No. 19-238

IN THE SUPREME COURT OF THE UNITED STATES

IN RE HOTZE HEALTH WELLNESS CENTER INTERNATIONAL ONE, LLC, ET AL.,

Petitioners,

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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ENVIRONMENTAL RESEARCH CENTER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Respondent Environmental Research Center respectfully requests that the instant Petition for Writ of Mandamus be denied. Petitioners here seek a common law writ of mandate as codified at 28 U.S.C. section 1651(a), which this Court has described as "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). Such a writ may only be issued if the petitioner's "right to issuance of the writ is 'clear and indisputable.'" *Id.* at 381. Here, Petitioners fail to carry this extraordinary burden. Petitioners' request is plainly contrary to federal statute and Supreme Court precedent and should be denied.

In this case, Petitioners sought to remove the state law claims of Environmental Research Center to federal court. Plaintiff Environmental Research Center moved to remand the case to state court on the basis that it lacked injury in fact for Article III standing, which is not required for Environmental Research Center to pursue its state law claims in state court. The federal removal statute requires: "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c) (emphasis added). The District Court granted the remand motion, finding a lack of subject matter

jurisdiction, because "[t]he defendants have not shown that Environmental Research Center would have Article III standing to pursue their Proposition 65 action in federal court." *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C., No. 18-17463* (9th Cir. Mar. 21, 2019); *Petitioner's Petition for Writ of Mandamus at* App. 2a-3a.

That order was not appealable, and is not reviewable by writ of mandamus, or otherwise, because the federal removal statute plainly states that: "An order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise*, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d). The Supreme Court in *Thermtron Products v. Hermansdorfer* confirmed that this statutory prohibition on appellate review applies "whether review is sought by appeal or by extraordinary writ." (1976) 423 U.S. 336, 343 ("*Thermatron*"), *superseded in part* by statutory amendment not relevant here; *see, Powerex Corp. v. Reliant Energy Servs.* (2007) 551 U.S. 224, 230 (under "*Thermtron* the remand is immunized from review only if it was based on a lack of subject-matter jurisdiction.") Thus, by statute and Supreme Court precedent, a remand order based on a lack of federal jurisdiction is not reviewable by appeal, a petition for writ, or otherwise.

Such is the case at hand. The District Court expressly stated that remand was required due to an absence of "Article III standing." Pet. for Writ of Mand. at App. 2a-3a. That order is thus "immunized from review" by statute and *Powerex*. The Circuit Court of Appeals, therefore, did not err in dismissing Petitioners' appeal. On September 10, 2019, the Circuit Court of Appeals also denied Petitioner's motion for reconsideration and motion for rehearing *en banc*. Appendix at 1a.

Where plaintiff in the underlying action alleges no injury in fact, the District Court ruled that the plaintiff has no Article III standing and remanded on that basis, and statute and Supreme Court precedent state that a remand order for a lack of jurisdiction is unreviewable by appeal or mandamus, Petitioners have failed to carry their extraordinary burden to show any right or error that is clear and indisputable, and the Petition for Writ of Mandamus should be denied.

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Respectfully submitted,

September 20, 2019

COOPER & LEWAND-MARTIN, INC.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED SEP 10 2019
MOLLY C. DWYER,
CLERK U.S. COURT OF APPEALS

Case No. 18-17463
D.C. No. 3:18-cv-05538-VC
Northern District of California, San Francisco

ENVIRONMENTAL RESEARCH CENTER, INC.,

Plaintiff-Appellee,

v.

HOTZE HEALTH WELLNESS CENTER INTERNATIONAL ONE, LLC, INDIVIDUALLY AND ALLEGEDLY DOING BUSINESS AS HOTZE VITAMINS; et al.,

Defendants-Appellants.

ORDER

Before: SILVERMAN, TALLMAN, and MURGUIA, Circuit Judges.

Appellants have filed a combined motion for reconsideration and motion for reconsideration en banc and a related notice of supplemental authority (Docket Entry Nos. 11, 12).

The motion for reconsideration is denied (Docket Entry No. 11) and the motion for reconsideration en banc (Docket Entry Nos. 11, 12) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

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