No. 26-1021

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ENBRIDGE ENERGY, LIMITED PARTNERSHIP; ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY PARTNERS, L.P.,

Plaintiffs-Appellees,

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-Appellants.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Robert J. Jonker

BRIEF OF *AMICI CURIAE* FOR LOVE OF WATER AND SIERRA CLUB IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

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CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 29(a)(4)(A), Fed. R. App. P. 26.1, and 6th Cir. R. 26.1, counsel for Amici certifies that neither Amicus Curiae has a parent corporation and no publicly held corporation owns 10% or more of either Amicus Curiae's stock.

CERTIFICATE OF CONCURRENCE

Pursuant to Fed. R. App. P. 29(a)(2), all parties have consented to this filing.

Statement of Interests of Amici[1]

For Love of Water, d/b/a Flow Water Advocates ("Flow"), is a Great Lakes non-profit law and policy center whose mission is "to ensure the waters of the Great Lakes Basin are healthy, public, and protected for all."[2] Flow has expertise in Michigan's public trust doctrine and regularly advocates for the protection of the public's rights in and uses of navigable waters and submerged lands throughout the Great Lakes.

The Sierra Club is a national nonprofit organization with 64 chapters and over 611,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the protection of clean air and water, the preservation of wildlife habitat, and transitioning away from a fossil fuel economy. The Club's particular interest in this case is centered on the protection of the Great Lakes, among the world's most important water resources.

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[1] No party or its counsel authored any part of this brief or contributed money to support its preparation or submission. No person other than Amici contributed money to prepare or submit this brief.

[2] *Mission, Vision & Operating Principles,* Flow, https://forloveofwater.org/about-us/mission-and-goals/.

Flow and Sierra Club submit this brief in support of the defendants-appellants' (Michigan Officials) appeal of the District Court's summary judgment in favor of Enbridge on Counts I and III. Amici provide background and analysis of Michigan's historic public trust doctrine and explain why federal preemption of the 2020 Notice of Revocation and Termination (Revocation Notice) is inconsistent with Supreme Court precedent protecting the exercise of this essential attribute of state sovereignty.

Introduction and Summary of Argument

The Great Lakes are an extraordinary natural resource, containing 21 percent of the world's fresh surface water and 84 percent of North America's fresh surface water.[3] They provide drinking water for 30+ million people, support a $6 trillion regional economy, and sustain thousands of species of wildlife.[4] Located at the heart of this globally unique freshwater system are the Straits of Mackinac, through which Enbridge transits millions of gallons of crude oil and natural gas liquids through its aged and failing Line 5 pipelines (Straits Pipeline) daily.[5]

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[3] U.S. EPA, *Great Lakes Facts and Figures*, https://www.epa.gov/greatlakes/great-lakes-facts-and-figures.

[4] U.S. EPA and Canada, State of the Great Lakes—2025 Report, at 1-5, https://binational.net/wp-content/uploads/2026/01/State-of-the-Great-Lakes-2025-Report.pdf.

[5] Michigan Department of Environment, Great Lakes and Energy, *Line 5: Overview-Line 5 Details*, https://www.michigan.gov/egle/about/featured/line5/overview.

The centerpiece of Michigan's protection of the fresh waters and submerged lands of the Great Lakes is the public trust doctrine, which is as old as the common law itself. This doctrine, buttressed by Michigan's constitution and environmental and natural resource protection statutes, assures that the state's water resources and submerged lands are legally protected and preserved for public uses—hunting, fishing, and recreational and commercial navigation. *See Glass v. Goeckel*, 703 N.W.2d 58, 73-74 (2005). *See also Nedtweg v. Wallace*, 208 N.W. 51, 52-53 (Mich. 1926).

The District Court's injunction effectively nullifies the state's exercise of public trust authority over sovereign submerged lands in favor of private, commercial interests–an extraordinary action never before sanctioned by the United States Supreme Court or any federal appellate court. The District Court failed to recognize the limitations on federal preemption when a state exercises a core attribute of sovereignty, denigrating and wrongly dismissing the State's discharge of its public trust responsibilities as a mere pretext for state enforcement of an allegedly preempted "pipeline safety standard". In finding preemption, the District Court ignored settled law requiring a clear and unambiguous statement of congressional intent to abrogate a traditional state authority over navigable waters and sovereign lands. The court also ignored a long line of Supreme Court cases expressly limiting federal "paramountcy" to protection or improvement of navigation with respect to

submerged lands and navigable waters subject to state public trust obligations. (Section I, *infra*.)

The District Court also erred in finding federal preemption based on the foreign affairs doctrine. The Revocation Notice does not conflict with U.S. foreign policy because the 1977 Transit Pipelines Treaty expressly reserves state sovereign authority. *See* Treaty, art. IV. The District Court sidestepped interpretation of the Treaty by finding "occupy the field" foreign affairs preemption. But Supreme Court precedent holds that field preemption does not apply where a state has acted well within an area of traditional state responsibility—here, protection of sovereign submerged lands under the state's well-established, robust public trust doctrine. The District Court's application of the rarely used foreign affairs doctrine to find implied conflict and field preemption was erroneous and wrongfully extinguishes a core sovereign interest of the state (Section II, *infra*).

Argument

I. Michigan's revocation of the Line 5 easement, pursuant to its historic public trust authority, is not preempted by federal law.

Michigan's sovereign lands submerged beneath the navigable waters of Lake Michigan, including the bottomlands at the Straits of Mackinac, are impressed with an inalienable and irrepealable public trust. *See Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 455-456 (1892); *Glass v. Goeckel*, 703 N.W.2d 58, 64-65 (2005). The public trust doctrine imposes upon each branch of state government "a solemn duty" to

protect the public's historic interests in hunting, fishing, and recreational and commercial navigation. *Collins v. Gerhardt*, 211 N.W. 115, 118 (Mich. 1926). Sovereign submerged lands subject to the public trust cannot be dedicated to private interests in derogation of the public trust. When that happens, as established by *Illinois Central*, the state has the power, indeed the duty, to revoke the conveyance. 146 U.S. at 460.

Michigan's right and obligation to protect the public trust in sovereign lands through revocation is not mere regulation, but an exercise of a unique and essential attribute of state sovereignty. As with other such attributes of sovereignty, like the state's historic police powers, its public trust authority to revoke falls within the reserved powers of the U.S. Constitution's Tenth Amendment and can be preempted or abrogated, if at all, only where federal legislation contains a "clear and unambiguous statement" of Congress' intent to preempt. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). And, as the Supreme Court has repeatedly recognized, public trust interests are so connected to state sovereignty that Congress' authority to displace state public trust authority is limited to the protection of navigation for commerce upon navigable waters. *Weber v. Bd. of Harbor Comm'rs* 85 U.S. 57, 65–66 (1873); and cases cited at pp. 16 - 18, *infra*. No such clear statement exists here, and the District Court erred in finding federal preemption and enjoining enforcement of the Revocation Notice.

A. The power to revoke a conveyance of sovereign submerged lands is central to the public trust doctrine and is inherent in state sovereignty.[6]

Illinois Central is the lodestar decision that established two critical elements of the public trust doctrine, both of which bear on this case. First, the submerged lands beneath the navigable waters of Lake Michigan are infused with an ineradicable public trust such that the state is without authority to convey such lands for private use in derogation of the interests protected by the trust. 146 U.S. at 452-54. That decision is a remarkable parallel to this case. There, the Illinois legislature had authorized fee simple conveyance of the bottomlands of Chicago's inner harbor to the railroad for building a rail line and related commercial purposes, *id*. at 448-49, but the state later determined that the conveyance was an impermissible derogation of the state's inalienable dominion over navigable waters and submerged lands and repealed the conveyance. *Id*. at 460. The Straits of Mackinac are subject to the very same public trust.

Second, *Illinois Central* established that a state has the power, indeed the obligation, to revoke a conveyance when the state determines that the conveyance

[6] We focus here on Michigan Officials' authority and duty to *revoke* the 1953 Easement, as an inherent and necessary exercise of the state's public trust authority (*see* Rev. Notice, sec. I), as distinguished from authority to *terminate* for breach of conditions in the easement agreement (*ibid.,* sec II.). *See* Appellants' Principal Br. at 38-41 (termination for breach of material conditions negotiated in 1953 is not tantamount to regulatory enforcement of safety standards).

violated the public trust. *Id*. at 453-55.[7] The power to revoke is inherent in the public trust doctrine because, as the Court noted, "[t]he State can no more abdicate its trust over [submerged lands] . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id*. at 453. "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it." *Id*. at 460.

The force of the public trust and the power to revoke are not diminished by either the passage of time or the grantee's investment in improvements to the conveyed property. This is because the state never relinquishes its sovereign interests in or responsibility for lands subject to the public trust. *Id.* at 453, 460; *see also Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 494 (1988). And under the reserved powers doctrine, "a state government may not contract away 'an essential attribute of its sovereignty.'" *United States v. Winstar Corp*., 518 U.S. 839, 888 (1996).

The power to revoke, established in *Illinois Central,* has endured for more than 125 years and was applied in the landmark decision, *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 721 (Cal. 1983). The California Supreme Court,

[7] A "conveyance" of property is not limited to a grant of fee simple title, as in *Illinois Central*, but also includes a grant of a property interest conferring a right to control or enjoy exclusive use, such as an easement. *See* Black's Law Dictionary 334-35, 527 (7th ed. 1999) (defining conveyance and easement).

applying *Illinois Central*, held that the state had the power to revoke longstanding permits granting water rights that adversely impacted public trust interests. *Id.* at 728. The court affirmed that "the continuing power of the state as administrator of the public trust . . . extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust." *Id*. at 723. Other courts have recognized that the power to revoke is essential to the administration of state public trust obligations. *See Smith v. New York,* 545 N.Y.S.2d 203, 205 (N.Y. App. Div. 1989) (a conveyed interest in submerged lands "may be revoked by the State when the uses proposed are not in conformity with the public trust doctrine"); *Vermont v. Central Vermont Ry*., 571 A.2d 1128, 1132-33 (Vt. 1989) (affirming in dicta the state's power to revoke previously granted property rights); *cf*. *Owsichek v. Alaska State Guide Lic. and Control Bd.,* 763 P.2d 488, 496 (Alaska 1988) (grant of "exclusive guide area" interest void on public trust grounds). As stated in *Illinois Central*, public trust bottomlands "cannot be placed entirely beyond the direction and control of the state." 146 U.S. at 460.

B. Michigan Officials acted well within the bounds of the state's public trust authority in issuing the Revocation Notice.

The Supreme Court has made clear that the precise contours of the public trust doctrine are for each state to determine in its sovereign capacity. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 604 (2012). Michigan's fidelity to the public trust doctrine is as robust as that of any state's, as demonstrated in 100 years of public

trust common law, together with its constitution and statutes. *See Glass v. Goeckel*, 703 N.W.2d 58 at 63-66 (reviewing the history of public trust jurisprudence and holding that "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"); *Obrecht v. Nat'l Gypsum Co.*, 105 N.W.2d 143, 148 (Mich. 1960) (declaring that all three branches of state government are the "sworn guardians of Michigan's duty and responsibility as trustee of the above delineated beds of 5 Great Lakes."); *see also* Mich. Const. art. IV, § 52; Michigan Environmental Protection Act, Mich. Comp. Laws § 324.1701 *et seq*. (MEPA); Great Lakes Submerged Lands Act, Mich. Comp. Laws § 324.32501 *et seq*. (GLSLA).

Michigan's historic commitment to its public trust lands is reflected in specific requirements limiting conveyances in submerged lands of the Great Lakes. The state cannot convey an interest in such lands unless the state makes a determination, set forth in a "due finding" in "recorded form," that there is an "exceptional reason" for the conveyance that conforms to the public trust. *Obrecht*, 105 N.W.2d at 149; *see also* GLSLA § 324.32501 (codifying the "due finding" requirement). Without the requisite public trust findings, such a conveyance is void from inception and "become[s]… an unlawful detention of State property." *Obrecht*, 105 N.W.2d at 149-50.

The Michigan Officials' revocation of the Line 5 easement across submerged

lands at the Straits was entirely consistent with the foregoing precepts. *See* Revocation Notice, Section I.B ("The 1953 Easement Violated the Public Trust and Was Void From its Inception"), at 4-5. The lack of "due finding" at the granting of the 1953 Easement undergirded the determination that the grant of easement never satisfied the public trust and was thus void from inception. *Id*. Michigan Officials' issuance of the Revocation Notice was a necessary and valid exercise of the state's right and obligation to protect the public trust.

The District Court took a different and incorrect view of public trust considerations in the Revocation Notice, mischaracterizing the Notice and its reliance on the public trust doctrine as mere pretext. Opinion and Order, RE 164, Page I.D. # 2490. ("[T]he public trust doctrine is nothing but a vehicle for imposing state safety judgments that Congress precluded the state from making."). Under the Court's reasoning, any state action that would have the effect of shutting down the Straits Pipeline must mean *ipso facto* that the state is enforcing a federally preempted safety standard. The Court's fundamental misunderstanding (and denigration) of the public trust doctrine and its application by Michigan Officials infected the entirety of the Court's preemption analysis and ruling. Denial or impairment of the state's power to revoke a conveyance that violates the public trust would eviscerate an essential attribute of state sovereignty.

C. Michigan's public trust authority over its submerged lands can be preempted only if Congress has made a clear statement of intention to do so—and none exists here.

Michigan's sovereign title to and perpetual public trust responsibility for the bottomlands of the Great Lakes within its boundaries is grounded in two venerable, intertwined doctrines—the equal footing and public trust doctrines. *See Idaho v. Coeur D'Alene Tribe of Idaho,* 521 U.S. 261, 283 (1997) (describing both). The sovereign rights and responsibilities that flow from those doctrines comprise an indivisible and essential attribute of sovereignty that Michigan acquired upon statehood. *See id.* at 283-84. Echoing *Illinois Central*, the Supreme Court in *Coeur d'Alene* made clear that because navigable waters and their submerged lands are "infused with public trust," they "implicate [a state's] sovereign interest." 521 U.S. at 283-84. The states' "power to control navigation, fishing, and other public uses of water, we have said, is an essential attribute of sovereignty." *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (internal quotations omitted); *see generally* Michael C. Blumm & Lynn S. Schaffer, *Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. REV. 399, 401 n.10, 419-21 (2015) (discussing federal and state cases that demonstrate "widespread judicial recognition that the public trust doctrine is inherent in sovereignty").

As an essential attribute of state sovereignty, the public trust doctrine triggers a background principle of federalism that defeats federal preemption here: the "clear statement rule." That rule compels courts considering the possible preemptive effect of federal legislation to "start[] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). As Michigan Officials argue, no such clear purpose can be found in the Pipeline Safety Act. That's because the PSA is concerned with regulation (including § 60104(c) preemption) and not conduct premised on state public trust obligation or exercise of state property and contract rights to protect sovereign state land. Appellants' Br. at §§ I(C) & I(D). "Th[e] plain statement rule [acknowledges] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). The rule is especially apt where a court is being asked to adjust the traditional relationship of federal and state authorities with respect to water and land use within state borders.

Michigan's inseparable sovereign title in and public trust authority over the submerged lands at the Straits of Mackinac is more than just an area of traditional state responsibility or exercise of historic state police power. As discussed above, they comprise an essential element of state sovereignty traceable to the Nation's

founding. Under the clear statement rule they warrant protection from federal court interference at the behest of private commercial interests or a foreign government. Neither Enbridge nor the District Court points to any statement of Congress that satisfies the clear statement rule. Equating Michigan's exercise of its public trust authority with enforcement of a "safety standard," and thus preempted by 49 U.S.C. Section 60104(c), requires a semantical backflip that is contrary to the clear statement rule.

D. Federal authority can displace state public trust authority over submerged lands only for the protection or improvement of navigation for commerce.

Throughout its 150 years of public trust jurisprudence, the Supreme Court has recognized that a state's sovereign, public trust interests in its submerged lands can be displaced by federal authority only in the narrowest circumstances. Starting with *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845), and most recently in *PPL Montana v. Montana*, 565 U.S. 576, 591 (2012), the Supreme Court has repeated this limitation with little variation. As the Court famously stated in *Weber v. Bd. of Harbor Comm'rs*:

> Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, *subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with*

> *foreign nations or among the several States,* the regulation of which was vested in the General government.

85 U.S. 57, 65–66 (1873) (citing *Pollard's Lessee*) (emphasis added).

The "subject only to" limitation of federal authority over state public trust lands—which reaches no further than protection of navigation for commerce—appears in a host of Supreme Court decisions: *PPL Montana*, 565 U.S. at 591 ("[The state] may allocate and govern those [submerged] lands according to state law *subject only to* "the paramount power of the United States to control such waters *for purposes of navigation* in interstate and foreign commerce.") (emphasis added); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co*., 429 U.S. 363, 374 (1977) (quoting the "subject only to" rule announced in *Weber*); *United States v. Oregon*, 295 U.S. 1, 14 (1935) ("[U]pon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State or local sovereignty, and is *subject only* to the paramount power of the United States *to control* such waters for *purposes of navigation* in interstate and foreign commerce.") (emphasis added); *United States v. Mission Rock Co*., 189 U.S. 391, 404 (1903) (quoting *Weber*); *Shively v. Bowlby*, 152 U.S. 1, 24, 29-30 (1894) (reviewing earlier public trust cases and noting that state title in public trust lands "is held is subject to the paramount *right of navigation*, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States") (emphasis added); *Illinois Cent. R. Co. v. Illinois*, 146

U.S. 387, 435 (1892) ("It is the settled law of this country that the ownership of and dominion and sovereignty over [submerged] lands . . . with the consequent right to use or dispose of any portion thereof, . . . [is] subject always to the paramount right of congress *to control their navigation* so far as may be necessary for the regulation of commerce with foreign nations and among the states.") (citing *Pollard's Lessee* and *Weber*) (emphasis added).

Enbridge's federal preemption arguments fall far outside the Supreme Court's narrow limits of federal navigation described above. Protecting Enbridge's continued operation of its aged Straits Pipeline lying atop the submerged lands of the Straits of Mackinac does absolutely nothing to promote, improve, or protect the federal interest in navigation for commerce upon navigable waters. Indeed, the converse is glaringly obvious. As established in the Revocation Notice, Line 5 in the Straits threatens rather than promotes safe navigation and commerce through the Straits. *See* Revocation Notice at 6-8, 16-17. Thus, the narrow condition for federal paramountcy established in a century of Supreme Court public trust jurisprudence has not been met.

In sum, the Supreme Court has long recognized that state public trust authority over navigable waters and submerged lands is an essential element of state sovereignty. As such, federal paramountcy in respect thereof is not located at the outer boundaries of the Commerce Clause, but at the boundary of Congress's

exercise of federal power to control (*i.e.*, protect or improve) navigation as it relates to commerce upon navigable waters. If allowed to stand, the District Court's expansive preemption rulings will functionally and perpetually extinguish a core sovereign right and responsibility that the State of Michigan attained upon statehood.

II. The Notice of Revocation is not preempted by the foreign affairs doctrine under traditional preemption analysis.

The District Court also erred in ruling that Michigan's revocation of the 1953 Easement is preempted under the foreign affairs doctrine. The 1977 Treaty sets forth the Nation's foreign policy regarding transnational pipelines and expressly provides that Michigan has the authority to do exactly what it did here. *See* Agreement Concerning Transit Pipelines, Can.-U.S., Jan. 28, 1977, 28 U.S.T. 7449, art. IV (Treaty). The District Court correctly observed that the Treaty "embodies the United States' express foreign policy," but then declared that interpretation of the Treaty, including the reservation of state authority, is unnecessary. RE 164, Page I.D. # 2497. The District Court wrongfully subordinated an express, treaty-based foreign policy determination to the artful argumentation by various amici, including the current U.S. administration, *id.*, that would read a significant reservation of rights out the Treaty altogether.

While the foreign affairs doctrine acknowledges the federal government's plenary authority over foreign relations, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the doctrine cannot be employed so cavalierly to nullify an express

reservation of state authority contained in a Senate-ratified treaty. *See generally*, Curtis A. Bradley, *The Treaty Power and American Federalism,* 97 MICH. L. REV. 390, 394 (1998) (arguing that an absolutist reading of the federal government's "plenary authority" under the treaty power damages federalism).

A federal court should use the same caution, embodied in the Supreme Court's "clear statement rule," *see* pp. 16-17, *supra*, when assessing a treaty's possible abrogation of state's sovereign authority, as it does when considering the preemptive effect of federal legislation. Nothing in the 1977 Treaty manifests a clear and unambiguous intention of Congress to abrogate Michigan's public trust authority over its sovereign navigable waters and submerged lands. On this basis alone, the court should find that the Treaty does not displace Michigan's easement revocation, an action that lies within an area of traditional state authority firmly grounded in the equal footing and public trust doctrines.

In addition, this Court should reject foreign affairs implied preemption here because Enbridge's arguments fail to satisfy the traditional tests for implied preemption. The Supreme Court has addressed the application of the foreign affairs doctrine to state action under two branches of implied federal preemption: "conflict preemption" and "occupy the field" preemption. *Garamendi*, 539 U.S. 396, 418-20. When measured by the established standards for implied preemption, the Revocation Notice is neither conflict preempted nor field preempted. The District Court erred in

finding both.

A. No Conflict Preemption.

The Revocation Notice does not conflict with the express U.S. foreign policy embodied in the Treaty. That's because the Treaty itself expressly reserves for the states their authority to apply state laws to regulate and protect their sovereign public trust interest and the environment. Michigan Officials correctly observed that the Treaty expressly allows a public authority to impose measures that interfere with transnational pipelines, so long as they are "just and reasonable" and "applied equally to all persons and in the same manner." Appellants' Br. at 62 (quoting Treaty, art. IV.2). The Treaty also provides a second and closely related reservation of state authority: "a Transit Pipeline . . . shall be subject to regulations by the appropriate governmental authorities having jurisdiction over such Transit Pipeline . . . with respect to . . . environmental protection." Treaty, art. IV, cl. 1, § b. The Treaty does not define "appropriate government authorities," but in its sovereign, governmental capacity, Michigan has devised and enforced an array of common law, statutes, and regulations to protect the environment and natural resources, including a robust public trust doctrine that is inherent in state sovereignty and protects the waters and submerged lands of the Great Lakes. *See*, pp. 8-9, *supra* (citing, *e.g.,* MEPA and GLSLA; public trust case law). As such, the State of Michigan easily fits within the ambit of Art. IV.1.b. But in a footnote the District Court expressed doubt

about that proposition and then ducked analysis or resolution of the question. RE 164, Page I.D. # 2497, n.13. And even if the meaning of "appropriate government authorities" is deemed ambiguous (which for the reasons just explained, it is not), both the presumption against preemption and the clear statement rule should apply, leading to an interpretation that respects the interests of federalism and preserves state sovereignty. *See* pp. 11-13, *supra*.

In approving the Treaty, Congress made a foreign policy decision *to avoid* conflict with the states by expressly reserving their public trust and environmental protection authority. Indeed, with ratification of the Treaty and its explicit protection of state authority, Congress and the executive branch spoke with "one voice" on a matter of foreign policy—they guaranteed that the states' traditional role in environmental and natural resource protection would not be impaired by an international treaty. This is the nation's express foreign policy that must be accorded supremacy; not the revisionist version accepted by the District Court that would read Art. IV out of the Treaty altogether. *See* RE 164, Page I.D. # 2497.

The Treaty's express reservation of state authority contrasts starkly with the facts of *Garamendi*, on which the District Court heavily relied. There, the Supreme Court determined that California had no role whatsoever in the resolution of Holocaust-era insurance claims of American citizens against foreign governments. Moreover, the California statute aimed at aiding such claims conflicted directly and

clearly with agreements the President had signed with foreign countries that committed the United States to an international process for claims resolution. *Garamendi*, 539 U.S. at 421-23. The "clear conflict" required by *Garamendi* for application of conflict preemption is completely lacking here—under either the "impossibility" or "obstacle" branches of traditional conflict preemption analysis. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (describing both branches).

Additionally, "impossibility conflict" does not arise because Enbridge cannot demonstrate that it is impossible for it to comply with both federal law and the requirement of the Revocation Notice for orderly shutdown of the Straits Pipeline. *See* Revocation Notice at 20 (delaying the effect of revocation and termination for 180 days to allow an "orderly transition"). No federal law requires Enbridge to continue to operate Line 5 in the U.S. If Enbridge notifies the federal government tomorrow that it intends to decommission Line 5, or a portion of it, without replacement, neither the Treaty nor any federal law would stand in the way. There can be no "impossibility" conflict where the federal government *permits* an activity, but a state prohibits or restricts it. *See Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. 299, 314 (2019) ("[W]e have refused to find clear evidence of such impossibility where the laws of one sovereign permit an activity that the laws of the other sovereign restrict or even prohibit."). The absence of conflict would also be

true if decommissioning is involuntary and mandated by a state court injunction. Enbridge is simply not required by federal law to continue to operate Line 5 at the Straits of Mackinac.

The other branch of conflict preemption—frustration of congressional purposes or "obstacle preemption"—does not apply here because the foreign affairs doctrine is judge-made law. Thus, there is no obstacle to, or frustration of purposes embodied in legislation enacted by Congress. *See Mayor and City Council of Baltimore v. BP P.L.C.,* 388 F. Supp. 3d 538, 562 (D. Md. 2019)*, aff'd, Mayor of Baltimore,* 31 F.4th 178 (2022) ("[T]here is no congressional intent regarding the preemptive force of the judicially-crafted foreign affairs doctrine . . . ."). To the extent that Enbridge must turn back to the Treaty to find a congressional purpose, it runs headlong into the congressionally-approved Treaty provisions reserving state authority to regulate and protect the environment and institute "other measures." Treaty, art. IV. Enbridge's conjured implied preemption based on conflict preemption vanishes.

B. No Field Preemption.

The doctrine of "occupy the field preemption" is inapplicable here because neither prong of the two-part test for field preemption is met: First, the challenged state action must fall outside areas of traditional state responsibility. *Garamendi*, 539 U.S. 396, at 420 and 420 n.11. Second, the state action must seriously (not

incidentally) intrude upon the foreign affairs power reserved to the federal government by the Constitution. *Id.*; *Zschernig v. Miller*, 389 U.S. 429, 432 (1968). Both parts of the test must be satisfied to find field preemption. *See Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1074 (9th Cir. 2012) (en banc).

When either element is lacking, courts have not hesitated to reject preemption premised on the foreign affairs doctrine. *See, e.g.*, *Cassirer v. Thyssen-Bornemisza Collection Found.,* 737 F.3d 613, 617-619 (9th Cir. 2013) (because limitations period for stolen art claims did not intrude on foreign affairs power, no need to determine traditional state concern); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 579 (5th Cir. 2010) (holding that Louisiana's statutes of limitations are "well within the realm of traditional state responsibilities."); *Lighthouse Res. Inc. v. Inslee*, 429 F. Supp. 3d 736, 741 (W.D. Wash. 2019) (granting state defendants summary judgment on plaintiff's field preemption claim because plaintiff failed to show any facts bearing on either prong); *United States v. California*, No. 2:19-cv-02142, 2020 U.S. Dist. LEXIS 126504, at *20-33 (E.D. Cal. July 16, 2020) (neither prong of the field preemption test satisfied in foreign affairs doctrine-based challenge to fossil fuel emissions cap-and-trade program).

Here, the District Court fundamentally erred in finding that the Revocation Notice does not address an area of traditional state responsibility. It is undisputed that the Notice and its requirements are focused exclusively on a 4.5-mile stretch of

pipeline lying wholly within Michigan's submerged lands. The District Court acknowledged that the Notice is grounded solely in state public trust doctrine and state contract law RE 164, Page I.D. ## 2465-2468, but swept that aside with the remarkable and unsupported declaration that defendants' "'real purpose' was to shutdown [sic] an *international* pipeline." *Id*. at Page I.D. # 2496 (emphasis added). To the contrary, the justifications for revocation of Enbridge's easement are plainly set forth in the Notice, invoke a core attribute of state sovereignty (public trust), and are completely unrelated to Line 5's crossing into Canada some 300 miles south of the Straits. The District Court had no basis to invent a substitute rationale for the purpose of re-packaging the Notice with a foreign policy label. The Supreme Court has cautioned that, out of concern for federalism, federal courts are ill-equipped to accurately discern the motivations of state actors and risk trampling state sovereignty in trying to do so. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010) (observing that, rather than reshaping text to a federal court's conception of purpose, "the state-friendly approach [is] to accept the law as written.").

Unlike most foreign affairs preemption cases, Michigan is not seeking to enter into some fraught issue of foreign relations. *Cf. Zschernig,* 389 U.S. at 441 (Oregon, through its property descent statute, sought to "establish its own foreign policy" vis-à-vis the Soviet bloc during the Cold War); *Crosby v. Nat'l Foreign Trade Council*,

530 U.S. 363, 373-374 n.7 (2000) (public agency purchasing restrictions in Massachusetts' "Doing Business with Burma" law were not within traditional state responsibilities); *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1026-1027 (9th Cir. 2009) (California statute aiding the recovery of Nazi-looted art purported to regulate property law but the statute's "real purpose is to provide relief to Holocaust victims and their heirs," a matter for national foreign policy and not a traditional state concern). In clear contrast, Michigan Officials' exercise of the state's public trust rights and responsibilities with respect to its sovereign submerged lands is the exercise of an essential attribute of state sovereignty, inextricably bound up with sovereign title. This is clearly distinguishable from *Garamendi* where the Supreme Court concluded that California's Holocaust victims' relief statute "does not serious[ly] claim to be addressing a traditional state responsibility." *See Garamendi,* 539 U.S. at 420 n.11.

Enbridge's field preemption argument fails on the first prong, thus it fails completely. The District Court erred in assuming that field preemption exists if either of the two parts of the test is satisfied. RE 164, Page ID # 2496. Enbridge's argument also flounders on the second, necessary, prong of the test because the Revocation Notice does not intrude upon the federal government's foreign affairs power because it fits squarely within the state authority reserved in the Treaty. As discussed above, Article IV.1.b of the 1977 Treaty expressly reserves for the state

of Michigan its authority to regulate pipelines covered by the Treaty for the purposes of environment protection. Protection of the environment and natural resources (*i.e.* navigable waters and submerged lands) that lie at the heart of the public trust doctrine is the undisputed aim of the Revocation Notice. Where a state has acted pursuant to authority reserved in an international treaty, the notion of unconstitutional state intrusion into "dormant" federal foreign affairs power simply makes no sense.

And, the fate of dormant foreign affairs preemption may have just been sealed by the Supreme Court in *Hencley v. Fluor Corp.*, No. 24-924, (U.S. April 22, 2026). There, a military contractor in the Afghan conflict zone sought federal preemption of state tort law claims based on the existence of a dormant, constitutional "battlefield preemption." But the Court held no such doctrine can be found in the Constitution's exclusive allocation of war powers to the federal government. Slip op. at 12-16. As the majority observed, "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or federal statute to assert it." *Id*. at 5 (quoting *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.,* 485 U.S. 495, 503 (1988). Similarly, there is no constitutional text that frames a dormant foreign affairs preemption. While a handful of provisions in Articles I and II allocate foreign affairs related authority to the federal government. *See* U.S. Const., art. I, § 8, cl. 3 ("dormant" foreign commerce clause); art. I, § 10 (prohibitions on some state

foreign-facing activities); art. II, § 2 (executive treaty power)), linking these disparate provisions comes nowhere near the constitutional rigor applied in *Hencley*. Indeed, the dissent in *Hencley* made the case for broad dormant foreign affairs preemption, and it did not succeed. *See id.* at 7 (Alito, J., dissenting) (relying upon *Garamendi* and *Zschernig* to argue that the constitutional structure vests in the federal government "exclusive authority to conduct relations with other nations").

Legal scholars have long debated the interplay of state sovereignty and federal foreign affairs power, with some urging that presumptive foreign affairs preemption lacks constitutional foundation and cannot be reconciled with either federalism or the realities of global engagement by the states. *See, e.g.*, Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2137 n.20, 2138 & n.24 (collecting scholarly articles) (June 2017) ("In the last twenty years, some prominent scholars have pushed for constricting the scope of the federal government's foreign affairs powers in light of federalism principles."). Not since *Zschernig* in 1968 has the Supreme Court invalidated a state action on the basis of foreign affairs field or dormant preemption. There is no reason for this Court to do now.

* * *

The careful, constitutional allocation of sovereign authority between the federal government and the states has sustained our republic for 250 years. With due

respect to federalism, the Supreme Court has consistently interpreted the power of the federal government to override state authority over state sovereign lands narrowly. In contrast, the District Court's preemption rulings impermissibly expand the reach of federal power to extinguish an essential attribute of state sovereignty: the right and responsibility of the state's public trust over the infinitely precious fresh waters and submerged lands of the Great Lakes. If Michigan is divested of its sovereign interests in the Straits of Mackinac, one wonders whether any realm remains in which a state may act free of federal interference via the judiciary. And what state would ever again agree to conditional occupation and use of sovereign lands, knowing that either a commercial entity or foreign power could secure a federal court injunction that strips away sovereign state authority? "Even in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers." *Arizona v. United States*, 567 U.S. 387, 423 (2012) (Scalia, J., concurring in part and dissenting in part).

Conclusion

Amici request this Court to reverse summary judgment on Counts I and III.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT PURSUANT TO FRAP 32(g)

Pursuant to FRAP 32(g) I, Rebecca L. Millican certify that the foregoing brief consists of 6,480 words and was created using Times New Roman, 14 pt font and Microsoft Word 365.

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CERTIFICATE OF SERVICE

I, Rebecca L. Millican, hereby certify that on the 11th of May 2026, I electronically filed the foregoing documents with the CM/ECF system which will send a notification of such to all parties of record.

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