IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH RUFFOLO and
MARY RUFFOLO,

Plaintiffs,

Case No. 23-CV-0635

v.

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

ADAM PAYNE, *in his official capacity as secretary of the Wisconsin Department of Natural Resources*,

and

JOSH KAUL, *in his official capacity as attorney general of Wisconsin*,

Defendants.

PLAINTIFFS' BRIEF SUPPORTING THEIR MOTION FOR REMAND

INTRODUCTION

The Wisconsin Department of Natural Resources (DNR) informed Ralph Ruffolo that, in the DNR's view, he is responsible for remediating underground contamination at his and his wife Mary's bicycle and skateboard shop. The Ruffolos filed this action in Jefferson County Circuit Court to obtain a declaration that they are not liable under Wis. Stat. § 292.11(3) for remediating underground petroleum contamination that they did not cause—and for which they cannot constitutionally

be held liable. The Ruffolos also sought a declaration that Wis. Stat. § 292.11(3) does not authorize the DNR to compel the Ruffolos to mitigate air vapors within their commercial building.

Initially, the Defendants filed a motion to change the venue of the state case to the circuit court for either Dane or Kenosha County. After the Ruffolos filed a brief opposing a change of venue, the Defendants removed this case to this Court.

This Court should remand this entire case to state court because the notice of removal was untimely. If the Court disagrees with that conclusion, it should remand the state-law claims to state court and stay its resolution of the Ruffolos' federal constitutional claims.

ARGUMENT

I. This Court should remand this entire case to state court because the notice of removal was untimely.

A. The party seeking federal jurisdiction has the burden of proving its notice of removal was timely.

"The party seeking removal bears the burden of proving the propriety of removal; doubts regarding removal are resolved in favor of the plaintiff's choice of forum in state court." *Morris v. Nuzzo*, 718 F.3d 660, 668 (7th Cir. 2013) The party seeking federal jurisdiction thus bears the "burden of persuasion." *In re Safeco Ins. Co. of Am.*, 585 F.3d 326, 329 (7th Cir. 2009).

"Removal is proper if it is based on statutorily permissible grounds, 28 U.S.C. § 1441, and if it is timely. 28 U.S.C. § 1446." *Boyd v. Phoenix Funding Corp.*, 366 F.3d 524, 529 (7th Cir. 2004).

"The general removal statute includes two different 30–day time limits for removal." *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 820 (7th Cir. 2013). "The first applies to cases that are removable based on the initial pleading." *Id.* "In such a case, the notice of removal 'shall be filed within 30 days after the receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief' or within 30 days of service of the summons 'if such initial pleading has then been filed in court and is not required to be served on the defendant.'" *Id.* (alteration in original) (quoting 28 U.S.C. § 1446(b)(1)). Second, "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant . . . of a copy of an amended pleading . . . from which it may first be ascertained that the case is one which is or has become removable." *Id.* (quoting 28 U.S.C. § 1446(b)(3).

This 30-day time limit "is a strictly applied rule of procedure and untimeliness is a ground for remand so long as the timeliness defect has not been waived." *N. Illinois Gas Co. v. Airco Indus. Gases, A Div. Of Airco, Inc.*, 676 F.2d 270, 273 (7th Cir. 1982).

B. The Defendants' notice of removal was untimely.

Here, the Defendants untimely filed their notice of removal. On June 13, 2023, the office of the DNR secretary accepted service of the Ruffolos' initial complaint. (Dkt. 1-1:754.) Two days later, on June 15, the office of the Wisconsin attorney general accepted service of the initial complaint. (Dkt. 1-1:755.) The Defendants filed a notice

of removal in this Court on September 27, 2023. (Dkt. 1.) That notice was filed more than 90 days after the service of the initial complaint.

The question thus becomes whether the initial complaint "facially reveal[ed] that the grounds for removal [were] present." *See Walker*, 727 F.3d at 824. It did. The Ruffolos clearly raised federal constitutional claims in their initial complaint. (Dkt. 1-1:21–27, 28–29.) Those claims served as the jurisdictional basis for the Defendants' removal of this case to federal court. (Dkt. 1:2–3.) Because the Defendants could have removed this case to federal court based on the federal claims in the initial complaint, the 30-day clock in 28 U.S.C. § 1446(b)(2) began to run on June 15. That clock expired on July 17, long before the Defendants filed their notice of removal on September 27.

C. The Ruffolos' amended complaint did not restart the statutory clock for filing a notice of removal.

The Defendants assert that their notice of removal was timely because Wisconsin Attorney General Josh Kaul and DNR Secretary Adam Payne were served with an amended complaint on August 29, 2023. (Dkt. 1:3.) But the filing and service of that amended complaint did not trigger a new 30-day window for removal under 28 U.S.C. § 1446(b).

This statute provides, in relevant part, that "[e]ach defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons . . . to file the notice of removal." 28 U.S.C. § 1446(b)(2)(B). "If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served

defendant did not previously initiate or consent to removal." 28 U.S.C. § 1446(b)(2)(C).

The later-served rule in § 1446(b)(2)(C) does not help the Defendants. As explained above, the Defendants had 30 days after June 15 to file a notice of removal. The office of the DNR secretary was served on June 13, and the office of the Wisconsin attorney general was served on June 15. (Dkt. 1-1:754–755.) So, under the later-served rule in § 1446(b)(2)(C), the 30-day clock for filing a notice of removal began to run on June 15 rather than June 13. But those two extra days fall far short of saving the DNR's notice of removal, which was filed in late September.

The Defendants suggest that the 30-day time limit restarted because the DNR secretary and the attorney general were served with the Ruffolos' *amended* complaint on August 29. (Dkt. 1:3.) But the amended complaint did not restart the 30-day time limit. An amended pleading does not restart the 30-day time limit for removal if, as here, the initial pleading revealed a basis for removal. *See, e.g.*, *Dahl v. R.J. Reynolds Tobacco Co.*, 478 F.3d 965, 970 (8th Cir. 2007).

The Defendants might argue that the 30-day time limit restarted on August 29 because the Ruffolos' initial complaint named the DNR and the Wisconsin Department of Justice (DOJ) as defendants, whereas the amended complaint named the DNR, the DNR secretary, and the attorney general as defendants. (*See* Dkt. 1-1:6, 850.) But that argument would elevate form over substance and conflict with binding case law.

Boyd is instructive and controlling here. In *Boyd*, the plaintiff filed a fourth amended complaint that added a new defendant, Residential Funding Corporation (Residential). *Boyd*, 366 F.3d at 528. "As soon as Boyd filed her Fourth Amended Complaint, substituting Residential . . . as a defendant, Residential filed a notice of removal in federal district court pursuant to 28 U.S.C. § 1441." *Id.* The Seventh Circuit Court of Appeals addressed "whether Residential's removal was timely." *Id.* at 529. There was "no dispute" that Residential had filed its notice of removal within 30 days after being served with the amended complaint. *Id.* Ultimately, though, the Seventh Circuit remanded the case to federal district court to determine if the notice of removal was timely. The Seventh Circuit instructed the district court that "[i]f Residential was a *de facto* participant in the litigation from the beginning, or if any other facts suggest that manipulation of the removal process was occurring, the district court should remand the entire case to state court in accordance with the timely motion to remand that Boyd filed." *Id.* at 532. The Seventh Circuit noted multiple times that Residential and two other defendants were represented by the same attorneys in the state and district courts. *Id.* at 531–532.

Consistent with *Boyd*'s language regarding *de facto* participation, federal district courts have held that § 1446(b) does not extend the time for removal if a later-served defendant and an earlier-served defendant are part of the same entity. *See, e.g.*, *Higgins v. Kentucky Fried Chicken*, 953 F. Supp. 266, 270 (W.D. Wis. 1997) (Crabb, J.); *Eltman v. Pioneer Commc'ns of Am., Inc.*, 151 F.R.D. 311, 318 n.15 (N.D.

Ill. 1993); *D. Kirschner & Sons, Inc. v. Cont'l Cas. Co.*, 805 F. Supp. 479, 481 (E.D. Ky. 1992).

Principles regarding official-capacity suits are also relevant here. Lawsuits against government officers in their official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (citation omitted). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Id.* at 166. "It is not a suit against the official personally, for the real party in interest is the entity." *Id.*

Here, under *Boyd*, the later-served rule in § 1446(b) does not save the Defendants' untimely notice of removal. Because the DNR secretary is the administrative head of the DNR, *see* Wis. Stat. § 15.05(1)(b), the DNR secretary was a *de facto* participant in this lawsuit since the Ruffolos filed their initial complaint. The same is true of the attorney general because the DOJ is under his direction and supervision. *See* Wis. Stat. § 15.25. Because this lawsuit is against the DNR secretary and the attorney general in their official capacities, the DNR and the DOJ are the real parties in interest. *See Graham*, 473 U.S. at 166. Moreover, the same three DOJ attorneys represented all the Defendants in state court after both the initial complaint and the amended complaint were filed. (Dkt. 1-1:756–761, 1046–1047.) Those attorneys continue to represent all the Defendants in this Court. (Dkt. 1:4.) Because the DNR secretary and the attorney general were "*de facto* participant[s] in

the litigation from the beginning," this Court "should remand the entire case to state court in accordance with the timely motion to remand that [the Ruffolos] filed." *See Boyd*, 366 F.3d at 532.

II. If this Court does not remand the entire case, it should remand the Ruffolos' state-law claims to the state court and stay the federal claims.

A. This Court should remand the state-law claims under 28 U.S.C. § 1367(c)(1) or (c)(2).

When a district court has supplemental jurisdiction over state-law claims, it may decline to exercise jurisdiction over them for the reasons provided in 28 U.S.C. § 1367(c). *Doe v. Vill. of Arlington Heights*, 782 F.3d 911, 920 (7th Cir. 2015). As relevant here, a district court may decline to exercise supplemental jurisdiction over a state-law claim if "the claim raises a novel or complex issue of State law" or "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(1) & (2). Both of those grounds apply here.

1. This Court should remand the state-law claims under 28 U.S.C. § 1367(c)(1) because they raise novel and complex issues of state law.

As the DNR recognizes, the Ruffolos' state-law claims are based on a "novel interpretation of the Spills Law." (Dkt. 3:22.) The Ruffolos raised two state-law claims in their first amended complaint, and both are novel and complex. This Court should thus remand them to state court.

First, Claim One is a novel and complex issue of state law. In Claim One of the Ruffolos' first amended complaint, they allege that Wis. Stat. § 292.11(3) does not

impose liability on them for the underground petroleum contamination at their commercial property. (Dkt. 1-1:862.) In *State v. Mauthe*, 123 Wis. 2d 288, 366 N.W.2d 871 (1985), the Wisconsin Supreme Court held that the Spills Law imposed clean-up liability on a person whose soil was discharging a hazardous substance onto neighboring property. (Dkt. 1-1:864.) The Ruffolos allege that they are not liable for the petroleum because, unlike the contaminant in *Mauthe*, the petroleum is not migrating onto neighboring property and thus is not discharging. (Dkt. 1-1:865.) No Wisconsin appellate court has decided whether this fact pattern establishes clean-up liability under the Spills Law.

In addition, the Ruffolos allege in Claim One that the *Mauthe* court's view of possession is no longer good law, such that they do not even possess the underground petroleum. (Dkt. 1-1:865–866.) Only the Wisconsin Supreme Court may overturn its prior interpretation of state law. *See Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 272 (7th Cir. 1983) (noting federal courts "are bound by authoritative state court rulings on matters of state law"). State courts should "decide important state statutory . . . issues of first impression." *Roe v. City of Milwaukee*, 26 F. Supp. 2d 1119, 1123–24 (E.D. Wis. 1998). Because this Court has no authority to overrule *Mauthe*, this fact also weighs in favor of remanding Claim One.

Second, the Ruffolos' other state-law claim is novel and complex, too. In Claim Five of the Ruffolos' first amended complaint, they allege that Wis. Stat. § 292.11(3) does not impose liability on them for the trichloroethene vapors in their commercial building. (Dkt. 1-1:873.) Whether this state statute imposes clean-up liability for so-

called "vapor intrusion" is a complex matter of first impression. This Court should remand Claim Five so the state courts can decide this important and novel question of state law.

2. In addition, this Court should remand the state-law claims under 28 U.S.C. § 1367(c)(2) because they substantially predominate.

As noted, this Court may decline to exercise supplemental jurisdiction over a state-law claim that "substantially predominates over" a federal claim. 28 U.S.C. § 1367(c)(2). A state-law claim substantially predominates if resolution of a federal claim "is largely dependent upon the resolution of" the state-law claim. *See Palivos v. City of Chicago*, 901 F. Supp. 271, 273 (N.D. Ill. 1995).

That principle applies here. The Ruffolos' three federal constitutional claims hinge on how their related state-law claim gets resolved. All three constitutional claims involve the underground petroleum at the Ruffolos' commercial property. (Dkt. 1-1:867–872.) As discussed, the Ruffolos allege in Claim One that Wis. Stat. § 292.11(3) does not impose liability on them for the petroleum "because they did not cause the petroleum contamination," "the petroleum is not presently discharging and has not discharged while the Ruffolos allegedly possessed it," and "the Ruffolos do not possess or control the petroleum under [recent Wisconsin Supreme Court precedent]." (Dkt. 1-1:866.) If a court agrees with the Ruffolos on Claim One, then it will not need to decide the constitutional claims.

Indeed, the Ruffolos made clear in their first amended complaint that their constitutional claims are relevant only if Claim One is resolved against them. Under Claim Two, the Ruffolos alleged that "*if* Wis. Stat. § 292.11(3) imposes liability on a

person because he or she owns contaminated property, such liability facially violates the Fourteenth Amendment's Equal Protection Clause." (Dkt. 1-1:868 (emphasis added).) Under Claim Three, they alleged that "*if* Wis. Stat. § 292.11(3) imposes liability on a person because he or she owns contaminated property, such liability facially violates the Fourteenth Amendment's Due Process Clause." (Dkt. 1-1:871 (emphasis added).) Likewise, under Claim Four, they alleged that "[b]ecause Wis. Stat. § 292.11(3) is facially unconstitutional *to the extent* that it imposes liability based on ownership of contaminated land, that portion of the statute is unconstitutional as applied to the Ruffolos regarding the petroleum contamination at their commercial property." (Dkt. 1-1:872 (emphasis added).) Those three constitutional claims are alternative grounds for relief because Claim One alleges that Wis. Stat. § 292.11(3) does not actually impose liability based on ownership of contaminated property, absent a discharge of the contaminant.

In short, Claim One raises a state-law issue that substantially predominates over the Ruffolos' federal constitutional claims. The federal claims need not be decided if Claim One is resolved in the Ruffolos' favor. This Court should thus remand Claim One to the state court under 28 U.S.C. § 1367(c)(2).

The same goes for Claim Five. Again, Claim Five involves vapor intrusion in the Ruffolos' commercial building. The Ruffolos do not raise a federal claim regarding the vapor intrusion in their first amended complaint. This state-law claim regarding vapor intrusion substantially predominates over a non-existent federal claim regarding vapor intrusion.

* * *

This Court should remand Claims One and Five under 28 U.S.C. § 1367(c)(1) or (c)(2) because they raise novel and complex issues of state law and because they substantially predominate over the federal claims.[1]

B. If this Court remands the state-law claims under 28 U.S.C. § 1367(c), it should stay the federal claims.

"[F]ederal courts have the power to refrain from hearing . . . cases in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law . . . ." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716–17 (1996) (citing *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941)). "*Pullman* abstention is appropriate 'only when (1) there is a substantial uncertainty as to the meaning of the state law and (2) there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling.'" *Wisconsin Right to Life State Pol. Action Comm. v. Barland*, 664 F.3d 139, 150 (7th Cir. 2011) (citation omitted). "The purpose of *Pullman* abstention is to 'avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.'" *Id.* (quoting *Pullman*, 312 U.S. at 500). "The doctrine is based on considerations of comity and federalism and applies when 'the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law.'" *Id.* (quoting *Quackenbush*, 517 U.S. at 716–17).

[1] Section 1367 authorizes a district court to remand state-law, not federal-law, claims to state court. *Roe v. City of Milwaukee*, 26 F. Supp. 2d 1119, 1124 (E.D. Wis. 1998).

Both requirements for *Pullman* abstention are met here.

First, there is substantial uncertainty as to the meaning of state law, specifically Wis. Stat. § 292.11(3). As explained above, the Wisconsin Supreme Court in *Mauthe* held that the predecessor version of this statute imposed clean-up liability on a person whose property was discharging a hazardous substance *onto neighboring property*. (Dkt. 1-1:864.) Whether this statute imposes liability based merely on ownership of contaminated soil, without a discharge, is substantially uncertain. Also, whether Wis. Stat. § 292.11(3) imposes liability for vapor intrusion is substantially uncertain because no Wisconsin appellate court has addressed that issue.

Second, there is a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling. As just explained, if the state courts determine that Wis. Stat. § 292.11(3) does not impose liability based on ownership of contaminated soil, then there would be no need for the courts to decide whether such liability is constitutional.

In short, this Court should abstain and stay this case if it remands the Ruffolos' state-law claims to state court pursuant to 28 U.S.C. § 1367(c).

CONCLUSION

This Court should remand this entire case to the Jefferson County Circuit Court because the notice of removal was untimely. If this Court does not remand the entire case, it should remand Claims One and Five under 28 U.S.C. § 1367(c) and stay Claims Two through Four under *Pullman*.

Dated this 16th day of October 2023.

Respectfully submitted,

Electronically signed by
s/ Scott E. Rosenow

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