No. 21-738

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.

RESPONDENT'S CORRECTED BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT ENVIRONMENTAL RESEARCH CENTER'S CORRECTED BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Procedural History

In the underlying California state court action giving rise to this appeal, Respondent Environmental Research Center alleges that Petitioners Hotze Health and Wellness et al. violated California Health and Safety Code section 25249.5 *et seq*, also known as "Proposition 65." Respondent initiated the state court action purely in the public interest, as authorized by state statute, without alleging any injury to itself and without having suffered any injury-in-fact. *See* Cal. H&S Code § 25249.7(d).

Petitioners removed the case to the United States District Court for the Northern District of California in 2018. The District Court remanded, finding that Respondent lacked Article III standing: "[t]he…motion to remand the case…is granted. The Defendants have not shown that Environmental Research Center would have Article III standing to pursue their Proposition 65 action in federal court." *Envtl. Research Ctr., Inc. v. Hotze Health Wellness Ctr. Int'l One, L.L.C.,* No. 18-cv-05538-VC, 2018 U.S. Dist. LEXIS 221676 at *1 (N.D. Cal. Dec. 21, 2018) (modifications added) (hereafter "*ERC I*"). An order

remanding for lack of federal jurisdiction is not appealable, yet the District Court's remand nonetheless precipitated a series of frivolous appeals by Petitioners.

Petitioners first appealed to the Ninth Circuit Court of Appeals from the District Court's decision to remand. Petitioners' appeal was denied. *Envtl. Research Ctr., Inc. v. Hotze Health Wellness Ctr. Int'l One, LLC*, No. 18-17463, 2019 U.S. App. LEXIS 8591, at *1 (9th Cir. Mar. 21, 2019). Petitioners then sought rehearing *en banc*, which was denied (*Envtl. Research Ctr., Inc. v. Hotze Health Wellness Ctr. Int'l One, LLC*, No. 18-17463, 2019 U.S. App. LEXIS 27287, at *1 (9th Cir. Sep. 10, 2019)); filed a Petition for Writ of Mandamus to the U.S. Supreme Court, which was denied (*In re Hotze Health Wellness Ctr. Int'l One, LLC*, 140 S. Ct. 466 (2019)); filed a Petition for Certiorari to the U.S. Supreme Court, which was denied (*Hotze Health Wellness Ctr. Int'l One, LLC v. Envtl. Research Ctr., Inc.*, 140 S. Ct. 2514 (2020)); and filed a Petition for Reconsideration of the Court's cert petition denial, which was denied. *Hotze Health Wellness Ctr. Int'l One, LLC v. Envtl. Research Ctr., Inc.*, 140 S. Ct. 2797 (2020).

Following the first remand order, Respondent amended its Complaint to add two previously dismissed parties back to the case as defendants and to add two new, but related, parties as additional

defendants, asserting claims for single enterprise and alter ego liability against all defendants. *Envtl. Research Ctr., Inc. v. Hotze Health Wellness Ctr. Int'l One, LLC*, *infra,* No. 20-15457, Dkt. 24-1, ER:10-27. The Amended Complaint was consistent with the original Complaint in all other respects, including the exact same Proposition 65 violations, and nothing more, in the public interest. *Id.* Petitioners once more removed the action to the District Court for the Northern District of California.

On May 20, 2020, the District Court again remanded this case to California Superior Court, finding no Article III standing. *Envtl. Research Ctr. v. Hotze Health Wellness Ctr. Int'l One, L.L.C.*, No. 20-cv-00370-VC, 2020 U.S. Dist. LEXIS 88768 at *1-2 (N.D. Cal. May 20, 2020) (hereafter "*ERC II*") ("This case is remanded…for the reasons stated at the hearing and in the first remand order"). The second remand order also awarded plaintiff reasonable attorneys' fees and costs for the second District Court proceeding stating that "[t]he second removal was without objective basis, particularly in light of the fact that it was based almost entirely on the same grounds as were rejected the first time around." *Id.* at *2.

Undeterred, Petitioners appealed the second remand order in *ERC II* and the resulting fee award. *Envtl. Research Ctr., Inc. v. Hotze Health Wellness*

Ctr. Int'l One, LLC, No. 20-15457, 2020 U.S. App. LEXIS 23844, at *1-2 (9th Cir. July 28, 2020). Respondent subsequently filed a motion to dismiss the appeal, which was granted with regard to Petitioners' "challenge to the merits of the district court's remand order or the preceding related case order" due to a lack of appellate jurisdiction. *Id.* The Ninth Circuit denied Respondent's motion to dismiss Petitioners' appeal from the District Court's fee award (*id*), but ultimately upheld the award. *Envtl. Research Ctr., Inc. v. Hotze Health Wellness Ctr. Int'l One, LLC*, 850 F. App'x 572, 573 (9th Cir. 2021).

The Ninth Circuit also granted Respondent's motion for damages: "ERC's renewed motion for damages is granted in part...Hotze's challenge of the district court's second remand order and the preceding related case order was frivolous. Neither of these orders were appealable, yet Hotze continuously argued to the contrary, and, each time, we rejected its arguments as meritless." *Id.* at 573.

Petitioners continue their pattern of frivolous litigation tactics by filing the present Petition with the Court.

II. Certiorari is not Warranted

Petitioners argue in part that certiorari is warranted because the framework established by this Court's decision in *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224 (2007) is too vague and

does not clearly decide whether the basis for the District Court's remand below was based on a lack of subject-matter jurisdiction and, therefore, shielded from appellate review. Pet. for Cert. at 11, 28-29.

Regardless of whether the *Powerex* decision is too vague in some marginal cases, the present action is clearly controlled by the decision. The district court, in both *ERC I* and *ERC II*, expressly remanded the action based on a lack of subject-matter jurisdiction due Respondent's lack of Article III standing. *ERC I, supra,* No. 18-cv-05538-VC, 2018 U.S. Dist. LEXIS 221676 at *1; *ERC II, supra, L.L.C.*, No. 20-cv-00370-VC, 2020 U.S. Dist. LEXIS 88768 at *1-2. The District Court's remand, therefore, clearly satisfies the framework set forth in *Powerex* which holds that remand orders based on a lack of "subject-matter jurisdiction…[are] shielded from review by § 1447(d)…." *Powerex, supra,* 551 U.S. at 234. The Ninth Circuit similarly found that the District Court remanded the action because Petitioner "failed to show that the district court had subject matter jurisdiction." *Envtl. Research Ctr., Inc., supra, LLC*, 850 F. App'x at 572-73 (9th Cir. 2021). There is no legitimate basis for Supreme Court review on these facts.

Alternatively, Petitioners argue that intervening decisions by the Court *BP P.L.C. v. Mayor of Baltimore,* 141 S. Ct. 1532 (2021) and the

Ninth Circuit in *Magadia v. Wal-Mart Assocs.*, 999 F.3d 668 (9th Cir. 2021) require that the Court grant the Petition, or alternatively to grant the "grant the petition, vacate the Ninth Circuit's decision and remand ("GVR") for the lower court to reconsider in light of *BP* and *Magadia*." Pet. for Cert. at 11-12, 35. Neither *BP* nor *Magadia* alter the legal landscape of this case.

Petitioners mistakenly argue that under *BP, supra,* 141 S.Ct. 1532, appellate review is available for the District Court's jurisdictional bases for remand (*e.g.* lack of Article III standing) because the District Court also declined to exercise prudential standing over the action and otherwise abused its discretion in declining to consider supplemental jurisdiction. Pet. for Cert. at 32. According to Petitioners, "these clear non jurisdictional anchors for appellate review" authorize appellate review of the jurisdictional aspects of the remand order. *Id.*[1]

Without wading into the merits of Petitioners' prudential standing and supplemental jurisdiction

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[1] Petitioners also raise phantom due process concerns arising from the District Court's fee award: "An order that is Obviously *ultra vires*…would violate due process if not open to appellate review *somewhere*." Pet. for Cert. at 32 (emphasis in original). The Ninth Circuit, however, *did* provide appellate review of the District Court's fee award, and ultimately upheld it. *Envtl. Research Ctr., supra*, 2020 U.S. App. LEXIS 23844, at *1-2; *Envtl. Research Ctr., supra*, 850 F. App'x 572-573.

arguments, Petitioners ignore that the holding in *BP* was premised on express statutory language in 28 U.S.C. § 1447(d) providing that "an order remanding a case to the State court from which it was removed pursuant to…[28 USCS § 1442 or 1443] shall be reviewable by appeal or otherwise." *BP*, 141 S.Ct. at 1536-37 (quoting 28 U.S.C. § 1447(d)). Under *BP,* the term "order" authorizes appellate review of all bases for removal decided by a remand order as long as the action was removed, at least in part, pursuant to §§ 1442-43. *Id.* at 1537-38. Petitioners here did not remove the action pursuant to 28 USCS § 1442 or § 1443, and there is otherwise no comparable statutory authorization permitting review of the remand order in *ERC II*, which was based expressly on a lack of subject matter jurisdiction and is otherwise shielded from appellate review. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976); *accord. Powerex, supra,* 551 U.S. at 230.

The Ninth Circuit's decision in *Magadia, supra*, 999 F.3d 668, moreover, simply restates and applies existing Ninth Circuit and Supreme Court precedent regarding assignment and informational theories of standing. 673-680. Each of these theories of standing were fully briefed by Petitioners first in *ERC I* and again in *ERC II* and were rejected both times at by the District Court and Ninth Circuit. Petitioners seek to use this Petition as a means to

again relitigate the merits of those issues. Neither *Magadia* or *BP* constitute "intervening developments" that would otherwise alter the decision of the Ninth Circuit; nor do they alter or run counter to existing Court precedent, which clearly controls in the present action.

Petitioners use the remainder of the Petition as a vehicle to argue simply that the Ninth Circuit wrongly decided the issues presented on appeal. Without wading into the thicket of Petitioners' myriad and often convoluted arguments, Rule 10 of the Rules of the Supreme Court clarifies that these considerations rarely warrant granting a petition for certiorari: "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Petitioners have provided no compelling argument for deviating from this general principle.

III. Conclusion

The pending Petition for Certiorari continues Petitioners' multi-year pattern of frivolous pleadings in federal court where no federal jurisdiction lies. For each of the foregoing reasons, Respondent respectfully asks that the Court deny the present Petition for Certiorari.

Date: December 16, 2021

Respectfully Submitted,

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