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

REPLY BRIEF FOR PETITIONERS

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May 12, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The statement of the parties to the proceeding and the corporate disclosure statement contained in the petition for a writ of certiorari remain accurate.

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REPLY BRIEF FOR PETITIONER

Petitioners asked this Court to resolve an important circuit split: whether the district courts have equitable power to toll the 30-day removal window in 28 U.S.C. § 1446(b)(1) in exceptional circumstances. The circuit split is real. In one corner stand the Sixth and Second Circuits, which hold that there are no equitable exceptions to the 30-day window. In the other corner stand the Eleventh and Fifth Circuits, holding that the district courts have equitable power to excuse the 30-day window.

Enbridge's removal petition thus would have turned out differently in the Eleventh and Fifth Circuits than it did in the Sixth Circuit. The district court here found that exceptional circumstances warranted excusing the 30-day window and also concluded that it had original jurisdiction to hear the case. (App. 34a-39a.) Yet Enbridge was denied access to the federal courts because the Sixth Circuit ruled the 30-window is immune from exceptions. (App. 2a, 18a-24a.)

Respondent spends several pages trying to explain away the circuit split. In certain instances, she seizes on inconsequential fact differences in the cases; in others, she embraces stray statements but ignores the holdings. As Professor Arthur Miller explains, there *is* "a circuit split," and "it is critical to achieve uniformity for something as basic as a time limitation." *Amicus* Brief of Professor Arthur R. Miller at 1-2, 6. This issue often evades review due to limitations on appellate jurisdiction in the removal context. *See id.* at 8-9. That's why

Professor Miller "urge[s] this Court to resolve a circuit split and provide for national uniformity on a significant question of civil procedure." *Id.* at 1.

I. The Decision Below Deepens an Existing Conflict

As explained below, Respondent does not dispute the legal holdings of the federal circuit decisions cited in Enbridge's petition. Thus, all parties seem to agree that the ordinary criteria for this Court's review are present in this case. Rule 10(a).

A. Eleventh Circuit

In *Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985), the defendant removed the case several months "beyond the 30-day time limit established by 28 U.S.C. § 1446(b)." *Id.* at 805. Despite "disapproving" of defendant's "tardiness," the Eleventh Circuit refused to remand the case: "The timeliness of a removal petition is not jurisdictional, and we therefore have the power to review even an untimely petition." *Id.*

Respondent characterizes *Loftin* as an "outlier" and expressing a minority view. (Opp. 4, 23.) But lower courts continue to cite *Loftin* with approval, including in circuits that have yet to address this question. Pet. 18-19 & n.7 (collecting cases); App. 35a-36a; 14B Wright & Miller, *Fed. Prac. & Proc. Juris.*, § 3731 nn.31-32 and accompanying text (Rev.

4th ed.)[1] That is hardly the mark of an isolated decision or stale split. Respondent is also wrong to suggest that the Eleventh Circuit, rather than the Sixth or Second Circuits, is the outlier. (Pet. 18-20.) At any rate, Respondent's portrayal of the Eleventh Circuit as an "outlier" only confirms a circuit conflict on the question presented.

Respondent tries to distinguish *Loftin* on the basis that the federal government was the removing party there. (Opp. 22.) But the identity of the removing party had no bearing on the Eleventh Circuit's resolution of the legal issue. *See Loftin*, 767 F.2d at 802, 805 ("We are unwilling to allow a modal defect to pretermit our substantive inquiry."). At most, the Eleventh Circuit cited the federal government's sovereign immunity status as grounds for finding the *presence of* exceptional circumstances. *See id.* at 805-10 (state court entered a judgment greater than allowed by federal statutes).[2]

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[1] *See also Miami Herald Media Co. v. Fla. Dep't of Transp.*, 345 F. Supp. 3d 1349, 1368 (N.D. Fla. 2018); *Farm & City Ins. v. Johnson*, 190 F. Supp. 2d 1232, 1237 (D. Kan. 2002).

[2] In the two cases cited by Respondent (Opp. 22), the district courts declined to follow *Loftin*—not based on any factual distinction—but because any tolling of the removal deadlines was discouraged in those districts. *Vill. Improvement Ass'n of Doylestown v. Dow Chem. Co.*, 655 F. Supp. 311, 315 (E.D. Pa. 1987); *Stone Street Cap. v. McDonald's Corp.*, 300 F. Supp. 2d 345, 351 (D. Md. 2003).

Respondent argues that *Loftin* was decided before the 1988 amendments to 28 U.S.C. § 1447. (Opp. 21.) But the 30-day time window for removal is found in Section 1446(b)—not Section 1447(c). Regardless, the 1988 amendments to Section 1447(c) support *Enbridge's position*. Prior to 1988, Section 1447(c) required a remand when the case "was removed improvidently and without jurisdiction …." 28 U.S.C. § 1447(c) (1982). In 1988, Congress amended Section 1447(c) to require a remand when the "district court lacks subject matter jurisdiction …." *Rothner v. City of Chicago*, 879 F.2d 1402, 1411 & n.7 (7th Cir. 1989). In explaining the amendment's purpose, the House Report states: "So long as the defect in removal" is not jurisdictional, "there is no reason why" the courts or parties "should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction." 1988 U.S.C.C.A.N 5982, 6033. Section 1447(c) today distinguishes between procedural and jurisdictional defects in removal. *See Harris v. U.S. Dep't of Transp.*, 122 F.4th 418, 425 (D.C. Cir. 2024). It directs remand when the district court lacks subject matter jurisdiction but is silent on procedural defects in the removal petition. *See id*. That Congress expressly required remand in some cases but not others suggests that district courts have equitable authority in the latter context. *See State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby*, 580 U.S. 26, 34 (2016) (where a statute has "provisions that do require, in express terms, the dismissal" of an action, then "[i]t is proper to infer that, had Congress intended to require dismissal for a violation of [a different] requirement, it would have said so").

Respondent also cites three post-*Loftin* decisions in the Eleventh Circuit but none are on point. (Opp. 22.) In two of them, the defendants timely removed to federal court but the plaintiff argued that removal was waived in the contract's forum-selection clause. *See Snapper, Inc. v. Redan*, 171 F.3d 1249, 1251, 1252-60 (11th Cir. 1999); *Glob. Satellite Comm'n v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1271 (11th Cir. 2004). In the third, *the plaintiff* removed his own action after losing in state court. The Eleventh Circuit rejected removal for two reasons: only a defendant can remove a civil action, and the state action must be pending at the time of removal. *James v. Freedom Mortg. Corp.*, 2024 WL 1509682, at *1 (11th Cir. Apr. 8, 2024). These decisions do not cast shade on *Loftin* or suggest it is no longer law of the circuit.

B. Fifth Circuit

The Fifth Circuit has recognized repeatedly that the 30-day window is subject to equitable exceptions. (Pet. 19-20.) Respondent points to immaterial factual distinctions but does not dispute the legal principle established by those cases. *See Brown v. Demco,* 792 F.2d 478, 482 (5th Cir. 1986) (there is "no inexorable time limit" for removing and it is within the court's equitable power to consider "[e]xceptional circumstances"); *Gillis v. Louisiana*, 294 F.3d 755, 759 (5th Cir. 2002) (applying "equitable exception" to permit removal even though "defendant fail[ed] to comply fully with § 1446 within the thirty-day removal period"); *Johnson v. Heublein*, 227 F.3d 236, 241 (5th Cir. 2000) (permitting

removal even though defendants "did not file a notice of removal within thirty days"); *Doe v. Kerwood*, 969 F.2d 165, 169 & n.15 (5th Cir. 1992) (recognizing court's equitable power to consider exceptions to the 30-day window for removal).[3]

Respondent emphasizes that two of the cited Fifth Circuit decisions concerned removal by multiple defendants. (Opp. 17.) This factual distinction proves Enbridge's point. For a notice of removal to be timely in the Fifth Circuit, "all served defendants must join . . . prior to the expiration of the removal period" in Section 1446(b). *Gillis*, 294 F.3d at 759; *Getty Oil*, 841 F.2d at 1263. In *Gillis* and *Getty Oil*, all defendants had not within the 30-day period and thus the removal was untimely. The Fifth Circuit held, in line with its prior precedents, that the district courts have equitable power to toll Section 1446(b)'s 30-day removal window. *Getty Oil*, 841 F.2d at 1263-64; *Gillis*, 294 F.3d at 759 & n.6.

Respondent accuses Enbridge of "overlook[ing] the most analogous Fifth Circuit case." Opp. 17, citing *Cervantez v. Bexar County Civil Service Com'n*, 99 F.3d 730 (5th Cir. 1996). But *Cervantez* is inapposite. There, the defendant constructively waived removal by litigating the case in state court

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[3] In briefing below, Enbridge relied on the Fifth Circuit's lead decision on this issue—*Brown v. Demco*. *See* Answering Br. 25 (ECF No. 38); *contra* Opp. 16 n.1 (suggesting Enbridge never cited Fifth Circuit precedent to the panel before its decision).

through discovery and summary judgment motions. *Id*. at 732. The defendant tried to avoid this result by arguing that removal did not become apparent until plaintiff filed his summary judgment opposition. The Fifth Circuit disagreed, holding that plaintiff's first amended complaint had stated a federal question. *Id*. at 772 n.4 & 773.[4] Equitable tolling was not raised or addressed in *Cervantez*.

Following *Cervantez*, the Fifth Circuit twice reaffirmed a district court's equitable power to toll 30-day window in the removal statute. *See Tedford v. Warner-Lambert Co*., 327 F.3d 423, 426 & nn.5-8 (5th Cir. 2003); *Johnson v. Heublein Inc*., 227 F.3d 236, 241-44 (5th Cir. 2000). At issue in *Tedford* was the one-year bar in 28 U.S.C. § 1446(b) for removing in diversity of citizenship cases. *Id.* The Fifth Circuit recognized that its precedent allowed equitable tolling of the 30-day window in Section 1446(b). *Tedford*, 327 F.3d at 426 n.8. The court saw "no reason to depart" from this precedent for purposes of the one-year bar in Section 1446. *See id.*; *accord* App. 33a-38a (as in *Tedford*, the district court here cited plaintiff's conduct in finding exceptional circumstances). Respondent emphasizes that Congress subsequently amended Section 1446, moved the one-year bar to paragraph (c), and created a bad faith exception to it. Opp. 18-19, citing *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287 (5th Cir. 2019).

[4] There was no finding of constructive waiver in this case, nor could there be. Even to this day, Enbridge has not filed an answer in state court and no discovery has taken place.

This statutory amendment is irrelevant here. No court has ever held that the statutory amendments to the one-year bar in Section 1446(c) presage the legislative overruling of precedent allowing an equitable exception to a different deadline that Congress did not alter.

In *Johnson,* the Fifth Circuit permitted tolling of the 30-day window under the revival doctrine. Opp. 19, citing *Johnson*, 227 F.3d at 241-44. The revival-doctrine is a judicially-created exception that allows a defendant to remove after the expiration of Section 1446(b)'s 30-day window. *Id.* This happens if the plaintiff changes his case by amending the complaint, thereby reviving the defendant's right to remove. *See id.* Respondent emphasizes that she never amended her complaint and thus this case did not present the revival doctrine. (Opp. 19.) This misses the point. Here, the district court cited both the revival doctrine and *Johnson* in its order denying remand because the revival doctrine is an application of the general rule that Section 1446(b) is subject to equitable exceptions. (App. 38a.)

C. Second and Sixth Circuits

In contrast to the Eleventh and Fifth Circuits, the Second and Sixth Circuits hold that the 30-day window for removing is immune from exceptions. Pet. 20. Only this Court's intervention can resolve that conflict, restore uniformity to the removal statute, and provide much-needed guidance to the lower courts on their power to consider equitable exceptions to non-jurisdictional time-limits.

D. Other Circuits

Respondent tries to avoid the circuit conflict by reframing the issue presented, stating that the issue is whether the 30-day window is mandatory. (Opp. i.) She then walks through decisions in every circuit containing some stray statement that the removal time limits are mandatory or strictly construed. (Opp. 11-15.) Of course a statute stating that a notice "shall be filed within 30 days" imposes a mandatory deadline. *Kingdomware Techs. v. United States*, 579 U.S. 162, 171 (2016). But as this Court recently explained: "The procedural requirements that Congress enacts to govern the litigation process are only occasionally as strict as they seem. Most of those rules read as categorical commands …. But Congress legislates against the backdrop of judicial doctrines creating exceptions, and typically expects those doctrines to apply." *Harrow v. Dep't of Def.*, 601 U.S. 480, 483-84 (2024).

The real question is not whether the Section 1446(b)(3)'s deadline is "mandatory" but whether it is subject to equitable exceptions. (Pet. i, 3-4.) *None* of the circuit cases cited in Respondent's five-page litany address that issue. *E.g., Romulus v. CVS Pharmacy*, 770 F.3d 67, 74-80 (1st Cir. 2014) (concluding removal was timely); *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1142 (9th Cir. 2013) (same); *N. Illinois Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 274 (7th Cir. 1982) (allowing amendment to notice of removal to cure a pleading defect). Respondent is wrong to claim a "consensus" of federal circuit decisions on the issue raised here.

II. Respondent's Faulty Merits Arguments Confirm that Review is Warranted

Respondent argues that "the decision below is correct" but, tellingly, she fails to defend that decision on its own terms. (Opp. 24-25.) The Sixth Circuit recognized that the 30-day removal window is not jurisdictional but emphasized that the statute is to be "strictly construed against removal …." App. 22a-23a, citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). Conspicuously absent from the opposition brief is any meaningful defense of this reasoning.

As the petition explained, the Sixth Circuit's presumption against removability is an invention of the lower courts that has no applicability here. *See* Pet. 22. This Court has never announced such a presumption. *See Back Doctors Ltd v. Metro. Prop. & Cas. Ins.*, 637 F.3d 827, 830 (7th Cir. 2011) (Easterbrook, J.) ("There is no presumption against federal jurisdiction in general, or removal in particular."). While some courts have invoked the presumption on jurisdictional questions arising in the removal context, everyone agrees that the 30-day removal window is not jurisdictional. (App. 19a.)

This Court's decision in *Shamrock*—cited in the decision below—does not say otherwise. There, a plaintiff removed his own case to federal court after the defendant filed a counterclaim. 313 U.S. at 100. While the removal statute previously permitted "removal by either party," Congress amended the statute by the time *Shamrock* was decided to permit removal only by "defendant or defendants." *Id.* at

107. The Court held that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts [was] one calling for the strict construction of such legislation." *Id*. at 108. In using the words "strict construction," the *Shamrock* Court was referring to a particular *congressional policy* at the time, not some overriding constitutional prerogative to interpret the removal statute narrowly. *See Breuer v. Jim's Concrete of Brevard,* 538 U.S. 691 (2003) (rejecting that *Shamrock* required strict construction of ambiguous removal provision).

Respondent asserts that the decision below promotes "federalism." (Opp. 4, 24.) To the contrary, the Framers contemplated that removal jurisdiction would play a vital role in our federal system of government. *See* THE FEDERALIST No. 80 at 403 (Alexander Hamilton) (federal courts were "likely to be impartial …owing [their] official existence to the Union"). It is no more an affront to state courts to allow equitable tolling of the initial 30-day window in Section 1446(b)(1) than it is to allow removal under the second 30-day window in Section 1446(b)(1)(2).

Respondent says that Congress used "all the hallmarks of [] mandating" a strict 30-day removal period. (Opp. 25.) But Respondent overlooks that Section 1447(c) directs a remand only when there are jurisdictional defects. *See Harris*, 122 F.4th at 425.

Respondent's barren merits argument highlights the need for this Court's review. But right or wrong, the 2–2 circuit split calls for resolution.

III. This Is an Ideal Vehicle to Resolve the Conflict

This case is the ideal vehicle to resolve the circuit conflict.

First, the factual predicate is clear and undisputed: the district court found this case to present exceptional circumstances warranting tolling of the 30-day removal window. App. 33a-38a, 41a (citing plaintiff's conduct and importance of federal issues); Opp. 7.

Second, the legal predicate is clear. The Sixth Circuit ruled that Section 1446(b) is immune to any equitable exceptions. (App. 2a, 18a-24a.)

Third, the question presented often evades appellate review. (Pet. 25-26.) If the district court finds the removal untimely and remands to state court, appellate review is barred in most cases. *See* 28 U.S.C. § 1447(d). If the district court tolls the 30-day window and proceeds to entry of judgment, appellate review of procedural defects in the removal process is barred. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996). In contrast here, the district court certified the tolling issue for interlocutory review. Since "[a] comparable case might not come up again for a long time," the "Court should seize this opportunity …." *Amicus* Brief of Professor Miller at 9.

Finally, the importance of the underlying issues is reinforced by recent events. The President recently declared a national energy emergency and

directed the U.S. Attorney General to take all appropriate action to stop the continuation of civil actions by state officials that unreasonably burden domestic energy development. *See* Executive Order 14260, Protecting American Energy from State Overreach; Executive Order 14156, Declaring a National Energy Emergency; *United States v. Michigan*, No. 25-cv-496 (W.D. Mich. filed Apr. 30, 2025). Here, Respondent seeks an unprovoked shut down of critical energy infrastructure on which millions of North Americans depend. *See* Pet. 6-7; *Amicus* Brief of North Americas Building Trades Unions, U.S. Steel Workers at 11-17.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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