Nos. 23-2309 & 23-2467

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER RESERVATION,
Plaintiff-Appellee, Cross-Appellant,
v.
ENBRIDGE ENERGY COMPANY, INC., AND ENBRIDGE ENERGY, L.P.,
Defendants-Appellants/Cross-Appellees.

ENBRIDGE ENERGY COMPANY, INC., AND ENBRIDGE ENERGY, L.P.,
Defendants-Appellants/Cross-Appellees,
v.
BAD RIVER BAND OF THE LAKE SUPERIOR TRIBE OF CHIPPEWA INDIANS OF THE BAD RIVER RESERVATION, AND NAOMI TILLISON
Plaintiff-Appellees/Cross-Appellants

Appeal from the U.S. District Court for the Western District of Wisconsin,
Case No. 19-cv-602-wmc, Judge William M. Conley

BRIEF OF *AMICUS CURIAE* HUMAN RIGHTS AND ENVIRONMENTAL ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND AFFIRMANCE OF PART AND REVERSAL OF PART

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-2309, 23-2467

Short Caption: Bad River Band of the Lake Superior Tribe of the Chippewa Indians v. Enbridge Energy Co., Inc.

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Environmental Defence Canada, University of Toronto International Human Rights Program

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N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Jeffrey A. Macey Date: October 18, 2023

Attorney's Printed Name: Jeffrey A. Macey

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Attorney's Printed Name: Nikki Reisch

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Attorney's Signature: /s/ Amanda Misasi Date: October 18, 2023

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Attorney's Signature: /s/ Upasana Khatri Date: October 18, 2023

Attorney's Printed Name: Upasana Khatri

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Attorney's Signature: /s/ Maryum Jordan Date: October 18, 2023

Attorney's Printed Name: Maryum Jordan

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INTRODUCTION

The Line 5 pipeline has caused, and threatens, immediate and catastrophic harms to the local environment and the people who live nearby. As the District Court concluded, an oil spill would devastate the Great Lakes region, threatening the drinking water supply for millions of people. For the Bad River Band and other Indigenous Peoples from the Great Lakes region, such impacts would jeopardize their way of life, violating their human rights to life and culture. Moreover, the pipeline's continued operation on Tribal lands against the Bad River Band's wishes and without a valid easement infringes on the Band's sovereignty, which Congress has guaranteed by Treaty.

Recognizing the threat of an oil spill at the Bad River meander and the pipeline's ongoing trespass on the Bad River Reservation, the District Court appropriately exercised its jurisdiction and found Defendants-Appellants ("Enbridge") liable for trespass and other harms. The court correctly found Enbridge's conduct unlawful, but erred in ordering injunctive relief that does not properly address the immediacy of the harm. It ordered Enbridge to adopt shutdown and purge plans to abate the public nuisance posed by the pipeline at the meander, to

remove the pipeline from the Bad River Band's territory within three years, and to disgorge some of the profits Enbridge unjustly earned from their trespass. Yet Enbridge and the Government of Canada claim that the District Court had no authority to protect the property rights of a federally-recognized Tribe in the United States.[1] They misinterpret the 1977 Agreement between the Government of the United States and the Government of Canada Concerning Transit Pipelines, Jan. 28, 1977, 28 U.S.T. 7449 (hereinafter "Pipeline Treaty"), which has lay dormant for nearly fifty years.

Canada contends that the Pipeline Treaty overrides a domestic court's authority to enforce non-discriminatory laws of general application, such for trespass and nuisance, with respect to a transboundary pipeline. Adopting their argument would immunize transboundary pipelines from all sorts of laws and rules that domestic pipelines, and everyone else, must follow, and hamstring courts from protecting property rights and preventing imminent environmental

[1] In the alternative, Canada proposes substantially modifying the District Court's injunction to reroute Line 5 within the Bad River watershed. Canada Amicus Br. 2.

harm in the United States during lengthy treaty dispute resolution processes. Their argument is unsupported by the plain text and purpose of the treaty, and at odds with the principle of harmonious interpretation, as it would preclude the United States from taking protective and remedial measures necessary to fulfil its obligations under Tribal treaties as well as international obligations applicable to both countries. Tellingly, the U.S. government has not intervened to support Canada's stance.

Amici, global human rights and environmental organizations, respectfully submit this brief to advise the Court on the proper application of the Pipeline Treaty. Rather than eliminate a court's power to enforce property law when a transboundary pipeline threatens imminent harm to people and the environment, the Pipeline Treaty explicitly provides that governmental authorities may continue to exercise their jurisdiction over such pipelines to enforce neutral laws. Thus, implementing safety and environmental protection measures is appropriate—insofar as they do not discriminatorily block the transnational flow of oil. The Pipeline Treaty, consequently, does not prohibit the District Court from immediately and permanently

enjoining Enbridge's unlawful conduct.

The Bad River Band has been forced to tolerate infringements on its sovereignty for over a decade—and for at least three years since it sought a legal remedy in court. And the District Court improperly permitted three *more* years of trespass. JA 75-6. Yet Canada expects the Band to tolerate a continuing infringement on its sovereignty and significant threat to its members' human rights for an indefinite period while it negotiates behind closed doors with the U.S. government. *Amicus* Br. of the Gov't of Canada ("Canada Br.") 17. This pipeline is entitled to no such special treatment. This Court should affirm the District Court's holding that Enbridge is liable for its unlawful conduct, but remand with instruction to provide relief that *immediately* addresses Enbridge's ongoing trespass and other harm.

INTEREST OF AMICI CURIAE[2]

Canadian Lawyers for International Human Rights, EarthRights International, Center for International Environmental Law,

[2] No counsel for a party authored, in whole or in part, this brief. No person other than *amici* and their counsel contributed any money in the preparation or submission of this brief. All parties to this appeal have consented to the filing of this brief.

Environmental Defence Canada, and the University of Toronto International Human Rights Program, (collectively, "*amici*") submit this brief in support of the Bad River Band. *Amici* are national and global organizations dedicated to the protection of human rights and the environment in the United States, Canada, and around the world:

Canadian Lawyers for International Human Rights (CLAIHR) is a non-profit, non-partisan, non-governmental charitable organization, established in 1992 to promote international human rights, within and in connection to Canada. CLAIHR hosts events, advocates for policy reform, and serves as a Friend of the Court on matters of international human rights.

EarthRights International is a non-governmental, non-profit organization that combines the power of law with the power of people in defense of human rights and the environment. EarthRights frequently represents Indigenous groups and their interests, especially in the context of extractive industries and climate change, and regularly submits *amicus* briefs to U.S. courts.

The Center for International Environmental Law (CIEL) uses the power of law to protect the environment, promote human

rights, and ensure a just and sustainable society. CIEL seeks a world where the law reflects the interconnection between humans and the environment, respects the limits of the planet, protects the dignity and equality of each person, and encourages all of Earth's inhabitants to live in balance with each other. It was founded in 1989.

Environmental Defence Canada is a leading Canadian environmental advocacy organization, founded in 1984, that works with government, industry and individuals to defend clean water, a safe climate and healthy communities. Environmental Defence works at the municipal, provincial and federal level to safeguard our freshwater, create livable communities, decrease Canadians' exposure to toxic chemicals, end plastic pollution, tackle climate change and build a clean economy.

International Human Rights Program at the University of Toronto Faculty of Law provides legal services to individuals, communities, non-governmental organizations, and lawyers to protect and promote international human rights before Canadian courts, regional and United Nations treaty bodies, and foreign courts and international tribunals, while providing supervised clinical legal

education to University of Toronto law students. It was established in 1987.

Collectively, *amici* include advocates for Indigenous Peoples whose rights are threatened by State and corporate action including the Line 5 pipeline. *Amici* are particularly well-suited to offer *amicus* assistance to this Court based on their experience protecting Indigenous rights under international and domestic law, including by working to ensure that the U.S. and Canadian governments comply with their treaty and international human rights obligations.

ARGUMENT

I. Canada's argument for overturning the District Court's injunction would violate the Bad River Band's Rights.

Canada asserts its respect for the "rights and interests of Indigenous Peoples in the United States, including the Band's governance of its Reservation." Canada Br. 2. But respect for the Band's rights forecloses Canada's argument that the District Court cannot enjoin Line 5's continued operation on the Reservation. *Id*. at 2-3. Far from remedying the rights violations the Bad River Band has experienced or avoiding new ones, this approach would perpetuate indefinite trespass on Tribal land. Further, Canada's extreme reading of the Pipeline Treaty would preclude the Band or any other Tribe from asserting their land rights and sovereignty to challenge such trespasses.

Canada's proposition threatens the safety of not only the Bad River Band, but *many* Indigenous communities in both the United States and Canada who oppose the continued operation of Line 5. *See* ANISHINABEK NATION, ANISHINABEK NATION LEADERSHIP SUPPORTS SHUT DOWN OF LINE 5 PIPELINE (2021), https://www.anishinabek.ca/2021/05/06/anishinabek-nation-leadership-supports-shut-down-of-line-5-pipeline/. Line 5 is at risk of an oil spill

that would devastate the natural and cultural resources vital to the survival of dozens of Anishinaabe Tribes and First Nations in the Great Lakes region. Canada's invocation of the Pipeline Treaty is at odds with its own obligations under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). International experts from the United Nations have expressed concern about Canada's invocation of the Pipeline Treaty in support of Line 5, despite opposition from Indigenous communities.

A. Line 5 threatens the sovereign rights of Tribes and First Nations.

The District Court correctly found that the migration of the Bad River meander toward Line 5 exposes the pipeline to "an actual risk of a significant rupture." JA 59. That risk threatens not only the Bad River Band, but the rights and sovereignty of numerous Anishinaabe Tribes and First Nations. The Anishinaabe people maintain a reciprocal relationship with the natural environment where the waters, trees, animals, plants, and air are extensions of their community. This community is at the center of Anishinaabe culture and life, and they have the responsibility to preserve their homeland, environment, culture, treaty-protected resources, and distinct lifeways for future

generations.

Line 5 poses a foreseeable risk of a catastrophic oil spill that would threaten the survival of Anishinaabe Tribes and First Nations. The stretch of Line 5 that "lie[s] exposed in the Straits [of Mackinac] below . . . busy shipping lanes" poses a risk of an oil spill to an ecologically vulnerable waterway. DEP'T NAT. RES., STATE OF MICHIGAN, NOTICE OF REVOCATION AND TERMINATION OF EASEMENT 5-9 (2020). Indeed, Enbridge vessels struck *their own* pipeline with anchors or cables at least three times in 2018 and 2019. *Id.* at 6-7. In 2020, the pipeline was damaged so severely that a court ordered Enbridge to shut it down. *See* Temporary Restraining Order, *Nessel v. Enbridge Energy*, No. 19-474-CE (Ingham Cnty. Cir. Ct. Mich. June 25, 2020) (No. 19-474-CE). Enbridge's and Canada's proposal to reroute the pipeline within the Bad River watershed rather than shut it down does not alleviate these concerns. The proposed route follows a 41-mile path along the edge of the Band's reservation and remains in the Bad River watershed. BAD RIVER BAND, COMMENTS ON THE SECTION 404 AND SECTION 10 PERMIT APPLICATION FOR THE ENBRIDGE LINE 5 PIPELINE SEGMENT RELOCATION PROJECT 10-11, 35-36 (2022), *available at*

http://www.badriver-nsn.gov/wp-content/uploads/2022/03/bad_river_band_comment_letter_to_usace_03.22.2022_2.pdf. Any spill along the reroute would thus still contaminate the watershed, posing a risk to the reservation's waters and threatening the Band's ability to pursue its treaty-protected cultural practices. *Id.* Moreover, the reroute would enable continued operation of a pipeline at risk of a devastating oil spill, recklessly endangering the Anishinaabe people.

Further, Line 5 traverses traditional Anishinaabe territories[3] without the consent of impacted Tribes and First Nations. The Midwest Alliance of Sovereign Tribes and Anishinabek Nation have issued directives on behalf of all 35 federally recognized Tribes in the U.S. Great Lakes states and 39 Anishinabek First Nations in Canada to shut down Line 5. *See* MIDWEST ALLIANCE OF SOVEREIGN TRIBES OPPOSES CONTINUED OPERATION OF LINE 5 ACROSS THE MACKINAC STRAITS,

[3] For a map of Anishinaabe territory in the United States and Canada, *see* United States Environmental Protection Agency, *Indian Lands in US EPA Region 5*, https://www.epa.gov/tribal/indian-lands-us-epa-region-5; *Anishinabek Nation*, https://www.anishinabek.ca/who-we-are-and-what-we-do/.

Resolution No. 004-16 (April 27, 2017), https://d3n8a8pro7vhmx.cloudfront.net/oilandwaterdontmix/pages/723/attachments/original/1487109966/MAST-resolution-004-16.pdf?1487109966; ANISHINABEK NATION, ANISHINABEK NATION LEADERSHIP SUPPORTS SHUT DOWN OF LINE 5 PIPELINE (2021), https://www.anishinabek.ca/2021/05/06/anishinabek-nation-leadership-supports-shut-down-of-line-5-pipeline/. Canada's proposed re-route not only fails to address the risks to the Bad River Band's territory, but also enables continued threats to Indigenous sovereignty throughout the Great Lakes region.

B. Canada's interpretation of the Pipeline Treaty contravenes its obligations to First Nations under UNDRIP.

Canada has passed legislation giving UNDRIP "application in Canadian law." United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14, 4(a) (Can). Here, Canada even cites to its commitment to ensure the rights of First Nations under UNDRIP. Canada Br. 2. But this commitment cannot be reconciled with Canada's invocation of the Pipeline Treaty to preserve the operations of Line 5 despite opposition from First Nations.

UNDRIP instructs States to consult and cooperate with Indigenous Peoples to obtain their free, prior, and informed consent (FPIC) "prior to the approval of any project affecting their lands or territories and other resources." UNDRIP, art. 32(2). Specifically, FPIC is required for extractive industry projects within the territories of Indigenous Peoples and/or projects with a significant, direct impact on Indigenous Peoples. Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and Informed Consent: a Human Rights-Based Approach*, U.N. Doc. A/HRC/39/62, paras. 31-35 (2018). FPIC processes must allow Indigenous Peoples to "influence the outcome of decision-making," suggest alternatives, and withhold consent. *Id*. paras. 14-20, 24-30.

Canada's commitment to UNDRIP requires that Indigenous communities directly affected by Line 5 have a legal right to withhold consent. Yet Canada asks *this* Court to violate rights that Canada's own law protects. This Court should decline that invitation.

C. United Nations experts recognize the grave danger posed by Line 5.

International experts have echoed *amici's* assessment that the continued operation of Line 5 and Canada's invocation of the Pipeline

Treaty pose serious concerns. In April 2023, the United Nations Permanent Forum on Indigenous Issues concluded that Line 5 "jeopardizes the Great Lakes" and "presents a real and credible threat to the treaty-protected fishing rights of Indigenous Peoples in the United States and Canada." United Nations Permanent Forum on Indigenous Issues, Report on the Twenty-Second Session (17-28 April 2023), E/2023/43-E/C.19/2023/7, para. 65 (2023). Accordingly, the Permanent Forum "call[ed] on Canada to re-examine its support for the Enbridge Line 5 oil pipeline" and "recommend[ed] that Canada and the United States decommission Line 5." *Id*.

In July 2023, the United Nations Special Rapporteur on the Rights of Indigenous Peoples expressed concern that Canada was not adequately "regulat[ing] the activities of Canadian companies operating transnationally," noting specifically that

> Canada continues to support the operation of the Line 5 pipeline, despite the opposition of directly affected Indigenous Peoples in Canada and the United States of America. [Line 5] is creating the risk of a catastrophic oil spill that could contaminate the lands and waters of Indigenous Peoples on both sides of the border. . . . The Government invoked the 1977 transit pipeline treaty . . . to prolong Line 5 operations . . . .

Visit to Canada, Report of the Special Rapporteur on the rights of Indigenous Peoples, A/HRC/54/31/Add.2, paras. 70-71 (July 24, 2023). Accordingly, he recommended that Canada "cease . . . operation of . . . Line 5 . . . until the free, prior and informed consent of the Indigenous Peoples affected is secured." *Id.* para. 96(i). These experts affirm what Indigenous Peoples in the United States and Canada have consistently argued: Line 5 poses a serious danger to their rights.

II. The Pipeline Treaty does not interfere with the District Court's jurisdiction to adjudicate common law claims concerning property in the United States.

The Pipeline Treaty clearly permits States to apply their own laws to the operations of a transboundary pipeline in a non-discriminatory manner.[4] Thus, the Treaty does not prohibit courts from adjudicating common law claims regarding trespass, the validity of contractually-imposed easements, and imminent nuisances while negotiations under the Treaty are ongoing. *See* Canada Br. 7, 18; Appellants' Br. 39.

[4] Enbridge and Canada assert that the Pipeline Treaty is self-executing and is therefore, federal law. *See* Canada Amicus Br. 12, 18; Appellants' Br. 33 n.7. The Pipeline Treaty has no such weight given the absence of evidence that Congress ever passed implementing legislation giving the Treaty force in domestic law. *Medellín v. Texas*, 552 U.S. 491, 505 (2008).

Nothing in the Treaty requires the United States to abandon its sovereign ability and responsibility to enforce neutral requirements applicable to pipelines generally.

Nor has the United States intervened in support of such a drastic reading. Rather, the Treaty's text and purpose both affirm that Parties are free to enforce the non-discriminatory requirement that pipelines must comply with bedrock common law principles of trespass and nuisance.

A. The Pipeline Treaty clearly allows for non-discriminatory application of neutral laws, including property rights.

1. The Pipeline Treaty explicitly provides Parties with broad oversight authority over transboundary pipelines.

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506 (2008), and the text of the Pipeline Treaty clearly allows applicable of neutral laws.

The plain language of the Pipeline Treaty allows States to regulate pipeline operations for non-discriminatory domestic policy concerns. Article II(1) provides that "[n]o public authority . . . shall institute any measures, other than those provided for in Article V, which are intended to, or which would have the effect of, impeding,

diverting, redirecting or interfering with" transit pipelines.[5] Pipeline Treaty, art. II(1). However, Article IV clarifies that, "notwithstanding" Article II(1), transit pipelines are "subject to regulations by appropriate governmental authorities . . . in the same manner as for any other pipelines." Pipeline Treaty, art. IV. Typically, superseding language such as "notwithstanding" shows "the drafter's intention that the section . . . override conflicting provisions of another section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). The oversight authority provided for in Article IV is therefore additional to that provided for in Article V.

Article IV authorizes a wide range of government interventions to oversee pipelines, provided they are reasonable and non-discriminatory. Article IV(2) makes clear that the permitted exercise of authority extends not only to regulations, but also to "requirements, terms and conditions" imposed in an equal manner to pipelines in similar circumstances. Pipeline Treaty, art. IV(2). Article IV's only limitation is that the rules imposed "shall be just and reasonable, and shall always,

[5] Article V provides for temporary, emergency measures.

under substantially similar circumstances with respect to all hydrocarbons transmitted in similar pipelines . . . be applied equally to all persons and in the same manner." *Id.* There is no serious claim that requiring a pipeline operator to have an easement to operate on someone else's land discriminates against transboundary pipelines, or that it is unjust or unreasonable.

Likewise, the governmental oversight authority permitted under Article IV is broad. Article IV(1) lists "such matters as" pipeline safety, environmental protection, rates, and reporting requirements. The term "such as" indicates the "illustrative and not limitative function of the examples given" and "thus provide[s] only general guidance" about the types of matters included. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Canada's argument that U.S. federal courts cannot enforce trespass and property laws because these matters were not explicitly listed in Article IV(1) is therefore unavailing.

Canada relies on the *expressio unius* principle to argue that the omission of a "trespass/property rights exception" "was deliberate" and reflects a decision to prohibit the Parties' application and enforcement of trespass and property law with regard to transboundary pipelines.

Canada Br. 22, n.19. Nonsense. This principle typically applies to a closed list of strongly "associated groups," which "justif[ies] the inference that items not mentioned were excluded by deliberate choice." *See* Brannon, Valerie C. Statutory Interpretation: Theories, Tools, and Trends. Cong. Research Serv., R45153 55 (2023). In contrast, the plain meaning of Article IV(1)'s use of "such [] as" reveals an intent to form an open, illustrative list. In this Court, the *expressio unius* canon is "much derided and disfavored," and is "especially inapt" where applying it would, as here, contradict the apparent openness of the surrounding text. *White v. United Airlines, Inc.*, 987 F.3d 616, 622 (7th Cir. 2021) (quotation marks omitted).

Canada's argument would require accepting that the United States deliberately threw out all applicable private property rights to allow transit pipelines to always continue operating, even without any legal right to do so. The United States lacks the *power* to effectively create such easements on private property without providing just compensation. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). Moreover, it is preposterous to suggest that both Canada and the United States would have impliedly signed away their respective

rights to enforce conditions in easements ceding the property rights of its residents, *sub silentio*; indeed, it would violate the U.S. Constitution.[6] But regardless, nothing in the Treaty suggests it attempted to do so.

Moreover, under Canada's argument, the Pipeline Treaty would override *all* other U.S. law unless expressly excepted. For example, Article IV makes no mention of labor law, yet if a transboundary pipeline were operating in violation of labor laws, the relevant Party could surely take appropriate enforcement action, including a stop work order. The Treaty need not enumerate every relevant subject matter to achieve this result because relevant subjects fall comfortably under Article IV's language as written—which encompasses *all* regulations, requirements, terms, and conditions generally applicable to pipelines.

[6] Any suggestion that the District Court is not the appropriate authority to "regulate" the pipeline, so Article IV does not apply, is a red herring. *Cf.* Canada Br. 20. Nothing in the Pipeline Treaty requires that application of non-discriminatory laws must go through the Treaty's dispute resolution process, and none ever has before.

2. The Treaty's purpose of ensuring safe, non-discriminatory transmission of hydrocarbons affirms that the Parties retained authority to oversee transboundary pipelines through generally applicable law.

U.S. courts also consider the object and purpose of treaties when interpreting their meaning. *See Abbott v. Abbott*, 560 U.S. 1, 20 (2010); *see also* Restatement (Fourth) of Foreign Relations Law of the U.S.—Treaties § 106 (Am. Law Inst., Tentative Draft No. 2, 2017); Vienna Convention on the Law of Treaties (VCLT), arts. 31, 32, *opened for signature* May 23, 1969, 1155 U.N.T.S 331, 340.[7] Because a treaty is "essentially a contract between two sovereign nations," *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U. S. 658, 675 (1979), its interpretation, like "a contract's interpretation, [is] a matter of determining the parties' intent." *BG Group plc v. Republic of Argentina,* 572 U.S. 25, 37 (2014). Thus courts may consider "the negotiation and drafting history of the treaty as well as the post-ratification understanding of signatory nations," along with the treaty text, as aids to interpretation. *Medellín*, 552 U.S. at 507.

The Pipeline Treaty's text and legislative history reveal the Parties' intent: to prevent discriminatory interference with hydrocarbon

flows between the two countries. The Treaty was ratified in response to oil and gas shortages in the early 1970s, when Canadian producers kept gas for domestic use, creating shortages in the United States. *See* John Bishop Ballem, *International Pipelines: Canada-United States*, 18 Can Y.B. Int'l L. 146, 152-53 (1980). The agreement developed as an assurance that, if the United States built a pipeline from Alaska through Canada, Canada would not divert petroleum to favor Canadian interests. Senate Committee on Foreign Relations, Report on Agreement with Canada Concerning Transit Pipelines, S. Rep. No. 95-9 at 84 (1977) (Dep't of State Responses) ("The [Pipeline Treaty] prevents governmental authorities from exercising their jurisdiction *in a manner which discriminates against transit* pipelines . . . .") (emphasis added).

The Pipeline Treaty was not intended to constrain or supplant legitimate, non-discriminatory regulatory decisions or the power of relevant domestic authorities to enforce the law. More specifically, it was not intended to upend basic tenets of property law to allow

[7] Although the United States has not ratified the VCLT, courts and the executive branch generally regard it as reflecting customary international law on many matters. *See, e.g.*, *De Los Santos Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008).

pipelines to operate on someone else's land without their permission. As articulated in the negotiating and legislative history, the Treaty "does not authorize or approve any particular transit pipeline project proposed, through Canada or the United States. Instead, that approval or disapproval is left to the normal regulatory processes of the two nations, since *neither nation wished to prejudge such issues in an agreement of general applicability*." *Id.* at 51 (Testimony of Sen. Sparkman) (emphasis added). Likewise—and of particular relevance here—the Treaty was "not expected to resolve all the detailed questions concerning the construction and operation" of transit pipelines. *Id.* at 79 (Testimony of Assistant Secretary Katz). The Treaty instead leaves such questions to the "appropriate governmental authorities having jurisdiction over similar non-transit pipelines." *Id.* at 84 (Department of State Responses).

Rather, to fulfill the Treaty's object and purpose, the Parties must be able to oversee transboundary pipelines through the application and enforcement of generally applicable laws. The Treaty is premised on a belief "that pipelines can be an efficient, economical *and safe* means of transporting hydrocarbons[.]" Pipeline Treaty, pmbl. (emphasis added).

Realizing the goal of pipeline safety necessarily included allowing for governmental oversight and the application of relevant restrictions to prevent hazards. For example, the 1970s saw the advent of environmental regulations, and negotiators would have predicted the need for environmental regulations of pipelines to ensure their safety. In light of this need, the Parties explicitly recognized in Article IV that pipelines under the Treaty must be subject to the same environmental protections as any other pipeline. Pipeline Treaty, art. IV. It defies reason to conclude that the Parties would not have similarly intended to allow for the application of other generally applicable laws—such as property law—to ensure effective oversight of pipelines.

Neither Enbridge nor Canada suggest that the District Court's order was discriminatory. Instead, they seek to portray the order as outside the bounds of the regulatory authority that the Pipeline Treaty permits the Parties to exercise. Canada suggests that government interventions under Article IV must stop "short of a shutdown." Canada Br. 19 n.18, 21, 27. Again, Canada invents limitations on Article IV that are not present in the text—and are contrary to the purpose of the Treaty. The authority to order cessation of conduct that is not in

compliance with applicable requirements is essential to effective regulation. If a government cannot enforce contractual obligations under easements, environmental regulations, or fundamental tenets of property law by closing a pipeline that is noncompliant with domestic laws, those rules are meaningless.

A domestic pipeline could be shut down while trespassing; an international pipeline should be treated no differently. In fact, Article IV(2) requires such equal treatment. Pipeline Treaty, art. IV(2). Enbridge's and Canada's attempt to prevent the District Court from applying generally applicable law contrasts with the Treaty's purpose of promoting non-discriminatory treatment of pipelines between the United States and Canada.

B. The absence of U.S. support for Enbridge's and Canada's invocation of the Pipeline Treaty weighs against accepting their drastic interpretation.

Canada's argument that the injunction below makes the United States breach its obligations under the Pipeline Treaty fail for the reasons noted above. *Cf.* Canada Br. 18. Moreover, the United States is entirely capable of warning courts when it believes their decisions or acceptance of jurisdiction in a case may impinge on its interests,

particularly in the realm of foreign relations. *See, e.g.*, *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 80 (D.D.C. 2007) (U.S. government's "silence, particularly in light of foreign policy interests that are supposedly crucial, is significant"); *Doe v. Cisco Systems,* 73 F.4th 700, 722 (9th Cir. 2023) (U.S. government's silence "offers support for the conclusion that the State Department views such cases as less likely to harm foreign relations"). As Canada admits, the United States has never intervened in favor of Enbridge's interpretation of the Pipeline Treaty. Canada Br. 6. This litigation began in 2019—the United States has had plenty of time, under two Administrations, to intervene. It has not, even though Canada previously invoked the Treaty in the related Michigan litigation. *See* Brief by Amicus Curiae Gov't of Canada in Support of Defendants, *Michigan v. Enbridge Energy, L.P.*, No. 1:20-cv-01142 (W.D. Mich. 2021).

The United States' silence on the Pipeline Treaty also undermines Enbridge's assertion that the foreign affairs preemption doctrine precludes the neutral application of U.S. property law to property in the United States. As a threshold matter, that doctrine applies to *state* law—not, as Enbridge argues, to federal courts applying federal

common law. And even then, *American Insurance Association v. Garamendi,* 539 U.S. 396 (2003), involved a state's explicit attempt to address a foreign policy issue. Enbridge cites no case preempting generally applicable *state* law claims, such as trespass, for domestic injuries. *See id.* at 418-20 & n. 11. Regardless, Enbridge cannot show a "more than incidental effect in conflict with express foreign policy of the National Government." *Id.* at 420. "The relevant question is not whether the foreign government is pleased or displeased by the litigation, but how the case affects the interests of the United States,"—and the way to assess that is through the positions of the U.S. government. *Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001).

Canada's self-interested statements, without support from the United States, carry little weight. U.S. courts enforce U.S. law, including by preventing harm to people and the environment, and protecting private property rights. This Court should not deny ordinary relief to U.S. citizens harmed in the United States based on the United States' (alleged) bilateral treaty obligations to Canada that the United States has not seen fit to invoke.

III. The Pipeline Treaty must be read harmoniously with Indian treaties, human rights treaties, and customary international law.

Although the Pipeline Treaty clearly allows for the non-discriminatory application of neutral laws, any ambiguity about this application requires a harmonious reading with other legal provisions. Here, under the principle of harmonious interpretation, this Court should read the Pipeline Treaty consistently with other relevant bodies of law and legal principles, including Indian treaties, international human rights law, and customary international law. The Pipeline Treaty should not be read to compel action inconsistent with other treaty obligations, nor to prohibit actions necessary to comply with other international duties. Nothing in the Pipeline Treaty requires the United States to disregard its international human rights obligations and bilateral treaties with Indigenous Peoples. Nor does the Treaty preclude the Parties from taking action necessary to their fulfillment of other international and domestic treaty obligations, such as ordering the shutdown of a pipeline that is operating in violation of Indigenous Peoples' sovereign rights.

A. Canada's interpretation of the Pipeline Treaty is inconsistent with the principles of harmonious treaty interpretation.

Canada's interpretation of the Pipeline Treaty would create a conflict with obligations under Indian Treaties and international human rights norms, counter to principles of treaty interpretation.

U.S. laws and treaties should be interpreted in conformity with one another, absent clear legislative indication to the contrary. Restatement Fourth, Foreign Relations Law of the U.S.—Treaties, TD No. 2 § 106. Indeed, when invoking the Pipeline Treaty in related proceedings in Michigan, Canada stressed "the importance of fully respecting and implementing [] international agreements." *Statement by Minister Garneau on Line 5 Transit Pipeline* (Oct. 4, 2021), https://www.canada.ca/en/global-affairs/news/2021/10/statement-by-minister-garneau-on-line-5-transit-pipeline.html. As the District Court recognized, the United States also interprets domestic laws in accordance with its treaties with Tribes. JA 42-3. So does Canada. *R. v. Badger*, [1996] 1 S.C.R. 771, para. 47.

The Pipeline Treaty must be read together with U.S. obligations under Indian treaties, the federal trust responsibility, and international

law. That is easy, because the Pipeline Treaty allows the Parties to implement regulations and other limitations on the pipeline—including for the protection of the rights of Indigenous Peoples. *See supra* Section II.A. Thus, these distinct areas of law are to be read consistently.

Additionally, Canada's reading of the Pipeline Treaty is contrary to its own assertion that the United States and Canada must act consistently with their international obligations. Canada Br. 13. It makes little sense to say that the United States is bound to ensure the uninterrupted operation of Line 5 despite clear infringements on Indigenous sovereign rights protected by international law and treaties of the United States.

B. The Pipeline Treaty does not preclude the United States from taking action necessary to uphold its obligations under international and bilateral treaties.

1. The United States has a fiduciary duty to protect Indigenous Peoples' treaty rights.

In multiple legally binding treaties, the U.S. government has committed to honoring Indigenous Peoples', including the Bad River Band's, rights to hunt, fish, gather, and exclude in the Great Lakes. *See* Treaty with the Chippewa, arts. 1, 5, July 29, 1837, 7 Stat. 536; Treaty with the Chippewa, arts. 1, 2, Oct. 4, 1842, 7 Stat. 591.

In exchange for the millions of acres of Tribal land ceded to the United States, the federal government charged itself with "the highest responsibility and trust" towards Indigenous Peoples. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). This commitment—enshrined in the federal trust doctrine—imposes legal and moral obligations of "the most exacting fiduciary standard" to protect Tribal treaty rights, lands, assets, and resources. *Id.* The federal trust doctrine has been a cornerstone of the government-to-government relationship between the United States and Tribes throughout the nation's history and is grounded in numerous treaties, the U.S. Constitution, statutes, federal court cases, and executive orders and regulations. *Cohen's Handbook of Federal Indian Law* § 5.04[3][a] (Nell Jessup Newton ed., 2012). The United States has a duty to protect Tribes' rights to hunt, fish, and gather in their ancestral lands and exclude the existential threats posed by Line 5. If the Pipeline Treaty requires the United States to keep Line 5 operating regardless of its effect on treaty-protected rights, it would essentially require the U.S. government to violate its obligations as a trustee to protect these resources.

2. The Pipeline Treaty does not upend the U.S. government's human rights treaty obligations.

Subsequent to the Pipeline Treaty, the United States ratified the International Covenant on Civil and Political Rights (ICCPR), *ratified* June 8, 1992, 999 U.N.T.S. 171, and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), *ratified* Oct. 21, 1994, 660 U.N.T.S. 195. Furthermore, the United States is subject to customary international law norms regarding Indigenous Peoples' rights, specifically the obligation to respect the right to self-determination. *See* Office of the High Commissioner of Human Rights, *Indigenous Peoples and the United Nations Human Rights System* 8 (2012).

Indigenous Peoples have a right to participate in government decisions that "may affect them" or "their rights." *See* ICCPR, art. 1. Their right to culture is enshrined in international human rights law. ICCPR, art. 27. The right to culture includes "a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law." Human Rights Committee ("HRC"), *General Comment 23: Article 27*

(Rights of Minorities) (Fiftieth session 1997), U.N. Doc. CCPR/C/21/Rev.1/Add.5, para. 7.

The United States' obligations under the ICCPR to respect and protect the right to culture include the protection of the environment from harm and pollution caused by private actors. HRC, Concluding Observations on Suriname (4 May 2004) U.N. Doc. CCPR/CO/80/SUR, para. 21.

In light of the pipeline's manifold risks to the environment and the health of affected Indigenous communities, Line 5's continued operation would contravene the United States' duties to protect the right to life of Indigenous communities. ICCPR, art. 6. The right to life includes the right to enjoy a life with dignity, which is predicated on a clean, healthy, and safe environment, and access to food and water. HRC, General Comment 36, Article 6 (Right to Life), 3 Sept. 2019, CCPR/C/GC/35, paras. 3, 26, 62. That right gives rise to a corresponding State duty to protect against harm and pollution caused by private actors. *Id.* at para. 62.

As noted above, a Line 5 oil spill would cause substantial harm to the ecosystem and disproportionately affect the Bad River Band and

other Anishinaabe communities whose lives and livelihoods are dependent on the Great Lakes. If the Pipeline Treaty forces the United States to abandon environmental regulation and actively seek to ensure the pipeline's continued operation in spite of these grave risks of harm, it would require the United States to breach its duty to ensure fundamental human rights.

C. In the event of a conflict, the rights under Indian Treaties supersede the Pipeline Treaty.

The District Court correctly recognized that the United States cannot use the Pipeline Treaty as an excuse to ignore its commitments under Indian treaties including its treaty with Bad River Band. JA 42-3. Unless Congress has "clearly express[ed] its intent to do so," Indian treaty rights may not be abrogated. *United States v. Dion,* 476 U.S. 734, 738-740 (1986). To abrogate a treaty, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740. Nothing in the Pipeline Treaty nor the legislative history suggests any conflict, let alone that Indian treaty rights have been abrogated in favor of the operation of a transboundary pipeline. *See* JA 42-3 ("There is no such

abrogation language in the 1977 Transit Treaty, as the Transit Treaty does not mention Indian treaties or treaty rights at all, let alone the 1854 Treaty with the Chippewa."). The Pipeline Treaty's silence about Indian treaties provides no evidence that Congress considered any conflict. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999) (noting that Minnesota's enabling Act "makes no mention of Indian treaty rights" and therefore cannot provide a basis for abrogating them).

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Pipeline Treaty does not prevent the District Court from enforcing the Bad River Band's fundamental right to sovereignty over its Reservation. Accordingly, this Court should affirm the District Court's holding that Enbridge is liable for its unlawful conduct but remand with instructions to provide relief to Band River Band that immediately addresses the harm caused by Enbridge.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limit imposed by Circuit Rule 29 because it contains 6,578 words, excluding material exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the type-face and typestyle requires of Federal Rule of Appellate Procedure 32(a)(5-6) and Circuit Rule 32(b) because it has been prepared in a proportionally-spaced, 14-point Century Schoolbook typeface using Microsoft Word.

October 18, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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