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No. 120 Original

In The
Supreme Court of the United States
October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

**REPLY BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE COMPLAINT**

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JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States and under Title 28, United States Code, Section 1251(a).

**CONSTITUTIONAL PROVISION AND
STATUTES INVOLVED**

United States Constitution, Art. III, § 2, cl. 2

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.

28 U.S.C. 1251(a), Original jurisdiction

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

4 Stat. 708, the 1834 Compact between New Jersey and New York (see Appendix of New Jersey's Brief in Support of Motion for Leave to File Complaint.)



STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is a suit under the Court's original and exclusive jurisdiction seeking to resolve a longstanding dispute between the State of New Jersey and the State of New York as to the location of their common boundary on Ellis Island, in the Hudson River and in Upper New York Bay.

The State of New Jersey filed its Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint on April 26, 1993. New York filed its response on or about June 26, 1993. This is the brief of the State of New Jersey in reply to New York's brief.



LEGAL ARGUMENT

NEW JERSEY'S MOTION FOR LEAVE TO FILE A COMPLAINT SHOULD BE GRANTED BECAUSE NEW JERSEY HAS A CLAIM OF SUFFICIENT SERIOUSNESS AND DIGNITY TO WARRANT CONSIDERATION BY THE COURT AND BECAUSE ONLY THIS COURT HAS THE JURISDICTION TO RESOLVE BOUNDARY DISPUTES BETWEEN TWO SOVEREIGN STATES

The Court in *Mississippi v. Louisiana*, 506 U.S. ___, ___, 113 S.Ct. 549, 552, 121 L.Ed.2d 466, 471 (1992), identified the two factors that are to be considered in ruling on a motion for leave to file a complaint by one state against another state invoking the original jurisdiction of this Court. The Court must consider the interests of the complaining state, focusing on the "seriousness and dignity" of the claim. The Court must also consider whether there is an alternative forum in which the issue tendered can be fully resolved. New York maintains in its answering brief that New Jersey has neither alleged an interest sufficient to describe a current controversy with New York nor has New Jersey demonstrated potential conflicts which cannot be addressed in other judicial fora (NYb14). Notwithstanding New York's arguments, there does presently exist a serious conflict requiring resolution and only the Supreme Court of the United States has the authority to resolve this matter.

A. New York's Contention that New Jersey Has Exhibited "Lengthy Indifference" to New York's Assertion of Jurisdiction Over the Whole of Ellis Island is Without Merit Because New Jersey Never Acquiesced in New York's Claim of Jurisdiction.

New York suggests that there is no serious dispute concerning jurisdiction over Ellis Island because of what New York characterizes as New Jersey's "lengthy indifference" to New York's assertion of sovereignty over the island. In support of this argument, New York provides the Court with an extended history of Ellis Island, beginning its discussion in 1664. Much of this historical summary is wholly irrelevant to this dispute. As was made clear in New Jersey's brief, throughout the colonial period and into the early years of the 20th century, Ellis Island consisted of only three acres of land. In 1834, New Jersey and New York entered into a compact which recognized New York's jurisdiction over those few acres, but recognized as well that New Jersey had ownership and sovereignty over all of the underwater lands to the west of the midline of the Hudson River, including the underwater lands immediately surrounding Ellis Island. The issue in this case concerns the sovereignty over the 24.5 acres of underwater lands immediately surrounding the three-acre island that were filled in the years 1898 through 1934 to expand Ellis Island to its present size. Thus, New York's historical recitation concerning events that predated the 1834 Compact and the filling of the underwater lands is wholly irrelevant.

In addition, the argument that New Jersey has been largely indifferent to New York's so-called continuous

exercise of jurisdiction over the island is simply belied by the facts. It is important to recognize that for the past century Ellis Island has been owned and maintained by the federal government. Federal control has afforded neither New Jersey nor New York substantial opportunity to exercise sovereign power over the island. Now that private development of the filled portion of Ellis Island is imminent, the question of whether New Jersey or New York is sovereign over these lands is a matter of immediate and grave concern. New York notes that under its law Ellis Island has been in certain New York election districts, and that Ellis Island residents have been considered by New York subject to its own tax and criminal statutes. However, the mere sporadic enactment of these laws does not necessarily establish as a matter of historical or evidentiary fact that New York has actually exercised authority over the filled portions of Ellis Island.

Moreover, there has been no showing by New York that it actually enforced its laws with respect to individuals residing on the filled portions of the island or activities occurring on lands claimed by New Jersey. Indeed, New York has never presented any proof that Ellis Island residents actually voted in New York or that those residents were living on the filled portion of the island.*

* New York argues that the United States Census still counts the residents of Ellis Island as residents of Manhattan County. (NYb9). The Census did count six inhabitants of Ellis Island in 1990. However, the United States Attorney in *Collins v. Promark Products, Inc.*, 956 F.2d 383 (2d Cir. 1992) advised the Court that the Census was incorrect. The United States Attorney said that Ellis Island had no inhabitants in 1990, and has had none since 1954, when the Government immigration facility there was

Likewise New York has not presented any evidence that Ellis Island residents paid taxes to New York based on taxable events occurring on the filled portions of the island. There has been no showing by New York that Ellis Island residents who lived on the filled portions of the island enjoyed the benefits of New York's social service programs or were prosecuted in the New York courts under the laws of New York for crimes committed on land New Jersey claims as its own. Again, given the pervasive presence of the federal government on the island, it is doubtful whether New York's actions in regard to the filled lands were more than *de minimus*.

On the other hand, public officials of the State of New Jersey, its citizens and others have publicly asserted New Jersey's claim to the filled portion of Ellis Island on numerous occasions over the years since 1904. New York has not alleged, nor could it allege, that New Jersey's state government took any official action in this time to relinquish New Jersey's claim to the filled portions of the island. *New Jersey v. Delaware*, 291 U.S. 361, 376, 54 S.Ct. 407, 412, 78 L.Ed. 847, 854 (1934); *Illinois v. Kentucky*, 500 U.S. ___, ___, 111 S.Ct. 1877, 1882, 114 L.Ed.2d 420, 429-430 (1991) (illustrating official state actions waiving a sovereignty claim). With the closure of the immigration station on the island in 1954, and the consideration by the federal government of plans for private commercial use of the island, the issue of whether New York or New Jersey had jurisdiction over Ellis Island became a matter

closed. With the prospect of development of Ellis Island, there is the potential for full time residents on the Island again, a fact underscoring the importance of resolving the issue in this case.

of greater interest. It was nevertheless widely recognized that New Jersey continued to resist New York's claim to sovereignty. As *The New York Times* reported in its March 14, 1956 edition:

The United States bought Ellis Island from New York State in 1808. New Jersey has always contested the Empire State's ownership, contending that while the island was a mile off the Battery it was only 900 feet from the Jersey shore.

New Jersey's claims of sovereignty to a major portion of Ellis Island were also reported in the September 29, 1956 issue of *Business Week*, in the February 15, 1958 edition of *The New Yorker* and in the September 4, 1960 edition of the *Newark Evening News*. The last article discussed the potential sale of the island for commercial development but stated that the new owners will have an "unprecedented problem of jurisdiction." New York and New Jersey both claim the island and both "are prepared to fight for it."

New Jersey's claim to sovereignty over the filled portion of Ellis Island was also the subject of discussion in the United States Congress. On July 30, 1955, H.R. 3120, a bill authorizing the appointment of a New York City National Shrines Advisory Board, was considered by the House of Representatives. During the debate on that bill, Representative Thomas J. Tumulty of New Jersey stated, "I am not going to prolong the discussion, but Jersey City claims that Ellis Island, in particular, is within the confines of Jersey City." *Congressional Record*, July 30, 1955, at 12387. His objection to the bill blocked its passage in the House at that time. A companion bill, S.732, was considered on August 1, 1955. Representative George Klein of New York responded to Congressman Tumulty's

objection, and stated that New Jersey residents would be allowed to serve on the proposed Board. *Congressional Record*, August 1, 1955, at 12703. Congressman Tumulty withdrew his reservation of objection, and the bill thereupon passed. The bill was approved August 11, 1955. Pub. L. No. 341 c. 779, 69 Stat. 632.

Not only was New Jersey's claim a matter of public record, it was also a claim that has been recognized by the federal government. On February 11, 1963, the General Counsel of the General Services Administration rendered an opinion on the legal status of Ellis Island. The opinion was written by Special Assistant to the General Counsel Henry H. Pike and approved by General Counsel J. E. Moody. The opinion concluded that, although the federal government had title to the entire island, New York had sovereignty over the original three-acre island, and New Jersey had sovereignty over the 24.5 acres of filled lands that were added to the original island. The opinion stated:

. . . [T]he artificial filling in around the original island, about 3 acres in size, did not operate to change the sovereignty over the filled-in area as sometimes occurs in the case of accretion or erosion. *The filled-in area remains, for the purpose of applying the provisions of the 1833 compact, as if it were "land under water" lying west of the middle of the bay and river, which under Article Third has been consistently held to be a part of New Jersey.* The "land under water" is consistently treated throughout the 1833 compact as including lands below the low-water mark. It follows logically that, for the purpose of the 1833 compact, the term "Ellis Island" includes all the area above the low-water mark at the time the compact was

entered into. *The area below that low-water mark, including the filled-in area, is a part of the State of New Jersey.* [Pike, Henry H., *Ellis Island - Its Legal Status* (General Services Admin., Office of General Counsel, Opinion No. 143, GSA-WASH/DC 63-10835, February 11, 1963, pages 3-4). (Emphasis added.)]

New York was fully cognizant of this opinion, as evidenced by Governor Nelson Rockefeller's statement before the United States Senate Subcommittee on Intergovernmental Relations on September 4, 1963. See *Newark Evening News*, September 5, 1963.

Not only was New York aware of the opinion of the General Services Administration which endorsed New Jersey's claims to the filled portion of the island, New Jersey's claim also was recognized as valid in a July 24, 1963 statement in the House of Representatives by John V. Lindsay, then a member of Congress from New York, who was later Mayor of the City of New York. Congressman Lindsay had introduced legislation concerning the use of Ellis Island. In a statement in support of the legislation, Congressman Lindsay stated that the 24 acres of fill on Ellis Island "were never New York property, but, as subaqueous territory, pertained to the jurisdiction of New Jersey." *Congressional Record*, July 24, 1963, at 13300.

The same point was made in 1965 when the House of Representatives debated House Joint Resolution 454, which provided for the development of Ellis Island as part of the Statue of Liberty National Monument. A member from the State of New York commented that Ellis Island was in New York State, but that assertion was

quickly countered by New Jersey Congressman Cornelius H. Gallagher:

I would like to point out for the benefit of the House, that the gentleman from New York [Mr. Farbstein] is not altogether right when he states that Ellis Island is in his district – 3.4 acres of it is in his district while the other 24 acres of Ellis Island are in my district, the 13th Congressional District of the State of New Jersey. The island is filled in with land taken from New Jersey . . . [*Congressional Record*, July 12, 1965, at 16377.]

It is important to emphasize that the federal government has never abandoned the position reflected in the GSA opinion of 1963. In fact, the federal government asserted this same position in the *Collins* matter before the federal district court and the Court of Appeals for the Second Circuit.

Most recently, in 1986, Governor Thomas H. Kean of New Jersey and Governor Mario Cuomo of New York signed a Memorandum of Understanding allotting income from Ellis Island and Liberty Island equally to the homeless of both states. The New York Legislature never adopted legislation to implement the agreement, and for this reason New Jersey deems the Memorandum a nullity. Nevertheless, this was a substantial recognition by New York's Chief Executive of the continuing vitality of New Jersey's sovereignty claims to the filled portion of Ellis Island.

The historical record thus completely refutes New York's assertion that there is "stark evidence" of "lengthy indifference" on the part of New Jersey to New York's

"extensive" claims to jurisdiction (NYb18). The fact of the matter is that the record does not reflect any "extensive" claim by New York. Rather, the record before this Court reflects a paucity of actions by New York at a time when the federal government dominated activity on Ellis Island. New York did little, if anything, and New Jersey never acquiesced in New York's spurious claim to control over the filled portions of the island.

Taken together, such actions as are detailed here, and in New Jersey's Complaint, starting in 1904 and continuing until 1993, constitute repeated notice to New York of New Jersey's sovereignty claims to a major portion of Ellis Island. In nearly every decade since the filling was completed in 1935, New Jersey, its citizens and others, have called New Jersey's claims to Ellis Island to New York's attention. This is not "long silence and acquiescence", *Indiana v. Kentucky*, 136 U.S. 479, 512, 10 S.Ct. 1051, 1054, 34 L.Ed. 329, 333 (1890), but rather a continuous boundary dispute of the type recognized in *New Jersey v. Delaware*, *supra*, 291 U.S. at 376-7, 54 S.Ct. at 412, 78 L.Ed. at 855. The historical record recounted here, and not available to the Second Circuit Court of Appeals in *Collins v. Promark Products, Inc.*, *supra*, supports the position that New Jersey has used many reasonable avenues over the years since the filling was completed in 1935 to make its claim heard. As a direct result of these objections, New York's own Executive and Congressional leaders have in recent years recognized the validity of New Jersey's sovereignty claim to the filled portion of Ellis Island.

B. New York's Assumption of Sovereignty Over All of Ellis Island Has Meant in Recent Years that Sales, Business, and Income Taxes Due New Jersey Have Not Been Paid and The Planned New Development of the Island In New York's Asserted Exclusive Dominion Will Further Deny New Jersey Its Sovereign Right to Control and Share in This Development.

New York's argument that there is no current controversy between New Jersey and New York over Ellis Island must fail as well. Initially, it must be noted that Ellis Island has been open as a National Park Service facility for several years and has been staffed by federal and private concession employees during that time. Sales taxes and income taxes, as well as other taxes, have been, and continue to be, collected. Some of these revenues may properly belong to New Jersey. That alone should be enough to establish a real dispute between the two states.

Moreover, New Jersey alleged in its Complaint that the National Park Service plans to consider a development soon to be proposed for the filled portion of Ellis Island. (Complaint ¶4). New York does not deny that there may be such plans (NYb19), but it merely says that these plans may not be submitted or may be rejected (*Ibid.*). New Jersey has since learned from the National Park Service that its Director has allowed the proposal of the Center Development Corp. of New York to proceed for public review. As noted in New Jersey's Complaint, ¶4, the New York State Dormitory Authority has recently considered financing the Center Development project, according to the Deputy Executive Director of the Authority. See *Crain's New York Business*, January 11, 1993,

page 1. The National Park Service will discuss Center Development's proposal with officials of New Jersey and New York, and with leaders of various private non-profit organizations concerned with the development of the Island, during September 1993. Probably in October 1993, the National Park Service will submit Center Development's proposal for a sixty-day public review. 16 U.S.C. 470f. Thereafter, the plan, probably with revisions, will be adopted, and the redevelopment of the filled area of Ellis Island will begin.

The point which New Jersey seeks to make by reference to this plan, or to any revised plan, is that the filled area of Ellis Island not now occupied and used by the National Park Service is a prime site for further development. Moreover, and most importantly, development of that part of the island is under consideration *now*. New York would have New Jersey wait until the development plans for the filled portion of Ellis Island are a *fait accompli* before any of New Jersey's concerns become a live controversy. That could delay the development of the island.* Instead, this Court ought to resolve this boundary dispute *now*, so that both States, their officials,

* New Jersey is reminded of what a developer stated during a February 7, 1958 tour of Ellis Island. The General Services Administration then planned to sell the island, and gave a tour of the island to potential private buyers. According to the *Newark Evening News*, February 9, 1958, a developer on the trip recognized that the disputed sovereignty claims created a problem for him in formulating plans and bid proposals, "If it's New Jersey's, you might be able to run something here. But [if Ellis Island is in] New York? The taxes would kill you before you started."

regulatory agencies, taxing authorities, private developers, and all other affected persons will know which State's laws apply.

Indeed, with development of the island, it is anticipated that people will again live on Ellis Island. It is essential that the Court decide under which state laws these people will reside. Where will these individuals vote? Which state's family laws will apply? Which state's taxes will be paid? Which state should supply social services? These are only a few of the myriad of issues that will arise as the island is developed and repopulated.

It serves neither state's interests to delay a decision on the boundary on Ellis Island. The property is on the brink of a new and expanded era of development. A decision now will assist in that process, and will advance the interests of the citizens of New Jersey, New York, and indeed, the entire Nation.

C. There is No Other Forum Which Can Resolve the Issue of Where the Proper Boundary Should Be Located Between New York and New Jersey on Ellis Island. Federal Officials Cannot Decide Tax or Regulatory or Civil or Criminal Law Issues, Only the United States Supreme Court Has That Power.

Another point made by New York in its brief is that New Jersey has another forum to bring its complaint concerning its sovereignty over the filled portion of Ellis Island. That forum is to bring the issues "to federal authorities which control that development" planned for

Ellis Island (NYb21). While it is true that federal authorities have primary control over development on land that the Government owns, what is at issue here is State sovereignty over the same land, not merely ultimate control of development. That sovereignty decision is exclusively the province of this Court. *Mississippi v. Louisiana*, *supra*. Federal authorities cannot determine which State's income or business taxes to collect, nor which State's civil and criminal laws to apply, nor which State's insurance and construction laws should be enforced. These are matters of serious concern to both States and to potential developers on Ellis Island. Federal control cannot resolve these issues – only this Court's intervention can, and New Jersey believes that this Court should act now, and allow the filing of New Jersey's Complaint.

D. The Second Circuit Court of Appeals Decision In *Collins* Did Not Settle the Boundary Dispute on Ellis Island and Under 28 U.S.C. § 1251(a) That Court Did Not Have the Authority to Do So.

In support of its position that all of Ellis Island is within its sovereign jurisdiction, New York relies in large measure on the Second Circuit's decision in *Collins v. Promark Products, Inc.*, *supra*. That matter involved a worker's compensation claim arising from an injury which occurred on Ellis Island. The court decided that New York law should apply to resolve the dispute, even though the accident occurred on the filled portion of the island, on lands New Jersey claims as its territory. The Court of Appeals based its decision on a completely erroneous interpretation of the 1834 Compact. The Court

determined that the framers of the Compact intended that New York would have jurisdiction over the entity called Ellis Island, no matter what its eventual size, and contemplated that such jurisdiction would extend to any filled lands.

As New Jersey stated in its main brief, neither the district court nor the Court of Appeals had before it any of the legislative history concerning the Compact of 1834, 4 Stat. 708 (NJb46). That history, especially the boundary agreement between the two states in 1888, conclusively demonstrates that filling of shorelands was not meant to change the boundary between New Jersey and New York as determined in the 1834 Compact. (NJb45-48). The river bottom on the New Jersey side of the Hudson River was acknowledged as New Jersey land before the filling of the shorelands, and the Boundary Commission of 1888 adjusted for the filling which had occurred between 1834 and 1888 in setting the final boundary line. (NJb47). The Boundary Commission would not have needed to do so if either state could have expanded its lands by filling. In 1888, both States recognized that their intent was that filling of the River and Bay would not expand their boundaries. Thus, it is clear that the *Collins* opinion is grounded on a fundamental error.

There is, moreover, an equally serious flaw in New York's attempt to use the Second Circuit's decision as a boundary determination between New Jersey and New York on Ellis Island. It is the prerogative of this Court, and not the lower federal courts, to decide boundary issues between the States. Under 28 U.S.C. § 1251(a), this Court has original and *exclusive* jurisdiction of all controversies between two States. The rule in State boundary

disputes was recognized early in the history of our country, *Fowler v. Lindsay*, 3 U.S. 411, 1 L.Ed. 658 (1799), and down to more recent times. *Durfee v. Duke*, 375 U.S. 106, 115-116, 84 S.Ct. 242, 247-248, 11 L.Ed.2d 186, 193 (1963).

In *Georgia v. South Carolina*, 497 U.S. 376, 392, 110 S.Ct. 2903, 2913, 111 L.Ed.2d 309, 327 (1990), the Court refused to regard a Fifth Circuit Court of Appeals decision as one which fixed a boundary: "In any event, this Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved."* This issue was recently addressed in *Mississippi v. Louisiana*, *supra*, wherein Mississippi argued that this Court's refusal to allow Louisiana to file an original complaint to determine the boundary between the two States must, by implication, have indicated that the District Court was the proper forum for the resolution of that question. *Id.*, 506 U.S. at ___, 113 S.Ct. at 552, 121 L.Ed.2d at 471. The Court squarely held that 28 U.S.C. § 1251(a), deprived the district court of jurisdiction to entertain Louisiana's third party complaint against Mississippi. *Id.*, 506 U. S. at ___, 113 S.Ct. at 551, 121 L.Ed.2d at 470.

In the face of this unbroken line of cases, the Second Circuit's decision in *Collins v. Promark Products, Inc.*, *supra*, cannot be regarded as fixing the boundary on Ellis Island between New Jersey and New York. New York's reliance upon *Collins* is therefore misplaced. Moreover,

* The only exception to a decision by this Court is the alternative of a negotiated settlement of any dispute between the states over the location of a boundary. *U.S. Const.* Art. I, § 10. *Durfee v. Duke*, *supra*, 375 U.S. at 116 n. 15, 84 S.Ct. at 247, 11 L.Ed.2d at 194.

because the Court of Appeals did not have before it any of the legislative history of the Compact of 1834 or the 1888 Report of the Boundary Commissioners, it was in error in deciding that New York law governed the disposition of the claim. This Court should allow the filing of New Jersey's Complaint to make clear that the Second Circuit's erroneous decision does not represent the final resolution of the dispute over the boundary on Ellis Island.* The filing of the Complaint should be permitted so that this Court can delineate the boundary between the two states.

CONCLUSION

Ellis Island in New York Harbor was expanded to its present size by artificial filling of land on the New Jersey side of the Hudson River and New York Bay. That filling did not change New Jersey's sovereignty over the filled land: the filled land of Ellis Island remained part of New Jersey. Since the completion of the filling in 1935, New

* Indications of the early misuse of the decision of the Court of Appeals are not hard to find. The New York City Landmarks Preservation Commission had delayed making a decision on city landmark status on all of Ellis Island because of the jurisdictional dispute between New Jersey and New York. Ms. Traci Rozhon, a Commission spokeswoman, was recently quoted as saying, "The second the [Collins] decision was reported she [Commissioner Laurie Beckelman] jumped right in because she very much wanted the city involved in decisions on Ellis Island." The newspaper report erroneously referred to the *Collins* decision as "giving the Big Apple undisputed jurisdiction over Ellis Island." *The Sunday Star Ledger*, November 15, 1992, p. 23.

Jersey's federal, state and local officials have continually brought this dispute to the attention of New York. In 1963, the federal government itself recognized in a detailed opinion that a major part of Ellis Island was in New Jersey. The same year a New York Congressman recognized the validity of New Jersey's sovereignty claim there. In 1986, New York's Governor recognized the validity of New Jersey's claims of sovereignty and signed a Memorandum of Understanding equally apportioning the revenue from Ellis Island between both States. The boundary controversy between New Jersey and New York should be resolved now so that imminent potential development can take place without the uncertainty an unclear boundary will generate. No other forum exists to determine state boundary disputes but this Court. The federal authorities involved are without the power to take such action. Accordingly, the State of New Jersey seeks leave from this Court to file its Complaint against the State of New York.

Respectfully submitted,

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