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

PETITIONERS' REPLY BRIEF

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REPLY BRIEF

Petitioners Physician's Preference International, LP ("PPILP"), a Texas limited partnership registered as doing business as Hotze Vitamins, Hotze Health & Wellness Center International One, L.L.C., and Braidwood Management, Inc. (collectively, "Petitioners") file this reply to the brief in opposition ("BIO") filed by respondent Environmental Research Center, Inc. ("ERC") to the petition for a writ of mandamus or, alternatively, for a writ of *certiorari*.

The "merits" of this appeal involve important questions of district-court and appellate jurisdiction and the Ninth Circuit's local *en banc* procedures. In deciding the threshold issue of this Court's own appellate jurisdiction, the Court would decide all the key issues needed for mandamus relief, leaving only the real-party-in-interest issue for resolution on remand or on *certiorari* review here.

RESTATEMENT OF THE CASE

On appeal, this private enforcement action under CAL. HEALTH & SAFETY CODE §§25249.5-25249.14 ("Proposition 65") presents two jurisdictional issues: did federal jurisdiction exist in federal court, and does appellate jurisdiction exist to review the district court order remanding the case to state court? In addition, the petition raised a third question about whether the Ninth Circuit's local rules – which allow a three-judge motions panel to deny reconsideration *en banc* for the *en banc* court – conflict with the federal rules' requirement for *en banc* review.

Post-Petition Proceedings in Ninth Circuit

The supplemental appendix ("Suppl. App.") to Petitioners' supplemental brief reproduces the Ninth

Circuit motions panel's Order denying reconsideration and that court's Mandate. As relevant here, the Mandate sets the judgment date at March 21, 2019, rather than September 10, 2019. Suppl. App. 2a, The motions panel's Order expressly "denie[s] [reconsideration *en banc*] on behalf of the court." *Id.* 1a (citing 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11).[1]

ERC's Opposition to the Petition

ERC's BIO asserts four points:

- Mandamus is an extraordinary remedy, *see* BIO 1;
- An article III case or controversy is absent here, *see* BIO 1-3;
- The district court remanded for a lack of Article III standing, *see* BIO 3; and
- Remands for lack of jurisdiction are unreviewable on appeal, *see* BIO 2.

Other than these four points, ERC neither proposes alternate Questions Presented nor identifies "any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court." S.CT. RULE 15.2. As shown in this reply, these arguments cannot carry the weight that ERC puts on them. But ERC has a bigger problem: ERC's four arguments fail to respond to Petitioners' *other* arguments that – even conceding *arguendo* ERC's four arguments – would nonetheless provide this Court a basis to grant the relief that Petitioners request.

Specifically, ERC ignores several potentially dispositive issues that Petitioners raised:

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[1] The appendix ("App.") sets out Ninth Circuit Rule 27-10 and General Order ¶6.11. *See* Pet. App. 8a-11a.

- ERC ignores *certiorari* review as an alternate basis for this Court's review, *compare* BIO 1-3 *with* Pet. 23-31;
- Like the district court and Ninth Circuit, ERC ignores Petitioners' alternate bases for standing (namely, informational and purchaser standing), *compare* BIO 1-3 *with* Pet. 5, 18-19;
- Like the district court and Ninth Circuit, ERC ignores that diversity jurisdiction exists for Count II even if California's real-party status is a bar to diversity jurisdiction over Count I, *compare* BIO 1-3 *with* Pet. 6, 13, 18-19;
- Like the district court and Ninth Circuit, ERC ignores the argument that the district court had jurisdiction over Count II and should have severed and remanded only Count I if jurisdiction were indeed lacking for Count I, *compare* BIO 1-3 *with* Pet. 6, 13, 18-20, 27-28;
- Like the district court and Ninth Circuit, ERC ignores that supplemental jurisdiction existed for Count I (and did not involve California as a real party in interest), *compare* BIO 1-3 *with* Pet. 6, 13, 18;
- Like the Ninth Circuit, ERC ignores the argument that ignoring arguments is a non-jurisdictional abuse of discretion, *compare* BIO 1-3 *with* Pet. 6-7, 19-20;
- Like the Ninth Circuit, ERC ignores that a district court's withholding supplemental jurisdiction is reviewable as an abuse of discretion (*i.e.*, non-jurisdictional), *compare* BIO 1-3 *with* Pet. 13, 19-20.

On ERC's weak showing, Petitioners respectfully submit that summary disposition is warranted. *See*

Section IV, *infra*.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

Jurisdictionally, the prerequisites for review by a writ of either mandamus or *certiorari* are an Article III case or controversy, statutory subject-matter jurisdiction, and appellate jurisdiction. All three forms of jurisdiction exist here.

A. Article III jurisdiction is present.

Although ERC correctly suggests that state-based standing need not satisfy Article III, BIO 1; *accord Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013), most of the rest of the BIO is simply wrong about Article III and its application to removed cases.

First, ERC claims Article III jurisdiction hinges on whether *its complaint* alleges an injury in fact, BIO 3, but the pleadings do not cast removal jurisdiction in concrete: evidence can establish federal jurisdiction even if not in the pleadings. *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 84 (2014); *cf. Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 73-74, 79-81 (1978) (standing from environmental injury used to challenge damage caps on future nuclear accidents as takings). Here, ERC admitted to purchasing PPILP products, Pet. App. 14a (¶9), and seeks *inter alia* a refund. *Id.* 17a (¶16), 27a (¶6); Pet. 18-19; FED. R. CIV. P. 15(b)(2). 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.

Second, other than citing the district court, ERC does not dispute assignee, informational, or purchaser standing. *Compare* BIO 1-3 *with* Pet. 5-7, 15, 18-19. Because appellate review is *de novo*, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1196-97 (9th Cir. 2004), ERC has no non-frivolous basis to dispute standing.

Third, if Petitioners' appeal is plausible, the Ninth Circuit 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 paragraphs, ERC has concrete interests at stake here. So does PPILP: ERC seeks not only to compel PPILP to label products with warnings 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 PPILP. PPILP thus has standing to seek *en banc* review by the Ninth Circuit.

B. Diversity and supplemental jurisdiction are present.

As explained, ERC's two-count complaint includes a Proposition 65 count (Count I) and a non-Proposition 65 count for declaratory relief (Count II).[2] *See* Pet. 4.

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[2] In distinguishing between the complaint's allegation that "[t]here exists an actual controversy relating to the legal rights and duties of the Parties," Pet. App. 26a (¶25), and standing for Proposition 65, ERC was emphatic that Count II does not make claims under Proposition 65: "Your allegation that ERC alleges

On statutory subject-matter jurisdiction, ERC does not dispute several dispositive issues:

- Diversity jurisdiction exists for Count II, for which California is not even allegedly a real party in interest, *see* Pet. 6, 13, 18-20;
- Count I could have been severed and remanded by itself if jurisdiction were lacking, *see* Pet. 6, 13, 18-20, 27-28;
- With diversity jurisdiction over Count II, as an exercise of discretion under 28 U.S.C. §1367(a), the district court could have jurisdiction over Count I, without regard to California's disputed real-party status for diversity jurisdiction. *See* Pet. 6, 13, 18;

At a minimum, then, statutory subject-matter jurisdiction is conceded and obvious as to Count II, and Petitioners have a compelling argument to keep Count I in federal court through supplemental jurisdiction. Even if the district court properly could deny supplemental jurisdiction for Count I, the district court would retain federal jurisdiction over Count II.

Consequently, this Court need not decide whether California defeats diversity as a real party in interest to grant the writ of mandamus: the district court had jurisdiction, regardless of whether diversity exists for Count I. But diversity for Count I is worth resolving because, without it, future Proposition 65 enforcers will simply leave out the standard non-Proposition 65 catch-all claim, thus defeating the diversity "hook" in Count II of ERC's complaint.

As explained in the petition and not disputed by

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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." Pet. App. 14a (ERC's emphasis).

ERC, California law expressly authorizes suits by private enforcers, without regard to the State's real-party status. *See* Pet. 16, 24-28. Petitioners are clearly entitled to recall of the remand, diversity jurisdiction for Count II, and an exercise of discretion on whether to assert supplemental jurisdiction over Count I. But this Court could resolve the real-party issue to find diversity jurisdiction for both Counts.

C. This Court has appellate jurisdiction.

This Court has appellate jurisdiction under 28 U.S.C. §1254(1), provided that 28 U.S.C. §1447(d) does not bar appellate review. *Dart*, 574 U.S. at 90. That subsection bars review only for "lack of subject matter jurisdiction or defects in removal procedure," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996), but the district court did not *decide* the legal issues of assignee standing or California's real-party status. *See* Pet. App. 2a-3a; Pet. 6-7, 14-17. Instead, the district court relied on an evidentiary standard and "doubt" about those legal questions. Pet. App. 2a. That is not a decision that the district court *lacked* jurisdiction: it is a decision not to decide.

Moreover, the district judge ignored Petitioners' second jurisdictional argument for standing based on ERC's admitted purchases of PPILP products (*i.e.*, informational and purchaser standing), diversity jurisdiction for Count II, and supplemental jurisdiction for Count I. *See* Pet. 5-6, 18-20; Pet. App. 2a-3a, 15a-16a (¶14). Because California's real-party status is irrelevant to Petitioners' second argument, he necessarily ignored that argument by tying the twin issues of assignee standing and California's real-party status to his "doubt" about jurisdiction. Pet. App. 2a-3a. Ignoring arguments is not jurisdictional;

it is a reviewable abuse of discretion. *See* Pet. 19-20, 24. Significantly, the supplemental-jurisdiction argument required a reviewable exercise of discretion, *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640 (2009) (supplemental jurisdiction is discretionary and appealable if denied), which provides another reason §1447(d) is inapposite here.

Appellate jurisdiction exists to determine whether a district court's "*purporting* to remand on [subject-matter jurisdictional] ground[s]" is colorable. *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232-33 (2007) (emphasis in original); *cf. id.* at 235 (reserving question of "a district-court remand order that dresses in jurisdictional clothing a patently nonjurisdictional ground"). Here, the district judge failed to resolve Petitioners' first argument for jurisdiction under his non-jurisdictional "doubt" standard and ignored their second argument for jurisdiction; both his action and inaction are not colorably jurisdictional, *see* Pet. 14-20, and thus are reviewable. P*owerex*, 551 U.S. at 232-35. The ignored supplemental-jurisdiction argument was itself reviewable, *Carlsbad*, 556 U.S. at 640, which makes the district court's action non-colorable and reviewable. *See* Pet. 14-15 (federal courts' obligation to exercise jurisdiction); P*owerex*, 551 U.S. at 232-35. This Court thus has appellate jurisdiction over the remand.[3]

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[3] *Powerex* denied a similar abuse-of-discretion argument because the district court "*never mentioned* … supplemental jurisdiction," 551 U.S. at 235 (emphasis in original),but three factors differ here: (1) unlike the *Powerex* petitioner, Petitioners indisputably raised supplemental jurisdiction, Pet. App. 15a-16a (¶14); S.CT. RULE 15.2, (2) ignoring arguments itself constitutes a reviewable, non-jurisdictional abuse of discretion. Pet. 18-20, and (3) *Carlsbad* resolved the then-open jurisdictional question.

II. THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF MANDAMUS.

Other than citing mandamus as extraordinary relief, ERC does not rebut Petitioners' entitlement to that relief. *See* BIO 1-3. If appellate jurisdiction is present, the appeal divested the district court of jurisdiction to remand, which clearly and indisputably entitles Petitioners to mandamus. Pet. 12-20. There is no other basis – adequate or otherwise – to obtain a federal forum (and possibility for transfer to Texas). Pet. 20-21. Moreover, "traditional use" of mandamus is appropriate both "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Mandamus is especially appropriate where lower courts could repeat the same improper denial of jurisdiction. *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249, 256-57 (1957). Allowing this improper judicial denial of a federal forum will chill Proposition 65 defendants from asserting the right to a federal forum or prompt other judges to deny that right. *See*, *e.g.*, *Envtl. Res. Ctr., Inc. v. S103, Inc.*, No. 4:19-cv-0640-SBA, 2019 U.S. Dist. LEXIS 96178, at *11-12 (N.D. Cal. Apr. 22, 2019) (remanding based on this litigation).

III. THIS COURT SHOULD ISSUE A WRIT OF *CERTIORARI* TO REVIEW THE NINTH CIRCUIT'S ACTIONS.

Petitioners cast their petition to this Court as a petition for a writ of mandamus, but also sought – in the alternative – a petition for a writ of *certiorari*, Pet. 23-32, and noted that this Court can and does grant *certiorari* review in response to similarly styled

petitions. Pet. 23 (citing *In re Dep't of Commerce*, 139 S.Ct. 566 (2018)). Although criteria for *certiorari* review are less stringent than criteria for mandamus review, *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980), ERC explains only that Petitioners have not met the extraordinary burden of showing an entitlement to mandamus review. *See* BIO 1-3. That is not enough to deflect *certiorari* review.

Significantly, when Petitioners first filed, they did not know whether the Ninth Circuit would reconsider the dismissal. In that context, faced with the ongoing violation of the constitutional right to a federal forum and state discovery unavailable in federal court, the mandamus petition was appropriate. With a now-final order from the Ninth Circuit, *certiorari* review is even more appropriate than it was when Petitioners first filed. *Compare* S.CT. RULE 11 (*certiorari* before judgment) *with* S.CT. RULE 10 (*certiorari* after judgment). Indeed, with respect to the Ninth Circuit's violation of the *en banc* requirements of FED. R. APP. P. 35(a), the case for *certiorari* view is especially strong now that the three-judge motions panel has expressly denied a request for *en banc* review "for the court" (*i.e.*, without seeking the views of other judges). In sum, Petitioners respectfully submit that this Court should review the Ninth Circuit's actions here, in addition to recalling the district court's improper remand to state court.

A. Even after granting mandamus relief, review is needed on the real-party issue.

As shown in Section I.B, *supra*, statutory subject-matter jurisdiction exists for Count II, without regard to whether California is a real party in interest for Proposition 65 cases. Although neither this Court nor the lower courts *need* to answer the disputed real-

party question for mandamus relief, the question remains important. Moreover, the question is not moot for purposes of *certiorari* review. Specifically, without the Ninth Circuit's or this Court's review of the real-party question, Petitioners would have to argue in district court for supplemental jurisdiction over Count I. By contrast, if the Ninth Circuit or this Court resolves the real-party question in Petitioners' favor, the remand would not present the possibility of remanding on Count I to the state court or the need to argue for supplemental jurisdiction. *Cf. Osborn v. Haley*, 549 U.S. 225, 244-45 (2007) (court would have discretion to resolve supplemental claims if federal claims were resolved).

B. The Ninth Circuit's denying Petitioners' motion for reconsideration makes this a post-judgment petition.

As indicated in the supplemental brief, the Ninth Circuit motions panel's denial of panel and *en banc* reconsideration converts Petitioners' alternate form of requested relief from a petition for a writ of *certiorari* before judgment to one after judgment. Suppl. App. 1a-2a. That lowers the threshold for this Court's review. *Compare* S.CT. RULE 11 *with* S.CT. RULE 10.

C. This Court should reject the *en banc* provisions of the Ninth Circuit's rules.

The Ninth Circuit motions panel denied *en banc* reconsideration for the *en banc* court. Suppl. App. 1a. The local rules allowing that process conflict with the federal rules' *en banc* provisions and improperly empower three-judge panels to flout circuit precedent, as happened here. This Court should reject the Ninth Circuit's procedures for *en banc* review by motion.

IV. SUMMARY DISPOSITION IS WARRANTED.

Even summary dispositions' critics consider it appropriate in instances of settled law, undisputed facts, and clear error by the lower courts. *Wyrick v. Fields*, 459 U.S. 42, 50 (1982) (Marshall, J., dissenting) (citing Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77 (1958)). Petitioners do not seek mere error correction only for themselves. Without this Court's intervention, Petitioners' experience will, as a practical matter, foreclose other Proposition 65 defendant's ability to obtain the federal forum that the Constitution promises.

ERC has admitted all relevant jurisdictional facts[4] and standing is clear. Mandamus could issue without deciding the real-party issue (*i.e.*, diversity jurisdiction exists for Count II, and supplemental jurisdiction exists for Count I). Although this Court also could resolve the real-party issue on *certiorari* review, that resolution is unnecessary for mandamus relief.

CONCLUSION

The Court should grant the petition for a writ of mandamus and, alternatively or in addition, could construe the petition as a petition for a writ of *certiorari*, which should be granted.

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[4] *See* Pet. App. 14a (¶9), 16a-17a (¶15); *compare* Pet. 4-10 *with* BIO 1-3 (no disputed facts); S.CT. RULE 15.2.

October 7, 2019

Respectfully submitted,

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