STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

DANA NESSEL, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v. ENBRIDGE ENERGY, LIMITED PARTNERSHIP; ENBRIDGE ENERGY COMPANY, INC.; and ENBRIDGE ENERGY PARTNERS, L.P., Defendants.	No. 19-474-CE HON. JAMES S. JAMO ***AMICUS CURIAE* BRIEF OF THE ATTORNEYS GENERAL OF MINNESOTA, CALIFORNIA, AND WISCONSIN IN SUPPORT OF PLAINTIFF**

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ARGUMENT

The public trust doctrine has been established in the United States since the 19th century, and traces its origins as far back as Roman law and English common law. Under the doctrine, states, including those of the the amici,[1] hold important natural resources such as tidelands, submerged lands, and the beds of inland navigable waters in trust for the benefit of the public. Although the outer limits of the public trust doctrine vary from state to state, it is beyond dispute that the doctrine universally applies to submerged lands beneath navigable waters, and confers upon the states permanent and un-diminishable authority over those lands. This authority stems from the inherent sovereignty of states. Title to sovereign lands passed to each state upon its admission to the Union. *Montana v. United States*, 450 U.S. 544, 552 (1981); *Oregon v. Corvallis Sand & Gravel Co*., 429 U.S. 363, 373-74 (1977). Because the public trust doctrine carefully circumscribes the states' ability to alienate such sovereign public trust lands, the authority includes the power to reject uses of these lands previously allowed by a state. The seminal U.S. Supreme Court case on the public trust doctrine, *Illinois Central Railroad Company v. Illinois*, addressed this exact issue and laid it to rest more than 125 years ago. The court should reject any claim that the public trust doctrine is preempted here.

Defendants argue that the strict limits on alienability of sovereign lands and Michigan's powers to manage these lands for public purposes under the public trust doctrine have been preempted by either the Pipeline Safety Act or the U.S. Coast Guard's general authority over navigable waters. Defendants fail to cite on-point authority, and this argument has no merit. The amici have an interest in preserving their long-standing authority over submerged lands, and they

[1] The amici consist of the Attorneys General of Minnesota, California, and Wisconsin. This brief was not authored, in whole or in part, by counsel for any party; no person, other than the amici, made a monetary contribution intended to fund the preparation or submission of this brief.

submit this memorandum in support of Michigan's argument that there has been no federal preemption of the public trust doctrine in this case.

I. THE PUBLIC TRUST DOCTRINE IS CLEARLY IMPLICATED ON THE FACTS OF THIS CASE.

Illinois Central resolves the question of whether Michigan has the power to regulate the use of submerged sovereign lands under the Straits of Mackinac pursuant to the public trust doctrine. Though the *Illinois Central* case itself was a statement of Illinois law, "the general principle [of the public trust] and the exception [allowing for alienation of lakebeds in limited instances] have been recognized the country over." *Appleby v. City of New York*, 271 U.S. 364, 395 (1926).

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). One inherent aspect of sovereignty is the power to preserve public uses of navigable waters and lakebeds from private interruption and encroachment. *Ill. Cent.*, 146 U.S. at 436; *see also Corvallis Sand & Gravel Co*., 429 U.S. at 373-74; *Glass v. Goeckel*, 703 N.W.2d 58, 64-65 (Mich. 2005); *Marks v. Whitney*, 491 P.2d 374, 379-80 (Cal. 1971) (citing *Ill. Cent.*, 146 U.S. at 452).

In *Illinois Central*, the Supreme Court examined the relationship between the public's right to use navigable waters and the state's ability to convey property rights in the lakebeds of those waters to a private party. *Id.* at 438-41. The question in *Illinois Central* was whether the state could, consistent with the public trust doctrine, permanently convey title to the bed of Lake Michigan to a private entity—the Illinois Central Railroad. *Id.* at 452-55. The Court concluded that Illinois could not, and that "[a]ny grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time." *Id.* at 455.

In other words, "[e]very succeeding legislature possesses the same jurisdiction and power with respect to [the public trust] as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less." *Newton*, 100 U.S. at 559.

As a result, the Supreme Court held that Illinois could revoke the title to the lakebed that it had previously granted to the railroad company. *Ill. Cent.*, 146 U.S. at 460 ("There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it."). The Court explained its reasoning:

> The harbor of Chicago is of immense value to the people of the state of Illinois, in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose—one limited to transportation of passengers and freight between distant points and the city,—is a proposition that cannot be defended.

Id. at 454. Subsequent authority applying the public trust doctrine, including in amicus State of California, is in accord. *See Corvallis Sand & Gravel Co*., 429 U.S. at 373-74, (holding that because absolute title to the beds of navigable waters passed to states upon admission to the Union, and federal government held such lands in trust for states pending their admission, federal government had no power to dispose of such lands); *accord*, *City of Berkeley v. Super. Ct.*, 606 P.2d 362, 367 (Cal. 1980).

Illinois Central controls the application of the public trust doctrine in this case. The lakebed beneath the Mackinac Straits is subject to Michigan's power to manage the lands for the public benefit. *Ill. Cent.*, 146 U.S. at 455-56. No private entity enjoys permanent property rights to the sovereign lakebed. *Saint Anthony Falls-Water-Power Co. v. Bd. of Water Comm'rs*, 168 U.S. 349, 359 (1897) (citing *Martin v. Waddell,* 41 U.S. 367, 410 (1842) (holding the navigable waters and soils under them are owned by the states in their sovereign capacity for the benefit of

the public and the government is incapable of transferring title to either the navigable waters or the beds to private land owners)); *see also Montana*, 450 U.S. at 552; *City of Berkeley*, 606 P.2d at 367. Michigan's right to preserve its sovereign lands for the public's benefit represents a central aspect of its sovereignty with which Defendants cannot interfere.

II. THE PUBLIC TRUST DOCTRINE IS NOT PREEMPTED BY THE PIPELINE SAFETY ACT OR COAST GUARD JURISDICTION.

The Court should reject the argument that the public trust doctrine is preempted by the Pipeline Safety Act or the U.S. Coast Guard's "broad authority over vessels traversing navigable waters." (Defs. Mem. in Support of Motion for Summary Disposition (Defs. Mem.) at 28.) Michigan is free to exercise its public trust powers to determine whether pipelines may cross its sovereign lands and, if so, where that may occur. That is qualitatively different from regulating how a pipeline operator must design, construct, maintain, test, and operate the pipeline.

The preemption doctrine derives from the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2. Based on this doctrine, a federal law can supersede a state law, but *only* if Congress intended it to do so. *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 536 (Mich. 2014) ("The purpose of Congress is the ultimate touchstone in every pre-emption case.") (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). In determining Congress' intent, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.; accord, Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008) (holding that the "presumption against preemption is heightened 'where federal law is said to bar state action in fields of traditional state regulation'") (citation omitted).

Defendants offer two theories as to how the public trust doctrine is preempted in this case. Defendants first assert that the Pipeline Safety Act expressly preempts Michigan's actions

here. Express preemption exists if the federal law expressly states that it intends to preempt state or local laws on the same subjects. *Konynenbelt v. Flagstar Bank*, 617 N.W.2d 706, 710 (Mich. Ct. App. 2000). Alternatively, Defendants argue for implied preemption. Implied preemption can exist where two laws conflict such that they both cannot be simultaneously enforced, or when it is clear from the statutory scheme that Congress intended to occupy the field such that no room is left for state regulation. *Id.* The presumption against preemption applies to both types of preemption. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). Neither express nor implied preemption applies here.

As an initial matter, Defendants' entire preemption argument overlooks Congress's *express recognition* of states' authority over their navigable waterways. In the Northwest Ordinance of 1789, the first United States congress reaffirmed the organic acts of the states, as set forth in the original Northwest Ordinance of 1787, enacted by the Confederation Congress. Both acts confirmed that the then-northwest states (including Michigan) exercised organic authority over "the navigable waters leading into the Mississippi and St. Lawrence," recognizing that those waters "shall be common highways and forever free." Upon entry into the Union, the amici were afforded equal sovereignty over these navigable waters. Defendants point to nothing to suggest that either the Pipeline Safety Act or the jurisdiction of the U.S. Coast Guard somehow withdraws that organic authority. The cases cited by Defendants all involve specific attempts by local governments to infringe on the Pipeline Safety Act's exclusive authority over safety standards. The strong presumption against preemption, and the stark difference between state public trust powers and federal regulatory authority, compels the conclusion that the Pipeline Safety Act does not and cannot preempt Michigan's public trust powers in this case. Against this backdrop, Defendants' express and implied preemption arguments founder.

A. The Preemption Clause in the Pipeline Safety Act is Limited to Operational Safety Issues, and Therefore Does Not Expressly Preempt the Public Trust Doctrine.

Michigan's public trust powers are not expressly preempted by the language in the Pipeline Safety Act. "Under their police power, states and localities retain their ability to prohibit pipelines altogether in certain locations." *Portland Pipe Line Corp. v. City of S. Portland*, 288 F.Supp.3d 321, 430 (D. Me. 2017) (citation omitted). Plaintiff seeks to control the siting and routing of the pipeline, not to impose a "safety standard." To argue that the Pipeline Safety Act expressly preempts the public trust, Defendants point to the following clause: "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." (Defs. Mem. at 29, citing 49 U.S.C. 60104(c).) But this clause does not foreclose Michigan's ability to exercise its public trust powers over the placement of a pipeline beneath the Straits of Mackinac in sovereign lands.

First, the Pipeline Safety Act is not intended to cover all aspects of environmental risk posed by pipeline siting and routing. The preemption clause in section 49 U.S.C. 60104(c) of the Pipeline Safety Act (relied on by Defendants) is explicitly limited by section 60104(e), which does not authorize the federal government "to prescribe the location of routing of a pipeline facility." This demonstrates that Congress did *not* intend the Pipeline Safety Act to preempt state and local authority. *See Portland Pipe Line Corp.*, 288 F.Supp.3d 321 at 430-31 (relying in part on the limitation in section 60104(e) to conclude that a prohibition on crude oil transfers is not preempted by the Pipeline Safety Act); *Tex. Midstream Gas Services, LLC v. City of Grand Prairie*, 608 F.3d 200, 211 (5th Cir. 2010) ("[T]he [Pipeline Safety Act] itself only preempts *safety* standards.") (emphasis in original). Michigan's public trust powers in this case, even if they serve to address safety concerns on its sovereign lands, address the *location* of the pipeline—not the design, installation, inspection, emergency plans and procedures, testing,

construction, extension, operation, replacement, or maintenance of the pipeline. The preemption clause does not include routing or siting concerns.[2] Defendants cite no authority involving the Pipeline Safety Act that applies preemption in such a manner.

Second, even if section 60104 (e) did not place routing issues explicitly outside of the Pipeline Safety Act, the public trust doctrine cannot fairly be characterized as a "safety standard" as that term is used in the Act's preemption clause in any event. Importantly, preemption clauses are to be read narrowly in light of the presumption against the preemption of state police power regulations. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 519 (1992). A narrow reading of this clause would not allow for the conclusion that the Michigan Attorney General is attempting to "adopt or continue in force safety standards." Michigan is not imposing safety standards on Line 5. None of the activities regulated by the Pipeline Safety Act—design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, or maintenance—are at issue in this case. *See* 49 U.S.C. § 60102, subd. (a)(2)(B). If a "requirement is not a safety standard in letter, purpose, or effect, it may remain in force." *Tex. Midstream Gas Services, LLC*, 608 F.3d at 212. 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. *Id.* And it neither preempts or otherwise conflicts with Michigan's sovereign power to dictate the *location* of pipelines that cross its sovereign lands.

[2] If it did, 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.

Case law supports the interpretation that only safety "standards" are preempted by the Pipeline Safety Act. In *Portland Pipe Line Corp.*, the pipeline company argued that a local ordinance prohibiting certain operations was preempted as a safety standard because it was "designed to stop the transportation of oil through interstate pipeline facilities based on human and environmental health concerns." 288 F.Supp. at 408. The court disagreed. The court held that the ordinance at issue, which the parties agreed prohibited the pipeline company from loading crude oil at a Maine harbor, was a "prohibition" and not a "standard." *Id.* at 429-30. Here, even if Plaintiff is successful and Defendants' pipelines are prohibited from traversing the Mackinac Straits due to what Defendants characterize as "safety concerns," this outcome nevertheless cannot be characterized fairly as flowing from the application of a "safety *standard*." Determining whether a pipeline may be located on and cross sovereign lands in the first place imposes no safety standard governing how such a pipeline must be operated.

Olympic Pipe Line Co. v. City of Seattle, relied on by Defendants, also demonstrates that the preemption clause in the Pipeline Safety Act is limited to safety standards—not to states' powers to control routing or location across sovereign lands. 437 F.3d 872, 874-76 (9th Cir. 2006). *Olympic Pipe* concerns the standards by which a pipeline would operate, not a case about *where* it would operate. *Id*. In *Olympic Pipe*, the city sought to impose certain operational and testing conditions on a pipeline through a franchise agreement. *Id.* at 874-76. The district court concluded that the demand for testing conditions and other safety measures were more "regulatory" than "proprietary" and therefore preempted by the Pipeline Safety Act. The public trust doctrine is proprietary in nature, and *Olympic Pipe* therefore stands for the proposition that those types of concerns are *not* preempted by the Pipeline Safety Act. *See*, *e.g.*, *Marine One, Inc.*

v. Manatee Cnty., 898 F.2d 1490, 1492 (11th Cir. 1990) (discussing connection between a state's proprietary powers over lands and the public trust doctrine).

Texas Oil & Gas Assoc. v. City of Austin,[3] also did not concern the routing of a pipeline. In *Texas Oil*, the issue was whether the City of Austin could require liability insurance as a prerequisite to operation of a pipeline within the city limits. On a motion for a preliminary injunction, the district court held that the insurance requirement was preempted by state and federal law. The Court held that because the requirements related to the operation of the pipeline, they were preempted. The case did not involve any application of the public trust doctrine, or issues concerning routing which are specifically reserved to the states by the Pipeline Safety Act. *See* 49 U.S.C. § 60104(e).

In the last case cited by Defendants, *Kinley Corp. v. Iowa Utilities Bd.*, the court held that the Pipeline Safety Act preempted state law provisions that were "so related to federal safety regulations that they are preempted by the [Pipeline Safety Act] with respect to interstate hazardous liquid pipelines." 999 F.2d 354, 360 (8th Cir. 1993). But, importantly, the court did not find that the "environmental and damages remedies provisions" were preempted for resembling "safety standards." *Id.* Instead, the court found that those provisions were not severable from the preempted provisions and were therefore preempted as well. *Id.* Michigan's exercise of the state's public trust powers are more similar to an "environmental and damage remedy" than they are to a safety regulation, so the *Kinley* decision does not support preemption in this case.

[3] Unpublished, U.S. District Court for the Western District of Texas, No. 03-CV-570-SS, Nov. 7, 2003.

In sum, there is no support for the assertion that the Pipeline Safety Act expressly preempts an attempt by a state attorney general to assert the public trust doctrine. This is not a state agency or other regulatory body attempting to regulate how a pipeline that happens to be on public trust land must operate; this is a state attorney general seeking to protect an inherent aspect of state sovereignty from incompatible private uses of public trust lands in the first place.

B. There is No Implied Preemption of the Public Trust by Either the Pipeline Safety Act or Coast Guard Jurisdiction

Not only are Michigan's claims not expressly preempted by the Pipeline Safety Act, but they are not impliedly preempted either. Implied preemption exists when there is a conflict between the state and federal laws or when Congress has occupied the field so completely that the intent to preempt other regulations should be implied. *See*, *e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002). Those situations are not present here.

First, Defendants do not argue that there is a conflict between the public trust doctrine and the Pipeline Safety Act. Nor could it. A state can assert its interest in submerged lake beds while the Pipeline and Hazardous Materials Safety Administration can regulate pipeline safety standards without running into a conflict.[4]

Second, it was not Congress's intent to occupy by the entire field of pipeline regulation such that all state regulation related to pipelines is impliedly preempted. *See* 49 U.S.C. § 60104(e) (indicating that federal jurisdiction does not extend to "the location or routing of a pipeline facility"). States have jurisdiction over many aspects of interstate pipeline approval,

[4] "Conflict preemption" has been further broken down into two types: impossibility conflict preemption when "compliance with both federal and state regulations is a physical impossibility" and obstacle conflict preemption "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ter Beek*, 823 N.W.2d at 871 (quoting *Hillsborough Co., Fla. v. Med. Labs., Inc.*, 471 U.S. 707, 712 (1985)). Defendants assert neither type of conflict preemption in this case.

siting, and routing. Decisions of state agencies under these laws and regulations will often be based on safety considerations. To hold that the Pipeline Safety Act expressly preempts any attempt by a state to consider how a pipeline may affect the state's natural resources would upend the entire pipeline regulatory structure in the country. This was not Congress's intent when it enacted the Pipeline Safety Act.

In addition to preemption under the Pipeline Safety Act, Defendants also claim that the public trust is preempted by "the U.S. Coast Guard regulations concerning navigable waters." (Defs. Mem. at 32.) Defendants seem to assert that because the Coast Guard monitors and regulates boat traffic and behavior through the Mackinac Straits, Michigan's ability to enforce the public trust doctrine based on a private company's conduct in the same geographic location is preempted. (*Id.* at 34.) Defendants do not explain under what theory of preemption the Coast Guard's regulatory authority over vessel traffic on the Great Lakes preempts Michigan's ability to bring a public trust lawsuit. They cite no statute or regulation governing the Coast Guard's authority that expressly preempts state public trust powers. Presumably Defendants assert some sort of "field preemption" where the Coast Guard occupies the entire field of regulations related to "anchor strikes." But even that proposition—to the extent Defendants argue for it—relies merely on the vague suggestion that the Attorney General's efforts "overlook the Coast Guard's ongoing vessel anchor safety efforts." (*Id.* at 35.)

There is no legitimate legal argument that Coast Guard regulation of vessel traffic on the great lakes has preempted state attorneys general authority to safeguard the great lakes for public use under the public trust doctrine, and Defendants cite no case so holding. Nevertheless, the amici, and particularly those that are great lake states, reiterate that they hold an inherent right, as sovereigns, in the lakebed below navigable waters. *Ill. Cent.*, 146 U.S. at 454 ("So with trusts

connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state."); *accord*, *Corvallis Sand & Gravel Co*., 429 U.S. at 373-74; *Marks*, 491 P.2d at 379-80; *People v. Cal. Fish Co*., 138 P. 79, 83, 87-88 (Cal. 1913). The concurrent authority of the Coast Guard to regulate boat safety does nothing to undermine Michigan's sovereign right to regulate and protect lakebeds below navigable waters. Nor may the federal government do through regulation what it cannot do directly—essentially convey to the Defendants a right to occupy the beds of navigable waters, the ownership of which vested in the states at statehood.

CONCLUSION

Whether the Michigan Attorney General succeeds on the merits of her public trust claim will turn on questions of the public trust doctrine as interpreted under Michigan state law. Nothing in the Pipeline Safety Act or any other provision of federal law preempts the application of state law to the issues in question. For these reasons, the amici urge the Court to reject Defendants' preemption claims.

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Respectfully submitted,

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