

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 ENBRIDGE ENERGY, LP, ET AL.,)
4 Petitioners,)
5 v.) No. 24-783
6 DANA NESSEL, ATTORNEY GENERAL)
7 OF MICHIGAN, ON BEHALF OF THE)
8 PEOPLE OF THE STATE OF MICHIGAN,)
9 Respondent.)
10 - - - - -

11
12 Washington, D.C.
13 Tuesday, February 24, 2026

14
15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:09 a.m.

18
19 APPEARANCES:
20 JOHN J. BURSCH, ESQUIRE, Caledonia, Michigan; on
21 behalf of the Petitioners.
22 ANN M. SHERMAN, Solicitor General, Lansing, Michigan;
23 on behalf of the Respondent.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 24-783, Enbridge Energy versus Nessel.

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONERS

MR. BURSCH: Thank you, Mr. Chief Justice, and may it please the Court:

This case arises from state officials' attempt to use state court proceedings to shut down an international pipeline that supplies energy to millions in the U.S. and Canada. The question is whether federal courts retain their traditional equitable authority to excuse the 30-day removal deadline. Under this Court's case law and statutory text, they do.

To begin, Section 1446(b) is a non-jurisdictional filing rule, a timing rule, that satisfies this Court's test in Young because it prescribes a period within which certain rights may be enforced. So, under Holland, the Court's presumption, it presumes that federal courts retain their traditional

1 equitable authority absent the clearest
2 command.

3 Next, the Michigan attorney general
4 cannot rebut that presumption. Like Boechler,
5 1446(b) does not expressly prohibit equitable
6 tolling, and its short 30-day time limit is
7 directed at the defendant, not the court, which
8 is why it's placed in a procedural section.

9 As in State Farm, Congress's decision
10 to expressly direct a remand for lack of
11 jurisdiction but not for procedural defects
12 suggests that courts retain their traditional
13 equitable authority to excuse procedural
14 defects. And other equitable exceptions, like
15 waiver and estoppel, apply to 1446(b). It
16 would be incongruous not to allow equitable
17 tolling too.

18 Finally, the attorney general points
19 to so-called exceptions to the 30-day timing
20 rule. None rebut the presumption. Some simply
21 define when the 30 days begins; others were
22 adopted years apart to govern discrete
23 categories of litigants or subject matter.
24 None provide what Holland demands: the
25 clearest command that courts are precluded from

1 exercising their traditional equitable
2 authority.

3 In sum, there's no need to break new
4 ground here. We ask that you apply the Court's
5 well-settled precedents and reverse.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: You removed the case
8 against the governor to federal court.

9 MR. BURSCH: We did.

10 JUSTICE THOMAS: Why wasn't this
11 removed? They're basically the same case.

12 MR. BURSCH: Well, it was a similar
13 case, but what really changed the -- the ground
14 was that the Canadian government invoked the
15 1977 transit treaty while the governor's case
16 was up on appeal -- or, I'm sorry, was up on
17 removal. And, at that point, that's when the
18 common law -- federal common law of foreign
19 affairs suddenly burst into -- into force, and
20 it would have made sense for us to remove at
21 that time.

22 However, the state court had already
23 stayed all of its proceedings. Everybody, the
24 attorney general and Enbridge, assumed that the
25 proceedings would be going forward with the

1 dual federal cases, the -- the original case
2 that Enbridge filed and the governor's removed
3 case.

4 Once the governor dismissed her case
5 and the attorney general announced that she was
6 going to go back to the state court, we filed
7 our notice of removal within 15 days.

8 JUSTICE THOMAS: A --

9 JUSTICE JACKSON: So you talked -- oh,
10 go ahead.

11 JUSTICE THOMAS: But it seems to me
12 that if they were going to be paired in that
13 way, you would have removed them in pairs,
14 because that suggests that they were very much
15 similar.

16 MR. BURSCH: There were similarities,
17 but the Canadian government invoking the treaty
18 really changed what the state court case looked
19 like. I don't think it was clear to anyone
20 that there was necessarily federal jurisdiction
21 at the outset of the state court case that the
22 attorney general filed. But, by the time that
23 the governor invoked -- or, I'm sorry, that the
24 governor terminated the easement and then
25 Canada invoked the treaty, that really changed

1 the lay of the land.

2 Ultimately, however, the Court doesn't
3 need to get into any of that. You can do what
4 you did in Boechler, where the -- the law firm
5 clearly dropped the ball, in the Court's words,
6 simply decided that equitable tolling applied,
7 and then remanded it to the lower courts.

8 JUSTICE THOMAS: So have we applied
9 the presumption in a removal case before?

10 MR. BURSCH: This will be the first
11 time. And I'm -- I'm glad you brought that up,
12 Justice Thomas, because I think that's one of
13 the linchpins of this case.

14 And I rely on three unanimous
15 decisions of this Court why you should apply it
16 here. First, in Lozano, the Court unanimously
17 announced that the statute of limitations
18 concept is a functional one, it's not a strict
19 one. So you don't need to have a claim being
20 cut off.

21 Second, a great example of that is
22 Young, also a unanimous decision, and, there,
23 the IRS's three-year look-back period was a
24 statute of limitations because it prescribed a
25 period within which certain rights may be

1 enforced. And that was true even though the
2 statute did not eliminate the IRS's claim, only
3 some of the IRS's mechanisms for enforcement,
4 just like removal.

5 And then, finally, the unanimous
6 opinion in *Nutraceutical*, where, again, the
7 plaintiff lost their -- their right to an
8 interlocutory appeal of the denial of class
9 certification, but they did not lose their
10 claim. And they could always bring up that
11 class certification issue later after final
12 judgment. And yet the Court looked for clear
13 intent to preclude tolling.

14 CHIEF JUSTICE ROBERTS: Well, there's
15 a different interest involved here. We --
16 we've obviously had a tendency, for example, in
17 filings recently to pay -- put more of a focus
18 on the interests of the plaintiffs and --
19 and -- and less on the interests of the
20 defendant in -- but, here, it's a state, right,
21 that would be in -- suffering to the extent the
22 complaint is allowed to go forward.

23 And isn't the fact that we're dealing
24 with a sovereign in this case cause the --
25 perhaps the weighing to go in a different

1 direction?

2 MR. BURSCH: Well, thank you,
3 Mr. Chief Justice. To begin, it's not
4 suffering for a state to have to litigate in
5 federal court, but I -- I think what your --
6 your question goes to --

7 (Laughter.)

8 MR. BURSCH: -- what your question
9 goes to --

10 CHIEF JUSTICE ROBERTS: We'll hear
11 about that shortly, but -- but anyway --

12 MR. BURSCH: -- what your question
13 goes to is the other side's contention that --
14 that because of the state/federal dynamic, this
15 federalism dynamic, that perhaps the removal
16 statute should be strictly construed. And I
17 have three responses to that.

18 First, as the Chamber brief explains
19 at pages 20 to 21, in Dart and Breuer, this
20 Court made clear that it doesn't provide any
21 kind of a strict construction in this context.

22 Second, to the extent that you have,
23 it's only for jurisdiction, not for procedural
24 matters.

25 And the third thing is that even if

1 you would construe 1446(b) strictly, they still
2 can't overcome the presumption.

3 And we have this long history of
4 courts having traditional equitable authority,
5 and what we don't want is to -- to assume that
6 Congress wanted to handcuff federal courts so
7 that they couldn't exercise equity. You need a
8 clear command or some other really compelling
9 statement to strip federal courts of that. And
10 that should apply equally to removal as it does
11 in other functional statutes of limitation.

12 JUSTICE SOTOMAYOR: I'm having a
13 problem understanding what you're losing, what
14 right you're losing. You call it a right to
15 have a federal court try the case, but I don't
16 know that that's a right. You have a right to
17 have recovery for a loss or a potential loss,
18 and the forum where that right is adjudicated
19 is not lost -- not lost. You have a forum.
20 You have the state court.

21 None of your remedies, like in some of
22 our other cases, would be lost forever. None
23 of your claims or defenses would be lost
24 forever. Canada can file whatever it filed in
25 the federal action in the state action.

1 I -- I've always thought of a statute
2 of limitations as something where you're losing
3 a part of your recovery --

4 MR. BURSCH: Mm-hmm.

5 JUSTICE SOTOMAYOR: -- a part of your
6 claim, but this is no loss of claim.

7 MR. BURSCH: Well, Justice Sotomayor,
8 that's why Lozano makes clear that this is a
9 functional test and why you crossed that
10 Rubicon of having to lose a claim in both --

11 JUSTICE SOTOMAYOR: But tell me what
12 the function is. Meaning, in Lozano, the
13 question was did the parent -- and we said no,
14 that even though the parent didn't get
15 automatic return of the child, it still got
16 circumstances in which the child wouldn't be
17 returned. If it's non-functional, I still
18 don't understand what right to your claim you
19 have lost.

20 MR. BURSCH: Right. That -- that's
21 why I point you to Young and also your opinion
22 in Nutraceutical because, in those cases too,
23 no one lost a claim.

24 In -- in Nutraceutical, there was no
25 right to interlocutory appeal other than that

1 granted by rule, and yet the Court looked for a
2 clear intent to preclude tolling.

3 JUSTICE SOTOMAYOR: Well, but wait a
4 minute, that -- that's a right to have someone
5 hear the case.

6 MR. BURSCH: Right.

7 JUSTICE SOTOMAYOR: So you're losing
8 that, all right, but, here, there is a court.
9 Whether it's the state court or the federal
10 court, there is a forum for your claim.

11 MR. BURSCH: Yes. But, in
12 Nutraceutical, you still had the ability to
13 have an appeal at the end of final judgment.
14 You were just losing a mechanism to enforce
15 your arguments in the same way that we're
16 losing our right to removal.

17 And it was the same thing with the IRS
18 in Young. They didn't lose their ability to go
19 after the person who failed to pay taxes. They
20 simply lost the mechanisms of being able to
21 invoke non-dischargeability and priority.

22 But they could overcome those by, for
23 example, alleging fraud as a way to get around
24 dischargeability or maybe the -- the priority
25 wouldn't have affected them actually being able

1 to recover.

2 So -- so this Court in both of those
3 cases was very generous, really, capacious in
4 recognizing lower courts' equitable authority.
5 And I think that's why most recently in Harrow,
6 the 2024 case which also involved appeals, the
7 Court said the presumption applies to
8 non-jurisdictional timing rules.

9 And this -- this case fits exactly
10 within that.

11 JUSTICE SOTOMAYOR: Thank you.

12 JUSTICE JACKSON: So are you saying
13 that this particular deadline is functionally a
14 statute of limitations, or are you saying it
15 doesn't matter whether it's functionally a
16 statute of limitations for the purpose of our
17 analysis?

18 MR. BURSCH: I'm saying, under Lozano,
19 Young, Nutraceutical, and Harrow, it's
20 functionally a statute of limitations the way
21 the Court has defined that phrase for purposes
22 of these inquiries about traditional equitable
23 authority.

24 JUSTICE JACKSON: What do you do with
25 Arellano, which is a more recent, I think, or

1 one of the most recent cases that we have that
2 talk about this doctrine and comes out the
3 other way?

4 MR. BURSCH: Justice Jackson, I'm
5 delighted that you brought up Arellano.

6 JUSTICE JACKSON: Thank you, good.

7 MR. BURSCH: Yeah. That -- you start
8 with the fact that there were 16 reticulated
9 exceptions there, some of which included
10 equitable tolling-type language. But -- but
11 here's the important thing about Arellano. It
12 was the text. It said, "unless specifically
13 provided otherwise in this chapter."

14 That is the clearest command that
15 Holland requires. And what the Court said was
16 that that was a textual book "indicating that
17 Congress enumerated an exhaustive list of
18 exceptions with each confined to its specific
19 terms."

20 We don't have anything like that in
21 the removal statute, anything like that in the
22 IRS statute.

23 JUSTICE JACKSON: Well, I understand,
24 but isn't that sort of a -- a little bit later
25 in the analysis? I mean, I -- I started you

1 with the question of is this functionally a
2 statute of limitations because I'm just trying
3 to get that pinned down.

4 MR. BURSCH: Yes.

5 JUSTICE JACKSON: And I think, in
6 Arellano, it may have functioned as that, but
7 then we looked at the statute and we said, you
8 know, the way this -- Congress has set this up,
9 we understand it not to want any additional
10 equitable considerations --

11 MR. BURSCH: Yes.

12 JUSTICE JACKSON: -- so we're not
13 going to consider it.

14 I think I'm sort of at the first step
15 with you, which is is what is happening here in
16 light of what Justice Sotomayor and others have
17 said really like a statute of limitations.
18 You're not losing the rights in the same way.
19 It seems like we're just shifting forums here.

20 So, on the very kind of threshold
21 consideration of does this function as a
22 statute of limitations, I -- I'm struggling to
23 see why it does.

24 MR. BURSCH: Yes. So, in Arellano, I
25 don't think the Court decided that question --

1 JUSTICE JACKSON: Okay.

2 MR. BURSCH: -- whether that was a
3 statute of limitations. It just assumed that
4 the presumption applied, and then it found that
5 clear command that I -- I just quoted to you.

6 JUSTICE JACKSON: All right.

7 MR. BURSCH: And on the front end --

8 JUSTICE JACKSON: So why should we
9 assume, though, the presumption applies here?

10 MR. BURSCH: Because the functional
11 test that Young adopts and that Lozano then
12 recognizes is that a statute of limitations for
13 purposes of this inquiry, whether a presumption
14 of traditional equitable authority applies, is
15 whether the statute prescribes a period within
16 which certain rights may be enforced.

17 And so, in Young, you didn't lose a
18 claim. You simply lost some process
19 enforcement rights, non-dischargeability and
20 priority. In Nutraceutical, you didn't lose
21 any rights. You didn't lose your -- I'm sorry,
22 you didn't lose any claim. You simply lost the
23 right to an interlocutory appeal.

24 JUSTICE JACKSON: All right. So let's
25 move to the Arellano test. If we assume as

1 Arellano did that this functions as a statute
2 of limitations, why should we look at this
3 statute and believe that Congress wanted other
4 equitable tolling considerations to work here?

5 MR. BURSCH: Well, the -- the baseline
6 is that Holland says you need the clearest
7 command to rebut the presumption. So now
8 burden of proof shifts to the attorney general.
9 And, incidentally, the -- the Sixth Circuit did
10 apply the presumption below and so they're
11 actually the appellant on that as well.

12 And so you look at the statute. And
13 I -- I start with our affirmative case, which
14 is Boechler, just like 14 -- or, I'm sorry,
15 just like the -- the statute in Boechler,
16 1446(b) does not expressly prohibit equitable
17 tolling, it's got the short 30-day time
18 deadline, and it's directed at the defendant,
19 not at the court. It speaks -- speaks to
20 removal procedures, not the court's authority.

21 And then you have this curious thing
22 where, in 1447(c), you have to remand if there
23 is a lack of jurisdiction. But the statute
24 doesn't say that you have to remand for a lack
25 of procedural defects. So, for example, it's

1 not uncommon that someone who doesn't remove
2 very often may get their notice of removal in
3 within 30 days, but they'll -- they'll forget
4 to attach a copy of all the state court
5 pleadings, which 1446 also requires.

6 JUSTICE JACKSON: Isn't the broader
7 point that because there were these kinds of
8 exceptions in the statute, Congress was
9 thinking about this, they covered it, and --
10 and who are we now to believe that other things
11 should be taken into account on this equitable
12 basis?

13 MR. BURSCH: Well, we start with the
14 ground rule assumption that the Court maintains
15 its equitable authority, and so, when we look
16 at the exceptions, now we have to ask whether
17 Congress was clearly commanding, like did
18 Congress intend to handcuff federal courts --

19 JUSTICE JACKSON: And you don't see
20 that as -- as starting with the answer in this
21 case? I mean, you sort of -- you -- you -- you
22 say the ground rule is that -- that you retain
23 the -- the equitable authority. But the issue
24 here is whether --

25 MR. BURSCH: Has it been clearly

1 rebutted. Do you have the clearest command.

2 JUSTICE JACKSON: I see. I see.

3 Okay.

4 MR. BURSCH: And so, if we start
5 walking down what they call the exceptions --

6 JUSTICE JACKSON: Mm-hmm.

7 MR. BURSCH: -- you know,
8 1446(b)(2)(B), 1446(b)(3), those are just
9 telling you when the 30 days accrues. If you
10 have multiple defendants, it doesn't accrue
11 until each defendant is served. If you've got
12 a complaint that's not initially removable, it
13 accrues when it becomes removable, as in this
14 case with the treaty.

15 Then you start looking at the things
16 that they point to elsewhere. It's notable
17 that in the red brief they only spend one page
18 on how the text provides the clearest command,
19 and all the rest of it are exceptions that are
20 elsewhere.

21 And the problem with those is that
22 those involve distinct litigants and distinct
23 subject matter. They don't provide that
24 clearest command. And I would add that those
25 exceptions that they point to, some of them

1 make relief even broader than what equity would
2 provide.

3 So, for example, for suits against
4 members of the Armed Forces, this is 1442a, you
5 can allow removal at any time. That's not an
6 equitable exception. That's just completely
7 blowing up the 30-day removal period.

8 In 1441e, the multi-party, multi-forum
9 jurisdiction provision, it's at a later time
10 with leave of court. And so Congress created
11 some incredibly non-equitable, capacious
12 exceptions in these other sections. None of
13 those suggest that Congress meant to handcuff
14 courts and their traditional equitable
15 authority --

16 JUSTICE ALITO: Mr. Bursch --

17 MR. BURSCH: -- when it comes --

18 JUSTICE ALITO: -- can I ask you this?
19 I understand that you and your amici allege
20 that the state engaged in some procedural moves
21 at a certain point that were inequitable.

22 But was the attorney general's suit
23 removable when it was filed and for the 30 days
24 following the filing of the suit?

25 MR. BURSCH: That -- that's a very

1 difficult question that the parties had trouble
2 answering from the outset and probably continue
3 to have trouble answering today. That's the
4 kind of thing that we would encourage the Sixth
5 Circuit to decide on remand, as you did in
6 Boechler and also in Harrow, you know, sending
7 back that hard question.

8 All we're asking you to do is to
9 declare that the presumption applies, that it
10 hasn't been rebutted by the clearest command,
11 and -- and to reverse. I mean, it could be an
12 opinion that's 160 pages less than the tariffs
13 opinion last week.

14 JUSTICE ALITO: Well, if -- well --

15 (Laughter.)

16 JUSTICE ALITO: -- that's certainly a
17 goal to aim for.

18 (Laughter.)

19 JUSTICE ALITO: I felt very left out
20 in the tariffs case. Justice Sotomayor didn't
21 write and I didn't write opinions. But, if
22 the --

23 JUSTICE SOTOMAYOR: Maybe we'll have a
24 chance here.

25 (Laughter.)

1 JUSTICE ALITO: If the -- the
2 governor's suit was removable, on what basis
3 would it -- would we perhaps hold that the
4 original attorney general's suit was not
5 removable?

6 MR. BURSCH: Yeah. So, again,
7 something you don't have to decide, but the
8 argument we would make to the Sixth Circuit is
9 that the district court didn't abuse her
10 discretion because, as soon as the governor
11 declared that the easement was terminated and
12 then filed a lawsuit that asked for an
13 immediate shutdown of the pipeline -- I mean,
14 keeping in mind this means depriving millions
15 of people of -- of fuel and propane in Michigan
16 and Ohio and Canada -- that everything shifted
17 to that lawsuit and the affirmative lawsuit
18 that we filed.

19 And so the parties quickly agreed with
20 the state trial court that the state trial
21 court proceeding would just be stayed, and so
22 that kind of sat on the shelf while the two
23 federal claims went forward.

24 JUSTICE ALITO: Well, I understand
25 that, but what was the relief sought in the

1 attorney general's suit? It was an injunction,
2 wasn't it, against continuing operation of the
3 pipeline?

4 MR. BURSCH: It -- it could have been,
5 but there -- there were also a lot of other --
6 there were state law claims in there. They
7 didn't specifically invoke any federal
8 questions. And there were lots of relief that
9 could have been granted that would have stopped
10 short of an injunction. So it wasn't clear to
11 anyone that that was the type of case that the
12 federal courts would have taken jurisdiction of
13 in the first instance.

14 And so what the district court relies
15 on -- you know, this will be the abuse of
16 discretion review that the Sixth Circuit would
17 eventually give to this -- you know, is really
18 five things. She says that the dispute is best
19 heard in federal forum when you're involving
20 literally, you know, the ability to click and
21 provide heat to millions of people. Second,
22 that there was the gamesmanship that the AG
23 engaged in. Third, you have this race to
24 judgment between the state and federal courts,
25 which federal courts don't want. You've got

1 the national and international implications
2 of -- of now the treaty, you know, which has
3 now come into force by the time she rules on
4 the governor's removal action. And then,
5 finally, unusually in this case, the state
6 court hadn't done anything. Here we are seven
7 years later and the state court has not issued
8 any merit rulings, not any discovery rulings.

9 You know, so if the concern is that
10 somehow maintaining the federal courts'
11 traditional equitable authority is going to
12 open the barn door, that's not going to happen.
13 This is kind of a unicorn case. And that's why
14 you can see in the Eleventh and Fifth Circuit,
15 which have had this rule for more than 40 years
16 and more than 35 years, respectively, you're
17 not seeing a flood of people coming in and
18 succeeding on equitable tolling or equitable
19 arguments.

20 JUSTICE GORSUCH: Well, can I ask
21 about that, Mr. Bursch?

22 MR. BURSCH: Yes.

23 JUSTICE GORSUCH: So how would that be
24 policed effectively at the appellate level? I
25 mean, if it's all going to be done, equitable

1 tolling, at the beginning by a district court
2 judge, probably not going to certify that, not
3 going to be ever really an opportunity to have
4 appellate review in a way that would create
5 rules and uniformity.

6 MR. BURSCH: Well, to start, there
7 really hasn't been a need to do that because,
8 if you look at the district court decisions in
9 the -- the Fifth and the Eleventh Circuits
10 after the rule was established, in the -- the
11 mine-run case, they're just simply denied
12 because the court doesn't think that equitable
13 factors have been satisfied.

14 Now let's say over time you start to
15 see a few more of those being granted. There
16 will be examples like this case where something
17 is certified for appeal, and if it's necessary,
18 the circuits or this Court can lay down
19 standards.

20 But -- but one of the lessons of
21 Holland is that when it comes to equity, we
22 trust our district courts. We allow them to
23 consider all equitable factors, things like the
24 importance of the lawsuit to the federal
25 government and to the Canadian government,

1 things like gamesmanship, you know, whatever
2 that is.

3 And so, at least at the get-go,
4 there's no need to put hard-and-fast rules on
5 district courts that know how to apply equity.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. BURSCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Ms. Sherman.

10 JUSTICE SOTOMAYOR: I'm sorry.

11 CHIEF JUSTICE ROBERTS: Oh, I -- well,
12 okay, do you have anything further?

13 MR. BURSCH: Do you have a question?

14 JUSTICE SOTOMAYOR: Yes.

15 CHIEF JUSTICE ROBERTS: Yeah, I'm
16 sorry. Why don't you get back there. I was
17 jumping the gun.

18 MR. BURSCH: And I'm glad that the
19 Chief will exercise his traditional equitable
20 authority --

21 (Laughter.)

22 MR. BURSCH: -- to allow you to ask
23 this important question.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas, anything further?

1 Justice Alito?

2 Justice Sotomayor?

3 JUSTICE SOTOMAYOR: Isn't fraud an
4 equitable ground for tolling?

5 MR. BURSCH: It can be, yes,
6 absolutely.

7 JUSTICE SOTOMAYOR: Yes. And for
8 causes, can also be equitable ground for
9 tolling?

10 MR. BURSCH: What was the word,
11 "causes"?

12 JUSTICE SOTOMAYOR: Causes.

13 MR. BURSCH: Oh, sure. Yeah.

14 JUSTICE SOTOMAYOR: Okay. So why did
15 Congress bother writing those exceptions into
16 the statute?

17 MR. BURSCH: They wrote those into
18 other portions of the -- the statute.

19 JUSTICE SOTOMAYOR: Uh-uh. 13 --
20 1446.

21 MR. BURSCH: Oh, oh, the -- yes. I'm
22 sorry. Yes, in 1446(c).

23 JUSTICE SOTOMAYOR: The diversity one
24 is under 1446(c). But even why bother writing
25 a separate one?

1 MR. BURSCH: Well, sometimes what
2 Congress will do is it'll have a
3 belt-and-suspenders approach where, even if
4 equitable principles apply, they want to make
5 sure that they will be applied in specific
6 circumstances.

7 JUSTICE SOTOMAYOR: All right. So --

8 MR. BURSCH: And there was a circuit
9 split.

10 JUSTICE SOTOMAYOR: -- you're saying
11 these are just redundancies?

12 MR. BURSCH: Well, there was a circuit
13 split.

14 JUSTICE SOTOMAYOR: What do I do with
15 the fact that 1455, just two provisions after
16 the last -- or one provision after 1554 on the
17 intellectual property claims, Congress actually
18 used the words "equitable tolling" and said, in
19 the criminal context, you apply equitable
20 tolling? So it knew how to use those terms.
21 Why didn't it use it here?

22 MR. BURSCH: Right. So, in the
23 criminal context, where they said that you
24 could, for good cause, excuse the deadline,
25 I -- I have two points on that.

1 First, generally, it's harder to
2 remove a criminal case from state court to
3 federal court, and so Congress may have wanted
4 a more capacious statutory standard to make
5 clear that federal courts have that authority.

6 But the main point I want to make --

7 JUSTICE SOTOMAYOR: I'm sorry, that
8 makes no sense to me. If it's capacious, why
9 not just leave it alone in 1446? Why not apply
10 it there?

11 MR. BURSCH: Well, the main point that
12 I want to make is that when Congress adopted
13 the good cause standard for criminal things and
14 didn't do it for the rest of it, there are two
15 inferences you could draw from that. One would
16 be Congress didn't want equity. The other one
17 would be that Congress assumed that equitable
18 exceptions applied and it didn't need to amend
19 1446 to do the same thing that it was doing in
20 1455.

21 And when you have competing
22 inferences --

23 JUSTICE SOTOMAYOR: But it needed --
24 it needed to add fraud as an exception to
25 removal within 30 days and needed to add it

1 with respect to intellectual property?

2 MR. BURSCH: Yeah. So just --

3 JUSTICE SOTOMAYOR: Just -- just --
4 just --

5 MR. BURSCH: -- let me finish my
6 answer and then walk through each one of those.

7 So, when you have these competing
8 inferences, what did Congress mean? Did it
9 intend to exclude equity or intend to include
10 equity? Competing inferences are not the
11 clearest command to cut off courts' traditional
12 equitable authority.

13 JUSTICE SOTOMAYOR: No, but I find
14 1445 is --

15 MR. BURSCH: So -- so that's there.
16 So -- so, with respect to intellectual, you
17 know, property, Congress was setting aside a
18 separate area of subject matter jurisdiction
19 and giving it separate rules. I mean, that's
20 why in all of these elsewhere things -- we're
21 talking about pure structure now, not text --
22 Congress cross-references 1446(b) to make it
23 clear that it doesn't apply, that you've got
24 literally different sets of rules depending on
25 subject matter and party.

1 So, as for the fraud exception, there
2 was a split among the lower federal courts
3 about whether fraud was an equitable reason
4 that courts could grant tolling. And so
5 Congress resolved that split, and what it did
6 is it made the fraud exception, and then, on
7 top of that, it made the -- you know, the
8 one-year limit.

9 But none of that provides the clearest
10 command that Congress intended to handcuff,
11 again, restrain, federal courts from exercising
12 their traditional equitable authority in all
13 other cases. That was simply solving a lower
14 court problem, Justice Sotomayor.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: I mean, I suppose the
18 question, Mr. Bursch, is whether these
19 provisions taken as a whole don't do the same
20 thing effectively as the Arellano provisions
21 do. And, obviously, they're not to that
22 extent. There are not very many statutes with,
23 like, 16 different exceptions.

24 So it's a little bit harder than
25 Arellano, but whether the same principle

1 basically applies, that there is enough
2 reference to equitable consideration in
3 different parts of the statute that it suggests
4 that Congress did not have in mind a -- the
5 thought that equity would underlie the whole
6 thing.

7 MR. BURSCH: So, Justice Kagan, in
8 Arellano, all 16 of those exceptions applied to
9 the same class of litigants. It wasn't like in
10 1446, where you have one rule, and then you
11 have a separate rule for criminal defendants
12 and a separate rule for members of -- of the
13 military.

14 So, on its face, that's one
15 difference. But the -- the -- the crux of the
16 Court's holding, again, is that textual hook
17 that we talked about, "unless specifically
18 provided otherwise in this chapter."

19 And there are a lot of things Congress
20 could have put in 1446 to make clear that they
21 were excluding equitable authority. They could
22 have used that language. They could have said
23 you have to remove within 30 days without
24 exception. They could have said this is the
25 list of exceptions and there are no others. It

1 could have said in 1447(c), we remand if
2 there's a lack of jurisdiction or if you fail
3 to remove within 30 days.

4 You know, Congress had a panoply of
5 options to give the clearest command, and it
6 didn't do that, and when that happens, we
7 assume that Congress means to trust courts.

8 And when we think about this
9 traditional equitable authority, this isn't
10 something that just developed in Irwin or the
11 Court's tolling cases. This goes all the way
12 back to before the statute was even passed.

13 You know, this Court's Porter decision
14 from 1946 says, unless a statute restricts a
15 court's equitable authority with a clear
16 command, then equitable principles apply with
17 full force. That was three years before
18 1446(b) was passed. Congress trusts courts to
19 get equity right, and this Court can trust
20 district courts to get equity right.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE KAVANAUGH: Why do you want to
24 be in federal court?

25 MR. BURSCH: That's a great question.

1 We have four reasons, two generally speaking
2 and two specific to this case.

3 The -- the two general, the first is I
4 can't do better than Paul Clement last month
5 quoting Daniel Webster in response to a similar
6 question. There's value in having your case
7 litigated in a forum that respects the federal
8 authority. We agree with that.

9 In addition, this case here is
10 important because federal courts are uniquely
11 qualified to decide federal common law foreign
12 affairs issues. That's just not something
13 state courts deal with very often.

14 The two specific reasons that we have
15 is that typically, there are no interlocutory
16 appeals from the state courts to this Court
17 except for, you know, very narrow exceptions.
18 And if the Michigan Supreme Court were to
19 uphold a preliminary injunction, a non-final
20 order that shut down the pipeline, you know,
21 took away half of the fuel for the Detroit
22 airport, resulted in no propane for heating for
23 the entire Upper Peninsula of Michigan and
24 two-thirds of the residents in the
25 Upper-Lower -- the Lower Peninsula, you know,

1 those are the types of things that we would
2 want a federal court to be able to weigh in,
3 and we wouldn't be able to do that at an
4 interlocutory stage.

5 And then, finally, because Enbridge
6 has its own affirmative lawsuit against the
7 governor in federal court and it's acknowledged
8 to have subject matter jurisdiction, as Judge
9 Neff talked about in -- in her orders, that
10 creates this race to judgment instead of a
11 single consolidated action, and that's one of
12 the reasons why she did not abuse her
13 discretion when she allowed the attorney
14 general's case to be removed.

15 JUSTICE KAVANAUGH: Are you concerned
16 that you would not get a fair shake in state
17 court?

18 MR. BURSCH: I'm not impugning --

19 JUSTICE KAVANAUGH: And if so, what's
20 the basis for that?

21 MR. BURSCH: Yeah. I'm not impugning
22 the state courts at all, but I -- I'm guessing
23 that the -- the Michigan state courts have not
24 dealt very often with the federal common law of
25 foreign affairs jurisdiction. That's something

1 that's uniquely situated to the federal system.
2 And then, you know, again, you have this race
3 to judgment problem.

4 JUSTICE KAVANAUGH: Doesn't come up
5 that often in regular federal district court
6 litigation either.

7 MR. BURSCH: Certainly, it does more
8 often than state court litigation. I'm -- I'm
9 guessing that from time to time at least
10 federal courts deal with issues involving the
11 United States and foreign sovereigns. And
12 that's one of the really unique things about
13 this case, which makes the exercise of equity
14 be -- equity especially crucial, as the -- the
15 district court recognized.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 I'm sorry, Justice Barrett?

20 JUSTICE BARRETT: No.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

23 JUSTICE JACKSON: So just to follow up
24 on Justice Kavanaugh's question, knowing the
25 various benefits of removal, as you've

1 articulated them, and maybe you said this
2 earlier and I missed it, why didn't you remove
3 at the same time as you removed the governor's
4 case?

5 MR. BURSCH: Because it wasn't clear
6 at the outset of the attorney general's case.
7 When the -- the governor filed her --

8 JUSTICE JACKSON: Wasn't clear that
9 she had a case or --

10 MR. BURSCH: Wasn't clear that there
11 was federal jurisdiction at that time. What
12 happened when the governor filed her case, that
13 was the first of two things that really changed
14 the landscape.

15 She terminated the easement, so now
16 we're trespassers in -- in her mind. She's
17 wrong about that, but that was her view. And,
18 second, she's asking for an immediate shutdown
19 order with her lawsuit.

20 And so, at that point, everybody's
21 attention shifts once we remove it away from
22 the state court and to the federal court.
23 We're proceeding with those things. The state
24 court case is put on ice. And then Canada
25 invokes its treaty, and that's what brings the

1 federal foreign affairs or the federal common
2 law of foreign affairs into the case.

3 JUSTICE JACKSON: When you say put on
4 ice, I'm sorry, was it stayed by the --

5 MR. BURSCH: It was stayed, yes --

6 JUSTICE JACKSON: It was stayed? All
7 right.

8 MR. BURSCH: -- with the consent of
9 both parties. Like, no one thought anything
10 was going to be happening in the state court
11 until the governor loses her remand motion, the
12 governor dismisses her lawsuit, and the
13 attorney general signals in a press conference
14 or a press release that they're going to go
15 back to the state court judge. And that's when
16 we acted within 15 days.

17 But we need the equity to -- to bridge
18 that gap between the 72 days between when
19 Canada invoked the treaty and when we finally
20 removed in order to -- to keep that case in
21 federal court.

22 JUSTICE JACKSON: Thank you.

23 MR. BURSCH: But -- but, again, you
24 don't need to resolve any of those issues in
25 this case. That's all appropriate for the

1 Sixth Circuit on remand.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Ms. Sherman.

6 ORAL ARGUMENT OF ANN M. SHERMAN

7 ON BEHALF OF THE RESPONDENT

8 MS. SHERMAN: Mr. Chief Justice, and
9 may it please the Court:

10 Having missed Congress's express
11 mandatory 30-day removal deadline by over two
12 years, Enbridge seeks an atextual escape hatch.
13 This Court should reject that effort for two
14 reasons.

15 First, the presumption of equitable
16 tolling does not apply. The presumption is
17 justified by a historical tradition specific to
18 statutes of limitations which set a deadline by
19 which legal remedies must be pursued or are
20 lost.

21 The history and function of the
22 removal deadline are different. The deadline
23 serves not to protect defendants from stale
24 claims but to officially settle which of two
25 courts will decide the merits of a case. This

1 allocation of judicial power is a task for
2 Congress, not courts, which is why the
3 traditional practice in the removal context has
4 always been strict enforcement, not equitable
5 tolling.

6 Second, even assuming the presumption
7 applies, it is overcome here. Congress created
8 at least six explicit exceptions to the 30-day
9 deadline, many of which already reflect
10 equitable concerns and some of which
11 specifically authorize courts to extend the
12 deadline for cause.

13 This comprehensive scheme shows that
14 Congress did not authorize courts to create
15 their own exceptions. Enforcing the rules that
16 Congress has set honors its choice to
17 prioritize efficiency and does not have a harsh
18 consequence of depriving defendants of their
19 day in court.

20 All told, Enbridge's approach
21 disregards the statute's text, structure, and
22 history and would inject messy, fact-bound
23 questions into a forum selection process that
24 Congress intended to be short and predictable.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: What do you see as
2 the difference between the removal time limits
3 and the statute of limitations?

4 MS. SHERMAN: There's a -- there's a
5 huge difference. The -- this Court in Lozano
6 talked about the functional test for statute of
7 limitations. The removal deadline doesn't meet
8 any aspect of that test. It's not establishing
9 the period of time with -- with which a
10 claimant must bring a claim. It doesn't foster
11 the elimination of stale claims.

12 It doesn't provide any certainty about
13 a plain -- plaintiff's opportunity to recovery,
14 a defendant's potential liabilities. And when
15 we talk about a statute of limitations in
16 the -- and -- and a presumption of statute of
17 limitations, the reason it's important there is
18 because we are trying to get at what Congress
19 intended.

20 And in the context of statute of
21 limitations, equity is sometimes important
22 because the result of missing a statute of
23 limitations is that the courthouse door closes
24 for that litigant.

25 That is not true here. The courthouse

1 door doesn't close. One of them might close,
2 but there is another courthouse door open for
3 both litigants to potentially have full
4 recovery on claims. And -- and so --

5 JUSTICE THOMAS: So how do you address
6 the argument of Petitioner with respect to this
7 being a functional statute of limitations in
8 this case?

9 MS. SHERMAN: It -- it's not a -- it's
10 not a functional statute of limitations in this
11 case at all. There is no -- Enbridge could
12 recover in state court just as it could recover
13 in -- in federal court.

14 And the -- the presumption of statute
15 of limitations doesn't do any work here because
16 the whole tradition of equitable tolling for
17 statute of limitations is a different tradition
18 than the unique tradition here for the removal
19 process.

20 The removal deadline, the whole
21 removal process is a creature of statute. It
22 is not a creature of common law. And only
23 Congress can set limits on when a case is going
24 to be taken from one sovereign, the state
25 court, and removed to another sovereign, the

1 federal court.

2 JUSTICE ALITO: Do you think there are
3 any grounds on which equity would allow a
4 district court to excuse non-compliance with a
5 30-day removal deadline other than the
6 exceptions that are set out in the statute?

7 Are there any equitable -- are there
8 any non-statutory equitable exceptions to the
9 30-day rule?

10 MS. SHERMAN: The -- it's -- it's
11 possible that there could be some estoppel.
12 There cannot be equitable tolling. There --
13 it's possible there could be estoppel, but that
14 isn't an issue here. It's not an issue that
15 Enbridge has raised and for good reason.

16 JUSTICE ALITO: Well, if -- if
17 estoppel is -- I mean, if estoppel would permit
18 removal after the 30-day period on equitable
19 grounds, I mean, that does seem to say that we
20 have to look beyond the statutory text and see
21 whether what is alleged here might possibly
22 qualify.

23 MS. SHERMAN: This Court has said that
24 equitable tolling and estoppel are distinct
25 doctrines. It said that in Beggerly. And this

1 Court has typically deferred, as it did in
2 Arellano, the question of estoppel because
3 it -- you know, especially if it's not raised
4 in a case. It was not raised here. It hasn't
5 been briefed before this Court.

6 And it's hard to see that equitable
7 estoppel would --

8 JUSTICE ALITO: No, I'm not suggesting
9 that this is a case in which equitable estoppel
10 would excuse non-compliance. I'm just asking
11 whether you have to agree, if you recognize
12 that equitable estoppel might excuse the late
13 filing of removal, that equity might possibly
14 extend further to other comparably egregious
15 situations.

16 MS. SHERMAN: I'm not suggesting that
17 equitable estoppel would apply. I don't think
18 it would apply to this removal statute. And
19 the reason I say that, I just bring it up as
20 it's not something the Court has considered.
21 It's a separate question.

22 I don't think it would apply here, and
23 I say that because there is so much -- there
24 are so many equitable considerations that are
25 already built into this statute that this Court

1 might well decide if -- if estoppel was briefed
2 and before this Court that -- that it didn't
3 apply, that -- that --

4 JUSTICE ALITO: All right. Well,
5 thank you.

6 Let me ask you one other -- one other
7 question at least for now, and that is I would
8 be interested in your response to the arguments
9 that are made by some of the amici about the
10 consequences for U.S./Canadian relations if the
11 state court orders that operation of the -- of
12 the pipeline be terminated.

13 Those are spelled out in the West
14 Virginia brief. They're pretty severe. And
15 Mr. Bursch made the point that if this proceeds
16 in state court and the state court issues a
17 preliminary injunction against continued
18 operation of the pipeline, it could be a long
19 time before the issue could be -- this issue
20 involving treaty rights, which is a federal
21 question, could be reviewed here.

22 So what would you -- you don't really
23 address that. So what would you say to that?

24 MS. SHERMAN: When Congress wants a --
25 a kind of case or a kind of issue to be decided

1 in federal court, it mandates exclusive
2 jurisdiction. And, otherwise, state courts
3 have concurrent jurisdiction. They have
4 reserve power under the Constitution to
5 adjudicate -- adjudicate cases in their own
6 courts.

7 This is a state official, state claims
8 filed in a state court. Congress, when they
9 set up the renew -- the removal process --

10 JUSTICE ALITO: So the answer is it's
11 just too bad? And maybe that's the answer.
12 Sometimes the law produces consequences that
13 are not desirable. But what we're told -- this
14 is in the West Virginia brief; they're quoting
15 a Canadian source -- shutting down Line 5 would
16 result in a massive shortage of gas, diesel,
17 and jet fuel in both Ontario and Quebec, not to
18 mention end thousands of Canadian jobs. A
19 special committee of the Canadian Parliament
20 concluded that Line 5's shutdown could reduce
21 safety, create shortages of various energy
22 products on both sides of the border, et
23 cetera, et cetera.

24 Just --

25 MS. SHERMAN: The state's position is

1 that these are state law claims. None of those
2 considerations are at play here because we
3 trust state courts to adjudicate issues to even
4 federal questions. They've been doing that
5 since the founding.

6 And we trust them to do that with this
7 Court's backstop. If something goes really
8 awry in a state court and it's an important
9 matter of -- of federal treaty, it hasn't been
10 given exclusive jurisdiction in the district
11 court, this Court can -- can review that and
12 can -- can fix that.

13 But we trust state courts to do -- to
14 do their job and to have concurrent
15 jurisdiction. And one of the reasons this
16 is -- there has been a tradition of strict
17 enforcement of the removal deadline here is out
18 of respect for state courts.

19 And this Court had said over and over
20 in a long line of cases from *Babbitt* versus
21 *Clark* on that when the deadline is missed,
22 remand is necessary. The -- and this Court has
23 said that strict procedures -- the statutory
24 procedures for removal are to be strictly
25 construed.

1 JUSTICE SOTOMAYOR: Counsel, the state
2 court action here has been stayed for most of
3 its existence. We now have a separate federal
4 action. In that case, the district court
5 recently granted summary judgment to Enbridge,
6 finding that the attempt to revoke the easement
7 was preempted by federal law, correct?

8 MS. SHERMAN: Yes.

9 JUSTICE SOTOMAYOR: So, if we affirm
10 the Sixth Circuit, that -- that will result in
11 litigation in both state and federal court,
12 correct?

13 MS. SHERMAN: The -- the way that
14 stands now is that there has been an adverse
15 judgment in a -- in a federal district court,
16 including rejection --

17 JUSTICE SOTOMAYOR: If we reverse the
18 Sixth Circuit. I misspoke.

19 MS. SHERMAN: Yes.

20 JUSTICE SOTOMAYOR: Then there would
21 be two actions if we --

22 MS. SHERMAN: Yeah. Yes, the governor
23 has filed --

24 JUSTICE SOTOMAYOR: So wouldn't it
25 avoid waste to have these two actions proceed

1 together in the same court?

2 MS. SHERMAN: The -- the attorney
3 general and the governor have always been
4 concerned about these two -- about cases being
5 not on the same track. The attorney general in
6 another --

7 JUSTICE SOTOMAYOR: Right. So assume
8 you win here. Could you represent or are you
9 willing to represent that, on remand, you will
10 ask the state court to continue to stay this
11 action until the federal action finishes?

12 MS. SHERMAN: There has already been a
13 stay of --

14 JUSTICE SOTOMAYOR: I've asked you a
15 very different question. If you were to win
16 here, are you willing to commit that you will
17 ask the state court to continue its stay
18 pending resolution of the federal action?

19 MS. SHERMAN: I haven't talked to my
20 client to be able to confirm that, but that's
21 certainly something that we can talk about
22 strategically because --

23 JUSTICE SOTOMAYOR: And if the
24 strategic is you want the state court to beat
25 out the federal court, should we care about

1 that? That was --

2 MS. SHERMAN: She --

3 JUSTICE SOTOMAYOR: -- Justice Alito's
4 question.

5 MS. SHERMAN: The attorney general
6 does care about staying in state court. She
7 believes these are state --

8 JUSTICE SOTOMAYOR: Yeah, but didn't
9 act very expeditiously in state court.

10 MS. SHERMAN: It would be a strategic
11 decision. At this point, there has been a
12 second stay in order to see what the Sixth
13 Circuit is going to decide. And then --

14 JUSTICE SOTOMAYOR: One final
15 question. You give us two grounds to reverse.
16 The one is that this is not a statute of
17 limitations, and the other is that even if it
18 is, the presumption has been overcome.

19 If you were to win, which is the
20 easiest and most narrow ground to win?

21 MS. SHERMAN: I think the easiest for
22 this Court is to say -- not to deal with the
23 statute of limitations and the presumption
24 issue because we think that the text and the
25 structure and the history here absolutely mean

1 that congressional intent would say that even
2 if there was a presumption, it would be
3 rebutted. And --

4 JUSTICE SOTOMAYOR: Is there any
5 way -- some of them are clearer on how to
6 distinguish them. But he mentioned --
7 Bursch -- Mr. Bursch mentioned four cases that
8 talk about losing a procedural right to proceed
9 that we -- Lozano was one of them and there
10 were three others that he mentioned.

11 Can you distinguish each of those
12 cases?

13 MS. SHERMAN: I -- I think one of them
14 was Lozano.

15 JUSTICE SOTOMAYOR: Mm-hmm.

16 MS. SHERMAN: Definitely talked about
17 what is or isn't a statute of limitations.
18 There was no statute of limitations there
19 because there was the opportunity for recovery,
20 albeit adjudicated differently.

21 I believe another one of the cases was
22 Young, and, there, the Court said it was a
23 statute of limitations. It was albeit a
24 limited one, but the rights that were issued --
25 at issue in Young were priority and

1 non-dischargeability, and those are procedural
2 rights that -- that were connected to a
3 recovery and would have been lost.

4 And the Court did recognize the reason
5 it was limited is because there were some
6 equitable abilities to recover. Nevertheless,
7 that -- those very, very important rights for
8 the -- the United States would have been lost.
9 And --

10 JUSTICE SOTOMAYOR: How about the tax
11 case?

12 MS. SHERMAN: Boechler. Boechler was
13 a -- a statute of limitations. There was just
14 one exception. Boechler -- Boechler was also
15 a -- a case that was steeped in equity. It was
16 about the collection due process hearings in --
17 for state court for a particular kind of case
18 where the -- the tax court was going to be
19 levying property. And that really mattered
20 there because that was a context that was very
21 friendly to the -- to the lay filer, but it
22 involved --

23 JUSTICE SOTOMAYOR: Thank you,
24 counsel.

25 JUSTICE KAGAN: Haven't, though,

1 General, we been pretty generous in terms of
2 what we call functionally a statute of
3 limitations? I mean, take the Boechler case
4 that you ended on, which was just an appeals
5 deadline. You know, I bet, if you put 10
6 lawyers in a room and said is an appeals
7 deadline a statute of limitations, they would
8 kind of stare at you funny, you know. What it
9 is, it's a deadline.

10 I mean, a statute of limitations is
11 also a deadline, but we don't typically think
12 of every deadline, like an appeals deadline, as
13 a statute of limitations. But we've been
14 willing to call it that just because it's a
15 deadline, and if you don't meet the deadline,
16 consequential things matter -- consequential
17 things happen.

18 And -- and -- and so too here. This
19 is a deadline, and if you don't meet the
20 deadline, consequential things happen. Now, in
21 this case, it's the loss of a forum rather than
22 the loss of a claim. But I guess, when we're
23 being quite as generous and quite as
24 functional, if you will, as we have been in
25 this area, it -- it doesn't seem to me obvious

1 why we shouldn't say that this isn't
2 functionally a statute of limitations too.

3 MS. SHERMAN: It's very different
4 because, although there might be consequences
5 and there might be a right involved, the Court
6 in Young said it had to be a substantive right,
7 and it defines a subset of claims eligible for
8 certain remedies.

9 And, here, when you're talking -- it's
10 all about remedy and whether you're going to
11 lose the remedy. And the reason statute of
12 limitations doesn't apply here is because there
13 isn't the -- there isn't a harsh consequence.
14 The reason statutes of limitation apply to
15 cases is because -- and why there's equitable
16 tolling is because there are very harsh
17 consequences. Somebody's going to lose out
18 completely on their ability to bring a case.

19 That's not true here. They're going
20 to get one forum or another, and maybe they're
21 not going to get their preferred forum, but
22 they're going to get a forum to litigate their
23 case. And that would -- that's the biggest
24 thing that separates this from a statute of
25 limitations.

1 And this Court has never applied
2 statute of limitations beyond -- the
3 presumption of equitable tolling beyond statute
4 of limitations, and I think that's one of the
5 reasons why. And if the Court was thinking of
6 expanding that at all, it wouldn't be here. It
7 shouldn't be here, where there's a whole
8 distinct tradition of strict enforcement.

9 We cite cases on pages 50 to 51 of our
10 brief starting from Babbitt versus Clark in
11 1880 onward where this Court has strictly
12 enforced the deadline, and there's a reason for
13 that.

14 JUSTICE JACKSON: Counsel, can I ask
15 you about that context? Because I actually
16 kind of hear you making a slightly different
17 argument, and it -- it -- it is yes, the Court
18 has said that when these rules function as a
19 statute of limitations, the presumption
20 applies.

21 But, based on your original analysis
22 or your original statement and what you say in
23 the brief, I almost hear you suggesting that
24 whether or not this functions as a statute of
25 limitations, the presumption shouldn't apply

1 because this is the removal context. And you
2 say in your brief, the federal removal statute
3 provides a comprehensive scheme that governs
4 the allocation of judicial power in this way,
5 that Congress has made this decision.

6 And that seems to me almost to be like
7 a different or separate argument from whether
8 or not this functions as a statute of
9 limitations.

10 MS. SHERMAN: It's -- it's just we --
11 we've set forth a number of arguments for why
12 this doesn't function as a statute of
13 limitations. One of them is -- is history and
14 purpose. And, certainly, this doesn't function
15 as a statute of limitations because, if you
16 look at sort of there not being a historical
17 tradition that there is for statute of
18 limitations, the separate historical tradition
19 here is about strict construction, and,
20 respectfully --

21 JUSTICE JACKSON: But do you lose if
22 we disagree with you on the functioning of the
23 statute -- that's what I'm just -- lose the
24 presumption point?

25 My only point is I wonder if you have

1 to be right about whether or not this functions
2 as a statute of limitations in order to make
3 your presumption point, that if you lose on
4 that, then we do have to presume that Congress
5 wanted to -- courts to retain their equitable
6 authority, as your friend on the other side
7 says, in this area, and so then we jump to, you
8 know, has that been rebutted? Is there a clear
9 command here?

10 But I kind of hear you suggesting --
11 and I don't know if this is right or wrong, I
12 just want -- I just want to put it out there --
13 I kind of hear you suggesting that in the
14 removal context, even if we look at a statute
15 that relates to removal and we say, boy, this
16 kind of functions like a statute of
17 limitations, there are good reasons to believe
18 why we shouldn't presume that nonetheless
19 Congress intended for this to be an area where
20 courts retain their equitable authority.

21 MS. SHERMAN: Yeah. No, I would say
22 the reverse is true.

23 JUSTICE JACKSON: Okay. Tell me.

24 MS. SHERMAN: Yes. If -- I would say
25 that this whole context of taking --

1 transferring jurisdiction from one sovereign to
2 another counsels for there -- there not to be
3 equitable tolling.

4 JUSTICE JACKSON: That's what I'm
5 saying.

6 MS. SHERMAN: Yes. To do --

7 JUSTICE JACKSON: What I'm saying is
8 regardless --

9 MS. SHERMAN: Yes.

10 JUSTICE JACKSON: We look at this
11 statute and we might go, oh, yes, this looks
12 like the rights are being transferred.

13 MS. SHERMAN: Yeah.

14 JUSTICE JACKSON: It looks like a
15 statute of limitations.

16 But does that necessarily mean that we
17 should presume that Congress intended for
18 equitable tolling to arise in this situation?
19 And you're saying, regardless of how it
20 functions in this situation, we should not
21 presume that Congress wanted courts to have
22 equitable authority because this is a removal
23 context and that's a special kind of thing.

24 MS. SHERMAN: Yeah. Even if this
25 Court thought it was a statute of limitations,

1 in this context, that would butt up against
2 strict construction canons.

3 I also would disagree with my -- my --
4 my -- my friend, opposing counsel, that this
5 test is a clearest command test. There is not
6 a clear statement test here. The test is the
7 test that this Court has articulated in
8 Arellano, and that is we're looking at
9 congressional intent.

10 Is there reason to believe that
11 Congress didn't want equitable tolling? And
12 everything here from the text, the structure,
13 the history, and the purpose strongly suggests
14 that Congress would not have wanted tolling.

15 We haven't talked a lot today about
16 the -- the exceptions, but when you look at
17 the -- the clear mandatory language, "shall
18 file in 30 days," and that's supported by a
19 very comprehensive scheme that has at least six
20 exceptions, and those exceptions are
21 interrelated, they are -- the default deadline
22 of 30 days is repeated multiple times, similar
23 to in Brockamp and similar to in -- in
24 Arellano, you have these many exceptions that
25 are taking a situation outside of the default

1 rule.

2 JUSTICE KAVANAUGH: Can I ask a
3 question about state courts? I certainly
4 appreciate and agree with your respect for
5 state courts. Is there some particular reason
6 you want to be in state court in this case?

7 MS. SHERMAN: Yes, because this is a
8 state official, state law claims, and those
9 state law claims have to do with -- the primary
10 claim in the attorney general's case is public
11 trust and whether the -- the easement is
12 violating a public trust doctrine.

13 These are state lands and state bottom
14 lands in the Straits of Mackinac. And those
15 are reasons why the attorney general wants this
16 in state court.

17 Congress has given the parties sort of
18 the choice of forum. And they gave plaintiff
19 the first choice of forum. She was the
20 plaintiff. She chose the state forum.

21 Congress also gives defendants the
22 opportunity to choose a federal forum. And if
23 this had been a case where Enbridge looked at
24 it and said: Boy, there's a lot of really, you
25 know, important issues here, we don't think

1 this is state law, and we ought to have this in
2 federal court, they should have removed timely.
3 They missed every opportunity to move -- remove
4 timely.

5 JUSTICE KAVANAUGH: Can you respond to
6 the point that your opposing counsel made about
7 foreign affairs issues or the foreign -- you
8 heard that.

9 MS. SHERMAN: Yes. The foreign -- the
10 whole foreign affairs area is not a -- is not
11 an area where Congress said federal courts have
12 exclusive jurisdiction. So, again, we trust
13 state courts to decide big, important federal
14 cases.

15 And even if this turns out to be not a
16 case about state law claims but somehow, you
17 know, a case about a treaty, we trust the state
18 court to do it with this Court as a backdrop.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Thomas, anything further?

22 Justice Alito?

23 JUSTICE ALITO: Did the attorney
24 general represent the governor in the
25 governor's suit?

1 MS. SHERMAN: The Department of
2 Attorney General represents the governor in the
3 governor's suit, which we do often in that, you
4 know, sometimes the attorney general will take
5 one position and somebody in Department of
6 Attorney General will represent a separate side
7 of an issue.

8 JUSTICE ALITO: Why was a separate
9 suit brought? Why didn't you simply move -- if
10 there were additional claims, why didn't you
11 simply move to add those claims to the case
12 that was already in state court?

13 MS. SHERMAN: The second suit, the
14 suit by the governor, was brought 14 months
15 after the attorney general's suit. And
16 although there are some overlapping issues,
17 the -- the -- the biggest distinction with the
18 governor's suit is it was based on a new
19 circumstance that occurred then, which was that
20 the governor issued a notice and revocation of
21 the easement over state land.

22 And, at that point, 14 months had
23 passed. Enbridge had already litigated this
24 case in state court for -- for over a year.
25 And it was a -- a prudent decision to say we're

1 going to file -- the governor is going to file
2 this in state court, assuming that it would be
3 consolidated with the attorney general's case
4 and -- and, frankly, because there were new
5 parties, new claims.

6 JUSTICE ALITO: Assuming that it
7 would -- assuming that it would be
8 consolidated. Was it ever consolidated?

9 MS. SHERMAN: No, they were -- because
10 Enbridge removed the governor's case timely.
11 So it -- it didn't stay in state court very
12 long. And to your -- to an earlier question,
13 Enbridge could have removed during the 30-day
14 period for the same reasons that they later
15 removed the governor's case. They also could
16 have removed this case when they removed the
17 governor's case.

18 And they could have -- whether that
19 would have been successful or not would have
20 depended on whether a court thought that they
21 could come under the (b)(3) exception for
22 initial non-removability.

23 And then they had a third potential on
24 October 4th, 2021, when Canada invoked the
25 dispute resolution, but they -- but they didn't

1 take any of those. And as the Sixth Circuit
2 held in this case, they had -- they missed
3 every opportunity. They were 850 days late.
4 They missed every potential opportunity. And
5 they -- that is now law of the case because
6 Enbridge has not sought to have this Court
7 review that -- that part of the Sixth Circuit's
8 decision.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor?

11 Justice Kagan?

12 Justice Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 Justice Jackson?

16 Thank you, counsel.

17 MS. SHERMAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Rebuttal,
19 Mr. Bursch?

20 REBUTTAL ARGUMENT OF JOHN J. BURSCH

21 ON BEHALF OF THE PETITIONERS

22 MR. BURSCH: Thank you, Mr. Chief
23 Justice.

24 First, I just want to level-set the
25 ground here again, and then I'm going to talk

1 about some concessions that we just heard that
2 maybe make this opinion even shorter than the
3 10 pages I suggested.

4 To level-set, why do we have this
5 presumption? Wong said it's likely to be a
6 realistic assessment of legislative intent, as
7 well as a practically useful rule of
8 interpretation. Why is that? Because going
9 all the way back to the beginning of the
10 Republic, Justice Scalia's dissent in -- in
11 *McQuiggin* says that we've recognized equitable
12 tolling in statute of limitations periods going
13 all the way back to the colonial legislatures.
14 So we don't need an atextual escape hatch.

15 They need to explain why there is a
16 clearest command that Congress intended to take
17 away this Court and the lower courts'
18 traditional equitable authority.

19 And -- and that clearest command
20 requirement isn't just from *Holland*. That goes
21 back all the way to *Porter* at least in the --
22 1943 or '46, three years before 1446(b) was
23 adopted. So this isn't a new standard that
24 suddenly started getting applied to statutes of
25 limitations in the modern day. It's been the

1 backdrop forever. So that's number one.

2 So, number two, how about this
3 presumption? And here's where the first two
4 concessions come in. Justice Alito, you were
5 asking my friend whether estoppel would apply.
6 All lower courts recognize that estoppel and
7 waiver apply in this context.

8 And this Court said in Zipes -- that
9 was a unanimous Justice White opinion -- that
10 those two equitable doctrines and the doctrine
11 of tolling travel together. And so we would
12 expect that if someone could lose their right
13 to remove because they did too much stuff in
14 the trial -- trial court, in the state court,
15 or someone could lose their right to resist
16 removal by failing to file a timely motion to
17 remand in the federal court, that there would
18 also be equitable tolling. So that -- that's a
19 huge problem for them.

20 And then, second concession, Justice
21 Sotomayor, when you were asking about whether
22 the presumption would apply, is this a statute
23 of limitations, and she was talking about
24 Young, and she admitted that in Young, we were
25 talking about procedural rights, not

1 substantive rights. When you're talking about
2 something like non-dischargeability and
3 priority, those are simply mechanisms to get
4 you to the final judgment. The IRS did not
5 lose its claim to go and get back taxes. It
6 simply had a different burden that it had to
7 satisfy.

8 And the same thing is true here. And
9 so that's why, Justice Kagan, you're completely
10 right that this seems obvious to fit within
11 those types of statutes because, whether you're
12 talking about dischargeability and priority
13 mechanisms in *Young* or you're talking about
14 appeal deadlines in cases like *Nutraceutical* or
15 in -- in *Boechler*, this Court has not confined
16 the application of the presumption only to
17 those cases where you lose a cause of action.
18 That -- that's happened over and over and over
19 again.

20 Third point I want to make is about
21 this strict construction because of the
22 federalism. I mentioned this briefly. But the
23 two cases that they most rely on, *Syngenta* and
24 *Shamrock Oil*, those both strictly construed
25 jurisdiction. And, of course, we have to

1 strictly construe federal subject matter
2 jurisdiction when you're talking about state
3 courts' interests.

4 In the first case, it was whether the
5 All Writs Act would provide subject matter
6 jurisdiction to remove. The Court said no.
7 Shamrock Oil, it was whether the amount alleged
8 in a counterclaim could count towards the
9 diversity limit, and the Court said no.

10 But, when you're talking about mere
11 procedural things, there is no strict
12 construction, and there is no construction of
13 this statute that provides that clear rebuttal
14 of the general equitable authority that courts
15 have.

16 Justice Kavanaugh, you're raising
17 exactly the practical points that we're
18 concerned about here. Yes, they brought
19 state -- state court claims. But what we're
20 talking about is an international pipeline that
21 not only impacts the relationship between the
22 United States and Canada but literally millions
23 of people within and with outside Michigan.
24 This is the paradigm case that belongs in
25 federal court.

1 It was a much different kind of
2 federal interest but one that I think was
3 significant in the Loftin case, which is the
4 Eleventh Circuit decision that created the
5 equitable tolling doctrine for removal statutes
6 in the Eleventh Circuit 40 years ago. There,
7 the Navy had been subjected to a garnishment,
8 final judgment, in a state court that exceeded
9 the federal statutory limit of the waiver of
10 sovereign immunity.

11 And when they removed late, there was
12 no excuse for it. The Navy just blew it. And
13 yet the Eleventh Circuit said this is the kind
14 of case that belongs in federal court. We're
15 talking about an invalid judgment entered
16 against a branch of the military. So the fact
17 that the -- the federal government was not
18 diligent and didn't have any obstacles to
19 filing its removal action in time did not stop
20 the court from exercising its equity and
21 putting that case where it belonged, in
22 federal -- in front of federal judges. You
23 should do that here.

24 So, finally, as to the merits of
25 whether equity should apply here, we could go

1 very deep into those. We could have lots of
2 briefing on that. But the attorney general did
3 not raise that issue in the Sixth Circuit, as
4 we pointed out in our brief. The Sixth Circuit
5 did not decide it. And it's not part of the
6 question presented. You should simply remand
7 and allow that to be worked out.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 The case is submitted.

12 (Whereupon, at 11:12 a.m., the case
13 was submitted.)

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