No. 23-

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Petition for Writ of Mandamus from the United States District Court
Western District of Michigan, Southern Division
Honorable Janet T. Neff

PETITION FOR WRIT OF MANDAMUS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Petitioner requests oral argument to assist the Court in deciding the fundamental questions of subject matter jurisdiction and state sovereignty at issue in this matter.

JURISDICTIONAL STATEMENT

This Petition arises from an Order issued by Judge Janet T. Neff in *Dana Nessel, Attorney General for the State of Michigan, on behalf of the People of the State of Michigan v. Enbridge Energy, Limited Partnership, et al.*, No. 21-cv-01057, a case pending in the United States District Court for the Western District of Michigan. This Court has jurisdiction to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651, as set forth in Rule 21 of the Federal Rules of Appellate Procedure; *see also In re United States*, 32 F.4th 584, 590 (6th Cir. 2022).

STATEMENT OF ISSUES PRESENTED

1. 28 U.S.C. § 1446(b)(1) requires, in relevant part, that a defendant remove a case from state court to federal court within 30 days of service. Here, the Defendants (collectively Enbridge) litigated the case in state court for over a year, which included the parties filing and arguing cross-motions for summary disposition. While those motions were pending before the state court judge, Enbridge removed the matter to the U.S. District Court for the Western District of Michigan. Is a writ of mandamus appropriate where the District Court excused Enbridge's non-compliance with 28 U.S.C. § 1446(b)(1) and denied the Attorney General's motion to remand?

2. Subject matter jurisdiction is an issue that may not be waived by the parties and can be raised at any time, and it must even be raised by a court sua sponte if necessary. Here, the Attorney General moved for remand not only based on the mandatory removal deadline set forth in 28 U.S.C. § 1446(b)(1), but also on the basis that the District Court lacked subject matter jurisdiction because the Attorney General's complaint did not raise any question of federal law. Is a writ of mandamus appropriate where the District Court refused to consider whether it had subject matter jurisdiction and went so far as to estop the Attorney General from raising the issue?

3. In deciding whether to issue a writ of mandamus, this Court considers several factors. Where, as here, (1) the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired; (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) the District Court's order is clearly erroneous as a matter of law; and (4) the District Court's order raises new and important problems, or issues of law of first impression, is a writ of mandamus appropriate?

INTRODUCTION

This case was brought by the Attorney General for the State of Michigan in a Michigan state court, premised exclusively on Michigan state law claims, to preserve and protect Michigan's sovereign rights as owner and trustee of Great Lakes bottomlands. In an affront to fundamental principles of federalism and state sovereignty, the District Court abused its discretion by disregarding both a mandatory removal deadline and the limits of its own subject matter jurisdiction and "snatching [this] case[] which a State has brought from the courts of that State." *Nessel ex rel. Michigan v. Amerigas Partners, L.P.*, 954 F.3d 831, 837–38 (6th Cir. 2020).

The Attorney General for the State of Michigan, Dana Nessel, brought this action in state court on behalf of the People of the State of Michigan to challenge the validity of a 1953 easement agreement between the predecessors of the Michigan Department of Natural Resources (DNR) and Enbridge that authorized the placement of what are known as the Line 5 Dual Pipelines (Pipelines) on bottomlands of the Straits of Mackinac. Enbridge initially agreed that the state court was a proper forum, as it litigated the case there for well over a year.

During that time, the state court heard arguments on cross-motions for summary disposition (which remain pending nearly three years later) and entered a temporary restraining order enjoining operation of the Pipelines after evidence of external impacts to the Pipelines became known. Only after this extensive litigation took place in state court, and more than *two years* after the 30-day removal deadline in 28 U.S.C. § 1446(b) had expired, did Enbridge remove the case to the U.S. District Court for the Western District of Michigan.

In denying the Attorney General's motion to remand, the District Court abused its discretion in two distinct ways: first in excusing Enbridge's untimely removal based on "overriding federal interests" and equitable concerns, and second in refusing to consider whether it had subject matter jurisdiction and, in fact, estopping the Attorney General from raising the issue of jurisdiction. The District Court has since failed to rule on the Attorney General's motion to certify those decisions for interlocutory appeal, filed on August 30, 2022 and now *pending for more than five months*, leaving a writ of mandamus as the only remedy since the Attorney General will be prejudiced if forced to press these claims on an appeal from a final judgment.

STATEMENT OF THE CASE

A. *Nessel v. Enbridge* in State Court

The Attorney General filed the complaint in this case in Michigan's 30th Circuit Court for the County of Ingham on June 27, 2019. (State Court Summons and Compl., R 1-1, PAGE ID # 19–63.) [1] It was served on the Defendants on July 12, 2019. (State Court Register of Actions, R. 11-1, PAGE ID § 317, Item 135.) The complaint seeks declaratory and injunctive relief—enjoining the continued operation of the Straits Pipelines—based upon the public trust doctrine (Counts I.A. and I.B.), the common law of public nuisance (Count II), and the Michigan Environmental Protection Act, Mich. Comp. Laws § 324.1701 *et seq.* (Count III).

Count I.A. alleges that the 1953 Easement, which authorized the placement of the Pipelines on Great Lakes bottomlands in the Straits of Mackinac, was void from its inception in the absence of due findings

[1] Unless otherwise indicated, all record citations in this petition refer to the District Court record in the instant case. Where record citations refer to record entries from the parallel District Court cases of *Michigan v. Enbridge* and *Enbridge v. Michigan*, that will be demonstrated by inclusion of the District Court docket number. The docket number will also be included in the corresponding "Designation of Relevant District Court Documents" table at the end of the petition.

that it would enhance or at least not adversely affect the public trust. (State Court Compl., R. 1-1, PAGE ID # 31–32.) Count I.B. alleges that continued operation of the Straits Pipelines is inconsistent with the public trust. (*Id.*, PAGE ID # 32–46.)

Enbridge filed its initial response to the complaint on September 16, 2019. (Enbridge's Mot. for Sum. Disp., R. 11-2.) It asserted, in a motion for summary disposition under Mich. Ct. R. 2.116(C)(8), that the complaint failed to state a claim upon which relief can be granted. (*Id.*) Enbridge argued, among other things, that the Attorney General's claims under the public trust doctrine were expressly and impliedly (i.e., completely) preempted by the federal Pipeline Safety Act. (*Id.*, PAGE ID # 362–369.) It specifically argued that "the Federal Government has occupied the entire field of pipeline safety regulation," and emphasized that "PHMSA [Pipeline Hazardous Materials and Safety Administration] regulates all aspects of pipeline operations." (*Id.*, PAGE ID # 367.)

The state court held oral arguments on the cross-motions for summary disposition on May 22, 2020. In advance of argument, the state court asked the parties to be prepared to answer questions

regarding federal preemption. (Email from State Court, R. 11-3, PAGE ID # 400.) Preemption issues (including under the Pipeline Safety Act and the Federal Submerged Lands Act) indeed formed a substantial focus of argument (Transcript, R. 11-4, PAGE ID # 469–480), and the court requested supplemental briefing on them. Enbridge reiterated its preemption arguments in its June 22, 2020 supplemental brief in support of its motion for summary disposition (Enbridge's Supp. Br., R. 11-5, PAGE ID # 519–528), relying upon the Pipeline Safety Act and also arguing that the scope of the State's public trust authority was preempted by the Federal Submerged Lands Act, 43 U.S.C. § 1301 *et seq*.

Between June 25, 2020 and September 24, 2020, Enbridge also actively participated in proceedings on the Attorney General's motions for a temporary restraining order and preliminary injunction relating to then-recently-disclosed external impacts to the Straits Pipelines infrastructure that led to the issuance of a temporary restraining order enjoining pipeline operation, and subsequent modifications to that order. (State Court Register of Actions, R. 11-1, PAGE ID # 306–312, Items 71 through 11.) Those proceedings included multiple hearings

before, and conferences with, the state court judge, and ultimately led to the entry of a temporary restraining order enjoining the operation of the Pipelines for several weeks before the Parties stipulated to an order allowing Pipeline operations to resume. (*Id.*)

B. *Michigan v. Enbridge*

On November 13, 2020, the Governor of the State of Michigan and the Director of the Michigan DNR issued a Notice of Revocation and Termination of the 1953 Easement and the State of Michigan, the Governor, and Director (collectively State Plaintiffs) filed a complaint for declaratory and injunctive relief in Ingham County Circuit Court to enforce the Notice. (1:20-cv-1142, R. 1-1, PAGE ID # 26–27 (referred to in this Petition as "*Michigan v. Enbridge*.").) Count I of the complaint and the corresponding sections of the Notice, Sections I.A., I.B., and I.C., very closely parallel Counts I.A. and I.B. of the complaint in this case, asserting that the 1953 Easement violated the public trust doctrine because the Easement was void from its inception in the absence of due findings of consistency with the public trust, and that continued operation of the Straits pipelines at their location likewise violates the public trust. (*Id.*, PAGE ID # 53–61.)

On November 24, 2020, Enbridge removed *Michigan v. Enbridge* to the District Court and simultaneously filed counterclaims which are described in § C below. The initial Notice of Removal of *Michigan v. Enbridge* asserted federal jurisdiction under the narrow "substantial federal question" exception to the well-pleaded complaint rule recognized in *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312–13 (2005), arguing that the complaint "necessarily raised" substantial questions regarding the federal foreign affairs powers, and preemption under the Pipeline Safety Act and Federal Submerged Lands Act. (Notice of Removal, 1:20-cv-1142, R. 1-2, PAGE ID #116–123.) It also asserted federal jurisdiction under the Federal Officer Removal Statute. (*Id.,* PAGE ID # 123–124.) On December 12, 2020, Enbridge's Amended Notice of Removal asserted additional grounds for federal jurisdiction, including arguments that the claims "arise" under federal common law. (Amended Notice of Removal, 1:20-cv-1142, R. 12, PAGE ID # 239–246.)

The State Plaintiffs filed a motion to remand, disputing each of the jurisdictional arguments advanced by Enbridge. (1:20-cv-1142 Mot. to Remand and Br. in Supp. 6/1/21, R. 41 and 42.) The Parties in the

instant case stipulated to hold this case in abeyance pending the outcome of that motion.

The District Court denied the motion to remand in a November 16, 2021 Order. (1:20-cv-1142, R. 80.) In doing so, the District Court held that *Grable* substantial federal question jurisdiction existed because resolution of the State Plaintiff's claims would necessarily require interpretation of two federal statutes: the Federal Submerged Lands Act and the Pipeline Safety Act. (*Id*., PAGE ID # 1030, 1035.)

Ultimately, on November 30, 2021, the State Plaintiffs exercised their right to voluntarily dismiss the case pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i).[2] (1:20-cv-1142 Not. of Vol. Dis. 11/30/21, R. 83.)

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[2] In this case, the District Court took issue with the Attorney General seeking remand after a similar motion was denied in *Michigan v. Enbridge*. The District Court's repeated statements that the Attorney General in this case sought to "undermine" the Court's prior jurisdictional ruling or engage in "gamesmanship," "procedural fencing," or "forum manipulation," in an effort to "gain an unfair advantage through the improper use of judicial machinery" by seeking remand after the Court denied remand in *Michigan v. Enbridge* (*see* Op. and Order, R. 23, PAGE ID # 619–621), are misplaced. There is nothing improper or underhanded about the State Plaintiffs in *Michigan v. Enbridge* exercising their right to voluntarily dismiss their case under Fed. R. Civ. P. 41(a)(1)(i). Parties frequently assert this right in order to prosecute an action in state court. *See* 9 Wright & Miller, *Federal Practice & Procedure* § 2363 at 257–58; *see also Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997) (affirming plaintiff's right to

C. *Enbridge v. Michigan*

On November 24, 2020, the same day that Enbridge removed *Michigan v. Enbridge* to the District Court, it also filed its own complaint in federal court for declaratory and injunctive relief against the Governor and DNR Director. (1-20-cv-01141-JTN-RSK Compl. 11/24/20, R. 1.) The complaint sought a declaration that the Notice of Revocation and Termination of the 1953 Easement issued by the Governor and Director to Enbridge was unenforceable on the grounds that it was unconstitutional and otherwise preempted by federal law, as well as an injunction prohibiting the Governor and Director from "taking any steps to impede or prevent the interstate and international operation of Line 5 . . . ." (*Id*., PAGE ID # 18–19.)

On April 5, 2022, the parties filed dispositive motions. The Governor and Director filed a motion to dismiss premised on 11th Amendment immunity. (1:20-cv-01141-JTN-RSK Mtn. to Dismiss and Br. in Supp., 4/5/22, R. 62 and 63.) In particular, they argued that the Supreme Court foreclosed the relief Enbridge sought in *Coeur d'Alene*

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voluntarily dismiss after losing a motion to remand). In any event, the choice of other litigants to dismiss their claims in a separate case, to which the Attorney General was not a party, does not impute any nefarious motive to the Attorney General in this case.

Tribe of Idaho, 521 U.S. 261 (1997), and because it would impermissibly require Michigan's specific performance of a contract. (1:20-cv-01141-JTN-RSK Br. in Supp., R. 63, PAGE ID # 339–348.)

Enbridge filed a motion for summary judgment of two counts of its complaint based on the same arguments that it had previously advanced in its motion for summary disposition in state court in the case at bar: that any effort by State of Michigan officials to sue Enbridge on the contract to which the State and Enbridge are parties is preempted by federal law. (1:20-cv-01141-JTN-RSK Mtn. for Sum. Judgment and Br. in Supp. 4/5/22, R. 65 and 66.)

Briefing on these cross-motions concluded on April 6, 2022. The parties await the District Court's ruling. The matter has now been pending for more than ten months.

D. Removal of *Nessel v. Enbridge*

On December 15, 2021, approximately two and a half years after it was filed and served, Enbridge removed the instant case to the District Court, making removal arguments that will sound very familiar. As in *Michigan v. Enbridge*, Enbridge asserted federal jurisdiction primarily under *Grable* and the contention that the Attorney General's state law

claims are preempted by the Pipeline Safety Act and the Federal Submerged Lands Act. (R. 1, PAGE ID # 8–9.)

Astonishingly, Enbridge claimed that this removal was timely because it supposedly could not have ascertained that there were grounds for removal until the District Court's November 16, 2021 order denying remand in *Michigan v Enbridge*. (*Id*., PAGE ID # 6–8.) In doing so, Enbridge ignored three different facts that impeached the assertion Enbridge could not have determined that removal was warranted until November 2021:

- More than two years before it removed this case, in its initial response to the complaint in state court, Enbridge argued that the Attorney General's claims were completely and expressly preempted by the same federal laws it relied on in its Notice of Removal.

- Instead of removing the case in 2019, it chose to litigate the merits of the Attorney General's claims in state court, repeating and expanding its arguments that the Pipeline Safety Act and Federal Submerged Lands Act preempt the Attorney General's claims.

- More than a year before it removed this case, in November 2020, before the District Court, Enbridge "ascertained" from the face of the closely parallel complaint in *Michigan v. Enbridge* that it was removable.

E. The District Court's denial of the Attorney General's motion to remand *Nessel v. Enbridge* and continued failure to rule on the Attorney General's motion for certification for interlocutory appeal.

On January 14, 2022, the Attorney General moved for remand to state court on two bases: (1) that Enbridge had removed the case more than two years after being served with the complaint and after substantial litigation in state court, in violation of the mandatory 30-day removal deadline set forth in 28 U.S.C. § 1446(b), and (2) lack of subject matter jurisdiction because the complaint alleged exclusively state law claims and did not raise any issue of federal law. (Mt. to Remand and Br. in Supp., R. 10 and 11.)

The District Court denied the Attorney General's motion on August 18, 2022. (Op. and Order, R. 23.) The District Court excused Enbridge's noncompliance with 28 U.S.C. § 1446(b) based on equitable principles, including the overriding federal interest in the subject matter of the case, the desire for uniformity in adjudicating interstate pipeline disputes, and the Attorney General's act of seeking remand to state court itself, which the District Court described as inequitable "forum manipulation" and "procedural fencing." (*Id.*, PAGE ID # 619–621.)

With regard to the issue of whether it had "federal question" jurisdiction under *Grable*, the District Court refused to consider the issue and again relied on equitable principles to estop the Attorney General from challenging the Court's subject matter jurisdiction. (*Id.*, PAGE ID # 621.) As a factual matter, the District Court referred to a denial of remand being proper when there has been "no significant action taken" in the state court and noted that dispositive motions had already been filed in Enbridge's lawsuit against the Governor and DNR Director, *Enbridge v. Michigan*. (*Id.*, PAGE ID # 618 and 617.) The District Court also noted that it had reviewed the state court's docket and saw that the case had been closed.[3] (*Id.*, PAGE ID # 613.)

On August 30, 2022, the Attorney General moved the District Court to certify its August 18, 2022 opinion and order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Mot. for Cert. and Br. in Supp 8/30/22, R. 24 and 25.) In its brief in support, the Attorney General pointed out that this Circuit considers the 30-day removal deadline in

[3] In fact, the state court administratively closes every case upon receipt of a notice of removal to federal court. The District Court's apparent reliance on this as a factor in support of removal was therefore misplaced, because the act of removal itself is not an indicator that removal is appropriate.

28 U.S.C. § 1446(b)(1) to be mandatory, and that it does not recognize any equitable exception such as those invoked by the District Court. (Br. in Supp. 8/30/22, R. 25, Page ID # 634-639.) The Attorney General further argued that subject matter jurisdiction is an issue that cannot be waived, that can be raised at any time, and that there is no support for the notion that a court can estop a party from challenging it. (*Id.*, PAGE ID # 644.) These points were addressed further in the Attorney General's proposed reply in support of certification. (Repl., R. 29-1.) There, the Attorney General pointed out that the instant case is actually more procedurally advanced than Enbridge's lawsuit as substantial litigation had taken place in the state court—the parties had briefed and argued cross-motions for summary disposition and were awaiting the state court's decision on those motions, and the state court had entered a temporary restraining order enjoining the operation of the Pipelines for several weeks in 2020. (*Id.*, PAGE ID # 681 n 1, 686.)

To date, and almost five months after the completion of briefing, the District Court has not ruled on the Attorney General's motion for certification. The Attorney General therefore brings this petition for a

writ of mandamus and asks this Court to order that this case be remanded to the state court.

STANDARD OF REVIEW

Mandamus "is appropriate only where there is a clear abuse of discretion or a judicial usurpation of power." *In re United States*, 32 F.4th 584, 590 (6th Cir. 2022) (citing *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). To obtain such a writ, a petitioner "must (1) have no other adequate means of obtaining relief, (2) demonstrate a right to issuance that is clear and indisputable, and (3) show that issuance of the writ is appropriate under the circumstances." *In re Univ. of Mich.*, 936 F.3d 460, 466 (6th Cir. 2019) (citing *Cheney*, 542 U.S. at 380–81). This Court employs a five-factor balancing test to "distinguish between errors that are merely reversible and not subject to mandamus, and those errors that are of such gravity that mandamus is proper." *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008); *see also In re United States*, 32 F.4th at 590; *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 843 (6th Cir. 2020). These factors include whether:

> (1) the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired;
>
> (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal;
>
> (3) the District Court's order is clearly erroneous as a matter of law;
>
> (4) the District Court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and
>
> (5) the District Court's order raises new and important problems, or issues of law of first impression.

John B., 531 F.3d at 457. These factors are guidelines and are applied flexibly, not rigidly. *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997). In fact, not all the factors are required for mandamus to issue. *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005); *see also In re Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996) (observing "the factors would often be balanced in opposition to one another"). While it is not required that a party first seek permissive interlocutory review before seeking mandamus (as the Attorney General did here), that is the "better practice." *Id.* at 539.

SUMMARY OF ARGUMENT

This petition is about an abusive exercise of judicial power. The issuance of the writ is necessary to uphold the federalism considerations enshrined in the mandatory removal timelines, to

respect the sovereignty of the State of Michigan by allowing its chief law enforcement officer to bring this action based on Michigan law in a Michigan forum to adjudicate a contract dispute over Michigan's Great Lakes bottomlands, and to avoid "snatching cases which a State has brought from the courts of that State, unless some clear rule demands it." *Nessel*, 954 F.3d at 837–38. There are two bases on which this Court should exercise its authority and grant relief in the form of mandamus.

First, Enbridge did not remove this case within the mandatory time limitation set forth in 28 U.S.C. § 1446(b)(1). The District Court excused this procedural defect by claiming the judicial power to disregard these strict statutory time constraints due to "overriding federal interests" and the "equitable administration of justice." But these considerations do not provide a valid legal basis for ignoring the removal timelines prescribed by Congress, and thus the District Court's denial of remand was clearly erroneous.

Second, the District Court refused to consider the limits of its subject matter jurisdiction under *Grable*, and went so far as to estop the Attorney General from raising the issue of jurisdiction. By wrongfully

holding this case in federal court, the District Court has acted well beyond its jurisdiction, usurped judicial power, and abused its discretion.

Regarding these claims, mandamus is necessary because the Attorney General will functionally waive her right to a remedy for this clear procedural error if she waits to appeal an adverse final judgment.

ARGUMENT

I. A writ of mandamus is necessary because the District Court abused its discretion when it denied the Attorney General's motion to remand based on 28 U.S.C. § 1446(b)(1).

Mandamus is an extraordinary exercise of judicial supervisory power, reserved for situations involving "judicial usurpation of power" or "clear abuse of discretion." *Cheney,* 542 U.S at 380; *In re United States*, 32 F.4th at 590. That is precisely the situation here. The District Court impermissibly encroached on state-court jurisdiction and abused its discretion by invalidly excusing Enbridge's noncompliance with the statutory procedures for timely removal, and by estopping the Attorney General from questioning whether the District Court had subject matter jurisdiction over this case. This Circuit's mandamus factors overwhelmingly support issuance of the writ.

A. Time limitations for removal pursuant to 28 U.S.C. § 1446(b) are mandatory and strictly construed in favor of remand.

"The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941).

When construing removal statutes, courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* This Circuit embraces this strict-construction requirement and the federal-state comity that the statute is designed to protect. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999) ("[S]tatutes conferring removal jurisdiction are to be strictly construed because removal jurisdiction encroaches on a state court's jurisdiction."); *see also Nessel*, 954 F.3d at 837–38 (recognizing that "[t]he Supreme Court has long cautioned against snatching cases which a State has brought from the courts of that State, unless some clear rule demands it") (quotation marks and alterations omitted).

This Circuit treats removal timelines as "strictly applied rule[s] of procedure" even though they are not jurisdictional in nature. *Seaton v. Jabe*, 992 F.2d 79, 81 (6th Cir. 1993) (concluding that "untimeliness is a ground for remand so long as the timeliness defect has not been waived") (quotation marks and citations omitted); *City of Albion v. Guar. Nat. Ins. Co.*, 35 F. Supp. 2d 542, 544 (W.D. Mich. 1998) ("Although not jurisdictional, the thirty-day period for removal is mandatory and must be strictly applied."); *see also Hawes v. Riversource Life Ins. Co.*, Civ. Action 4:21-cv-00120-JHM, 2022 WL 1814158, at *2 (W.D. Ky. June 2, 2022)*; Cristal ASU, LLC v. Delta Screen & Filtration, LLC*, No. 1:18-cv-00849, 2018 WL 3118277, at *1 (N.D. Ohio June 25, 2018); *Groesbeck Invs., Inc. v. Smith*, 224 F. Supp. 2d 1144, 1148 (E.D. Mich. 2002); *Green v. Clark Refining & Marketing, Inc.*, 972 F. Supp. 423, 424 (E.D. Mich. 1997); *McGraw v. Lyons*, 863 F. Supp. 430, 434 (W.D. Ky. 1994); *Kerr v. Holland America-Line Westours, Inc.*, 794 F. Supp. 207, 210 (E.D. Mich. 1992). At bottom, "all doubts should be resolved against removal." *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) (quotation marks omitted).

The Federal Judicial Code establishes two distinct windows for removal, each subject to time limitations that are strictly applied. *See* 28 U.S.C. § 1446(b)(1) and (b)(3). The first window opens upon a defendant's receipt of an initial pleading if the case stated therein is removable. *Id.* § 1446(b)(1). If the defendant fails to file a notice of removal within 30 days of receiving such a pleading, the statutory removal window closes. *See State ex rel. Slatery v. Tenn. Valley Auth.*, 311 F. Supp. 3d 896, 902 (M.D. Tenn. 2018). The second window is available *only* where "the case stated by the initial pleading is not removable." 28 U.S.C. § 1446(b)(3). It opens "after receipt by the defendant, through service or otherwise, 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." *Id.* Like the first window, the second closes 30 days after the triggering event. *See Berera v. Mesa Med. Grp., PLLC*, 779 F.3d 352, 364 (6th Cir. 2015).

Nothing in 28 U.S.C. § 1446(b)(1) or (b)(3) provides courts with discretion to override the mandatory 30-day time limitations for removal premised on federal question jurisdiction. *Cf.* 28 U.S.C.

§ 1446(c)(1) (expressly authorizing courts to excuse noncompliance with the one-year time limitation for removal based on diversity of citizenship where the court finds "the plaintiff acted in bad faith in order to prevent a defendant from removing the action"). Nor does this Circuit recognize any judicially crafted exceptions to these strict timelines. *See State ex rel. Slatery*, 311 F. Supp. 3d at 904. It is a "strictly applied rule." *Id.*

B. The District Court's decision to exercise jurisdiction over this case despite Enbridge's untimely removal was a clear abuse of discretion.

In her motion to remand, the Attorney General argued that Enbridge's notice of removal failed to satisfy the requirements for timely removal under either § 1446(b)(1) or (b)(3). Rather than analyze compliance with the 30-day time limitation, however, the District Court circumvented the statute with this remarkable end-run: "The thirty-day window, or prompt settlement of the forum question, is also overcome in exceptional circumstances, where overriding federal interests or compelling equitable considerations are evidenced." (ECF No. 23, PAGE ID # 615 (footnotes omitted).)

The District Court created from whole cloth a new doctrine for excusing noncompliance with § 1446(b)'s strict time limitations—a doctrine that has no support in this Court's removal jurisprudence. The District Court's sanctioning of Enbridge's statutory noncompliance was a clear abuse of discretion.

1. "Overriding federal interests" cannot excuse Enbridge's failure to timely remove.

The District Court made no secret of its conviction that federal court is the forum in which the Pipeline controversy should be litigated. (Op. and Order 8/18/22, R. 23, PAGE ID # 614 ("The Court reinforces the importance of a federal forum in deciding disputed and substantial federal issues at stake, with uniformity and consistency.").) Nor did the District Court disguise its view that its prior jurisdictional determination in the 2020 case of *Michigan v. Enbridge* (a case in which the Attorney General was not a party) could be used to override the statutory timelines for removal:

> Nothing has changed since the first order denying remand; as in the earlier case, a federal forum is a proper place to decide this controversy. That order, which found jurisdiction proper in this Court, should be seen to have tolled or excused the procedural time limit, based as well on the exceptional circumstances of the Straits Pipeline controversy.

(*Id.*, PAGE ID # 615.)

There are two fundamental flaws in the District Court's reasoning, however. First, it puts 28 U.S.C. § 1446(b)'s jurisdictional cart before the procedural horse. *Cf. Williams v. Homeland Ins. Co. of N.Y.*, 18 F.4th 806, 817 (5th Cir. 2021) (holding that removal cannot be premised on federal joinder framework of Fed. R. Civ. P. 20, which necessarily "applies *after* a federal court has jurisdiction . . .. So it would be odd to use the impropriety of joinder under [the federal rules] to *establish* jurisdiction."). Simply put, the fact that the District Court previously held in another case that it had subject matter jurisdiction over similar claims does not cure Enbridge's failure to comply with the mandatory 30-day removal deadline found in 28 U.S.C. § 1446(b). If a court could use a jurisdictional determination to cure a defect in removal procedure, the statutory prerequisites to removal would be eviscerated. *McGraw*, 863 F. Supp. at 434 ("To permit a defendant to remove a case to federal District Court based on an untimely, though substantively valid, petition would completely emasculate the effect of the thirty-day limitation.") (Quotation marks omitted).

Second, the District Court compounded its error by relying on its order denying remand in *Michigan v. Enbridge*. (Op. and Order 8/18/22, R. 23, PAGE ID # 616 ("Even though this Court has previously said in that closely parallel case that the federal issues at stake should be heard in a federal forum (ECF No. 80, Case No. 1:20-cv-1142), Plaintiff asks for remand.").) *Michigan v. Enbridge* did not involve an untimely removal, therefore the District Court's holding that it had subject matter jurisdiction over that case because the complaint necessarily raised a substantial question of federal law does not provide a basis to excuse Enbridge's untimely removal here. Additionally, that order was nullified by the State Plaintiffs' voluntary dismissal of *Michigan v. Enbridge*. *See Bomer v. Ribicoff*, 304 F.2d 427, 428 (6th Cir. 1962) ("An action dismissed without prejudice leaves the situation the same as if the suit had never been brought."); *Marex Titantic, Inc. v. Wrecked and Abandoned Vessel*, 2 F.3d 544, 547 (4th Cir. 1993) (same); *Nat'l R.R. Passenger Corp. v. Int'l Ass'n of Machinists & Aerospace Workers*, 915 F.2d 43, 48 (1st Cir. 1990) (same).

2. Equitable considerations and estoppel cannot override the time limitations for removal.

The District Court's reliance on its perceived equitable reasons for excusing Enbridge's untimely removal constitute a further abuse of discretion. There is no case law to support the District Court's theory that the 30-day time limitation for removal is merely "a formal requirement that can be excused" to promote the "equitable administration of justice." (Op. and Order 8/18/22, R. 23, PAGE ID # 618.) As discussed in Argument § I.A. above, statutory removal timelines are mandatory. *See* cases cited *supra* at 21–24. Moreover, many district courts in this Circuit have rejected the idea of equitable exceptions as incompatible with the plain language of § 1446(b), which admits no exceptions. *See, e.g., Gray v. Martin*, Civil No. 13-73-ART, 2013 WL 6019335, at *5 (E.D. Ky. Nov. 13, 2013) (noting that courts in this Circuit have consistently rejected invitations to engraft unwritten equitable exceptions onto the removal statute); *Riley v. Ohio Cas. Ins. Co.*, 855 F. Supp. 2d 662, 671 (W.D. Ky. 2012) (refusing to recognize a judicially crafted equitable exception to the one-year time limitation in § 1446(b)).

As explained in detail in the Attorney General's brief in support of her motion for certification for interlocutory appeal, the "exceptional circumstances" cases cited by the District Court in support of its equitable gymnastics are not relevant to the case at bar, are out-of-circuit and not precedential, and do not support the District Court's conclusion that Enbridge's untimely attempt at removal should, or even could, be excused. (Br. in Supp. of Mot. for Cert., R. 25, PAGE ID # 634–639.) Thus, there is no legal basis for the District Court's finding that its order denying remand in the 2020 case of *Michigan v. Enbridge* "should be seen to have tolled or excused the procedural time limit, based as well on the exceptional circumstances of the Straits Pipeline controversy." (*Id.*, PAGE ID # 619.)

The District Court's cursory invocation of estoppel as an additional basis for excusing untimely removal also fails. (*Id.*, PAGE ID # 621). "Judicial estoppel is an equitable doctrine that preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP*, 546 F.3d 752,

757 (6th Cir. 2008) (quotation marks omitted). None of these elements is satisfied here.

First, the District Court based its invocation of estoppel in part on its misperception that the Attorney General has engaged in inconsistent argumentation. (Op. and Order 8/18/22, R. 23, PAGE ID # 621.) The Attorney General's arguments have been consistent throughout this litigation. The Attorney General argues that this case was not removable at all due to the lack of federal question jurisdiction and that, even if the Attorney General is incorrect and this case *was* removable, Enbridge still runs afoul of the 30-day removal deadline in 28 U.S.C. § 1446(b)(1) because the issues in this case are virtually identical to the issues in *Michigan v. Enbridge*. (Br. in Supp. of Mot. to Remand 1/14/22, R. 11, PAGE ID # 290 n 3 (citing *Rodas v. Seidlin*, 656 F.3d 610, 623 (7th Cir. 2011) ("[R]emoval is not a kind of jurisdiction—analogous to federal question jurisdiction and diversity of citizenship jurisdiction. Rather it is a *means* of bringing cases within federal courts' original jurisdiction into those courts.") (quotation marks omitted).) On the contrary, Enbridge's position—that it could not possibly have known that this case was removable until it prevailed on

removal of virtually identical issues in a different case more than two years later—defies logic. There is nothing inconsistent in the Attorney General's arguments that the District Court lacked subject matter jurisdiction and, even if it did not, the case would still not be removable for procedural reasons.

Second, the District Court's allegations of contumacious behavior by the Attorney General are baseless and do not justify exercise of the Court's equitable powers. (*See* Op. and Order 8/18/22, R. 23, PAGE ID # 621 (accusing the Attorney General of "attempt[ing] to gain an unfair advantage through the improper use of judicial machinery," threatening "the integrity of the judicial process," and "engag[ing] in procedural fencing and forum manipulation.").) The Attorney General has done nothing more than exercise her statutory right to move for remand; before that, other plaintiffs in another case (the State, Governor, and DNR Director) exercised their procedural right to voluntarily dismiss the 2020 case of *Michigan v. Enbridge*. Fed. R. Civ. P. 41(a)(1)(A)(i); *see also Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997) (affirming plaintiff's right to voluntarily dismiss after losing a motion to remand). Furthermore, the State Plaintiffs in *Michigan v. Enbridge*

exercised their right to voluntarily dismiss without prejudice on November 30, 2021, (1:20-cv-01142-JTN-RSK, R. 83)—*before* Enbridge moved for removal of the instant case.

3. The District Court's reliance on the "removal revival exception" was erroneous and cannot save Enbridge from its failure to timely remove.

The District Court gave an additional, but unsupportable, reason for excusing Enbridge's failure to remove this case within the initial 30-day time limitation set forth in § 1446(b)(1)—the so-called "removal revival exception." (*See* Op. and Order 8/18/22, R. 23, PAGE ID # 620.) The District Court stated that "[a] lapsed right to remove may be restored where a litigation event, such as a court order, starts a virtually new, more complex, and substantial case." (*Id.* (citing *Johnson v. Heublein Inc.*, 227 F.3d 236, 242 (5th Cir. 2000).)

The District Court determined that its order denying remand in *Michigan v. Enbridge* was such a litigation event because the order "established for the first time that this Court is an appropriate forum for deciding the substantial federal issues at stake in the Straits Pipeline controversy." (*Id.*) Thus, Enbridge's right to remove the case, though not exercised in response to the Attorney General's initial filing,

was purportedly revived by issuance of the order denying remand of *Michigan v. Enbridge*, issued nearly two years after the complaint in the instant case was served.

In so holding, the District Court abused its discretion by relying on inapplicable case law to engraft into 28 U.S.C. § 1446(b) an exception that has been treated negatively by most federal courts and never adopted by this Circuit.

Johnson is a diversity of citizenship case in which the plaintiffs' original complaint named nondiverse defendants who subsequently settled. The plaintiff then amended the complaint so that it named only diverse defendants, and this amendment took place after the one-year deadline for removal under 28 U.S.C. § 1446(c) had passed. The Fifth Circuit held that the amendment of the complaint "so changes the nature of the action as to constitute substantially a new suit which revives the defendant's right to remove . . . ." *Johnson*, 227 F.3d at 239. In other words, the case did not become removable until the complaint was amended to exclude the nondiverse defendants, and the amendment to the complaint "revived" the diverse defendants' right to remove.

As a factual matter, *Johnson* is nothing like this case. Here, the Attorney General has neither amended her complaint nor joined or dismissed any parties, nor has she changed any aspect of the claims against Enbridge. The case did not become a virtually new, substantially different, or more complex lawsuit when the District Court denied the State Plaintiffs' motion to remand in *Michigan v. Enbridge*.

As a legal matter, the "removal revival exception" conflicts with the rule in this Circuit that the 30-day removal deadline in 28 U.S.C. § 1446(b) is mandatory. *See State ex rel Slatery*, 311 F.Supp.3d at 903–910 (M.D. Tenn. 2018) (noting that, while many courts have rejected the revival exception, this Circuit has not even considered it, and that in fact this Circuit treats the removal periods of 28 U.S.C. § 1446 as mandatory unless they are waived by the plaintiff). Multiple other jurisdictions have rejected or questioned the validity of the exception. *See, e.g.*, *Tucker v. Equifirst Corp.,* 57 F. Supp. 3d 1347, 1351 (S.D. Ala. 2014) ("The Court does not believe that the Eleventh Circuit would recognize a 'revival exception' to Section 1446(b)(1) were the question presented. A defendant's right to remove an action against it from state

to federal court is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress.") (quotation marks omitted); *Hudson v. Allstate Ins. Co.*, 4:21-cv-00310-LPR, 2021 WL 3081565, at *2 (E.D. Ark. July 21, 2021); *Brown v. Rivera*, No. 2:15-cv-01505-CAS, 2015 WL 2153437, at *5 (C.D. Cal. May 6, 2015); *Dunn v. Gaiam, Inc.*, 166 F. Supp. 2d 1273, 1279 (C.D. Cal. 2001).

Even if this Court was to adopt the removal revival exception for the first time, it is not applicable here. It is well established that, even in jurisdictions where the exception has been recognized, the "event" triggering the exception cannot be a court order, but it must be the filing of an amended complaint that changes the character of the case so as to constitute "substantially a new suit begun that day." *Wilson v. Intercollegiate (Big Ten) Conf. Athletic Ass'n*, 668 F.2d 962, 965 (7th Cir. 1982). Here, the Attorney General has done nothing to change the character of this case, and she has merely exercised her statutory right to seek remand. The complaint in this case was no different on the day Enbridge filed its notice of removal than on the day the complaint was filed in state court, more than two years prior.

The District Court disregarded the clear rule in this Circuit that the 30-day removal deadline in 28 U.S.C. § 1446(b)(1) is mandatory, and it relied on the inapplicable removal revival exception to suit its purpose of avoiding the obvious: that Enbridge failed to remove the case within the 30-day limitation in § 1446(b)(1), and that failure cannot be remedied. At the end of the day, the District Court's decision to accept jurisdiction and deny remand was thus a clear abuse of discretion and usurpation of judicial power that rightfully belongs to the state court.

II. Mandamus is also appropriate because the District Court abused its discretion and usurped judicial power by snatching this case from the state court despite a lack of subject matter jurisdiction.

The well-pleaded complaint rule "governs whether a case is removable" under 28 U.S.C. § 1441(a) because it "arises under federal law for purposes of [28 U.S.C. § 1331]." *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 & n.2 (2002). Under it, "a suit arises under federal law only when the plaintiff's statement of his own cause of action shows that it is based upon federal law." *Perna v. Health One Credit Union*, 983 F.3d 258, 268 (6th Cir. 2020). As a

result, federal "jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 12 (2003). Nor can it rest on "an actual or anticipated defense," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009), even if "both parties admit that the *only question* for decision is raised by a federal preemption defense," *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 12 (1983).

Here, the Attorney General's complaint raises exclusively state law claims. (Compl. 6/27/19, R. 1-1, PAGE ID # 29–49.) The only issues of federal law are found in Enbridge's preemption defenses. (Enbridge's Mot. for Summ. Disp., R. 11-2, PAGE ID # 345–369.) Such defenses cannot form the basis of federal question jurisdiction, and so removal would be improper, and remand state court would be required, even if Enbridge's removal was timely.

A. Enbridge cannot establish grounds for removal on the basis of *Grable* or federal common law.

Without mentioning the well-pleaded complaint rule, Enbridge's Notice of Removal attempted to overcome it by relying on the "substantial federal question" exception, also known as the *Grable*

doctrine.[4] (Not. of Removal 12/15/21, R. 1, PAGE ID # 8–9.) Enbridge's reliance on *Grable* is misplaced because no federal issue is necessarily raised by the complaint, which is premised entirely on state law.

In particular, the control of public trust Great Lakes bottomlands is a matter of state common law. *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452–453 (1892); *Glass v. Goeckel*, 703 N.W.2d 58, 63–64 (Mich. 2005) (tracing the doctrine's roots to English common law).

Moreover, the siting and routing of interstate oil pipelines is expressly *not* regulated by the federal government under the Pipeline Safety Act. 49 U.S.C. § 60104(e).[5] And, contrary to Enbridge's

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[4] The other exception to the well-pleaded complaint rule, complete preemption, was not explicitly alleged in the Notice of Removal. However, Enbridge did assert complete preemption in its still-pending motion for summary disposition in state court. (Enbridge's Mot. for Summ. Disp. 1/14/22 R. 11-2, PAGE ID # 366–369.) Complete preemption does not provide a basis for removal of this matter because it "requires a finding that the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action," which is not the case here. *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 564 (6th Cir. 2007) (quotations omitted).

[5] In ruling on this issue in *Michigan v. Enbridge*, the District Court held that the fact that the Pipeline Safety Act expressly reserves to state law the siting, routing, and location of interstate oil pipelines presents a substantial issue of federal law that supports federal question jurisdiction under *Grable* because the Court would have to read this federal statute to confirm that it does not apply to this case. (1:20-cv-

assertion, the Submerged Lands Act does not define or control the scope of state authority over bottomlands. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 n.4 (1977).

Additionally, none of the federal issues asserted by Enbridge is substantial because this is a "fact-bound and situation-specific" dispute about the location of specific pipelines, and thus will not "govern numerous subsequent cases." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 690 (2006). And moving this case to federal court would disrupt the congressionally approved balance of judicial responsibilities, because Congress has spoken directly to the question of whether state law or federal law controls the siting and routing of interstate oil pipelines. *See* 49 U.S.C. § 60104(e) ("This chapter does not

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01142-JTN-RSK Op. and Order 11/16/21, R. 80, PAGE ID # 1034 ("the fact that provisions of the Pipeline Safety Act require interpretation, even if those provisions are ultimately construed in favor of the State Parties, demonstrates that the claims necessarily raise issues properly heard in federal court.") In other words, the District Court held that a defendant's mere act of asserting a federal preemption defense to a state law claim, even if the federal statute defendant relies on expressly reserves the issue to state law, means that the complaint necessarily raises a substantial question of federal law and supports federal court jurisdiction. This analysis turns *Grable* on its head and contradicts the well-pleaded complaint rule. The fact that a federal statute reserves an issue to state law does not make that issue a substantial question of federal law; in fact, it does the exact opposite.

authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.").

Nor can Enbridge establish federal court jurisdiction on the basis of federal common law. First, Enbridge only alludes vaguely to federal common law as an independent basis of removal, which supplies the "rule of decision." (Not. of Removal 12/15/21, R. 1, PAGE ID # 10–11.) As a preliminary matter, the instances where federal common law exists are "few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 561 (1963). More importantly, it is well established that, in the context of a well-pleaded complaint, a defendant's invocation of federal common law as a basis for removal jurisdiction must fail in the absence of complete preemption. *See, e.g.*, *New Mexico ex rel. Balderas v. Monsanto Co.*, 454 F. Supp. 3d 1132, 1149–50 (D.N.M. 2020) ("However, even if the Court were to ignore the well-pleaded complaint doctrine and find that Plaintiff's state law claims implicated federal common law, removal still would not be appropriate without a showing of *complete* preemption of the issues raised. Federal common law cannot support complete preemption without a 'demonstration of Congressional intent to make the action removable.'" (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S.

58, 63 (1987)); *see also Marcus v. AT & T Corp.*, 138 F.3d 46, 53–54 (2d Cir. 1998) (rejecting argument that unpleaded federal common law provided the basis for removal of state law claims where federal common law did not completely preempt plaintiff's claims).

The Supreme Court has reaffirmed that "before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied," "one of the most basic" of which is that "common lawmaking must be 'necessary to protect uniquely federal interests.'" *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020) (quoting *Tex. Indus.*, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)). As set forth above, the complaint in this matter concerns issues of state law. The fact that state law controls both the location of interstate oil pipelines and the disposition of public trust bottomlands has been affirmed by both Congress and the Supreme Court. Enbridge's argument that the complaint implicates *uniquely* federal interests is, therefore, without merit.

B. Removal is not proper under 28 U.S.C. § 1442(a)(1) because Enbridge is not "acting under" a federal officer, and the actions for which it is being sued were not taken under color of federal office.

Enbridge must show not only that it acted under the "subjection, guidance, or control" of a federal officer, but that it did so in "an effort to assist, or help carry out, the duties or tasks of a federal superior." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151–52 (2007). "Simply complying with a regulation is insufficient, even if the regulatory scheme is highly detailed and the defendant's activities are highly supervised and monitored." *Mays v. City of Flint*, 871 F.3d 437 (6th Cir. 2017) (quotations omitted). But Enbridge's sole contention is that PHMSA controlled the "operation and safety management of the Straits Pipelines" through "extensive regulation." (Not. of Removal 12/15/21, R. 1, PAGE ID # 12–13, ¶ 30.) This vague allegation, however, simply describes the type of "regulatory/regulated relationship" that the Supreme Court has found insufficient to support federal officer jurisdiction. *Watson*, 551 U.S. at 157 (government's "inspection and supervision of the industry laboratory's testing" did not satisfy acting-under standard). Also, Enbridge fails to explain how its operation of a privately owned pipeline helps PHMSA carry out a federal "dut[y] or

task[]," *id.* at 152, much less how the company "perform[s] a job that, in the absence of a contract with a private firm, the Government itself would have had to perform," *id.* at 154.

Enbridge also cannot show a "causal connection between the charged conduct and the asserted official authority." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1088 (6th Cir. 2010) (cleaned up). To meet this burden, Enbridge "must show that it is being sued because of the acts it performed at the direction of the federal officer." *Id.* The claims against Enbridge in this case relate to the location of the Straits Pipelines. Enbridge does not, and cannot, claim that it was directed by PHMSA to locate its pipelines on the bottomlands of the Straits of Mackinac. Even if PHMSA had existed at the time the Straits Pipelines were placed there (it was created over 50 years later, in 2004), PHMSA has no authority to "prescribe the location of routing a pipeline facility." 49 U.S.C. § 60104(e).

C. The District Court abused its discretion when it refused to consider the limits of its subject matter jurisdiction and estopped the Attorney General from raising the issue.

In its order denying remand, the District Court estopped the Attorney General from challenging the Court's subject matter jurisdiction based on what it described as the Attorney General's "forum shopping" and "procedural fencing." (Op. and Order 8/18/22 R. 23, PAGE ID # 619–621.)

As a preliminary matter, the District Court's assessment of the Parties' respective conduct is astonishing. The Attorney General merely sought to return this case to the proper court where the case was initiated and where Enbridge voluntarily litigated for over a year. It was not until the state court ordered the Straits Pipelines to be temporarily shut down, and after the District Court sanctioned the removal of *Michigan v. Enbridge*, that Enbridge decided it would prefer a federal forum and removed this case more than two years after the removal deadline had expired. "Forum manipulation" and "procedural fencing" may have occurred here, but the District Court got it backward in assigning blame to the Attorney General instead of to Enbridge. In

fact, in accusing the Attorney General of these underhanded tactics, the District Court stated:

> There is another reason remand is timely and proper. A lapsed right to remove may be restored where a litigation event, such as a court order, starts a virtually new, more complex, and substantial case . . . . *the purposes of the thirty-day limitation are "to deprive the defendant of the undeserved tactical advantage of seeing how the case goes in state court before removing, and to prevent the delay and wastefulness of starting over in a second court after significant proceedings in the first*."

(*Id.*, PAGE ID # 620 (cleaned up, emphasis added.)

In a case where Enbridge waited over two years to remove, during which time it briefed and argued dispositive motions and the operation of the Pipelines was temporarily enjoined by the state court, it is incomprehensible that the District Court would invoke this language in excusing Enbridge's untimely removal and accusing *the Attorney General* of attempting to gain an unfair advantage through forum shopping. The language applies to the conduct of Enbridge here, not the Attorney General.

Additionally, in estopping the Attorney General from raising the issue of subject matter jurisdiction, the Court made the troubling error of confusing the Attorney General with the State Plaintiffs in *Michigan v. Enbridge*. (Op. and Order 8/18/22, R. 23, PAGE ID # 616) ("This is

the second remand motion the Court has addressed from the State Plaintiff relating to the Straits Pipeline controversy. The State lost the first time on jurisdictional grounds and voluntarily dismissed the case; in the present case, the State Plaintiff seeks remand based on alleged defects in removal procedure and jurisdiction.") At the risk of stating the obvious, the Attorney General, as Plaintiff in this case, is a distinct and separate person from the State Plaintiffs in the separate case of *Michigan v. Enbridge*, and the State Defendants in *Enbridge v. Michigan*. Michigan's Attorney General is a separately elected law enforcement officer (Mich. Const. art. V §§ 3 and 21), distinct from Michigan's Governor and department directors. The Attorney General not only represents the Governor and state departments as legal counsel, but also has separate authority to bring civil actions on behalf of the People of the State of Michigan. Mich. Comp. Laws § 14.28 (establishing that, in addition to bringing actions on behalf of the Governor, state departments, and Legislature, the Attorney General also "may, when in his judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any matter, civil or criminal, in which the people of the

state may be a party or interested"); Mich. Comp. Laws § 14.102 (establishing venue provisions for "[a]ny action at law brought by the attorney general in the name of the state or of the people of the state . . . ."). This is separate and distinct from the Attorney General's duty to act as legal counsel and bring suit on behalf of the Governor and state departments such as the DNR. Mich. Comp. Laws § 14.29 ("It shall be the duty of the attorney general, at the request of the governor, the secretary of state, the treasurer or the auditor general, to prosecute and defend all suits relating to matters connected with their departments."). Michigan courts have long recognized the Attorney General's authority to bring civil actions as a plaintiff on behalf of the people of the state. *See*, *e.g.*, *Attorney General on Behalf of the People of the State of Michigan v. Beno*, 373 N.W.2d 544 (Mich. 1985). Again, the District Court appears to hold the litigation decisions of other parties in other cases against the Attorney General when balancing the equities in this case.

More substantively, there is no basis for any court to refuse to consider whether it has subject matter jurisdiction over a case, or to estop a party from raising the issue. Subject matter jurisdiction cannot

be waived and can be raised at any time. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *Taubman Co. v. Webfeats*, 319 F.3d 770, 773 (6th Cir. 2003) (holding that subject matter jurisdiction may even be challenged "collaterally" after disposition). The District Court's refusal to entertain a jurisdictional challenge, and its estoppel of the Attorney General from raising such a challenge, constitute an abuse of discretion.

III. This Court's mandamus factors overwhelmingly support issuance of the writ.

Although the District Court's denial of remand was a clear abuse of discretion, that abuse only warrants mandamus if this Circuit's five-factor balancing test supports issuance of the writ. *John B.*, 531 F.3d at 457. Here, four of the five the factors collectively and conclusively demonstrate that the writ should be granted, the other factor being inapplicable to the proceeding here. [6]

[6] The District Court's order involves the application of a novel equitable theory to excuse an untimely removal; consequently, the order does not contain an oft-repeated error. The inapplicability of the fourth mandamus factor is to be expected under these circumstances. *See In re Pros. Direct Ins. Co.*, 578 F.3d 432, 437 (6th Cir. 2009) (noting that factors "four and five tend to point in opposite directions").

A. The first two factors militate in favor of issuance because the Attorney General has no other adequate means of attaining the desired relief and will be damaged in a way not correctable on appeal.

Caterpillar Inc. v. Lewis, 519 U.S. 61 (1996) and its progeny plainly demonstrate that the Attorney General's petition satisfies factors one and two. In *Caterpillar*, the Supreme Court held "that a District Court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." 519 U.S. at 64. The Court so held despite its recognition that the underlying "statutory flaw—Caterpillar's failure to meet the § 1441(a) requirement that the case be fit for federal adjudication at the time the removal petition is filed—*remained in the unerasable history of the case*." *Id.* at 73 (emphasis added). The Court acknowledged merit in the plaintiff's contention that the defendant would never have been able to get into federal court had the District Court adhered to the statutory rules for removal. *Id.* But the Court concluded that "[t]o wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the

fair and unprotracted administration of justice." *Id.* at 77. The Court foreclosed remand premised on defective removal, even though the plaintiff, "by timely moving for remand, did all that was required to preserve his objection to removal." *Id*. at 74.

The federal courts of appeals applying *Caterpillar* have held that a District Court's wrongful denial of remand due to timeliness defects can also be overridden. *See, e.g.*, *Moore v. N. Am. Sports, Inc.*, 623 F.3d 1325, 1329 (11th Cir. 2010) (excusing, without consideration, an alleged timeliness defect because "any untimeliness would be an insufficient basis to vacate the judgment and remand for a new trial"); *Huffman v. Saul Holdings Ltd. P'ship,* 194 F.3d 1072, 1080 (10th Cir.1999) (acknowledging same). The rule also applies to procedural defects related to the removal of cases based on alleged federal question jurisdiction, not just diversity cases such as *Caterpillar*. *Quintero Cmty. Ass'n Inc. v. F.D.I.C.*, 792 F.3d 1002, 1008 (8th Cir. 2015) (holding that *Caterpillar* "applie[s] to cases in which removal based on federal question jurisdiction was untimely, a motion to remand was denied, and the case proceeded to final judgment in federal court" and citing cases).

The only real limitation on the reach of the *Caterpillar* rule is where a litigant loses quickly in the lower court and appeals. *See City of Oakland v. BP PLC*, 969 F.3d 895, 909 (9th Cir. 2020) (agreeing with the Fifth Circuit "that a dismissal under Rule 12(b)(6), unlike a grant of summary judgment, is generally insufficient to forestall an otherwise proper remand") (quotation marks omitted).

No litigant's crystal ball is accurate enough to predict whether at the end of adjudication in the lower court—the duration and intensity of which are necessarily uncertain—the reviewing court will find that considerations of "finality, efficiency and economy" will not "overwhelm" an erroneous denial of remand.[7] *See Caterpillar*, 519 U.S. at 75. This dilemma renders the ordinary appeal route for review of an adverse final judgment, and the embedded wrongful denial of remand, manifestly inadequate. *Cf. In re Nat'l Presto Indus., Inc.*, 347 F.3d 662,

[7] Based on Enbridge's vigorous litigation of a separate lawsuit in which a District Court recently held that Line 5 is trespassing on an Indian nation's sovereign lands, *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Rsrv. v. Enbridge Energy Co., Inc.*, No. 19-cv-602-WMC, 2022 WL 4094073, at *12 (W.D. Wis. Sept. 7, 2022); *see also* case docket report, which to date, includes 618 entries), the odds that federal court proceedings will overwhelm the District Court's wrongful denial of remand on appeal are significant.

663 (7th Cir. 2003) ("[Plaintiff] would not have an adequate remedy for improper failure to transfer the case by way of appeal from an adverse final judgment because it would not be able to show that it would have won the case had it been tried in a convenient forum."); *In re Beazley Ins. Co.*, No. 09-20005, 2009 WL 7361370, at *7 (5th Cir. May 4, 2009) (invoking this reasoning from *In re Nat'l Presto* to reverse, via mandamus, an erroneous denial of a motion to remand). Nor is appeal via 28 U.S.C. § 1292(b) an adequate means of obtaining relief. The Attorney General filed a motion for certification of issues for interlocutory appeal on August 30, 2022, (R. 24); however, more than five months after conclusion of briefing, the District Court has elected not to rule on that motion.

Unless this Court issues a writ of mandamus to correct the District Court's clearly erroneous decision, the Attorney General risks suffering the same irreparable harm as the plaintiff in *Caterpillar* who correctly identified a removal defect but waited for a final judgment to appeal. *See* 519 U.S. at 63, 73. Such harm satisfies the second mandamus factor—harm that cannot be corrected on appeal. *In re Chimenti*, 79 F.3d at 540 (holding that, where a mandamus petition

satisfies the first factor (inadequate relief through direct appeal), "forcing petitioners to litigate a case in a forum they did not choose, even though the applicable law was designed to preserve their choice of forum, constitutes significant damage not correctable on appeal.") (quotation marks omitted); *see also In re Nat'l Presto*, 347 F.3d at 663 (holding that lack of an adequate remedy to correct a District Court's erroneous forum determination constitutes irreparable harm). Such harm is magnified here where the wrongful denial of remand forces a sovereign state into federal court against its will. *See West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011) (recognizing that although "West Virginia voluntarily entered into its own courts to enforce its laws, it did not voluntarily consent to removal of its case to a federal court").

B. The third factor militates in favor of issuance because the District Court's order is clearly erroneous as a matter of law.

As set forth above, the District Court's opinion and order denying the Attorney General's motion to remand is clearly erroneous as a matter of law for two reasons. First, the District Court erred when it improperly excused Enbridge's untimely removal. Second, the District

Court erred when it estopped the Attorney General from raising the issue of subject matter jurisdiction.

Under the proper standards for assessing compliance with the time limitations of 1446(b)(1) and (b)(3), and based on a proper application of the *Grable* doctrine, it is plain that the District Court's decision denying remand was erroneous as a matter of law.

C. The fifth factor militates in favor of issuance because the District Court's order raises new and important problems, or issues of law of first impression.

The District Court's order presents a new and important federalism problem: under what, if any, circumstances can a district court disregard the mandatory time limitations for removal Congress established to prevent encroachment on state-court jurisdiction? This question takes on heightened importance in light of the well-established doctrine in removal jurisprudence that all doubts about the propriety of remand, including procedural compliance, should be resolved in favor of remand. *Brierly*, 184 F.3d at 534. Moreover, the federal judiciary's concern for federalism and comity, and the concomitant mandate to resolve all doubts about the procedural propriety of removal in favor of remand, comes into sharpest focus when the plaintiff is the Attorney

General in an action seeking to represent the collective interests of the state's citizens. *West Virginia ex rel. McGraw*, 646 F.3d at 178.

This Court's decision in *Nessel ex rel. Michigan*, 954 F.3d 831, is instructive. There, the Attorney General brought a class action under the Michigan Consumer Protection Act (MCPA), Mich. Comp. Laws § 445.901 *et seq*., against the largest provider of residential propane in the state, alleging unfair trade practices including illegal pricing schemes. Amerigas removed to federal court under the removal provision of the federal Class Action Fairness Act (CAFA) on the grounds that a case brought pursuant to the class action provision in the MCPA is, by definition, a class action for purposes of CAFA. *Id.* at 833. The district court disagreed, concluded it lacked subject matter jurisdiction, and remanded. *Id.*

In affirming, this Court agreed with the district court's interpretations of both CAFA and Michigan law. This Court also emphasized the role of federalism in the strict construction and constrained application of federal removal statutes:

> Lastly, federalism concerns also weigh in favor of our interpretation of CAFA. The Supreme Court has long cautioned against "snatch[ing] cases which a State has brought from the courts of that State, unless some clear rule

> demands it." *CVS Pharmacy*, 646 F.3d at 179 (alteration in original) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, (citation omitted); *see also id.* at 178 ("While it is true that West Virginia voluntarily entered into its own courts to enforce its laws, it did not voluntarily consent to removal of its case to a federal court, and a federal court should be most reluctant to compel such removal, reserving its constitutional supremacy only for when removal serves an overriding federal interest."). This principle strikes us as a specific manifestation of the general clear-statement rule requiring Congress to speak clearly if it "intends to alter the usual constitutional balance between States and the Federal Government." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 529 U.S. 765, 787 (2000).

Id. at 837–38*; see also*, *West Virginia*, 646 F.3d at 178–79 (affirming remand order based on narrow interpretation of CAFA removal provision).

The federalism concerns identified by this Court and Fourth Circuit in construing the removal provision in CAFA apply with equal force in the construction and application of the mandatory time limitations of 28 U.S.C. § 1446(b). By establishing mandatory removal timelines in § 1446(b), Congress issued a clear statement that state-court jurisdiction may not be disturbed by an untimely removal. The only overriding federal interest here is to enforce Congress's will. The federal judiciary's respect for state sovereignty requires nothing less.

CONCLUSION AND RELIEF REQUESTED

The District Court committed clear error and abused its discretion—first by excusing Enbridge's failure to remove this case within the time limitations prescribed by 28 U.S.C. § 1446(b), and second by refusing to consider the limits of its own subject matter jurisdiction and going so far as to estop the Attorney General from even raising the issue. These errors resulted in the District Court "snatching" this case which a State brought from the courts of that State without any clear rule that demands it, and in direct contravention of clear rules that forbid it.

In the absence of mandamus, the State has no adequate means of remedying this clear error, which offends the State of Michigan's sovereignty and the principles of comity that Congress's removal timelines are designed to safeguard. This Circuit's five-factor test overwhelmingly favors issuance of the writ to control the District Court's usurpation of power, abuse of discretion, and failure to discharge a judicial duty. The Attorney General respectfully requests that this Court find that Enbridge's removal of this case was untimely and issue a writ a mandamus directing the District Court to vacate its

order denying remand and to remand this case to state court from which it was improvidently removed.

Respectfully submitted,

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Dated: February 17, 2023

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
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1. This petition exceeds with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains more than 7,800 words. This document contains 11,840 words. Permission to exceed the applicable type-volume limitation has been requested in a contemporaneously filed motion.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on February 17, 2023, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Plaintiff-Petitioner, per Sixth Circuit Rule 28(a), 28(a)(1)-(2), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID No. Range
Notice of Removal	12/15/2021	R. 1	1–17
State Court Complaing	12/15/2021	R. 1-1	19–63
Motion to Remand	01/14/2022	R. 10	267–268
Brief in Support of Motion to Remand	01/14/2022	R. 11	269–303
State Court Register of Actions	01/14/2022	R. 11-1	306–319
Enbridge's State Court Motion for Summary Disposition	01/14/2022	R. 11-2	325–398
Email from State Court	01/14/2022	R. 11-3	400
State Court Hearing Transcript	01/14/2022	R. 11-4	401–508
Enbridge's Brief in Support of Motion for Summary Disposition	01/14/2022	R. 11-5	510–541
Order Denying Motion to Remand	08/18/2022	R. 23	611–623
Motion for Certification for Interlocutory Appeal	08/30/2022	R. 24	624–625

Brief in Support of Motion for Certification for Interlocutory Appeal	08/30/2022	R. 25	626–647
Proposed Reply in Support of Motion for Certification for Interlocutory Appeal	09/20/2022	R. 29-1	675–688

Records from *Michigan v. Enbridge*, District Court case no. 1:20-cv-1142

Description of Entry	Date	Record Entry No.	Page ID No. Range
State Court Complaint	11/24/2022	R. 1-1	15–107
Notice of Removal	11/24/2022	R. 1-2	108–111
Amended Notice of Removal	12/10/2020	R. 12	237–249
State Plaintiffs' Motion to Remand	06/01/2021	R. 41	465–467
State Plaintiffs' Brief in Support of Motion to Remand	06/01/2021	R. 42	468–509
Order Denying Motion to Remand	11/16/2021	R. 80	1021–1035
Notice of Voluntary Dismissal	11/30/2021	R. 83	1051

Records from *Enbridge v. Michigan*, District Court case no. 1:20-cv-01141

Description of Entry	Date	Record Entry No.	Page ID No. Range
Complaint	11/24/2020	R. 1	1–20
State Defendants' Motion to Dismiss	04/05/2022	R. 62	322–323
State Defendants' Brief in Support of Motion to Dismiss	04/05/2022	R. 63	324–349
Enbridge's Motion for Summary Judgment	04/05/2022	R. 65	352–354
Enbridge's Brief in Support of Motion for Summary Judgment	04/05/2022	R. 66	355–386

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