

No. 24-783

In the Supreme Court of the United States

ENBRIDGE ENERGY, L.P., *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 Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

**BRIEF FOR CENTER FOR LITIGATION & COURTS
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus Curiae 1

Summary of Argument..... 2

Argument 2

 A. *If* the 30-Day Removal Deadline Permits
 Equitable Exceptions, They Aren't Met
 Here. 2

 B. This Court Needn't—And Shouldn't—
 Decide Whether the 30-day Removal
 Deadline is Ever Subject to Equitable
 Exceptions. 12

Conclusion..... 20

TABLE OF AUTHORITIES

CASES

<i>Abbo-Bradley v. City of Niagara Falls</i> , 73 F.4th 143 (2d Cir. 2023)	19
<i>Arellano v. McDonogh</i> , 598 U.S. 1 (2023)	13
<i>Beneficial National Bank v. Anderson</i> , 539 U.S. 1 (2003)	5
<i>Blackburn v. Oaktree Capital Management</i> , <i>LLC</i> , 11 F.3d 633 (6th Cir. 2008).....	20
<i>Boechler, P.C. v. Commissioner of Internal</i> <i>Revenue</i> , 596 U.S. 199 (2022)	13
<i>Broyes v. Junction City Foundry, Inc.</i> , 992 F. Supp. 1246 (D. Kan. 1997).....	15
<i>Carlisle v. United States</i> , 517 U.S. 416 (1996)	14
<i>Carlsbad Technologies, Inc. v. HIF Bio, Inc.</i> , 556 U.S. 635 (2009)	20
<i>Caterpillar v. Lewis</i> , 519 U.S. 61 (1996)	18–19
<i>Chamberlain v. Amrep, Inc.</i> , 2004 WL 2324676 (N.D. Tex. 2004).....	14–15
<i>Charles Dowd Box Co. v. Courtney</i> , 368 U.S. 502 (1962)	9–10
<i>Colorado River Water Conservation District v.</i> <i>United States</i> , 424 U.S. 800 (2076).....	8

<i>Couser v. Shelby County</i> , 139 F.4th 664 (8th Cir. 2025)	5
<i>DeMartini v. DeMartini</i> , 964 F.3d 813 (9th Cir. 2020)	20
<i>Gillis v. Louisiana</i> , 294 F.3d 755 (5th Cir. 2002)	19
<i>Glus v. Brooklyn Eastern District Terminal</i> , 359 U.S. 231 (1959)	15
<i>Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing</i> , 545 U.S. 308 (2005)	6
<i>Great Northern Railroad Co. v. Merchants Elevator Co.</i> , 259 U.S. 285 (1922)	9
<i>Grover v. Corndial Corp.</i> , 275 F. Supp. 2d 750 (W.D. Va. 2003)	14
<i>Holland v. Florida</i> , 560 U.S. 631 (2010)	16
<i>Harrow v. Department of Defense</i> , 601 U.S. 480 (2024)	13
<i>Irwin v. Department of Veterans Affairs</i> , 498 U.S. 89 (1990)	2, 13
<i>Kinley Corp. v. Iowa Utilities Board</i> , 999 F.2d 354 (8th Cir. 1993)	5
<i>Loftin v. Rush</i> , 767 F.2d 800 (11th Cir. 1985)	11, 20
<i>Menominee Indian Tribe of Wisconsin v. United States</i> , 577 U.S. 250 (2016)	2, 8, 10

<i>Metropolitan Life Insurance Co. v. Taylor</i> , 481 U.S. 58 (1987)	5
<i>Michigan v. Enbridge Energy, L.P.</i> , 571 F. Supp. 3d 851 (W.D. Mich. 2021).....	7
<i>Morse v. Frederick</i> , 551 U.S. 393 (2007)	12
<i>Northern Pacific Railroad Co. v. Austin</i> , 135 U.S. 315 (1890)	13, 15
<i>Nutraceutical Corp. v. Lambert</i> , 586 U.S. 188 (2019)	14
<i>Osborn v. Haley</i> , 549 U.S. 229 (2007)	19
<i>Pace v. DiGuglielmo</i> , 544 U.S. 408 (2005)	2, 4, 8, 12
<i>PDK Labs., Inc. v. D.E.A.</i> , 362 F.3d 786 (D.C. Cir. 2004)	12
<i>Powers v. Chesapeake & Ohio Railway Co.</i> , 169 U.S. 92 (1898)	3
<i>Price v. Wyeth Holdings Corp.</i> , 505 F.3d 624 (7th Cir. 2007)	4
<i>Quackenbush v. Allstate Insurance Co.</i> , 517 U.S. 706 (1996)	20
<i>Ross v. Blake</i> , 578 U.S. 632 (2016)	12
<i>Shamrock Oil & Gas Corp. v. Sheets</i> , 313 U.S. 100 (1941)	9

<i>Staples v. Joseph Morton Co.</i> , 444 F. Supp. 1312 (E.D.N.Y. 1978).....	15
<i>Stutler v. Marathon Pipeline Co.</i> , 938 F. Supp. 968 (S.D. Ind. 1998).....	5
<i>Syngenta Crop Protection, Inc. v. Henson</i> , 537 U.S. 28 (2002)	13
<i>Tafflin v. Levitt</i> , 493 U.S. 455 (1990)	10
<i>Taylor v. Medtronic, Inc.</i> , 15 F.4th 148 (2d Cir. 2021)	19
<i>Teague v. Regional Commissioner of Customs</i> , 394 U.S. 977 (1969)	14
<i>Thermtron Products, Inc. v. Hermansdorfer</i> , 423 U.S. 336 (1976)	20
<i>Transport Indemnity Co. v. Financial Trust Co.</i> , 339 F. Supp. 405 (C.D. Cal. 1972)	15
<i>United States v. Joseph</i> , 94 U.S. 614 (1876)	12
<i>United States v. Mitchell</i> , 463 U.S. 206 (1983)	11
<i>Vogel v. U.S. Office Products Co.</i> , 56 F. Supp. 2d 859 (W.D. Mich. 1999).....	14
RULES AND STATUTES	
15 U.S.C. § 717u	9
28 U.S.C. § 1292	18
28 U.S.C. § 1441	5

28 U.S.C. § 1442	9
28 U.S.C. § 1447	19, 20
28 U.S.C. § 1453	18, 19
Fed. R. Civ. P. 12	11, 19
Federal Courts Jurisdiction and Clarification	
Act, Pub. L. 112-63, 125 Stat. 758 (2011).....	16
Act of May 24, 1949, 63 Stat. 101	16–17
OTHER	
14C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3731 (5th ed. 2025).....	10, 19
Daniel Wilf-Townsend, <i>Assembly-Line</i> <i>Plaintiffs</i> , 135 Harv. L. Rev. 1704 (2022).....	15

INTEREST OF AMICUS CURIAE

The Center for Litigation and Courts (“Center”) is a nonpartisan, academic research center at the University of California Law, San Francisco. Its mission includes sharing knowledge of civil litigation with courts. In furtherance of that mission, the Center has filed briefs in this Court and others on issues relevant to its expertise in civil litigation.

The Center has a particular expertise in the matters of federal jurisdiction and procedure at issue in this case. Because neither the parties nor the courts below have fully addressed the position articulated in this amicus brief, the Center believes the brief will aid the Court’s adjudication.

The Center’s interest is in informed development and application of federal law. The Center has no interest in the ultimate outcome of this litigation. Rather, the Center’s interest is that of a true friend of the court.¹

¹ No person or entity other than the Center and its counsel authored this brief in whole or in part or contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Whether the nonjurisdictional 30-day removal deadline is ever subject to equitable exceptions is a difficult question that this Court needn't—and shouldn't—answer here. That's because, even if the statute permits equitable exceptions, Petitioners don't qualify for them.

That reason alone is sufficient to affirm the Sixth Circuit's judgment ordering the district court to remand the case. Principles of judicial restraint counsel going no further. Alternatively, the Court may prefer to dismiss the writ as improvidently granted.

ARGUMENT

A. *If the 30-Day Removal Deadline Permits Equitable Exceptions, They Aren't Met Here.*

1. Equitable exceptions to the 30-day deadline—if permitted at all—require the defendant to prove two elements: (1) the defendant diligently pursued removal; and (2) exceptional or extraordinary circumstances beyond the defendant's control prevented removal.

a. The general test for equitable tolling is clear: the litigant must prove both diligence in pursuing the right and the presence of extraordinary circumstances beyond the litigant's control that stood in the way. *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255–56 (2016); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). The Court has cautioned that the test is a difficult one to meet. *See Irwin v. Dep't of Veterans Aff.*, 498 U.S. 89, 96 (1990) (“Federal courts have typically extended equitable relief only sparingly.”).

b. This Court's removal cases suggest that equitable tolling, if it applies to removal deadlines in

the first place, would follow this stringent, two-part test requiring both diligence in seeking removal and exceptional circumstances beyond the defendant's control that stood in the way.

In *Powers v. Chesapeake & Ohio Railway Co.*, 169 U.S. 92 (1898), the Court confronted a removal outside the pre-1949 version of the deadline, which ran solely from when the case was filed, rather than from when it became removable. The defendant initially removed the case within the deadline, but the district court remanded for lack of complete diversity. On remand, but after the removal time expired, the plaintiff dismissed all nondiverse parties, and the defendant again exercised diligence by immediately removing. *Id.* at 97–98. This Court held the second removal timely to prevent a diligent defendant's opportunity to remove "from being defeated by circumstances wholly beyond his control." *Id.* at 100–01.

Powers is a statutory-interpretation case on when the time to remove begins, not an equitable-exception case. *Id.* at 102 ("We do not find it necessary to pass upon the points of fraudulent joinder and of estoppel . . . because, for the reasons before stated, we are of opinion that, upon the true construction of the act of congress, the petition [was timely]."). But by emphasizing the defendant's due diligence and circumstances wholly beyond his control, *Powers* is consistent with the Court's general approach to equitable tolling. *Powers* thus suggests that, if equitable tolling applies to the removal deadline, the general *Menominee Indian Tribe* test would apply.

2. In this case, Petitioners don't qualify for equitable tolling of the 30-day removal deadline—even were it available—because they meet neither element

of the *Menominee Indian Tribe* test; Petitioners neither were diligent in seeking removal nor faced exceptional circumstances beyond their control that stood in their way.

a. Neither Petitioners nor their amici try to show diligence. Yet diligence is an essential prerequisite to equitable tolling. *Pace*, 544 U.S. at 418 (“Even if we were to accept [the existence of extraordinary circumstances], [Petitioner] would not be entitled to relief because he has not established the requisite diligence.”). Diligence is especially crucial here because Congress intentionally crafted a short, rigid, and clear deadline to prevent defendants from unfairly waiting to see how their case might fare before removing. *See Price v. Wyeth Holdings Corp.*, 505 F.3d 624, 631 (7th Cir. 2007).

Here, Petitioners weren’t diligent in seeking removal. Instead, they repeatedly followed a wait-and-see approach in their litigation strategy.

Petitioners could’ve—but didn’t—remove the case when it was originally filed. Rather than file a notice of removal, Petitioners filed a motion to dismiss and for summary disposition on the pleadings, arguing that all Respondent’s claims were preempted by federal law. (J.A. 145a–155a.) Petitioners asserted

- that “the Federal Government has occupied the entire field”;
- that, “to ensure that states do not regulate in areas covered by [the federal pipeline act,]” Congress “express[ly] preempt[ed]” state regulatory laws and gave the federal Pipeline and Hazardous Materials Safety Administration “exclusive jurisdiction” as “a

single regulator” to regulate pipelines like the one at issue in this lawsuit;

- that the act “preempts all efforts by states or local governments to impose, whether facially or otherwise, operational and environmental requirements that pertain to the interstate pipelines”; and
- that, citing *Kinley Corp. v. Iowa Util. Bd.*, 999 F.2d 354, 358 (8th Cir. 1993), “the state cannot regulate in this area” because of preemption.

(J.A. 147a–152a.)

Those same preemption arguments offered a colorable basis for removal under the doctrine of complete-preemption removal. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (“When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b)”); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987) (“Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.”); *see also Couser v. Shelby Cnty.*, 139 F.4th 664, 672 (8th Cir. 2025) (concluding that “Congress expressly preempted the entire field of hazardous liquid pipeline safety”); *Kinley*, 999 F.2d at 359 (“This Congressional grant of exclusive federal regulatory authority precludes state decision-making in this area altogether and leaves no regulatory room for the state to either establish its own safety standards or supplement the federal safety standards.”); *cf. Stutler v. Marathon Pipeline Co.*, 938 F. Supp. 968, 970 (S.D. Ind. 1998) (concluding that

complete-preemption removal under the Pipeline Safety Act “was not frivolous”).

Petitioners, however, chose to seek summary disposition in state court rather than removal to federal court. That decision was perfectly reasonable. In state court, Petitioners had a chance to obtain a judgment on the pleadings. Successfully removing the case to federal court, by contrast, would’ve converted some claims to federal claims based on complete preemption, potentially disrupting state-law arguments that Petitioners might have hoped would prevail in state court. So Petitioners made a strategic decision to submit to the authority of the state court to adjudicate their dispositive motion rather than diligently pursue their right to remove.

Petitioners declined a second opportunity to remove the case when the Governor filed a “virtually identical lawsuit” in state court against Petitioners alleging “the same basic facts and state-law theories.” (Pet’r Br. 10.) On November 24, 2020, Petitioners timely removed the Governor’s case, but not this case, based on federal-question jurisdiction under *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005). (Pet. App. 5a & 29a n.4.)

By that time (and likely well before), the *Grable* arguments for removal were equally available to Petitioners as a basis to remove this case. Nonetheless, Petitioners again chose to keep this case in state court by agreeing to hold the state-court action in abeyance. (Pet’r Br. 13.) And again, the decision was reasonable. Petitioners could wait to see how they fared in the Governor’s case in federal court, and, if they fared poorly, they still had their pending dispositive motion in state court. Removing this case,

by contrast, would moot their dispositive motion and prematurely commit them to federal court.

The wait-and-see gambit paid off. In the Governor’s case, the district court confirmed that the case was removable based on federal-question jurisdiction under *Grable. Michigan v. Enbridge Ene., L.P.*, 571 F. Supp. 3d 851, 858–59 (W.D. Mich. 2021). The district court also “made rulings reflecting its view of the merits” that favored Petitioners. (Pet’r Br. 15.) Having secured that favorable ruling, Petitioners finally removed this case based on the same *Grable* factors and noted it as a related case for assignment to the same federal judge. (J.A. 4a.) Removal occurred more than two years after the case was originally filed, more than two years after Petitioners moved for summary disposition in state court based on preemption, and about a year after Petitioners removed the Governor’s case based on *Grable*. (Pet. App. 6a–7a, 29a.)

In short, Petitioners could’ve removed the case when originally filed based on complete-preemption grounds; they instead chose to seek merits adjudication in state court. They could’ve removed the case when they removed the Governor’s nearly identical case on *Grable* grounds; they again instead chose to wait and see what happened with that removal before abandoning their dispositive motion in state court. Each step of the way, Petitioners decided against removal in favor of a wait-and-see litigation strategy to keep their state-court motion pending until getting enough information to finally better-deal the state court. That is not “diligence,” and neither Petitioners nor their amici argue to the contrary.

Petitioners’ failure to exercise due diligence in pursuing removal is fatal to their assertions of

equitable tolling even if equitable tolling is allowed under the statute. *Cf. Pace*, 544 U.S. at 419 (explaining that where a party “waited years, without any valid justification, to assert [his] claims,” his lack of diligence precluded equitable tolling).

b. Nor have Petitioners shown exceptional or extraordinary circumstances beyond their control that prevented removal.

A showing of exceptional or extraordinary circumstances is an independent, essential element of equitable tolling. *Menominee Indian Tribe*, 577 U.S. at 259 n.5. This element requires not only that the circumstances be exceptional or extraordinary but also that they be beyond the litigant’s control. *Id.* at 257 (“[T]he second prong of the equitable tolling test is met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond its control.” (emphasis in original)).

The district court found exceptional circumstances based on the importance of the federal issues, a “collision course” between the state and federal actions, and the need “to maintain uniform and consistent administration of this controversy.” (Pet. App. 34a & n.9, 35a–38a.)

No other federal court of which amicus is aware has permitted untimely removal by a private party based on the importance of the federal issues, the need to avoid parallel state and federal litigation, or the need to maintain uniform and consistent administration of the dispute. Notably, those very same concerns were present in a canonical *abstention* opinion from this Court that directed a federal court to dismiss a case in favor of state-court jurisdiction. *Colo. R. Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976).

Those concerns don't justify excusing noncompliance with a clear and rigid removal deadline. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941) (stating that “[d]ue regard for the rightful independence of state [courts] requires [federal courts] scrupulously confine their own jurisdiction” via “strict construction” of the removal statute). Nothing about the federal issues in this case is exceptional, and the district court was wrong to conclude otherwise.

Had Congress thought matters involving pipeline regulation especially deserving of federal-court adjudication, Congress could've provided for exclusive federal jurisdiction or for a more flexible removal regime for such disputes, as Congress has with other types of claims. *E.g.*, 15 U.S.C. § 717u (exclusive federal jurisdiction over certain civil actions involving natural gas); 28 U.S.C. § 1442 (federal-officer removal). Instead, Congress left the forum decision in this case to the parties under ordinary, concurrent federal-question jurisdiction and ordinary, party-driven removal procedures. Congress has long committed even important federal issues to concurrent federal-court jurisdiction, content to allow the parties to agree to state court, if they wish, with this Court available to safeguard interests in federal-law uniformity and solicitude. *E.g.*, *Tafflin v. Levitt*, 493 U.S. 455 (1990) (holding RICO subject to concurrent jurisdiction). *Cf. Great N. R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 290–91 (1922) (noting that important questions of federal law “may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured”). And the nation has long followed a “consistent history of acceptance of concurrent jurisdiction.” *Charles Dowd Box Co. v. Courtney*, 368

U.S. 502, 508 (1962). To use equitable tolling—a device designed for fairness to the parties—to override the parties’ initial choice of forum, Congress’s decision to provide for concurrent jurisdiction, and the union’s longstanding solicitude of concurrent jurisdiction would turn removal on its head. This case offers no basis to justify such a revolution.

Petitioners’ alternative contention—that *Grable* removal was uncertain until proved successful in the Governor’s case (Pet’r Br. 18, 34–35)—also doesn’t qualify as an exceptional circumstance beyond Petitioners’ control. In *Menominee Indian Tribe*, this Court rejected a similar argument based on a litigant’s mistaken judgment, concluding that a “mistake of law was not outside its control.” 577 U.S. at 257 n.3. The Court explained: “[I]t is common for a litigant to be confronted with . . . an uncertain outcome based upon an uncertain legal landscape, and impending deadlines. These circumstances are not extraordinary.” *Id.* at 258 (quotation marks omitted).

Finally, Petitioners argue that suspected forum shopping by Respondent and the parties’ abeyance agreement in state court amount to exceptional circumstances. (Pet’r Br. 42–44.) Petitioners are wrong. A legion of cases denies equitable tolling to represented defendants even when the parties agree to continue proceedings in state court beyond the 30-day deadline. 14C Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 3731 n.63 (5th ed. 2025) (collecting cases). After all, such an agreement—as the abeyance agreement here—requires the consent of the defendant, consent that’s wholly within the defendant’s control. As for suspected forum shopping by Respondent, removal itself provides the solution:

when plaintiffs select state court, defendants may counter with their own preemptive removal right. Petitioners' recourse to any suspected state-court forum shopping by Respondent was to preemptively remove the case rather than file a motion in state court and wait to see what would happen.

3. The facts of this case make for an easy decision: the removal petition was untimely, and equitable tolling isn't available. The facts don't even present a circuit split.² The Sixth Circuit correctly ordered the case remanded to state court.

² Petitioners wouldn't be entitled to equitable tolling under *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985). *Loftin* involved a state court's default money judgment against the U.S. Navy despite sovereign immunity from such judgments. *Id.* at 805. Even if amounting to exceptional circumstances, those facts aren't apposite to Petitioners. For one, the Government's litigation-defense structure is uniquely bureaucratic, such that a surprising and unusual default money judgment issued by a state court may require more than 30 days for the Government to properly assess its strategy. *Cf.* Fed. R. Civ. P. 12(a)(2) (giving the Government 60 days to respond to a complaint rather than the usual 21 days for other defendants). For another, federal sovereign immunity is jurisdictional and can be raised at any time. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Petitioners can claim neither the unique bureaucracy nor the sovereign immunity that might amount to special and exceptional circumstances for the Government in a case like *Loftin*.

B. This Court Needn't—And Shouldn't—Decide Whether the 30-day Removal Deadline is Ever Subject to Equitable Exceptions.

1. The Sixth Circuit held, and Respondent argues, that the 30-day deadline is *never* amenable to equitable exceptions. (Pet. App. 2a, 18a–24a; Resp. Br. 21–53.) Petitioners disagree. (Pet'r Br. 23–50.) This Court needn't, and shouldn't, decide who's correct. *See Pace*, 544 U.S. at 418 n.8 (finding that a party was “not entitled to equitable tolling” without deciding whether equitable tolling was available in the first place).

2. Fundamental principles of judicial restraint counsel against pronouncing a broad rule when a narrow resolution is easy and straightforward. A “cardinal principle of judicial restraint” is that “if it is not necessary to decide more, it is necessary not to decide more.” *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring & dissenting) (quoting *PDK Labs., Inc. v. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring)). That prudent principle has guided this Court for more than a century. *United States v. Joseph*, 94 U.S. 614, 618 (1876) (“abiding by the rule which we think ought always to govern this court, to decide nothing beyond what is necessary to the judgment we are to render”).

Judicial restraint is especially applicable here, for three reasons.

a. First, the broader question is a difficult one under the Court's existing doctrine.

As the parties' briefing shows, the word “shall” is ambiguous. (Pet'r Br. 33–34; Resp. Br. 34–35.) *Compare Ross v. Blake*, 578 U.S. 632 (2016) (rejecting equitable exceptions to the PLRA's exhaustion

requirement because of the word “shall”), *with Harrow v. Dep’t of Defense*, 601 U.S. 480, 489 (2024) (stating that the presumption of equitable tolling applies to a statutory filing deadline with the word “shall”).

The structure of the statutory framework for removal points in different directions (Pet’r Br. 37–40; Resp. Br. 35–44), as do longstanding judicial presumptions (Pet’r Br. 32–33; Resp. Br. 32). *Compare Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (directing that removal statutes be “strictly construed”), *with Northern Pac. R. Co. v. Austin*, 135 U.S. 315, 318 (1890) (recognizing arguments for equitable estoppel), *and Boechler, P.C. v. Comm’r of Internal Revenue*, 596 U.S. 199, 209–10 (2022) (applying the general presumption of equitable tolling), *and with Arellano v. McDonogh*, 598 U.S. 1 (2023) (finding the equitable-tolling presumption rebutted).

So the question presented is a difficult one.

b. Second, waiting for a case presenting truly extraordinary circumstances beyond a diligent defendant’s control, briefed by parties with a concrete stake in them, would better inform this Court about whether and when Congress intended the deadline to allow for equitable exceptions in deserving cases. Such cases are reasonably foreseeable.

Suppose, for example, a surprise cyber attack shuts down a district court’s ECF system (but the clerk’s office’s remains accessible for accepting physical filings) for the twenty-four hours immediately preceding the expiration of the 30-day removal deadline, and an out-of-state defendant, who was prepared for timely electronic filing, can’t make last-day arrangements for physical filing until the next

morning. *Cf. Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 197 n.7 (2019) (reserving “whether an insurmountable impediment to timely filing might compel a different result”); *Teague v. Regional Comm’r of Customs*, 394 U.S. 977, 981–84 (1969) (Black, J., dissenting) (recounting an analogous act-of-God filing delay caused by an unexpected snowstorm); *Grover v. Corndial Corp.*, 275 F. Supp. 2d 750 (W.D. Va. 2003) (accepting a defendant’s removal notice as timely when the defendant’s good-faith attempt to file was prevented by bad weather); *Vogel v. U.S. Off. Prods. Co.*, 56 F. Supp. 2d 859, 865–66 (W.D. Mich. 1999) (accepting a late removal notice when the defendant timely submitted the notice to the court, but the clerk failed to properly docket the notice in time), *rev’d on other grounds*, 258 F.3d 509 (6th Cir. 2001).

Consider further, in the above hypothetical, that the defendant could, with significant expense, physically file a timely notice but instead relies on the district court’s assurance that all filings subject to nonjurisdictional deadlines will be deemed timely if made the following day. *Cf. Carlisle v. United States*, 517 U.S. 416, 435–36 (1996) (Ginsburg, J., concurring) (discussing the “unique circumstances” exception when a court misleads a party into filing late).

Or consider a plaintiff who files a removable case in state court, but the state court dismisses the case before the defendant can remove, leaving nothing to remove. The plaintiff successfully seeks reopening of the case, or reconsideration of the dismissal, or even direct appeal to the state appellate court, and, as a result, the case is reopened, but, in the meantime, the 30-day removal deadline has elapsed. *Cf. Chamberlain*

v. Amrep, Inc., 2004 WL 2324676 (N.D. Tex. 2004) (finding equitable tolling under those circumstances).

Or consider a defendant who, immediately after service, engages in good-faith settlement negotiations with the plaintiff, resulting in a settlement offer to the plaintiff on the thirtieth day of the removal window, which the plaintiff orally, but in bad faith, accepts and specifically pledges not to move to remand the case based on noncompliance with the 30-day deadline to give the parties time to consummate a written settlement agreement. The next morning, the plaintiff reneges, seeking more money. The defendant immediately removes the case, and the plaintiff moves to remand based on the 30-day deadline. *Compare Transport Indem. Co. v. Fin. Trust Co.*, 339 F. Supp. 405, 408–09 (C.D. Cal. 1972) (hypothesizing similar facts justifying equitable estoppel), *and Staples v. Joseph Morton Co.*, 444 F. Supp. 1312 (E.D.N.Y. 1978) (applying estoppel on similar facts), *with Broyes v. Junction City Foundry, Inc.*, 992 F. Supp. 1246 (D. Kan. 1997) (denying estoppel based on similar facts). *Cf. Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 233–34 (1959) (affirming the general principle of equitable estoppel); *Northern Pac. R.*, 135 U.S. at 318 (suggesting, in dictum, the possibility of applying equitable estoppel to the 30-day removal deadline).

Now add to this hypothetical the facts that the defendant is pro se and the plaintiff is a represented debt-collection agency that repeatedly sues pro se defendants in state court seeking a quick and lucrative resolution, which removal would disrupt. *See Daniel Wilf-Townsend, Assembly-Line Plaintiffs*, 135 Harv. L. Rev. 1704, 1708–10 (2022) (documenting that represented corporate plaintiffs—often debt

collectors—repeatedly sue individual, pro-se debtors in state court).

Perhaps these or other exceptional scenarios could present a compelling case for equitably tolling or excusing the 30-day removal deadline. *See Holland v. Florida*, 560 U.S. 631, 650 (2010) (acknowledging that “specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case”). But they are not before the Court, and they have no advocates to argue their merits here. The easy answer produced by the facts in this case masks more difficult circumstances in which equitable exceptions are more compelling. Awaiting a more appropriate case would offer better grounding for deciding whether to adopt a blanket rule against all equitable exceptions to the 30-day removal deadline.

c. Third, Congress could, in the meantime, step in to clarify when, if at all, the 30-day deadline is subject to equitable exceptions. Ultimately, the flexibility of the deadline is a question for Congress, which has, in the past, resolved conflicts and uncertainties over whether and when removal deadlines should yield to exceptional circumstances. *E.g.*, Federal Courts Jurisdiction and Clarification Act, Pub. L. 112-63, § 103, 125 Stat. 758 (2011) (resolving lower-court conflicts by adding a bad-faith exception to the one-year bar on removal of diversity cases); *id.* (resolving lower-court conflicts by giving each defendant its own 30-day deadline to remove); Act of May 24, 1949, ch. 139, § 83, 63 Stat. 101 (superseding this Court’s interpretation in *Powers* by amending the 30-day removal deadline to clarify that the time period begins when the case becomes removable). An opinion from this Court noting the difficulty of the issue but

reserving judgment would give Congress the first opportunity to clarify or rework the statute as it sees fit. And the Judicial Conference could charge its Committee on Federal-State Jurisdiction to study the issue and provide guidance to Congress in the interim.

For these reasons, judicial restraint counsels against deciding the broad question presented here.

3. The principle of judicial restraint might be set aside if leaving the question undecided would cause unacceptable confusion, uncertainty, or unfairness, or if the question would likely evade review in the future. Here, neither situation is concerning.

a. Leaving the broader question unanswered here will not generate unacceptable confusion, uncertainty, or unfairness because exceptional circumstances are rare. In the decades of practice under the 30-day statutory deadline, across hundreds of thousands of removal petitions filed, the issue has reached decision in only a small minority of appellate courts. In the vast majority of removals, the 30-day deadline will be either clearly met or clearly not met.

And the unanticipated nature of those rare instances of exceptional circumstances inhibits gamesmanship. The plaintiff selects the initial forum, and the defendant has no option to transfer a state-court case across state lines. Thus, the defendant has little opportunity to strategically select a forum within a circuit that recognizes exceptional circumstances. And the unpredictable nature of exceptional circumstances ought not influence the plaintiff's initial selection of a circuit that doesn't recognize equitable exceptions. So leaving the question unanswered, for now, won't cause unfairness.

b. Although exceptional circumstances are rare, when they do arise, they likely won't evade review in an appropriate future case.

Whether the 30-day removal deadline permits equitable exceptions is either unresolved or answered in the affirmative in around eleven circuits. If a district court in one of those circuits denies a motion to remand after finding equitable reasons to excuse noncompliance with the 30-day deadline, then the plaintiff may challenge that ruling in one of two ways.

First, the plaintiff in a class-action case falling under the Class Action Fairness Act can seek immediate review of the denial of a remand order. *See* 28 U.S.C. § 1453(c)(1) (“[A] court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed . . .”). In all other cases, a plaintiff can seek interlocutory review, as Respondent did here. *See* 28 U.S.C. § 1292(b). Although appeal in either circumstance is discretionary, an opinion from this Court reserving the question will signal to lower courts that permission to appeal should be granted.

Second, the plaintiff can seek review of the denial of a motion to remand in conjunction with a dispositive pretrial order, such as the granting of a motion to dismiss. In such a case, *Caterpillar v. Lewis*, 519 U.S. 61 (1996), will not stand in the plaintiff's way.

Caterpillar held that a statutory defect in removal—that the case be suitable for removal at the time of removal—could be disregarded when the case had reached verdict and thus faced overwhelming considerations of finality, efficiency, and economy. *Id.* at 75–76. *Caterpillar* may apply in the rare case that

involves no dispositive ruling through years of pretrial litigation and then trial. But pretrial disposition is far more common. Frequently, federal judges dismiss cases prior to discovery for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). A plaintiff appealing a dismissal could also appeal the denial of a remand motion, and because considerations of finality, efficiency, and economy wouldn't be overwhelming in such a case, *Caterpillar* wouldn't bar appellate courts from reviewing the timeliness of removal. *E.g.*, *Taylor v. Medtronic, Inc.*, 15 F.4th 148 (2d Cir. 2021) (considering the 30-day deadline on the plaintiff's appeal of both a dismissal under Rule 12(b)(6) and the denial of a motion for remand); *cf.* *Gillis v. Louisiana*, 294 F.3d 755 (5th Cir. 2002) (considering the 30-day deadline on the plaintiff's appeal of both a summary judgment and the denial of a motion for remand).

If a district court grants a plaintiff's motion to remand, holding that the deadline doesn't recognize equitable exceptions, appellate review is, admittedly, more difficult because 28 U.S.C. § 1447(d) normally would bar the defendant from appealing the remand.

That bar, however, doesn't apply in civil-rights removals, in federal-officer removals, in Class Action Fairness Act removals, in Westfall Act removals, and in two other kinds of cases. *See* 28 U.S.C. §§ 1447(d) (exempting civil-rights and federal-officer removals); *id.* § 1453(c) (class-action removal); *Osborn v. Haley*, 549 U.S. 229 (2007) (Westfall Act); 14C Wright & Miller, *supra*, § 3740 (other cases). So a defendant removing any of these cases could appeal a remand order based on noncompliance with the 30-day deadline. *E.g.*, *Abbo-Bradley v. City of Niagara Falls*, 73 F.4th 143 (2d Cir. 2023) (considering the 30-day

deadline on appeal from a remand order after federal-officer removal).

In other cases, the appellate bar doesn't apply to certain remand orders for reasons outside of removal or jurisdictional defects. *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009) (discretionary decline of supplemental jurisdiction); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (abstention); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (remand based on docket congestion). And several courts of appeals (including the Sixth Circuit) have held that remand orders under Section 1447(e) aren't subject to the appellate bar. *E.g.*, *DeMartini v. DeMartini*, 964 F.3d 813 (9th Cir. 2020); *Blackburn v. Oaktree Cap. Mgmt., LLC*, 511 F.3d 633 (6th Cir. 2008). If a defendant appeals a remand based on one of these grounds when the 30-day deadline is also at issue, the plaintiff could seek affirmance of the remand order based on the alternative ground of noncompliance with the 30-day deadline, allowing the court of appeals to decide whether the deadline supplies an alternative reason to affirm the remand. *E.g.*, *Loftin*, 767 F.2d at 805–06 (reviewing noncompliance with the 30-day removal deadline on appeal from a remand made pursuant to discretionary decline of supplemental jurisdiction).

For these reasons, an appropriate case presenting truly exceptional circumstances is likely to be reviewable by this Court in the future.

CONCLUSION

In such an appropriate case, perhaps this Court should resolve the question presented. But that day needn't be today, and this case isn't such a case.

The Court instead should affirm the Sixth Circuit solely on the ground that the facts of this case don't warrant excusing noncompliance with the 30-day removal deadline. In the alternative, the Court may prefer to dismiss the writ as improvidently granted.

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Respectfully submitted,

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