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' REPLY BRIEF SUPPORTING THEIR MOTION FOR REMAND

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INTRODUCTION

As the Ruffolos have explained in other briefs, this Court should remand this entire case to state court on jurisdictional and non-jurisdictional grounds. (Dkt. 7:2–8; 8:5–10.) If the Court does not remand the entire case, then it should remand the Ruffolos' state-law claims and stay their federal claims. (Dkt. 7:8–13.) If the Court resolves the Ruffolos' federal claims instead of staying them, then it should remand the Ruffolos' state-law claims to state court. (Dkt. 8:13–16.)

In responding to the Ruffolos' motion for remand, the Defendants have failed to prove that their notice of claim was timely. The Defendants' main argument on timeliness is that Congress abrogated a key Seventh Circuit case by amending the removal statute in 2011. Congress did no such thing. When Congress amended the removal statute, it codified the rule that the 30-day removal period begins when the last-served defendant is served with a complaint. Because this key Seventh Circuit case applied that rule, it is still good law and requires a remand of this entire case to state court.

In arguing against the Ruffolos' alternative request for a stay of their federal claims, the Defendants misunderstand the basics of abstention. The Defendants argue that this Court should decide the Ruffolos' federal constitutional claims *before* deciding whether to remand their state-law claims. Black-letter law, however, requires federal courts to refrain from deciding federal constitutional claims if state law can provide the same relief, as is the case here.

ARGUMENT

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

As the Ruffolos have explained, this case should be remanded to state court because the Defendants' notice of removal was untimely. (Dkt. 7:2–8.) The office of the Wisconsin Department of Natural Resources (DNR) secretary and the office of the Wisconsin attorney general were served with the Ruffolos' original complaint in June 2023, and the Defendants filed their notice of removal more than 90 days later. (Dkt.

1; 1-1:754–755.) Although the DNR secretary and the attorney general were not named as defendants until the Ruffolos filed a first amended complaint, the agencies that they run were named defendants in the Ruffolos' original complaint. Accordingly, 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 v. Phoenix Funding Corp.*, 366 F.3d 524, 532 (7th Cir. 2004).

A. The Seventh Circuit's application of the later-served rule is still good law and requires a remand here.

The Defendants argue that the *Boyd* court's application of the removal statute, 28 U.S.C. § 1446, is no longer good law because Congress has since amended that statute. (Dkt. 16:10, 12.) But *Boyd* is consistent with the current version of the statute.

In 2011, Congress amended this statute to codify the rule that the 30-day removal period begins to run when the last-served defendant is served with a complaint. *See, e.g.*, *Robertson v. U.S. Bank, N.A.*, 831 F.3d 757, 762 (6th Cir. 2016). Previously, courts were split on whether the removal period begins to run when the first-served defendant or the last-served defendant is served. *See, e.g.*, *Boyd*, 366 F.3d at 530 (noting this split of authority); *Higgins v. Kentucky Fried Chicken*, 953 F. Supp. 266, 268–70 (W.D. Wis. 1997) (same). But "in 2011, Congress dispensed with the first-served defendant rule and wiped out the line of cases that" had espoused that rule. *Grandinetti v. Uber Techs., Inc.*, 476 F. Supp. 3d 747, 752 (N.D. Ill. 2020).

That statutory amendment did not affect *Boyd* because the court in *Boyd* did not adopt or apply the first-served rule. Rather, it applied the later-served rule, as this Court has recognized. "Although [the court in *Boyd*] stopped short of explicitly adopting the rule that a later-served defendant has thirty days to remove it did so implicitly." *Chlopek v. Fed. Ins. Co.*, No. 05-C-545-S, 2005 WL 3088355, at *2 (W.D. Wis. Nov. 17, 2005). The court in *Boyd* thus proceeded on the assumption that the pre-amendment version of § 1446 supported the later-served rule. *See id.* (discussing *Boyd*). Applying the later-served rule, the court in *Boyd* "remanded the case for

further fact finding on the relationship between the defendants . . . ." *Id.* "Such a remand would have been unnecessary had the [*Boyd*] Court adhered to the first-served defendant rule, since the petition would have been untimely regardless of the relationship between the defendants." *Id.* Because the *Boyd* court implicitly applied the later-served rule, Congress did not abrogate *Boyd* by codifying that rule in 2011.[1]

The Defendants also argue that *Boyd* is factually distinguishable. The Defendants seem to contend that the plaintiff in *Boyd* amended her complaint "solely for the purpose of creating a new window for removal." (Dkt. 16:13.) That characterization of *Boyd* is wrong. "Shortly after the case had been removed, Boyd filed a motion to remand the case back to the state court." *Boyd*, 366 F.3d at 529. The plaintiff in *Boyd* thus apparently did not want her case removed to federal court.

At any rate, the *Boyd* court held that "[i]f [the newly added defendant] 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. Although the present case does not involve manipulation by the Defendants, it involves *de facto* defendants and thus falls within *Boyd*'s holding.

The Defendants dispute the validity of that holding, arguing that the 30-day removal period for any given defendant begins to run only after that defendant becomes a party officially. (Dkt. 16:13.) But the removal statute does not have language about a defendant officially becoming a party. Instead, the statute provides that "[i]f 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). This lack of clarity is important here because "federal courts should interpret the removal statute narrowly, resolving any doubt in

[1] Indeed, the Defendants recognize that the Seventh Circuit has adhered to the later-served rule before the removal statute was amended in 2011. (Dkt. 16:8 (citing *Knudsen v. Liberty Mut. Ins. Co.*, 411 F.3d 805, 807 (7th Cir. 2005)).)

favor of the plaintiff's choice of forum in state court." *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 758 (7th Cir. 2009). The statute is silent on the issue of *de facto* defendants who are served *before* they officially become defendants. The *Boyd* court indicated that the statute does not give a new 30-day removal window to *de facto* defendants when they are officially brought into a lawsuit. *Boyd*, 366 F.3d at 532.

The Defendants next argue that it is immaterial that the same three attorneys represent all the Defendants. (Dkt. 16:14.) To be clear, the Ruffolos do not argue that this shared representation alone renders the removal untimely. Instead, the Ruffolos simply argue that shared representation is an important fact when determining whether a later-served defendant was a *de facto* defendant since the beginning of a lawsuit. *See Boyd*, 366 F.3d at 531–32 (twice mentioning that the defendants were represented by the same attorneys).

Relatedly, the Defendants argue that the notice of removal here was timely under *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999). (Dkt. 16:10–11.) Specifically, the Defendants argue that *Boyd* is "distinguishable" in light of "*Murphy Brothers* and the 2011 amendment to § 1446." (Dkt. 16:12.)

Murphy Brothers is immaterial here. That case was about whether the removal clock begins when a defendant receives a courtesy copy, as opposed to a formal copy, of a complaint. The Court held that the clock begins to run upon formal service of a complaint. While some courts have relied on the reasoning in *Murphy Brothers* to support their adoption of the later-served rule, *see, e.g.*, *Boyd*, 366 F.3d at 530 (noting the Eight Circuit relied on *Murphy Brothers* when it adopted the later-served rule in *Marano Enterprises of Kansas v. Z–Teca Restaurants, L.P.*, 254 F.3d 753, 757 (8th Cir. 2001)), other courts have taken a different view, holding that *Murphy Brothers* did not require them to adopt the later-served rule, *see, e.g.*, *Auchinleck v. Town of LaGrange*, 167 F. Supp. 2d 1066, 1069–70 (E.D. Wis. 2001). Because it is debatable whether *Murphy Brothers* compelled courts to adopt the later-served rule, that case does not shed light on how to apply that rule, which was codified 12 years after *Murphy Brothers* was decided. The *Murphy Brothers* Court did not address the later-

served rule, the concept of *de facto* defendants, or when their removal period begins to run.

Essentially, the Defendants are arguing that *Boyd* was wrongly decided because it conflicts with *Murphy Brothers*. That position is untenable, given that the court in *Boyd* quoted *Murphy Brothers* several times. *Boyd*, 366 F.3d at 530. The court was plainly aware of *Murphy Brothers* when it decided *Boyd*. The *Boyd* court's concept of *de facto* defendants is consistent with *Murphy Brothers*. Under *Boyd*, formal service of a complaint on a defendant triggers the removal period for that party and for a *de facto* defendant that is part of the same entity, even if they "technically" are "separate legal entities." *See id.* at 531–32. Under *Murphy Brothers*, informal service of a courtesy copy of a complaint does not trigger the removal period. *Boyd* does not involve informal service; it involves formal service on an entity of which a *de facto* defendant is a part. Because *Boyd* is good law, this Court should follow it.

B. The district court decisions on which the Ruffolos relied are still good law and consistent with Seventh Circuit precedent.

The Defendants next argue that *Murphy Brothers* and the 2011 amendment to § 1446 abrogated three district court cases on which the Ruffolos relied. (Dkt. 16:14–15.) That argument is unpersuasive for the reasons explained above regarding *Boyd*'s continuing validity.

Specifically, because the Ruffolos are *not* citing those district court decisions to advance a first-served rule, those decisions are still good law to the extent the Ruffolos have cited them. (*See* Dkt. 7:6–7.) In *D. Kirschner & Sons, Inc. v. Continental Casualty Company*, 805 F. Supp. 479, 481 (E.D. Ky. 1992), the court held that the later-served rule does not apply if the newly added defendant "is a part of or associated with the original" defendant. In *Eltman v. Pioneer Communications of America, Inc.*, 151 F.R.D. 311, 318 & n.15 (N.D. Ill. 1993), the court adopted the later-served rule but noted that it would *not* apply "when defendants are actually part of the same operating entity." And in *Higgins*, 953 F. Supp. at 270, this Court noted that even if the later-served rule were appropriate in some circumstances, it would *not* apply when the defendants "all are part of a common operating entity." All three

of these cases are consistent with the post-2011 version of § 1446, which explicitly codifies the later-served rule. Those three decisions, like *Boyd*, show how the later-served rule applies when the later-served defendants and first-served defendants are part of the same entity.

C. Case law shows that the Seventh Circuit's *de facto* defendant concept is still viable after Congress amended the removal statute in 2011.

Contrary to the Defendants' position, an instructive district court case shows that the *de facto* defendant concept from *Boyd* is still viable after Congress amended 28 U.S.C. § 1446 in 2011. In that district court case, the plaintiff's original "complaint named as defendants several state officers in their individual and official capacities. One of the defendants was the Secretary of the Florida Department of Business and Professional Regulation." *Kreitlow v. Fla. Dep't of Bus. & Pro. Regul.*, No. 4:17CV242-RH/CAS, 2017 WL 6547460, at *1 (N.D. Fla. Sept. 13, 2017). In amended complaints, the plaintiff dropped all those defendants and instead sued a single defendant: the Florida Department of Business and Professional Regulation. *Id.* That department filed a notice of removal within 30 days of the plaintiff's third amended complaint, which was the first removable complaint that named the department as a defendant. *Id.* at *1–2.

The court concluded that the removal was timely, finding "good grounds to treat the Department and Secretary as jurisdictionally distinct in this case." *Id.* at *2. The court reasoned that "the Secretary was sued not just in his official capacity but also individually. This introduced strategic considerations related to removal that were distinct from those faced by the Department when it entered the case." *Id.* The court also reasoned that sovereign immunity and other doctrines may allow a suit against a state but not an individual officer or vice versa. *Id.* The court also noted that "in some circumstances, a state and an officer may have different attorneys. These considerations may impact a defendant's strategic decision whether to remove a case or remain in state court." *Id.* Finally, the court stated that "it would be an odd result to allow a plaintiff to avoid removal by asserting and then dropping claims

against one set of defendants and then, after those defendants choose not to remove, adding a new otherwise-removable claim against a new defendant." *Id.*

Notably, the court in *Kreitlow* did not suggest that a *de facto* defendant theory ala *Boyd* was no longer viable after Congress amended the removal statute in 2011. Instead, the court simply held that such a theory was not available on the facts of that case.

Kreitlow shows why the notice of removal here was untimely. Tellingly, the Defendants have not argued that the Ruffolos' first amended complaint raised strategic considerations regarding removal that were absent in the Ruffolos' original complaint. The strategic considerations that drove the court's decision in *Kreitlow* are lacking here. First, unlike in *Kreitlow*, here the DNR secretary and the attorney general are *not* being sued in their personal capacities. (Dkt. 1-1:848.) Second, Wisconsin's doctrine of sovereign immunity applies to state agencies and their officers. *Appel v. Halverson*, 50 Wis. 2d 230, 235, 184 N.W.2d 99 (1971). That point is significant because the Defendants are asserting sovereign immunity under state law. (Dkt. 3:24–30.) Indeed, in their response brief opposing the motion for remand, the Defendants urge this Court to dismiss this case under state-law sovereign immunity. (Dkt. 16:6, 22–23, 25, 27.) Relatedly, the Defendants argue that 42 U.S.C. § 1983 does not authorize any of the Ruffolos' claims. (Dkt. 3:30–32.) Third, the same three attorneys have been representing the Defendants since this case was in state court. (Dkt. 7:7.) Fourth, unlike in *Kreitlow*, the Ruffolos did not drop all the defendants from the original complaint and replace them with a different defendant. Instead, the DNR has been a named defendant since the Ruffolos filed their original complaint; the Ruffolos' first amended complaint added the DNR secretary and replaced the Wisconsin Department of Justice (DOJ) with its head, the attorney general. (Dkt. 1-1:6, 850 & n.1.) For all these reasons, there are *not* "good grounds" to treat the DNR secretary as "jurisdictionally distinct" from the DNR or to treat the attorney general as "jurisdictionally distinct" from the DOJ. *See Kreitlow*, 2017 WL 6547460, at *2.

Because the offices of the attorney general and the DNR secretary were served with the Ruffolos' original complaint in June, their notice of removal in September was untimely.

D. The *de facto* defendant concept is consistent with the purpose of the later-served rule.

The purpose of the 2011 amendment to the removal statute also shows that the *Boyd* court's holding about *de facto* defendants is still good law. Even before the statute was amended, some courts adopted the later-served rule because it gave later-served defendants an "opportunity to attempt to persuade their co-defendants to join a notice of removal." *Marano*, 254 F.3d at 755; *see also Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1206–07 (11th Cir. 2008) (favorably quoting this aspect of *Marano*). Congress had the same idea when it amended the statute to codify that rule. The amendment to the statute ensured "[f]airness to later-served defendants" by giving them "their own opportunity to remove, even if the earlier-served defendants chose not to remove initially." H.R. REP. No. 112-10, at 14 (2011). If a newly added defendant was a *de facto* participant in a lawsuit from the start because it was part of an entity that was initially served with a complaint, then it had an opportunity to persuade the named defendants to remove the case to federal court.

This statutory purpose supports application of the *de facto* defendant concept here. After their offices were served with the Ruffolos' original complaint in June 2023, the DNR secretary and the attorney general had an "opportunity to remove" this case to federal court. *See id.* After all, these two officials are the administrative heads of these two agencies. Wis. Stat. §§ 15.05(1)(b), 15.25. Tellingly, the Defendants do *not* argue that the DNR secretary and the attorney general could not have urged their agencies' attorneys to remove this case after receiving the original complaint. Because the Defendants removed this case more than 90 days after they were given an opportunity to do so, their notice of removal is untimely.

E. The statutory functions of the attorney general, the DNR secretary, and their agencies are irrelevant here.

The Defendants spend several pages arguing that the attorney general and the DNR secretary are legally separate from the agencies they head. (Dkt. 16:16–19.) But those differences are irrelevant here. Service of a complaint on a defendant triggers the removal period for that party and for a *de facto* defendant that is part of the same entity, even if they "technically" are "separate legal entities." *See Boyd*, 366 F.3d at 531–32.

The crucial facts are that the offices of the DNR secretary and the attorney general were served with the Ruffolos' original complaint in June 2023, and the Defendants filed their notice of removal more than 90 days later. (Dkt. 1; 1-1:754–755.) The Defendants thus miss the mark by focusing on their respective statutory functions.

DNR Secretary Payne and Attorney General Kaul could have asked their agencies' lawyers to remove this case after the Ruffolos filed their original complaint in June. The Defendants have not shown otherwise. Their notice of removal more than 90 days later was untimely.

* * *

In sum, 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. The Defendants have not met their burden of proving their notice of removal was timely.

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

The Defendants argue that this Court should resolve the Ruffolos' federal constitutional claims *before* deciding whether to remand their state-law claims to state court. (Dkt. 16:21–22, 28.)

That argument conflicts with the Supreme Court's directives on "the sequence in which a court reaches alternative theories for relief." *Saint Augustine School v. Underly*, 78 F.4th 349, 359 (7th Cir. 2023). If a state-law theory is sufficient to provide a litigant with relief, then a federal court must avoid deciding a federal constitutional claim. *See id.* (citing *Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (per curiam)). In cases "where the non-constitutional theories are sufficient to provide a plaintiff with all the relief she seeks, the Supreme Court has instructed lower courts to avoid constitutional adjudication." *Id.* "Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Id.* at 358 (quoting *Jean v. Nelson*, 472 U.S. 846, 854 (1985)). "'Constitutional adjudication' must be 'unavoidable.'" *Id.* (quoting *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

The Defendants try to flip this mandatory sequence on its head. (Dkt. 16:21–22, 28.) This mandatory sequence is precisely why abstention is appropriate in this case (if this Court does not remand the entire case). As the Ruffolos have explained, their federal constitutional claims will not need to be resolved if their state-law claim is decided in their favor. (Dkt. 7:10–11, 13.)

The cases in the Defendants' string cite do not support the odd notion that a federal court should resolve federal constitutional claims before deciding whether to remand state-law claims. (*See* Dkt. 16:20.) Those cases merely show that *if* a federal court resolves all the federal claims in a removal case, then the court must determine whether to exercise jurisdiction over any state-law claims. *See also United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (holding "if the federal claims are dismissed before trial," then "the state claims should be dismissed as well"). But none of those cases holds that a federal court must (or even should) resolve federal constitutional claims *before* deciding whether to remand state-law claims to state court.

Crucially, none of those cases mentions any abstention doctrine. (*See* Dkt. 16:20.) That omission is significant because the Ruffolos are alternatively requesting this Court to remand their state-law claims and stay their federal claims under the

Pullman abstention doctrine. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). (Dkt. 7:8–13.) As explained below, the *Pullman* doctrine can apply in cases removed from state court. *See infra* § II.B. When a federal court applies *Pullman* abstention, it abstains from deciding federal claims. The *Pullman* doctrine is consistent with the mandatory sequence for deciding alternative grounds for relief. *See Underly*, 78 F.4th at 358–59 (discussing this sequence and citing *Pullman*).

The Defendants next argue that sovereign immunity under Wisconsin law supports dismissal of all the Ruffolos' claims. (Dkt. 16:22.) As the Ruffolos have explained, however, the fact that the Defendants are asserting sovereign immunity under state law is a reason to remand their claims to state court. (Dkt. 8:10.) Because a question of state-law sovereign immunity is an issue for a state court to resolve, a defendant's assertion of sovereign immunity under state law is *not* a reason for a federal court to decline to remand a case to state court. *See, e.g.*, *Gossmeyer v. McDonald*, 128 F.3d 481, 488–89 (7th Cir. 1997); *Smith v. Wisconsin Dep't of Agric., Trade & Consumer Prot.*, 23 F.3d 1134, 1139 (7th Cir. 1994). The gist of the Defendants' argument is that there is no reason to remand this case because the state court would find the Ruffolos' claims barred under state-law sovereign immunity. The Seventh Circuit, however, squarely rejected that reasoning in *Smith*, 23 F.3d at 1139.

The Defendants incorrectly characterize the Ruffolos' federal claims as "intertwined" with their state-law claims. (Dkt. 16:23, 27.) As the Ruffolos have explained, there is no need for a court to resolve their federal claims if a court resolves their state-law claim in their favor. (Dkt. 7:10–11.) They are not intertwined in any relevant sense.

The Defendants assert that the Ruffolos' state-law claims are not novel and complex enough to justify a remand, but the Defendants do not adequately develop that argument. (Dkt. 16:25–26.) Also, mere pages later, the Defendants describe the Ruffolos' state-law theory as "extremely novel." (Dkt. 16:29.) In a prior brief, the Defendants have described the Ruffolos' state-law claims as "novel." (Dkt. 3:22.) The Defendants' inconsistent attempt to walk back that concession is half-hearted at best.

(*See* Dkt. 16:25–27.) The novelty of the Ruffolos' state-law claims is a sufficient reason to remand them to state court under 28 U.S.C. § 1367(c)(1). (Dkt. 7:8–10.)

Relatedly, the Defendants allege that the Ruffolos' fact pattern is "fairly common." (Dkt. 16:26.) But as the Ruffolos have noted, the Defendants have "not cited any Wisconsin case law applying Spills Law liability under facts like the ones here." (Dkt. 8:23.) They still haven't done so. (*See* Dkt. 16.) Instead, the Defendants resort to ignoring the dispositive facts and mischaracterizing the holdings in *State v. Mauthe*, 123 Wis. 2d 288, 366 N.W.2d 871 (1985). (*See* Dkt. 8:22–23.)

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

The Defendants argue that *Pullman* abstention is available only if a parallel state case is ongoing and that "the proper procedure is to first decide the federal claims." (Dkt. 16:28–29.) They're wrong. As explained above, the Defendants have the decisional sequence backwards. *See supra* § II.A.

Contrary to the Defendants' baseless argument, the *Pullman* doctrine can apply in cases removed from state court. *See, e.g.*, *Stoe v. Flaherty*, 436 F.3d 209, 213–14 (3d Cir. 2006). "Generally, a U.S. district court that abstains from reaching federal constitutional issues under *Pullman* will remand to state court but stay the federal issues pending determination of the state law questions in state court." *Moheb, Inc. v. City of Miami*, 756 F. Supp. 2d 1370, 1373 (S.D. Fla. 2010). "Where there are no parallel state court proceedings because a defendant removed the case to federal court, a U.S. district court may decide not to stay the federal claims but rather to remand the action in its entirety." *Id.* (citing *Administaff, Inc. v. Kaster*, 799 F. Supp. 685, 690 & n. 12 (W.D. Tex. 1992); *Ganz v. City of Belvedere*, 739 F. Supp. 507 (N.D. Cal. 1990)).

Indeed, district courts in this circuit and around the country have applied *Pullman* abstention in cases removed from state court. In addition to the cases cited in the previous paragraph, *see, e.g.*, *VH Prop. Corp. v. City of Rancho Palos Verdes*, 622 F. Supp. 2d 958, 969 (C.D. Cal. 2009) ("[W]hen the district court concludes that it is appropriate to abstain under *Pullman*, the state law claims at that point

predominate, and are properly remanded to state court."); *Badanish v. City of Chicago*, 895 F. Supp. 201, 203 (N.D. Ill. 1995) (noting that *Pullman* abstention "was really devised for exactly such a situation as is posed here," *i.e.*, the removal of a case where the plaintiff's state-law claim was the "linchpin" to his case).

The Seventh Circuit has also indicated that *Pullman* abstention is available in removal cases. In *Underly*, 78 F.4th at 358, the court cited *Pullman* to support its avoidance of the plaintiffs' federal claims after their state-law claims had been remanded to state court. In another removal case, the court declined to apply *Pullman* abstention under the facts presented there. *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 365–66 (7th Cir. 1998). Nowhere in that opinion did the court suggest that *Pullman* abstention was unavailable in removal cases.

Relatedly, "the existence of an ongoing state proceeding is not inherent in the nature of abstention." *Stoe*, 436 F.3d at 213. *Pullman* abstention, "as well as other forms of abstention, apply without regard to the existence of an ongoing proceeding." *Id.*; *see also, e.g.*, *Mazanec v. N. Judson-San Pierre Sch. Corp.*, 750 F.2d 625, 628 (7th Cir. 1984) (contrasting "*Pullman* abstention" with "abstention in favor of a parallel state proceeding"); *Moheb, Inc.*, 756 F. Supp. 2d at 1373–74 (noting *Pullman* abstention can apply in removal cases where there are no parallel state-court proceedings).

To support their baseless suggestion that *Pullman* abstention is unavailable in removal cases, the Defendants cite *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139 (7th Cir. 2011). (Dkt. 16:29.) But the *Barland* court said nothing on that subject. In fact, *Barland* was not even a removal case; it was filed in federal court. *Barland*, 664 F.3d at 143.

The Defendants next argue that, even if *Pullman* abstention were available here, it should not apply because "there is no real uncertainty in state law." (Dkt. 16:29.) According to the Defendants, "Other than the Ruffolos' extremely novel theory repudiating *Mauthe*'s longstanding interpretation of the Spills Law, the scope of the Spills Law is clear and unambiguous." (Dkt. 16:29.) The Defendants think *Mauthe* and the Spills Law are straightforward because they ignore key facts and holdings in

Mauthe and key statutory language. (*See* Dkt. 8:18–19, 22–23.) For example, the Defendants falsely suggest that an inactive waste site constitutes a discharge under Wisconsin's Spills Law. (Dkt. 3:45.) The Wisconsin Supreme Court actually "concluded that 'discharge' encompasses inactive waste sites *from which hazardous substances are flowing*." (Dkt. 8:22 (emphasis added) (quoting *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 161, 580 N.W.2d 203 (1998)).) The Defendants' mischaracterization of Wisconsin Supreme Court precedent is not a reason for this case to remain in federal court.

Because there will be no need for a court to resolve the Ruffolos' federal claims if their state-law claim is decided in their favor, *Pullman* abstention is proper here if the Court does not remand the entire case. *See, e.g.*, *Administaff, Inc.*, 799 F. Supp. at 690 ("[B]ecause a determination of Plaintiff's state law claims by a Texas state court may make a constitutional ruling unnecessary, this Court will also remand under the doctrine of *Pullman* abstention."); *see also Moheb, Inc.*, 756 F. Supp. 2d at 1373–74 (remanding the entire case under *Pullman* because "there is a significant possibility that a state law determination in this case will moot the one federal constitutional question raised").

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 14th day of November 2023.

Respectfully submitted,

Electronically signed by
s/ Scott E. Rosenow

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