Case No. 23-1671

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANA NESSEL, Attorney General of the State of Michigan, on behalf of The People of the State of Michigan,

Plaintiff-Appellant,

v

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

Defendants-Appellees.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Janet T. Neff

BRIEF OF FOR LOVE OF WATER AS AMICUS CURIAE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-1671 Case Name: Nessel v Enbridge et al

Name of counsel: James M. Olson

Pursuant to 6th Cir. R. 26.1, For Love Of Water
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

None.

CERTIFICATE OF SERVICE

I certify that on September 25, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ James M. Olson
420 E. Front Street
Traverse City, MI 49686

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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INTEREST OF *AMICUS CURIAE*

For Love of Water ("FLOW") is a Michigan non-profit law and policy center whose mission is "to ensure the waters of the Great Lakes Basin are healthy, public, and protected for all."[1] FLOW's brief is based on its experience and expertise regarding Michigan's sovereign ownership of public lands and water resources, the public trust doctrine, and advocacy in the courts for the protection of the navigable waters and submerged lands throughout the Great Lakes.

FLOW submits this *amicus* brief to inform the Court regarding the jurisdictional questions and closely related issues set forth in its Order, July 21, 2023, granting permission for leave to appeal. FLOW's brief addresses "*Grable* factor 3," as well as Enbridge's invocation of federal common law to override the well-pleaded complaint rule and remove the Attorney General's action to federal court. As an advocacy organization committed to protection of the precious water resources of the Great Lakes, FLOW brings a unique perspective to the jurisdictional questions now before the Court.

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[1]https://forloveofwater.org/about-us/mission-and-goals/

[2] Michael C. Blumm, et al., *The Public Trust Doctrine in Forty-Five States*, Lewis & Clark Law School Legal Studies Research Paper, March 18, 2014, available at SSRN: https://ssrn.com/abstract=2235329.

SUMMARY OF ARGUMENT

Over four years ago Attorney General Nessel ("AG") filed an action in state court, seeking an order commanding Enbridge to shut down its dual oil pipelines that unlawfully occupy state-owned bottomlands and waters in the Straits of Mackinac. The Complaint alleges strictly state law-based causes of action. In removing the AG's well-pleaded complaint, Enbridge has employed a litigation strategy common to global energy companies: "catch and kill," that is, remove to federal court any state law-based action brought in state court that seeks to hold the fossil fuel industry accountable. Numerous federal appellate courts have resoundingly rejected this tactic. *See, infra,* at p. 12. This Court should uphold the well-pleaded complaint rule and do the same.

FLOW agrees completely with the AG's argument that Enbridge failed to remove the action within the strict time periods prescribed in 28 U.S.C. § 1446 (Certified Questions 1 and 2). FLOW also agrees with the AG that no substantial, disputed federal question "necessarily arises" from the AG's complaint, thus essential elements of *Grable* jurisdiction are not satisfied (Certified Question 3).

FLOW presents these additional reasons for rejection of removal jurisdiction:

1. The AG's claims fall squarely within "traditional domains" of state law that are the responsibility of state courts: public trust doctrine, public nuisance and violations of the state's comprehensive environmental protection statute. Should the Court find it necessary to examine the exercise of jurisdiction in light of *Grable's* "third factor," removal of the AG's claims would severely disrupt the balance of federal and state judicial responsibilities that is critical to federalism, particularly in light of the constitutional and common law underpinnings of state ownership of bottomlands underlying navigable waters, which the U.S. Supreme Court has enshrined as an "essential attribute" of state sovereignty and state responsibility. *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). To avoid this disruption, the Court should exercise the removal "veto" authorized under the third factor of the *Grable* removal analysis. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313-14 (2005).

2. In its Notice of Removal, Enbridge asserted removal jurisdiction "independently" of *Grable* based on federal common law. If this Court chooses to address this alternative theory of federal question jurisdiction, it should reject removal because it does not fall within any of the exceptions to the well-pleaded complaint rule. Moreover, no Supreme Court or Sixth Circuit precedent recognizes an assertion of federal common law defenses as an exception to the well-pleaded complaint rule. Enbridge's invocations of the federal common law of foreign

relations and the federal common law of environmental protection each have been squarely rejected by other circuits as insufficient to support federal jurisdiction and removal. This Court should reject Enbridge's entreaty to manufacture a new exception that expands federal jurisdiction.

ARGUMENT

I. Under the *Grable* doctrine, removal would disrupt the balance between state and federal judiciaries, which respects states' use of state courts to protect sovereign interests in waters and submerged lands.

FLOW strongly supports the Attorney General's position that Enbridge cannot satisfy any of the *Grable* criteria for removal jurisdiction. R. 18, Page ID# 76. Should the Court determine, however, that the AG's state law-based claims *do* necessarily turn on a substantial and disputed question of federal law, *Grable* allows a removal "veto" where exercising federal jurisdiction is not "consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Grable*, 545 U.S. at 313.

That risk is significant when a defendant seeks to remove causes of action that fall squarely within a traditional domain of state law and the exercise of federal jurisdiction would impinge upon constitutionally grounded states' rights. The issue of "disruption" is not to be resolved by only guessing at how many state cases may be shifted to federal court by an exercise of federal jurisdiction. Courts must also assess the significance of the state's interests at stake in bringing the action. Here,

the state's sovereign and constitutionally grounded interests in protecting the waters and bottomlands of the Great Lakes must be accorded great weight in preserving the state-federal "balance" addressed in *Grable's* "third factor." *Id*.

The Sixth Circuit assesses several factors to evaluate the potential disruption of the balance between state and federal judiciaries. First, whether Congress has provided a statutory cause of action encompassing plaintiff's claim is a sound indicator of congressional intent regarding the scope of federal question jurisdiction. Where no such federal cause of action has been provided, congressional intent can be discerned: "[N]o welcome mat meant keep out." *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 573 (6th Cir. 2007) (en banc) (quoting *Grable*, 545 U.S. at 318-19). "While *Grable* went on to explain that the absence of a cause-of-action provision is not determinative, this certainly provides a starting point for this part of the analysis." *Id*. Here, Enbridge's Notice of Removal does not suggest there is any congressionally created cause of action by which the AG can pursue her state-law claims in federal court.

Second, courts must "inquire into the risk of upsetting the intended balance by opening the federal courts to an undesirable quantity of litigation." *Id*. This is necessarily a "speculative inquiry," but even if "the actual number of cases proved not to be overwhelming, or even uncomfortably burdensome," courts should decline jurisdiction where Congress has given no indication that it "intended to open the

federal court door quite so wide." *Id.* at 573, 574. In this case, allowing Enbridge to remove on the basis of its patently defensive invocation of federal law would obliterate the bedrock doctrine that a defendant cannot remove state claims by asserting federal defenses. Unlike in *Grable,* exercising federal question jurisdiction would have far more than a "microscopic effect on the federal-state division of labor." *Grable*, 545 U.S. at 315.

Third, and most significantly, exercising federal jurisdiction in areas that lie squarely within the traditional domain of state law risks disrupting the established balance between federal and state judicial authority. "With an eye to federalism and comity concerns, federal courts are understandably reluctant to insert themselves into areas that are traditionally the province of the state courts." *Miller v. Bruenger*, 949 F.3d 986, 994 (6th Cir. 2020); *Palkow v. CSX Transp., Inc*. 431 F.3d 543, 555 (6th Cir. 2005) ("Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined." (quoting *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-09 (1941)).

It's hard to conceive areas of law more "traditionally within the domain of state law" than those pleaded in the AG's complaint: State vindication of public rights under Michigan's public trust doctrine to protect waters and bottomlands of the Great Lakes owned by the state (Count I); remediation of a potentially

catastrophic harm to public resources via action on public nuisance (Count II); and prevention of pollution, impairment, or destruction of natural resources as provided in the Michigan Environmental Protection Act. Mich. Comp. Laws § 324.1701 *et seq*. (Count III). R. 1-1, PageID# 29-47. Against this backdrop, Enbridge's removal of the AG's complaint represents a particularly egregious disruption of the federal-state balance. That is so because the rights and responsibilities of a state, including its judiciary, under the public trust doctrine are inextricably intertwined with state ownership of the bottomlands underlying navigable waters, which the U.S. Supreme Court has enshrined as a basic attribute of state sovereignty. *See Shively v. Bowlby*, 152 U.S. 1, 47-49, 57-58 (1894).

Michigan's sovereign rights and obligations inherent in the public trust doctrine are derived from the equal footing doctrine, not federal legislation. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977) ("[T]he State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself."). Upon independence, each of the original thirteen states acquired the title held as colonies to the beds of its navigable water bodies, to hold in trust for its citizens; and each state admitted to the Union thereafter acquired the same rights under the equal footing doctrine. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-76 (1988) (affirming *Shively v. Bowlby*). The Supreme Court has stressed that "lands underlying navigable

waters have historically been considered sovereign lands" of the states; and state ownership thereof "has been considered an essential attribute of sovereignty." *Coeur D'Alene*, 521 U.S. at 283. Submerged lands owned by the state have "unique" status and are "infused with a public trust the State itself is bound to respect." *Id.* at 284; *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 457-60 (1892). "Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders while federal law determines riverbed title under the equal-footing doctrine." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 604 (2012). A case such as this one, that does not require resolution of state title, but is centered on the state's judicial exercise of its rights and responsibilities under public trust doctrine regarding bottomlands indisputably owned by the state, falls squarely within the purview of state law and state courts.

The public trust doctrine in Michigan is particularly robust, given the state's ownership and responsibility for bottomlands and waters of the Great Lakes.

> [U]nder longstanding principles of Michigan's common law, the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public. The state serves . . . as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure.

Glass v. Goeckel, 703 N.W.2d 58, 64-65 (Mich. 2005) (citing extensive state supreme court precedent dating to the late 1800s) (footnote omitted). The Michigan courts "equally with the legislative and executive departments" are the "sworn

guardians" of this trust obligation. *Obrecht v. National Gypsum Co.*, 105 N.W.2d 143, 149-50 (Mich. 1960) (adopting the public trust principles of *Illinois Central*); *Collins v Gerhardt*, 211 N.W. 115, 118 (Mich. 1926) (recognizing that the public trust doctrine imposes on the state a "high, solemn and perpetual trust, which it is the duty of the State to forever maintain"). These decisions align perfectly with the mandate of the state constitution, which declares the state's "paramount public concern" for the conservation of the state's natural resources. Mich. Const. art. IV, § 52.

Given the preeminent position of the public trust doctrine in state law, its universality among the states,[2] and the risk of trampling upon Michigan's sovereign rights, disruption of the federal-state balance appears here in its most potent form. "[C]onsiderations of comity make [federal courts] reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 21 n. 22 (1983). The "balance disruption" factor that so concerned the Supreme Court in *Grable* should be resolved in favor of the historical balance that retains in state courts cases where a state sues on causes of action traditionally within the domain of state law. The *Grable* "veto" is at its peak justification when applied

[2] Michael C. Blumm, et al., *The Public Trust Doctrine in Forty-Five States*, Lewis & Clark Law School Legal Studies Research Paper, March 18, 2014, available at SSRN: https://ssrn.com/abstract=2235329.

to an action brought by the state, in state court, to enforce the state's constitutionally derived public trust rights in its navigable waters and beds. In short, the *Grable* "veto" is necessary here.

II. Federal common law cannot overcome the well-pleaded complaint rule and does not provide an "independent" basis for removal.

In addition to *Grable* jurisdiction, Enbridge urged in its Notice of Removal ("NOR") that removal is proper because the AG's claims "implicate uniquely federal interests and thus must be brought, if at all, under federal common law." NOR at ¶ 25, R. 1, PageID# 9-10. On this basis, Enbridge asserts that the federal common law of foreign relations and the federal common law of interstate pollution each independently provides a basis for removal. *Id*. at ¶¶ 26-28. Enbridge is mistaken, however, because it cannot overcome two bedrock principles of removal jurisprudence: the well-pleaded complaint rule and its corollary rule that a defendant's assertion of federal law as a defense to a well-pleaded complaint cannot establish federal jurisdiction.

As an initial matter, FLOW is unaware of any case where removal jurisdiction under the *Grable* doctrine had been found wanting, yet federal common law independently established federal question jurisdiction. This makes perfect sense—if federal common law is found to be incapable of supplying a "necessarily raised," substantial question of federal law under *Grable*, then it cannot raise a substantial

federal question under the guise of "uniquely federal interests" that separately triggers federal question jurisdiction. One court quite rightly rejected a similar attempt to base removal on federal common law, both under the *Grable* framework and independently, as "the same wolf in different sheep's clothing." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 709 (3rd Cir. 2022).

A. The Sixth Circuit should not create a new rule establishing federal common law as an independent exception to the well-pleaded complaint rule.

The Sixth Circuit has recognized only three exceptions to the well-pleaded complaint rule: the "artful pleading" doctrine, the "complete-preemption" doctrine, and the "substantial-federal-question" or *Grable* doctrine. *Mikulski*, 501 F.3d at 560. Removal based on a defendant's invocation of federal common law plainly is not one of them. Enbridge essentially asked the District Court to manufacture a new removal exception based upon a defendant's assertion of federal common law. Other circuits have firmly rejected that removal theory, holding that federal common law should be treated no differently than any other area of federal law for purposes of applying the well-pleaded complaint rule. *See, e.g., Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 202-04 (4th Cir. 2022), *cert. denied*, 598 U.S. __ (No. 22-361) (2023); *Patrickson v. Dole Food Co*., 251 F.3d 795, 803 (9th Cir. 2001), *aff'd in part, cert. dismissed in part sub nom.*, 538 U.S. 468 (2003); *Aquafaith*

Shipping, Ltd. v. Jarillas, 963 F.2d 806, 808 (5th Cir. 1992), *cert. denied*, 506 U.S. 955 (1992).

The deficiency of Enbridge's removal theory is obvious in a slew of recent decisions in by U.S. Courts of Appeal. In response to multiple lawsuits brought by state and local governments, oil company defendants have routinely employed a "catch and kill" strategy—that is, remove to federal court any state court case seeking to hold defendants accountable for their conduct and seek dismissal. *See* Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171, 173-74 (2022) (describing oil company removal tactics as "catch and kill"). With this tactic, defendants have achieved years of litigation delay, but five circuits have recently and unanimously refused to find federal question jurisdiction based on assertions of federal common law, including the same areas of common law Enbridge claims are implicated here (foreign relations and transboundary pollution). *Minnesota v. Am. Petroleum Inst.*, 63 F. 4th 703, 709-710 (8th Cir. 2023); *Rhode Island v. Shell Oil Prods. Co*., 35 F.4th 44, 55 (1st Cir. 2022), *cert. denied*, 598 U.S. __ (U.S. April 24, 2023) (No. 22-524); *Cnty. of San Mateo v. Chevron Corp*., 32 F.4th 733, 747-48 (9th Cir. 2022); *Mayor of Baltimore*, 31 F.4th at 204-06; *Bd. of. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.) Inc.*, 25 F.4th 1238, 1257-62 (10th Cir. 2022), *cert. denied*, 598 U.S. __ (U.S. April 24, 2023) (No. 22-1550); *City of Oakland v. BP*

PLC, 969 F.3d 895, 906-07 (9th Cir. 2022). In each case, removal was rejected and remand to state court was ordered.

Enbridge's flawed understanding of removal jurisdiction premised on federal common law is further underscored by its misplaced reliance on cases in which the original action was initiated in federal district court, not state court as is the case here. NOR, at ¶¶ 25 and 27, R. 1, PageID# 9-11 (citing *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 485 (1985); *Texas Indus., Inc. v. Radcliff Materials, Inc*., 451 U.S. 630 (1981); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *United States v. Standard Oil Co*., 332 U.S. 301 (1947); *City of New York v. Chevron Corp.*, 993 F.3d 81 (2nd Cir. 2021); *Ungaro-Benages v. Dresdner Bank AG*, 376 F.3d 1227 (11th Cir. 2004)). None of the cases is relevant to the removal inquiry here—whether federal common law should displace state law to force removal of a well-pleaded complaint. Indeed, in evaluating the availability of the federal common law of nuisance as governing law and defendants' federal preemption defense, the Second Circuit in *City of New York* (relied upon by Enbridge), took pains to note that its analysis was markedly different than that used for assessing removal jurisdiction, in which courts apply "the heightened standard unique to the removability inquiry." *City of New York*, 993 F.3d at 94.

Cases where federal question jurisdiction and removal were not at issue offer no support for Enbridge's removal. Enbridge's Notice is devoid of justification for

deviating from the removal analysis in *Mikulski* and fashioning a new exception to the well-pleaded complaint rule.

B. Enbridge's defensive assertion of federal common law cannot establish federal question jurisdiction.

There is an additional reason for rejecting Enbridge's theory of jurisdiction premised on federal common law. Not surprisingly, cases affirming the preeminence of the well-pleaded complaint rule in the context of the federal common law have also affirmed its corollary rule: the defensive assertion of federal common law is insufficient to establish that a dispute "arises" under federal law for purposes of federal question jurisdiction under 28 U.S.C. § 1331. *City of Hoboken*, 45 F.4th at 707-08 (defensive invocation of federal common law is insufficient to raise a federal question); *Patrickson v. Dole Food Co*., 251 F.3d at 800 ("The common law of foreign relations will become an issue only when—and if—it is raised as a defense."); *Pacheco de Perez v. AT&T Co*., 139 F.3d 1368, 1378 (11th Cir. 1998) (finding that "issues involving the participation of the Venezuelan government, or its corporate entities [in the activities alleged in the complaint] will arise in the form of a defense by AT&T"); *accord*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987) (federal preemption of state law, even when asserted as an inevitable defense to a state law claim, does not provide a basis for removal).

The corollary rule applies with full force to Enbridge's Notice of Removal. Enbridge invoked both the federal common law of foreign relations and the federal common law of transboundary pollution in a strictly defensive manner. NOR, at ¶¶ 26 and 28, R. 1, PageID# 10-12. Enbridge argues that the Transit Pipelines Treaty *preempts* the AG's causes of action ("kill" part of "catch and kill"): "The 1977 Treaty is part of the 'supreme law of the land' under the Constitution's Supremacy Clause and burdens the State's title here. It expressly prohibits measures that have the effect of permanently stopping the cross-border flow of hydrocarbons through a transit pipeline." Enbridge's Answer to Petition for Permission to Appeal under 29 U.S.C. § 1292(b), p. 4, R. 10, PageID# 9 (citing Transit Pipelines Treaty, art. II.1).[3] Similarly, Enbridge's argument that federal common law of transboundary pollution preempts state causes of action is defensive. NOR, at ¶ 28, R. 1, PageID# 11-12. As to each area of common law Enbridge is making a classic conflict preemption argument that state law claims must yield under the Supremacy Clause. And to the extent that Enbridge seeks to invoke field preemption based on the federal common

[3] To be clear, FLOW does not concede the merits of any of the Enbridge's Treaty preemption arguments in light of the Treaty's savings clause (art. IV.1). Agreement between the United States and Canada concerning Transit Pipelines, Jan. 27, 1977, 28 U.S.T. 7449. TIAS 8720, art. IV.1. But the merits of preemption are not at issue—only whether Enbridge is *raising* a preemption defense, improperly to gain federal question jurisdiction and removal.

law, that too is a defensive argument that is insufficient to establish removal jurisdiction.

The logic is inescapable—if ordinary preemption by federal statute is insufficient to support removal, then it follows that ordinary preemption by international treaty or federal common law is also insufficient, whether the preemption is express, conflict, or field preemption. And the jurisdictional doctrine of complete preemption, which hinges on examination of congressional intent expressed in legislation, is unavailable here. Since federal common law is judge-made law, congressional intent to make an action removable simply does not exist. *Roddy v Grand Trunk Western R.R. Inc.*, 395 F.3d 318, 323 (6th Cir. 2005); *Bd. of. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.) Inc.*, 405 F. Supp. 3d 947, 973 (D. Colo 2019), *aff'd*, 25 F.4th 1238 (10th Cir. 2022). The Court should reject Enbridge's attempt to defend its way into federal court on the back of defensively asserted federal common law.

III. Federal common law of foreign relations does not establish removal jurisdiction in this case.

As shown above, Enbridge's reliance on vague invocations of federal common law is reason enough to reject federal question jurisdiction and removal. But there are additional reasons for rejecting the federal common law of foreign relations specifically as a theory of jurisdiction and removal in this case. To find

jurisdiction here, this Court would have to go outside the restricted categories for which the Supreme Court has held that the "interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Indus., Inc. v. Radcliff Materials, Inc*., 451 U.S. 630, 604-641 (1981). The Supreme Court has never upheld removal based on an assertion that the federal common law of foreign relations provides federal question jurisdiction under 28 U.S.C. §1331. And, even under the novel, expansive approach pressed by Enbridge, the AG's complaint does not implicate issues of U.S. foreign relations sufficiently to displace Michigan law pleaded in the Complaint and force removal.

A. The Supreme Court has established narrow categories for application of the federal common law of foreign relations—none of which apply here.

The Supreme Court has recognized only two categories of "uniquely federal interest" where the relationship of the dispute to the conduct of U.S. foreign relations is so significant that state law must be displaced because a federal rule of decision is necessary to protect the Constitution's allocation of foreign affairs to the national government and assure uniformity of decisions. Those categories are: (1) "act of state doctrine," which holds that U.S. courts cannot question the validity the official acts of foreign sovereigns, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); and (2) invalidation of laws enacted by state legislatures to assert a state's

own "foreign policy" objectives, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Zschernig v. Miller,* 389 U.S 429 (1968).

The leading Supreme Court cases establishing the contours of the federal common law of foreign relations did not address federal question jurisdiction and did not examine removal. In *Sabbatino*, the Supreme Court reset the foundations of the act of state doctrine, which precludes courts (state and federal alike) from sitting in judgment of the validity a foreign government's actions taken within its own borders. The central issue in that case was whether a state court-appointed receiver could exercise of dominion over the contested proceeds of a sugar shipment expropriated by the Cuban government. The Supreme Court addressed a conflict of laws issue and held that the applicability of the act of state doctrine is determined by federal law, not state law or international law. *Sabbatino*, 376 U.S. at 425-27. Importantly, diversity of citizenship was uncontested, and the Court considered neither a challenge to federal jurisdiction nor removal jurisdiction. *Id*. at 421, n. 20.

While *Sabbatino* affirmed that the act of state doctrine is an area of the federal common law of foreign relations, it did no more than that. *W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 409 (1990) ("The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."). The

Sabbatino decision should not be read as expanding federal common law beyond circumstances where the official acts of a foreign sovereign are directly implicated, and the application of state law stands as a clear obstacle to the conduct of U.S. foreign affairs.

In addition to the *Sabbatino* line of cases, the Supreme Court has established a second category of cases where federal common law of foreign relations governs to protect foreign relations: instances where state legislatures have enacted their own "foreign policies" that impermissibly impinge upon federal foreign affairs powers. In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court invalidated an Oregon statute that mandated intrusive inquiries into the inheritance laws and practices of foreign governments. The Court found that the law had "great potential for disruption or embarrassment" and, therefore, the state statute unconstitutionally infringed on the federal government's foreign affairs powers. *Id*. 434-35. And, like *Sabbatino*, the action was filed in federal district court—thus removal was not at issue and the Court did not examine the interplay between federal common law and removal jurisdiction.

Similarly, in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court addressed whether the foreign affairs doctrine preempted a California statute aimed assisting Holocaust survivors and heirs in identification and recovery of insurance proceeds. The issue was conflict preemption—whether the California

statute conflicted directly and significantly with the president's constitutional authority to set U.S. foreign policy—in that case to make agreements with foreign governments settling the claims of American citizens against foreign corporations. *Id*. at 421. While the Court held the California statute preempted, it did *not* address removal jurisdiction since the action was brought in federal court.

These cases affirm that the federal common law of foreign relations may at times be necessary to displace state law, but only in narrow circumstances. The Supreme Court has cautioned that, while the act of state doctrine announced in *Sabbatino* may be of "particular importance to foreign relations, . . . the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004). *See Id*. at 743 (Scalia, J., concurring) (observing that "creating a federal command (federal common law) out of 'international norms' . . . is nonsense on stilts"); *accord Mayor and City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 562 (D. Md. 2019), *aff'd, Mayor of Baltimore,* 31 F.4th 178 ("[T]here is no congressional intent regarding the preemptive force of the judicially-crafted foreign affairs doctrine, and the doctrine obviously does not supply any substitute causes of action."); *Boulder Cnty.*, 405 F. Supp. 3d at 973 (distinguishing *Garamendi* and finding that removal based upon complete preemption by the foreign affairs doctrine is impossible).

The limited reach of the Supreme Court's foreign affairs decisions is significant here for several reasons. In each case the action was brought in federal court, thus the propriety of removal based on foreign affairs was never at issue. Also, the impact of foreign affairs principles, when they do apply, is ordinary preemption. *Garamendi,* 539 U.S. at 419-20 & 420 n. 11 (analyzing conflict and field preemption); *Zschernig*, 389 U.S. at 432 (applying field preemption). Long-standing Supreme Court precedent disallows federal preemption as a basis for removal jurisdiction, *see Caterpillar,* 482 U.S. at 392-93, thus the Supreme Court's foreign affairs cases resulting in preemption of state law cannot support removal jurisdiction. In sum, there is no Supreme Court or Sixth Circuit precedent that stands for the extraordinary proposition advanced by Enbridge that invocation of federal common law of foreign relations shoves aside the venerable well-pleaded complaint rule, resulting in removal.

B. The Court should reject Enbridge's invocation of *Torres's* unjustified, expansive approach to federal question jurisdiction.

The Supreme Court's foreign affairs jurisprudence has come nowhere near the expansive, ill-defined approach to the federal common law of foreign relations of the kind devised by the Fifth Circuit in *Torres v. S. Peru Copper Corp.,* 113 F.3d 540 (5th Cir. 1997), a case cited by Enbridge as describing the instant case "perfectly." NOR, at ¶ 26, R. 1, PageID# 10-11. In *Torres*, the court held that federal

common law of foreign relations arises when a state-law based cause of action brought by citizens of Peru may affect the "vital" economic *and* sovereign interests of another country, thereby creating federal question jurisdiction and allowing removal, all without regard to the well-pleaded complaint rule. *Torres*, 113 F.3d at 543.

The *Torres* approach is flawed. It does not fall within any of the categories endorsed by the Supreme Court for application of the federal common law of foreign relations described above, nor has the Sixth Circuit recognized *Torres*. The limitations of the Supreme Court's foreign affairs cases are important here because their misapplication by lower courts renders suspect the three primary cases relied upon by Enbridge for removal of the AG's complaint: *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986); *Torres*; and *Pacheco de Perez,* 139 F.3d 1368. *See* NOR, at ¶ 26, R. 1, PageID# 10-11. The Ninth Circuit's rationale in *Patrickson* for breaking with those cases was grounded on three distinct points:

- First, the Ninth Circuit found that in *Marcos* the Second Circuit substantially misunderstood the scope of *Sabbatino* as a jurisdictional decision. *Patrickson*, 251 F.3d at 802 ("*Sabbatino* was about choice of law, not jurisdiction."). In *Marcos* the Philippines government sued pursuant to official governmental directives to recover property located in the United States. The *Marcos* court found that, because the foreign sovereign sought to enforce its directives in

this country, federal common law must govern the action, thus displacing state and international law. 806 F.2d at 354. But that holding should not be read as expanding federal jurisdiction or removal based upon the mere utterance of "foreign relations". *Patrickson*, 251 F.3d at 801-02 & 802 n.4.

- Second, the *Patrickson* court found that when Congress wants to provide for jurisdiction and removal in circumstances that implicate foreign relations, it knows how to do so. *Id.* at 803 (citing federal statutes controlling federal jurisdiction in foreign affairs). Congress has not extended federal question jurisdiction "to all suits where the federal common law of foreign relations might arise as an issue. We interpret congressional silence outside these specific grants of jurisdiction as an endorsement of the well-pleaded complaint rule." *Id*.
- Third, the *Patrickson* court was highly skeptical that federal question jurisdiction and removal should turn on a judicial assessment about how a case might affect foreign government interests or U.S. foreign policy interests. "That is an inherently political judgment, one that courts—whether state or federal—are not competent to make." *Id*. at 804. The court concluded that "[b]ecause such political judgments are not within the competence of either state or federal courts, we can see no support for the proposition that federal courts are better equipped than state courts to deal with cases raising such

concerns." *Id.* The court found the case for exclusive federal jurisdiction warranting removal based on foreign affairs concerns to be weak to nonexistent.

The *Patrickson* court's penetrating critique of *Torres, Marcos* and other cases cited by Enbridge in its Notice of Removal (*Texas Indus.* and *Pacheco*) is on point and persuasive. [4] This Court likewise should reject the expansive approach to removal premised on the federal common law of foreign relations.

C. Even under the expansive approach of *Torres,* the Attorney General's complaint neither impacts Canada's vital interests, nor interferes with the conduct of U.S. foreign relations.

Even if this Court were to adopt the unjustifiably expansive approach to removal jurisdiction in *Torres*, the facts there were vastly different from the facts presented by the Complaint. In *Torres* all of the key events recited in the complaint occurred entirely within the sovereign territory of Peru, the government owned the mined land and the minerals, and the government of Peru had "participated substantially" in activities for which the defendant mining company was being sued, thus implicating Peru's "vital" sovereign interests. *Torres*, 113 F.3d at 543.

[4] The *Patrickson* court noted that *Texas Indus., Inc. v. Radcliff Materials, Inc*., 451 U.S. 630 (1981) was "antitrust case that had nothing to do with foreign affairs." 251 F.3d 801 n.4. And the Eleventh Circuit in *Pacheco* merely adopted *Torres* without analysis. *Id*. at 801.

In contrast, the entire focus of the Complaint is on a 4.5-mile stretch of Enbridge's aged and failing oil pipelines, located wholly within the sovereign territory of Michigan. Nothing in the Complaint challenges any official act of the Canadian government or its exercise of sovereign power. Nor does the Complaint imperil the Treaty or U.S. diplomacy related thereto; the remedy sought by the AG does not prevent either the U.S. or Canadian government, nonparties here, from engaging fully in the Treaty's dispute resolution process. And Canada's alarm about (highly disputable) impacts to its economy from shutdown of Line 5 is irrelevant to the jurisdictional question at hand. *Patrickson*, 251 F.3d at 804, n. 9 (noting that the "effect of the litigation on the economies of foreign countries is of absolutely no consequence to our jurisdiction"). As the Supreme Court observed in *Sabbatino*, "the less important the implications of an issue are for *our* foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428 (emphasis added). This Court should reject Enbridge's efforts to recharacterize and federalize the AG's state law-based claims under the guise of federal common law of foreign relations.

IV. Federal common law of environmental protection does not establish removal jurisdiction of the Attorney General's well-pleaded complaint.

In its Notice of Removal Enbridge asserts, without specifics, that the federal common law of environmental protection governs the Complaint; thus, "this case

belongs in federal court." NOR, at ¶ 28, R. 1, PageID# 11-12. As discussed in Section II.B above, defensively asserted federal common law is incapable of overriding the well-complaint rule or sustaining removal. That result is even more pronounced with respect to federal common law of nuisance relating to water pollution (whether transboundary or not) for this reason: it doesn't exist, having been displaced by the Clean Water Act fifty years ago. *City of Milwaukee v. Illinois*, 451 U.S. 304, 328-29 (1981).

Again, recent circuit courts of appeal decisions in the fossil fuels cases are instructive. The First, Fourth and Tenth Circuits have flatly rejected the oil companies' attempt to invoke federal common law of environmental protection as a basis for removal. In each, the courts ruled that the federal common law of nuisance with respect to water and air pollution has been extinguished by the federal Clean Water Act and the Clean Air Act, respectively—and cannot serve as a basis for removal. *Rhode Island v. Shell Oil Prods. Co*., 35 F.4th at 55-56; *Mayor of Balt.*, 31 F.4th at 206-07; *Bd. of. Comm'rs of Boulder Cnty.*, 25 F.4th at 1260-61.

Enbridge's reliance on older Supreme Court decisions, *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) and *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), for the proposition that federal common law of environmental protection is alive and well, and must govern the Complaint here, is misplaced. *See* NOR, at ¶ 28, R. 1, PageID# 11-12. The impatience of other courts with oil companies' same

arguments is notable. After an exhaustive review of the Supreme Court precedents, including the cases cited by Enbridge, the Fourth Circuit concluded that defendant energy companies' argument for removal based on federal common law of environmental protection "defies logic." *Mayor of Baltimore*, 31 F.4th at 206. Enbridge's flawed invocation of the nonexistent federal common of law of nuisance should be viewed the same way and rejected.

CONCLUSION

The Supreme Court has consistently emphasized that "in exploring the outer reaches of 28 U.S.C. § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Grable*, 545 U.S. at 317. The Court has admonished that this sensitive judgment includes not only an assessment of congressional intent but also respect for the constitutional balance in our federal system between federal and state power and authority:

> We have reiterated the need to give "[d]ue regard [to] the rightful independence of state governments"—and more particularly, to the power of the States "to provide for the determination of controversies in their courts." . . . Our decisions, as we once put the point, reflect a "deeply felt and traditional reluctance ... to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes." . . . That interpretive stance serves, among other things, to keep state-law actions like [plaintiff's] in state court, and thus to help *maintain the constitutional balance* between state and federal judiciaries.

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. 374, 389-90 (2016) (emphasis added, citations omitted). Due regard here for the rightful independence of state government and its judiciary requires due respect for the venerated well-pleaded complaint rule, the limited jurisdiction of federal courts, and the AG's decision to exercise Michigan's sovereign rights and responsibilities in Michigan state court. Enbridge's expansive and unsupportable theories of federal question jurisdiction and removal should be rejected. This case should be remanded to state court.

Respectfully submitted,

Dated: September 25, 2023

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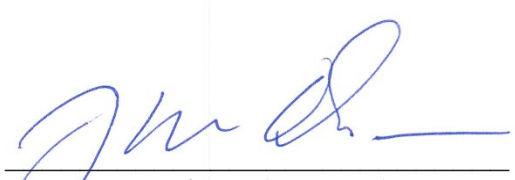

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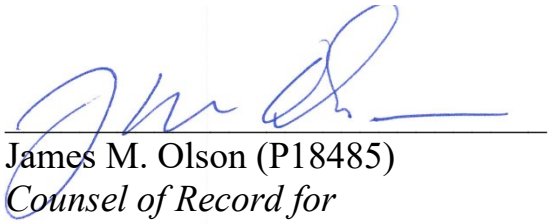

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