No. 23-1671

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiff-Appellant,

v.

ENBRIDGE ENERGY LIMITED PARTNERSHIP, ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY PARTNERS, L.P.,

Defendants-Appellees.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Janet T. Neff

BRIEF FOR PLAINTIFF-APPELLANT

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Dated: September 18, 2023

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Attorney General Dana Nessel requests oral argument to assist the Court in deciding the fundamental questions of removal procedure, subject-matter jurisdiction, and state sovereignty at issue in this matter. Because this is an interlocutory appeal arising under 28 U.S.C. § 1292(b), the Attorney General requests that oral argument be expedited pursuant to 6 Cir. R. 34(c)(2) and 6 Cir. I.O.P. 28(c).

JURISDICTIONAL STATEMENT

This interlocutory appeal arises from an August 18, 2022 Opinion and Order denying the Attorney General's motion to remand 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 in the United States District Court for the Western District of Michigan. The District Court certified its Opinion and Order pursuant to 28 U.S.C. § 1292(b), and this Court granted permission to appeal in case number 23-0102 on July 21, 2023.

STATEMENT OF ISSUES PRESENTED

In its August 18, 2022 Opinion and Order denying the Attorney General's motion to remand, the District Court allowed Defendants to remove this case from state court to federal court more than two years after the removal deadline set forth in 28 U.S.C. § 1446(b)(1) expired, and estopped the Attorney General from arguing that the District Court lacked subject-matter jurisdiction. This Court granted the Attorney General permission to bring this interlocutory appeal pursuant to 28 U.S.C. § 1292(b) based on three controlling issues of law:

1. Whether the 30-day removal deadline in § 1446(b)(1) is mandatory or instead a procedural guideline that may be excused.

2. Whether the District Court's order in a closely-related case was the first point in time when Defendants could ascertain that this action was removable under 28 U.S.C. § 1446(b)(3).

3. Whether this case presents a substantial question of federal law that gives rise to federal jurisdiction.

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 allowed the Defendants (Enbridge) to disregard the plain language of 28 U.S.C. § 1446(b)(1) and remove this case to federal court more than *two years* after the statutory 30-day deadline to do so had expired, and after substantial state-court litigation.

In so doing, the District Court engrafted exceptions into the removal statute that are not found in its text, holding that the 30-day removal deadline may be disregarded based on overriding federal interests, equitable considerations, or other exceptional circumstances. This decision resulted in the District Court "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 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 oil pipelines known as the Line 5 Dual Pipelines (Pipelines) on bottomlands of the Straits of Mackinac between Michigan's Upper and Lower Peninsulas.

Enbridge initially agreed that the state court was the proper forum, as it actively litigated the case there for over a year. During that time the state court heard arguments on cross-motions for summary disposition (which remain undecided approximately three years later), and entered a temporary restraining order enjoining the operation of the Pipelines for several weeks after evidence of impacts to the Pipelines became known. Only after it received this adverse ruling from the state court, and more than *two years* after the 30-day removal deadline in § 1446(b)(1) had expired, did Enbridge remove the case to the U.S. District Court for the Western District of Michigan.

This interlocutory appeal arises from the District Court's Opinion and Order denying the Attorney General's motion to remand this

matter to state court. There are three fundamental reasons why this Opinion and Order must be reversed and this matter remanded to state court:

- The 30-day removal deadline is mandatory and not a mere procedural guideline that may be disregarded;
- Enbridge's extremely dilatory removal is not saved by § 1446(b)(3) because Enbridge waived any right to remove the case when it chose to litigate the matter in state court and, even if Enbridge's asserted bases for removal were valid (which they are not), Enbridge could have ascertained them long before it removed the case; and
- The complaint raises state-law claims over which there is no basis for federal court subject-matter jurisdiction.

For these reasons, the Attorney General respectfully requests that this Court reverse the District Court's August 18, 2022 Opinion and Order and remand this matter to state court where it belongs.

STATEMENT OF THE CASE

A. *Nessel v. Enbridge* in state court

The Attorney General filed this case in Michigan's 30th Circuit Court for the County of Ingham on June 27, 2019. (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 Pipelines—based upon the public trust doctrine (Counts I.A. and I.B.), the state 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 that it would enhance or at least not adversely affect the public trust. (R. 1-1, Page ID # 31–32.) Count I.B. alleges that continued operation

[1] Unless otherwise indicated, all record citations in this brief 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.

of the Straits Pipelines is inconsistent with the public trust. (*Id*., Page ID # 32–46.)

Enbridge responded to the complaint on September 16, 2019 by filing a motion for summary disposition under Mich. Ct. R. 2.116(C)(8), arguing that the complaint failed to state a claim on which relief could be granted. (Enbridge's Mot. for Sum. Disp., R. 11-2.) Enbridge argued, among other things, that the Attorney General's claims under the public trust doctrine were preempted by the federal Pipeline Safety Act, which it claimed occupies the field of pipeline safety regulation. (*Id*., Page ID # 362–369.)

The Attorney General filed her own dispositive motion as well, and the state court held oral arguments on those motions 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 (Tr., 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 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 Pipelines' infrastructure. (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 DNR Director 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 brief as "*Michigan v. Enbridge*" or "the Governor's case").) 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 the Governor's case to the District Court and simultaneously filed the counterclaims described in § C below. The initial notice of removal of the Governor's case 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. (Am. Notice of Removal, 1:20-cv-1142, R. 12, Page ID # 239–246.)

The Governor and DNR Director 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., R. 41 and 42.) The Attorney General and Enbridge 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 so doing, the District Court held that *Grable* substantial federal question jurisdiction existed because resolution of the Governor and DNR Director's claims would necessarily require interpretation of two federal statutes: the Federal Submerged Lands Act, the Pipeline Safety Act, and the 1977 Transit

Pipelines Treaty with Canada (1977 Treaty) "burdened" the State's ownership of Great Lakes bottomlands and federal questions were therefore "embedded" in the public trust claims. (*Id.*, Page ID # 1030, 1035.)

Ultimately, on November 30, 2021, the Governor and DNR Director exercised their right to voluntarily dismiss the case pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). (1:20-cv-1142, Not. of Vol. Dis., R. 83.)

C. *Enbridge v. Michigan*

On November 24, 2020, the same day that Enbridge removed the Governor's case 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-1141, Compl., R. 1.) Enbridge's complaint sought a declaration that the Notice of Revocation and Termination of the 1953 Easement issued by the Governor and DNR Director to Enbridge was unconstitutional and otherwise preempted by federal law, and sought an injunction prohibiting the Governor and DNR Director from "taking any steps to impede or prevent the interstate and international operation of Line 5 . . . ." (*Id.*, Page ID # 18–19.)

The parties filed dispositive motions, which were fully briefed as of April 5, 2022. More than 17 months later, the parties await the District Court's ruling.

D. Removal of *Nessel v. Enbridge*

On December 15, 2021, approximately two and a half years after it was filed and served, Enbridge removed this case to the District Court. As its basis for removal, Enbridge simply repeated the arguments for federal jurisdiction set forth in its notice of removal and amended notice of removal in the Governor's case—both of which were filed more than a year before the notice of removal in this case. (*Compare* 1:20-cv-1142, R. 1-2, Page ID #1–218, *and* 1:20-cv-1142, R. 12, Page ID # 237–249, *with* R.1, Page ID # 1–130.) As in the Governor's case, Enbridge primarily asserted federal jurisdiction under *Grable*, asserting that the Attorney General's state-law claims necessarily raised substantial federal questions about the Pipeline Safety Act, the Federal Submerged Lands Act, and the 1977 Treaty. (R. 1, Page ID # 8–9.) Enbridge also repeated its arguments that there was federal jurisdiction under the Federal Officer Removal Statute and based on federal common law. (*Id.* at 9–14.)

Enbridge claimed that this removal—887 days after it was served with the complaint—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 the Governor's case. (*Id.*, Page ID # 6–8.) But Enbridge ignored the fact that it had raised and litigated these same issues in state court more than two years prior and relied on them to remove the Governor's case approximately one year prior.

E. The District Court's denial of the Attorney General's motion to remand *Nessel v. Enbridge* and the Attorney General's requests for interlocutory appellate review

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 § 1446(b)(1), and (2) lack of subject-matter jurisdiction because the complaint alleged exclusively state-law claims and did not raise any issue of federal law. (Mot. 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 § 1446(b)(1) 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 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 have been "no significant actions 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, 617.) The District

Court also noted that it had reviewed the state court's docket and that the case had been closed.[2] (*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., R. 24 and 25.) In her brief in support, the Attorney General pointed out that this Circuit considers the 30-day removal deadline in § 1446(b)(1) to be mandatory and that it does not recognize any equitable exceptions such as those invoked by the District Court. (Br. in Supp., R. 25, Page ID # 634–639.) The Attorney General further argued that subject-matter jurisdiction cannot be waived and can be raised at any time, and that a court cannot 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 this case is actually more

[2] 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.

procedurally advanced than Enbridge's lawsuit against the Governor and DNR Director as substantial litigation took place in the state court. (*Id.*, Page ID # 681 n. 1, 686.) Indeed, as explained above, the Parties briefed and argued cross-motions for summary disposition and were awaiting the state court's decision on those motions, and the state court entered a temporary restraining order enjoining the operation of the Pipelines for several weeks, long before *Enbridge v. Michigan* was even filed.

On February 17, 2023, after waiting approximately five months for a ruling on her motion for certification, the Attorney General petitioned this Court for a writ of mandamus. No. 23-1148, R. 1. The next business day, February 21, 2023, the District Court granted the Attorney General's motion for certification. (Op. and Order, R. 32.) The Attorney General then filed a request for permission to appeal to this Court pursuant to 28 U.S.C. § 1292(b) on March 2, 2023. *See* Case No. 23-0102.

This Court granted the Attorney General's request for permission to appeal and denied the Attorney General's petition for a writ of

mandamus on July 21, 2023. (No. 23-0102, R. 11 and 12; No. 23-1148 R. 8 and 9.) This appeal now follows.

STANDARD OF REVIEW

Removal jurisdiction is a question of law which this Court reviews de novo. *Davis v. McCourt*, 226 F.3d 506, 509 (6th Cir. 2000).

SUMMARY OF ARGUMENT

This appeal is about the District Court's decision to essentially rewrite the controlling removal statute by creating exceptions that have never been contemplated by Congress or this Court. The District Court's decision contradicts the plain language of § 1446(b)(1), this Court's removal jurisprudence, and important principles of state sovereignty and federalism.

There are three reasons why the District Court erred in denying the Attorney General's motion for remand—each of which compels reversal by this Court. First, Enbridge filed its notice of removal over *two years* after the deadline set forth in § 1446(b)(1). The District Court excused this procedural defect by claiming the judicial power to disregard statutory time constraints based on overriding federal

interests and equitable considerations. But no such power exists, and thus the denial of remand must be reversed.

Second, Enbridge's extremely dilatory removal cannot be saved by § 1446(b)(3). Enbridge's argument on this point—that it could not ascertain that this case was removable until the District Court denied remand based on virtually identical claims raised in the Governor's case—is belied by the fact that Enbridge raised identical arguments in its first responsive pleading in this case in state court, that it waived any right to removal by expressly asking the state court to adjudicate this case, and that its bases for removal could have been ascertained numerous times over the preceding two years.

Third, even if Enbridge's removal was timely—and it was not—removal would still not be proper because there is no federal subject-matter jurisdiction over this case. Enbridge erroneously claims that the Attorney General's complaint necessarily raises substantial questions of federal law, which give rise to federal jurisdiction under the *Grable* doctrine. But the Attorney General's complaint pleads exclusively state-law causes of action. The "substantial questions of federal law" asserted by Enbridge are nothing more than ordinary preemption

defenses, which are not sufficient to overcome the well-pleaded complaint rule.

By wrongfully holding this case in federal court, the District Court essentially rewrote § 1446(b)(1) by adding exceptions that are not found in its plain language. This was contrary to the statutory language, this Court's removal jurisprudence, basic principles of federalism and state sovereignty, and the limits of the District Court's own jurisdiction. For these reasons, the Attorney General respectfully requests that this Court reverse the District Court's August 18, 2022 Opinion and Order, and remand this case to state court where it belongs.

ARGUMENT

I. This case must be remanded to state court because Enbridge failed to comply with the mandatory 30-day removal deadline in 28 U.S.C. § 1446(b)(1).

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

In 28 U.S.C. §§ 1441(a) and 1442, Congress authorized federal courts to exercise federal judicial power over certain cases originally

filed in state court. To remove a case under those provisions, however, "a party must meet the requirements for removal detailed in other provisions," *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019), including § 1446(b)(1).

"The party seeking removal bears the burden of establishing its right thereto." *Her Majesty The Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989). Because "removal jurisdiction encroaches on a state court's jurisdiction," "federal jurisdiction should be exercised only when it is clearly established, and any ambiguity regarding the scope of § 1446(b) should be resolved in favor of remand to the state courts." *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534 (6th Cir. 1999) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941)).[3] Erring on the side of remand to state court is particularly important where, as here, the case is brought by the forum state itself. This Court has recognized that "[t]he Supreme Court has long cautioned against snatching cases

[3] *Accord Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017); *Harnden v. Jayco, Inc.*, 496 F.3d 579, 581 (6th Cir. 2007); *Eastman v. Marine Mech. Corp.*, 438 F.3d 544, 550 (6th Cir. 2006).

which a State has brought from the courts of that State, unless some clear rule demands it." *Nessel*, 954 F.3d at 837–38 (cleaned up).

Here, the District Court's Opinion and Order contradicted this clear jurisprudence that requires caution and restraint in deciding whether cases may be removed. The result was that the District Court "snatch[ed]" this case, brought by Michigan's chief law enforcement officer, from Michigan's courts. *See id*. This Court should reverse and remand to state court.

A. The District Court erred in holding that the 30-day removal deadline in § 1446(b)(1) is not mandatory.

In her motion to remand, the Attorney General argued that Enbridge's notice of removal failed to satisfy the requirements for timely removal under § 1446(b)(1). (R. 10; R. 11, Page ID # 286–298.) In fact, as noted above, Enbridge's notice of removal was filed more than *two years* after the expiration of the 30-day removal deadline. Rather than analyze compliance with the 30-day deadline, 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." (R. 23, Page ID # 615 (footnotes omitted).)

That holding does not withstand scrutiny. It is contrary to the statutory text, the prevailing case law and practice in this Circuit, and well-established principles of comity and federalism—all of which are incompatible with the District Court's decision to disregard the 30-day removal deadline based on unwritten, judicially-created exceptions.

1. The removal deadline in § 1446(b)(1) is mandatory and must be strictly enforced.

In applying § 1446(b)(1), this Court's analysis "begins with the statutory language." *Brierly*, 184 F.3d at 534. The statutory language states in relevant part:

> The notice of removal of a civil action or proceeding **shall be filed within 30 days** after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . .

28 U.S.C. § 1446(b)(1) (emphasis added).

Here, Enbridge was served with the Attorney General's complaint on July 12, 2019, meaning that any notice of removal "shall be filed" by August 12, 2019. Enbridge missed that deadline by over 850 days.

The District Court had no power to excuse Enbridge's noncompliance with § 1446(b)(1) based on equitable factors. Instead, under ordinary principles of statutory interpretation, Congress's use of the word "shall" dictates that the 30-day removal deadline is a mandatory deadline that may not be excused. *See United States v. Ostrander*, 411 F.3d 684, 688 (6th Cir. 2005); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("[A] mandatory 'shall' . . . impose[s] discretionless obligations."); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983) (calling "shall" "language of an unmistakably mandatory character"). Indeed, it is well-established that "[a] statutory procedural rule framed 'in terms of the mandatory "shall" normally create[s] an obligation impervious to judicial discretion.'" *United States v. Young*, 424 F.3d 499, 507 (6th Cir. 2005) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)) (cleaned up).

The District Court's decision to excuse compliance with the 30-day deadline set forth by Congress—based on unwritten exceptions found nowhere in the statute—is contrary to the clear and mandatory statutory language. Congress is responsible for setting the bounds of federal removal jurisdiction. And Congress did not authorize the

District Court to excuse compliance with § 1446(b)(1) based on its assessment of "overriding federal interests" or "equitable considerations." *Cf., e.g.*, *Brock v. Syntex Labs, Inc.*, Nos. 92-5740, 92-5766, 1993 WL 389946, at *1 (6th Cir. 1993) ("[T]he statutory language is unmistakably clear . . . . [J]urisdiction of the court is determined by Congress, and courts are powerless to question the fairness of any limits imposed on that jurisdiction.").

The District Court's decision to engraft unwritten exceptions into the statute is also contrary to this Court's removal jurisprudence. This Court 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); *accord Holston v Carolina Freight Carriers Corp.*, No. 90–1358, 1991 WL 112809, at *2 (6th Cir. June 26, 1991) ("It has been uniformly held that the failure to file for

removal within the thirty-day period, while waivable by plaintiff, is a formal barrier to the exercise of federal jurisdiction.").[4]

District Courts throughout this Circuit have correctly understood this Court's guidance to mean what it says: that the 30-day removal deadline must be strictly applied. *See, e.g., 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."); *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) ("A defendant's failure to comply with the thirty-day limitation set forth in section 1446(b) is an absolute bar to removal regardless of whether the removal would have been proper if timely filed."); *May v. Johnson*

[4] Other circuits are in accord. *See, e.g.*, *Taylor v. Medtronic, Inc.*, 15 F.4th 148, 152 (2d Cir. 2021) ("[I]n light of the statute's mandatory language, we can[not] . . . carve out exceptions to the removal statute's clear directive . . . .") (citing *Ross v. Blake*, 578 U.S. 632, 639 (2016))); *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1142 n.4 (9th Cir. 2013) ("Section 1446(b)'s time limit is mandatory such that a timely objection to a late petition will defeat removal." (cleaned up)).

Controls, Inc., 440 F. Supp. 2d 879, 882–84 (W.D. Tenn. 2006) ("The great weight of the case law, as well as the present language of the statute, is contrary to this discretionary approach . . . . Given the clear language of 1446(b), and the relevant case law, the Court finds that the line has been drawn for it by the statute and that the Court lacks the authority to alter it."); *Green v. Clark Refining & Mktg., 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*, 871 F.3d at 442 (citation omitted).

Notwithstanding the plain language of § 1446(b)(1) and this Circuit's clear removal jurisprudence, the District Court held that the 30-day removal deadline is "merely modal and formal[,]" (Op. and Order, R. 23, Page ID # 614 n. 4), and "a formal requirement that can be excused[.]" (*Id.*, Page ID # 618.) Specifically, the District Court held that the 30-day removal deadline may be disregarded "where overriding federal interests or compelling equitable considerations are evidenced." (*Id.*, Page ID # 615.)

But the 30-day removal deadline cannot be disregarded, and it was error to do so. It is mandatory and must be strictly adhered to, and the District Court's holding to the contrary cannot stand.

2. The removal deadline in § 1446(b)(1) cannot be excused based on "overriding federal interests."

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 # 618 ("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 # 619.)

But there are several fundamental flaws with the District Court's reasoning.

First, nothing in the controlling statute or any case cited by the District Court supports the proposition that the 30-day removal deadline can be overcome by "overriding federal interests." In fact, the phrase "overriding federal interest" appears in removal jurisprudence *only* as a caution *against* offending principles of federalism and state sovereignty by forcing states to litigate in federal court against their will. *See Nessel*, 954 F.3d at 837–38 (explaining that the "overriding federal interest" standard is "a specific manifestation" of the rule that federal courts should be reluctant to "snatch[ ] cases which a State has brought from the courts of that State, unless some clear rule demands it" (citations omitted)); *accord Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (citing the "overriding federal interest" standard as a caution against exercising federal removal jurisdiction); *LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011) (same); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178–79 (4th Cir. 2011) (same). Using the "overriding federal interests"

language to "override" a mandatory statutory deadline turns the rule on its head.

Additionally, no "overriding federal interest" is furthered by excusing compliance with the 30-day deadline. The United States government has not weighed in as an amicus or otherwise expressed any interest in whether this case belongs in state or federal court. In fact, in the Pipeline Safety Act, Congress has expressly left the location and routing of interstate oil pipelines to the states by providing that the federal government has no authority to "prescribe the location or routing of a pipeline facility." 49 U.S.C. § 60104(e).

Indeed, it appears that the only "overriding federal interest" relied upon by the District Court was its own prior determination that it had subject-matter jurisdiction over the Governor's case against Enbridge. (Op. and Order, R. 23, Page ID # 618.) And this presents the second flaw in the District Court's reasoning: it conflates subject-matter jurisdiction with removal procedure. Even if the District Court was correct that it had subject-matter jurisdiction (as set forth in Part III below, it did not), that is a separate question from whether Enbridge followed mandatory removal procedure.

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 in § 1446(b)(1). 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." (cleaned up)).

Third and finally, the District Court's error in relying on its order denying remand in the Governor's case is compounded by the fact that the procedural posture of that case was very different from this case. (Op. and Order, 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.").) The Governor's case did not involve an untimely removal, and therefore the District Court's holding that it had subject-matter jurisdiction over that case does not provide a basis

to excuse Enbridge's untimely removal here. Additionally, that order was nullified by the Governor and the DNR Director's voluntary dismissal of the case. *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 & 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).

3. The removal deadline in § 1446(b)(1) cannot be excused based on equitable considerations and, even if it could, it would not be appropriate here.

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, R. 23, Page ID # 618.) As discussed in Part I(A)(1) above, statutory removal timelines are mandatory. *See supra* at 23–26. Moreover, district courts in this Circuit have rejected the idea of equitable exceptions as incompatible with the plain language of § 1446(b)(1), 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 into 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)); *May*, 440 F. Supp. at 884 (holding that "[t]he great weight of the case law, as well as the present language of the statute, is contrary to this discretionary approach").

The District Court's cursory invocation of estoppel as an additional basis for excusing untimely removal also fails. (Op. and Order, R. 23, 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) (citation 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, 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 this case *was* removable, Enbridge still runs afoul of the 30-day removal deadline in § 1446(b)(1), and its late removal cannot be saved by § 1446(b)(3) because its asserted grounds for removal were long since ascertainable. (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).) 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. (*See* Op. and Order, 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. *See* 28 U.S.C. § 1447(c). Prior to that, *and before Enbridge even filed its notice of removal in this case*, other plaintiffs in another case (the Governor and DNR Director) exercised their procedural right to voluntarily dismiss the 2020 case of *Michigan v. Enbridge* pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). (1:20-cv-01142-JTN-RSK, R. 83.) There was nothing untoward about that decision. *See*, *e.g.*, *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997) (affirming the plaintiff's right to voluntarily dismiss after losing a motion to remand); 9 Wright & Miller, *Federal Practice & Procedure* § 2363 at 257–58. Nor was there any basis for the District Court to find that a litigation decision made by other parties in a different case somehow alters the statutory deadline for filing a notice of removal in this case.

4. The removal deadline in § 1446(b)(1) cannot be disregarded based on "exceptional circumstances."

The District Court also relied on a number of cases that are unrelated to "overriding federal interests" or the "equitable

administration of justice," but which, according to the District Court, support the notion that the 30-day removal deadline may be disregarded in "exceptional circumstances." (Op. and Order, R. 23, Page ID # 615–622.) These cases are inapposite. As set forth below, each of these cases is out-of-circuit and distinguishable, and many of them have been superseded by statutory amendment.

Four of the cases relied upon by the District Court concern removal based on diversity of citizenship under § 1446(c), which allows up to one year for removal based on diversity of citizenship. *Tedford v. Warner-Lambert Co.*, 327 F.3d 426, 426 (5th Cir. 2003); *Johnson v. Heublein*, 227 F.3d 236, 242 (5th Cir. 2000); *Dufrene v. Petco*, 934 F. Supp. 2d 864, 870 (M.D. La. 2012); *Schoonover v. W. Am. Ins. Co.*, 665 F. Supp. 511, 514 (S.D. Miss. 1987). Each of these cases involves a situation where the plaintiff either initially named non-diverse defendants or represented the amount of damages as being below the threshold for federal court jurisdiction based on diversity of citizenship, then either dismissed the non-diverse parties or increased their damages after the one-year removal period expired. In these cases, the courts invoked the "removal revival exception" or "bad faith exception"

and held that such practices by the plaintiffs revived defendants' removal period in order to prevent plaintiffs from engaging in forum manipulation by misrepresenting the nature of their claims until after the removal deadline passed.

As a preliminary matter, these cases have been superseded by a statutory amendment to § 1446. *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 293–94 (5th Cir. 2019) (holding that Congress's enactment of the "bad-faith exception" in § 1446(c)(1) supersedes cases that provided for equitable extension of the one-year removal period for diversity of citizenship jurisdiction to prevent forum manipulation by plaintiffs). Moreover, even before this statutory amendment superseded these cases, there was a circuit split and this Circuit was among those that rejected the idea that the one-year removal period could be tolled, extended, or revived based on equity principles. *Id.* (citing *Brock*, 1993 WL 389946, at *1).

As a legal matter, the "removal revival exception" conflicts with the rule in this Circuit that the 30-day removal deadline in § 1446(b) is mandatory. *See State ex rel. Slatery v. Tenn. Valley Auth.*, 311 F.Supp.3d 896, 903–10 (M.D. Tenn. 2018) (noting that, while many

courts have rejected the revival exception, this Circuit treats the removal periods of § 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.'" (quoting *Global Satellite Communication Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1271 (11th Cir. 2004)); *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).

And even if the removal revival exception did exist in this Circuit and was not superseded by statutory amendment, it is not applicable here. Unlike the plaintiffs in the cases cited by the District Court, the Attorney General has done nothing to change the character of this case.

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.

Two other cases relied upon by the District Court are premised on federal statutes that have their own unique removal deadlines which, pursuant to their terms, had not yet expired when the defendants filed their notices of removal. *Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 286 (6th Cir. 2016) (defendant's removal period was revived when plaintiff first alleged facts that made the case removable under the Class Action Fairness Act); *Simmons v. Sabine River Auth. of La.*, 823 F.Supp.2d 420, 426 (W.D. La. 2011) (defendant's notice of removal was timely filed under the removal provision of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, which allows for removal any time prior to trial).

Two more authorities relied upon by the District Court noted that failure to file a copy of a notice of removal with the *state* court within 30 days does not require remand. *Neurology & Pain Mgmt. Assocs., PC v. Bunin*, No. 1:16-cv-2856-LIM-MPB, 2017 WL 82512, at *3 (S.D. Ind.

2017) (holding that defendant complied with § 1446(b)(1) when it filed its notice of removal with the federal court within 30 days, but that the same 30-day limitations period does not apply to filing a copy with the state court because the statute only requires that it be filed with the state court "[p]romptly after the filing of such notice of removal" in federal court) (citing 28 U.S.C. § 1446(d)); 14C Charles Alan Wright et al. *Federal Practice & Procedure* § 3736 (1998) ("The filing of the notice of removal *in state court* is a procedural and ministerial act and a number of federal courts have held that a failure to do so will not defeat the district court's subject-matter jurisdiction." (emphasis added)).

Two more cases relied upon by the District Court concern situations where defendants made every effort to remove within 30 days of being served with the complaint, but missed the deadline through no fault of their own but rather due to recordkeeping errors or procedural filing requirements of the relevant courts. *Vogel v. U.S. Off. Prod. Co.*, 56 F. Supp. 2d 859, 846–65 (W.D. Mich. 1999), rev'd 258 F.3d 509 (6th Cir. 2001) (defendant timely filed its notice of removal with the District Court, but the court clerk lost the notice and never entered it in the court's record; the magistrate held that a motion to remand is not

dispositive but that the Court could excuse a filing that was 16 days late based on the court clerk losing the timely filing; subsequently reversed by this Court on the grounds that a motion to remand is dispositive, therefore the motion to remand could not be decided by a magistrate); *Wise Bread Co. v. Daily Bread, LLC*, No. 2:11-cv-00868-CW, 2012 WL 681789, at *4 (D. Utah 2012) (excusing the untimely filing of a notice of removal shortly after the removal period expired because of a unique aspect of Utah state law that allows a plaintiff to serve a complaint on a defendant prior to filing the complaint in court, and in this situation the state court clerk's office misinformed the defendant as to whether the complaint had been filed).

The remaining case relied upon by the District Court is also distinguishable. *Almonte v. Target Corp.*, 462 F. Supp. 3d 360, 364 (S.D.N.Y. 2020) did not concern a notice of removal at all, but rather concerned whether the plaintiff had timely filed a motion to remand. There, the court excused the filing of the motion to remand 24 days after the 30-day window for seeking remand closed where the lateness was caused in part by the court rejecting the initial motion to remand

for failure to comply with a local court rule that required the plaintiff to request a pre-motion conference before filing its motion.

None of these non-binding cases override the statutory language in § 1446(b)(1) or justify the District Court's decision here. If anything, they illustrate that the circumstances here—where there was no filing issue or other ministerial defect—are *not* exceptional.

B. Even if the District Court *did* have authority to excuse compliance with the 30-day removal deadline—and it did not—it would be inappropriate to do so here.

The District Court did not have equitable authority to toll or otherwise excuse compliance with the 30-day removal deadline. But, even if it did, it should not have done so here for two reasons: because Enbridge waived its right to remove this case, and because Enbridge, not the Attorney General, engaged in inequitable forum manipulation.

1. Enbridge waived its right to remove this case by expressing an intent to have the matter adjudicated in state court.

In this Circuit, a defendant constructively waives its right to remove a case, even if removal would still be timely, "by taking substantial action in state court that manifests a willingness to litigate

on the merits." *Robertson v. U.S. Bank, N.A.*, 831 F.3d 757, 760–61 (6th Cir. 2016); *see also Rulewicz v. Marathon Oil Corp.*, No. 1:11-CV-587, 2011 WL 6042789, at *1 (W.D. Mich. Dec. 5, 2011). Such waiver must be "clear and unequivocal." *Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990).

Here, Enbridge clearly and unequivocally took substantial action in state court that manifested a willingness to litigate on the merits when it moved for summary disposition of the case. (Enrbidge's Mot. for Summ. Disp., R. 11-2.)

Numerous district courts have held that a defendant waives its right to remove when it files a dispositive motion in state court prior to removing the case to federal court. *See Scholz v. RDV Sports, Inc.*, 821 F. Supp. 1469, 1471 (M.D. Fla. 1993) (holding that removal is waived where the defendant files a motion to dismiss and subsequently removes the case before a judgment is issued); *Chavez v. Kincaid*, 15 F. Supp. 2d 1118, 1125 (D.N.M. 1998) (same); *Heafitz v. Interfirst Bank of Dallas*, 711 F. Supp. 92, 96 (S.D.N.Y. 1989) (same); *Peeters v. Mlotek*, No. CV 15-00835 (RC), 2015 WL 3604609, at *2 (D.D.C. June 9, 2015) (same); *see also Jacko v. Thorn Americas, Inc.*, 121 F. Supp. 2d 574, 576

(E.D. Tex. 2000) (noting that "further intent [to litigate in state court] is manifested when the defendant attends the hearing and asks the state judge to rule on the motion"); *Harvey v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, No. 2:13-CV-00862, 2014 WL 2967468, at *2–3 (D. Utah July 1, 2014) (holding that removal was waived where the defendants filed a reply brief, filed two motions to admit out-of-state attorneys *pro hac vice*, and participated in oral argument on their motion to dismiss before filing their notice of removal). This Court should reach the same conclusion here.

2. It is Enbridge, not the Attorney General, that engaged in "forum manipulation" and "procedural fencing."

As noted above, the District Court took the Attorney General to task for what the District Court perceived as the Attorney General's "desire to engage in procedural fencing and forum manipulation." (R. 23, Page ID # 621.)

This assessment of the Parties' respective conduct is confounding. The Attorney General merely sought to enforce a mandatory statutory deadline and 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 Pipelines to be temporarily shut down, and after the District Court approved the removal of the Governor's case, that Enbridge decided a federal forum was preferable and removed this case more than two years after the 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 . . . . [*T*]*he 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).)

Here, 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 difficult to understand why 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 the process of accusing the Attorney General of gamesmanship, the District Court made the troubling error of confusing the Attorney General's case with the Governor's case. (Op. and Order, 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 plaintiffs (the Governor and DNR Director) in the separate case of *Michigan v. Enbridge*. 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. While the Attorney General represents the Governor and state departments as

legal counsel, she also has separate authority to bring civil actions on behalf of the People of the State of Michigan. Mich. Comp. Laws § 14.28; Mich. Comp. Laws § 14.102. 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. 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 ex rel. the People of the State of Michigan v. Beno*, 373 N.W.2d 544 (Mich. 1985). The District Court appears to have conflated the two cases and parties and held the litigation decisions of other parties in another case against the Attorney General when balancing the equities in this case.

II. This case is not removable under 28 U.S.C. § 1446(b)(3) because the District Court's order denying remand in the Governor's case was not the first point in time when Enbridge could ascertain its asserted grounds for removal.

Perhaps recognizing that the District Court had no authority to excuse compliance with the 30-day removal deadline based on unwritten exceptions, Enbridge did not argue below that its notice of removal should be treated as timely based on "overriding federal

interests," "equitable considerations," or other "exceptional circumstances."[5] Instead, Enbridge attempted to shoehorn this case into § 1446(b)(3), which states:

> Except as provided in subsection (c), 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, 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.

Enbridge argued that its notice of removal was timely under this provision because the Attorney General's complaint "lacked solid and unambiguous information that the case was removable" and Enbridge could not ascertain that the case was removable until the District Court order denied the Governor's motion to remand in the Governor's case. (*See* R. 1, Page ID # 1–2.)

That argument strains credulity. Enbridge not only ascertained—but in fact briefed and argued—every asserted basis for removal more than 30 days before filing its notice of removal on December 15, 2021.

[5] Those arguments were raised by the District Court itself in its August 18, 2022 Opinion and Order, with no opportunity for the Parties to address them.

As set forth above, Enbridge litigated this case in state court for well over a year throughout 2019 and 2020, during which time it repeatedly and clearly argued that the Attorney General's claims were preempted by federal laws including the Pipeline Safety Act and the Submerged Lands Act. (Enbridge's Mot. for Sum. Disp., R. 11-2, Page ID # 362–369.) More than two years after the expiration of the 30-day removal deadline in this case, the District Court approved Enbridge's removal of the Governor's case. (1:20-cv-1142, R. 80.) In that case, Enbridge's notice of removal was based on virtually identical arguments of federal preemption. (Notice of Removal, 1:20-cv-1142, R. 1-2, Page ID # 116–123.) Yet, somehow, in this case Enbridge claims that its removal is timely because it could not have ascertained that this case was removable until it successfully removed a separate case more than two years after the fact. (R. 1, Page ID # 8–9.)

The outlandishness of Enbridge's claim is evident from the following chart showing the timeline of events in which Enbridge demonstrated, time and time again, that its asserted bases for removal were known to it more than 30 days before it filed its December 15, 2021 notice of removal in this case:

Date	Event	Description
6/27/19	The Attorney General files her complaint.	The Complaint states three claims, none of which has been amended or altered.
7/12/19	Enbridge is served with the Attorney General's complaint.	Any notice of removal "shall be filed within 30 days" after this date.
8/12/19	The statutory removal deadline in § 1446(b)(1) expires.	
9/16/19	Enbridge files a motion for summary disposition in state court.	Enbridge asserts, among other things, that the Attorney General's claims are expressly and impliedly preempted under the federal Pipeline Safety Act, 49 U.S.C. § 60101, *et seq.*, specifically arguing that "the Federal Government has occupied the entire field of pipeline safety regulation," and that the Pipeline and Hazardous Materials Safety Administration (PHMSA) regulates "all aspects of pipeline operations." (R. 11-2, Page ID # 362–369).
5/1/20	The State Court sends the Parties questions in advance of oral argument.	The State Court specifically asks the Parties to prepare to address Enbridge's federal preemption arguments at oral argument. (R. 11-3, Page ID # 400.)
5/22/20	The State Court holds oral argument on Enbridge's motion for summary disposition.	Enbridge argues at length that the Attorney General's claims are preempted under the Pipeline Safety Act and the Federal Submerged Lands Act. (R. 11-4, Page ID # 469–479.)

6/19/20	Enbridge files a supplemental brief in support of its motion for summary disposition.	Enbridge reiterates its arguments that the Attorney General's claims are preempted by relying on the Pipeline Safety Act and the Federal Submerged Lands Act. (R. 11-5, Page ID # 519–528.)
11/24/20	Enbridge files a notice of removal in the Governor's case.	Enbridge removes the Governor's case, asserting that the case was removable based on the *Grable* doctrine and the federal officer removal statute. (1:20-cv-01142, R. 1, Page ID # 1–218.)
12/12/20	Enbridge files an amended notice of removal in the Governor's case.	Enbridge asserts additional grounds for federal jurisdiction, including that the claims "arise" under federal common law. (1:20-cv-1142, R. 12, Page ID # 239–246.)
3/16/21	The Governor and DNR Director file a motion to remand.	The Governor and DNR Director move to remand their case to state court. (1:20-cv-01142, R. 42, Page ID # 468–509.)
4/15/21	The Canadian House Committee issues an Interim Report on Line 5.	The special committee issues an interim report recommending, among other things, that "the Government of Canada encourage Enbridge Inc. and the State of Michigan to resolve the dispute between them concerning the Line 5 pipeline through a negotiated or mediated settlement."
4/15/21	Enbridge files a brief in opposition to the Governor and DNR Director's motion to remand.	Enbridge files an opposition to the Governor and DNR Director's motion to remand, reiterating its arguments in favor of removal. (1:20-cv-01142, R. 47, Page ID # 585–633.)

4/27/21	Canada files an amicus brief in the Governor's Case.	The Government of Canada files an amicus brief discussing the 1977 Treaty at length. (1:20-cv-01142, R. 45, Page ID # 545–564.)
6/1/21	The Governor and DNR Director file a reply brief in support of their motion to remand.	The Governor and DNR Director file a reply brief in support of their motion to remand. (1:20-cv-01142, R. 51, Page ID # 825–853.)
6/1/21	Canada invokes the dispute resolution provision of the 1977 Treaty.	The Government of Canada sends a diplomatic communication seeking to invoke the dispute resolution provision of the 1977 Treaty.
10/4/21	Canada files a supplemental amicus brief.	The Government of Canada files a supplemental amicus brief notifying the Parties and the District Court that it has invoked the dispute resolution provision of the 1977 Treaty. (1:20-cv-01142, R. 76, Page ID # 1005–1014.)
11/16/21	The District Court issues an opinion and order denying the Governor and DNR Director's motion to remand.	The District Court denies the Governor and DNR Director's motion to remand, finding federal jurisdiction because "there are at least two federal issues embedded in the State Parties' claims": (1) the Federal Submerged Lands Act and the 1977 Treaty burden the State's ownership in public-trust bottomlands; and (2) the federal Pipeline Safety Act prohibits states from imposing safety regulations on interstate pipeline operations. (1:20-cv-01142, R. 80, Page ID # 1021–1035.)

12/15/21	Enbridge files its notice of removal in the Attorney General's case.	Enbridge removes the Attorney General's case to federal court, arguing that it could not "ascertain" that the case was removable until the District Court issued its 11/16/21 opinion in the Governor's Case. (*See* R. 1, Page ID #1–130.)

In its August 18, 2022 Opinion and Order, the District Court adopted this tortured logic and held that Enbridge's untimely removal was proper because "[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." (Op. and Order, R. 23, Page ID # 620.) In support of this holding, the District Court relied on *Johnson*, 227 F.3d at 242.

As set forth above in Part I(A)(4), *Johnson* is a "removal revival exception" case that has been superseded by statute and is wholly inapposite, particularly because it turned on the dismissal of non-diverse defendants that made the case removable for the first time after the removal deadline had passed. Here, the Attorney General has never amended her complaint, nor has the removability of the case changed in any way since its inception. In other words, no "amended pleading, motion, order or other paper" has changed whether there is

federal jurisdiction over the Attorney General's claims. *See* 28 U.S.C. § 1446(b)(3). If the case was removable on December 15, 2021, it was removable when Enbridge received the complaint on July 12, 2019, and on each of the more than 850 days in between.

In sum, there can be no credible dispute that Enbridge was fully aware of its asserted bases for removal long before the District Court's November 16, 2021 Opinion and Order denying remand of the Governor's case. Thus, its late removal of this case cannot be saved by § 1446(b)(3).

III. This case must be remanded to state court because it does not present any substantial question of federal law that could give rise to federal jurisdiction.

As noted above, in its Opinion and Order denying remand, the District Court refused to even consider the limits of its subject-matter jurisdiction and estopped the Attorney General from raising the issue. (R. 23, Page ID # 621.) This was improper because a court cannot use its equitable powers to prevent a litigant from challenging the court's subject-matter jurisdiction. 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).

More substantively, *Grable* jurisdiction does not exist here because the only federal issues Enbridge has identified are its preemption defenses, which cannot give rise to federal jurisdiction under the well-pleaded complaint rule.

A. Enbridge cannot establish federal question jurisdiction because no federal question is presented on the face of the Attorney General's well-pleaded complaint.

"Federal courts use the 'well-pleaded complaint' rule to determine 'arising under' jurisdiction. That rule provides that 'federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.' The party who brings the suit is the master to decide what law he will rely upon." *Loftis v. United Parcel Servs., Inc.*, 342 F.3d 509, 514–15 (6th Cir. 2003) (cleaned up). "Generally, a state law claim cannot be 'recharacterized' as a federal claim for the purpose of removal." *Id.* at 515 (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)). "Similarly, 'a case may not be removed to federal court on the basis of a federal defense, including the

defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.'" *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)).

Rather, as the Third Circuit recently held, "[o]ur federal system trusts state courts to hear most cases—even big, important ones that raise federal defenses." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 705 (3d Cir. 2022). "Defenses are not the kinds of substantial federal questions that support federal jurisdiction." *Id.* at 709. In rejecting the defendants' arguments that *Grable* jurisdiction was proper based on federal preemption defenses, the Third Circuit stated:

> Contrast this argument with the two key cases defining what federal questions are substantial and disputed. In each, to prove some *element* of a state-law claim, the plaintiff had to win on an issue of federal law. In *Grable*, an "essential element of [Grable's state] quiet title claim" required it to prove that the IRS had not "give[n] it adequate notice, as defined by federal law . . . . And in *Gunn*, to show legal malpractice, Gunn had to prove that if his lawyers had been competent, 'he would have prevailed in his federal patent infringement case.'"

Id. (citing *Grable*, 545 U.S. at 314–15 and *Gunn v. Minton*, 568 U.S. 251, 259 (2013)).

This Circuit recognizes three exceptions to the well-pleaded complaint rule, which are narrowly applied:

- The "artful pleading" doctrine, which holds that a plaintiff may not, through clever pleading, recast what is essentially a federal law cause of action as a state-law cause of action;
- The "complete preemption" doctrine, which applies "when a federal statue wholly displaces the state-law cause of action"; and
- The "substantial federal question" or *Grable* doctrine, which applies "where the vindication of a right under state law necessarily turn[s] on some construction of federal law."

See Mikulski v. Centerior Energy Corp., 501 F.3d 555, 560 (6th Cir. 2007). Of the three, Enbridge raised only the substantial federal question (*Grable*) exception in its notice of removal. (R. 1, Page ID # 8.)

B. Enbridge cannot establish federal court jurisdiction under the "substantial federal question" exception to the well-pleaded complaint rule.

Without mentioning the well-pleaded complaint rule, Enbridge's notice of removal attempted to overcome it by relying on the *Grable* exception. (Not. of Removal, R. 1, Page ID # 8–9.) To qualify for this

exception, the federal issue within a state-law claim must be: "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258.

The Supreme Court has clarified that *Grable* represents a "special and small category of cases" that generally do not involve "fact-bound and situation-specific" disputes. *Gunn*, 568 U.S. at 258, 263 (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006)).

Grable itself illustrates the type of unusual circumstances in which the substantial federal question rule may apply. In that case, the IRS seized the plaintiff's (Grable's) property to satisfy a tax delinquency. 545 U.S. at 310–11. The IRS sold the property to the defendant (Darue). *Id*. Five years later, "Grable sued Darue in state court to quiet title. Grable asserted that Darue's record title was invalid because the IRS had conveyed the seizure notice improperly." *Empire Healthchoice*, 547 U.S. at 700 (citing *Grable*, 545 U.S. at 311). Although the suit was a quiet title action under state law, the *only question* at issue—which was an essential element of the claim Grable

raised—was whether the IRS had properly followed *federal* law in seizing Grable's property.

The circumstances of this case are entirely distinguishable from *Grable*. As set forth below, none of the requirements for *Grable* jurisdiction are satisfied here.

1. No disputed federal issue is necessarily raised by the Attorney General's claims.

Enbridge founders on the first prong of the substantial federal question test. As the case law makes clear, a lawsuit necessarily raises a federal issue only if that issue is an "essential element" of the plaintiff's claim. *Grable*, 545 U.S. at 315; *see also Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 531 (6th Cir. 2010) (requiring the "federal issue" to be "embedded in . . . the state-law claims"). In its notice of removal, however, Enbridge lists certain grounds for removal (the Federal Submerged Lands Act, the Pipeline Safety Act, and the 1977 Treaty), all of which are nothing more than ordinary preemption defenses. (R. 1, Page ID # 8–9.) Enbridge fails to show that those issues are "necessary elements" of the Attorney General's complaint. *See Fried v. Sanders*, 783 F. App'x 532, 536 (6th Cir. 2019).

Nor could it, because the Attorney General can prove all of her claims without reference to federal law. To prevail on Count I.A. and I.B. of the complaint, the Attorney General must demonstrate that the 1953 Easement violates Michigan's public trust doctrine, a creature of state common law. *Ill. Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452–53 (1892); *Glass v. Goeckel*, 703 N.W.2d 58, 63–64 (Mich. 2005) (tracing the doctrine's roots to English common law). Counts II and III, in turn, rest entirely on the state common law of public nuisance and a state statute, the Michigan Environmental Protection Act, Mich. Comp. Laws § 324.1701, *et seq*. None of these claims requires the Attorney General to prove, as an element, any issue related to the Federal Submerged Lands Act, the Pipeline Safety Act, or the 1977 Treaty.

These federal laws which Enbridge falsely claims are "necessary elements" of the Attorney General's complaint are nothing more than ordinary preemption defenses. The Attorney General's complaint makes no reference to them. Rather, they will enter the case only if *Enbridge* raises them as defenses. These issues are therefore not "necessarily raised" by the Attorney General's complaint, and the first requirement of the substantial federal question test is not satisfied.

That alone is sufficient to defeat Enbridge's claim of jurisdiction under the substantial federal question doctrine.

To avoid this conclusion, Enbridge seeks to recast its ordinary preemption defenses as necessary elements of the Attorney General's complaint by claiming that they are "burdens" on the State of Michigan's property interest in the Great Lakes bottomlands at issue. As its first basis for removal, Enbridge states:

> *First*, the State's suit necessarily raised federal issues because "the Federal Submerged Lands Act necessarily governs the scope of the State's property interest" by reserving to the Federal Government "paramount" authority over the bottomlands, which the Federal Government has exercised by burdening the State's property right through the Pipeline Safety Act and the Transit Pipelines Treaty with Canada.

(Not. of Removal, R. 1, Page ID # 8 (emphasis in original).)

As a preliminary matter, contrary to Enbridge's assertion, the "scope of the State's property interest" in the Great Lakes bottomlands at issue is not disputed. The State of Michigan's ownership of these bottomlands is stipulated in the 1953 Easement itself. (1953 Easement, R. 1-1, Page ID # 51 (noting that the easement Grantee, Enbridge's predecessor, applied for "an easement authorizing it to construct, lay and maintain pipe lines over, through, under and upon certain lake

bottom lands *belonging to the State of Michigan . . . .*" (emphasis added)).) Enbridge cannot satisfy the *Grable* exception by simply describing its preemption defenses as burdens on the State's property interest. Instead, it must identify a federal issue that is both "necessarily raised" by the Attorney General's claims and "actually disputed." *Gunn*, 568 U.S. at 258. Enbridge cannot do so here not only because no federal issue is necessarily raised, but also because the State's property interest is not in dispute.

Moreover, despite Enbridge's disclaimer that these are not ordinary preemption defenses but rather are burdens on the State's property interest, the defensive character of Enbridge's invocation of federal law is plain to see. As noted previously, Enbridge raised these very same arguments as preemption defenses in the state court. And even a cursory examination of these laws reveals that they are not necessary elements of the Attorney General's claims. Enbridge cites no authority for the proposition that a plaintiff who brings a Michigan state-law claim for violations of the public trust doctrine, public nuisance, or the Michigan Environmental Protection Act must necessarily prevail on issues arising under the Federal Submerged

Lands Act, the Pipeline Safety Act, or the 1977 Treaty, because no such authority exists. In fact, there is contrary authority.

As noted previously, the Pipeline Safety Act contains a non-preemption provision that plainly states that the siting and routing of interstate oil pipelines is left to state law. 49 U.S.C. § 60104(e).[6] This case falls squarely within that non-preemption clause, because the Attorney General's complaint challenges the validity of the 1953 Easement that authorized the siting and routing of the Straits Pipelines on State-owned Great Lakes bottomlands. Moreover, Enbridge's claim that its invocation of the Pipeline Safety Act is not a preemption defense is belied by the fact that it asserted the Act as a preemption defense in its state court motion for summary disposition and argued in its complaint against the Governor that "[t]he [Pipeline Safety Act] expressly preempts the State from regulating the safety of interstate pipelines." (1:20-cv-01141, R. 1, Page ID # 2.)[7]

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[6] In the Governor's case, the District Court troublingly held that the fact that a court would have to read the Pipeline Safety Act to learn that it does not apply to this case means that the complaint necessarily raises a substantial issue of federal law which justifies removal under *Grable*. (1:20-cv-1142, Op. and Order, R. 80, Page ID # 1034.)

[7] The U.S. District Court for the Western District of Wisconsin recently rejected Enbridge's argument that the Pipeline Safety Act preempts a

Enbridge's Federal Submerged Lands Act argument fares no better. Contrary to Enbridge's assertion, that 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). Rather, Congress's reservation of federal authority over submerged lands (43 U.S.C. § 1314(a)) is an unexceptional, general statement of federal supremacy under the Constitution's Supremacy Clause. *See Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 289 (1977) (Rehnquist, C.J., concurring) (noting that the Act's "reservation-of-powers clause" by itself has no preemptive effect, but "only gives fair warning of the possibility" that in the future the federal government may intrude upon state interests).

Finally, Enbridge asserts that the 1977 Treaty should be viewed as "burdening the State's property rights" (Not. of Removal, R. 1, Page ID # 8). Either way, this is strictly a defensive assertion. No element of the Attorney General's claim turns on the Treaty; rather, Enbridge is

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landowner's decision to withhold consent to the continued operation of the Line 5 Pipelines on its property. *Bad River Band of Lake Superior Tribe of Chippewa Indians of Bad River Reservation v. Enbridge Energy Co.*, 626 F. Supp. 3d 1030, 1048–49 (W.D. Wis. 2022).

raising a defense that the Treaty preempts state law. The fact that a court may need to interpret the Treaty to discern its preemptive effect (if any) does not change what is really at issue here: ordinary conflict preemption.[8]

And on that point, Enbridge cannot convert ordinary preemption defenses into a basis for federal jurisdiction by baldly declaring that they are not really defenses but rather are "burdens" or "limits" on the State's interest. Indeed, Enbridge's novel "burdens on interests" theory of *Grable* jurisdiction sweeps far too broadly. Under Enbridge's theory, every federal law that might preempt any state law necessarily creates

[8] The U.S. District Court for the Western District of Wisconsin also rejected Enbridge's claims for injunctive and declaratory relief against a Tribal Government based on the Treaty, 1977 WL 181731, art. II, IV, noting that "nothing in the Treaty suggests that a private entity could bring a cause of action to enforce it, or even that it may be enforced in federal court" and holding that a Tribal Government did not run afoul of the Treaty by denying Enbridge its desired easement access due to environmental concerns, as the Treaty's Article IV "specifically states that, 'notwithstanding the provisions of Article II, international pipelines shall be subject to regulations by the appropriate governmental authorities having jurisdiction over such Transit Pipeline' with respect to matters of 'environmental protection.'" *Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation v. Enbridge Energy Company, Inc.*, No. 19-cv-602-wmc, 2022 WL 17249085, at *5 (W.D. Wis. Nov. 28, 2022) (copy available at 1:20-cv-1141, R. 84, Page ID # 797–817).

a burden or limitation on state interests or state rights, and divining the scope of that burden can then be converted into a substantial federal question necessarily raised by the complaint. This would eviscerate the well-pleaded complaint rule and the longstanding principle that a defendant cannot manufacture *Grable* jurisdiction by asserting a federal preemption defense.

2. None of the federal issues raised by Enbridge is substantial.

Even if Enbridge could identify an actually disputed federal question that was necessarily raised by the Attorney General's complaint—and it cannot—none would qualify as "substantial" under *Grable*. Four factors inform this Court's evaluation of the substantiality of the federal interest in a case:

> (1) whether the case includes a federal agency, and particularly, whether that agency's compliance with the federal statute is in dispute; (2) whether the federal question is important (i.e., not trivial); (3) whether a decision on the federal question will resolve the case (i.e., the federal question is not merely incidental to the outcome); and (4) whether a decision as to the federal question will control numerous other cases (i.e., the issue is not anomalous or isolated).

Mikulski, 501 F.3d at 570 (citing *Empire Healthchoice*, 547 U.S. at 700).

The Supreme Court's decision in *Empire Healthchoice* shows why Enbridge's asserted federal issues are insubstantial under this standard. That case concerned a claim brought by an insurance company against a beneficiary who had recovered damages in a state court tort suit. *Empire Healthchoice*, 547 U.S. at 682–83. Pursuant to an insurance plan created by the Federal Employees Health Benefits Act of 1959, the plaintiff health insurance company had reimbursed medical expenses arising from the same accident that led to the personal injury action. *Id.* at 683. The insurance company brought suit in federal court, claiming that substantial federal question jurisdiction was appropriate because the suit sought "to vindicate a contractual right contemplated by a federal statute." *Id.* at 690.

In evaluating the substantiality of the federal issues at play, the *Empire Healthchoice* court observed that the suit was "poles apart from *Grable*" because (1) it did not "center on the action of a federal agency"; (2) it did not "present a nearly pure issue of law" that would govern numerous subsequent cases; and (3) resolving the relevant federal issue would not be "dispositive of the case." *Id.* at 700–01. Rather, the central issues regarding the reimbursement of medical benefits were

"fact-bound and situation-specific." *Id.*; *see also Gunn,* 568 U.S. at 263 ("'[F]act-bound and situation-specific' effects are not sufficient to establish federal arising under jurisdiction." (quoting *Empire Healthchoice*, 547 U.S. at 701)).

The Attorney General's complaint presents a similarly "fact-bound and situation-specific" set of issues regarding a 1953 pipeline easement that is highly unlikely to control in any other case. *See Columbia Gas Transmission, LLC v. Singh,* 707 F.3d 583, 590 (6th Cir. 2013) ("The proper resolution of the scope of a pipeline easement is a fact-bound inquiry that looks at the specific context of the land."). And, as in *Empire Healthchoice*, the Attorney General's claims do not "center on the action" of any federal agency, nor do they depend on any federal issues to succeed. 547 U.S. at 700.

3. Exercising federal jurisdiction over this case would disrupt the congressionally-approved balance of judicial responsibilities.

The final element of the substantial federal question test prohibits disruption of the federalism values reflected in "any division of labor between the state and federal courts, provided or assumed by Congress." *Grable*, 545 U.S. at 310. Generally speaking, "[o]ur federal

system trusts state courts to hear most cases—even big, important ones." *City of Hoboken*, 45 F.4th at 705. And the *Grable* exception applies only to a "special and small category of cases." *Gunn*, 568 U.S. at 263.

As noted above, the Attorney General's claims are fact-bound and situation-specific. Enbridge's jurisdictional theory, on the other hand, is incredibly broad. If it was adopted, any dispute over the terms of an easement involving an interstate pipeline could be moved to federal court, effectively conferring federal jurisdiction over a "whole category of suits" and upsetting a "conscious legislative choice." *Bennett v. S. W. Airlines Co.*, 484 F.3d 907, 911 (7th Cir. 2007) (finding no federal jurisdiction where it "would move a whole category of suits to federal court").

There is no indication that Congress contemplated this result. To the contrary, Congress expressly reserved authority over the siting and location of interstate oil pipelines to state law. 49 U.S.C. § 60104(e). This evinces a conscious legislative choice which will be upset if the District Court's Opinion and Order is allowed to stand.

Moreover, this Circuit rejected precisely such an outcome in *Columbia Gas*, which concerned a dispute between a plaintiff landowner and a defendant natural gas pipeline company over the defendant's disruptive activities beyond the scope of the easement. 707 F.3d at 590–91. There, the pipeline company argued that federal jurisdiction was appropriate because federal regulations controlled its activities on the right of way. This Court held that substantial federal question jurisdiction was not merited, in part because "allowing for federal jurisdiction over nondiverse disputes related to pipeline rights-of-way could disrupt the congressionally approved balance of federal and state judicial responsibilities." *Id.* Opening federal courts to such disputes "could lead to a large number of cases . . . certainly more than the 'microscopic effect' that the Supreme Court expected [in *Grable*] . . . ." *Id.* at 591.

The same reasoning applies with greater force in the context of oil pipelines, over which Congress has left a larger measure of state control. While interstate natural gas pipeline routing and siting is subject to federal control under the Natural Gas Act, Congress has left the states in charge of those issues with respect to oil pipelines such as

those at issue here. *Compare* 15 U.S.C. § 717f (providing natural gas pipeline developers with federal eminent domain authority following Federal Energy Regulatory Commission approval), *with* 49 U.S.C. § 60104(e) ("This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.").

As such, a company seeking to establish a right of way for an oil pipeline must rely on state law if it wishes to exercise the power of eminent domain. And if it intends to cross state land, as the Pipelines do here, it must have a valid easement from the state. Congress made a "conscious legislative choice" not to claim federal jurisdiction over such matters, *Bennett,* 484 F.3d at 911; moving them to federal court would disturb that balance.

C. Federal common law does not provide a separate basis for removal.

The control of public trust Great Lakes bottomlands is a matter of state common law, not federal common law. *Ill. Cent. R.R. Co.*, 146 U.S. at 452–53; *Glass*, 703 N.W.2d at 63–64 (Mich. 2005). Nonetheless, in its

notice of removal, Enbridge alludes to federal common law as an independent basis of removal. (Not. of Removal, 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 (which Enbridge has not alleged here—as noted above, the only exception to the well-pleaded complaint rule that Enbridge raises is the substantial federal question, or *Grable*, exception). *See, e.g.*, *New Mexico ex rel. Balderas v. Monsanto Co.*, 454 F. Supp. 3d 1132, 1149–50 (D.N.M. 2020) ("[E]ven 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 *Taylor*, 481 U.S. at 63); *see also City of Hoboken*, 45 F.4th at 707–08 (rejecting an argument by oil companies that there was *Grable* jurisdiction based

on federal common law because the oil companies could only assert "garden-variety preemption, not the complete preemption they need"); *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, thus, without merit.

D. Removal is not proper under 28 U.S.C. § 1442(a) because Enbridge was not "acting under" a federal officer, and the actions that gave rise to the complaint were not taken under color of federal office.

In its notice of removal, Enbridge erroneously claims that removal is appropriate under the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), because, in constructing and operating the Pipelines, Enbridge "acted under" a federal officer (PHMSA). (R. 1, Page ID # 12–14.) This assertion is without merit.

To remove this case based on this statute, 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*, 871 F.3d at 444 (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, 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 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 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).

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, the Attorney General respectfully requests that this Court reverse the District Court's August 18, 2022 Opinion and Order and remand this matter to state court.

Respectfully submitted,

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Dated: September 18, 2023

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This brief contains 14,863 words, which exceeds the type-volume limitation of 13,000 words set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). The type volume limitation may be excused with the Court's permission, which the Attorney General has sought in a separately-filed motion to exceed word count limit.

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CERTIFICATE OF SERVICE

I certify that on September 18, 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 Complaint	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
Reply in Support of Motion to Remand	02/28/2022	R. 21	596–608
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
Order Granting Motion to Certify, Certifying Opinion and Order, Granting Plaintiff's Motion for Leave, and Closing Case Pending Interlocutory Appeal	02/21/2023	R. 32	767-769

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

Description of Entry	Date	Record Entry No.	Page ID No. Range
Notice of Removal	11/24/2022	R. 1	1-14
State Court Complaint	11/24/2022	R. 1-1	15–107
Notice to State Court of Filing 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
Amicus Brief by Government of Canada	06/01/2021	R. 45	545-564
Enbridge's Response to Motion to Remand	06/01/2021	R. 47	585-633
State Plaintiffs' Reply in Support of Motion to Remand	06/02/2021	R. 51	825-853
Motion to File Supplemental Amicus Brief by Government of Canada	11/05/2021	R. 76	1005-1014
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