of the Report's current effort to rewrite history. The process of constantly re-ascertaining sovereignty, which would be required by the proposed boundary, would be "uncertain and hectic," likely to benefit "only those who benefit from confusion and uncertainty," and equally likely to hamper legitimate efforts at ensuring Ellis Island's historic integrity for future generations. *See Decoteau*, 420 U.S. at 466. The tortured border that the Report urges the Court to accept would make it inordinately difficult to determine under whose authority or preservation laws such decisions should be made, could subject different parts of a single historic district to different standards, and could generate duplicative administrative procedures. A return to this Court would be all but unavoidable, a result which in and of itself is enough to justify rejecting the impractical remedy recommended by the Report.

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governments regarding impact of federal undertakings on historic properties). If the Report's recommendations were adopted, federal authorities could become entangled in disputes between the States over which State's law should guide the National Park Service in its administration of matters within each State's difficult-to-discern boundaries on the Island.

POINT II

IN THE ABSENCE OF FEDERAL CONTROL, EFFORTS AT JOINT ALLOCATION OF PRESERVATION RESPONSIBILITY WOULD BE FRUSTRATED BY DISPARITIES BETWEEN NEW YORK'S AND NEW JERSEY'S HISTORIC PRESERVATION PROGRAMS

Even if the practical difficulties inherent in the Report's proposed remedy could be overcome, efforts at joint administration would, in the absence of federal control of Ellis Island, ultimately be frustrated by the disparate resources of New York's and New Jersey's historic preservation programs and substantive differences in their respective state and local landmarks laws and regulations.

A. DISPARITIES BETWEEN THE NEW YORK CITY AND JERSEY CITY LANDMARKS PROGRAMS WOULD HINDER FUTURE PRESERVATION EFFORTS ON THE ISLAND

The disparity between the expertise and overall approach to preservation that New York City and Jersey City would bring to Ellis Island, and the resources each could dedicate to the Island, would hinder future preservation efforts on the Island. New York City's landmarks law was adopted in 1965, and it has since been acknowledged as one of the most comprehensive in the nation. *See* N.Y.C. Charter § 3020 and New York City Landmarks Preservation and Historic Districts Law, N.Y.C. Admin. Code § 25-301 *et seq.* (collectively, the "New York Landmarks Law" or "NYLL") (Appendix, Tab N); *see generally Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). As of 1995, nearly 1,000 individual landmarks had been designated, together with 95 significant interiors, 68 historic districts (including

Ellis Island), and 9 scenic landmarks, for a total of more than 20,000 properties. *See New York City Landmarks Preservation Commission Fact Sheet* (1995) ("LPC Fact Sheet") (Appendix, Tab F). Moreover, a substantial body of case law has arisen construing the New York Landmarks Law. *See, e.g., Penn Central*, 438 U.S. at 104; *Rector, Wardens & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991); *Teachers Ins. & Annuity Ass'n v. City of New York*, 623 N.E.2d 526 (N.Y. 1993); *383 Madison Assocs. v. City of New York*, 598 N.Y.S.2d 180 (App. Div.), *appeal dismissed*, 622 N.E.2d 307 (N.Y. 1993), *review denied*, 632 N.E.2d 461 (N.Y.), *cert. denied*, 511 U.S. 1081 (1994); *Shubert Org., Inc. v. Landmarks Preservation Comm'n*, 570 N.Y.S.2d 504 (App. Div.), *review denied*, 587 N.E.2d 289 (N.Y. 1991), *cert. denied*, 504 U.S. 946 (1992); *Church of St. Paul & St. Andrew v. Barwick*, 496 N.E.2d 183 (N.Y.), *cert. denied*, 479 U.S. 985 (1986); *Lutheran Church In America v. City of New York*, 316 N.E.2d 305 (N.Y. 1974).

The City's preservation agenda has been overseen by the Landmarks Preservation Commission, an independent New York City agency, which is headed by a full-time Chairperson and includes ten additional commissioners, the majority of whom must have expert credentials, including as professional architects, landscape architects, historians, urban planners or realtors. *See* N.Y.C. Charter § 3020. The Commission's work is carried out by a staff of 48, with a budget for fiscal year 1995-96 of $2.7 million. Most of the Commission's non-clerical staff have graduate degrees in architecture, architectural history, historic preservation, urban planning or law. *See* LPC Fact Sheet (Appendix, Tab F). Moreover, the Commission has often been aided in its efforts by an active and substantial community of urban planning and historic preservation groups, including the Municipal Art Society, the New York Landmarks Conservancy, the Historic

Districts Council, the Preservation League of New York State, and the National Trust for Historic Preservation, which have statewide as well as national reputations for leadership in historic preservation.

By contrast, Jersey City has had a comprehensive landmarks law on its books only since 1989. *See* Jersey City Historic Preservation Law, Jersey City Code §§ 345-79 *et seq.* (the "Jersey City Landmarks Law" or "JCLL") (Appendix, Tab G). Its preservation and coordination activities are carried out by a single employee in the City planning department—the City Historic Preservation Officer. JCLL § 345-87. As of 1995, only 3 individual landmarks and 4 historic districts had been designated. No reported court decision has construed the terms or effect of the Jersey City Landmarks Law. There have in the past been numerous vacancies on the Jersey City Historic Preservation Commission, an entity which, apart from the Commissioners themselves, does not appear to have a clear-cut existence separate from the Jersey City Planning Commission. *See* JCLL § 345-87; *see also* Al Frank, *Jersey Challenge Fails As N.Y. Panel Moves Ellis Island Landmark Status*, NEWARK STAR-LEDGER, Feb. 8, 1994 (Appendix, Tab H). The Commission has nine regular members with a "demonstrated interest, competence or knowledge in historic preservation." JCLL § 345-82. However, only four Commissioners are required to have either "knowledge in building design and construction or architectural history" or "knowledge or a demonstrated interest in local history." *Id.* This relative lack of expertise compared to New York is exacerbated by the fact

that the Commission has only one staff person and a budget for fiscal year 1995-96 of only $2,000.[7]

The disparity between the resources and experience available to the New York City Landmarks Commission and the Jersey City Historic Preservation Commission could have serious consequences on Ellis Island. Structures straddling the proposed boundary could find themselves the subject of intense scrutiny on the New York side of line, while their

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7 Furthermore, the two Commissions have different relationships, in terms of power and independence, with respect to local government. For, example, the Jersey City law grants great discretion to the Jersey City City Council: applications for landmark designation are submitted first, not to preservation professionals, but to the City Council, which *may* (but need not) submit them to the Commission. *See* JCLL § 345-93(a). In New York City, by contrast, the Commission designates landmarks and historic districts (which designations become immediately effective), and thereafter the City Council has an opportunity to either disapprove or modify the Commission's designations. *See* NYLL § 25-303. The New York City Commission has made over 1,100 designations (involving more than 20,000 buildings) since 1965, less than 25 of which have been modified or disapproved.

Property owners also have amplified influence under the Jersey City law to exempt their property from designation. If the owner of a building selected for designation or 20% of the residents in or within 200 feet of a proposed historic district object to designation, designation requires a 2/3 vote of the City Council. *See* JCLL § 345-93(d). In New York, on the other hand, an objection by property owners or neighbors will not impede the designation process. This provision of the New York City law has been reviewed with approval by New York's highest court. *See Teachers*, 623 N.E.2d at 526.

New Jersey counterparts languish unattended and imperiled. Further, the still-ruined structures on the Island's southern half, which remains undeveloped and would fall entirely on New Jersey's side of the boundary, could be demolished or inappropriately rehabilitated with minimal protest from New Jersey—primarily because the Jersey City Historic Preservation Commission may lack the experience, the authority, or the resources to dictate otherwise.

B. THE DISPARITIES BETWEEN THE TWO CITIES' HISTORIC PRESERVATION PROGRAMS WOULD BE COMPOUNDED BY SUBSTANTIVE DIFFERENCES IN THEIR RESPECTIVE LANDMARKS LAWS

The problems caused by the disparities in scope of New York City's and Jersey City's historic preservation programs would be compounded by substantive differences in their respective landmarks laws and regulations. Significant differences between the two laws fall into three categories—(l) scope, (2) procedures, and (3) standards. Perhaps the most dramatic and important difference is in the scope of the laws. In stark contrast to New York City's law, for example, the Jersey City Landmarks Law exempts landmarks owned by not-for-profit entities. JCLL § 345-93(n). Thus, if any of Ellis Island's historic buildings were eventually transferred to a not-for-profit entity—such as the already-active Statue of Liberty/Ellis Island Foundation or another cultural institution—such an owner would be completely exempt from review by the Jersey City Landmarks Commission, no matter how destructive the proposed development might be.[8]

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8 New Jersey's contrary contentions notwithstanding, *see* Letter Brief of the State of New Jersey dated Apr. 1, 1996 ("Letter Brief") (Appendix, Tab O), the applicability of related New

Nor does Jersey City's law expressly provide for the landmarking of significant public interiors, whereas New York City's interior landmarking provision has been validated by New York's highest court. NYLL § 25-302[m]; JCLL § 345-93; *see Teachers*, 623 N.E.2d 526 (Four Seasons Restaurant interior designation upheld); *Shubert*, 570 N.Y.S.2d 504 (interior designation of Broadway theaters upheld). New York City has already acted to recognize the Registry Room in the Main Building on Ellis Island through interior landmark designation. *See* Letter dated Nov. 24, 1993 from Landmarks Preservation Commission (Appendix, Tab P). Absent federal control, if, as the Report recommends, New Jersey law were to apply to the structures adjoining the Main Building, such as the Kitchen & Laundry Building and the Baggage & Dormitory Building—and especially to the connecting structures between those buildings and the Main Building—conflicts would be certain to arise.

Less dramatic but no less important to the historic integrity of Ellis Island are procedural differences between the two landmarks laws. For example, applications for certificates of appropriateness, which are required to "construct, reconstruct, alter or demolish any improvement on a landmark site," must be the subject of a public hearing

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(...continued)

Jersey state laws to not-for-profits would not impose any additional restrictions relating to historic landmarks on such organizations. No matter whether relevant development efforts were commercial or not-for-profit, the inherent limitations of these state laws would not afford any protections beyond those provided by the Jersey City Landmarks Law—which simply does not apply to landmarks owned by not-for-profit entities.

in New York, NYLL § 25-307-08, but not in Jersey City. *See* JCLL § 345-89(b)(3) (application for certificate of appropriateness "deemed approved"—with no need for hearing—if Historic Preservation Commission fails to act within 35 days).[9] The public hearing is uniquely useful for presenting a proposal in "full view" to the community and for ascertaining the community's concerns about historic preservation. Such hearings typically help local officials identify and resolve troublesome aspects of a proposal, and

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9 While New Jersey has argued otherwise, *see* Letter Brief at 17-18, New Jersey's Open Public Meetings Act (the "OPMA") only applies when a government body actually holds a meeting. *See* N.J. Stat. Ann. 10:4-6; *see also Downtown Residents for Sane Dev. v. City of Hoboken*, 576 A.2d 926, 931 (N.J. Super. Ct. App. Div. 1990) (no violation of OPMA because "no showing that a meeting occurred"). Where approval can be granted by inaction, as it can be in Jersey City, no meeting is required, and the OPMA does not apply. *Cf. Application of North Jersey Dist. Water Supply Comm'n*, 417 A.2d 1095 (N.J. Super. Ct. App. Div.) (denial of hearing by Commissioner of Environmental Protection under state historic preservation law upheld because, *inter alia*, applications deemed approved if Commissioner fails to act within 120 days), *cert. denied*, 427 A.2d 559 (N.J. 1980). Moreover, even if the OPMA were applicable, it would require only that the public be permitted to *attend* Commission meetings, not to *participate* in the decisionmaking process with the procedural safeguards provided by the New York Landmarks Law. *Compare* N.J. Stat. Ann. § 10:4-12 (public body may "prohibit or regulate the active participation of the public at any meeting") *with* NYLL § 25-313 (New York City Commission must "afford a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard").

give applicants ideas about how to make their proposals more appropriate.

Finally, the standards employed under each law differ. Most significantly, the New York City and Jersey City landmarks laws have very different criteria for determining whether alterations to historic structures are appropriate. Under the New York City Landmarks Law, the specific criteria to be applied in reviewing proposed changes to designated buildings are set forth explicitly. *See, e.g.*, NYLL § 25-307[b]; *see also* NYLL §§ 25-306, 307, 310, and New York City Rules & Regulations, Tit. 63. Overall, application of the law is predictable and consistent. By contrast, both the standards to be applied under the Jersey City Landmarks Law and the relationship among its provisions are often unclear and susceptible to potential abuse. The standard for issuance of a "certificate of no effect" ("CNE") demonstrates this ambiguity. The Jersey City Landmarks Law provides that issuance of a CNE requires a determination that the work proposed is "not detrimental." JCLL § 345-80. However, the procedures for issuance of a CNE list a confusing array of (in some places contradictory) factors for consideration by the Jersey City Historic Preservation Commission in making such determinations. *Compare* JCLL § 345-89 (procedures for obtaining a certificate of appropriateness or certificate of no effect) *with* JCLL § 345-94 (Standards for the Commission's Decisions). Compounding the difficulties of applying these multiple standards simultaneously is the lack of guidance as to precisely when the various standards apply. Similar problems exist for certificates of appropriateness, which are issued when major alterations are proposed. *Id.* In some sections of the law, the appropriate standard for the

project is not even specified. *See, e.g.*, JCLL § 345-92[c] (criteria for "non-commercial" hardship applications).[10]

The application of such inconsistent landmarks laws could prove particularly problematic on Ellis Island. If the Report's recommendations were adopted, and in the event of federal abandonment, preservation and rehabilitation of some of the Island's most important historic structures would trigger conflicting procedural and substantive standards.

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10 Despite New Jersey's contrary contentions, New Jersey state law would not furnish Ellis Island with any additional preservation safeguards. *See* Letter Brief at 15-16. Neither New Jersey's Historic Sites Law, N.J. Stat. Ann. § 13:1B-15.128 *et seq.*, nor its Waterfront Development Law, N.J. Stat. Ann. § 12:5-1 *et seq.*, would afford Ellis Island any greater measure of protection for preservation purposes. To the contrary, New Jersey's Historic Sites Law protects against only state and local governmental action, and does not apply to private development. *See Hoboken Env't Comm., Inc. v. German Seaman's Mission*, 391 A.2d 577 (N.J. Super. Ct. Ch. Div. 1978) (N.J. Historic Sites Law only protects against governmental and not private encroachment); *Application of North Jersey Dist. Water Supply Comm'n*, 417 A.2d 1095 (N.J. Super. Ct. App. Div.) (Historic Sites Law provides for only limited enforcement by the public and permits the Commissioner of Environmental Protection to authorize "encroachment" by pure inaction), *cert. denied*, 427 A.2d 559 (N.J. 1980). New Jersey's Water Development Law actually encourages commercial development, *Last Chance Dev. Partnership v. Kean*, 575 A.2d 427, 433 (N.J. 1990) (limiting Water Development Law to protection of "commercial" interests), but in any event, may well be preempted by Jersey City's Landmarks Law. *Anfuso v. Seeley*, 579 A.2d 817 (N.J. Super. Ct. App. Div. 1990) (Water Development Law preempted by local land use regulation).

Thus, for example, New Jersey officials might deem efforts to restore a facade on any of the connecting structures that straddle the proposed New York/New Jersey boundary (such as between the Main Building and the Baggage & Dormitory Building) as "not detrimental" to the New Jersey section of the facade, and endorse the work, while New York officials might object to the work after concluding that it would "affect" an architectural feature of the facade on the New York side of the boundary. Similarly, such a proposal could be construed as work requiring a public hearing in New York, but no public hearing in New Jersey. Such conflicts could, at the very least, cause bureaucratic paralysis, while officials decided how to avoid violating either City's law. At worst, disputes arising from these conflicts could compromise Ellis Island's historic integrity through delayed repairs and inconsistent preservation or alteration efforts. All of these differences make it inevitable that, in the absence of federal control of Ellis Island, even good faith efforts to harmonize New York's and New Jersey's preservation programs would be fraught with problems and unlikely to succeed.

POINT III

TO THE EXTENT THAT EQUITY MAY BE INVOKED IN AN ORIGINAL CASE, IT SHOULD BE INVOKED HERE TO KEEP ELLIS ISLAND SUBJECT TO A SINGLE SOVEREIGN

The facts and the law before the Court lead inescapably to the conclusion that dividing Ellis Island—as New Jersey had proposed and on the assumption that the Federal Government might relinquish control over the Island—would give rise to conflicts between the two States' preservation programs that would improperly engage this Court in a role of "continuing supervision" with respect to the Island's landmarks. In a perfunctory effort to ameliorate this

objectionable outcome, the Special Master recommends "equitably reconstituting" the so-called "original island," so as not to split the Main Building into several pieces. While agreeing with this result as to the Main Building, the Preservation Amici note that "equity" should have no place in a case that can be decided on the basis of compact construction and the additional arguments advanced by New York and the other amici. *See Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983) ("If there is a compact, it is a law of the United States, and our first and last order of business is interpreting the compact."); *accord Arizona v. California*, 373 U.S. 546, 565-66 (1963). However, to the extent this Court determines that equitable and historical factors should be applied to decide this compact case, the Amici respectfully submit that those factors should be invoked more readily in favor of a remedy that protects the Island's historic integrity as opposed to a remedy that appears to serve chiefly New Jersey's development interests. *See For Ellis Island, New Talk of a Hotel, a Bridge and Masses Yearning to Get In Free*, NEW YORK TIMES, Apr. 3, 1997 (New Jersey officials opining that the Report's recommendations would rekindle commercial development plans for Ellis Island).

If anything, the Report construes too narrowly the remedies that equity would make available if it were properly invoked in this case. After acknowledging the impracticality and likely detriment of a "split sovereignty" remedy, the Report goes on to recommend granting to New York a fraction of an acre above and beyond the acreage included in the least generous estimate of the area of the "original" Ellis Island.[11] In the process, it draws a boundary that, without

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11 The arbitrary nature of the Report's point of departure for invoking equity is well-illustrated by its choice of the 1857 map as the best estimation of the size of the "original" Ellis

explanation, would cut through the heart of the ensemble of buildings forming the Island's historic core (including the Main Building, the Baggage & Dormitory Building, the Kitchen & Laundry Building and several connecting structures). Most tellingly, it would cut in half an as-yet-unrestored exterior staircase connecting the Main Building and the Baggage & Dormitory Building, thereby highlighting once again the Preservation Amici's chief concerns. Which State's law (if the Federal Government were to relinquish control of the Island) is to govern preservation, restoration and/or demolition of this structure? Will New York seek to restore it and New Jersey vote in favor of demolition? Who but this Court would have the power to resolve this impasse? The Preservation Amici urge this Court to avoid such a dilemma by invoking equitable principles to apportion to New York as much jurisdiction over Ellis Island as is necessary to safeguard the Island's future as a monument with more personal connections to more individual Americans than any other in the nation.

(...continued)

Island. The Report concedes that this choice is "potentially flawed," but ignores the contradictory premises upon which this choice is based. (R. 156 n.62.) The Special Master chose this map—created over twenty years after the Compact was executed—notwithstanding the availability of what the Report terms "probative and convincing" testimony from New York's experts as to the size of the Island in 1836 and maps (containing more detailed tidal data) created in 1836 and 1841. (R. 160 n.63.) This choice cost New York as a much as an additional acre in territory, which, the Preservation Amici submit, would have been enough to provide an equally plausible baseline for invoking equity to shelter the Island's historic core.

Equity has certainly been utilized to this extent and with this effect in the cases cited by the Special Master to support his recommended "reconstitution" of Ellis Island. Indeed, in each of those cases, the difference between what was required by the letter of the law and what was deemed warranted by equitable considerations was far more substantial than the fraction of an acre the Report offers to grant to New York. Thus, in *Vermont v. New Hampshire*, 289 U.S. 593, 595 (1933), for example, the Court's employment of equitable principles resulted in the addition to New Hampshire of a strip of land between high and low water that ran for many miles along the Connecticut River. Similarly, the adoption of the "thalweg" instead of the geographical center approach in *New Jersey v. Delaware*, 291 U.S. 361 (1934), resulted in the effective cession to Delaware of many square miles of territorial waters. *See also New Mexico v. Colorado*, 267 U.S. 30, 37 (1925) (invoking equity to establish Colorado claim to "large strip of territory" including "the greater portions of one town and two villages, and five post offices"); *Maryland v. West Virginia*, 217 U.S. 1, 46 (1910) (invoking equity to establish Maryland claim to a strip of territory entailing approximately 50 square miles).

This Court could use equitable principles to fashion any number of remedies that would much better serve Ellis Island's future than that proposed in the Report. It could do so on a territorial basis by looking to any of the several alternative allocation schemes proffered by New York but summarily rejected by the Special Master at the May 14, 1997 hearing. *See* Supplement to Final Report at 15-16. Any of those proposals would shield from the "split sovereignty" quandary a greater proportion of the Island's historic structures than the boundary recommended by the Report. Alternatively, the Court could, consistent with the principles of the cases relied upon by the Report, use equity to leave all of Ellis Island subject to New York's law for all

purposes, including historic preservation regulation. The Court could look to New Jersey's 1904 "sale" of its property interest in the underwater land surrounding Ellis Island as a renunciation of any responsible role with respect to the Island, note New York's ongoing interest in the Island's affairs, and conclude that equity requires that New York retain sovereignty over the Island in the event of federal abandonment of the Island.[12]

The Report ignores entirely the fact that Ellis Island has long been subject to the control of a single sovereign. The Federal Government—not New Jersey and not New York—created the landfill that forms the *res* of this action, built the Immigration Station, and conducted the activities there that have given Ellis Island its significance in modern American history and culture. Keeping Ellis Island subject to the preservation laws of a single sovereign is the best way to ensure that Ellis Island survives in a form consonant with the images of its past that are etched in the memories of millions of Americans. The Court can reach this result as a matter of law or as a matter of equity, but, in either event, if that

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12 As a further alternative, the Court could use equity to reach a conclusion which the New York Landmarks Amici argue elsewhere is required by the terms of the Compact—that, at the very least, Article III left New York with "police power" jurisdiction, and thus historic preservation control, over Ellis Island. *See* Brief of New York Landmarks Amici, Point II. Thus, even if the Court were unwilling to extend the boundaries of New York's territory on the Island beyond those proposed by the Report, such a remedy would ensure that New York's demonstrably more protective Landmarks Law would govern development plans on Ellis Island in the event of federal relinquishment of control over the Island.

sovereign does not continue to be the Federal Government, it should be the State of New York.

CONCLUSION

For all the foregoing reasons, the Court should reject the Report of the Special Master because the remedy recommended by the Report is impractical and unworkable. In the alternative, to the extent that "equity" is properly invoked in this case, it should be invoked to protect Ellis Island's historic past by keeping it subject to a single sovereign. If that sovereign does not continue to be the Federal Government, it should be the State of New York.

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