Nos. 1, 2 and 3, Original

IN THE
Supreme Court of the United States

STATE OF WISCONSIN, ET AL.,
Plaintiffs,
v.
STATE OF ILLINOIS, ET AL.,
Defendants.

STATE OF MICHIGAN,
Plaintiff,
v.
STATE OF ILLINOIS, ET AL.
Defendants.

STATE OF NEW YORK,
Plaintiffs,
v.
STATE OF ILLINOIS, ET AL.,
Defendants.

On Motions for Leave to
File or Reopen

Amicus Brief of Alliance for the Great Lakes, National Wildlife Federation, and Natural Resources Defense Council, Inc. in Support of Complainant States and Original Jurisdiction

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INTEREST OF AMICI[1]

Amici are organizations dedicated to the preservation of the Nation's natural resources, with protection of the Great Lakes a matter of preeminent importance. The Great Lakes are an environmental and economic treasure, holding 95 percent of America's fresh surface water, providing drinking water, jobs, and recreation to tens of millions of people, and harboring an incredible diversity of plants and wildlife, including bass, yellow perch, northern pike and lake sturgeon. Amici work closely with the States as sovereign trustees charged with safeguarding these waters for the public. Amici submit this brief to provide the Court with relevant information and analysis demonstrating that the sovereign interests here warrant the Court's attention under its original and exclusive jurisdiction.

The Alliance for the Great Lakes is a not-for-profit membership organization based in Chicago. The Alliance's mission is to conserve and restore the world's largest freshwater resource using policy, education and local efforts. The Alliance is working for ecological separation of the Great Lakes and the Mississippi watersheds to end the transfer of invasive species between them, and its work in this

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[1] Counsel of record for all parties received 10 days' written notice of amici's intent to file this brief and have consented thereto. No counsel for a party authored this brief in whole or part and no such counsel or party, nor any other person but amici, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

area has been recognized by the Great Lakes Fishery Commission and the International Joint Commission of Canada and the United States.

The National Wildlife Federation ("NWF") is a national, non-profit corporation working to protect the ecosystems that are most critical to native wildlife for future generations. NWF, which maintains its Great Lakes Regional Center in Ann Arbor, is deeply concerned about the economic and environmental costs of non-indigenous species in the Great Lakes, and supports state, federal, and private efforts to combat them.

Natural Resources Defense Council, Inc. is a national, not-for-profit membership organization staffed by scientists, lawyers and environmental specialists dedicated to protecting public health and the environment. Protection of the Great Lakes ecosystem is one of the primary objectives of its Midwest Office, based in Chicago.

SUMMARY OF ARGUMENT

The Court should grant the motions of the complainant States for leave to file, either in a new original action or a reopening of *Wisconsin v. Illinois*. The other Great Lakes States have come to the Court seeking redress against Illinois because its maintenance of a system of artificial canals ("the Waterway") poses an unparalleled threat to the Great Lakes environment, including destruction of the Lakes' fisheries and their suitability for boating. The gravity of this controversy easily satisfies the Court's high standard for exercising its original and exclusive jurisdiction in matters affecting the States'

sovereign dignity. The States' trusteeship over navigable waters, including their fisheries and navigation, is an inherent aspect of their sovereignty, long recognized by this Court and carefully guarded by the States themselves. That interest attains its highest level where the Great Lakes are concerned because of their regional, national, and continental importance. The unprecedented threat posed by Asian Carp strikes at the very heart of the complainant States' sovereign interests. Due respect for their sovereignty requires their cause to be heard by this Court, not an inferior tribunal.

The dignity of this dispute as one between States is not diminished by the roles of the Metropolitan Water Reclamation District of Greater Chicago ("District") and the U.S. Army Corps of Engineers ("Corps") in operating the sluice gates and locks on the Waterway. For more than a century, this Court has repeatedly ruled that Illinois "is the primary and responsible defendant" in suits to remedy grave interstate harms caused by the Waterway, notwithstanding the District's role in implementing the State's overall policy. Experience has shown that the District alone may not be able to carry out a decree and that the State is needed for complete relief. Illinois's choice to pursue its policy through an incorporated entity does not diminish the interstate nature of this controversy and should not deprive the complainant States of the dignity of an original action in this Court.

As in *Wisconsin*, the Corps is also properly joined and does not defeat the interstate character of the controversy. This Court is the only tribunal where

all three defendants can be joined in a single action, and the United States has waived its sovereign immunity to such suit in 5 U.S.C. § 702 (and, in addition, by intervening in *Wisconsin*). The complainant States have ripe causes of action against the Corps under federal common law, and also, for at least some Corps actions, under the Administrative Procedure Act ("APA"). To be sure, the precise scope of the States' claims may be contested and adjudicated upon a full hearing on the merits. But in view of the sovereign interests at stake, *this* Court should decide those merits issues in exercising its constitutional office of adjudicating original actions between States.

ARGUMENT

I. This Controversy Satisfies the Court's Rigorous Standards for Exercising Its Original and Exclusive Jurisdiction.

This controversy lies within the heartland of the Court's original and exclusive jurisdiction over disputes between States. The guiding principle of this original jurisdiction is an abiding "respect [for] state sovereignty." *South Carolina v. North Carolina*, __ U.S. __, 2010 WL 173370, at *7 (Jan. 20, 2010) (majority); *accord id.* at *13 (Roberts, C.J.) ("our original jurisdiction is limited to high claims affecting state sovereignty"). Accordingly, the paradigm for exercise of the Court's "original and exclusive jurisdiction [is] to resolve controversies between States that, if arising among independent nations, would be settled by treaty or by force." *Id.* at *7 (quotation marks omitted); *accord id.* at *13

(Roberts, C.J.) ("The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign") (quotation marks omitted); *North Dakota v. Minnesota*, 263 U.S. 365, 373 (1923) ("When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done.... [T]he alternative to force is a suit in this court") (quotation marks omitted).

The gravity of this controversy exceeds that high standard. *See* U.S. P.I. Opp. 31 n.6 ("'the seriousness and dignity of the claim' … factor is met here, because the protection of the Great Lakes from invasive aquatic species is an issue of great importance"). The State of Illinois, via the District, built and mandates the continued maintenance of the Waterway artificially connecting two great watersheds of this Nation – the Great Lakes and the Mississippi Valley – which otherwise would be separated. Illinois's breach of the natural barrier separating the two great watersheds poses an imminent threat of Asian Carp invading the Great Lakes. And while the destructive force of invasive species is now universally recognized, the magnitude of the devastation threatened by invasive Asian Carp is virtually unprecedented. Due to their size, voracity, and fecundity, Asian Carp threaten to destroy the existing fisheries throughout the Great Lakes that support a multi-*billion* dollar sport fishing industry; severely damage the entire Great Lakes ecosystem; and seriously interfere with

boating on the Lakes. Even Defendants admit that "prevention of an inter-basin transfer of [these] carp from the Illinois River to Lake Michigan is paramount in avoiding ecological and economic disaster." Mich. Pet. App. 51a (statement by Corps); *see also*, *e.g.*, *id.* at 45a (statement of Illinois Department of Natural Resources).

Conduct by one State threatening serious harm to the natural resources of other States implicates the kind of sovereign interests that the Court's exclusive original jurisdiction exists to vindicate. Such disputes are resolved under the law of interstate "nuisances," but that name belies the gravity of the sovereign interests involved rising to "*casus belli*." Two of the seminal cases addressed Illinois's maintenance of the Waterway itself. As the Court explained in *Missouri v. Illinois*, 200 U.S. 496 (1906), "a nuisance might be created by a state upon a navigable river like the Danube, which would amount to a casus belli for a state lower down, unless removed. If such a nuisance were created by a state upon the Mississippi, the controversy would be resolved by the more peaceful means of a suit in this court." *Id.* at 520-21. And in *Wisconsin v. Illinois*, 278 U.S. 367 (1929), the Court adopted the findings of special master Charles Evans Hughes and enjoined Illinois's diversion from Lake Michigan through the Waterway because of the harms imposed on other Great Lakes States, including "damage … to navigation and commercial interests, to structures, to the convenience of summer resorts, to fishing and hunting grounds, to public parks and other enterprises, and to riparian property generally." *Id.*

at 408; *see also*, *e.g.*, *New York v. New Jersey*, 256 U.S. 296 (1921); *North Dakota*, 263 U.S. 365.

Invasive Asian Carp pose a threat similar in kind – but much greater in degree – than those at issue in these prior cases. As Defendants have acknowledged, Asian Carp threaten the devastation of the Great Lakes ecosystem, particularly their commercially valuable sport fisheries, and substantially menace recreational navigation. That implicates the complainant States' core sovereign interests as much as or more so than diverting the Great Lakes' waters or flushing sewage downstream.

The States' sovereign interests as public trustees in this arena have long been recognized. In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997), the Court recounted that "navigable waters uniquely implicate sovereign interests," citing "ancient doctrines" going back to the Institutes of Justinian ("'the right of fishing in a port, or in rivers are in common'"); Bracton ("'[a]ll rivers and ports are public, so that the right to fish therein is common to all persons'"); Magna Carta (regulating placement of "'fish weirs'"); and English common law (ownership of soil of sea "'is held subject to the public right, *jus publicum*, of navigation and fishing'") (quoting *Shively v. Bowlby*, 152 U.S. 1, 13 (1894)). In this country, this ancient aspect of sovereignty has been extended to the navigable waters of the Great Lakes, which each State holds "in trust for the people of the state, that they may enjoy the navigation of the waters … and have liberty of fishing therein." *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The Great Lakes States have jealously

guarded their core sovereign interests as trustees of the public's rights to fish and boat in such waters. *E.g.*, *Collins v. Gerhardt*, 211 N.W. 115, 118 (Mich. 1926) ("the state of Michigan acquired title to all of the beds of its navigable waters in perpetual trust for the preservation of the public right of navigation, fishing, etc."); *State v. Longyear Holding Co.*, 29 N.W.2d 657, 669 (Minn. 1947) ("at the time Minnesota was admitted to statehood it held absolute title, both sovereign and proprietary, to all the beds of navigable waters … in trust for the people of the state, primarily that they might enjoy navigation of the waters … and have the liberty of fishing in them"); *Smith v. City of Rochester*, 92 N.Y. 463, 1883 WL 12612, at *9 (1883) ("the rights and interests of the public, such as fishing, ferrying and transportation, are preserved in all navigable waters by the inherent and inalienable attributes of the sovereign"); *Sloan v. Biemiller*, 34 Ohio St. 492, 514 (1878) ("fishery in such waters as Lake Erie and its bays should be as free and common as upon tide waters, and alike subject to control by public authority"). The States' sovereign role *requires* the exercise of their dominion to safeguard these waters as trustees of the public interest. *Glass v. Goeckel*, 703 N.W.2d 58, 64-65 (Mich. 2005) ("The state serves, in effect, as the trustee of public rights in the Great Lakes.… The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources").[2]

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[2] These state sovereign interests extend with full force to sport fishing and recreational boating. Recreational fishing and navigation have enormous commercial significance for the

The sovereign interests in fisheries and navigation are also well recognized internationally and are the frequent subject of treaties, international court cases, and hostilities. *E.g.*, United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261 (sovereign navigation and fishery rights); *Fisheries Jurisdiction Case (Spain v. Can.)*, 1998 I.C.J. 432 (Dec. 4); *Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, 1991 I.C.J. 12 (July 29); United Nations Economic & Social Council, *The Agreement on High Seas Fishing: An Update* (Feb. 1997) (describing Cod Wars).

The States' interests here are magnified by the unique and irreplaceable character of the Great Lakes, which are the defining geographical aspect of an entire region of the Nation and adjoining parts of Canada, spanning 750 miles across the boundaries of eight States and Ontario and containing twenty percent of the world's fresh water. The Court has repeatedly recognized the unique importance of the

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Great Lakes States and are defining features of this region's way of life. Hence, these States have long recognized that their sovereign interests extend to recreational fishing and boating. *E.g.*, *Lamprey v. Metcalf*, 53 N.W. 1139, 1144 (Minn. 1893) ("so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule"); *City of Milwaukee v. State*, 214 N.W. 820, 829 (Wis. 1927) ("The term, when applied to the vast majority of our inland lakes, imports the use of such lakes for recreation, hunting, fishing, and swimming …"); *Glass*, 703 N.W.2d at 64 (identifying "fishing, hunting, and boating for commerce or pleasure" as public rights in the Great Lakes that Michigan must "preserve").

Great Lakes as "inland seas." *E.g.*, *Moore v. Am. Transp. Co.*, 65 U.S. (24 How.) 1, 38 (1861) ("These lakes are usually designated by public men and jurists … as great inland waters, inland seas, or great lakes.… The waters of these lakes, in the aggregate, exceed those of the Baltic, the Caspian, or the Black sea, and approach in magnitude those of the Mediterranean. They exceed those of the Red sea, the North sea or German ocean …"); *Ill. Cent.*, 146 U.S. at 435 ("These lakes possess all the general characteristics of open seas"); *United States v. Rodgers*, 150 U.S. 249, 256 (1893) ("The Great Lakes possess every essential characteristic of seas"); *City of Milwaukee v. State*, 214 N.W. 820, 829 (Wis. 1927) ("the chain of Great Lakes … form[s] practically one great inland sea"). The unique significance of the Great Lakes is further reflected in numerous international agreements between the United States and Canada, including treaties to protect the Great Lakes fisheries, *see* Convention on Great Lakes Fisheries Between the United States and Canada, Sept. 10, 1954, 6 U.S.T. 2836, T.I.A.S. 3326, and to safeguard navigation, water levels, and water purity, *see* Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448, T.S. 548.

Given the sovereign interests at issue, this Court is properly called upon to exercise its original jurisdiction. Such adjudication may require creation of a factual record with the assistance of a special master, but that has never hindered the Court's exercise of its *exclusive* jurisdiction over interstate

disputes of this character. The Court only recently observed that exercising original jurisdiction over an equitable apportionment suit requires intensive consideration of numerous facts, but did not refuse the case on that ground. *South Carolina*, at *8-*10 (noting "difficulty of our task" and need to consider "all relevant factors" in the "exercise of an informed judgment") (quotation marks omitted). Factual complexity is grounds for declining original jurisdiction only where that jurisdiction is not exclusive because it does not have the dignity of a suit between two or more sovereign States, such as when a State sues an out-of-state corporation, *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971), or sues an out-of-state municipality that is not acting as the instrumentality of another State, *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Here, all the other Great Lakes States (and Ontario) are asking the Court to vindicate their sovereign interests in the Great Lakes from an imminent and severe threat of destruction engendered by their sister State Illinois.[3] Due respect for the complainant States' sovereignty requires the Court's exercise of original jurisdiction.

[3] At the time this brief was prepared, Indiana had not yet filed, but had publicly stated its intent to file an amicus brief supporting the complainant States' invocation of original jurisdiction.

II. The Roles of the District and the Corps Do Not Remove This Controversy from the Court's Exclusive Original Jurisdiction over Disputes Between States.

A. The Court Has Repeatedly Held Illinois Legally Responsible for Interstate Harms Caused by the Waterway, Notwithstanding the District's Incorporation.

The District and the Corps are named as parties here because they have direct responsibility for operating the sluice gates and locks on the Waterway. But that does not alter the nature of the suit as one brought by several States against Illinois. *See South Carolina*, at *5 (joinder or intervention of non-state parties does not remove case from Court's exclusive jurisdiction over suits between States). The action would lose its interstate character only if Illinois were improperly joined or were not a necessary party. But that is not the case. As the Court has recognized for more than a century, despite the District's separate incorporation, it acts in this arena as the instrumentality of the State of Illinois, which remains legally responsible for serious interstate nuisances resulting from the Waterway.

When Missouri brought an original action against Illinois and the District in 1900 to stop sewage from being sent through the Waterway, Illinois asserted – exactly as it does here – that because "the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a corporation of the state of Illinois, it therefore follows that the state, as such, is not

interested in the question, and is improperly made a party." *Missouri v. Illinois*, 180 U.S. 208, 242 (1901).[4] But the Court rejected that argument because "the corporation [*i.e.*, District] is an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended." *Id.* Similarly, in *Wisconsin v. Illinois*, 289 U.S. 395 (1933), Illinois again contested "the 'legal liability of the State of Illinois for the acts of the Sanitary District'" and argued "that this [C]ourt 'should not now assume the existence of a legal liability on the part of the State'" for harms occasioned by the Waterway. *Id.* at 399-400. Again the Court, through Chief Justice Hughes, rejected the argument as "untenable":

> In this controversy between states, the state of Illinois by virtue of its status and authority as a state is *the primary and responsible defendant*. While the sanitary district is the immediate instrumentality of the wrong found to have been committed against the complainant states …, that instrumentality was created and has continuously been maintained by the state of Illinois. Every act of the sanitary district in establishing and continuing the diversion has derived its authority and sanction from the action of the state, and is *directly chargeable to the state*.

Id. at 400 (emphasis added); *see also id.* at 401-02 ("the canal project from its first initiation has been

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[4] The District was formerly known as the Sanitary District of Chicago and that name is used in earlier cases.

promoted by the state of Illinois to provide a waterway for general state purposes and the advantage of the people of the state at large," and the Court's "decree in terms bound the state of Illinois, no less than its creature, the sanitary district"). Significantly, the State's indispensability as a party was confirmed when the District was unable to carry out the acts necessary to end the diversion from Lake Michigan, necessitating the Court to order the State itself to take the required steps. *Id.* at 399, 410-11.

The District's status as an "instrumentality" distinguishes it from ordinary municipalities which, though they might be acting within the confines of state law, are independently pursuing their own parochial ends rather than implementing state policies. In *Illinois v. Milwaukee*, for example, Illinois sought to prosecute an original action against several Wisconsin cities, but chose not to name the State of Wisconsin as a defendant. The Court reaffirmed its decisions leaving "no doubt that the actions of public entities might, under appropriate pleadings, be attributed to a State so as to warrant a joinder of the State as party defendant" within the Court's exclusive jurisdiction. 406 U.S. at 94. In the case before it, however, Wisconsin was merely a permissible party, not a necessary one, no doubt because the cities were pursuing their own policies rather than the State's – a circumstance reflected in Illinois's decision not to name Wisconsin as a defendant. *See id.* at 97 ("Wisconsin *could* be joined as a defendant in the present controversy, [but] it is *not mandatory* that it be made one") (emphasis

added). The suit was thus deemed to be against the cities alone, and therefore properly heard in district court. *Id.* at 98. But that did not alter the rule from *Missouri* and *Wisconsin* that in cases where incorporated entities serve as instrumentalities of State policies, the suit is one between States within the Court's *exclusive* original jurisdiction, with joinder of the incorporated instrumentality as an additional defendant. *See New Jersey v. New York*, 345 U.S. 365, 375 (1953) (per curiam) (observing with approval that "New York City … was forcibly joined as a defendant to the original action [against New York State] since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey"); *South Carolina*, at *6 (reaffirming *New Jersey* intervention rule and observing that there "the State of New Jersey sued the State of New York and city of New York for their diversion of the Delaware River's headwaters").

In light of the square holdings of *Missouri* and *Wisconsin*, Illinois cannot argue that it is not "the primary and responsible defendant" to which the District's acts are "directly chargeable," *Wisconsin*, 289 U.S. at 400.[5] In their preliminary injunction oppositions, defendants do not even try to distinguish those holdings, other than to weakly note that the earlier harms were different from the specific threat here. But differences in the varieties of grave harms caused by the Waterway have no

[5] Indeed, the matter would appear to be *res judicata* under principles of issue preclusion.

bearing on whether Illinois is legally "responsible" for such harms when they affront the sovereign interests of other States.

Even if the question were open to relitigation, the Court was correct in 1901 and again in 1933 (and in its continuing oversight of the *Wisconsin* decree today) in holding Illinois legally responsible here. Illinois law mandates and constrains the range of actions the District may take with respect to the Waterway. In 1889, the Illinois Legislature adopted a joint resolution establishing "'the policy of the State of Illinois to procure the construction of a water-way of the greatest practicable depth and usefulness for navigation from Lake Michigan via the Des Plaines and Illinois rivers, to the Mississippi River.'" *Wisconsin*, 289 U.S. at 401 (quoting Illinois Laws 1889). That same year the Legislature enacted statutes, which are still in force, regulating numerous aspects of the Waterway, including that it must be operated for sanitary, drainage, and navigation purposes. 70 ILCS 2605/23, 2605/24. Illinois has thus chosen to pursue a State policy, through the District, of keeping the Waterway open – thereby allowing invasive species like the Asian Carp to enter and devastate the Great Lakes from the Mississippi.

Further, as was true in 1933, joinder of the State is almost certainly required for complete relief. The District already contends that its limited powers under Illinois law do not allow it to provide some of relief sought by the complainant States. Dist. P.I.

Opp. 31 & n.21.[6] The State itself, through agencies like the Department of Natural Resources, has responsibility for necessary actions such as fish poisonings. *Id.* at 32. And just as construction of a sewage treatment plant was needed to abate the nuisance in 1933, new infrastructure may be required to finally remedy this new threat engendered by the Waterway. The District alone could not perform the earlier decree in 1933, and is equally unlikely to be able to perform a new or modified decree without the State's participation now.

As this Court has repeatedly recognized, the rights of the complainant States may not be defeated merely because Illinois has chosen to pursue its policy through an incorporated entity. The dignity of the complainant States and the gravity of the sovereign interests threatened by Illinois and the District deserve adjudication by this Court. Indeed, "[e]xclusive jurisdiction was given to this [C]ourt, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal." *South Carolina*, at *7 (quotation marks omitted); *see also The Federalist No. 81*, at 487 (Hamilton) (Clinton Rossiter ed., 2003) ("In cases in which a State might … be a party, it would ill suit its dignity to be turned over to an inferior tribunal").

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[6] The District disclaims the power to provide some of the relief sought because the matter is allegedly under the control of the Corps. In other instances, however, it disclaims responsibility and the power to act under Illinois law. *Id.*

B. The Corps Is Properly Joined As Party.

The Corps is also properly named as a party. As shown above, this original action is properly instituted against Illinois. And as *Wisconsin* and many other cases show, such a suit falls within the Court's *exclusive* jurisdiction over controversies between States, even when the United States is also a party. Here, the defendants' responsibilities in operating the Waterway are intimately intertwined, *see*, *e.g.*, Dist. P.I. Opp. 5-9, such that separate suits against any of them would be a plainly inadequate remedy. To take just one example, the Corps operates the locks between the Chicago River and Lake Michigan in downtown Chicago, while the District (for whose conduct the State is legally responsible) operates the sluice gates at the same location. *Id.* at 6. As this Court is the only tribunal in which all three defendants can be named in a single suit, original jurisdiction over all defendants is appropriate.

Of course, unlike States, the United States cannot be joined in an original action unless it has waived its sovereign immunity. *Arizona v. California*, 298 U.S. 558, 568 (1936). But there can be no dispute that the United States *has* consented to suit by waiving its immunity for *all* actions seeking non-monetary equitable relief against United States officers or agencies. 5 U.S.C. § 702 ("An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be

denied on the ground that it is against the United States or that the United States is an indispensable party") (emphasis added). That waiver necessarily extends to original actions in this Court. *See California v. Arizona*, 440 U.S. 59, 65-66 (1979) (quiet title waiver applies to original actions).[7]

The United States appears to suggest that consent under § 702 extends only to suits asserting causes of action under the APA. *See* U.S. P.I. Opp. 37 & n.9. That is incorrect. Although this Court has not directly addressed the issue, the Courts of Appeals that have done so have all concluded that the plain language of § 702 waives sovereign immunity for *any* cause of action seeking equitable relief against federal officers or agencies, not just claims arising under the APA. *E.g.*, *Trudeau v. FTC*, 456 F.3d 178, 186-187 (D.C. Cir. 2006) ("There is nothing in the language of the second sentence of § 702 that restricts its waiver to suits brought under the APA"); *see also* S. Rep. No. 94-996, at 8 (1976) ("the time has now come to eliminate the sovereign immunity defense in *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity") (emphasis added).[8] Accordingly, the waiver applies to equitable suits regardless of whether the "final agency action" requirement for

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[7] The operative language of § 702 was enacted in 1972, thereby superseding earlier original jurisdiction decisions requiring a separate waiver from the United States for each such action.

[8] The Second Circuit initially took a narrower view of § 702, but reversed itself in a decision by Judge Friendly. *BK Instruments, Inc. v. United States*, 715 F.2d 713, 723-25 (2d Cir. 1983).

APA review is satisfied, or regardless of whether review is sought under the APA at all. *Trudeau*, 456 F.3d at 187 ("the waiver applies regardless of whether the [agency conduct] constitutes 'final agency action'").

Although § 702 disposes of the issue, it is worth noting that the United States also waived its immunity by voluntarily intervening in *Wisconsin v. Illinois*. In its Motion to Intervene in that action, the United States identified a wide range of interests it sought to vindicate by participating as a party, not limited to maintaining the water levels of the Great Lakes, but extending to all aspects of "[p]romoting the general welfare of all the United States in the utilization of the Great Lakes-St. Lawrence system as one of the great natural resources of the Nation." Mem. in Support of Mot. of the United States for Leave to Intervene, at 5, *Wisconsin v. Illinois*, Nos. 2, 3, 4 and 12 Original (filed Dec. 1959); *see also id.* at 8-9 ("Apart from the specific interests referred to above, the utilization of the Great Lakes as one of the great assets of the nation is of prime importance. Whatever may be the powers and rights of the individual states in these interstate waters, the people of the United States as a whole have a vital interest in the use of the Lakes and their maintenance as part of the essential geographic structure of the country"). The United States has thereby taken the position that the widest range of considerations affecting the Great Lakes – not just water levels – should be accounted for when entering a decree based on operation of the Waterway. The current controversy arises out of the same subject

matter, and the Court plainly has the discretion (even if not the obligation) to proceed here by reopening *Wisconsin*, where the United States is already a party.[9] In light of the waiver in § 702, however, sovereign immunity is no obstacle to joining all defendants in a new original action as an alternative to reopening.

Turning to the merits, the complainant States have causes of action against the United States (as against Illinois and the District) sounding in federal common law. "These rules are as fully 'laws' of the United States as if they had been enacted by Congress." *Illinois v. Milwaukee*, 406 U.S. at 99. The United States incorrectly asserts that "Federal courts do not apply even already-recognized principles of federal common law *once Congress legislates in the area*." U.S. P.I. Opp. 41 (emphasis added). The Court has repeatedly rejected that view, holding instead that federal common law is displaced only if legislation *directly conflicts* with it. In *Wisconsin*, for example, Illinois argued that the common law had been superseded by congressional legislation concerning the Waterway, but after

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[9] As the relief sought by the complainant States targets operation of the locks and sluice gates by which water enters the Waterway from Lake Michigan, complete relief here may in fact require a modification of the *Wisconsin* decree. Indeed, the District asserts that if it "is prohibited from opening its sluice gates…, it will be unable to take water from the Lake," contrary to the *Wisconsin* decree. District P.I. Opp. 24. Given the United States' long-held position that all interests in the Great Lakes should be considered in any revision of the *Wisconsin* decree, reopening that matter may well be the most appropriate course of proceeding.

reviewing the statutes, the Court found no displacement because "nothing has been determined or enacted [by Congress] in any way *conflicting* with the terms of the decree." 289 U.S. at 403 (emphasis added). Similarly, in *Illinois v. Milwaukee*, the Court observed that Congress had extensively legislated in the area of water pollution, but nonetheless held that common law remedies remained intact because "the remedies which Congress provides are not necessarily the only federal remedies available." 406 U.S. at 103. The case cited by the United States, *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 n.8 (1981), is not to the contrary. As the Court only recently explained, that case is consistent with the rule that "to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law" – not merely legislate in the area, as the United States would have it. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 & n.7 (2008) (finding no abrogation, despite extensive legislation, in the absence of a "clear indication of congressional intent to occupy the entire field") (quotation marks omitted). In light of the sovereign bases for the complainant States' claims sounding in the equal footing doctrine, the common law could be supplanted here, if at all, only by the clearest statement from Congress.

In addition to common law claims, the complainant States have also asserted claims under the APA. The United States paints with too broad a brush when it says there is no reviewable agency action under the APA here merely because solutions

are still being considered; for some specific decisions may well be final and reviewable. Most significantly, the Corps has decided not to "order an immediate closure of the locks." U.S. P.I. Opp. 14. Contrary to the United States' position, this action should not be understood as an unreviewable "failure to act," but instead as a reviewable "denial" of an "order" immediately closing the locks. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) ("A 'failure to act' is not the same thing as a 'denial.' The latter is the agency's act of saying no to a request…").[10]

To be sure, the exact effect (if any) of federal statutes on the States' common law claims, and the precise Corps actions that are subject to review under the APA, may be contested and determined upon a full hearing on the merits. But the complainant States have made a powerful case for *this Court* – not some inferior tribunal – to decide those merits issues. In light of the State sovereign interests involved, the Court should exercise its original and exclusive jurisdiction over disputes between States in this matter.

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[10] Additional Corps actions will become final as the case progresses. Because the complainant States' common law claims (and some APA claims) are presently ripe, they are entitled to bring suit against the Corps now. If further Corps actions subsequently become final, APA claims for review of such actions may be brought into the case by supplemental complaint. *See* Fed. R. Civ. P. 15(d); Sup. Ct. R. 17.2 ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed" in original actions).

CONCLUSION

The complainant States' motions to reopen or for leave to file should be granted.

Respectfully submitted,

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