No.

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 Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether district courts have the authority to excuse the thirty-day procedural time limit for removal in 28 U.S.C. § 1446(b)(1).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the court of appeals are:

1. Petitioners (Defendants-Appellees below): Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P.
2. Respondent (Plaintiff-Appellant below): Dana Nessel, Attorney General of the State of Michigan, on behalf the People of the State of Michigan.

Petitioners Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P., are each indirect subsidiaries of Enbridge Inc., a publicly traded company. No publicly-held corporation owns 10% or more of Enbridge, Inc.'s stock.

LIST OF RELATED CASES

The related proceeding within the meaning of this Court's Rule 14.1(b)(iii) are listed below:

- *Nessel v. Enbridge Energy Limited Partnership*, *et al.*, No. 23-1671 (6th Cir. Jun2 21, 2023) (judgement entered).
- *Nessel v. Enbridge Energy Limited Partnership*, *et al.*, No. 23-0102 (6th Cir. July 21, 2023) (granting permission to file an interlocutory appeal);
- *Nessel v. Enbridge Energy Limited Partnership*, *et al.*, No. 23-1148 (6th Cir. July 21, 2023) (denying as moot petition for writ of mandamus);
- *Nessel v. Enbridge Energy Limited Partnership*, *et al.*, No. 1:21-cv-1057 (W.D. Mich. Feb. 21, 2023) (certifying order denying remand for interlocutory appeal); and
- *Nessel v. Enbridge Energy Limited Partnership*, *et al.*, No. 1:21-cv-1057 (W.D. Mich. Sept. 11, 2024) (order of remand).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Enbridge Energy, Limited Partnership, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P (collectively, "Enbridge") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and resolve a square circuit conflict.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 104 F.4th 958 and included in the Appendix ("App.") at 1a–25a. The Sixth Circuit's order denying rehearing en banc (App. 50a) is not reported. The opinions of the U.S. District Court for the Western District of Michigan are unreported and included in the appendix at 26a-42a and 43a-45a.

JURISDICTION

The Sixth Circuit entered judgment on June 17, 2024. (App. 1a.) Enbridge filed a timely petition for rehearing en banc, which was denied on August 16, 2024. (App. 50a.) On October 23, 2024, Justice Kavanaugh extended the time within which to file a petition for writ of certiorari until January 13, 2025. *See* No. 24A410. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1446(b) of Title 28 of the United States Code provides:

> (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.
>
> * * *
>
> (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.

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

> 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. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A

> certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

STATEMENT

This case arises from efforts by Michigan state officials to permanently shut down Enbridge's international pipeline. This pipeline—known as Line 5—has supplied energy to millions in the Midwest and Canada for over seventy years. (App. 2a.) As the Government of Canada explained in an amicus brief submitted in the related case, "Line 5 is vital to Canada's energy security and economic prosperity …." (R.38:10; App. 6a.)

Michigan's Attorney General filed this action in state court. (App. 3a.) When Enbridge removed the action to federal court, the Michigan Attorney General argued the removal was untimely under 28 U.S.C. § 1446(b)(1). (App. 7a, 30a.) The district court ruled that it had subject matter jurisdiction and that the 30-day time limit was excused. (App. 7a, 33a-38a, 41a.) The Sixth Circuit reversed, holding that the 30-day window for removal is mandatory and immune from exceptions. (App. 2a, 18a-24a.) Thus, this case presents the question whether a district court has authority to excuse the 30-day time limit in Section 1446(b)(1).

As the Sixth Circuit recognized, its ruling is inconsistent with the holding in *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985). (App. 24a.) In *Loftin*, the Eleventh Circuit refused to remand a case that had been removed "far beyond the 30-day time limit

established by 28 U.S.C. § 1446(b)." *Loftin,* 767 F.2d at 805. "The timeliness of a removal petition is not jurisdictional and [courts] therefore have the power to review even an untimely petition." *Id.* By rejecting *Loftin*'s holding, the Sixth Circuit deepened a circuit conflict on this issue. The Fifth Circuit agrees with the Eleventh Circuit that the district court can excuse the 30-day time requirement in certain circumstances, but the Second Circuit—and now the Sixth Circuit—have reached the opposite conclusion. *Gillis v. Louisiana*, 294 F.3d 755 (5th Cir. 2002); *Taylor v. Medtronic, Inc.,* 15 F.4th 148 (2d Cir. 2021). Even before the Sixth Circuit issued its opinion in this case, the leading commentators on federal practice and procedure—Wright & Miller—recognized the disagreement in the federal courts on this issue. 14C Wright & Miller, Federal Practice and Procedure § 3731 & nn.31-32 (4th ed.) ("Some circuits have adopted a doctrine pursuant to which in 'exceptional circumstances' the court may permit removal even when defendants fail to comply fully with Section 1446(b) within the 30-day removal period.").

This circuit conflict creates an untenable situation. As a result of the uncertainty in the law, some defendants will be subject to strict removal deadlines while others will not. A defendant's right to a federal forum should not depend on where a case is initially filed. With the federal circuit courts in sharp disagreement on this issue, the time is ripe for this Court to intervene and achieve a uniform interpretation of the federal removal statute. This case—which raises momentous constitutional and foreign-affairs issues—is an ideal vehicle for deciding the conflict.

A. The Statutory Framework for Removal

The general removal statute allows defendants to remove any action over which the federal courts have original jurisdiction, with certain limited exceptions not relevant here. *See* 28 U.S.C. § 1441. Removal has been sustained based on original jurisdiction when there is a substantial federal issue embedded in the complaint (*Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005)), or when the complaint directly implicates foreign affairs (*Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997)).

Section 1446(b) sets the removal procedure applicable to civil cases: the notice of removal shall be filed "within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading …." 28 U.S.C. § 1446(b)(1). Section 1446(b)(3) adds that "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after the receipt by the defendant … 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." 28 U.S.C. § 1446(b)(3). Section 1446(c) imposes a one-year cap for removing actions based on diversity of citizenship. 28 U.S.C. § 1446(c). But there is no statutory cap on removing actions based on original jurisdiction.

Once a defendant has filed a notice of removal in the federal district court, a plaintiff objecting to removal "on the basis of any defect in removal procedure other than lack of subject matter jurisdiction" may, within 30 days, file a motion asking

the district court to remand the case to state court. 28 U.S.C. § 1447(c). "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *Id.*

B. The Relevant Facts and Procedural History

1. Enbridge owns and operates Line 5. (App. 2a.) Built in 1953, Line 5 extends over 645 miles, traversing Wisconsin and Michigan before crossing into Ontario, Canada. (App. 2a.) As reflected in the map below, a four-mile segment of Line 5 crosses the Straits of Mackinac under a perpetual easement that the State of Michigan granted to Enbridge in 1953:



For over 70 years since its construction, Line 5 has been serving the energy markets in the Midwest and

Canada. (App. 2a.) Line 5 is unique in that it transports both natural gas liquids and light crude oil. (App. 27a.) It serves ten refineries and provides thousands of solid middle-class jobs on both sides of the border. (R.40:4-12.) Line 5 is the main source of propane (used to heat homes) in Michigan and parts of Canada. (R.43:5, 7-8.)

Line 5's continued operations are protected by a 1977 Treaty between the United States and Canada.[1] (App. 5a-6a, 17a, 27a & n.2.) This Treaty was ratified by President Carter with the advice and consent of the U.S. Senate. 123 Cong. Rec. 26,291 (1977). During the Senate advice-and-consent hearings, a State Department representative specifically identified Line 5 as one of the transit pipelines that would be protected under the treaty.[2] The 1977 Treaty guarantees the uninterrupted flow of hydrocarbons on Line 5. (App. 5a.) *See also* Art. II of the 1977 Treaty, 1977 WL 181731.

2. This action was one of three lawsuits filed over the same controversy between the same parties or their privies. (App. 2a, 27a, 40a.) The three lawsuits are: *Nessel v. Enbridge* (this suit), *Michigan v. Enbridge*, and *Enbridge v. Whitmer*. All three suits relate to efforts by state officials to shut down

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[1] *Agreement Between the Government of the United States and the Government of Canada Concerning Transit Pipelines*, Jan. 28, 1977, 28 U.S.T. 7449, 1977 WL 181731 (hereafter "1977 Treaty").

[2] Senate Committee on Foreign Relations, Report on Agreement with Canada Concerning Transit Pipelines, S. Rep. No. 95-9, at 40, 80 (1977).

Enbridge's operation of Line 5 in the Straits of Mackinac. (App. 27a, 40a.)

In June 2019, the Michigan Attorney General filed this action on behalf of the People of the State of Michigan (*Nessel v. Enbridge*) in state court. (App. 3a, 26a.) Her complaint alleged that Line 5 was at risk of release in the Straits of Mackinac due to the "inherent risks of pipeline operations" and potential "anchor strikes" from shipping traffic. (R.38:5.) The Attorney General sought a shutdown of Line 5, asserting violations of three state laws: the public trust doctrine, common-law public nuisance, and the Michigan Environmental Protection Act. (App. 3a, 26a.) Enbridge has not filed an answer in the state court action; no discovery has taken place; and the state court has not issued any ruling on the merits. (App. 3a-4a, 29a.) The parties filed cross motions for summary disposition on the pleadings, which remain pending. (App. 29a.)

In November 2020, the State of Michigan filed a second lawsuit (*Michigan v. Enbridge*) in state court, repeating the same basic facts and state-law theories alleged in the Attorney General's complaint. (App. 4a, 12a, 28a.) Unlike the Attorney General's action, however, the State's action sought to enforce the Governor's deadline of May 2021 for shutting down Line 5. (App. 4a.) This sparked strong reactions from the Government of Canada, which indicated that a shutdown of Line 5 could constitute a violation of the United States' treaty commitments. (App. 5a-6a, 17a;

R.38:7-8, 22-23.)[3] Enbridge removed the State's case to federal court, alleging jurisdiction under the *Grable* doctrine and federal common law of foreign affairs. (App. 5a.) Enbridge also alleged removal under the federal officer removal statute, 28 U.S.C. § 1442. (Enbridge's Notice of Removal at 12-13.) At the same time, Enbridge filed its own lawsuit against Michigan state officials (*Enbridge v. Whitmer*) in federal court seeking to enjoin the Governor's shutdown deadline. (App. 27a.)

Once the Straits controversy was in federal court, the Attorney General agreed to hold her state-court action in abeyance. (R.38:9.) As the state court explained in its abeyance order, both parties had agreed that the Attorney General's state-court action should be held in abeyance because the parties "have asked the federal court to address [issues that] may potentially impact this Court's proceedings …." (R.38:9.) Thus, the parties and the state court were awaiting guidance from the federal court on these important federal issues.

The Government of Canada filed amicus briefs in the federal court actions. (App. 5a-6a.) It stressed the importance of Line 5 to Canada's energy security and economic prosperity. (App. 6a.) It also explained that Michigan's efforts to shut down Line 5 violate express promises the United States made to Canada in a 1977 Treaty. (App. 5a-6a.) As Canada explained, any

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[3] Enbridge's Line 5: An Interim Report by Canada's House of Commons, *available at* https://www.ourcommons.ca/Content/Committee/432/CAAM/Reports/RP11234513/caamrp01/caamrp01-e.pdf (last visited Jan. 9, 2025). This Report was quoted in the district court papers below.

"unilateral action by a single state" to shut down Line 5 "would impair important U.S. and Canada foreign policy interests by raising doubts about the capacity of the Government of the United States to make and uphold commitments without being undermined by an individual state." (App. 6a.)

In October 2021, the Government of Canada invoked the dispute resolution provisions of the 1977 Treaty in direct response to Michigan's efforts to shut down Line 5. (App. 6a, 27a & n.2.) Canada explained that the 1977 Treaty "guarantees the uninterrupted transit of light crude oil and natural gas liquids between the two countries" and "stressed the importance of fully respecting" this commitment with respect to Line 5.[4] Canada's invocation of the 1977 Treaty was a significant development because it meant that the United States and Canada were engaged in the formal international dispute resolution process—a process that could result in a determination that Michigan's efforts to shut down Line 5 are prohibited by the United States' treaty obligations.

In November 2021, the federal district court denied the State of Michigan's remand motion. App. 6a, 28a; *see also Michigan v. Enbridge Energy, L.P.*, 571 F. Supp. 3d 851 (W.D. Mich. 2021). The district court held that "this case is properly in federal court"

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[4] Statement by Minister Garneau on Line 5 transit pipeline, which is in the record below and also *available at* https://www.canada.ca/en/global-affairs/news/2021/10/statement-by-minister-garneau-on-line-5-transit-pipeline.html (last visited Jan. 9, 2025).

due to substantial federal issues embedded in the complaint. *Michigan*, 571 F. Supp. 3d at 854. While the State's complaint alleged that it was the owner of the bottomlands, federal law expressly burdens the State's title and reserves for the federal government the "power of regulation and control of said lands … for constitutional purposes of commerce, navigation, national defense, and international affairs." 43 U.S.C. § 1314(a). Under the exercise of its paramount authority, the federal government burdened the State's ownership of the Straits bottomlands by way of the 1977 Treaty. *See Michigan*, 571 F. Supp. 3d at 858-59. "[W]ith Canada's [recent] invocation of the dispute resolution provision in the 1977 Treaty, the federal issues in this case are under consideration at the highest levels of this country's government." *Id.* at 860. The federal Pipeline Safety Act—which preempts state regulation of pipeline safety standards— further burdens the State's ownership of the bottomlands. *Id.* at 859.

The State of Michigan did not appeal this order but instead voluntarily dismissed its lawsuit. (App. 6a, 29a & n.4.) In a press release, the Governor of Michigan explained that the dismissal was in direct response to the federal court's decision to keep the dispute in federal court: "the federal court has now decided to keep the lawsuit … [but] I believe the people of Michigan, and our state courts, should have the final say." (R.38-12.) "[B]y voluntarily dismissing the governor's action against Enbridge in federal court," the state officials "clear[ed] the way for … Attorney General Dana Nessel's lawsuit to go forward … expeditiously in state court." *Id.*

While the State dismissed its action, Enbridge's affirmative *Ex parte Young* action against the state officials remains pending in federal court. (App. 34a & n.9.)[5]

3. In December 2021, Enbridge removed the Attorney General's action to federal court. (App. 6a-7a, 29a.) The Attorney General's action was in state court at the time, but it had been held in abeyance for over a year by agreement of the parties. (R.38:9; App. 29a.) Citing 28 U.S.C. § 1446(b)(3), Enbridge filed its notice of removal within 30 days of the district court's "order" denying the State's remand motion. (App. 6a-7a, 29a.) For jurisdiction, Enbridge again relied on the *Grable* doctrine, federal common law of foreign affairs, and the federal officer removal statute, 28 U.S.C. § 1442. (Notice of Removal, at 12-14.)

The Attorney General moved to remand the action, arguing that Enbridge's removal was untimely under Section 1446(b)(1) because it was filed more than two years after her initial complaint. (App. 9a, 29a.) While claiming that Enbridge had a legitimate basis for removing within 30 days of the initial complaint, the Attorney General also argued the federal court never had any subject matter jurisdiction over this dispute. (App. 30a & n.6, 39a.)

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[5] In July 2024, the federal court denied defendants' motion to dismiss based on sovereign immunity grounds. Defendants filed an interlocutory appeal (No. 24-1608), which remains pending.

C. The Opinions of the District Court and Sixth Circuit

The federal district court denied the Michigan Attorney General's motion to remand. (App. 26a-42a.) The court found jurisdiction under the *Grable* doctrine. (App. 38a-39a, 41a.) It ruled that the 30-day procedural time-requirement in Section 1446(b)(1) was excused based on exceptional circumstances or the judicially-created revival doctrine. (App. 31a-38a.)

The district court explained that the 30-day removal window was not jurisdictional and could be tolled in exceptional circumstances. (App. 31a-32a, 35a-41a.) "Courts have recognized that the thirty-day time limit can be avoided where jurisdiction obtains and based on the equitable administration of justice." (App. 35a-36a; *see also* App. 31a & n.7.) The court found exceptional circumstances in this case, including the importance of the federal issues already in federal court in the related Enbridge case and the Attorney General's efforts to create a "collision course" between the state and federal courts. (App. 34a & n.9, 35a-38a.) "[T]he Court again points to the important federal issues at stake in having this dispute heard in federal court." (App. 41a.) The district court explained that tolling the 30-day window in this case was consistent with the removal statute's purposes and the efficient administration of justice. (App. 35a-41a.) "The Court reads Enbridge's Notice of Removal as an effort to maintain uniform and consistent administration of this controversy." (App. 35a.)

The district court further held that Enbridge's removal was proper under the judicially-created

revival exception to the 30-day requirement in 28 U.S.C. § 1446(b) because it was filed within 30 days of the court's order denying remand in the State's parallel action. (App. 38a.) "A lapsed right to remove may be restored where a litigation event, such as a court order, starts a virtually new, more complex, and substantial case." *Id.*, citing *Johnson v. Heublein Inc.*, 227 F.3d 236, 242 (5th Cir. 2000). "The Court's order in *Michigan v. Enbridge* established for the first time that this Court is an appropriate forum for deciding the substantial federal issues at stake in the Straits Pipeline controversy." (App. 38a.) Enbridge removed within 30 days of the court's order denying remand in *Michigan v. Enbridge*. (App. 29a.)

The district court subsequently granted the Attorney General's motion to certify for interlocutory review the court's order denying remand pursuant to 28 U.S.C. § 1292(b). (App. 43a-45a.) In July 2023, the Sixth Circuit granted the Attorney General

permission to file an interlocutory appeal. (App. 46a-49a.)[6]

The Sixth Circuit reversed the district court's order denying the Attorney General's motion to remand. (App. 1a-25a.) The panel expressed no opinion on Enbridge's jurisdictional theories and assumed they could give rise to federal jurisdiction for removal purposes. (App. 12a; App. 7a-8a & n.2.) The court ruled that Enbridge's removal to federal court was untimely and that "there are no equitable exceptions to the statute's deadlines for removal." (App. 2a.)

The Sixth Circuit held that Enbridge's removal was untimely under Section 1446(b)(1) because it was not filed within 30-days of the initial complaint. (App. 15a-16a). The panel recognized that the removal deadlines are not jurisdictional. (App. 19a.) But the court held that the statutory text and context reveal "a clear intent" to compel strict enforcement of the deadline in Section 1446(b)(1). (App. 20a-22a.) The

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[6] While this case was in the Sixth Circuit, the United States filed an amicus brief in a different appeal involving Line 5 pending before the Seventh Circuit. *See Bad River Band v. Enbridge*, Appeal Nos. 23-2309, 23-2467 (argued Feb. 2024). There, a tribe filed a federal trespass and nuisance action against Line 5's operations on parts of a Wisconsin reservation. In its amicus brief, the U.S. Government agreed that Line 5 was protected by the 1977 Treaty and that the treaty is self-executing. (R.50, U.S. Amicus Br. 22-30 & n.5.) The U.S. Government expressed a "strong interest" in preventing any action with respect to Line 5 that would "expos[e] the United States to … substantial monetary damages" and affect "trade and diplomatic relations with Canada." (*Id.* at 2-3.) As of the date of filing this petition, the Seventh Circuit has not yet issued its decision.

panel also emphasized that removal statutes are to be strictly construed against removal. (App. 22a-23a.)

The panel recognized that Enbridge's "best case" supporting equitable tolling of the 30-day removal deadline is *Loftin v. Rush*, 767 F.2d 801 (11th Cir. 1985). (App. 24a.) In that case, the Eleventh Circuit "excused a late removal" notice that the United States government had filed in federal court. (App. 24a.) The panel refused to follow "this single, 39-year old, distinguishable, and out-of-circuit case …." (App. 24a.) Accordingly, the Sixth Circuit held that Section 1446(b)'s time limits are mandatory and "leave no room for equitable exceptions." (App. 24a.)

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the federal courts are in conflict on whether the district courts have authority to excuse the procedural time-limits for removal under 28 U.S.C. § 1446(b)(1). The Sixth and Second Circuits hold that there are no equitable exceptions to the statutory deadlines for removal, while the Eleventh and Fifth Circuit have reached the opposite conclusion. Only this Court can resolve this conflict and ensure uniformity in the interpretation of the federal removal statute.

I. The Sixth Circuit's decision deepens an existing conflict.

A. This Court interpreted the predecessor removal statute and held it should be interpreted equitably

Over a hundred years ago, this Court recognized that the time limit for removal is not jurisdictional and that the statute should be interpreted equitably

to carry out the statutory purposes. *See Powers v. Chesapeake & O Ry. Co.,* 169 U.S. 92, 98 (1898). In *Powers*, the plaintiff had filed a tort action against the railroad and nondiverse individuals but, after the removal deadline had passed, "discontinued his action against" the nondiverse individual defendants, "leaving it an action between citizens of different states." *Id.* at 98. The defendants then attempted to remove the case to federal court a second time, and the question became whether the second removal was untimely.

This Court started by recognizing that "the time of filing a petition for removal is not essential to the jurisdiction." *Id.* The Court then construed the removal statute in effect at that time as giving effect to the defendants' right to remove:

> The reasonable construction of [the removal statute], and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, 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, 169 U.S. at 100-01 (emphasis added). The untimely removal in *Powers* was due to circumstances beyond the defendant's control, but the Court clearly adopted the principle that equitable tolling is applicable. *See also Fritzlen v. Boatmen's Bank*, 212 U.S. 364, 372-74 (1909).

B. The Eleventh, Fifth, and Second Circuits split on the issue

More recently, the federal circuit courts addressed the procedural time limits in the current removal statute in situations where defendants could have filed a notice of removal earlier but did not. Before the Sixth Circuit issued its decision in this case, the Eleventh, Fifth, and Second Circuits were split on this issue.

When faced with the issue in 1985, the Eleventh Circuit held that the federal courts "have the power to review even an untimely petition." *Loftin v. Rush*, 767 F.2d at 805. In *Loftin*, the government removed a case to federal court fifty days after the thirty-day window for removal had closed. *Id.* The court recognized that the plaintiff had "not waive[d] the timeliness issues but, rather, has advanced it promptly." *Id.* While the court disapproved of the government's tardiness, the court refused to remand the case on purely "technical grounds." The court found exceptional circumstances warranting retaining the case: The state court had entered a garnishment judgment against the United States greater than allowed by statute. *See id.* at 805. "We do not read [existing precedent] as mandating remand in all cases where a removal petition is untimely. We are unwilling to allow a modal defect to pretermit our substantive inquiry." *Id.*

Loftin remains governing law in the Eleventh Circuit today. *E.g.*, *Green v. Hill*, 954 F.2d 694 n.3 (11th Cir.) ("because the time limitation for removal is not jurisdictional, this court has the power to review untimely petitions," citing *Loftin*), *superseded in part on other grounds*, 968 F.2d 1092 (11th Cir 1992);

Premier Holidays Int'l, Inc. v. Actrade Capital, 105 F. Supp. 2d 1336, 1339-40 (N.D. Ga. 2000) ("this court has the discretion to deny remand even where the removal is untimely"); *Reese v. South Florida Water Management Dist.*, 853 F. Supp. 413, 415 (S.D. Fla. 1994) ("the untimeliness of the government's removal petitions is not grounds for remand").[7]

The Fifth Circuit follows the Eleventh. In *Gillis v. Louisiana*, 294 F.3d 755 (5th Cir. 2002), plaintiff disputed that defendants had properly removed within the 30-day window. *See id.* at 759. The defendant's attorney did not have authority to file removal "until thirty-nine days *after* the expiration of the removal period …." *Id.* (emphasis added). The Fifth Circuit ruled that the untimeliness could be excused, finding "the circumstances in the case to be exceptional." *Id.*; *see also Doe v. Kerwood*, 969 F.2d 165, 169 (5th Cir. 1992) ("[I]t is within the equitable power of the court to consider... exceptional circumstances [to the time limitations for removal] on a case-by-case basis."); *Getty Oil Corp. v. Insurance Co. of N. Am.*, 841 F.2d 1254, 1263 n.12 (5th Cir. 1988) (holding that exceptional circumstances would require that the thirty-day time limitation in § 1446 not be applied strictly and remanding for determination as to whether such circumstances were present). In *Johnson v. Heublein Inc.*, 227 F.3d 236, 241-44 (5th Cir. 2000), the Fifth Circuit followed the

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[7] *See also Law Office of Mark Kotlarsky Pension Plan v. Hillman*, No. TDC-14-3028, 2015 WL 5021399, at *4-5 (D. Md. Aug. 21, 2015) (permitting an untimely removal, citing *Loftin*); *Wise Co. v. Daily Bread, LLC*, No. 1:11-CV-00868-CW, 2012 WL 681789, at *4 (D. Utah. Feb. 29, 2012) (similar).

"judicially-created revival exception to the thirty-day requirement" and allowed a later removal even when the defendant had a right to removal within thirty days of the initial complaint and failed to exercise that right. *Id.* at 241-44

The Second Circuit reached the opposite conclusion. In *Taylor v. Medtronic, Inc.,* all but one of the named defendants filed a timely removal within the 30-day window. 15 F.4th at 149. The district court ruled that the notice of removal was technically cured when the last defendant eventually consented 17 days after the 30-day removal window had expired. *See id.* The Second Circuit reversed, holding that courts are "not free to create an exception to the statute's mandatory language …." *Id.* While the last defendant claimed that its failure to join the removal notice earlier was inadvertent, the Second Circuit ruled that the mistake could not be fixed with a late consent. *Id.* at 153. "At bottom, nothing in the statute provides a court with any discretion to allow a party to cure a failure to meet the statute's requirements once the thirty-day period for removal lapses." *Id.*; *see also Abbo-Bradley v. City of Niagara Falls*, 73 F.4th 143, 149 (2d Cir. 2023) (refusing to adopt the judicially-created revival exception to the 30-day requirement, which allows removal to federal court even when the initial pleading was removable and no notice of removal was filed within 30 days).

C. The Sixth Circuit expands the existing conflict by adopting the Second Circuit's strict interpretation

In June 2024, the Sixth Circuit published its decision in this case, deepening the circuit conflict.

The panel held here that "there are no equitable exceptions to the statute's deadlines for removal." (App. 2a.)

The panel maligned the Eleventh Circuit's *Loftin* decision as a "39-year-old … out-of-circuit" case. (App. 24a.) While *Loftin* was issued in 1985, it remains good law in the Eleventh Circuit and is followed by the lower courts there. *E.g.*, *Green v. Hill*, 954 F.2d at 694 n.3; *Premier Holiday Int'l*, 105 F. Supp. 2d at 1339 ("this court has the discretion to deny remand even where the removal is untimely," citing *Loftin*).

The Sixth Circuit made a perfunctory statement that *Loftin* was "distinguishable," but it identified no meaningful difference between that case and this one. In fact, there is none. In both, it was alleged that the defendant had removed far beyond the 30-day window. In both, the district courts found important, overriding federal issues at stake. Yet the outcomes were materially different. *Loftin* held that the case should remain in federal court; the Sixth Circuit here ruled that the time limitations cannot be excused in any circumstances.

The Sixth Circuit stated that *Loftin* is against "the overwhelming weight of authority." (App. 24a.) But the panel did not address the relevant Fifth Circuit precedent. And the panel relied on this Court's precedent having nothing to do with equitable tolling or the time limit on removal generally. (App. 22a-23a.) For example, in *Shamrock Oil & Gas Corporation v. Sheets*, 313 U.S. 100, 108-09 (1941), the plaintiff, rather than the defendant, attempted to remove the case to federal court; the Court concluded that removal was improper. In reaching that

conclusion, the Court seized upon both (1) the express language of the removal statute, which limited the right of removal to "defendants," and (2) the fact that the statute had previously allowed "parties" to remove an action, but had been amended by Congress to give only "defendants" the right to remove. *See id.* at 110. *See also Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32-34 (2002) (defendants cannot use the All Writs Act to avoid the statutory requirement in 28 U.S.C. § 1441 that the federal court have original jurisdiction over an action in order for it to be removed from federal court). *Shamrock Oil* and *Syngenta* are not on point here.

The panel also relied on lower court precedent holding that removal statutes are to be strictly construed. In the context of removal, "strict construction" means that federal courts should limit their jurisdiction to the cases for which Congress intended them to have jurisdiction, not that courts are to do everything in their power to defeat federal jurisdiction. *E.g., Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329, 337-38 (D.S.C. 1996). As the district court found here, this dispute raises significant constitutional and foreign affairs issues that should be decided in federal court. (App. 33a-41a.) The district court thus used equitable considerations to *protect* congressional judgment.

It follows logically from the Sixth Circuit's rigid interpretation that the time limit for removal cannot be extended even for waiver or estoppel—exceptions that this Court, as well as numerous other federal courts, have expressly recognized. *Powers*, 169 U.S. at 99; *Harris v. Edward Hyman Co.*, 664 F.2d 943,

944-45 (5th Cir. 1983); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980). The Sixth Circuit cited two cases involving multi-defendants where one defendant filed late and yet the district court excused the untimely removal. (App. 24a.) The Sixth Circuit offered no explanation as to how its strict construction of the removal statute could be compatible with these decisions.

Finally, the Sixth Circuit's strict construction disregards the fact that remand under the removal statute is only required if "the district lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). This suggests, as the Fifth and Eleventh Circuits have concluded, that exceptional circumstances may warrant a denial of remand even when the removal was untimely, so long as subject matter jurisdiction otherwise exists.

II. The Question Presented is Important.

The question presented in this case needs to be definitively resolved so that defendants such as Enbridge are not denied their right to a federal forum. Defendants view the right to remove as important and, in many cases, it can be outcome determinative.[8]

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[8] *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 607 (1998) (a "study of win-rate data leads to the conclusion that forum really does affect outcome, with removal taking the defendant to a forum much more favorable in terms of biases and inconveniences"); *see id.* at 593-95 ("federal question cases, excluding prisoner litigation, show a[] … drop in win-rate [for plaintiffs] from 52% to 25%").

Virtually every time a potentially removable lawsuit is filed the defendants and their counsel must consider whether to seek removal and must confront the issue of determining *when* the notice of removal must be filed. As the Sixth Circuit recognized, it is sometimes difficult "to navigat[e] complicated doctrines and appl[y] them to unique facts under time constraints …." (App. 16a.)

Furthermore, Enbridge's removal turned in part on the acts of a foreign sovereign—*i.e.*, Canada's view that Michigan's actions constituted a potential violation of the 1977 Treaty. (App. 38a-39a.) By the time Canada had raised the 1977 Treaty and later invoked the Treaty's dispute resolution provision, the 30-day window for removing from the Attorney General's initial complaint had long expired. 28 U.S.C. § 1446(b)(1). (App. 17a.)

This case is an optimal vehicle for resolution of the question presented. The district court found subject matter jurisdiction and made specific findings that tolling the 30-day deadline was consistent with the removal statute and that the right to remove had been revived. (App. 33a-41a). The court of appeals held that the 30-day window was mandatory, with no exceptions, and addressed its reasoning at length in its opinion. (App. 18a-22a.)

As the district court explained (App. 37a-38a, 41a), failure to apply equitable tolling in these circumstances would unfairly penalize Enbridge and create inefficiencies that the removal statute was designed to prevent. *See Powers*, 168 U.S. at 100-01. The State of Michigan filed a second action virtually identical to the Attorney General's action, and

Enbridge removed that suit to federal court and filed its own affirmative action in federal court. The parties agreed to hold the Attorney General's action in abeyance pending the federal court's ruling on the remand issues. The Attorney General's action was dormant for over a year. (App. 29a.) But once the federal court ruled that the controversy should stay in federal court, the State voluntarily dismissed its lawsuit with the express intent of defeating federal court jurisdiction over the controversy. (App. 33a-41a.) The district court correctly pointed to "extraordinary circumstances" warranting the tolling or revival of the time for removal. (App. 35a-38a, 41a.)

Another opportunity for this Court to provide a definitive interpretation of the removal statute may not arise soon. When there is an order remanding the case to state court, appellate review is rare because of the procedural roadblocks to review of removal issues. *See* 28 U.S.C. § 1447(d) (precluding review of an order remanding a case to state court, except for cases removed pursuant to the federal-officer or civil rights removal statutes). In this case, the district court denied the motion to remand. (App. 26a.) The Attorney General obtained interlocutory review but, in most other cases, the case is not appealed until entry of the final judgment. By that point, any antecedent procedural error in the removal process is not an appellate concern. *See Caterpillar v. Lewis*, 519 U.S. 61, 74-76 (1996) (holding that an alleged defect in the removal process is not a basis to reverse a judgment if the district court had jurisdiction at the time the judgment was entered). This Court should take the opportunity now to resolve the uncertainty

created by the conflicting interpretations of the removal statute.

CONCLUSION

The petition for a writ of certiorari should be granted. And, given the vital federal issues implicated and the U.S. Government's interests (see *supra* page 15, note 6), Enbridge respectfully suggests that the Court call for the views of the Solicitor General.

Respectfully submitted,

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January 13, 2025

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APPENDIX A

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, DECIDED JULY 2, 2024

In the United States Court of Appeals
for the Sixth Circuit

No. 23-1671

DANA NESSEL, Attorney General of the State of Michigan, on behalf of the people of the State of Michigan,

Plaintiff-Appellant,

v.

ENBRIDGE ENERGY, LP; ENBRIDGE ENERGY COMPANY, INC.; ENBRIDGE ENERGY PARTNERS, L.P.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 1:21-cv-01057—Janet T. Neff, District Judge.

Argued: March 21, 2024

Decided and Filed: June 17, 2024

Before: GRIFFIN, THAPAR, and NALBANDIAN, Circuit Judges.

GRIFFIN, Circuit Judge.

Michigan Attorney General Dana Nessel seeks to shut down Enbridge's Line 5 Pipeline, which runs underwater across the Straits of Mackinac between

Michigan's Lower and Upper Peninsulas. The merits of this litigation are not before us. Instead, we consider only which court should decide this case: does it belong in Michigan state court (where the Attorney General filed it in 2019) or in federal court (to where Enbridge removed it over two years later)? We hold that Enbridge failed to timely remove this case to federal court under 28 U.S.C. § 1446(b), and there are no equitable exceptions to the statute's deadlines for removal. Thus, under these circumstances, this case belongs in Michigan state court. Because the district court held to the contrary, we reverse the district court and direct it to remand this case to Michigan's 30th Circuit Court for the County of Ingham.

I.

Defendant Enbridge[1] owns and operates the Line 5 Pipeline, which is part of a pipeline network that transports petroleum products to refineries in the Midwest, Ontario, and Quebec. Line 5 runs from northwestern Wisconsin through Michigan's Upper and Lower Peninsulas and then into Canada—terminating in Sarnia, Ontario, just across the border from Port Huron, Michigan. Between Michigan's peninsulas, it traverses the Straits of Mackinac pursuant to a 1953 easement issued by the State of Michigan, which owns the Straits' bottomlands. In recent years, that easement has been the subject of litigation in several cases, two of which are relevant here.

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[1] The defendants here are Enbridge Energy, LP; Enbridge Energy Company, Inc.; and Enbridge Energy Partners, L.P. (collectively, "Enbridge").

A.

The Attorney General's case. On June 27, 2019, Michigan Attorney General Dana Nessel filed this case in Michigan state court, the 30th Circuit Court for the County of Ingham. The summons and complaint were served on Enbridge on July 12, 2019. The complaint seeks to enjoin Enbridge's continued operation of Line 5 based on alleged violations of three state laws: the public-trust doctrine, common-law public nuisance, and the Michigan Environmental Protection Act.

On September 16, 2019, Enbridge responded to the complaint by moving for summary disposition, arguing that the complaint failed to state a claim on which relief could be granted. Enbridge argued, among other things, that the Attorney General's claims under the public-trust doctrine were preempted by the federal Pipeline Safety Act, which it claimed occupies the field of pipeline-safety regulation. The Attorney General then filed her own dispositive motion.

In May 2020, the state court held oral argument on those dispositive motions. Before the argument, the state court asked the parties to be prepared to answer questions about federal preemption. Much of the argument indeed focused on preemption issues, including whether the Attorney General's claims were preempted by either the Pipeline Safety Act or the federal Submerged Lands Act. The court requested post-argument briefing on these preemption issues. In Enbridge's supplemental brief, Enbridge reiterated its preemption defenses, arguing that the Pipeline Safety Act and the Submerged Lands Act preempted

Michigan's public-trust authority applied to an oil pipeline on submerged bottomlands.

While those dispositive motions were pending, the Attorney General filed a separate motion for a temporary restraining order and preliminary injunction on June 25, 2020. That motion stemmed from a recently disclosed report about issues with Line 5's infrastructure at the Straits. Enbridge actively participated in the briefing and argument that followed. The motion resulted in a temporary restraining order that briefly enjoined the operation of the pipeline on the Straits' bottomlands. The court later authorized Enbridge to restart the pipeline's operations after complying with its federal safety regulator's requirements.

B.

The Governor's case. On November 13, 2020, before a ruling by the Ingham County Circuit Court on the competing motions in the Attorney General's case, Michigan Governor Gretchen Whitmer issued a notice of revocation of the 1953 easement, calling for Line 5 to be shut down by May 2021, and simultaneously filed a complaint in state court to enforce the notice. Her complaint closely paralleled the Attorney General's. Indeed, according to Enbridge, it "repeat[ed] the same basic facts and claims alleged in the Attorney General's complaint," and these two lawsuits involved the "same controversy" between the "same parties or their privies."

Enbridge timely removed the Governor's case to the United States District Court for the Western District of Michigan on November 24, 2020. *See* 28

U.S.C. § 1446(b)(1). Enbridge's notice of removal asserted that the district court had federal-question jurisdiction under 28 U.S.C. § 1331 because the action "ar[ose] under" federal law. Specifically, Enbridge argued that the district court's subject-matter jurisdiction derived from the "substantial federal question" doctrine, as recognized in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312–13 (2005). In Enbridge's view, the Governor's state-law claims necessarily raised substantial questions of the federal government's foreign-affairs powers and preemption under the Pipeline Safety Act and the Submerged Lands Act. Still within 30 days of the complaint's service, Enbridge then filed an amended notice of removal on December 10, 2020, asserting additional grounds for federal-question jurisdiction, including arguments that the claims arise under federal common law.

The Governor moved to remand the case to state court, arguing that the district court lacked jurisdiction over her exclusively state-law claims. The Canadian government then filed an amicus brief in opposition to the motion to remand, arguing that "Michigan's Shutdown Order Presents Substantial and Important Treaty Issues" under the 1977 Transit Pipelines Treaty between the United States and Canada. That treaty covers gas and oil pipelines crossing the border between Canada and the United States and prevents any public authority from "interfering with" the cross-border transmission of gas and oil. Agreement Between the Government of the United States of America and the Government of Canada Concerning Transit Pipelines, art. I(a), art.

II(1), Jan. 28, 1977, 28 U.S.T. 7449. In its amicus brief, the Canadian government argued that "unilateral action by a single state" to shut down Line 5 "would impair important U.S. and Canadian foreign policy interests by raising doubts about the capacity of the Government of the United States to make and uphold commitments without being undermined by an individual state." On October 4, 2021, the Canadian government filed a supplemental amicus letter notifying Enbridge and the district court that Canada had formally invoked the treaty's dispute resolution provision, beginning negotiations between the governments of Canada and the United States over Line 5. *See id.*, art. IX.

The district court denied the Governor's motion to remand on November 16, 2021, a date critical to Enbridge's argument for timely removal of this case. The court held that it had federal-question jurisdiction under *Grable* because resolution of the Governor's claims necessarily requires interpretation of federal law (namely, the Submerged Lands Act, the Pipeline Safety Act, and the 1977 Treaty) and the extent to which those laws "burden[]" Michigan's ownership of Great Lakes bottomlands. *Michigan v. Enbridge Energy, Ltd. P'ship*, 571 F. Supp. 3d 851, 859, 862 (W.D. Mich. 2021). Soon thereafter, the Governor voluntarily dismissed her case.

C.

Removal of the Attorney General's case. Citing both the district court's order denying the motion to remand in the Governor's case and § 1446(b)(3)'s provision that permits removal within 30 days after the defendant's receipt of an "order . . . from which it

may first be ascertained that the case is one which is or has become removable," Enbridge removed this case to federal court on December 15, 2021. Although 887 days had passed since receipt of the Attorney General's complaint, Enbridge argued removal was nonetheless timely 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.

On January 14, 2022, the Attorney General moved to remand this case to state court on two grounds: untimely removal and lack of subject-matter jurisdiction. The district court denied the motion on both grounds. It excused Enbridge's untimely removal based on equitable principles. And it estopped the Attorney General from challenging subject-matter jurisdiction in this case, relying on its finding of subject-matter jurisdiction in the Governor's case. It then certified its order for interlocutory appeal, and we granted the Attorney General permission to appeal.

II.

We review a denial of a motion to remand de novo. *Davis v. McCourt*, 226 F.3d 506, 509 (6th Cir. 2000). The Attorney General seeks remand on the same two independent grounds it raised below: untimely removal and lack of subject-matter jurisdiction.

In terms of sequencing, we need not address subject-matter jurisdiction before we address the timeliness of removal. Although federal courts must resolve questions of subject-matter jurisdiction before deciding a case on the merits, we have "leeway to choose among threshold grounds for denying audience

to a case on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (internal quotation marks omitted); *see also* Scott Dodson, *In Search of Removal Jurisdiction*, 102 Nw. U. L. Rev. 55, 69 (2008) (noting that, in terms of "decisional sequencing," *Sinochem* suggests that jurisdictional issues do not have "rigid priority" over procedural issues). Consistent with this discretion and following other courts that have remanded cases because of untimely removal without addressing questions of subject matter jurisdiction, *see, e.g., Tr. Servs. of Carolina, LLC v. Rivera*, 2012 WL 1664224, at *1–2 (W.D.N.C. May 2, 2012); *In re Foreclosure of a Deed of Tr.*, 2008 WL 5234301, at *2 (E.D.N.C. Dec. 15, 2008); *Laughlin Assocs., Inc. v. Durand*, 1997 WL 998381, at *1 n.1 (D. Nev. Oct. 17, 1997), *aff'd*, 156 F.3d 1236 (9th Cir. 1998) (unpublished table decision); *Steadman v. Sinclair*, 1996 WL 257664, at *2 n.2 (S.D.N.Y. May 16, 1996),[2] we do not decide whether the district court had subject-matter jurisdiction over this case because Enbridge's removal was untimely.

A.

"The party seeking removal bears the burden of establishing its right thereto." *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989). To remove a civil case from state to federal court, a defendant

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[2] It gives us no pause that there appear to be few, if any, appellate cases deciding a question of removal timeliness before deciding a question of subject-matter jurisdiction, considering 28 U.S.C. § 1447(d)'s prohibition of appellate review of remand orders for removal cases. *See Wisconsin v. Amgen, Inc.*, 516 F.3d 530, 533 (7th Cir. 2008).

must meet the requirements for removal detailed in § 1446. *See Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019). That statute requires the defendant to file a notice of removal, 28 U.S.C. § 1446(a), and provides time limits to do so, *id.* § 1446(b). Section 1446(b)(1) states that the notice of removal "shall be filed within 30 days" of the defendant's receipt of the complaint or summons. *Id.* § 1446(b)(1). However, § 1446(b)(3) allows relief from that 30-day deadline under the following specific circumstances:

> [I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 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.

Id. § 1446(b)(3).

Enbridge unquestionably did not comply with § 1446(b)(1)'s initial 30-day removal deadline from the date of service of the complaint. The Attorney General served Enbridge with the complaint on July 12, 2019, so, under § 1446(b)(1), Enbridge needed to file its notice of removal by August 12, 2019. *See* Fed. R. Civ. P. 6(a)(1)(C). Enbridge missed that deadline by over two years.

Thus, at issue is whether Enbridge can avail itself of § 1446(b)(3)'s later 30-day window. By the statute's plain terms, that extension applies only if three elements are met. *See A.S. ex rel. Miller v. SmithKline*

Beecham Corp., 769 F.3d 204, 209–10 (3d Cir. 2014). First, Enbridge must show that "the case stated by the initial pleading [was] not removable." 28 U.S.C. § 1446(b)(3). Second, it must show that some variable changed that transformed this initially non-removable case into one that was removable. And third, Enbridge must show that, no more than 30 days before December 15, 2021—when it filed its notice of removal—it received "a copy of an amended pleading, motion, order or other paper from which it [could] first be ascertained that the case is one which is or has become removable." *Id.*

For a case to be removable, a federal district court must have "original jurisdiction" over the case.[3] *Id.* § 1441(a); *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); 14C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3721.1 (Rev. 4th ed. 2023). Enbridge bases its removal arguments on 28 U.S.C. § 1331's grant of "original jurisdiction [over] all civil actions arising under the Constitution, laws, or treaties of the United States"—i.e., federal-question jurisdiction. On that ground, if any one of the plaintiff's claims depends on the application of federal law, the entire case may be removed. 28 U.S.C. § 1441(c); *see also* 14C Wright & Miller § 3722. Further, removability requires that a defendant be able to articulate that ground in its

[3] The jurisdiction and removal statutes—and thus this opinion—alternatively use the terms "original jurisdiction" and "subject matter jurisdiction." *Compare* 28 U.S.C. § 1441(a) (referring to "original jurisdiction"), *with id.* § 1447(c) (referring to "subject matter jurisdiction"). For our purposes, these terms are synonymous, and § 1331 is a fount of both.

notice of removal, which must be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." 28 U.S.C. § 1446(a). Under that standard, a signature certifies that, to the best of counsel's "knowledge, information, and belief," the contentions in the notice of removal are supported by existing law or a "nonfrivolous" argument for extending existing law. Fed. R. Civ. P. 11(b). In other words, a defendant must have a "good-faith" basis for legal arguments in the notice of removal. *King v. Whitmer*, 71 F.4th 511, 528 (6th Cir. 2023); *see also Dahl v. R.J. Reynolds Tobacco Co.*, 478 F.3d 965, 970 (8th Cir. 2007) (applying Rule 11 in removal context). Thus, a case becomes removable on federal-question grounds when the defendant has a good faith basis to argue that at least one of the plaintiff's claims depends on the application of federal law.

B.

Enbridge asserts that federal-question jurisdiction now exists in either of two ways. First, under the *Grable* doctrine, the Attorney General's state-law claims necessarily turn on a substantial and disputed issue of federal law—the extent to which the Submerged Lands Act, the Pipeline Safety Act, and the 1977 Treaty "burden" Michigan's authority over the Straits' bottomlands. *See Grable*, 545 U.S. at 312–13. Second, because the Attorney General's state law claims could cause major implications for foreign affairs, an area of "uniquely federal interest[]," those claims arise under federal common law via the foreign-affairs doctrine. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 116 (2022) (citation omitted); *see also Republic of Phil. v.*

Marcos, 806 F.2d 344, 352–53 (2d Cir. 1986); *Torres v. S. Peru Copper Corp.,* 113 F.3d 540, 543 (5th Cir. 1997).

We express no opinion on the merits of Enbridge's jurisdictional theories. Rather, to determine whether Enbridge can avail itself of § 1446(b)(3)'s later removal window, we assume that either theory could give rise to federal jurisdiction and decide only (1) whether that theory made this case removable when the complaint was filed; (2) if not, whether some later change made the case removable; and (3) when Enbridge could have first "ascertained" that the case was removable. As set forth next, we agree with the Attorney General that Enbridge did not comply with § 1446(b)(3)'s requirements.

1.

Viewed through this timing lens, both of Enbridge's jurisdictional theories fail on § 1446(b)(3)'s first or third elements. First, Enbridge cannot establish that "the case stated by the initial pleading [was] not removable." 28 U.S.C. § 1446(b)(3). Enbridge's own actions support this conclusion—it timely removed the Governor's case on *Grable* grounds in November 2020, and soon after amended that notice of removal in December 2020 with its argument about federal common law. As Enbridge admits, the Attorney General's and Governor's complaints both featured "the same basic facts and claims" and involved the "same controversy" between the "same parties or their privies." Thus, assuming either of Enbridge's jurisdictional theories are meritorious, the Attorney General's case was

removable on those grounds from its outset, just like the Governor's case was.

Enbridge's appellate brief offers no explanation regarding how the Governor's case could be removable from its outset but this case was not. At oral argument, Enbridge argued (for the first time) that the Governor's easement-revocation notice, calling for the shutdown of Line 5 within six months, sparked a "significant foreign-affairs controversy" that, in turn, made the Governor's and Attorney General's cases such that they arose under federal law under either *Grable* or federal common law. *See Resurrection Sch. v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022) (en banc) (suggesting forfeiture).

But while this unpreserved argument might explain how this case initially was not removable and then later became so, it cannot satisfy § 1446(b)(3)'s third element because it clashes with Enbridge's argument about the first "paper" it received that allowed it to "ascertain[]" that this case had become removable. Enbridge asserts that first "paper" was the district court's November 2021 order denying remand in the Governor's case. Even if papers filed in one case could trigger § 1446(b)(3)'s later removal window in another, *but see Amgen*, 516 F.3d at 533–34 (collecting cases suggesting that § 1446(b)(3)'s reference to "an amended pleading, motion, order or other paper" refers only to papers in the suit to be removed), Enbridge's removal in the Governor's case shows that it was the Governor's complaint, not the district court's order denying remand, that first gave Enbridge good-faith grounds to remove. Regardless of whether the Governor's notice sparked a "foreign-

affairs controversy," Enbridge plainly had good-faith grounds to remove when it received the Governor's complaint, and then promptly removed, in November 2020. Indeed, by December 2020, Enbridge had already articulated both of its jurisdictional theories in its amended notice of removal in the Governor's case. Yet Enbridge did not remove this case until a full year later—far exceeding § 1446(b)(3)'s window of 30 days. Thus, under either of Enbridge's jurisdictional theories, its arguments for timely removal fail under § 1446(b)(3)'s first or third elements.

2.

Enbridge's arguments to the contrary are not persuasive. Enbridge tries to justify the delay between its late 2020 removal of the Governor's case and December 2021 removal of this case by focusing on the word "ascertain" in § 1446(b)(3) and our interpretation of that statute in *Berera v. Mesa Medical Group, PLLC*, 779 F.3d 352, 364 (6th Cir. 2015). There, we stated that "[t]he 30-day period in § 1446(b)(1) starts to run only if the initial pleading contains solid and unambiguous information that the case is removable." *Id.* (internal quotation marks omitted).

We added that, "[i]f the initial pleading lacks solid and unambiguous information that the case is removable," then the defendant must remove "'within 30 days after receipt of a copy of an amended pleading, motion, order or other paper' that contains solid and unambiguous information that the case is removable." *Id.* (ellipses omitted) (quoting § 1446(b)(3)). Applying this language, Enbridge argues that the question is not just whether the case was "removable" when the

complaint was filed but whether it was "unambiguously removable." It further contends that the first time it had "solid and unambiguous information" that this action was removable—i.e., the first time it "ascertained" removability—was when it received the district court's November 2021 order denying remand in the Governor's case.

But, for two reasons, *Berera* cannot save Enbridge's belated removal. First, *Berera* is distinguishable on its facts. It was a case of artful pleading, in which the plaintiff tried to circumvent federal jurisdiction "by artfully casting [her] essentially federal law claims as state-law claims." *Id.* at 358 (citation omitted). There, in response to the plaintiff's threadbare complaint, which purported to assert only state-law claims, the defendant had to file a motion for a more definitive statement to learn about the claims' true nature. *Id.* at 355. The plaintiff's intention to assert federal claims became clear only after her counsel's admissions at a hearing on that motion. *Id.* at 356. Such obfuscation by the plaintiff deprived the defendant of the opportunity to learn of grounds for removal.

Here, by contrast, Enbridge does not argue that the Attorney General "carefully crafted her complaint to circumvent federal jurisdiction." *Id.* at 358. Rather, Enbridge argues only that the Attorney General's complaint is the rare case in which federal jurisdiction exists but was uncertain because the complaint alleges only state-law claims, the parties are not diverse, and the *Grable* and foreign-affairs doctrines are "anything but clear." *See Grable*, 545 U.S. at 321 (Thomas, J., concurring). At bottom, Enbridge

contends that its jurisdictional theories were complex, necessitating additional time to remove. While we appreciate the difficulty of navigating complicated doctrines and applying them to unique facts under time constraints, that is what § 1446(b) requires. And Enbridge showed that it could make these arguments under a tight deadline—it timely filed its notice of removal (and amended notice of removal) articulating these theories within 30 days of its receipt of the complaint in the Governor's case.

Second, § 1446(b)(3)'s use of "ascertain[]" and *Berera*'s reference to "solid and unambiguous information" does not transform the removability inquiry into whether and when a case was "unambiguously removable." Granted, as Enbridge points out, to "ascertain" means "to learn with certainty." *Ascertain*, Random House Webster's Unabridged Dictionary (2d ed. 2001). But to ascertain that a case is removable does not mean to learn with certainty that there is federal jurisdiction. Rather, it means to learn with certainty that there are good-faith grounds on which to argue for federal jurisdiction. In other words, as *Berera* states: "Section 1446(b)'s requirement of solid and unambiguous information is akin to actual notice." 779 F.3d at 364. If at first a case is not removable, § 1446(b)(3) ensures that the defendant "has an opportunity to remove upon being given notice" of grounds on which it can exercise that right. *Id.* (citation and ellipses omitted). Enbridge had notice of good-faith grounds for removability because it removed the "same controversy" on the same grounds a full year before it removed this case.

Given this conclusion, Enbridge's additional argument that Canada's later invocation of the 1977 Treaty first made this case removable is without merit. And even if that argument could somehow show that this case first became removable based on Canada's declarations, it too fails under § 1446(b)(3)'s third element. On October 4, 2021, the Canadian government filed a supplemental amicus letter in the Governor's case notifying Enbridge and the court that Canada had formally invoked the treaty's dispute-resolution provision. Enbridge confirmed its understanding of that letter's importance in a filing of its own on October 12, 2021, arguing that "Michigan's claims have directly and significantly affected U.S. foreign relations with Canada, making removal appropriate." Thus, Canada's October 4 letter in the Governor's case was a paper from which Enbridge could ascertain removability of this case—the "same controversy" as the Governor's case. But Enbridge did not remove this case within 30 days of its receipt of that letter; it instead waited until December 15, 2021—72 days later.

C.

In sum, under either of Enbridge's jurisdictional theories, Enbridge had good-faith grounds to argue for federal jurisdiction more than 30 days before it removed this case. Enbridge missed § 1446(b)(1)'s initial window for removal, 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).

III.

Next, we must decide whether the district court correctly ruled that § 1446(b) permits an equitable exception to the statutory deadlines. Although Enbridge argues that we should review the district court's determination that equity favored Enbridge for abuse of discretion, whether a statute permits an equitable exception in the first place is a legal question that we review de novo. *Cf. In re Maughan*, 340 F.3d 337, 341 (6th Cir. 2003).

Statutory time limits exist on a spectrum of how strictly courts enforce them. They range from "jurisdictional" conditions on the stricter end to mere "time-related directives" on the laxer. *See Dolan v. United States*, 560 U.S. 605, 610–11 (2010). In the middle is the broad category of "claims-processing rules," which "do not limit a court's jurisdiction, but rather regulate the timing of [requests] brought before the court." *Id.*

Federal courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Indeed, immunity from equitable exceptions is one of several hallmark characteristics of a jurisdictional rule. If a statutory time limitation "is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the courts of appeals mandatory." *Id.* at 216–17 (2007) (Souter, J., dissenting) (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)); *see also Day v. McDonough*, 547 U.S. 198, 205 (2006).

We know that § 1446(b)'s time limits are not jurisdictional because they do not possess all these characteristics—specifically, removal-timing issues may be raised only by the plaintiff and only within a strict window of time. Section 1447(c) provides that a plaintiff's motion to remand "on the basis of any defect other than lack of subject matter jurisdiction," such as untimely removal, "must be made within 30 days after the filing of the notice of removal." Thus, unlike "jurisdictional" statutory deadlines, § 1446(b)'s removal deadlines are not ones that "authorize *sua sponte* remands for purely procedural defects," and they are subject to forfeiture if not raised in a timely motion to remand. *Page v. City of Southfield*, 45 F.3d 128, 133 (6th Cir. 1995); *cf. Smith v. State of Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 429 n.2 (6th Cir. 2006).

But simply confirming that § 1446(b)'s deadlines are non-jurisdictional does not resolve the question before us. After all, "[t]he mere fact that a time limit lacks jurisdictional force . . . does not render it malleable in every respect." *Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 192 (2019). Certain deadlines, though non-jurisdictional, are "not subject to equitable tolling." *Id.* When properly raised by an opposing party, these "mandatory" claims processing rules "are 'unalterable,'" id. (quoting *Manrique v. United States*, 581 U.S. 116, 121 (2017)), and "assure relief to a party properly raising them," *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam). In other words, "[r]ules in this mandatory camp are not susceptible of the equitable approach" the district court applied here. *Nutraceutical*, 586 U.S. at 192; *see also Scott Dodson, Mandatory Rules*, 61 Stan. L. Rev.

1, 5–9 (2008). Because the Attorney General properly invoked § 1446(b)'s removal time limits in a timely motion to remand, see 28 U.S.C. § 1447(c), we must determine whether those non-jurisdictional time limits are mandatory and thus immune from equitable exceptions.

Although we presume that we can grant equitable exceptions to non-jurisdictional statutes, *Holland v. Florida*, 560 U.S. 631, 645–46 (2010), that presumption is rebuttable, s*ee Harrow v. Dep't of Def.*, 144 S. Ct. 1178, 1186 (2024) (remanding for consideration of whether a non-jurisdictional appeal deadline is subject to equitable tolling). Whether "equitable tolling is available" under a particular statute "is fundamentally a question of statutory intent." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014). Here, applying our usual tools of statutory construction, we have "good reason to believe that Congress did *not* want" equitable exceptions to apply to § 1446(b)'s time limitations. *United States v. Brockamp*, 519 U.S. 347, 350 (1997).

We begin with the text, focusing on whether the statute as a whole allows flexibility for extra-textual exceptions. *See Nutraceutical*, 586 U.S. at 192–93; *see also Harrow*, 144 S. Ct. at 1183-84. Section 1446(b)(1) sets the default rule: a notice of removal "shall be filed within 30 days" after the defendant's receipt of the initial pleading or summons. If the defendant receives those documents at different times, the applicable deadline is "whichever period is shorter," suggesting an intent for strict enforcement. *Id.*

The statute then includes explicit exceptions—and carveouts from those exceptions—to that default rule.

It first includes an exception in cases involving multiple defendants served at different times (which is not applicable here). *Id.* § 1446(b)(2)(C). It then provides for § 1446(b)(3)'s later 30-day removal window, which, as discussed above, applies only "if the case stated by the initial pleading is not removable" and a later-received paper gives the defendant notice that the case has become removable. *Id.* § 1446(b)(3). But Congress further limited that exception—it applies "[e]xcept as provided in subsection (c)." *Id.* Subsection (c), in turn, provides that "[a] case may not be removed under subsection (b)(3) on the basis of [diversity jurisdiction] 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." *Id.* § 1446(c).[4]

This statutory text expresses "a clear intent to compel rigorous enforcement" of its deadlines, limited only by its explicit exceptions. *Nutraceutical*, 586 U.S. at 193. Applying equitable tolling to either 30-day window in (b)(1) or (b)(3) would require adding a judicially made exception to Congress's detailed, express scheme of exceptions and carveouts, an action

[4] Congress added this last exception—the bad-faith exception to the one-year limit on removal of diversity actions—in 2011 as part of the Federal Courts Jurisdiction and Venue Clarification Act. Pub. L. No. 112-63, 125 Stat. 758 (2011). That amendment was intended "to resolve the conflict" over whether the one-year limit was subject to equitable tolling. *See* H.R. Rep. No. 112–10, at 15 (2011), *reprinted in* 2011 U.S.C.C.A.N. 576, 580. The language "makes clear that the exception to the bar of removal after one year is limited in scope." *Id.*

the Supreme Court has cautioned against. *See id.* at 194; *United States v. Beggerly*, 524 U.S. 38, 48–49 (1998); Brockamp, 519 U.S. at 352.

Next, we look to context. One relevant consideration for whether a deadline has "jurisdictional attributes"—like immunity to equitable exceptions—is where Congress placed it in the overall statutory scheme. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 439 (2011); *see also West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 721 (2022). The removal statutes, including § 1446, are nested within U.S. Code Title 28, Part IV, titled "*Jurisdiction* and Venue." (Emphasis Added). Indeed, as discussed above, whether a case is removable is intertwined with questions of whether and when the defendant had grounds to argue for federal jurisdiction. Although § 1446(b) may not be jurisdictional, its placement near and interrelation with the jurisdictional statutes suggests stricter enforcement. *Cf. Henderson*, 562 U.S. at 439; *see also United States v. Wong*, 575 U.S. 402, 411–12 (2015).

Finally, we look to precedent. Overwhelming authority provides that removal statutes—such as § 1446(b)—are to be strictly construed against removal out of respect for state sovereignty. *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) ("[S]tatutory procedures for removal are to be strictly construed."); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (explaining that language and policy of removal statutes "call[] for the strict construction of such legislation"); *Holston v. Carolina Freight Carriers Corp.*, 936 F.2d 573, 1991 WL 112809, at *3 (6th Cir. 1991) (unpublished table

decision) (interpreting § 1446(b) and stating that "the statutes conferring removal jurisdiction are to be construed strictly"); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999) (interpreting § 1446(b) and observing that "statutes conferring removal jurisdiction are to be construed strictly because removal jurisdiction encroaches on a state court's jurisdiction"); *see also* 14C Wright & Miller § 3731 & n.62 (noting that "[t]he two 30-day time limitations in Section 1446 are mandatory" and collecting cases). "[S]trict construction does not allow a court to disregard the purpose of Congress." *United States v. Klingler*, 61 F.3d 1234, 1237 (6th Cir. 1995). Thus, we do not "snatch[]" cases from state courts "unless some clear rule demands it." *Nessel ex rel. Michigan v. AmeriGas Partners, L.P.*, 954 F.3d 831, 837 (6th Cir. 2020) (citation omitted).

For these reasons, several district courts in this Circuit have rejected equitable exceptions as incompatible with a strict construction of § 1446(b). *See, e.g., Gray v. Martin*, 2013 WL 6019335, at *6 (E.D. Ky. Nov. 13, 2013) (Thapar, J.) (noting that courts in this Circuit have consistently rejected invitations to engraft unwritten equitable exceptions into the removal statute); *Riley v. Ohio Cas. Ins.*, 855 F. Supp. 2d 662, 671 (W.D. Ky. 2012) (refusing to recognize a judicially crafted equitable exception to § 1446(b)'s one-year limitation for removal of actions based on diversity jurisdiction); *City of Albion v. Guar. Nat'l Ins.*, 35 F. Supp. 2d 542, 544 (W.D. Mich. 1998) ("Although not jurisdictional, the thirty-day period for removal is mandatory and must be strictly applied."); *McCraw v. Lyons*, 863 F. Supp. 430, 434 (W.D. Ky. 1994) ("[A] defendant's failure to comply with the

statute's thirty-day limitation is an absolute bar to removal regardless of whether the removal would have been proper if timely filed."). We agree—there is no equitable exception to § 1446(b)'s timing requirements.

The cases Enbridge cites in support of an equitable exception are not persuasive. For instance, some are factually distinct, like two multi-defendant cases in which every defendant except one filed a timely notice of removal but one defendant filed one day late. *Hernandez v. Six Flags Magic Mountain, Inc.*, 688 F. Supp. 560, 561 (C.D. Cal. 1988); *Farm & City Ins. v. Johnson*, 190 F. Supp. 2d 1232, 1237 (D. Kan. 2002). Others disfavor an equitable exception because they resulted in remand to state court for untimely removal. *Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986); *Holder v. City of Atlanta*, 925 F. Supp. 783, 786 (N.D. Ga. 1996). Enbridge's best case is *Loftin v. Rush*, 767 F.2d 800, 801, 805–06 (11th Cir. 1985), which held that a state court's improper entry of default judgment against the United States Navy, in derogation of federal-government immunity, warranted excusing a late removal. But this single, 39-year-old, distinguishable, and out-of-circuit case hardly constitutes a "clear rule" that "demands" an equitable exception here, *Nessel*, 954 F.3d at 837, especially considering the overwhelming weight of authority against it.

Accordingly, we hold that § 1446(b)'s time limitations are mandatory. When invoked in a timely motion to remand, these limitations leave no room for equitable exceptions. Enbridge's failure to comply with these mandatory rules requires remand.

IV.

For these reasons, we reverse the district court's denial of the motion to remand. We remand for the district court to enter an order remanding this case to Michigan's 30th Circuit Court for the County of Ingham.

APPENDIX B

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, SIGNED AUGUST 18, 2022

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

Plaintiff,

v.

ENBRIDGE ENERGY, LP; *et al.*,

Defendants.

No. 1:21-cv-1057

OPINION AND ORDER

Before the Court is Plaintiff's Motion to Remand (ECF No. 10). Enbridge submitted a response in opposition (ECF No. 20), and Plaintiff replied (ECF No. 21). Plaintiff also filed a notice of supplemental authority (ECF No. 22). For the reasons that follow, the motion to remand is denied.

I. BACKGROUND

Plaintiff filed this action in Ingham County Circuit Court on June 27, 2019 (ECF No. 1-1). The Complaint requests a declaration that the 1953 Straits of Mackinac Pipe Line Easement is void, violates the public trust, and should be revoked and that Enbridge's continued operation of the Straits Pipeline should be permanently enjoined (*id.* at PageID.19;

ECF No. 1-2 at PageID.115-116).[1] On December 15, 2021, Enbridge filed a Notice of Removal to this Court, stating that this Court has jurisdiction over this case pursuant to federal question jurisdiction, 28 U.S.C. § 1331, and stating that the case relates to two other cases in this Court: *Enbridge v. Whitmer*, Case No. 1:20-cv-1141 and *Michigan v. Enbridge*, Case No. 1:20-cv-1142 (ECF No. 1 at PageID.3, 8-15).

The three controversies relate to Enbridge's continued operation of the Straits Pipeline, which transports crude oil and natural gas liquids through several states into Canada (Opp'n to Mot. to Remand, ECF No. 20 at PageID.569).

In *Enbridge v. Whitmer*, Enbridge seeks declaratory and injunctive relief that the Notice of Revocation and Termination of Easement or Shutdown Order violates the Supremacy Clause, the Interstate Commerce Clause, the Foreign Commerce Clause, and Foreign Affairs Doctrine, referring to the federal Pipeline Safety Act, 49 U.S.C. § 60101 et seq., and the 1977 Agreement between the Government of the United States and the Government of Canada concerning Transit Pipelines,[2] 28 U.S.T. 7449 (1977)

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[1] Enbridge states that the Complaint raises "claims that purport to arise under state law only" (ECF No. 20 at PageID.571).

[2] On October 4, 2021, the Government of Canada formally invoked the international dispute resolution provision of the Pipeline Treaty, and the Governments of Canada and the United States are now actively engaged in an international dispute resolution process (Suppl. Br., ECF No. 82 at PageID.1048, Case No. 1:20-cv-1142).

("Pipeline Treaty") (Compl., Nov. 24, 2020, ECF No. 1, Case No. 1:20-cv-1141).[3]

In *Michigan v. Enbridge*, Case No. 1:20-cv-1142, the State sought a declaration that: (1) the State properly revoked the 1953 Easement because it violates the public trust; (2) the State properly terminated the 1953 Easement because of Enbridge's repeated and incurable violations of the Easement's terms and conditions; and (3) the State properly determined that the December 19, 2018 Third Agreement does not preclude the revocation and termination of the 1953 Easement (Compl., Nov. 13, 2020, ECF No. 1-1, Case No. 1:20-cv-1142). The State also sought a permanent injunction, enjoining Enbridge from operating the Straits Pipelines (*id.*). Enbridge removed the case to this Court (Notice of Removal, Nov. 20, 2020, ECF No. 1, Case No. 1:20-cv-1142). After the Court denied the State's motion to remand, concluding that disputed and substantial federal issues are at stake and finding a serious federal interest in a federal forum deciding this matter (Op. & Order, Nov. 16, 2021, ECF No. 80 at PageID.1026-1027, 1030-1035, Case No. 1:20-cv-1142), *see Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005), the State voluntarily dismissed the dispute (Notice of Voluntary

[3] The Court determined that it would consider the issue of subject-matter jurisdiction before considering the issue of consolidation (Order, Feb. 18, 2021, ECF No. 20, Case No. 1:20-cv-1142).

Dismissal, Nov. 30, 2021, ECF No. 83, Case No. 1:20-cv-1142).[4]

The Notice of Removal in the present action, filed on December 15, 2021, references the Court's remand order in *Michigan v. Enbridge*, stating that the Notice is filed within thirty days of the Court's order, which provided "solid and unambiguous information" that this case is removable (ECF No. 1 at PageID.2, quoting *Berera v. Mesa Medical Group, PLLC*, 779 F.3d 352, 364 (6th Cir. 2015); ECF No. 20 at PageID.570).

Plaintiff provides in the present Motion to Remand that prior to the Notice of Removal Defendants participated in briefing and hearings on cross-motions for summary disposition and Plaintiff's motion for a temporary restraining order and preliminary injunction in the state court (ECF No. 11 at PageID.280-281; Hr'g on Cross-Mot. for Summ. J., ECF No. 11-4; Suppl. Br. In Supp. of Defs' Mot. for Summ. Disposition, ECF No. 11-5). The Court reviewed the docket of the state court's case. Records of the Ingham County Circuit Court show that no decision was entered in the case before removal and the case is currently closed (Ingham County Docket Sheet, Case No. 19-474; ECF No. 11-1; Ingham County, Michigan, Court Record Search, Case No. 19-474).

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[4] On November 24, 2020, Enbridge removed *Michigan v. Enbridge* to this Court. On November 30, 2021, the State voluntarily dismissed the case.

Plaintiff filed the Motion to Remand on January 14, 2022, less than thirty days after the notice of removal,[5] making two principal arguments in the motion: (1) removal was untimely; and (2) this case is not removable (ECF No. 11). Enbridge counters that (1) removal was proper and timely, (2) the related cases covering the same controversy should be heard in one court to avoid conflicting results, and (3) the substantial federal issues at stake should be heard in a federal forum (ECF No. 20 at PageID.571, 575, citing ECF No. 80 at PageID.1026-1027, 1030-1035, Case No. 1:20-cv-1142). Both parties contend that the other party is seeking a favorable forum, requiring this Court to consider the nature of this forum battle.

II. ANALYSIS

The procedural requirements and timeliness of removal are determined under federal law, 28 U.S.C. § 1446.[6] Generally, a case should be removed within thirty days of receipt of the initial pleading. 28 U.S.C. § 1446(b); *see Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 466 (6th Cir. 2002) (internal quotation and citation omitted) ("The intent of § 1446(b) is to make sure that a defendant has an opportunity to assert the

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[5] Generally, under 28 U.S.C. § 1447(c), a motion to remand based on a procedural defect in removal, such as untimeliness, should be made within thirty days of the filing of the notice of removal.

[6] Plaintiff is at pains to show this Court lacks jurisdiction. Plaintiff states that compliance with the removal procedures is a prerequisite for federal jurisdiction (ECF No. 11 at PageID.279). Later, Plaintiff changes position and says that removal is not a form of subject matter jurisdiction. (*id.* at PageID.290, citing and quoting *Rodas v. Seidlin*, 656 F.3d 610, 622-23 (7th Cir. 2011)).

congressionally bestowed right to remove upon being given notice in the course of the case that the right exists").

Alternatively, a case may be removed within thirty days of the point at which it is first ascertained that the case is removable. 28 U.S.C. § 1446(b)(3) ("a notice of removal may be filed within thirty days after receipt by the defendant . . . 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"). Remand of a removed case is only required where a case is removed improvidently and the court is without jurisdiction. *See, e.g., Barajas v. Wells Fargo Bank, N.A.*, No. CV 21-844-JAK-SPX, 2022 WL 819928, at *5 (C.D. Cal. Mar. 18, 2022) (internal quotation and citation omitted).

The thirty-day window, or prompt settlement of the forum question,[7] is also overcome in exceptional circumstances, where overriding federal interests or

[7] *See Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426 (5th Cir. 2003) (internal quotation and citation omitted) ("the time limit for removal is not jurisdictional; it is merely modal and formal and may be waived"); *Neurology & Pain Mgmt. Assocs., P.C. v. Bunin*, No. 1:16-CV-2856-LJMMPB, 2017 WL 82512, at *3 (S.D. Ind. Jan. 10, 2017) (defects in a notice of removal can be remedied even after the thirty-day period "if the defect to be amended is a procedural defect within the defendant's claim of jurisdiction"); 14C Charles Alan Wright et al., Federal Practice & Procedure § 3736 (1998) ("The filing of a copy of the notice of removal in the state court is a procedural and ministerial act and a number of federal courts have held that a failure to do so will not defeat the district court's subject matter jurisdiction.").

compelling equitable considerations are evidenced.[8] *See, e.g., Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 516-17 (6th Cir. 2003) (failure to file a motion to remand within thirty days after a notice of removal waives any defect in removal procedure); *Naji v. Lincoln*, 665 F. App'x 397, 402 (6th Cir. 2016) (a party may waive an untimeliness objection in the removal procedure); *Vogel v. U.S. Off. Prod. Co.*, 56 F. Supp. 2d 859, 864-65 (W.D. Mich. 1999), *rev'd on other grounds*, 258 F.3d 509 (6th Cir. 2001) (time limit requirement may be subject to waiver or estoppel and for the proposition that "although untimeliness is certainly a ground for remand, it does not mandate remand"); *Dufrene v. Petco Animal Supplies Stores, Inc.*, 934 F. Supp. 2d 864, 870 (M.D. La. 2012) (denying a motion to remand based on equitable tolling and forum manipulation); *Simmons v. Sabine River Auth. of Louisiana*, 823 F. Supp. 2d 420, 426 (W.D. La. 2011) (removal under Convention on the Recognition and Enforcement of Foreign Arbitral Award not limited by thirty-day period); *Schoonover v. W. Am. Ins. Co.*, 665 F. Supp. 511, 514 (S.D. Miss. 1987) (for the proposition that the time limitation may be waived or barred by estoppel).

On a motion to remand, the removing party bears the burden of showing that removal was proper. *Harnden v. Jayco, Inc.*, 496 F.3d 579, 581 (6th Cir. 2007). This Court can remand the removed case to the

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[8] Similarly, a court may "in its discretion treat a motion to remand that is filed after the 30-day deadline as timely" based on whether "strict application of these requirements would cause an unjust result." *Almonte v. Target Corp.*, 462 F. Supp. 3d 360, 364 (S.D.N.Y. 2020) (internal citations omitted).

state court only if it finds (1) defects in the removal procedure or (2) lack of subject-matter jurisdiction. 28 U.S.C. § 1447(c). Below the Court addresses Plaintiff's Motion for Remand based on the alleged untimeliness of Enbridge's removal and the alleged jurisdictional defects in removal.

A. Timeliness

This is the second remand motion the Court has addressed from the State Plaintiff relating to the Straits Pipeline controversy (*See* Mot. to Remand, June 1, 2021, ECF No. 41, Case No. 1:20-cv-1142). The State lost the first time on jurisdictional grounds and voluntarily dismissed the case; in the present case, the State Plaintiff seeks remand based on alleged defects in removal procedure and jurisdiction.

This remand motion cannot be taken in isolation, or apart from the Court's first remand decision, as Plaintiff admits. Plaintiff concedes that this case and *Michigan v. Enbridge* are "closely parallel" cases (Br. in Supp. of Mot. to Remand, ECF No. 11 at PageID.281). Even though this Court has previously said in that closely parallel case that the federal issues at stake should be heard in a federal forum (ECF No. 80, Case No. 1:20-cv-1142), Plaintiff asks for remand. It is apparent that Plaintiff seeks to avoid this federal forum. Plaintiff could waive any alleged removal defect, but Plaintiff does not want this case in federal court, where the Straits Pipeline

controversy *Enbridge v. Whitmer* is currently pending (ECF No. 20 at PageID.570-571).[9]

In essence, Plaintiff argues in its motion that the Court's November 16, 2021, order denying the motion to remand in *Michigan v. Enbridge* did not impact the removability of this case; Enbridge says it did. Plaintiff states that the Court should look no further than the removal statute, 28 U.S.C. § 1446, because the thirty-day time limit in the statute is an absolute requirement, and, according to Plaintiff, Enbridge failed to remove this case within thirty days of receipt of information or actual notice from which Enbridge could ascertain that this case was removable (ECF No. 11 at PageID.292; ECF No. 21 at PageID.600, 602, 603, 605-606). *Berera v. Mesa Med. Grp., PLLC*, 779 F.3d 352, 364 (6th Cir. 2015) ("Section 1446(b)'s requirement of solid and unambiguous information is akin to actual notice."). Plaintiff says that Enbridge's knowledge or notice of the availability of a federal forum was apparent almost from the inception of the case based on Enbridge's litigation strategy: Enbridge argued before the state court that Plaintiff's claims are expressly preempted by the Pipeline Safety Act invoking a "recognized ground for federal question jurisdiction" (ECF No. 11 at PageID.288; ECF No. 21 at PageID.605).

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[9] Enbridge states that Plaintiff's strategy is to evade federal jurisdiction and federal law (ECF No. 20 at PageID.570-571, 574). A hearing has been held in *Enbridge v. Whitmer*, Case No. 1:20-cv1141, orders entered, and the parties' dispositive motions are pending before the Court.

Enbridge takes an entirely different stance, arguing that removal was timely and proper because Enbridge removed this case within thirty days of the Court's ruling on jurisdiction in *Michigan v. Enbridge*. That ruling, according to Enbridge, established for the first time the Court's jurisdiction and the removability of this case based on the important federal issues at stake (ECF No. 20 at PageID.569-570). Enbridge maintains that removal to this Court "ensures that the substantial federal questions that this Court pointed to in the remand order will indeed be answered by a federal court" (*id.* at PageID.574).

The Court's decision follows from the Court's decision as to State Plaintiff's first motion to remand, and Plaintiff's desire to return the Straits Pipeline controversy to state court. The Court reinforces the importance of a federal forum in deciding the disputed and substantial federal issues at stake, with uniformity and consistency. *See Grable*, 545 U.S. at 313. The Court reads Enbridge's Notice of Removal as an effort to maintain uniform and consistent administration of this controversy.

The Court is also guided by the principle that the time limit in the removal statute is a formal requirement that can be excused. *See, e.g., Vogel*, 56 F. Supp. 2d at 865; *Wise Co. v. Daily Bread, LLC*, No. 2:11-CV-00868-CW, 2012 WL 681789, at *4 (D. Utah Feb. 29, 2012) (untimeliness excused; plaintiff not prejudiced in any legally significant way by having case heard in federal court; no significant actions taken in state court, case involves questions of federal law, and the federal nature of the case favors it being heard in federal court). Courts have recognized that

the thirty-day time limit can be avoided where jurisdiction obtains and based on the equitable administration of justice. *See Vogel*, 56 F. Supp. 2d at 865 (cataloguing cases where an exception applied); *Berberian v. Gibney*, 514 F.2d 790, 792 (1st Cir. 1975) (the function of the removal statute "is to provide a simple means, uniformly applied irrespective of state rules, for defendants entitled to do so to remove actions from state to federal court"). The question for the Court on remand turns, primarily, on jurisdiction and the equitable administration of justice.

Enbridge states that the court's order, denying the motion to remand in *Michigan v. Enbridge*, opened the thirty-day removal window under § 1446(b)(3) because of the significance of what that order said regarding the importance of a federal forum for deciding the Straits Pipeline controversy (*id.* at PageID.575). *See* 28 U.S.C. § 1446(b)(3) (an order can start the removal period). Nothing has changed since the first order denying remand; as in the earlier case, a federal forum is a proper place to decide this controversy. That order, which found jurisdiction proper in this Court, should be seen to have tolled or excused the procedural time limit, based as well on the exceptional circumstances of the Straits Pipeline controversy.

Enbridge correctly frames Plaintiff's motion as inciting a forum dispute; since it says, that is the way the State is doing battle: Plaintiff prefers a state forum, after the Court's decision finding federal jurisdiction in *Michigan v. Enbridge*, on facts no different from the facts in this case (*id.* at PageID.571, 574-575). According to Enbridge, the logic and

motivation of the motion are clear; Plaintiff wants to avoid the important federal interests at stake and the implications of federal law to this controversy by undermining the Court's decision in *Michigan v. Enbridge* (*id.* at PageID.574, 587-589). Indeed, in seeking to reopen the state court case, Plaintiff desires a race to judgment and a collision course between the state and federal forum, even as much as this Court has said that federal jurisdiction is proper in this Court and there are important federal interests at stake.[10]

In a battle of equity, as the State invites throughout its brief (ECF No. 11 at 280, 293-295), equity favors Enbridge. In this battle about the correct law to apply—Plaintiff says state law;[11] Enbridge says federal law—this Court has already said important federal interests determine federal jurisdiction and a federal forum. The Court will not accept the State's invitation to undermine its previous decision and perpetuate a forum battle.

This Court previously said that it is an "appropriate forum for deciding the[] disputed and substantial federal issues" in the Straits Pipeline controversy (ECF No. 80 at PageID.1035, Case No. 1:20-cv-1142). It would be an absurd result for the Court to remand the present case and sanction a forum battle. The thirty-day rule in the removal

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[10] "Either both [cases, *Michigan v. Enbridge* and this case] provided a basis for removal, or neither did" (ECF No. 11 at PageID.295).

[11] Plaintiff continues to maintain that this is a purely private State matter.

statute is intended to assist in the equitable administration of justice and prevent gamesmanship over federal jurisdiction, but, here, it is clear to the Court that Plaintiff is the one engaging in gamesmanship. *See Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 286 (6th Cir. 2016).

There is another reason removal is timely and proper. A lapsed right to remove may be restored where a litigation event, such as a court order, starts a virtually new, more complex, and substantial case. *See Johnson v. Heublein Inc.*, 227 F.3d 236, 242 (5th Cir. 2000) (the purposes of the thirty-day limitation are "to deprive the defendant of the undeserved tactical advantage of seeing how the case goes in state court before removing, and to prevent the delay and wastefulness of starting over in a second court after significant proceedings in the first"). The Court's order in *Michigan v. Enbridge* established for the first time that this Court is an appropriate forum for deciding the substantial federal issues at stake in the Straits Pipeline controversy. This Court is therefore the first court to recognize the scope of this dispute. Plaintiff cannot undo or unwrite that decision. The remand order in *Michigan v. Enbridge* did present a watershed event for removal purposes in the closely parallel case.

B. Removability

Plaintiff disregards and seeks to undermine the Court's remand order on jurisdiction in *Michigan v. Enbridge* (ECF No. 80, Case No. 1:20-cv-1142). Plaintiff continues its argument from the first remand order, arguing that removability was improper here on jurisdictional grounds. The inconsistency of

Plaintiff's position in its briefing provides further equitable support that this case should remain in this Court.

Plaintiff takes inconsistent positions on removability in its motion. First, Plaintiff says that this case was removable earlier in the proceeding based on the existence of Enbridge's plausible claim of complete federal preemption, which is a recognized ground for federal question jurisdiction, the invocation of federal question jurisdiction which proved successful, Plaintiff says, in the companion case *Michigan v. Enbridge* (ECF No. 11 at PageID.279, 281, 286-289; ECF No. 21 at PageID.605). Plaintiff's language is striking: "Enbridge cannot credibly contend that the 2019 Case was not removable at its inception when Enbridge timely removed the 2020 Case, which rests on the same public trust claims that the Plaintiff has pled here" (ECF No. 11 at PageID.287). Although Plaintiff contends that Enbridge could have removed this case, because it has a legitimate basis for federal question jurisdiction and grounds for removal, and Enbridge waived that right by not removing promptly; Plaintiff also argues that this Court lacks subject matter jurisdiction over this dispute (*id.* at PageID.289, 298-301). Remarkably, Plaintiff argues that Enbridge should be estopped from asserting inconsistent positions in this litigation on removability (*id.* at PageID.294).

The Court concludes that Plaintiff's motion must fail based on estoppel and Plaintiff's attempt to gain an unfair advantage through the improper use of judicial machinery. The purpose of the estoppel is to

safeguard the integrity of the judicial process, yet Plaintiff urges the Court to adopt inconsistent determinations on jurisdiction in the two motions to remand. *See New Hampshire v. Maine*, 532 U.S. 742, 755 (2001).

The Court's decision, therefore, is also undergirded by Plaintiff's desire to engage in procedural fencing and forum manipulation. *See, e.g., W. World Ins. Co. v. Hoey*, 773 F.3d 755, 759, 761 (6th Cir. 2014) (for the proposition that courts regard as unfair or unseemly procedural games that encourage a forum race to res judicata and where a court has said it is better positioned to evaluate and clarify the legal and factual issues) ("The essential question is always whether a district court has taken a good look at the issue and engaged in a reasoned analysis of whether issuing a declaration would be useful and fair" in clarifying the issues). Plaintiff admits there are identical issues across the related Straits Pipeline cases (*id.* at PageID.281, 295). Nevertheless, Plaintiff, unhappy with the result in *Michigan v. Enbridge*, is pursuing in this motion duplicative or piecemeal litigation and conflicting results; where consolidation in this Court can occur, and the Court has said, important federal issues are at stake, counseling for a federal forum. *See Baatz v. Columbia Gas Transmission, LLC*, 814 F.3d 785, 789-93 (6th Cir. 2016) (a district court in its sound judicial administration should give regard to conserving judicial resources, minimizing duplicative or piecemeal litigation, protecting the parties and the courts from the possibility of conflicting results, and eliminating inequitable conduct).

The extraordinary circumstances of this case, Plaintiff's conduct, equity, and the Court's regard for comprehensive and efficient administration of justice demand that this case remain in federal court. *See, e.g., Tedford*, 327 F.3d at 426 (the time limits in Section 1446 are not inflexible, and the conduct of the parties may affect whether it is equitable to strictly apply the time limits); *Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Assocs., Inc.*, 16 F. App'x 433, 437 (6th Cir. 2001) ("A plaintiff, even one who files first, does not have a right to bring a declaratory judgment action in the forum of his choosing. . . . Factors that weigh against enforcement of the first-to-file rule include extraordinary circumstances, inequitable conduct, bad faith, anticipatory suits, and forum shopping."). The Court views such policy considerations as judicial economy, fairness, convenience, equitable administration, and consistent results as counseling for keeping this case in federal court.

Considering the motion in the proper context and totality, the Court again points to the important federal interests at stake in having this dispute heard in federal court. Because this Court has jurisdiction and the state court did not take action during the delay, the purpose of the removal statute was not thwarted, and this Court will retain jurisdiction. *See, e.g., Ligutom v. SunTrust Mortg.*, No. C10-05431 HRL, 2011 WL 445655, at *2 (N.D. Cal. Feb. 4, 2011) (citing *Whitney v. Wal–Mart Stores, Inc.*, 2004 WL 1941345, at *1-2 (D. Me. Aug. 31, 2004) (for the proposition that the time limits in the statute can be excused; a delay of six months in completing the removal procedure did not require remand, where

federal court had jurisdiction and the purpose of the statute was not thwarted, including avoiding duplicative labor and possible inconsistent results). Here, Plaintiff seeks to perpetuate duplicative litigation and inconsistent results. The motion is, therefore, denied.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (ECF No. 10) is DENIED.

Dated: August 18, 2022

APPENDIX C

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, SIGNED FEBRUARY 21, 2023

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

Plaintiff,

v.

ENBRIDGE ENERGY, LP; *et al.*,

Defendants.

No. 1:21-cv-1057

OPINION AND ORDER

Pending before the Court is Plaintiff's Motion to Certify This Court's August 18, 2022 Opinion and Order Under 28 U.S.C. § 1292(b) (ECF No. 24). Defendants filed a response in opposition (ECF No. 27). Plaintiff has moved for leave to file a reply (ECF No. 28). For the reasons stated below, the Court will grant Plaintiff's motions.

Generally, a party may appeal only final orders or judgments. See 28 U.S.C. § 1291. An interlocutory appeal under 28 U.S.C. § 1292(b) is an exception to the general rule. Under this statute, a district court may certify an order for interlocutory appeal if (1) the appeal "involves a controlling question of law," (2) there is a "substantial ground for difference of opinion" about the answer, and (3) "an immediate

appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The party requesting certification bears the burden of establishing each statutory factor. *See In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013).

District courts have broad discretion in deciding whether to grant or deny an interlocutory appeal. *See Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 47 (1995). Certification for an appeal under § 1292(b) should be "granted sparingly and only in exceptional cases." *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).

Plaintiff argues that the August 18, 2022 Opinion and Order contains three controlling issues of law which there are substantial grounds for difference of opinion: (1) whether the 30-day removal period set forth in 28 U.S.C. § 1446(b)(1) is mandatory; (2) whether this Court's order denying remand in *Whitmer v. Enbridge* constituted an order from which Enbridge could first ascertain that this case is or has become removable; and (3) whether Plaintiff's 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). Plaintiff further argues that an interlocutory appeal would materially advance the ultimate termination of the litigation because it would eliminate "the risk that the parties would litigate this matter to completion in this Court, only to have the Sixth Circuit ultimately hold that remand was warranted, which would require that the entire matter be relitigated in state court" (ECF No. 25 at PageID.645).

Having reviewed the record, the Court concludes that this dispute is one of the exceptional situations that compels certification. The Court is of the opinion that each of the three issues identified by Plaintiff involve a controlling question of law, there is substantial ground for difference of opinion, and an immediate appeal will materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b). Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion to Certify (ECF No. 24) is GRANTED and the Court CERTIFIES the August 18, 2022 Opinion and Order (ECF No. 23) for immediate appeal under 28 U.S.C. § 1292(b).

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to Reply to Defendants' Opposition (ECF No. 28) is GRANTED.

IT IS FURTHER ORDERED that this case is STAYED and ADMINISTRATIVELY CLOSED pending the outcome of the interlocutory appeal.

Dated: February 21, 2023

APPENDIX D

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JULY 21, 2023

In the United States Court of Appeals
for the Sixth Circuit

Nos. 23-0102/1148

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

Petitioner.

Before: MOORE, STRANCH, and BUSH, Circuit Judges.

Defendants Enbridge Energy, LP, Enbridge Energy Company, Inc., and Enbridge Energy Partners, L.P. (collectively "Enbridge") removed an action seeking to permanently enjoin Enbridge from continuing to operate a pipeline in the Straits of Mackinac waterway between Michigan's Upper and Lower Peninsulas. The district court denied Plaintiff Michigan Attorney General Dana Nessel's motion to remand. Two cases are before us. In No. 23-1148, General Nessel petitions for a writ of mandamus to compel the district court to vacate its order and remand the case to the state court and moves for leave to file an oversized petition. In No. 23-0102, General Nessel petitions for permission to appeal the order denying remand, see 28 U.S.C. § 1292(b), and moves for leave to file an oversized petition. Enbridge

opposes permission to appeal, is not obligated to respond to the mandamus petition absent an order from the court, *see* Fed. R. App. P. 27(b)(1), and did not respond to the motions for leave to file excess pages.

A petitioner must satisfy three conditions to obtain a writ of mandamus: first, there must be no other adequate means to obtain the relief desired; second, the right to the writ must be "'clear and indisputable'"; and, finally, issuance of a writ must be "appropriate under the circumstances." *Cheney v. U.S. Dist. Ct. for D.C.,* 542 U.S. 367, 380–81 (2004) (quoting *Kerr v. U.S. Dist. Ct. for N.D. Cal.*, 426 U.S. 394, 403 (1976)). The first condition "ensure[s] that the writ will not be used as a substitute for the regular appeals process." *Id.* Where an "interlocutory appeal seems a practical but untried avenue, we will ordinarily deny a petition for mandamus" because an adequate alternative is available. *In re Chimenti*, 79 F.3d 534, 539 (6th Cir. 1996) (quoting *In re Sch. Asbestos Litig.*, 977 F.2d 764, 774 (3d Cir. 1992)).

Section 1292(b) permits a district court, within its discretion, to certify an interlocutory appeal if: (1) its order involves a controlling question of law; (2) a substantial ground for difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal will materially advance the termination of the litigation. 28 U.S.C. § 1292(b). Even if the district court grants permission, as it did in this case, a party must then obtain permission from this court. *Id.* We consider the same criteria "along with other prudential factors." *In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017) (order).

"A legal issue is controlling if it could materially affect the outcome of the case." *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002). In determining whether "a substantial ground for difference of opinion" is present, we consider whether: (1) there is a novel issue with little binding authority or the resolution is not substantially guided by prior decisions; (2) the issue is difficult and one of first impression; (3) a difference of opinion exists within the controlling circuit; or (4) there is a circuit split. *In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013) (order). To establish material advancement, a movant must typically show that "potentially unnecessary 'protracted and expensive litigation' w[ould] ensue." *In re Somberg*, 31 F.4th 1006, 1008 (6th Cir. 2022) (quoting *Little v. Louisville Gas & Elec. Co.*, 805 F.3d 695, 699 (6th Cir. 2015)).

General Nessel offers three questions for review on interlocutory appeal: (1) whether the thirty-day deadline for removal in §1446(b) is mandatory or instead a procedural guideline that may be excused; (2) whether the district court's order in a closely-related action was the first point in time when Enbridge could ascertain that this action was removable; and (3) whether this case presents a substantial question of federal law that gives rise to federal jurisdiction. We conclude that the governing criteria in § 1292(b) are met for each of these questions and, therefore, that interlocutory review is appropriate.

Accordingly, the petition for permission to appeal in No. 23-0102, and General Nessel's accompanying motion for leave to file an oversized brief, are

GRANTED. The petition for a writ of mandamus in No. 23-1148 is DENIED, and the motion for leave to file excess pages in that matter is DENIED AS MOOT.

ENTERED BY ORDER OF THE COURT

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 16, 2024

In the United States Court of Appeals
for the Sixth Circuit

No. 23-1671

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

Plaintiff-Appellant,

v.

ENBRIDGE ENERGY, LP; ENBRIDGE ENERGY COMPANY, INC.; ENBRIDGE ENERGY PARTNERS, L.P.,

Defendants-Appellees.

BEFORE: GRIFFIN, THAPAR, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT