No. 11-541

In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of preliminary injunctive relief based on its determination that each of the forms of injunctive relief that petitioners demand would be unlikely to significantly reduce the risk of the alleged irreparable harm occurring and would involve substantial costs and risks to the government and the public interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule: Page

Statutes and rule—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-71a) is not yet published in the *Federal Reporter*, but is available at 2011 WL 3836457. The opinion of the district court (Pet. App. 72a-149a) is not published in the *Federal Supplement*, but is available at 2010 WL 5018559.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2011. The petition for a writ of certiorari was filed on October 26, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A series of manmade and natural water bodies called the Chicago Area Waterway System (CAWS) con-

nects Lake Michigan with the Des Plaines River. The CAWS includes the Chicago Sanitary and Ship Canal; the Chicago, Calumet, Little Calumet, and Grand Calumet Rivers; the Calumet-Sag Channel; and the North Shore Channel. See Pet. App. 150a (map). The Des Plaines River flows into the Illinois River, which in turn flows into the Mississippi River. The CAWS generally serves three purposes: it provides a navigation link between the Great Lakes and the Mississippi River basin; it provides a means of flood control for the Chicago metropolitan area; and it provides an outlet for storm water and effluent from Chicago.

Congress has charged the Army Corps of Engineers with operating the Chicago Sanitary and Ship Canal and related facilities to "sustain through navigation from Chicago Harbor on Lake Michigan to Lockport on the Des Plaines River." Supplemental Appropriations Act, 1983, Pub. L. No. 98-63, Tit. I, Ch. IV, 97 Stat. 311; see also Energy and Water Development Appropriation Act, 1982, Pub. L. No. 97-88, § 107, 95 Stat. 1137 (1981); Act of July 24, 1946, ch. 595, 60 Stat. 636. The Corps operates two locks and associated structures in coordination with respondent Metropolitan Water Reclamation District of Greater Chicago (Water District). The Chicago Harbor Lock and Chicago River Controlling Works sit at the confluence of the Chicago River and Lake Michigan and regulate the flow in the Chicago Sanitary and Ship Canal. The Thomas J. O'Brien Lock and Dam is on the Calumet River and regulates the flow of that river and the Calumet-Sag Channel. The locks permit navigation by numerous cargo and passenger vessels; they allow for emergency response between the CAWS and Lake Michigan by the Coast Guard and the Chicago po-

lice and fire departments; and they are used for flood control and water diversion. Pet. App. 76a-78a.

Because the CAWS establishes a hydrological link between the Mississippi River and Lake Michigan, fish and other species could potentially migrate from one to the other, absent measures to prevent their passage. This case concerns two migratory species of fish: silver carp and bighead carp. Those species, native to Asia (and thus referred to collectively as Asian carp), can spread rapidly, adapt to a variety of environments, and crowd out native species once established. Asian carp have spread from the lower Mississippi River basin north to the Illinois River and other rivers in the basin. An adult population of Asian carp with the potential to spawn now exists about 60 miles from Lake Michigan, but the closest verified spawning of Asian carp is about 150 miles from the Lake. Pet. App. 38a-39a.

2. The Corps and numerous other federal and state agencies are keenly aware of the problems Asian carp pose and are taking active measures to prevent Asian carp from spreading into Lake Michigan. They coordinate those actions as members of the Asian Carp Regional Coordinating Committee (ACRCC), which includes agencies from the federal government, all of the petitioner States, Illinois, Indiana, and the Water District. See ACRCC, *About Us*, http://www.asiancarp.us/aboutus.htm (last visited Jan. 27, 2012). Each member of the ACRCC takes steps within its authority to combat the spread of Asian carp, as contemplated in the ACRCC's Asian Carp Control Strategy Framework. Pet. App. 66a-67a.

a. Congress has authorized, and the Corps has built, three underwater electric dispersal barriers in the Chicago Sanitary and Ship Canal as the primary defense

against the northward spread of Asian carp. See 16 U.S.C. 4722(i)(3); Water Resources Development Act of 2007 (WRDA), Pub. L. No. 110-114, § 3061(b)(1), 121 Stat. 1121. Electric current, running through steel cables secured to the bottom of the canal, creates an electric field in the water that either deters fish from passing through or immobilizes them. Navigation, however, can continue; the Corps consults with the Coast Guard to ensure safety. Pet. App. 90a-92a.

To ensure that the electric barriers keep Asian carp at bay, Congress directed the Corps to study ways to reduce the "impacts of hazards that may reduce the efficacy of the Barriers." WRDA § 3061(b)(1)(D), 121 Stat. 1121. The Corps has done that through four interim studies, and is completing a comprehensive Efficacy Study that encompasses those studies and other matters. As a result of those studies, the Corps has closed pathways that might have allowed Asian carp to bypass the barriers during flooding; it has adjusted the operating parameters of the barriers themselves; and it has added bar screens to some sluice gates at the locks. Pet. App. 68a.

b. Besides using the electric barriers to prevent Asian carp from moving upstream, members of the ACRCC, including the Corps, undertake extensive efforts to monitor, capture, and kill Asian carp. Monitoring techniques include telemetry (the tagging and tracking of fish); electrofishing (a technique that uses electrodes to attract and stun fish for easy capture); commercial fishing below the electric barriers, to reduce the number of Asian carp and thereby decrease the pressure to migrate; and larval fish tows (netting specifically to capture larval Asian carp). Pet. App. 66a-70a, 88a-90a. For example, in 2010 the agencies conducted over 3200

hours of surveying and placed miles of nets in the CAWS. In addition, the ACRCC monitoring subcommittee has established five fixed monitoring stations within the CAWS, from which sampling events are conducted weekly when conditions permit. *Id.* at 135a-136a.

In addition to those traditional detection methods, the Corps has used a research technique known as environmental DNA (eDNA) testing to help evaluate the possible leading edge of Asian carp migration. Pet. App. 35a-37a, 85a-88a. While a potentially important monitoring tool, eDNA has several limitations. For example, "eDNA evidence cannot verify definitively whether live Asian carp are present, the number of Asian carp in an area, or whether a viable population of Asian carp is present." *Id.* at 88a. And a positive result cannot reveal how Asian carp DNA arrived at the sampling location —whether the eDNA is from a live or dead fish, from water transported to the CAWS from somewhere else, or from another source. The Corps and other members of the ACRCC therefore use eDNA primarily to inform the location and intensity of traditional monitoring and control efforts, and then use those traditional efforts to confirm if Asian carp are present. *Id*. at 88a-89a.

c. When eDNA or other monitoring methods indicate Asian carp might be present, the ACRCC Monitoring and Rapid Response Workgroup has responded with intensive efforts to try to locate and capture any live Asian carp. During 2009 and 2010 there were multiple positive eDNA results on the Little Calumet River below the O'Brien Lock. From May 20-27, 2010, the multiagency team applied rotenone, a fish poison, to a two-and-a-half-mile reach of river immediately lakeward of the O'Brien Lock. Over 130,000 pounds of fish were killed and collected. Pet. App. 89a. The team used un-

derwater video monitoring and divers to ensure that fish did not sink to the bottom and remain undetected. The team did not find any Asian carp. *Id.* at 136a. Similarly, during February and March 2010, Fish and Wildlife Service crews conducted electrofishing at sites with potentially good habitat and where multiple positive eDNA results had been obtained. No Asian carp were captured. Then in May 2010, positive eDNA results led to intensive sampling efforts in the North Shore Channel. No Asian carp were captured. *Id.* at 89a.

To date, only one Asian carp has been found in the CAWS above the electric barriers. On June 22, 2010, a single bighead carp was captured in Lake Calumet during a commercial fishing operation. Its capture prompted an intensive sampling response. For eleven days, several governmental crews and contracted commercial fishers conducted electrofishing and netting in the Calumet River from the O'Brien Lock to Lake Michigan. Agency crews deployed over 16,500 yards of trammel nets and conducted two hauls using a 2400-foot seine. Over ten miles of commercial nets were also set, resulting in a total catch of over 15,000 fish of 17 species. No additional Asian carp were captured. Pet. App. 89a-90a.

d. The Corps has also embarked on a significant study of how to prevent any and all transfers of aquatic invasive species between the Mississippi River basin and the Great Lakes basin, in either direction. See WRDA § 3061(d), 121 Stat. 1121; Pet. App. 56a-58a, 97a-98a. The Great Lakes and Mississippi River Inter-Basin Study (GLMRIS) is proceeding in two separate portions. One focuses on the CAWS and "the unique challenges posed in the evaluation of permanent measures to prevent the transfer of all manners of aquatic invasive species, not just Asian carp, from one basin to the other."

C.A. Supp. App. 46. The second portion of the study focuses on all other potential aquatic passageways between the Great Lakes and Mississippi River basins. *Ibid.* Although GLMRIS is a multi-year study, the Corps intends to proceed in a way that allows decisions on particular recommended steps to be made, if appropriate, as soon as the relevant portion of the study is complete. Pet. App. 26a, 97a-98a.

3. a. In December 2009, the State of Michigan, later joined by the rest of the petitioner States, began requesting that the Corps and other agencies take additional actions to control the spread of Asian carp. Pet. App. 98a-99a. Michigan sought to commence an original action in this Court and repeatedly sought preliminary injunctive relief. This Court denied the preliminary-injunction motions and declined to entertain Michigan's action. *Wisconsin* v. *Illinois*, 130 S. Ct. 2397 (2010); 130 S. Ct. 1934 (2010); 130 S. Ct. 1166 (2010).

b. In July 2010, petitioners filed this action in district court against the Corps and the Water District. They claimed that the Corps has created a public nuisance by operating the two locks in accordance with Congress's statutory instructions, and they contended that various actions or failures to act by the Corps should be set aside under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* The complaint seeks a permanent injunction requiring the Corps to develop and implement plans to permanently separate the Mississippi River and Great Lakes basins. Compl. 34. Contemporaneously, petitioners sought a mandatory preliminary injunction to require the Corps to close the locks and take other measures that petitioners claimed would prevent the spread of Asian carp while the litigation is pending, including installing block nets in the Little Cal-

umet River and accelerating the completion of GLMRIS. Compl. 31-32.

After voluminous testimony and a three-day evidentiary hearing, the district court denied the preliminary-injunction motion. Pet. App. 72a-149a.

The court first concluded that there was only a minimal chance petitioners would prove the elements of a public nuisance claim or establish a violation of the APA, particularly since the Corps is operating the locks for navigation, flood control, and water diversion as contemplated by Congress. Pet. App. 103a-126a. Next, the court concluded that petitioners had not shown that they would suffer irreparable harm absent an injunction. The court found that there was no evidence the electric barriers have been breached, that Asian carp likely exist in only small numbers above the barrier, that Asian carp are not likely to establish a breeding population in Lake Michigan in the near future, and that "the level of certainty that any damage will occur is low." *Id.* at 140a (citation omitted); see *id.* at 127a-141a. The district court also found that imposing the requested relief would harm the public interest by increasing flood risks, diverting finite Corps resources from other necessary projects, increasing Coast Guard response time, and causing undue economic hardship. Thus, the balance of harms tipped decidedly against issuing a preliminary injunction. *Id.* at 141a-149a.

4. The court of appeals affirmed the denial of preliminary injunctive relief. Pet. App. 1a-71a. Although it disagreed with the district court's analysis in several respects, the court held that the balance of harms "tips * * * decisively in favor of the defendants" and that "[a]s things stand now, * * * preliminary relief is not appropriate." *Id.* at 70a, 71a.

a. The court of appeals held that 5 U.S.C. 702 waived the government's sovereign immunity from the States' public-nuisance claim. Section 702 waives sovereign immunity for actions against the United States seeking relief other than money damages, except when "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The government argued that the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), is such a statute. The FTCA provides for the award of only money damages against the United States; the government contended that the FTCA impliedly forbids injunctive relief in tort suits against the government. The court of appeals rejected that argument; although the FTCA does not provide for injunctive relief or for suits using federal common law as the rule of decision, the court discerned no implication that Congress meant to forbid tort suits that rely on federal common law and seek injunctive relief. Pet. App. 18a-20a.

b. The court of appeals also concluded that a federal common law of nuisance "extends to the problem" of Asian carp, and that even though Asian carp are not a "traditional pollutant" (and respondents are not emitting *any* pollutant), petitioners could state a nuisance claim based on the maintenance of a manmade waterway through which invasive species could pass. Pet. App. 8a-11a. But the court of appeals declined to decide whether such a nuisance claim could lie against a federal agency acting within its statutory authority. *Id.* at 11a-15a. Although that question "may well require attention as this case proceeds," the court did not need to decide it at the preliminary-injunction stage. *Id.* at 15a.

The court of appeals next held that Congress had not displaced the common law of public nuisance with re-

spect to invasive species generally or Asian carp in particular. Pet. App. 20a-28a. In *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527 (2011), this Court held that the "test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *Id.* at 2537 (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)) (brackets in original). The government identified several statutes speaking to the problem of invasive species in the CAWS. Congress had provided authority for the electric barrier system and required a long-term study of the how to best address movement of invasive species between the Great Lakes and the Mississippi River basin. See p. 4, *supra.* And with regard to Asian carp specifically, Congress had given the Corps a broad (but time-limited) grant of emergency authority to adopt measures to "prevent aquatic nuisance species from bypassing the [electric barriers]" or "dispersing into the Great Lakes." Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, § 126, 123 Stat. 2853 (2009).[1]

The court of appeals rejected the displacement argument. It concluded that no "substantive statute * * * speaks directly to the interstate nuisance about which [petitioners] are complaining." Pet. App. 27a.

c. Having resolved those preliminary objections, the court of appeals next concluded that petitioners had sufficiently shown that they were likely to prevail on the merits of their public-nuisance claim. Pet. App. 28a-40a. The court emphasized that petitioners only needed to

[1] After the petition for a writ of certiorari was filed, Section 126 expired and was replaced with a new provision. See p. 28, *infra.*

show a likelihood of success, not actual success. *Id.* at 32a-33a. The court did not find that any of the district court's factual findings were clearly erroneous, see *id.* at 38a, and it specifically agreed that the district court had "reasonabl[y]" found that Asian carp are present in the CAWS only "in 'low numbers.'" *Id.* at 37a. But the court of appeals, relying on a newspaper account of government statements that post-dated the preliminary-injunction proceedings, thought that the district court had underestimated the likelihood that the carp could establish themselves in the Great Lakes and, on petitioners' theory, create a nuisance. *Id.* at 37a-38a. Thus, the court of appeals concluded that, giving petitioners "the benefit of the doubt," the "proper inference to draw from the evidence is that invasive carp are knocking on the door to the Great Lakes." *Id.* at 39a-40a.

The court of appeals similarly concluded that the States had made a sufficient showing of irreparable harm. Pet. App. 44a-47a. The court again noted the "intense factual dispute" over the likelihood that Asian carp will soon establish themselves in the Great Lakes, and it again resolved that dispute by giving the States "the benefit of the doubt." *Id.* at 46a.

d. Despite giving petitioners "the benefit of the doubt" on the first two prongs of the preliminary-injunction standard, the court of appeals held that petitioners had failed to demonstrate their entitlement to an injunction, because "[t]he balance of harms favors the defendants and the public interests they represent" so "decisively." Pet. App. 48a-49a, 70a.

The court noted that petitioners' requests for injunctive relief had repeatedly "shifted" and "evolved" over the course of the litigation and had suffered from "unhelpful" "vagueness." Pet. App. 49a. The court thus

applied its best understanding of what petitioners were seeking, and it analyzed each specific measure petitioners sought. *Id.* at 50a-51a. The court concluded that, even if those measures were adopted, they would "offer no assurance that they will block the carp over the short run" or prevent irreparable harm to the Great Lakes in the long run. *Id.* at 58a. In contrast, the court of appeals concluded that it could "be sure" that those same injunctive measures "would impose significant costs" on the Corps and the public. *Id.* at 60a. As relevant here, the court of appeals noted that block nets would "increase[] the risk of flooding." *Ibid.*; see also *id.* at 146a. And forcing the Corps to complete GLMRIS within petitioners' requested timetable would not achieve anything that a preliminary injunction is supposed to achieve, *i.e.*, it would not "reduce the odds that invasive carp will establish themselves in the short term." *Id.* at 57a-58a. The court further noted the Corps' representation that the hurry would also detract from the study's thoroughness and efficacy. *Id.* at 60a.

In short, the costs that petitioners' requested injunction would impose were not justified in light of the injunction's only questionable benefit and the "tremendous effort" already underway to prevent the spread of Asian carp. Pet. App. 61a-62a, 65a. Thus, the court concluded, "there is nothing that any preliminary injunction from the court could add that would protect the Great Lakes from invasive carp while this suit is being adjudicated any better than the elaborate measures" being undertaken by federal, state, and local agencies, measures that "agencies are better suited" to manage than courts. *Id.* at 64a, 70a.

ARGUMENT

This case does not warrant further review. The courts below were correct to deny preliminary injunctive relief. As the court of appeals explained, the costs of an injunction, including the costs of judicial interference in the significant, ongoing, and coordinated effort to address the Asian carp problem, outweigh any limited benefit that preliminary injunctive relief might afford. Petitioners allege no conflict among the courts of appeals and, indeed, present no question of law at all. Rather, they ask this Court to re-weigh, as a factual matter, the lower courts' conclusions about how to balance the equities with respect to only two of the proposed injunctive measures petitioners presented below. The courts below did not err.

Moreover, even if the equities did favor petitioners with respect to those two injunctive measures, petitioners would not be entitled to preliminary injunctive relief in any event. For several reasons, petitioners' claims are jurisdictionally barred and are otherwise unlikely to succeed on the merits, and petitioners have not shown that irreparable injury is likely during the pendency of this litigation. If the Court were to consider the propriety of injunctive relief at this interlocutory stage, it would need to reach those substantial questions, some of which have not yet been ruled on by the lower courts. Dispositive motions in the district court are due on January 30, 2012, and the case will proceed in that court; while it proceeds, the ongoing effort to prevent the spread of Asian carp is being effectively managed through an intensive multi-agency and multi-sovereign effort. This Court's review is not warranted.

1. a. Petitioners contend (Pet. i, 12-19) that the court of appeals was required to separately balance the

relative harms for each type of preliminary injunctive relief they requested. But in the district court and the court of appeals petitioners presented their proposed preliminary injunction as a suite of measures that were *all* necessary to prevent the spread of Asian carp. Thus, petitioners briefed the issue assuming that all of the requested measures were to be evaluated for their effectiveness as a group. Pet. C.A. Br. 61-74; Pet. C.A. Reply Br. 43-49. Petitioners now focus on block nets, despite having devoted a total of one paragraph, Pet. C.A. Br. 65-66, and one sentence, Pet. C.A. Reply Br. 47, to block nets in their briefs to the court of appeals. And as the court noted, what they did say was overly vague and general. Pet. App. 49a. The court of appeals can hardly be faulted for emphasizing in its discussion the same measures (chiefly closure of the locks) that petitioners emphasized in their briefs. Exactly what preliminary relief petitioners want has been a "shift[ing]," "evolv[ing]," "moving * * * target" throughout this litigation. *Ibid.* Petitioners' newfound emphasis on block nets is an attempt to move the target again.

In any event, the court of appeals did separately analyze and discuss each of the measures petitioners requested. Like the district court, Pet. App. 146a, the court of appeals credited the unrebutted evidence (*ibid.*) that block nets would heighten the risk of flooding because they would become clogged with debris. *Id.* at 60a. The court of appeals also agreed with the government that at present, that risk outweighs any potential usefulness of block nets. *Id.* at 55a.[2] Petitioners dis-

[2] Petitioners mischaracterize this statement by the court of appeals as a holding that because the Corps is considering adopting block nets, the court would not mandate them. Pet. i, 14-15. Rather, the Corps explained that it had examined the possibility of installing block nets

agree (Pet. 14), but they cannot dispute that both courts below separately considered and rejected their argument about block nets.

The same is true of petitioners' argument about accelerating GMLRIS. The court of appeals concluded, and petitioners do not dispute, that accelerating GLMRIS would do nothing to prevent irreparable harm during the pendency of this litigation. Pet. App. 57a-58a. Rather, petitioners contend (Pet. 17 & n.7) that the court of appeals should instead have asked whether such an injunction would reduce the likelihood that irreparable harm will *ever* occur. That again has nothing to do with the question petitioners present, about separate consideration of each form of relief.

Petitioners' contention is meritless in any event. This Court has "frequently reiterated," including in the lone case that petitioners cite (Pet. 17 n.7), that a plaintiff seeking a preliminary injunction must also demonstrate that "irreparable injury is *likely* in the absence of an injunction." *Winter* v. *NRDC*, 555 U.S. 7, 22 (2008). Moreover, the injury must be likely to occur "before a decision on the merits can be rendered." *Ibid.* (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1, at 139 (2d ed. 1995)); accord, *e.g.*, *Withrow* v. *Larkin*, 421 U.S. 35, 43 (1975). Petitioners' novel theory of preliminary injunctive relief also presumes that petitioners will win on the merits *and* will obtain permanent injunctive relief, which they say will be easier to develop if GLMRIS is complete. But even a permanent "injunction is a matter of equitable discre-

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but had thus far found that task infeasible. The court of appeals properly credited that assessment based on the record, Pet. App. 55a, rather than accept petitioners' assertions (Pet. 13, 14) that the technology is "straightforward" and the solution "simple."

tion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32; accord *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982).

b. The court of appeals correctly concluded that even if *all* of petitioners' proposed injunctive measures were adopted, they were not likely to significantly reduce the risk of Asian carp establishing a breeding population in Lake Michigan while the litigation is pending. Pet. App. 58a, 61a. For example, the court of appeals concluded that petitioners' proposed injunctive measures do not address 18 other potential pathways Asian carp might use to travel from the Mississippi River to the Great Lakes. *Id.* at 52a. It follows that adopting *some* of those measures similarly could not reduce that risk sufficiently to justify the extraordinary remedy of a mandatory preliminary injunction.

Petitioners take issue with that fact-based conclusion. Petitioners' arguments have nothing to do with the questions they present, see Pet. i, and in any event, the lower courts correctly rejected petitioners' proposed injunction as contrary to the balance of equities and the public interest.

i. Petitioners contend (Pet. 13-15) that block nets would close two "entirely open pathway[s]"—the Little and Grand Calumet Rivers—and could be deployed at minimal cost. By "open pathways" petitioners mean that there are no "permanent physical impediments to fish passage" in those rivers. Pet. 13, 14.[3] But that ignores the electric barrier system, which prevents Asian carp from entering those rivers in the first place. Thus, block nets in the Little Calumet River would at most provide

[3] In fact, at present the Grand Calumet River does contain a physical impediment to fish passage. See Pet. App. 55a.

a redundant backup to the electric barriers and potentially block one pathway (out of several, see Pet. App. 150a) to any Asian carp that entered the CAWS in some other way. Although petitioners contended below (*e.g.*, Pet. C.A. Br. 52-56) that the electric barriers had failed, and that the district court had clearly erred by finding to the contrary, Pet. App. 121a, 134a-135a, the court of appeals disagreed, and petitioners do not renew that contention here. See generally, *e.g.*, *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (explaining that this Court ordinarily does not review factual findings on which two courts below agree).

In contrast to their limited benefits, installing block nets would have significant drawbacks; the court of appeals noted these demerits—and petitioners' "insouciant attitude" about the costs of their proposed injunctive relief. Pet. App. 58a. As noted above, both courts below agreed that block nets pose an unjustifiable risk of flooding, *id.* at 55a, 146a, and they did not agree with petitioners' bare assertion (Pet. 13-14) that the solution to the flooding risk is "simple." Cutting the nets free during storm and flood conditions could be dangerous and difficult to accomplish during a storm—and would in any event completely destroy the nets' efficacy.

Petitioners also underestimate the monetary costs associated with block nets. Petitioners cite no evidence that block nets are "inexpensive" (Pet. 13), and in fact the cost of deploying them effectively as fish barriers, while still being explored by the Corps, appears to be quite high. Securing the block nets to the bottom and sides of the rivers, without any gaps that could let fish pass, is a difficult endeavor that might require building a dedicated structure to hold the net. Moreover, petitioners fail to take into account the cost, in both dollars

and personnel hours, of monitoring the nets for clogging, cutting them free, and replacing them with new nets. Those are dollars and hours that could not be spent on different efforts to prevent the spread of Asian carp.

ii. Petitioners are even further afield with respect to expediting GLMRIS. Imposing an arbitrary 18-month timetable on GLMRIS would not do anything to prevent the spread of Asian carp while this litigation is pending. See p. 15, *supra*. And contrary to petitioners' contention (Pet. 18-19), expediting GLMRIS would come at a cost to the government and to the public interest. To complete the same task in less time necessarily requires more resources; and here, the agency conducting the study believes that attempting to complete it in 18 months—even with more resources—would risk the adequacy of the study. GLMRIS is a massive undertaking, as its scope encompasses any and all invasive aquatic species moving between the Great Lakes and Mississippi River basins, in either direction and through any pathway, and the significant challenge of studying how the two basins could safely and efficiently be separated.

iii. As the court of appeals noted (Pet. App. 64a-70a), a further problem with *all* of petitioners' requested forms of relief is the extent to which they ask the judiciary to second-guess, through federal common lawmaking, the expert agencies that are administering the ongoing effort to combat Asian carp pursuant to statutory authority. The petition does not solve that difficulty by focusing on block nets and a time limit for GLMRIS. To the contrary, petitioners seek to take time and resources away from the agencies' priorities and substitute their own priorities, with which the agencies disagree. In any event, as the court of appeals concluded, that request is

manifestly inequitable under general equitable principles.

Under the APA, an individual who seeks to compel an agency to take affirmative measures, such as installing block nets or accelerating GLMRIS, must establish that the requested action has been "unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). Petitioners have not demonstrated that the Corps was *required* by any of the statutes under which it acts to install block nets, see *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004), or that the Corps' ongoing conduct of the massive GLMRIS has been "unreasonably delayed" within the parameters established by Congress and the Corps. See *id.* at 63 & n.1.

In sum, the courts below did not err in holding that, with respect to each form of relief that petitioners seek, "[t]he balance of harms favors the defendants and the public interests they represent" so "decisively" that no preliminary injunction may issue on this record. Pet. App. 48a-49a, 70a.

2. The court of appeals' application of the preliminary-injunction standard was, by its nature, interlocutory, and the conclusions it drew are subject to revision as this case proceeds. Rule 12 motions are due in district court on January 30, 2012; at petitioners' insistence, those proceedings will move forward while the petition in this Court is pending. The court of appeals flagged but did not resolve a substantial question whether petitioners may proceed against the Corps under federal common law at all. Pet. App. 11a-15a. And Congress's recent enactment of new emergency authority for the Corps to use in combating Asian carp will require the district court to analyze anew the question

whether federal common law has any role to play. See p. 28, *infra*.

Further review of the preliminary injunction is not warranted in light of the ongoing litigation in the district court; a final judgment would moot the request for a preliminary injunction. See, *e.g.*, *U.S. Philips Corp.* v. *KBC Bank N.V.*, 590 F.3d 1091, 1093-1094 (9th Cir. 2010) (collecting cases). Nor does the court of appeals' interlocutory ruling about the balance of the equities pretermit that litigation; the court recognized that the facts are fluid and instructed the district court to "keep its mind open" about new facts. Pet. App. 38a. And petitioners make no effort to offer any non-case-specific reason (such as a circuit conflict on a legal issue) why the questions they present warrant review.

3. Petitioners present two questions limited to the equitable-balancing and public-interest prongs of the preliminary-injunction standard. Even if this Court were to agree with petitioners rather than the courts below about how to apply that standard in this case, petitioners still could not obtain a preliminary injunction unless they can "demonstrate * * * a likelihood of success on the merits" and a likelihood of "irreparable injury." *Munaf* v. *Geren*, 553 U.S. 674, 690 (2008) (citation omitted); *Winter*, 555 U.S. at 22. They cannot, and further review of the questions presented would be futile. Petitioners' suit is barred by sovereign immunity, fails to state a claim on which relief can be granted, and relies on federal common law nuisance principles that have been displaced by congressional action. Petitioners also have not shown likely irreparable injury. To the extent the court of appeals concluded otherwise, that conclusion does not bind this Court.

a. Petitioners' public-nuisance suit is barred by sovereign immunity. The court of appeals incorrectly concluded (Pet. App. 15a-20a) that a provision of the APA, 5 U.S.C. 702, waives the government's sovereign immunity to this lawsuit. By its terms, that statute does not apply when "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702(2). The FTCA is such a statute, and the court of appeals' contrary conclusion failed to give due weight to Congress's specification that statutes (particularly those adopted long before Section 702) may "forbid[]" particular forms of relief not just "expressly," but also "impliedly." The court of appeals' holding is also squarely contrary to the statutory history and purpose.

Congress adopted the current version of Section 702 in 1976. Act of Oct. 21, 1976, Pub. L. No. 94-574, § 1, 90 Stat. 2721 (5 U.S.C. 702). As amended, Section 702 provides that an action in federal court, "seeking relief other than money damages and stating a claim that [a federal agency, officer, or employee] acted or failed to act in an official capacity or under color of legal authority," may proceed and "shall not be dismissed * * * on the ground that it is against the United States or that the United States is an indispensable party." At the same time, however, Congress was careful to preserve the limitations prescribed in other statutes in which it had waived sovereign immunity for particular classes of cases. To that end, the last sentence of Section 702 provides that "[n]othing herein"—that is, nothing in the APA's waiver of sovereign immunity—"confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. 702(2).

The FTCA, which was first enacted 30 years before the 1976 amendments to Section 702, is precisely the sort of "other statute" to which Congress referred when it limited the scope of the APA's waiver. Before the FTCA was enacted, the United States was not amenable to suit in tort actions. Congress enacted the FTCA to waive the United States' immunity from tort actions "for money damages" where the United States "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). The FTCA does not grant consent to suit for tort actions seeking equitable relief; that omission left in place the traditional prohibition of other types of relief in tort actions. The text of Section 702(2) was enacted precisely to preserve the limited nature of the FTCA's waiver: the FTCA is an "other statute that grants consent to suit" but that "expressly or impliedly forbids the relief which is sought" in a case, such as this one, seeking injunctive relief against the United States. This suit is therefore barred by Section 702 and sovereign immunity.

The legislative history of Section 702 confirms what is apparent from the text. In enacting that provision, Congress adopted a proposal of the Administrative Conference of the United States. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4, 23-24, 26-28 (1976) (House Report); S. Rep. No. 996, 94th Cong., 2d Sess. 3, 22-23, 25-27 (1976) (Senate Report). In a memorandum supporting its proposal, the Administrative Conference had pointed out that its "recommendation [wa]s phrased as not to effect an implied repeal or amendment of any prohibition, limitation, or restriction of review contained in existing statutes, such as * * * the Federal Tort Claims Act, in which Congress has conditionally consented to

suit." *Sovereign Immunity: Hearing on S. 3568 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 92, 138-139 (1970) (*1970 APA Hearing*) (citations omitted). The Committee observed that "this result would probably have been reached by the preservation of all other 'legal or equitable ground[s]' for dismissal," *id.* at 139, in Section 702(1), which states that "[n]othing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground," 5 U.S.C. 702(1). But the Committee explained that "clause (2) of the final sentence of part (1) of the recommendation"—*i.e.*, the clause that became Section 702(2)—is phrased "unequivocally" and "is intended to prevent any question on this matter from arising." *1970 APA Hearing* 139.

As originally introduced in the Senate, the APA bill varied from the Administrative Conference's proposal in a significant respect: its version of Section 702(2) would have withheld authority to grant relief only if another statute "forbids the relief which is sought," rather than if it "expressly or impliedly forbids the relief which is sought," as the Administrative Conference had suggested. Senate Report 12, 26. On behalf of the Department of Justice, then-Assistant Attorney General Scalia urged Congress to restore the phrase "expressly or impliedly." *Id.* at 26-27. As he explained, waiver statutes enacted before 1976 were enacted against the background of a system that assumed the existence of a general rule of sovereign immunity, and Congress therefore would have had no occasion "expressly" to forbid relief other than that to which it consented under the particular waiver statute. *Id.* at 27. Assistant Attorney Gen-

eral Scalia observed that "this will probably mean that in most if not all cases where statutory remedies already exist, these remedies will be exclusive." *Ibid.* That result, he concluded, is "simply an accurate reflection of the legislative intent in these particular areas in which the Congress has focused on the issue of relief." *Ibid.*

In response to Assistant Attorney General Scalia's letter, the Senate Committee amended the provision to conform to the Administrative Conference's proposal, Senate Report 12, and the provision passed the House and Senate in that form. That history confirms that, under Section 702(2), "where statutory remedies already exist, these remedies will be exclusive." *Id.* at 27. As the House Report explained (at 13), "the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as * * * tort claims."

The court of appeals concluded that there "is nothing in the [FTCA] suggesting that Congress meant to forbid all actions that were not expressly authorized." Pet. App. 18a. But the FTCA's comprehensive specification of the tort liability of the United States, see 28 U.S.C. 2674, 2679, 2680, creates just the sort of "fair implication" that the court of appeals thought was missing, Pet. App. 18a. As we have explained, the background assumption at the time Congress enacted the FTCA was that sovereign immunity generally precluded suit, and therefore Congress had no reason to include any express provision in the FTCA to preserve that limitation for equitable relief in tort actions. The court of appeals relied chiefly on a D.C. Circuit decision allowing a claim for prospective tort relief to proceed, but that decision rested on reasoning specific to claims alleging "interfer-

ence with contract rights," which are expressly addressed in 28 U.S.C. 2680(h). See *United States Info. Agency* v. *Krc*, 989 F.2d 1211, 1216 (1993).[4] The court of appeals misread *Krc* as applying to all "tort cases." Pet. App. 19a. There is no comparable provision for nuisance claims.

The court of appeals also erroneously believed that sovereign immunity does not bar petitioners' suit because they do not bring an action that is "cognizable" under the FTCA. Pet. App. 20a. Petitioners' suit is based on the federal common law, and state law provides the source of substantive liability under the FTCA. *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994). Thus, the court of appeals was correct that petitioners could not bring an action under the FTCA using *federal* common law as the rule of decision, but it drew the wrong lesson from that observation. As this Court explained in *Meyer*, because the FTCA's waiver of sovereign immunity does not extend to claims based on federal law, the United States "simply has not rendered itself liable" in cases where "federal law, not state law, provides the source of liability." *Ibid.* In *Meyer*, the agency had a "sue-and-be-sued" clause that generally waived its immunity, irrespective of the FTCA. The FTCA expressly does not narrow an agency's liability under its sue-and-be-sued clause except where the particular tort claim is actually "cognizable under" the FTCA. 28 U.S.C. 2679(a). Likewise, although the court of appeals noted that nuisance litigation has proceeded against the Tennessee Valley Authority, Pet. App. 14a, that entity has a sue-and-be-sued clause as well. See 16 U.S.C. 831c(b). No such sue-and-be-sued clause is present here. Thus,

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[4] *Krc*'s reasoning is problematic even within that limited scope.

the fact that Congress intended to *rule out* federal common law as a source of tort liability in cases against the United States does not support *allowing* such a common-law claim to proceed merely because it seeks injunctive relief.

b. Even if sovereign immunity did not bar petitioners' suit, they have failed to state a cognizable nuisance claim. The court of appeals left open the question whether federal common law of nuisance, even if it otherwise might be recognized in a context such as this, can govern the actions of a federal agency, let alone compel the agency to stop complying with a statutory directive, Pet. App. 11a-15a, and it noted that petitioners "have done little to counter" the government's submission on that point, *id.* at 12a. As noted above, that issue will soon be before the district court, and it is a bar to petitioners' claims against the Corps, in part for reasons identified by the court of appeals: "[I]t may be thought illogical to say that a federal actor, which in theory embodies the national interest," particularly when it complies with congressional directives and exercises congressionally assigned authority, "is at the same time violating a judgemade concept of that same interest." *Id.* at 13a.

Congress has expressly directed the Corps to maintain a navigational connection between Lake Michigan and the Des Plaines River. See p. 2, *supra*. The Corps' exercise of that authority cannot constitute a public nuisance under federal common law. Yet petitioners' theory is that the Corps has created a nuisance simply by allowing continued navigation between the Great Lakes and Mississippi River basins, a pathway through which Asian carp might pass—on their own, not because of any act on the part of the Corps to introduce or encourage

them. No similar federal common law claim has ever been found cognizable in federal court. See *American Electric Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2535-2537 (2011) (*AEP*). The federal courts' power to formulate federal common law is not "akin to that vested in Congress," but is intended to "fill in statutory interstices." *Id.* at 2535, 2536 (citation omitted). It cannot completely override a clear congressional statutory grant of authority. See also Restatement (Second) of Torts § 821B cmt. F (1965) ("Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability."). The court of appeals deliberately left open these "potentially important and complex" questions, Pet. App. 12a, but resolving petitioners' claim for injunctive relief would require this Court to examine them; they provide a further reason why petitioners cannot prevail.

c. Even if such a common-law claim were cognizable, it would be displaced by congressional action. This Court recently clarified that the "test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue." *AEP*, 131 S. Ct. at 2537 (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)) (brackets in original). The congressional intent to displace federal common law need not be "clear and manifest." *Ibid.* (citation omitted). A "statute speaks directly to the question at issue" if it grants authority to an agency to resolve that question; it is not necessary that either Congress or the agency have resolved the question comprehensively or in the way that the plaintiff seeks. See *id.* at 2538 ("[T]he delegation is what displaces federal common law.").

Congress has recognized and taken action to combat the problem of aquatic invasive species in the Great Lakes and Mississippi River basins, but it has done so while leaving in place the statutory mandate to operate the CAWS structures in the interest of navigation between those basins, see p. 2, *supra*, and it has charged the Corps with investigating solutions that can be incorporated into ongoing operations of the CAWS, see 16 U.S.C. 4722(i)(3)(A) and (B)(ii); WRDA § 3061(d), 121 Stat. 1121. And Congress has mandated that the Corps construct, upgrade, operate, and maintain the electric barrier system and study long-term solutions to "prevent" the spread of Asian carp and other invasive species. See WRDA § 3061(b)(1) and (d), 121 Stat. 1121. Those statutes are incompatible with the federal common law rule that petitioners seek—a rule mandating the permanent ecological separation of the two basins.

Furthermore, Congress has granted authority to the Corps specific to the particular problem of aquatic nuisance species in these basins. Section 126 of the pertinent appropriations statute (see p. 10, *supra*) authorized the Corps to take "emergency measures" to combat Asian carp in the CAWS. After the petition for a writ of certiorari was filed, Section 126 expired and was replaced with a new provision, effective through Fiscal Year 2012, authorizing the Corps to take "emergency measures * * * to prevent aquatic nuisance species from dispersing into the Great Lakes by way of any hydrologic connection between the Great Lakes and the Mississippi River Basin." Energy and Water Development and Related Agencies Appropriations Act, 2012, Pub. L. No. 112-74, Div. B, § 105, 125 Stat. 856-857 (2011).

The court of appeals dismissed these statutes as insufficiently "detail[ed]" or "substantive." Pet. App. 25a, 27a. The court of appeals acknowledged that Congress, by enacting Section 126, had granted emergency authority to the Corps to deal with the Asian carp problem. But the court read that statute only as a "temporary power to implement various recommendations," and it concluded that "neither the Corps nor any other agency has been empowered actively to regulate the problem of invasive carp." *Id.* at 28a. That conclusion was incorrect. The displacement analysis does not turn on whether Congress has "address[ed] every issue" in a comprehensive manner, *Mobil Oil*, 436 U.S. at 625; *AEP*, 131 S. Ct. 2536-2537, or whether the agency adopts solutions that federal common law plaintiffs would prefer. The court of appeals focused too narrowly on whether the statutes relevant to Asian carp are similar to the Clean Air Act or Federal Water Pollution Control Act, two comprehensive and complex statutes that the Supreme Court has previously held displaced federal common law. See Pet. App. 25a, 27a, 28a. Complexity is not required for displacement. In *Mobil Oil*, federal common law was displaced by one phrase in a provision of the Death on the High Seas Act, 46 U.S.C. 762 (1976) (now 46 U.S.C. 30303). Because the statute "sp[oke] directly to [the] question" at issue, it displaced federal common law. *Mobil Oil*, 436 U.S. at 625; see *AEP*, 131 S. Ct. at 2537. That is also the case here.

Congress has granted the Corps authority to investigate solutions for aquatic invasive species in general and Asian carp in particular, to construct and operate the electric barrier system, to study the problem further, and to implement other solutions through the exercise of its emergency authority, with a goal of integrating

solutions into the operation of the CAWS. That "delegation is what displaces federal common law." *AEP*, 131 S. Ct. at 2538. Congress has placed the responsibility for combating the problem with the expert agencies, not the federal courts, which "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id.* at 2539-2540. Matters such as the location of the invasion front, the efficacy of the electric barriers, the appropriate amount and method of other monitoring efforts, the best long-term solutions for the basin as a whole, and the economic impacts of measures to prevent the spread of Asian carp are undoubtedly "scientific, economic, and technological" questions that Congress appropriately left for the agencies to answer.

Once the agencies do answer those questions through final agency action, petitioners may obtain judicial review under the APA's traditional arbitrary and capricious standard, 5 U.S.C. 706(2), to the extent the agency action is not committed to agency discretion by law, 5 U.S.C. 701(a)(2). See *AEP*, 131 S. Ct. at 2540. The agencies are working diligently toward solutions, and petitioners should not be permitted to short-circuit that process through claims styled as relying on federal common law.

d. A preliminary injunction is also not appropriate because petitioners failed to show that injunctive relief was necessary to prevent irreparable injury while this litigation is pending. The evidence before the district court showed that Asian carp are present in at most "low numbers" upstream of the electric barrier system, that the electric barrier system is effective in preventing the northward movement of Asian carp, and that Asian carp are not threatening to imminently establish a breeding

population in the Great Lakes. Pet. App. 76a-101a, 120a-121a, 133a-141a.[5]

The court of appeals did not find fault with any of the "facts that [the district court] so carefully found," Pet. App. 34a, yet it nevertheless concluded that the district court had drawn the wrong inferences from those facts. The district court gave petitioners "the benefit of the doubt" on not only the likelihood of their ultimate success, but also the likelihood that they would suffer irreparable harm during the lawsuit. In doing so, the court of appeals highlighted the substantial degree to which the balance of the equities weighed against petitioners' request. But even if petitioners had a more compelling case on the equities, petitioners could not be awarded a preliminary injunction based on "the benefit of the doubt" as to the other prongs of the test. It was petitioners' burden to prove a likelihood of irreparable injury. *Winter*, 555 U.S. at 22. The district court's findings demonstrate that petitioners did not carry that burden. For that reason as well, there is no basis for this Court to review the court of appeals' analysis of the equitable-balancing and public-interest prongs of the standard for preliminary injunctive relief.

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[5] If the district court does not resolve the case on motions to dismiss, it can entertain further evidence on that point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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