In The
Supreme Court of the United States
October Term, 1966

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA, *Complainants*, *v.* STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Defendants*, UNITED STATES OF AMERICA, *Intervenor*.	No. 1 Original
STATE OF MICHIGAN, *Complainant*, *v.* STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Defendants*, UNITED STATES OF AMERICA, *Intervenor*.	No. 2 Original
STATE OF NEW YORK, *Complainant*, *v.* STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Defendants*, UNITED STATES OF AMERICA, *Intervenor*.	No. 3 Original

RESPONSE OF STATE OF ILLINOIS TO MOTION FOR PRELIMINARY INJUNCTION

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Introduction

The motion for preliminary injunction should be denied. As an initial matter, this case does not fall within the scope of the decades' old Consent Decree on which Michigan and the joining States (hereinafter "Michigan") chiefly rely as a source for this Court's jurisdiction. The Decree reconciles States' competing claims to water from Lake Michigan, and it would stretch the Decree's scope well past the breaking point to argue that it resolves any dispute related in any way to Illinois canals, particularly where, as here, Michigan disclaims any interest in reducing the amount of Lake Michigan water that Illinois may divert. But without the Decree, Michigan has little on which to proceed, especially against the State of Illinois, which operates neither the locks nor the sluice gates that Michigan wants closed or regulated. In fact, Michigan does not—and cannot—specify a single action within Illinois' legal authority that it has not undertaken already to ensure that the Asian carp do not reach the Great Lakes.

Illinois is intensely concerned about, and invested in, the ecology and health of the Great Lakes. Its own environmental and commercial stake in the Lakes' well-being is unsurpassed, and Illinois is as much a victim of the release of Asian carp into the Mississippi years ago by fish farmers in the South as any of the complainants. Indeed, the State is doing everything within its legal authority over a federal, navigable waterway to combat the carps' progress. The Illinois Department of Natural Resources ("IDNR") spent millions of dollars in 2009 alone in a massive effort to kill all aquatic life over a six-mile stretch of water—hand in

hand with officials from Michigan and other Great Lakes States, who participated in the effort—notwithstanding this measure's devastating effect on water life. And this is only a small fraction of the work the State has done, within its limited authority in this area, to stop the progress of Asian carp. Alongside officials from each of the Great Lakes States and Canada, Illinois has been an active participant for years in efforts to keep the carp and other invasive species from entering the Lakes, contributed $1.8 million toward the construction by the Army Corps of Engineers ("Corps") of an electric barrier to prevent Asian carp from passing into Lake Michigan, and sponsored commercial and "electrofishing" efforts to detect the presence of Asian carp. Having participated in these efforts, Michigan makes no specific demand of Illinois, and accordingly this case does not fall within this Court's exclusive, original jurisdiction. At best, it is a thinly veiled end-run around the Administrative Procedure Act, under which Michigan would need to sue the Corps in federal district court to close the locks.

But Michigan has another problem, beyond the fact that it has sued in the wrong court and demands nothing specific from Illinois. The harm that it identifies is speculative. Illinois has deployed a battery of tests to detect the presence of Asian carp above the protective barrier that the Corps built to keep the fish from Lake Michigan, without finding a single fish. The "fish kill" that devastated all aquatic life over a six-mile stretch revealed one Asian carp, and even that was *south* of the barrier. In the end, plaintiffs rely on "eDNA" evidence suggesting that some fish matter north of the barrier tested positive for the presence of Asian carp DNA.

But putting aside the fact that eDNA testing is a nascent, unpublished practice, every effort to find even a single actual Asian carp above the barrier has come up empty. And against this speculation, Michigan understates the massive health, safety, and economic effects of even a temporary shut-down of the lock system.

Finally, there is yet another, independently fatal defect in Michigan's extraordinary request for preliminary injunctive relief from this Court: it cannot show any likelihood of success on the underlying merits of its claim. Without the argument that the 1967 decree somehow resolves this dispute, Michigan must contend that Illinois has violated the common law of nuisance. But this is absurd on its face. That Asian carp would be introduced into Mississippi by third parties and make their way toward the Great Lakes was wholly unforeseeable at the time the Chicago waterway system was constructed, and Illinois lacks control over the locks and sluice gates on which Michigan premises its claim for relief. And where Illinois does have control, it has worked cooperatively with other States in ensuring that the carp do not enter the Great Lakes, and has used what legal authority it has, and substantial resources, to fulfill this mission.

For each of these several, independent reasons, Michigan's motion for preliminary injunction should be denied.

Statement of Facts

Introduction of Asian Carp to American Waterways

In the 1970s, fish farmers in Arkansas and other southern States first brought silver and bighead varieties of Asian carp, which are native to eastern Siberia and China, to the United States to keep the farmers' aquaculture and waste retention ponds clean. After flooding in the 1990s allowed the fish to escape into the Mississippi River, the fish migrated into the Missouri and Illinois Rivers. Ill. App. 4a; Pl. App. 18a, 44a, 49a. To date, no silver or bighead carp have been found beyond the electric dispersal barriers built and operated by the Corps to prevent Asian carp from migrating from the Mississippi River watershed into the Great Lakes. Ill. App. 77a.

The Chicago Area Waterway System

Lake Michigan is the sole source of Chicago's municipal drinking water supply. Ill. App. 17a. In the late nineteenth century, a plan was developed to reverse the flow of the Chicago River, which became polluted, so that, instead of flowing into Lake Michigan, it flowed towards the Mississippi River and ultimately emptied into the Gulf of Mexico. Libby Hill, The Chicago River: A Natural & Unnatural History 119, 122 (Lake Claremont Press 2000). Reversing the river in this manner would dilute and flush away pollution in the river, *id.* at 115, and the waterway created by the project would be deep enough to permit commercial navigation, *id.* at 119-120.

To these ends, the Chicago Sanitary and Ship Canal ("Canal"), the North

Shore Channel, and the Calumet-Sag Channel (collectively, the "waterway") were built to link the Mississippi River with the Chicago, Calumet, Grand Calumet and Little Calumet Rivers, respectively, thereby reversing the flow of those rivers away from the lake. Ill. App. 1a, 31a, 50a-51a, 91a; Hill, *supra*, at xiii-xv. In addition, Lake Michigan water was diverted into the waterway to decrease pollution and improve sanitation. Hill, *supra*, at 118.

Three locks were built on the Canal to allow for navigation: the Lockport Powerhouse and Lock (located in downstate Illinois), the O'Brien Lock and Dam (located just south of Chicago), and the lock at the Chicago River Controlling Works ("Controlling Works") (located in Chicago). Ill. App. 1a, 31a. The Corps operates these locks, and Illinois has no authority or ability to direct the Corps to close them. Ill. App. 11a, 31a, 106a-107a; Mich. App. 77a, 91a-92a.

The Controlling Works, which lies at the mouth of the Chicago River and connects the river to Lake Michigan, Ill. App. 31a-32a, serves as the gateway to one of the nation's busiest commercial and recreational waterways. Every year more than 50,000 vessels and 900,000 passengers pass through this lock. Ill. App. 72a. Indeed, more than $16 billion worth of goods are transported annually in and out of Illinois via barge, Ill. App. 51a, and in 2008, over 19.3 million tons moved through the three locks combined, Ill. App. 31a-32a. Commodities that travel by barge through the waterway include petroleum products, agricultural products, coal, road salt, steel, cement, home heating oil, and aircraft-deicing fluid. Ill. App. 32a, 52a-55a, 57a-58a. At any given time, hundreds of towing vessels are operating or

fleeted lakeward of the O'Brien Lock, Ill. App. 36a, and it would take between 30 and 60 days to reposition the barges lakeward of the O'Brien and Chicago locks to avoid stranding those barges if the locks closed. Ill. App. 37a. Additionally, the waterway is the receiving stream from some of the biggest commercial dischargers in the nation, including the District, Midwest Generation's coal-fired power plants, and many chemical manufacturing plants. Ill. App. 14a. Over 70% of the annual flow in the waterway is discharge of treated municipal wastewater effluent. Ill. App. 94a.

In addition to the three locks, moreover, the Chicago waterway system also includes sluice gates, which are large plates that slide into grooves in the sides of a channel to control water level and flow rates, at the O'Brien Lock and Dam, the Controlling Works, and the Wilmette Pumping Station. Ill. App. 11a, 31a. The Metropolitan Water Reclamation District of Greater Chicago ("District") controls and operates the sluice gates, as well as pumps located at the Controlling Works and the Pumping Station. Ill. App. 12a, 106a-107a; Mich. App. 77a, 91a-92a.

The District uses the gates to regulate the diversion of Lake Michigan water into the Chicago waterway system, Ill. App. 12a, and to direct diversion from Lake Michigan to improve and maintain inland water quality, lockage, and navigation, Ill. App. 95a; Mich. App. 89a. The State of Illinois, through IDNR, establishes a maximum quantity of water that the District may divert from the lake annually pursuant to the Lake Michigan Water Allocation program, but so long as the District diverts the water for allocated purposes and does not exceed the allocated

amount in any year, IDNR has no authority over the District's operation of the sluice gates for diversion. Ill. App. 12a. And just as the Corps uses the locks to lower water levels during significant rainfalls to prevent flooding, Ill. App. 26a; Mich. App. 94a-95a, the District may use the sluice gates to allow water back into Lake Michigan to avoid flooding during heavy rains, as it has done on six occasions since August 2007, Mich. App. 107a. Again, Illinois has no authority to direct or control the District's operation of the gates for this purpose. Ill. App. 12a, 108a.

Efforts to Prevent the Migration of Asian Carp

Illinois, the Corps, and other stakeholders have gone to—and continue to go to—substantial efforts to prevent the Asian carp from entering the Great Lakes. The Corps built, operates, and controls an Electrical Disbursal Barrier System—located in the Canal approximately 37 miles south of the Calumet River entrance to Lake Michigan—that was designed to prevent invasive species, such as Asian carp, from entering the lake. Ill. App. 11a, 73a-76a. The Corps has completed construction on Barriers I and IIA, which operate continuously, and is in the process of constructing Barrier IIB. Ill. App. 74a-75; Mich. App. 30a. Together with other States, IDNR supplied a significant amount of the funding toward the construction of the barrier, Ill. App. 5a; Mich. App. 33a, but Illinois has no authority to direct the Corps' operation of that system, Ill. App. 5a, 11a; Mich. App. 30a-33a. In addition, the Corps is working to control flooding along the Des Plaines River, the Illinois and Michigan Canal, and the Calumet rivers. Mich. App. 69a.

The Corps also contracted with the University of Notre Dame to take environmental DNA ("eDNA") samples to determine whether Asian carp eDNA was present in the waterway south of the electric barrier. Ill. App. 6a. Samples taken in Spring 2009 were positive for the presence of Asian carp eDNA, and in response IDNR intensified monitoring, consulted with the Corps about increasing the voltage of the barrier, and coordinated with other agencies to address the Corps' need to shut down the barrier for maintenance. *Ibid.* In November 2009, the Corps and University of Notre Dame reported positive eDNA results for samples collected in September above the electric barrier, but below the O'Brien Lock and Dam. Ill. App. 7a.

Illinois responded by contracting with commercial fishermen experienced in fishing for Asian carp to use electrofishing and thousands of yards of fishing nets in the areas of the Channel where the earlier eDNA results were collected. Ill. App. 8a. From December 1 to 7, 2009, more than 1,000 fish were caught and identified, without finding a single Asian carp. Ill. App. 8a, 77a-78a; Mich. App. 65a-66a, 68a. Also in December, as part of a 350-person operation by the Asian Carp Rapid Response Workgroup ("Workgroup"), IDNR applied the fish poison Rotenone to a 5.7-mile stretch of the Canal south of the electric barrier.[1] Rotenone affects all

[1] IDNR is the lead responding agency member of the Workgroup, whose other members are the United States Coast Guard, the District, the Corps, the United States Environmental Protection Agency, and the United States Fish and Wildlife Service. Ill. App. 81a-83a. Additional operational support for the group is provided by the Great Lakes Fishery Commission, the City of Chicago, the International Joint Commission, Midwest Generation, and local law enforcement and emergency services. Ill. App. 83a-84a. And

fishes and invertebrates, not just the target carp. Ill. App. 6a-7a; Mich. App. 25a, 61a-63a. Michigan, Indiana, Wisconsin, and Canada provided personnel and equipment to aid the operation, and Minnesota, New York, Ohio, and Pennsylvania, made other contributions. Ill. App. 7a.

Before this operation, Illinois could not confirm the eDNA results using any established fishing techniques, and no Asian carp had been found in the Canal. *Ibid.* And even the Rotenone operation, though it killed tens of thousands of fish, revealed just one bighead carp, and that fish was found south of the electric barrier. *Ibid.*; Mich. App. 25a, 61a-63a.

Meanwhile, IDNR continues to work with other Workgroup members to evaluate and develop further measures to control Asian carp migration. Ill. App. 8a; Mich. App. 69a. Since the mid-1990s, IDNR has undertaken significant efforts to monitor for bighead and silver carp, and it continues to monitor and survey the waterway. Ill. App. 5a, 8a. Illinois also is a member of the Great Lakes Panel on Aquatic Nuisance Species, along with representatives from Michigan, Indiana, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, Ontario and Quebec. Ill. App. 4a. Many federal agencies, including the Corps, also participate on the

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supplemental in-kind support is provided by Michigan, Indiana, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, the Ontario Ministry of Natural Resources, and the province of Quebec, among others. Ill. App. 84a; Mich. App. 67a. The group's mission is to implement procedures and take action to protect the integrity of the Great Lakes ecosystem from Asian carp migration via the Canal. Ill. App. 80a.

Panel, *ibid.*, which provides guidance on nuisance species research, policies, and educational programs. Ill. App. 5a.

Public Health and Safety Effects of Closing Locks and Sluice Gates

Even a temporary closure of the locks will "devastate the local economy" and Illinois' role in the regional, national, and global economies, endanger public safety, and cause serious environmental harm. Ill. App. 50a. Turning first to health and safety issues, closure of the O'Brien and Controlling Works locks would obstruct the performance of critical duties by the Chicago Police and Fire Departments, and undercut Chicago's ability to respond to, mitigate, and recover from a large-scale incident (including a terrorism incident) along the Chicago area's inland waterway or within Chicago's central business district, which is occupied by more than one million people on an average work day. Ill. App. 23a-24a. The Chicago Police Department's Marine Operations Officers must use the locks to enforce state and municipal law effectively and assist the United States Coast Guard and the IDNR Conservation Police with protecting established safety zones for special events and high profile, threat-assessed targets. Ill. App. 20a-21a. Homeland security is also a key responsibility within the Marine Operations' jurisdiction, which extends three miles into Lake Michigan. Ill. App. 21a. Operations officers perform 700 to 800 homeland security checks each month along the lakefront, the Chicago and Calumet Rivers, and the Canal. *Ibid.*

Marine Operations Officers also respond to 300 distress calls per month on Lake Michigan during boating season, and 30 calls per month during the offseason.

Ibid. The response time in these cases would be considerably longer if the locks were closed, for police then would need to deploy their marine resources and personnel by land instead of through the lock. Ill. App. 20a. And if the locks were closed while ice was present, Marine Operations could not respond to a Lake Michigan emergency at all. *Ibid.*

In addition, the Chicago Fire Department's Air Sea Rescue Division docks its emergency response watercraft—which includes Engine 58, a 96-foot fireboat—in Lake Michigan, and these fire vessels could not access the inland waterways to respond to emergencies if the O'Brien and Chicago River Controlling Works locks were closed. Ill. App. 22a. The Air Sea Rescue Division passes through the locks approximately 250 times each year responding to and returning from emergencies in the inland waterways. *Ibid.* In 2009, it responded to 165 incidents along these waterways, ranging from water rescues to fires. *Ibid.* Engine 58 can deliver more than 14,000 gallons of river water per minute to fire engines battling fires near the inland waterway. *Ibid.* And if the main water line in Chicago's central business district fails, Engine 58 is the primary means of water supply to the area because it can pump water directly from the river. *Ibid.*

Permitting the locks to be opened only in case of emergency and then immediately re-closed is incompatible with rescue operations. Ill. App. 24a. The locks and sluice gates need to be operated to control the river level to enable Engine 58 to go under the Chicago River bridges that cannot be raised. *Ibid.* And raising

the movable bridges takes longer than using the locks and gates to lower the water level, so requiring the fireboat to wait for those bridges to be raised would impede its emergency response capability. *Ibid.*

Economic Effects of Closing Locks and Sluice Gates

The waterway is a vital and vibrant link to the Midwest's economy. Granting Michigan's request for interlocutory injunctive relief also would be "catastrophic for the tugboat, towboat, and barge industry in the Great Lakes-Midwest region and the customers who depend on it, and would have a disastrous impact on the economy, the environment, and public safety in the region." Ill. App. 30a-31a. The first to be affected would be the at least two dozen barge and towing operators, ranging from small, family-owned operations to large national companies, and some likely would not survive a closure lasting more than a couple of days, risking hundreds of jobs. Ill. App. 33a-37a.

Meanwhile, the closures would have a devastating effect on the many businesses that rely on commercial navigation for delivery of raw materials and as a market outlet for their goods. Ill. App. 38a-40a. There are no alternate water routes for shipping and delivering cargo, and road and rail transport cannot make up for the halt in commercial navigation caused by lock closures. Ill. App. 33a, 40a. Indeed, there are not enough trucks and train cars available to haul the freight that passes through the waterway. Ill. App. 40a-41a. One barge has a typical dry-cargo capacity of at least 16 rail cars and 70 semi trailer trucks, and a liquid-cargo capacity of 46 rail cars or 144 semi trailer trucks. Ill. App. 40a. To put this number

in perspective, a single barge can carry 60,000 bushels of wheat; enough to provide one loaf of bread to almost every resident in Chicago. Ill. App. 51a. It would take 500,000 truck loads to move the same amount of cargo hauled by the barges on the Chicago waterway system annually. Ill. App. 51a. And the cost of transporting cargo by truck is over three times the cost of transporting it by barge. Ill. App. 41a. This is not to mention that substituting rail and truck transportation for commercial navigation will lead to untenable congestion on the rails and roads and increased traffic fatalities. Ill. App. 45a, 58a. And, in any event, dozens of facilities, including power plants, petroleum plants, steel producers, and shippers of agricultural products receive cargo exclusively or primarily through commercial navigation and do not have the physical infrastructure necessary to receive or distribute large amounts of goods by rail or truck. Ill. App. 41a-43a.

Accordingly, if water freight traffic is interrupted, costs for businesses will rise, consumer costs will increase, and jobs will be lost. Ill. App. 52a. Energy prices for the region will be affected. Ill. App. 54a. And the lock closure will increase the cost of road salt, which many municipalities in northeastern Illinois obtain from terminals along the Canal after the salt has been delivered by barges crossing through the O'Brien lock. Ill. App. 57a-58a.

The grain industry will also suffer. The Chicago Board of Trade prices the world's grain, and it bases those prices on two facilities that are dependent on grain shipped through the O'Brien lock. Ill. App. 52a-53a. A restriction on barge traffic will "devastate" those facilities and damage the Chicago Board of Trade's ability to

reliably price world grain. *Ibid.* Additionally, lock closure will expose the corn industry to up to $500 million per year in added costs to ship by barges that cannot be repositioned through the O'Brien lock. Ill. App. 53a. And the Indiana steel industry will feel the effects, for it relies on the waterway to receive raw material and to ship finished products and market byproducts. Ill. App. 54a.

In addition to the devastating economic effect on businesses of all kinds and the consumers who rely on them, the degraded water quality in the inland waterway caused by lock and sluice gate closure would seriously impair its recreational use. Ill. App. 25a-26a, 95a. Over the last 10 years, the locks on the waterway have handled between 45,000 and 65,000 recreational vessels annually, and it is home to numerous recreational marinas and boat storage facilities. Pl. App. 101a. Indeed, an entire industry has developed to provide day excursions between the Chicago River and Lake Michigan, carrying approximately 800,000 passengers through the Controlling Works lock in 2009. Ill. App. 65a, 67a. These companies rely upon river-to-lake and lake-to-river travel, and therefore must use the locks. Ill. App. 64a-65a. In fact, a single company may use the locks up to 35 times a day, and together the operators' vessels pass through the locks over 8,000 times a year. Ill. App. 67a. These companies alone employ roughly 750 people, with a total annual payroll of more than $7 million and a gross revenue of more than $18 million. Ill. App. 66a-67a. A lock closure would have drastic consequences for their business. Ill. App. 67a-68a. And excursion tourism will cease altogether if either stagnation occurs or river levels rise (preventing boats from passing under

bridges) because the District is unable to use the sluice gates to control water levels. Ill. App. 69a-70a.

Environmental Effects of Closing Locks and Sluice Gates

Water quality diversions from Lake Michigan are necessary to maintain the abundant wildlife, including migratory and endangered birds, native fishes, turtles, and beaver, that the inland waterway supports. Ill. App. 25a. Limiting the District's authority to open sluice gates would impair its ability to make water quality diversions from Lake Michigan and would degrade water quality in the inland waterway, which is bordered by thousands of homes and businesses. *Ibid.* The waterway, which combines storm and waste water in a single sewer system, is susceptible to low or zero dissolved oxygen conditions. Ill. App. 14a-15a. A lack of dissolved oxygen can result in extremely noxious water conditions and lead to fish kills. Ill. App. 15a. At present, the only way to mitigate periodic low dissolved oxygen levels is through the District's discretionary diversion of lake water into the system through the sluice gates at the Wilmette Pumping Station, the Controlling Works lock, and the O'Brien Lock and Dam. Ill. App. 15a, 70a. Water pumps at these facilities alone are incapable of resolving an oxygen sag. Ill. App. 15a.

Moreover, water passage is the most environmentally friendly mode of commercial freight transportation. Ill. App. 44a. Moving the same goods by rail or truck would increase dramatically the emissions of hydrocarbon, carbon monoxide, nitrogen oxides, and particulate matter in the region, with adverse environmental consequences. Ill. App. 44a-45a, 59a.

Finally, the Indiana steel industry ships recyclable materials via barge through the O'Brien lock. Ill. App. 58a-59a. In the year ending June 2009, 31,516 truckloads of recyclable metals left the region by barge to be reused. Ill. App. 59a. If the metals cannot be shipped by barge, the steel companies would likely send the metal to the landfill because other modes of transport are too expensive. *Ibid.*

Argument

Michigan's motion for preliminary injunction fails on several, independent grounds. First, and while this will be the subject of a fuller argument in Illinois' response to Michigan's motion to reopen the 1967 Decree, the request for preliminary injunctive relief fails because it requires the Court to reopen a Decree that has no bearing on this dispute. Second, Michigan fails in its alternative theory that this represents a new dispute subject to the Court's exclusive, original jurisdiction, for Michigan seeks nothing specific from Illinois (as opposed to the District and the Corps), and as a new case this litigation therefore is not subject to this Court's exclusive jurisdiction. Third, even if Michigan were in the proper Court, it has not met its burden of showing a likelihood of success on its nuisance claim. And finally, given the speculative nature of the threat—which the Corps, Illinois, and the other Great Lakes States have worked tirelessly to monitor, evaluate, and prevent—Michigan has not shown that this threat outweighs the certain damage that closing the locks and curtailing the use of the sluice gates even temporarily will inflict. The Corps does not represent the interests of any one State; it represents the long-term interests of the Great Lakes region as a whole,

and it has taken steps to advance those interests in response to the threat posed by Asian carp, often in cooperation with Michigan and other States. To satisfy the balance-of-harms element for preliminary injunctive relief, Michigan must show that the Corps has not weighed the region's interests properly, and Michigan does not begin to make that showing. For this reason, too, Michigan's motion fails.

I. This Dispute Does Not Fall Within The Scope Of The 1967 Decree.

Michigan's primary claim to this Court's original jurisdiction is based on the 1967 Decree in *Wisconsin v. Illinois*, 388 U.S. 426 (1967). This reflects an apparent attempt on Michigan's part to avoid the need to establish liability in nuisance against defendants (something it cannot do as to Illinois, see *supra* Section III.A), to specify what, if anything, it seeks from the State of Illinois, and to make an end-run around the Federal Administrative Procedure Act, under which Michigan should proceed in district court if it wants the Corps to close the locks. But Michigan does not seek to enforce or modify any provision of the 1967 Decree, which resolved solely a dispute over the amount of water that the District may withdraw from Lake Michigan for sanitation and navigation purposes. See Mich. Mot. to Reopen 2 ("The Petition does not seek to alter the quantity of water being diverted from Lake Michigan under the existing Decree, as most recently amended.").[2] The Decree did not even address, much less adjudicate, defendants' duty to prevent invasive species

[2] Ohio appears to recognize that it would take a change in Illinois' diversion rights to implicate the Decree. See Ohio Mem. at 3. But Michigan disavows any challenge to these rights, and Ohio is only asking the Court to grant Michigan's motion to reopen. See *id.* at 1, 4.

such as the Asian carp from entering Lake Michigan, just as it did not purport to regulate any of the countless other issues that could be said to relate in some way to the Chicago waterway system. Michigan's motion therefore does not properly invoke this Court's retained jurisdiction over the 1967 Decree.

A more detailed look at the Decree and its history only reinforces this point. In the 1920s, the States of Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania, and New York brought suit in this Court against Illinois and the Sanitary District of Chicago (as the District was then known, see App. 85a-86a), challenging the District's diversion of water from Lake Michigan into the Canal. See *Wisconsin v. Illinois*, 278 U.S. 367, 402, 419 (1929); see also Mich. App. 85a-86a. The District had diverted water from Lake Michigan to reverse the flow of the Chicago River away from the Lake, into the Canal and ultimately into the Des Plaines, Illinois, and Mississippi Rivers. See Mich. App. 86a; *supra* pp. 4-5. The complaining States challenged the quantity of water diverted, alleging that the reduced water levels of the Great Lakes injured the States and their citizens. See *Wisconsin*, 278 U.S. at 399-400.[3] "The exact issue" before the Court was

> whether the state of Illinois and the Sanitary District of Chicago by diverting 8,500 cubic feet [per second ("cfs")] from the waters of Lake Michigan have so injured the riparian and other rights of the complainant states bordering the Great Lakes and connecting streams by lowering their levels as to justify an injunction to stop this diversion and thus restore the normal levels.

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[3] The States of Arkansas, Kentucky, Louisiana, Mississippi, Missouri, and Tennessee were granted leave to intervene as codefendants. See 278 U.S. at 400-401.

Id. at 409-410. In entering judgment for the complaining States, this Court held that, while the District could divert water to maintain the navigability of the Chicago River, withdrawal for local sanitation purposes was unlawful. See *id.* at 418, 420. The Court did not immediately enjoin the District from diverting Lake Michigan water, however, as such relief would have inflicted an "unnecessary hazard" on "the health of the people" within the District. *Id.* at 419. Instead, "[t]he situation require[d] the district to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the lake diversion." *Id.* at 420-421.

In 1930, after a remand to the Special Master "[t]o determine the practical measures needed to effect the object just stated and the period required for their completion," *id.* at 421, the Court entered its original Decree, see *Wisconsin v. Illinois*, 281 U.S. 696 (1930). The 1930 Decree ordered defendants to reduce the quantity of water withdrawn from Lake Michigan gradually, and it required the District to report twice annually on "the progress made in the construction of the sewage treatment plants" and on "the extent and effects of the operation of sewage treatment plants" already constructed. *Id.* at 696-698. Finally, the Court "retain[ed] jurisdiction" over the case "for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy." *Id.* at 698.

The Court twice modified the 1930 Decree, both times to make changes related to its exclusive subject matter—the quantity of diverted water. Thus, in 1933, after the Special Master found that the District lacked the financial resources to comply with the Decree's mandate that it construct sewage treatment plants, the Court ordered Illinois "to take all necessary steps" to raise funds sufficient "to cause and secure the completion of adequate sewage treatment or sewage disposal plants and sewers." *Wisconsin v. Illinois*, 289 U.S. 395, 399, 412 (1933). And in 1956, the Court temporarily modified the Decree to allow a diversion of up to an average of 8,500 cfs to alleviate an "emergency in navigation caused by low water in the Mississippi River." *Wisconsin v. Illinois*, 352 U.S. 945, 947 (1956).

In 1967, on Illinois' motion for modification, see Mich. App. 8a, the Court reopened the cases and entered a superceding Decree, see *Wisconsin v. Illinois*, 388 U.S. 426 (1967), this time to enable Illinois to make more efficient use of the diverted water and to provide for a new method of diversion accounting, see *id.* at 427-430; see also Mich. App. 9a. The Decree further authorized Illinois to apply for modification, if necessary, "to permit the diversion of additional water," and, as with the 1930 Decree, provided that this Court would "retain[] jurisdiction" over the cases "for the purpose of making any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy." *Id.* at 429-430. Finally, the 1967 Decree was amended in 1980, again to resolve an issue involving the quantity of water that the District diverts from the Lake. The 1980 amendment specified the

method for testing compliance with the 3,200 cfs limit, and to cabin Illinois' authority to allocate the diverted water. See *Wisconsin v. Illinois*, 449 U.S. 48, 48-50 (1980).

In short, the "subject matter in controversy" that gave rise to the 1967 Decree, as well as all preceding and subsequent proceedings, had nothing to do with Asian carp, invasive species, or water entering Lake Michigan. The actions that resulted in this Decree challenged the withdrawal of water from Lake Michigan into the Canal. The Decree merely sets limits on the amount of water that the District may divert, and Michigan disclaims any desire to change those limits now. See Mich. Mot. to Reopen 2.

Although at times Michigan acknowledges that prior litigation under the Decree involved only the diversion of lake water (and only the *amount* of water that lawfully may be diverted, not the fact of diversion), see Mich. Br. i, 1, 4, 5, 20, elsewhere its filings recharacterize and expand the nature of that litigation by claiming that the "Lake Michigan diversion project" as a whole was the true "subject" of the earlier cases. *Id.* at 1; see also *id.* at ii, 3, 7, 17, 25, 29; see also Mich. PI Mot. 1, 21, 24. "But for" this project, the argument runs, Asian carp "would not threaten to invade Lake Michigan." Mich. Br. 7; see also *id.* at 21, 29; Mich. PI Mot. 24.[4] But the Decree's requirement that any requested modification

[4] To the extent that other States' memoranda address the basis for this Court's jurisdiction, they merely restate Michigan's claim to this Court's continuing jurisdiction and thus fail for the same reasons. See N.Y. Resp. 1 n.1 ("Because the new harm stems from the same source as the harm in the original cases and affects all of the complainants,

"relat[e] to the subject matter in controversy," *Wisconsin v. Illinois*, 388 U.S. at 430, surely does not contemplate, as Michigan must argue, that any claim having anything to do with the Canal falls within the Court's retained jurisdiction. If this were true, then any time the Canal is a but-for cause of an injury, the Court properly could be urged to assert the jurisdiction it retained under the 1967 Decree. This cannot have been the Court's intent in retaining jurisdiction.[5] Indeed, were the Court to reopen the 1967 Decree, as Michigan suggests, the Court would be inundated with such requests, for, as the Court noted when declining a similar motion to reopen, "the urge to relitigate, once loosed, will not be easily cabined." *Arizona v. California*, 460 U.S. 605, 625 (1983).

Nor do Michigan's authorities support its position. In *Arizona v. California*, on which Michigan relies, this Court declined to reopen an existing decree because no "changed circumstances or unforeseen issues not previously litigated" warranted revisiting its prior factual determinations, as the movant had urged. 460 U.S. at 619. The Court did not doubt, however, that the movant must also show that its

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New York agrees that it would be appropriate to reopen these cases to address Michigan's new claims."); Ohio Mem. 1 ("subject matter" of 1967 Decree is "defendants' creation and operation of a series of artificial waterways connecting Lake Michigan and the Des Plaines and Illinois Rivers"), 3 ("but for" defendants' "construction and operation of" Canal, "Great Lakes would not now be threatened by the steady march of the Asian carp"); Wisc. Resp. 8 ("the [Asian carp] threat is the direct result of the authorized diversion project at issue in the Court's earlier decree").

[5] Michigan also suggests in passing that this case is part and parcel of the existing action because the Asian carp threaten "fishing and hunting grounds," just as the prior diversion of Lake Michigan water did. See Mich. Br. 30-31 (internal punctuation omitted). But if the nature of the threatened injury were sufficient to warrant this Court's continuing jurisdiction, again, the scope of that jurisdiction would be limitless.

newly sought relief pertains to the same subject matter as the existing decree. In *Arizona v. California*, the movant easily satisfied this latter requirement, for the parties had previously adjudicated the very issue sought to be resolved upon reopening. See *id.* at 621-624. But not so here, where Michigan seeks to raise an entirely new issue under the guise of the 1967 Decree.

Michigan's reliance on *Nebraska v. Wyoming*, 507 U.S. 584 (1993), is equally misplaced. The Court there identified a factual issue over whether Nebraska could show the substantial injury needed to prevail on its motion to modify the Court's existing decree, which imposed restrictions on Wyoming's (and other States') storage and diversion of water from the North Platte River and "expressly retained jurisdiction to consider requests for further relief with respect to the effect of threatened construction of new storage capacity." 507 U.S. at 592, 599, 601. There was no question that Nebraska's motion for modification, which challenged Wyoming's construction of a new storage reservoir, fell squarely within the scope of the Court's retained jurisdiction. See *id.* at 599. Once again, because Michigan cannot overcome this first hurdle and establish that its request to reopen is within the subject matter of the 1967 Decree, its claim to "changed circumstances" and "substantial injury," Mich. Br. 16-20, 25-29, is immaterial.

The case that this one does resemble is *New Jersey v. Delaware*, 295 U.S. 694 (1935), which Michigan cites in passing, see Mich. Br. 14 n.28. The Court there declined New Jersey's invitation to reopen its 1935 Decree. See *New v. Delaware*,

546 U.S. 1028 (2005). And although the Court gave no reason for its denial, it is plain that, as Delaware had argued, see Del. Br. in Opp. to N.J.'s Mot. to Reopen, *New Jersey v. Delaware*, No. 134, 2005 WL 6140912, at *2-3, 23-25 (Oct. 27, 2005), the cases did not concern the same subject: the earlier Decree resolved a boundary dispute between the two States, see *New Jersey v. Delaware*, 295 U.S. 694 (1935), while the later sought the Court's construction of a provision in a 1905 Compact concerning the exercise of riparian rights, see *New Jersey v. Delaware*, 128 S. Ct. 1410, 1415-1416 (2008). Just as it did in that case, the Court should decline to reopen the decree here.

II. This Case Does Not Otherwise Fall Within This Court's Exclusive, Original Jurisdiction.

Once it becomes apparent that the 1967 Decree does not govern this dispute, little remains of Michigan's petition. It vaguely alleges a cause of action under the common law of nuisance, but such a claim is facially implausible against the State of Illinois. See *supra* Section III.A. Indeed, the petition ties Illinois to this case solely by virtue of the fact that it built the canals more than a century ago, but Michigan asks nothing specific of the State at this point, and it does not (and cannot) claim that the State has failed to take extraordinary measures to combat the Asian carp's progress. Illinois has done everything in its power to protect the Lakes from Asian carp, often in cooperation with Michigan and other States, and Michigan does not suggest anything more that Illinois can do. And although Illinois will address this Court's original jurisdiction more fully in its response to

Michigan's motion for leave to file an original action, this fact is also fatal to Michigan's motion for a preliminary injunction, for it means that in reality this is a suit against the Corps, and possibly the District, and that motion therefore is not properly presented as preliminary to a mandatory, original action.

This Court has "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a). But the Court exercises its original jurisdiction only "sparingly," *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992), and § 1251(a) provides "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court," *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). The Court's "original 'jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi v. Louisiana*, 506 U.S. at 76 (quoting *Louisiana v. Texas*, 176 U.S. 1, 15 (1900)). Thus, original jurisdiction is "obligatory only in" certain, "appropriate cases" even if the action involves a claim by one State against another. *Mississippi v. Louisiana*, 506 U.S. at 76-77 (internal quotation marks omitted).

For this Court to exercise original jurisdiction, the plaintiff State "must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State." *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976). And a necessary corollary to that rule is that the defendant State must be able to provide the relief sought by the plaintiff State. See *Mississippi v. Louisiana*, 506

U.S. at 78 n.2. But it is not just the fact of injury by another State that matters, but the magnitude of that injury. The Court assesses the "nature of the interest of the complaining State," with a "focus[] on the seriousness and dignity of the claim." *Id.* at 77 (internal quotation marks omitted). Emphasizing the extreme nature of a case qualifying for this Court's original jurisdiction, the Court has described the "model case" in this camp as "a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Ibid.* (internal quotation marks omitted).

Second, even if the States are truly adverse over a matter of sufficient magnitude, the Court must explore "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* For the Court to exercise its original jurisdiction, "recourse to that jurisdiction [must be] necessary for the State's protection." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (per curiam) (internal quotation marks omitted). Michigan's action does not meet any of these requirements because (1) it seeks relief chiefly from the Corps and the District, not Illinois, and what Michigan demands of Illinois (if anything) is not sufficiently serious to justify the exercise of original jurisdiction, and (2) other forums exist to address Michigan's claims against the Corps and the District.

A. Michigan Does Not Seek Any Specific Relief From Illinois, Much Less Accuse Illinois Of Serious Misconduct.

Turning to the first requirement, Michigan does not seek anything specific from the State of Illinois, much less accuse Illinois of any action or inaction that

would rise to the level of a *casus belli*. Michigan contends that the "Chicago waterway system" presents a public nuisance because Asian carp may reach the Great Lakes via that system. Mich. Mot. to Reopen 22-25. But as Michigan admits in its motion for preliminary injunction, while the system was created by Illinois over a century ago, today it "is primarily maintained and operated by the District," while "several structures in the system contain navigational locks and are jointly operated by the Corps." Mich. Mot. for PI at 2. Michigan thus concedes that Illinois does not control the very facilities that are the focus of its complaint.

Consider the injunctive relief that Michigan actually seeks. Michigan first asks the Court to enjoin the operation of the locks and sluice gates in the waterway. Mich. Mot. for PI at 28. But Illinois has no operational control over the locks or gates. The Corps operates and controls the O'Brien Lock and Dam and the lock at the Controlling Works, and Illinois has no authority to direct the Corps to close them. See *supra* p. 5. Likewise, it is the District that operates the sluice gates at the Controlling Works, the O'Brien Lock and Dam, and the Wilmette Pumping Station. See *supra* p. 6. The only control Illinois has over the gates is IDNR's authority to limit the maximum amount of water the District may divert from the lake annually, *ibid.*, but Michigan is not asking IDNR even to reduce that amount, much less reduce it to zero and thereby effectively prohibit the District from operating the gates in its discretion, see Mich. Mot. to Reopen 2.

Next, Michigan asks the Court to direct the installation of "interim Barriers or structures" in the Grand and Little Calumet Rivers and between the Canal and

the Des Plaines River. Mich. Mot. for PI at 28-29. But it is unlawful for Illinois or any other State to erect structures in navigable waterways. 33 U.S.C. § 403. And the Corps already is the process of obtaining approval to build the requested berm between the Des Plaines River and the Canal that is designed to prevent the river from flooding into the canal. Mich. App. 69a. Likewise, the Corps oversees the construction and operation of the electric barriers in the river, over which Illinois has no authority. See *supra* p. 7.

Finally, Michigan seeks an order requiring the defendants to "comprehensively monitor" the waterways using "the best available methods and techniques" and to destroy any Asian carp that are discovered. Mich. PI Mot. 29. But Illinois is already undertaking these actions and more, with the blessing and cooperation of other Great Lakes States, including Michigan. See *supra* pp. 8-9 & n.1. In 2004, for example, Congress appropriated $6.825 million to fund the completion of the barrier, to which Illinois contributed an additional $1.8 million and the other Great Lakes States collectively contributed $575,000. See Ill. App. 114a-118a. In 2006, when cost overruns and construction delays had precipitated the need for additional funding, see Ill. App. 119a-120a, the Council of Great Lakes Governors ("Council") (which consists of the Governors of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin), through its Chair, Wisconsin Governor Jim Doyle, made clear its view that the States—particularly Illinois—had done more than their fair share to address the Asian carp threat. See *ibid.* ("Illinois and other Great Lakes States have already

contributed substantial non-federal funds toward construction of the barrier."). The Council stated that "[i]t is the responsibility of Congress and the Administration to ensure that funds exist to finish barrier construction and to keep the barrier system operating." *Ibid.*; see also Ill. App. 121a-122a ("Because the Chicago Sanitary and Ship Canal is a Federal navigation water, it is the responsibility of Congress and the Federal government to ensure that funds exist to protect" "the Lakes from all species of Asian carp").[6]

But even if Michigan wanted Illinois to do something else within its legal authority, such as perform more comprehensive monitoring or use different methods and techniques—though Michigan offers no ideas of its own, as one would expect if it actually sought anything additional from Illinois—a disagreement over Illinois' specific approach to monitoring is not sufficiently serious to constitute a *casus belli* between the States, especially where Michigan has been a participant in these

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[6] The actions of the Great Lakes Commission ("Commission"), which consists of members of the executive and legislative branches of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Ontario, Pennsylvania, Quebec, and Wisconsin and was chaired by Michigan's Lieutenant Governor John D. Cherry, Jr. between 2006 and 2008, and subsequently chaired by Illinois Governor Pat Quinn, only confirm the depth of Illinois' efforts to address the Asian carp problem and the other States' approval of and acquiescence in these efforts. In its 2006 Annual Report, the Commission described obtaining federal funds to construct the barrier as "a top regional priority for most of this decade." Ill. App. 124a; see also Ill. App. 125a. The 2007 Report similarly stated that the Commission had "focused" its "[a]dvocacy efforts" that year on obtaining federal "authorization and funding for the [barrier] to prevent the Asian carp and other invasive species from entering the Great Lakes." Ill. App. 127a. And the 2008 Report identified "[c]ombating the introduction and spread of aquatic invasive species . . . in the Great Lakes" as a "high priority," and noted that the Great Lakes Panel on Aquatic Nuisance Species had held its first-ever combined session with the Mississippi River Basin Panel to discuss "the shared concerns of these interconnected watersheds." Ill. App. 129a-130a.

monitoring efforts. Indeed, Michigan's non-specific demand for "comprehensive[] monitor[ing]" and "the best available methods and techniques" are inadequate even to satisfy the federal rules' requirement that an injunction "state its terms specifically" and set forth the actions required in "reasonable detail." FED. R. CIV. P. 65(d); see *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Assoc.*, 389 U.S. 64, 74-76 (1967); *United States v. Apex Oil Co., Inc.*, 579 F.3d 734, 739 (7th Cir. 2009); see also *Int'l Longshoremen's Ass'n*, 389 U.S. at 76 ("The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one."). An order requiring Illinois to monitor the waterways using the "best available methods and techniques" is too vague to be enforced by the Court's contempt power, and without even this passing reference to Illinois in Michigan's list of requests, Michigan seeks no actionable relief from Illinois at all.

Accordingly, having failed to satisfy even the threshold requirement for an original action, Michigan's complaint is on all fours with a string of cases in which courts have recognized that the exercise of this Court's original jurisdiction is improper even if another State is named as a party. See, *e.g.*, *Hood v. City of Memphis*, 570 F.3d 625, 631-32 (5th Cir. 2009); *Alabama v. United States Army Corps of Eng's*, 424 F.3d 1117, 1130 (11th Cir. 2005); *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025-1026 (8th Cir. 2003). Those decisions recognize that § 1251(a) requires one State to seek actual relief from another State, not merely to have an

interest adverse to the other's. See *Mississippi v. Louisiana*, 506 U.S. at 78 n.2. Thus, for example, in *Ubbelohde*, South Dakota and Nebraska were at odds over whether the Corps should release water from a South Dakota reservoir to maintain the navigability of a river in Nebraska. See 330 F.3d at 1021-1022. Nevertheless, the court held that permitting Nebraska to intervene against South Dakota would not trigger the Supreme Court's exclusive, original jurisdiction, for it was the Corps whose actions were at issue—though adverse, the States were not asking anything directly of each other. *Id.* at 1026. Likewise, the relief Michigan seeks here is not from Illinois, and Michigan's complaint does not trigger this Court's exclusive, original jurisdiction.

B. Michigan May Obtain The Relief It Seeks In Other Forums.

Michigan's effort to invoke this Court's original jurisdiction fails on a separate, independent ground, for Michigan may obtain the relief it seeks elsewhere. See *Mississippi v. Louisiana*, 506 U.S. at 77; *United States v. Nevada*, 412 U.S. 534, 538 (1973). Michigan asserts a common law nuisance claim and a claim under the Federal Administrative Procedure Act. Mich. Mot. to Reopen 22-29. A federal district court or an Illinois court has the authority to hear a tort claim against the District because it is not an arm of the State and therefore does not enjoy Eleventh Amendment or sovereign immunity. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47-51 (1994) (no Eleventh Amendment immunity because entity is not arm of State); *Williams v. Med. Ctr. Comm'n*, 328 N.E.2d 1, 3-4

(Ill. 1975) (Illinois lawsuit immunity statute applies only to arms of State); see also *infra* p. 34. And a federal district court has jurisdiction to consider a proper Administrative Procedure Act claim against the Corps. See 5 U.S.C. §§ 702, 704. Because the relief Michigan seeks must come from the Corps or the District, alternate forums exist to adjudicate those claims, and this Court should decline to exercise its original jurisdiction. See *California v. Nevada*, 447 U.S. 125, 133 (1980).

Michigan wrongly contends that Illinois "is an indispensable party" because it is "directly responsible for the diversion project that is the source of the imminent threat" to the Great Lakes, it exercises statutory control over the diversion, and it has exercised control over fish in the waterways. Mich. PI Mot. 27. But even if Illinois were responsible for creating the diversion project over 100 years ago, Illinois has no control over relevant aspects of the project now, including the locks and gates that Michigan asks this Court to regulate or close. See *supra* pp. 5-6.

Michigan's sole authority on this score, *Wisconsin v. Illinois*, 289 U.S. 395 (1933), is not to the contrary. There, several States sought to require the District to decrease its diversion from Lake Michigan, and for that the District needed to build waste treatment facilities. *Id.* at 397-398. This Court rejected Illinois' claim that it was not a proper party to the suit, reasoning that the District "was created and has continuously been maintained by the state of Illinois," and that "[e]very 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 399-400. But this case does not involve diversion, where the State is not only a party to the Decree but is the party with diversion rights and the power to allocate those rights. And because of "the unmarketability of [the District's] bonds and its inability to obtain the needed moneys through levy of taxes or assessments," *id.* at 399, Illinois was the only party who could raise funds for the waste treatment facilities in that case; without the State, no relief was possible. In sharp contrast, this case does not involve water diversion or the Decree, see *supra* Part I, and the District rather than the State is the only party from whom relief is possible regarding the sluice gates.

And it would be absurd to claim that Illinois is a necessary party to any suit against an entity created by state law. All Illinois municipalities are created by and operate pursuant to state statute, see 65 ILCS 5/1 – 5/11 (2008), but Illinois is not a proper party to every action against the City of Chicago. The same goes for Illinois counties, see 55 ILCS 5/1 – 5/7 (2008), and Illinois corporations, see 805 ILCS 5/2.05 – 5/2.35 (2008), but no one would suggest that Illinois is the true defendant in suits against these entities, either.

Illinois exerts no more operational control over the District than it does over the City of Chicago. As this Court has recognized in the Eleventh Amendment context, whether a state-created entity is an "arm of the State" depends on the nature of the relationship between the two, and where an entity functions like a county or a city, it is not an arm of the State. See *Mt. Healthy City Sch. Dist. Bd. of*

Educ. v. Doyle, 429 U.S. 274, 280 (1977). The District's commissioners are elected, not appointed by the State, except in the extraordinary event of a vacancy filled temporarily by gubanatorial appointment, see 70 ILCS 2605/3, 2605/3.2 (2008), and the District is recognized as a separate "body corporate and politic," 70 ILCS 2605/3 (2008). Additionally, the modern District is financially self-sustaining and may levy taxes, issue bonds, and borrow money without state approval. See 70 ILCS 2605/5.3, 2605/9 – 2605/9.8, 2605/12 – 2605/15 (2008). And the District, not the State, is liable for any damages caused by the District's operations. See 70 ILCS 2605/19 (2008). Indeed, for Eleventh Amendment purposes, the "most salient" factor in determining whether a state-created entity is an arm of the State is the "vulnerability of the State's purse," *Hess*, 513 U.S. at 48, and Illinois is not liable for the District's actions, and the District enjoys neither Eleventh Amendment nor sovereign immunity, see *supra* p. 31; see also *Hess*, 513 U.S. at 47 ("[P]olitical subdivisions exist solely at the whim and behest of their State, yet cities and counties do not enjoy Eleventh Amendment immunity.") (citation and internal quotation marks omitted). Moreover, the District is responsible for the operation and maintenance of the waterway system, see 70 ILCS 2605/23 – 2605/24 (2008), and it is authorized to create a police force and exercise police power over its right of way, see 70 ILCS 2605/50 (2008). And while state law requires the Illinois Attorney General to represent the State before this Court, see 15 ILCS 205/4 (2008), the Attorney General does not represent the District.

In short, the District operates independently of the State, and though it was created by Illinois law (like every Illinois county and municipality), it has an arm's length relationship with the State. To give the State authority to direct the District's operations would require a new statutory scheme, something that courts may not order state legislators to effect. See *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 732-734 (1980). Accordingly, Michigan's action is not a proper one against the State of Illinois, and this Court should decline to exercise its § 1251(a) jurisdiction.

III. Michigan Cannot Satisfy The Criteria For A Preliminary Injunction.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 376 (2008). Absent specific statutory authorization, a plaintiff seeking this relief must establish that it is likely to succeed on the merits, that it is likely to suffer an irreparable harm in the absence of an injunction, that the balance of equities is in its favor, and that the injunction is in the public interest. See *id.* at 374. The likelihood of success on the merits must be "better than negligible," and there must be more than "some possibility of irreparable injury." *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (internal quotation marks omitted). "[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-377 (internal quotation marks omitted).

Moreover, Michigan does not seek to preserve the status quo pending trial on the merits, but rather seeks a mandatory injunction against the government to alter the status quo.[7] Such mandatory preliminary injunctions are disfavored, and a party seeking this relief must make a "heightened showing" of the traditional elements. *Att'y Gen. of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); see also *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009) (mandatary preliminary injunctions "require strong showings of the likelihood of success on the merits and the balance of harms"); *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008) (party seeking mandatory interlocutory injunction "must meet the more rigorous standard of demonstrating a 'clear' or 'substantial' likelihood of success on the merits"); *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) ("A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity."). This heightened standard for mandatory preliminary injunctions is "especially appropriate when a preliminary injunction is sought against government." *D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006). Michigan cannot satisfy this standard here, where it has not shown a likelihood of success on

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[7] The claim that Michigan seeks a preliminary injunction "to protect the status quo of Lake Michigan waters that are currently free from the invasive Asian carp," Mich. PI Mot. 7, is strained, to say the least. Michigan's request that the Court order defendants to close and cease all operation of the locks and stringently limit operation of the sluice gates (not to mention install interim barriers, operate the electric barrier at full power and expedite its completion, and monitor the Canal for Asian carp and eradicate any carp discovered), see *id.* at 28-29, is a request for mandatory, affirmative action that alters the status quo, not merely a prohibition against certain action to preserve the status quo.

the merits of its claim, and—given the speculative nature of the injury alleged; Michigan's participation in remedial efforts to date; and the serious public health, environmental, and economic harms associated with the relief Michigan seeks—the balance of the equities and the public interest weigh against Michigan.

A. Michigan Has Not Shown A Likelihood Of Success On The Merits.

Assuming it can overcome the jurisdictional obstacles that this case poses, Michigan does not articulate any viable theory of nuisance liability against Illinois. Without further elaboration, Michigan invokes "common law, including the common law of Illinois," relying entirely upon the Illinois Supreme Court's decision in *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004). Mich. PI Mot. at 25; Mich. Mot. to Reopen 22; Mich. Br. 29. But *Beretta*, and the established tort principles on which it relies, demonstrate that Michigan is unlikely to succeed on the merits of its public nuisance claim against Illinois for at least two, independent reasons. First, it was not reasonably foreseeable at the time the Canal was lawfully built that Asian carp might pass through it and enter Lake Michigan, and, second, the means Michigan urges to prevent entry of carp into the Great Lakes are wholly beyond Illinois' control.

In *Beretta*, the Illinois Supreme Court relied upon the Restatement of Torts, which defines a "public nuisance" as an "'unreasonable interference with a right common to the general public.'" 821 N.E.2d at 1111 (quoting Restatement (Second) of Torts § 821B(1) (1979) ("Restatement")). And the court elaborated that liability

for a public nuisance consists of "four distinct elements": "[T]he existence of a public right, a substantial and unreasonable interference with that right by the defendant, proximate cause, and injury." *Beretta*, 821 N.E.2d at 1113.[8] Applying these elements, the court rejected claims by Chicago and Cook County that the defendants (gun manufacturers, distributors, and dealers) should be held liable in public nuisance for making and selling handguns that were used to commit crimes, holding that neither duty (with regard to the manufacturers and distributors) nor legal cause (with regard to all defendants) could be established. See *id.* at 1148. The Court explained that "the question of foreseeability plays a pivotal role not only in the question of the existence of duty but also in the determination of legal cause." *Id.* at 1127; see also *id.* at 1136 ("the existence of a duty and the existence of legal cause" "depend on an analysis of foreseeability"). And because the alleged injury was the result of numerous unforeseeable intervening acts by third parties not under the defendants' control, the defendants' conduct was too "remote from the resulting injury" to make out a public nuisance claim. *Id.* at 1136; see also *id.* at 1126, 1137. At the same time, moreover, the court reaffirmed its prior holdings that, "[w]hen the nuisance results from a condition or conduct upon land," the defendant's "control over the land is generally a necessary prerequisite to the

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[8] Federal common law—to the extent it is invoked or applicable—is substantially similar. See, *e.g.*, *Connecticut v. Am. Elec. Power Co. Inc.*, 582 F.3d 309, 350-352 (2d Cir. 2009) (after discussing authorities, "apply[ing] the Restatement's principles of public nuisance as the framework within which to examine the federal common law of nuisance question presented," and noting that Restatement principles "have served as the backbone of state nuisance law").

imposition of liability." *Id.* at 1132; see also *ibid.* (control is "a relevant factor in both the proximate cause inquiry and in the ability of the court to fashion appropriate injunctive relief").

Applying the traditional tort principles set forth in *Beretta* makes clear that Michigan cannot show that it is likely to succeed on the merits of its public nuisance claim and, thus, that it is entitled to a preliminary injunction. First, when the Canal was built more than one hundred years ago, Asian carp were unknown to this part of the world. See *supra* p. 4. They did not appear in the United States until the 1970s, when southern fish farmers imported them to remove algae from farm ponds and clean wastewater treatment facilities. See *ibid.* Then, in the 1990s, extensive flooding allowed the carp to escape into the Mississippi River, from where they began a migration northward into Illinois. See *ibid.* In short, Illinois played no role in introducing Asian carp into the United States, and their current presence in Illinois derives from a series of extraordinary, unforeseeable events.[9] Michigan's

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[9] For this reason, the cases cited by Minnesota in support of a public nuisance claim against Illinois, see Minn. Resp. 7 n.26, are even further afield. In each of these cases, the Court was asked to enjoin conduct undertaken directly by the defendants and wholly within their control. For example, in *Missouri v. Illinois*, 180 U.S. 208, 208-216, 241 (1901), Missouri sought an injunction prohibiting Illinois' ongoing discharge of sewage into the Canal, on the theory that such discharge was making the water in the Mississippi River unhealthy for Missouri residents. The Court ultimately concluded that there was insufficient evidence of detrimental effect on river water to establish a public nuisance. See *Missouri v. Illinois*, 200 U.S. 496, 522-526 (1906). And in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907), Georgia sought to enjoin Tennessee copper companies from "discharging noxious gas from their works in Tennessee over the plaintiff's territory." Although the Court ultimately granted Georgia its requested relief, it declined to do so on a preliminary basis. See *ibid.* Thus, both *Missouri v. Illinois* and *Tennessee Copper Co.* merely stand for the uncontroversial proposition that when one State is actively engaged in conduct that injures the residents of another, the latter State may make "reasonable

theory that Illinois should nevertheless be held responsible for the possibility that the carp may enter the Great Lakes is inconsistent with *Beretta*, the sole case upon which it relies, and violates well-recognized proximate cause principles. See, *e.g.*, W. Page Keeton *et al.*, Prosser & Keeton on the Law of Torts, § 41, at 264 (5th ed. 1984) (explaining that proximate cause embodies concept that "[a]s a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability").

Equally important, the means Michigan urges to prevent the Asian carp from entering Lake Michigan—including closing the locks, limiting operation of the sluice gates, and completing and operating the barrier in a particular manner—are wholly beyond Illinois' control. Illinois does not operate the locks or sluice gates, and the barrier is constructed and maintained by the Corps. See *supra* pp. 5-7. Unsurprisingly, Illinois can bear no nuisance liability for the failure to take actions that it has no authority to take. See *Beretta*, 821 N.E.2d at 1131 (noting the "unremarkable proposition" that an "injunction will not issue, ordering a defendant to abate a nuisance upon the land, if he has no authority, by reason of ownership or possession, to enter upon the land"); see also Restatement at § 839 cmt. d (noting

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demands" that the conduct cease. See *Tennessee Copper*, 206 U.S. at 237. These principles have no application here, for Illinois is doing nothing to cause the Asian carp to enter the Great Lakes and has done everything reasonably possible to prevent such an eventuality. As for *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 519-520 (2007), the final case cited by Minnesota, see Minn. Resp. 7 n.26, that case does not even involve a public nuisance claim.

that liabilities of possessors of land derive from their "exclusive control over the land and the things done upon it").

Indeed, not only is Illinois unable to undertake the specific measures Michigan urges, but Illinois has acted aggressively to pursue all means within its legal authority over a federal, navigable waterway to prevent the Asian carp from entering the Great Lakes. In particular, Illinois has actively supported efforts—including by contributing $1.8 million—to complete the electric barrier being constructed and maintained by the Corps. See *supra* pp. 7, 28-29. Illinois also has cooperated with, advised, and assisted the Corps; is the lead responder in the Workgroup; is an active participant in the educational, policy, and research efforts of the Great Lakes Panel; and undertakes extensive monitoring efforts. See *supra* pp. 8-10 & n.1. And just last month, after eDNA was discovered on the Lake Michigan side of the barrier, Illinois expended substantial funds to determine whether that discovery portended any actual carp in that area of the Canal, and to destroy any carp living there. See *supra* pp. 8-9. Joined by Michigan and other Great Lakes States, Illinois participated in a massive "fish kill" to destroy all aquatic life over a six-mile stretch and contracted with commercial fishers to conduct a large-scale effort to net fish in the area that produced the positive eDNA result. See *ibid.* Michigan simply cannot—and does not—articulate a viable public nuisance theory for enjoining Illinois to do more than it has done and continues to do.

B. The Remaining Preliminary Injunction Factors Favor Defendants And Intervenor.

Not only is Michigan unlikely to succeed on its nuisance claim, but the remaining preliminary injunction factors also favor defendants and the intervenor. Michigan's preliminary injunction motions (and the "me too" responses filed by other States, as well as the Province of Ontario's amicus brief) focus almost entirely on the harm that will result if Asian carp enter and infest the Great Lakes. And Illinois takes this threatened harm extremely seriously, for it has much to lose from any degradation of the Great Lakes ecology, and the State has gone to great lengths to prevent the Asian carp from entering Lake Michigan. See *supra* pp. 7-10. But Michigan's effort to show that it will suffer irreparable harm without the injunction fails for two reasons. First, Michigan offers no substantial evidence that the threatened injury is more than speculative at this time. Second, Michigan's delay in seeking closure of the locks and sluice gates—indeed, Michigan agreed to the alternate remedial measures advocated for and implemented by Illinois—counsel against a finding that Michigan's requested interlocutory relief is truly necessary. Finally, Michigan, which seriously downplays the severe public health, safety, environmental, and economic harms that its requested relief will cause, also fails to demonstrate that the balance of equities and public interest weigh in its favor. Accordingly, Michigan is unable to show that it is entitled to the extraordinary relief it requests.

At the outset, Michigan is incorrect to claim that, absent immediate closure of the locks and gates, the entry of Asian carp into the Great Lakes is "imminent." Mich. PI Mot. 14-17. In December 2009, after eDNA testing revealed the presence of a substance containing Asian carp DNA (but not an actual fish, the presence of which eDNA technology, by its nature, does not test for) on the Lake Michigan side of the electric barrier, Illinois and other stakeholders immediately acted to determine whether any carp actually made it through the Corps' electric barrier. The Workgroup (for which IDNR serves as lead responding agency, see *supra* pp. 8-9 n.1) undertook a massive fish kill in the Canal and deployed thousands of yards of fishing nets in the Calumet-Sag Channel, see *ibid.* The fish kill identified a single carp on the Lockport side, that is, on the Mississippi River side of the barrier. See *supra* p. 9. And not a single Asian carp was among the hundreds of fish netted during the latter effort, which occurred on the Lake Michigan side of the barrier. See *supra* p. 8.

In short, while Illinois and other stakeholders acted with appropriate dispatch to determine whether a positive result on the eDNA test (a nascent technology that has yet to undergo the rigors of publication and peer review) portended an actual fish on the Lake Michigan side of the barrier, these extensive efforts indicated the contrary. Thus, Michigan's claim that the barrier is an "imperfect protection" against the entry of Asian carp, Mich. PI Mot. 15, lacks the evidentiary support needed to obtain any preliminary injunction, much less mandatory injunctive relief against a sovereign.

Michigan's irreparable-harm showing grows even weaker when one considers that its officials have been aware of the risk posed by Asian carp since at least 2002. See Ill. App. 132a ("Numerous species are knocking at the door, including Asian carp coming up the Chicago diversion."). Michigan also has known of (indeed, has participated in) the alternate remedial measures urged by Illinois, which are significantly less devastating to the public health and local economy than immediate closure of the locks and gates. See *supra* pp. 8-9 & n.1. Along with Illinois and the other Great Lakes States, Michigan has advocated consistently for the Corps' completion of the electric barrier. See *supra* pp. 28-29 & n.6; *infra* pp. 45-46. If an "imminent" threat exists, and Michigan has not borne its heavy burden of proving that it does, equity counsels that having acquiesced in Illinois' efforts to address the Asian carp though other measures, Michigan should not be heard to complain that the extraordinary injunctive relief it requests is necessary to address it, much less that there is anything more in the State's power to do.

Courts have held consistently that delay in bringing suit or moving for preliminary injunctive relief cuts against a finding of irreparable injury. See, *e.g.*, *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211 (10th Cir. 2009); *Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 79-80 (4th Cir. 1989); *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984); see also *Keyes v. Eureka Consol. Min. Co.*, 158 U.S. 150, 153 (1895) ("the laches of appellants was such, upon

their own showing (for the delay was unexplained), as to disentitle them to a preliminary injunction"). This is so because "the failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief." *Tough Traveler*, 60 F.3d at 968 (internal quotation marks omitted); accord *Lydo*, 745 F.2d at 1213 ("By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action.") (internal quotation marks omitted).

That Michigan for years worked cooperatively with Illinois and the other Great Lakes States to address the Asian carp threat through alternate remedial measures—the construction of the electric barrier, in particular—indicates that any threat of irreparable harm is speculative or, at worst, that the "emergency" is of Michigan's own making. In 2001, the Council of Great Lakes Governors (which includes the Governor of Michigan) launched the Aquatic Invasive Species Task Force ("Task Force"), see Ill. App. 133a-135a, which made preventing the entry of Asian carp into the Great Lakes a priority and consistently focused its efforts on construction by the Corps of a permanent electric barrier in the Canal. In 2004, the Council (then-chaired by Ohio Governor Bob Taft and Wisconsin Governor Jim Doyle) repeatedly wrote letters to members of the executive and legislative branches of the federal government urging that "securing full federal funding" for the construction of a permanent barrier in the Canal be a "priority" to address the "particular[]" concern that Asian carp would enter the Great Lakes. Ill. App. 136a-138a; see also Ill. App. 139a-140a ("there is no greater priority at this time than identifying federal funding sources to complete the construction of the Chicago

Sanitary and Ship Canal dispersal barrier"); Ill. App. 141a-142a (urging appropriation of federal funds to complete construction of barrier). Indeed, as recently as November 2009, the Council continued to insist that the Corps' completion of the barrier is necessary to keep Asian carp out of the Great Lakes. See Ill. App. 143a-144a ("Without the completion and operation of an effective barrier system in the Chicago Sanitary and Ship Canal, the Asian carp may soon enter the Lakes."). In short, given Michigan's past actions, its current insistence that the Canal's locks and sluice gates must immediately be closed to prevent Asian carp from entering Lake Michigan should not be credited.

Nor has Michigan established that the balance of equities weighs in its favor or that an injunction would be in the public interest. Although Michigan acknowledges (as it must) that closure of the locks and gates "will cause injury to the local economy through the disruption of local barge and recreational traffic," Michigan seriously downplays the public health and safety concerns that immediate closure of the locks and gates will precipitate. Michigan also substantially understates the scope of the "economic impact" and "inconvenience," for neither will be "short-term," "finite," or "minuscule." Mich. PI Mot. 18-19.

First, closure of the locks and gates at this time would critically undermine the City of Chicago's ability to respond to, mitigate, and recover from a large-scale incident (including a terrorism-related incident) along the area's inland waterways or within Chicago's central business district, which more than one million people occupy on an average workday. See *supra* p. 10. Both the Chicago Police

Department's Marine Operations Officers (for whom Homeland Security is a key responsibility) and the Chicago Fire Department's Air Sea Rescue Division (who respond to more than one hundred incidents along the inland waterways each year) must pass through the locks to discharge their duties. See *supra* pp. 10-12. And if the sluice gates were unavailable to maintain water levels, the Chicago Fire Department would be unable to deploy Engine 58, its 96-foot fireboat, which is critical both for supplying river water to fire engines battling fires near the inland waterways and providing water to Chicago's central business district in the event of main water line failure. See *supra* pp. 11-12. Michigan fails to acknowledge any of these substantial risks to public health and safety.

Nor does Michigan consider that limiting the District's ability to use the sluice gates to divert water from Lake Michigan would degrade the quality of water in the inland waterways, which are bordered by thousands of houses and businesses; provide a habitat for abundant wildlife, including migratory and endangered birds, native fishes, turtles and beaver; and are used for recreational purposes. See *supra* pp. 14, 15.[10] At present, these discretionary diversions are the

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[10] New York is wrong when it claims that closing the locks and restricting the use of the sluice gates "would result in little if any interference with the quantity of water diverted from Lake Michigan under the consent decree currently in place, because the great majority of the allowable water diversions consist of sewage discharge and rainfall-snowmelt runoff that would not be affected." N.Y. Resp. 3-4. No part of Illinois' allowable diversion "consist[s] of sewage discharge." To the contrary, as the report New York cites demonstrates, the two primary components of the water diversion attributable to Illinois are water usage (drinking water) and run-off . See *Lake Michigan Diversion Accounting: Water Year 2005 Report*, 20-22, table 5, fig. 3, available at http://155.79.114.198/divacct/05%20Reports/wy05_Diversion.pdf. And the report further makes clear that 11.6% of the water diverted in water year 2005 (comprised of lockages, navigation makeup

District's only way to mitigate the periodic low oxygen levels that occur in these waterways and that, if left unaddressed, can result in noxious water conditions and fish kills. See *supra* p. 15. Michigan at least acknowledges that severe flooding may result if the District is not permitted to open the sluice gates to permit water flow into Lake Michigan following a major storm (as has been necessary six times in the last three years), although Michigan provides no workable standards for when, in its view, such use of the gates should be permitted. See Mich. PI Mot. 28 (urging an order that "limits opening the gates except as required to prevent significant flooding that threatens public health or safety"). And Michigan simply ignores other, also substantial, health and safety risks associated with its request for preliminary relief.

As for the economic impact of Michigan's request, the Chicago waterway system comprises one of the nation's busiest commercial and recreational waterways, handling more than 50,000 vessels and 900,000 passengers annually. See *supra* p. 5. More than $16 billion worth of cargo (including petroleum and agricultural products, coal for power plants, road salt, steel, cement, home heating oil, and aircraft de-icing fluid) are transported each year in and out of Illinois by

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flow, and discretionary flow) would be expressly prohibited if this Court were to grant Michigan's requested relief. See *ibid.* Most important, the percentage of water diverted for discretionary use to minimize pollution problems is far greater during the summer months than during other times of the year. For example, in September 2005, discretionary diversions to address water quality accounted for 34.9% of the total diversion for that month. See *Id.* at 12, table 4. Eliminating nearly 35% of the total water diversion in a given month will have significant environmental consequences.

river barge. See *supra* p. 6. Dozens of facilities (including power plants, petroleum plants, steel producers, and shippers of agricultural products) receive cargo exclusively or primarily by water and lack the physical infrastructure necessary to receive or distribute large amounts of goods by rail or truck. See *supra* p. 13. Thus, not only would closure of the locks devastate the commercial navigation industry (at least two dozen barge and towing operations would suffer directly, with hundreds of jobs lost) and the passenger vessel business (which alone employs approximately 750 people with a total annual payroll of $7 million and a gross revenue of $18 million), but even a temporary closure would have a disastrous effect on the economy in general and, in particular, on the grain, steel, energy, and construction industries. See *supra* pp. 12-15. The resulting higher costs will lead to an inevitable loss of jobs and higher prices for businesses, local governments, and consumers. See *supra* p. 13. Michigan's claim that "the primary impact will be felt by private individuals or companies who use the locks," Mich. PI Mot. 20, should not be credited. The relief it seeks, if granted, will detrimentally impact not only private individuals but the public throughout the Midwest and beyond.

Finally, Michigan's unsupported statement that "alternate means of transportation" quickly will be "engaged" and "any injury from closing the locks" will be "temporary," *id.* at 18, is simply not credible. There are no alternate water routes for shipping and delivering cargo, and there are not enough trucks and train cars to haul the freight that passes through these waterways. See *supra* p. 12. One

barge typically has a dry-cargo capacity of at least 16 rail cars and a liquid-cargo capacity of 46 rail cars, and some 500,000 additional truck loads would be needed to move the amount of cargo currently hauled by barges on the Canal each year. See *supra* p. 12. And even if trucks and rail cars were available, the financial and environmental costs of substituting rail or truck transportation for waterway transport would be devastating in terms of increased emissions of hydrocarbon, carbon monoxide, nitrogen oxides, and particulate matter. See *supra* p. 15. Substituting rail and truck transportation for commercial navigation would also lead to untenable congestion on the rails and roads, raise the cost of maintaining roadways (and, in particular, of salting roadways during the winter months), and cause increased traffic fatalities. See *supra* p. 13. Michigan's efforts to downplay the economic impact that will result if its request for preliminary relief is granted, as well as its silence on the public health effects associated with even a temporary closure of the locks and sluice gates, cannot disguise the fact that neither the balance of equities nor the public interest weighs in Michigan's favor.

Conclusion

For the foregoing reasons, the State of Illinois respectfully requests that the Court deny Michigan's Motion for Preliminary Injunction.

Respectfully submitted.

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