

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

ENBRIDGE ENERGY LIMITED  
PARTNERSHIP, et al.,

Plaintiffs,

v.

GRETCHEN WHITMER, et al.,

Defendants.

Case No. 1:20-cv-1141-JTN-RSK

HON. JANET T. NEFF

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***BRIEF OF AMICI CURIAE AMERICAN FUEL & PETROCHEMICAL  
MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF OIL  
PIPE LINES, INDIANA PROPANE GAS ASSOCIATION, MICHIGAN PROPANE GAS  
ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL  
PROPANE GAS ASSOCIATION, OHIO PROPANE GAS ASSOCIATION, AND  
WISCONSIN PROPANE GAS ASSOCIATION IN SUPPORT OF PLAINTIFFS’  
MOTION FOR SUMMARY JUDGMENT***

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## **I. INTRODUCTION**

*Amici Curiae* (collectively, “*amici*”) support Plaintiffs’ Motion for Summary Judgment (“Motion”) because the Notice of Revocation and Termination of Easement (“Notice”) by Michigan’s Governor Gretchen Whitmer and Department of Natural Resources Director (“Defendants”) to shut down a long-operating, vital interstate and international pipeline is unlawful. Defendants’ attempts to compel a shutdown of an interstate and international pipeline are preempted by (i) the federal Pipeline Safety Act (“PSA”) § 60104(c)’s prohibition on states’ adoption and implementation of interstate pipeline safety standards and the statute’s exclusive grant of authority to the federal government through the U.S. Secretary of Transportation and the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) to regulate interstate pipeline safety, and (ii) the Foreign Affairs Doctrine ensuring the United States can speak with one voice on international relations matters, such as the interstate and international pipeline here.

## **II. BACKGROUND**

### **A. Interest of *Amici***

*Amici* are national and regional associations with members engaged in and reliant upon all aspects of the oil and natural gas industry. *Amici* have direct and profound interests in the free flow of petroleum products through, and in the safety of, the interstate and international network of pipeline systems.

American Fuel & Petrochemical Manufacturers (“AFPM”) is a national trade association whose members comprise nearly all U.S. refiners and petrochemical manufacturers that receive crude oil and other liquids products via the midstream sector, which includes pipelines, railroads, vessels, tankers, and trucks. AFPM’s member companies have an interest in ensuring that they will be able to receive crude oil supplies necessary to meet U.S. energy consumption demand without interference by local governments with contrary interests. AFPM’s members supply

consumers with products that are used daily in homes and businesses, help meet the fuel and petrochemical needs of the nation, strengthen economic and national security, and support nearly three million jobs. *See* <https://www.afpm.org/>.

The American Petroleum Institute (“API”) is a national trade association representing all aspects of America’s oil and natural gas industry. API’s over 580 members, from large integrated companies to smaller independents, come from all segments of the industry. They are producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry. API is also the worldwide leading standards-making body for the oil and natural gas industry, including standards and recommended practices incorporated or referenced in numerous state and federal regulations. *See* <https://www.api.org>.

The Association of Oil Pipe Lines (“AOPL”) is a nonprofit national trade association that represents the interests of oil pipeline owners and operators. AOPL’s members operate pipelines carrying nearly 97 percent of the crude oil and petroleum products moved by pipeline throughout the United States, extending over 225,000 miles in total length. These pipelines safely, efficiently, and reliably deliver more than 22 billion barrels of crude oil and petroleum product each year, consistent with safety regulations implemented by PHMSA. *See* <https://www.aopl.org>.

The Indiana Propane Gas Association (“IPGA”) is a member-focused trade organization providing services that communicate, educate and promote the propane industry within Indiana. The IPGA focuses on education, networking, and representing the interests of the Indiana propane industry with Indiana state government. *See* <https://indianapropane.com/>.

The Michigan Propane Gas Association (“MPGA”) is a trade and membership service organization that represents propane marketers throughout the state. The mission of the MPGA is to promote the proper handling and use of propane, to work for a favorable environment for

propane distribution and marketing, and to increase its application by demonstrating propane's value as a clean energy resource. *See* <https://mipga.org>.

The National Association of Manufacturers (“NAM”) represents small and large manufacturers in every industrial sector nationwide. Manufacturing employs over 12.5 million people, contributes \$2.55 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. U.S. manufacturers are committed to the communities in which they live and serve, and dedicated to protecting the health, safety and vibrancy of those communities. As a result of its relentless drive toward sustainability, innovation and environmental stewardship, the manufacturing sector in the U.S. today is a clean and efficient operation that is technology driven and dedicated to the planet and its people. *See* <https://www.nam.org/>.

The National Propane Gas Association (“NPGA”) is the national trade association representing the U.S. propane industry. Its membership includes approximately 2,400 businesses in all 50 states, and the membership is comprised of propane retail marketers who deliver the fuel to the end user; producers and wholesalers of propane; manufacturers and distributors of propane gas appliances, equipment, and trucks; fabricators of propane gas cylinders and tanks; propane transporters; and service providers of all types. *See* <https://www.npga.org/>.

The Ohio Propane Gas Association (“OPGA”) is a member-focused trade organization providing services that communicate, educate and promote the propane industry within Ohio. Its mission is to provide a unified, proactive voice to influence legislative, regulatory and code issues, and to facilitate training, safety, and marketing programs that positively impact the Ohio propane industry. *See* <http://www.ohioprogas.org/>.

Wisconsin Propane Gas Association (“WPGA”) is a trade and membership service



organization providing services that communicate with propane marketers, suppliers, builders, and consumers throughout the state of Wisconsin. Its primary purpose is to promote awareness and the growth of propane usage as a safe and reliable source of energy. *See* <https://wipga.org/>.

## **B. Uniform Federal Regulation of Pipeline Safety Standards**

Crude oil and petroleum products pipelines play a fundamental and irreplaceable role in satisfying American energy and other needs. The vast volumes they transport cannot be easily or feasibly moved by other transportation modes. It would take a line of tanker trucks, about 750 per day, loading up and moving out every two minutes, 24 hours a day, 7 days a week, to move the volume of even one modest-sized pipeline.<sup>1</sup> The railroad-equivalent of that same modest-sized pipeline would be a train of 225 28,000 gallon tank rail cars every day.<sup>2</sup> No other infrastructure, let alone safe facilities, exists to readily displace volumes transported by Line 5.

The safety of interstate pipeline transportation of crude oil and petroleum products like propane is ensured via comprehensive, uniform, and effective federal regulation and oversight. The operation and maintenance of interstate liquids pipelines is extensively regulated by PHMSA pursuant to the PSA. PHMSA's regulations govern all facets of interstate pipeline operations, including design, specifications, operation, and maintenance so as to ensure safety. *See, e.g.*, 49 C.F.R. Part 195. PHMSA regulations, for example, dictate the design and specifications for all segments of a pipeline, 49 C.F.R. § 195.100, *et seq.*; the pressures at which such pipelines may be operated, 49 C.F.R. § 195.406; and the frequency within which operators must conduct internal and external investigations to identify potential integrity threats, including the timelines under which even *potential* threats must be inspected and repaired, 49 C.F.R.

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<sup>1</sup> *See* PHMSA, General Pipeline FAQs, *available at* <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> (last visited Jan. 31, 2022)

<sup>2</sup> *Id.*

§§ 195.452, 195.454. PHMSA regulations further address possible releases, including responding to alarms or triggers that may be indicative of a release, 49 C.F.R. § 195.446; the placement of valves that may be remotely shut to minimize a potential release, 49 C.F.R. §§ 195.116, 195.260; and requirements for alarms to notify a control room in the event of a potential release, 49 C.F.R. § 195.446(e). As this Court has found, PHMSA can also force the closure of a pipeline that poses an imminent safety hazard. 49 U.S.C. § 60117(p); *Michigan v. Enbridge*, 2021 WL 5355511, at \*6 (W.D. Mich. Nov. 16, 2021).

Congress determined that the federal government should implement a single, uniform regulatory scheme for interstate pipelines to ensure pipeline safety is protected, safety regulations are adopted and enforced by a dedicated federal agency with nationwide expertise, and pipelines can operate safely and efficiently without having to track and comply with a patchwork of potentially inconsistent and conflicting state and local pipeline safety regulations. The PSA thus preempts any state or local government from implementing any standards and regulations concerning interstate pipeline safety. *See* 49 U.S.C. § 60104(c).

### **C. Enbridge Line 5**

Enbridge's Line 5 is a 645-mile-long pipeline that transports petroleum products across Wisconsin and Michigan into Ontario, Canada. At issue in this case is a four-mile section of the pipeline where it splits into two parallel lines crossing under the Straits of Mackinac (the "Straits Pipelines"). Line 5 transports more than 540,000 barrels of petroleum products per day, which are crucial to satisfying state and national energy needs.<sup>3</sup> For example, 55 percent of Michigan's

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<sup>3</sup> *Q&A: What happens if state shuts down Line 5 oil pipeline*, Crain's Detroit Business (June 16, 2019), available at <https://www.crainsdetroit.com/energy/qa-what-happens-if-state-shuts-down-line-5-oil-pipeline>; *see also* Beth LeBlanc, *What a Line 5 shutdown would mean for Michigan's energy*, The Detroit News (December 19, 2019) available at <https://www.detroitnews.com/story/news/politics/2019/12/19/what-line-5-shutdown-means-michigan-energy-enbridge/4334264002/>.

annual propane supply—used mostly to provide home heating for countless Michigan families—comes from natural gas liquids that are transported through the Straits Pipelines.<sup>4</sup>

The Straits Pipelines have an outstanding safety record, supported by regular inspections and testing. In nearly 7 decades of operation there never has been a single release of product from Line 5 where it crosses under the Straits. On this record, there is no basis to conclude that the Straits Pipelines fail to meet federal pipeline safety standards or requirements, are unusually susceptible to anchor strikes, or pose an unreasonable or unacceptable risk of a release incident. Also, the Straits Pipelines’ ongoing safety is within the exclusive purview of PHMSA, not the state.

**D. This Case Has Significance Beyond Line 5.**

This Court’s determination on federal preemption of Defendants’ attempts to shut down an interstate and international pipeline has far-reaching national and international significance. If the Court rules Defendants can simply invoke the state-law “public trust” doctrine and thereby prohibit Line 5 from continuing to operate due to alleged pipeline safety concerns, it would not only terminate operation of a vital interstate pipeline, but also significantly undermine the exclusive federal regulatory authority over interstate pipeline safety. Such a novel ruling would open the door to a spate of similar claims from other states for other interstate pipelines that could create the patchwork of varying and potentially conflicting pipeline safety regulations and closures that Congress expressly precluded. That result could, in turn, significantly hinder the operation of the interstate network of pipeline systems and the ability to meet American energy needs.

**III. ARGUMENT**

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<sup>4</sup> *Id.*

**A. The Pipeline Safety Act Expressly Preempts Defendants’ Attempts to Shut Down an Interstate Pipeline.**

**1. Congress Granted the Federal Government Exclusive Authority to Regulate Interstate Pipeline Safety.**

The PSA’s purpose is “to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation.” 49 U.S.C. § 60102(a)(1). Under the PSA, the Secretary of Transportation sets “safety standards for pipeline transportation and for pipeline facilities” that apply to “the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities” and address qualifications for individuals “who operate and maintain pipeline facilities.” *Id.* § 60102(a)(2). Standards must be “practicable” and “meet the need for . . . safely transporting hazardous liquids” and “protecting the environment.” *Id.* § 60102(b)(1). PHMSA administers and enforces the PSA. PHMSA’s highest priority is “safety,” recognizing Congress’s dedication to “the highest degree of safety in pipeline transportation.” 49 U.S.C. § 108(b).

Like the statutes that preceded it,<sup>5</sup> the PSA grants *exclusive* authority to regulate the safety of *interstate* pipelines to the *federal* government. Section 60104(c), titled “Preemption,” provides that “[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.” 49 U.S.C. § 60104(c).<sup>6</sup>

Congress provided for “exclusive Federal regulation and enforcement” of “interstate pipeline

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<sup>5</sup> The PSA was enacted in 1992 and combined two existing pipeline safety statutes, the Natural Gas Pipeline Safety Act (“NGPSA”), formerly 49 U.S.C. § 1671 *et seq.*, and the Hazardous Liquid Pipeline Safety Act (“HLPSA”), formerly 49 U.S.C. § 2001 *et seq.*

<sup>6</sup> The HLPSA’s interstate pipeline preemption provision was identical to the PSA, and the NGPSA preemption provision was substantively identical, providing that “[n]o State agency may adopt or continue in force any such standards [referring to state safety standards for interstate pipelines] applicable to interstate transmission facilities.” *See Kinley Corp. v. Iowa Utilities Bd., Utilities Div., Dep’t of Commerce*, 999 F.2d 354, 358-59 (8th Cir. 1993).

facilities” to create a nationally uniform regulatory safety program. 49 C.F.R. Part 195 App’x A.

The 2016 and 2020 Protecting Our Infrastructure of Pipelines and Enhancing Safety (“PIPES”) Acts further strengthened PHMSA’s safety authority, including by requiring pipeline operators to protect certain underwater pipelines such as the Straits Pipelines from anchor and similar strikes. 49 USC. 60109(g)(5). PHMSA recently implemented a broad package of amended regulations furthering its safety mission.<sup>7</sup>

## **2. The PSA Preempts State Laws and Actions That Regulate Interstate Pipeline Safety.**

In determining whether the PSA expressly preempts a state act or regulation, a court must determine both the scope of the preemption provision and the nature of the state action or regulation. As the Supreme Court has recognized, “[p]re-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988)).

Section 60104(c)’s prohibition of state “safety standards for interstate pipeline facilities or interstate pipeline transportation” preempts all state laws and regulations regarding interstate pipeline *safety*, but not necessarily all state laws that might touch on or affect interstate pipelines. Among other things, the PSA does not authorize the federal government to “prescribe the location or routing of a pipeline facility” and “does not affect the tort liability of any person.” *Id.* §§ 60104(e) & 60120(c). Furthermore, state laws addressing non-safety issues such as aesthetics or zoning that do not regulate interstate pipeline safety might not be preempted by § 60104(c). But the Notice here does not implicate such issues.

Courts have implemented the express language of § 60104(c) and recognized Congress’s

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<sup>7</sup> Pipeline Safety: Safety of Hazardous Liquid Pipelines, 84 Fed. Reg. 52,260 (Oct. 1, 2019).

intent to establish a single, uniform, national regulatory program for interstate pipeline safety. In doing so, courts have consistently rejected arguments that seek to narrow or circumvent the express prohibition on state adoption or enforcement of “safety standards” for interstate pipelines. Courts have recognized that the exclusive federal authority to regulate interstate pipeline safety granted by the PSA “leaves no regulatory room for the state to either establish its own safety standards or supplement the federal safety standards” for interstate pipelines. *Kinley*, 999 F.2d at 359. *See also Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 211 (5th Cir. 2010) (“Cases decided under the PSA’s predecessor statutes have uniformly invalidated parochial safety provisions.”); *Save Our Land v. Illinois Com. Comm’n*, No. 4-21-0008, 2022 WL 110229, at \*2, \*16 (Ill. App. 4th., Jan. 12, 2022) (finding PSA preempts state agency from adopting interstate pipeline safety standard); *N. Border Pipeline Co. v. Jackson Cty., Minn.*, 512 F. Supp. 1261, 1264 (D. Minn. 1981) (finding that a zoning permit requirement that a gas line be buried at a depth of at least six feet was preempted because “the provisions and legislative history of the Natural Gas Pipeline Safety Act indicate quite clearly that federal legislation *has preempted the entire field of gas pipeline safety*”) (emphasis added).

Likewise, to further Congress’s purpose of a single, uniform national program for regulating interstate pipeline safety, courts have generally adopted a practical rather than formalistic approach to determining if state regulations and actions implement interstate pipeline “safety standards” and are thus preempted by § 60104(c). Courts have routinely held that local laws regulating the safety of interstate pipeline facilities are preempted even if they are not designated on their face as pipeline safety regulations, and even if they also address other local considerations. *See, e.g., Texas Midstream Gas Servs., L.L.C. v. City of Grand Prairie*, Civil Action No. A.3:08-CV-1724-D, 2008 WL 5000038, at \*12 (N.D. Tex. Nov. 25, 2008), *aff’d sub*

*nom. Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010).

**3. The PSA Expressly Preempts Defendants' Line 5 Shutdown Notice Because It Is an Interstate Pipeline Safety Regulation.**

Pipeline safety concerns are ineluctably the driving force behind Defendants' Notice to shut down Line 5. Defendants contend that the 1953 Easement must be revoked and the Straits Pipelines must be shut down because continued operation of the pipeline violates the public trust. Notice at 1 (ECF No. 1-1 at 1, PageID.22). And that assertion is grounded in Defendants' erroneous determination that the Straits Pipelines are not sufficiently safe and their desire to regulate and eliminate perceived potential risks by prohibiting continued operation of the Straits Pipelines. *See, e.g.*, Notice at 7 (ECF No. 1-1 at 7, PageID.28) (arguing "operation of the Straits Pipelines presents inherent risks of environmental harm"); *id.* at 17 (arguing "continued operation of the Straits Pipelines presents a substantial, inherent and unacceptable risk of a catastrophic oil spill with grave ecological and economic consequences").

The Notice thus is plainly an attempt to "regulat[e] in the area of safety in connection with" an interstate pipeline, *Kinley*, 999 F.2d at 358, in this case by prohibiting continued operation of the pipeline based on a state determination that the pipeline is not sufficiently "safe." But the PSA grants the *federal* government the exclusive authority to set pipeline safety standards. 49 U.S.C. § 60102(a). And the federal government has raised no such safety concern regarding Line 5. In short, Defendants' shutdown order is invalid because it seeks to exert state regulatory control over interstate pipeline safety, an area in which the state "cannot regulate." *Kinley*, 999 F.2d at 358.

**4. Defendants Cannot Avoid Preemption By *Post Hoc* Labeling Their Line 5 Shutdown Notice as a Location or Routing Decision.**

Defendants cannot skirt PSA § 60104(c)'s express preemption by making *post hoc* assertions about "the *location or routing*" of the Straits Pipelines (emphasis added). Although 49

U.S.C. § 60104(e) provides that the PSA “does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility,” Defendants’ Notice here cannot be considered a “location” or “routing” decision.

First, Michigan officials made their one-time determination regarding the location and routing of the Straits Pipelines many decades ago when they authorized Line 5’s construction in its present location. *Lakehead Pipe Line Co. v. Dehn*, 64 N.W.2d 903, 906 (Mich. 1954) (noting Public Service Commission approval of pipes across the Straits). Any contrary assertion by Defendants is an effort to prohibit *operation* of an existing, approved pipeline based on a state determination that the pipeline does not meet safety standards—not a decision with respect to the routing of that pipeline. Such an effort, therefore, is preempted by the PSA.<sup>8</sup>

Second, the fact that the PSA does not give the federal government the authority to *prescribe* pipeline locations does not allow states to evade § 60104(c)’s prohibition of state safety regulation by prohibiting all operation of a pipeline under the guise of a location determination. Reconciling the statutory provisions at §§ 60104(c) & (e), states retain authority to determine pipeline routing and location in connection with pipeline construction, so as to protect state and local concerns governed by land use laws and regulations, but that is separate and apart from pipeline safety oversight on an existing, operational pipeline. State authority includes reviewing potential interference with or impacts on neighboring uses and other typical land use considerations such as noise, aesthetics, and property values. However, states cannot regulate existing interstate pipeline facilities based on safety considerations under the guise of

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<sup>8</sup> See *Pacific Gas and Elec. Co. v. State Energy Resources Conserv. & Dev. Comm’n*, 461 U.S. 190, 212 (1983) (holding that states cannot evade preemption of state safety regulations by prohibiting construction of new nuclear plants based on state safety concerns); *Olympic Pipe Line v. City of Seattle*, 437 F.3d 872, 874, 880 (9th Cir. 2006) (state’s attempt to shut down pipeline unless it complied with local pipeline safety demands is preempted by the PSA).



zoning regulations or other land use actions or prohibitions. *See Texas Midstream*, 608 F.3d at 211-12 (5th Cir. 2010); *Olympic Pipe Line Co. v. City of Seattle*, No. C03-2343L, 2003 WL 27392855 (W.D. Wash. Aug. 21, 2003) (rejecting Seattle’s argument that pipeline shutdown attempt was a “location or routing” decision when it was in fact safety-related). Defendants’ Notice fails to identify or rely upon any land use considerations, for the obvious reason that the Straits Pipelines comprise existing, operational pipeline facilities.

**B. The Foreign Affairs Doctrine Also Precludes Defendants From Regulating This Interstate Pipeline.**

While the Court need only rule on PSA preemption to grant Plaintiffs summary judgment, the Notice also fails on a second legal ground—it constitutes impermissible state-level regulation of international affairs. The Supreme Court has long recognized that “the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution.” *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941). Where state actions “conflict with a treaty, they must bow to the superior federal policy.” *Zschernig v. Miller*, 389 U.S. 429, 441 (1968). State action that “interferes with the National Government’s conduct of foreign relations . . . is preempted.” *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 401 (2003). The Notice here qualifies.

**1. Defendants’ Line 5 Shutdown Order Is Preempted by the Foreign Affairs Doctrine.**

Defendants’ illegitimate attempt to exercise state power here conflicts with the 1977 *Agreement between the Government of Canada and the Government of the United States Of America Concerning Transit Pipelines*, 28 U.S.T. 7449, 1977 WL 181731 (1997) (“Treaty”), and is therefore preempted. The federal policy governing the international flow of hydrocarbon products embodied in that Treaty is clear: “No public authority in the territory of either Party shall institute any measures, other than those provided for in Article V, which are intended to, or which would have the effect of, *impeding. . . or interfering with in any way the transmission of*

*hydrocarbons in transit.*” *Id.* Art. II(1) (emphasis added). Defendants’ attempt to shut down this international pipeline stands in apparent conflict with this longstanding national policy. The Notice not only violates the Treaty’s express prohibition against interfering with “the transmission of hydrocarbons in transit,” but also impermissibly “interferes with the National Government’s conduct of foreign relations.” *Garamendi*, 539 U.S. at 401. Tellingly, Defendants’ actions prompted Canada to invoke the Treaty’s dispute resolution provision in October 2021, and the Canadian and U.S. governments are now engaged in an international dispute resolution process. State officials like Defendants may not interfere with U.S. foreign policy prerogatives. This Court should rule that Defendants’ action does so and thus is preempted.

**2. Defendants’ Line 5 Shutdown Notice Inhibits the Federal Government’s Ability to Speak with One Voice.**

For decades, the Supreme Court has recognized that “the Federal Government must speak with one voice when regulating commercial relations with foreign governments.” *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976). Indeed, “[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.” *Hines*, 312 U.S. at 63. Additionally, “an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place.” *Garamendi*, 539 U.S. at 413 (quotation omitted).

The federal government cannot speak with “one voice” on behalf of the United States in foreign affairs and international trade if individual state governments are permitted to regulate transboundary pipelines. If Defendants’ shutdown Notice is upheld, states and their

municipalities will be emboldened to adopt their own policies that contradict or otherwise interfere with federal foreign policy and trade. Under such a regime states could influence international affairs by pursuing their own local agendas and regulatory efforts, creating significant legal uncertainty. Defendants’ attempted “exercise of state power” it does not possess to shut down Line 5 thus cannot stand, and instead must “yield” to federal policy embodied in the Treaty supporting continued operation of Line 5. *Garamendi*, 539 U.S. at 413.

**C. Shutting Down Line 5 Would Have Devastating Impacts on Refineries and Others That Rely on Its Supply, Particularly in These Challenging Times.**

Refineries depend on oil supply from pipelines, including Enbridge’s Line 5, through which 540,000 barrels of crude oil and natural gas liquids pass daily.<sup>9</sup> The harms from shutting down Line 5, even for a brief period, are significant, especially for the refining industry and manufacturers as they rebound from COVID-19 mitigation. In 2020, for example, the pandemic contributed to a substantial decrease in demand for motor fuels and refined petroleum products, which put downward pressure on refinery margins and made market conditions more challenging for refinery operators.<sup>10</sup> As a result of several U.S. refinery closures in 2020, the beginning of 2021 marked the lowest annual capacity figure to start the year since 2015. Operating at minimum rates undermines the profitability of these facilities, and restricting the access to crude oil supplied by Line 5 would further undermine their viability, as refineries are generally finely tuned to, and thus enormously dependent upon, their particular crude supply.

A 2018 assessment of the Great Lakes refining capacity indicated that Line 5 supplied the region’s 1.3 million barrels per day of refining capacity with approximately 42 percent of its

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<sup>9</sup> *About Line 5*, available at <https://www.enbridge.com/projects-and-infrastructure/public-awareness/line-5-michigan/about-line-5> (last visited January 19, 2022).

<sup>10</sup> *Refinery closures decreased U.S. refinery capacity during 2020* (July 8, 2021), available at <https://www.eia.gov/todayinenergy/detail.php?id=48636>.

crude oil. Without Line 5, the Great Lakes region refineries would lose a significant source of reliable crude oil, potentially resulting in significant unintended consequences. It would also deprive the region of an important source of propane, essential to keep residences warm.

Refineries and facilities that produce propane depend on the product transported on Line 5 for their continued operations. Without this product supply, refineries that supply a significant percent of transportation fuels and propane could be forced to shut down or significantly cut back operations, resulting in gasoline and diesel Midwestern supply shortages. This could significantly drive up consumer fuel costs, which could create even greater adverse ripple effects. Union jobs at the region's refineries could also be lost, as would the indirect jobs that the refineries support throughout the service and supply chains. These jobs range from "jobbers" that deliver gasoline to fuel stations and home heating oil to homes, to maintenance and construction contractors who work at refineries, to small businesses like restaurants and truckers that rely on both the economic activity generated from refinery workers and suppliers, as well as the benefits of the affordable fuel manufactured in the region. For example, the shutdown of just one of the refineries could result in the loss of \$5.8 billion in annual economic output to Ohio and Southeast Michigan and the loss of thousands of direct and contracted skilled trades jobs.<sup>11</sup> These harms illustrate why federal law and an international treaty preempt the state officials' shutdown order.

#### **IV. CONCLUSION**

The Court should grant Plaintiffs summary judgment and preserve operation of Line 5.

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<sup>11</sup> See Tom Henry, *Potential Line 5 closing has Toledo Refining Co., employees on edge* (June 18, 2019) (explaining that 550 high-paying jobs at Toledo Refining Company are at stake), available at <https://www.toledoblade.com/local/environment/2019/06/18/toledo-refining-company-eyes-line-five-controversy-with-worries-about-shutdown-job-losses/stories/20190618002>; see also, Beth LeBlanc, *What a Line 5 shutdown would mean for Michigan's energy*, The Detroit News (Dec. 19, 2019), available at <https://www.detroitnews.com/story/news/politics/2019/12/19/what-line-5-shutdown-means-michigan-energy-enbridge/4334264002/> (shutting down Line 5 creates a "logistical nightmare").

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Respectfully submitted,

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