No. _____

In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO, RESPONDENTS

AND CITY OF CHICAGO, ET AL., INTERVENORS-RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This multi-sovereign dispute involves the imminent invasion of Asian carp into the Great Lakes ecosystem. Although the Seventh Circuit Court of Appeals concluded that catastrophic harm has a "good" or "perhaps even a substantial" likelihood of occurring, Pet. App. 4a–5a, it affirmed the district court's denial of even the plaintiffs' most modest requests for injunctive relief. The Seventh Circuit's opinion raises two questions for this Court's review:

1. Whether a request for multiple types of preliminary-injunctive relief requires a balancing of harms with respect to each form of relief requested.

2. Whether a party's statement that it is "considering" implementing the relief requested in a motion for injunction is a ground for denying the injunction.

PARTIES TO THE PROCEEDING

Petitioners are the States of Michigan, Wisconsin, Minnesota, and Ohio, and the Commonwealth of Pennsylvania (States). Respondents are the United States Army Corps of Engineers (Corps) and the Metropolitan Water Reclamation District of Greater Chicago (District). Intervenors are Grand Traverse Band of Ottawa and Chippewa Indians for the Petitioners, and the City of Chicago, Wendella Sightseeing Company, and Coalition to Save our Waterways for the Respondents.

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JURISDICTION

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 702 of the Administrative Procedure Act, Pub. L. No. 94-574, § 702, 90 Stat. 2721, 2721 (codified at 5 U.S.C. § 702), states:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 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.

INTRODUCTION

It has been seven years since the U.S. Fish and Wildlife Service concluded that "Asian Carp pose the greatest immediate threat to the Great Lakes ecosystem." Pet. App. 80a n.7. Yet the United States Army Corps of Engineers (Corps) and the Metropolitan Water Reclamation District of Greater Chicago (District) have moved slowly to cut off the passageways that link the Great Lakes and the carp's Mississippi-basin home, rejecting even the suggestion that the Corps expedite completion of a five-year study to formulate a permanent solution to the Asian carp crisis. By the time the Corps finishes its investigation, the catastrophic harm that the Seventh Circuit acknowledged has a "good" or "perhaps even a substantial" likelihood of occurring, Pet. App. 4a–5a, will almost assuredly have already come to pass.

In the district court, the States sought a preliminary injunction requiring acceleration of the Corps' study and a menu of interim measures to physically block the movement of Asian carp from the Mississippi River basin into the Great Lakes while the Corps completed the study necessary to develop a permanent remedy. For different reasons, the district court and the Seventh Circuit rejected all of the States' requests for relief. But the States respectfully submit that the Seventh Circuit's legal analysis missed the mark with respect to the two narrowest and least intrusive requests for preliminary relief: (1) installation of block nets in the Little Calumet and Grand Calumet Rivers, and (2) acceleration of the feasibility study.

The Seventh Circuit viewed the block nets as "potentially the most effective element of the proposed relief" aimed at stopping the carp's migration. Pet. App. 55a. The court also acknowledged that the Corps has received criticism for taking too long to conduct the five-year study, including from Corps' ally the City of Chicago. Pet. App. 57a. But as explained below, the Seventh Circuit erred in analyzing the appropriateness of granting both of these limited requests for relief. Accordingly, the States respectfully request that the Court grant the Petition, reverse, and remand for entry of a district-court order that compels the Corps to install the block nets and accelerate the feasibility study that is already underway.

STATEMENT OF THE CASE

1. In the late 19th century, engineering projects established an artificial connection between Lake Michigan and the Mississippi watershed. Pet. App. 2a. The principal purpose of this connection, now known as the Chicago Area Waterway System (CAWS), was to reverse the flow of the Chicago River for purposes of managing Chicago's sewage. Pet. App. 2a. At the turn of and well into the 20th century, the CAWS spawned litigation resulting in multiple decisions from this Court.[1]

2. The present litigation involves "the threat posed by the invasive species of carp that have come to

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[1] *Missouri* v. *Illinois*, 180 U.S. 208 (1901); *Missouri* v. *Illinois*, 200 U.S. 496 (1906); *Sanitary Dist. of Chicago* v. *United States*, 266 U.S. 405 (1925); *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929); *Wisconsin* v. *Illinois*, 388 U.S. 426 (1967); *Wisconsin* v. *Illinois*, 449 U.S. 48 (1980).

dominate parts of the Mississippi River basin and now stand at the border of one of the most precious freshwater ecosystems in the world." Pet. App. 70a. As the Seventh Circuit described them, these "carp are voracious eaters that consume small organisms on which the entire food chain relies; they crowd out native species as they enter new environments; they reproduce at a high rate; they travel quickly and adapt readily; and they have a dangerous habit of jumping out of the water and harming people and property." Pet. App. 3a.

3. Use of the term "Asian carp" in this litigation includes two types of fish: bighead carp and silver carp. The U.S. Fish and Wildlife Service has designated Asian carp an injurious species, 50 C.F.R. § 16.13(a)(2)(v), with "rapid range expansion and population increase" that can eliminate native habitats and aquatic species.[2] The Corp concedes that the "prevention of an interbasin transfer of bighead and silver carp from the Illinois River to Lake Michigan is paramount in avoiding ecological and economic disaster." Pet. App. 80a n.6.

4. Asian carp pose a dire threat to the Great Lakes' ecosystem, commercial and sport-fishing industries, and tourism, charter-boat, and aquatic-recreation industries. Bighead carp grow to be 110 pounds, and silver carp jump so high—and with such force—that they can knock down humans, cause bruising, and even break bones, as illustrated by

[2] U.S. Fish & Wildlife Service, Asian Carp—An Aquatic Nuisance Species (March 2004).

numerous disturbing videos that have been posted on the Internet by various news organizations.[3]

5. The speed with which Asian carp have moved north is more than alarming. As the Seventh Circuit observed, it "is hard to see 60 miles of separation between the carp invasion front and the Great Lakes (and remember that this was the estimated distance more than two years ago) as a particularly safe margin, even with functioning electric barriers to deter fish and efforts to reduce" the volume of carp downstream. Pet. App. 39a. "It is especially chilling to recall that in just 40 years the fish have migrated all the way from the lower Mississippi River to within striking distance of the lakes and have come to dominate the ecosystem in the process." Pet. App. 39a–40a. To appreciate the scope of this invasion, consider that commercial harvesting of carp in the Mississippi basin was just over five tons in 1994. Pet. App. 40a. "[A]s of 2007, commercial fishers were catching 12 tons of invasive carp *each day*." Pet. App. 40a.

6. Both of the lower courts acknowledged that the carp are already present in the CAWS in "low numbers." Pet. App. 37a. And the newest publicly available evidence suggests that the carp "are unlikely to have trouble establishing themselves in the Great Lakes." Pet. App. 37a. In sum, as the Seventh Circuit concluded, "the magnitude of the potential harm here is tremendous, and the risk that this harm will come to pass may be growing with each passing day." Pet. App. 39a.

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[3] *E.g.*, CNN, *That Will Leave a Mark*, *available at* http://www.youtube.com/watch?v=DLFe8xfgx24%feature=related (last accessed Oct. 19, 2011).

7. In an effort to stop the carp invasion, Michigan, supported by the States of Minnesota, Ohio, and Wisconsin, the Commonwealth of Pennsylvania, and the Province of Ontario, sued and originally requested that this Court exercise its original jurisdiction or reopen Original Action Nos. 1, 2, and 3. After the Court denied that request, the States filed the instant lawsuit against the Corps and the District in the United States District Court for the Northern District of Illinois.

8. The States contend that the Corps and the District are managing the CAWS in an ineffective manner, and that their failure to decisively respond to this crisis will allow the carp to move for the first time into the Great Lakes, creating an ecological and economic disaster. The Corps' and the District's refusal to close down and modify parts of the CAWS creates a grave risk of harm in violation of the federal common law of public nuisance. See *American Elec. Power Co., Inc.* v. *Connecticut*, 131 S. Ct. 2527 (2011). The States asked the district court for declaratory and injunctive relief, and they moved for a preliminary injunction that would require the defendants to do five things: (1) close temporarily the Chicago and O'Brien Locks in the CAWS, (2) install additional screens over sluice gates, (3) place block nets in the Little Calumet and Grand Calumet Rivers, (4) use rotenone poisoning to poison fish in the CAWS, and (5) accelerate the portion of the Great Lakes and Mississippi River Interbasin Study (GLMRIS) that relates to the CAWS so that it is completed by summer 2013. Congress directed the Corps to perform the GLMRIS in the Water Resources

Development Act of 2007.[4] Pet. App. 26a. (For a graphical overview of the CAWS, please refer to the map at Pet. App. 150a.)

9. Analyzing the four standards governing the grant of a preliminary injunction, the district court rejected the States' motion and committed three distinct, significant legal errors in its analysis. The district court believed the States had "at best, a very modest likelihood of success" on the merits of their claim. Pet. App. 121a. The district court also viewed the irreparable-harm inquiry as the same as the likelihood-of-success-on-the-merits inquiry. Pet. App. 121a–122a n.21. Finally, the district court balanced the potential harms and concluded that the analysis favored defendants. Pet. App. 148a.

10. The Seventh Circuit departed from the district court's analysis "in significant respects." Pet. App. 4a. First, the Seventh Circuit concluded that the States "presented enough evidence at this preliminary stage of the case to establish a good or perhaps even a substantial likelihood of harm," sufficient "to constitute a public nuisance." Pet. App. 4a–5a. Second, the court recognized that if "the [carp] invasion comes to pass, there is little doubt that the harm to the plaintiff states would be irreparable." Pet. App. 5a. When it came to the balancing of the harms, however, the Seventh Circuit followed the district court's approach and looked primarily at the cost of closing the CAWS altogether. In so doing, the court overlooked the very different balancing implicated by the States' other forms of requested relief.

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[4] Pub. L. No. 110-114, § 3061(b)(1), 121 Stat. 1041.

11. In this Petition, the States limit their request for injunctive relief to the following: (1) installation of block nets on the Little Calumet and Grand Calumet Rivers, and (2) acceleration of the portion of the GLMRIS relating to the CAWS.

12. As explained in more detail below, the block nets are exactly what their name suggests: nets that physically prevent fish from escaping a segment of a waterway. Even the Corps recognizes the nets as a straightforward, inexpensive, and well-recognized technology. And while the Corps promised that it would release a study of the nets' efficacy in the spring of 2011, Prelim. Inj. Hr'g Tr. at 358–60, no study has been released as of the date of this Petition.

13. As for the GLMRIS, one of its primary purposes is to examine the feasibility of a permanent separation of the Great Lakes and the Mississippi basin. Without such a completed study, it will be impossible for the district court to order appropriate relief on the merits, even if the States prevail on their public-nuisance theory. Like the block nets, expediting the GLMRIS does not implicate the societal and economic costs associated with an outright closure of the locks in the CAWS.

14. The Seventh Circuit declined to order the block nets based on the Corps' ill-defined and unenforceable statement that this option "is under serious consideration." Pet. App. 55a. And the court refused to order acceleration of the GLMRIS because the court did not believe that doing so "would reduce the odds that invasive carp will establish themselves in the short term." Pet. App. 57a–58a. Both conclusions were erroneous as a matter of law.

REASONS FOR GRANTING THE PETITION

I. The Court should grant review and reverse to abate an imminent threat to one of the most precious freshwater ecosystems in the world.

The States respectfully submit that this Court's review is warranted in this case for multiple reasons.

First, one of this Court's core functions is "to determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies . . . ." *Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) (citation omitted). Accordingly, this Court will grant certiorari to resolve an important question in such a context that affects a state or the United States. E.g., *Hinderlinder* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 101, 110 (1938); *Petty* v. *Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 278 (1959). This dispute involves the federal common law of nuisance and is between the States of Michigan, Minnesota, Ohio, and Wisconsin and the Commonwealth of Pennsylvania on the one hand, and the United States Army Corps of Engineers and an instrumentality of Illinois on the other. This is precisely the type of litigation that warrants this Court's review.

Second, this case is of immense importance to the public. See *Layne & Bowler Corp.* v. *Western Well Works*, *Inc.,* 261 U.S. 387, 393 (1923); *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.,* 349 U.S. 70, 79 (1955). As the Seventh Circuit recognized below, "[a]ny threat to the irreplaceable natural resources on which we all depend demands the most diligent attention of

government." Pet. App. 70a. This is just such a case. In the Seventh Circuit's view, there is a "good or perhaps even a substantial likelihood of harm" here, Pet. App. 4a–5a, and if the carp "invasion comes to pass, there is little doubt that the harm to the plaintiff states would be irreparable." Pet. App. 5a. We are dealing, after all, with "one of the most precious freshwater ecosystems in the world." Pet. App. 70a.

Third, this is a case involving migratory wildlife, a subject that members of this Court have recognized as uniquely justiciable in the original-jurisdiction context. As Justice O'Connor explained:

> This controversy, like disputes over the waters of interstate streams, is one particularly appropriate for resolution by this Court. . . . The original jurisdiction was 'conferred by the Constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.' Disputes between sovereigns over migratory wildlife typically give rise to diplomatic solutions. Such solutions reflect the recognition by the international community that each sovereign whose territory temporarily shelters such wildlife has a legitimate and protectable interest in that wildlife. In our federal system, we recognize similar interests, but the original jurisdiction of this Court or interstate compacts substitute for interstate diplomatic processes.

Idaho ex. rel. Evans v. *Oregon*, 462 U.S. 1017, 1031 n.1 (1983) (O'Connor, J., dissenting) (citations omitted). The fact that this case comes to the Court on direct

review, rather than as an original-jurisdiction matter, does not diminish the importance of the Court's role in resolving this multi-sovereign dispute.

Finally, the Court's review is both necessary and appropriate, despite the fact that the procedural posture is the appeal of an interlocutory order rejecting the States' request for preliminary injunction. 28 U.S.C. § 1254(1) makes clear that this Court has certiorari jurisdiction before rendition of final judgment, and the Court has long exercised its jurisdiction when "the facts of the case require an earlier interposition." *The Conqueror*, 166 U.S. 110, 114 (1897). This is just such a case.

To begin, the States seek a remedy (block nets) that will substantially improve the likelihood of maintaining the status quo—the Great Lakes ecosystem not yet infested with an established population of Asian carp—without imposing great cost on defendants. In addition, the States' request for an expedited study (concluded within 18 months) is essential so that Asian carp can be permanently excluded from the Great Lakes ecosystem when the trial court, at the conclusion of merits proceedings, concludes that the States are entitled to relief. If the Court refuses interlocutory review, the States will find themselves in the untenable position of having won on the merits of their nuisance claim, but left in a multi-year holding pattern while the Corps figures out how best to achieve the permanent separation of the Great Lakes and the Mississippi basin.

Importantly, this Court's immediate review and partial reversal of the Seventh Circuit's decision will not induce inconvenience, substantial litigation costs,

or delay in determining ultimate justice. See *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152–53 (1964). This Court's entry of an order regarding the block nets and the GLMRIS should have no impact on the trial-court proceedings, which must continue to conclusion of the merits stage regardless of this Court's direction on the two narrow requests for relief the States present in this Petition.

II. The plaintiff States are entitled to a preliminary injunction that orders defendants to (1) install block nets that will help stop the migration of Asian carp into the Great Lakes, and (2) expedite a five-year study that Congress has already directed the Corps to undertake for devising a permanent solution to the Asian carp crisis.

Speaking generally, the Seventh Circuit concluded that grant of a preliminary injunction would cause significantly more harm than it would prevent for two reasons. Pet. App. 48a. First, the court doubted whether the proposed injunction "would reduce by a significant amount the risk that invasive carp will gain a foothold in the Great Lakes between now and the time that a full trial on the merits is completed," while imposing "substantial costs on the defendants and the public interests they represent." Pet. App. 48a. Second, the court did not want to interfere with the ongoing efforts of the officials already working to stop invasive carp from invading the Great Lakes. Pet. App. 48a. While these two criticisms were aimed at the States' request for a complete closing of the locks, they do not apply to the States' requests for block nets and an

accelerated GLMRIS. Those requests require independent analysis.

A. Block nets

The States requested an injunctive order compelling the Corps to place block nets in the Little Calumet and Grand Calumet Rivers. Pet. App. 55a. Those rivers directly connect the CAWS to Lake Michigan at Burns Harbor and Indiana Harbor, respectively. (See map, Pet. App. 150a.) And, in contrast to the three other points where the CAWS connects to the lake, no permanent physical impediments to fish passage of any kind (such as lock gates or sluice gate screens) exist in those portions of the CAWS.[5] As the name suggests, the proposed nets are intended to slow (or stop altogether) the northward migration of the Asian carp through open channels to Lake Michigan.

Block nets are a straightforward, inexpensive, and well-recognized technology that have been temporarily deployed in portions of the CAWS by the Corps and allied agencies to prevent fish from escaping segments of the waterway when the fish poison rotenone was applied, while still allowing water to flow. Moreover, in contrast to the portions of the CAWS where the States sought lock closure, the sections of the Little Calumet and Grand Calumet Rivers at issue are not used for commercial navigation and support little if any recreational boat use.

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[5] A temporary barrier (cofferdam) is present in the Grand Calumet River as part of a dredging project. The States' request for a block net on the Grand Calumet assumes that this barrier will eventually be removed. Pet. App. 55a.

Unlike the States' request for closed locks or additional sluice gate screens, the Seventh Circuit concluded that block nets represented "potentially the most effective element of the proposed relief." Pet. App. 55a. The Corps' only objection was not cost (the nets would be inexpensive), but a concern that "flooding will increase as debris becomes caught in the nets." Pet. App. 55a. The answer to that potential problem is simple: "block nets could be cut free and replaced with new nets if risks of flooding materialized." Pet. App. 55a. But rather than compel the Corps to take this "promising" step to stem the tide of Asian carp through an entirely open pathway to Lake Michigan, the Seventh Circuit accepted the Corps' word that it was already working on that remedy. Pet. App. 55a ("We take the Corps at its word that this option is under serious consideration and would be implemented if and when a feasible plan can be developed.").

Given that the parties are already more than *seven years* past the date when the federal government first identified the carp as the most serious threat to the Great Lakes ecosystem, the States are not assured by the Corps' vague commitment. In fact, during the preliminary injunction hearing in September 2010, the Corps' Regional Commander testified that he expected the Corps' consideration of block nets to be completed as part of a "Final Efficacy Study" he estimated would be released in the spring of 2011. Prel. Inj. Hr'g Tr. at 358–60. To date, no such report, or the results of any further analysis of block nets, has been released.

More important, the Seventh Circuit's use of that commitment as a reason to deny an injunction was legal error: there is nothing in the injunction analysis

that suggests the non-moving party can avoid an injunction simply by saying it is "seriously considering" implementing the relief requested. Such an admission actually counsels in *favor* of granting an injunction, because it suggests that the requested relief will not inflict any appreciable harm on the non-moving party. As the Eighth Circuit noted long ago, a party entitled to an injunction "should not be driven from the court to which he has rightfully resorted with a mere promise by the offender of better conduct in the future." *Deere & Webber Co.* v. *Dowgiac Mfg. Co.*, 153 F. 177, 180–181 (8th Cir. 1907).

As for the Seventh Circuit's second generic concern—interfering with ongoing carp efforts—it drops away when, as here, the Corps has already said it plans to undertake the action but is not clear when that will actually happen. This situation is not at all like the States' request to close the locks altogether, a remedy that may have been at cross-purposes with the Corps' other efforts (though the States disagree with the Seventh Circuit's concern about that possibility). Instead, an order regarding block nets would ensure that the Corps was moving forward in an expeditious manner. Contrary to the Seventh Circuit's conclusion, a balance of the potential harms involving the block nets demonstrates conclusively that the States are entitled to this very limited form of relief.

B. Acceleration of the GLMRIS

The analysis is similar with respect to the States' request for an expedited GLMRIS. This time it is Congress that has already instructed the Corps to move forward, in the Water Resources Development

Act of 2007. The only question is how quickly the Corps will choose to implement that legislative command. As a result, there is virtually no cost to the Corps or the public that would not have been incurred eventually anyway; conversely, there is a substantial likelihood of great harm to the States and their citizens if the study takes the full five years the Corps predicts.[6]

Unless something is done, the ecological disaster of Asian carp invading the Great Lakes is a matter of when, not if. Accordingly, the time taken to devise a permanent solution is of critical importance. Assume that further merits proceedings in the trial court take 12–18 months until final judgment, and that the trial court concludes the States are entitled to permanent injunctive relief. Defendants will say that the

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[6] In the Seventh Circuit briefing, the Corps complained that the States raised the issue of an expedited study only in a footnote in their brief supporting the motion for a preliminary injunction. United States Army Corps of Engineers Brief on Appeal. Corp CA7 Br. at 58. The Corps ignored the following: (1) The States specifically requested an expedited study in the complaint, Compl. at 33-34, initial preliminary-injunction motion, Mot. For Prelim. Inj. at 3-4, and the supporting brief, Br. in Support of Mot. at 6, 31, 49; (2) the States' request was supported by a portion of a DNR expert affidavit filed in support of the motion, 07/15/2010 Aff. Of Tammy J. Newcomb ¶ 48, pp. 14-15; (3) the States' request was also supported by the testimony of the Corps' lead witness, General Peabody, who testified that the Corp could perform the study in 18 months if ordered to do so, Prel. Inj. Hr'g Tr. at 276; (4) the footnote the Corps referenced was in the States' post-hearing brief, which was limited to 15 pages for a discussion of all the issues presented, September 10, 2010 Minute Order; and (5) the States emphasized the request for an expedited relief in their closing oral argument in the district court regarding the preliminary injunction Prel. Inj. Hr'g Closing Argument Tr. at 112-13. The issue of an expedited study was properly presented.

appropriate scope of injunctive relief will be determined by the GLMRIS—an event that will not be complete for several more years. But if defendants are ordered to accelerate the study and complete it within 18 months (they already have approximately one year of investigation complete already, meaning that total study time would be cut roughly in half), the remedy will be ready, or nearly ready, at the same time judgment enters.

The Seventh Circuit erred in concluding that an accelerated study would not "reduce the odds that invasive carp will establish themselves in the short term." Pet. App. 57a–58a. Rather, "[a] plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted).[7] Applying that analysis, the negligible harm to defendants of having to, in the Seventh Circuit's words, "study harder and think faster," Pet. App. 57a, is easily outweighed by the significant time lost for identifying and implementing a permanent injunctive remedy. That is because each day of accelerated effort by the Corps that is lost cannot be regained. All parties involved fully appreciate that the Asian carp, having already migrated hundreds of miles, will not require significant

[7] The Seventh Circuit's belief—that the question is the extent "the proposed measures decrease the risk of invasive carp establishing themselves in the Great Lakes between now and when the litigation concludes," Pet. App. 52a—is contrary to the injunction standard this Court articulated in *Winter*.

time to migrate the last few miles into Lake Michigan. Every day counts.

The irreparable-harm component of the request for an injunction accelerating the study is not that the carp will create a self-sustaining population during the course of trial, but that time will be irretrievably lost, time that must be put to good use now so that later, completion of the feasibility study *and the resulting remedy* will not be delayed. Yet the Seventh Circuit did not address the probability that Asian carp will become established in the Great Lakes after trial but while the feasibility study—needed to fashion and implement an effective permanent remedy—is completed.

In another part of its opinion, the Seventh Circuit did say that if "the requested preliminary injunction were to issue, we can be sure that it would impose significant costs." Pet. App. 60a. But that conclusion related to a complete closure of the locks and the States' request for other, more intrusive remedies. Pet. App. 60a–61a. The conclusion does not apply to the cost of installing block nets or accelerating the portion of the GLMRIS relating to the CAWS.

The final potential objection to an order compelling an 18-month study is that the Corps "*suggests* that it would not have time to study the problem comprehensively and that the study might not adequately support any proposed solutions." Pet. App. 60a. But the Corps' "suggestion" is unsupported by any evidence, can be adequately addressed by the district court as the expedited study unfolds, and is belied by the Corps' reputation as one of the most competent engineering organizations in the country. The States do not doubt that the Corps can, if required to do so,

produce an adequate study in 18 months, and the time saved has a substantial likelihood of preventing the catastrophic harm of a carp invasion.

In sum, with respect to the block-net and accelerated-GLMRIS elements of the preliminary injunction, the balance of the harms weighs conclusively in the States' favor. The problem was that the Seventh Circuit overlooked how little cost these remedies imposed on defendants, a cost quite different than that the defendants alleged with respect to other remedies, such as lock closure. And because the block nets and the study are remedies the Corps and Congress have favored and directed, respectively, this Court's grant of the States' requested injunction does not run the risk of judicial intervention in areas of agency competence. Contra Pet. App. 61a–62a.

Aside from the erroneous analysis involving the block nets and the request for an accelerated GLMRIS, there is much to be commended in the Seventh Circuit's opinion, particularly that court's analysis regarding the States' likelihood of success on the merits and of substantial harm to the States and their citizens. See Pet. App. 40a (states established "a good or even substantial likelihood of success on the merits of their public nuisance claim"); Pet. App. 46a (it "is likely that irreparable harm will come to pass."). In addition, the Seventh Circuit correctly rejected a slew of other arguments that Respondents raised below, conclusions that the States briefly summarize here.

III. There are no other impediments to this Court's grant of the States' requested relief.

In addition to the injunction factors, the Corps and the District raised a veritable kitchen sink of other arguments in opposition to the States' request for injunctive relief. The Seventh Circuit's analysis of each argument is sound. In summary:

- Defendants are responsible for the harm their operation of the CAWS causes, even though defendants are "not themselves physically moving fish from one body of water to the other." Pet. App. 9a, citing RESTATEMENT (SECOND) TORTS § 834 & cmt. (b).

- Defendants also cannot avoid common-law-nuisance liability because invasive species are not a "traditional pollutant." "[P]ublic nuisance law, like common law generally, adapts to changing scientific and factual circumstances." Pet. App. 11a, quoting *American Elec. Power*, 131 S. Ct. at 2536. The federal common law of public nuisance extends to the problem of invasive species. Pet. App. at 9a–11a (numerous citations omitted).

- The Corps also says that the common law of public nuisance does not apply against the United States. But there appear to be no compelling reasons not to apply public nuisance to federal agency actions, and a plethora of such actions have proceeded against federal agencies with nary a whisper about whether the claim

runs against the United States. Pet. App. at 11a–15a (numerous citations omitted).

- Alternatively, the Corps says, it has sovereign immunity. Not so, the Seventh Circuit concluded; the waiver contained in § 702 of the APA subjects the Corps to common-law claims for declaratory and injunctive relief. Pet. App. at 15a–20a (numerous citations omitted).

- Finally, defendants argue that congressional regulation has displaced the common law on which the States rely, seeking to invocate this Court's recent decision in *American Electric Power*. The Seventh Circuit correctly held that while Congress had ordered informal task forces to study and propose solutions to the invasive-species problem, it is a "minimal" legislative scheme that falls far short of the Clean Air Act or the Federal Water Pollution Control Act that have, in any other contexts, occupied the field of federal regulation. Pet. App. 20a–28a (numerous citations omitted).

Given the Seventh Circuit's comprehensive analysis of these collateral issues, there is no need for the States to address them further. Suffice it to say that these alternative arguments do not create an impediment to this Court's grant of the petition or a remand order directing the district court to enter a narrow preliminary injunction.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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