No. 24-783

In the Supreme Court of the United States

ENBRIDGE ENERGY, LP, *et al.*,
Petitioners,

v.

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

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

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

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INTEREST OF *AMICUS CURIAE*[1]

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

Professor Miller files this brief on behalf of himself individually, and not as a member of the NYU School of Law.

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[1] No counsel for any party authored this brief in whole or in part, and no party or their counsel made a financial contribution intended to fund the preparation or submission of this brief. The American Petroleum Institute, the Liquid Energy Pipeline Association, and the National Propane Gas Association made a monetary contribution to fund the preparation and submission of this *amicus* brief.

SUMMARY OF THE ARGUMENT

When, as here, a time limit is not jurisdictional, this Court has—repeatedly and in many different contexts—established a presumption that it is not absolutely mandatory and preserves courts' equitable power to excuse noncompliance if exceptional circumstances are present.

The statute here is like many other statutes where this Court has found equitable tolling to be available. The Sixth Circuit's interpretive arguments for a mandatory time limit are insufficient to overcome the strong presumption to the contrary.

Equitable tolling serves the valuable federal policy of promoting access to federal court. It does so in several ways: (1) it promotes the general right of access to federal court for cases within the federal judicial power; (2) it promotes the specific right of access to federal court for cases that present a federal question; and (3) it prevents litigants from being penalized for noncompliance with a time limit when that noncompliance has a sufficient excuse.

Because the Sixth Circuit misread the statute as precluding equitable tolling, this Court should remand for reconsideration under the correct standard.

ARGUMENT

I. Limitations periods usually incorporate equitable tolling principles.

The Sixth Circuit correctly ruled that "§ 1446(b)'s time limits are not jurisdictional," since "removal-timing issues may be raised only by the plaintiff and only within a strict window of time." *Nessel v. Enbridge Energy, LP*, 104 F.4th 958, 969 (6th Cir. 2024). And this

Court has repeatedly stressed, in a variety of contexts, that nonjurisdictional limitations periods should not usually be interpreted as absolutely mandatory: "It is hornbook law that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002) (internal quotation marks and citations omitted); *see also Lozano v. Montoya Alvarez*, 572 U.S. 1, 11 (2014) ("Congress is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law.").

Young arose in a bankruptcy context, but this Court has ruled to the same effect in many other contexts: Title VII claims against the federal government, *see Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), habeas corpus claims under AEDPA, *see Holland v. Florida*, 560 U.S. 631, 645-46 (2010) ("'rebuttable presumption' in *favor* 'of equitable tolling'" of "nonjurisdictional federal statute[s] of limitations" (quoting *Irwin*, 498 U.S. at 95-96)), antitrust claims, *see Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558-59 (1974), and tax claims, *see Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 208-11 (2022), to mention just a few, *see Am. Pipe*, 414 U.S. at 558-59 (listing other cases); *Dolan v. United States*, 560 U.S. 605, 611 (2010). *See also Harrow v. Dep't of Def.*, 601 U.S. 480, 489 (2024) ("'Because we do not understand Congress to alter' age-old procedural doctrines lightly, 'nonjurisdictional [timing rules] are presumptively subject to equitable tolling.'" (quoting *Boechler*, 596 U.S. at 209)). *But see Lozano*, 572 U.S. at 11 ("[T]here

is no general presumption that equitable tolling applies to [time limitations contained in] treaties.").

To be sure, this presumption can sometimes be overcome; some nonjurisdictional time limitations have been held to be mandatory. But the wording of the limitation must nonetheless be clear enough to overcome the presumption. For instance, in *Manrique v. United States*, 581 U.S. 116, 121 (2017), and *Greenlaw v. United States*, 554 U.S. 237, 252-53 (2008), the result (as to appeals deadlines) hinged on specific mandatory wording in Federal Rules of Appellate Procedure 3 and 4. And cases like *United States v. Brockamp*, 519 U.S. 347 (1997), and *United States v. Beggerly*, 524 U.S. 38 (1998), had certain unusual factors, as this Court explained in *Holland*:

> In *Brockamp*, we interpreted a statute of limitations that was silent on the question of equitable tolling as foreclosing application of that doctrine. But in doing so we emphasized that the statute at issue (1) "se[t] forth its time limitations in unusually emphatic form"; (2) used "highly detailed" and "technical" language "that, linguistically speaking, cannot easily be read as containing implicit exceptions"; (3) "reiterate[d] its limitations several times in several different ways"; (4) related to an "underlying subject matter," nationwide tax collection, with respect to which the practical consequences of permitting tolling would have been substantial; and (5) would, if tolled, "require tolling, not only procedural limitations, but also

> substantive limitations on the amount of recovery—a kind of tolling for which we . . . found no direct precedent."
>
> And in *Beggerly* we held that *Irwin*'s presumption was overcome where (1) the 12-year statute of limitations at issue was "unusually generous" and (2) the underlying claim "deal[t] with ownership of land" and thereby implicated landowners' need to "know with certainty what their rights are, and the period during which those rights may be subject to challenge."

560 U.S. at 646-47 (quoting *Brockamp*, 519 U.S. at 350-52; *Beggerly*, 524 U.S. at 48-49) (paragraph break added).

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

II. The Sixth Circuit's contrary arguments are insufficient to overcome the equitable presumption.

As noted above, the presumption in favor of equitable tolling can be rebutted, but that is a matter of ordinary statutory interpretation. *Lozano*, 572 U.S. at 10.

The Sixth Circuit used standard interpretive methods, including interpretive canons, in holding that there was no equitable tolling here. These arguments are not unreasonable in themselves, but they are insufficient to overcome the strong and long-standing contrary presumption in the other direction.

For instance, the Sixth Circuit noted that the presence of the text "whichever period is shorter" in § 1446(b)(1) suggests strictness. *Enbridge*, 104 F.4th at 969-70. It also noted that there are specific listed exceptions in § 1446(b)(2)(C) and (b)(3), and even an exception to an exception in § 1446(c), which is a form of *expressio unius est exclusio alterius* argument. *Id.* at 970. Another argument relied on the placement of the removal statutes near jurisdictional statutes in a part of the U.S. Code captioned "Jurisdiction and Venue." *Id.* In other contexts, the accumulation of such arguments might give rise to a suggestion of strictness (to be weighed against arguments on the other side). But it would only be a suggestion, and not a particularly compelling one given the contrary presumption.

Finally, the Sixth Circuit used the substantive canon of respect for state sovereignty, which suggests limitations on federal courts' ability to make exceptions to the time limits specified by Congress. *Id.* at

970-71. But this canon is problematic here. The statute here concerns time limits on removal of cases to federal court. If a case is removable, it falls within the Article III judicial power, and allowing federal courts to exercise their legitimate authority (including their federal-question jurisdiction, which is at issue in this case) is plainly also an important federal interest (especially where, as here, the federal question involves obligations under an international treaty). Excusing noncompliance with the 30-day time limit when compelling circumstances exist gives effect to a major purpose of the statute.

The trouble is that there are two competing substantive policies at work here. The removal statute *as a whole* furthers the interest in federal courts hearing cases within the judicial power. But the *time limit* in the removal statute limits that interest and thus furthers the states' interest in having their courts hear cases that are filed there (in addition to furthering the interest in efficiency and judicial economy). The statute thus embodies a compromise between these important interests, which cannot simply be resolved by recourse to a canon in favor of one interest. Indeed, sometimes, a canon has an equal and opposite counter-canon. *Cf.* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401 (1950) ("[T]here are two opposing canons on almost every point. . . . Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon . . . .").

The presumption in favor of equitable tolling, on the other hand, is long-standing and has rightly been

endorsed in many cases in many contexts, because, as this Court has repeatedly recognized, "equitable tolling is part of the established backdrop of American law." *Lozano*, 572 U.S. at 11. It is stronger than the ambiguous implications that stem from the Sixth Circuit's arguments.

Thus, in addition to being justified by the presumption, the judicial discretion inherent in equitable tolling—in the context of this statute—serves the valuable federal policy of promoting access to federal court. It does so in several ways: (1) it promotes the general right of access to federal court for cases within the federal judicial power; (2) it promotes the specific right of access to federal court for cases that present a federal question; and (3) it prevents litigants from being penalized for noncompliance with a time limit when that noncompliance has a sufficient excuse.

III. This Court need not decide whether the facts in this case justify equitable tolling.

If equitable tolling is available, then the question arises whether the equities cut in favor of tolling in this case. But this Court need not (and, in fact, should not) decide that question. The district court determined that exceptional circumstances existed, based on the interest in "maintain[ing] uniform and consistent administration of justice" and based on the Michigan Attorney General's efforts to "perpetuate a forum battle." Pet. App. 35a-37a. The circuit court reversed the district court—not based on a disagreement about those factors, but based on its view that those factors were legally irrelevant. All this Court needs to do is reverse the circuit court, clarify that dis-

trict courts have the power to excuse untimely removals, and remand for consideration under the proper legal standard.

There are of course advantages to maintaining time limits in the interests of judicial economy and efficiency; time limits should not be flouted for no good reason. But district courts are fully capable of using their equitable powers to distinguish good excuses from bad ones. *See Somlyo v. J. Lu-Rob Enters., Inc.*, 932 F.2d 1043, 1049 (2d Cir. 1991); *cf. Phoenix Global Ventures, LLC v. Phoenix Hotel Assocs., Ltd.*, 422 F.3d 72, 75 (2d Cir. 2005) (in the related context of remand motions under § 1447(c), allowing a district court to excuse an untimely filing caused by procedural errors in using the court's electronic case filing system). The plaintiff's attempt to manipulate the forum—which the district court believed was relevant in this case, see Pet. App. at 36a-37a—is one possible factor that could validly lead a court to excuse technical noncompliance with a time limit. *Cf. Dufrene v. Petco Animal Supplies Stores, Inc.*, 934 F. Supp. 2d 864, 869-70 (M.D. La. 2012) (in the related context of the one-year limit on removal in diversity actions in § 1446(b), allowing for equitable tolling when the plaintiff had opportunistically delayed in amending the amount in controversy to exceed the jurisdictional amount).

And circuit courts are fully capable of reviewing district courts' determinations to ensure that district courts are being uniform and that parties are not abusing whatever flexibility is present in the statute. This Court need not engage in that highly fact-based inquiry in this case.

CONCLUSION

For these reasons, this Court should reverse and remand to the Sixth Circuit for consideration under the proper legal standard.

Respectfully submitted,

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SEPTEMBER 2025