UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, et al.

Plaintiffs,

v.

GRETCHEN WHITMER, et al.

Defendants.

Case No. 1:20-cv-01141-JTN-RSK

Hon. Janet Neff

CHAMBERS AMICI CURIAE BRIEF IN SUPPORT OF ENBRIDGE'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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AMICI CURIAE BRIEF OF THE CHAMBERS

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I. Introduction and interest of the *amici curiae*

The Canadian Chamber of Commerce, the Chamber of Commerce of the United States of America, the Michigan Chamber of Commerce, the Ohio Chamber of Commerce, the Pennsylvania Chamber of Business and Industry, and the Wisconsin Manufacturers and Commerce, Inc. (collectively, the "Chambers") respectfully submit this amici curiae brief in support of Plaintiffs' ("Enbridge") opposition to the Defendants' motion to dismiss and in accordance with this Court's December 9, 2021. Order, ECF No. 42.[1]

The decision in this case will affect business and the Chambers' members throughout the United States and Canada. The shutdown order purports to force the closure of a segment of an interstate, cross-border petroleum pipeline—known

[1] Rivenoak Law Group, P.C. authored the brief in whole, with input from its clients, and did not make a monetary contribution intended to fund the preparation or submission of the brief. No monetary contributions intended to fund the preparation or submission of the brief were made by a person other than the *amici curiae*. Rivenoak Law Group, P.C. certifies this brief is in compliance with the length limits set by this Court's order of December 9, 2021 and otherwise in compliance with the local rules of the Western District of Michigan.

as Line 5. Shutting down the pipeline would carry tremendous negative consequences for the Chambers' members and the economies of the United States and Canada. Such a shutdown would constrain an already disrupted energy supply, an especially problematic development given recent decisions related to importation of petroleum products from Russia.

The procedural history of this case is also troubling to the Chambers, as it appears to be a deliberate attempt to evade judgment by the federal courts of whether Defendants' actions run afoul of federal law. Defendants attempted to judicially enforce their shutdown order against Enbridge. But when this Court agreed that determining the legality of their actions would require deciding "disputed and substantial federal issues," and thus the case belonged in federal court, they suddenly lost interest in enforcing the order. *Michigan v. Enbridge Energy, Ltd*., 2021 WL 5355511, at *8 (W.D. Mich., Nov. 16, 2021). Instead of trying to defend their actions, or alternatively, withdrawing the shutdown order they are unwilling to enforce, the state officials are attempting to have their cake and eat it too. They are now trying to close the federal courthouse doors to a determination of whether the shutdown order is illegal under federal law (despite the clear application of the *Ex Parte Young*[2] exception to Eleventh Amendment

[2] *Ex Parte Young*, 209 U.S. 123 (1908).

immunity), while leaving the order in place. Such tactics waste judicial resources and impose significant costs on litigants. As the Chambers argued previously, this case presents an issue of great importance to the federal system and thus belongs in federal court. Moreover, it is important to allow businesses access to federal courts for federal law challenges to state officials' actions and orders.

This Court has jurisdiction and should deny Defendants' motion.

II. Michigan law preferences federal jurisdiction to resolve issues of federal law.

Michigan law explicitly prefers federal forums to state courts when hearing federal claims, even when those claims are brought against the State. MCL 600.6440 ("No claimant may be permitted to file claim in said court against the state nor any department, commission, board, institution, arm or agency thereof who has an adequate remedy upon his claim in the federal courts."). Although courts have held that MCL 600.6440 does not waive Eleventh Amendment immunity, *Abick v. State of Mich.*, 803 F.2d 874, 877 (6th Cir. 1986), in general, "such actions should be filed in federal court" MCL 600.6452(1). Thus, in Michigan, "where a claimant has an adequate remedy in federal court, the Court of Claims is stripped of subject matter jurisdiction to hear the claim." *Regents of*

Univ. of Michigan v. St. Jude Med., Inc., Case No. 12-12908, 2013 WL 673797, at *3 (E.D. Mich. Feb. 25, 2013).

The Michigan Attorney General, too, has pressed to have the federal courts decide federal law questions, recognizing the "specific competence" of the federal courts to decide those matters. As the Attorney General recently explained, federal courts have the "appropriate expertise" and "specific competence of federal courts over federal law." Exhibit A, Supplemental Br. of Attorney General, *McKenzie et al. v. Dep't of Corrections*, Dec. 20, 2021 at 1, 2.

When a plaintiff alleges facts supporting an *Ex Parte Young* exception to Eleventh Amendment immunity, Michigan courts have found the "Eleventh Amendment does not foreclose plaintiff from seeking a remedy for his claim in federal court." *Gordon v. Sadasivan*, 144 Mich. App. 113, 119, 373 N.W.2d 258, 261 (1985). It is only when Eleventh Amendment immunity applies that there is no federal remedy and the state courts can resolve the claims. *Michigan State Emps. Ass'n v. Civ. Serv. Comm'n*, 177 Mich. App. 231, 238, 441 N.W.2d 423, 427 (1989). Thus, a business in Michigan that believes that an order by a state official is illegal under federal law and that its suit is permitted under the *Ex Parte Young* line of cases is directed by state law and precedent to seek disposition of those claims in federal court, as Enbridge did here.

Additionally, a business is entitled to raise these claims as a defense to suit, as Enbridge first did when the State sued to enforce the shutdown order. Arguing that the federal law issues involved were substantial and decisive, Enbridge sought to remove the case to this Court. *State of Michigan, et al. v. Enbridge Energy Limited Partnership,* et al., Case No. 20-cv-01142 (filed Nov. 24, 2020). On Nov. 11, 2021, this Court granted Enbridge's motion, finding that the underlying questions "necessarily turn[] on the interpretation of federal law […] and this Court is an appropriate forum for deciding these disputed and substantial federal issues." Opinion and Order at 15. In response, the Governor abandoned efforts to enforce the shutdown order—for the explicit reason of avoiding resolution of these arguments by the federal court. Press Release, The Office of Governor Gretchen Whitmer, Governor Whitmer Takes Action to Protect the Great Lakes (November 30, 2021), available at https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-573181--,00.html.

In its amicus brief to this Court, the Attorneys General of Minnesota, et al. argued that "Enbridge must make its arguments as defenses to Michigan's state law claims and not as affirmative claims in a federal suit, even if Enbridge would prefer a federal forum." Br. at 2. This is both ironic and problematic, for the reasons explained above. First, Enbridge already sought to make its arguments as

defenses, but the State blocked those efforts by dismissing its suit against Enbridge rather than allow this Court to resolve Enbridge's defenses. Second, whether or not Enbridge preferred a federal forum, Michigan law directs that a federal forum should resolve questions of federal law—in other words, that a complaint like this be filed in federal court.

Arguing that these claims may be raised *only* as defenses is another way of saying that states ought to have the power to thwart claims that may be brought under *Ex Parte Young* from being heard altogether. Nothing in the law requires this Court to allow state officials to issue orders and permanently evade the application of federal law to those orders.

III. State officials should not be able to evade federal review by refusing to enforce or revoke an order.

The Supreme Court has long recognized that the doctrine of *Ex Parte Young*, which allows suit in federal court for violations of federal law by state officials, is necessary if "the Constitution is to remain the supreme law of the land." *Alden v. Maine*, 527 U.S. 706, 747 (1999). That is because the Eleventh Amendment otherwise bars certain suits in federal court against a State. *Id.* at 755. Without the *Ex Parte Young* exception, States could rely on their Eleventh Amendment immunity to evade compliance with federal law requirements, even though "States

and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Id.*

Plaintiffs' response brief summarizes well why their suit is not barred by state sovereignty protections of the Eleventh Amendment, and the Chambers will not repeat these arguments here. Simply put, the real interests served by the Supremacy Clause of the U.S. Constitution should not be sacrificed to a flawed reading of the limited exceptions to *Ex Parte Young*. Given the interstate and international implications of this case, those interests are strongly present in this matter.

IV. Orders by state officials, even if unenforced, negatively impact business.

As this Court knows, Defendants dropped an attempt to enforce the shutdown order when faced with having to defend federal law claims against it in federal court. Even still, that shutdown order remains in place. That carries real harm to Enbridge and to businesses that depend on the interstate and international energy economy to function smoothly.

A. The shutdown order may prevent Enbridge from securing permits to construct a safer alternative.

This case presents an explicit illustration of the negative effects of an unenforced government order. Enbridge is seeking required federal and state regulatory approvals to replace the twin pipelines with a tunnel in the Straits bedrock to house a new petroleum pipeline. Opponents of the project are arguing that the shutdown order alters the environmental analyses that are done as part of those regulatory approvals.

For instance, Plaintiff is currently engaged in ongoing proceedings before the Michigan Public Service Commission ("MPSC") for key permissions related to the tunnel project. The MPSC is required, as part of the process, to analyze the environmental impact of the proposed project. In those proceedings, several parties have recently argued that because the shutdown order exists, the MPSC must evaluate the proposed replacement segment as if there were no petroleum pipelines currently operating in the Straits, rather than as a replacement for the operating pipelines. (A similar issue may arise in the U.S. Army Corps of Engineers permitting process that is also ongoing.)

Compare two pieces of testimony from expert witnesses in the MPSC case. Dr. Peter Howard, a witness for the Environmental Law and Policy Center, relied

on the existing shutdown order to argue that the baseline for the required environmental analyses must assume no oil or natural gas liquids are today flowing through the Straits and must be premised on "allowing the existing pipelines to shut down, and not building a tunnel or installing any replacement pipelines." Direct Testimony of Peter Howard, MPSC case No. U-20763, Docket No. 865, p. 5, lines 18-19. Conversely, Michael Mooney, a witness for Mackinac Straits Corridor Authority, testified that "placing Line 5 inside the tunnel reduces the risk of leaking products reaching the Great Lakes to practically zero…This is a notable reduction in environmental risk from the current dual pipeline configuration on the lakebed." Corrected Direct Testimony of Michael Mooney, MPSC case No. U-20763, Docket No. 882, p. 6 lines 16-20. In short, whether the project is environmentally beneficial is a more complicated analysis if governmental agencies must analyze a fictional reality in which resources no longer flow through the pipelines.

This is one clear example of the way the shutdown order, even unenforced, continues to impact Enbridge—making it more difficult for Enbridge to obtain necessary federal and state permits for safety improvements. Should permits be denied as a result, not only will the unenforced order have serious legal consequences, but Plaintiffs will also be under no further legal obligation to the

State to construct that safer alternative. In other words, a consequence of Governor Whitmer's decision to leave the challenged shutdown order in place could be that oil continues to flow through the Straits of Mackinac for the foreseeable future.

B. Unenforced state orders have chilling effects on business generally.

Even setting aside the particular consequences of the state order in this case, the failure to allow Enbridge's challenge to proceed would cause broader harm to business. Businesses need the ability to challenge orders from state officials that they believe are illegal under federal law. Even unenforced orders can cause harm by chilling myriad legitimate business activities. Every day, businesses engaged in normal operations may find themselves caught up in varying political winds. They may choose to follow a federal mandate that is highly unpopular in their state. They may require current and potential employees to provide documentation required for federal compliance or contracting that state officials do not believe should be required as a condition of employment. They may choose to legally ship items in interstate commerce that a particular governmental official finds objectionable. They may choose to employ people who live in another state or country instead of residents of that state. Politically, it may be very appealing for state officials to issue orders to those businesses to halt their operations or change

their practices. It would be even more appealing if the officials could do so while insulating those orders from federal review.

Such a situation, however, would create and continue to cause harm to the affected business, even if state officials didn't immediately take actions to compel compliance through the courts. Such orders create uncertainty regarding ongoing operations and may pose a number of problems for the affected businesses. At the most basic level, businesses may be concerned that state officials could change their enforcement posture at any moment and impact operations. Even without additional judicial action from the state, many insurance policies exclude criminal acts from coverage,[3] so questions may arise about whether businesses has or can obtain insurance coverage for their activities, and whether they can provide proof of insurance to current or potential customers.[4] It could also be significantly more

[3] *See Allstate Ins. Co. v. McCarn*, 471 Mich. 283, 289, 683 N.W.2d 656, 659 (2004) (citing an insurance policy provision as "commonly described as the criminal-acts exclusion").

[4] *See Hobbs v. Shingobee Builders, Inc.*, No. 307359, 2013 WL 5951707, at *5 (Mich. Ct. App. Nov. 7, 2013) (noting contracts contained requirement for "additional insured endorsements policies").

difficult for a business subject to some orders to get financing for their activities, as commercial lending practices often require representations and warranties as the legality of the businesses' activities.[5] Any attempt to sell such a business would likely result in a lowered valuation due to the existence of the order, given all the potential negative effects on the day-to-day operations described above.

In addition to the impacts on existing operations, there are impacts to future business that are harder to quantify but no less real. Existing customers may seek alternative arrangements, fearful of being left without service suddenly. Employees may seek other employment to avoid the risk of losing their job suddenly or of being dragged into an eventual lawsuit. Potential counterparties for long-term contracts may be reluctant to commit due to the potential uncertainties, and business opportunities may be lost.

As these examples illustrate, there are substantial negative implications for business should this court allow Defendants to leave their order in place but evade review. Courts should be wary of creating a pathway for state officials to issue

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[5] *See Exxon Mobil Corp. v. Fenelon*, 76 F. App'x 581, 587 (6th Cir. 2003) (contract's representation and warranty section contained provision requiring compliance with all laws).

orders that are illegal under federal law and at the same time bar the federal courthouse doors to the affected businesses. This is exactly the kind of situation that the *Ex Parte Young* exception to Eleventh Amendment immunity is designed to prevent. This case illustrates both the appropriateness of that exception, and the dangers of finding it does not apply.

V. Conclusion

Application of the *Ex Parte Young* exception to Eleventh Amendment immunity is appropriate and allows this case to continue in federal court. Finding otherwise condones Defendants' attempts to evade federal review and thwarts Enbridge's rightful federal challenge to the shutdown order.

The State's litigation tactics were designed specifically and explicitly to avoid a federal court determination of the legality of their actions under federal law. This is not a case where the State merely has a general distrust of federal courts, as the State of Michigan's own laws prefer federal court determinations on cases in which a federal remedy is available. Rather, this is a case in which the shutdown order was vulnerable to challenge and State officials seemingly determined that they could simply leave it in place without enforcing it through the federal courts. This does not accord with the rule of law. It leaves Enbridge in the shadow of uncertainty and chills business more broadly.

When a clear exception to Eleventh Amendment immunity is present, to allow a State to block the federal courthouse doors in such an instance would create a dangerous precedent. This Court should reject Defendants' invitation to go down such a path.

Respectfully submitted,

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