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In The
Supreme Court of the United States
October Term, 1966

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.*	No. 1 Original
STATE OF MICHIGAN, *Complainant,* *v.* STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Defendants,* UNITED STATES OF AMERICA, *Intervenor.*	No. 2 Original
STATE OF NEW YORK, *Complainant,* *v.* STATE OF ILLINOIS AND THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Defendants,* UNITED STATES OF AMERICA, *Intervenor.*	No. 3 Original

RESPONSE OF STATE OF NEW YORK TO MOTION FOR A PRELIMINARY INJUNCTION

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The State of New York supports the motion of the State of Michigan for a preliminary injunction.

New York was the complainant in original action No. 3, one of the consolidated cases that Michigan seeks to reopen. These cases were brought by Great Lakes states to redress harm the State of Illinois caused by diverting water from Lake Michigan through a canal system into the Des Plaines and Illinois Rivers. That same canal system now threatens to harm the Great Lakes in a new way, by providing a path for two invasive species of Asian carp to enter the Lakes from the rivers. Because the carp appear to be on the verge of entering Lake Michigan, this Court should act to preserve the status quo and protect the Lakes while the Court considers Michigan's motion to reopen.[1]

The Great Lakes are a unique natural resource of immeasurable value to New York and its citizens. The five Lakes and the rivers, streams, and other waterbodies in their drainage basin are an interconnected hydrologic system. In New York, 40 percent of the State's total land area, over 700 miles of shoreline, and 80 percent of the State's fresh surface water are within the Great Lakes basin. *See* N.Y. State Dep't of Envtl. Conservation, *25 Year Plan for the Great Lakes* 1 (1992), *available at* http://www.dec.ny.gov/docs/regions_pdf/25year.pdf. New York has sovereign and proprietary interests in those waters and the aquatic life in them. *See* New York

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[1] Because the new harm stems from the same source as the harm in the original cases and affects all of the complainants, New York agrees that it would be appropriate to reopen these cases to address Michigan's new claims. Michigan has asked in the alternative that this Court grant it leave to file a new Bill of Complaint. Should the Court do so, New York intends to participate in the new case because it shares Michigan's interest in preventing the carp from destroying the Great Lakes fisheries.

Environmental Conservation Law ("ECL") § 15-0103(1), (8). New York's waters include significant portions of Lakes Erie and Ontario, which are part of the Great Lakes recreational and commercial fishery valued at nearly $7 billion per year. *See* ECL § 15-0107(4); App. 45a, 117a. These fishing and boating activities are of longstanding importance to New York's economy and its citizens' way of life, and they depend on a healthy Great Lakes ecosystem.

The Asian carp in the canal system now pose an imminent threat of irreparable harm to the Great Lakes. As explained by Michigan, in just a few years the Asian carp have migrated the length of the Mississippi and Illinois Rivers. App. 14a, 24a. These rapidly reproducing, voracious invaders now dominate the fisheries in those rivers. App. 24a, 44a-45a, 49a. Intervenor the United States, through the U.S. Army Corps of Engineers, has taken steps to prevent the carp from reaching the Great Lakes, including creating an electric barrier located near the Lockport Dam. App. 27a-34a, 51a. Recent testing by the Corps, however, indicates that the carp have now likely migrated beyond this barrier. App. 40a, 72a. The responses to this discovery—emergency fish poisoning and netting along several miles of canal waters—are at best stopgap measures. App. 61a-62a, 121a. Beyond the electric barrier, structures such as canal-system locks could physically block the carp's entry into Lake Michigan. App. 119a. But as currently operated, these locks would allow the carp's passage to the Lake, and more structures are needed to close additional invasion pathways in the canal system. App. 72a-81a. Thus, the threat to the Great Lakes from the carp is imminent.

If the Asian carp manage to reach Lake Michigan, the harm to the Great Lakes would be grave and likely irreversible. There is widespread agreement among scientists and governmental agencies that an invasion of Asian carp would have disastrous effects on the Lakes. As described by Michigan, these effects would be particularly severe because Asian carp weigh up to 100 pounds and feed almost continuously at the base of the food web. App. 13a. The carp consume huge quantities of plankton that other fish species depend on to survive. App. 14a, 19a-23a. Given the Asian carp's resilient, aggressive nature and the patterns of invasion by other non-native species in the Great Lakes, once carp populations were established they likely would grow exponentially, spread throughout the Great Lakes, and become virtually impossible to remove. App. 24a-26a, 45a. The predictable result of an Asian carp invasion of Lake Michigan would be colonization by the carp of the four other interconnected Great Lakes and their tributaries as well. App. 49a. As the United States has recognized, this would be an "ecologic and economic disaster." App. 51a. It would constitute irreparable harm.

Because New York and others face irreparable harm, New York agrees with Michigan that this Court should preserve the status quo by preliminarily enjoining defendants and intervenor to take reasonable measures to prevent the Asian carp from entering the Great Lakes. Michigan has proposed a number of specific protective measures that the parties should adopt. *See* Motion for a Preliminary Injunction at 28-29. These measures would result in little if any interference with the quantity of water diverted from Lake Michigan under the consent decree currently in place, because the great majority of the allowable water diversions consist of sewage discharge and rainfall-snowmelt runoff that would not be affected. *See* U.S. Army Corps of Engineers,

Lake Michigan Diversion Accounting: Water Year 2005 Report 20-22 & tbl. 5, fig. 3, *available at* http://155.79.114.198/divacct/05%20Reports/wy05_Diversion.pdf. At a minimum, however, this Court should order the temporary closure of the canal-system locks identified by Michigan and appoint a special master to recommend a more comprehensive preliminary injunction. *See* Motion for a Preliminary Injunction at 28. Although closing the locks even temporarily may impose some economic costs on those who use them for transportation or recreation, those costs are outweighed by the grave and irreparable injury that would be inflicted by Asian carp should they become established in the Great Lakes.

Respectfully submitted,

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