ORAL ARGUMENT NOT YET SCHEDULED
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANDING ROCK SIOUX TRIBE, *et al.*,
Plaintiffs-Appellees
and
CHEYENNE RIVER SIOUX TRIBE; STEVE VANCE,
Intervenors for Plaintiff-Appellees,
v. No. 20-5197

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Defendant-Appellee,
and
DAKOTA ACCESS LLC,
Intervenor for Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMICUS BRIEF FOR THE STATES OF INDIANA, MONTANA, AND 16 OTHER STATES IN SUPPORT OF MOTION FOR STAY

TIM FOX
Attorney General of Montana

ROB CAMERON
Deputy Attorney General
Office of the Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Tel: (406) 444-2026
Email: Rob.Cameron@mt.gov

CURTIS T. HILL, Jr.
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General
JULIA C. PAYNE
Deputy Attorney General
Office of the Attorney General
IGC South, Fifth Floor
Indianapolis, Indiana 46204
Tel: (317) 232-6255
Fax: (317) 232-7979
Email: Tom.Fisher@atg.in.gov
Julia.Payne@atg.in.gov

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INTERESTS OF AMICI STATES AND SUMMARY OF THE ARGUMENT

The States of Indiana, Montana, Alabama, Arkansas, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Ohio, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming respectfully submit this brief as amici curiae in support of the Appellants' motion for stay pending appeal.

All Amici States, even those that the pipeline does not pass through, stand to suffer disastrous consequences if the district court's order vacating the easement allowing operation of the pipeline is allowed to go into effect. First, many Amici States produce large amounts of grain currently shipped by rail—grain that will suffer displacement, owing to competition with higher-revenue oil for access rail transport, if the Dakota Access Pipeline is shut down. Such competition is likely to revisit the market conditions that obtained before the pipeline became operational in 2017, namely intractable railroad congestion, rotting grain, higher food prices and, ultimately, a potential for food shortages. An expert witness has estimated that an influx of crude-by-rail traffic would impose the following losses on grain-producing States:

- Indiana: $24 to $59 million in revenue
- Minnesota: $98 to $243 million in revenue
- Montana: $41 to $104 million in revenue
- North Dakota: $127 to $317 million in revenue

- South Dakota: $55 to $137 million in revenue

ER 1282, 1284–85. In Indiana alone, those revenue losses would be the equivalent of 1,450 lost jobs. *Id.*

Second, crude oil shipments by rail or truck pose greater safety hazards and have higher fatality rates than shipments by pipeline, which is both cheaper and less likely to cause widespread destruction—such as the rail accident that incinerated much of the town of Lac-Mégantic, Quebec, with Bakken crude. Vacating the easement essentially gives a greenlight to massive rail and truck shipments of crude oil with no federal government oversight.

These imminent harms of shutting down the pipeline, ignored by the district court, justify a stay pending appeal, and indeed pending the Corps' preparation of an environmental impact statement—if the Court concludes that one should have been prepared.

ARGUMENT

I. Shutting Down DAPL Will Tie Up Transportation for Other Commodities, Especially Grain, with Consequences for Food Security

A stay is necessary because the district court did not account for the harms vacatur of the DAPL easement would cause to third parties, including Amici States, their citizens, and indeed all who depend on Midwest grain for food security. The court in passing acknowledged that "[s]everal states also argue that their grain farmers would be harmed by having to pay a premium for railroad cars once oil, which is more valuable by volume, enters the market and drives up prices." ER 154. But, having diminished these concerns as mere "economic disruption," it quickly dismissed them as "not necessarily . . . determinative." *Id.* at 157.

The disruption that will result from vacating the easement is not merely "economic." It will affect the food security of all who rely on Midwestern grain producers to ship affordable food through rail transport. In short, the disruption caused by diverting thousands of barrels of oil to already over-crowded trains will not be isolated to a single industry or sector of the economy but will have far-reaching effects on the most vulnerable populations.

As it happens, one need not speculate about how the world of commodities transportation would look without DAPL, for the agriculture economy sustained substantial congestion and attendant losses when the Bakken fields began pumping crude *before* DAPL opened. Agricultural products are grown in remote, highly distributed fields, requiring farmers and dealers to aggregate grain from multiple sources for shipping to far-away food-processing purchasers. *Id.* at 1267. As a result, grain farmers have grown to rely substantially on rail for long-haul shipping; rail is "the primary source of transportation for moving the region's bulk products, such as grain, crude oil, and ores," and in turn "agricultural products in aggregate represent 42 percent of rail loadings, with cereal grains accounting for nearly 24 percent of rail tonnage originating in the region in 2018." *Id.* at 1226–27.

Oil provides railroads substantially greater revenue than grain. In 2013—before the pipeline became operational—railroads were receiving average revenue of over $56 per originated ton for shipping crude petroleum, but only $38.45 per originated ton for shipping field crops. *Freight Commodity Statistics*, Association of American Railroads (2013), A.1, A.3 (dividing revenue for field crops (011) and crude petroleum/natural gas (131) by originated tons for each); *see also* ER 1279–80 (reciting similar data for 2018). So, from 2013 through 2015, unprecedented volumes of crude oil tankers clogged the rail lines. ER 1278.

The result was less rail capacity for the coal and grain that the trains had previously pulled. Shippers of grain and other agricultural products saw significant increases in rates along oil-shipment corridors, as well as historically high prices in the secondary grain railcar market (sublease prices bid among grain shippers for committed space on railcars). *Id.* at 1271. These higher freight costs yielded lower revenues for farmers, not only in areas where grain shipments were dependent on rail transportation, but all across America where the secondary freight prices were inflated by competition between crude oil and grain. *Id.*

DAPL, which opened in 2017, alleviated otherwise intractable logistical problems that arose for the nation's farmers and food supply when Bakken oil displaced grain commodities on critical railway corridors. In 2014, the volume of crude oil shipped by rail hit a peak of 31.8 million barrels per month. *Id.* at 1192–

93. In 2017, the volume of crude shipped by rail declined to a low of less than 10 million barrels per month, and by 2019 remained at a mere 70% of the volume shipped by rail in 2014. *Id.* at 1192–94. That relief benefitted grain farmers and shippers as well, for transporting crude oil by pipeline frees up rail capacity for agricultural products, plain and simple. The ultra-depressed North Dakota corn basis, seen at $1.20 less than the benchmark futures contract during the peak of the freight congestion in 2014, has once again settled in its normal seasonal basis of $0.65 less than the benchmark futures contract price. *Id.* at 1274. Nationwide, rail service to the grain industry has returned to normal train speeds and dwell times. *Id.* at 1270.

Shutting down the pipeline would at the very least revisit those unsustainable market conditions. A recent analysis looking at present-day grain production volumes in twelve high-producing States, applying the same methodology as a 2015 USDA study that revealed staggering farm losses from the 2014 congestion, suggests that if rail congestion were to affect the grain markets over an entire marketing year, the revenue losses to America's farmers could range from $526 million to $1.3 billion. *Id.* 1283–84.

Indeed, shutting down DAPL would displace 208.1 million barrels of crude oil per year. *Id.* at 1183. Even if only one-third of the displaced crude were transported by rail, the result would still be crude volumes exceeding the average amount of crude on railways in 2014—and even approaching the maximum volume of that year. *Id.* at 1194–95. Railroads are already operating near full capacity, so even small, unexpected changes in the supply or demand for rail services may cause significant problems. *Id.* at 1184.

The effects would largely impact corridors where the oil is shipped, many of which already carry high density shipments of other goods. *Id.* at 1231–32. Because crude oil must be shipped from the Bakken to Patoka or Chicago, rail lines in the upper Midwest would experience the worst of the congestion. *Id.* at 1202–03. And, because railways cannot adapt quickly to heightened demand on capital-intensive infrastructure, crude oil would thereby displace grain commodities, disrupt the economics of grain distribution and, ultimately, threaten the food supply chain. Moreover, oil-producing States, like Montana, will experience losses in tax revenue and increased unemployment due to the oil company's inability to ship oil through the Dakota Access Pipeline. *Id.* at 486–87, 1303, 1343–44. Higher unemployment rates will increase the number of people experiencing food insecurity, while lower tax revenues will simultaneously impede States' ability to alleviate these problems.

Closing DAPL will thus result in *much* more than mere "economic disruption." With no substitute freight provider available to serve America's farmers, the implications of shutting down DAPL for the world's food supply become unthinkable. If grain cannot be shipped from its origins and is stranded across the Midwest, swaths of grain customers with time-critical needs—such as animal feedlots that demand grain each day—would quickly fail, with staggering implications for animal welfare and food security. The most food-secure nation on earth could well experience food shortages, to say nothing of the consequences for developing nations whose industries and food security also rely on American grain exports. The need for an EIS—if indeed one is needed—does not merit such drastic consequences during its preparation.

II. Shutting Down the Pipeline Will Threaten Safety and Create Environmental Hazards

Moreover, shutting down the pipeline will also have disastrous safety and environmental consequences. The district court's opinion dismissed a single report cited by Defendants, *see* ER 161–62, but did not consider additional safety and environmental evidence cited by Amici States. The possibility of an oil spill caused by mass rail transport of crude oil would not only increase the cost of shipping crude oil, but would also endanger the health of citizens living near the pipeline and risk the very consequences to the environment that the district court sought to avoid by requiring an environmental impact statement.

Transporting crude oil by pipeline is safer than transporting it by rail or truck owing to the volatility of the crude and the safety of pipelines compared to rail and truck shipments. A 2016 USDOT comparison of freight-related fatalities among various modes of transportation showed that rail transportation fatality rates were nearly 35 times higher than pipeline transportation on a per-billion ton-miles basis. United States Department of Transportation Federal Highway Administration, *Freight Quick Facts Report* 32 Table 35 (2016). Trucks are even less safe. Crude oil transportation by truck kills an average of 10.2 people per year, whereas rail transportation results in 2.4 fatalities per year and pipeline transportation results in 1.7 fatalities per year. Megan E. Hansen & Ethan Dursteler, *Pipelines, Rail & Trucks*, Strata, at 4–5. And in terms of injuries (rather than fatalities), rail transportation injury rates exceed 50 times the rate for pipeline shipments. United States Department of Transportation Federal Highway Administration, *Freight Quick Facts Report* 32 Table 35 (2016).

Pipelines also compare favorably to rail when considered in terms of incident and accident rates. A 2015 report by the Fraser Institute showed that, for the decade 2003–13, rail transport of crude oil was 4.5 more times more likely to result in an accident than pipeline transport of crude oil. Fraser Research Bulletin 1. And a 2017 study by the National Bureau of Economic Research concluded that, on a normalized cost-per-million-barrel-mile basis, crude-by-rail accidents and spills cost roughly 600% more than pipeline accidents and spills. Karen Clay et al., *The External Costs of Transporting Petroleum Products by Pipelines and Rail: Evidence from Shipments of Crude Oil from North Dakota*, National Bureau of Economic Research, at 20 (Sept. 2017).

Consequently, absent the DAPL easement, Bakken oil shipments will likely cause 11.4 more accidents each year, with attendant additional injuries and fatalities, than would occur if the oil continues to be transported by pipeline. ER 1244. Tragic human suffering can be the result. In 2013, in Lac-Mégantic Quebec, an unattended 74-car train carrying Bakken crude oil rolled down some low-grade track, ultimately derailing. *Lac-Mégantic Runaway Train and Derailment Investigation Summary*, Transportation Safety Board of Canada, https://www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054-r-es.html. The resulting conflagration killed over 40 people and forced 2000 more people from their homes. *Id.* In addition, "trains hauling crude from the Bakken region of North Dakota and Montana have been involved in fiery derailments in six states." Matt Volz, *35,000 Gallons of Oil Spills After Montana Train Derailment*, Independent Record (July 17, 2015), *available at* https://helenair.com/missoula/news/state-and-regional/gallons-of-oil-spills-after-montana-train-derailment/article_9a7778f6-e118-5dad-afe3-3ea4aaf9a2d3.html.

Shipping crude by train is also likely to inflict substantial more environmental damage than shipping by pipeline, even as the Corps completes an EIS (if this Court holds one is necessary). Railroads would likely transport the displaced DAPL crude along main lines, which means introducing the hazardous cargo "near or through rivers, population centers, national parks, and many environmentally sensitive areas." ER 1246. These rail lines crisscross various branches and tributaries of the

Mississippi and Missouri Rivers, for example. *Id.* In July 2015, before DAPL became operational, a train hauling oil from North Dakota derailed in rural northeastern Montana, and four tank cars leaked an estimated 35,000 gallons of oil. Matt Volz, *35,000 Gallons of Oil Spills After Montana Train Derailment*, Independent Record (July 17, 2015), *available at* https://helenair.com/missoula/news/state-and-regional/gallons-of-oil-spills-after-montana-train-derailment/article_9a7778f6-e118-5dad-afe3-3ea4aaf9a2d3.html.

Crude-by-rail yields still other negative environmental externalities. One study found that, for moving Bakken crude to the Gulf of Mexico in 2014, the sum of air pollution and greenhouse gas costs were nearly twice for rail as for pipeline. Karen Clay et al., *The External Costs of Transporting Petroleum Products by Pipelines and Rail: Evidence from Shipments of Crude Oil from North Dakota*, National Bureau of Economic Research, at 15 (Sept. 2017). That report estimated that a fully loaded 100-car train of Bakken crude headed to the Gulf Coast would impose air pollution and greenhouse gas costs of $150,000, compared to $78,000 if it moved by pipeline. *Id.* at 21. And as trains move through more densely populated areas, those costs increase as trains idle for substantial periods of time in hubs like Chicago, often threatening more environmental harm in under-resourced residential urban areas than affluent suburbs. *Id.* at 11. By contrast, not only do pipelines pose no threat to residential urban areas themselves, but they terminate at refineries which do not sit in residential areas. *Id.* at 9.

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This case is ostensibly about the Corps' failure to study the environmental impact of an oil pipeline. But if pipeline flow must cease while the environment is studied, it is not only oil producers who will suffer—so will grain farmers, the world food supply, public safety, and the environment itself (particularly in the West).

CONCLUSION

Amici States urge this Court to stay the district court's order vacating the easement that allows continued operation of the Dakota Access Pipeline.

Respectfully submitted,

TIM FOX
Montana Attorney General

Rob Cameron
Deputy Attorney General

Office of the Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Tel: (406) 444-2026
Email: Rob.Cameron@mt.gov

CURTIS T. HILL, JR.
Indiana Attorney General

By: */s/ Thomas M. Fisher*
Thomas M. Fisher
Solicitor General

Julia C. Payne
Deputy Attorney General

Office of the Indiana Attorney General
302 W. Washington St.
IGC South, 5th Floor
Indianapolis, IN 46204-2770
Phone: (317) 232-6255
Fax: (317) 232-7979
Email: Tom.Fisher@atg.in.gov
Julia.Payne@atg.in.gov

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

LESLIE RUTLEDGE
Attorney General
State of Arkansas

TOM MILLER
Attorney General
State of Iowa

DEREK SCHMIDT
Attorney General
State of Kansas

DANIEL CAMERON
Attorney General
Commonwealth of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ERIC SCHMITT
Attorney General
State of Missouri

DOUG PETERSON
Attorney General
State of Nebraska

DAVE YOST
Attorney General
State of Ohio

ALAN WILSON
Attorney General
State of South Carolina

JASON RAVNSBORG
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

SEAN REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia

BRIDGET HILL
Attorney General
State of Wyoming

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is printed in 14-point font and contains 2,404 words exclusive of the certificate as to the parties, rulings, related cases, and separate briefing; table of contents; table of authorities; signature lines; biographical appendix; and certificates of service and compliance.

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which shall send notification of such filing to any CM/ECF participants.

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

Office of the Attorney General
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770
Telephone: (317) 232-6255
Fax: (317) 232-7979
Email: Tom.Fisher@atg.in.gov