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Re: *State of Michigan v. Enbridge Energy*
File No. 1:20-cv-01142-JTN-RSK

Counselors,

Attached please find the State *Amicus Curiae* Brief in Support of Plaintiffs, and Proof of Service, with regard to the above-referenced matter.

Sincerely,

/s/ Leigh Currie
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN, GOVERNOR OF THE STATE OF MICHIGAN, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Plaintiff,

v.

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

Defendants.

No. 1:20-cv-01142-JTN-RSK

HON. JANET T. NEFF

STATE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS

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INTRODUCTION

The amici[1] submitting this brief in support of Plaintiffs have an interest in preserving their long-standing authority over state-owned submerged lands, and they submit this brief in support of the Plaintiffs State of Michigan, Governor Gretchen Whitmer, and the Michigan Department of Natural Resources (collectively, Michigan). Defendants Enbridge Energy, Limited Partnership; Enbridge Energy Company, Inc.; and Enbridge Energy Partners, L.P. (collectively, Enbridge) improperly removed Michigan's state lawsuit to federal court on grounds that do not apply to this case. Federal courts do not have original jurisdiction to determine claims by states that seek to vindicate state property rights under a state's public trust doctrine, even if those claims involve a federally regulated pipeline. The amici agree with Michigan (*see* Plaintiffs' Brief in Support of Motion to Remand) that this case should be remanded to state court, where it was brought.

ARGUMENT

Enbridge's articulated grounds for removal (*see* Notice of Removal, ECF No. 1-2, PageID.112-25 and Amended Notice of Removal, ECF No. 12, PageID.237-49) do not apply to Michigan's claims under Michigan state law. Under the bedrock well-pleaded complaint rule, the plaintiff is "the master of [its] claim[s]," and Michigan's "exclusive reliance on state law" precludes removal here. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). The Court should return Michigan's claims, brought under the laws of Michigan to protect the people of Michigan, to the courts of Michigan.

[1] Amici consist of the Attorneys General of Minnesota, California, Delaware, District of Columbia, Illinois, Maryland, Commonwealth of Massachusetts, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Virginia, Washington, and Wisconsin, the Governors of Kentucky and Louisiana, and the Pennsylvania Department of Environmental Protection.

First, Michigan's public-trust claim is based solely on Michigan's state public trust doctrine. Michigan's claim is not a federal common-law claim in disguise. Second, state courts are the appropriate forum to determine claims by states that seek to vindicate their rights under their respective state public trust doctrines related to state-owned submerged lands, even if those claims involve the siting and location of a federally regulated pipeline. *See*, *e.g.*, 49 U.S.C. § 60104(e) ("This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility."). And even if a federal law is implicated here, which it is not, "state courts are generally presumed competent to interpret and apply federal law." *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 560 (6th Cir 2007) (citing *Zwickler v. Koota*, 389 U.S. 241, 245 (1967)). Because Michigan's claims arise solely under Michigan state law, remand is required.

I. Michigan's public trust doctrine claim sounds in state law and should be heard in state court.

Title to sovereign lands passed to each state upon its admission to the Union. *Montana v. United States*, 450 U.S. 544, 552 (1981); *Or. ex rel. State Bd. v. Corvallis Sand & Gravel Co*., 429 U.S. 363, 373-74 (1977). The public trust doctrine embodies the inherent powers of states to hold sovereign lands in trust for, and manage such resources for, the public benefit. *See Newton v. Mahoning Cnty. Comm'rs*, 100 U.S. 548, 554 (1879) (discussing inherent powers of states—such as the police power—of which states cannot divest themselves). "Submerged land beneath navigable waters has a unique status in law and is infused with a public trust; state ownership of such lands has been 'considered an essential attribute of sovereignty.'" *MCI Telecommunication Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 507 (3rd Cir. 2001) (quoting *Idaho v. Coeur d'Alene,* 521 U.S. 261, 283 (1997)). One inherent aspect of sovereignty is the power to preserve and protect public uses of navigable waters and lakebeds from private interruption and encroachment. *Glass v. Goeckel*, 703 N.W.2d 58, 64-65 (Mich. 2005). All of the amici states

recognize the public trust doctrine. *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 436 (1892); *see also White Bear Lake Restoration Ass'n v. Minn. Dep't of Nat. Res.*, 946 N.W.2d 373, 385 (Minn. 2020); *Marks v. Whitney*, 491 P.2d 374, 379-80 (Cal. 1971); *Groves v. Dep't of Nat. Res. & Env't Control*, 1994 WL 89804 at *5-6 (Del. Super. Ct. Feb. 8, 1994); *Alec v. Jackson*, 863 F.Supp. 2d 11, 13 (D.D.C. 2012); *Avenal v. State*, 86 So.2d 1085, 1102 (La. 2004); *Commonwealth v. Thomas*, 427 S.W.2d 213, 215-16 (Ky. 1967); *Diffendal v. Dep't of Nat. Res.*, 112 A.3d 1116, 1128-29 (Md. App. 2015); *Trio Algarvio, Inc. v. Dep't of Env't Prot.*, 795 N.E.2d 1148, 1150-51 (Mass. 2003); *Neptune City v. Avon-By-The-Sea*, 294 A.2d 47, 54-55 (N.J. 1972); *Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015) (recognizing application of public trust principles); *People v. New York & S.I. Ferry Co.*, 68 N.Y. 71, 77 (1877); *Delaware Avenue LLC v. Pa Dept. of Conservation and Nat'l Res.*, 997 A.2d 1231 (Pa. Cmmw. Ct. 2010); *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041 (R.I. 1995); *Palmer v. Commonwealth Marine Res. Comm'n*, 628 S.E. 2d 84, 89 (Va. App. 2006); *Chelan Basin Conservancy v. GBI Holding Co.*, 413 P.3d 549, 554-56 (Wash. 2018); *Wisconsin's Env't Decade, Inc. v. Dep't of Nat. Res.*, 271 N.W.2d 69, 72-73 (Wis. 1978). Michigan's right to preserve its sovereign lands for the public's benefit represents a central aspect of its sovereignty with which Enbridge cannot interfere without Michigan's approval.

Michigan's lawsuit is based on the state public trust doctrine and the validity of, and Enbridge's compliance with, a 1953 Easement Agreement between the two parties. The complaint does not include any claim under federal law.

Despite the obvious state-law nature of Michigan's lawsuit, Enbridge argues that this Court should construe Michigan's state-law public trust claim as arising under federal common law.[2] Enbridge asserts that because the state-owned lakebed underlies a lake that is navigable and straddles more than one state, Michigan's claim is actually one arising from transboundary pollution. (ECF No. 12, PageID.241-42.) And Enbridge asserts that because the pipeline crosses an international boundary and there are international efforts to protect the Great Lakes from pollution, Michigan's public trust claim implicates the foreign commerce clause. (*Id.* at PageID.243-46.) Neither of these bases for federal jurisdiction has any merit and were the court to credit them, it would unjustifiably erode the public trust doctrine and state sovereignty.

A. Michigan has not asserted a federal common law claim for pollution or environmental destruction of the Great Lakes.

The public trust doctrine applies to and guides both Michigan's ownership of the submerged lands and its responsibility to protect those lands for public use. It is undisputed that Michigan owns the lakebed under the Straits of Mackinac and, as such, that Enbridge requires an easement to place the pipeline on the lakebed. Michigan asserts that, as a matter of state law and pursuant to the public trust doctrine, either (1) the 1953 easement was void from its inception because it attempted to transfer inalienable interests in the lakebed; or (2) that the State had the right to revoke the easement to protect the public trust. In support of its argument that federal common law governs this lawsuit, Enbridge asserts that Michigan's lawsuit is instead about "pollution of interstate and navigable waters." (*Id.* at PageID.241.) Enbridge is wrong.

[2] In its Original Notice of Removal, Enbridge frames similar arguments as giving rise to substantial federal questions and cites to *Grable & Sons Metal Prod. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (ECF No. 1-2, PageID.117-18). But regardless of whether the issues of transboundary pollution, foreign commerce, or others are analyzed as allegedly embedded substantial federal questions under *Grable* or simply as "federal common law," Enbridge's arguments fail. Michigan asserted only state-law claims, and Enbridge has failed to establish federal jurisdiction.

Enbridge relies on *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) and *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765 (7th Cir. 2011) to support its argument that "[f]ederal common law governs claims arising out of the 'interstate or navigable waters' of the United States," including Michigan's claims here. (*Id*.) But those cases are inapposite. For one thing, both cases were brought in federal court to enjoin threatened incursions from outside the states' borders via navigable waters. *See Illinois* 406 U.S. at 93; *Michigan*, 667 F.3d at 768. For that reason, those courts did not address removal (or subject matter jurisdiction, for that matter), so these cases are thus wholly inapplicable to the issues here.

And even putting aside this fundamental distinction, in both of those cases the states asserted nuisance claims based on the federal common law. In contrast, Michigan asserts no such claim; this case is about revoking and terminating a previously granted easement. While Michigan does point to the risk of a catastrophic oil spill as part of its justification for its decision to revoke the easement (ECF. No. 1-2, PageID.138), that does not convert this case into one asserting a nuisance claim (or any other claim) based on alleged pollution or environmental destruction of Lakes Michigan and Huron. Instead, Michigan's lawsuit is based on its sovereign right to ensure that the private use of state-owned land is compatible with the public trust character of such lands.

Enbridge nevertheless quotes *Michigan* to support its contention that "[b]ecause federal common law 'extends to the harm caused by . . . environmental and economic destruction' by way of navigable waters, it necessarily applie[s] to the claims at issue." (ECF No. 12, PageID.241 (quoting *Michigan*, 667 F.3d at 771).) But this is a gross mischaracterization of the Court's holding in *Michigan*. The quote from *Michigan* was in the context of the Seventh Circuit determining whether aquatic invasive species should be treated similarly to traditional pollutants when both enter the state via navigable waters. *Michigan*, 667 F.3d at 771. Nothing in *Michigan* supports the

contention that a case involving a state's public trust doctrine, pled under state law, can be transformed into a federal common-law case simply because both involve navigable waters.

Enbridge's reliance on *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011), *Int'l Paper Co. v. Oullette*, 479 U.S. 481, 492 (1987), and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cr. 2012), is similarly misplaced. (ECF No. 12, PageID.241-42.) These cases also involve claims for injuries resulting from transboundary pollution brought in federal courts. Michigan's claims have nothing to do with transboundary pollution—via navigable waters or otherwise.

In sum, none of the cases relied on by Enbridge involved removal jurisdiction, and none addressed subject-matter jurisdiction when a sovereign state asserts its public trust rights to control private use of publicly owned submerged lands. There is simply no authority to support Enbridge's position that federal jurisdiction is warranted in this case.

B. Enbridge's assertion that this case is of an "international nature" does not transform Michigan's case into a federal common law case.

Similarly, there is no support for Enbridge's argument that Michigan's public-trust claim is actually a federal common-law claim because it is of an "international nature." (ECF No. 12, PageID.243.) Michigan's lawsuit involves a four-mile segment of pipeline on the state-owned lakebed and does not concern international affairs or agreements. Enbridge is free to raise international treaties as defenses to Michigan's lawsuit; but federal defenses do not establish federal jurisdiction. *Mikulski*, 501 F.3d at 560-61.

The cases cited by Enbridge in its Amended Notice of Removal are inapposite. Nearly all of those cases originated in federal court, and they therefore have no bearing on the removability of well-pleaded state-law claims. Only *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997) involved removal of an action initiated in state court. In that case, approximately 700

citizens of Peru sued a Delaware company in Texas state court[3] for harm suffered from emissions from a smelting and refining operation in Peru. *Torres*, 113 F.3d at 541. Although the plaintiffs asserted only state-law claims, the Fifth Circuit concluded that removal was warranted because the government of Peru had "participated substantially in the activities for which [the defendant] is being sued." *Id.* at 543. The Peruvian government owned the property, owned the minerals, owned the refinery, and allowed the defendant to operate in return for a fee; as such, the case "str[uck] . . . at Peru's sovereign interests." *Id.*

But nothing on the face of Michigan's complaint suggests the same type of direct, international ties to Michigan's public trust claim involving Michigan's assertion of sovereign authority over its lands. *Torres* is thus plainly distinguishable.

And while *Republic of Philippines v. Marcos* 806 F.2d 344, 352 (2d Cir. 1986) and *Republic of Iraq v. First Nat. City Bank*, 353 F.2d 47, 50 (2d Cir. 1965) at least addressed subject matter jurisdiction, these cases likewise offer no support for Enbridge's position. In *Philippines*, the Philippines government was seeking to freeze assets purportedly held by American corporations for the benefit of the country's exiled former dictator. 806 F.2d at 346-48. The Second Circuit concluded that federal jurisdiction was warranted when cases, like *Philippines*, "concern efforts by a foreign government to reach or obtain property located here." *Id.* at 353.

> We hold that federal jurisdiction is present . . . because the claim raises, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state.

Id. at 354. The same principle underpinned the Second Circuit's decision in *Iraq*, wherein the newly formed republic of Iraq sought to confiscate all property of the former dynasty, including

[3] Texas law allows foreign citizens to sue for injuries occurring in a foreign nation if the country has equal treaty rights with the United States. *Torres*, 113 F.3d at 542.

property held in New York. 353 F.2d at 49-50. This case, in contrast, does not involve any attempt by a foreign government to control property within the United States.

The fact that the Great Lakes span international borders or are protected by international treaties does not embed a foreign-policy question into a state public trust claim. A contrary finding would indeed be absurd because it would turn virtually any state regulatory action concerning the Great Lakes (*e.g.*, a state wetlands permit) into a federal question removable to federal court. At most, Enbridge has raised a potential defense to Michigan's assertion of its authority, which a state court can competently assess. *See Mikulski*, 501 F.3d. at 560-61.

II. Federal regulation of pipelines does not establish federal subject matter jurisdiction here.

Enbridge also asserts that removal is warranted because "Congress has acted through a variety of federal statutes—primarily, but not exclusively, the Pipeline Safety Act—to ensure pipeline safety and strike the balance between pipeline transportation and environmental protections." (ECF No. 1-2, PageID.118-19.) Specifically, Enbridge asserts that (A) the preemption clause of the Pipeline Safety Act shows that removal is proper; (B) federal regulation of pipelines embeds a substantial issue of federal law into a well-pleaded state public trust claim; and (C) regulation of pipelines by the Pipeline and Hazardous Materials Safety Administration (PHMSA) justifies removal under 28 U.S.C. § 1442(a)(1), the federal officer removal statute. These assertions all fail.

A. The Pipeline Safety Act does not preempt the public trust doctrine.

Enbridge asserts that the preemption clause of the Pipeline Safety Act preempts Michigan's ability to vindicate its property rights to the lakebed. (*Id.*) As an initial matter, this argument is irrelevant to Michigan's motion to remand for lack of subject-matter jurisdiction. It is beyond dispute that ordinary preemption (as opposed to complete preemption) does not create subject-

matter jurisdiction over state-law causes of action. *See Franchise Tax Bd. v. Constr. Laborers*, 463 U.S. 1, 14 (1983). "Even 'a defense that relies on . . . the pre-emptive effect of a federal statute will not provide a basis for removal.'" *Mikulski*, 501 F.3d at 560 (quoting *Beneficial Nat'l Bank*, 539 U.S. at 6). State courts are perfectly capable of considering the defenses that Enbridge raise here, such as preemption and interference with the commerce clause. *Id.* at 560-61 ("[T]here is nothing unusual about a court having to decide issues that arise under the law of other jurisdictions; otherwise there would be no field called 'conflict of laws' and no rule barring removal of a case from state to federal court on the basis of a federal defense." (quotation omitted)).[4]

Moreover, Michigan's public trust claim is not preempted, even in the ordinary sense. Despite federal safety regulations for pipelines, states are free to exercise their public trust powers to determine whether and where pipelines may cross their sovereign lands. Indeed, Congress was explicit in this respect: "interstate liquid pipelines are not subject to [Federal Energy Regulatory Commission] jurisdiction, but rather are subject to the routing and environmental assessment requirements of the individual states they traverse." H.R. Rep. No. 102-247, pt. 1 at 13-14 (1991); *see also* 49 U.S.C. § 60104(e).[5] Thus, Congress did *not* intend to preempt state and local authority related to the placement of a pipeline. *Portland Pipe Line Corp. v. City of S. Portland*, 288

[4] Indeed, Enbridge raised these very defenses in a state court case brought by the Michigan Attorney General in 2019. *See Nessel v. Enbridge Energy, Ltd. Partnership et al.*, Case No. 19-474. Enbridge did not remove this case to federal court and the state court is considering the merits of Enbridge's defenses.

[5] If the Pipeline Safety Act preempted state oversight of oil pipeline siting and routing, there would be no oversight of hazardous liquid pipeline siting and routing. There is no federal authority with jurisdiction over siting and routing of hazardous liquid interstate pipelines; if state authority is deemed to be preempted by the Pipeline Safety Act, it will leave a gaping hole in the regulatory scheme. As the Federal Energy Regulatory Commission (FERC), the federal agency that makes natural gas pipeline siting decisions, explains: "FERC has no jurisdiction over construction . . . of . . . oil pipelines . . . or storage facilities." FERC: Oil-Environment, https://www.ferc.gov/industries/oil.asp.

F.Supp.3d 321, 430-31 (D. Me. 2017), *appeal pending*, No. 18-2118 (1st Cir.) ("Under their police power, states and localities retain their ability to prohibit pipelines altogether in certain locations.").

Even if Congress did not place routing issues explicitly outside federal jurisdiction, the public trust doctrine cannot fairly be characterized as a "safety standard" as that term is used in the Pipeline Safety Act's preemption clause. Importantly, preemption clauses are to be read narrowly in light of the presumption against the preemption of state regulations. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 519 (1992). A narrow reading of this clause precludes the conclusion that Michigan is attempting to "adopt or continue in force safety standards." 49 U.S.C. § 60104(c). None of the activities regulated by the Pipeline Safety Act—design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, or maintenance—is at issue in this case. *See* 49 U.S.C. § 60102 (a)(2)(B). The Pipeline Safety Act is quite clearly intended to cover the design and maintenance of interstate pipelines; it is not intended to cover all aspects of environmental risk posed by pipeline siting and routing, nor Michigan's sovereign power to dictate the *location* of pipelines that cross lands owned and held in trust by the state.

B. Federal regulation of pipelines does not embed a substantial federal issue of federal law in this case.

Enbridge asserts that "[e]ven where the State has ownership of the submerged bottomlands, Congress made this ownership subject to federal regulation." (ECF No. 1-2, PageID.120.) According to Enbridge, removal was proper because "the Pipeline Safety Act and PHMSA regulations fully apply to pipelines that are located in navigable waters." (*Id.*) The amici do not dispute that if a state grants permission to a private company to use state-owned bottomlands for a pipeline, that pipeline is subject to federal safety regulations. But for a federal regulation to result

in federal jurisdiction over a state claim, compliance or violation of the regulation must be a required element of the state claim, or Congress must have intended complete preemption of the area of state law. *Mikulski*, 501 F.3d at 563. Neither is present here.

Enbridge appears to argue that Michigan's public trust claim is completely preempted because "PHMSA has promulgated an extensive body of federal safety regulations that govern the construction and operation of pipelines like the one at issue here." (ECF No. 1-2, PageID.120.) As discussed above, there is no ordinary preemption here and certainly no complete preemption. *See K.B. by & through Qassis v. Methodist Healthcare-Memphis Hosp.*, 929 F.3d 795, 800 (6th Cir. 2019) (discussing the difference between complete preemption and ordinary preemption); *see also Mikulski*, 501 F.3d at 564 (noting that the Supreme Court has found complete preemption in only three classes of cases, none of which involve pipelines); *Caterpillar*, 482 U.S. at 393 (deeming "extraordinary" the preemptive force of a statute required to convert an ordinary state common-law complaint into one stating a federal claim). Congress clearly reserved to the states the authority to control the use of state-owned lands and to regulate the location of pipelines within their borders, which eliminates the possibility that Congress also intended to completely occupy the field of pipelines. 49 U.S.C. § 60104(e) (reserving siting and routing of pipelines to states).

But in the next paragraph, Enbridge shifts legal theories entirely and instead asserts that the PHSMA regulations establish *Grable* jurisdiction "because the relief sought by Michigan would necessarily alter the regulatory regime designed by Congress, impacting residents of the Nation far outside the state court's jurisdiction." (ECF No. 1-2, PageID.121.) If Congress was concerned about the possible out-of-state effects of leaving pipeline siting decisions to individual states, then surely it would not have so explicitly given states that authority. And, in any event, Enbridge distorts *Grable's* narrow exception for federal court jurisdiction beyond recognition.

The Supreme Court in *Grable* clarified that federal question jurisdiction extends only to state-law claims filed in state court where a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Grable*, 545 U.S. at 314; *see also Mikulski*, 501 F.3d at 567-68 (discussing, at length, the narrow applicability of the *Grable* exception to the well-pleaded complaint). Enbridge's removal attempt fails on the first prong because Michigan's lawsuit does not necessarily raise a federal issue. Nothing in Michigan's lawsuit requires the state court to resolve a question of federal law. For example, Michigan need not prove as an element of its state law public trust claim that Enbridge violated any federal safety standards. Instead, Michigan need only demonstrate that its public trust doctrine gives it the authority to revoke the easement it granted to Enbridge to locate the pipeline on the state's submerged lands. That doctrine applies without regard to whether Enbridge is in compliance with federal pipeline safety regulations.

Defendants around the country have attempted to remove cases brought against them in state court on similar theories. They have claimed, among other things, that federal jurisdiction is proper because fossil fuels are subject to federal regulations. But every court (save one district court, later reversed) to have heard these arguments has roundly rejected them. "On the Defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable. *Grable* does not sweep so broadly." *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *reh'g en banc denied* (Aug. 4, 2020), *cert. pet. docketed*, No. 20-884 (Jan. 4, 2021). "[T]he mere existence of a federal regulatory regime [does not] mean that these cases fall under *Grable*." *Id.; see also Massachusetts v. Exxon*

Mobil Corp., 462 F. Supp. 3d 31, 44 (D. Mass. 2020) ("Contrary to ExxonMobil's caricature of the complaint, the Commonwealth's allegations do not require any forays into foreign relations or national energy policy. It alleges only corporate fraud."); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 151 (D.R.I. 2019), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020), *cert. pet. docketed* No. 20-900 (Jan. 5, 2021) ("By mentioning foreign affairs, federal regulations, and the navigable waters of the United States, Defendants seek to raise issues . . . that are not perforce presented by the State's claims.").

The same result is warranted here.

C. Complying with federal regulation is not equivalent to acting under a federal officer.

The federal officer removal statute provides a federal forum to "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a). Thus, the federal officer removal statute permits removal only if the defendant, "in carrying out the 'act[s]' that are the subject of the petitioner's complaint, was 'acting under' any 'agency' or 'officer' of 'the United States.'" *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007).

Enbridge has failed to meet its burden to establish it was "acting under" a federal agency. To meet this burden, Enbridge must establish both that it was "involve[d in] an effort to assist, or to help carry out, the duties or tasks of [a] federal superior" and that its relationship with the federal superior "involve[d] 'subjection, guidance, or control.'" *Id*. at 151–52. Enbridge asserts that regulation of its activities by PHSMA is sufficient to satisfy this standard. That assertion is incorrect. "Formal 'delegation of legal authority' might authorize removal under § 1442, but regulation of an activity cannot, no matter how extensive or complex it may be." *Ohio State*

Chiropractic Ass'n v. Humana Health Plan, Inc., 647 F. App'x. 619, 622 (6th Cir. 2016) (reversing denial of motion to remand). Indeed, multiple circuits have held that even formal delegation of authority from a federal agency to a private party is insufficient when the delegated authority simply permits the private party to certify its own compliance with pre-existing regulations. *See Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 989 (9th Cir. 2019) (delegation of authority from FAA to airline manufacturers to self-certify compliance with safety requirements insufficient for removal because "mere compliance with federal directives does not satisfy the 'acting under' requirement of § 1442(a)(1)"); *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 810 (7th Cir. 2015) (reaching the same conclusion and stating that "[w]hen discussing the possibility that delegation might create 'acting under' status, the [Supreme] Court mentioned rule *making* rather than rule *compliance* as the key ingredient." (emphasis added)). Here, PHSMA has not delegated its authority to regulate the safety of pipelines to Enbridge or any other private actor. "As *Watson* makes clear, a private firm does not 'act under' a federal officer simply because its activities are directed, supervised, and monitored by an agency." *Ohio State Chiropractic Ass'n*, 647 F. App'x. at 622.

The same result has been reached by circuit courts around the country considering similar arguments by federally regulated fossil fuel companies. "Mere compliance with the law, even if the laws are highly detailed, and thus leave an entity highly regulated, does not show that the entity is acting under a federal officer." *Cty. of San Mateo*, 960 F.3d at 603 (citations omitted); *see also Rhode Island*, 979 F.3d at 59-60; *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 463-66 (4th Cir. 2020), *cert. granted*, No. 19-1189 (Oct. 2, 2020);[6] *Bd. of Cty. Comm'rs of Boulder*

[6] The Supreme Court granted certiorari in *Baltimore* to address the scope of appellate review of a remand order under 28 U.S.C. § 1447(d), and its decision will therefore not disturb the Fourth

Cty. v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792, 819-27 (10th Cir. 2020), *cert. pet. Docketed* No. 20-783 (Dec. 8, 2020).

Enbridge is engaged in a highly regulated business, but it was not acting under a federal officer when it sought an easement across a state-owned lakebed in Michigan. Removal on this basis also fails.

CONCLUSION

Whether Michigan succeeds on the merits of its public trust claim will turn on questions of the public trust doctrine as interpreted under Michigan state law. Federal jurisdiction here would be an affront to Michigan's sovereign prerogative to have its own state law claims heard in state court. Enbridge has not met and cannot meet its burden to demonstrate that federal subject matter jurisdiction exists in this case. This case must be remanded.

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Circuit's rejection of rejection of federal officer jurisdiction in that case. *See* Petition for Writ of Certiorari, U.S. Sup. Ct. Case No. 19-1189 (Mar. 31, 2020).

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