

No. 26-1021

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ENBRIDGE ENERGY, L.P., ENBRIDGE ENERGY COMPANY, INC.;
ENBRIDGE ENERGY PARTNERS, L.P.,
Plaintiffs-Appellees,

v.

GRETCHEN WHITMER, the Governor of the State of Michigan in her official
capacity; SCOTT BOWEN, Director of the Michigan Department of Natural
Resources, in his official capacity,
Defendants-Appellants.

On appeal from the United States District Court for the
Western District of Michigan, Southern Division
Case No. 1:20-cv-01141
The Honorable Robert J. Jonker

**BRIEF OF AMICI CURIAE
PROFESSORS OF FOREIGN RELATIONS LAW
IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

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STATEMENT OF AUTHORITY TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae Evan J. Criddle, William Dodge, Sharmila L. Murthy, Michael D. Ramsey, and Robert D. Sloane are law professors who teach and publish about foreign relations law, federal courts, constitutional law and history, and international law. It is in amici's professional interest to ensure the proper understanding and interpretation of the foreign affairs preemption doctrine. Additional background about amici is provided in Appendix A.

STATEMENT OF THE ISSUE ADDRESSED BY AMICI CURIAE

Foreign-affairs preemption has a limited job. It keeps a state from making its own foreign policy, and it keeps a state from acting contrary to a federal foreign-affairs policy that has the force of law. Michigan enforced ordinary easement terms on public trust lands to guard against a Great Lakes oil spill. That act falls within Michigan's traditional powers; it establishes no foreign policy; and it conflicts with no binding federal foreign-affairs law. It is not preempted.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Appellees' ("Enbridge's") Line 5 pipeline poses a real risk to Michigan of a disastrous oil spill. Line 5 lies beneath the Straits of Mackinac, the

narrow passage joining Lake Michigan to Lake Huron and separating Michigan's Upper and Lower Peninsulas. Defendants-Appellants ("Michigan") owns the submerged lands and holds them in trust for the public. With that trust comes a duty: Michigan must protect the lands.

This stretch of Line 5 presents a particularly high risk of spill because heavy shipping in the Straits exposes the pipeline to damage from anchors and other objects. The district court recognized what a rupture would mean: "[a]n oil spill in Michigan's Great Lakes would undoubtedly be an environmental catastrophe. And Michigan would undoubtedly be the recipient of almost all the environmental damage that would result." Op., RE 164, PageID.2504.

To avoid that catastrophe, in November 2020, Michigan terminated Enbridge's easement after ship anchors or cables struck Line 5 in at least three separate incidents, narrowly avoiding a catastrophic rupture. Michigan concluded that the easement was void and revocable under the public trust doctrine. It also determined that Enbridge had violated the easement itself. The easement required Enbridge to use due care in operating Line 5 and allowed Michigan to terminate when Enbridge failed to do so.

The district court held that federal foreign policy preempted Michigan's enforcement of its own property rights. In doing so, it overlooked strict limits that make foreign affairs preemption narrow. The doctrine has two forms: dormant

preemption, which operates without an affirmative federal law based on constitutional federalism, and conflict preemption, which requires a conflict with federal law. Both respect the states' traditional authority. Neither bars a state from acting just because foreign relations may be affected.

Dormant preemption – preemption in the absence of affirmative, preemptive federal law – does not stop a state from applying generally applicable rules in fields of traditional state concern, like protecting its own lands and people. Instead, it applies only when a state ventures beyond its constitutional role and sets foreign policy for itself. Michigan did not cross that line.

The district court instead recognized that Michigan acted to protect pipeline “safety,” Op., RE 164, PageID.2498, a traditional state concern. It then treated Michigan’s action as preempted because, in its view, the Pipeline Safety Act of 1992 meant Michigan was not acting in a traditional state field, and because the action would “disturb foreign relations.” *Id.* at PageID.2495, 2499. But a *statute* has no bearing on *dormant* preemption (which applies in the *absence* of a federal statute) or whether state action is within traditional state authority.¹ And incidental effects on foreign affairs do not turn a state protecting its own land and property rights into foreign policy.

¹ Any preemptive effect of the Pipeline Safety Act outside of foreign affairs preemption is beyond this brief’s scope.

That leaves conflict preemption. To prevail, Enbridge must show a conflict with a clear statement of U.S. foreign policy in law that has preemptive force. Enbridge does not, and cannot, argue that any federal law *expressly* preempts Michigan's action. Instead, Enbridge relies on an *implied* conflict with the 1977 Agreement between the Government of the United States and the Government of Canada Concerning Transit Pipelines, but the Treaty is not self-executing and therefore cannot preempt. And Article IV expressly *permits* "regulations by appropriate governmental authorities . . . in the same manner as for any other pipelines." Agreement between the Government of the United States and the Government of Canada Concerning Transit Pipelines art. IV, Jan. 28, 1977, 28 U.S.T. 7449 ("Transit Treaty").

The district court admitted it bypassed that text. It relied instead on the federal government's claim that the Transit Treaty embodies a policy against Michigan's action. But only the text can preempt. In a statement of interest filed below, the United States also invoked recent executive orders related to national energy security. Those sources, and nonbinding policy statements of the same kind, do not preempt state law.

Even if there were some implied conflict between Michigan's act and a federal policy having the force of law, the conflict would still fall short. It is

neither clear enough nor substantial enough to overcome Michigan’s overriding interest in preventing a catastrophic oil spill in the Great Lakes.

ARGUMENT

I. Both dormant and conflict foreign affairs preemption are carefully limited to protect state authority, and a mere effect on foreign affairs does not preempt.

Courts have long recognized that displacing state law with federal law “treads on the states’ customary prerogatives in ways that risk upsetting the traditional federal-state balance of authority.” *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015). The risks to state sovereignty are particularly acute when courts are asked to displace state law in areas that states have traditionally occupied. *Id.*

Foreign affairs preemption includes two distinct doctrines: dormant preemption and conflict preemption. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419-20 (2003). Dormant preemption applies where a state acts outside its traditional authority and intrudes upon constitutionally-delegated exclusive federal foreign affairs prerogatives, even in the absence of any federal act having the power of law. *Id.* at 419 n.11. Conflict preemption applies the Supremacy Clause’s direction that enacted federal law – when within the scope of federal authority – is the supreme law of the land, and conflicting state law must give way. *See U.S.*

Const. art. VI, Cl. 2.² Both dormant preemption and conflict preemption have strict limits to ensure federal courts do not intrude upon state prerogatives. Neither permits preemption merely based on effects on foreign relations.

For dormant preemption, the limits on the doctrine are defined by the Constitution. Dormant preemption only prevents states from exercising their own foreign policy; it does not apply when states act within realms of traditional state authority, even if there are foreign affairs effects. Section II.A, *infra*. “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., dissenting).

For conflict preemption, the limits on the doctrine are related to the clarity of the conflict. Congress, of course, can expressly preempt state law. But Enbridge does not contend that Congress has chosen to expressly preempt Michigan’s act through any foreign affairs law. Federal law can also implicitly preempt state law through a conflict. But “[b]ecause preemption can trammel upon state sovereignty,

² Dormant preemption is sometimes referred to as “field” preemption, but this is confusing because a species of statutory preemption is also referred to as “field” preemption. The latter applies when the federal government has occupied the field by statute or treaty, precluding state regulation of the same subject. That form of field preemption is not at issue here. Amici call the former “dormant” preemption to avoid confusion.

courts apply a strong presumption against implied preemption in fields that States traditionally regulate,” even when state regulation has an incidental effect on foreign affairs. *Torres v. Precision Indus.*, 995 F.3d 485, 491 (6th Cir. 2021) (citation modified) (considering employment law that affects immigrants).

To overcome the presumption against implied conflict preemption, “congressional intent to supersede state laws must be clear and manifest.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (citation modified); *Garamendi*, 539 U.S. at 418-20, 425-26 & n.11 (noting that the conflict between federal policy and state law must be “sufficiently clear” and “unmistakabl[e]”). Implied preemption “does not justify a freewheeling judicial inquiry into whether a state [action] is in tension with federal objectives.” *Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011) (citation modified). “[I]n the absence of a clear expression of [] preemption,” “principles of federalism and respect for states’ rights would likely” “preserve state common law claims.” *Merrick*, 805 F.3d at 694.

The judiciary is not “vested with power to decide” federal policy in the face of ambiguity. *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 328 (1994) (citation modified). Thus, “to order preemption based not on the strength of a clear congressional command . . . would represent not only a significant federal intrusion into state sovereignty. It would also represent a significant judicial intrusion into

Congress’s authority to delimit the preemptive effect of its laws.” *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 773 (2019) (Gorsuch, J., three-justice opinion).

As set forth below, the district court’s finding that Michigan’s action is displaced under dormant and conflict preemption impermissibly exceeded the narrow circumstances in which the Supreme Court has allowed the Constitution or federal law to prevent states from exercising their traditional authorities. If affirmed, the district court’s opinion would unsettle the delicate balance of federalism interests at stake, risking a broad expansion of federal power that could trammel on states’ sovereign rights in countless areas that affect foreign affairs in today’s globalized world.

II. Dormant foreign affairs preemption does not apply because Michigan acted within the core of traditional state authority and takes no position on foreign affairs.

Dormant preemption applies only where a state creates its own foreign policy outside the bounds of its constitutionally-delegated traditional state authority. Michigan has done no such thing, and the district court did not find that it did. The dormant preemption analysis can end there.

Nonetheless, the district court determined that Michigan was not acting within its traditional state authority because the Pipeline Safety Act of 1992 reserved some authority over regulating pipeline safety to the federal government. Op., RE 164, PageID.2498. This was error. The Act says nothing about whether

enforcing an easement to protect the public trust and the State's own property rights is a traditional state authority under the Constitution. Regardless of its preemptive effect, the Act has no bearing on the dormant preemption analysis.

The district court also thought that Michigan's action "disturb[ed] foreign relations," and that this sufficed to preempt. *Id.* at PageID.2499. But where a state acts within its realm of traditional authority, a mere effect on foreign relations does not preclude state law. State law, within traditional constitutional authority, does not bend so easily.

A. Dormant foreign affairs preemption prevents states from establishing their own foreign policy, not from acting within areas of traditional state competence where there may be incidental foreign affairs impacts.

As the Supreme Court explained in *Garamendi*, dormant preemption – preemption in the absence of federal law – should apply *only* where a state "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." 539 U.S. at 419 n.11. Thus, the doctrine applies only where a state seeks to "establish its own foreign policy," *Zschernig v. Miller*, 389 U.S. 429, 441 (1968), such as where a state "enter[s] the forbidden domain of negotiating with a foreign country or making a compact with it contrary to Article I, Section 10 of the Constitution." *Clark v. Allen*, 331 U.S. 503, 517 (1947) (citation modified). Where, by contrast, "a State has acted within . . . its traditional competence," even "in a way that affects foreign relations, it might make good

sense to require a conflict” with binding federal law before preemption is warranted. *Garamendi*, 539 U.S. at 419 n.11 (citation modified).

The only case in which the Supreme Court *ever* found dormant foreign affairs preemption is *Zschernig*. There, Oregon probate courts criticized foreign nations. The Court found that the State had reached beyond its traditional area of competence and “establish[ed] its own foreign policy.” 389 U.S. at 440. The Court has declined to expand the doctrine beyond the narrow circumstances of that case in the nearly six decades since.

It is not enough merely to show an act has an incidental impact on foreign relations. As the Supreme Court has long held, the federal government’s authority to conduct foreign policy does not displace states’ sovereign power to protect their citizens from in-state harm simply because state law may have “some incidental or indirect effect in foreign countries” – something that is “true of many” unobjectionable state laws. *Clark*, 331 U.S. at 517. An overbroad application of dormant preemption based on effects “would cast a shadow over laws long understood to represent valid exercises of the States’ constitutionally reserved powers.” *Nat’l Pork Prod. Council v. Ross*, 598 U.S. 356, 375 (2023).

The Supreme Court confirmed this restrained approach in *Medellin v. Texas*, 552 U.S. 491 (2008). There, the Court held that a generally applicable state law was not preempted in the absence of a federal act having the force of law, even

though it interfered with foreign relations and U.S. foreign policy opposed the application of the state law. *Id.* at 530. Even “plainly compelling” federal foreign policy interests “do not allow us to set aside first principles.” *Id.* at 524. That decision precludes the district court’s holding that generally applicable state law that interferes with foreign *policy* may be preempted on that basis alone.

Other circuits to address the issue have limited dormant preemption to cases where a state has enacted a law specifically designed to weigh in on a foreign policy matter outside its traditional state authority.³ The mere application of facially neutral requirements within the heartland of traditional state authority in a context that might impact foreign relations is not preempted.⁴ Dormant preemption

³ See, e.g., *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 963-65 (9th Cir. 2010) (law aimed at facilitating recovery of artwork lost during the Holocaust); *Deutsch v. Turner*, 324 F.3d 692, 708-16 (9th Cir. 2003) (law addressing slave labor during World War II); *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-61 (1st Cir. 1999) (selective purchasing law targeting business in Burma), *aff’d on other grounds sub nom. Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

⁴ E.g., *Barclays*, 512 U.S. at 324-28 (tax law); *Shen v. Comm’r*, 158 F.4th 1227, 1265-66 (11th Cir. 2025) (law that screened foreign purchasers); *Capron v. Off. of the Att’y Gen. of Mass.*, 944 F.3d 9, 25 (1st Cir. 2019) (wage and hour laws); *Fac. Senate of Fla. Int’l Univ. v. Winn*, 616 F.3d 1206, 1211 (11th Cir. 2010) (state school spending on foreign travel to designated countries); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 579 (5th Cir. 2010) (generally applicable state statutes of limitation); *Trojan Techs., Inc. v. Pa.*, 916 F.2d 903, 913-14 (3d Cir. 1990) (buy-American-steel law); *Lighthouse Res., Inc. v. Inslee*, 429 F. Supp. 3d 736, 741 (W.D. Wash. 2019) (clean water protections); *Portland Pipe Line Corp. v. City of South Portland*, 288 F. Supp. 3d 321, 442-45 (D. Me. 2017) (zoning ordinance restricting use of port authorities); *GH Am. Energy LLC v. Vegas*, No. 1:24-cv-648, 2025 U.S. Dist. LEXIS 185629, at *37-38 (W.D. Tex. Sep. 16, 2025) (power grid

is inapplicable to state law within an area of traditional state responsibility that does not attempt to create foreign policy, even where it incidentally effects foreign relations.

B. In enforcing easements and protecting the public trust, Michigan was acting within its traditional state authority.

In requiring that Enbridge operate in the Straits on a valid easement on Michigan's land, Michigan exercised traditional state powers to protect state property and the public trust and avoid a potential "environmental catastrophe." *Op.*, RE 164, PageID.2504. Enforcing the State's rights to state-owned property within the State, to protect Michigan's environment and residents, is unquestionably an area of traditional state responsibility.

Courts have long held that environmental protection "is a field that the states have traditionally occupied." *Merrick*, 805 F.3d at 694 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960)). Likewise, states have traditionally occupied the fields of "health and safety," *Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578, 584 (6th Cir. 2013), local land use, *Portland Pipe Line Corp.*, 288 F.

protection law); *United States v. Cal.*, No. 2:19-cv-02142, 2020 U.S. Dist. LEXIS 126504, at *26-27, *32-33 (E.D. Cal. July 16, 2020) (cap and trade system). The only exception is a war crimes case, which conflicts with the Supreme Court's guidance. *See Saleh v. Titan Corp.*, 580 F.3d 1, 24 & n.8 (D.C. Cir. 2009) (Garland, J., dissenting) (noting that "no precedent has employed a foreign policy analysis to preempt generally applicable state laws"). But even this case involved effects on an area particularly reserved for the federal government, the conduct of war, which is not at issue here.

Supp. 3d at 444-45, and trespass and nuisance, *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 250 (Fed. Cl. 2004); *see also Merrick*, 805 F.3d at 695 (allowing nuisance and trespass claims despite federal Clean Air Act). And, in a case like this one involving state public trust property, the Supreme Court affirmed that “the law of real property is, under our Constitution, left to the individual States to develop and administer.” *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988) (citation modified). Prohibiting Michigan from enforcing *its own* property rights to prevent harm to its own land, its environment, and the public trust impermissibly “reaches deep into the heart of the State’s [] powers.” *Medellin*, 552 U.S. at 532.

These are not just Michigan’s rights; as the district court recognized, the public trust doctrine “obligates” Michigan “to protect and preserve navigable waters, like the Great Lakes.” Op., RE 164, PageID.2488. Michigan clearly has a “serious claim to be addressing a traditional state responsibility.” *See Garamendi*, 539 U.S. at 419 n.11.

The district court’s finding that “pipelines safety regulation is not a traditional state responsibility” because Congress “reserved that authority for the federal government in the Pipeline Safety Act,” Op., RE 164, PageID.2498 (citation modified), ignores the State’s traditional property, land use, and public trust rights and responsibilities. It is also a *non sequitur*. Congress sometimes

legislates in realms of traditional state authority. That Congress does so therefore says nothing about whether the authority is one *traditionally* within states' purview.

More generally, dormant preemption enforces the constitutional limit on states creating their own foreign policy in the *absence* of congressional action. No statute, including the Pipeline Safety Act, can speak to whether Michigan's conduct exceeds a constitutional limit and unconstitutionally interferes with *dormant* federal foreign affairs authority. Instead, a statute can sometimes require statutory preemption. Amici take no position on whether the Pipeline Safety Act preempts. But in conflating dormant foreign affairs preemption (which applies, or not, in the *absence* of federal action) with statutory preemption, the district court erred.

C. Michigan did not create its own foreign policy; any foreign affairs effects are incidental.

The district court's statement that Michigan's "real purpose" was to "regulate [the pipeline's] safety," Op., RE 164, PageID.2498, *precludes* dormant preemption. To the extent, if any, courts inquire into a state's motivations, they ask whether its real purpose is an improper effort to "establish its own foreign policy." *Zschernig*, 389 U.S. at 441. Far from finding that Michigan's real purpose was to establish foreign policy or impact U.S.-Canada trade, the district court found Michigan was concerned about protecting state lands, Michigan's environment,

and Michigan's public trust. *See* Op., RE 164, PageID.2498. Protecting *Michigan* by requiring that Enbridge operate under the terms of a valid Michigan easement does not “take a position on a matter of foreign policy.” *See Garamendi*, 539 U.S. at 419 n.11. That Michigan is facilitating permitting for an alternative route, *see Little Traverse Bay Bands of Odawa Indians v. MPSC*, 25 N.W.3d 327 (Mich. 2025) (granting request to reconsider permit), is further evidence that Michigan's real purpose was not to shut down Line 5 indefinitely. Since Michigan was “addressing a traditional state responsibility,” not making its own foreign policy, *Garamendi*, 539 U.S. at 419 n.11, there is no dormant preemption.

The district court found Michigan's action subject to dormant preemption “because Defendants' order to shutdown Line 5 has already ‘disturb[ed] foreign relations.” Op., RE 164, PageID.2498. But a mere effect on foreign relations alone does not suffice to supplant state law when the first requirement of dormant preemption, a state's attempt to create its own foreign policy, is absent. Any effect here is an *incidental* effect of a proper exercise of Michigan's traditional state authority, not the product of Michigan creating its own foreign policy. Where the exercise of traditional state authority has such incidental effects, courts decline to find foreign affairs field preemption, Section II.A, *supra*, and instead look to whether there is a conflict with federal foreign policy carrying the force of law, Section III, *infra*.

Nor does the specific incidental effect that the district court noted suffice. According to the district court, Michigan’s action “interferes with the United States’s relations with Canada” because Canada invoked the Transit Treaty’s dispute resolution mechanism and shutting down the pipeline would affect trade relations. Op., RE 164, PageID.2499.

But a foreign government’s initiation of an international dispute resolution process because of a state’s action does not trigger dormant preemption.⁵ *Medellin* is instructive. There, Mexico had *already prevailed* in its case against the United States before the International Court of Justice (“ICJ”) arguing that the application of a generally applicable Texas criminal law against Mexican nationals violated a U.S. treaty. 552 U.S. at 497-98. The Supreme Court noted the federal government’s “plainly compelling” interest in “protecting relations with foreign governments” in giving effect to the ICJ decision, but held that it did not warrant preemption of generally applicable state law. *Id.* at 498, 523-25. Here, by contrast, Canada’s claim that the United States breached its treaty obligation has yet to be

⁵ The United States did not raise, and the district court did not consider, foreign affairs preemption in the Bad River Band’s litigation against Enbridge for continuing to operate on their land without a valid easement, even though Canada initiated the Transit Treaty dispute resolution process there. See Br. of the U.S. as Amicus Curiae Supp. Partial Reversal, *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co.*, Nos. 23-2309, 23-2467, RE 94 (7th Cir. Apr. 10, 2024).

resolved. Op., RE 164, PageID.2499. Tellingly, the district court did not even cite *Medellin*.

III. Conflict preemption does not apply because Michigan’s action does not conflict with any clear federal policy that has the force of law.

Foreign affairs conflict preemption is appropriate only if state law conflicts with a clear federal foreign policy expressed in an act that carries the force of law. *See Garamendi*, 539 U.S. at 416, 418-19 & n.11; *accord Va. Uranium*, 587 U.S. at 767 (Gorsuch, J., three-justice opinion) (to displace state law, “a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law”) (citation modified). The Supremacy Clause applies to law, not policy. Mere federal foreign policy preferences do not preempt state law. Michigan’s action presents no such conflict.

The Transit Treaty is the only legally binding act the district court mentioned. But it is not self-executing and expressly reserves to state and local authorities the ability to regulate environmental matters, as Michigan has done here. It cannot preempt.

While the United States suggested below that the Transit Treaty stands for the policy position of keeping Line 5 flowing, that position is at odds with the Treaty’s text. The district court did not analyze the text, finding that to be “largely unnecessary.” Op., RE 164, PageID.2497. Instead, it merely accepted the Executive’s current position on what the Treaty stands for and the effect it should

be given. *Id.* at PageID.2497 n.13. But the Executive’s opinion on the Treaty’s purpose in a statement of interest does not have the force of law, and the district court erred in treating it as such. Since there is no conflict between Michigan’s act and the Transit Treaty’s text, it does not preempt.

The United States in its brief below also pointed to recent executive orders relating to a national energy emergency, but these are irrelevant – the executive orders do not address foreign affairs, nor do they have the requisite force of law for foreign affairs conflict preemption to apply. The court below was correct to ignore these orders in its preemption analysis. Far from a clear statement of a consistent commitment to keeping international pipelines flowing, U.S. foreign policy in general, and on Line 5 in particular, is ambiguous. Such ambiguity cannot create a conflict clear enough to preempt Michigan’s strong, traditional interest in protecting the public trust from the risk of environmental catastrophe, even putting aside the fact that the executive orders lack the force of law.

A. The Transit Treaty does not preempt Michigan’s act.

1. The Transit Treaty lacks the power to preempt state law.

The Transit Treaty cannot preempt Michigan’s action because it lacks the force of domestic law. Treaties are *international* obligations, whose violation may raise foreign policy concerns. But they are only preemptive *domestic* law if “Congress has either enacted implementing statutes or the treaty itself conveys an

intention that it be ‘self-executing’ and is ratified on these terms.” *Medellin*, 552 U.S. at 505 (citation modified). Congress did not enact legislation implementing the Transit Treaty. Thus, the Treaty may only preempt if it is self-executing. It is not.

Whether a treaty is self-executing turns on its text. *Id.* at 506, 514. In *Medellin*, the Court analyzed the text of three treaties and concluded that none had the force of domestic law. It did so based largely on the *non-judicial* enforcement structure laid out in the relevant treaty text. “The U.N. Charter’s provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that [the treaty was] not meant to be enforceable in domestic courts.” *Id.* at 509.

Likewise, the Transit Treaty’s text fails to demonstrate an intent to be self-executing because it specifically provides that all disputes regarding its “interpretation, application or operation” are to be resolved through a non-judicial dispute resolution. *See* Transit Treaty, art. IX. This enforcement structure means that the Transit Treaty cannot automatically constitute federal law enforceable in domestic courts. Since *Medellin* does not allow a non-self-executing treaty to preempt state law, the Transit Treaty does not preempt.

2. Michigan’s action does not conflict with any unmistakable foreign policy expressed in the Transit Treaty.

Even if the Transit Treaty were self-executing, it does not preempt because Michigan’s act is consistent with the Treaty’s plain text, which the district court explicitly ignored.

The Treaty allows states to apply generally applicable laws to a transboundary pipeline’s operations in a non-discriminatory manner. While Article II(1) prohibits public authorities from interfering with transit pipelines, Article IV clarifies that, “notwithstanding” Article II(1), transit pipelines are “subject to regulations by the appropriate governmental authorities . . . in the same manner as for any other pipelines.” Transit Treaty, arts. II, IV. Article IV specifically authorizes “appropriate governmental authorities” to impose a wide range of “regulations, requirements, terms and conditions” to oversee pipelines, provided they are “just and reasonable” and are “applied equally.” *Id.*, art. IV.

Superseding language such as “notwithstanding” typically shows that the “section . . . override[s] conflicting provisions of any other section.” *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). Article IV’s notwithstanding “clause makes clear that states retain the right” to subject pipelines to regulation. *Cf. Merrick*, 805 F.3d at 690 (holding Clean Air Act provision allowing states to adopt pollution regulations indicated such regulations were not preempted); *Barclays*,

512 U.S. at 327 (holding treaty’s reservation clause exempting states was evidence Congress did not intend to preempt state action).

When joining international agreements, the federal government regularly includes such provisions to respect state governments’ prerogatives. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 447 (1998) (noting that “the Senate routinely attaches federalism clauses to human rights treaties”); Sarah H. Cleveland, *Crosby and the “One-Voice” Myth in U.S. Foreign Relations*, 46 Vill. L. Rev. 975, 1005 (2001) (“The United States was similarly deferential to state interests in ratifying the GATT/WTO system.”).

The Treaty’s “notwithstanding” clause likewise makes clear that it does not conflict with Michigan’s action. Requiring Enbridge to operate on a valid easement is the type of non-discriminatory application of neutral requirements Article IV allows. There is no serious claim that requiring a pipeline operator to have a valid easement – a rule generally applicable to all pipeline operators – discriminates against transboundary pipelines, or that it is unjust or unreasonable.

The district court, however, refused to apply the Treaty’s text. It held that “a line-by-line analysis of the treaty to determine its specific requirements is largely unnecessary.” Op., RE 164, PageID.2497. Instead, the court accepted the United States’ and Canada’s bald assertions that the Treaty “embodie[s]” the policy position “that neither country will do anything to impede the flow of oil between

the[m].” *Id.* PageID.2497-2498. But courts cannot ignore the Treaty’s text; they must apply the Treaty. Only the Treaty can have the power to preempt.

Governmental statements of interest are at best non-mandatory persuasive interpretations, not a substitute for the Treaty’s plain text.

Treaty interpretation “begins with” text. *Medellin*, 552 U.S. at 506; *accord Pliego v. Hayes*, 843 F.3d 226, 233 (6th Cir. 2016) (“[T]reaty interpretation begin[s] with the ‘ordinary meaning to be given to the [treaty’s] terms.’”) (quoting Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331). Courts look outside the text “[o]nly if the language of a treaty, when read in the context of its structure and purpose, is ambiguous.” *Martinez v. United States*, 828 F.3d 451, 475 (6th Cir. 2016) (citation modified).

The Transit Treaty is unambiguous. Rather than clarifying the Treaty, the United States’ position directly contradicts the Treaty’s text. The district court erred in relying on the United States’ position, rather than actually applying the law.

B. Statements of interest and executive orders do not have the requisite force of law to preempt Michigan’s action.

Implied preemption may only be based on federal acts that are “fit to preempt state law” because they carry the force of law. *See Garamendi*, 539 U.S. at 416. Statements of interest and executive orders lack such force.

Medellin held that a presidentially-issued memorandum requiring that state courts comply with the United States’ obligations under an ICJ decision did not preempt. 552 U.S. at 498-99. The Supreme Court noted that “[t]he President’s authority to act, as with the exercise of any governmental power, must stem either from an act of Congress or from the Constitution itself.” *Id.* at 524 (citation modified). The President generally has the power to execute federal law, not to unilaterally create it. *Id.* at 526. Aside from powers derived from statutes and treaties, or powers expressly granted by the Constitution, the only other “narrow set of circumstances” in which *Medellin* recognized preemptive authority involves “the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.” *Id.* at 531. Because the President’s memorandum did not derive from these sources of authority, it did not have the force of law and did not preempt state law. *Id.* at 532.

Similarly, in *Barclays Bank*, in the analogous foreign commerce clause context, the Court rejected the contention that amicus briefs or letters from the administration to a state governor had the power to preempt, finding they “lack the force of law.” 512 U.S. at 328-30. Congress might delegate preemptive authority to the President “by a statute or a ratified treaty.” *Id.* at 329. But in the absence of such delegation, the President may only preempt state law “pursuant to legally binding executive agreements.” *Id.*

Presidential directives thus lack the unilateral power to “set aside neutrally applicable state laws.” *Id.* at 525, 532; *see also Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (noting no authority grants executive officials “the power to invalidate state law simply by conveying the Executive’s views”).

Federalism concerns preclude preemption based on policy preferences advanced in U.S. statements of interest or executive orders, for three reasons.

First, the requirement that the President seek congressional authorization protects state sovereignty. “Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances.” *Medellin*, 552 U.S. at 515. States are protected against federal intrusion by their representation in the federal political process. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985). Allowing the President or a federal court to override state powers by affording preemptive force to executive policy, without explicit congressional direction, “would evade the very procedure for lawmaking on which *Garcia* relied to protect states’ interests.” *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 464 (1990) (citation modified).

Second, limiting preemption to acts that carry the force of law ensures that the President only preempts law within the bounds of executive power. After all, presidential power over foreign affairs is not unlimited. *See, e.g., Youngstown*

Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952); *Learning Res., Inc. v. Trump*, 146 S. Ct. 628 (2026) (rejecting exception that would give President unlimited power to impose tariffs). For example, the Supreme Court has described Congress’s foreign commerce power as “exclusive.” *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56-57 (1933).

Third, allowing the President to create preemptive foreign policy with the stroke of a pen is a prescription for chaos. States would have to predict the President’s actions and would have little advanced guidance as to the contours of the expressed policies, let alone how to avoid conflicting with them.

The U.S. statement of interest clearly does not have the force of law and therefore cannot provide the basis for implied preemption here. *Barclays*, 512 U.S. at 328-29; *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 213 (4th Cir. 2022) (“remarks are not explicit foreign policies that may create a conflict”).

The United States also cited executive orders about unleashing American energy. Statement of Interest of the United States, RE 140, PageID.2057-2058 (citing Unleashing American Energy, Exec. Order No. 14154, § 2, 90 Fed. Reg. 8353, 8353 (Jan. 20, 2025), Protecting American Energy From State Overreach, Exec. Order No. 14260, § 1, 90 Fed. Reg. 15513, 15513 (Apr. 8, 2025)). The district court did not address this argument, and this Court should reject it if the United States or Enbridge raises it again.

Not only do the purely domestic executive orders fail to embody a foreign policy, they do not preempt Michigan's action because they do not have the force of law. "[A]n executive order is not law within the meaning of the Constitution." *Sierra Club v. U.S. Dep't of Energy*, 134 F.4th 568, 573 (D.C. Cir. 2025) (citation modified). Here, "the President's order[s] [were] not rooted in [any] statutes." *Youngstown*, 343 U.S. at 586. They thus cannot preempt Michigan's act.

C. An ambiguous, implied conflict cannot preempt Michigan's overriding interest in preventing a catastrophic oil spill.

Even if there were some implied conflict between Michigan's act and a federal policy having the force of law, such an implied conflict is not sufficiently clear or substantial to preempt. Courts should "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." *Garamendi*, 539 U.S. at 420.

Michigan's interest in preventing an oil spill in the Straits is undeniably strong. Michigan seeks to exercise its own property rights in order to protect its own property and the public. As the district court recognized, "[a]n oil spill in Michigan's Great Lakes would . . . be an environmental catastrophe." Op., RE 164, PageID.2504. The Great Lakes "must be protected." *Id.* The record is rife with evidence of the Great Lakes' irreplaceable value: they provide fresh surface water, sustain the traditional lifeways and culture of indigenous communities, and are an

economic engine for the region. *E.g.*, Compl. Ex. 1, Notification of Revocation and Termination of Easement, RE 1-1, PageID.30.

Only a conflict with a “consistent [federal] policy” with the force of law could require Michigan to put its own territory at risk. *See Portland Pipe Line Corp.*, 288 F. Supp. 3d at 442. No such conflict exists. The United States has taken no clear, consistent, and binding position on whether oil should flow to Canada at all costs. Instead, the executive has taken multiple, “less than consistent,” positions on the various interests here – environmental protection, indigenous rights, and transborder pipelines. *See id.* at 442-45. For instance, President Biden revoked a permit for the Keystone Pipeline that would have brought oil from Western Canada to American refiners. *Keystone pipeline officially canceled after Biden revokes key permit*, CNBC (June 9, 2021), <https://www.cnbc.com/2021/06/09/tc-energy-terminates-keystone-xl-pipeline-project.html>. Successive administrations have waffled on Line 5. *See Br. of the U.S. as Amicus Curiae Supp. Partial Reversal, Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co.*, Nos. 23-2309, 23-2467, RE 94 (7th Cir. Apr. 10, 2024) (recognizing competing interests in Line 5 disputes and arguing that Enbridge committed trespass by operating without a valid easement).

If a state intrudes upon foreign relations, the political branches can easily protect themselves by passing preemptive laws. If Congress or the Executive

thought that transporting petrochemicals to Canada through the four-mile stretch of Line 5 under the Straits is so essential that Enbridge can violate the terms of its easement, they have had five years since Michigan's act to pass legislation or create a treaty saying so. The fact they have not done so indicates "Congress' willingness to tolerate" application of state law here. *Cf. Barclays*, 512 U.S. at 324, 327.

CONCLUSION

For the foregoing reasons, this Court should reject Plaintiffs' foreign affairs preemption argument.

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,486 words, excluding words exempted by Federal Rule of Appellate Procedure 32(f) and 6th Circuit Rule 32(b)(1).

2. This Brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman, 14-point font.

3. With respect to Federal Rule of Appellate Procedure 29(E): no party's counsel authored the brief in whole or in part; no person other than amici and its counsel contributed money that was intended to fund preparing or submitting the brief.

/s/ Alison Borochoff-Porte
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CERTIFICATE OF SERVICE

I hereby certify on this 11th day of May 2026, the foregoing Brief of Amici Curiae Professors of Foreign Relations Law was filed electronically via CM/ECF. All parties to the case are registered CM/ECF users and will receive notice of the filing.

/s/ Alison Borochoff-Porte
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APPENDIX A: List of Amici Curiae

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Sharmila L. Murthy is Professor of Law and Public Policy at Northeastern University School of Law, where she teaches and writes on environmental law, international law and foreign affairs federalism. Her research has appeared in such publications as the *Stanford Law Review*, the *Virginia Environmental Law Journal*, and the *University of Pennsylvania Journal of Law and Public Affairs*.

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