



IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

**BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE
COMPLAINT**

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(3168—LC9-977—1993)

i.

Question Presented

Whether this Court should deny the motion of New Jersey for leave to file an original jurisdiction complaint to resolve a claim by the State of New Jersey over portions of Ellis Island, New York, where (1) New Jersey's current claim is contrary to the language of an 1834 boundary agreement between New York and New Jersey, and marks the first effort by New Jersey to exercise sovereignty over the Island in more than one hundred and fifty years; and (2) New Jersey has raised no claim or issue which cannot be addressed to administrative authorities of the United States, to which New Jersey transferred in 1904 its claim of title and jurisdiction over the subaqueous lands around the Island which form the basis of New Jersey's current complaint.

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No. 120, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

**Brief in Opposition to Motion for Leave to File
Complaint**

Preliminary Statement

This brief is in response to a motion by the State of New Jersey, invoking the original jurisdiction of this Court, for leave to file a complaint seeking a declaration as to the boundary line between New Jersey and the State of New York on or around the isle located in New York Harbor and known as Ellis Island, New York. Disregarding New York's

long and unchallenged exercise of jurisdiction over the whole of Ellis Island, and ignoring recent case precedent which dispositively addressed each claim raised by New Jersey in its papers to this Court, New Jersey has requested that this Court exercise its discretionary jurisdiction to resolve a purported boundary “controversy” on two principal grounds. First, it has argued that the federal government is considering a plan for further development of the Island which might involve partial funding by a New York State authority. Second, it has claimed that the New York City Landmarks Preservation Commission might at some future time designate the Island as a New York City landmark. As we shall demonstrate below, these claims are insubstantial and fail to present a controversy warranting an exercise of original jurisdiction. Contrary to its claims, New Jersey has failed to assert jurisdiction over the Island in the past. Moreover, its current concerns over the Island’s future development are addressed more properly to federal authorities who will determine that development, rather than to this Court. The motion for leave to file the complaint should be denied.

Statement of the Case

1. Colonial and Early State Jurisdiction Over Ellis Island.

On March 12, 1664, Charles the Second, King of England, granted the territory then known as New Netherlands, including what is now known as Ellis Island,¹ to the Duke of York. 1827 New York Assembly Journal 615. Title to the

¹Ellis Island has been known at various times throughout its history as, among others, Bucking Island, one of the Oyster Islands, and Ellis Island.

Island was subsequently granted to Captain William Dyre by the colonial governor of New York in the late 1670's, and devolved through various conveyances to Samuel Ellis and his heirs. Records of transfers during this time were recorded in accordance with New York law with the Registrar of New York County (Liber 13, pp. 202, 210; Liber 145, p. 432). In the late eighteenth century, the Island was a part of New York State and New York County (L. 1788, Ch. 63), and was subject to taxation by the City of New York. L. 1796, Ch. 27. In 1795 and after, New York State appropriated and expended substantial sums of money for the construction of military fortifications on Ellis and Bedloe's Islands and continually occupied them with military staff. L. 1795, Ch. 43; Public Papers of Daniel D. Tompkins, Governor of New York, 1807-1817, Vol. II, Albany, 1902, pp. 5-8, 28-31, 158-159, 197-200.

2. 1808 Conveyance to the United States.

On March 18, 1808, the New York Legislature authorized the cession of Ellis Island to the federal government for fortification purposes. L. 1808, Ch. 51. Following New York State's acquisition of the Island by condemnation, Governor Tompkins executed and delivered a deed to the United States conveying all right and title of the State to the Island. Tompkins Papers, *supra*. New York retained the right to execute civil and criminal process on the Island. *See*, Act of February 15, 1800 (Laws of New York, 1797-1800, p. 454); State Law § 22(3). Moreover, New York's conveyance contained an express reverter provision, set forth in chapter 51 of the 1808 Laws of New York, in the event that the Island ceased to be used for the defense and safety of the city. The deed conveying title over the Island to

the United States, dated June 30, 1808, citing portions of L. 1808, Ch. 51, conveyed

all the right, title and interest of the State of New York in and to the lands, tenements and appurtenances above mentioned and described to the United States to have and to hold the same for the purposes mentioned and expressed in the said above in part recited act.

3. The 1834 Compact.

In 1829, New Jersey brought a claim to the United States Supreme Court by New Jersey over Staten Island, the Oyster Islands, and other portions of New York Harbor. *See, New Jersey v New York*, 28 U.S. (3 Pet.) 461 (1830); 30 U.S. (5 Pet.) 284 (1831); 31 U.S. (6 Pet.) 323 (1832). In its pleadings filed in that matter, New Jersey alleged that

while [New Jersey and New York] were Colonies, New York became wrongfully possessed of Staten Island and the other small islands in the dividing waters between the two States; that the possession thus acquired by New York had been since acquiesced in, New York insisting that her possession of said islands had established her title; that New York has no other pretense of title to said islands but adverse possession * * *. *Devoe Manufacturing Company*, 108 U.S. 401, 407 (1883).

Moreover, in a series of proposals proffered by New Jersey in 1828 to resolve the dispute, that State offered to "relinquish all claims to Staten Island and the other islands in the waters between the two States now claimed and

possessed by New York.” *Report of New Jersey Commissioners to Settle Question of Territory and Jurisdiction*, February, 1828 (Trenton, N.J.), pp. 15, 12, 18.

In September, 1833, commissioners representing New York and New Jersey entered into a compact to define the territorial and jurisdictional limits of each State in the harbor. The agreement was ratified by the New York and New Jersey legislatures, and was approved by the U.S. Congress on June 28, 1834. Laws of New York 1834, Ch. 8; Laws of New Jersey 1833-34, p. 118; 4 Stat. 728, Ch. 126 (“1834 Compact”).

While the provisions of the 1834 Compact established the general boundary line between the two States as the middle of New York Bay (Article I), that boundary was modified by several exceptions, both general and specific. Under Article Two, New York was to “* * * retain its present jurisdiction of and over Bedlow’s and Ellis’ Islands * * *”; under Article Three, New York was to have “exclusive jurisdiction” over all waters of the bay and of the lands covered by said waters subject to certain rights of New Jersey. New Jersey was to have the “exclusive right of property” to the land under the water lying west of the middle of the bay; it was also to have the “exclusive jurisdiction over the wharves, docks and improvements on the shore or attached to such docks or wharves.” The Compact did not limit New York’s sovereignty over Ellis Island to a fixed geographic dimension.

4. New York Transfer of Title Over Subaqueous Lands.

On May 7, 1880, the New York State Legislature enacted Chapter 196 of the Laws of 1880, which relinquished title

and jurisdiction to the United States over certain lands covered with water in New York Harbor, including lands surrounding Ellis Island. That grant of jurisdiction contained express limitations, providing that

the jurisdiction hereby ceded shall continue no longer than the United States shall own said lands at Governor's Bedloe's, Ellis' and David's Islands . . . and the adjacent lands covered with water, herein described and hereby released; and provided, further, that all civil and such criminal liability as may lawfully issue under authority of this State may be served and executed over said released lands.

New York's Governor Alonzo B. Cornell executed letters patent transferring title over those subaqueous lands to the United States on May 26, 1880.

5. New Jersey Transfer of Title and Jurisdiction Over Subaqueous Lands.

On November 30, 1904, the Riparian Commissioners of the State of New Jersey,² acting pursuant to authority vested with them by the New Jersey State Legislature, executed a deed transferring title to the land beneath the waters around Ellis Island to the United States of America. The "price or reasonable compensation to be paid to the State for said lands" was determined by the Commissioners to be one thousand dollars. Pursuant to the deed, New Jersey

²The Riparian Commissioners were Governor Franklin Murphy, William Cloke, Robert Williams, W.F. McLaughlin, and John R. Reynolds.

does hereby grant, sell and convey, unto the said
THE UNITED STATES OF AMERICA, all the right,
 title, claim and interest of every kind, of the State of
 New Jersey

to those lands, together with “all and singular the hereditaments and appurtenances thereunto belonging”,

TO HAVE AND TO HOLD all and singular the
 above granted and described lands under water and
 premises unto the said **UNITED STATES OF**
AMERICA, in fee simple, for ever.

No conditions, use limitations, or reservations of rights of any sort were contained in the deed.

Portions of the subaqueous lands transferred in 1904 were filled and built upon between 1890 and 1927, augmenting the size of the Island to its present extent of approximately 27.5 acres.

6. New York’s Continuous Exercise of Jurisdiction Over the Island.

Subsequent to the approval of the 1834 Compact, New York’s jurisdictional exercise over the entire Island continued unabated. Ellis Island was and continues to be placed in New York County and New York City by express provisions of the New York Revised Statutes issued subsequent to 1835 (Revised Statutes of the State of New York [1836], Part I, Chap. II, Title I, § 5; Title V, § 1), as well as the New York Consolidation Act of 1882 (L. 1882, Ch. 410, § 1), the Greater New York Charter (L. 1897, Ch. 378; L. 1901, Ch. 466, § 1; Ash & Ash, *Greater New York Charter* [1902 ed.],

pp. 956, 980), and the Administrative Code of the City of New York (§ 2-202[1]). Both the 1894 and the 1938 New York State Constitutions place the Island in one of the State Senate Districts (Art. III, § 3). The Island has been a component of New York Congressional Districts and State Senate and Assembly Districts for more than one hundred and fifty years.³ As a part of the County of New York, it lies within the jurisdiction of the United States District Court for the Southern District of New York. 28 U.S.C. § 112. It is contained within the jurisdiction of the New York City Courts (Ash & Ash, p. 774), lies within New York's First Judicial District (New York State Constitution, Art. VI, § 6), and is under the jurisdiction of the New York State Supreme Court, First Department. *Rettig v John E. Moore Co.*, 90 Misc. 664 (App. Term, 1st Dep't, 1915) (civil action for assault committed "upon government property at Ellis Island").

Since 1938, Ellis Island has been expressly treated as a subdivision of the Borough of Manhattan whose residents are required to comply with the sales tax rules and regulations issued by the City. *First Annual Compilation of the Rules and Regulations of New York City Agencies* (1938-1939) 52; *1 Cumulative Compilation of the Rules and Regulations of New York City Agencies* 582 (1967).

Since at least 1910, the federal government has treated the full extent of Ellis Island as part of New York State for United States Census purposes. Laidlaw, *Population of the City of New York, 1890-1930*, pp. 53, 85; U.S. Department

³Currently, Ellis Island is part of the twenty-fifth State Senate District, and the sixty-second State Assembly District. State Law, §§ 121, 124.

of Commerce, Bureau of the Census, *Housing* (Supplement to the First Series Housing Bulletin for New York, Census of 1940), Manhattan Tract Block 9; U.S. Department of Commerce, Bureau of the Census, *Census Tract Statistics, New York, New York* (1952), Part 5 ("Tracts in Manhattan Borough"). In 1940, for example, the Island's 717 inhabitants were treated as Manhattan residents for reapportionment and other census purposes; in 1990, the six inhabitants of New York Tract 0001, Block 101—which includes the full extent of Ellis Island—were treated identically. The Department of Commerce also recognizes Ellis Island as part of the Borough of Manhattan, and as part of the 15th Congressional District of New York, as established on September 27, 1983. Bureau of the Census, *Congressional District Atlas, Districts of the 100th Congress*. Consequently, throughout its history Ellis Island's residents have voted in New York's elections, been subject to New York's laws, been eligible to enjoy New York's social and other services, and been treated for all purposes as citizens of this State.

7. The *Collins* Litigation.

The single federal case authority which examines the propriety of jurisdictional claims over Ellis Island is the recent decision of the Second Circuit in *Collins v Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992). *Collins* was a tort action filed by an employee of the United States who, while operating a stump grinding machine on the landfilled portion of Ellis Island, received injuries requiring amputation of his lower leg. Plaintiff Collins brought an action in the United States District Court for the Southern District of New York against Promark, the manufacturer of the grinding machine, to recover damages for personal injuries sustained in the accident. Promark impleaded the United States in a third-party action, alleging negligence in training and supervision of Collins and failure to

provide safe apparel and a safe working environment. 956 F.2d at 385. Seeking to escape this liability, the United States argued in a motion for summary judgment that the third-party action was barred by the New Jersey Workers' Compensation Law, which limited an employer's liability for work-related accidents where the employee, like Collins, received workers' compensation benefits. 956 F.2d at 386. Promark argued in opposition that the Workers' Compensation Law of New York provided no such protection to the employer and that New York's law governed the entire extent of Ellis Island, including landfilled areas. Following an examination of extensive documentation addressing interests over the Island, including the 1834 Compact, the District Court (Knapp, J.) found that the full extent of the Island was within the exclusive jurisdiction of New York under the terms of the Compact. *Collins v Promark Products, Inc.*, 763 F. Supp. 1204 (S.D.N.Y. 1991), *aff'd upon reconsideration*, 763 F. Supp. 1206 (S.D.N.Y. 1991). Upon certification of the district court's orders, the Second Circuit granted to the United States permission to appeal.

The States of New Jersey and New York each participated as *amicus curiae* on this appeal before the Second Circuit. New Jersey filed a detailed brief fully supporting the position of the United States seeking reversal of the district court.

On appeal, the Second Circuit affirmed. Noting that the Compact Commissioners "[s]urely . . . must have contemplated that the territory of the Island might over the years decrease or increase as a result of natural or artificial forces", the Court found that Article II of the Compact confirmed New York's jurisdiction over the *entity* known as Ellis Island, without regard to its metes and bounds. 956 F.2d at 386-87. It found as well that the Compact expressly distinguished between New Jersey's proprietary and sovereign rights over

subaqueous land west of the state boundary line in New York Harbor, and New York's distinct and specific jurisdiction over the whole of Ellis Island above the waves. 956 F.2d at 387. The court noted that the phrase "present jurisdiction" (956 F.2d at 387)

only acknowledged that [federal] government ownership carried with it some limited form of federal jurisdiction. It did *not* acknowledge any jurisdiction on the part of New Jersey, which never exercised any authority or control of any kind with respect to the Island.

The court cited various features of the lengthy and uncontroverted exercise of jurisdiction over the whole of the Island by New York for more than three centuries, including at all times since the land around the Island was filled (956 F.2d at 387):

Ellis Island remains a part of New York by acknowledgment of the government and without objection (except in this case) by New Jersey. It has been a component of New York Congressional, State Senate and Assembly districts for more than one hundred fifty years. As part of New York County, it lies within the territorial jurisdiction of the United States District Court for the Southern District of New York, 28 U.S.C. § 112, and of New York's first judicial district, N.Y. Const. art VI, § 6; *see Rettig v. John E. Moore Co.*, 90 Misc. 664, 154 N.Y.S. 124 (N.Y. App. Term 1915) (civil suit for assault committed "upon government property at Ellis Island"). The government treats the entire area of Ellis Island as part of Manhattan for census purposes and has assigned a New York postal zip code to the Island. Those who have resided on Ellis

Island, both before and after the Compact, have been treated as citizens of New York.

Such long acceptance of the status quo “counts for a great deal in matters of territorial disputes between states”. 956 F.2d at 388 (*citing Georgia v South Carolina*, 487 U.S. 376 [1990]; *Arkansas v Tennessee*, 310 U.S. 563, 569-71 [1940]; *Michigan v Wisconsin*, 270 U.S. 295, 306-08 [1926]; *Indiana v Kentucky*, 136 U.S. 479 [1890]).

The court noted as well that the division of the Island in the fashion suggested by New Jersey and the federal government would create a “haphazard and uneven” boundary line, and would occasion extensive future litigation in tort matters. 956 F.2d at 388. Finally, the court found that no case law cited by New Jersey and the federal government in support of their interpretation of the Compact addressed the issue of jurisdiction over Ellis Island. 956 F.2d at 388-389. It concluded (956 F.2d at 389):

The Compact does not provide for jurisdiction over lands created by fill. It does provide for jurisdiction over Ellis Island. New York is the jurisdiction provided.

The federal government did not seek review of the Second Circuit’s decision by filing a petition for writ of certiorari before this Court.⁴

⁴On March 26, 1993, an order of settlement was entered in the *Collins* matter in the United States District Court for the Southern District of New York.

8. The Current Matter.

On April 26, 1993, the State of New Jersey filed with this Court a motion for leave to file a complaint, a complaint, and a supporting brief seeking relief including, *inter alia*, a declaration that the boundary line between New York and New Jersey on Ellis Island is

the former mean high water line of the original natural island, approximately 3 acres in size, so that the original island is thereby declared to be within the territory and jurisdiction of the State of New York, and so that the balance of the island, approximately 24.5 acres in size, and the surrounding waters, are thereby declared to be within the territory and jurisdiction of the State of New Jersey Complaint, p. 15.

ARGUMENT

Although it is beyond cavil that this Court has jurisdiction to determine boundary disputes between States, U.S. Constitution, Art. III, Sec. 2, Cl. 1; 28 U.S.C. § 1251(1); *Virginia v West Virginia*, 220 U.S. 1 (1911), original jurisdiction should be used only sparingly, *Wyoming v Oklahoma*, 502 U.S. —, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992), and should not be employed in the absence of absolute necessity. *Louisiana v Texas*, 176 U.S. 1, 15 (1900). This Court has substantial discretion to make judgments on a case-by-case basis as to the necessity of original jurisdiction. *Texas v New Mexico*, 462 U.S. 554 (1983). As this Court recently noted (*Mississippi v Louisiana*, 506 U.S. —, 113 S. Ct. 549, —, 121 L. Ed. 2d 466, 471 [1992]):

Determining whether a case is “appropriate” for our original jurisdiction involves an examination of two factors. First, we look to “the nature of the interest of the complaining State,” [citation omitted] focusing on the ‘seriousness and dignity of the claim,’ [citation omitted]. “The model case for invocation of this Court’s original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.” *Texas v New Mexico, supra*, at 571, n 18, 77 L. Ed. 2d 1, 103 S. Ct. 2558. Second, we explore the availability of an alternative forum in which the issue tendered can be resolved. [citation omitted.]

Applying these factors, this Court should decline to accept original jurisdiction in the matter at bar. New Jersey has neither alleged an interest sufficient to describe a serious current controversy with New York in the instant matter, nor has it demonstrated potential conflicts which cannot be addressed in other judicial fora.

POINT I

New Jersey has alleged no facts constituting a current controversy between the States requiring this Court’s exercise of original jurisdiction.

In the instant matter, New Jersey has failed to allege facts constituting a serious current controversy with New York requiring this Court’s exercise of original jurisdiction. The

complaint does not allege that New Jersey is currently being directly harmed by any actions taken by New York; nor does it allege current actions by New York challenging New Jersey's territorial integrity. Instead, New Jersey's complaint is purportedly based upon longer-standing claims arising under the 1834 Compact. New Jersey asserts that it "has been attempting for many decades to resolve the issues concerning Ellis Island without success", which efforts, according to its Brief,⁵ "have involved state and federal officials, including United States Senators, United States Congressional Representatives, local officials, and the Governors of both states." Brief, p. 20. It asserts as well that immediate resolution of the Ellis Island jurisdictional issue is required because New York State, as a result of the *Collins* decision, is attempting "to expand its governmental authority over the filled portion of Ellis Island." Brief, p. 20. This latter allegation is rooted in two factual claims, allegedly of recent origin: (1) New York currently has an "imminent plan for the development of the filled portion of Ellis Island" (Brief, p. 16); and (2) the New York City Landmarks Preservation Commission has held hearings at which the possibility of having the Island declared a city landmark was discussed (Brief, p. 17).

These claims by New Jersey are inaccurate, overstated, and insufficient to state a controversy which warrants an exercise of jurisdiction by this Court. We will address them in turn.

⁵References to the "Brief" are to New Jersey's Brief in Support of Motion for Leave to File Complaint, filed with its Motion and Complaint in this matter.

A. Contrary to New Jersey's assertions, the complaint does not arise from a failure of New Jersey's attempts to resolve Ellis Island issues "for many decades".

New Jersey's claim that it seeks leave to file its complaint in this matter after efforts "for many decades" to resolve the issues concerning Ellis Island is erroneous. A significant finding of the Second Circuit in *Collins* was the determination that "Ellis Island remains a part of New York by acknowledgment of the [federal] government and without objection (except in this case) by New Jersey". 956 F.2d 383 (2d Cir. 1992). That finding was based upon careful analysis of an extensive record of public documents in which New York's authority over the Island was clearly asserted, including federal census and election districts, the New York State Constitution, New York State boundary statutes, federal and state court jurisdictional statutes, case law, the New York City Charter, and other documents. These claims of jurisdiction extended across several centuries, and included the whole of the Island at all times. Throughout this period, Ellis Island residents have voted in New York's elections, been subject to New York's laws, and been eligible to enjoy New York's social and civil services, without challenge from New Jersey.

Attempting to divert attention from this lengthy history of acquiescence to New York's sovereignty, and in an effort to persuade this Court to exercise its original jurisdiction, New Jersey has argued that the State and its citizens "have publicly asserted the sovereignty claim of the State of New Jersey to the filled portion of Ellis Island many times over the years after 1904 . . ." (Brief, p. 10). As evidence of these sovereign claims, New Jersey has cited various actions and statements by New Jersey citizens and public

officials, as well as several actions by a New Jersey local municipality. These alleged assertions of jurisdiction, as described by New Jersey in its Brief, include: a visit to the Island by New Jersey state officials in 1956 (Brief, p. 11); a visit to the Island by the Mayor of Jersey City in 1962 (Brief, p. 12); a letter from a New Jersey congresswoman to a federal official in 1934 regarding federal employment practices on the Island (Brief, pp. 10-11); a letter from a New Jersey state official to a regional federal official in 1955 (Brief, p. 11); a comment by a New Jersey state official in 1960 (Brief, pp. 12-13); a telegram from a New Jersey State Senator to several New Jersey congressional representatives in 1958 (Brief, p. 12); a single ambiguous statement by the Jersey City Corporation Counsel before a congressional subcommittee in 1962 (Brief, p. 13);⁶ Jersey City's placement of "Ellis Island" on its tax rolls as assessed property from 1890 to the present, with tax exempt status (Brief, p. 10); Jersey City's enactment of a zoning ordinance applicable to "Ellis Island" in September, 1963, to take effect only if the Island were sold to private interests (Brief, p. 14); a concession in answer filed by the State of New Jersey in an action commenced against it and New York State by private citizens of New Jersey in 1985 (Brief, p. 14); and a 1986 Memorandum of Understanding between the Governors of New York and New Jersey which made no

⁶New Jersey cites in its Brief the remark of Corporation Counsel Meyer Pesin that "Jersey City may well claim preemptive governmental jurisdiction over Ellis Island. . . [.] To put it simply, in other words, the city of Jersey City may look upon Ellis Island as within the proper boundaries of the city and subject to its jurisdiction," and proffers this single ambiguous assertion as a claim of "the interests of the City in the filled portion of Ellis Island" during three days of hearings on the disposal of Ellis Island in 1962. Brief, p. 13.

claim by New Jersey of jurisdiction over any part of Ellis Island (Brief, p. 15).

These alleged assertions of jurisdiction are facially insufficient to establish a claim over the Island warranting this Court's exercise of original jurisdiction. Indeed, they are irrelevant to any purported formal claim by the State of New Jersey over the Island. Conspicuously lacking in this list are instances of legislative or sovereign action by that State over any portion of the Island remotely comparable to the electoral, judicial, tax, and other claims made by New York. These random and isolated claims of jurisdiction simply do not amount to an attempt by New Jersey "for many decades to resolve the issues concerning Ellis Island without success", as claimed in the Brief (p. 20). They comprise instead stark evidence of the lengthy indifference of New Jersey to the Island in the face of extensive claims by New York during this period.

B. New York is not expanding its jurisdiction over the filled portion of Ellis Island in consequence of the *Collins* decision.

Contrary to New Jersey's claim, New York is not expanding its jurisdiction over the filled portion of Ellis Island in consequence of the *Collins* decision. As we have noted above, New York's exercise of jurisdiction over the Island has long and unchallenged precedent. More significantly, however, in its effort to encourage this Court to exercise its original jurisdiction over this matter, New Jersey has misstated the current state of development of the Island.

New Jersey's claim that New York has an "imminent plan" for the development of the filled portions of the Island is

simply incorrect and is controverted by the very allegations of the complaint and memorandum in support. The Complaint alleges that the National Park Service plans to "present for public comment in the near future plans by the Center Development Corporation of New York for the renovation of three existing buildings on the filled area of the island" (Brief, p. 17). Clearly no such plan has yet been formally proposed by the Park Service for public examination; current comments upon the contents of such a plan are purely speculative. Furthermore, the Center Development Corporation, the alleged architect of this so-called "imminent plan" (Brief, p. 17), is a private corporation without power to act on behalf of the State of New York. No state action has been taken to endorse or fund any plan which may be proposed by the Center Development Corporation. No steps have been taken by the New York State Dormitory Authority to issue bonds to fund any such Corporation plan.

Moreover, while we do not concede the accuracy of New Jersey's allegations about a purported Center Development Corporation plan, the mere proposal of a plan for Park Service examination and public comment would pose no basis for a claim of controversy between the States of New York and New Jersey in any case. The Park Service might well determine that any such plan was not meritorious for a variety of reasons. Given the uncertainty of future action by the federal government, New Jersey's invocation of this Court's jurisdiction is premature.

Finally, New Jersey's claim that prospective development of the Island would violate New York State law if funded in part by Dormitory Authority bond proceeds (Brief, pp. 17-18) is simply irrelevant. The Authority's compliance with New York State law, though a matter of importance to

New York, poses no basis for an exercise of jurisdiction by this Court.

New Jersey's claim addressing recent purported hearings by the New York City Landmarks Preservation Commission is similarly insufficient to justify an exercise of original jurisdiction by this Court. The Complaint does not allege that any decision by the Landmarks Preservation Commission has been issued concerning any area over which New Jersey purports to lay claim. Until such issuance, the claim and complaint are simply premature.

POINT II

This Court should decline to exercise its jurisdiction on grounds of judicial economy.

In addition to New Jersey's failure to set forth a current controversy over Ellis Island warranting exercise by this Court of its original jurisdiction, principles of judicial economy strongly recommend a refusal to exercise jurisdiction in this matter. As this Court has noted, even the presence of a justiciable controversy does not require the Court to exercise its jurisdiction. *Illinois v City of Milwaukee*, 406 U.S. 91, 93-94 (1972). A necessary precondition of such exercise is the unavailability of another forum to resolve the dispute. *California v Texas*, 457 U.S. 164, 169 (1982). In the instant matter, New Jersey's effort to invoke this Court's original jurisdiction to address a claim of injury based on the future development of the Island and public discussions about its landmark qualities is inappropriate in light of that State's long-standing concession of sovereignty and jurisdiction over the Island and its surrounding waters to the United

States. As New Jersey concedes in her brief, the State sold the lands beneath the waters surrounding Ellis Island to the United States in 1904 for "reasonable compensation" and with the approval of the New Jersey State Legislature. Pursuant to Article I, Section 8, Clause 17 of the United States Constitution,⁷ such a purchase vested the United States with the power of "exclusive legislation" over the Island vis-a-vis New Jersey. Absent any express limitation in the conveyance, this power of exclusive legislation is tantamount to complete sovereignty and provides the federal government with exclusive jurisdiction over the purchased area. *Fort Leavenworth Railroad Company v Lowe*, 114 U.S. 525, 532-33 (1885). Consequently, New Jersey's claim of injury based on future development of the Island and its status as a landmark addresses property which that State does not own, over which it has ceded its jurisdiction, and which is in the full control of the United States government. Under such circumstances, we submit, New Jersey should address its concerns over future economic development of the Island not to this Court, but to federal authorities which control that development. Decisions by those authorities may then be addressed properly in the lower courts and submitted to this Court only after those courts have fully and fairly

⁷Art. I, Sec. 8, Cl. 17 provides that the Congress shall have the power

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority of all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

reviewed the matter. In this fashion, the resources of this Court will be expended with optimum economy.

CONCLUSION

The motion for leave to file the complaint should be denied.

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Respectfully submitted,

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