No. 17-2585

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SAUK PRAIRIE
CONSERVATION ALLIANCE,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR, et al.,

Defendants-Appellees.

APPEAL FROM THE DENIAL OF A MOTION FOR A PRELIMINARY INJUNCTION, ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, THE HONORABLE JAMES D. PETERSON, PRESIDING

BRIEF OF THE STATE OF WISCONSIN

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INTRODUCTION

Before the Sauk Prairie Conservation Alliance ("Alliance") asked the federal courts for preliminary injunctive relief, the group had received three decisions on an identical request in Wisconsin's courts. In every instance, the Wisconsin courts found that the Alliance had failed to show that the challenged activities at the Sauk Prairie Recreation Area—limited on-trail motorcycling, helicopter training by the Wisconsin Air National Guard, and an area for training dogs—would result in "irreparable harm" to either the Alliance or the environment. Those decisions, entered after full litigation of the issue in courts of competent jurisdiction, should preclude further litigation of the issue of irreparable harm for purposes of the Alliance's federal motion for a preliminary injunction.

With that issue precluded, the Alliance could not establish any need for a preliminary injunction in this case. Whether on this basis, or based on the merits of the motion, as addressed by the Federal Appellees, the district court's decision denying the preliminary injunction should be affirmed.

JURISDICTIONAL STATEMENT

The jurisdictional summary in Appellant's brief is complete and correct.

STATEMENT OF THE ISSUE

Issue preclusion bars relitigation of matters finally and necessarily decided in a court of competent jurisdiction, so long as it would not be unfair

to bar further litigiaton on the issue. Earlier this year, two Wisconsin courts (state and appellate) rejected the Alliance's request to temporarily enjoin three activities at the Sauk Prairie Recreation Area: helicopter training, motorcycling, and dog training. Both courts held that the Alliance failed to establish that irreparable harm would occur if the challenged activities were not enjoined. Is the Alliance now precluded from relitigating whether irreparable harm supports temporary injunctive relief as to the same activities?

SUPPLEMENTAL STATEMENT OF THE CASE[1]

I. Wisconsin's state-court proceedings are proper subjects for judicial notice.

Under Fed. R. Evid. 201(b), courts may take judicial notice of matters of public record, so long as it is a source "whose accuracy cannot reasonably be questioned" and the finding taken is "not subject to reasonable dispute." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081–82 (7th Cir. 1997) (quoting Fed. R. Evid. 201(b), (b)(2)). This allows courts "to avoid unnecessary proceedings when an undisputed fact in the public record

[1] In an effort to avoid repeating matters presented in the Federal Appellees' brief, this supplemental statement of the case provides information pertaining to the Alliance's parallel state-court cases, and their relationship to this case, whereas the Federal Appellees focus on matters relevant to the federal court litigation, specifically. Wisconsin joins in full the Federal Appellees' statement of the case, as well as their arguments on the merits of the district court's denial of the Alliance's motion for a preliminary injunction.

establishes that the plaintiff" is not entitled to its sought-after relief. *Id.* at 1081 (discussing judicial notice in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6)). "Courts routinely take judicial notice of the actions of other courts or the contents of filings in other courts." *Daniel v. Cook Cty.*, 833 F.3d 728, 742 (7th Cir. 2016); *accord Ewell v. Toney*, 853 F.3d 911, 917 (7th Cir. 2017) (citing *Opoka v. I.N.S.*, 94 F.3d 392, 394–95 (7th Cir. 1996)).

Here, the State of Wisconsin asks this Court to take notice of the proceedings and filings in state courts involving the Alliance's first attempt to litigate the issues now before this Court.[2] The existence of these state court proceedings, and the existence of the Alliance's arguments therein, are not subject to dispute. Nor can there be any question of the accuracy of the documents establishing the existence of the proceedings and arguments. Judicial notice is therefore proper under Fed. R. Evid. 201(b)(2) and this Court's cases.

[2] The cases for which judicial notice is proper are Sauk County Circuit Court Case No. 16-CV-642, and Wisconsin Court of Appeals Case No. 2017AP650-LV. The State includes copies of the relevant filings from these cases in its supplemental appendix filed with this brief.

II. Wisconsin's management of the Sauk Prairie Recreation Area.

This case involves lands now managed by the State of Wisconsin (through its Department of Natural Resources (hereinafter WDNR)).[3] (*See* Dkt. 1-8:16.) The lands at issue make up the Sauk Prairie Recreation Area ("the Area"), which is a formal designation within Wisconsin's land-management regime, and which the State has been actively managing since receiving the lands approximately six years ago. (*See* Dkt. 1-8:16.)

The Area consists of lands that once comprised the Badger Army Ammunitions Plant ("Badger Plant"). (*See* Dkt. 1-8:16.) At its peak, the Badger Plant was the largest manufacturer of ammunition propellant in the world, employing over 6,000 people in continuous shifts throughout World War II. (*See* Dkt. 1-8:10.) The sprawling facility consisted of over 1,400 buildings across 7,300 acres, with over 150 miles of roads crisscrossing the lands. (*See* Dkt. 1-8:10, 69, 108.)

Munition production at the Badger Plant ceased in 1975, and in 1998 the United States Army declared the Badger Plant "excess," thereby requiring that the property be disposed under the Federal Property and Administrative Services Act of 1949. (*See* Dkt. 1-10:6.)

[3] Citations to "Dkt." refer to entries in the district court docket; "7th Cir. Dkt." refers to entries in this Court's docket.

Soon thereafter, Wisconsin expressed interest in acquiring parts of the Badger lands for public recreation and ecological restoration. (*See* Dkt. 1-15:2–3; *see also* Dkt. 1-18 (Wisconsin's application under the Federal Lands to Parks Program).) After nearly a decade of federal environmental analysis, decommissioning, dismantling, remediation, and negotiations between the parties, Wisconsin began receiving parcels of the Badger Plant lands in 2011. (*See* Dkt. 1-8:16.)

In 2012, WDNR began the formal state process for developing a "Master Plan" for the Area, as required for state lands under Wis. Admin. Code ch. NR 44. (*See also* Dkt. 1-22:7 (Draft Regional and Property Analysis).) Over the next four years, WDNR engaged in extensive public outreach and additional analysis, first releasing a draft Vision, Goals, and Conceptual Alternatives document (Dkt. 1-26), followed by a Draft Master Plan and Environmental Impact Statement (Dkt. 1-28). These documents included analyses of multiple alternative visions for the Area, including "no action," "ecological restoration emphasis," and "outdoor recreation emphasis." (*See* Dkt. 1-26:3–7; *see also* Dkt. 1-28:27, 32–96 (Draft Master Plan discussing proposed recreational uses and habitat management for the Area).)

In November 2016, WDNR issued the final Master Plan and Environmental Impact Statement for the Area. (*See* Dkt. 1-8.) The plan indicates that the recreational goal for the Area is to provide "[a] blend of

recreation activities," including a variety of "silent sports" such as hiking, biking, and snowshoeing, as well as hunting, trapping, and bird watching. (*See* Dkt. 1-8:11–12.) Other approved recreational uses include those challenged here: "[r]e-purposing trails and roads for use by dual-sport motorcycles (up to 6 days/year)," and creating a 72-acre area for training dogs for upland bird hunting. (*See* Dkt. 1-8:11–12, 44 (discussing dog training area).)[4]

Soon after WDNR released the finalized Master Plan, the National Park Service informed WDNR that the State had addressed all of the federal agency's outstanding concerns about future plans for the Area. (*See* Dkt. 1-34:2.) The Park Service informed WDNR that once the Master Plan was formally approved by the Wisconsin Natural Resources Board (which exercises statutory oversight over the WDNR, *see* Wis. Stat. § 15.34(1)), the Park Service would deem the Master Plan to be an amendment to Wisconsin's Program of Utilization, which defines the intended use of the property and governs how the transferred lands may be used. (*See* Dkt. 1-34:2; *see also* Dkt. 1-18:10–15 (Wisconsin's Federal Lands to Parks application, including the initial Program of Utilization).) On

[4] A concise summary of the challenged activities, and their context within the Area's Master Plan, can be found at Suppl. App. 298–302.

December 14, 2016, the Wisconsin Natural Resources Board approved the Master Plan. (*See* 7th Cir. Dkt. 10:12 (Alliance Br.).)

III. State litigation challenging land-use decisions at the Area.

Following the Wisconsin Natural Resource Board's approval of the Master Plan, the Alliance filed a petition for judicial review of the Master Plan in the Circuit Court for Sauk County (Wisconsin trial court).[5] (*See* Suppl. App. 1–13.) In particular, the Alliance challenged the Master Plan's allowance of three so-called "high-impact" land uses that the Alliance finds objectionable: limited off-road motorcycling; a 72-acre area for training hunting dogs; and continuation of the Wisconsin Air National Guard's helicopter training program (which has been occurring for over thirty years). (*See id.*)

A. Motion for stay/temporary injunction.

Less than two weeks after filing its petition for judicial review in state court, the Alliance moved for a stay or temporary injunctive relief as to the

[5] The petition for judicial review was filed under Wisconsin's administrative procedure statutes, Wis. Stat. ch. 227.

challenged uses.[6] (*See id.* at 14–36.) Specifically, the Alliance asked the Wisconsin court to "allow all of the uses in the Plan to go forward except the high-impact uses challenged in the petitions." (*Id.* at 15–16.) Those challenged uses, the Alliance argued, "will have significant and immediate adverse environmental effects, will create safety hazards and will be a nuisance for low-impact recreational users and neighboring landowners." (*Id.* at 16.) Its argument that irreparable harm would befall the Alliance, its members, and the natural environment of the Area was central to its claim. (*See, e.g.*, *id.* at 32–35.)

In its opening brief before the state circuit court, the Alliance focused exclusively on the three challenged "high-impact uses" and why those uses needed to be halted. (*See id.* at 14–17, 23–35.)

Regarding motorcycling, the Alliance discussed risks of "displacement, nest desertion, breeding failure, and other impacts to some native species,"

[6] Based on the procedural posture of the Alliance's request for temporary relief in state court, the parties and the court discussed two theories on which the challenged uses might be halted: a "stay" under the procedures for administrative review of agency decisions, Wis. Stat. § 227.54; and a generally applicable temporary injunction, under Wis. Stat. § 813.02(1). Both theories included similar factors for determining whether the challenged activities should be halted. (*See* Suppl. App. 63.) Most important for current purposes, the Alliance acknowledged that under either theory, it was required to prove "irreparable harm," and framed its evidence and arguments accordingly. (*See id.* ("Each of those four-part tests is very similar and effectively instructs this Court to weigh . . . the level of potential irreparable harm."); *see also id.* at 39.)

the fact that the motorcycles would give off exhaust, and that "some animals could be struck by dual-sport motorcycles." (*Id.* at 33 (citation omitted).)

As for the dog training area, the Alliance argued that "[i]n addition to any disturbance caused by the presence of unleashed dogs, 'wildlife may also flush or exhibit avoidance behaviors due to the occasional discharge of firearms used in dog training.'" (*Id.* at 34 (citation omitted).) The Alliance contended that "allowing any member of the public to come to the Area and discharge firearms, not just during hunting season, but at any time will have negative impacts to the environment, particularly to nesting birds and wildlife. [No supporting citation]." (*Id.*)

Similarly, in its reply, the Alliance dedicated a substantial portion of its argument to establishing the irreparable harm that would occur. (*See id.* at 41–52.) Allowing motorcycling on trails, the Alliance urged, would "clearly and negatively affect[ ] Alliance members' and the public's recreational activities . . . in addition to the adverse impacts to breeding grassland and shrubland birds." (*Id.* at 47; *see also id.* at 47–51.) The Alliance also included arguments about the harms of helicopter training, and reiterated its arguments about how dog training might have detrimental environmental impacts, particularly through the associated discharge of firearms. (*See id.* at 42–43, 51–52.)

At oral argument on its motion, the Alliance argued that "[w]e think the irreparable harm in this case is both significant and frankly obvious. You can't take back the environmental harm that will be caused by riding motorcycles, flying helicopters and playing paintball on the property." (*Id.* at 70.) To prove its case, the Alliance acknowledged, "[o]n irreparable harm, it is our burden I think to show the Court that there will be irreparable harm." (*Id.* at 120–21.)

In the end, the circuit court concluded that the Alliance failed to carry its burden. Although the court found that it was "a close call," the court was not persuaded that irreparable harm would occur without temporary injunctive relief. (*See id.* at 143–44, 149.)

B. Motion for reconsideration and appeal.

The Alliance then moved for reconsideration of the circuit court's denial of temporary relief. In support of its request for reconsideration, the Alliance referred to five expert affidavits discussing alleged ecological harms that might result from the challenged uses.[7] (*See id.* at 156 n.1; *see also id.* at 160–251.) These affidavits—presented for the first time on

[7] The Alliance submitted the expert affidavits in support of a separate motion before the circuit court, but nonetheless specifically urged the court to consider those affidavits in support of its request for reconsideration. (*See* Suppl. App. 156 n.1.) In denying the motion for reconsideration, the court indicated that it had "reviewed its decision and the submissions of the parties related thereto, the last of which was filed by the petitioner on April 27, 2017." (*Id.* at 325.)

reconsideration—are identical to those filed in support of the Alliance's motion for a temporary injunction before the district court in this case. (*Compare id.* at 160–251, *with* Dkts. 22–26.)

The circuit court ultimately stood by its earlier decision "for the reasons and based on the analysis set forth in the decision." (Suppl. App. 325.)

While its motion for reconsideration was pending, the Alliance also sought interlocutory review in the Wisconsin Court of Appeals.[8] Just as it had in the trial court, the Alliance urged that irreparable harm would occur without immediate review and injunctive relief. (*See generally id.* at 252–88.) In support of its petition, the Alliance again focused on the irreparable harm that each of the challenged uses would allegedly cause. (*See id.* at 266–70 (motorcycling), 270–72 (dog training), 272–73 (helicopter training by the Wisconsin Air National Guard).)

The Wisconsin Court of Appeals denied the petition, concluding that the Alliance had failed to establish that there would be any harm warranting relief. (*See id.* at 328.) "In sum," the court held, "the Alliance has not

[8] In Wisconsin, discretionary interlocutory review is governed by Wis. Stat. § 808.03(2), which limits the circumstances under which the Wisconsin Court of Appeals may review interlocutory decisions, including the denial of a request for injunctive relief. The circumstances in which a petition for leave to appeal may be granted are when immediate review would "(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation; (b) Protect the petitioner from substantial or irreparable injury; or (c) Clarify an issue of general importance in the administration of justice." Wis. Stat. § 808.03(2)(a)–(c). Here, the Alliance's petition was based solely on its contention that an appeal was necessary to "protect the Alliance from substantial and irreparable injury." (Suppl. App. 265.)

persuaded us that the temporary disruption of the habitat and nesting areas of the birds in the limited areas at issue would result in either substantial or irreparable harm." (*See id.*)

IV. Motion for temporary injunction in federal court.

Ten days after the Wisconsin Court of Appeals denied the Alliance's petition for leave to appeal, the Alliance asked the federal district court to temporarily enjoin the same three uses, framing the issue as "whether these high-impact recreational uses should be allowed to continue on the property while this case proceeds." (Dkt. 21:2.) In support, the Alliance dedicated nine pages of its brief to its argument that "[m]otorcycles, helicopters, firearms, and off-leash dogs will cause substantial irreparable harm to the Area's grassland and woodland habitat and the animals that inhabit the Area, especially birds." (Dkt. 21:24–33.)

The district court denied the motion three days after it was filed. (Dkt. 32.) The court noted that the state courts had recently denied "a similar motion," and that "the Alliance wants to try again in this court." (Dkt. 32:2.) Without further addressing the effect of the state court decisions, the district court concluded that the Alliance had again failed to make a sufficient showing of irreparable harm, and therefore denied the motion "without need for a response from defendants." (Dkt. 32:2.)

The Alliance moved for reconsideration; two days later, the district court denied that motion. (*See* Dkts. 33; 34.) This appeal followed.

SUMMARY OF THE ARGUMENT

The Alliance received a full and fair opportunity to litigate the issue of irreparable harm in the Wisconsin courts. With the benefit of three rounds of briefing, thirteen affidavits from the Alliance, oral argument, and consideration by four judges at both the trial and appellate levels, the Wisconsin courts rendered three separate decisions on this issue. In every instance, those courts concluded that the Alliance failed to show that irreparable harm would occur if temporary relief were denied. The issue of irreparable harm has therefore been fully litigated, and the Alliance's failure to establish the point was essential to the denial of temporary relief. In light of those proceedings, equitable considerations demand that the Alliance be precluded from litigating this issue further.

STANDARD OF REVIEW

Whether issue preclusion applies is a question of law, reviewed de novo. *Carter v. C.I.R.*, 746 F.3d 318, 321 (7th Cir. 2014), *as am. on denial of reh'g* (Apr. 25, 2014). To determine whether an issue was actually litigated and resolved in a prior action, this Court considers "established principles of preclusion in light of 'the materials submitted, the record, pleadings, exhibits

and transcripts' from the prior litigation." *Id.* (quoting *E.B. Harper & Co., Inc. v. Nortek, Inc.*, 104 F.3d 913, 922 (7th Cir. 1997)).

ARGUMENT

I. The Alliance is precluded from relitigating the issue of whether the challenged helicopter training, motorcycling, and dog training will cause irreparable harm during the pendency of the Alliance's litigation.

A. Issue preclusion bars relitigation of issues of fact and law that were previously decided in a court of competent jurisdiction.

1. Federal courts evaluating the preclusive effect of state-court decisions apply that state's preclusion law, and seek to give the earlier decision the same preclusive effect it would have in state court.

Issue preclusion (also called collateral estoppel) is a doctrine based on the principle that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Carter*, 746 F.3d at 321. As the first Justice Harlan explained for the Court in *Southern Pacific Railroad*:

> This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in

> respect of all matters properly put in issue, and actually determined by them.

S. Pac. R.R. v. United States, 168 U.S. 1, 48–49 (1897); *see also* 18A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 4416 (3d ed. 2017).

When federal courts evaluate whether to give preclusive effect to an earlier state-court proceeding, the federal courts apply that state's preclusion rules, and seek to give the earlier order or judgment the same effect it would have had in state court. *See First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 772 (7th Cir. 2013).

2. Wisconsin courts evaluating issue preclusion ask whether the issue was actually and necessarily decided in a previous action, and whether preclusion would be fair under the circumstances.

Under Wisconsin law, issue preclusion is "designed to limit the relitigation of issues that have been contested in a previous action" between the same parties or even one or more different parties. *Id.* at 773 (quoting *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 495 N.W.2d 327, 329 (1993)). The general rule applied in Wisconsin courts (as recognized by this Court) is that issue preclusion will bar relitigation of an issue of fact or law where two criteria are met. The first requires that the issue of fact or law was "actually litigated and determined by a valid and final judgment," and that the issue

decided was "essential to the judgment." *Id.* (quoting *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 174 Wis. 2d 381, 497 N.W.2d 756, 762 (Ct. App. 1993)).

Preclusion can apply even where the second action involves a party who did not participate in the first action, so long as the party to be precluded had a full and fair opportunity to litigate the issue in the first action, and there are no other circumstances that support giving that party another opportunity to litigate the issue. *See Cirilli v. Country Ins. & Fin. Servs.*, 2013 WI App 44, ¶ 8, 347 Wis. 2d 481, 830 N.W.2d 234. It is irrelevant for purposes of issue preclusion that the substantive claims in the two cases are different; claim preclusion, not issue preclusion, governs that situation. *See Michelle T.*, 495 N.W.2d 327 at 333 n.13 (noting distinction between doctrines, and that collateral estoppel "precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit") (quoting *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 326 (1955)); *see also* 18A Wright, Miller, Cooper § 4416.

Also, a party's "full and fair" opportunity to litigate its claim does not mean that the party must have a right to mandatory appellate review. *See Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank*, 224 Wis. 2d 288, 592 N.W.2d 5, 13 (Ct. App. 1998). Instead, the availability of review—even if the appellate court denies review—is sufficient for purposes of

preclusion. *See id.* (noting that preclusion remains available where "there is discretion in the reviewing court to grant or deny review") (citation omitted).

Under the second step for evaluating whether to apply preclusion, a court must determine "whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand." *First Weber Grp., Inc.*, 738 F.3d at 772. (quoting *Mrozek v. Intra Fin. Corp.*, 281 Wis. 2d 448, 699 N.W.2d 54, 61 (2005)). Factors relevant to the "fundamental fairness" inquiry "include the availability of review of the first judgment, differences in the quality or extensiveness of the proceedings, shifts in the burden of persuasion, and the adequacy of the loser's incentive to obtain a full and fair adjudication of the issue." *Id.* (quoting *Mrozek*, 699 N.W.2d at 61–62). The fundamental fairness inquiry is not confined to any formalistic elements, and instead bends to "a looser, equities-based interpretation of the doctrine." *Id.* (quoting *Michelle T.*, 495 N.W.2d at 330). Under this approach, courts seek to effectuate the doctrine's purposes, to "ward off endless litigation[,] . . . guard[ ] against inconsistent decisions on the same set of facts," and "protect[ ] against repetitious or harassing litigation." *See Precision Erecting*, 592 N.W.2d at 11, 12 (emphasis omitted).

3. Wisconsin law supports applying preclusion to issues conclusively decided on a motion for a preliminary injunction.

Wisconsin courts have not directly addressed the preclusive effect of a previous denial of a temporary injunction. But the state's courts have acknowledged that an interlocutory judgment which disposes of certain issues while reserving others will have preclusive effect as to those matters actually disposed, particularly where the interlocutory disposition was affirmed on appeal. *See Hebel v. State*, 60 Wis. 2d 325, 210 N.W.2d 695, 698 (1973) (distinguishing *Gates v. Paul*, 127 Wis. 628, 107 N.W. 492 (1906)); *see also Thorp Sales Corp. v. Gyuro Grading Co.*, 111 Wis. 2d 431, 434, 331 N.W.2d 342, 344 (1983) (holding that interlocutory determination of breach of contract would have preclusive effect in subsequent proceedings on damages). Also, Wisconsin courts analyzing the concept of "finality" have recognized that there is no doctrinal reason to limit issue preclusion to final judgments that completely resolve all the matters in litigation. *See Precision Erecting*, 592 N.W.2d at 12–14 (concluding that issue preclusion barred relitigation of issue previously decided on summary judgment in same matter). Instead, finality must be evaluated in light of the predominant purpose of "limit[ing] relitigation of issues already decided." *Id.* at 12.

Moreover, other authorities have recognized that, in the context of the grant or denial of a temporary injunction, "[p]reclusion may properly be

applied . . . if the same showings are made and it appears that nothing more is involved than an effort to invoke a second discretionary balancing of the same interests." 18A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 4445, at 305, n.8 (2d ed. 2017) (collecting cases). These authorities recognize that while the denial of a preliminary injunction does not bar subsequent litigation on whether, for example, a permanent injunction is available, the preliminary denial is sufficiently "final" for purposes of preclusion on the limited issues relevant to the preliminary relief—for example, whether the applicant will suffer irreparable harm during the pendency of litigation, or whether there is a likelihood of success on the merits. *See id.*; *see also Hayes v. Ridge*, 946 F. Supp. 354, 364–66 (E.D. Pa. 1996) (citing Wright, Miller, Cooper, and discussing three other federal cases addressing the application of issue preclusion in the context of preliminary injunctions), *aff'd*, 216 F.3d 1076 (3d Cir. 2000).

B. The Wisconsin courts' previous determinations of the issue of irreparable harm preclude relitigation of that issue now.

Wisconsin's courts issued three decisions rejecting the Alliance's arguments about the harm that might arise from motorcycling, dog training, and continued helicopter training by the Wisconsin Air National Guard at the

Area. The issue has therefore been actually and necessarily decided, and fundamental fairness supports preclusion here.

1. The Alliance actually litigated the issue of irreparable harm, and its failure to establish the point was essential to the Wisconsin courts' decisions.

Under the first criterion for issue preclusion, there can be no question that the Alliance actually litigated the issue of whether the challenged uses would result in irreparable harm without immediate relief. The Alliance and WDNR spent four months briefing and arguing this very question before the trial court. The same question was central on appeal, and the Wisconsin Court of Appeals' decision relied on this ground exclusively when denying the Alliance's petition for leave to appeal. (*See* Suppl. App. 328–29.)

There can also be no question that this issue was essential to the Wisconsin circuit courts' denial of the Alliance's request for injunctive relief. To prevail on its motion for a stay or injunction, the Alliance was required to show "irreparable harm" that would occur from motorcycling, dog training, or helicoptering. (*See, e.g.*, *id.* at 120–21 (acknowledging burden to prove irreparable harm.) The trial court held that the Alliance did not carry its burden, and its failure to do so was essential to the trial court's denial of temporary injunctive relief. (*See id.* at 135–36, 143–44, 149.)

The issue of irreparable harm was also central to the Wisconsin Court of Appeals' denial of discretionary review. The Alliance's petition for leave to appeal addressed two main issues: first, whether the Alliance would be irreparably harmed if the Wisconsin Court of Appeals did not accept review; and second, whether it appeared likely that the circuit court had erroneously denied injunctive relief. (*See id.* at 265–80.) The court of appeals, however, did not even reach the second issue after concluding that the absence of irreparable harm was fatal to the Alliance's petition. (*See id.* at 327–29.) In both courts, then, the Alliance's failure to establish irreparable harm was essential.

It is immaterial, for purposes of preclusion, that the decisions at issue were not "final" in the sense of completely resolving all issues in the case. As noted above, courts that have directly addressed the doctrine in preliminary injunction context, as well as the leading treatise on federal practice, approve of giving preclusive effect to issues decided on motions for interlocutory injunctions. *See* 18A Wright, Miller, Cooper § 4445, at 305, n.8 (and cases cited therein). The reasoning of these authorities is sound: once the limited issue of temporary relief is resolved, that determination is final *as to that limited issue*, and preclusion should bar relitigation. *See id.*

Even without any definitive state-court precedent applying issue preclusion in the context of a preliminary injunction, Wisconsin's

equity-driven approach strongly supports applying preclusion in that context. *See, e.g.*, *Precision Erecting*, 592 N.W.2d at 12–15. As the court of appeals recognized in *Precision Erecting*, there is no doctrinal reason to require a "final judgment" that completely resolves all the matters in litigation. *See id.* at 12–14. Instead, "finality" should be evaluated by reference to the specific determination at issue, and whether *that issue* has been conclusively decided. *See id.* (applying preclusion to issue decided on summary judgment, when party who did not contest the issue on summary judgment sought to contest issue in a later phase of the case).

For the Alliance, there was nothing further for a court to decide about preliminary relief on the current facts. The Wisconsin courts' determination of the issue was final on the issue of irreparable harm to support temporary relief. The first criterion for issue preclusion is satisfied here.

2. Fundamental fairness demands that the Alliance be precluded from relitigating the issue of irreparable harm.

The second criterion for applying issue preclusion—fundamental fairness—is also satisfied under the circumstances presented, and none of the factors that would except preclusion are applicable here. *See id.* at 12 (listing factors relevant to whether applying preclusion would offend fundamental fairness).

In state court, the Alliance carried the burden to show that it suffered irreparable harm, and thus had every incentive to zealously litigate the issue there. The proceedings were comprehensive, including full briefing, numerous affidavits in support of the Alliance's position,[9] oral argument, and briefing on reconsideration. The court and counsel were prepared and engaged.

[9] The Alliance might argue that the Wisconsin courts did not adequately examine the five expert affidavits the Alliance referred to in its request for reconsideration, and that this evidence is somehow "new" in federal court, thereby defeating preclusion. Such an argument would fail for two reasons. First, and most fundamentally, the Alliance's failure to submit all of its supporting evidence with its initial motion cannot entitle it to another opportunity to prove its case. For a litigant to upset a previous decision based on allegedly "new" evidence he must make a showing why such "new" evidence was not presented previously. *Cf.* Wis. Stat. § 805.15(3)(a), (b) (civil procedure rule setting forth standard for when "newly-discovered evidence" will support a new trial, including requirement that evidence that came to a party's attention after judgment, and failure to discover evidence "did not arise from lack of diligence in seeking to discovery it"). Without any suggestion why the expert affidavits were withheld initially, the Alliance should not be allowed to rely on those affidavits as "new" evidence showing irreparable harm in a subsequent action. To allow such sandbagging would encourage litigants to hold back some supportive evidence, knowing that, if they lost the first time around, they could submit the additional materials later and receive a new, full examination of the issue presented.

Second, there is no indication that the Wisconsin courts did not consider the expert affidavits on reconsideration. As noted above, the Alliance submitted these affidavits the day after its motion for reconsideration and referred the court to those affidavits in its motion. In denying the motion for reconsideration, the circuit court stated that it had considered all the materials before the court. The Alliance never suggested that the court had failed to consider the affidavits.

Therefore, the affidavits are not "new" in federal court, and they do not support giving the Alliance another opportunity to litigate its claim now.

And after losing in trial court, the Alliance sought discretionary review in the court of appeals. There, the central issue was whether the Alliance would suffer irreparable harm without immediate review of the denial of injunctive relief. *See* Wis. Stat. § 808.03(2)(b)2.

The fact that the court of appeals denied discretionary review does not undermine the fairness of applying preclusion. *See Precision Erecting*, 592 N.W.2d at 13. In fact, even in the denial of discretionary appeal, the Alliance received more than adequate review. The court of appeals' order did not summarily deny review, or deny review on some ground separate from the merits. Instead, the court denied review for the same, substantive reason that the trial court denied the injunction: the Alliance failed to make a sufficient showing of irreparable harm that would occur if the challenged uses were allowed to proceed pending final judicial review.

It is irrelevant for purposes of issue preclusion that the claims at issue in the Alliance's federal complaint are different from those in its state case. *See Michelle T.*, 495 N.W.2d at 333 n.13. The relevant issue question is the same between the two suits: whether the threat of irreparable harm necessitates immediate relief. This issue was resolved before, and fairness does not demand that it be addressed again.

Finally, the fact that there are defendants in this federal case that were not parties to the state proceedings does not defeat preclusion. The question of fairness—including the opportunity to litigate the issue—is for the benefit of the party against whom preclusion is to be applied. When all other factors remain the same, the Alliance does not get another crack at winning injunctive relief just by selecting new defendants.

Under the legal standards governing preclusion, as well as notions of fairness to the parties, the Alliance should now be precluded from relitigating the issue of irreparable harm. Because irreparable harm was resolved against the Alliance in state court, the district court properly denied the Alliance's motion for relief in this case. That decision should be affirmed, whether on the merits (as addressed in the Federal Appellees' brief), or on the independent grounds discussed herein.

CONCLUSION

Based on the record and legal principles discussed herein, the State of Wisconsin asks this Court to AFFIRM the district court's judgment below, denying the Alliance's motion for a temporary injunction.

Dated this 28th day of September, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), typeface requirements of Fed. R. App. P. 32(a)(5), and type style requirements of Fed. R. App. P. 32(a)(6).

> This brief contains 5,819 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13 point Century Schoolbook.

Dated this 28th day of September, 2017.

/s/ Gabe Johnson-Karp
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CERTIFICATE OF SERVICE

I certify that on September 28, 2017, I electronically filed the foregoing Brief and Supplemental Appendix of the State of Wisconsin with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 28th day of September, 2017.

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