

No. 24-783

IN THE
Supreme Court of the United States

ENBRIDGE ENERGY, LP, ET AL.,
Petitioners,

v.

DANA NESSEL, ATTORNEY GENERAL OF MICHIGAN, ON
BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

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

**BRIEF OF TRIBAL NATIONS AS AMICI
CURIAE IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. Enbridge Requests An Open-Ended Exception To Congress’s Narrow Removal Period.....	8
A. Section 1446(b)(1)’s Deadline Is Strict For A Reason, And The <i>Irwin</i> Presumption Is Inapposite	8
B. Enbridge Asks For A Standardless Exception, Not Equitable Tolling.....	10
II. Enbridge Has Not Pursued Its Rights Diligently And Nothing Prevented It From Seeking Removal Earlier.....	13
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Arellano v. McDonough</i> , 598 U.S. 1 (2023).....	10, 12
<i>Bechuck v. Home Depot U.S.A., Inc.</i> , 814 F.3d 287 (5th Cir. 2016)	15
<i>Holland v. Florida</i> , 560 U.S. 631 (2010).....	7, 10, 13
<i>Irwin v. Department of Veterans Affairs</i> , 498 U.S. 89 (1990).....	6, 9, 10
<i>Loftin v. Rush</i> , 767 F.2d 800 (11th Cir. 1985).....	12
<i>Manrique v. United States</i> , 581 U.S. 116 (2017).....	8
<i>Menominee Indian Tribe of Wisconsin v. United States</i> , 577 U.S. 250 (2016).....	10
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning</i> , 578 U.S. 374 (2016).....	9
<i>Nutraceutical Corp. v. Lambert</i> , 586 U.S. 188 (2019).....	8, 10, 13

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Pullman Palace Car Co. v. Speck</i> , 113 U.S. 84 (1885).....	9, 18
<i>Royal Canin U.S.A., Inc. v. Wullschleger</i> , 604 U.S. 22 (2025).....	15
<i>Shamrock Oil & Gas Corp. v. Sheets</i> , 313 U.S. 100 (1941).....	9
<i>Syngenta Crop Prot., Inc. v. Henson</i> , 537 U.S. 28 (2002).....	9
<i>United States v. Michigan</i> , 471 F. Supp. 192 (W.D. Mich. 1979)	2
<i>Wilson v. City of San Jose</i> , 111 F.3d 688 (9th Cir. 1997)	15
Statutes	
28 U.S.C. § 1446(b)(1)	6, 8
28 U.S.C. § 1446(b)(3)	17-19
Other Authorities	
Chippewa Ottawa Res. Auth., <i>Resolution 01-28-16 A: Support for Removal or Decommissioning of Enbridge Line 5 in Mackinac Straits</i> (Jan. 28, 2016), https://perma.cc/5LKG-UZ9N	5
Great Lakes Commission, <i>About the Lakes</i> , https://perma.cc/5N9K-J4BP	5

TABLE OF AUTHORITIES—Continued

	Page(s)
Mich. Tech. Univ., <i>Independent Risk Analysis for the Straits Pipelines, Final Report</i> (Sept. 15, 2018), https://perma.cc/KK9M-H63R	5
Nat'l Transp. Safety Bd., <i>Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan, July 25, 2010</i> (July 10, 2012), https://perma.cc/59MZ-TQSP	4
Nottawaseppi Huron Band of Potawatomi, <i>The Great Stain: 10 Years After the Kalamazoo River Oil Spill</i> , https://perma.cc/86N4-YBFN	4
Ratified Indian Treaty 201: Ottawa and Chippewa, March 28, 1836, 7 Stat. 491	2
U.S. Dep't of Justice, <i>United States, Enbridge Reach \$177 Million Settlement After 2010 Oil Spills in Michigan and Illinois</i> (July 20, 2016), https://perma.cc/S6NA-2QNS	4
U.S. Fish & Wildlife Serv., Nottawaseppi Huron Band of the Potawatomi Tribe & Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, <i>Final Damage Assessment and Restoration Plan/Environmental Assessment for the July 25-26, 2010, Enbridge Line 6B Oil Discharges near Marshall, MI</i> (Oct. 2015), https://perma.cc/H8LL-K9XP	3
<i>Wright & Miller's Federal Practice & Procedure</i> § 2363 (4th. ed.) (Sept. 2025 update)	14

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of ten federally recognized Tribal Nations in the Great Lakes region who have long supported the State of Michigan’s suit against petitioner Enbridge Energy, LP, in which the State has sought to enjoin further operation of the two Line 5 pipelines that run along the Straits of Mackinac (the “Straits Pipelines”).¹ Tribal Amici include Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Keweenaw Bay Indian Community, Lac Vieux Desert Band of Lake Superior Chippewa Indians, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Nottawaseppi Huron Band of the Potawatomi Tribe (NHBP), Pokagon Band of Potawatomi, and the Sault Ste. Marie Tribe of Chippewa Indians.

All of the Tribal Amici are Anishinaabe, a cultural and linguistic group comprising the Ottawa, Chippewa, and Potawatomi peoples. The Anishinaabe have inhabited what is today the State of Michigan since time immemorial. The Anishinaabe way of life relies on the Great Lakes ecosystem and the Straits of Mackinac in particular. The Anishinaabe creation story describes how the Great Turtle emerged from the Straits to save humanity from a catastrophic flood. The Turtle transformed into the North

¹ No counsel for a party authored this brief in whole or in part, and no such counsel, party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

American continent—what the Anishinaabe call Turtle Island—after the humble muskrat placed on the Turtle’s back a fistful of dirt that he retrieved from the Straits’ bottomlands. The Anishinaabe accordingly carry out special ceremonies and traditions associated with the Straits and maintain a deep commitment to preserving this traditional cultural landscape for the next seven generations and beyond.

In addition to this cultural and spiritual heritage, five Tribal Amici—Bay Mills, Grand Traverse Band, Little Traverse Bay Bands, Little River Band, and Sault Tribe—hold treaty rights that they exercise in and around the Straits of Mackinac. In 1836—one year before Michigan’s statehood—certain Anishinaabe Tribes ceded vast acres of land and water to the United States in the Ratified Indian Treaty 201: Ottawa and Chippewa, March 28, 1836, 7 Stat. 491 (1836 Treaty). The signatory Tribal Nations preserved their rights to hunt, fish, gather, and exercise all “the usual privileges of occupancy” in the ceded territory. *See United States v. Michigan*, 471 F. Supp. 192, 235 (W.D. Mich. 1979), *aff’d as modified*, 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981); *see id.* at 225-38.

The Straits of Mackinac lie within the heartland of the territory on which those signatory Tribal Nations reserved their usufructuary rights in the 1836 Treaty.



For centuries, citizens of those Tribal Nations have sustainably harvested fish in northern Lake Michigan, Lake Huron, and the Straits of Mackinac, among other reserved uses. Today, the Straits remain among the most important and productive of all of the ceded waters for Tribal citizens, who continue to fish these waters for subsistence and income.

NHBP also has unique insight into the dangers of the Line 5 Straits Pipelines because of its previous experience with a catastrophic Enbridge oil spill.² In

² See U.S. Fish & Wildlife Serv., Nottawaseppi Huron Band of the Potawatomi Tribe & Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, *Final Damage Assessment and Restoration Plan/Environmental Assessment for the July 25-26, 2010, Enbridge Line 6B Oil Discharges near Marshall, MI* (Oct. 2015), <https://perma.cc/H8LL-K9XP>.

2010, Enbridge’s Line 6B pipeline—which was installed more recently than Line 5—spilled 840,000 gallons of crude oil near Marshall, Michigan, adjacent to NHBP’s land.³ The Line 6B disaster destroyed Talmadge Creek, a 35-mile span of the Kalamazoo River, and adjoining flood plains.⁴

Enbridge’s oil spill caused over one billion dollars in cleanup costs over several years.⁵ On the disaster’s ten-year anniversary, NHBP observed that the area’s plant and animal diversity has been demonstrably reduced and the spill’s effects on the ecosystem and long-term human health are still not fully understood.⁶ “Certainly,” the Tribe stated, “the spirit of the people residing within the watershed and beyond has been permanently stained.”⁷

A spill in the Straits of Mackinac could visit even worse destruction upon the natural and cultural resources that are central to Tribal Amici’s ways of life. The Enbridge Line 6B spill affected 35 miles of shoreline of an inland watershed and resulted in the costliest inland oil spill in American history. By

³ See Nat’l Transp. Safety Bd., *Enbridge Incorporated Hazardous Liquid Pipeline Rupture and Release, Marshall, Michigan, July 25, 2010* (July 10, 2012), <https://perma.cc/59MZ-TQSP>.

⁴ See U.S. Dep’t of Justice, *United States, Enbridge Reach \$177 Million Settlement After 2010 Oil Spills in Michigan and Illinois* (July 20, 2016), <https://perma.cc/S6NA-2QNS>.

⁵ *Id.*

⁶ Nottawaseppi Huron Band of Potawatomi, *The Great Stain: 10 Years After the Kalamazoo River Oil Spill*, <https://perma.cc/86N4-YBFN>.

⁷ *Id.*

comparison, a Straits Pipelines spill could put at risk over *a thousand miles* of Great Lakes shoreline, as modeled in a study by experts convened by Michigan Technological University.⁸ Such a spill would cause devastating impacts to fish, wildlife, critical habitat, and numerous other ecological relationships.⁹

The Michigan Tech study analogizes the potential impacts of a Straits Pipelines oil spill to the Deepwater Horizon and Exxon Valdez disasters.¹⁰ And a Straits Pipelines spill would pose a threat that even those catastrophes did not: Over forty million people in the United States and Canada rely on the Great Lakes for drinking water.¹¹

For many years, Tribal Amici have called on the State to uphold its public-trust obligation to protect the Straits of Mackinac and the Great Lakes, including the fisheries, from these known dangers of the aging Straits Pipelines.¹² Michigan's suit against Enbridge is a long-overdue course correction. The State has recognized that "[t]he Great Lakes and the Straits of Mackinac . . . have special ecological, cultural and economic significance for the tribes of

⁸ See Mich. Tech. Univ., *Independent Risk Analysis for the Straits Pipelines, Final Report* 79 (Sept. 15, 2018), <https://perma.cc/KK9M-H63R>.

⁹ See *id.* at 165-214.

¹⁰ See *id.* at 154.

¹¹ See Great Lakes Commission, *About the Lakes*, <https://perma.cc/5N9K-J4BP>.

¹² See, e.g., Chippewa Ottawa Res. Auth., *Resolution 01-28-16 A: Support for Removal or Decommissioning of Enbridge Line 5 in Mackinac Straits* (Jan. 28, 2016), <https://perma.cc/5LKG-UZ9N>.

Michigan.” *Michigan v. Enbridge Energy, Ltd. P’ship*, No. 20-cv-1142, D. Ct. Doc. 1-1, at 47 (W.D. Mich. Nov. 24, 2020). The State has accordingly exercised its state-law public-trust responsibility to preserve Tribal Amici’s “treaty-protected rights of commercial and subsistence fishing in the Straits and other Great Lakes waters.” *Id.*

The Straits of Mackinac are a sacred wellspring of life and culture for Tribal Nations in Michigan. An oil spill into those waters would be culturally, economically, and spiritually devastating. The State’s public-trust action should continue to be heard in state court—where proceedings have been ongoing for years—and Enbridge’s procedural tactics should not further delay a decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a poster child for why Congress imposed a narrow window for removal in 28 U.S.C. § 1446(b)(1), subject only to explicit, well-defined statutory exceptions. In arguing otherwise, Enbridge primarily relies upon this Court’s decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), which recognized a “rebuttable presumption” that nonjurisdictional statutes of limitations are subject to “equitable tolling.” *Id.* at 95-96. But the *Irwin* presumption of equitable tolling is a poor match for this case on both the law and the facts. Which may be why Enbridge never mentioned the *Irwin* presumption until its merits brief before this Court.

Among other problems with Enbridge’s newfound theory, this Court has made clear that equitable tolling is available only when a litigant has pursued

its rights diligently but some extraordinary external circumstance stood in its way. *See Holland v. Florida*, 560 U.S. 631, 645-46 (2010). That is not the framework the district court used to excuse Enbridge’s two-year-plus delay here, however. Rather, the district court reasoned that Section 1446(b)(1)’s deadline may be “overcome” based on considerations like the court’s assessment of the federal interests in play. Pet. App. 31a-32a. That reasoning conflates the independent requirements of federal subject-matter jurisdiction and compliance with the removal deadline. And this Court’s embrace of such an *ad hoc*, open-ended exception would lead to substantial disruption and uncertainty for state courts, federal courts, and litigants alike.

Enbridge and its amici also contend that the 30-day deadline should be set aside because the State supposedly engaged in “forum manipulation.” Pet. Br. 43 (citation omitted). That charge is baseless. It would not be an appropriate basis for equitably tolling Enbridge’s own missed deadline. And if anyone is guilty of gamesmanship in these proceedings, it is Enbridge. In seeking removal before the district court, Enbridge did not even try to claim that equity applied to excuse its untimeliness; Enbridge instead relied on one of the *written* exceptions to Section 1446(b)(1). Nor does the timeline of events support Enbridge’s current suggestion that it sought removal in response to foreign affairs developments.

This Court should affirm the Sixth Circuit’s ruling that Section 1446(b)(1) is not subject to equitable exceptions. But if the Court finds that equitable tolling is theoretically available, it should make clear

that Enbridge’s litigation conduct certainly would not qualify.

ARGUMENT

I. Enbridge Requests An Open-Ended Exception To Congress’s Narrow Removal Period

A. Section 1446(b)(1)’s Deadline Is Strict For A Reason, And The *Irwin* Presumption Is Inapposite

In 28 U.S.C. § 1446(b)(1), Congress set a 30-day deadline for a defendant to remove a plaintiff’s state-court action to federal court. The statutory removal deadline is phrased in mandatory and inflexible terms: The notice of removal “shall” be filed within 30 days of the defendant’s service of summons or receipt of the complaint, “whichever is shorter.” 28 U.S.C. § 1446(b)(1). And while the deadline is not jurisdictional, it is nonetheless a “‘mandatory claim-processing rule[]’” that is “‘unalterable’ if properly raised by an opposing party.” *Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 192 (2019) (citations omitted); *cf. Manrique v. United States*, 581 U.S. 116, 124 (2017) (“By definition, mandatory claim-processing rules . . . are not subject to harmless-error analysis.”).

Congress’s imposition of the current 30-day cutoff was a considered decision following a century of trial and error. *See* Mich. Br. 44-48 (describing statutory history); *see also* Fed. Cts. & Civ. Proc. Scholars Br. 9-12. In particular, during a period when Congress permitted removal at any time up to the state court’s trial or final hearing, defendants would “abuse” that leeway by “experiment[ing] in the state court until

satisfied [they] would fail there, and then change [their] forum.” *Pullman Palace Car Co. v. Speck*, 113 U.S. 84, 87 (1885) (citation omitted).

Section 1446(b)(1)’s deadline is not a mere housekeeping provision imposed for the convenience of the parties and the federal court. Rather, the constrained removal window serves important federalism and comity interests. This Court has “reiterated the need to give due regard to the rightful independence of state governments—and more particularly, to the power of the States to provide for the determination of controversies in their courts.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 389 (2016) (internal quotation marks and citation omitted).

That is why this Court has held that “statutory procedures for removal are to be strictly construed.” *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002); *see also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). As the Sixth Circuit observed below, “because removal jurisdiction encroaches on a state court’s jurisdiction,” a federal court should not “snatch[]” a case from state court “unless some clear rule demands it.” Pet. App. 23a (citations omitted).

The federalism costs of seizing an ongoing case from state court are too serious to assume that Congress intended to create exceptions to the removal deadline *sub silentio*. For this reason and others, *see* Mich. Br. 27-32, the presumption in favor of equitable tolling of statutory limitations periods that this Court established in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), is inapposite in this

distinct context. See *id.* at 95-96; see also *Nutraceutical*, 586 U.S. at 192-97 (not applying the *Irwin* presumption to a rule of civil procedure).

Indeed—notwithstanding Enbridge’s current reliance on the *Irwin* presumption as the centerpiece of its argument, *e.g.*, Pet. Br. 2-3, 23-24—Enbridge previously appeared to recognize that the presumption has no bearing on the statutory-interpretation dispute here. Enbridge never cited *Irwin* or mentioned “equitable tolling” once in its Sixth Circuit briefing. Nor did Enbridge mention *Irwin* or the presumption in favor of equitable tolling in its petition for certiorari. Enbridge was right then and wrong now. The *Irwin* presumption has no role to play in the removal context.

B. Enbridge Asks For A Standardless Exception, Not Equitable Tolling

In addition, the open-ended exception that Enbridge requests in this case does not resemble the equitable tolling this Court approved in *Irwin* and subsequent decisions. This Court has adhered to a stringent two-part test for equitable tolling: The party must show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks and citation omitted); see also *Arellano v. McDonough*, 598 U.S. 1, 6 (2023); *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 255 (2016); *Irwin*, 498 U.S. at 458.

As discussed below, Enbridge’s conduct in this

litigation plainly cannot meet the *Holland* standard. *See infra* at 13-19. It thus appears that Enbridge does not want this Court to recognize the availability of equitable tolling *per se*, but rather to establish an open-ended exception to the 30-day removal period to be applied in a federal court's discretion. *See* Pet. Br. 42-44.

That is the kind of *ad hoc* exception the district court employed in this case. *See* Pet. App. 31a-38a. The district court never cited the *Holland* standard for equitable tolling. *See id.* Instead, the court dismissed Congress's 30-day deadline as "a formal requirement that can be excused." *Id.* at 35a. It vaguely asserted that the statutory rule can be set aside if there are "exceptional circumstances" or "based on the equitable administration of justice." *Id.* at 36a. And it reasoned that removal of the present suit was appropriate because the court had already determined that it possessed federal subject-matter jurisdiction over the Michigan governor's related suit revoking the Straits Pipelines' state-law easement. *Id.* at 36a-38a. As the court put it, the 30-day deadline may be "overcome" where there are "overriding federal interests." *Id.* at 31a.

But if the removal deadline could be set aside whenever "federal jurisdiction is proper" and "there are important federal interests at stake," Pet. App. 37a, the deadline would be toothless. Obviously, a defendant cannot remove a case if federal subject-

matter jurisdiction is absent.¹³ Congress imposed the 30-day deadline as an *independent* requirement, to be applied even when the requirements for removal are otherwise met. The district court’s reasoning casually disregarded that choice. The court’s reasoning also overlooked that when Congress has wanted to relax the deadline based on a substantial federal interest in the case’s subject matter, it has created an express exception. *See* Fed. Cts. & Civ. Proc. Scholars Br. 7-8, 22-23 (explaining that Congress has carved out different rules for patent and copyright cases and suits against foreign states, among other categories).

Enbridge is not the only defendant to miss the removal deadline without sufficient excuse, assert that policy reasons nonetheless favor hearing the case in federal court, and hope that the district court will bite. *See, e.g., Loftin v. Rush*, 767 F.2d 800, 805 (11th Cir. 1985) (holding that federal courts may remove cases even when removal is “untimely,” without imposing any limits on when a federal court may do so, and calling the 30-day deadline “technical” and a “modal defect”). Inevitably, the number of such maneuvers would multiply if the Court were to rule in Enbridge’s favor.

For the reasons the State explains, even if the *Irwin* presumption applied here, it would be clearly rebutted. *See* Mich. Br. 33-50; *see also Arellano*, 598 U.S. at 7 (where equitable tolling is at odds with a

¹³ To be clear, Tribal Amici do not agree that there is federal subject-matter jurisdiction over Michigan’s state-law suit, and Amici so argued before the Sixth Circuit. *See* C.A. Doc. 29, at 18-20. The Sixth Circuit declined to rule on the issue in light of its holding on timeliness. Pet. App. 12a.

statutory timing requirement’s text and structure, the *Irwin* presumption is rebutted); *Nutraceutical*, 586 U.S. at 192-93 (similar analysis). But if the Court disagrees, it should endorse only availability of equitable tolling under the well-established *Holland* standard and not craft a new, unbounded exemption. And as Tribal Amici will explain next, Enbridge could not possibly meet the well-established standard for tolling here.

II. Enbridge Has Not Pursued Its Rights Diligently And Nothing Prevented It From Seeking Removal Earlier

Again, equitable tolling is available only when a party “pursu[ed] [its] rights diligently” but “some extraordinary circumstance” prevented timely filing. *Holland*, 560 U.S. at 649 (citation omitted). The various excuses that Enbridge offers for seeking removal on December 15, 2021—over two years after the Attorney General filed her complaint in this action (*Nessel v. Enbridge*) on June 27, 2019—do not come close to meeting that standard. If anyone is guilty of underhanded procedural tactics in this case, it is Enbridge.

The State’s Supposed Forum Manipulation. Enbridge and its amici argue that its delay was justified based on the State’s litigation conduct. They assert that the State’s voluntary dismissal of the *Michigan v. Enbridge* case in November 2021 under Federal Rule of Civil Procedure 41(a)(1)(A) amounted to “forum manipulation” and “gamesmanship.” Pet. Br. 16-17, 19, 43 (citations omitted); see Chamber Br. 3-4, 15, 18-19. The district court took this view as

well. Pet. App. 37a-38a.¹⁴

To begin with, far from shifting the playing field, the State merely kept the Straits Pipelines dispute in the forum where the court and the parties had been deeply engaged on the merits for over a year. *See* Pet. App. 3a-4a. The parties had briefed dispositive motions, presented oral argument on those motions, and fully litigated the State’s successful request for temporary injunctive relief. *Id.*; *see also infra* at 15-16. It was only after receiving the state court’s unfavorable decision awarding that temporary relief that *Enbridge* sought to start over in a federal forum. *See* Pet. App. 4a, 6a-7a.

In any event, “[t]he right of voluntary dismissal” under Rule 41(a)(1)(A) “extends as fully to cases removed from a state court as it does to cases commenced in a federal court.” 9 *Wright & Miller’s Federal Practice & Procedure* § 2363 (4th. ed.) (Sept. 2025 update). Plaintiffs thus “frequently” exercise the Rule 41(a)(1)(A) right in order to prosecute an action

¹⁴ *Enbridge* states that the Sixth Circuit “did not disturb the district court’s findings on exceptional circumstances.” Pet. Br. 45. That is misleading. The Sixth Circuit had no need to consider the district court’s finding that an exception was warranted here because the court of appeals ruled that such exceptions were unavailable in the first place. Pet. App. 24a. For the same reason, *Enbridge* overreaches in asking this Court to “reverse” the judgment below with instructions to “rescind the remand order.” Pet. Br. 25; *see id.* at 51. A decision for *Enbridge* on the question presented would at most result in vacatur of the judgment below. That would leave the Sixth Circuit free to consider (and reject) *Enbridge*’s claim to equitable tolling (if this Court does not reject it first), as well as the issue of subject-matter jurisdiction. *See supra* note 13.

in state court. *Id.* As courts of appeals have recognized, the rule is available for that purpose, and there is nothing underhanded about using it. *See, e.g., Bechuck v. Home Depot U.S.A., Inc.*, 814 F.3d 287, 293 (5th Cir. 2016) (“Rule 41(a)(1) essentially permits forum shopping. It is not uncommon for plaintiffs to use voluntary dismissal to secure their preferred forum, such as when they seek to undo removal and return to state court.” (internal quotation marks and citations omitted)); *Wilson v. City of San Jose*, 111 F.3d 688, 694 (9th Cir. 1997) (affirming plaintiffs’ right to voluntarily dismiss after losing a motion to remand). This Court made the same observation last Term in *Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22 (2025). *See id.* at 42 n.9.

Federal Preemption Defenses. Nor can Enbridge justify its multi-year delay on the ground that it only recently learned of its claimed federal defenses. In eventually seeking removal of this case, Enbridge argued that the federal Submerged Lands Act (SLA) and the Pipeline Safety Act (PSA) preempt the Attorney General’s state-law claims. J.A. 10a-11a. But there can be no dispute that those preemption arguments were available when the Attorney General filed her original complaint. Enbridge referenced the PSA preemption defense in its September 16, 2019 response to the complaint seeking summary disposition. J.A. 122a-23a, 145a-55a; *see also* Pet. App. 3a; Mich. Br. 10, 53. And before the May 2020 hearing on the parties’ summary-disposition motions, “the state court asked the parties to be prepared to answer questions about federal preemption,” and “[m]uch of the argument indeed focused on” the PSA and the SLA. Pet. App. 3a; *see* J.A. 167-68a, 225a-36a,

244a-47a, 250a-56a, 261a-82a; *see also* Mich. Br. 10. The state trial court even asked the parties for supplemental briefing on Enbridge’s preemption defenses, which Enbridge submitted in June 2020. Pet. App. 3a-4a; *see* J.A. 261a, 263a, 269a-81a. That was all well over a year before Enbridge sought removal.

Canada’s Treaty Invocation. Before this Court, Enbridge implies that it sought to remove this case once Canada reacted to the Michigan governor’s order revoking the Straits Pipelines’ easement, when Canada raised the possibility of a violation of the 1977 Transit Pipelines Treaty. *See* Pet. Br. 11-13, 43; *see also* Chamber Br. 18 (similarly indicating that Enbridge sought removal due to “the significant foreign affairs concerns now put in play”).

But the timeline belies that story. Governor Gretchen Whitmer issued the easement-revocation order on November 13, 2020, Pet. App. 4a, and the Canadian responses that Enbridge references occurred between February and May 2021, *see* Pet. Br. 11 & nn.6-8. Yet Enbridge did not seek to remove this case at any point during that six-month period or within 30 days afterward. Instead, on November 24, 2020, Enbridge removed only *Michigan v. Enbridge*. Pet. App. 4a. Enbridge suggests (Br. 13) that it took the alternate course of asking the state court to hold this case in abeyance. But the parties agreed to hold this case in abeyance in January 2021—that is, *before* “Canada’s intercession” (Pet. Br. 13) later that spring. J.A. 59a.

Enbridge also suggests that it removed this case once Canada actually invoked the Transit Pipelines

Treaty on October 4, 2021. Pet. Br. 14-15; *see* Pet. App. 17a (treaty invocation date). But again, Enbridge did not file its removal notice until December 15, 2021—well over 30 days later. J.A. 19a; Pet. App. 17a. Given that temporal misalignment, when Enbridge eventually got around to removing this case, its notice did not rely on Canada’s treaty invocation to excuse the delay. *See* J.A. 8a-9a.

Enbridge’s Prior Reliance On Section 1446(b)(3). In fact, in seeking removal, Enbridge did not try to invoke an equitable exception to Section 1446(b)(1)’s 30-day period at all. *See* 8a-9a; Mich. Br. 14-15.¹⁵

Instead, before the district court, Enbridge solely argued that removal was proper under the *written* exception to the 30-day period in Section 1446(b)(3). J.A. 8a. Section 1446(b)(3) states that “*if the case stated by the initial pleading is not removable*, a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, *order* or other paper from which it may first be ascertained that the case is one which is or has become removable.” 28 U.S.C. § 1446(b)(3) (emphasis added).

According to Enbridge, the “order” that rendered this case (*Nessel v. Enbridge*) newly removable was the federal district court’s November 16, 2021 order denying remand in *Michigan v. Enbridge*. J.A. 9a; *see* Pet. App. 6a-7a. Enbridge accordingly argued that this case was “*not* removable” when the Attorney

¹⁵ The district court instead raised *sua sponte* the “exceptional circumstances” issue and decided it in Enbridge’s favor. *See* Pet. App. 31a-32a, 35a-38a.

General filed it, but “bec[ame] removable” once Enbridge received the district court’s decision declining to remand another case. 28 U.S.C. § 1446(b)(3) (emphasis added); *see* J.A. 6a-9a; Pet. App. 7a. Or put more simply: Once Enbridge learned that the federal district judge was amenable to its removal arguments, it belatedly decided to remove this case too.

That Section 1446(b)(3) argument for removal—which Enbridge has abandoned before this Court—was both cynical and nonsensical. As the Attorney General pointed out in seeking remand, “Enbridge has had the same removability arguments that it used to justify removal of [*Michigan v. Enbridge*] available to it since the inception of this case.” D. Ct. Doc. 11, at 11 (Jan. 14, 2022). And while Enbridge had previously been content to litigate those federal defenses in state court, *see supra* at 15-16, when the district court indicated that it might be receptive to those arguments, Enbridge “changed its mind in the hopes of obtaining what it clearly perceives to be a more favorable forum.” D. Ct. Doc. 11, at 2. In other words, Enbridge did exactly what Congress intended the removal deadline to prevent: “experiment[ed] in the state court” until it learned that it might have better chances elsewhere, and then “change[d] [its] forum.” *Pullman Palace Car*, 113 U.S. at 87 (citation omitted).

Unsurprisingly, the Sixth Circuit soundly rejected Enbridge’s Section 1446(b)(3) argument—the primary contention Enbridge pressed on appeal. *See* Pet. App. 9a-17a. Like the State, the Sixth Circuit observed that Enbridge’s arguments for removal were present

when the Attorney General filed her complaint in June 2019. *Id.* at 12a-13a. Indeed, the Sixth Circuit noted that “Enbridge’s own actions”—namely, its timely removal of *Michigan v. Enbridge* on those same preemption-based grounds—demonstrated as much. *Id.* at 12a; *see also id.* at 13a (“Enbridge’s appellate brief offers no explanation regarding how [*Michigan v. Enbridge*] could be removable from its outset but this case was not.”). The Sixth Circuit also readily dispensed with Enbridge’s assertion (raised only during oral argument) that Canada’s invocation of the Transit Pipelines Treaty triggered a new removal window. *Id.* at 13a. As the court pointed out, Enbridge did not seek removal until 72 days after the treaty’s invocation. *Id.* at 17a; *see* 28 U.S.C. § 1446(b)(3) (requiring removal within 30 days of the development that renders the case newly removable).

No part of Section 1446 allows a defendant to escape the 30-day deadline by asserting that it only recently discovered that a federal court might be more sympathetic to its arguments. But at bottom, that is Enbridge’s explanation for what it attempted here. Thus, even if Section 1446(b)(1)’s deadline were subject to equitable tolling (and it is not), Enbridge could not demonstrate the required diligence or extraordinary external circumstance to warrant such relief.

* * *

Tribal Amici and the rest of the Great Lakes community have a paramount interest in the timely resolution of the State’s claims against the aging Straits Pipelines’ continued operation. If it were not for Enbridge’s procedural gamesmanship, the merits

of this state public-trust dispute may well have been settled long ago—and the risks to Tribal Amici’s critical treaty-protected resources addressed. That is exactly why Congress limited the period for jurisdictional maneuvering and imposed only explicit, well-defined exceptions to that timeframe. This Court should affirm the Sixth Circuit and hold that Section 1446(b)(1) is not an open-ended invitation for district courts to wrest cases away from state courts on an *ad hoc* basis.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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