No. __-_____

In the Supreme Court of the United States

HOTZE HEALTH WELLNESS CENTER INTERNATIONAL ONE, LLC, *ET AL.*,

PETITIONERS,

v.

ENVIRONMENTAL RESEARCH CENTER, INC.,

RESPONDENT.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF *CERTIORARI*

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Petitioners

QUESTION PRESENTED

FED. R. APP. P. 35(a)(1) provides appellate parties the opportunity for rehearing en banc as an important mechanism to avoid intra-circuit splits. FED. R. APP. P. 47(a)(1) allows local appellate rules that are consistent with the federal rules and relevant statutes. A three-judge motions panel summarily dismissed the appeal for lack of appellate jurisdiction, without addressing petitioners' argument that circuit precedent deemed the challenged action a non-jurisdictional abuse of discretion. Petitioners sought rehearing *en banc* under the local rules. Acting under those local rules, the three-judge motions panel denied *en banc* review for the *en banc* court (*i.e.*, without notifying or polling the *en banc* court).

The question presented is:

Whether the Ninth Circuit's local rules for *en banc* review violate FED. R. APP. P. 47(a)(1) by allowing a three-judge motions panel to deny *en banc* review for the *en banc* court, which conflicts with FED. R. APP. P. 35(a)(1)'s provisions for *en banc* review.

PARTIES TO THE PROCEEDING

Petitioners are Physician's Preference International, LP, Hotze Health & Wellness Center International One, L.L.C. and Braidwood Management, Inc., state-court defendants that removed to the district court and appealed to the court of appeals.

Respondent is Environmental Research Center, Inc., the plaintiff in the district court and the appellee in the court of appeals.

RULE 29.6 STATEMENT

Petitioners Physician's Preference International, LP, Hotze Health & Wellness Center International One, L.L.C. and Braidwood Management, Inc. have no parent companies, and no publicly held company owns 10 percent or more of their stock.

RELATED CASES

The following cases relate directly to this case for purposes of this Court's Rule 14.1(b)(iii):

- *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. RG18914802 (Alameda Cty. Super. Ct.). Filed July 30, 2018, removed Sept. 10, 2018, remanded Jan. 4, 2019; removed Jan. 16, 2020.
- *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 3:18-cv-05538-VC (N.D. Cal.). Ordered remanded Dec. 21, 2018, appealed Dec. 25, 2018, remanded Dec. 27, 2018.
- *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 18-17463 (9th Cir.). Dismissed Mar. 21, 2019; motion to reconsider *en banc* filed Apr. 4, 2019 and denied Sept. 10, 2019; mandate issued Sept. 18, 2019.

- *In re Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 19-238 (U.S.) Petition for writ of mandamus denied Nov. 4, 2019 (reported at 205 L.Ed.2d 288 (U.S. 2019)).
- *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 3:20-cv-0370-SK (N.D. Cal.). Pending.
- *Hotze Health & Wellness Ctr. Int'l One, LLC v. Envtl. Res. Ctr., Inc.*, No. 18A1222 (U.S.). Extended deadline to petition extended to May 28, 2019.
- *Hotze Health & Wellness Ctr. Int'l One, LLC v. Envtl. Res. Ctr., Inc.*, No. 19A605 (U.S.). Extended deadline to petition extended to Feb. 7, 2020.

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PETITION FOR WRIT OF *CERTIORARI*

Physician's Preference International, LP ("PPILP"), a Texas limited partnership, Hotze Health & Wellness Center International One, L.L.C. and Braidwood Management, Inc. (collectively, hereinafter "Petitioners) – the defendants-appellants below – respectfully petition for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit to review a three-judge panel's denial of Petitioners' motion for reconsideration *en banc*, without polling or even notifying the *en banc* court, after the same three-judge panel granted an appellate motion to dismiss by respondent Environmental Research Center, Inc. ("ERC").

OPINIONS BELOW

The Ninth Circuit motions panel's unreported order denying *en banc* rehearing – which is the order against which Petitioners seek relief – is reprinted in the Appendix ("App.") at 1a and available online at 2019 U.S. App. LEXIS 27287. The appellate motions panel's unreported order dismissing the appeal is reprinted at App. 2a and available online at 2019 U.S. App. LEXIS 8591. The district court's unreported order remanding the case to state court is reprinted at App. 3a and available online at 2018 U.S. Dist. LEXIS 221676.

JURISDICTION

On March 21, 2019, the Ninth Circuit issued an order granting ERC's motion to dismiss the appeal for lack of jurisdiction and denying Petitioners' cross-motion to stay district court proceedings and recall the remand. On April 4, 2019, Petitioners timely moved the Ninth Circuit for reconsideration *en banc* under

that court's Circuit Rule 27-10. On September 10, 2019, the three-judge Ninth Circuit motions panel denied Petitioners' request for *en banc* review. By order dated November 27, 2019, Justice Kagan acting as Circuit Justice extended until February 7, 2020, the time within which to petition for a writ of *certiorari*. *Hotze Health & Wellness Ctr. Int'l One, LLC v. Envtl. Res. Ctr., Inc.*, No. 19A605 (2019). The district court had diversity jurisdiction under 28 U.S.C. §1332(a)(1) – and potentially supplemental jurisdiction under 28 U.S.C. §1367(a)[1] – and the Ninth Circuit had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1) and the All Writs Act, 28 U.S.C. §1651(a).

STATUTORY PROVISIONS INVOLVED

The Appendix excerpts the relevant statutes.

STATEMENT OF THE CASE

This action commenced as a private enforcement action under CAL. HEALTH & SAFETY CODE §§25249.5-25249.14 ("Proposition 65"). Proposition 65 requires warnings about chemicals that California knows to cause cancer, birth defects and other reproductive harm. 27 CAL. CODE REGS. §§25601-25607.37. Proposition 65 does not apply to entities with fewer than 10 employees, CAL. HEALTH & SAFETY CODE §25249.11(b), and it exempts exposure to naturally occurring substances. 27 CAL. CODE REGS. §25501.

Proposition 65 imposes penalties of up to $2,500 for each violation, CAL. HEALTH & SAFETY CODE §25249.7(b)(1) and authorizes private parties like

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[1] The Notice of Removal did not cite supplemental jurisdiction under 28 U.S.C. §1367, but Petitioners raised the issue in a post-hearing brief filed in district court, prior to the remand order.

ERC to bring enforcement actions under Proposition 65. *See id.* §25249.7(c)-(d). In private enforcement actions, the private enforcer recoups a quarter of the civil penalties, and a California state agency gets the balance. *Id.* §25249.12(d). Proposition 65 does not itself have a fee-shifting provision, but a general law shifts fees for actions that enforce "an important right affecting the public interest" and confer "a significant benefit … on the general public or a large class of persons." CAL. CODE OF CIV. PROC. §1021.5. Under its savings clause, Proposition 65 does not "alter or diminish any legal obligation otherwise required in common law" and its penalties "shall be in addition to any penalties … otherwise prescribed by law." CAL. HEALTH & SAFETY CODE §25249.13.

Ubiquitous warnings like Proposition 65's can "exacerbate[over-warning problems] if warnings must be given even as to very remote risks." *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal. 4th 910, 931-32, 88 P.3d 1, 12-13 (Cal. 2004). California's reportable exposure levels are well below the levels set by the Food & Drug Administration. Similarly, the Environmental Protection Agency recently issued guidance to glyphosate pesticide registrants that including a Proposition 65 cancer warning on labeling would be misleading and would render the pesticide misbranded. Letter, Michael L. Goodis, P.E., Director, Registration Division. Office of Pesticide Programs, Environmental Protection Agency, at 1-2 (Aug. 7, 2019).[2] For reasons other than this litigation, PPILP modified its website in early

[2] Available https://www.epa.gov/sites/production/files/2019-08/documents/glyphosate_registrant_letter_-_8-7-19_-_signed.pdf (last visited Feb. 6, 2020).

2019 to disable the ability to order products for shipment to California.

The Underlying "Proposition 65" Action

ERC filed its two-count complaint in state court against Petitioners – which all are Texas-based entities – to enforce Proposition 65 in Count I and to seek related non-statutory relief in Count II; the complaint seeks an attorney-fee award for both Counts. In addition to its special pleadings, the complaint also includes a general prayer for "such other relief as the Court may deem just and proper."

At all relevant times, PPILP was the only entity that operated under the registered fictitious name of Hotze Vitamins and had fewer than 10 employees, which exempts PPILP from Proposition 65. In addition, PPILP claims that any lead in its products represents trace amounts of naturally occurring lead from the natural ingredients. The other two Petitioners – Braidwood and the Wellness Center LLC – are not engaged in the vitamin business.

PPILP's Removal to District Court and the District Court's Remand

On September 10, 2018, PPILP timely removed the action to federal court. On November 1, 2018, ERC moved to remand, citing a lack of an Article III case or controversy and an insufficient amount in controversy for diversity jurisdiction. Petitioners cross-moved to transfer the case to the Southern District of Texas pursuant to 28 U.S.C. §1404. By order, the district court raised the issue that the State of California – a non-party that has authorized private enforcers like ERC to bring Proposition 65 suits – might destroy diversity because "a State is not a 'citizen' for purposes

of diversity jurisdiction." *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973).

Petitioners made two discrete arguments for federal jurisdiction: (1) "Assignee standing" under *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771-73 (2000), with the amount in controversy made up by the $2,500 maximum penalty for each of the 44 allegedly unlawful shipments that ERC admitted to purchasing;[3] and (2) "Purchaser standing" for both economic injury, *Degelmann v. Advanced Med. Optics Inc.*, 659 F.3d 835, 840 (9th Cir. 2011) (purchase price); *Havens Realty Corp. v. Coleman*, 455 U. S. 363, 373 (1982) ("tester" standing), and informational injury, *Wilderness Soc., Inc. v. Rey*, 622 F.3d 1251, 1259 (9th Cir. 2010); *Pub. Citizen v. FTC*, 869 F.2d 1541, 1550 (D.C. Cir. 1989); *Fed'l Election Comm'n v. Akins*, 524 U. S. 11, 19-20 (1998), with the amount in controversy made up by the attorney-fee award that ERC claims under CAL. CODE OF CIV. PROC. §1021.5.[4]

Although PPILP's Notice of Removal did not mention supplemental jurisdiction, Petitioners argued in a post-hearing letter brief that the district court's supplemental jurisdiction would provide jurisdiction for Count I if non-party California's interest in enforcing Proposition 65 destroyed complete diversity. 28 U.S.C. §1367. As a result, the purchaser-based argument does not rely on diversity jurisdiction over Count I (the Proposition 65 count)

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[3] Admitting the purchases effectively amends the pleadings to create a contractual relationship. FED. R. CIV. P. 15(b)(2).

[4] Because CAL. CODE OF CIV. PROC. §1021.5 is a general-purpose provision not tied to Proposition 65 *per se*, ERC's complaint seeks an attorney-fee award for each count.

because diversity jurisdiction would nonetheless cover Count II (the non-Proposition 65 count), in which California has no interest.

Addressing only assignee-based standing and the real-party issue, the district court remanded without addressing purchaser-based standing or supplemental jurisdiction. *See* App. 2a-3a. Even as to assignee-based standing and diversity jurisdiction, the district court deemed Petitioners' theory as an insufficient showing under the evidentiary standard of *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992), without deciding the binary, yes-no question of whether jurisdiction exists (*i.e.*, the district court *doubted* jurisdiction, without *finding a lack* of jurisdiction). *See* App. 2a-3a. Petitioners filed their Notice of Appeal to the Ninth Circuit on December 25, 2018 and moved to stay the district court proceedings. The district court denied Petitioners' stay motion without awaiting a response and remanded to state court on December 27, 2018 (*i.e.*, after Petitioners' appeal).

Ninth Circuit Appeal

In the Ninth Circuit, ERC moved to dismiss the appeal for lack of appellate jurisdiction, and Petitioners cross-moved to stay the district court proceedings and to recall the remand. In briefing the cross motions, Petitioners submitted evidence that, as of January 17, 2019, ERC sought $138,235.61 in legal fees under CAL. CODE OF CIV. PROC. §1021.5; up to that point, during which the litigation had involved almost exclusively issues of removal and remand.

On March 21, 2019, a motions panel of the Ninth Circuit summarily granted ERC's motion to dismiss without addressing Petitioners' arguments that the

district court had failed to address Petitioners' purchaser-based standing theory and supplemental jurisdiction. App. 2a. Because Ninth Circuit Rule 27-10 (App. 7a-8a) replaces *petitions* under FED. R. APP. P. 35 and 40 with a *motion* for reconsideration, Petitioners timely moved the Ninth Circuit for panel reconsideration and rehearing *en banc* on April 4, 2019.

Because that motion remained pending without a response from the panel, on May 25, 2019, Petitioners applied to the Circuit Justice to extend the time within which to petition for a writ of *certiorari*. *See Hotze Health & Wellness Ctr. Int'l One, LLC v. Envtl. Res. Ctr., Inc.*, No. 18A1222 (U.S.) (extending deadline to Aug. 19, 2019). As discussed in the next subsection, on August 19, 2019, Petitioners petitioned this Court for a writ of mandamus to the district court to recall the remand.

The Ninth Circuit's rules allow motions panels to choose between putting motions for reconsideration *en banc* to the *en banc* court (*i.e.*, to treat the motion like a petition for rehearing *en banc*) and denying the motion for the *en banc* Court:

> The panel may follow the relevant procedures set forth in Chapter 5 in considering the motion for rehearing en banc, or may reject the suggestion on behalf of the Court.

Ninth Circuit Gen'l Order ¶ 6.11 (App. 9a). After the Circuit Justice granted that extension, Petitioners filed a notice of supplemental authority in the Ninth Circuit, advising that court of the extension and explaining, with respect to Circuit Rule 27-10 and General Order ¶ 6.11, that withholding this case from

the *en banc* Ninth Circuit would require this Court to exercise its supervisory authority over that court:

> Candor compels appellants to notify this Court that appellants have argued to the Supreme Court, in seeking an extension, that ¶ 6.11 of this Court's General Order would require the Supreme Court to exercise its supervisory powers over this Court to the extent that the motions panel relied on ¶ 6.11 to violate binding Circuit precedent and then deny a motion for *en banc* reconsideration on behalf of the *en banc* court, without presenting the motion to the *en banc* Court.

Appellants' Notice of Supplemental Authority, at 2, (June 3, 2019), *Hotze Health & Wellness Ctr. Int'l One, L.L.C. v. Envtl. Res. Ctr., Inc.,* No. 18-17463 (9th Cir.). On September 10, 2019, after Petitioners' petition for a writ of mandamus was filed, the Ninth Circuit motions panel finally denied reconsideration *en banc* for the *en banc* court. App. 1a.

With denial of *en banc* review on September 10, 2019, Petitioners would need to have petitioned this Court for review within 90 days (*i.e.*, by December 9, 2019). 28 U.S.C. §2101(c). On November 27, 2019, Petitioners sought and received an extension from the Circuit Justice to petition for a writ of *certiorari* by February 7, 2020. *Hotze Health & Wellness Ctr. Int'l One, LLC v. Envtl. Res. Ctr., Inc.*, No. 19A605 (2019).

Petition for a Writ of Mandamus

As indicated, during the pendency of their seeking *en banc* review before the Ninth Circuit, Petitioners petitioned this Court for a writ of mandamus to compel the federal district court to recall the remand. *In re Hotze Health & Wellness Ctr. Int'l One, L.L.C.,*

No. 19-238 (U.S.) (filed Aug. 19, 2019). This Court denied the petition for a writ of mandamus on November 4, 2019. *In re Hotze Health Wellness Ctr. Int'l One, LLC*, 205 L.Ed.2d 288 (U.S. 2019) ("petition for a writ of mandamus is denied"). Although similar issues underlie the petition for a writ of mandamus in No. 19-238 and this petition for a writ of *certiorari*, the criteria for *certiorari* review are less stringent than the criteria for mandamus review. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980). For that reason, it appears worthwhile to seek this Court's review by *certiorari*, notwithstanding the denial of mandamus.[5]

Post-Remand Proceedings in State Court

On remand, Braidwood Management, Inc., and Hotze Health & Wellness Center International One, L.L.C., were voluntarily dismissed, and PPILP moved to quash service (*i.e.*, moved to dismiss). PPILP's motion was deferred because ERC claimed to need discovery on the 10-employee issue (*i.e.*, whether Proposition 65 applies here). Because of differences in California discovery procedures versus federal procedures, the remand allowed ERC to engage in extensive discovery that it would not have had a basis to seek in federal court. *Mills v. Damson Oil Corp.*, 931 F.2d 346, 350-51 (5th Cir. 1991); *Calderon v. U.S. Dist. Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1106 (9th Cir. 1996); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). At this time, it is doubtful that ERC believes it has had enough discovery for the state court to allow a renewed motion to quash. Consequently, Petitioners

[5] In addition, the relief (namely, the procedural opportunity for *en banc* review) that Petitioners seek here is much narrower than the relief sought in No. 19-238.

would continue to face significant expenses in this baseless enforcement action. In any event, the costs and company time lost to baseless discovery may not be recoverable.

On December 10, 2019, ERC filed an amended complaint to add two new defendants and to add Braidwood and the Wellness Center LLC back as defendants. ERC began serving that new complaint later in December. The gist of the new complaint is that the various distinct legal entities should count toward the employee-count total, even though only PPILP was engaged in the challenged vitamin sales.

New Defendant's Removal to District Court

On January 16, 2020, one of the new defendants that ERC named in an amended complaint removed the case to the U.S. District Court of the Northern District of California. In this removal, the removing defendant cited ERC's purchaser-based standing and the availability of supplemental jurisdiction for Count I (*i.e.*, the Proposition 65 count), thus sidestepping the question of California's lack of citizenship for diversity purposes. *See* App. 3a (doubting diversity jurisdiction, given that California lacks citizenship). At the time of this petition, the parties have not yet briefed remand to state court or transfer to federal court in Texas.

REASONS TO GRANT THE WRIT

The petition raises an important issue of appellate due process for *en banc* review and provides an ideal vehicle for this Court to resolve that issue. In addition, either now with respect to this petition or in response to a renewed petition by the non-prevailing party, this case presents important jurisdictional issues with respect to Article III standing to enforce state statutes and "citizen-suit" provisions generally and the state-

as-noncitizen issue for diversity jurisdiction. Against that backdrop, this Court should grant the writ of *certiorari* for at least three of four distinct reasons.

1. The Ninth Circuit's local rules for a motion panel's denying *en banc* review flout the federal rules promulgated by this Court, FED. R. APP. P. 35(a), 47(a)(1), by allowing a three-judge panel to deny *en banc* review without consulting the *en banc* court. *See* Section I, *infra.*

2. The Ninth Circuit practice splits with the other circuits on the availability of *en banc* review when a three-judge panel terminates an appeal with an order on a dispositive motion. *See* Section II, *infra.*

3. The issues of Article III standing to enforce state statutes and "citizen-suit" provisions generally and the state-as-noncitizen issue for diversity are important and recurring. *See* Section III, *infra.*

4. This petition presents an appropriate vehicle for this Court both to reject the Ninth Circuit's short-circuiting of *en banc* review and to address the issues of jurisdiction, either *sua sponte* now or on a renewed petition after the Ninth Circuit provides its *en banc* position. *See* Section IV, *infra.*

Petitioners respectfully submit that these important reasons warrant this Court's intervention in this case.

I. THE NINTH CIRCUIT'S LOCAL RULES VIOLATE FED. R. APP. P. 35 AND 47.

The Ninth Circuit rule applied here flatly violates FED. R. APP. P. 47(a)(1) by being inconsistent with the requirement for an opportunity for *en banc* review in FED. R. APP. P. 35(a). If rules mean anything, this Court should vacate the motions panel's action, App. 1a, and remand for the *en banc* court to consider

whether to take up the important jurisdictional issues presented by the underlying appeal.

Specifically, Circuit Rule 27-10 and Ninth Circuit General Order ¶6.11 enable a three-judge panel to flout Circuit precedent,[6] then hide the fact from the *en banc* Court, notwithstanding that a non-prevailing party moved for reconsideration *en banc*: "The panel may follow the relevant procedures set forth in Chapter 5 in considering the motion for rehearing en banc, or may reject the suggestion *on behalf of the Court*" (App. 9a) (emphasis added). Petitioners respectfully submit that the Ninth Circuit's local practice violates FED. R. APP. P. 35(a)'s requirement for *en banc* review, as well as Rule 47's requirement that "[a] local rule must be consistent with … Acts of Congress and rules adopted under 28 U.S.C. §2072." FED. R. APP. P. 47(a)(1). Circuit Rule 27-10 and General Order ¶6.11 are inconsistent with Rule 35(a)(1).

Moreover, the Ninth Circuit's practice clearly fails to adopt "[a]ny procedure … which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts," *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941), which thus implicates this Court's "general power to supervise the administration of justice in the

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[6] Under Circuit precedent, the district court's ignoring Petitioners' arguments for purchaser standing to remand was a non-jurisdictional abuse of discretion, *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261-62 (9th Cir. 2010); *Barroso v. Gonzales*, 429 F.3d 1195, 1208-09 (9th Cir. 2005); *Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013); *Romero v. Nev. Dep't of Corr.*, 673 F. App'x 641, 646 (9th Cir. 2016); *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002), which means that the Ninth Circuit had jurisdiction for this appeal.

federal courts," and "the responsibility lies with this Court to define [the] requirements and insure their observance." *Western Pacific,* 345 U.S. at 260 (interior quotations omitted). Indeed, by allowing a three-judge motions panel to deny a motion for *en banc* review without notifying or consulting the *en banc* court, Ninth Circuit General Order ¶6.11 (App. 9a), the Ninth Circuit's local rules *exacerbate* that court's failure to avoid and resolve intra-circuit splits.

In his confirmation hearing, Chief Justice Roberts famously analogized judging to umpiring: "[I]t's my job to call balls and strikes, and not to pitch or bat." Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Circuit). The rules allow a litigant three strikes: (1) convince the district judge, (2) convince a three-judge appellate panel that the district judge got the case wrong, and (3) convince the *en banc* court that the three-judge panel got the case wrong. By deciding the *en banc* issue for the *en banc* court, the motions panel called Petitioners out on two strikes. That was not their call to make.

II. THE NINTH CIRCUIT'S ACTION HERE SPLITS WITH THE OTHER CIRCUITS THAT HAVE ADDRESSED THE ISSUE.

Perhaps because the rule that the Ninth Circuit violated is so clear and so basic, there has not been any significant discussion of it in reported decisions. In unreported decisions, however, the other circuits have been clear that appellate parties who lose by a dispositive motion can seek rehearing *en banc*. *See*, *e.g.*, *USW Local #1082 v. U.S.*, No. 91-1303, 1991 U.S.

App. LEXIS 33092, at *2 (Fed. Cir. Dec. 13, 1991) (extending option for *en banc* review to appeal resolved by dispositive motion); *Hickman v. Coleman*, No. 09-2464, 2009 U.S. App. LEXIS 29128, at *2 (3d Cir. Aug. 21, 2009) (same); *Santa's Best Craft, LLC v. St. Paul Fire & Marine Ins. Co.*, No. 11-2115, 2012 U.S. App. LEXIS 13345, at *1 (7th Cir. June 29, 2012) (same); Letter from Michael E. Gans, Clerk of the Court, U.S. Court of Appeals for the Eighth Circuit, to Daniel Salais, defendant, *U.S. v. Salais*, No. 06-3979 (8 Cir. Feb. 16, 2007) (same) (available in Lexis Advance pleadings database); *cf. Praise Christian Ctr. v. City of Huntington Beach*, 352 F. App'x 196, 198 n.** (9th Cir. 2009) (applying *en banc* review to appeal dismissed via dispositive motion). The Ninth Circuit has acted so far outside the rules that the other circuits have not widely considered the issue that the Ninth Circuit raises here. As indicated, the other circuits that *have* addressed the issue *all split* with the Ninth Circuit.

III. THE IMPLICT JURISDICTIONAL ISSUES ARE IMPORTANT AND RECURRING.

Although Petitioners do not now seek review of the underlying jurisdictional issues, this Court may have an obligation to review the threshold issue of jurisdiction. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). Alternatively, because this is a court "of review, not of first view," *Hernandez v. Mesa*, 137 S.Ct. 2003, 2007 (2017), this Court may decide to confine itself to whether three-judge panels can deny *en banc* review and wait to review the Ninth Circuit's final ruling on jurisdiction.

Petitioners respectfully submit that that second course might be appropriate where jurisdiction

depends, in part, on California law: "a home circuit's view of state law is entitled to deference." *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 944 (D.C. Cir. 1991); *accord Ehrenfelt v. Janssen Pharm., Inc.*, 737 F. App'x 262, 265 (6th Cir. 2018). For example, having the Ninth Circuit's views on whether the State of California is a real party in interest to private Proposition 65 actions could guide or inform this Court's decision on whether diversity jurisdiction exists for Count I of ERC's complaint.

A. This action presents an Article III case or controversy.

If the Court reaches the issue of standing as a threshold issue, this action clearly presents an Article III case or controversy. Indeed, ERC admitted to purchasing PPILP products and seeks *inter alia* a refund. Such "paradigmatic private rights … lie at the protected core of Article III judicial power." *Granfinanciera v. Nordberg*, 492 U.S. 33, 56 (1989) (internal quotations omitted). They are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) (internal quotation omitted), and squarely within Article III's reach.

1. Private enforces like ERC have assignee standing.

The district court's suggestion that assignee standing under *Stevens* might not apply is based on the theory that state legislatures cannot create assignable rights, App. 3a (citing *Envtl. Research Ctr. v. Heartland Prods.*, 29 F. Supp. 3d 1281, 1282 (C.D. Cal. 2014)), which is simply untenable. In *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 285

(2008), this Court upheld assignee-based standing based on *private* state-law assignments. *APCC Servs. v. AT&T Corp.*, 254 F. Supp. 2d 135, 137-38 (D.D.C. 2003) (*APCC* assignments based on state law). Moreover, Ninth Circuit precedent plainly – and correctly – holds that "state law can create interests that support standing in federal courts." *Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001). Any dispute on this issue is frivolous.

2. <u>As a purchaser-tester, ERC has tester standing under *Havens Realty*.</u>

With or without assignee standing, an Article III case or controversy exists for purchaser standing, which the lower courts ignored. *See* App. 3a-4a; App 2a. Indeed, ERC is a paradigmatic "tester" under *Havens Realty*, *supra*. ERC is in the business of enforcing Proposition 65 through suits like this action (*i.e.*, ERC purchases and tests products, then sues). ERC has always sought – and when successful in a case – recovered an amount to "reimburse its reasonable costs in bringing" the action (or words to that effect), which is distinct from its civil-penalty and attorney-fee awards.[7] While Proposition 65 does not

[7] *See*, *e.g.*, *Environmental Research Ctr. v. Taxus Cardium Pharms. Group*, at 6, No. CGC-14-539326 (Cal. Super. Ct. San Francisco Nov. 2, 2015); *Environmental Research Ctr. v. BioPharma Sci.*, at 6, No. CGC-14-539327 (Cal. Super. Ct. San Francisco Nov. 16, 2015); *Environmental Research Ctr. v. Altasource*, at 8, No. CGC-13-532293 (Cal. Super. Ct. San Francisco Oct. 29, 2014); *Environmental Research Ctr., Inc. v. Nutiva, Inc.*, at 7, No. CGC-15-545713 (Cal. Super. Ct. San Francisco Oct. 22, 2015); *Environmental Research Ctr., Inc. v. Sabre Scis., Inc.*, at 5-6, No. CGC-15-543826 (Cal. Super. Ct. San Francisco July 14, 2015); *Environmental Research Ctr. v. Fit Foods Ltd.*, at 7, No. CGC-14-541777 (Cal. Super. Ct. San Francisco June 17, 2015); *Environmental Research Ctr. v.*

have a damages remedy, courts can grant restitution as an equitable remedy, *U.S. v. Coca-Cola Bottling Co.*, 575 F.2d 222, 228-29 (9th Cir. 1978), and the "general prayer" in ERC's complaint (*i.e.*, seeking such other relief as is just) can provide such relief as well. *People for the Ethical Treatment of Animals, Inc., v. Gittens,* 396 F.3d 416, 421 (D.C. Cir. 2005) ("the complaint requested 'such other and further relief as the Court may deem just and proper[,' which] permits a district court to award damages for breach of contract even when the plaintiff has not pled a contract claim"); *Bemis Brothers Bag Co. v. U.S.,* 289 U.S. 28, 34 (1933) ("[t]he rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not"). Even taking the district judge's doubt about assignee standing at face value, an Article III case or controversy exists for purchaser and tester standing.

3. Petitioners suffered a procedural injury from the Ninth Circuit motions panel's voiding of *en banc* review.

If Petitioners' appeal is even plausible, the three-judge motion panel's denial of review *en banc* inflicted a procedural injury by denying what FED. R. APP. P. 35(a)(1) guarantees: that three-judge panels must follow circuit precedent or risk *en banc* review. If concrete interests are at stake, procedural injuries give rise to Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). As indicated in the prior two subsections, concrete interests are at

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Heartland Products, Inc., at 6, No. BC537505 (Cal. Super. Ct. Los Angeles Oct. 6, 2015).

stake on the plaintiff's side. Concrete interests are also at stake for Petitioners: ERC seeks not only to compel the use of product labeling that Proposition 65 does not require – an Article III injury in its own right, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (compelled speech on license plates) – but also to fine Petitioners. Petitioners thus have standing to seek *en banc* review by the Ninth Circuit.

B. Statutory subject-matter jurisdiction is an important issue to resolve.

Although the new defendant's removal back to the federal district court may end up displacing some of the issues presented here, the new removal does not moot the dispute over the first removal. For example, the first district judge's doubt about the state-as-noncitizen issue in the first removal kept that basis for jurisdiction out of the second removal. With respect to statutory subject-matter jurisdiction for Count I, the new removal seeks to address Count I via supplemental jurisdiction. If that view prevails, future Proposition 65 plaintiffs will eschew any relief that could provide a "hook" for diversity jurisdiction, thereby leaving no diversity jurisdiction under 28 U.S.C. §1332(a) onto which to "supplement" the Proposition 65 claims via 28 U.S.C. §1367(a). Thus, even if the new removal succeeds, the clarity provided by the Ninth Circuit's affirming the second removal could prove short-lived. In order to answer these recurring jurisdictional question definitively and completely, Petitioners respectfully submit that this Court must strike the motion panel's action and remand for further proceedings in the Ninth Circuit.

Despite the short shrift that the lower courts gave the issue, it is not clear that California's non-

citizenship should displace diversity jurisdiction here. *Glacier Gen. Assurance Co. v. G. Gordon Symons Co.*, 631 F.2d 131, 134 (9th Cir. 1980) ("[u]nder federal law a partial subrogor is a real party in interest as to the entire claim when the subrogor is entitled to enforce the entire claim and payment to the subrogor will completely extinguish the defendant's liability"); CAL. CODE CIV. PROC. §367 ("[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute"); *Titus v. Wallick*, 306 U.S. 282, 288-89 (1939). "An assignee for collection or security only is within the meaning of the real party in interest statutes and entitled to sue in his or her own name on an assigned account or chose in action, although he or she must account to the assignor for the proceeds of the action." *Sprint*, 554 U.S. at 285 (interior quotations omitted). While ERC undoubtedly must account to California for a portion of civil penalties collected, CAL. HEALTH & SAFETY CODE §§25249.7(k)(3), 25249.12(c)(1), that does not make California as assignor the real party in interest to this assigned action for diversity purposes.

IV. THIS PETITION IS AN APPROPRIATE VEHICLE TO ADDRESS – OR PRESERVE – THE ISSUES PRESENTED.

This petition presents an ideal vehicle for this Court to resolve the purely legal issues presented here: may local rules authorize a three-judge panel to decide the question of *en banc* review without polling or notifying the *en banc* court? There are no fact-bound issues or even any facts relevant to the petition.

With respect to Circuit Rule 27-10 and Ninth Circuit General Order ¶6.11, this case presents not only an instance of a motions panel withholding from

the *en banc* court a timely motion for reconsideration *en banc*, but also a *substantively meritorious* motion. Petitioners respectfully submit that no future such case could better present the disconnect between the Ninth Circuit's *en banc* motions practice *vis-à-vis* the petition process implemented by FED. R. CIV. P. 35.

With respect to jurisdiction, Petitioners have no doubt that the party that does not prevail in the Ninth Circuit will seek this Court's review. Thus, either now at this Court's own initiative or after the Ninth Circuit acts on Petitioners' request for en banc review, this Court will have the opportunity to address important jurisdictional questions.

For the foregoing reasons, this case presents an ideal vehicle to resolve the questions presented.

CONCLUSION

The Court should summarily grant the petition for a writ of *certiorari* and remand to the Ninth Circuit for that court to consider Petitioners' request for rehearing *en banc*.

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Respectfully submitted,

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Petitioners