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IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEW JERSEY,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

**MOTION FOR LEAVE TO FILE SUR REPLY BRIEF
AND
SUR REPLY BRIEF FOR DEFENDANT STATE OF NEW YORK**

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Dated: September 14, 1993

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.

MOTION FOR LEAVE TO FILE SUR REPLY BRIEF

Defendant State of New York respectfully moves for leave to file the attached sur reply brief in opposition to plaintiff State of New Jersey's motion for leave to file a complaint in this matter.

This additional brief is required to correct several misstatements and misimpressions contained in New Jersey's reply brief to this Court. Acceptance of this brief will facilitate the Court's thorough consideration of the issues

critical to the decision as to whether leave to file a complaint is appropriate.

Accordingly, the State of New York respectfully requests that its motion for leave to file a sur reply brief in opposition to the motion for leave be granted.

Dated: Albany, New York
September 14, 1993

Respectfully submitted,

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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.

Sur Reply Brief for Defendant State of New York

This brief is in response to a reply brief filed by the State of New Jersey in support of its motion 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 island located in New York Harbor and known as Ellis Island, New York.

ARGUMENT

New Jersey's contrary arguments notwithstanding, it has not raised a claim meriting this Court's exercise of its original jurisdiction.

Despite the arguments raised in its reply brief,¹ New Jersey fails yet to assert a claim of sufficient seriousness and dignity warranting this Court's exercise of its original jurisdiction. *Mississippi v Louisiana*, ____ 506 US ____, 113 S Ct 549, 552, 121 L Ed 2d 446, 471 (1992).

New Jersey has offered several erroneous and inconsistent arguments in its opposition to New York's claim that we have exercised long and unchallenged jurisdiction over Ellis Island, a jurisdiction keenly recognized by the Second Circuit in its decision in *Collins v Promark Products, Inc.*, 956 F2d 383 (2d Cir 1992). First, New Jersey has argued that the historical control of the Island by New York during the period between 1664 and "into the early years of the 20th century" was "wholly irrelevant to this dispute" because the Island was only several acres in size during that period. NJ R Br p 4. This view simply misses the point. New York's exercise of jurisdiction over the whole of the Island vis-a-vis New Jersey—including portions added by fill after 1898—has continued undiminished during a period of more than three centuries, including the last eight decades. This lengthy and unbroken exercise is certainly relevant to the matter at bar. Indeed, New Jersey concedes as much later in its brief, where it argues—wrongly—that the *Collins* court did not have before it "any of the legislative history of the

¹Numbers in parentheses preceded by "NJ R Br" refer to pages in New Jersey's Reply Brief in Support of Motion for Leave to File Complaint, served on August 20, 1993.

Compact of 1834 or the 1888 Report of the Boundary Commissioners”, and that, in consequence of this evidentiary lacuna, *Collins* was wrongly decided.² NJ R Br p 18.

In an effort to excuse its lengthy indifference to Ellis Island, New Jersey has also argued for the first time in its reply brief that “Federal control has afforded neither New Jersey nor New York substantial opportunity to exercise sovereign power over the island.” NJ R Br p 5. This claim is absurd, and again misses the point of New York’s argument. The federal government has owned the entirety of Ellis Island since 1808. As we described more fully in our main brief, New York *has* exercised its sovereign power over the Island in a variety of substantial ways since that time, including open territorial and jurisdictional claim over the entire Island, despite this federal ownership. The claim that New Jersey had no opportunity to exercise jurisdictional claims in a similar fashion during this period is simply incredible.

We have addressed New Jersey’s paucity of claims of sovereignty over portions of Ellis Island in our main brief. Its citation of several new sources—*Business Week*, *The New Yorker*, and the *Newark Evening News* (NJ R Br p 7)—are equally insubstantial. The 1963 internal legal memorandum of the federal General Services Administration cited as authority for New Jersey’s claim (NJ Br p 8-9) is typically

²Contrary to New Jersey’s claim, the *Collins* court had before it extensive documentation of the full proprietary history of Ellis Island, including the 1834 Compact and its antecedents. Both the United States of America as third-party defendant, and New Jersey as *amicus curiae*, made extensive arguments based upon the 1834 Compact in *Collins*. Those arguments were considered and rejected by the Second Circuit. 956 F2d at 386-87.

incompetent: New Jersey has not explained and cannot explain how this internal opinion by a federal agency represents a sovereign act of New Jersey over the Island.³ The citation of Congressman Lindsay's comment in the Congressional Record (NJ R Br p 9), which merely acknowledges that New Jersey at one time owned the subaqueous land around the Island, is likewise irrelevant.

New Jersey's argument that the 1986 Memorandum of Understanding between the governors of New York and New Jersey, proposing the creation of a fund for the benefit of the homeless of both States funded by tax income from business activity relating to Liberty and Ellis Islands, somehow recognized a sovereign claim by New Jersey over Ellis Island (NJ R Br p 10) is a fanciful revision of the history and language of that Memorandum. The Memorandum, which the New York Legislature never endorsed and which New Jersey itself concedes is "a nullity" (NJ R Br p 10), was signed in 1986, after many decades of inactivity by New Jersey towards the filled portions of the Island. In signing the document, Governor Cuomo in no manner conceded the legitimacy of any current claim of sovereignty by New Jersey. Rather, he rightly found that avoidance of litigation over even a belated and meritless claim,⁴ if achieved through the establishment of a program to benefit the home-

³We note that both New Jersey and the federal government presented the GSA opinion to the Second Circuit in *Collins*. We note further that the Justice Department apparently chose not to seek certiorari of the adverse ruling in *Collins* to this Court—although the cross-claim against the Federal Government in that matter would have been dismissed if the GSA position were found to be correct.

⁴At the time the Memorandum was signed, New Jersey had not raised a claim to or sought to litigate jurisdiction over Ellis Island. (Footnote continued on next page.)

less of both New York and New Jersey, was desirable in light of the “noble meaning and spirit” represented by Ellis and Liberty Islands. This highminded vision of the Island cannot be transformed into a territorial or jurisdictional cession.

Finally, New Jersey has repeated its allegation that the New York State Dormitory Authority has recently considered participation in a proposal for development of Ellis Island issued by the Center Development Corp., a private corporation. NJ R Br pp 12-13. While we have addressed the insubstantiality of that claim in our main brief (p 19), we note now as well that the Dormitory Authority will not participate in the Center Development Corp. proposal.

In sum, the facts and arguments raised in New Jersey’s reply brief provide no persuasive foundation for this Court’s exercise of original jurisdiction in this matter.

(Footnote continued.)

Several private citizens from New Jersey were concurrently attempting unsuccessfully to litigate the issue in *Guarini v State of New York*, 521 A2d 1362 (NJ Chan Div 1986), *aff’d*, 521 A2d 1294 (NJ App Div 1986), *certif den*, 526 A2d 157 (1987), *cert den*, 484 US 817 (1987). As the *Guarini* Court itself pointed out, this litigation by private parties cannot be viewed as an assertion of sovereignty by the State of New Jersey. 521 A2d at 1369-71.

CONCLUSION

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

Dated: Albany, New York
September 14, 1993

Respectfully submitted,

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