Nos. 2201ORG, 2202ORG, 2203ORG

IN THE

Supreme Court of the United States

STATES OF WISCONSIN, MINNESOTA, OHIO, and PENNSYLVANIA,

-and-

STATE OF MICHIGAN,

-and-

STATE OF NEW YORK,

Plaintiffs,

v.

STATE OF ILLINOIS, THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, and UNITED STATES OF AMERICA,

Defendants.

ON MOTION FOR LEAVE TO REOPEN ORIGINAL ACTIONS OR, IN THE ALTERNATIVE, OPEN A NEW ORIGINAL ACTION

BRIEF OF PLAINTIFFS STATES OF NEW YORK, MINNESOTA, AND WISCONSIN IN SUPPORT OF MOTION TO REOPEN AND RENEWED MOTION FOR A PRELIMINARY INJUNCTION

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The States of New York, Minnesota, and Wisconsin support (1) the motion of the State of Michigan to reopen original actions Nos. 1, 2, and 3, or, in the alternative, open a new original action; and (2) Michigan's renewed motion for a preliminary injunction. Minnesota and Wisconsin were plaintiffs in original action No. 1, and New York was the plaintiff in original action No. 3.

Under 28 U.S.C. § 1251(a), the Court has "original and exclusive jurisdiction of all controversies between two or more States." Such a controversy exists here. Michigan, Minnesota, Wisconsin, and New York, along with Ohio and Pennsylvania, seek to prevent Asian carp from invading the Great Lakes via the Chicago Sanitary and Ship Canal, which was constructed by the State of Illinois and breached the natural barrier between the Mississippi River watershed and the Great Lakes. The Court has taken original jurisdiction over two earlier controversies involving the same canal, and the threat here is of such serious magnitude that the Court's invocation of its original jurisdiction would again be appropriate. The Court should also grant Michigan's renewed motion for a preliminary injunction, based on new evidence showing that it is likely that Asian carp have already entered Lake Michigan.

STATEMENT

A continental divide separates the Great Lakes, which flow east into the Gulf of Saint Lawrence, from the Mississippi River watershed, which flows south into the Gulf of Mexico. *Wisconsin v. Illinois*, 278 U.S. 367, 402 (1929); *Sanitary Dist. of Chicago v. Rhodes*, 386 Ill. 269, 270-71, 53 N.E.2d 869, 870 (1944). In 1848, the Illinois and Michigan Canal breached that natural divide by connecting the Chicago River, which flowed into Lake Michigan, to the Illinois River, a tributary of the Mississippi. *Wisconsin*, 278 U.S. at 401-03; *Sanitary Dist.*, 386 Ill. at 271, 53 N.E.2d at 870.

In 1900, pursuant to an act of the Illinois legislature, the Illinois and Michigan Canal was replaced by the Chicago Sanitary and Ship Canal ("the Chicago Canal"), which runs between the Chicago River and the Des Plaines River, a tributary of the Illinois. *See Wisconsin*, 278 U.S. at 403; *Sanitary Dist.*, 386 Ill. at 272-73, 53 N.E.2d at 870-71. The Chicago Canal had two immediate impacts on other States. First, it reversed the flow of the Chicago River so that the river, and sewage discharged into it by the City of Chicago, flowed into the Mississippi watershed instead of Lake Michigan. *See Wisconsin*, 278 U.S. at 403; *Sanitary Dist.*, 386 Ill. at 272, 53 N.E.2d at 870. Second, an enormous volume of water was pumped from Lake Michigan into the canal, lowering the level of Lake Michigan and the three Great Lakes east of it—Huron, Erie, and Ontario—by as much as six inches. *Wisconsin*, 278 U.S. at 399-400, 404, 407.

In the original cases that Michigan seeks to reopen, six States bordering the Great Lakes sued Illinois for

withdrawing water from Lake Michigan. *Id.* at 399. The Court took jurisdiction and entered a decree limiting the volume of water Illinois could withdraw from Lake Michigan. *Wisconsin v. Illinois*, 281 U.S. 696 (1930). The Court modified that decree twice and then entered a superseding decree, which the Court has modified once. *Wisconsin v. Illinois*, 289 U.S. 395 (1933) (modified); *Wisconsin v. Illinois*, 352 U.S. 945 (1956) (modified); *Wisconsin v. Illinois*, 388 U.S. 426 (1967) (superseding); *Wisconsin v. Illinois*, 449 U.S. 48 (1980) (modified).

In a separate original case, Missouri sued Illinois and the Sanitary District of Chicago—the agency created by the Illinois legislature to build and oversee the Chicago Canal—to prevent the discharge of sewage from the canal into the Mississippi River to the detriment of Missouri and its citizens. *Missouri v. Illinois*, 180 U.S. 208, 248 (1901). The Court held that Missouri had the authority to bring such an action on behalf of its citizens and that Illinois was a proper party because the Sanitary District was an agency of Illinois and had acted within the authority granted to it by Illinois. *Id.* at 241-42. But the Court subsequently dismissed the case on the ground that Missouri had failed to prove that the span of the Mississippi River flowing through Missouri had been degraded by sewage from the canal. *Missouri v. Illinois*, 200 U.S. 496, 522-26 (1906).

REASONS TO GRANT THE MOTION TO REOPEN OR TO OPEN A NEW ORIGINAL CASE

The connection that the Chicago Canal provides between the Mississippi watershed and the Great Lakes poses a third major threat to other States. If Asian carp, which now dominate the fisheries in the Mississippi and Illinois Rivers, reach Lake Michigan via the Chicago Canal, the harm to the Great Lakes ecosystem, including its bays, estuaries, inlets, and tributaries, would be grave and likely irreversible. App. in Support of Mot. to Reopen & for a Supp. Decree ("Mich. App.") 12a, 14a, 24a, 44a-45a, 49a. An invasion of Asian carp would have disastrous effects, including a significant decline in fish, invertebrates, and other wildlife native to the Great Lakes. Mich. App. 13a-14a, 19a-23a, 57a-59a.

This Court should grant Michigan's motion to take original jurisdiction over this dispute between States, either by reopening the original cases challenging the diversion of water from Lake Michigan into the Chicago Canal or by opening a new original case. This latest controversy over the canal is just as worthy of this Court's attention as were the two earlier controversies that this Court addressed. The Court has original and exclusive jurisdiction, and the controversy involves a threat of such serious magnitude that the Court's assumption of jurisdiction would be appropriate.

This is a controversy between two or more States over which the Court has exclusive jurisdiction under 28 U.S.C. § 1251(a). The economies of New York, Minnesota, and Wisconsin and their citizens' way of life depend on maintaining the existing Great Lakes

fisheries and preserving a healthy Great Lakes ecosystem. The States' proprietary interests, as well as their quasi-sovereign interests in the well-being of their populace, would be harmed by the migration of Asian carp into the Great Lakes. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 591 (1923) (a State may bring an original case both to protect its proprietary interests and as the representative of the public); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez* 458 U.S. 592, 602 (1982) (distinguishing the States' sovereign, proprietary, and quasi-sovereign interests).

Furthermore, this controversy is between the plaintiff States and the State of Illinois. The Court held in *Missouri* that the Chicago Canal is a "state action" undertaken by Illinois. 180 U.S. at 242. In addition, the federal government's recently announced draft *Asian Carp: Control Strategy Framework* ("*Asian Carp Framework*") recognizes Illinois's primary role in the controversy by proposing that the Illinois Department of Natural Resources serve as the "[l]ead agency for work relating to monitoring, sampling, fish removal actions, and rapid response activities within the State." *Asian Carp Framework* 9 (2010).[1] Nor does the presence of the United States and the Sanitary District in these cases affect the Court's exclusive jurisdiction. *See California v. Arizona*, 440 U.S. 59, 68 (1979); *Wisconsin*, 278 U.S. 367.

This case also satisfies the prudential requirements for this Court to exercise jurisdiction. Although the

1. Available at http://www.asiancarp.org/RegionalCoordination/documents/AsianCarpControlStrategyFramework.pdf.

Court exercises its exclusive jurisdiction "sparingly and retain[s] substantial discretion to decide whether a particular claim requires an original forum in this Court," *South Carolina v. North Carolina*, slip op. at 9, 2010 WL 173370, at *7 (U.S. Jan. 20, 2010) (quotation marks omitted) (quoting *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992)), it does so when "the threatened invasion of rights" by one State's conduct is "of serious magnitude" and "established by clear and convincing evidence," *New York v. New Jersey*, 256 U.S. 296, 309 (1921). This is such a case, and the Court's exercise of its jurisdiction is appropriate to address the threatened harm. *See Missouri*, 180 U.S. at 242-45.

First, even the United States agrees that the threat that Asian carp will migrate into the Great Lakes and harm native fish and other wildlife is of serious magnitude. *See* Mem. for the United States in Opp'n 31 n.6 (dated Jan. 2010). Indeed, nations have used military force to protect their fisheries, *see*, *e.g.*, http://www.nationalarchives.gov.uk/cabinetpapers/themes/cod-wars.htm (discussing the 1958-1975 "Cod Wars" between Great Britain and Iceland), making this dispute "of such seriousness that it would amount to *casus belli* if the States were fully sovereign," *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983).

Second, unlike in other cases where this Court has declined to exercise its exclusive jurisdiction, there is no other pending action that "provides an appropriate forum in which the issues tendered here may be litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (emphasis omitted); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992); *Maryland v.*

Louisiana, 451 U.S. 725, 742-43 (1981). Although the United States speculates that the States might be able to obtain relief in a district court action against the Army Corps of Engineers, *see* Mem. for the United States in Opp'n 35, there is no such pending action involving the issues tendered here.

Finally, every State or Province that borders the Great Lakes—except for Illinois, which is a defendant here—is asking this Court to intercede in the Asian carp dispute. In addition to New York, Minnesota, and Wisconsin, which are jointly filing this brief, the other plaintiffs in the original cases—Ohio and Pennsylvania—have filed briefs in support of Michigan's motion. *See* Mem. of the State of Ohio (dated Dec. 23, 2009); Brief of the Commonwealth of Pennsylvania in Support of the State of Michigan's Mot. to Reopen (dated Jan. 12, 2010). Ontario has filed an amicus brief supporting the relief Michigan seeks. *See* Brief of *Amicus Curiae* Her Majesty the Queen in Right of Ontario in Support of the State of Michigan's Mot. for a Prelim. Inj. (dated Dec. 31, 2009). And Indiana has indicated that it intends to file an amicus brief in support of Michigan's motion as well. *See* Press Release, Attorney General Zoeller to Support Michigan in Asian Carp Lawsuit (Dec. 30, 2009).[2]

For these reasons, New York, Minnesota, and Wisconsin support Michigan's motion to reopen original actions Nos. 1, 2, and 3, or, in the alternative, open a new original action.

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2. Available at http://www.in.gov/portal/news_events/49658.htm.

REASONS TO GRANT THE RENEWED MOTION FOR A PRELIMINARY INJUNCTION

When Michigan submitted its initial motion for a preliminary injunction in December 2009, tests of water samples from the Chicago Canal had revealed "environmental DNA" ("eDNA") with Asian carp genetic markers. *Oversight Hearing on "Asian Carp and the Great Lakes" Before the Subcomm. on Water Resources & Environment of the H. Comm. on Transportation & Infrastructure*, 111th Cong. 5, fig. 2 (2010) (testimony of David M. Lodge) ("Lodge Testimony").[3] After the Court denied Michigan's motion, the complainant States learned that additional tests had revealed carp eDNA in water samples taken from the Calumet River, which runs from the canal to Lake Michigan, and from Lake Michigan itself. *See id.* "[B]y far the most plausible interpretation for the presence of eDNA is that at least one live individual [Asian carp] is present or has been present" in the past two days. App. to Mem. for the United States in Opp'n 127a.

While one fish is not sufficient for Asian carp to invade the Great Lakes and establish a self-sustaining population, the fact that at least one fish likely has entered Lake Michigan makes it urgent that specific measures be taken *now* to prevent additional fish from entering the lake. Lodge Testimony, at 7. The federal government's *Asian Carp Framework* proposes continued assessment of the situation and does not commit to taking any specific measures today. *See Asian*

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3. Available at http://transportation.house.gov/Media/file/water/20100209/Lodge%20Testimony.pdf.

Carp Framework, at 12-22. For example, the framework proposes "assess[ing] the potential use of 'modified structural operations'" to prevent carp from entering Lake Michigan. *Id.* at 15. But "while we talk, the Asian carps swim," and "each time more fish enter the lake, we roll the dice to determine whether an invasion will result." Lodge Testimony, at 7, 11.

For these reasons, New York, Minnesota, and Wisconsin support Michigan's renewed motion for a preliminary injunction requiring that all available measures be taken to prevent Asian carp from migrating into Lake Michigan.

Respectfully submitted,

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