

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS**

TRANSCANADA KEYSTONE XL PIPELINE, LP,
and
TC OIL PIPELINE OPERATIONS INC.,

Plaintiffs,

v.

JOHN F. KERRY, Secretary of the Department of
State,
LORETTA E. LYNCH, Attorney General of the
United States,
JEH CHARLES JOHNSON, Secretary of the
Department of Homeland Security, and
SALLY JEWELL, Secretary of the Department of the
Interior,

Defendants.

Case No: 4:16-cv-00036

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MONTANA, NEBRASKA, SOUTH DAKOTA, AND TEXAS**

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INTRODUCTION

The Executive's broad assertion of authority to burden commerce in this case is of great concern to the States. The President seeks to prohibit a means of interstate and international commerce desired by both the States and by Congress because, in his view, overriding the States and Congress is necessary to preserve his stature on the world stage and his bargaining position in ongoing or future multinational negotiations. The Executive then maintains that this exercise of authority to regulate commerce is unreviewable by the Courts. This assertion of expansive and unchecked power appears to have no limit and threatens to unacceptably infringe on the sovereignty of the States. In the particular case of the Keystone XL Pipeline, moreover, the President's actions will impose significant harm in the *Amici* States, which represent the States through which the Pipeline will transport oil from Canada to the Gulf Coast. Prohibition of the Pipeline will result in the loss of thousands of future jobs, millions of dollars in state and local government revenue, and billions of dollars in economic activity.

The Courts have in the past stepped in to check similarly creative assertions of power by the Executive. Courts rebuffed the President's attempt to seize most of the nation's steel mills despite his claim that they were necessary to preserve the national defense in a time of war. They similarly rejected the President's attempt to interfere with the States' judicial system even though he did so in order to fulfill the nation's treaty obligations. The States ask this Court to follow this precedent by declaring that the Executive lacks the authority to prohibit construction of the Pipeline because that authority lies exclusively with Congress and Congress has not delegated that power to the President.

ARGUMENT

I. The Executive’s Prohibition Of The Keystone XL Pipeline Unlawfully Interferes With Congress’s Power To Regulate Interstate and International Commerce.

A. Construction of the Keystone XL Pipeline is an issue of international and interstate commerce.

In determining whether the Executive has lawfully exercised its authority in this case, the first issue the Court must resolve is the nature of the authority being exercised.¹ In light of the context of this case, the decision to prohibit the construction of the Keystone XL Pipeline is a regulation of interstate and international commerce, not an exercise of the Executive’s foreign relations power or of the President’s power as Commander in Chief of the armed forces.

Generally, the States are empowered to regulate and permit economic activity in their territory.² But through the Constitution, the States ceded to Congress³ the power to “regulate Commerce with foreign Nations, and among the several States.”⁴ Commerce “means trade . . . it means intercourse . . . [and it] includes navigation, as the principal means by which foreign intercourse is effected.”⁵ Historically, this power has included the ability to regulate the importation of foreign goods, commerce engaged in by foreign persons, and the methods of transportation for those goods, services, and persons.⁶ Moreover, that power includes the authority to regulate commerce with both

¹ See *Medellin v. Texas*, 552 U.S. 491, 525-28 (2008) (examining in a separation of powers analysis first the nature of the power being exercised and the Branch to which the power belongs); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (same).

² See *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955).

³ See *Printz v. United States*, 521 U.S. 898, 918-21 (1997).

⁴ U.S. CONST. Art. I, § 8.

⁵ *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875).

⁶ See *United States ex. rel. Turner v. Williams*, 194 U.S. 279, 290 (1904) (“[T]he power to regulate commerce with foreign nations . . . includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States”); *Bd. of Trustees of Univ. of Ill. v. United States*,

foreign governments and foreign citizens.⁷ In sum, the power to regulate international commerce is the power to regulate all that is or directly affects commerce across our borders.

Even without elaboration, it is clear that regulation of the Keystone XL Pipeline falls squarely within Congress's interstate and international commerce power.⁸ The Pipeline is a commercial structure. Its sole purpose is to transport crude oil from one private commercial facility to another in order that citizens, both foreign and domestic, may profit from the fruits of their labor and engage in the mutually-beneficial exchange of goods and services.⁹ It crosses the border of both nations and states, and the economic activity it will generate spreads across the *Amici* States and into Canada.¹⁰ The Pipeline also qualifies as an international and interstate means of transportation, and its permitting is therefore a *per se* regulation of commercial intercourse and international commerce.

B. Prohibiting the Keystone XL Pipeline is not an exercise of the President's foreign affairs power or power as Commander in Chief.

Rather than acknowledging that the prohibition of the Pipeline is a regulation of interstate and international commerce, the Executive argues here that it is instead an act within the President's

289 U.S. 48, 57 (1933) (“The words of the Constitution comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.”); *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824) (“Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”).

⁷ See *United States v. Holliday*, 70 U.S. 407, 417 (1865) (“Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments.”).

⁸ See *U.S. v. Western Union Telegraph Co.*, 272 F. 311, 313 (1921) (Hand, J.) (expressing “no doubt that Congress, by virtue of its authority to regulate foreign commerce, could regulate the laying and operation of [international] cables” and rejecting the notion that “a failure by Congress to exercise its undoubted powers as proof that some other branch of the government has the right to do what Congress might readily have authorized”).

⁹ See Complaint, D.E. 1, Exhibit B at 6-7.

¹⁰ *Id.*

foreign affairs power and his power as Commander in Chief of our armed forces.¹¹ But through neither of those powers did the States in the Constitution give the President plenary authority to forbid international commerce in every circumstance, nor in this circumstance in particular.

“The President’s authority to act,” even in the area of foreign affairs, “must stem either from an act of Congress or from the Constitution itself.”¹² The Supreme Court has recognized that the President has significant powers over the nation’s foreign affairs. For example, the Constitution makes the President the Commander in Chief of the nation’s armed forces and gives the President the power to make war, make treaties, appoint ambassadors, and receive foreign ministers.¹³ In addition, there may be some level of foreign relations power inherent in the President’s role as chief executive.¹⁴ But the President’s power to take actions based on their effect on foreign relations is not without limits, and it must yield to the rights of individuals (like those at issue in *Youngstown*¹⁵), the sovereignty of the States (at issue in *Medellin*), and—most important for this case—the foreign relations powers vested in Congress, not the President (at issue in both *Youngstown* and *Medellin*).

The clearest limitations that the States placed on the President’s foreign relations power—which ensure that power is not so undefined as to be all-encompassing—are those powers that the Constitution vests in Congress, not the President.¹⁶ “Many decisions affecting foreign

¹¹ Mem. in support of Mot. to Dismiss, D.E. 42-1, at 13.

¹² *Medellin*, 552 U.S. at 524 (internal marks and citation omitted).

¹³ U.S. CONST. Art. II, §§ 2, 3.

¹⁴ See *Zivotofsky*, 135 S. Ct. at 2099-100 (Thomas, J., concurring in part and dissenting in part).

¹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

¹⁶ See *Zivotofsky*, 135 S. Ct. at 2090 (“The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not for the President alone to determine the whole content of the Nation’s foreign policy.” (citations omitted)).

relations . . . *require* congressional action.”¹⁷ Only Congress, not the President, may “‘establish an uniform Rule of Naturalization,’ ‘define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,’ ‘declare War,’ ‘grant Letters of Marque and Reprisal,’ and ‘make Rules for the Government and Regulation of the land and naval Forces.’”¹⁸ One of the foreign affairs powers the Supreme Court has explicitly recognized is vested in Congress, *not* the President, is the power to regulate international commerce.¹⁹ The President can no more regulate international commerce than he can act on his own to make a treaty, for the foreign affairs power to ratify treaties is vested in the Legislative branch, no matter how important and vital that treaty would be to our foreign policy.²⁰ Accordingly, because the decision to prohibit the Keystone XL Pipeline is one that regulates international commerce, it cannot be said that the States, in ratifying the Constitution, chose to give that authority to the President under any notion of a more generalized “foreign affairs” power.

That the power to regulate interstate and international commerce is vested in Congress, as opposed to part of the President’s foreign relations powers, is made clear by the Supreme Court’s Commerce Clause jurisprudence. As is all-too-familiar to the States, the Supreme Court has routinely explained that “an essential attribute of [the] power” to regulate foreign and international commerce is “that it is *exclusive* and plenary.”²¹ Thus, “Commerce Clause scrutiny may well be more rigorous when

¹⁷ *Id.* at 2087 (emphasis added).

¹⁸ *Id.* (citing U.S. CONST. Art. I, § 8).

¹⁹ *Id.*; *see also Western Union*, 272 F. at 316 (“It must be remembered that the Constitution gives only to Congress the power to ‘regulate commerce with foreign nations, and among the several states’”).

²⁰ *See id.* (citing U.S. CONST. Art. II, § 2, cl. 2).

²¹ *Bd. of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48, 56 (1933) (emphasis added); *see also California Bankers Ass’n v. Shultz*, 416 U.S. 21, 46 (1974) (“The plenary authority of Congress over both interstate and foreign commerce is not open to dispute”); *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123, 125 (1973) (“The Constitution gives Congress broad, comprehensive powers ‘(t)o regulate Commerce with foreign Nations.’”); *License Tax Cases*, 72 U.S. 462, 470 (1866) (Congress may grant licenses to engage in interstate and international commerce as part of “the exercise of that

a restraint on foreign commerce is alleged.”²² Because the Keystone XL pipeline falls squarely within Congress’s power to regulate foreign commerce, Congress’s power to regulate in this context includes the power to prescribe “the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.”²³ Here, by both action and inaction, Congress has made a choice as to the extent to which commerce through the Keystone XL Pipeline “shall be free and untrammelled,” as well as “how far it shall be prohibited,” and by prohibiting the Pipeline’s international and interstate commerce without Congressional authorization (and indeed contrary to expressed Congressional intent), the President has usurped Congress’s exclusive authority and exceeded his own.

To be sure, the President might take actions that affect international and interstate commerce in direct exercise of the foreign affairs powers granted to him by the States through the Constitution. For example, were we at war with Canada, the President could prohibit the Pipeline as Commander in Chief in efforts to make war as he sees fit.²⁴ But the Supreme Court has rejected creative assertions of power not directly related to making war, like those advanced by the Executive here, merely because an action might affect national security. The Court in *Youngstown*, for example, rejected the President’s attempt to seize steel plants in a time of war based on the national security concern that their halt in operations “jeopardize[d] our national defense” because steel was “indispensabl[e] [for] substantially all weapons and other war materials.”²⁵ Justice Jackson, in his famous concurrence, reasoned that

great and extensive power”); *Gibbons*, 22 U.S. at 236 (Johnson, J., concurring) (the Constitution provides “exclusive grants to Congress of power over commerce”).

²² *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980).

²³ *Welton v. Missouri*, 91 U.S. 275, 279-80 (1875).

²⁴ *See Western Union*, 272 F. at 314-15.

²⁵ *Youngstown*, 343 U.S. at 582-83.

“[t]he Constitution expressly places in *Congress* power ‘to raise and support Armies’ and ‘to provide and maintain a Navy,’” so the President cannot wield that authority by seizing steel mills despite the national security concerns.²⁶ Because the President’s national security concerns in this case are far more attenuated than those in *Youngstown*—and the power being exercised is as clearly vested in Congress as it was in *Youngstown*—his actions demand invalidation.

Moreover, the Executive’s frighteningly broad arguments in defense of its power to prohibit the Pipeline have already been rejected by the Supreme Court, would render the vesting of the power to regulate international commerce in Congress a near nullity, and would give the President the power to unilaterally destroy the economy of the States that depend on international commerce.

First, the Executive argues that its power in this case stems from the President’s role as the “sole organ of the nation in its external relations,” citing the *Curtis-Wright* case,²⁷ but fails to mention that the Supreme Court last year repudiated that language as dicta and rejected the State Department’s attempt to, as here, use it to assert “broad, undefined powers over foreign affairs.”²⁸

Next, the Executive argues that it is exercising power as Commander in Chief of the armed forces because the Pipeline implicates territorial integrity, relations with foreign governments, foreign policy, national security, and the intrusion of foreigners over our borders.²⁹ But that is true of almost *all* international commerce—be it ships entering port, goods flowing across our borders, or workers coming into the country. If this power was said to be vested in the President, the Commerce Clause

²⁶ *Id.* at 643 (Jackson, J., concurring) (emphasis added); *see also id.* at 587 (majority opinion holding that “[e]ven though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property”).

²⁷ Mem. in support of Mot. to Dismiss, D.E. 42-1, at 13.

²⁸ *Zivotofsky*, 135 S. Ct. at 2089-90.

²⁹ Mem. in support of Mot. to Dismiss, D.E. 42-1, at 14.

would be entirely read out of the Constitution. There is no doubt that international commerce “necessarily implicates relations with foreign governments as well as foreign policy,”³⁰ but *that* foreign affairs power was given by the States to Congress—not the President.

Finally, the Executive believes that it has the power to prohibit the Pipeline because of its potential effect on “the United States’ credible leadership role on climate change issues.”³¹ But if such tenuous connections to international stature and potential foreign negotiations is sufficient to provide the President constitutional authority to act, there is virtually no limit to the power of an enterprising President to dream up reasons to exercise authority far beyond what the Constitution contemplates in a manner that could prove disastrous to the States.³² The President could cripple the economy of border States like Texas and Montana by unilaterally prohibiting the importation of goods from bordering nations, claiming that such an action will improve his negotiating position with Mexico over immigration or with Canada over oil sands production. Or he might justify destroying the economy of States like Oklahoma, Kansas, Nebraska, and South Dakota by prohibiting foreign citizens from purchasing or shipping fossil fuels or genetically-modified crops from the United States, claiming that exercise of this power will put him in a better position to convince other countries to engage in responsible energy policy or farming practices.

Indeed, such a broad assertion of foreign relations power is inconsistent with the Supreme Court’s previous invalidations of the President’s actions. The Supreme Court in *Medellin*, for example, rejected the President’s contention that his desire to “demonstrat[e] commitment to the role of international law” gave him the foreign affairs power to enforce ratified treaty obligations on states

³⁰ *Id.*

³¹ *Id.* at 30-31.

³² *See Western Union*, 272 F. at 315.

without an affirmative act of Congress executing that treaty.³³ In the Executive's estimation, *Youngstown* would have come out quite differently if only President Truman had justified his seizure of steel mills by claiming he was attempting to show international leadership on good labor policy.

The importance of the courts' role in circumscribing the President's assertion of his foreign affairs power cannot be understated. In ratifying the Constitution, the States yielded a portion of their sovereignty to the federal government,³⁴ implementing careful checks to ensure that national government does not use that power to the States' detriment. While the States recognized that in certain aspects of foreign affairs it is important that the nation speak with "one voice," ceding those aspects to the unitary national executive,³⁵ the States also sought to protect themselves from Executive overreach in vital areas like commerce by vesting other foreign affairs powers in Congress, where the States through their representatives have a direct say on the nation's policy on any particular issue. In this case, the Executive is attempting to break that careful bargain by broadly construing its power so as to swallow the authority the States chose to vest exclusively in Congress. To maintain the federal structure created by the States, it is vital that this Court carefully confine the President's authority by recognizing that the actions in this case are the prerogative of Congress alone.

C. Congress has not delegated to the President the authority to prohibit construction of the Keystone XL Pipeline.

Having no formal, textual, or practical authority to unilaterally prohibit construction of the Pipeline, the Executive finally relies on past historical practice to demonstrate that it has power to do what it has done. While historical practice can be relevant to a separation of powers analysis, it is

³³ *Medellin*, 552 U.S. at 524.

³⁴ *See Printz*, 521 U.S. at 918-19.

³⁵ *See Zivotofsky*, 135 S. Ct. at 2086.

important to remember that “past practice does not, by itself, create power.”³⁶ Rather, past practice is only relevant in that, when systematic, unbroken, and unquestioned, it “can raise a presumption that the action had been taken in pursuance of [Congressional] consent.”³⁷ In other words, past practice goes only to whether Congress has implicitly delegated its power to the Executive, not whether the Executive has acquired that power extraconstitutionally through historical happenstance.

As TransCanada aptly explains, history does not indicate that Congress has delegated to the President plenary authority over international oil pipelines. Moreover, the Executive must demonstrate Congressional “acquiescence in this *particular* exercise of Presidential authority,”³⁸ and with respect to this *particular* Pipeline, the President does not have the implicit delegation from Congress to prohibit the Keystone XL Pipeline. In fact, Congress has explicitly repudiated the President’s particular actions in this case as evidenced by at least two Congressional actions.

First, the Executive relies on Section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011 (the “Payroll Act”) to argue that it has been delegated the authority exercised in this case, but the Payroll Act did not purport to grant authority to prohibit the Keystone XL Pipeline for all time and for any reason. In any event, to the extent that the President has been delegated any power, his exercise of that authority exceeded the discretion delegated by Congress. It is axiomatic that, although Congress may delegate its power to the Executive by enacting legislation, the Executive may not exceed the scope of that delegation by going beyond the limitations imposed by statute.³⁹

³⁶ *Medellin*, 552 U.S. at 532 (internal marks and citation omitted); *see also U.S. v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

³⁷ *Medellin*, 552 U.S. at 531 (internal marks and citation omitted).

³⁸ *Id.* at 528 (emphasis added).

³⁹ *See, e.g., City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1870 (2013).

The Payroll Act, which was passed by Congress and signed by the President, required the President grant a permit authorizing construction of the Keystone XL Pipeline within 60 days of its passage.⁴⁰ The only exception was on the condition that he “determines that the Keystone XL pipeline would not serve the national interest” and he submits to Congress within 15 days of that determination a report justifying the determination.⁴¹ If the President does neither within 60 days of the enactment of the law, “the permit for the Keystone XL pipeline . . . shall be in effect by operation of law.”⁴²

Within 60 days of the Payroll Act, the President neither granted the permit nor made a determination it was not in the national interest, but instead stated that he could not assess whether the Pipeline was in the national interest in the timeframe provided for in the Act—a timeframe to which he agreed when signing the law—and expressed no judgment on the merits of the Pipeline.⁴³ Thus, the Act required him to grant the permit or at least recognize that it is “in effect by operation of law.” Instead, the President decided to prohibit construction of the Pipeline four years later—an action not contemplated within the delegation of authority Congress provided for in statute. Accordingly, the President’s prohibition of the Pipeline was not within the authority delegated by Congress.

Second, even if practice indicates that Congress implicitly delegated permitting authority to the President in the past, that delegation is not permanent. Congress cannot irrevocably give up its power

⁴⁰ Pub L. No. 112-78, 125 Stat. 1280, 1289-1290, § 501(a) (Dec. 23, 2011).

⁴¹ *Id.* at § 501(b)(1) & (2).

⁴² *Id.* at § 501(b)(3).

⁴³ Statement by the President on the Keystone XL Pipeline (Jan. 18, 2012), *available at* <https://www.whitehouse.gov/the-press-office/2012/01/18/statement-president-keystone-xl-pipeline>. The Executive may argue that this statement constitutes a determination that the Pipeline was not in the national interest for the purposes of the Act, but such an action refusing to consider the merits of the Pipeline and instead kicking the can down the road was not within the intent of Congress. The Court should apply rigorous scrutiny to determine if the Executive’s action was a determination that the Pipeline was not in the national interest as intended by Congress. And even if the Executive is correct on this front, his “determination” under the Payroll Act ended his delegated authority, so his later denial of the Pipeline at issue here was no longer within the scope of the Act.

by lack of use, nor can the President irreversibly gain power by such means.⁴⁴ When the President abuses the discretion afforded to him by implicitly delegated power, Congress may take affirmative steps to indicate that this power is no longer being delegated to the President.⁴⁵ It has done so here.

In January 2015, after the President violated the terms of the Payroll Act and otherwise engaged in undue delay in granting a permit, Congress passed the Keystone Pipeline Approval Act, which states that: “TransCanada Keystone Pipeline, L.P. may construct, connect, operate, and maintain the pipeline and cross-border facilities described in the application filed on May 4, 2012.”⁴⁶ There can be no more question with respect to Congress’s intent concerning the Pipeline or the President’s authority to prohibit it. Nor can there any longer be any argument that Congress has implicitly delegated to the President authority to block its construction when it has, in the clearest terms, attempted to assert its authority to permit the Pipeline. That should be the end of the matter.

The Executive’s only response is that the Keystone Pipeline Approval Act was vetoed and therefore the Court should pay it no mind.⁴⁷ But having argued all along for a functionalist analysis of whether mere historical acquiescence implies Congressional delegation,⁴⁸ the Executive cannot now hide behind formalism to say that an enrolled bill provides no indication of Congressional intent. If formalism is the name of the game, then the result is clear: Congress is formally vested with the power to regulate international commerce, and prohibition of the Keystone XL Pipeline is far more the

⁴⁴ See *Youngstown*, 343 U.S. at 588-89.

⁴⁵ See *Midwest Oil*, 236 U.S. at 471 (noting that President’s ability to exercise impliedly delegated power is “subject to disaffirmance by Congress”).

⁴⁶ S. 1, 114th Cong., § 2(a) (1st Sess. 2015).

⁴⁷ Mem. in support of Mot. to Dismiss, D.E. 42-1, at 40-45.

⁴⁸ See Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 384 (2015) (describing Justice Jackson’s concurrence in *Youngstown* as “famously functionalist”).

regulation of international commerce than the exercise of any foreign affairs power that is vested in the Executive. But if we are to adhere to a functionalist approach, then there can be no clearer indication that Congress is expressing its intent to wrest any impliedly delegated power back from the President than a bill that has been passed through both houses.⁴⁹

Ultimately, this case presents a simple conflict between the President and Congress. The President seeks to prohibit the construction of the Keystone XL Pipeline and Congress has expressed its desire for it to be built. The question before the Court, given all the facts and circumstances surrounding the Pipeline, including the Executive and Legislative branches' actions, is: Does the decision to prohibit the Pipeline fall under Congress's authority to regulate interstate and international commerce, or the President's authority as Commander in Chief of the armed forces (or some other undefined, generalized foreign affairs power⁵⁰)? The *Amici* States believe it is very clearly the former and, as a result, the President has acted outside the scope of his authority.

II. **The *Amici* States Desire Construction Of The Pipeline That Has Been Prevented By The Executive's Unlawful Interference With Interstate And International Commerce.**

In transporting energy resources from Canada to refineries on the Gulf Coast, the Keystone XL Pipeline will transport crude through each of the *Amici* States,⁵¹ and each of those States desire to engage in that interstate and international commerce. Construction of the Pipeline provides many economic benefits to the States and, contrary to assertions of the Environmental *Amici* supporting

⁴⁹ And, as Commerce Clause jurisprudence indicates, lack of regulation of commerce by Congress evinces its intent for the free market to dictate the result. *See infra* pp. 5-6; *see also Youngstown*, 343 U.S. at 643 (when Congress does not act, it is not an expression of intent that the President has power to act in Congress's place, but that "Congress sees fit to rely on free private enterprise").

⁵⁰ *See Youngstown*, 343 U.S. at 646-47 (warning against "[l]oose and irresponsible use of adjectives" such as "[i]nherent powers,' 'implied powers,' 'incidental powers,' 'plenary powers,' [and] 'war' powers" because they are "without fixed or ascertainable meaning," and thus the "vagueness and generality" of "such nebulous claims" are used to justify "unrestricted presidential powers").

⁵¹ Complaint, D.E. 1, at 7; *id.*, Exhibit B, at 7.

Defendants, presents few net negative externalities. As explained above, because the *Amici* States are attempting to engage in interstate commerce, enabled by international commerce, and Congress has expressly approved that commerce, the President’s attempt to interfere with and burden interstate and international commerce exceeds his constitutional authority.

A. The *Amici* States desire construction of the Keystone XL Pipeline because it promotes interstate commerce and economic development.

According to the State Department, construction of the Pipeline would create over 42,000 jobs, many of which would be in the *Amici* States.⁵² This would lead to over \$2.05 billion of employee earnings,⁵³ including in minority and low-income communities,⁵⁴ with downstream economic effects that would spur even more growth in the *Amici* States. Thus, construction of the Pipeline would contribute about \$3.4 billion to the nation’s GDP.⁵⁵ In addition to the increased state revenue from taxes on pipeline-related income and consumption, the counties through which the Pipeline runs would also receive millions in increased property tax revenue, instantly becoming one the most substantial sources of revenue for many of those counties to fund roads, schools, hospitals, police, and firemen.⁵⁶ Moreover, the likely alternatives to transporting Canadian crude—rail or truck—will “likely result[] in a greater number of injuries and fatalities per ton-mile than transportation by pipeline.”⁵⁷

⁵² Complaint, D.E. 1, Exhibit B, at 15.

⁵³ *Id.*

⁵⁴ *Id.* at 16-17.

⁵⁵ *Id.* at 16.

⁵⁶ *Id.* at 15; see also Tony Dokoupil, *Main Street, Montana: Small Towns Pray for Keystone XL Pipeline*, NBC News (Oct. 22, 2014), <http://www.nbcnews.com/feature/seeking-main-street/main-street-montana-small-towns-pray-keystone-xl-pipeline-n139976>; Letter from Sen. Jim Smith, *et al.* to Sec. John Kerry (Mar. 4, 2014), available at <http://www.keystone-xl.com/wp-content/uploads/2014/03/Nebraska-Legislature-letter-of-support-for-Keystone-XL-1.pdf>.

⁵⁷ Complaint, D.E. 1, Exhibit B, at 14-15.

Not surprisingly, the people's representatives in each of the States through which the Pipeline will operate support construction of the Pipeline and the interstate commerce it promotes.

In **Montana**, Democratic Governor Steve Bullock sent a letter to President Obama expressing “strong support for the Keystone XL Pipeline” because it “will be a shot in the arm to our economy by creating much-needed jobs.”⁵⁸ Both of Montana's Democratic Senators voted for construction of the Pipeline in Congress, noting that the alternative to the Pipeline—increased rail traffic—would be less safe and would hurt Montana farmers who rely on the rail system, such that “[a]ny further delays in approving [the Pipeline] present serious threats to the health and safety of our people as well as our economy.”⁵⁹ The Montana Department of Environmental Quality issued a Certificate of Compliance approving construction of the Pipeline.⁶⁰ When the Obama Administration denied the permit, the Governor and each member of Montana's bipartisan delegation to the U.S. Congress criticized the Administration's attempt to interfere with interstate commerce.⁶¹ The commissioners of the Montana counties through which the Pipeline will run have all endorsed Keystone XL, and many believe that it will be key to saving small Montana towns that are gradually disappearing.⁶²

⁵⁸ Letter from Governor Steve Bullock to President Barack Obama (Jan. 23, 2013), *available at* https://governor.mt.gov/Portals/16/docs/Ltr_to_Pres_Obama_KeystoneXL_012313.pdf.

⁵⁹ Karl Puckett, *Montana senators vote for Keystone pipeline*, Great Falls Tribune (Nov. 18, 2014), *available at* <http://www.greatfallstribune.com/story/news/local/2014/11/18/montana-senators-vote-keystone-pipeline/19244445/>.

⁶⁰ Montana Department of Environmental Quality, *Keystone XL Pipeline*, <http://deq.mt.gov/DEQAdmin/mfs/keystonexl/keystonecertificate> (Mar. 2012).

⁶¹ Tom Lutey, *Montana delegation disappointed, outraged by Keystone Pipeline rejection*, Helena Ind. Record (Nov. 2015), *available at* http://helenair.com/news/politics/state/montana-delegation-disappointed-outraged-by-keystone-pipeline-rejection/article_ac0182e0-d819-5d97-8072-b2c42ba4ba83.html.

⁶² *See* Dokoupil, *supra* n.56.

In **South Dakota**, state regulators have approved several times the construction of the Pipeline,⁶³ and Governor Dennis Daugaard has expressed his support for the Pipeline.⁶⁴ All of South Dakota's representatives in Congress supported construction of the Pipeline,⁶⁵ with Senator Rounds noting that it would “bring millions of dollars of tax revenue to local units of government in South Dakota [and] would also ease the congestion on our rail system allowing us to move our crops to market in a more timely and efficient manner.”⁶⁶ Similarly, Senator Thune stated that “five environmental impact statements [all] found the pipeline would have no significant impact on the environment” and “[t]he pipeline would immediately support thousands of shovel-ready jobs during construction, including 3,000-4,000 in South Dakota alone.”⁶⁷

Nebraska has evaluated the Pipeline extensively for several years, and after review by the Nebraska Department of Environmental Quality, the Governor of Nebraska acting under authorization from the State's legislature approved the route and construction of the Pipeline.⁶⁸ Members of the Nebraska Legislature followed up with a letter to the Secretary of State urging

⁶³ *South Dakota: Keystone XL Pipeline Permit Renewed*, N.Y. Times, http://www.nytimes.com/2016/01/06/us/south-dakota-keystone-xl-pipeline-permit-renewed.html?_r=0 (Jan. 5, 2016).

⁶⁴ Chet Brokaw, *SD Gov. Daugaard says he supports Keystone XL oil pipeline*, Bismarck Tribune (Sept. 29, 2011), available at http://bismarcktribune.com/news/state-and-regional/sd-gov-daugaard-says-he-supports-keystone-xl-oil-pipeline/article_a22f9878-eb18-11e0-b7ef-001cc4c03286.html.

⁶⁵ Evan Hendershot, *South Dakota reacts to rejection of Keystone XL pipeline*, The Daily Republic (Nov. 6, 2015), available at <http://www.mitchellrepublic.com/news/state/3877476-update-south-dakota-reacts-rejection-keystone-xl-pipeline>.

⁶⁶ Sen. Mike Rounds, *Statement on President's Rejection of Keystone XL Pipeline*, <http://www.rounds.senate.gov/newsroom/press-releases/rounds-statement-on-presidents-rejection-of-keystone-xl-pipeline> (Nov. 6, 2015).

⁶⁷ Sen. John Thune, *Thune Statement on Obama Administration's Rejection of Keystone XL Pipeline*, <http://www.thune.senate.gov/public/index.cfm/2015/11/thune-statement-on-obama-administratio-n-s-rejection-of-keystone-xl-pipeline> (Nov. 6, 2015).

⁶⁸ Letter from Gov. Dave Heineman to Pres. Barack Obama (Jan. 22, 2013), available at http://www.keystone-xl.com/wp-content/uploads/2012/11/Governor_Pipeline_Approval.pdf.

approval of the Pipeline, noting that the Pipeline “will create jobs and boost the economy; will be the safest pipeline ever constructed; avoids Nebraska’s environmentally sensitive Sandhills; will result in an increase in local Nebraska property tax revenue; and, contributes greatly to the goal of achieving energy security for the United States.”⁶⁹ Not surprisingly, Nebraska’s entire bipartisan delegation to the U.S. Congress voted to approve the Keystone XL Pipeline.⁷⁰

So too in **Kansas**, where the State’s entire delegation voted to approve the Pipeline.⁷¹ The Kansas House and Senate also passed a joint resolution urging that a permit be granted for the Keystone XL Pipeline.⁷² In **Oklahoma**, a majority of the State’s legislators sent letters to Secretary Kerry urging approval of the Pipeline, noting the number of jobs already created by that portion of the Pipeline connecting Gulf refineries to Cushing, Oklahoma—one of the largest transshipment and oil storage locations in the world.⁷³ Oklahoma Governor Mary Fallin urged President Obama to approve the Pipeline during the weekly nationwide Republican address, stating that it would increase the

⁶⁹ Letter from Sen. Jim Smith, *et al.* to Sec. John Kerry (Mar. 4, 2014), *available at* <http://www.keystone-xl.com/wp-content/uploads/2014/03/Nebraska-Legislature-letter-of-support-for-Keystone-XL-1.pdf>; *see also* Letter from Additional Members of the State Legislature to Sec. Kerry (Mar. 7, 2014), *available at* <http://www.keystone-xl.com/wp-content/uploads/2014/03/Nebraska-Legislature-letter-of-support-for-Keystone-XL-2.pdf>.

⁷⁰ U.S. Senate Roll Call Vote on S.1, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00049; U.S. House Roll Call Vote on S.1, <http://clerk.house.gov/evs/2015/roll075.xml>.

⁷¹ *Id.*

⁷² Bill Information on House Concurrent Resolution 5014, http://www.kslegislature.org/li_2014/b2013_14/measures/hcr5014/.

⁷³ Jay F. Marks, *Oklahoma lawmakers endorse Keystone XL pipeline*, NewsOK (Mar. 7, 2014), *available at* <http://newsok.com/article/3940627>; *see also* Letters to Secretary Kerry (Mar. 7, 2014), *available at*, <http://www.keystone-xl.com/wp-content/uploads/2014/03/Oklahoma-House-of-Representatives-Letter.pdf> and <http://www.keystone-xl.com/wp-content/uploads/2014/03/Oklahoma-Senate-Letter.pdf>

volume flowing through Oklahoma pipelines by up to 75%.⁷⁴ Similarly, the Caddo Nation of Oklahoma has endorsed the Pipeline because of its respect for Tribal lands and heritage.⁷⁵ Finally, in **Texas**, where the Pipeline's crude will be refined, both the State's U.S. Senators and a majority of its House delegation voted for the Pipeline⁷⁶ and it has been advocated for by Texas Governor Abbott.⁷⁷

The States, through their representatives, and now through their Attorneys General, have expressed their desire to engage in interstate commerce, Congress has approved the international commerce that makes it possible, and the Executive is without authority to unilaterally prevent it.

B. Despite the Environmental *Amici's* assertions to the contrary, the record demonstrates that the Pipeline does not pose a high risk of environmental damage.

The *Amici* States do not turn a blind eye to the environmental dangers posed by the oil and gas industry, even in light of its great economic importance for the States. The land, air, and water resources in the States' jurisdiction are of utmost value to the States as sovereigns, and few are as concerned about the health impacts of environmental damage as the States. State and local government in less-populous States are closely attuned to the needs and desires of their people—it is, after all, *our* children that breathe the air, drink the water, and swim in the streams of our States. Having examined the potential consequences of the Keystone XL Pipeline given available data, the *Amici* States agree with the government of Canada and the U.S. Department of State that the direct

⁷⁴ Randy Krehbiel, *Gov. Mary Fallin pushes Keystone XL in weekly nationwide GOP address*, Tulsa World (Feb. 14, 2015), available at http://www.tulsaworld.com/news/government/gov-mary-fallin-pushes-keystone-xl-in-weekly-nationwide-gop/article_b226351a-a561-54b2-8b93-3fdf38d7cc8f.html.

⁷⁵ See Letter from Polly A. Edwards to Sec. Kerry (Mar. 18, 2014), available at <http://www.keystone-xl.com/wp-content/uploads/2014/04/Letter-of-Support-from-the-Caddo-Nation.pdf>.

⁷⁶ See *supra* n.70.

⁷⁷ *Governor Abbott Calls On President Obama To Sign Keystone XL Pipeline Into Law* (Feb. 12, 2015), <http://gov.texas.gov/news/press-release/20525>.

environmental impacts of the Pipeline are minimal, such that they do not counsel against constructing the Pipeline—contrary to the claims of the Environmental *Amici*. In fact, the *Amici* States support the Pipeline in part because the available data demonstrate that the Pipeline will be a net *benefit* to the environment when compared to the likely alternatives to building the Pipeline.

1. Basis for permit denial.

The Environmental *Amici*'s primary argument is that the "State Department properly denied the permit for Keystone XL based on its significant environmental impacts," including the dangers of tar sands crude, direct greenhouse gas emissions, the risk of spills, and danger to wildlife.⁷⁸ In so claiming, the Environmental Groups both ignore the relevant scientific data and misrepresent the basis of the State Department's decision in the administrative record. While it is true that the State Department "consider[ed]" the potential environmental impacts,⁷⁹ the State Department said that those considerations at best provide a "mixed picture," and instead based its decision to deny the Pipeline permit on not being "perceived as enabling further [greenhouse gas] emissions globally" and a desire to avoid "undermin[ing] the United States' successful foreign policy engagement in efforts to combat climate change on a global scale."⁸⁰ The Government's Motion to Dismiss likewise makes clear that the reason for denying the permit was *not* the effect on the environment of the Pipeline project itself, but rather because approving the Pipeline "would be viewed as inconsistent with U.S. efforts to transition to less-polluting forms of energy and would undercut the credibility and influence of the United States in urging other countries to make ambitious efforts to combat climate change."⁸¹

⁷⁸ Environmental Groups Amicus Br., D.E. 47, at 7.

⁷⁹ *Id.* at 6 (citing Complaint, D.E. 1, Exhibit B, at 31).

⁸⁰ Complaint, D.E. 1, Exhibit B, at 29-30.

⁸¹ Memorandum in Support of Motion to Dismiss, D.E. 42-1, at 10.; *see also id.* at 30-31.

The State Department assiduously avoided basing its permit denial on the Pipeline's net direct environmental effects because, as explained below, years of study and tens of thousand of pages of reports created a record that demonstrated the Pipeline's overall environmental soundness. Thus, the Environmental *Amici* are wrong to attempt to lead this Court to believe that the reason for the Department's permit denial was the Pipeline's direct environmental impacts.

2. *Extraction of tar sands oil.*

The relevant scientific data on the Pipeline's net environmental impacts, largely ignored by the Environmental *Amici*, reveal why the State Department avoided basing its denial of the permit on the Pipeline's direct environmental impact. For example, the Environmental *Amici* make much of the negative properties of tar sands crude oil,⁸² but they neglect to mention that the relevant data led the Department to conclude that “the proposed Project by itself is unlikely to significantly impact the level of . . . extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States.”⁸³ This is in part because “alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed project.”⁸⁴ Thus, the impacts of extracting oil sands has little relevance to the Pipeline and its environmental effects.

3. *Net effect on greenhouse gas emissions.*

For similar reasons, the Environmental *Amici* wrongly state the actual net effect of the Pipeline on greenhouse gas emissions.⁸⁵ The Environmental *Amici* cite to the Department's “well-to-wheels” analysis—which assumes that all oil transported by the Pipeline would have never been extracted but for the Pipeline—but omits the Department's concluding caveat that “the actual increase in GHG

⁸² Environmental Groups Amicus Br., D.E. 47, at 7-9.

⁸³ Complaint, D.E. 1, Exhibit B, at 29.

⁸⁴ *Id.* at 1.

⁸⁵ Environmental Groups Amicus Br., D.E. 47, at 9-13.

emissions attributable to the proposed Project depends on whether or how much approval and use of the pipeline would cause an increase in oil sands production.”⁸⁶ As explained above, the Department’s subsequent market analysis demonstrates the Pipeline’s minimal effects on oil sands production.

The Environmental *Amici* pretend that the Department stated that recent drop in oil prices “supports the conclusion that Keystone XL would significantly affect the climate by increasing tar sands exploitation,”⁸⁷ but no such conclusion was made or is supported by the record. Rather, the Department found that “Canadian crude oil production, including from the oil sands, has proven resilient despite a significant drop in the price of oil,” and warned against making assumptions based on “short-term fluctuations in price” as they are “less indicative of the industry’s general outlook than broader macroeconomic forces.”⁸⁸ The Department’s ultimate conclusion, as noted above, is that the Pipeline is “unlikely to significantly impact the level of . . . extraction of oil sands crude”⁸⁹ And even in the unlikely scenario that, absent the Pipeline, Canadian oil sands crude would not be extracted, the likely alternative to such oil—Venezuelan heavy crude—is “in the same [greenhouse gas] intensity range as oil sands” in a wells-to-wheels analysis.⁹⁰ Thus, even without the increased use of oil sands, “there would be little to no change in the overall [greenhouse gas] intensity of the US crude slate.”⁹¹

Indeed, because the production of oil sands crude won’t be significantly affected by the Pipeline, the alternative means of transporting that oil will result in *greater* greenhouse gas emissions

⁸⁶ Complaint, D.E. 1, Exhibit B, at 10.

⁸⁷ Environmental Groups Amicus Br., D.E. 47, at 11-12.

⁸⁸ Complaint, D.E. 1, Exhibit B, at 11-12.

⁸⁹ *Id.* at 29.

⁹⁰ Jackie Forrest & Aaron Brady, *Keystone XL Pipeline: No Material Impact on US GHG Emissions*, at 3, IHS CERA Insight (Aug. 5, 2013), available at http://press.ihs.com/sites/ihs.newshq.businesswire.com/files/press_release/additional/IHS_Keystone_XL_GHG_Impact.pdf.

⁹¹ *Id.*

than the Pipeline—a fact that the Environmental *Amici* counterproductively ignore. The Department analyzed these alternative means (rail, barge, tanker, and truck) and found that annual greenhouse gas emissions for the alternative means “would be greater than for the proposed Project,” and would be *even greater* after accounting for construction of new rail terminals and increased traffic congestion.⁹²

4. *Environmental justice.*

This same reality also undercuts the Environmental *Amici*'s concerns about disproportionate impact on minority communities,⁹³ because the Pipeline is unlikely to increase the extraction of oil sands crude, and that crude will likely be refined in those same communities regardless of the Pipeline's existence since Gulf Coast refineries “are optimized to process heavy crudes like those from the oil sands.”⁹⁴ The primary difference between granting the permit and denying it is whether the crude will arrive in those communities via a low-emission pipeline or instead via trucks, ships, and railcars that exacerbate the pollution in those communities. Thus, the Environmental *Amici* are simply wrong to state that the Department “relied on [its environmental justice] analysis in denying the permit” and concluding that the Pipeline “was not in the national interest.”⁹⁵ Rather, the Department merely noted potential environmental justice concerns and TransCanada's agreement to take extensive efforts to mitigate those concerns.⁹⁶ As explained above, the permit denial and national interest finding were based on wholly separate considerations.

⁹² Complaint, D.E. 1, Exhibit B, at 23.

⁹³ Environmental Groups Amicus Br., D.E. 47, at 13-16.

⁹⁴ Complaint, D.E. 1, Exhibit B, at 7.

⁹⁵ Environmental Groups Amicus Br., D.E. 47, at 13, 16.

⁹⁶ Complaint, D.E. 1, Exhibit B, at 16-17.

5. *Risk of spills.*

The Environmental *Amici* next claim that the “State Department . . . concluded that the risk of Keystone XL [oil spills] would pose to our water was not in the national interest.”⁹⁷ Again, that simply was not the basis for the Department’s national interest determination. In fact, with satellite technology monitoring the Pipeline and incorporation of 57 special safety measures over and above regulations and industry standards, the Department of State concluded that the Keystone XL Pipeline “would have a degree of safety over any other typically constructed domestic oil pipeline system.”⁹⁸ Even *without* such measures, the Department found that the probability of a spill over protected waterbodies would be only “once every 542 years.”⁹⁹ Nor does diluted bitumen make “pipelines more likely to rupture” because it is allegedly “more corrosive and abrasive,” as the Environmental *Amici* claim.¹⁰⁰ To the contrary, the available research demonstrates the opposite, leading the National Academy of Sciences to conclude that “[d]iluted bitumen has no greater likelihood of accidental pipeline release than other crude oils,” nor does it “cause or exacerbate internal corrosion.”¹⁰¹ More importantly, the Department found that “transport by rail likely results in a greater number of injuries

⁹⁷ Environmental Groups Amicus Br., D.E. 47, at 18. The Environmental *Amici* also point to the land disturbances caused by pipeline construction, *id.* at 16-17, but as the Department correctly notes, TransCanada has committed to extensive efforts to mitigate and repair any such disturbances, including by making “route modifications to avoid wetland areas” and by “restor[ing] areas to preconstruction conditions [as much] as practicable.” Complaint, D.E. 1, Exhibit B, at 17-19.

⁹⁸ Department of State, Final Environmental Impact Statement for Keystone XL Project, 3.13-4 (Aug. 26, 2011), *available at* <https://keystonepipeline-xl.state.gov/documents/organization/182068.pdf>; *see also* Complaint, D.E. 1, Exhibit B, at 14.

⁹⁹ Complaint, D.E. 1, Exhibit B, at 14.

¹⁰⁰ Environmental Groups Amicus Br., D.E. 47, at 17.

¹⁰¹ National Academy of the Sciences, *Transporting Diluted Bitumen Through Pipelines Does Not Increase Likelihood of Release*, <http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=18381> (June 25, 2013); *see also* Natural Resources Canada, *Bitumen-Derived Crude and Corrosivity*, <http://www.nrcan.gc.ca/media-room/news-release/2012/2175#cn-nav> (Nov. 14, 2012).

and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released.”¹⁰² The *Amici* States simply cannot agree with the Environmental *Amici*’s reckless apparent preference for rail, truck, or tanker transportation over pipeline construction.

6. *Impact on wildlife.*

Finally, the Environmental *Amici* seem to argue that the State Department decided that the Pipeline is not in the national interest because of its effect on wildlife,¹⁰³ but again, nothing in the record indicates that this formed the basis of the Department’s determination, and the Department’s conclusions with respect to the effect on wildlife are at odds with the Environmental *Amici*’s claims. For example, the Environmental *Amici* claim that the Pipeline’s construction will “entail[] *significant* disruption to local habitats,”¹⁰⁴ but the record states that “[t]he proposed Project would cause *minor* impacts to wildlife and wildlife habitat.”¹⁰⁵ And the Environmental *Amici* concede that, with the exception of the American burying beetle, the Pipeline likely would not affect any endangered species.¹⁰⁶ With respect to the beetle, the Fish and Wildlife Service determined that the Pipeline would not jeopardize the existence of the beetle, and the Department noted the several avoidance and conservation measures to which TransCanada has committed.¹⁰⁷ Moreover, the potential alternatives to the Pipeline, which may include the building of new rail line to transport the production of Canadian crude, may be far more disruptive to wildlife and habitats than the Pipeline.

¹⁰² Complaint, D.E. 1, Exhibit B, at 14-15.

¹⁰³ Environmental Groups Amicus Br., D.E. 47, at 18-20.

¹⁰⁴ *Id.* at 18 (emphasis added).

¹⁰⁵ Complaint, D.E. 1, Exhibit B, at 18 (emphasis added).

¹⁰⁶ Environmental Groups Amicus Br., D.E. 47, at 18-20; *see also* Complaint, D.E. 1, Exhibit B, at 17-18.

¹⁰⁷ Complaint, D.E. 1, Exhibit B, at 18.

* * *

In sum, the States agree with the parties in this case—both TransCanada and the Executive branch—that after many years of study and tens of thousands of pages of scientific inquiry, the available data demonstrates that the Pipeline will not directly cause the unmitigated environmental catastrophe alleged by the Environmental *Amici*. Indeed, the State Department chose *not* to reject the Pipeline on the consideration that it would directly cause unacceptable environmental harm precisely because the data demonstrates the opposite, forcing the Department to instead rely on far more attenuated “foreign relations” and “national security” grounds. The scientific data in the record demonstrates that the Pipeline will in fact be better for the environment as compared to the likely alternative scenarios to Pipeline construction. As stewards of the environment within our sovereign territory, the States are committed to, all things held equal, preferring that public policy which the available data demonstrates will be better for the environment, rather than relying on alarmism based primarily on speculation and inadequate analysis.

In this case, the States’ interest and the national interest is in promoting environmentally-sound interstate and international commerce by constructing the Keystone XL Pipeline, which would lead to tens of thousands of jobs and billions in economic development, especially in small and often struggling communities in the *Amici* States. Because the Constitution vests the power to regulate interstate and international commerce, such as the Pipeline, exclusively in the Congress, and Congress has expressed its approval of the Pipeline, the Executive has acted unlawfully in its interference with interstate and international commerce by prohibiting the Pipeline.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants’ Motion to Dismiss and grant Plaintiffs’ Motion for Summary Judgment.

Date: May 9, 2016

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