No. 24-783

In the Supreme Court of the United States

ENBRIDGE ENERGY, LP, ET AL., PETITIONERS

v.

DANA NESSEL, ATTORNEY GENERAL OF MICHIGAN, ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the 30-day removal deadline in 28 U.S.C. § 1446(b)(1) is mandatory such that a timely objection to a late notice of removal requires remand.

PARTIES TO THE PROCEEDING

Petitioners Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P. (collectively, "Enbridge") were appellees in the court below.

Respondent Dana Nessel, Attorney General of the State of Michigan, on behalf of the People of the State of Michigan, was appellant in the court below.

RELATED CASES

The petition accurately lists the directly related cases within the meaning of Rule 14.1(b)(iii).

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OPINIONS BELOW

The Sixth Circuit's opinion, Pet. App. 1a–25a, is reported at 104 F.4th 958.

The district court's opinion, Pet. App. 26a–42a, is not published in the Federal Reporter, but it is available at 2022 WL 19005621.

JURISDICTION

The Attorney General agrees that this Court has jurisdiction to consider the petition.

STATUTORY PROVISIONS INVOLVED

Section 1446 of Title 28 of the United States Code provides, in part:

> (a) GENERALLY.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) REQUIREMENTS; GENERALLY.—(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting

forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

> (c) REQUIREMENTS; REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

Section 1447(c) of Title 28 of the United States Code provides, in part:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

INTRODUCTION

The Sixth Circuit correctly rejected Enbridge's untimely removal of this action because the company failed to comply with the removal statute's clear commands. Congress has conditioned a defendant's right to remove a case from state to federal court upon compliance with certain "requirements," including that the defendant "shall" file a notice of removal "within 30 days" after receiving the complaint or summons, "whichever period is shorter." 28 U.S.C. § 1446(b)(1). Because Enbridge missed that deadline by over two years, the Michigan Attorney General timely objected, and no statutory exception applied, the Sixth Circuit held that Enbridge could not remove the case. Nor could the court disregard the statute's dictates and take this case from state court outside of the limits imposed by Congress.

The well-reasoned decision below follows from a straightforward application of the clear statutory text. It is faithful to precedent, sensitive to federalism, and respectful of Congress's role in establishing the bounds of federal court adjudication. Every court of appeals would have reached the same conclusion. Enbridge tries to manufacture a circuit split where there is none by citing decades-old, outlier cases that have largely been abrogated and would not apply on these facts. In reality, the caselaw across the circuits is overwhelmingly uniform. Any divergence is minor and not implicated here, so there is no cause for this Court's review.

STATEMENT OF THE CASE

A. Relevant facts and procedural history.

The Michigan Attorney General brought this action in state court on June 27, 2019, alleging that Enbridge's operation of the Line 5 dual pipelines in the Straits of Mackinac violates three state laws: the public-trust doctrine, common-law public nuisance, and the Michigan Environmental Protection Act. Pet. App. 3a. The summons and complaint were served on July 12, 2019, making August 12, 2019, the deadline to remove the case under 28 U.S.C. § 1446(b)(1). Pet. App. 9a.

Rather than filing a notice of removal within the prescribed period, Enbridge chose to litigate this case in state court. On September 16, 2019, it filed a motion for summary disposition, arguing in part that federal law preempted the Attorney General's claims. Pet. App. 3a. The Attorney General filed a dispositive motion as well. *Id*. The state court held an argument in May 2020, followed by post-argument briefing on the federal preemption arguments. Pet. App. 3a–4a.

In June 2020, while the dispositive motions were pending for decision, the State of Michigan received a report that Line 5's infrastructure had been damaged by an anchor strike or similar event. See Pet. App. 4a. The Attorney General sought a temporary restraining order requiring Enbridge to shut down the pipelines until the issue was resolved. *Id*. The state court issued the TRO over Enbridge's objection. *Id*. Following that adverse decision, Enbridge sought to remove the case to a different forum.

In November 2020, while the parties were still awaiting a decision on the cross-motions for summary disposition, Governor Gretchen Whitmer issued a notice that the State was revoking and terminating the 1953 easement that authorized Line 5 to traverse the Straits of Mackinac. Pet. App. 4a. The Governor filed a state-court complaint seeking to enforce the notice, which "closely paralleled" the complaint in this case. *Id.* Enbridge timely removed the Governor's case to federal court. *Id.* Despite the similarity of the claims and issues, Enbridge did not remove this case at that time. See *id.*; Pet. App. 7a.

The Governor moved to remand her case to state court, arguing the district court lacked subject-matter jurisdiction. Pet. App. 5a. The district court denied the motion on November 16, 2021, concluding that it had jurisdiction under the *Grable* doctrine. Pet. App. 6a. The Governor then voluntarily dismissed her case. *Id.*

Enbridge removed this case to federal court on December 15, 2021. Pet. App. 7a. "Although 887 days had passed since receipt of the Attorney General's complaint, Enbridge argued that removal was nonetheless timely [under 28 U.S.C. § 1446(b)(3)] because it could not have ascertained that there were grounds for removal until the district court denied the motion to remand in the Governor's case." *Id.* On January 14, 2022, the Attorney General filed a timely motion to remand on two grounds: untimely removal and lack of subject-matter jurisdiction. *Id.*

B. The district court's opinion.

The district court denied the Attorney General's motion. Pet. App. 26a–42a. The court did not adopt Enbridge's argument that its notice of removal was timely under § 1446(b)(3). Instead, the court set aside the 30-day deadline on equitable grounds, including its assessment of "the importance of a federal forum in deciding the disputed and substantial federal issues at stake," its decision that a federal forum was appropriate in the Governor's case, and the fact that—over two years after the Attorney General filed this action in state court—Enbridge had filed a separate lawsuit in federal court where overlapping issues were pending. Pet. App. 35a–38a. The district court also held that the Attorney General was estopped from challenging whether there was federal subject-matter jurisdiction over this case. Pet. App. 38a–42a.

The Attorney General moved the district court to certify its opinion for interlocutory appeal, identifying three issues for appeal:

> (1) whether the 30-day removal period set forth in 28 U.S.C. § 1446(b)(1) is mandatory;
>
> (2) whether [the] order denying remand in [the Governor's case] constituted an order from which Enbridge could first ascertain that this case is or has become removable; and
>
> (3) whether [the] complaint necessarily raises substantial questions of federal law that give rise to federal court jurisdiction under *Grable & Sons Metal Prod., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). [Pet. App. 44a.]

The district court granted the motion to certify Pet. App. 43a–45a, and the Sixth Circuit granted permission to appeal, Pet. App. 46–49a.

C. The Sixth Circuit's opinion.

The Sixth Circuit began its analysis with a simple principle: "To remove a civil case from state to federal court, a defendant must meet the requirements for removal detailed in § 1446." Pet. App. 8a–9a (citing *Home Depot U.S.A., Inc.* v. *Jackson*, 139 S. Ct. 1743, 1746 (2019)). It then held that Enbridge failed to meet those requirements. "Enbridge missed § 1446(b)(1)'s initial window for removal [by over two years], and to the extent § 1446(b)(3)'s later removal window was ever open, Enbridge missed that one too. Enbridge's removal was therefore untimely under § 1446(b)." Pet. App. 17a. Enbridge does not challenge this aspect of the court's ruling in its petition, thereby conceding that its removal did not comply with § 1446(b)'s time limits.

Next, the Sixth Circuit addressed whether the district court had discretion to disregard § 1446(b)—and assert federal jurisdiction over this case despite the Attorney General's timely objection to the defective removal—on equitable grounds not set forth in the statute. The court held that the answer was no, reasoning that Congress's directive that a notice of removal "shall be filed within 30 days" is a mandatory claims-processing rule. Pet. App. 18a–24a. Unlike a jurisdictional rule, it need not be policed *sua sponte* and may be forfeited. Pet. App. 19a. But when properly raised in a timely motion to remand, it is unalterable and assures relief. *Id.* (citing *Nutraceutical*

Corp. v. *Lambert*, 586 U.S. 188, 192 (2019), *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005), and Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 5–9 (2008)).

In reaching this conclusion, the Sixth Circuit found " 'good reason to believe that Congress did *not* want equitable exceptions' to apply to § 1446(b)'s time limitations," Pet. App. 20a (quoting *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997)), including that:

- Congress's use of the mandatory words "shall be filed," followed by "whichever period is shorter," suggests an intent for strict enforcement. Pet. App. 20a.

- "Congress's detailed, express scheme of exceptions and carveouts" to the statutory deadline militates against "adding a judicially created exception." Pet. App. 20a–22a.

- The removal deadline's placement within Title 28, Part IV, titled "*Jurisdiction* and Venue," and the interrelation of removal and the exercise of federal jurisdiction, suggest stricter enforcement. Pet. App. 22a.

- "Overwhelming authority provides that removal statutes—such as § 1446(b)—are to be strictly construed against removal out of respect for state sovereignty." Pet. App. 22a–23a (collecting cases).

- District courts "have consistently rejected invitations to engraft unwritten equitable exceptions into the removal statute," Pet. App. 23a,

> and the cases Enbridge offered in support of an equitable exception were distinguishable and unpersuasive, Pet. App. 24a.

The Sixth Circuit thus held that "§ 1446(b)'s time limitations are mandatory" and "Enbridge's failure to comply with these mandatory rules requires remand." Pet. App. 24a. As a result, the court did not reach whether there was subject-matter jurisdiction over the Attorney General's state-law claims. Pet. App. 8a.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's decision does not implicate a certworthy circuit split.

Over 30 years ago, the Sixth Circuit observed: "It has been uniformly held that the failure to file for removal within the thirty-day period, while waivable by plaintiff, is a formal barrier to the exercise of federal jurisdiction." *Holston* v. *Carolina Freight Carriers Corp*., 936 F.2d 573, 1991 WL 112809, at *2 (6th Cir. 1991) (unpublished table decision). That is as true now as it was then.

Enbridge argues there is a circuit split with the Sixth and Second Circuits on one side and the Fifth and Eleventh Circuits on the other. Pet. 16. Not so. The opinion below is consistent with the rule applied *in every circuit*—including the Fifth and the Eleventh. At most, Enbridge has located a single, 40-year-old Eleventh Circuit case that excused a removal deadline in a prior version of the statute. But that isolated case is easily distinguishable, rarely relied on, and may no longer be good law. It does not apply in the mine run of cases, and it does not warrant this Court's review.

A. Lower courts have overwhelmingly held that the 30-day removal deadline is mandatory and may not be extended by judicial decree.

The Sixth Circuit's opinion is consistent with the removal jurisprudence in every circuit:

The First Circuit has observed that the language in § 1446(b) is "mandatory." *Romulus* v. *CVS Pharm*.,

Inc., 770 F.3d 67, 74 (1st Cir. 2014). District courts in the First Circuit hold that the 30-day deadline cannot be extended by court order. E.g., *Hill* v. *Phillips*, *Barratt*, *Kaiser Eng'g Ltd.*, 586 F. Supp. 944, 945 (D. Me. 1984); *Diaz* v. *Swiss Chalet*, 525 F. Supp. 247, 250 (D.P.R. 1981).

The Second Circuit has stated that the "statutory time limit is mandatory" and "rigorously enforce[d]." *Somlyo* v. *J. Lu-Rob Enters., Inc.*, 932 F.2d 1043, 1048 (2d Cir. 1991), *superseded on other grounds by* Fed. R. Civ. P. 5(d)(4) & 83(a)(2). District courts in the Second Circuit regard it as "well established that § 1446(b)'s thirty day filing period . . . is mandatory and failure to comply with it will defeat a defendant's removal petition." E.g., *Nicola Prods. Corp.* v. *Showart Kitchens, Inc.*, 682 F. Supp. 171, 172 (E.D.N.Y. 1988).

The Third Circuit has stated that "[r]emoval is a statutory right, and the procedures to effect removal must be followed." *Lewis* v. *Rego Co.*, 757 F.2d 66, 68 (3d Cir. 1985). District courts in the Third Circuit have found it "well-settled . . . that the thirty-day limitation is mandatory and the court is without authority to expand it." *Ogletree* v. *Barnes*, 851 F. Supp. 184, 190 (E.D. Pa. 1994) (cleaned up); accord *Cacoilo* v. *Sherwin-Williams Co.*, 902 F. Supp. 2d 511, 519 (D.N.J. 2012).

The Fourth Circuit's rule is: "If you do not seek removal within the thirty-day window, you have forfeited your right to remove." *Barbour* v. *Int'l Union*, 640 F.3d 599, 611 (4th Cir. 2011) (en banc), *abrogated on other grounds by* 28 U.S.C. § 1446(b)(2)(B); accord *McKinney* v. *Bd. of Tr. of Md. Cmty. Coll.*, 955 F.2d 924, 925 (4th Cir. 1992) ("If the defendant does not act

within thirty days, the case may not be removed."). District courts in the Fourth Circuit have held that courts "do[] not have discretion to retain jurisdiction, in the face of a timely challenge to the timeliness of removal." *Stone Street Cap., Inc.* v. *McDonald's Corp.*, 300 F. Supp. 2d 345, 351 (D. Md. 2003); see also *Cook* v. *Robinson*, 612 F. Supp. 187, 190 (E.D. Va. 1985) ("The thirty day limitation is mandatory and cannot be extended by the court." (cleaned up)).

The Fifth Circuit has similarly held that "the requirement for timely filing a petition for removal is mandatory" and non-compliance waives the defendant's right to remove. *Cervantez* v. *Bexar Cnty. Civil Serv. Comm'n*, 99 F.3d 730, 732, 734 (5th Cir. 1996). District courts in the Fifth Circuit have held that federal courts "do[] not have authority to enlarge or extend this time period." E.g., *Skidmore* v. *Beech Aircraft Corp.*, 672 F. Supp. 923, 925 (M.D. La. 1987).

Courts in the Sixth Circuit have widely "rejected equitable exceptions as incompatible with a strict construction of § 1446(b)" and refused "to engraft unwritten equitable exceptions into the removal statute." Pet. App. 23a (collecting cases).

The Seventh Circuit regards the removal deadline as a "strictly applied rule of procedure," meaning that "untimeliness is a ground for remand so long as the timeliness defect has not been waived." *N. Ill. Gas Co.* v. *Airco Indus. Gases*, 676 F.2d 270, 273 (7th Cir. 1982). District courts in the Seventh Circuit have held that "the thirty day period in § 1446(b) is mandatory and cannot be extended by consent of the parties or by court order." E.g., *Cook* v. *Travelers Cos.*, 904 F. Supp. 841, 842 (N.D. Ill. 1995) (cleaned up).

The Eighth Circuit requires that "a defendant must file a notice of removal within 30 days," *Dalton* v. *Walgreen Co.*, 721 F.3d 492, 493 (8th Cir. 2013), and limitations on removal "must be strictly construed and enforced," *Int'l Ass'n of Entrepreneurs of Am.* v. *Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995). District courts in the Eighth Circuit hold that the removal deadline "is mandatory, therefore a timely motion to remand for failure to observe the 30-day limit will be granted." E.g., *Pender* v. *Bell Asbestos Mines, Ltd.*, 145 F. Supp. 2d 1107, 1110 (E.D. Mo. 2001); accord *State Farm & Cas. Co.* v. *Valspar Corp.*, 824 F. Supp. 2d 923, 938 (D.S.D. 2010).

The Ninth Circuit has held that § 1446(b)'s "time limit is mandatory such that a timely objection to a late petition will defeat removal." *Kuxhausen* v. *BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1142 n.4 (9th Cir. 2013) (cleaned up) (citing *Fristoe* v. *Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980)). District courts in the Ninth Circuit have held that courts may not extend the statutory time limit. E.g., *Lewis* v. *City of Fresno*, 627 F. Supp. 2d 1179, 1182 (E.D. Cal. 2008).

The Tenth Circuit has held that a defendant's failure to comply with § 1446(b)'s requirements renders the removal defective and justifies remand. *Huffman* v. *Saul Holdings Ltd.*, 194 F.3d 1072, 1077 (10th Cir. 1999). District courts in the Tenth Circuit treat compliance with the statutory time limit as mandatory. E.g., *Gruber* v. *Estate of Marshall*, 229 F. Supp. 3d 1245, 1247–48 (D. Kan. 2017).

The Eleventh Circuit has stated that "[t]he failure to comply with these express statutory requirements for removal can fairly be said to render the removal

'defective' and justify a remand." *Snapper*, *Inc.* v. *Redan*, 171 F.3d 1249, 1253 (11th Cir. 1999); see also *Glob. Satellite Comm'n Co.* v. *Starmill U.K. Ltd.*, 378 F.3d 1269, 1271 (11th Cir. 2004) ("A defendant's right to remove an action against it from state to federal court is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress." (cleaned up)); *James* v. *Freedom Mortg. Corp.*, No. 23-13039, 2024 WL 1509682, *3 (11th Cir. Apr. 8, 2024) ("[B]ecause removal jurisdiction raises significant federalism concerns, the removal statute is construed strictly," and a notice of removal that "clearly fails to meet the plain language of the federal removal statute" is "legally without merit" (cleaned up)). District courts in the Eleventh Circuit regard the 30-day removal deadline as "a strictly applied rule of procedure that may not be extended by the court." *BCC Apartments, Ltd.* v. *Browning*, 994 F. Supp. 1440, 1442 (S.D. Fla. 1997); accord *Tucker* v. *Equifirst Corp.*, 57 F. Supp. 3d 1347, 1353 (S.D. Ala. 2014); *Harris* v. *Kollsman, Inc.*, 97 F. Supp. 2d 1148, 1151 (M.D. Fla. 2000).

The D.C. Circuit has held "[t]he 30-day time limit to file a notice of removal is mandatory and a timely objection to a late petition will defeat removal." *In re Clark*, No. 23-7073, 2024 WL 3385251, at *5 (D.C. Cir. July 12, 2024) (cleaned up). District courts in the D.C. Circuit construe the removal statute strictly and routinely remand where a removal is defective. E.g., *Henry* v. *Reynolds & Assocs., Inc.*, Case No. 1:20-cv-02321, 2020 WL 7186158, at *3 (D.D.C. Dec. 7, 2020).

B. The cases Enbridge cites are decades-old outliers that are distinguishable and may no longer be good law.

Against this robust caselaw from every circuit, Enbridge has attempted to manufacture a circuit split by stretching a handful of outdated decisions from the Fifth and Eleventh Circuits. That effort fails.

1. There is no certworthy split between the Fifth and Sixth Circuits.

Enbridge cites five Fifth Circuit cases. Pet. 19–20, 22–23.[1] The first three—*Getty Oil Corp.* v. *Ins. Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988), *Doe* v. *Kerwood*, 969 F.2d 165 (5th Cir. 1992), and *Gillis* v. *Louisiana*, 294 F.3d 755 (5th Cir. 2002)—are inapposite, as they are multi-defendant cases about the so-called rule of unanimity, which requires that all defendants must consent to a notice of removal.

In *Getty Oil*, the Fifth Circuit held that when the defendants are served at different times, service on the first defendant starts the 30-day removal clock for all defendants—meaning later-served defendants had less than 30 days to seek or consent to removal. 841 F.2d at 1262–63. To soften this rule, however, the court provided that a later-served defendant may be able to consent to removal after the 30-day period in "exceptional circumstances." *Id.* at 1263 n.12. Most other circuits rejected the first-served defendant rule,

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[1] Enbridge did not cite any of these cases prior to the Sixth Circuit issuing its opinion. Enbridge cited *Gillis* for the first time in its petition for en banc rehearing. (R. 55-17.) It did not cite *Getty Oil*, *Kerwood*, *Johnson*, or *Harris* at any point below.

holding instead that each defendant has 30 days from the date it is served to seek removal. See *Barbour*, 640 F.3d at 609 (describing the circuit split).

Kerwood and *Gillis* merely apply *Getty Oil*. In *Kerwood*, the court held that the Red Cross was not exempt from the rule of unanimity, and it responded to the Red Cross's concerns about the unfairness of the first-served defendant rule by stating in dicta that courts could excuse the harsh timing requirement in exceptional circumstances. 969 F.2d at 169. In *Gillis*, the court excused the 30-day consent deadline where a defendant timely consented to a notice of removal based on a request from board members, but the board did not formally ratify the consent until after the 30-day period due to "exceptional circumstances" that prevented it from meeting. 294 F.3d at 758–59.

Enbridge's reliance on these cases is misplaced for two reasons.

First, this is not a rule-of-unanimity case. The issue here is not that a defendant failed to timely consent to a notice of removal, but that a notice of removal was not timely filed. Enbridge has not identified any case where the Fifth Circuit excused compliance with § 1446(b) on similar facts. Indeed, Enbridge overlooks the most analogous Fifth Circuit case, *Cervantez*, which holds that "the requirement for timely filing a petition for removal is mandatory" and a defendant that fails to file a timely petition "waive[s] its right to remove." 99 F.3d at 732, 734.

Second, these cases may no longer be good law. Congress abrogated *Getty Oil*'s first-served defendant rule in the Jurisdiction and Venue Clarification Act of

2011, amending 28 U.S.C. § 1446(b)(2) to codify the last-served defendant rule instead. See, e.g., *Tilley* v. *Tisdale*, 914 F. Supp. 846, 849 (E.D. Tex. 2012) (recognizing the abrogation). The Fifth Circuit has not addressed whether its prior caselaw survived the statutory amendments, but there is good reason to think the answer is no. As the Second Circuit explained:

> When the rule of unanimity was a judge-made rule, courts could allow judge-made exceptions to that rule. But now we are limited to interpreting a clear statutory command from Congress that all defendants must consent to removal within thirty days of service. Where, as here, Congress provides no exceptions to the rule, we are not at liberty to create one. [*Taylor* v. *Medtronic*, *Inc.*, 15 F.4th 148, 153 (2d Cir. 2021).]

The Fifth Circuit has approached other aspects of the 2011 statutory amendments in the same manner as the Second Circuit. Prior to the amendments, the Fifth Circuit allowed equitable tolling of the one-year time limit to remove diversity cases. *Tedford* v. *Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003). However, the 2011 amendments provide that removal after the one-year period is only available in cases of "bad faith." 28 U.S.C. § 1446(c)(1). The Fifth Circuit has since held that the amendment abrogated its prior caselaw and made equitable tolling of the one-year time limit unavailable. *Hoyt* v. *Lane Constr. Co.*, 927 F.3d 287, 294 (5th Cir. 2019). It reasoned: "Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in

federal courts. Once Congress has prescribed those procedures, we cannot add to them." *Id.* (cleaned up).

Given its analysis in *Hoyt*, it seems likely that, if it were faced with the question, the Fifth Circuit would follow the Second Circuit's holding in *Taylor* that equitable tolling of the time to consent to removal is no longer available. At any rate, the issue is not presented here, since this is not a rule-of-unanimity case. Thus, even if there were a split between the Second and Fifth Circuits on that issue, this case would not be an appropriate vehicle to resolve it.

Enbridge's fourth case—*Johnson* v. *Heublein*, 227 F.3d 236 (5th Cir. 2000)—is similarly inapposite. That case involved the so-called "revival" doctrine, under which "a lapsed right to remove . . . is restored when the complaint is amended so substantially as to alter the character of the action and constitute essentially a new lawsuit." *Id.* at 241. Few courts have applied this doctrine, and several have questioned it. See, e.g., *Kuxhausen*, 707 F.3d at 1142 n.5; *Tucker*, 57 F. Supp. 3d at 1350–58.

Enbridge did not raise the revival doctrine below, and the Sixth Circuit had no occasion to consider it. Nor does this Court. Even if the doctrine existed, it would not apply here since the Attorney General did not file an amended complaint, let alone one that so substantially altered the character of the action as to essentially create a new lawsuit. See *Abbo-Bradley* v. *City of Niagara Falls*, 73 F.4th 143, 151 (2d Cir. 2023) (declining to adopt or reject the revival doctrine since it would not apply in any event). Any questions about the revival doctrine are best left for another case where it would at least arguably apply.

Enbridge's fifth case, *Harris* v. *Edward Hyman Co.*, 664 F.2d 943 (5th Cir. 1981), is consistent with the Sixth Circuit's opinion below. In *Harris*, the Fifth Circuit held that a plaintiff forfeited the right to object to a defective removal petition "by failing to assert promptly her objections to the defects in the petition and by proceeding with discovery." *Id.* at 944. The court below did not hold to the contrary, and in fact recognized that a plaintiff could forfeit the right to object to a defective notice of removal. Pet. App. 19a (stating that objections to the timing of removal are "subject to forfeiture if not raised in a timely motion to remand"). That is not an issue here, however, since "the Attorney General properly invoked § 1446(b)'s removal time limits in a timely motion to remand." Pet. App. 20a. *Harris* is simply irrelevant.

In sum, none of the cases Enbridge cites show a certworthy split between the Fifth and Sixth Circuits. And to the extent there is any divergence, this is not a vehicle to address it because this case does not involve an untimely consent to a notice of removal, an allegedly "revived" right to remove, or a waiver of the right to seek remand.

2. There is no certworthy split between the Sixth and Eleventh Circuits.

In attempting to show a split between the Sixth and Eleventh Circuits, Enbridge cites *Loftin* v. *Rush*, 767 F.2d 800 (11th Cir. 1985), *abrogated on other grounds by Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 714–15 (1996). There, an employee of the U.S. Navy failed to pay child support owed under a divorce decree, and his ex-wife served a summons of

garnishment on the Navy. *Id.* at 801. The Navy did not answer, and the state court entered a default judgment against it for the entire amount of child support the employee owed, in derogation of the federal government's sovereign immunity. *Id.* at 801, 806–10. The Navy then filed an answer and removed the case to federal court under the federal officer removal statute, 28 U.S.C. § 1442, after the 30-day period had expired. *Id.* at 805. On those unusual facts, the Eleventh Circuit held that the Navy's untimely removal did not require remand. *Id.*

Enbridge seems puzzled by the Sixth Circuit's holding that *Loftin* is "distinguishable." Pet. 21. But there is no mystery. For one thing, *Loftin* involved a prior version of the removal statute, which required remand if a case was "removed improvidently and without jurisdiction." *Loftin*, 767 F.2d at 802 n.2 (quoting 28 U.S.C. § 1447(c)). Some courts have read *Loftin*'s statement that "[t]he timeliness of a removal petition is not jurisdictional . . . and we therefore have the power to review even an untimely petition," *id.* at 805, as an application of that statutory language, which was removed in 1988. Those courts have questioned whether *Loftin* and related cases remain good law based on the statutory language that exists today. See *May* v. *Johnson Controls*, *Inc.*, 440 F. Supp. 2d 879, 883–84 (W.D. Tenn. 2006) ("The great weight of the case law, as well as the present language of the statute, is contrary to this discretionary approach.").[2]

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[2] See also *California* v. *Salas*, No. 24-mc-80105, 2024 WL 3757492, at *4 (N.D. Cal. Aug. 12, 2024) (questioning whether *Loftin* remains good law); *Ligutom* v. *SunTrust Mortg.*, No. C10-05431, 2011 WL 445655, at *5 (N.D. Cal. Feb. 4, 2011).

For another thing, Enbridge is not the federal government, and litigating this action in state court would not offend federal sovereign immunity. Several courts have declined to follow *Loftin* where, as here, the federal government was not the removing party, and its sovereign immunity was not at issue. See, e.g., *Stone Street Cap.*, 300 F. Supp. 2d at 351; *Vill. Improvement Ass'n of Doylestown* v. *Dow Chem. Co.*, 655 F. Supp. 311, 315 (E.D. Pa. 1987).[3]

Loftin itself states that, when a timeliness defect is not waived, district courts are "*require*[*d*] . . . to remand the case in most instances." 767 F.2d at 805 (emphasis added). The *Loftin* court did not elaborate on when remand is not required, holding only that "the timeliness requirement in § 1446(b) is not binding on the government under the facts here." *Id.*

In the past 40 years, courts have not given *Loftin* wide application. Enbridge cites only two reported cases that relied on *Loftin*, Pet. 18–19, and they are easily distinguishable. In *Premier Holidays Int'l, Inc.* v. *Actrade Cap.*, 105 F. Supp. 2d 1336, 1339–40 (N.D. Ga. 2000), the court denied a motion to remand where one defendant timely filed a notice of removal and another defendant did not consent, holding the non-consenting defendant "must be realigned as a plaintiff and its consent to removal is unnecessary and

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[3] Courts in the Eleventh Circuit have cited *Village Improvement Association* with approval. See *Bray* v. *Loudo Trailers, Inc.*, No. 5:08-cv-392, 2009 WL 302164, at *1–2 (M.D. Fla. Feb. 6, 2009) (remanding a case that was removed one day late); *Dulaney* v. *Halsted Fin. Servs., LLC*, No. 1:16-CV-0316, 2016 WL 9558934, at *6 (N.D. Ga. May 3, 2016) (holding that the removal deadline is mandatory and cannot be excused).

irrelevant." In *Reese* v. *S. Fla. Water Mgmt. Dist.*, 853 F. Supp. 413, 415 (S.D. Fla. 1994), the court allowed the United States to remove a case 12 days after the deadline. No court has ever relied on *Loftin* to excuse a notice of removal filed by a private entity two years after the statutory deadline and after substantial state-court litigation had already occurred. Indeed, several district courts in the Eleventh Circuit regard the statutory removal deadline as a mandatory and strictly applied rule of procedure—exactly like the Sixth Circuit. See *supra* at 14.[4]

Because *Loftin* is a clear outlier that would not apply on these facts and has only rarely been relied on over the past 40 years, any conflict with the opinion below is not significant enough to warrant this Court's intervention. Further, as Professor Miller points out, "a later Eleventh Circuit panel might also distinguish [*Loftin*] based on . . . the persuasive value of this Sixth Circuit opinion." Amicus Br. 6–7. That the Eleventh Circuit may limit *Loftin* and follow the Sixth Circuit's persuasive analysis does not weigh in favor of granting certiorari. It indicates that there is no ripe circuit split for this Court to resolve, and further percolation is warranted to clarify the nature and extent of any discrepancy between the circuits.

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[4] Enbridge cites *Green* v. *Hill*, 954 F.2d 694, 696 n.3 (11th Cir. 1992), *superseded in part on other grounds*, 968 F.2d 1092 (11th Cir. 1992), for the proposition that "*Loftin* remains governing law in the Eleventh Circuit today." Pet. 18. But *Green* is a 30-year-old case that only referenced *Loftin* in dicta. The 30-day removal deadline did not apply in *Green* because the case was removed under the Westfall Act, which authorizes removal "any time before trial." *Green*, 954 F.2d at 696 n.3 (quoting 28 U.S.C. § 2679(d)(2)).

II. The decision below is correct and any issue can be addressed by Congress.

It is no accident that courts have so uniformly held compliance with the statutory removal deadline is mandatory. Congress "determine[s] when, and under what conditions, federal courts can hear [cases]." *Bowles* v. *Russell*, 551 U.S. 205, 212–13 (2007); see also *Patsy* v. *Bd. of Regents*, 457 U.S. 496, 501 (1982) ("Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts.").

"Removal is entirely a creature of statute and a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress." *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 32 (2002) (cleaned up). "These statutory procedures for removal are to be strictly construed," and defendants cannot "avoid complying with the statutory requirements for removal." *Id.* at 32–33.

There are good reasons to ensure that a notice of removal complies with Congress's express dictates. Removal infringes on the state court's power, which can only be done "by the action of Congress in conformity to the Judiciary Articles of the Constitution." *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108–109 (1941). Indeed, federalism concerns are at their zenith here since this case was brought in a state court, by the state Attorney General, on behalf of the People of State, against a nondiverse party under state law. See *Franchise Tax Bd.* v. *Constr. Laborers Vacation Tr.*, 463 U.S. 1, 21 n.22 (1983) (stating that "considerations of comity make us reluctant to snatch

cases which a State has brought from the courts of that State, unless some clear rule demands it").

When Congress added a specific time period to the removal statute in 1948, it intended the provision to "give adequate time and operate uniformly throughout the Federal jurisdiction." *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351 (1999) (citation omitted). The goal of national uniformity is not well served by allowing the removal period to change based on case-by-case assessments of equity. Accordingly, Congress used all the hallmarks of a mandatory claims-processing rule: it put the requirement in a statute, used mandatory language, and nestled the provision next to jurisdictional provisions. See *supra* at 8–9. Congress enacted express exceptions to the 30-day removal period where it intended for them to exist. See, e.g., 28 U.S.C. § 1446(b)(3). And when it intended to authorize courts to extend the time limits, it did that expressly, too. See 28 U.S.C. § 1441(d) (providing that in civil actions against foreign states, "the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown"). All of this supports the Sixth Circuit's opinion below.

If an issue were to arise—for example, if a strict application of the statute yielded inequitable results or a genuine circuit split ever did emerge—Congress would be well suited to step in. It has done so before, for example, by extending the removal window from 20 to 30 days, see *Murphy Bros.*, 526 U.S. at 352 n.3, adopting the last-served defendant rule, *Tilley*, 914 F. Supp. at 849, and enacting the bad-faith standard for removal after the one-year limit in diversity cases, *Hoyt*, 927 F.3d at 293–94.

But given the clear statutory language and the overwhelming consistency of the caselaw across the circuits—the development of which will be advanced by the Sixth Circuit's opinion—there is no need for this Court to intervene. This is especially true based on these facts, where the complaint was not amended, where Enbridge missed the statutory deadline by over two years, and where every circuit would reach the same result.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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