IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY PARTNERS, L.P., Plaintiffs, v. GRETCHEN WHITMER, the Governor of the State of Michigan, in her official capacity, and SCOTT BOWEN, Director of the Michigan Department of Natural Resources, in his official capacity, Defendants.	Case No. 1:20-cv-01141-RJJ-RSK Hon. Robert J. Jonker

BRIEF OF AMICI CURIAE BAY MILLS INDIAN COMMUNITY, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, LITTLE RIVER BAND OF OTTAWA INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, NOTTAWASEPPI HURON BAND OF POTAWATOMI, AND SAULT STE. MARIE TRIBE OF CHIPPEWA IN SUPPORT OF DEFENDANTS

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STATEMENT OF INTEREST[1]

Amici Tribal Nations are sovereign, federally recognized Indian tribes that share a strong interest in the prompt shutdown of Enbridge's dual pipelines across the Straits of Mackinac. They have ample basis for concern that a rupture of the pipelines into the Straits will cause grave and permanent damage to their fundamental rights and to the rights of all Michigan citizens. Amici Tribal Nations accordingly have a strong interest in an interpretation of the 1977 Transit Pipelines Treaty properly recognizing that the actions of Michigan's Governor to vindicate the Tribal Nations' rights under their treaties with the United States, and the rights of all Michigan citizens under the public trust doctrine, are fully countenanced by the Transit Treaty.[2]

For centuries, amici Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, and Sault Ste. Marie Tribe of Chippewa Indians have fished the Great Lakes for subsistence and commercial purposes. In the Treaty with the Ottawa, Mar. 28, 1836, 7 Stat. 491, these tribes' forebears ceded millions of acres of land, paving the way for Michigan's statehood. The central promise the tribes insisted upon in return was that they would continue exercising their usual privileges of occupancy,

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[1] No part of this brief was authored by counsel for a party, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] References to the "Governor" include the Governor and the Director of the Department of Natural Resources.

including their inherent rights to fish, hunt, and gather throughout the territory they were ceding (and in particular that they would sustain their fisheries in the Great Lakes), in order to maintain their traditional way of life. *Id.* art. XIII; *United States v. Michigan*, 471 F.Supp. 192 (W.D. Mich. 1979). In modern times, these tribes have fought vigorously to protect those fisheries from numerous threats, and in 2000 they formed the Chippewa Ottawa Resource Authority (CORA) for that purpose.[3]

Amicus Nottawaseppi Huron Band of Potawatomi (NHBP) has a unique and sobering perspective on the issues before the Court. In 2010, Enbridge's Line 6B ruptured into a tributary of the Kalamazoo River, "a primary element of the Tribe's lifeways and traditions for countless generations." NHBP, *The Great Stain: 10 Years After the Kalamazoo River Oil Spill*.[4] The release of nearly a million gallons of oil destroyed a large span of the river and adjoining flood plains and "permanently stained" "the spirit of the people residing within the watershed[.]" *Id*. NHBP understands acutely the signal importance of the Governor's efforts to honor her public trust obligations as well as her obligations to Michigan's tribes by ending Enbridge's conveyance of petroleum products through an exposed, aging pipeline on the Straits bottomlands.

[3] *See CORA: Regulating/Enforcement*, https://www.1836cora.org/fishing/.
[4] https://nhbp-nsn.gov/media/the-great-stain-10-years-after-the-kalamazoo-river-oil-spill/.

INTRODUCTION

"[T]he bottomlands [of the Mackinac Straits] are of *immense* importance to the People of the State[.]" Michigan Br., ECF No. 121 at PageID.1131.[5] The Governor has a deeply rooted public trust duty to protect those bottomlands and the surrounding waters from impairment or destruction caused by a rupture of Enbridge's seventy-year-old dual pipelines. Enbridge asks this Court to hold that the actions the Governor has taken pursuant to her sovereign obligation are preempted by virtue of the Agreement Between the Government of the United States and the Government of Canada Concerning Transit Pipelines, 28 UST 7449, 1977 WL 181731 (Jan. 28, 1977) ("Transit Treaty" or "Treaty"), and the foreign affairs doctrine.

Because the Treaty precludes private enforcement, Enbridge cannot base a federal cause of action on a purported Treaty violation (or a Treaty-based violation of the foreign affairs doctrine). And even if it could, its claim would fail because the Governor has not violated the Treaty (or the foreign affairs doctrine by violating the Treaty)—instead, she has taken actions explicitly recognized by its Article IV and entirely consistent with other Treaty provisions. Canada's invocation of Article IX's dispute resolution procedure does not alter the analysis, since that provision applies neither to Michigan nor to Enbridge and conveys no intention to pretermit domestic

[5] "Michigan Br." refers to Defendants' Brief in Support of Motion To Abstain or Stay, ECF No. 121, PageID.1118-1140.

processes, particularly those expressly contemplated by Article IV. Enbridge's attempt to use the Transit Treaty to avoid complying with the Governor's easement revocation should accordingly be rejected.

ARGUMENT

I. Enbridge Cannot Base a Preemption Cause of Action on a Purported Violation of the Transit Treaty.

A. A Party May Not Assert Preemption as a Basis To Enjoin a State Official from Violating Federal Law If That Law Precludes Private Enforcement.

Enbridge asserts that "the Supremacy Clause bars the Defendants' actions," Compl., ECF No. 1 at PageID.18 ¶ 68, because those actions are preempted in part by the Transit Treaty, *id.* at PageID.17-18 ¶¶ 64–68; *see also* Enbridge Br., ECF No. 128 at PageID.1631 ("Count III of the Complaint presents a preemption claim under the 1977 U.S.-Canada Transit Pipelines Treaty and the Foreign Affairs Doctrine.").[6] But as the Supreme Court has stated, "the Supremacy Clause is not the source of any federal rights and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015) (quotation marks and citations omitted); *Lindsey v. Whitmer*, 124 F.4th 408, 415 (6th Cir. 2024) (substantially same), *cert. denied*, 221 L.Ed.2d 968 (2025); *Churchill Downs Tech. Initiatives Co. v. Mich. Gaming Control Bd.*, 767 F.Supp.3d 556, 568 (W.D. Mich. 2025) (same).

[6] "Enbridge Br." refers to Enbridge's (Corrected) Brief in Support of Plaintiffs' Renewed Motion for Summary Judgment on Counts I and III of the Complaint, ECF No. 128, PageID.1607-1643.

"The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity[.]" *Armstrong*, 575 U.S. at 327. "It is a judge-made remedy" that is "subject to express and implied statutory limitations." *Id.*; *see also Churchill Downs*, 767 F.Supp.3d at 568 ("[B]ecause the implied cause of action to enjoin state actors is based on common law principles of traditional equity jurisprudence rather than the Constitution (via the Supremacy Clause), a federal statute may preclude this type of private enforcement."). Consequently, a party may not assert preemption as a basis to enjoin a state official from violating federal law if that law precludes private enforcement. Since the Transit Treaty precludes private enforcement, Enbridge cannot sustain a preemption claim based on the Transit Treaty, or on a foreign affairs doctrine argument grounded in the Treaty, in this Court.

B. The Transit Treaty Precludes Private Enforcement.

Enbridge and Canada argue that this Court must give effect to the Transit Treaty because it is self-executing. Enbridge Br., ECF No. 128 at PageID.1631, 1637-1638; Canada Br., ECF No. 133 at PageID.1724-1727.[7] But "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts."

[7] "Canada Br." refers to the Brief of Amicus Curiae the Government of Canada in Partial Support of Plaintiffs, ECF No. 133, PageID.1704-1739.

Medellín v. Texas, 552 U.S. 491, 506 n.3 (2008) (brackets and quotation marks omitted); *see also MacLeod v. Moritz*, No. 19-1887, 2020 WL 4590115, at *2 (6th Cir. Apr. 15, 2020) ("As a general rule, international treaties do not create rights that are privately enforceable in the federal courts." (ellipsis and citation omitted)); *Aslani v. Sparrow Health Sys.*, No. 1:08-cv-298, 2009 WL 3711602, at *22 (W.D. Mich. Nov. 3, 2009) (same).

The presumed "intent to foreclose equitable relief," *Armstrong*, 575 U.S. at 328 (quotation marks omitted), is amply borne out by the express language of the Transit Treaty. Article IX sets forth the procedure for resolving disputes "regarding the interpretation, application or operation" of the Treaty, Treaty art. IX(1), and by its express terms limits such dispute resolution to the United States and Canada. Any dispute "between the Parties" is to be settled by negotiation or, if such negotiation fails, by binding arbitration "at the request of either Party." *Id.* art. IX(1), (2). Article IX makes no allowance for any other person or entity to raise a claim grounded in the Treaty, including Enbridge. And no other provision provides a private cause of action to bring such a claim. *See Bad River Band of Lake Superior Tribe of Chippewa Indians v. Enbridge*, 19-cv-602-wmc, 2022 WL 17249085, at *5 (W.D. Wis. Nov. 28, 2022) ("[N]othing in the Treaty suggests that a private entity could bring a cause of action to enforce it or even that it may be enforced in federal court."); Brief of Amicus Curiae the Government of Canada in Support of Defendants, *Michigan v. Enbridge*, No. 1:20-cv-01142-JTN-RSK PageID.557 (W.D. Mich. June 1, 2021) ("Canada does not contend, and does not

understand Enbridge to contend, that the Treaty creates a private right of action for Enbridge against Michigan.").

"The Supreme Court [in *Armstrong*] recognized that when a statute's language creates an alternative, exclusive remedy for a Supremacy Clause violation, it illustrates an intent to foreclose equitable relief against state actors." *Churchill Downs*, 767 F.Supp.3d at 569; *see also Armstrong*, 575 U.S. at 328 ("[T]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." (quotation marks omitted)); *Arkansas United v. Thurston*, 146 F.4th 673, 679 (8th Cir. 2025) (holding that "because [the federal statute] has its own enforcement structure, we conclude equitable relief is not available"). Here, Article IX's exclusive remedy for violations of the Transit Treaty—available only to the treating sovereigns—"illustrates an intent [by the Treaty drafters] to foreclose equitable relief against state actors" by private entities, *Churchill Downs*, 767 F.Supp.3d at 569. Enbridge cannot, "by invoking [the Court's] equitable powers, circumvent [the Treaty's] exclusion of private enforcement," *Armstrong*, 575 U.S. at 328.

That Enbridge frames its Transit Treaty argument in terms of preemption under the foreign affairs doctrine does not alter the analysis. Enbridge makes clear that its cause of action under that doctrine is wholly predicated on the Transit Treaty. *See* ECF No. 128 at PageID.1613 ("[T]he claim of preemption here rests on interference with the foreign policy embodied by … the 1977 Transit Pipelines Treaty[.]" (cleaned up)). In

particular, Enbridge's claim that the Governor's actions "interfere with federal foreign policy," *id.* at PageID.1633, rests solely on Articles II, V, and IX of the Treaty, *see id.* at PageID.1634-1635. But since the Treaty precludes private enforcement, none of its provisions can support a preemption cause of action, whether styled as a claim under the Transit Treaty, the foreign affairs doctrine, or something else. Enbridge's affixation of the "foreign affairs doctrine" label onto its Transit Treaty claim does not alter the conclusion that the Treaty provides no basis for preemption of any kind here.

II. The Governor's Actions To Fulfill Her Public Trust Obligations Do Not Violate the Transit Treaty.

A. The Governor Has Ironclad Rights and Responsibilities Under the Public Trust Doctrine To Regulate Line 5.

Michigan holds fee title to the land under navigable waters, including the bottomlands of the Great Lakes within the State, "in its sovereign capacity" and "in trust for the use and benefit of its people[.]" *State v. Venice of Am. Land Co.*, 125 N.W. 770, 778, 779 (Mich. 1910). As the Michigan Supreme Court has explained, "the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public. The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure." *Glass v. Goeckel*, 703 N.W.2d 58, 64–65 (Mich. 2005) (footnote omitted). The State "cannot relinquish this duty," *id.* at 65, since "abdication is not consistent with the exercise of

that trust which requires … the state to preserve such waters for the use of the public," *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892).

Michigan's executive branch, equally with its other branches of government, is a "sworn guardian[] of Michigan's duty and responsibility as trustee of the … beds of five Great Lakes." *Obrecht v. Nat'l Gypsum Co.*, 105 N.W.2d 143, 149 (Mich. 1960). The Governor cited the State's public trust duties as the underpinning for her revocation and termination of Enbridge's easement across the Straits, finding that

> continued operation of the Straits Pipelines cannot be reconciled with the State's duty to protect public trust uses of the Lakes from potential impairment or destruction.… [T]ransporting millions of gallons of petroleum products each day through two 67-year old pipelines that lie exposed in the Straits below uniquely vulnerable and busy shipping lanes presents an extraordinary, unreasonable threat to public rights because of the very real risk of further anchor strikes and other external impacts to the Pipelines, the inherent risks of pipeline operations, and the foreseeable, catastrophic effects if an oil spill occurs at the Straits.

Notice of Revocation and Termination of Easement ("Notice"), ECF No. 1-1 at PageID.26-27. The Governor's actions in this case were thus taken to fulfill the State's "duty to preserve [these paramount] public rights in the Great Lakes and their natural resources," *Glass*, 703 N.W.2d at 65 (citing *Nedtweg v. Wallace*, 208 N.W. 51, 53 (Mich. 1926)).

B. Article IV of the Transit Treaty Explicitly Acknowledges the Governor's Authority To Regulate Line 5 Pursuant to Her Public Trust Duties.

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*,

590 U.S. 432, 439 (2020) (citation omitted). And the text of the Transit Treaty explicitly contemplates the actions taken by the Governor pursuant to her public trust duties.

Article IV states that a transit pipeline "shall be subject to regulations by the appropriate governmental authorities … with respect to such matters as … environmental protection[.]" Treaty art. IV(1). The Governor's revocation and termination of the Line 5 easement to address the "inherent risks of environmental harm" posed by the Straits pipelines, Notice, ECF No. 1-1 at PageID.28, fits squarely within this provision.[8] A study commissioned by the State shortly prior to the Governor taking her action predicted that an oil spill in the Straits could potentially damage over 1,200 miles of Great Lakes shoreline. Mich. Tech. Univ., *Independent Risk Analysis for the Straits Pipelines: Final Report* 68–69 (2018).[9] Such a spill would "be much greater than" Enbridge's Line 6B spill into the Kalamazoo River in 2010, *id.* at 113, which the National Transportation Safety Board has declared to be the costliest inland oil spill in American history and which resulted in catastrophic damage to the lands, waters, wildlife, and other resources of the Kalamazoo River watershed, NTSB, *Press Release: Pipeline Rupture and Oil Spill Accident Caused by Organizational Failures and Weak Regulations* (July 10,

[8] Enbridge agrees that the Governor's actions were taken to protect the environment. *See* ECF No. 128 at PageID.1615 ("Defendants' rationale for shutting down the pipeline is protection of the Straits and surrounding environment from a potential risk of release of oil from the Straits Pipelines.").

[9] https://hazmaton.org/wp-content/uploads/2022/01/Straits_Independent_Risk_Analysis_Final-1-1.pdf.

2012).[10] Enbridge argues that the Transit Treaty prevents the Governor from acting to prevent such a disaster. But the Governor's efforts to fulfill her public trust responsibility by protecting the bottomlands and waters of the Straits—an aim of the highest order—are explicitly recognized by Article IV as a valid subject of regulation.

In addition, and especially significant to the amici Tribal Nations, the Governor acted pursuant to her responsibility to respect tribal treaty rights and interests in the Straits. She explained that her revocation and termination order rests in important part on the fact that

> [t]he Great Lakes and the Straits of Mackinac … have special ecological, cultural and economic significance for the tribes of Michigan, including, but not limited to, the tribes that retain reserved hunting, fishing and gathering rights in the lands and waters ceded to the United States under the 1836 Treaty of Washington. An oil spill or release from the Straits Pipelines would have severe, adverse impacts for tribal communities. The tribes have fundamental interests in the preservation of clean water, fish and habitat at the Straits. Many tribal members rely on treaty-protected rights of commercial and subsistence fishing in the Straits and other Great Lakes waters that could be impacted by an oil spill or release.

Notice, ECF No. 1-1 at PageID.30 (footnote omitted).

As the Governor recognized, Line 5 runs through an area critically important to the 1836 Treaty Tribal Nations, which have occupied the Great Lakes region since time immemorial and have significant interests in the protection of the region's resources. *See*

[10] https://bloximages.chicago2.vip.townnews.com/madison.com/content/tncms/assets/v3/editorial/6/e3/6e35d803-3843-5976-b2b6-a485aa0641f1/57e4202dc7799.pdf.pdf.

United States v. Michigan, 471 F.Supp. at 220–25. Citizens of the Nations engage in fishing, hunting, and gathering in the area for both subsistence and commerce, and fishing is intertwined with their cultural and spiritual practices. *Id.* at 213, 221, 224–25 235, 238, 256–58. And through CORA, the Nations co-manage the Great Lakes fisheries along with the State in an effort to ensure that present and future generations enjoy their benefits.

As the Notice acknowledges, an oil release in the Straits would have "severe, adverse impacts" on this ecosystem, thus posing an intolerable risk to Tribal Nation amici's livelihood, cultural and spiritual practices, and identity. ECF No. 1-1 at PageID.30. The Governor has appropriately recognized that the public trust is advanced by respecting, not ignoring or violating, these significant tribal interests. The Governor's approach to safeguarding such interests fits comfortably within the purview of Article IV, which authorizes regulation for a non-exclusive list of wide-ranging purposes including "[p]ipeline safety," "operation standards," "rates, tolls, tariffs and financial regulations," "reporting requirements," and, of special relevance here, "environmental protection," Treaty art. IV(1). Environmental protection is inextricably linked to protection of tribal treaty rights in the Great Lakes, and neither Enbridge nor Canada has argued that vindication of those rights is not a cognizable subject of Article IV regulation.

When states act in areas of traditional state responsibility, federal courts will not enjoin such action unless Congress has provided a "clear statement" of intent to abrogate state authority, *Bond v. United States*, 572 U.S. 844, 858 (2014). "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Id.* (quotation marks omitted). Accordingly, "if the Federal Government would radically readjust" that balance, "those charged with the duty of legislating must be reasonably explicit about it." *Id.* (quotation marks and brackets omitted). Here, the Governor revoked Enbridge's easement in order to fulfill her public trust obligations and vindicate treaty-protected tribal rights. Preemption of such action would constitute "a stark intrusion into traditional state authority," *id.* at 866. Yet Enbridge asks this Court to accomplish precisely such an intrusion—without any showing that the federal government intended the Transit Treaty to have that effect. Far from being "reasonably explicit" about such an intent, the Treaty is *entirely* explicit in stating the opposite: Article IV expressly preserves the power of "appropriate governmental authorities" to regulate for "environmental protection." Without a clear expression of Treaty intent to the contrary, Enbridge cannot transform a provision preserving state power into a prohibition against its exercise.

Enbridge tries to avoid the force of Article IV by arguing that "Defendants seek not merely to 'subject [Line 5] to regulations' but to force it to shut down entirely[.]"

ECF No. 128 at PageID.1639 (first brackets in original) (quoting Treaty art. IV(1)). But "the authority to regulate is normally understood to include the authority to prohibit." *B-West Imports, Inc. v. United States*, 75 F.3d 633, 636 (Fed. Cir. 1996). And the courts have consistently rejected a purported distinction between the two. *See, e.g.*, *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1102 (9th Cir. 2024) ("[A] regulation may assume the form of a prohibition." (brackets and quotation marks omitted)); *R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles*, 29 F.4th 542, 559 (9th Cir. 2022) (rejecting "the-County-may-regulate-but-not-prohibit sales argument" as "drawing [an] amorphous line" "[b]ecause 'prohibitions' can almost always be practically achieved by mere well-crafted partial 'regulations'"); *United States v. Devenport*, 131 F.3d 604, 607 (7th Cir. 1997) (stating that distinctions between "regulatory" and "prohibitory" laws are mere "linguistic formulations").

Enbridge further contends that "it is PHMSA regulators—not Michigan officials—who are 'the appropriate governmental authorit[y] having [regulatory] jurisdiction over' Line 5." ECF No. 128 at PageID.1639 (brackets in original) (quoting Treaty art. IV(1)). But Enbridge provides no support for this claim (and neither does Canada, which simply cites Enbridge's brief, *see* ECF No. 133 at PageID.1735). The fact that PHMSA has authority to promulgate regulations pursuant to the Pipeline Safety Act in no way precludes other "appropriate governmental authorities"—such as the Governor—from exercising their authority pursuant to the Transit Treaty to regulate

specifically for "environmental protection," Treaty art. IV(1). Indeed, it would defy logic to conclude that PHMSA is the "appropriate governmental authorit[y]" to fulfill the Governor's public trust responsibilities in the Straits. To the contrary, the Pipeline Safety Act explicitly "does not authorize [PHMSA] to prescribe the location or routing of a pipeline facility," 49 U.S.C. 60104(e), instead reserving that issue for state and tribal governments—and the continued operation of the pipeline across the sensitive Straits bottomlands lies at the very core of the Governor's public trust doctrine decision here.[11]

In revoking and terminating Enbridge's Line 5 easement, the Governor is not "attempt[ing] to impose safety standards," Enbridge Br., ECF No. 128 at PageID.1629; rather, she is fulfilling her public trust obligations by ensuring that sovereign resources are dedicated to their proper use and that tribal interests are vindicated. *See* Notice, ECF No. 1-1 at PageID.22 ("[T]he Easement is being revoked for violation of the public trust doctrine[.]"). In our federalist system, the State is very much an appropriate governmental authority to discharge these important functions, just as it (rather than

[11] Notwithstanding Enbridge's reassurance that "PHMSA has promulgated detailed safety standards to protect the environment from pipeline releases," ECF No. 128 at PageID.1613, numerous pipeline ruptures—including the devastating rupture of Enbridge's Line 6B into Michigan waters—have occurred in the face of this PHMSA regulation. A recent Congressional Research Service report describes sixteen notable pipeline safety incidents since the Line 6B rupture. Paul W. Parfomak, Cong. Rsch. Serv., R44201, *DOT's Federal Pipeline Safety Program: Background and Issues for Congress* (May 7, 2025) (p. 5 of downloaded PDF), https://www.congress.gov/crs-product/R44201. The report further documents the chronic issues, including persistent understaffing, that continue to hamper PHMSA's effectiveness. *Id.* (p. 18 of downloaded PDF).

PHMSA) is the appropriate governmental authority to accord respect to the tribes' treaty rights in Michigan waters. *United States v. Winans*, 198 U.S. 371, 381–82 (1905) (tribal fishing rights reserved by treaty with the United States were "intended to be continuing against … the state and its grantees").

C. The Governor's Authority To Regulate Line 5 Is Entirely Consistent with Article II of the Transit Treaty.

Enbridge contends that "Defendants' attempts to shut down Line 5 violate Article II(1) of the [Transit] Treaty," ECF No. 128 at PageID.1635, which provides that "[n]o public authority in the territory of either Party shall institute any measures … which are intended to, or which would have the effect of, impeding, diverting, redirecting or interfering with in any way the transmission of hydrocarbons in transit." Treaty art. II(1). Because any shutdown of a transit pipeline would impede the flow of hydrocarbons, the argument goes, the Governor's termination order violates the Transit Treaty.

But as explained above, Article IV does exactly the opposite—it explicitly confirms the power of governmental authorities to "impose[]" "regulations, requirements, terms and conditions" on transit pipelines, *id.* art. IV(2). And "Transit Pipeline[s] shall be subject to" this regulatory power "*[n]otwithstanding the provisions of Article II*[.]" *Id.* art. IV(1) (emphasis added). Hence, transit pipelines are plainly subject to Article IV regulation despite the provisions of Article II. *See Portland Pipe Line Corp. v. City of S. Portland*, 288 F.Supp.3d 321, 443 (D. Me. 2017) (noting that the "broad

statement" of Article II "is limited … by [the] express savings clause" of Article IV); Black's Law Dictionary (12th ed. 2024) ("notwithstanding" means "[d]espite; in spite of").[12]

If Enbridge's interpretation of Article II were correct, then *any* effort by a state or tribal nation to enforce its rights and honor its obligations (including everything ranging from the enforcement of trespass laws on public lands to the enforcement of basic environmental protections) would be forbidden—even when, as here, a state acts pursuant to authority specifically recognized in Article IV and required by public trust law. Enbridge's theory, in other words, would convert any exercise of a state or tribe's core sovereign responsibilities with implications for the flow of transit oil into a breach of the United States' treaty obligations. Only the clearest text could support such a drastic diminution of state and tribal power. But Article IV confirms exactly the opposite.

Enbridge's sweeping interpretation of Article II overlooks the true purpose and effect of the Transit Treaty: to ensure that transit pipelines are not subject to discriminatory regulation or taxation. Article IV(2) requires that regulations of transit

[12] Neither Enbridge nor Canada addresses or even quotes the "notwithstanding" clause. Instead, Canada argues that "Article IV(1) is designed to operate as a qualification, but not an exception, to Article II(1)." ECF No. 133 at PageID.1734. But while Article IV explicitly indicates its application "[n]otwithstanding" Article II, Article II contains no such language indicating its application "notwithstanding" Article IV. These textual differences indicate that Article IV's provisions are indeed an "exception" (to use Canada's word) to Article II's limitations.

pipelines "shall be just and reasonable, and shall always, under substantially similar circumstances with respect to all hydrocarbons transmitted in similar pipelines, … be applied equally to all persons and in the same manner." Treaty art. IV(2). Article III similarly prohibits any discriminatory "fee, duty, tax or other monetary charge … on or for the use of any Transit Pipeline[.]" *Id.* art. III(1).

Numerous sources confirm that a central purpose of the Transit Treaty is to prevent discrimination by one country against transit pipelines of the other country and that nondiscriminatory regulations are entirely consistent with the treaty text, history, and application. For example, the lead treaty negotiator testified in the Senate that the Transit Treaty "does not interfer[e] with the normal powers of the provinces or states to tax and regulate pipelines, so long as those powers are not used to discriminate against transit pipelines." S. Rep. No. 95-9, at 86 (1977). Accordingly, in *Portland Pipe Line Corp.*, the court explained that "the federal policy embodied in the Transit Pipeline Agreement is one of anti-discrimination." 288 F.Supp.3d at 444. And there is no suggestion, let alone evidence, that the Governor's actions have been motivated by discriminatory animus toward Line 5 or have resulted in discriminatory treatment of it. Her actions are thus entirely consistent with the purpose and text of Article II.

D. Article V of the Transit Treaty Works in Tandem with Article IV.

Enbridge asserts that "Article V provides that the flow of hydrocarbons may be stopped only 'temporarily[.]'" ECF No. 128 at PageID.1634. However, Article V does not

override Article IV but works in conjunction with it. Article V speaks of "temporary" shutdowns because it only addresses situations calling for them: "*In the event of an actual or threatened natural disaster, an operating emergency, or other demonstrable need temporarily to reduce or stop … the normal operation of a Transit Pipeline*, the flow of hydrocarbons through such Transit Pipeline may be temporarily reduced or stopped[.]" Treaty art. V(1) (emphasis added). Article IV, in turn, speaks to the general regulatory powers of governmental authorities over transit pipelines—and does *not* limit those powers to regulations short of shutdowns. Canons of interpretation make clear that the temporal restrictions of Article V do not apply to the regulatory authority confirmed in Article IV. As the Supreme Court has explained, "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate." *Badgerow v. Walters*, 596 U.S. 1, 11 (2022) (brackets and quotation marks omitted).

The Senate committee that recommended ratification of the Transit Treaty made clear that Articles IV and V serve as distinct affirmations of governmental authority over pipelines. "Articles IV and V allow each nation to impose proper regulations for … environmental protection[.]" S. Rep. 95-9, at 2. Under Enbridge's efforts to conflate the two, however, the more serious the environmental threat posed by a pipeline, the less amenable that threat is to proper regulation because of the imagined strictures of the Transit Treaty. Enbridge interprets the Transit Treaty as a talisman that enables transit

pipeline companies to traverse precious waterways free of any state regulation—even regulation of "environmental protection," as explicitly authorized by Article IV(1), and even where pipeline operations present a grave danger. But neither Article IV nor Article V says any such thing.

Canada, meanwhile, argues that "if Article IV were read to authorize permanent shutdown orders, Article V would serve no function[.]" ECF No. 133 at PageID.1734. But Article V is not "surplusage," *id.* at PageID.1735. Instead, and consistent with its purpose of addressing temporary emergencies, Article V provides for the allocation of hydrocarbons to each party when the flow has been temporarily reduced. *See* Treaty art. V(2). That topic is simply not addressed by Article IV.

In issuing her notice of revocation and termination, the Governor did not seek to address a temporary emergency and so did not purport to act pursuant to Article V; instead, she sought to fulfill her public trust obligations by permanently solving an intractable problem. The Governor concluded that "the threat of damage to the Straits Pipelines from anchor strikes or impacts from other external objects is very real," Notice, ECF No. 1-1 at PageID.27, and that "even apart from their unique vulnerability to anchor strikes, operation of the Straits Pipelines presents inherent risks of environmental harm," *id.* at PageID.28. These findings led to the unavoidable conclusion that "continued operation of the Straits Pipelines cannot be reconciled with the State's duty to protect public trust uses of the Lakes from potential impairment or

destruction," *id.* at PageID.26. A permanent shutdown under these circumstances is fully consistent with Article IV's explicit contemplation of state regulatory action.

III. Article IX's Dispute Resolution Procedure Provides No Basis for Preempting the Governor's Actions Under the Foreign Affairs Doctrine.

A. Article IX's Dispute Resolution Procedure Does Not Apply to Either Enbridge or the Governor.

Enbridge argues that the Governor's actions are preempted under the foreign affairs doctrine because "the express federal U.S. policy is to funnel any disagreements over the Treaty's scope through the dispute resolution provisions in Article IX." ECF No. 128 at PageID.1635; *see also* Canada Br., ECF No. 133 at PageID.1715 ("This Court should ensure that while the Article IX process is ongoing, there is no state-compelled shutdown[.]"). Simply by virtue of Canada's invocation of the dispute resolution process, goes the argument, any exercise of governmental regulatory authority over Line 5—even if fully consistent with Article IV—must immediately stop.

Nothing in Article IX supports this claim. By its own terms, the dispute resolution provisions of the Transit Treaty govern only disputes *between the parties to the Treaty* (i.e., the United States and Canada). Article IX provides that "[a]ny dispute *between the Parties* regarding the interpretation, application or operation of this Agreement shall, so far as possible, be settled by negotiation between them" or, if negotiation fails, "shall be submitted to arbitration at the request of *either Party*." Treaty art. IX(1), (2) (emphases added). Of course, neither the Governor nor Enbridge is a party

to the Transit Treaty. Enbridge's claim that "the state actors here are preempted from unilaterally trying to circumvent [the dispute resolution] process here," ECF No. 128 at PageID.1638-1639, ignores the fact that the Governor does not have a dispute with either Treaty party. Article IX says nothing about nonparties and consequently provides no basis for preempting the actions of the nonparty Governor. And a finding by this Court that her actions are not preempted will in no way impair the dispute resolution process between the Treaty parties.

B. Canada's Invocation of the Dispute Resolution Procedure Does Not Create Grounds for Preempting the Governor's Actions.

Enbridge argues that the Governor's termination of the Line 5 easement must be enjoined because Canada invoked Article IX's dispute resolution process. *Id.* at PageID.1613-1614, 1635-1637. Canada argues more specifically that "once a colorable Treaty objection is raised by a Treaty Party who invokes Article IX … domestic courts must prevent actions identified by the invoking Treaty Party as potential Treaty violations unless and until the Article IX process has concluded in a determination that those actions are permissible under the Treaty." ECF No. 133 at PageID.1728-1729. But just as Article IX says nothing about nonparties, it also contains no instruction to courts to preempt or enjoin state regulatory actions whenever a Treaty party invokes Article IX. Neither Enbridge (in its preemption argument) nor Canada (in its invented test) points to any textual basis for its Article IX interpretation. Nothing in Article IX or any other provision of the Transit Treaty even suggests that a Treaty party's invocation of

the Article IX process halts a nonparty's regulatory activities—especially when those activities are explicitly authorized by Article IV.

Enbridge and Canada urge a radical interpretation of the Transit Treaty that would produce a radical result: any invocation of Article IX by a Treaty party hijacks all domestic regulation of transit pipelines. Whenever either the United States or Canada invokes that provision, "appropriate governmental authorities" must cease their exercise of the regulatory power recognized by Article IV. Neither Treaty party need do anything more, since the oil will flow through transit pipelines for as long as it takes the dispute resolution process to run its course. And neither Treaty party has any incentive to move that process along, since transit pipeline companies will happily maintain the status quo and those who object will be forbidden from doing anything in response.[13] The nature or validity of their objections will not matter: if a transit pipeline trespasses on private land, the landowner will be forbidden from bringing a trespass claim—no matter how blatant the trespass; if a transit pipeline causes a nuisance, potential plaintiffs will be forbidden from bringing a nuisance claim—no matter how severe or

[13] That scenario looms large in this case. To amici Tribal Nations' knowledge, the most recent statement by either Canada or the United States regarding the status of the proceedings was issued by Canada on May 16, 2023, indicating that "[t]he most recent [negotiation] session took place … on April 14, 2023." Gov't of Can. Statement on the 1977 Can.-U.S. Transit Pipelines Treaty as it Relates to Line 5 on the Bad River Band Reservation in Wis., https://www.international.gc.ca/country_news-pays_nouvelles/2023-05-16-us-eu.aspx?lang=eng&utm_source=chatgpt.com. For over two years, the oil has continued to flow while dispute resolution languishes, with no end in sight for either.

pervasive the nuisance; and if a transit pipeline threatens to destroy precious waters protected by public trust obligations and tribal treaty rights, the Governor of Michigan will be forbidden from revoking the pipeline's easement—no matter how catastrophic the results.

This breathtaking interpretation finds no support in the Transit Treaty or the foreign affairs doctrine. According to Enbridge, Canada's invocation of the dispute resolution process proves that termination of the Line 5 easement "creates a likelihood of 'something more than an incidental effect in conflict with express foreign policy,'" ECF No. 128 at PageID.1635 (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003)), which policy "mandates the unimpeded operation of cross-border pipelines like Line 5," *id.* at PageID.1636. But while Enbridge trains its foreign affairs lens on Articles II, V, and IX of the Transit Treaty, it overlooks the central expression of the Treaty's foreign policy: Article IV. That provision reflects the United States' foreign policy decision to *avoid* conflict with the states by expressly recognizing their regulatory authority over "environmental protection." Enbridge cannot simply wish away this express recognition of the Governor's power. And since the Governor revoked Enbridge's easement to address the "inherent risks of environmental harm" posed by the Straits pipelines, Notice, ECF No. 1-1 at PageID.28, her actions create no conflict with United States foreign policy. Instead, they are fully consistent with that policy as manifested in Article IV.

Enbridge's reliance on *Garamendi* is misplaced. As Enbridge admits, "the relevant international agreements" in that case "did not directly address the ability of states to pass laws like the California law at issue there[.]" ECF No. 128 at PageID.1636. In stark contrast, Article IV not only "directly address[es] the ability of" the Governor to act as she did here, it authorizes her to regulate as she did for the specific purpose of "environmental protection." Because the Transit Treaty expressly preserves state action, *Garamendi* is readily distinguishable.[14]

Moreover, *Garamendi* instructs courts to "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." 539 U.S. at 420. Here, the strength of Michigan's interest is at an apex: the Governor acted in fulfillment of her "high, solemn, and perpetual" duty as trustee to safeguard the public interest in the Great Lakes and in fulfillment of her duty to honor the tribes' treaty rights. Her actions address a quintessentially state obligation imposed by a doctrine long enshrined in Michigan caselaw and reflected in Michigan's Constitution, which declares "[t]he conservation and development of the natural resources of the state … to be of paramount public concern in the interest of the health, safety and general welfare of the

[14] The Treaty similarly preserves provincial action in Canada. *See* S. Rep. No. 95-9, at 86 ("The Agreement does not interfer[e] with the normal powers of the provinces or states to tax and regulate pipelines, so long as those powers are not used to discriminate against transit pipelines.").

people," Mich. Const. art. IV, § 52. The strength of this interest contrasts sharply with "the weakness of the State's interest" in *Garamendi*, 539 U.S. at 425 (describing the state's interest "in regulating disclosure of European Holocaust-era insurance policies").

Venturing far beyond the confines of an amicus brief properly devoted to the issue of preemption, Canada contends that "[t]he market could not adapt to a shutdown of Line 5 without serious harm to North American energy security and economic prosperity." ECF No. 133 at PageID.1721. It further claims that "Line 5 is … an important source of fuel for businesses and consumers in … Michigan." *Id.* at PageID.1719 n.16. Canada's zeal to influence the Court with such claims leads it to rely heavily on discredited studies and to ignore entirely a widely respected industry analysis finding it "clear that there exists a range of commercially feasible and operationally viable solutions that can provide alternative crude and NGL supply chains to affected markets in the event of a Line 5 shutdown." PLG Consulting, *Executive Summary: Likely Market Responses to a Potential Shutdown of Line 5* at 17 (Oct. 2023).[15] Regarding the best interests of the "businesses and consumers" of Michigan, the Governor of Michigan is better positioned to make that determination than the Government of Canada or a Canadian oil corporation.[16] And she has done so, after

[15] https://plgconsulting.com/executive-summary-likely-market-responses-to-a-line-5-shutdown/.

[16] *See also* Brief of Amici Curiae [Tribal Nations], Environmental Law & Policy Center, For Love of Water (FLOW), and Great Lakes Business Network in Support of Plaintiff at

considerable study of the risks posed by the Straits pipelines and the viable alternatives should they be shut down. The brunt of any rupture of Line 5 in the Straits will be borne by the people of Michigan. That they have twice elected a Governor and an Attorney General committed to a shutdown speaks to their priorities.

Enbridge made the same Article IX preemption argument in previous litigation, and the argument was roundly rejected. In *Bad River Band of Lake Superior Tribe of Chippewa Indians v. Enbridge*, 626 F.Supp.3d 1030 (W.D. Wis. 2022),[17] the Bad River Band sued Enbridge for trespass and public nuisance, alleging that Enbridge continued to pump oil through Line 5 across expired easements on the Band's reservation and that the pipeline's proximity to a migrating river presents a significant environmental risk. The district court considered and rejected the contention that Article IX prevented it from resolving the dispute. "Enbridge goes so far as to argue that Canada's request for international arbitration precludes this court from issuing any injunctive relief or, at the very least, requires this court to stay the Band's request for an injunction.… [T]he court

8, *Nessel v. Enbridge*, Case No. 19-474-CE (Mich. Cir. Ct. July 23, 2025) (describing amicus Great Lakes Business Network as "an association of over 200 prominent businesses that depend on the health and accessibility of the Great Lakes" and "rely on unimpaired navigation, from ferries to kayaks to freighters supplying goods … [and] tourist-producing, public-trust-protected recreation … that … would suffer greatly were the dual pipelines to rupture").

[17] *Appeals docketed*, No. 23-2309 (7th Cir. June 30, 2023) and No. 23-2467 (7th Cir. July 28, 2023).

is not persuaded that it must stay resolution of the parties' ongoing dispute[.]" *Id.* at 1057.

Had Enbridge's Article IX argument succeeded, the Band would have been powerless to address Enbridge's blatant trespass on its land, which the district court found to be "conscious and willful," *Bad River Band of Lake Superior Tribe of Chippewa Indians v. Enbridge*, 19-cv-602-wmc, 2023 WL 4043961, at *14 (W.D. Wis. June 16, 2023). The Band would likewise have been powerless to address through its nuisance claim the impending environmental disaster should Line 5 become exposed to the Bad River. The *Bad River* court rejected such an extreme interpretation of Article IX, and this Court should do the same.

CONCLUSION

The Transit Treaty precludes private enforcement and consequently provides no ground for preempting the Governor's actions based on a Treaty violation, even if styled as preemption under the foreign affairs doctrine. And in any case, there has been no violation here. The Governor revoked Enbridge's Line 5 easement pursuant to her duty to safeguard public trust rights and vindicate tribal interests. Her actions are explicitly contemplated by Article IV, which acknowledges the power of governmental authorities to regulate for "environmental protection." Enbridge cannot graft a limitation on this power that is unsupported by the provision's text and contravenes its very purpose. Nor can Enbridge convert an antidiscrimination treaty into one that

abrogates Michigan's "sworn" and "solemn" public trust duty and puts transit pipelines above the law. Finally, Canada's invocation of the Transit Treaty's dispute resolution procedure provides no basis for Enbridge to defy the Governor's order. For all these reasons, Enbridge's Treaty-based preemption argument fails.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with Local Civil Rule 7.2(b)(i) because it contains 7,808 words. The word count was determined using Microsoft Word for Mac Version 16.100.3.

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CERTIFICATE OF SERVICE

I certify that on September 11, 2025, this document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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