

No. 25-582

In the Supreme Court of the United States

GRETCHEN WHITMER, GOVERNOR OF THE STATE OF
MICHIGAN, ET AL., PETITIONERS

v.

ENBRIDGE ENERGY, LP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Dana Nessel
Michigan Attorney General

Ann M. Sherman
Solicitor General
Counsel of Record

P.O. Box 30212
Lansing, Michigan 48909
ShermanA@michigan.gov
(517) 335-7628

Keith D. Underkoffler
Assistant Attorney General
Environment, Natural
Resources, and Agriculture
Division

Spencer D. Smith
Special Assistant Attorney
General
Attorneys for Petitioners

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INTRODUCTION

Enbridge’s brief in opposition reinforces the need for this Court’s review of the decision below. Enbridge offers four reasons for denying review, none of which withstand scrutiny.

First, Enbridge says the question presented is not raised here, oddly claiming that “*Petitioners* injected the Easement into this case.” Br. in Opp. 18. Not so. Enbridge attached the easement to its complaint, Dist. Dkt. 1-1:23–35,¹ claimed the easement’s essential terms had been “nullified,” Dist. Dkt. 66:18, and sought to enjoin state officials from taking “any steps” to “interfere” with its physical occupation of state land, “including the revocation or termination of the 1953 Easement,” Dist. Dkt. 1:19.

Second, Enbridge argues the review criteria are not satisfied. Br. in Opp. 2, 11–19. But Enbridge fails to address *Petitioners*’ argument for review under Rule 10(c)—i.e., an important question of federal law has not been, but should be, settled by this Court—thereby conceding the issue. Review is also warranted under Rule 10(a) because the Sixth Circuit’s degree-of-intrusion analysis conflicts with decisions from other courts of appeals and state courts of last resort—a fact Enbridge tries, but fails, to rebut.

¹ “Dist. Dkt.” refers to the district court’s CM/ECF docket in No. 1:20-cv-01141. “Dkt.” refers to the Sixth Circuit’s CM/ECF docket in No. 24-1608. Page cites are to the page numbers in the top right of the ECF header.

Third, Enbridge claims this case is a poor vehicle because its occupation of state land does not interfere with the State’s rights of use and enjoyment. Br. in Opp. 20. Not only is that inaccurate, but it ignores that the entire purpose of this suit is to prevent the State from exercising its right to exclude an occupier from state land. Enbridge also says it now disputes whether the easement was properly terminated. *Id.* at 17–18. But that does not change that the *effect* of the relief sought—which is what determines whether a suit is in fact against the sovereign—is “operation of the 1953 Easement,” Pet. App. 36a, without the State’s consent.

Finally, Enbridge makes a cursory defense of the decision below. Br. in Opp. 21–23. But Enbridge fails to engage with Petitioners’ argument and provides no good reason to hold that a State is *not* the real party in interest when a suit seeks to diminish the State’s ownership and control of sovereign land.

ARGUMENT

I. The question presented is squarely raised.

Enbridge argues that the question presented is not raised because Enbridge does not “seek to *diminish* state sovereign control over the Straits bottomlands.” Br. in Opp. 19. That is wrong. As both lower courts recognized, the relief Enbridge seeks would diminish the State’s ownership and control of the bottomlands by nullifying the State’s contractual property rights and preventing state officials from ‘interfering’ with an ongoing physical occupation of state land. Enbridge’s re-characterization of its suit is belied by the record below.

Enbridge seeks to enjoin enforcement of the State’s revocation and termination of the easement, which is attached as Exhibit 1 to its complaint. Dist. Dkt. 1-1. Enbridge does not dispute that States generally have the sovereign power to revoke easements over submerged lands. See, e.g., *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 455 (1892) (“Any grant of the kind is necessarily revocable.”); *id.* at 460 (“There can be no irrevocable contract” conveying submerged lands.). Nor does Enbridge contest that “[t]he easement is a contract,” Pet. App. 20a, granted “by the State of Michigan,” Dist. Dkt. 1-1:23, which expressly “allow[s] the State to terminate the easement” for breach. Pet. App. 6a.

Yet Enbridge seeks an order prohibiting state officials from doing just that. Dist. Dkt. 1:19. Stripping the State of its ability to terminate or revoke an easement that was granted by the State—and reserves rights to the State—would unquestionably diminish the State’s ownership and control of the land.

Both lower courts agreed. Enbridge challenges “any enforcement of the 1953 Easement[s] [disputed terms],” Dist. Dkt. 1:12, arguing that those terms were “nullified” by a later-enacted federal law, Dist. Dkt. 66:18. The district court stated that divesting the State of its contractual right to enforce the easement’s terms would “take[] something away from the state” and “deprive[] [the State] of part of the bargain back in 1953.” Dist. Dkt. 160:31.

The Sixth Circuit similarly observed that Enbridge’s suit implicated State “property interest[s]”

and would “deprive the State of [some] of the sticks in the so-called bundle of sticks representing the State’s property rights.” Pet. App. 16a; see also *id.* at 15a (“[T]his case implicates the State of Michigan’s ‘special sovereignty interests’ in the submerged bottomlands of the Straits of Mackinac.”).

The question presented is squarely raised because Enbridge seeks to prevent the State from enforcing its property rights, and Petitioners have asserted sovereign immunity on that basis.

II. The decision below warrants this Court’s review.

The Sixth Circuit allowed Enbridge to proceed against state officials without the State’s presence or consent because it understood *Coeur d’Alene* to require an examination of “the degree of intrusion into state sovereignty,” holding that sovereign immunity applies only if the requested relief would effectively “divest the State of full ownership” and “eliminate the State’s regulatory power over the land.” Pet. App. 17a, 20a.

The petition provides two reasons for review of that erroneous decision: (1) it raises an important federal question that “has not been, but should be, settled by this Court,” Pet. 8–16 (citing Sup. Ct. R. 10(c)); and (2) it conflicts with the approach taken by other courts of appeals and state courts of last resort, Pet. 16–20 (citing Sup. Ct. R. 10(a)). Enbridge does not contest the first basis for review, and its argument regarding the second is not persuasive.

A. The question presented has not been, but should be, settled by this Court.

The parties agree that sovereign immunity applies when a suit would effectively divest the State of full ownership and regulatory power over sovereign lands. The disagreement centers on whether such a request is a necessary—rather than sufficient—condition to trigger the State’s sovereign immunity. Pet. 12–16. Enbridge does not contest that this is an important question, that it implicates bedrock sovereign rights, or that the Rule 10(c) criteria are otherwise satisfied. Pet. 9–12.

Arguing the merits, Enbridge contends that full divestment is necessary. Br. in Opp. 13–19. But it fails to identify any decision of this Court settling that issue, and several opinions suggest otherwise. See, e.g., *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 289 (1997) (O’Connor, J., concurring) (sovereign immunity bars an officer suit that would effectively deprive the State “of a property interest”); *Va. Office for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 269 (2011) (VOPA) (Roberts, C.J., dissenting) (*Ex parte Young* does not apply when the relief sought “implicate[s] ... the State’s property rights”).

Enbridge primarily argues review is unwarranted because *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002), resolved the confusion caused by *Coeur d’Alene*. Br. in Opp. 12–13. To be sure, *Verizon* adopted the approach set out in Justice O’Connor’s *Coeur d’Alene* concurrence, rather than the “case-by-case balancing” advocated by Justice Kennedy and Chief Justice Rehnquist. See *Verizon*, 535 U.S. at 645.

But it did not address, let alone settle, when “that deceptively simple test [could be] met” in *Ex parte Young* actions seeking “to divest a State of sovereignty over territory within its boundaries.” See *id.* at 648–49 (Kennedy, J., concurring).

After *Verizon*, the Court restated the controlling inquiry: Plaintiffs cannot sue state officials without the State’s consent when the State itself “is the real, substantial party in interest, as when the judgment sought would expend itself on the public treasury *or domain.*” *VOPA*, 563 U.S. at 255 (emphasis added). Reiterating the need to “police abuses of [*Ex parte Young*] that threaten to evade sovereign immunity,” the *VOPA* Court held that the “general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought.” *Id.* at 256 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 107 (1984)). “[W]hen (for example) the object of the suit against a state officer is to ... acquire state lands,” the requested relief effectively runs against the State, so state sovereign immunity applies. *Id.* at 258.

The sanctity of state territory, often used as an exemplar of sovereignty, animates much of the caselaw in this area. Yet, since the fractured opinions in *Coeur d’Alene*, this Court has provided no guidance about the application of the doctrine to suits seeking to enjoin state officials from exercising a State’s property rights. As the court below observed, under existing precedent, this is “not an easy” task. Pet. App. 12a. Because this important question of federal law has not been settled by this Court, review is warranted under Rule 10(c).

B. The decision below conflicts with decisions of other courts of appeals and state courts of last resort.

The Sixth Circuit held that sovereign immunity applies only when an officer suit would effectively divest the State of *full* ownership and eliminate *all* regulatory power over State land. Pet. App. 20a. Contrary to Enbridge’s argument that there is no split, Br. in Opp. 13–17, other courts of appeals have rejected both aspects of the Sixth Circuit’s inquiry.

As to the first component, the Second and Fifth Circuits have held that an *Ex parte Young* suit need not effectively divest the State of full ownership for sovereign immunity to apply. In *Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004), the Tribe did not claim full ownership of the State’s land. Instead, it argued that New York “held fee title ... subject to the Indians’ right of occupancy and use.” *Id.* at 23. Enbridge’s assertion that “the tribe’s suit sought to *extinguish* the State’s ownership” is thus inaccurate. Br. in Opp. 14. As here, the Tribe *admitted* that New York owned the land. The Sixth Circuit’s statement that the State “seemingly could, for example, sell the disputed parcel subject to an encumbrance” applies equally to the Second Circuit’s facts. See Pet. App. 16a.

The Second Circuit held that sovereign immunity applied because the Tribe’s suit was “fundamentally inconsistent with the State of New York’s *exercise* of fee title.” 395 F.3d at 23 (emphasis added). That the Tribe sought to exclude state officials from State land weighed heavily in this determination. *Id.* But the

same is true here. Like the Tribe, Enbridge seeks to enjoin state officials from “taking any steps” that would interfere with its use and occupation of State land. Dist. Dkt. 1:19. Enbridge’s physical occupation necessarily divests the State of its right to possess that land; and the injunction that Enbridge requests would deprive the State of its right to exclude. Pet. 21–22. That is fundamentally inconsistent with Michigan’s exercise of fee title. See *id.* This case would have come out the other way in the Second Circuit.

The Fifth Circuit’s decision in *Baker Farms, Inc. v. Hulse*, 54 F. App’x 404, 2002 WL 31687704 (5th Cir. 2002), departs even further from the opinion below.² The plaintiff there did not assert anything approaching full ownership of State land. As here, the dispute centered on an easement. If the plaintiff prevailed, the State would still retain all the property rights the Sixth Circuit found significant: “title to and ownership over the land,” Pet. App. 16a; the ability to “sell the disputed parcel subject to an encumbrance (that is, [the easement]),” *id.*; “the right to exclude entities and individuals other than [the plaintiff] from the parcel,” *id.*; and regulatory authority over the land, Pet. App. 19a. Yet, the Fifth Circuit held that state sovereign immunity applied.

Enbridge attempts to distinguish *Baker Farms* by selectively recounting factual allegations that the

² Enbridge notes that *Baker Farms* is unpublished. But an opinion’s publication status is not part of this Court’s review criteria under Rule 10. And the need to ensure uniformity in the application of sovereign immunity is too important to turn on whether a court of appeals’ opinion is placed in the federal reporter.

Fifth Circuit itself did not consider significant. Br. in Opp. 16–17. Unlike the court below, the Fifth Circuit conducted no degree-of-intrusion inquiry. Instead, it held the plaintiff could not proceed against state officials because a federal court “may not adjudicate ... limitations of the [State’s] interest in its property” without the State’s presence or consent. *Baker Farms*, 2002 WL 31687704 at *1. The same is true here. Enbridge seeks to limit the exercise of property rights that belong to Michigan—not the named officials.³

The Ninth Circuit has also held that an *Ex parte Young* suit need not seek to eliminate *all* regulatory power for state sovereign immunity to apply, explaining that while the fractured opinions in *Coeur d’Alene* mentioned that factor, none of them “considered [it] determinative.” *Lacano Invs., LLC v. Balash*, 765 F.3d 1068, 1075 (9th Cir. 2014). The dispositive question, the Ninth Circuit explained, is whether the suit would deprive the State of “actual control over submerged lands.” *Id.* That test is satisfied here.

Similarly, the Supreme Court of Georgia has held that state sovereign immunity applies when “the claimed relief would control or take the State’s real property or interfere with contracts to which the State is a party.” *Bd. of Comm’rs of Lowndes Cnty. v. Mayor*

³ Enbridge protests that *Baker Farms* involved a prescriptive easement. But, as Petitioners highlighted below, Enbridge itself has claimed a prescriptive easement over the State’s submerged lands. Dkt. 16:40–43. While Enbridge has not styled its claim *here* as one asserting a prescriptive easement, that distinction is without a difference because the *effect* of the relief sought is the same. See *VOPA*, 563 U.S. at 256.

& *Council of Valdosta*, 848 S.E.2d 857, 858 (Ga. 2020); see also *id.* at 861 (sovereign immunity applies to “attempts to control the real property rights and contractual obligations of the State”). Here, Enbridge seeks to control or take Michigan’s real property by preventing the State from ending a physical occupation of state land. Pet. 21–22. And Enbridge seeks to interfere with a contract to which the State is a party by requesting a declaration that essential terms of the easement have been “nullified” and cannot be enforced. Again, if the Supreme Court of Georgia’s test were applied below, this case would have come out the other way.

III. This case is an ideal vehicle.

Enbridge claims this case is “a poor vehicle because Line 5 is not interfering with the State’s use and enjoyment of the Straits bottomlands.” Br. in Opp. 20. But it *is* interfering. As this Court has held, “a permanent physical occupation of another’s property ... is perhaps the most serious invasion of an owner’s property interests” because “it chops through the bundle, taking a slice of every strand.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Neither the State nor its People can use land that is occupied by a pipeline—for example, they cannot build docks or drop anchor there. More to the point, Enbridge’s *lawsuit* (which is the proper focus of the sovereign immunity analysis) seeks to stop the State from exercising its power to exclude, which “has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” *Id.*

Enbridge also says it disputes whether state officials properly terminated the easement. Br. in Opp. 17–18, 21. It is telling that Enbridge has never presented that dispute for judicial review. Instead of challenging whether the State provided adequate notice to terminate, Enbridge filed this suit to enjoin the termination from having real-world effect. Dist. Dkt. 1:19. The dispute Enbridge now attempts to raise is at most a legal, not a factual, one. And it is no barrier to reaching the question presented because it does not change that the *effect* of the relief sought by Enbridge—as the Sixth Circuit recognized—is to ensure the “operation of the 1953 Easement” without the State’s consent. Pet. App. 36a.

The only dispute is whether that effect of Enbridge’s requested relief renders its suit barred by sovereign immunity. This case is an ideal vehicle because the issue was outcome-determinative below, and there is no procedural, jurisdictional, or factual impediment to this Court’s review.

IV. The decision below is wrong.

Finally, Enbridge makes a cursory defense of the decision below. Br. in Opp. 21–22. But its analysis is unpersuasive and fails to engage with most of the petition’s arguments for rejecting the Sixth Circuit’s holding. Pet. 20–24.

To reiterate: a State’s immunity does not turn on “the degree of intrusion into state sovereignty” or whether a suit would effectively “deprive the State of all the sticks in the so-called bundle of sticks.” Pet.

App. 16a–17a. It turns on whether the State is the real party in interest to the suit—*i.e.*, whether the “*effect* of the relief sought” runs against the State itself. *VOPA*, 563 U.S. at 256.

That test aligns with longstanding precedent, see *Belknap v. Schild*, 161 U.S. 10, 18 (1896), and makes good sense: If a State cannot be haled into federal court to defend its property rights, neither can its officers be haled to litigate those rights in the State’s absence. See *Coeur d’Alene*, 521 U.S. at 289 (O’Connor, J., concurring). Sovereign immunity applies not only in title disputes, but also to suits seeking to “deprive [the sovereign] of the incident of title,” such as its rights to use, possess, or exclude others from sovereign property. See, e.g., *Int’l Postal Supply Co. v. Bruce*, 194 U.S. 601, 606 (1904) (Holmes, J.); Pet. 22–23. Because Enbridge’s requested relief would divest Michigan of those rights, the State is the real party in interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dana Nessel
Michigan Attorney General

Ann M. Sherman
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
ShermanA@michigan.gov
(517) 335-7628

Keith D. Underkoffler
Assistant Attorney General
Environment, Natural
Resources, and Agriculture
Division

Spencer D. Smith
Special Assistant Attorney
General

Attorneys for Petitioners

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