No. 11-541

In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES ARMY OF CORPS 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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

While the risk that Asian carp will invade the Great Lakes through the Chicago Area Waterway System grows each day, the Army Corps of Engineers' study of a permanent solution continues to lag. The Corps was recently quoted as saying that the Great Lakes Mississippi River Interbasin Study (GLMRIS) of options to block invasive species—initially promised in 2012, then 2015—may not be completed until 2016.[1] What the Corps did not say is that it has already been *eight years* since the federal government publicly announced Asian carp as "the greatest immediate threat to the Great Lakes ecosystem," Pet. App. 80a n.7, a sentiment the Seventh Circuit echoed in concluding 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. The Army Corps' sluggish timetable is why the plaintiff States seek judicial compulsion of the report's acceleration.

Compounding the States' frustration is that a neutral, public-interest entity, the Great Lakes Commission (GLC), issued a January 31, 2012 study that has already accomplished what the Army Corps hopes to complete by 2016: the evaluation of alternatives for separating the Great Lakes and Mississippi River basins permanently to prevent the migration of Asian carp and other invasive species.[2]

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[1] http://www.freep.com/article/20111222/NEWS05/112220465/Asian-carp-report-expected-end-2015-might-delayed.

[2] *Restoring the Natural Divide*, *Separating the Great Lakes and Mississippi River Basins in the Chicago Area Waterway System*, Great Lakes Commission and Great Lakes and St. Lawrence Cities Initiative (Jan. 31, 2012), http://www.glc.org/caws/.

The GLC study examines several alternatives and shows that physical separation "is feasible" and "can be achieved while also maintaining or enhancing water quality, flood management, and transportation."[3] Significantly, the study is endorsed by all eight Great Lakes states represented on the GLC, and was overseen by an Executive Committee that includes the Illinois Governor and Chicago Mayor.[4]

The GLC study explains that physical separation is needed because the federal government's control efforts—including the electric barriers—are important but inadequate:

> Separation is needed to prevent the movement of Asian carp and other AIS [aquatic invasive species] between the Great Lakes and Mississippi River basins in the Chicago-area waterways. Asian carp, in particular, are an imminent threat; in 2010 a bighead carp was collected from Lake Calumet, just five miles from Lake Michigan. Recent research confirms that they can survive and spread in the Great Lakes, and that the CAWS is the most likely point of entry. Current control efforts for the

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[3] Summary Report at 4, http://www.glc.org/caws/pdf/CAWS-PublicSummary-mediumres.pdf [hereinafter "GLC Report"].

[4] The Great Lakes Commission is an interstate compact agency formed by the eight Great Lakes states in 1955, with associate member status for the Canadian provinces of Ontario and Quebec. http://www.glc.org/about/. Each jurisdiction appoints a delegation of three to five members. The January 31, 2012 report is prefaced with a message from the study's "Executive Committee," consisting of Illinois Governor Pat Quinn, Chicago Mayor Rahm Emanuel, and Grand Rapids Mayor George Heartwell. GLC Report at 2.

> carp are vital, including the electric barriers in the Chicago Sanitary and Ship Canal. However, these efforts are incomplete, costly to maintain, and vulnerable to failure. The electric barriers will not stop the spread of all AIS and may not stop small Asian carp. Monitoring continues to find carp DNA between the barriers and Lake Michigan.[5]

In support of the *status quo*, the Army Corps argues to this Court that accelerating GLMRIS "would do nothing to prevent irreparable harm during the pendency of this litigation," which, in the Corps' view, is a necessary prerequisite to injunctive relief. Corps Br. 15 (citations omitted). What the Corps fails to acknowledge is that lost time, in and of itself, constitutes irreparable harm.

The math is simple. If the plaintiff States prevail on the merits in one year's time but the district court is unable to fashion relief because the Army Corps' study is not available until 2016 (or later), the carp have been effectively gifted several additional years to establish their Great Lakes foothold. In other words, the Corps' approach effectively precludes *any* redress for what is almost certain environmental and economic disaster. The Court's review of this multi-sovereign dispute and issuance of an injunctive order are warranted.

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[5] GLC Report at 4 (footnotes omitted).

I. The plaintiff States are entitled to a preliminary injunction that accelerates the GLMRIS.

The Army Corps' objection to expediting the GLMRIS report is summarized in a single paragraph on page 18 of the brief in opposition. The Corps claims that acceleration (1) "would not do anything to prevent the spread of Asian carp *while this litigation is pending*," and (2) would endanger the study's adequacy because of its scope and complexity. Corps Br. 18 (emphasis added). The Corps is wrong on both counts.

With respect to timing, a plaintiff seeking a preliminary injunction need only show "irreparable harm in the absence of preliminary relief." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). And there is no question that Petitioners will suffer irreparable harm in the absence of preliminary relief: lost time. Each passing day increases the likelihood that the carp will successfully establish a breeding population in the Great Lakes. The Seventh Circuit recognized that potential harm as "irreparable," Pet. App. 5a, a conclusion the Corps does not dispute.

As noted above, the Army Corps protests that an injunction is only appropriate if the injury is likely to occur "before a decision on the merits can be rendered." Corps Br. at 15 (citing *Winter*, 555 U.S. at 22). But that is precisely what the plaintiff States allege: injury in the form of lost time from today until the district court issues a final merits decision. It is simply wrong for the Corps to say that "a final judgment would moot the request for a preliminary injunction." Corps Br. 20

(citing *U.S. Philips Corp.* v. *KBC Bank N.V.*, 590 F.3d 1091 (9th Cir. 2010)). It is the district court's final judgment that necessitates the Corps' examination of possible remedies now.

The Corps' concern about the study's adequacy is a mere "suggestion," unsupported by any record evidence. Pet. 18–19 (citing Pet. App. 60a). The plaintiff States do not doubt that if the GLC can accomplish such a task competently in less than two years, then one of the great engineering organizations in the world can surely do the same given a four-year head start (Congress directed the Corps to conduct the study in the Water Resources Development Act of *2007*.) In the Seventh Circuit's words, this Court should compel the Corps to "study harder and think faster." Pet. App. 57a. And to the extent the Corps' consideration of "all invasive species" is slowing it down, Corps Br. 18, then it should segment the study and implement Asian carp-specific steps first.

II. The plaintiff States are entitled to an injunction compelling the Army Corps to install block nets on the Calumet River.

The Corps' objections to the block nets are just as cursory. The Corps claims the nets are an unnecessary redundancy given the existing electric barrier system, and argues that the nets would have practical problems and high costs. Corps Br. at 16–18.

The Corps' problem is that the Seventh Circuit already rejected these very arguments. Notwithstanding the existing electrical barrier, the Seventh Circuit concluded that the block nets were "potentially the most effective element of the proposed relief" aimed

at stopping the carp's migration, Pet. App. 55a, proposed relief that included closing of the CAWS locks altogether. Moreover, as the GLC study observed, the existing control efforts, including the electrical barriers, are "incomplete . . . and vulnerable to failure,"[6] and the effectiveness of the barriers has been questioned on several grounds.[7] The study even highlights the Corps' *own* conclusion that the electric-barrier system "is considered [an] experimental and temporary fix to this problem,"[8] contrary to the Corps' position here. See Corps Br. 16–17 ("block nets in the Little Calumet River would at most provide *a redundant backup* to the electric barriers") (emphasis added).

As for the cost of block nets, that is an objection that the Corps did not raise in the district court. And the potential debris problem is easily solved by simply cutting the block nets free and replacing them with new nets. Pet. App. 55a.

As explained in the Petition, the Seventh Circuit ultimately refused to compel the Army Corps to install the nets because the court took "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." Pet. App. 55a. But the Corps' promise to "work on it" is not a valid legal basis to deny injunctive relief. Pet. 14–15.

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[6] GLC Report at 4.

[7] GLC Report at 8

[8] GLC Report at 8.

III. There are no barriers to this Court's grant of review and the States' requested relief.

The Army Corps spends the bulk of its Argument rehashing the merits arguments it lost in the Seventh Circuit. Corps Br. 20–31. But there is no need for the Court to consider these issues.

Although the Seventh Circuit declined the States' request for injunctive relief, the court remanded the case for merits proceedings in the district court. The merits arguments that the Corps now tries to raise would, if successful, result in dismissal of this action in its entirety, i.e., a different form of relief. Accordingly, the Corps waived consideration of these issues by failing to file a cross-petition. Sup. Ct. R. 12.5; *Federal Energy Administration* v. *Algonquin SNG*, *Inc.*, 426 U.S. 548, 560 n.11 (1976) (sustaining respondents' argument "would represent . . . a modification of those judgments. But since respondents filed no cross-petition for certiorari, they are at this point precluded from seeking such modification."). Suffice it to say that the States disagree with the Corps' position on the merits, see Pet. 20–21, and will brief these issues on the merits if requested to do so.

Finally, the Corps ignores altogether this case's significance: resolution of a federal-common-law dispute among sovereigns that involves migratory wildlife and immense public importance. Pet. 9–12. This Court does not require a circuit split to grant further review in such circumstances, contra Corps Br. 13. After all, what is at stake is the largest and most important fresh-water ecosystem in the world.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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