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In the

Supreme Court of the United States

October Term, 1993

STATE OF NEW JERSEY,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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LEGAL ARGUMENT

NEW JERSEY'S MOTION FOR LEAVE TO FILE A COMPLAINT SHOULD BE GRANTED BECAUSE, NOTWITHSTANDING THE SOLICITOR GENERAL'S ARGUMENTS TO THE CONTRARY, NEW JERSEY HAS RAISED A CLAIM OF SUFFICIENT SERIOUSNESS AND DIGNITY TO WARRANT EXERCISE OF THE COURT'S ORIGINAL JURISDICTION.

At the Court's invitation, the Solicitor General has filed a brief in which he takes the position that the Court should decline to resolve New Jersey's contested claim of sovereignty over the filled portions of Ellis Island. The Solicitor General frankly admits that within the last two years the United States argued before the Court of Appeals of the Second Circuit in Collins v. Promark Products, Inc., 956 F.2d 383 (2d Cir. 1992), that the filled portions of the island were subject to New Jersey's jurisdiction. Moreover, the Solicitor General's brief does not repudiate the United States' substantive legal position that it advanced in Collins in support of New Jersey's claim. Despite the United States' substantive agreement with New Jersey in Collins, the Solicitor General asserts that the Court should not exercise its original jurisdiction so that New Jersey can secure a definitive ruling on this important boundary issue. With all due respect to the Solicitor General, the arguments made on behalf of the federal government urging denial of New Jersey's motion for leave to file a complaint are both inconsistent with legal precedents of this Court and impractical.

The Solicitor General makes essentially three points that require a response. The Solicitor General seems to suggest that Ellis Island is rather too small an area to warrant this Court's attention. Brief of the United States, at p. 8. It is further maintained that federal jurisdiction over Ellis Island is "exclusive" and there is little practical importance in determining whether the filled portions of Ellis Island are in New Jersey or New York. Brief of the United States, at pp. 8-9. Finally, the Solicitor General suggests that New Jersey could resolve its claim by assessing taxes based on activities in the disputed territory and then litigate the issue in the New Jersey courts or, perhaps, in this Court at some later time. Brief of the United States, at p. 12.

First, the Solicitor General is wrong in suggesting that the filled portions of Ellis Island are too small to justify the exercise of the Court's original jurisdiction. There is no decision of this Court which even remotely indicates that the size of a disputed area is the key factor in determining whether the Court should allow the filing of a complaint by one state against another to resolve a controversy over a boundary. Even a small piece of the United States known as the Barnwell Islands warranted this Court's merits consideration. See Georgia v. South Carolina, 497 U.S. 376, 110 S. Ct. 2093, 11 L.Ed. 2d 309 (1990). There is little doubt that Ellis Island, however small it may be, is a place of singular importance to the history of the United States. It deserves no less attention in this Court than the Barnwell Islands.

In arguing that there is little practical importance to the resolution of this case, the Solicitor General argues that federal authority over Ellis Island is exclusive. It is said that New Jersey ceded its jurisdiction over the filled portions of Ellis Island in its 1904 deed transferring ownership of the State-owned underwater lands to the United States. This is simply not so. In that instrument, the

State granted "all the right, title, claim and interest of any kind of the State of New Jersey," in the tideland properties to the United States. This is the language of conveyance, not language completely ceding the governmental jurisdiction of a sovereign state.

Mere ownership and use for public purposes by the United States does not entirely withdraw the lands from the jurisdiction of New Jersey. Surplus Trading Co. v. Cook, 281 U.S. 647, 650, 50 S.Ct. 455, 456, 74 L.Ed.1091, 1094 (1930), James v. Dravo Contracting Co., 302 U.S. 134, 141, 58 S.Ct. 208, 212, 82 L.Ed. 155, 162 (1937). This includes the taxing and police powers. Silas Mason Co. v. Tax Commission, 302 U.S. 186, 197, 82 S.Ct. 233, 239, 82 L.Ed. 187, 196 (1937). In Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963), the Court stated that although Congress has the power under Article I, §8, cl. 17 of the Constitution to exercise "exclusive legislation" over federal enclaves, it does not obtain the benefits of the constitutional grant of authority unless the States cedes its legislative authority and political jurisdiction to the United States. New Jersey transferred only its ownership in the submerged lands that became part of Ellis Island in 1904. New Jersey never ceded full legislative authority and political jurisdiction over those lands to the federal government.

New Jersey did enact a general statute consenting to future acquisitions of land by the United States, N.J. Stat. Ann. 52:30-1, as well as a statute that did cede exclusive jurisdiction "in and over any land so acquired," N.J. Stat. Ann. 52:30-2. However, these statutes were not enacted by New Jersey until three years after the United States acquired the state-owned tidal area around the original three acre Ellis Island. See Laws of New Jersey 1907, c. 19, §1. Previously, New Jersey consented to the acquisition of land

and ceded its legislative and political authority to the federal government in separate pieces of legislation enacted from 1790 through 1938 for thirty eight individual parcels of land. None of these laws included the lands around the original three acre Ellis Island. Thus, the Solicitor General can point to no action by the Legislature of the State of New Jersey that represents a cession of sovereign authority over the filled portions of Ellis Island to the United States. There is none, and as a consequence, New Jersey retains its jurisdiction over the filled portions of Ellis Island on all matters where there is no conflicting federal legislation.*

The Solicitor General additionally maintains that, even if federal authority is not exclusive on Ellis Island, there is currently little practical conflict between New Jersey and New York arising from the activities on the island. Yet, in his brief the Solicitor General has revealed for the first time how far along its renovation plans for Ellis Island have progressed. In its proposed complaint, New Jersey had alleged that the Park Service was expected to present plans of the Center Development Corporation of New York to renovate three buildings on the filled portions of the island as dormitories. New York dismissed the plan as "purported," and noted that it was merely a "proposal." See New York's Brief, at p. 19.

* Justice Holmes recognized this distinction in his opinion for the Court in Central Railroad Co. v. Mayor, etc. of Jersey City, 209 U.S. 473, 28 S.Ct. 592, 52 L.Ed. 896 (1908), in which he discussed the 1834 Compact fixing the boundary between New York and New Jersey in the Hudson River, the very compact at issue in this case. Justice Holmes noted that the sale by New Jersey of its submerged land in the Hudson River, in that case to a railroad, does not in any way convey the state's sovereignty.

According to the Solicitor General, the Secretary of Interior has executed a lease with Center Development Corporation in 1988 for the so-called "adaptive reuse" of the south portions of Ellis Island, the entire filled area of the island. The federal government has extended this lease several times. Center Development Corporation is bound by the lease to submit plans and specifications to renovate the buildings by July 1994 unless that deadline is extended. Those plans will provide a basis for the execution of a "final lease." Brief for the United States, at p. 10.

In the face of these facts, the Solicitor General nonetheless maintains that the prospects for future development are "uncertain." Brief of the United States, at p. 9. There is nothing "uncertain" about the fact that the federal government has been dealing with a private developer for the development of the filled portions of Ellis Island for six years and that development of the island could very well be imminent. Clearly, this is not a "purported" plan for renovation, as New York asserted. Nor is this merely a "proposal." Ellis Island is plainly on the verge of substantial development. To deny New Jersey the opportunity to pursue its case for sovereignty over the filled portions of Ellis Island now is effectively to deny New Jersey the ability to have a substantial voice in the imminent development of the island. It will simply be too late in the day to resolve these important issues at a future time.

New Jersey need not, however, wait for the finalization of the plans for Ellis Island in order to have any concern about the development of the island. As a practical matter, it is extremely important to know now whether Ellis Island is part of New Jersey or a part of New York. In planning for the development of the island, Congress has declared in the National Historic Preservation Act that the plans must be submitted for public comment. 16 U.S.C. §470(f).

Certainly, the public comment of the government of the state in which the development is to take place will have a great deal of weight.

Indeed, the actions of officials of the City of New York confirm that this is so. As New Jersey has previously pointed out, the New York City Landmarks Commission, with the concurrence of the City's Council, has designated all of Ellis Island, including the filled land, as a New York City historic district. The Chair of the Commission frankly admitted that this action was taken so that the Commission would have "more influence" in planning for the island's future. The New York Times, November 17, 1993, p. B4, column 1. See also The New York Times, November 9, 1994, p. B1 (quoting a New York City Council member as stating that, "It brings us to the table in any discussions having to do with the Island.") Quite obviously, City of New York officials think that during this extremely important planning stage of the future of Ellis Island there is great practical importance in knowing whether the island is in New Jersey or New York. Regrettably, the Solicitor General does not share this understanding.

Wholly aside from the importance of state involvement in the planning for the future of Ellis Island, eventual implementation of these plans will unquestionably have great practical importance to New Jersey and to New York. Although the federal government does have a certain measure of authority over the island as owner, such authority does not entirely foreclose the application of state law to activities within that federal property. It is well established that so long as there is no interference with the jurisdiction of the federal government, the State's domain continues even within a federal enclave such as Ellis Island. Howard v. Commissioners of Louisville, 344 U.S. 624, 627, 73 S.Ct. 465, 467, 97 L.Ed. 617, 621 (1953).

Substantial construction activities on Ellis Island will necessarily result in tax obligations owed by private individuals and entities to the state that has sovereign jurisdiction over the island. Under New Jersey law, this would mean taxes due under a variety of state laws including the Corporation Business Tax Act, N.J. Stat. Ann. 54:10A-1 et seq., the Gross Income Tax Act, N.J. Stat. Ann. 54A:1-1 et seq., and the Sales and Use Tax Act, N.J. Stat. Ann. 54:32B-1 et seq. Indeed, as the Solicitor General points out in his brief, Congress has expressly declared in the Buck Act that no person shall be relieved of the obligation to pay sales and use taxes on the ground that the sales or use in question occurred in a federal area. 4 U.S.C. §105(a). In addition, employees of the federal government and all workers on land owned by the federal government must contribute to the unemployment fund of the state where the land is situated. Congress has provided that the state has "full jurisdiction" in this regard. 26 U.S.C. §3305(d).

New Jersey also has a vital interest in having its worker's compensation laws enforced in all areas within its jurisdiction. Where workers are injured on federal property, Congress has directed the courts considering the claim to apply the law of the state where the accident occurred. 28 U.S.C. §1346(b). The Court of Appeals for the Second Circuit has already erroneously determined that New York's worker's compensation law would apply in a claim brought by a worker arising from injuries sustained on the filled portions of Ellis Island. Collins v. Promark Products, Inc., *supra*. The anticipated construction and development activities will undoubtedly mean the employment of many workers. Like the Collins case, some of those actions will be brought in the United States District Court for the Southern District of New York. The lower courts will undoubtedly apply the Collins precedent. But, as New Jersey and the federal government both argued in

the Second Circuit, New Jersey law -- not New York law -- should apply to the disposition of those claims. Again, it should be emphasized that the Solicitor General has not repudiated the United States' substantive legal position on those points.

Finally, and most surprisingly, the Solicitor General suggests in his brief that New Jersey might endeavor to have the issue of its interest in the filled portions of the island litigated by assessing taxes on individuals or entities by reason of their activities on the parts of Ellis Island that New Jersey claims. The Solicitor General suggests that New Jersey litigate these issues in New Jersey's courts and seek review by the Court on certiorari in the event of an unfavorable decision. The Solicitor General also suggest that New Jersey consider an original action after it had assessed taxes and had the issue decided in the state courts.

These arguments do not square with the Court's recent decision in Mississippi v. Louisiana, 506 U.S. ___, 113 S.Ct. 549, 121 L.Ed. 2d 466 (1992), wherein the Court held that only this Court has jurisdiction to determine boundary disputes between two states. In fact, the procedure outlined by the Solicitor General is precisely the sort of approach explicitly rejected by the Court in Mississippi v. Louisiana. The suggested procedure would, moreover, run afoul of the need for judicial economy. It would thrust private taxpayers into the middle of a jurisdictional tug of war between two states and compel them to engage in what could be years of protracted, expensive litigation. These suggestions are not practical and, more importantly, conflict with this Court's original and exclusive jurisdiction. Simply put, this case is a boundary dispute and the Supreme Court and only the Supreme Court has exclusive jurisdiction to hear it and to determine it.

In summary, the Solicitor General has failed to present any persuasive reason whatsoever for the denial of New Jersey's application for leave to file a complaint under this Court's exclusive jurisdiction. New Jersey has, in fact, presented a case of sufficient seriousness and dignity to warrant exercise of the Court's original jurisdiction. There is no other forum in which these claims can be definitively resolved, and the time to resolve these questions is now.

CONCLUSION

For the reasons set forth herein, New Jersey should be granted leave to file its complaint against New York to resolve the present dispute over the boundary between the states on Ellis Island.

Respectfully submitted,

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