No. __-_____

In the Supreme Court of the United States

HOTZE HEALTH WELLNESS CENTER INTERNATIONAL ONE, LLC, PHYSICIAN'S PREFERENCE INTERNATIONAL, LP, BRAIDWOOD MANAGEMENT, INC., PARADIGM HOLDINGS, LLC, AND DR. STEVEN HOTZE,

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*

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QUESTIONS PRESENTED

This Court has recently sought to define when 28 U.S.C. § 1447(c)-(d) preclude appeals from remand orders. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640 (2009); *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224 (2007); *BP P.L.C. v. Mayor of Baltimore*, 141 S.Ct. 1532 (2021). The lower courts and parties need more clarity than these cases give.

Petitioners removed a "Proposition 65" bounty-hunter suit from state to federal court, premising the removal in part on supplemental jurisdiction to avoid the state's noncitizen status for diversity purposes. Moreover, under the terms of the bounty-hunter law and its own constitutional injury, the plaintiff has prudential third-party standing—a *nonjurisdictional* issue that § 1447(c) requires plaintiffs to raise within 30 days of removal or waive—that should be appealable as nonjurisdictional like exercises of jurisdictional discretion under *Carlsbad*. With these prudential and discretionary issues falling outside § 1447(d)'s bar of appellate review, but nonetheless sounding "jurisdictional," the *Powerex* framework of barring appeals when the rationale for remand is "colorably characterized as subject-matter jurisdiction" is too vague to guide courts and parties.

Petitioners raised discretionary and prudential arguments against remand, but the district court remanded and awarded attorney fees as "actual expenses" under § 1447(c), with no evidence or claim that the bounty hunter actually paid its counsel. The Ninth Circuit affirmed and found the appeal frivolous.

The questions presented are:

(1) Whether the appeal was frivolous.

(2) Whether the remand and fee order was proper.

PARTIES TO THE PROCEEDING

Petitioners are Physician's Preference International, LP, Hotze Health & Wellness Center International One, L.L.C., Braidwood Management, Inc., Paradigm Holdings, LLC, and Dr. Steven Hotze, 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., Paradigm Holdings, LLC, and Braidwood Management, Inc., have no parent companies, and no publicly held company owns any 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; remanded May 26, 2020; dismissed in part Sept. 2, 2021; appellate review sought Oct. 12, 2021; pending.
- *Physician's Preference Int'l, LP v. Superior Court for the County of Alameda*, No. A163647 (Cal. Ct. App.). Filed Oct. 12, 2021; pending.
- *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.
- *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 19-1005 (U.S.). Petition for *certiorari* filed Feb. 06, 2020; denied Mar. 23, 2020; petition for rehearing filed Apr. 17, 2020; denied May 18, 2020.
- *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 3:20-cv-0370-SK (N.D. Cal.). Ordered remanded May 20, 2020, operative (amended) notice of appeal filed May 27, 2020; remanded May 26, 2020.
- *Envtl. Res. Ctr., Inc. v. Hotze Health & Wellness Ctr. Int'l One, L.L.C.,* No. 20-15457 (9th Cir.). Dismissed in part July 28, 2020; motion to reconsider *en banc* filed Aug. 11, 2020, and denied Jan. 12, 2021; memorandum issued June 17, 2021; mandate issued July 9, 2020; order for briefing on attorney-fee award June 21, 2021; pending as to attorney-fee award.
- *Hotze Health & Wellness Ctr. Int'l One, LLC v. Envtl. Res. Ctr., Inc.*, No. 18A1222 (U.S.). 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.). Deadline to petition extended to Feb. 7, 2020.

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PETITION FOR WRIT OF *CERTIORARI*

Hotze Health & Wellness Center International One, L.L.C., Physician's Preference International, LP ("PPILP"), Braidwood Management, Inc., Paradigm Holdings, LLC, and Dr. Steven Hotze (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 three discrete issues raised in their notice of appeal: (1) the remand of a state-court case filed by respondent Environmental Research Center, Inc. ("ERC") —the plaintiff-appellee below—to state court; (2) a case-management order; and (3) attorney-fee awards in district court under 28 U.S.C. § 1447(c) and in the Ninth Circuit under FED. R. APP. P. 38.

OPINIONS BELOW

The Ninth Circuit's memorandum affirming the district court's attorney-fee award and finding the remand and case-management appeals frivolous is reported at 850 F.App'x 572 and reprinted in the Appendix ("App.") at 1a. A Ninth Circuit motions panel's unreported order dismissing the remand and case-management appeals is reprinted at App. 5a and available at 2020 U.S. App. LEXIS 23844. The motions panel's unreported order denying rehearing of the motions panel's dismissal of the remand and case-management appeals is reprinted at App. 26a and available at 2021 U.S. App. LEXIS 792. The district court's unreported order remanding the case to state court and assessing an attorney-fee award is reprinted at App. 7a and available at 2020 U.S. Dist. LEXIS 88768. The district court's unreported case-management order is reprinted at App. 9a.

JURISDICTION

On June 17, 2021, the Ninth Circuit issued a Memorandum affirming the district court's attorney-fee award and finding the appeal of the remand and case-management order frivolous. By Order dated April 15, 2020, this Court extended to 150 days the time within which to petition for a writ of *certiorari*. The district court had jurisdiction under 28 U.S.C. §§ 1332(a)(1), 1367(a), and the Ninth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).[1]

STATUTORY PROVISIONS INVOLVED

The Appendix excerpts the statutes involved. Rule 38 also applies: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

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[1] Jurisdiction to review the district court's remand and case-management orders is less clear. The Ninth Circuit motions panel dismissed the appeal of those orders on July 28, 2020, and denied Petitioners' timely motion for *en banc* review of that dismissal by order dated January 21, 2021 (*i.e.*, more than 150 days ago). If dismissal of those facets of Petitioners' notice of appeal is regarded as distinct or collateral, this Court would lack jurisdiction to review those orders themselves. The Ninth Circuit merits panel found those appeals frivolous as part of the Memorandum dated June 17, 2021, and this petition is filed within 150 days of that finding. This Court's jurisdiction under 28 U.S.C. § 1254(1) would thus extend to the finding that those appeals were frivolous, even if this Court would lack jurisdiction to reach the district court orders underlying those appeals.

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 exempts naturally occurring substances, 27 CAL. CODE REGS. § 25501, like trace amounts of lead available in organic ingredients.

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 ERC to bring enforcement actions. *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 (2004). California's reportable exposure levels are well below the levels set by the federal 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 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 PPILP, Braidwood, and the wellness center—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 sold nutritional supplements into California via the hotzevitamins.com website. App. 23a (state court's holding), PPILP has always had fewer than 10 employees, App. 45a-46a (¶¶ 11-13, 17), 52a (¶¶ 9-11), which exempts PPILP from Proposition 65. CAL. HEALTH & SAFETY CODE § 25249.11(b). In addition,

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[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).

PPILP claims that any lead in its products represents trace amounts of naturally occurring lead from the natural ingredients.

On September 10, 2018, PPILP timely removed the action to the U.S. District Court for the Northern District of California, which remanded the case as explained below. On remand to state court, ERC dismissed Braidwood and the wellness center without prejudice, but later sought (and was granted) leave to amend the complaint to add them back as defendants, along with two new defendants—Paradigm and Dr. Hotze—on an alter ego or joint enterprise theory. As ERC later admitted at a hearing, ERC added the new defendants in an effort to bolster the employee count.

The amended complaint gave the new defendants the chance to file a second removal, which gives rise to this appeal. As explained below, the district court again remanded the case. In state court, ERC has had ample discovery—three depositions and hundreds of special interrogatories, requests for admissions, and requests for documents—and has not proven either a joint enterprise among the defendants or an employee count of 10 or more for PPILP. The state court granted the four new defendants' motion to dismiss on personal-jurisdiction grounds, but denied PPILP's motions to dismiss on both inconvenient-forum and personal-jurisdiction grounds. PPILP petitioned the state court of appeals for a writ of mandate—the California term for mandamus—to grant those two motions, which is the procedure that California sets for threshold challenges to jurisdiction and venue. CAL. CODE CIV. PROC. § 418.10(a). The petition is pending; if granted, the California mandate would moot claims for injunctive relief, but not fee awards.

PPILP's Removal to Federal Court

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 *sua sponte* 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; 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.[3]

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. Addressing only assignee-based standing and the diversity issue, the district court remanded without addressing purchaser-based standing or supplemental jurisdiction. *See* App. 11a-12a. On 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. 11a-12a.

Petitioners appealed the remand to the Ninth Circuit, which dismissed the appeal under 28 U.S.C. § 1447(d) for lack of appellate jurisdiction, without addressing Petitioners' arguments that the district court had abused discretion by failing to address Petitioners' purchaser-based standing theory and supplemental jurisdiction. App. 13a. Because Circuit rules replace *petitions* under FED. R. APP. P. 35 and 40 with *motions* for reconsideration *en banc* to the same motions panel, Petitioners timely moved the Ninth

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[3] 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.

Circuit for panel reconsideration and rehearing *en banc* on April 4, 2019, which the motions panel denied without circulating to or polling the *en banc* court, again without addressing Petitioners' arguments on purchaser-based standing theory and supplemental jurisdiction. App. 14a. This Court denied review in Nos. 19-238 (mandamus) and 19-1005 (*certiorari*).

Paradigm's Removal to Federal Court

On January 16, 2020, Paradigm removed the case to the U.S. District Court of the Northern District of California. In this removal, Paradigm cited ERC's purchaser-based standing and the availability of supplemental jurisdiction for Count I (*i.e.*, the Proposition 65 count), App. 36a, 40a-41a, thus sidestepping the question of California's lack of citizenship for diversity purposes. *See* App. 11a-12a (doubting diversity jurisdiction, given that California lacks citizenship). Although randomly assigned to a different judge, ERC belatedly sought to have the case assigned to prior judge, which Petitioners opposed on substantive and timeliness grounds. Defs.' Resp. to Pl.'s Admin. Mot. to Relate Case No. 4:20-Cv-00370-PJH to No. 3:18-Cv-5538-VC, at 1-5 (Feb. 18, 2020) (ECF #21-1) (notice of same filing in No. 3:18-cv-05538-VC as ECF #51). The judge's order granting reassignment does not address Petitioners' arguments, App. 9a-10, which Petitioners appealed under the collateral order doctrine.

Petitioners asserted the prudential doctrine that ERC had third-party standing to assert California's claims, which ERC did not challenge within 30 days of removal. The judge again remanded the case along the same lines as the prior remand, but this time awarded ERC $42,164.30 in attorneys' fees pursuant

to 28 U.S.C. § 1447(c). App. 7a-8a, which Petitioners amended their notice of appeal to address. While § 1447(c) provides for fees as "actual expenses," ERC submitted no evidence that it actually paid its counsel *anything*:

> On information and belief, formed after reasonable inquiry, which likely could be proved with an opportunity for discovery, … the outside lawyers do not invoice ERC for their time … [based] … on what I know about … the legal-service industry for environmental plaintiffs like [ERC from] work[]as an environmental lawyer in San Francisco … including in Proposition 65, for industry for approximately six years.

Declaration of Lawrence J. Joseph in Support of Defs.' Resp. to Pl.'s Evidence for Fees and Costs, at 7 (¶ 46) (May 4, 2020) (ECF #62-1); ERC counsel's fee requests were based instead on their hours expended and what they characterized as the market rate for their service based on their time as lawyers (*i.e.*, not based on what anyone actually paid them).

Appeal to the Ninth Circuit

On ERC's appellate motion to dismiss, a motions panel dismissed the appeal of the remand and the related-case order, App. 5a-6a, On August 11, 2020, Petitioners moved for reconsideration *en banc*, which the motions denied without requesting a response on January 12, 2921, three days before Petitioner's reply brief was due. Add. 26a.[4] In finding Petitioners' appeal of the remand and related-case orders frivolous, the

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[4] Under the local rules, motions for reconsideration do not delay the briefing schedule.

merits panel took exception to Petitioners' arguments in their opening brief, which protectively included the issues then pending under motion for reconsideration:

> Neither of these orders were appealable, yet Hotze continuously argued to the contrary, and, *each time*, we rejected its arguments as meritless.

App. 3a (emphasis added). Assuming that the "each time" refers to the appeals of the two removals, the Ninth Circuit's collective response to Petitioners until the above-quoted language was that "§ 1447(d) *generally* bars review of a district court order remanding a case to state court," App. 5a (emphasis added); *id.* 26a; *id.* 13a; *id.* 14a. Nowhere did the court address Petitioners' arguments about supplemental jurisdiction being reviewable as an abuse of discretion or prudential standing being nonjurisdictional for purposes of § 1447(d). Having found the remand and related-case appeals frivolous, the merits panel assigned to an appellate commissioner the task of assessing the appropriate sanction under Rule 38, a process which is ongoing. App. 18a.

REASONS TO GRANT THE WRIT

The petition raises important issues of appellate and removal jurisdiction and procedure, as well as issues of constitutional and prudential standing for state "bounty-hunter" laws that authorize private enforcement of state claims by private parties. Against that backdrop, this Court should grant the writ of *certiorari* for five distinct reasons.

1. The removal statute makes remands for "lack of subject matter jurisdiction" "not reviewable on appeal or otherwise," 28 U.S.C. § 1447(c)-(d), but

plaintiffs waive *nonjurisdictional* arguments for remand not raised within 30 days of removal. *Id.* 1447(c). Significantly, exercises of discretion remain appealable under *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640 (2009) (supplemental jurisdiction is discretionary and appealable if denied). Similarly, prudential doctrines such as third-party standing are not jurisdictional. Thus, § 1447(d) does not bar appeal of many issues that may sound "jurisdictional." Quite the contrary, § 1447(c) *forbids* remands based on these nonjurisdictional bases unless raised within 30 days of removal.

2. Although this Court sought to resolve these issues in *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006), and *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224 (2007), *Kircher*, 547 U.S. at 641 n.9, reserved the question, and *Powerex*, 551 U.S. at 234, resolved it only in the abstract, holding that § 1447(d) bars appeal of "a ground [for remand] that is *colorably* characterized as subject-matter jurisdiction." *Id.* (emphasis added). This phrasing does little to guide courts faced with bases for remand that sound jurisdictional but are discretionary or prudential, as this litigation demonstrates.

3. More recently, in *BP P.L.C. v. Mayor of Baltimore*, 141 S.Ct. 1532 (2021), this Court found that otherwise unappealable remand orders can be appealable if bound up with an appealable remand order, but—in doing so—called into question that basis for removing defendants to appeal fee awards under § 1447(c). This issue coalesces with the *Powerex* and prudential or discretionary issues above to allow consideration of otherwise-non-appealable Article III and other subject-matter jurisdiction issues in a

remand order that combine with appealable issues that are discretionary or prudential,

4. In finding Petitioners' appeals frivolous, the Ninth Circuit faults Petitioners for arguments that other Ninth Circuit panels have approved, as in *Kinney v. Gutierrez*, 709 F. App'x 453, 455 (9th Cir. 2017), with respect to related-case orders and *Magadia v. Wal-Mart Assocs.*, 999 F.3d 668 (9th Cir. 2021), with respect to standing for private-attorney-general statutes.

5. The lower courts also awarded attorney fees as "actual expenses" under § 1447(c), notwithstanding the lack of any evidence that ERC actually paid its counsel anything, much less the inflated hourly rates that those counsel claimed.

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

I. THE REMAND WAS IMPROPER.

Although couched in jurisdictional terms, App. 7a, the remand was not only discretionary and prudential but also based on nonjurisdictional facets raised more than 30 days after removal. Under the circumstances, those facets were improper bases on which to remand. *See* 28 U.S.C. § 1447(c)-(d) (only *jurisdictional* bases for remand continue after 30 days). As explained in this section, the district court had jurisdiction, and the remand was thus improper.

A. Standing did not provide a basis for remand.

Although the district court found that a lack of standing required remand, App. 7a, Article III did not provide a basis for remand for two reasons. First, an Article III case or controversy exists here. Second, in

addition, Petitioners also raised *prudential* third-party standing as a basis for removal and ERC failed to challenge that within 30 days of removal. Because prudential standing is not jurisdictional, the removal statute not only precluded remand on that basis but also allows appellate review. *See* 28 U.S.C. § 1447(c)-(d). Accordingly, as argued here and in Section III.B.1, *infra*, the concept of standing does not impede Petitioners' challenge to the remand.

1. <u>An Article III case or controversy exists here.</u>

If the Court reaches the issue of Article III standing, this action presents a case or controversy for both counts.

As to Count II, ERC purchased PPILP products and seeks *inter alia* a refund. App. 39a-41a. 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.

As to Count I, *California* clearly would have a case or controversy with proper Proposition 65 defendants:

> The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic "case" or "controversy" within the meaning of Art. III.

Diamond v. Charles, 476 U.S. 54, 64 (1986) (emphasis added). Moreover, ERC has *qui tam*, assignment-for-

collection, and third-party standing to raise State claims. *Stevens*, 529 U.S. at 771-73 (*qui tam* standing); *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 285 (2008) (assignment-for-collection standing); *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 623, n.3 (1989) (third-party standing). In addition, recent Ninth Circuit precedent makes standing clear for parties—like ERC—who are not only private enforcers but also a direct object of the unlawful conduct. *Magadia*, 999 F.3d at 678-80.[5] Because ERC has its own constitutional standing, it also has third-party standing to raise California's claims.

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. 7a-8a; *id.* 11a-12a. 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 the Proposition 65

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[5] Significantly, there are two types of Proposition 65 enforcers: (1) true bystanders who learn of alleged violations without personal involvement (*e.g.*, by reading a material safety data sheet or using common knowledge such as automobile exhaust's being trapped in parking garages), and (2) testers like ERC who purchase a product and test it. Standing under Magadia applies only to ERC's type of private enforcer.

civil penalty and any attorney-fee award.[6] While Proposition 65 does not 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 other just relief) 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. Private enforcers like ERC have assignee standing.

California's private-attorney-general bounty laws are "a type of qui tam action." *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 382 (2014). 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. 7a (adopting prior remand ruling); App. 11a (citing *Envtl. Research Ctr. v. Heartland Prods.*, 29 F. Supp. 3d 1281, 1282 (C.D. Cal. 2014)), which is simply untenable. In *Sprint*, 554 U.S. at 285, this

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6 *See* App. 40a (collecting cases).

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." *Magadia*, 999 F.3d at 680 n.99 (internal quotations omitted). Any dispute on this issue is frivolous.

4. Nonjurisdictional issues like third-party standing provide no basis for remand unless timely raised.

Because ERC has third-party standing to assert California's claims, Petitioners face no barrier from § 1447(d) when appealing the remand order. Prudential issues like third-party standing are nonjurisdictional. *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*, 455 U.S. at 372-73. Petitioners respectfully submit that 28 U.S.C. § 1447(c)-(d) together do two important things: (1) they prohibit district courts' ruling for challenges based on prudential issues that a plaintiff raises more than 30 days after the removal; and (2) they allow appeal of remands based in whole or in part on those nonjurisdictional issues.

Although this Court's most recent precedent on assignee-for-collection standing includes a sharp dissent, the majority and dissent each acknowledged 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). In other words, third-party standing is different from assignee standing.

5. The law-of-the-case doctrine is discretionary—not jurisdictional—and its application was an abuse of discretion.

To the extent that the district judge relied on his own prior rulings as the law of the case, he exercised discretion. *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (*en banc*). Under *Carlsbad*, discretion is reviewable. Moreover, insofar as Paradigm was a non-party to the first removal and that remand order was not reviewable on appeal, even if "clearly wrong," *Hansen v. Blue Cross of Cal.*, 891 F.2d 1384, 1387 (9th Cir. 1989), applying law of the prior removal to the new—and different removal—violated due process and abused any discretion that the district court exercised.

B. Statutory subject-matter jurisdiction did not provide a basis for remand.

Although the district court suggested that California's noncitizen status could destroy diversity, thus requiring remand, under the reasoning for the first removal, App. 11a, a lack of statutory subject-matter jurisdiction did not provide a basis for remand for the second removal because it cured the pleading error of failing to cite supplemental jurisdiction in the

notice of removal. App. 36a, 40a-41a. While California is not—and should not be—a diversity-destroying real party in interest, that cure bypasses not only the jurisdictional issue but also the bar to appellate review, as *Carlsbad* held. Any failure of the removal to meet the removal criteria of 28 U.S.C. § 1441(a) was statutory and procedural, not jurisdictional. As such, ERC needed to have raised the issue within 30 days of the removal, *see* 28 U.S.C. § 1447(c)-(d), but did not.

1. The district court had statutory subject-matter jurisdiction.

The district court had diversity jurisdiction for the non-Proposition 65 count and supplemental jurisdiction for the Proposition 65 count, even if California were a diversity-destroying real party in interest for Proposition 65 claims. But this Court either should reject the claim that California destroyed diversity or should not require complete diversity for out-of-state defendants' removal of private enforcement of bounty-hunter laws like Proposition 65.

a. Diversity jurisdiction exists for the entire case or controversy.

This Court can disregard California's noncitizen status for diversity purposes. First, as indicated, California has *no interest* here because Proposition 65 does not apply to Petitioners. Second, California law expressly allows private Proposition 65 enforcement without the State's participation. Accordingly, absent States cannot destroy diversity for four reasons.

First, a State's "status as a 'real party in interest' in a *qui tam* action does not automatically convert it into a 'party'" if the State does not intervene in the action. *U.S. ex rel. Eisenstein v. City of New York*, 556

U.S. 928, 935 (2009). Both the state and the assignee can be real parties in interest. *Id.* at 934. While this Court has interpreted the diversity statute to require complete diversity, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978), that only goes so far for non-parties and for nominal parties. It should go no further than necessary and justified as an interpretation of the diversity statute. Although the policy behind requiring complete diversity does not apply here, *see* Section I.B.1.b, *infra*, complete diversity is present here because California is not a real party in interest for diversity purposes.

Second, the issue is important: "hypertechnical jurisdictional purity" would inflict harm on the legal system and deny important rights. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837-38 (1989). Applying the district court's thinking too strictly would deny a single forum for *qui tam* cases filed under both federal and state false claims acts. Moreover, it would defeat a defendants' right to have its case heard in a neutral forum. 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"). The issue is, thus, clearly worthy of this Court's consideration.

Third, this Court already has narrowed the main case on which the district court and ERC relied—*Mo., Kan. and Tex. Ry. Co. v. Hickman*, 183 U.S. 53, 60 (1901)—to limit the real-party analysis to inquiring whether the state was a *necessary*, *indispensable* party. *Ex parte Nebraska*, 209 U.S. 436, 444 (1908). As explained, California law holds otherwise. CAL. CODE CIV. PROC. § 367; CAL. HEALTH & SAFETY CODE §

25249.7(c)-(d). Indeed, to avoid "hypertechnical jurisdictional purity," this Court has even authorized courts "to dismiss a [named] dispensable nondiverse party" after considering whether "the dismissal of a nondiverse party will prejudice any of the parties in the litigation." *Newman-Green*, 490 U.S. at 837-38. Dismissing California would not prejudice anyone because California has no interest in this case.

Fourth, California's non-citizenship should not 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.

In sum, California is not a real party in interest to this matter for purposes of diversity jurisdiction.

b. <u>This Court should not require complete diversity for a removal by out-of-state defendants of private enforcement of state law.</u>

Although the Constitution extends the federal judicial power to suits "between a state and citizens of another state" and "between citizens of different states," U.S. CONST. art. III, § 2, the requirement for complete diversity under *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), and States' status as noncitizens can complicate jurisdiction for removal when a State is a real party in interest. The State can destroy diversity that otherwise would exist (*e.g.*, between ERC and the Texas defendants here). As this Court has explained, both the Court and Congress have long since rejected *Strawbridge* in part. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 n.66 (1967). Even counting California as a real party in interest—which it is not—should not destroy diversity jurisdiction where an in-state plaintiff like ERC sues under state bounty-hunter laws like Proposition 65 against out-of-state defendants like Petitioners. California's imaginary presence does not make California's state courts any more hospitable to out-of-state defendants: it makes those state courts dramatically *less* hospitable. When these out-of-state defendants remove to a federal court where the in-state defendant could have filed the action in the first place, this Court should require only minimal diversity for such removals under 28 U.S.C. § 1332(a).

c. Even if California's noncitizen status prevented complete diversity, the district court had diversity jurisdiction for Count II and supplemental jurisdiction for Count I.

Although Petitioners argue for revisiting the need for complete diversity and for disregarding California as a real party in interest, those arguments are not necessary for Petitioners to prevail. The district court had subject-matter jurisdiction under the clear precedents of this Court, based on supplemental jurisdiction for the Proposition 65 count, even if California is a real party in interest. *See Carlsbad*, 556 U.S. at 640 (supplemental jurisdiction is discretionary and appealable if denied). The district court's error was to treat this removal as identical to the first removal, when this one—but not the first removal—asserted supplemental jurisdiction for Count I. Because Ninth Circuit precedent prohibited adding new jurisdictional bases for removal after 30 days, *O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1381 (9th Cir. 1988); *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1117 (9th Cir. 2000), the prior removal could not assert supplemental jurisdiction on appeal. But the second removal cured that pleading error, App. 36a, 40a-41a, so the district court plainly had jurisdiction over Count II:

> When the well-pleaded complaint contains at least one claim that satisfies the amount-in-controversy requirement, and there are no other relevant jurisdictional defects, the

> district court, beyond all question, has original jurisdiction over that claim.

Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 559 (2005), *abrogated in part on other grounds*, Class Action Fairness Act of 2005, PUB. L. NO. 109-2, § 4(a), 119 Stat. 4, 9. With that "hook" in place, the district court also had supplemental jurisdiction over Count I without the need to consider California's noncitizen status under § 1367.[7]

2. ***Removal procedure*** **is nonjurisdictional and thus waived.**

Because the district court had subject-matter jurisdiction (*i.e.*, ERC could have filed its complaint in federal court), *see* Section I.B.1, *supra*, Petitioners' error (if any) was an error of *removal procedure*—not one of *jurisdiction*—to the extent that 28 U.S.C. § 1441(a) requires that district courts have not merely subject-matter jurisdiction but *original* jurisdiction (*i.e.*, without resort to supplemental jurisdiction). If Petitioners erred in that manner, the error was one of removal procedure, not one of jurisdiction because the district court indeed had jurisdiction. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 572-74 (2004) (failure to comply with § 1441(a) is not jurisdictional). As a nonjurisdictional basis for remand, the failure (if any) to fall within the district court's *original* jurisdiction—as distinct from original-plus-supplemental

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[7] Where a State is an actual party—as opposed to an absent real party in interest, as the district court argued here, App. 11a—Petitioners' supplemental-jurisdiction argument would run up against Eleventh Amendment immunity from suit. *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533, 540-41 (2002). But that is not an issue here because California is not a party.

jurisdiction—had to have been raised within 30 days. *See* 28 U.S.C. § 1447(c)-(d). Neither ERC nor any of the lower courts ever cited § 1441(a) in this case, much less argued for remand on that basis within 30 days of removal. Accordingly, this nonjurisdictional issue is waived.

II. THE DISTRICT COURT'S AWARDING FEES WAS IMPROPER.

The district court made an attorney-fee award, and the court of appeals affirmed that award. Under 28 U.S.C. § 1447(c), fee awards are discretionary after a remand, no fee awards are unwarranted when removal is neither frivolous nor improper. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Under *Martin*, Petitioners argue not only that they correctly analyzed jurisdiction for removal but also that they had a good-faith basis for removal, even if this Court rejects their jurisdictional analysis.

As indicated in Section I, *supra*, the remand order was in error, so the fee award was also in error. But even if a court found that the removal was not jurisdictionally sound, that would not mean that the removal was unsound. To the contrary, a removal to federal court could succeed even if the federal court lacked statutory or Article III jurisdiction: "there is no unyielding jurisdictional hierarchy" that requires review of those jurisdictional issues before all other issues. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). Under *Ruhrgas*, federal courts could dismiss for lack of personal jurisdiction, without assessing Article III standing. Similarly, if a merits issue that goes to statutory standing—such as the 10-employee threshold for Proposition 65 to apply—and is "logically antecedent" to a jurisdictional issue, a

federal court also could dismiss on that basis. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999). In other words, even a federal court lacking subject-matter jurisdiction *could* dismiss on the other bases that Petitioners cited. The fact that the federal judge chose not to do so does not make Petitioners' efforts improper.

Again assuming *arguendo* that this Court rejects Petitioners' jurisdictional analysis, that analysis is nonetheless not *frivolous* as required for a court to order a fee award under *Martin*. Neither the courts below nor ERC has ever offered a reasoned dispute to the arguments that Petitioners raise. For its part, ERC has argued law of the case and a series of inapposite district court decisions on the Article III issue. The lower courts cite decisions on the lack of appealability *in general*, with no effort to address Petitioners' arguments that this case falls within the exceptions to those general rules. App. 5a ("§ 1447(d) *generally* bars review of a district court order remanding a case to state court") (emphasis added); *id.* 26a; *id.* 13a; *id.* 14a.

Moreover, the removal statute's wording differs significantly from other fee-shifting statutes that might authorize a court to award fees to *pro bono* or nonpaid counsel: "An order remanding the case may require payment of just costs and any *actual expenses*, including attorney fees, incurred as a result of the removal.." 28 U.S.C. § 1447(c) (emphasis added). ERC provided no evidence that ERC actually paid counsel anything, which Petitioners raised as a basis to deny fees in both district court and the Ninth Circuit. Declaration of Lawrence J. Joseph in Support of Defs.' Resp. to Pl.'s Evidence for Fees and Costs, at 7 (¶ 46)

(May 4, 2020) (quoted *supra*) (ECF #62-1); Appellants' Br. at 36 ("the claims by ERC and its counsel to have *incurred fees* – as opposed to having *invested time* for which they hoped later to recover under CAL. CODE OF CIV. PROC. § 1021.5 – are false") (emphasis in original, citing fee evidence in appellate appendix).

Finally, assessing fees would chill an important 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); Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. AT 1880 (quoted *supra*). Removal to a federal court is an aspect of the First Amendment, and this Court should not allow the lower courts to chill the right of petition.

III. THE APPEAL WAS PROPER OR—*AT LEAST*—NOT FRIVOLOUS.

As interpreted, § 1447(d) bars appeals only when the district court lacked subject-matter jurisdiction for the removed case. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) ("only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)") (interior quotations omitted); *compare* 28 U.S.C. § 1447(c) *with id.* § 1447(d) (only *jurisdictional* bases for remand continue after 30 days). As signaled above and explained in this section for each aspect of Petitioners' appeal, the appeal was proper and thus certainly nonfrivolous.

The requirement of frivolous conduct sets a high bar. "Whatever 'wholly insubstantial,' [and] 'obviously frivolous' … mean, at a minimum they cannot include a plea for relief based on a legal theory put forward by

a Justice of this Court and uncontradicted by the majority in any of our cases." *Shapiro v. McManus*, 577 U.S. 39, 46 (2015). A similar, trickle-down version of that definition should apply equally to the lower courts (*e.g.*, Ninth Circuit panels should not find their colleagues' arguments to be frivolous unless that court has rejected those arguments). The bottom line is that Petitioners cannot have acted frivolously if holdings by this Court and the Ninth Circuit support the action that Petitioners took.

A. The appeal of the related-case order was proper and not frivolous.

The Ninth Circuit found Petitioners' appeal of the district court's related-case order (App. 9a) under the district court's local rules to be frivolous. App. 3a-4a. Because earlier Ninth Circuit panels had reviewed orders under the very same local rule, the merits panel abused its discretion in denying review of this issue and *a fortiorari* in sanctioning Petitioners for seeking review that a prior Ninth Circuit panel had allowed.

By way of background, Petitioners filed an opposition to ERC's related-case designation, arguing that the filing was both substantively incorrect and untimely. *See* Defs.' Resp. to Pl.'s Admin. Mot. to Relate Case No. 4:20-Cv-00370-PJH to No. 3:18-Cv-5538-VC, at 1-5 (Feb. 18, 2020) (ECF #21-1) (notice of same filing in No. 3:18-cv-05538-VC as ECF #51). The district judge ignored these arguments and indeed appears to have ignored Petitioners' filing altogether: "The time for filing an opposition or statement of support has passed." App. 9a. In general, ignoring an argument—as the district judge did here—is an abuse of discretion. *See* note 8, *infra* (collecting cases). The

only question is whether that abuse of discretion was open to appellate review.

Appellate courts review case-management orders for abuse of discretion as part of the final judgment. *GCB Communs., Inc. v. U.S. S. Communs., Inc.*, 650 F.3d 1257, 1262 (9th Cir. 2011); *Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988). Related-case designations are simply one example of a reviewable case-management order. *See Kinney*, 709 F.App'x at 455 (reviewing related-case order under N.D. Cal. Civ. R. 3-12). While *Kinney* is certainly a non-precedential decision, the merits panel should not have held that Petitioners acted frivolously by seeking review of an issue that three judges of that court had reviewed.

The district court long ago remanded the case to state court, App. 7a, and the district court cannot amend whatever appellate sanction the Ninth Circuit might assess. While the related-case order appears to be moot because there is no district court case to which to remand this appeal, the assessment of an attorney-fee award for making the appeal is not moot.

B. Appeal of the remand was proper and not frivolous.

Under Ninth Circuit precedent, an issue on which a district judge has *discretion* is not jurisdictional (*i.e.*, if a court permissibly could rule one way or the other, then the *choice* between the two options cannot be jurisdictional). Accordingly, the Ninth Circuit reviews remands *de novo*: "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). Significantly, "if we concluded that the district court's order was the result of an exercise of discretion, we could review it." *Id.* at 1117. This Court

has not squarely resolved the issue, *see Kircher*, 547 U.S. at 641 n.9 (reserving the question); *Powerex*, 551 U.S. at 234 ("we need not pass on whether § 1447(d) permits appellate review of a district-court remand order that dresses in jurisdictional clothing a patently nonjurisdictional ground"). Instead, this Court held that § 1447(d) bars appeal of "a ground [for remand] that is *colorably* characterized as subject-matter jurisdiction." *Powerex Corp.*, 551 U.S. at 234 (emphasis added).

Unfortunately, courts often use the term "jurisdiction" more broadly than the meaning relevant here: "Jurisdiction … is a word of many, too many, meanings," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotations omitted). In § 1447(c), Congress clearly referred to "subject matter jurisdiction." 28 U.S.C. § 1447(c). As relevant here, that phrase refers to a court's power to hear a case, including supplemental jurisdiction but not including statutory conditions precedent to filing the case. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514-16 (2006). As signaled in *Powerex*, calling an issue jurisdictional does not make it jurisdictional. Both for Article III standing and statutory subject-matter jurisdiction, the remand order here fails that test. Moreover, even if this Court finds the remand to have been colorably jurisdictional—notwithstanding the statutory bases and precedents of this Court on which Petitioners rely—the appeal was not *frivolous*.

1. Remand was not colorably based on a lack of Article III jurisdiction.

With respect to standing, prudential standing—like ERC's indisputable third-party standing to press California's claims, *see* Section I.A.4, *supra*—is simply

not jurisdictional. *Mont. Envtl. Info. Ctr.*, 766 F.3d at 1188 n.3; *Susan B. Anthony List*, 573 U.S. at 167-68. ERC's failure to challenge this aspect of the removal within 30 days of removal waives the issue. 28 U.S.C. § 1447(c). As such, the issue of standing is not here an issue of "subject-matter jurisdiction," so § 1447(d) does not bar appellate review on that basis. The district judge's ignoring this issue does not make the issue any less appealable because § 1447(d) simply does not apply.

2. Remand was not colorably based on a lack of statutory subject-matter jurisdiction.

With statutory subject-matter jurisdiction, the district judge remanded the case based on the same rationale as the remand of the first removal, App. 7a, but that error abused his discretion because the first removal cited only diversity jurisdiction, while the second removal cited diversity jurisdiction for the non-Proposition 65 count (Count II) and supplemental jurisdiction for the Proposition 65 count (Count I). App. 36a, 40a-41a. A district court's decision not to apply supplemental jurisdiction is a discretionary act, which is reviewable notwithstanding § 1447(d). *Carlsbad*, 556 U.S. at 640 (supplemental jurisdiction is discretionary and appealable if denied). Again, the district judge's ignoring this issue does not make the issue any *less* appealable as an abuse of discretion.[8]

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[8] Ignoring an argument for federal jurisdiction qualifies as an abuse of discretion, which is not jurisdictional. *See*, *e.g.*, *U.S. v. Lynn*, 592 F.3d 572, 585 (4th Cir. 2010) ("court erred and so abused its discretion by ignoring [a party's] non-frivolous arguments"); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 612 (3d Cir. 1991); *Brookshire Bros. Holding v. Dayco*

3. Even if the district court's remand fails the *Powerex* "colorable" test, *BP* may make the remand appealable.

Under *BP*, § 1447(d) does not bar the appeal of an otherwise-unappealable remand order if that order is bound up with an appealable order. Under the *Martin* framework, fee orders are appealable. *BP*, 141 S.Ct. at 1541. Although BP arose in the context of appealable federal-officer removals, its application to fee awards under § 1447(c) is uncertain:

> While § 1447(d) generally precludes appellate review of remand orders, many lower courts have suggested that these § 1447(c) fee and cost awards are nonetheless reviewable on appeal. The City contends that our reading of § 1447(d) could put an end to all that. It could, the City reasons, because if an "order remanding a case" really means the whole order, then the statute may bar appellate review of fee and cost awards contained within those orders. That much, however, does not necessarily follow. Often enough fee and cost awards are treated as collateral to the merits and independently appealable. In any event, the question is not presented in this case and we do not purport to resolve it.

Prods., 554 F.3d 595, 598-99 (5th Cir. 2009) (exercise of discretion is not jurisdictional under § 1447(c)-(d) and reviewable on appeal); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223-24 (3d Cir. 1995) (collecting cases); *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); *Charles Schwab*, 300 F.3d at 1117 (discretion reviewable *de novo*).

BP, 141 S.Ct. at 1541-42 (citations omitted). One of four situations applies: (1) § 1447(d) bars appeals of fee orders under § 1447(c); (2) fee orders under § 1447(c) are appealable, but separately from or collateral to remand orders; or (3) fee orders under § 1447(c) are appealable and can be included in the same appeal as any otherwise-allowable appeal of a remand order; and (4) appealable orders, including fee orders under § 1447(c), allow appeal of the corresponding remand order.

The first and fourth options seem extreme, in opposite directions, Petitioners appeal would be warranted under either of the two middle options. Specifically, Petitioners claim a right to appeal on standing because of nonjurisdictional prudential standing, *see* Section III.B.1, *supra*, and on statutory subject-matter jurisdiction under *Carlsbad* because the district court abused its discretion in declining to consider supplemental jurisdiction. *See* Section III.B.2, *supra*. Having these clear nonjurisdictional anchors for appellate review, *BP* authorizes appellate review of the jurisdictional aspects of the case, as well.

This Court should resolve this important jurisdictional issue. An order that is obviously *ultra vires*—*e.g.*, because it exceeds "actual expenses" as here—would violate due process if not open to appellate review *somewhere*. Either appellate review lies for fee orders or the removing defendant can challenge those orders in a collateral collection proceeding. And if appellate review lies for fee orders, the Court should consider whether that appellate jurisdiction extends to remand orders.

IV. THE JURISDICTIONAL ISSUES ARE IMPORTANT AND RECURRING.

Article III jurisdiction for removability of these private-attorney-general actions is an important and growing issue. Petitioners respectfully submit that the push of other states to adopt private-enforcement regimes like Proposition 65 requires this Court's attention. Similarly, the appellate jurisdiction (or the lack thereof) under § 1447(d) is both recurring and important.

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 several state legislatures). Relatedly, Texas recently enacted a statute that puts enforcement in private hands, which this Court has acknowledged to "present[] complex and novel antecedent procedural questions." *Whole Woman's Health v. Jackson*, 141 S.Ct. 2494, 2495 (2021). These questions have persisted under Proposition 65, but with States acting on the private-enforcement front, these issues are important for this Court to address.

Alternatively, this Court could grant review even if the denial of appellate review were appropriate: "[t]he Court today holds that Congress did not mean what it so plainly said" in § 1447(d). *Kakarala v. Wells Fargo Bank, N.A.*, 136 S.Ct. 1153, 1153-54 (2016) (Thomas, J., dissenting from the denial of *certiorari*) (interior quotations omitted) (collecting statements by then-Justice Rehnquist and Justices Scalia and Breyer). Even a clear rule *against* appellate review for

remand orders would benefit parties like Petitioners if it removed the ambiguity left by *Powerex*.

In addition to the economic and jurisprudential importance, 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.*, 326 U.S. at 111; THE FEDERALIST NO. 80, at 477 (A. Hamilton); Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. AT 1880 (citing "the danger of state bias against out-of-state interests" as "the precise reason why federal courts exist"). All of these reasons should compel the Court to review—or to direct the Ninth Circuit to review—the removability of these types of private actions.

V. THIS PETITION IS AN IDEAL VEHICLE TO ADDRESS THE ISSUES PRESENTED.

This petition presents an ideal vehicle for this Court to resolve the purely legal issues presented here. There are no fact-bound issues relevant to the petition.[9] For that reason, this case presents an ideal vehicle to resolve the important removal-jurisdiction issues implicit in the questions presented.

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[9] It is a matter of record that ERC never claimed to have actually paid its counsel to litigate this matter—and in any event did not pay its counsel the amounts they claim under the lodestar method—so that there is no evidence of "actual expenses" within the meaning of 28 U.S.C. § 1447(c).

VI. ALTERNATIVELY, THIS COURT COULD GVR THE CASE FOR THE NINTH CIRCUIT TO RESOLVE ISSUES NOT ADDRESSED IN ITS SUMMARY DISPOSITION.

In lieu of deciding this case on the record that now exists, this Court could grant the petition, vacate the Ninth Circuit's decision and remand ("GVR") for the lower court to reconsider in light of *BP* and *Magadia*:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence v. Chater, 516 U.S. 163, 167 (1996). A GVR would be appropriate because it need not affect the state-court litigation if confined to the issue of whether Petitioners' actions had merit or, instead, were frivolous and to the issue of whether appellate jurisdiction exists. Even if PPILP prevails in obtaining the dismissal of the state-court action, the issue of fees would remain an Article III case or controversy. A GVR would also benefit this Court by providing the Ninth Circuit's views on the emerging post-*BP* issue of whether appellate review of remand orders is available when removing defendants have another appeal in which the remand order joins: "This Court … is one of review, not of first view." *Hernandez v. Mesa*, 137 S.Ct. 2003, 2007 (2017) (internal quotations omitted). It may aid this Court to have the

courts of appeals address the issue before this Court decides it.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

November 15, 2021

Respectfully submitted,

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