No. 24-783

In the

Supreme Court of the United States

ENBRIDGE ENERGY, LP, et al.,
Petitioners,

v.

DANA NESSEL, in her official capacity as Attorney General of Michigan,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF appears as amicus curiae before the Court to ensure that the interpretation of federal law does not interfere with the constitutional execution of the Nation's foreign policy, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), and to defend the proper allocation of jurisdiction between the state and federal courts. *First Choice Women's Res. Centers v. Platkin*, Case No. 24-781 (2025); *B.P. v. Mayor of Baltimore*, 593 U.S. 230 (2021).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case needs to be heard in a federal court in the first instance for two reasons.

First, by bringing this state-court action, the State of Michigan's attorney general is causing the United States of America to violate a self-executing treaty. *Agreement Between the Government of the United States and the Government of Canada Concerning Transit Pipelines*, 28 U.S.T. 7449 (1977) (Pipelines Treaty). But she has no role in foreign policy, Michigan has no power to abrogate treaties, and it can't be left up to a state judge to reel her in.

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

U.S. Const., art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority").

Second, the State's lawsuit is frustrating interstate and international commerce. The Constitution was designed to bring about a nationwide market, with federal superiority on questions of interstate and international commerce. The Enbridge Petitioners are a collection of out-of-state companies, which are all indirect subsidiaries of a Canadian firm. Line 5 has provided energy to Americans and Canadians for nearly seventy years. Yet the Michigan Attorney General is trying to close Line 5 through litigation on her home turf, "the proverbial 'home-cooking.'" *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 576 (5th Cir. 2004). Picking up that thrown gauntlet should be a federal responsibility, not a state one.

Combined, these two reasons point in the same direction. The Court should reverse and give Enbridge its day in the Article III tribunal it asked for. *Cf.* 28 U.S.C. § 1331. But it should do something more than that. The Court should announce a presumption in favor of removal when a litigant seeks to escape state court on a core Article III question. U.S. Const., art. III, § 2.

ARGUMENT

I. THE ATTORNEY GENERAL'S STATE SUIT VIOLATES THE PIPELINES TREATY.

Ratification of the Constitution deprived the States of their ability to engage in foreign affairs, and all subsequent admitted States struck the same bargain. "'In international relations and with respect to foreign intercourse and trade the people of the United States act through a *single* government with unified and adequate national power.'" *Japan Line, Ltd. v. Los Angeles Cnty.*, 441 U.S. 434, 448 (1979) (quoting *Bd. of Trs. of U. of Ill. v. United States*, 289 U.S. 48, 59 (1933) (emphasis supplied)). So Michigan doesn't get to conduct an independent foreign policy, and its attorney general certainly has no "share of responsibility for the conduct of [America's] foreign relations." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

Yet for years, Michigan has strewn pebbles in the shoes of U.S.-Canada relations via its state-law assault on Line 5. App. 6a (noting the Government of Canada's amicus brief below). Put more baldly, the Attorney General is causing the United States to violate a treaty obligation. Under the Sixth Circuit's ruling, she can undermine American foreign policy, and if a motion for removal isn't timely made, the ball remains in her home court. That can't be right.

This isn't a close question either. The Pipelines Treaty, which both Canada and the United States are still signatories to, is a short and lucid text. Article II of the Treaty provides that "[n]o public authority in

the territory of either Party shall institute any measures, other than those provided for in Article V, which are intended to, or which would have the effect of, impeding, diverting, redirecting[,] or interfering with in any way the transmission of hydrocarbons in transit" through energy pipelines—including Line 5. Pipelines Treaty, art. II, § 1. (Article V allows for temporary stoppage only "[i]n the event of actual or threatened natural disaster, an operating emergency, or other" similarly dire "demonstrable need." *Id*., art. V, § 1.).

That mandatory "shall" language means that the Pipelines Treaty is self-executing—it is "a directive to domestic" authorities, including the States. *Medellín v. Tex.*, 552 U.S. 491, 508 (2008); *id.* (finding treaty non-self-executing where it did "not provide that the United States 'shall' or 'must' comply"). Indeed, the United States has publicly taken the position "that th[e] Treaty is self-executing." Pet. Br. at 21.

Michigan's state-law claims are a "measure[]," Pipelines Treaty, art. II, § 1, that cannot be crammed into any "just and reasonable" exception, *id*., art. IV, §2, "intended to, or which would have the effect of" shutting down hydrocarbon flow through a Treaty-designated pipeline. *Id*. And the Michigan Attorney General, acting in her official capacity as an arm of the State, certainly qualifies as a "public authority in the territory" of the United States. *Id*. So her suit violates the Treaty. Even worse, her suit causes the *United States* to violate the Treaty.

That's not Michigan's call to make. "The United States Constitution embodies the fundamental

principle that in certain areas the United States must act as a single nation, led by the federal government, rather than as a loose confederation of independent sovereign states." *Abraham v. Hodges*, 255 F. Supp. 2d 539, 549 (D.S.C. 2002). The Attorney General's action might be permissible if States could opt out of international treaties or abrogate them on behalf of the whole. But of course, they can't. U.S. Const. art. VI, cl. 2; *Mo. v. Holland*, 252 U.S. 416, 434 (1920) ("Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States'") (quoting *Baldwin v. Franks*, 120 U.S. 678, 683 (1887)).

The swiftest way to stop Michigan's unconstitutional foreign policy adventurism is to remove the Attorney General's suit to federal court. That's also the best constitutional option, short of her having a sudden change of heart. The President, notwithstanding his "presumptive dominance in matters abroad," *Zivotofsky v. U.S. Sec'y of State*, 725 F.3d 197, 211 (D.C. Cir. 2013), *aff'd sub nom. Zivotofsky v. Kerry*, 576 U.S. 1 (2015), has no binding authority to order her to dismiss the case. Nor can Congress, notwithstanding its own foreign policy powers, U.S. Const., art. I, § 8, defund the Attorney General's prosecution or dissolve the Michigan court on whose docket it sits.

A federal court, however, can dismiss the suit and end all this. *See Martin v. Hunter's Lessee*, 1 Wheat. 304, 348-49 (1816); *Johnson v. State of Md.*, 254 U.S. 51, 55 (1920) (Maryland may not "interrupt the acts of the general government itself"); *Abraham*, 255 F. Supp. 2d at 555-56 (striking South Carolina

governor's executive order blocking shipment of plutonium through the State on Supremacy and Commerce Clause grounds). The Attorney General's lawsuit, which conflicts with a U.S. treaty obligation—or as the Constitution knows it, "the Law of the Land," U.S. Const. art. VI, cl. 2—should have been dismissed on Supremacy Clause grounds years ago, *id.*, but the next best thing would be for a federal district court to decide the merits.

Preventing the States from carrying out a foreign policy at odds with the Nation's is no small detail as to *why* Article III exists in the first place. As Hamilton correctly predicted, "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members," and so the federal judiciary's "superintendence" of treaty commitments was "necessary to the perfection of the [constitutional] system." The Federalist, No. 80.

True enough, the state case might still be heard by this Court years from now. *See Martin*, 1 Wheat. at 347-48 (affirming the Court's "appellate power over" state-court decisions regarding "the laws, the treaties, and the Constitution of the United States") (capitalization altered). But should an ongoing foreign policy controversy caused by a non-federal official—imposing friction between the United States and a longstanding ally—really be left to the state courts just because certiorari may be granted on appeal from the Michigan Supreme Court later this decade? *See N. Atlantic Treaty*, 63 Stat. 2241 (1949) (noting Canada as an original signatory).

No. Michigan's misadventure in international relations has already gone on for just over six years.

Pet. Br. at 9. Enbridge has yet to file an answer in the state proceeding, and every day that case remains live, the Respondent causes the United States to violate its treaty obligations. Enough time has been wasted, and the Michigan Attorney General's unconstitutional lawsuit must end at the earliest moment.

II. THE ATTORNEY GENERAL'S STATE SUIT UNDERMINES BOTH INTERSTATE AND INTERNATIONAL COMMERCE.

Michigan's action also sandpapers against another core reason why the Framers built an independent judiciary. The Founders chose to privilege federal fora over state courts in interstate and international disputes because they knew that "the prevalency of a local spirit," The Federalist, No. 81, could capture state court proceedings. And they knew such in-state bias, "whether real or perceived," would "crippl[e] . . . interstate commerce," destabilizing markets and unnecessarily destroying wealth. Charles J. Cooper & Howard C. Nielson, Jr., *Complete Diversity and the Closing of the Federal Courts*, 37 Harv. J.L. & Pub. Pol'y 295, 296 (2014).

So the Founders acted. As James Wilson trenchantly observed: "[T]he Constitution's grant of jurisdiction over interstate and international disputes" was needed "'to restore either public or private credit,'" by providing "'that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort.'" *Id*. at 308 (quoting Wilson). Where "the State tribunals cannot be supposed to be impartial and unbiased," The Federalist, No. 80, Article III ensures that interstate enterprises have

ready access to "a neutral tribunal, not beholden to local interests, in which interstate controversies could be adjudicated." Cooper & Neilson at 304.

Two centuries later, thanks to this national judiciary with power to hear "Controversies . . . between a State and Citizens of another State" or country, U.S. Const., art. III, § 2, "investors and commercial enterprises" may "cross state lines with confidence that their legal disputes" will generally "be fairly adjudicated in new markets." Cooper & Neilson at 304.

The Attorney General's treaty-defying move against Enbridge's Line 5—which has operated since 1953—fractures that confidence and risks that protection, throwing longstanding interstate economic plans into great uncertainty. That's a problem with real costs. Businesses "crave certainty as much as almost anything: certainty is what allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018).

Hamilton and Wilson point the way back to business certainty and good government: bring this case to an Article III court. The four going concerns on petitioners' side are all out-of-state corporations with domestic and international operations, exactly the type of nationwide "investors and commercial enterprises" the Founders sought to protect from predatory state action. Cooper & Neilson at 304. Ample access to the federal courthouse is consistent with the Constitution's many provisions designed to foster a nationwide market for competitors. *E.g.*, U.S. Const., art. I, § 8 (giving Congress power to establish

a national currency, federal bankruptcy laws, and "to regulate Commerce with foreign Nations, and among the several States").

The Constitution likewise provided a federal forum for the uniform protection of international and interstate markets. U.S. Const., art. III, § 2. Keeping this action in state court undoes that promise of uniformity and preserves the Attorney General's gambit as a tool for future chicanery. Commercial concerns operating across state and international borders should not have to assume that longstanding operations may be suddenly attacked by a state attorney general, who gets to play out the case on her home-turf if the targeted enterprise misunderstands § 1446(b)(1)'s short timeclock.

But that's the rule that the Sixth Circuit has announced. And that rule, along with this case, should be removed.

III. A PRESUMPTION OF REMOVAL SHOULD APPLY IN CASES LIKE THESE.

The Attorney General's suit is at war with why the Founders vested Article III judicial power. With a simple filing in her home court, she has done two constitutionally destructive things. She is putting the United States in violation of a treaty commitment to an ally. And she is threatening the certainty of both commercial and energy flows across state and international boundaries. This kind of thing should never happen again.

This Court has repeatedly affirmed that statutory deadlines may be equitably tolled for good

cause. *E.g., Harrow v. U.S. Dep't of Def.*, 601 U.S. 480, 485 (2024) (upholding equitable tolling where Congress's "time limit was 'just a time limit, nothing more'") (quoting *United States v. Kwai Fun Wong*, 575 U.S. 402, 412 (2015) (brackets omitted)). It has clarified that there is no presumption against removal. *Breuer v. Jim's Concrete of Brevard*, 538 U.S. 691, 698 (2003). And yet the Attorney General went ahead with her action anyway—and we're here now because she succeeded below.

The Court should reaffirm those holdings in this case, of course. But it shouldn't stop there. "The past, it turns out, is all we know about the future." Philip Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* 810 (Anchor Books 2003). The Attorney General obviously wasn't deterred by the Court's prior decisions, and those earlier holdings must have confused the court of appeals below. A rote reaffirmation of the law risks inviting this problem again, in a different way, with different facts, undermining a different reason why Article III's judicial power exists. To avoid future cases that so rhyme with this one, the Court will have to do something more.

The Court should announce that statutes like 28 U.S.C. § 1331 are presumed to always provide removal, notwithstanding other statutory caveats, if keeping the case bottled up in state court would vitiate a core reason why the "judicial Power" itself was granted. U.S. Const. art. III, § 2. That presumption should be defeated rarely, only where "considerations of finality, efficiency, and economy become overwhelming." *Caterpillar v. Lewis*, 519 U.S. 61, 75 (1996). Short of such a showing, cases the

Framers would find "proper objects of federal superintendence and control" should be removed to federal court. The Federalist, No. 80.

Such a rule would cleanly resolve this case, deter future ones of its ilk, and open the door to realigning the Article III judicial power with the Framers' true intent. *See, e.g.*, Cooper & Neilson at 328 ("In the words of Chief Justice Marshall, the federal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given") (quoting *Cohens v. Va.*, 6 Wheat. 264, 404 (1821)).

CONCLUSION

The Sixth Circuit's indulgence of the Attorney General's treaty-defying and economically disruptive state-court action was flatly wrong. The Court should reverse.

Respectfully submitted,

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