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

PETITION FOR REHEARING

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QUESTION PRESENTED

Petitioners removed a two-count state complaint to federal court, citing diversity jurisdiction. Count I alleges violations of state law and seeks to collect penalties, divided between the state and the "private attorney general" plaintiff, and Count II seeks related relief between the parties. Because it found the state to be a real party in interest, the district court *sua sponte* raised the issue of whether the state's status as a non-citizen barred reliance on diversity jurisdiction, but allowed petitioners to make a post-hearing filing pursuant to 28 U.S.C. § 1653. That post-hearing filing cited supplemental jurisdiction under 28 U.S.C. § 1367(a). Both the district court and an appellate motions panel summarily dismissed, simply ignoring the issue of supplemental jurisdiction raised in the post-hearing brief.

Under *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1117 (9th Cir. 2000), Ninth Circuit precedent holds that asserting supplemental jurisdiction outside the 30-day window for removal is "more than a correction of a 'defective allegation of jurisdiction' permissible under 28 U.S.C. § 1653." By contrast, the Courts of Appeals for the Fifth, Sixth, and Seventh Circuits have held that removing defendants may cite supplemental jurisdiction under § 1653 outside the 30-day window to cover state-law claims not covered by original federal jurisdiction.

The question presented is:

Whether removing defendants who did not assert supplemental jurisdiction in their notice of removal may raise that basis for federal jurisdiction pursuant to § 1653 outside the 30-day window for removal.

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-VC (N.D. Cal.). Pending.
- *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 20-15457 (9th Cir.). 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 REHEARING

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 this Court to rehear the denial of a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the Ninth Circuit. A certification of counsel pursuant to this Court's Rule 44.2 is attached hereto.

JURISDICTION

On March 21, 2019, the Ninth Circuit issued an order granting the respondent'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). Petitioners filed a timely petition for a writ of *certiorari*, which this Court denied by order dated March 23, 2020. The district court had diversity jurisdiction under 28 U.S.C. §1332(a)(1) over Count II and supplemental jurisdiction under 28 U.S.C. §1367(a) over Count I. The Ninth Circuit had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

AUTHORITIES INVOLVED

This action arises under CAL. HEALTH & SAFETY CODE §§ 25249.5-25249.14 ("Proposition 65"), which as relevant here is a California consumer-product warning-label statute that imposes penalties when a manufacturer omits required warnings. In a private enforcement action like this, a 25% share of the penalties goes to private enforcer under CAL. HEALTH & SAFETY CODE § 25249.12(d).

The only part of Proposition 65 relevant here is its savings clause, CAL. HEALTH & SAFETY CODE § 25249.13. In addition, three parts of California's Code of Civil Procedure are relevant, CAL. CODE OF CIV. Proc. §§ 17(6) (definition of "person"); 1021.5 (attorney-fee awards), 1060 (declaratory judgments), as are three jurisdictional provisions of the United States Code: 28 U.S.C. §§ 1332(a)(1), 1367(a), 1653. These provisions of state and federal law are set out in the Appendix ("App.). The Appendix also includes relevant excerpts from the removal statutes, 28 U.S.C. §§ 1446(b), 1447(c)-(d).

STATEMENT OF THE CASE

The petition summarizes the factual background of this case, Pet. 2-10, the pertinent parts of which are emphasized here.

1. Respondent's two-count complaint seeks to enforce Proposition 65 in Count I and obtain declaratory relief in Count II for the same course of conduct (namely, Petitioners' allegedly unlawful vitamin sales in California).

2. The complaint seeks an attorney-fee award for each count of the complaint, and respondent claims well in excess of $130,000 in fees alone.

3. As relevant here, the notice of removal cited only diversity jurisdiction as a basis for removal of both Counts I and II.

4. The district judge raised *sua sponte* the issue of whether California was a real party in interest to an action to enforce Proposition 65, which could bar complete diversity under the *Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973), line of cases because a state is not a citizen.

5. The district could allowed Petitioners to file a post-hearing brief, in which Petitioners asserted for the first time – more than 30 days after service of the complaint – that supplemental jurisdiction existed for Count I (Proposition 65) and diversity jurisdiction existed for Count II (which did not involve California as a real party): "Even if California were a real party in interest, this Court still would have diversity jurisdiction over Count II, based on the monetary reimbursement that ERC could seek plus the attorney-fee award [which] would easily exceed $75,000. *See* Second Joseph Decl. 2 (¶6)[.] With diversity jurisdiction thus established, this Court would have supplemental jurisdiction over Count I. 28 U.S.C. §1367; *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 858 (9th Cir. 2001)[.]" Defs.' Post-Hearing Br. at 8 *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 3:18-cv-05538-VC (N.D. Cal. Dec. 21, 2018) (ECF #35); Appendix, at 15a-16a, *In re Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 19-238 (U.S.).

6. The district court's curt order remanding the caser to state court mentions California's status as a real party in-interest with no citizenship, which bars complete diversity under the *Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973), line of cases, but neither

distinguishes between Counts I (Proposition 65) and Count II (declaratory relief) not discusses address § 1367 and § 1653. *See* Pet. App. 3a-4a.

7. On appeal and later in this Court, Petitioners cited this ignoring of supplemental jurisdiction as an abuse of discretion, but the Ninth Circuit dismissed the appeal for lack of appellate jurisdiction in an even more curt order that, again, does not address § 1367 and § 1653. *See* Pet. App. 2a.

8. As set out below, the law of the Ninth Circuit is that removing defendants cannot add supplemental jurisdiction under § 1653 outside the 30-day window to remove a case.

9. Back in state court, respondent amended its complaint to add new parties, which prompted one of the new defendants to remove the case again.

10. Back in federal court, the parties cross-moved again to remand to state court (respondent) and to transfer to the United States District Court for the Southern District of Texas (Petitioners) with respondent's ignoring the question of statutory subject-matter jurisdiction and focusing instead on the twin issues of Article III standing and law of the case for standing.

11. Petitioners argued against law of the case on, among other things, the theory that law of the case does not apply to pleading errors (*i.e.*, having omitted § 1367 from the first notice of removal).

12. As a case management conference on April 15, 2020, the district judge *sua sponte* rejected the Petitioners' suggestion that the first remand resulted from the pleading error of omitting § 1367 and announced his view that Count II – because it

mentions Proposition 65 – includes the State of California as a real party in interest.

REASONS TO GRANT THE PETITION

The petition for rehearing should be granted for two reasons. First, the split in circuit authority on the use of 28 U.S.C. § 1653 to add supplemental jurisdiction as a basis for removal warrants this Court's review. Second, this litigation presents an appropriate vehicle to resolve the important and recurring issue presented here. The following two sections outline these rationales for granting rehearing.

I. THE CIRCUITS ARE SPLIT ON WHETHER § 1653 ALLOWS ADDING SUPPLEMENTAL JURISDICTIONAL OUTSIDE § 1446'S 30-DAY WINDOW FOR REMOVAL.

This Court should grant the writ to resolve the split in circuit authority. Petitioners' removal would have sufficed in the Fifth, Sixth, and Seventh Circuits but it failed under a contrary precedent in the Ninth Circuit. The constitutional right to a federal forum for diversity cases is too important to leave to this mature split in authority: "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").

Both the district court and the appellate motions panel simply ignored Petitioners' invocation of § 1376 via § 1653, which Petitioners argued was an abuse of

discretion. It turns out, however, that the lower courts were *sub silentio* following binding Ninth Circuit law:

> "The … Notice of Removal states that federal jurisdiction exists under 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b), but does not state that removal jurisdiction exists under either the supplemental jurisdiction statute or the All Writs Act. Because more than thirty days have passed since this action was filed in Montana state court, the [defendant] may not amend its Notice of Removal to state alternative bases for removal jurisdiction. The necessary amendment is more than a correction of a "defective allegation of jurisdiction" permissible under 28 U.S.C. § 1653."

ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality, 213 F.3d 1108, 1117 (9th Cir. 2000).

By contrast, the Fifth, Sixth, and Seventh Circuits all allow the use of § 1653 to add supplemental jurisdiction under § 1367 to the jurisdictional basis for removal, even outside the 30-day window of 28 U.S.C. § 1446(b). *See Menendez v. Wal-Mart Stores, Inc.*, 364 F. App'x 62, 65-67 (5th Cir. 2010) (allowing use of § 1653 to cure diversity allegations and unpleaded supplemental jurisdiction to carry state-law survival action without independently meeting the amount in controversy); *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 232 (5th Cir. 2016); *Aldrich v. Univ. of Phoenix, Inc.*, 661 F. App'x 384, 388-90 (6th Cir. 2016); *Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 430 (7th Cir. 2009); *cf. Camsoft Data Sys. v. S. Elecs. Supply, Inc.*, 756 F.3d 327, 332, 336-37 (5th Cir. 2014) (allowing unpleaded supplemental jurisdiction to

provide jurisdiction for claims not within the district court's original jurisdiction).

As the Fifth Circuit put it, in contrast to the Ninth Circuit, it is not necessary for a notice of removal to assert supplemental jurisdiction within the 30-day window of § 1446(b):

> The notice of removal must therefore contain a short and plain statement" describing the basis for subject matter jurisdiction. Usually, the best practice is for the removing party to specifically invoke supplemental jurisdiction and cite to § 1367 in the jurisdictional allegations. But, as with pleading original jurisdiction, the failure to expressly plead supplemental jurisdiction will not defeat it if the facts alleged in the complaint satisfy the jurisdictional requirements.

Heinsohn, 832 F.3d at 232 (alterations and interior quotations omitted).

In short, Petitioners' removal efforts would have sufficed to establish supplemental jurisdiction over Count I (the Proposition 65 count) in the Fifth, Sixth, or Seventh Circuits. By contrast, those efforts failed in the Ninth Circuit under its *ARCO* precedent. This Court should resolve this split in circuit authority.

II. THIS LITIGATION IS AN APPROPRIATE VEHICLE TO ADDRESS THE RECURRING AND IMPORTANT ISSUE RAISED HERE.

This litigation presents an ideal vehicle to resolve the question presented because the material facts are not in dispute and subject-matter jurisdiction exists under the law of the Fifth, Sixth, and Seventh Circuits and does not exist under the law of the Ninth Circuit.

A. The issue presented here is purely legal.

If the district court improperly declined to exercise supplemental jurisdiction over Count I, the Ninth Circuit motions panel improperly dismissed for lack of appellate jurisdiction: "We are not bound by the district court's characterization of its authority for remand." *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir. 2002). Moreover, "if we concluded that the district court's order was the result of an exercise of discretion, we could review it." *Abada*, 300 F.3d at 1117; *accord Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640 (2009). The jurisdictional issue depends on the purely legal issue of whether removing defendants may invoke supplemental jurisdiction via § 1653 outside of § 1446(b)'s 30-day window. If they can, declining to consider supplemental jurisdiction is a reviewable abuse of discretion.

B. Count II falls under diversity jurisdiction, and California is not a real party to Count II.

Although the respondent has never questioned supplemental jurisdiction, the district judge argued *sua sponte* on a case management conference on April 15, 2020, that California is a real party in interest to Count II. Because that argument is baseless, it does not undermine this action as a vehicle to resolve the circuit split on § 1653.

Other than incorporating prior allegations by reference, Count II consists of one paragraph:

> There exists an actual controversy relating to the legal rights and duties of the Parties, within the meaning of Code of Civil Procedure section 1060, between ERC and Defendants, concerning whether Defendants have exposed

> individuals to a chemical known to the State of California to cause cancer, birth defects, and other reproductive harm without providing clear and reasonable warning.

Complaint, at 8, *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 3:18-cv-05538-VC (N.D. Cal. Nov. 1, 2018) (ECF #1-1); Appendix, at 26a, *In re Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 19-238 (U.S.). While Count II does indeed mention Proposition 65, it does not seek to enforce Proposition 65 *per se* for five independent reasons.

First, when Petitioners cited Count II as alleging an "actual controversy" for purposes of Article III, respondent – through an email that respondent later submitted into evidence via a sworn declaration – has already confirmed that Count II is not a Proposition 65 claim:

> Your allegation that [respondent] alleges that its "legal rights and duties" are in "actual controversy" does NOT establish injury in fact. Note that this allegation was set forth in the cause of action for declaratory relief.

Freund Decl. Ex. A at 1 (capitalization in original), *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 3:18-cv-05538-VC (N.D. Cal. Nov. 1, 2018) (ECF #20); Appendix, at 14a, *In re Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 19-238 (U.S.). By respondent's own sworn statement, then, Count II is not a Proposition 65 count.

Second, the declaratory-judgment provision that Count II invokes is not open to the State of California, either by its express or incorporated terms. In pertinent part, § 1060 applies to "[a]ny person interested … under a contract, or who desires a declaration of his

or her rights or duties with respect to another" to seek declaratory relief. CAL. CODE OF CIV. PROC. § 1060. That applies to purchasers – such as respondent – allegedly injured by Petitioners, but it would stretch the statutory language to say that § 1060 applies to the State of California. But this Court need not even attempt to stretch § 1060 that far. By its terms, § 1060 applies only to persons, who are defined as natural persons and corporate entities. CAL. CODE OF CIV. PROC. § 17(6). Significantly, that does not include the State of California: "A sovereign state is not a person." *Berton v. All Persons*, 176 Cal. 610, 617, 170 P. 151, 154 (Cal. 1917); *Trinkle v. Cal. State Lottery*, 71 Cal. App. 4th 1198, 1203 (Cal. Ct. App. 1999) (same); *cf. Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (same under federal statute). So, Count II cannot apply to California.

Third, a declaratory count can satisfy diversity jurisdiction, provided that – as here – the criteria of 28 U.S.C. § 1367(a) are met. *Morgan Stanley & Co. LLC v. Couch*, 659 F. App'x 402, 403-04 (9th Cir. 2016) ("claim satisfying diversity requirements satisfies jurisdictional requirements for declaratory judgment"). Respondent has not argued otherwise.

Fourth, although Count II *mentions* Proposition 65, it does not seek to *enforce* Proposition 65. Instead, Count II falls under Proposition 65's savings clause, CAL. HEALTH & SAFETY CODE § 25249.13, which allows non-Proposition 65 actions to continue (*i.e.*, the state's action does not displace actions that the people had before Proposition 65's enactment).

Fifth, the mere mention of Proposition 65 in Count II does not make California as a real party in interest. Private parties can have a non-governmental interest in whether products comply with Proposition 65. For

example, a retail drugstore could purchase vitamins from a manufacturer for sale in the purchaser's retail locations in Arizona and California. In that scenario, the purchaser – like respondent here – could bring a declaratory-judgment action to establish whether the items meet an implied warranty of merchantability for sale in California, without seeking prior approval from the State of California to bring an enforcement action under the private-attorney-general theory of Count I. That example of how private contracting parties could have a Count II-style claim in a private lawsuit demonstrates that Count II does not become an action under Proposition 65 – with California as a real party in interest – merely because declaratory relief would touch upon Proposition 65 compliance.

For all these reasons, Count II does not seek to enforce Proposition 65 in any way that would make California a real party in interest to Count II. As such, given that respondent seeks well in excess of $100,000 in attorneys' fees on each count of its complaint and the parties are completely diverse, the district court has diversity jurisdiction over Count II. With original jurisdiction in place for Count II, the district court will have supplemental jurisdiction for Count I if this Court holds that Petitioners may raise supplemental jurisdiction via § 1653 outside the 30-day window for removal.

CONCLUSION

The petition for rehearing should be granted.

April 17, 2020

Respectfully submitted,

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COUNSEL CERTIFICATION

Pursuant to this Court's Rule 44.2, and as specifically set out below, the undersigned counsel for the petitioners certifies that the grounds proffered in the accompanying Petition for Rehearing are limited to other substantial grounds not previously presented and are not presented for delay.

1. The petition for rehearing concerns a question not previously raised: whether this Court should review the split in authority between Fifth, Sixth, and Seventh Circuits versus the Ninth Circuit on the issue of whether removing defendants may invoke 28 U.S.C. § 1653 to add supplemental jurisdiction outside 28 U.S.C. § 1446(b)'s 30-day window for removal.

2. Petitioners become aware of this split in briefing the second removal of the case, *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 3:20-cv-0370-VC (N.D. Cal.), on the issue of whether "law of the case" applies to pleading defects. *See*, *e.g.*, *Goddard v. Sec. Title Ins. & Guarantee Co.*, 14 Cal. 2d 47, 52, 92 P.2d 804, 807 (Cal. 1939) (no preclusion for "technical or formal" defects that "may … by a different pleading eliminate them or correct the omissions"); *Morris v. Cty. of Tehama*, 795 F.2d 791, 794 n.3 (9th Cir. 1986) (citing *Goddard*). Petitioners were not aware of the split when they filed the underlying petition for a writ of *certiorari* in this matter.

3. The underlying litigation was remanded to state court in late December of 2018, and the Ninth Circuit mandate issued on September 18, 2019. *See* Pet. App. 5a. Accordingly, there is nothing in this case to delay: if the Court takes the case, it will re-activate

in this Court; if the Court denies rehearing, the case will stay where it is, without regard to this Court's actions.

4. At a status conference on April 15, 2020, the district judge in the new removal, *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 3:20-cv-0370-VC (N.D. Cal.), scheduled a hearing on the respondent's motion to remand for April 23, 2020, but that event had no bearing on petitioners' decision to seek rehearing in this Court. The printer slot was secured before April 15, and the subsequent district court proceedings have formed no part of the decision to seek rehearing on the new basis presented here.

April 17, 2020 Respectfully submitted,

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