No. 26-1021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
CASE NO. 1:20-cv-01141, HON. ROBERT J. JONKER

BRIEF OF *AMICUS CURIAE* GREAT LAKES BUSINESS NETWORK

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DISCLOSURE STATEMENT

Pursuant to Sixth Cir. R. 26.1, *amicus curiae* makes the following disclosure:

1. Is the *amicus curiae* a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal or an *amicus curiae*, that has a financial interest in the outcome?

No.

Dated: May 11, 2026

/s/ Bruce T. Wallace
Bruce T. Wallace

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INTRODUCTION

The Great Lakes Business Network ("Business Network"), composed of more than 200 businesses concentrated geographically around the Great Lakes and predominated by local Michigan companies, respectfully requests that the Court reverse the district court's decision to preempt the state's enforcement of the conditions in the 1953 contractual Easement allowing Enbridge to construct and operate Line 5 on the state's property—the lakebed of the Straits of Mackinac.[1] The business owners, candidly and justifiably attending both to our own self-interest and to the interests of the state and its citizens that we hold dear, seek to preserve an oil-free Great Lakes to enable our businesses to thrive, while reversing a lower court decision that threatens our private property and the property of others. We are not a political or advocacy organization. We are business realists, with responsibilities to the employees, investors, customers, and local and state governments that we support.

For the legal reasons set forth in detail below, we oppose Enbridge's attempt to preempt state law and avoid having this critical case heard on the merits. Business Network members recognize the threat Line 5 poses to the Great Lakes, its

[1] Both parties consent to the Business Network's filing of this amicus brief. No party or its counsel authored any part of this brief or contributed money to support its preparation or submission. No person other than the Business Network and its members contributed money to prepare or submit this brief.

businesses, and our own livelihoods, and we consequently support the efforts by the Michigan Officials to enforce the contractual terms of the Easement agreed to by Enbridge and the state in 1953. The enforcement of these contractual conditions would terminate the Easement and protect the Great Lakes. Enbridge's resistance to enforcing that contract and the district court's erroneous decision in support of Enbridge give us, as businesses and property owners, cause for alarm. Enbridge is seeking to seize the property of another landowner, the State of Michigan, without authorization from Congress. Such a seizure threatens private property everywhere: Enbridge and other pipeline companies would be able use the use federal Pipeline Safety Act ("PSA") to exercise eminent domain powers over any property, private or state, in which they have an existing easement, ignoring the contractual terms of that easement and taking permanent control of it. As businesses and landowners ourselves, that result would be of grave concern.

Our business calculations support decommissioning Line 5 and protecting property rights. Our understanding of the applicable law dictates that this critical relief be decided on the merits under Michigan law and not preempted by federal law. And our membership is unanimously committed to this outcome.

INTEREST OF THE AMICUS CURIAE

Amicus curiae the Great Lakes Business Network ("Business Network") is an unincorporated association of over 200 prominent businesses and business leaders

in the Great Lakes region. The Business Network seeks to provide for "thriving ecosystems, economies, and communities" in the Great Lakes area.[2] Each member business depends on the purity and quality of the Great Lakes and their reputation as healthy and beautiful lakes. The Business Network includes businesses across a broad range of sectors, many of them leading enterprises in their fields, including Cherry Republic, Bell's Brewery, Short's Brewing Company, Patagonia, and Keweenaw Mountain Lodge.

Of particular concern to the Business Network are the dual pipelines that make up Line 5 in the Straits and their high likelihood of rupture. Line 5's owner and operator, Enbridge, was responsible for the Kalamazoo River oil spill, which pumped over 1 million gallons of oil into the Kalamazoo River over 17 hours despite alarms ringing in the Enbridge control center, contaminating 40 miles of the Kalamazoo River, and costing over $1 billion to clean up to the extent possible.[3] This disaster should never have happened. According to the National Transportation Safety Board, the federal agency which oversaw the investigation into the event:

[2] *About GLBN*, Great Lakes Bus. Network, https://glbusinessnetwork.com/about-us/ (last visited May 5, 2026).

[3] Jeff Alexander & Beth Wallace, *Sunken Hazard*, National Wildlife Federation (Oct. 8, 2012), https://www.nwf.org/Educational-Resources/Reports/2012/10-08-2012-Sunken-Hazard.

"[t]he rupture and prolonged release were made possible by pervasive organizational failures at Enbridge Incorporated."[4]

As devastating as the Kalamazoo River spill was, a Line 5 rupture would be far worse. A Michigan Technical University study commissioned for the state estimated that a Line 5 spill would contaminate up to 1,000 miles of shoreline and 650 square miles of the open waters of Lakes Huron and Michigan.[5] The risk of a spill is significant. In the past 6 years alone, ships navigating the Straits perpendicular to Line 5 have twice struck the dual lines, once denting them[6] and another time pulling them 10 feet across the lakebed out of alignment. [7] It is only a matter of time before the lines are dealt a fatal blow.

Any oil spill in the Great Lakes would gravely injure the businesses and communities that depend on the water and on navigation, and so the Business Network unequivocally supports the State of Michigan's efforts to protect the natural

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[4] PIPELINE ACCIDENT REPORT, Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan, July 25, 2010, NTSB Report (Adopted July 10, 2012), NTSB Number: PAR-12/01, at xii, https://www.ntsb.gov/investigations/AccidentReports/Reports/PAR1201.pdf.

[5] *See* Mich. Tech. Inst., *Independent Risk Analysis for Straits Pipelines, Final Report* (Sept. 15, 2018) at 69-71, https://www.michigan.gov/psab/-/media/Project/Websites/psab/archive/media/Straits_Independent_Risk_Analysis_Final.pdf?rev=7ec49ca4abd847b4a2542fcd083674fe&hash=37C49779A2B68A3EB79B85CA42AC7B93.

[6] State of Michigan, "Notice of Revocation and Termination of Easement" ("Notice"), R.158, Page ID.2352-71.

[7] *Id.* at PageID.2357.

resources of the Great Lakes through its enforcement of the contractual conditions of the 1953 Easement. Our businesses depend on the navigation, from ferries to kayaks to freighters supplying goods, all of which would be decimated by an oil spill, and which are already being hampered by measures the Coast Guard has had to order Enbridge to take to prevent an anchor from shearing the pipeline. Our businesses also rely on the tourist recreation – swimming, fishing, walking the beach—protected by the original 1953 Easement, activities that would be destroyed by an oil spill. And we all depend on clean water.

The Business Network's members are not alone. In 2024, outdoor recreation in the State of Michigan accounted for 124,965 jobs, with wages totaling $6.9 billion and $15.1 billion value added to the Michigan GDP.[8] In 2014, "over 113 million visitors spent over $22 billion in Michigan alone" visiting the Great Lakes.[9] The craft beer industry—in which many Business Network members participate and lead—supports 66,990 jobs in Michigan and contributes more than $9.9 billion to the state's economy.[10] All this would be at risk from a Line 5 rupture. The Michigan

[8] U.S. Bureau of Economic Analysis, 2024, Outdoor Recreation Economics Statistics (ORES), State Tables (embedded Excel sheet), https://www.bea.gov/data/special-topics/outdoor-recreation.

[9] Mich. Sea Grant, *The Dynamic Great Lakes Economy, Employment Trends from 2009 to 2018*, (Oct. 2020), https://www.michiganseagrant.org/wp-content/uploads/2020/10/MICHU-20-715-Great-Lakes-Jobs-Report-fact-sheet.pdf.

[10] Dave Bartkowiak, Jr., *Michigan's Beer Industry Chugs Along: $9.9 Billion to State's Economy, CLICK ON DETROIT* (July 9, 2021),

Tech study concluded that such a spill could cost the state $1.878 billion in economic damages due to lost tourism income, harm to fisheries and fishing, other recreational damage, and public health costs.[11]

We expect that Enbridge and its supporting amici will posit that purported national economic concerns from shutting down Line 5—jobs, energy security, and consumer prices—should outweigh the damage a Line 5 rupture will cause Business Network members and other Michigan businesses. But if that were true, the Business Network would not support the shutdown of Line 5. Our businesses depend on affordable, reliable and plentiful energy. Our revenues depend on a robust regional economy that creates and maintains jobs. But after close and extended research on the economic impacts of a Line 5 shutdown, we know that the economic concerns of Line 5 shutting down are baseless and the story advanced by Enbridge is fiction.

Enbridge's own experts disprove Enbridge's claims of economic disaster. In a case involving the shutdown of Line 5 heard in the federal district court in Wisconsin, Enbridge's economic expert testified that if Line 5 shuts down, because of the availability of refined product, the price of gasoline at the pump would

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https://www.clickondetroit.com/features/2021/07/09/michigans-beer-industry-chugs-along-99-billion-to-states-economy/#//.

[11] Mich. Tech. Inst., *Independent Risk Analysis for Straits Pipelines Executive Summary* at 31, https://www.michigan.gov/psab/-/media/Project/Websites/psab/archive/media/Straits_Independent_Risk_Analysis_Final_ExecSummary.pdf?rev=359e3d18ea414c3cac53a94231122b69&hash=AD8148B951C8AA699EC68AF28F89F0C6.

increase only one half to one cent per gallon.[12] Enbridge's and industry experts further testified that virtually all of the 400,000-450,000 barrels of oil per day supplied to refineries by Line 5 would be quickly replaced by existing infrastructure: 201,000 barrels per day by waterborne transport to refineries in Quebec, where it would be shipped to other refineries in the region;[13] 100,000 barrels per day in existing excess capacity in another Michigan pipeline, Line 78, that does not transit the Straits;[14] and at least 110,000 barrels per day that Enbridge can add to Line 78 simply by adding pumping capacity (without laying new pipe).[15] And even more capacity exists through the expansion of rail.[16] Because the refineries supplied by Line 5 now would promptly receive a full complement of oil from other sources,

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[12] *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Company, Inc.*, 626 F.Supp.3d 1030 (W.D. Wis. 2022) (No. 19-CV-602-WMC) [hereinafter "*Bad River Band*"], Neil K. Earnest Expert Report at 12, ECF No. 262.

[13] *Bad River Band*, Tr. of Earnest Testimony at 91:18–92:2, 130:6–11, ECF No. 610; *Bad River Band*, Sarah Emerson Expert Report at Exhibit B 23-24, 37-38, ECF No. 265-1.

[14] *Bad River Band*, Tr. of Earnest Testimony at 99:11–20, ECF No. 610.

[15] *Bad River Band*, Defs.' Objs. and Resps. to Pls.' Fourth Set of Interrogs. at 4, 5, ECF No. 399-4 (describing actions needed to expand each segment of Line 78); *Bad River Band*, Brisben Expert Rebuttal Report at 52-53, 62-63, ECF No. 255-1("The Line 78 expansion would mostly involve increasing the pressure of the pipeline by adding compression (vs. replacing with bigger pipe or twinning the pipeline).") (showing expansion of Line 78A from 570,000 bpd to 680,000 bpd of capacity would allow for full use of downstream pipelines Line 78B, Line 17, and Line 79).

[16] *Bad River Band*, Emerson Expert Report at 27-28, 41-42, ECF No. 265-1.

there would be no job loss or energy security concerns. These phantom economic losses from a Line 5 shutdown cannot compare to the concrete, real, and massive damage that Business Network members and other Great Lakes businesses would suffer.

The Business Network therefore supports the efforts by Michigan officials to enforce the terms of the original 1953 Easement agreed to by Enbridge and the state, enforcement of which would shut down Line 5 and protect our business interests in the Great Lakes. We further support the rule of law that ensures that contract easement terms agreed to voluntarily and freely by parties are enforceable. Pipeline companies like Enbridge should not be able to seize complete control of an easement as they seek to do here, ignoring the conditions they have agreed to and creating a permanent right away over another's land (private or state). The district court's decision to allow seizures of this type puts existing contracts and easements in legal limbo, voidable at the discretion of a pipeline company. And it threatens the integrity of contracts and property everywhere.

We are encouraged that the law does not allow a private pipeline company to seize the property of another without Congressional or state authorization, and that such a seizure would be an unconstitutional taking under the 5th Amendment. We also are pleased that the Pipeline Safety Act itself forbids the federal government from authorizing such a seizure, which would be a prohibited federal prescription of

a pipeline route or location. And we are gratified that we will not have to rely exclusively on the Pipeline Materials Safety Administration ("PHMSA"), the weak and ineffective federal agency designated to administer the PSA, to protect our property rights and the Great Lakes; the contractual conditions in the siting agreements between pipeline companies and landowners provide essential protections. The district court decision ignored the rights of property owners protected by law. We ask you to reverse that decision.

ARGUMENT

This is a case like no other PSA preemption case that has come before the courts. It does not involve general rules or restrictions imposed by state or local governments. *See Couser v. Shelby County, Iowa,* 139 F.4th 664, 667 (8th Cir. 2025) (in response to a proposed pipeline, two counties "passed ordinances regulating pipelines"). It does not involve prospective requirements set after a pipeline has been sited. *See Olympic Pipe Line Co. v. City of Seattle,* 437 F.3d 872, 875 (9th Cir. 2006) (city attempted to impose new safety requirements in a licensing proceeding); *Kinley Corp. v. Iowa Utils. Bd.,* 999 F.2d 354, 356-57 (8th Cir. 1993) (state required existing pipeline to apply for a new state permit); *Williams Pipe Line Co. v. City of Mounds View,* 651 F. Supp. 551, 553-556 (D. Minn. 1987) (city and county set new safety standards for an existing pipeline pursuant to the original agreement between the county and pipeline company: "The county engineer had the right to 'make all

rules with respect to possible hazards as he shall deem necessary and advisable.'"). It does not ask a court to decide whether a general regulation is closer to a safety standard or a siting decision. *Couser*, 437 F.3d at 670 (raising the issue of whether zoning "setbacks are …'safety standards' under § 60104(c) … or 'location or routing' regulations under § 60104(e)"). Indeed, it does not involve a safety standard at all.

This case is about an agreement that was made between Enbridge and the State of Michigan when the Line 5 pipeline was first sited in 1953. [17] The agreement—a contract granting a limited easement to Enbridge to build and operate a pipeline on the bedlands of the Straits of Mackinac— contained conditions that were agreed to by Enbridge. As contract conditions consented to by both parties in the original 1953 Easement, they were not standards, safety or otherwise. The state seeks to enforce those original contractual conditions—conditions that were negotiated well before the enactment of the PSA—not to impose standards.

The PSA, preempting only safety standards, has no power to countermand the 1953 contractual, consensual Easement terms. The State of Michigan brief goes into detail as to why. In this brief, amicus Business Network demonstrates that PSA preemption of this contractual Easement would be both unlawful and unwise. Such

[17] The actions taken by the state in 1953 are also governed by the public trust doctrine. The state and other amici address those issues in their briefs, and we support their compelling arguments; we do not cover them here.

preemption would be unlawful because it would erase essential contract conditions in the original Easement, enabling Enbridge to exercise unfettered control over the state's property. In the absence of Congressional delegation to Enbridge and other oil pipeline companies the power of eminent domain, Enbridge's continued occupation of the Easement would be both an unlawful trespass and an unconstitutional taking of state property. And not just a taking: it would be the prescription of a pipeline route in violation of the PSA itself.

PSA preemption would be unwise as well. Without allowing landowners like Michigan to negotiate site-specific conditions with pipeline companies, their sole remedy would be the inaction of the Pipeline Hazardous Materials Safety Administration ("PHMSA") — the weak, ineffective and interest-conflicted federal agency charged with implementing the PSA.

I. PSA preemption of the 1953 Easement's agreed-upon essential contract conditions would be a trespass, an unconstitutional taking of state property and the unlawful prescription of a pipeline route

Enbridge is attempting to seize public property by claiming that the Pipeline Safety Act's preemption clause allows them to turn their terminable easement into a permanent one, thereby depriving the state of control of its property and creating a permanent right of way for Enbridge. Although the seizure of state land by private actors is typically unlawful, the Supreme Court has recognized that Congress can delegate its eminent domain power to allow a private entity to take state land for

public use. *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 487 (2021). Here, Congress has made no such delegation: the Pipeline Safety Act does not provide *any* delegation of the federal government's eminent domain power. In the absence of that delegation, Enbridge's actions are unlawful in three ways, each of which is grounds for reversing the district court's decision: Enbridge's seizure of state land is an unlawful trespass; the use of the PSA to deprive the state of its property is an unconstitutional taking under the 5th Amendment; and even if such a forced easement were allowed, it would violate the PSA's prohibition against the federal prescription of the routing of pipelines.

A. Enbridge's theory of the Pipeline Safety Act transforms the state's conditional easement into a permanent easement, which unlawfully deprives the state of its property

Enbridge's attempt to use the PSA preemption provision to prevent the state from enforcing the essential conditions of the 1953 Easement[18] would transform the Easement from conditional to unconditional, deprive the state of control of its property, and create a permanent right of way for Enbridge. The district court decision erroneously approved Enbridge's unlawful seizure of state property.

The 1953 Easement issued by the state to Enbridge has a number of essential conditions that enable the state to maintain control over its property—conditions

[18] State of Michigan, "Straits of Mackinac Pipeline Easement" (1953) ("Easement"), R.158, PageID.2373-85.

Enbridge has violated and which the district court held the state may not enforce. It has 15 construction and operational requirements, Easement Secs. A, F, which were designed to ensure the integrity of the pipeline and were essential to the granting of the Easement. *Id*. They were also agreed to by Enbridge's predecessor in interest. The Easement includes a single enforcement provision: that the state can terminate the Easement if any of the 15 requirements are breached and uncorrected for 90 days after Enbridge was notified of them. *Id.* at Sec. C. Enbridge does not dispute that the Easement's conditions and right of termination are material and essential to the Easement.

The 2020 State Notice documents multiple violations of several of those conditions – involving lack of required coatings, excessive span length, acute pipeline curvature and lack of due care—of which Enbridge was notified and given far more than 90 days to correct. Notice, R.158, PageID.2352-71. The violations of those conditions remain unaddressed.

Enbridge argues and the district court held that the PSA preempts the state from terminating the Easement despite Enbridge's material breaches. According to the district court's decision, Enbridge can ignore the conditions of the Easement with impunity because under the PSA's preemption clause, the state cannot terminate the Easement—the Easement's only enforcement provision—when Enbridge violates its terms. The district court's decision transforms the Easement from conditional to

unconditional, allowing Enbridge to permanently maintain its right of way on state property. In doing so, it deprives the state of control of its property. "[T]he right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987) (citations omitted). Forcing an unwanted easement onto the state deprives the state of its right to exclude others from its property, operating as a seizure of the state's Easement. But Enbridge cannot seize the state's Easement without authorization from Congress—authorization it does not have.

B. Enbridge's seizure of the state's Easement is an unlawful trespass because the federal government has not delegated eminent domain power to Enbridge

Although Congress has the power to authorize a seizure of state land, it has not done so here. Eminent domain power is an inherent power of the government. It can only be exercised by a private company if the government delegates eminent domain power to the company. *PennEast Pipeline Co.*, 594 U.S. at 487. The district court held that the federal PSA authorizes Enbridge to turn a conditional easement into a permanent one, thereby seizing state property. But the federal government has not delegated its eminent domain power to Enbridge to take the bottomlands of the Great Lakes via the PSA or any other means. The district court's decision thus approves an unlawful trespass, the unlawful seizure of state land by a private party.

The legal analysis of the government's delegation of eminent domain powers through the Pipeline Safety Act is quite straightforward. The Pipeline Safety Act regulates pipeline safety. Nowhere does it delegate eminent domain power to private parties or authorize the Secretary of Transportation or PHMSA to do so. Indeed, the PSA does not mention eminent domain at all. And in no cases has the PSA been interpreted to authorize private parties (or the federal government, for that matter) to exercise eminent domain. In fact, the only case on point holds the opposite. In *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Co.*, the district court considered whether the PSA could compel a property owner – in that case, a tribal government—to grant or renew an easement, thereby enabling Enbridge to seize the property of another. 626 F. Supp. 3d 1030 (W.D. Wis. 2022). The court held the PSA could not be stretched to authorize such a seizure, saying, "Enbridge [has not] been able to cite *any* legal authority supporting its argument that the Pipeline Safety Act would *require* a tribe (or any other landowner for that matter) to grant or renew an easement for a pipeline across its land . . ." *Bad River Band*, 626 F. Supp. 3d at 1049 (emphasis in original).

If Congress had intended to delegate eminent domain power to private parties like Enbridge, it knows how to do so. Contrast the silence of the PSA with the detailed eminent domain provisions of the Natural Gas Act ("NGA"). The NGA contains an express eminent domain provision that requires a natural gas pipeline

company to apply to the lead agency, the Federal Energy Regulatory Commission, for a certificate of convenience and necessity, go through a hearing on the application, obtain the certificate, seek to reach an agreement on the acquisition of the property with the property owner, and then seek to condemn the property in federal or state court using the eminent domain procedures of the state. 15 U.S.C. § 717f(c), (h). In the Natural Gas Act, Congress explicitly granted eminent domain authority by stating:

> When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas . . ., it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.

Id. at 1717f(h). In contrast, the Pipeline Safety Act does not include any mention of eminent domain. The PSA does not authorize any entity, public or private, to take private or state property. It contains no process for pipeline companies to seek or institute condemnation of private lands, much less state public trust land. It has no provision for the PSA's implementing federal agency, PHMSA, to supervise or oversee Enbridge's condemnation actions.

There is nothing in the PSA or the cases interpreting it to indicate that Congress intended to grant such expansive powers to hazardous liquid pipeline companies like Enbridge.

C. Without a Congressional delegation of eminent domain power to Enbridge, the district court's authorization of Enbridge's seizure of state property is an unconstitutional taking

As demonstrated above, in the absence of condemnation under the power of eminent domain, a private party's imposition of a permanent easement (as Enbridge has imposed on the state) is a trespass and the district court decision should be reversed on that basis alone. But the district court's error is worse—it reaches constitutional dimensions. The district court held that a federal law—the PSA—authorizes a private pipeline company to seize the state's Easement. Without an eminent domain delegation, that authorization is an unconstitutional taking under the 5th Amendment.

Relying on *Nollan's* principle that the right to exclude others is an essential attribute of property ownership, the Supreme Court has repeatedly held that the government seizure of an easement is a taking:

> We reiterated that the appropriation of an easement constitutes a physical taking in *Nollan v. California Coastal Commission*. The Nollans sought a permit to build a larger home on their beachfront lot. 483 U.S. at 828. The California Coastal Commission issued the permit subject to the condition that the Nollans grant the public an easement to pass through their property along the beach. *Ibid.* As a starting point to our analysis, we explained that, had the Commission simply required the Nollans to grant the public an easement across their property, "we have no doubt there would have been a taking." *Id.,* at 831; see also *Dolan*, 512 U.S., at 384 (holding that compelled dedication of an easement for public use would constitute a taking).

Cedar Point Nursery v. Hassid, 594 U.S. 139, 151-52 (2021) (citations cleaned up); *see Kaiser Aetna v. United States,* 444 U.S. 164, 179-80 (1979); *Loretto v. Teleprompter Manhattan Catv Corp*., 458 U.S. 419, 433 (1982) ("imposition of a navigational servitude requiring public access to a pond was a taking") (citing *Kaiser*).

The Supreme Court has also made it clear that the government's authorization of a private party's permanent physical occupation of another's property is a taking, regardless of the size of the invasion or the public interests that it may serve. *Loretto v. Teleprompter Manhattan Catv Corp*., 458 U.S. at 426. In *Loretto*, as Enbridge seeks to mandate here, a government regulation authorized a private party to access the property of another. A New York law expressly authorized cable television companies to install cable facilities on building roofs, and landlords or owners of the buildings were required to allow the installation to occur. *Loretto*, 458 U.S. at 421. The Supreme Court ruled that this law constituted a taking because the government had mandated that property owners give up their right to decide how to possess, use, and dispose of their property, as the landlords had no say in whether the cable facilities were installed on their buildings. *Id*. at 435-36.

Here, as in *Loretto*, Enbridge is attempting to use a law (this time, the PSA) to authorize its physical occupation of another's property in derogation of property rights – in this case, the State of Michigan's. The state's granting of the Easement

was conditioned on Enbridge using the state's submerged lands in a specified way, with a certain type of structure operated in a certain manner. Enbridge's construction of the PSA would allow it to physically occupy the bottomlands in perpetuity in a way that the state never authorized and without recourse to the state. The state would be denied the right to exclude another – Enbridge—from its property, an easement on the bedlands of the Great Lakes. The PSA would force a new, unconditional easement upon the state, which would constitute a classic taking under *Loretto*, *Cedar Point Nursery*, *Nollan*, and the cases cited therein.[19]

D. Federally-authorized seizure of state land for Line 5 would be the federal prescription of a pipeline location prohibited by the PSA

Federal preemption of the state's enforcement of its easement conditions would not only be an unconstitutional taking, it also would be a violation of the PSA itself. The PSA prohibits the Secretary of Transportation and its designees from "prescribing the routing or location of a pipeline facility." 49 U.S.C. § 60104(e). As the 8th Circuit held in applying this provision, "Prescribe" means: "'To dictate, ordain, or direct; to establish authoritatively (as a rule or guideline).'

[19] This Court's earlier decision in *Enbridge v. Whitmer*, 135 F.4th 467 (6th Cir. 2025) does not say otherwise. There, the Court held that for state immunity to apply, all the sticks in the bundle of property rights had to be extinguished to trigger 11th Amendment immunity. I*d.* at 474-77. That decision did not change the standard for determining a taking under the 5th Amendment, nor could it: the Supreme Court has consistently held that seizure of one stick in the bundle—an easement—constitutes a taking, See *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 151-52 (2021), and cases cited therein.

Prescribe, Black's Law Dictionary (12th ed. 2024)." *Couser*, 139 F.4th at 671. If PHMSA or any other designee of the Department of Transportation were to empower Enbridge to seize the state's easement, the result would be a forced easement for a pipeline facility, dictating where and how the pipeline must be sited—the very prescription the PSA forbids.

The district court's ruling, if allowed to stand, would mandate that forced easement. As discussed *supra,* by holding that the PSA preempts state enforcement of Easement conditions, the court transformed a conditional easement into an unconditional one, delegating to Enbridge the power to seize state property for the routing of its pipeline facility. The routing conditions the state set (and to which Enbridge agreed) when the pipeline location was determined in 1953 would be erased, delegating to Enbridge the unilateral authority to dictate where and how to route its pipeline. Such a forced easement would be the very definition of "prescribing the routing or location" of a pipeline facility prohibited by the PSA.

* * *

Enbridge's actions, and the lower court's approval, that prevented Michigan from enforcing the conditions of the state's Easement would be an unlawful trespass on state property, an unconstitutional taking under the 5th Amendment and a violation of the PSA itself. The lower court's ruling would strip the state of the right to exclude Enbridge from the Great Lakes bottomlands, thereby enabling Enbridge

to seize the state's property. A private company like Enbridge cannot conduct such a seizure without a lawful delegation of eminent domain authority from the federal government. That delegation has not occurred here; neither the Pipeline Safety Act nor any other federal law authorizes Enbridge (or other hazardous liquids pipeline companies) to condemn state land. And if the PSA were to delegate to Enbridge the authority to seize state land for its Line 5 pipeline, such a forced easement would violate the PSA's prohibition against the federal prescription of the routing of a pipeline. To avoid a trespass, an unconstitutional taking and a violation of the PSA, Michigan must be allowed to enforce the 1953 contract conditions in the Easement and protect its land. The district court erred in transforming the PSA's preemption clause into a condemnation delegation, and its decision must be reversed.

II. Property owners like Michigan cannot rely solely on PHMSA to protect their land and water and so must have the power to enforce existing easement contracts with pipeline companies

At Enbridge's urging, the District Court held that the PSA preempted the negotiated conditions in the 1953 Easement and therefore that only the PHMSA could protect the Great Lakes and other state land from pipeline ruptures. *Enbridge Energy, Ltd. P'ship v. Whitmer*, 813 F. Supp 3d. 777, 784-85; 810 (W.D. Mich. 2025), Op., R.164, PageID.2461-2505; Jmt., R.165, PageID.2506. As demonstrated above and in other briefs, that holding is an error of law. It also is an error of fact:

PHMSA is incapable of protecting land and water, state or private, from pipeline spills.

PHMSA's own enforcement data proves its inability to protect land and water from pipeline spills, ruptures and leaks. PHMSA's enforcement actions are called Notices of Proposed Safety Orders (NOPSOs). A new report, "PHMSA's Pipeline Safety Records Show A Failure to Prevent Ruptures and Enforce the Law," prepared for the Business Network by the University of Michigan's Environmental Law and Sustainability Clinic (hereinafter "PHMSA Pipeline Safety Report"),[20] reviewed all of the NOPSOs issued by PHMSA since 2010, and the results are alarming. During this period, PHMSA data recorded 10,024 pipeline "incidents."[21] Of these incidents, 4,596 have been categorized as "significant" incidents, defined by PHMSA as those including any of the following conditions (excluding gas distribution incidents caused by a nearby fire or explosion that impacted the pipeline system):

1. Fatality or injury requiring in-patient hospitalization
2. $50,000 or more in total costs, measured in 1984 dollars
3. Highly volatile liquid releases of 5 barrels or more or other liquid releases of 50 barrels or more

[20] David Weaver, "PHMSA's Pipeline Safety Records Show A Failure to Prevent Ruptures and Enforce the Law," University of Michigan's Environmental Law and Sustainability Law Clinic (May 4, 2026), https://glbusinessnetwork.com/2026/05/phmsas-pipeline-safety-records-show-a-failure-to-prevent-ruptures-and-enforce-the-law/

[21] *Pipeline Incident 20 Year Trends*, **PHMSA**, https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-incident-20-year-trends (last visited May 5, 2026).

4. Liquid releases resulting in an unintentional fire or explosion[22]

A total of 429 of the incidents since 2010 were characterized by PHMSA as "serious" incidents, defined as including "a fatality or injury requiring in-patient hospitalization . . . [excluding] gas distribution incidents caused by a nearby fire or explosion that impact the pipeline system."[23]

In the face of these thousands of pipeline spills, leaks and ruptures—over 400 of which caused death or hospitalization—as well as through their day-to-day inspections and reviewing mandatory reports from industry, PHMSA has issued only 50 NOPSOs. And in those 50 enforcement actions, **the agency never shut down a pipeline – even temporarily– before the rupture, spill or leak occurred**. PHMSA Pipeline Safety Report at 2, 4.

Pipeline Incidents and PHMSA's NOPSOs Since 2010

Pipeline incidents	10,024
Significant incidents	4,596
Serious incidents	429
NOPSOs	50
Temporary shutdowns	10
Permanent shutdowns	0

An analysis of the NOPSOs documents that 33 of the NOPSOs were issued in reaction to a spill or leak; 9 were issued based on a third-party report of a condition;

[22] *Id.*
[23] *Id.*

and only 7 were issued as a result of a PHMSA inspection. *Id.* at 2. That's worth emphasizing: in the same time period that the nation experienced 429 serious pipeline ruptures causing death or hospitalization, and thousands more spills classified as significant, PHMSA took proactive enforcement measures in only 7 cases.

The enforcement picture gets worse. PHMSA's 10 temporary shutdowns *all* were ordered only *after* a rupture of a pipeline. And in no cases—before or after a rupture, even one as severe as the 1,000,000 gallon rupture of Enbridge's Line 6B into the Kalamazoo River in 2010—did the agency order a permanent shutdown of a pipeline.

Categorizations of PHMSA's NOPSOs Since 2010[24]			
Reactive Enforcement	Initiated by External Organization	Proactive Enforcement	Withdrawn
33/50	9/50	7/50	1/50
PHMSA only required a temporary shutdown in 10/33 cases and required a reduction in pressure in only 12/33 NOPSOs.	PHMSA only required a reduction in pressure in 4/9 cases and 0 temporary shutdowns.	PHMSA required only 2/7 to reduce pressure in the pipeline and 0 temporary shutdowns	N/A

[24] PHMSA Pipeline Safety Report at 2.

PHMSA's record of enforcement on Enbridge pipelines goes from weak to non-existent. Although Enbridge is the second largest pipeline network in the nation and had 1,068 spills from 1999 to 2013, PHMSA issued Enbridge *no* NOPSOs from 2010 on. PHMSA did not even issue a NOPSO after Enbridge's massive Line 6B spill into the Kalamazoo River in 2010 "saturating around 40 miles of the Kalamazoo River watershed . . . [after] a 6-foot break in their [Line 6B] pipeline . . . rupture[d and] went undetected and unreported for nearly 17 hours." PHMSA Pipeline Safety Report at 12. Nor does the PHMSA database indicate any NOPSOs were issued to prevent or respond to any of the 35 spills Enbridge has experienced on Line 5. PHMSA Pipeline Safety Report at 13-17.

There are many reasons for the agency's total ineffectiveness. PHMSA's staffing and budget are tiny compared to its charge. PHMSA has 207 inspection and enforcement staff and 456 state inspectors responsible for the safety of nearly 3.3 million miles of pipelines nationwide, as well as "183 liquefied natural gas plants, 396 underground natural gas storage fields, and 8,528 hazardous liquid breakout tanks."[25] That means each staff person would be responsible for inspecting nearly

[25] *Federal Effort*, PHMSA (Feb. 17, 2026), https://www.phmsa.dot.gov/pipeline/effort-allocation/federal-effort#:~:text=OPS's%20232%20federal%20inspection%20and,over%20the%20last%20twenty%20years.

5,000 miles of pipelines in addition to monitoring other facilities and bringing enforcement actions.

Worse, the agency is plagued by inherent conflicts of interest. According to the PHMSA Pipeline Safety Report (at 11):

> PHMSA has historically suffered from near-complete industry capture and a revolving door between industry and regulators. In 2010 when Enbridge's Line 6 Pipeline ruptured spilling over one million gallons of oil into the Kalamazoo River, the head of PHMSA had to recuse herself because she "had served as outside counsel to Enbridge before she was named to lead PHMSA."[26] Currently, the Deputy Administrator of PHMSA and their chief council both worked for an influential pipeline industry group prior to taking positions in the agency.[27]

* * *

Relying on PHMSA to protect state and private land from pipeline ruptures is not only bad law, it is bad policy. The nation's 3.3 million miles of pipelines, mostly traversing private and state lands via easements, operate without meaningful federal oversight. Pipeline companies often operate their pipelines until failure without federal supervision, as demonstrated by the 4,596 "significant incidents"—pipeline spills, leaks and ruptures—since 2010. Stopping state and private landowners from

[26] Andrew Restuccia & Elana Schor, *'Pipelines Blow Up and People Die'*, Politico (7-13-25) https://www.politico.com/story/2015/04/the-little-pipeline-agency-that-couldnt-217227

[27] Jesse Coburn, "Amid Trump's Proposed Pipeline Safety Rollbacks, Senator Questions Regulators' Industry Ties," ProPublica (Dec. 15, 2025) https://www.propublica.org/article/trump-dot-oil-gas-pipeline-ethics-questions-senator-cantwell

negotiating enforceable easement terms with pipeline companies would strip these landowners of all meaningful protections against oil spills on their lands.

CONCLUSION

The district court's erroneous decision alarms Business Network members in two basic respects. First, it endangers the Great Lakes, which are vital to our livelihoods and quality of life and those of thousands of other businesses in the region. Second, it calls into question the very nature of the contracts and private property rights that are fundamental to our economic security. If a federal law can be transformed into a weapon for a private company to ignore contracts and take over state property, our own contracts and property are at risk, and so are those of landowners everywhere.

We respectfully request that the Court reverse the district court's decision and deny Enbridge's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,411 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(f)(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2026, an electronic copy of the foregoing brief was filed with the Clerk for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished via the CM/ECF system.

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