No. 19-1005

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

PETITIONERS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Table of Contents i
Table of Authorities i
Supplemental Brief 1
Argument 2
I. The second removal likely will *eventually* moot this appeal of the first remand. 2
II. Petitioners may raise on appeal the plaintiff's third-party standing to assert California's case or controversy. 4
III. The third-party and assignee-standing issues are important. 5
Conclusion 6

TABLE OF AUTHORITIES

Cases

Chandler v. Miller,
520 U.S. 305 (1997) 4
Guar. Tr. Co. v. York,
326 U.S. 99 (1945) 5-6
Havens Realty Corp. v. Coleman,
455 U. S. 363 (1982) 3
Kowalski v. Tesmer,
543 U.S. 125 (2004) 5
Mont. Envtl. Info. Ctr. v. Stone-Manning,
766 F.3d 1184 (9th Cir. 2014) 3
Moor v. Alameda Cty.,
411 U.S. 693 (1973) 1
Sprint Communs. Co., L.P. v. APCC Servs.,
554 U.S. 269 (2008) 3

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 3
United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) 4
Vt. Agency of Natural Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000) 1
Wooley v. Maynard,
430 U.S. 705 (1977) 4

Statutes

U.S. CONST. art. III 1-6
28 U.S.C. § 1447(c) 3, 5
28 U.S.C. § 1447(d) 3
28 U.S.C. § 1653 4
CAL. HEALTH & SAFETY CODE
§§ 25249.5-25249.14 ..... 1, 4, 6
CAL. HEALTH & SAFETY CODE
§ 25249.12(d) 1

Other Authorities

Braden Campbell, *Calif. Private AG Law: Coming To A State Near You?* Law360
(Feb. 21, 2020) 5
THE FEDERALIST NO. 80 (A. Hamilton)
(C. Rossiter ed. 1961) 6
Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1808
(2018) 6

SUPPLEMENTAL BRIEF

Petitioners Physician's Preference International, LP, Hotze Health & Wellness Center International One, L.L.C., and Braidwood Management, Inc. (collectively, "Petitioners") file this supplemental brief to advise the Court of a development since the filing of the petition, an additional basis for Article III jurisdiction, and the effect of those two issues on the potential for future mootness of this appeal.

The underlying litigation is a private enforcement action under CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.14 ("Proposition 65"), a state warning-label law partly modeled on the citizen-suit provisions of federal environmental laws, but differing from those citizen suits by providing – analogously to *qui tam* actions – the private enforcers a quarter of any civil penalties. *Id.* § 25249.12(d). Petitioners removed the case from California state court to the U.S. district court, which remanded back to state court because the district judge doubted that Petitioners had assignee standing under *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771-73 (2000), but – even if they had assignee standing – found that California's real-party-in interest status would destroy diversity jurisdiction under *Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973). *See* Pet. App. 3a. On remand, the respondent amended the complaint to add new defendants, who removed a second time. When the petition was filed, fewer than 30 days had elapsed since the removal, but 30 days have now passed without the respondent-plaintiff seeking remand on the prudential issue of its third-party standing to assert California's Article III case or controversy for compelled speech and monetary fines.

Against that backdrop, Petitioners ask this Court to enforce the federal appellate rules guaranteeing an opportunity to seek review from the *en banc* court. *See* Pet. at i. The Court could either decide the Article III issue *sua sponte* or send it to the Ninth Circuit for that court to address in the first instance. *See* Pet. at 14-15. This brief provides the Court additional issues to weigh when it decides which course to take.

ARGUMENT

I. THE SECOND REMOVAL LIKELY WILL *EVENTUALLY* MOOT THIS APPEAL OF THE FIRST REMAND.

Because Petitioners have cured the diversity issue that provided the district judge's primary argument against jurisdiction for the first remand, *compare* Pet. App. 3a (remanding first removal) *with* Pet. at 10 (describing statutory subject-matter jurisdiction for second removal), the respondent's motion to remand the second removal omits subject-matter jurisdiction as a basis for remand. Under the circumstances, it appears that the absence of a plausible *Article III* objection to federal jurisdiction should suffice to keep the second removal in federal court. Specifically, in addition to Petitioners' affirmative case for Article III jurisdiction, it also appears that respondent has third-party standing to assert California's injuries, which presents a merely prudential (*i.e.*, nonjurisdictional) limit of federal review. If it were *known* at this time that the second removal would remain in federal court, this appeal would be moot: the ultimate relief that Petitioners seek of recalling the first remand from state would be mooted by the second removal.

But the respondent vigorously opposes removal in district court and presumably would appeal a denial

of its motion to remand. As such, it is possible that a second appeal will find its way to the Ninth Circuit. If the district court grants a second remand, Petitioners would face no barrier under 28 U.S.C. § 1447(c)-(d) to appealing the remand order based on prudential issues such as third-party standing. *See Mont. Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1188 n.3 (9th Cir. 2014) (distinguishing constitutional and prudential aspects of standing); *cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167-68 (2014). Unlike constitutional barriers to federal-court jurisdiction, the judiciary's prudential limits on standing can be eliminated by Congress. *Havens Realty Corp. v. Coleman*, 455 U. S. 363, 372-73 (1982). Petitioners respectfully submit that 28 U.S.C. § 1447(c)-(d) not only eliminates prudential limits on federal courts' hearing cases raised more than 30 days after the removal but also allows appeals of prudential bases for remanding a case.[1]

While having no barrier to appellate jurisdiction increases the *likelihood* that the second removal will be permanent and thus will moot this appeal, that jurisdiction does not guarantee that result. As such,

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[1] Although Court's recent precedent on assignee-for-collection standing includes a sharp dissent, both the majority and the dissent acknowledge that they did not consider the assignee's *third-party standing* to assert the assignor's rights. *Compare Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 289-90 (2008) (third-party standing not relevant because assignee had first party standing) *with id.* at 298 (third-party standing not relevant because assignee had no independent Article III injury) (Roberts, C.J., dissenting). With 28 U.S.C. § 1447(c)-(d), the need for independent constitutional standing under the prudential test for third-party standing is eliminated, although respondent here has independent constitutional standing as a purchaser of the allegedly unlawful product. *See* Pet. at 15.

this appeal is not moot *yet*. If the second remand goes to the Ninth Circuit, this appeal could rejoin it there to ensure consideration of important jurisdictional issues not presented in the second removal (*e.g.*, whether the state is a real party in interest if statutory standing is lacking, whether a state's non-citizenship destroys diversity in the removal context, whether California is a real and necessary party for Proposition 65 cases). In order to preserve these issues for resolution, this appeal should not be deemed moot.

II. PETITIONERS MAY RAISE ON APPEAL THE PLAINTIFF'S THIRD-PARTY STANDING TO ASSERT CALIFORNIA'S CASE OR CONTROVERSY.

Under 28 U.S.C. § 1653, Petitioners may correct a statement of jurisdiction – even for the first time on appeal – by showing jurisdiction that existed when the action was filed. *Chandler v. Miller*, 520 U.S. 305, 313 n.2 (1997) ("defective allegations of jurisdiction curable by amendment at trial or in appellate stages"). Here, *California* has had an Article III case or controversy (*i.e.*, monetary fines, compelled speech) for the entirety of this action. *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (discussing standing for "a $ 5 fine and costs"); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (Article III injury for compelled speech). Moreover, respondent has third-party standing under this Court's three-part test (namely, independent constitutional standing from its own purchases, a relation with California in Proposition 65's controls over private enforcers, and a budgetary hindrance that California legislature has found to keep the responsible state agency from bringing these

enforcement actions). *See Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004). Even if respondent did not have third-party standing, however, the restriction is prudential, not jurisdictional. The motion to remand the first removal was filed on November 1, 2018, which was 52 days after the first removal. *Compare* Pl.'s First Mot. to Remand, *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 3:18-cv-05538-VC (N.D. Cal.) (Docket #19) *with* Notice of Removal, *id.* (Docket #1). The district court set the briefing schedule by an order issued on October 29, 2018, and a minute entry on October 16, 2018, which were 49 and 36 days after removal, respectively. *See* Order, *id.* (Oct. 29, 2018) (Docket #18); Minute Entry, *id.* (Oct. 16, 2018) (Docket #17). As such, prudential objections to private enforcer's pressing the state's interests is outside § 1447(c)'s 30-day window.

III. THE THIRD-PARTY AND ASSIGNEE-STANDING ISSUES ARE IMPORTANT.

Article III jurisdiction for removability of these private-attorney-general actions is an important and growing issue. On February 21, 2020, the online journal law360.com reported that several states are looking to replicate California's model of a "private attorney general act" ("PAGA"). *See* Braden Campbell, *Calif. Private AG Law: Coming To A State Near You?* Law360 (Feb. 21, 2020) (listing pending or forthcoming legislation in the New York, Massachusetts, Vermont, Washington, Maine, and Connecticut legislatures). In addition to this issue's economic importance to affected industries and the national economy, denying a federal forum denies a right anchored in the Constitution: "Diversity jurisdiction is founded on assurance to nonresident

litigants of courts free from susceptibility to potential local bias." *Guar. Tr. Co. v. York*, 326 U.S. 99, 111 (1945); THE FEDERALIST NO. 80, at 477 (A. Hamilton) (C. Rossiter ed. 1961); Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1808, 1880 (2018) (citing "the danger of state bias against out-of-state interests" as "the precise reason why federal courts exist"). Petitioners respectfully submit that the push of other states to adopt private-enforcement regimes like Proposition 65 requires this Court's attention.

CONCLUSION

This Court could resolve the important issues of third-party standing in private-enforcement statutes and the Ninth Circuit's inconsistency with the federal *en banc* rules in a summary decision that Article III is met and remanding to the Ninth Circuit for a decision on Petitioners' motion for reconsideration by the *en banc* court.

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Respectfully submitted,

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