NOS. 1, 2, & 3, ORIGINAL

IN THE

Supreme Court of the United States

October Term, 1966

STATES OF WISCONSIN, ET AL.,	*Complainants,*
v.	
STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,	*Defendants,*
UNITED STATES OF AMERICA,	*Intervenor.*
STATE OF MICHIGAN,	*Complainant,*
v.	
STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,	*Defendants,*
UNITED STATES OF AMERICA,	*Intervenor.*
STATE OF NEW YORK,	*Complainant,*
v.	
STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,	*Defendants,*
UNITED STATES OF AMERICA,	*Intervenor.*

AMICUS CURIAE BRIEF OF MICHIGAN SHORELINE CAUCUS SUPPORTING MOTION TO REOPEN AND RENEWED MOTION FOR PRELIMINARY INJUNCTION

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QUESTIONS PRESENTED

1. Whether the Court should exercise its original jurisdiction under Article III, Section 2, Clause 2 of the United States Constitution to hear this dispute between Michigan and Illinois involving the imminent invasion of Asian carp into the Great Lakes ecosystem.

2. Whether the Court should alternatively hear this dispute by reopening Original Action Nos. 1, 2, and 3 to consider Michigan's request for a Supplemental Decree.

3. Whether the Court should grant Michigan's renewed motion for a preliminary injunction seeking to temporarily close the O'Brien and Chicago Locks and various sluice gates, except as needed to protect public health and safety.

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AMICUS CURIAE BRIEF OF MICHIGAN SHORELINE CAUCUS SUPPORTING MOTION TO REOPEN AND RENEWED MOTION FOR PRELIMINARY INJUNCTION

Amicus curiae Michigan Shoreline Caucus respectfully submits that this Court has jurisdiction over the dispute between Michigan and Illinois and should exercise that jurisdiction, either by opening a new, original action to resolve the current dispute or, alternatively, by granting the motion to reopen.[1] In addition, the Caucus respectfully requests that the Court grant Michigan's Renewed Motion for Preliminary Injunction.

INTEREST OF *AMICUS CURIAE*

The Michigan Shoreline Caucus consists of 10 members of the Michigan House of Representatives, each representing a district that borders the Great Lakes: Arlan Meekhof (89th District), Kevin Elsenhiemer (105th District), Bob Genetski (88th District), Joe Haveman (90th District), Sharon Tyler (78th District), Phil Pavlov (81st District), Goeff Hansen (100th District), John Proos (79th District), Tonya Schuitmaker (80th District), and Wayne

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the Michigan Shoreline Caucus, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, even though notified of *amicus curiae*'s intent to file this brief only seven days in advance of its filing. Correspondence consenting to the filing of this brief by all parties has been submitted to the Clerk.

Schmidt (104th District). As elected state officials, the Caucus members have a strong interest in protecting the rights of their constituents and Michigan citizens in general. Specifically, the Caucus represents the citizens who live along the shorelines of Lakes Michigan and Huron and, therefore, will be most directly affected by the invasion of Asian carp into the Great Lakes. The Caucus files this *amicus* brief to bring to the Court's attention facts and dispositive legal arguments that are not addressed in the various briefs that have already been filed in these three, consolidated, original actions.

INTRODUCTION

The *London Times* recently identified Asian carp—not recession—as the biggest threat to America's economy.[2] That is certainly true in Michigan, where the Great Lakes provide citizens with jobs that represent nearly 25% of Michigan's payroll, including a world–renowned commercial and sport fishery valued at more than $4 billion annually, a $12.8 billion annual travel and tourism industry, a $21 million annual charter boat industry, and a $2 billion annual recreational boating industry.

Despite acknowledging that Asian carp could have a "devastating effect on the Great Lakes ecosystem and a significant economic impact on" Michigan's economy, Mich. App. 45a, Illinois has been reluctant to take any meaningful action to stop the threat of Asian carp migrating into the Great

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[2] Chris Ayres, *Attack of the giant Asian carp threatens to cost the US economy billions* (Dec. 4, 2009), *available at* http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6943400.ece.

Lakes. In fact, the only significant curative proposal floated by Illinois and the Army Corps of Engineers since this litigation began involves closing the locks "a few days a week." As *The Detroit News* chided in an op–ed, what Michigan citizens "can't wait to see is the new federal agency that will be created to teach carp how to tell what day it is so they won't swim into Lake Michigan when the canal is open."[3]

As set forth in Michigan's renewed motion for preliminary injunction, the gravity of the Asian carp problem and the magnitude of the potential environmental and economic effects more than justify an interim closing of the relevant locks and sluices until a permanent solution can be devised and implemented. In addition, this Court is the most appropriate forum for entry of such an injunction, because this dispute between Michigan and Illinois is a paradigm case for exercising original jurisdiction, and the lawsuit's subject matter relates directly to the three original actions that Michigan seeks to reopen.

STATEMENT

1. Common use of the term "Asian carp" in the United States typically includes two types of fish: bighead carp and silver carp. The U.S. Fish and Wildlife Service considers Asian carp "an aquatic nuisance species," with "rapid range expansion and population increase" that can eliminate native habitats and aquatic species. Mich. App. 13a–14a. The Army Corps of Engineers concedes that the "preven-

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[3] Eric Sharp, *Feds' Asian carp plan all wet*, THE DETROIT NEWS, Feb. 7, 2010, at 2, *available at* http://www.freep.com/article/20100207/SPORTS10/2070479/1356/SPORTS/Feds–Asian–carp–plan–all–wet.

tion of an inter-basin transfer of bighead and silver carp from the Illinois River to Lake Michigan is paramount in avoiding ecological and economic disaster." Mich. App. 51a.

2. Asian carp pose a dire threat to the commercial and sport fishing industries, as well as the hunting industry. The carp's prodigious reproduction and intense eating patterns simply wipe out the lowest levels of the aquatic food chain, adversely affecting native fish and birds. *E.g.*, Mich. App. 13a–23a.

3. Asian carp also dramatically and negatively affect the tourism, charter boat, and aquatic recreation industries that play such a prominent role in Michigan's economy. Bighead carp grow to be 110 pounds, Mich. App. 13a, and jump so high—and with such force—that they can knock down humans, cause bruising, and break bones, as illustrated by numerous disturbing videos that have been posted on the Internet by professional and amateur videographers.[4] The U.S. Department of the Interior has explained that there are "numerous reports of injuries to humans and damage to boats and boating equipment because of the jumping habits of silver carp in the vicinity of moving motorized watercraft." Mich. App. 23a. Reported injuries include cuts, "black eyes, broken bones, back injuries, and concussions."

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[4] *E.g.*, That Will Leave a Mark, *available at* http://www.youtube.com/watch?v=DLFe8xfgx24&feature=related (CNN); Asian Carp Invasion Part I, *available at* http://www.youtube.com/watch?v=yS7zkTnQVaM; Asian Carp Invasion Part II, *available at* http://www.youtube.com/watch?v=2ChwJiKKBdA; Asian Carp Jumping, part 1, *available at* http://www.youtube.com/watch?v=PdcQ56OpxNE&feature=related.

Id. Some boat owners in affected areas have been forced to retrofit their vessels with Plexiglas as protection against jumping carp. *Id.* Such protection is unavailable for the tens of thousands of Michigan residents who water ski, jet ski, and tube on Michigan lakes and waterways.

4. A Michigan Asian carp invasion would hardly be limited to the Great Lakes. Nearly all of Michigan's major rivers (as well as their tributaries and lakes) are connected to the Great Lakes, as illustrated on the map, below:

In other words, if Asian carp gain a foothold in the Great Lakes ecosystem, they will quickly spread to countless Michigan rivers, lakes, and streams, U.S.

App. 146a–47a, destroying what are unquestionably Michigan's greatest resources.[5]

5. The potential economic effect of an Asian carp invasion far exceeds the $7 billion negative effect that Illinois estimates the fish will have on the Great Lakes fishing industry. Mich. App. 45a. A Michigan Department of Environmental Quality investigation completed in January 2009 found that the Great Lakes provide Michigan with 823,000 jobs that flow from a $4 billion annual commercial and sport fishing industry; a $12.8 billion annual travel industry; an estimated $21 million annual charter boat industry; and a $2 billion annual recreational boating industry.[6] And the U.S. Fish and Wildlife Service has separately identified a potential negative impact to a $2.6 billion annual Great Lakes waterfowl hunting industry. Mich. App. 15a.

6. Such losses would be devastating to a Michigan citizenry that is already experiencing an unemployment rate that exceeds 14.5%,[7] particularly when one considers that tourism–related employment in coastal counties (i.e., those represented by Michigan Shoreline Caucus members) is one of the few bright spots in Michigan's otherwise

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[5] For a visual depiction of how the Asian carp have spread throughout the Mississippi River basin, see minute mark 1:11 of That Will Leave a Mark, *available at* http://www.youtube.com/watch?v=DLFe8xfgx24&feature=related (CNN).

[6] MI Great Lakes Plan at 1, *available at* http://www.michigan.gov/documents/deq/MI-GLPlan_262388_7.pdf.

[7] http://www.milmi.org/.

dismal economy, increasing 33% from 2000 to 2007.[8] And the citizens who will be hardest hit—commercial and sports fishermen, charter boat captains, marina owners and operators, cabin and lodge owners, and the like—are residents of the Caucus members' home districts.

SUMMARY OF ARGUMENT

This Court should exercise its exclusive jurisdiction over this dispute under Article III, Section 2, Clause 2 of the United States Constitution. The litigation easily satisfies all constitutional, statutory, and prudential considerations, including the fundamental requirement that the case be a dispute between sister States. This Court has repeatedly rejected the contention that Illinois is not congruent with the Sanitary District of the City of Chicago, and the presence of the Corps as an additional litigating party does not destroy this Court's exclusive jurisdiction.

Alternatively, the Court should exercise jurisdiction over this dispute as a continuation of Original Actions Nos. 1, 2, and 3. The 1967 consent decree that still governs the three cases specifically contemplates modifications or supplemental decrees in relation to the controversy's subject matter, and the Asian carp invasion is related to the subject matter of the consolidated cases.

Finally, the Court should grant Michigan's renewed motion for preliminary injunction. The po-

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[8] MI Great Lakes Plan at 8, *available at* http://www.michigan.gov/documents/deq/MI-GLPlan_262388_7.pdf.

tential harm to Michigan and its citizens is massive, far outstripping the modest impact to Illinois if the relief is granted. In addition, the Corp's belatedly produced "eDNA" evidence demonstrates both the need for immediate action and the unlikelihood that the Corps will take meaningful or prompt action to address the problem before it is too late.

ARGUMENT

I. The Court should exercise its original jurisdiction to hear this dispute.

A. Michigan's suit squarely meets the constitutional and statutory requirements for the Court's exercise of its original jurisdiction.

The U.S. Constitution provides that "[t]he judicial Power shall extend . . . to Controversies between two or more States" and that "[i]n all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2. Congress implemented this jurisdiction through 28 U.S.C. § 1251(a), which provides that "[t]he Supreme Court shall have original and *exclusive* jurisdiction of all controversies between two or more States" (emphasis added).

Here, Michigan seeks relief from a sister State, Illinois, that Illinois can provide: Illinois can, for example, direct its agency, the Metropolitan Water Reclamation District (the "District"), to close the sluice gates at the O'Brien Lock and Dam, at the Chicago River Controlling Works, and at the Wilmette Pumping Station. Ill. Prelim. Inj. Resp. at 6 (admitting that the "District . . . controls and operates the sluice gates, as well as pumps located at the

Controlling Works and the Pumping Station"). This relief would help to mitigate the risk Illinois created by building a canal system linking Illinois rivers to the Great Lakes and then failing to keep the Asian carp that have infiltrated those waterways from entering the shared waters of the Great Lakes.

Illinois protests that it "has no operational control over the locks or gates" because its agency, the District, controls them, Ill. Prelim. Inj. Resp. at 27, and suggests that Michigan should sue the District (and the Corps) instead. The United States makes the same argument. U.S. Opp'n to Prelim. Inj. at 32–34. But the fact that Illinois has created, by statute, an agency to control the sluice gates neither absolves Illinois of its public-trust responsibility for, nor forecloses Illinois from directing, its agent's actions. *Cf.* Ill. Comp. Stat. 2605/24 (2010) (the "general government [Illinois] shall have full control over [the canal] for navigation purposes"). And that fact certainly does not preclude another State from suing the State of Illinois for the actions of that agency. In fact, this Court has twice rejected that same argument with regard to this exact entity.

The Court first rejected Illinois's argument more than a century ago by holding that original jurisdiction was proper in an action against both Illinois and the Sanitary District of the City of Chicago—the very parties to this case. *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *see also* Ill. Prelim. Inj. Resp. at 18 (admitting the District was formerly known as the Sanitary District of Chicago). Illinois argued then—just as it does now—"that the Sanitary District was the proper defendant and that Illinois should not have been made a party." *Missouri*, 180 U.S. at 241. This Court was "unable to see the force of this

suggestion" and explained that "[t]he Sanitary District of Chicago is not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State." *Id.* at 242. The District is "an agency of the state" and its actions are "state action." *Id.* [9]

Three decades later, in *Wisconsin* v. *Illinois*, 289 U.S. 395 (1933), Illinois again argued that "the sanitary district is the 'active defendant'" and that Illinois should not be a defendant. *Id.* at 399–400. This Court concluded Illinois's argument was "untenable." *Id.* at 400. "Every act of the sanitary district in establishing and continuing the diversion has derived its authority and sanction from the action of the state, and is directly chargeable to the state." *Id.* at 400. The adjudication sought in the suit was "not merely as against the sanitary district but as against the state as the defendant responsible under the Federal Constitution to its sister states for the acts which its creature and agent, the sanitary district, has committed under the state's direction." *Id.*

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[9] The Corps attempts to avoid *Missouri* v. *Illinois* by arguing that the Court in *Missouri* "was not considering whether to grant leave to file the bill of complaint, having not yet adopted that practice in its present form." U.S. Opp'n at 34 n.8. But in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court addressed "a motion by Illinois to file a bill of complaint," *id.* at 93, and yet still endorsed its holding in *Missouri*. In other words, this Court did not find the Corps' distinction significant.

Because the Court has already resolved this key issue against Illinois twice previously, collateral estoppel prevents Illinois from litigating it again here, whether in opposition to Michigan's invocation of this Court's original jurisdiction or the Court's power to reopen the original actions under the 1967 consent decree. *See generally Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979) (collateral estoppel forecloses "the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party").

Likewise, the presence of a federal agency as party defendant in a matter of great and differing views among two or more sovereign states does not divest this Court of original jurisdiction. *Contra* U.S. Opp'n at 29–34. Whenever there is a controversy between two States, the presence of additional parties against whom relief is also sought (such as the Corps) does not destroy original jurisdiction. *See, e.g.*, *California* v. *Arizona*, 440 U.S. 59, 68 (1979) (granting leave to file complaint with "California as plaintiff, and Arizona and the United States as defendants"); *Vermont* v. *New York*, 406 U.S. 186, 186 (1972) (granting Vermont "leave to file a bill of complaint invoking our original jurisdiction against New York and against International Paper Co., a New York corporation").

B. The seriousness of the Asian carp threat and the lack of an alternate forum satisfy this Court's prudential limitations on original jurisdiction.

In addition to constitutional and statutory requirements, this Court considers two prudential factors when determining whether to exercise its original jurisdiction. First, the Court looks "to 'the

nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim.'" *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) (citations omitted). Second, it "explore[s] the availability of an alternative forum in which the issue tendered can be resolved." *Id.* Both of these factors counsel in favor of the Court's exercise of its jurisdiction here.

1. This case presents a claim of sufficient seriousness and dignity to warrant the Court's exercise of its original jurisdiction. In fact, the United States "agree[s] that that factor is met here, because the protection of the Great Lakes from invasive aquatic species is an issue of great importance." U.S. Opp'n to Prelim. Inj. at 31 n.6. Further, this Court has explained that 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," *Mississippi* v. *Louisiana*, 506 U.S. at 77, or, in other words, to "controversies between States that, if arising among independent nations, 'would be settled by treaty or by force,'" *South Carolina* v. *North Carolina*, 128 S. Ct. 1117, 2010 WL 173370, at *7 (2010) (quoting *Kansas* v. *Colorado*, 206 U.S. 46, 98 (1907)).

This is just such a case, as evidenced by the fact that international treaties specifically address the issue of invasive species. For example, the United Nations Convention on the Law of the Sea states that "States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from . . . the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which

may cause significant and harmful changes thereto." United Nations Convention on the Law of the Sea, art. 196(1), Dec. 10, 1982, 1833 U.N.T.S. 397. Similarly, and as noted in the *amicus curiae* brief of Ontario, the Convention on Great Lakes Fisheries between the United States and Canada was implemented because of the nations' shared concerns over the invasion of sea lamprey. Br. of Her Majesty the Queen in Right of Ontario Supporting a Prelim. Inj. at 5; *see also* Brian T. Schurter, *Great Lakes Water Quality from a Fisheries Perspective*, 26 U. Tol. L. Rev. 467, 483–84 (1994–95).

The federal and state agencies that have investigated the threat of Asian carp all agree that the fish present a serious threat to the Great Lakes. The Corps of Engineers commander in charge of the Great Lakes and Ohio River Division, for example, has stated that "the threat of this species gaining access to Lake Michigan and the Great Lakes has become generally recognized in the environmental community and throughout numerous federal, state and local agencies as having great significance with potentially devastating ecological consequences for the Great Lakes." U.S. App. 7a; *see also id.* at 35a ("[T]he Corps believes that preventing Asian carp migration and establishment in the Great Lakes is a national imperative."). The Deputy Regional Director of the Midwest Region of the U.S. Fish and Wildlife Service further notes that the Asian carp also threaten to spread beyond the Great Lakes into the streams of the adjacent States: "Asian carp species that become adapted to life in the Great Lakes would also likely invade the Lakes' tributary streams and rivers where they would most likely spawn." *Id.* at 146a–47a. And even the Illinois Department of Natural Resources, another arm of

the State of Illinois, has acknowledged that "Asian carp could have a devastating effect on the Great Lakes ecosystem and a significant economic impact on the $7 billion fishery." Mich. App. 45a.

The invasive nature of this threat is analogous to another category of cases where this Court has repeatedly exercised its original jurisdiction. "[T]his Court has often adjudicated controversies between States and between a State and citizens of another State seeking to abate a nuisance that exists in one State yet produces noxious consequences in another." *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493, 496 (1971) (citing *Missouri* v. *Illinois*, 180 U.S. 208 (1901) (addressing discharge of sewers into the Mississippi River); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907) (enjoining corporations in Tennessee from discharging noxious gases over large tracts of Georgia); *New York* v. *New Jersey*, 256 U.S. 296 (1921) (considering whether sewage discharged into a bay of New York harbor was a public nuisance); *New Jersey* v. *City of New York*, 283 U.S. 473 (1931) (considering whether dumping garbage into the Atlantic Ocean was a nuisance)). While the Court ultimately denied the motion for leave to file a bill of complaint in *Wyandotte*—in large part because the suit was between a State and the citizens of another State—it first observed that the above precedent "leads almost ineluctably to the conclusion that we are empowered to resolve this dispute in the first instance." *Wyandotte*, 401 U.S. at 496. Here, as in the disputes between New York and New Jersey, the controversy is between coequal States, and thus that conclusion applies with full force.

In sum, Michigan presents a grave claim concerning Illinois's part in allowing Asian carp to

threaten Michigan's ecology and economy, and this claim warrants the Court's review. *See Tennessee Copper*, 206 U.S. at 238 (Holmes, J.) ("It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted . . . , that the forests on its mountains . . . should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source."); *Maryland* v. *Louisiana*, 451 U.S. 725, 737 (1981) ("A State . . . may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." (citations omitted)).

2. Exercising the Court's original jurisdiction is further appropriate because no alternative forum exists. The United States contests this point by arguing that "[t]his dispute is properly one between Michigan and the entities that can grant the relief Michigan seeks, which are the Corps and the Water District," U.S. Opp'n to Prelim. Inj. at 29–30, thus suggesting that the most appropriate forum is federal district court. Illinois presses the same argument. *See* Ill. Prelim. Inj. Resp. at 31–35; *id.* 27, 36 (Illinois claims it has "no operational control" over the District, and that "the District operates independently of the State").

But this Court previously rejected the same contention about that same entity, as noted above. *See, e.g.*, *Wisconsin* v. *Illinois*, 289 U.S. at 400 (The suit is "not merely as against the sanitary district but as against the state as the defendant responsible under the Federal Constitution to its sister states for the acts which its creature and agent, the sanitary district, has committed under the state's direction.").

In short, Michigan is entitled to sue Illinois for the acts, and failures to act, of the agency that Illinois created and oversees. Illinois can grant the specific relief that Michigan has requested. This Court should therefore reject, yet again, Illinois's contention to the contrary, on collateral estoppel grounds or otherwise.

The United States also contends that "[a] federal district court is the proper forum to consider Michigan's claims for relief." U.S. Opp'n to Prelim. Inj. at 23. But, to quote this Court, the federal government's "argument for jurisdiction in the District Court here founders on the uncompromising language of 28 U. S. C. § 1251(a), which gives to this Court 'original and *exclusive* jurisdiction of all controversies between two or more States' (emphasis added)." *Mississippi* v. *Louisiana*, 506 U.S. at 77. "Though phrased in terms of a grant of jurisdiction to this Court, the description of [this Court's] jurisdiction as 'exclusive' necessarily denies jurisdiction of such cases to any other federal court." *Id.* at 77–78. Because Michigan has properly sued its sister State to take action to control one of its subordinate agencies (the District), this suit could not be brought in a district court.

The United States also argues that a State is not the master of its complaint, but the case she cites, U.S. Opp'n to Prelim. Inj. at 34 (citing *Kentucky* v. *Indiana*, 281 U.S. 163, 173–75 (1930)), did not dismiss a State properly named as a defendant; instead, it dismissed individual defendants because the State defendant, in its capacity as a State, already represented the individual citizens. *See Kentucky*, 281 U.S. at 173 ("Citizens, voters, and taxpayers, merely as such, of either state, without a

showing of any further and proper interest, have no separate individual right to contest in such a suit the position taken by the state itself."). And indeed, in *Illinois* v. *City of Milwaukee*, this Court stated that "under appropriate pleadings" naming a state defendant, "the actions of public entities might . . . be attributed to a State so as to warrant a joinder of the State as party defendant." 406 U.S. 91, 94 (1972). This reference to "appropriate pleadings" shows that the plaintiff State may decide whom to sue through its allegations in the pleadings.

On occasion, this Court has declined to exercise its original jurisdiction because the issue in dispute was currently being litigated by other parties in another action. *See, e.g.*, *Arizona* v. *New Mexico*, 425 U.S. 794, 797 (1976) ("In the circumstances of this case, we are persuaded that the pending state–court action provides an appropriate forum in which the Issues tendered here [a Commerce Clause challenge to an electricity tax] may be litigated."). But when, as here, there is no pending litigation that this Court could be assured would resolve the issue, the exercise of this Court's jurisdictions is appropriate and, indeed, necessary. *See, e.g.*, *Wyoming* v. *Oklahoma*, 502 U.S. 437, 447 (1992) (noting that "no pending action exists to which we could defer adjudication on this issue" and holding that it was "proper to entertain this case without assurances, notably absent here, that a State's interests under the Constitution will find a forum for appropriate hearing and full relief").

Lastly, neither the United States nor Illinois argues that an Illinois state court would be a suitable alternative forum, although that is technically possible. The likely reason they do not urge this

argument is that "no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own." *Wyandotte*, 401 U.S. at 500. This is the very reason that the Constitution creates original jurisdiction over controversies between States.

II. Alternatively, the Court should re-open Original Action Nos. 1, 2, and 3 because the 1967 consent decree is expansive and encompasses the present danger to the Great Lakes ecosystem.

Even apart from the appropriateness of exercising original jurisdiction over this dispute as a new case, the re-opener provision in the Court's existing decree is intentionally broad, and it encompasses the threatened Asian-carp invasion attendant to Illinois's diversion of water from the Great Lakes.

The consent decree provides that "this Court retains jurisdiction of the suits in Nos. 1, 2, and 3, Original Docket" and that "[a]ny of the parties" to those suits "may apply . . . for any other or further action or relief" that this Court "may deem at any time to be proper *in relation to* the subject matter in controversy." *Wisconsin* v. *Illinois*, 388 U.S. 426, 430 (1967) (emphasis added).

As this Court has repeatedly recognized, "the phrase 'in relation to' is expansive." *Travelers Indem. Co.* v. *Bailey*, 129 S. Ct. 2195, 2203 (2009) (interpreting an injunction and quoting *Smith* v. *United States*, 508 U.S. 223, 237 (1993)); *see also Dist. of Columbia* v. *Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992) (the phrase "relate to" is "deliberately expansive") (quotation marks

omitted); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) ("For purposes of the present case, the key phrase, obviously, is 'relating to.' The ordinary meaning of these words is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)."); *Fort Halifax Packing Co., Inc.* v. *Coyne*, 482 U.S. 1, 8 (1987) ("We have held that the words 'relate to' should be construed expansively.").

The subject matter in controversy in Original Actions Nos. 1, 2, and 3 was the construction of the Chicago Sanitary and Ship Canal and how the Canal's diversion of waters from Lake Michigan affected public rights in the Great Lakes. The current dispute likewise involves the Canal, this time focused on the threat of an Asian carp invasion through the very sluice gates that Illinois uses to divert water from Lake Michigan. It is not at all difficult to say that the present action has "some relation" or "connection" to the original actions. Accordingly, it would be equally appropriate for the Court to exercise its jurisdiction over this controversy through the vehicle of Original Actions Nos. 1, 2 , and 3.

III. The Court should grant Michigan's renewed motion for a preliminary injunction.

In evaluating Michigan's request for a preliminary injunction, it is important to remember that the relief need not be permanent. Illinois and the Corps argue that a technical solution may ultimately be developed that will allow for the reopening of the locks. All that Michigan seeks at this juncture is a temporary preservation of the status quo. If new

solutions are proposed and prove to be effective, they can be safely implemented and the cost of preserving the status quo in the interim will be minimal. But if Illinois and the Corps are wrong, the devastation of not preserving the status quo would be cataclysmic. In light of this reality, and with the additional evidence provided with Michigan's Renewed Motion for Preliminary Injunction, Michigan satisfies the four familiar factors that must be weighed when considering injunctive relief. *See generally Winter* v. *NRDC, Inc.*, 129 S. Ct. 365, 374 (2008) (reciting factors).

1. First, Michigan is likely to succeed on the merits of its public-trust claim. Illinois, which operates the O'Brien and Chicago Locks and accompanying sluice gates, has a non-delegable public-trust responsibility with respect to the waters of the Great Lakes. *Illinois Cent. R. Co.* v. *Illinois*, 146 U.S. 387, 453 (1892). "It is a title held in trust for the [public], that they may enjoy the navigations of the waters . . . and have liberty of fishing therein[.]" *Id.* at 452. The exercise of that trust responsibility "requires the government of the state to preserve such waters for the use of the public" and prohibits an abdication of state control for purposes of the trust. *Id.* at 453. And, as the Illinois Supreme Court has observed, this public-trust obligation extends to "conserving natural resources and in protecting and improving [the] physical environment," with a special sensitivity to "the irreplaceability of natural resources." *People ex rel. Scott* v. *Chicago Park Dist.*, 360 N.E.2d 773, 780 (Ill. 1977).

Michigan has already satisfied its burden of demonstrating that Illinois's failure to close the locks and prevent the Asian carp invasion is violative of

Illinois's public-trust responsibilities. The Corps acknowledges that "Asian carp have the potential to damage the Great Lakes and confluent large riverine ecosystems by disrupting the complex food web of the system and causing damage to the sport fishing industry." Mich. App. 51a. That is why the "prevention of an inter-basin transfer of bighead and silver carp from the Illinois River to Lake Michigan is paramount in avoiding ecological and economic disaster." *Id.* Likewise, the Illinois Department of Natural Resources concedes that "Asian carp could have a devastating effect on the Great Lakes ecosystem and a significant economic impact on the $7 billion fishery." Mich. App. 45a. In light of these impacts, it is a woefully inadequate defense for defendants to argue that they are still "researching," considering "planning," and conducting "demonstration projects" that may or may not prevent the inter-basin transfer of Asian carp.

2. Second, Michigan and the public are likely to suffer irreparable harm in the absence of preliminary relief. This reality is made clear by the eDNA evidence that the Corps belatedly disclosed to the Court *after* the Court had already denied Michigan's initial request for injunctive relief. The evidence shows the presence of silver carp at two locations lakeward of the O'Brien Lock, i.e., literally in Lake Michigan itself. Mich. Supp. App. 2a. The Corps' eDNA expert warns that a positive eDNA detection shows the recent presence of at least one live fish, U.S. App. 129a, but does not demonstrate that sufficient fish have migrated into Lake Michigan to create a sustainable population. But once a breeding population of Asian carp is established in the Great Lakes, all parties agree that the damage is undeniable and irreparable. The passive proposals from

Illinois and the Corps—such as closing the locks for a few days each week or pursuing further research—is akin to Nero's "fiddling" while Rome burned. And the impact of this irreparable injury will fall most heavily on the citizens that the Shoreline Caucus represents.

3. Third, the balance of equities weighs heavily in Michigan's favor. The Asian-carp invasion will damage Michigan's economy in the billions of dollars, and it will permanently and irreparably alter aquatic recreation in Michigan's lakes and rivers. Conversely, expert assessment pegs the cost of lock closure at only $70 million (the expense of transporting freight over land around the locks), less than 0.02% of Chicago's economy, with the benefit of a net increase in local jobs. Mich. Supp. App. 25a, 43a–44a, 51a–52a.

4. Fourth, the public interest weighs heavily in favor of a temporary lock closure. In most litigation, the public interest is given lip service based on likelihood of success on the merits or the relative harm that will inure to each party if relief is granted or denied. Here, however, the public interest is of critical importance. The Great Lakes represent one-fifth of the world's fresh surface water and provide unparalleled recreational and economic opportunities to the tens of millions of people that reside in neighboring states and provinces. As detailed at length above, Illinois's lack of action places the entire ecosystem at risk, along with the concomitant economic and recreational activity.

The public also has an interest in using public waterways for commerce, but that interest is not infringed by a temporary closure of the locks and sluices, which can be alleviated by land

transportation around the locks. Equally important, if the Corps and Illinois are able to establish a method for keeping the locks open and can prove the method will effectively keep Asian carp out of the Great Lakes, the injunction can and should be lifted. Michigan has not requested permanent relief, but merely the minimum steps necessary to maintain the status quo—an uninfested Lake Michigan—while further research and political negotiations continue. The public would be well served by such a respite.

The circumstances here call to mind the Hippocratic oath, which applies with equal force to cases involving the public trust: "first, do no harm." The Corps and Illinois strategy of "experimenting" and launching "trial demonstrations" is no different than a physician refusing to treat a patient with a therapy that is already known to work, because the physician would like to try an unknown and untested solution. Here, the risk to the patient—the Great Lakes ecosystem—is far too great for such experimentation. The Court should intervene immediately and grant the requested injunction.

CONCLUSION

The Court should exercise its jurisdiction over this dispute, either under Article III, Section 2, Clause 2 of the United States Constitution or Section 7 of the 1967 consent decree, and grant Michigan's Renewed Motion for Preliminary Injunction.

Respectfully submitted.

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February 19, 2010