Nos. 1, 2 and 3, Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WISCONSIN, ET AL., PLAINTIFFS

v.

STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, ET AL.

STATE OF MICHIGAN, PLAINTIFF

v.

STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, ET AL.

STATE OF NEW YORK, PLAINTIFF

v.

STATE OF ILLINOIS AND METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, ET AL.

ON RENEWED MOTION FOR PRELIMINARY INJUNCTION

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Solicitor General, on behalf of the United States of America, respectfully submits this memorandum in opposition to the renewed motion for preliminary injunction submitted by the State of Michigan.

STATEMENT

Our memorandum in response to Michigan's first motion for a preliminary injunction explains the operation of the Chicago Area Waterway System (CAWS) and details the extensive efforts by the federal and state governments to prevent the silver and bighead carp (Asian carp) from entering Lake Michigan through the CAWS. Those efforts include Congress's authorization for the U.S. Army Corps of Engineers to take emergency action to prevent Asian carp from entering the Great Lakes, see Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, § 126, 123 Stat. 2853 (2009) (Section 126); the continued operation of the current electric Barriers I and IIA to prevent passage of Asian carp through the CAWS, and the expedited construction of Barrier IIB, to be completed later this year, to furnish additional protection; new restrictions on ballast and bilge water discharge by vessels crossing the electric barriers, to prevent any potential transfer of Asian carp or carp eggs; construction (recently approved) of new physical barriers to prevent Asian carp from being swept into the Chicago Sanitary & Ship Canal in a flood; and the use of environmental DNA (eDNA) technology, including as a means of focusing further intensive netting and electrofishing operations undertaken by federal and state agencies. Michigan filed no reply to the United States' prior memorandum, and this Court denied the requested preliminary injunction on January 19, 2010.

1. Since the United States' prior memorandum was filed, numerous federal, state, and local agencies participating in the Asian Carp Regional Coordinating Committee have drafted a comprehensive strategy to combat Asian carp in both the near and long terms. Draft Asian Carp Control Strategy Framework (Feb. 2010), http://www.asiancarp.org/RegionalCoordination/documents/AsianCarpControlStrategyFramework.pdf (Framework); App. 2a.[1] The Great Lakes States have been invited, through their governors and attorneys general, to comment on and participate in refining the Framework. Michigan has provided comments on the Framework.

a. In accordance with the Framework, the U.S. Fish and Wildlife Service and the Illinois Department of Natural Resources have engaged in sustained electrofishing and netting operations at several locations in the CAWS above the electric barrier system. The agencies selected locations at which positive eDNA samples had been found and which were likely to attract fish during the winter months (e.g., points at which warm water is discharged into the CAWS). Four days of sustained operations in early February, and four more days of sustained operations last week, yielded numerous common carp but no Asian carp. Thus, to date, no live or dead

[1] References to "App." refer to the appendix to this memorandum. References to "U.S. January App." refer to the appendix to the United States' memorandum in opposition to Michigan's previous motion for a preliminary injunction. References to "Ill. App." refer to the appendix to Illinois's response to the renewed motion for a preliminary injunction.

Asian carp have been identified or observed in the CAWS above the electric barrier system. App. 69a-71a.

As a way of evaluating the efficacy of these targeted detection methods, the Illinois Department of Natural Resources undertook a similar electrofishing operation near Starved Rock Dam, well below the electric fish barriers, to verify that electrofishing can capture Asian carp under winter conditions. Those efforts captured between 30 and 40 Asian carp. App. 70a-71a; Ill. App. 14a.

b. One important aspect of the Framework is its examination of a short-term strategy that the Corps identifies as "modified structural operations." Under several of the alternatives being considered as part of that strategy, the locks would be closed to traffic for recurring periods. In examining modified structural operations, the Corps, in consultation with other agencies, is considering whether the goals of preventing Asian carp migration toward or into Lake Michigan and permitting continued navigation, at certain times, can co-exist through modified operation of existing structures in the CAWS (such as locks and dams, sluice gates and pumping stations) in ways that would impede migration of any Asian carp that might reach those points. With respect to the locks, any recurring periods of closure would be synchronized with other efforts by federal and state agencies, such as targeted poisoning or intensive electrofishing and netting, to determine whether Asian carp are present, to capture or kill any carp that may exist, and to prevent Asian carp from passing at times when the

lock is open to navigation. Framework at ES-2 to ES-3; id. at 15-16; App. 2a, 8a-9a. The Corps has already sought comments on that proposal, App. 10a, and intends to make an initial recommendation to the Assistant Secretary of the Army for Civil Works in the near future, in time to permit action to be taken this spring, ibid.

The Corps is also examining how the locks, sluice gates, and other facilities can be modified to repel Asian carp or reduce or eliminate pathways through which they might travel, such as by installing new technology (such as acoustic barriers) or by modifying the existing facilities (such as by installing screens on sluice gates). App. 9a, 50a. The evaluation of acoustic, bubble, or strobe-light barriers to deter passage of Asian carp has been expedited, and a special "Red Team" has been formed to assist the Corps' Chicago District with a potential recommendation. The Corps expects that the Assistant Secretary will receive a recommendation regarding the use of these new technologies in March. App. 10a.

Although the short-term measures currently being considered under the heading of modified structural operations do not involve an indefinite closure of the locks, the Corps intends to study permanent separation of the Great Lakes and Mississippi River watersheds as a long-term solution. That study involves considerably more issues and a correspondingly longer timeframe. See App. 4a-6a; Framework 23-24.

c. Another step, which Michigan requested in its previous motion, is already underway. On January 12, 2010, shortly after our previous filing, the Assistant Secretary invoked her authority

under Section 126 to authorize the construction of structural protections to prevent flooding from carrying Asian carp into the Chicago Sanitary & Ship Canal from the Des Plaines River or the Illinois & Michigan Canal. Framework 17; App. 2a, 5a.

d. The Framework includes more than 30 short- and long-term steps that federal agencies are undertaking to combat the spread of Asian carp. They include intensive efforts to monitor, confine, capture, and kill Asian carp in the waterway, using electrofishing, netting, eDNA sampling, side-scan sonar, and trained observation divers; scientific efforts to develop carp-specific poisons and "bio-bullets," attractant and repellent pheromones, and sonic or electrical means to disrupt carp reproduction; and further validation of the Coast Guard's already-in-place restrictions to prevent any possibility that Asian carp or carp eggs might be carried through vessels' ballast or bilge water. Framework 13-15, 17-20, 27. The Corps will also continue to operate the existing electric dispersal barriers, to complete Barrier IIB, and to verify the efficacy of their settings. Id. at 22, 27-28. And in addition to the focus on the CAWS above the fish barriers, several agencies will take other steps to reduce the threat to the Great Lakes, such as combating the risk of Asian carp minnows' entering the Lakes when used as bait; using commercial fishing to reduce the Asian carp population below the fish barriers; enforcing prohibitions on transporting injurious wildlife; and educating the public about the dangers Asian carp pose. Id. at 28-30.

2. Dr. David Lodge's laboratory at the University of Notre Dame continues to process eDNA samples from the CAWS. As explained in the government's letter of January 19, Mich. Renewed App. 1a, samples collected in December from two locations lakeward of the O'Brien Lock -- one in the Calumet River and one in Calumet Harbor -- tested positive for silver carp eDNA. Id. at 2a. Updates on the eDNA results are regularly made public on the website of the Corps' Chicago District, http://www.lrc.usace.army.mil. Since our last filing, samples from two other locations have tested positive: one location in the Chicago Sanitary & Ship Canal (silver carp) and one in the Grand Calumet River near the confluence with the Cal-Sag Channel (bighead and silver carp). See App. 25a (approximate locations yielding one or more positive samples); Environmental DNA Results as of February 11, 2010 (visited Feb. 25, 2010), http://www.lrc.usace.army.mil/pao/11Feb2010_eDNA_update.pdf (map reflecting number of sampling dates for each location); see also U.S. Prelim. Inj. Opp. 12-13, 15-16 (discussing locations of previous positive samples). Those results continue to be the basis for targeted netting and electrofishing operations like those described above. App. 69a.

Simultaneously, the Environmental Laboratory at the Corps' Engineer Research and Development Center (ERDC) is working with Dr. Lodge's laboratory to triple the processing rate of eDNA samples and to review the eDNA science to better understand how accurately the eDNA results correlate with the presence (or absence) of the target species. See App. 13a, 33a-35a. The Corps will also be

subjecting the eDNA technology to independent, external peer review. App. 13a-14a, 32a-33a.

ARGUMENT

Michigan has not shown that this case belongs in this Court; has not identified any statute or any recognized principle of federal common law that might ultimately entitle it to relief in any court; and has not demonstrated that it is entitled to a mandatory preliminary injunction even before this Court decides whether to take up the case at all. Michigan's first preliminary-injunction motion suffered from all of these deficiencies, and Michigan has cured none of them. Its renewed filing offers no new reason why this case belongs under the heading of long-closed water-diversion litigation in this Court; no cognizable dispute with the State of Illinois; no valid reason why it could not seek effective relief against the other parties from a federal district court; and nothing about the ultimate merits of the legal theory that purportedly entitles it to relief. Nor has any new evidence confirmed the presence of live Asian carp in the Chicago Area Waterway System above the fish barriers. Rather, Michigan's only new submissions present additional results from the ongoing eDNA testing and a belated attempt to dispute economic analysis in the defendants' previous briefs. But the weight to be given eDNA evidence and the economic impact of the proposed injunction were central to Michigan's previous brief, and this Court denied the extraordinary relief Michigan sought. The renewed motion should likewise be denied.

1. Likelihood of Success. Like its previous preliminary-injunction motion, Michigan's renewed motion fails first and foremost because Michigan has not shown that this Court is likely to take up this case or that, if it does, Michigan is likely to establish by the requisite clear and convincing evidence that it is entitled to the mandatory injunctive relief it seeks on the merits. In its renewed motion Michigan offers nothing new to bolster its chances of prevailing. On this ground alone, Michigan cannot show entitlement to the extraordinary preliminary injunction it once again seeks.

a. Michigan repeatedly attempts to minimize the importance of showing a likelihood of success. It discusses that factor last, and then only cursorily (Renewed Mot. 35-37; see also Mot. for Prelim. Inj. 21-23, 25-26). And tacitly acknowledging the inadequacy of its submission on this point, it twice suggests that it should be excused from having to make the ordinary showing. See Renewed Mot. 37 ("even a modest showing on the likelihood of success factor should be sufficient"); id. at 12 (seeking support from cases purportedly authorizing injunctive relief "where the case supporting the likelihood of success on the merits factor is not as strong").

That is not the law. "[A] party seeking a preliminary injunction must demonstrate, among other things, a likelihood of success on the merits." Munaf v. Geren, 128 S. Ct. 2207, 2219 (2008) (emphases added; citation omitted); accord, e.g., Winter v. NRDC, 129 S. Ct. 365, 374 (2008); Amoco Prod. Co. v. Village of

Gambell, 480 U.S. 531, 546 n.12 (1987). That showing is not optional, and it is not an afterthought: a party who seeks a court order before winning its case must show that it is, at least, likely to win.

Furthermore, if Michigan cannot show that it is likely to prevail, the strength of its showing on other prongs of the test is not relevant. Cf. Winter, 129 S. Ct. at 375-376 (even a strong showing of likely success cannot compensate for failure to show likely injury). Since Munaf and Winter, the courts of appeals have begun to recognize as much. See, e.g., The Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346-347 (4th Cir. 2009) (overruling circuit precedent permitting a more relaxed showing of injury in light of Winter), petition for cert. pending, No. 09-724 (filed Dec. 16, 2009); Davis v. PBGC, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., joined by Henderson, J., concurring) (explaining that "[i]n light of the Supreme Court's recent decisions," including Winter and Munaf, "a strong showing of irreparable harm * * * cannot make up for a failure to demonstrate a likelihood of success on the merits"); accord Reed v. Town of Gilbert, 587 F.3d 966, 973-974, 981 (9th Cir. 2009) (affirming denial of preliminary injunction based purely on failure to show likely success on the merits). Even petitioner's sole authority postdating Winter (Renewed Mot. 12 n.9; see also Mot. for Prelim. Inj. 7 n.13) requires "at least a fair chance of success on the merits." Qingdao Taifa Group Co. v. United States, 581 F.3d 1375, 1381 (Fed. Cir. 2009) (citation omitted); see also ibid. (noting that the

United States did not oppose the preliminary injunction in that case).

Finally, as the United States has previously explained and as Michigan does not dispute, the burden is higher in an action between sovereigns. To obtain an injunction in an original action in this Court directing the conduct of the State of Illinois or the United States, Michigan must establish the merits of its entitlement by clear and convincing evidence. U.S. Prelim. Inj. Opp. 22. Thus, to obtain the extraordinary remedy of a mandatory preliminary injunction before this Court has even granted leave to commence the action, Michigan must show both that this Court is likely to take up the case and that, if it does, Michigan is likely to establish a clear and convincing entitlement to relief. As we have already shown and further explain below, Michigan can make neither showing.

b. The United States explained in its previous filing why this dispute is not properly the subject of a motion to reopen the prior decree. Michigan offers no new justification in its current filing. The litigation that Michigan seeks to reopen pertained to how much total water the State of Illinois may remove from the Lake Michigan watershed (which mostly includes pumpage and runoff). U.S. Prelim. Inj. Opp. 19-20; Ill. Prelim. Inj. Opp. 17-21. The decree in that earlier water-diversion litigation does not encompass this dispute, which is altogether unrelated to the total quantity of water Illinois may divert from Lake Michigan. U.S. Prelim. Inj. Opp. 25-29. Indeed, the only relevant new matter in Michigan's latest filing makes this new dispute even more remote

from the water-diversion litigation: not only has Michigan disclaimed all along any request to enjoin diversions of water from the Lake, id. at 26-27, Michigan has now abandoned even its tangential request that the Court restrict the water levels in the CAWS. See Renewed Mot. 7. This dispute simply is not "proper in relation to the subject matter in controversy" in the water-diversion litigation, as the reopener clause in the prior decree requires. Wisconsin v. Illinois, 388 U.S. 426, 430 (1967) (emphasis added).[2]

Nor is this case properly the subject of a new original action in this Court, because Michigan could obtain complete relief in a trial court, with no need to invoke this Court's exclusive jurisdiction over a suit between States. Illinois simply is not a

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[2] Less than a week prior to this filing by the United States in response to Michigan's renewed request for a preliminary injunction, several party States and various amici filed briefs in support of Michigan's motion, or of the underlying motions to reopen the Court's prior decree or for leave to file a new bill of complaint. Those briefs advance various jurisdictional arguments, including several not made by Michigan. Amicus Shoreline Caucus devotes four paragraphs to the reopening issue, reading the word "proper" out of the decree and arguing that any dispute between the Great Lakes States that "has 'some relation' or 'connection' to the original actions" may be brought to this Court in a reopening motion. Shoreline Caucus Br. 19. As we have previously explained, the reopener clause in the Court's Decree does not commit this Court to serving as a court of first instance for the Great Lakes. U.S. Prelim. Inj. Opp. 27-29. Amici AGL et al. incorrectly assert (at 21 n.9) that the 1967 decree is implicated by any restriction on diversions by the Water District; in fact, the decree caps diversions by Illinois as a whole and does not specify diversions by the Water District.

We expect to address the amici's jurisdictional arguments more fully in our brief in opposition to Michigan's motion to reopen, which is due March 22, 2010.

necessary party to any ripe dispute. As we have pointed out, Michigan's prayer for relief focuses on actions within the control of federal agencies (chiefly the Corps) and in some instances the Water District. Only the Corps and the Water District operate locks, sluice gates, or the pumping station. U.S. Prelim. Inj. Opp. 32-33. The only basis Michigan advances for naming Illinois as a defendant is its assertion that only Illinois can take "active measures to capture, kill, or impede the movement of Asian carp" in waterways within Illinois, and that the State has not "announced * * * any [such] active measures." Renewed Mot. 21, 36-37. But Michigan has not even shown a ripe controversy on that score; as Illinois has explained, it is undertaking active measures, and Michigan does not specify what Illinois should be doing differently. See Ill. Renewed Prelim. Inj. Opp. 4-6, 16-17. This Court routinely denies leave to file bills of complaint when the complained-of conduct is not presenting or threatening any real or substantial injury. See, e.g., Mississippi v. City of Memphis, No. 139, Original (Jan. 25, 2010) (citing Colorado v. New Mexico, 459 U.S. 176, 187 n.13 (1982)). And in any event, Michigan and its amici (see note 2, supra) are wrong in their assertion (Renewed Mot. 37; AGL Br. 16-17 & n.6) that state law asserting title to fish makes Illinois the only possible actor: state law does not bind the federal government, and the Corps has broad, clear authority under Section 126 to take any necessary action to combat the carp. See U.S. January App. 3a; Ill. Renewed Prelim. Inj. Opp. 15-20.

Michigan's amici instead make a new argument: that, simply by naming Illinois, Michigan has become entitled to sue in this Court. E.g., Shoreline Caucus Br. 15-17; Indiana Br. 9. But this Court has denied a State's motion for leave to file an action against another State on a number of occasions. See, e.g., Arkansas v. Oklahoma, 546 U.S. 1166 (2006) (No. 133, Original); Arkansas v. Oklahoma, 488 U.S. 1000 (1989) (No. 115, Original); Louisiana v. Mississippi, 488 U.S. 990 (1988) (No. 114, Original); Pennsylvania v. Alabama, 472 U.S. 1015 (1985) (No. 101, Original); Pennsylvania v. Oklahoma, 465 U.S. 1097 (1984) (No. 98, Original). Michigan may sue in this Court only if no alternative forum exists, Mississippi v. Louisiana, 506 U.S. 73, 77 (1992), and then only if the other discretionary criteria for invoking this Court's original jurisdiction are satisfied.

The amici rely on the theory that Illinois is responsible for whatever the Water District does; that Michigan may therefore sue Illinois; and that naming Illinois defeats the jurisdiction of the alternative forum. Shoreline Caucus Br. 8-11, 15-16; AGL Br. 15-16. That argument misses the point. The question here, unlike in the cases on which amici rely, is not whether Illinois is responsible in a legal sense for the Water District's actions and, if not, is entitled to dismissal on the merits. See Missouri v. Illinois, 180 U.S. 208, 242 (1901) (overruling demurrer); accord Wisconsin v. Illinois, 289 U.S. 395, 399-400 (1933) (Illinois made "no objection * * * to [being joined] as a party defendant" but disputed its "legal liability * * * for the acts of the Sanitary District").

Rather, the question is whether Michigan can obtain the identical relief against the Water District in another forum. If it can, this Court will require it to go there. See U.S. Prelim. Inj. Opp. 31 & n.7 (citing cases).[3] In the earlier phase of the water-diversion litigation, there was no alternative forum, because the dispute -- whether Illinois was diverting an inequitably large quantity of water from Lake Michigan -- was quintessentially one between the States, not their instrumentalities. See, e.g., South Carolina v. North Carolina, No. 138, Original (Jan. 20, 2010), slip op. 17-18; id. at 4 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("An interest in water is an interest * * * properly pressed or defended by the State."). Here the federal district courts are open to hear a suit against the Corps and the Water District, as no one disputes.

As one amicus expressly states (Shoreline Caucus Br. 8), its argument would permit Michigan to sue Illinois in this Court and seek an order directing Illinois to direct the Water District to provide exactly the same relief that a district court could impose against the Water District directly. This Court has no obligation to entertain suits in the first instance when the State is named purely as an intermediary and the entity against whom relief is

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[3] The notion that this Court will deny leave to file only if there is already pending litigation in the alternative forum, Shoreline Caucus Br. 17; States' Br. 6-7, is wrong. See, e.g., California v. Texas, 457 U.S. 164, 168-169 (1982) (per curiam). Such a first-to-file rule would negate this Court's authority to manage not only its exclusive, but also its concurrent, original jurisdiction. See Illinois v. City of Milwaukee, 406 U.S. 91, 93-94, 108 (1972).

truly sought can be sued in an alternative forum that is better suited to trial-level litigation. Michigan cannot negate that alternative forum simply by naming Illinois as a defendant, when Michigan would not be able to obtain any greater or better relief with Illinois in the case than without it.

c. Even if Michigan could show at this stage that this Court will take up the case, Michigan cannot establish that it is likely to prevail on the ultimate merits of its claims -- i.e., that it will be able to make the clear and convincing showing necessary to obtain a permanent injunction ordering that the Illinois Waterway be "permanently and physically separate[d]" from Lake Michigan, Pet. for Supplemental Decree 29-30. As we explained in response to Michigan's first motion for a preliminary injunction, Michigan has not identified any source of law that compels the Corps (or any other federal agency) to take the steps Michigan demands or that permits a federal court to impose those steps on the United States, whose operation of the facilities for which it is responsible is governed by statutes authorizing the works and regulating their uses. U.S. Prelim. Inj. Opp. 36-43. Michigan makes no effort in its renewed motion to refute those points, and indeed does not address the issue at all.

Nor do Michigan's amici offer it any help. Amicus Shoreline Caucus devotes two paragraphs (at 20-21) to Illinois's purported public-trust obligations under state law, a theory on which Michigan does not rely. But amicus does not assert (nor could it) that state public-trust law regulates federal actions. Nor does it

explain why the active measures to combat the migration of Asian carp that are already in place or underway do not satisfy any such obligations. See Ill. Renewed Prelim. Inj. Opp. 2 n.2. Amici AGL et al. do not address the preliminary injunction; they simply assert (at 23) that this Court has jurisdiction and that Michigan's common law and APA claims "may be contested and determined upon a full hearing on the merits."[4] But as this Court unanimously held in Munaf, simply establishing jurisdiction is not enough for a preliminary injunction; "[i]ndeed, if all a 'likelihood of success on the merits' meant was that the [court of first instance] likely had jurisdiction, then preliminary injunctions would be the rule, not the exception." 128 S. Ct. at 2219. Even if amici were correct about this Court's likely exercise of jurisdiction, Michigan would still lack any persuasive showing as to the merits of its claims.

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[4] Amici AGL et al. acknowledge (at 21) that federal common law is displaced when it conflicts with a federal statute, and they do not address our explanation (U.S. Prelim. Inj. Opp. 39-42) of why federal common law does not provide a rule of decision here. They also erroneously assert (at 23) -- based on a statement taken out of context from the government's previous memorandum -- that the Corps has undertaken final agency action with respect to lock closures. But see U.S. Prelim. Inj. Opp. 21, 38. And they do not explain why such final agency action would be arbitrary and capricious or contrary to law. See id. at 39-41. Finally, they assert (at 23 n.10) that Michigan may sue now and wait for further APA actions to ripen later, suggesting that this Court extends plaintiffs in original actions the same liberal leave to amend complaints that the Federal Rules of Civil Procedure provide. That is not so. Nebraska v. Wyoming, 515 U.S. 1, 8 (1995) ("[T]he solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure does not suit cases within this Court's original jurisdiction.") (citations omitted); cf., e.g., South Carolina, slip op. 18 n.8.

2. Imminent Irreparable Injury. Michigan renews its contention that it can show an imminent and irreparable injury. But Michigan's allegation is, in substance, the same allegation it made two months ago -- i.e., that the results of eDNA testing by the Corps show the presence of Asian carp above the electric barriers, and that such evidence alone should suffice to establish an imminent risk that a breeding population of Asian carp will establish itself in Lake Michigan. As the Corps has explained, however, the novelty and limitations of the eDNA technology have led Corps officials, in consultation with the Corps' partners on the Asian Carp Regional Coordinating Committee, to deem the record insufficient, without more, to establish an imminent threat that would warrant recommending the drastic measures Michigan seeks under the governing statutory framework. The federal government continues to work diligently to validate the eDNA science, to track Asian carp by all possible means, and to implement solutions as soon as warranted by the numerous ongoing assessments. Showing "only * * * a 'possibility' of irreparable harm" is insufficient; Michigan must show "that irreparable injury is likely in the absence of an injunction." Winter, 129 S. Ct. at 375. Once again, Michigan has not met that burden.

a. Michigan's central contention, as before, is that the eDNA results compel the Corps to take the actions Michigan wants, immediately. As we have already explained, the eDNA results to date do not yet permit the agencies to conclude with the requisite confidence that live Asian carp are on the lake side of the

electric barriers, much less that they are present in numbers that present an imminent threat. U.S. Prelim. Inj. Opp. 45-47. That is not because of the number of positive samples or the locations above the barriers from which they were taken, but because of the nature of the science, which Dr. Lodge himself describes as "novel." U.S. January App. 113a, 118a; see App. 12a-14a, 33a. Those facts have not changed since Michigan filed its first motion. Using its own scientific experts, the Corps has undertaken to validate the eDNA science and, through peer review, to verify its efficacy in detecting the leading edge of the Asian carp. App. 13a, 32a-35a. That validation effort is expected to conclude in the near future. App. 13-14a. While the validation study is underway, the Corps and other federal agencies continue to treat Dr. Lodge's eDNA results as useful and have used them to target their efforts to combat the carp. See, e.g., U.S. January App. 142a-143a. Since the previous filings in this case, federal and state agencies have undertaken two separate four-day rounds of intensive searching for Asian carp in the CAWS above the electric fish barriers, using standard tools such as electrofishing and netting. These agencies used the eDNA results, as well as the known propensity of Asian carp to favor areas with warm water discharges in the winter months, to identify likely areas for search. They found no Asian carp. Furthermore, to evaluate the efficacy of those traditional tools under winter conditions, state officials used electrofishing on the Illinois River well below the electric fish barriers, in an area where Asian carp were known to

be. They were able to capture between 30 and 40 Asian carp using that technique. App. 69a-71a. The agencies intend to continue these monitoring efforts as temperatures rise and fish become more physically active. See Framework 14.

Michigan's renewed argument -- that despite these facts, the eDNA must be taken as proving the presence of live carp -- presents no new ground for a preliminary injunction. Indeed, it is based principally on evidence that the United States itself submitted to the Court in connection with the previous preliminary-injunction motion. Renewed Mot. 14-20. To be sure, the most recently reported results (see p. 7, supra) show the presence of Asian carp eDNA on the lake side of the O'Brien Lock, a development that the responsible federal and state agencies are taking seriously. But the points we previously explained remain true: eDNA remains novel science; even perfectly accurate eDNA results do not show the number of individuals that might be present; these eDNA results remain unverified by any definitive evidence showing the presence of live Asian carp above the fish barriers; and complete, immediate lock closure remains a drastic step.

Michigan also contends (Renewed Mot. 5, 15-16 & n.10) that the reliability of the eDNA science for these purposes has been established in an audit by the Environmental Protection Agency. That contention misunderstands the scope of the EPA's review, which focused on Dr. Lodge's laboratory practices and compliance with scientific protocols, not the efficacy of the technology for present purposes. The EPA's audit report states that it "did not

address interpretation of the eDNA results in regards to the presence or absence, proximity, or abundance of silver or bighead carp, the presumed source of eDNA." App. 12a-13a, 31a; see App. 30a-32a.

Moreover, as Dr. Lodge previously explained, the experts agree that positive eDNA results do not establish the number of silver or bighead carp that might be present or the likelihood that a reproducing population is imminent. Indeed, as Dr. Lodge explained, individual bighead carp have been caught in Lake Erie on a number of occasions, but there is no evidence that the species has established a reproducing population there, or that it could. U.S. January App. 128a-129a, 133a; see also App. 74a, 76a. Current scientific knowledge about the carp suggests that it is highly unlikely that the carp could successfully reproduce in the CAWS above the fish barriers, and there are potential obstacles to their reproduction even in Lake Michigan itself. App. 77a; see also App. 79a, 81a-83a. Thus, although Dr. Lodge concludes (and the government agrees) that if Asian carp have entered Lake Michigan, it is highly important to keep out additional fish to prevent a self-sustaining population from arising, U.S. January App. 133a; Mich. Renewed App. 2a; see App. 80a-82a, the eDNA results do not by themselves establish an imminent risk of such a self-sustaining population.

b. Michigan wrongly derides the intensive federal effort to combat Asian carp migration, and to prevent Michigan's asserted imminent injury, as "languid[]," "slow," "bureaucratic," and

ineffective. Renewed Mot. 4, 22. The Corps has already undertaken emergency measures pursuant to its Section 126 authority. See U.S. January App. 3a; App. 2a, 7a-8a. The Fish and Wildlife Service, along with its state counterpart, has been actively searching the CAWS above the electric fish barriers for signs of Asian carp. See pp. 3-4, supra. And as the Framework sets out in detail, the Corps and numerous partner agencies, federal and state, are preparing to undertake more actions. See pp. 2-5, supra.

Specifically, the Corps is assessing a potential short-term measure -- "modified structural operations" -- that includes various options involving regular closure of the locks for recurring periods, as well as modifications to other structures in the waterway system to impede Asian carp. See pp. 4-5, supra. During these periods of closure, partner agencies would take additional steps to capture or kill Asian carp that may be present during the closure. App. 9a. Such periods of closure, while not requiring a complete cessation of use of the locks, would nonetheless be a major step, and the Corps is expeditiously gathering the information necessary to determine how modified structural operations might best be conducted. App. 8a-11a. Contrary to Michigan's suggestion (Renewed Mot. 4) that nothing will happen until fall, the federal agencies expect to have a recommendation to the Assistant Secretary by early spring and, if the recommended steps are approved, to begin action this spring. App. 10a; see Framework at ES-3, 8-9.

The Corps is also evaluating, on an expedited basis, the placement of acoustic or bubble barriers near the Chicago and O'Brien locks and as a potential deterrent in the Little Calumet River. A special "Red Team" has been formed to assist in hastening this evaluation. The Corps intends to make a recommendation to the Assistant Secretary regarding the potential use of these barriers in March. App. 9a-10a. Although Michigan makes a passing reference to the installation of physical barriers in its prayers for relief (Renewed Mot. 6, 38), Michigan does not mention the Little Calumet River anywhere else in its renewed motion, nor does it address our previous explanation about the potential impact of a new physical barrier in that river on flood control and water quality. See U.S. January App. 31a-32a, 77a, 102a-103a.

3. Balance of Equities and Public Interest. In our previous submission, we explained that a complete closure of the locks would have consequences for flood control, public safety, and the economy: the locks are used to relieve flooding, to provide Coast Guard vessels with speedy passage between the lakefront and the CAWS, and to transport more than $1.7 billion in cargo annually. U.S. Prelim. Inj. Opp. 47-52; see also Ill. Prelim. Inj. Opp. 46-47 (fire and police departments' reliance on the locks); Ill. Renewed Prelim. Inj. Opp. 9-11 (same). In its renewed motion, Michigan effectively concedes (at 25, 27) that an indefinite closure would indeed have those consequences.

Instead, Michigan now responds that it does not mean for its proposed injunction to affect flood control or public safety and

that an injunction "can be fashioned" to address those concerns. That sentiment is commendable, but as we explain below, a vague amendment to the prayer for relief is not sufficient to guarantee that a preliminary injunction would not have those effects. All Michigan has done is to ask the Court to undertake for itself the question of deciding when, whether, and how the locks should be permitted to open in emergencies -- an extraordinary request in a case this Court has not even agreed to hear. See Ill. Renewed Prelim. Inj. Opp. 7-8. Moreover, Michigan does not deny that its requested relief would completely halt shipping between the Illinois Waterway and the Great Lakes -- and potentially even affect shipping within the waterway. Rather, it quibbles over quantifying the economic impact of such a decision, and it does so using models that disregard many of the costs the requested injunction would impose. As even Michigan's amicus Indiana agrees, those economic impacts are real, significant, and cannot be assumed away.

a. As we have explained, U.S. Prelim. Inj. Opp. 49, the Chicago and O'Brien Locks were not designed as fish barriers; they are not watertight, and small fish or fish eggs conceivably could penetrate even a permanently closed lock. Permanently closing the locks in a way that would actually prevent fish passage would require at least the installation of bulkheads (and potentially dewatering the locks as well). Those bulkheads would have to be emplaced or removed using cranes. Accordingly, a bulkheaded lock

would effectively be unusable for rapid response by the Coast Guard or by local police or fire boats. See App. 57a.

Indeed, for bulkheaded locks to be available for flood control purposes, a crane must constantly be available -- at a cost of $12,000 per day -- to remove the bulkheads under flood conditions that require the use of the lock. App. 54a. The Corps and the Water District take seriously the need to ensure that the locks are available to protect public safety. That is why, throughout a scheduled refurbishment of the Chicago Lock next year, the Corps intends to have the crane standing by on a floating barge to remove the bulkheads at any time the lock needs to be opened for flood control -- even though the refurbishment will take place during the winter, when flooding risks are lower, and will not affect the sluice gates, the primary flood-control tool. App. 53a-54a.[5]

Michigan also offers no response to the point that its proposed new structure on the Little Calumet River (which the

[5] The long-planned improvement of the Chicago Lock will close the lock between November 2010 and April 2011, as the Corps announced on January 20, 2010. App. 53a. Unlike Michigan's proposed injunction, the Chicago lock refurbishment will not affect the Chicago Controlling Works' sluice gates (which are the primary tool for flood-control and water-quality purposes), and will not affect the O'Brien Lock, which handles a steady stream of commercial traffic year-round. Ibid. Furthermore, the Chicago closure will take place during the winter season, when the Chicago Lock's traffic (which is mostly recreational and passenger boat traffic) is at a minimum and, as noted in the text, the risk of flooding is lower. App. 53a-54a. Moreover, the Chicago lock closure is being announced to navigation interests ten months in advance, see App. 53a, so that -- to the extent possible -- they can plan around the closure. And the temporary unavailability of the lock is necessary to make sure it is available in the future for public safety and other purposes. App. 11a-12a, 59a.

renewed motion mentions only in passing) would have serious flood-control consequences for the State of Indiana, which has filed its own brief expressing that concern. U.S. Prelim. Inj. Opp. 48-49; Indiana Br. 4-5.

b. Furthermore, even a temporary lock closure risks becoming permanent and irreversible if the locks are not either de-watered -- making them unusable for passage by rapid responders -- or allowed to operate to keep the machinery in regular motion. During the winter months, if the lock gates remained in the water without being operated, they would risk being permanently damaged by ice. U.S. January App. 93a-94a. We explained as much in our earlier submission, U.S. Prelim. Inj. Opp, 49, yet Michigan conspicuously does not say in its renewed motion whether its request for relief would permit the locks to cycle in order to keep them operational and usable for public safety. Instead, Michigan suggests (Renewed Mot. 27 n.15) that the Corps should develop some unspecified technological solution that prevents freezing but does not require moving the lock gates. Years of research on that question by the Corps' cold-weather research laboratory has not produced a fully effective device, App. 49a-50a, and Michigan's notion that one could be implemented instantaneously is fanciful.

c. Michigan seeks to explain away the consequences of a permanent lock closure for public safety by asserting that the Coast Guard (and local public-safety agencies) should operate facilities and maintain boats on both sides of the to-be-closed locks. The Coast Guard does not view that solution as a viable

one: dividing its Chicago-area assets, such that boats stationed on the river side are not quickly available to the lake side and vice versa, could leave both sides vulnerable to shortages. Michigan's proposed solution would require the Coast Guard to open a new station, using boats, personnel, and funds that it does not currently have. App. 60a-61a.

d. One consequence that Michigan does not dispute is that its injunction would completely end navigation between the Illinois Waterway and Calumet Harbor/Lake Michigan. Michigan's only answer is that the region -- indeed, anyone who ships, carries, receives, or ultimately purchases the $1.7 billion worth of freight that passes through the O'Brien Lock annually -- simply must bear the cost.

That assertion goes too far even for Michigan's own amicus Indiana. As Indiana explains (Br. 3-4), the continued use of the O'Brien Lock is "vital to the operations of the steel mills of northwest Indiana" and to "petroleum refining [and] re-refining, agricultural and building construction manufacturing businesses."

Michigan's belatedly proffered economic analysis, which seeks to minimize the economic impact of the proposed injunction, founders on its own assumptions. See generally App. 36a-47a. Michigan's expert, Dr. Taylor, acknowledges that there currently is no facility on the CAWS that would permit goods to be transferred from barges and loaded onto trucks or rail cars, but he simply "assume[s]" that one would be built, and instantaneously. Mich. Renewed App. 42a, 52a. In fact, because freight currently passes

through the locks in both directions, at least two trans-loading facilities would have to be built, one on each side of the locks, plus separate facilities for cement, which requires special barges and special handling. Even if suitable sites exist, that construction could not likely be done in less than a year. App. 43a-44a. In the absence of such a facility, shippers would be forced to do precisely what the Corps' model explained: to ship by some other means that does not involve transport through the CAWS at all. Dr. Taylor acknowledges that shipment by barge is cheaper than overland shipment, e.g., Mich. Renewed App. 43a; accordingly, his estimate, which assumes that the CAWS can still be used to ship goods to within 12.5 miles of their final destination, necessarily understates the impact of a complete lock closure.

Even if Dr. Taylor were correct that goods would need to be shifted to ground transportation for only 12.5 miles, he acknowledges that it would take 1,000 trucks per day to carry the amount of cargo that passes through the O'Brien lock. Mich. Renewed App. 47a. A thousand trucks lined up bumper to bumper would occupy ten solid miles of road. App. 45a. Adding a thousand trucks per day doing 25-mile round trips in a concentrated area served primarily by secondary roads, not multi-lane highways, would have a far greater effect than Dr. Taylor estimates. Ibid. That is because Taylor uses as the denominator of his estimate "the Chicago region," "Chicago," or the road "system" as a whole, Mich. Renewed App. 25a, 47a-48a, when in fact the premise of Dr. Taylor's analysis is that the traffic would be concentrated in a small area

within 12.5 miles of the hypothetical trans-loading facility. Id. at 42a. Thus, even if one indulged all of Dr. Taylor's assumptions, the impact of Michigan's injunction would be far more significant than he predicts. See also App. 45a-47a.

Finally, Dr. Taylor uses unrepresentatively low figures for both the cargo traffic through the locks and the cost savings associated with water transport. He uses figures from 2008 alone, a recession year with lower traffic; the Corps' estimate -- that closing the locks would increase shipping costs by $192 million a year -- used a 5-year average tonnage. See App. 40a. But even using Dr. Taylor's chosen year, the Corps' estimate is still more than twice as high as Dr. Taylor's ($167 million per year), because the Corps uses more precise cost data that better tracks the specific commodities that actually pass through the O'Brien lock, whereas Dr. Taylor relies on national averages. App. 41a-43a.

* * * * *

Michigan's renewed motion corrects none of the flaws of its first motion. Michigan had no valid argument for proceeding in this Court, and it has offered no new one. Michigan had no valid legal theory on which any federal court could mandate that the Corps take the action Michigan demands; it has offered no new one. Michigan had no evidence that irreparable injury was truly imminent; on that prong, the new eDNA findings do not add to the previous ones. Michigan had and has only a bare demand for an extraordinary, mandatory injunction -- an injunction that could threaten public safety and flood control, substantially affect the

regional and national economies, and greatly disrupt transportation systems (on both land and water) on which those economies rely. This Court should again reject Michigan's demand.

CONCLUSION

The renewed motion for a preliminary injunction should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

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