No. 24-783

In the Supreme Court of the United States

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, *et al.*,
Petitioners,

v.

DANA NESSEL, Attorney General of the State of Michigan,
on behalf of the People of the State of Michigan,
Respondent.

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

BRIEF OF PROFESSOR ARTHUR R. MILLER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ALEXANDER VOLOKH
Counsel of Record
EMORY UNIVERSITY
SCHOOL OF LAW
1301 Clifton Road NE
Atlanta, GA 30322
(404) 727-5225
avolokh@emory.edu

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Arthur R. Miller is University Professor and the Warren E. Burger Professor of Constitutional Law and the Courts at the New York University School of Law, and one of the nation's leading scholars in the field of civil procedure. For 36 years before joining New York University School of Law as a University Professor in 2007, he was the Bruce Bromley Professor of Law at Harvard Law School. He is co-author, along with the late Charles Alan Wright, of *Federal Practice and Procedure*, one of the most-often cited and well-regarded civil procedure treatises. He is the recipient of a number of honorary doctorates and has served as the reporter and then a member of the Advisory Committee of Civil Rules of the Judicial Conference of the United States, as reporter and advisor to the American Law Institute, and as a member of a special advisory group to the Chief Justice of this Court. Professor Miller has also argued several cases before this Court.

Professor Miller files this brief on behalf of himself individually, and not as a member of the NYU School of Law, to urge this Court to resolve a circuit split and provide for nationwide uniformity on a significant question of civil procedure.

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[1] No counsel for any party authored this brief in whole or in part, and no party or their counsel made a financial contribution intended to fund the preparation or submission of this brief. The American Petroleum Institute, the Liquid Energy Pipeline Association, and the National Propane Gas Association made a monetary contribution to fund the preparation and submission of this *amicus* brief. Pursuant to Rule 37.2, Counsel of Record for all parties received timely notice of the intent to file this brief.

SUMMARY OF THE ARGUMENT

There are good arguments for the positions on either side of this circuit split. The most important issue here is uniformity: this Court should simply choose an interpretation of the time limitation in 28 U.S.C. § 1446(b), thus eliminating further ambiguity and possible inconsistency. This case is an ideal vehicle for the Court's consideration.

ARGUMENT

I. There Are Good Arguments on Either Side of This Issue.

There are good arguments for the positions on either side of this circuit split.

As an initial matter, the Sixth Circuit was correct to hold that the 30-day limit on removal is not jurisdictional, since—unlike truly jurisdictional rules—"removal-timing issues may be raised only by the plaintiff and only within a strict window of time." *Nessel v. Enbridge Energy, LP*, 104 F.4th 958, 969 (6th Cir. 2024).

The Sixth Circuit's holding opens up the possibility of considering whether exceptional circumstances exist that would justify removal beyond the limit. "It is hornbook law that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (internal quotation marks and citations omitted); *see also Holland v. Florida*, 560 U.S. 631, 645-46 (2010) ("'rebuttable pre-

sumption' in *favor* 'of equitable tolling' of nonjurisdictional statutes of limitations" (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990))).

Several circuit courts have held that judges have an equitable power to find exceptional circumstances under this statute or similar removal statutes. *See, e.g.*, *Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985) ("We are unwilling to allow a modal [i.e., formal] defect to pretermit our substantive inquiry. The timeliness of a removal petition is not jurisdictional, and we therefore have the power to review even an untimely petition. Were we to conclude otherwise, we would trivialize our authority under 28 U.S.C. § 1442(a)(1). While we emphatically disapprove of the government's tardiness, we will not order this cause remanded on technical grounds."); *Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986) ("We establish no inexorable time limit. Exceptional circumstances might permit removal even when a later-joined defendant petitions more than precisely thirty days after the first defendant is served.").

The view that exceptional circumstances can justify exceptions to the 30-day rule is plausible. Most obviously, "strict application of [the] requirements" might sometimes "cause an unjust result," *Almonte v. Target Corp.*, 462 F. Supp. 3d 360, 364 (S.D.N.Y. 2020) (internal quotation marks omitted), and there is a prima facie case for avoiding unjust results when courts have power to do so. *See also* Scott Dodson, *In Search of Removal Jurisdiction*, 102 Nw. U. L. Rev. 55, 60 (2008) ("[T]he values served by the procedural rules may not be promoted by strict application of the procedural rules and, indeed, may be hindered in certain situations by their strict application.").

What constitutes an "unjust result" is of course highly context-dependent, and presumptively, district courts are capable of using their equitable powers to distinguish good excuses from bad ones. *See Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1049 (2d Cir. 1991); *cf. Phoenix Global Ventures, LLC v. Phoenix Hotel Assocs., Ltd.*, 422 F.3d 72, 75 (2d Cir. 2005) (in the related context of remand motions under § 1447(c), allowing a district court to excuse an untimely filing caused by procedural errors in using the court's electronic case filing system). One potential source of unfairness could be the plaintiff's efforts to manipulate the forum, which the district court believed was relevant in this case, *see* Pet. App. at 36a-37a. *Cf. Dufrene v. Petco Animal Supplies Stores, Inc.*, 934 F. Supp. 2d 864, 869-70 (M.D. La. 2012) (in the related context of the one-year limit on removal in diversity actions in § 1446(b), allowing for equitable tolling when the plaintiff had opportunistically delayed in amending the amount in controversy to exceed the jurisdictional amount).

Moreover, a purpose of the removal statute is to allow federal courts to exercise their legitimate authority; thus, excusing noncompliance with the 30-day time limit when compelling circumstances exist gives effect to a major purpose of the statute. Various cases that have stated this principle have involved the specific context of suits against the federal government or federal officer removal under 28 U.S.C. § 1442, *see, e.g.*, *Willingham v. Morgan*, 395 U.S. 402 (1969); *Commonwealth of Puerto Rico v. Perez Casillas*, 624 F. Supp. 822 (D.P.R. 1985); *Reese v. S. Fla. Water Mgmt. Dist.*, 853 F. Supp. 413, 415 (S.D. Fla. 1994). The federal courts' exercise of federal question jurisdiction

(which is at issue in this matter) is also an important interest of the federal government.

Moreover, this Court has interpreted a previous removal statute to allow for equitable exceptions to time limitations. "The reasonable construction of the act of congress," this Court wrote, "is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right." *Powers v. Chesapeake & O. Ry. Co.*, 169 U.S. 92, 100-01 (1898). Exceptions could be warranted, according to this Court, when nondiverse parties were joined "through an honest mistake" or when damages originally thought to be below the required jurisdictional amount were "afterwards discovered to be so much graver," *id.* at 100—i.e., allowing for the possibility of mistakes, and not necessarily limited to cases that were in fact initially nonremovable and later became removable.

Still, the presumption in favor of equitable tolling of nonjurisdictional timing rules can be rebutted, and whether there can be exceptions is a matter of ordinary statutory interpretation. *Harrow v. Dep't of Defense*, 601 U.S. 480, 489-90 (2024).

Using standard interpretive methods, the Sixth Circuit here has made reasonable arguments for the absence of an equitable "exceptional circumstances" doctrine. One is the presence of the text "whichever period is shorter" in § 1446(b)(1), which suggests strictness. *Enbridge Energy*, 104 F.4th at 969-70. Another is the presence of specific listed exceptions in § 1446(b)(2)(C) and (b)(3), and even an exception to an exception in § 1446(c), which is a form of *expressio unius est exclusio alterius* argument. *Id.* at 970. Another is the placement of the removal statutes near

jurisdictional statutes in a part of the U.S. Code captioned "Jurisdiction and Venue." *Id.* Finally, the substantive canon of respect for state sovereignty suggests limitations on federal courts' ability to make exceptions to the time limits specified by Congress. *Id.* at 970-71.

II. Whatever the Rule, This Issue Calls for Nationwide Uniformity.

In short, there are good arguments on both sides; *amicus* takes no position on which answer to the question is better.

In the context of procedural issues, it is especially important that the rule be clear and constant. "[P]rocedure serves the largely litigant and systematic values of efficiency, cost-effectiveness, autonomy, predictability, and fairness." Dodson, *supra*, at 60. Federal law should generally be uniform, but uniformity is even more important on issues that concern the division of labor between state and federal courts—whether or not that division of labor is "jurisdictional" in the narrow sense—because those issues implicate federalism.

And it is critical to achieve uniformity for something as basic as a time limitation. Uncertainty will lead to increased litigation costs in circuits that have not come down on one side or another of the split. And even in circuits that are already on one side of the division, there could be uncertainty: if the Sixth Circuit could distinguish an Eleventh Circuit case, *see Enbridge Energy*, 104 F.4th at 971 (characterizing *Loftin* as a "single, 39-year-old, distinguishable, and out-of-circuit case"), a later Eleventh Circuit panel might also distinguish its own precedent based on

what it believed to be the persuasive value of this Sixth Circuit opinion.

This case provides an excellent opportunity to continue this Court's gradual move toward greater precision in jurisdictional analysis. Courts should not only avoid "'drive-by jurisdictional rulings,'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998)), they should also avoid words such as "mandatory and jurisdictional," *see id.* at 510 (quoting *United States v. Robinson*, 546 U.S. 220, 229 (1960)), or otherwise implying that "jurisdictional" and "mandatory" are synonymous. *See also* Dodson, *supra*, at 76 & n.116.

Whether or not the Sixth Circuit came to the right result, it correctly treated "jurisdictional" and "mandatory" as separate inquiries. It is important to know which rules are jurisdictional and therefore mandatory, *see Bowles v. Russell*, 551 U.S. 205, 214 (2007), which rules are nonjurisdictional but nonetheless "mandatory claim-processing rules," *see Manrique v. United States*, 581 U.S. 116, 121 (2017), and which claim-processing rules preserve a court's equitable power to make exceptions, *see Dolan v. United States*, 560 U.S. 605, 611 (2010). This Court should therefore take this opportunity to settle on a single rule.

III. This Case Is a Good Vehicle to Resolve the Question.

This case made it to appeal because the Michigan Attorney General was able to obtain interlocutory review of the district court's decision to retain jurisdiction. *Enbridge Energy*, 104 F.4th at 963. But in the typical case, errors in the interpretation of the

§ 1446(b) time limit usually evade appellate review. This is because of the intersection between the doctrine of *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), and the statutory preclusion of review in 28 U.S.C. § 1447(d).

In *Caterpillar*, this Court unanimously held that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." 519 U.S. at 64. In that case, the district court had erroneously retained jurisdiction of a removed case that lacked complete diversity. But the error had been cured by the time judgment was entered: the nondiverse defendant had settled and had been dismissed as a party.

Consider the two possible errors that a district court might make in a case involving the 30-day time limit. Either it might wrongly *retain jurisdiction* over a late-filed case that should have stayed in state court, or it might wrongly *remand* a late-filed case that should have stayed in federal court because of the presence of exceptional circumstances.

If the district court wrongly *retained jurisdiction*, but jurisdiction was otherwise present, there would be no jurisdictional defect by the time the court entered judgment, and so—assuming the case was litigated to final judgment—the *Caterpillar* doctrine would shield this error from appellate review.

If the district court wrongly *remanded*, the *Caterpillar* doctrine would not stand in the way. But then the problem would be 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on

appeal or otherwise." That preclusion of appellate review does not apply to suits removed under § 1442 (for federal officers and agencies) or § 1443 (for civil rights suits), but it does apply to suits removed under § 1446. So wrongful remands of suits removed under § 1446 are likewise shielded from appellate review.

This case is thus an ideal vehicle for this Court's consideration. Because of the interlocutory posture of this case, the question of the interpretation of § 1446(b) is presented in pure form. A comparable case might not come up again for a long time. This Court should seize this opportunity to eliminate further ambiguity and possible inconsistency.

CONCLUSION

For these reasons, this Court should grant certiorari.

Respectfully submitted,

ALEXANDER VOLOKH
Counsel of Record
EMORY UNIVERSITY
SCHOOL OF LAW
1301 Clifton Road NE
Atlanta, GA 30322
(404) 727-5225
avolokh@emory.edu

Counsel for Amicus Curiae

FEBRUARY 2025