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*In the Supreme Court of the United States*

STATES OF WISCONSIN, MINNESOTA, OHIO, AND PENNSYLVANIA,  
COMPLAINANTS,  
V.  
STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER  
CHICAGO,  
DEFENDANTS,  
UNITED STATES OF AMERICA,  
INTERVENOR.

[CAPTION CONTINUED ON NEXT PAGE]

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**PENNSYLVANIA'S MEMORANDUM IN SUPPORT OF MICHIGAN'S RENEWED MOTION  
FOR PRELIMINARY INJUNCTION**

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STATE OF MICHIGAN,  
COMPLAINANT,  
V.  
STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER  
CHICAGO,  
DEFENDANTS,  
UNITED STATES OF AMERICA,  
INTERVENOR.

STATE OF NEW YORK,  
COMPLAINT,  
V.  
STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER  
CHICAGO,  
DEFENDANTS,  
UNITED STATES OF AMERICA,  
INTERVENOR.

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## INTRODUCTION

Pennsylvania has sixty-three miles of coastline along Lake Erie. The Commonwealth oversees 748.7 square miles of the Lake. Pennsylvania has a sovereign proprietary interest in all its waters of the Great Lakes Basin, as well as the diverse ecosystem they make possible. Pennsylvania supports Michigan's Renewed Motion for Preliminary Injunction to protect that ecosystem from devastating and irreparable harm.

Michigan renewed its motion due to significant changes in circumstance since the entry of the Court's Order on January 19, 2010. Those changes in circumstances establish that the threat to the Great Lakes is more than imminent. Moreover, the clarification of the relief Michigan seeks, and additional information concerning the economic impact of that relief tips the balance of equities in Michigan's favor. These factors, as well as the devastating consequences, acknowledged by all parties, of the injurious fish species becoming established in the Great Lakes, strongly supports the injunctive relief Michigan seeks. Pennsylvania urges the Court to grant that relief.

## ARGUMENT

The party seeking a preliminary injunction must demonstrate likely success on the merits, that in the absence of a preliminary injunction, the applicant is likely to suffer irreparable harm that the balance of equities tips in favor of the applicant, and that an injunction is in public interest. *Winter v. Natural Resources Defense Counsel*, 129 S.Ct. 365, 374 (2008).

### MICHIGAN IS LIKELY TO SUCCEED ON THE MERITS.

The standard for a preliminary injunction is essentially the same as for a permanent injunction, except that a plaintiff must show a likelihood of success on the merits rather

than actual success. *Amoco Production Co., et al. v. Village of Gambell, et al.*, 480 U.S. 531, 546 n. 12 (1987). This action is a continuation of a dispute that arose between Wisconsin, Minnesota, Michigan, Ohio, Pennsylvania and New York (The Great Lake State's) and the State of Illinois and its Metropolitan Water Reclamation District of Greater Chicago upon the construction of the Chicago sanitary ship canal (the Canal). The Great Lake States sought to enjoin Defendant's diversion of water from Lake Michigan through the Canal. They asserted that the diversion substantially impaired public use of the Great Lake's and connecting waters for navigation fishing, hunting, recreation, and other apiarian rights. *Wisconsin v. Illinois*, 278 U.S. 367, 408 (1929).

The Court agreed, stating that "complainants might properly press for an immediate shutting down by injunction of the diversion"... *Id. at* 419. The Court held that the diversion was unlawful except, due to the exigencies of the time, to the very limited extent necessary to continue to flush sewage from the Chicago River and to the negligible extent necessary to keep up navigation in that river. *Id. at* 418-421. The Court subsequently entered a decree gradually reducing the diversion. *Wisconsin v. Illinois*, 281 U.S. 696 (1930).

The Great Lake States succeeded in their earlier effort to have the Court limit the diversion of water through the Canal system, when that diversion represented a threat to the Great Lakes. That same diversion of water is the mechanism now presenting a new threat. Michigan is more than likely to again succeed on the merits in addressing that threat.

**MICHIGAN IS LIKELY TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF INJUNCTIVE RELIEF**

All parties agree that the establishment of big head and silver carp into the Great Lakes would have devastating and irreparable consequences. *Michigan's Appendix in*

*Support of Its Motion to Reopen*, 45(a), 51(a). See also *Intervenor the United States Memorandum in Opposition to Michigan's Motion for Preliminary Injunction*, 43, 47. New evidence establishes that the introduction of injurious fish species into the Great Lakes is more than threatening. It is occurring.

New test results, disclosed after the Court's January 19, 2010 Order, show positive environmental DNA results for silver carp in Calumet Harbor, and in the Calumet River north of the O'Brien Lock. Calumet Harbor is part of Lake Michigan. *Appendix to Michigan's Renewed Motion for Preliminary Injunction*, (App.II) 2a. These locations are approximately 40 miles northeast and upstream from the electric dispersal barrier system designed to prevent the carp from invading the Great Lakes. (App.II) 7a-9a. This new evidence establishes that the threat of injurious species is now upon the Great Lakes. That threat requires the relief Michigan requests.

#### THE EQUITIES BALANCE IN FAVOR OF MICHIGAN.

Michigan reiterates, in its renewed motion, that it seeks only to have Defendants and Intervenor take all the measures within their control "consistent with the protection of public health and safety" to prevent the migration of big head and silver carp into Lake Michigan. (*Michigan's Renewed Motion for Preliminary Injunction*, pg. 25). In addition, Michigan offers new expert evidence quantifying the economic impact of *inter alia* closing certain Canal system locks. *Michigan App.II* 44a- 45a . The economic impact is in the range of seventy million dollars. *App. II* 43a – 44a. In comparison, the economic impact of these injurious fish species establishing themselves in the Great Lakes is estimated to be between 4 and 7 billion dollars annually. *Michigan's Appendix in Support of its Motion to Reopen*, 45a, 54a.

Michigan has carefully tailored its request for injunctive relief in light of the exigencies of today. Moreover, balancing the economic impact of that injunctive relief establishes that the equities strongly favor Michigan.

#### GRANTING MICHIGAN'S MOTION IS IN THE PUBLIC'S INTEREST

Court's of Equity have much greater latitude in granting injunctive relief in furtherance of the public interest. *United States v. First National City Bank*, 379 U.S. 378, 382 (1965). There will be some public impacts to the Chicago area from the injunctive relief requested by Michigan. However, the principal impact will be felt by private individuals or entities. *See Intervenor United States Memorandum in Opposition to Michigan's Motion for Preliminary Injunction*, 51. In contrast, the impact of the establishment of these injurious species in the Great Lakes will be irreparable and devastating consequences not only to private interests but to the sovereign and proprietary interests of all of the Great Lake States in the unique ecosystem they all share. Protection of that ecosystem is in the public interest. Public interest more than favors granting Michigan's request for preliminary injunction, it is the ultimate reason for the request.

#### CONCLUSION

The Court should grant Michigan's renewed motion for preliminary injunction.

Respectfully submitted,

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