Case No. 20-16955

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TULE LAKE COMMITTEE,

Plaintiff-Appellant,

vs.

FEDERAL AVIATION ADMINISTRATION, et al.,

Defendants-Appellees.

PLAINTIFF-APPELLANT'S REPLY BRIEF

On Appeal from the United States District Court
Eastern District of California, Case No. 2:20-cv-00688-WBS-DMC
The Honorable William B. Shubb

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The "Appellee's [sic] Joint Answering Brief" filed October 24, 2022, Docket Entry 39 ("Ans.Br."), argues five miscellaneous issues on behalf of the Modoc Nation ("Tribe"), the City of Tulelake ("City"), and the other defendants-appellees. Defendants briefed none of those issues to the district court.

Defendants' answering brief (Docket Entry 39) ("Ans.Br.") cites plaintiff's opening brief (Docket Entry 10) ("Open.Br.") for a number of propositions that the opening brief did **not** argue. The opening brief's argument on pages 12–19 covers issues of 28 U.S.C. § 1331 federal question jurisdiction identified in *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); its argument on pages 20-21 covers 28 U.S.C. § 1367 supplemental jurisdiction. Contrary to defendants' readings, the opening brief does **not** argue separate questions such as standing or the existence of private rights of action. Plaintiff argues defense-posed questions in this reply brief.

I. QUESTIONS PRESENTED

Defendants' list of issues (Ans.Br. 13–15) differs in substance and order from the arguments in the body of their brief (*id.* at 25–53). Plaintiff here states the issues in the order in which defendants argued them.

1. In an argued alternative ground for affirmance, does plaintiff have standing under U.S. Const. Art. III to seek declaratory relief against the sale of the airport property to the Tribe?
2. Can federal question jurisdiction of an action praying for declaratory relief be tested under *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005)?
3. Can federal question jurisdiction arise under Section 2(a)(7) of the Federal Airport Act of 1946 in the context of a federal land patent issued under that Act?
4. Can plaintiff have a right of action based on the California public policy that wrongs should be actionable, the federal land patent read in light of the Federal Airport Act of 1946, and the landownership claimant's non-waiver of its claim of tribal sovereign immunity?
5. Should state-law claims' dismissal premised on lack of federal question jurisdiction be vacated?

Plaintiff next addresses defendants' issues seriatim.

II. THE TULE LAKE COMMITTEE HAS STANDING UNDER U.S. CONST. ART. III.

Defendants' first argument (Ans.Br. 25-32) asserts lack of Art. III standing. The issue was not presented to the district court, as defendants could

have done to make it ripe for appeal. Plaintiff rebuts the argument here.

Defendants argue a lack of "concrete and particularized injury." Ans.Br. 26. Specifically, defendants argue that the harm must affect the party "in a personal and individual way" (citation), *id.,* and that the injury must be "unique to the plaintiff and distinct from injuries others have suffered." (Citation) *Id.* But these quotations aptly describe the injuries being suffered by plaintiff through its members, the Tule Lake concentration camp's survivors and descendants.[1]

As the complaint alleges, of all the WRA concentration camps, "Tule Lake is unique as the site where 12,000 American citizens were imprisoned for their American act of dissenting from governmental injustice." Compl. ¶ 14, ER-69. Survivors and descendants, in regular pilgrimages to Tule Lake, seek "healing, human connection, and connection to the history." Compl.

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[1] Plaintiff has its members' standing as well as its own as advocate. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Here, plaintiff shows its members' individual standing; their interests are germane to plaintiff's associational purpose; and the members' expected participation here is as witnesses, *cf. Friends of the Earth,* 528 U.S. at 181–84, not as parties.

¶ 26, ER-72.[2] The airport property includes "two-thirds of the barracks area where people were forced to live." Compl. ¶ 19, ER-71. Thus, visits to the airport property would potentially let a large proportion of survivors and descendants walk where their imprisoned families were forced to live.

Such visits "are important in maintaining the continuing cultural identity of the community." Compl. ¶ 31, ER-73. As an organization, plaintiff "advocates protecting the site from incompatible activities that threaten to destroy the site's historic fabric." Compl. ¶ 32, ER-74.

The Tribe, by contrast, pictures its ownership as a way of bringing "aviation-supportive businesses" to the property. Compl. ¶ 68, ER-75. But as plaintiff alleges, adding businesses to the property "could damage the historic resources." Compl. ¶ 69, ER-75.

Contrary to defendants' arguments, these allegations **do** make out "actual, direct, personal, particularized, or concrete imminent or future harm arising from the City's sale of the Airport to the Modoc Nation." *Cf.* Ans.Br. 28. Given these allegations, it is incorrect that "the simple transfer of ownership of the Airport property" could not "possibly cause the Committee,

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[2] Defendants repeatedly misrepresent the record by saying that this appeal is "the first time" plaintiff has asserted harm to its members' ability to do these things. Ans.Br. 29 & 29-30. The Complaint, which predates this appeal, contradicts those misrepresentations as the above citations show.

or its individual members, any harm" (Ans.Br. 28).

The transfer of ownership was neither harmless nor "simple." The new owner, unlike the old, claims sovereign immunity from regulation including suit against itself and its codefendants. SER-41, lines 23–27 (reciting that the Tribe sought dismissal of itself because of tribal sovereign immunity, and sought dismissal of codefendants for inability to join an indispensable party, the Tribe).[3]

Plaintiff's members suffer harm on the ground, for "public visitation in the barracks area where incarcerated Japanese Americans lived and died is restricted because of the area's use by an airfield servicing a crop-dusting business. Efforts to agree on dual use of the airfield have not succeeded." Open.Br. 7.

Nonetheless, defendants deny the existence of "real injury" and accuse plaintiff of "bias against the Modoc Nation" for the technical reason that in a California Environmental Quality Act action, "the governmental agency that approves a project is the respondent or defendant, not the project proponent." Ans.Br. 30. That asserted distinction between respondent and proponent does not prevent the Tribe as landowner from inserting itself into a (CEQA) action

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[3] Defendants' SER-41 summary was accurate, as can be seen by comparing SER-41 with district court ECF No. 12 (defense motion points and authorities) at 11–14 and 17–23; and ECF No. 18 (defense reply) at 6–23.

and seeking dismissal of itself for tribal sovereign immunity and dismissal of the action for failure to join an indispensable party.[4] *Cf.* SER-41, lines 23–27.

Next, defendants argue that plaintiff's injuries are "post factum" in "seeking to void actions that have already occurred" and seeking to void "a past violation of law," and therefore are "insufficient" for standing. Ans.Br. 28 & 32 (citing *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974)). But defendants ground their position upon a misleading truncation of the cited sentence in *O'Shea*.

Contrary to defendants' argument, the cited *O'Shea* sentence does not go so far as to disallow standing merely because the party claims a "past violation of law." Instead, it says, "Past exposure to illegal conduct does not *in itself* show a present case or controversy regarding injunctive relief, however, *if unaccompanied by any continuing, present adverse effects.*" *O'Shea*, 414 U.S. at 495–96 (emphasis added).[5] Because this action alleges continuing, present adverse effects, it does **not** fall within the *O'Shea*

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[4] That was this Tribe's apparent strategy in two previous CEQA actions that ended in January 2019: CU 14-104 and CU 17-079 (Superior Court, County of Modoc).

[5] It is immaterial here that *O'Shea* evaluated standing for injunctive, not declaratory relief, for "the Supreme Court seems to employ the same threshold test of likelihood of recurring injury when evaluating claims for declaratory relief as it does when evaluating claims for injunctive relief." *Smith v. City of Fontana*, 818 F.2d 1411, 1421 n.17 (9th Cir. 1987).

sentence's no-standing category of past illegal conduct "unaccompanied by any continuing, present adverse effects."

III. FEDERAL QUESTION JURISDICTION CAN COEXIST WITH DECLARATORY RELIEF.

Defendants' second argument (Ans.Br. 33-45) says that the federal question jurisdiction analysis in *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), does not apply where the party seeks declaratory relief under the federal or the state Declaratory Judgment Act. Defendants did not raise this argument to the district court, since they never briefed any Section 1331 issue there.

The reason for defendants' second argument is not immediately clear. Their heading II, in its entirety, is, "There is no federal question jurisdiction over the Committee's declaratory relief claims under either federal or California law." Subheading A is, "The *Grable* test for determining whether there is federal jurisdiction over state law claims with embedded issues of federal law does not apply to claims brought under the Declaratory Judgment Act."[6] The gist appears to be that the *Grable* analysis cannot coexist with a

[6] At the outset, defendants seem confused how to characterize claims, such as plaintiff's, that include a prayer for declaratory relief. Perhaps we contributed to that confusion by referring to a "claim pled below, for declaratory relief." Open.Br. 13. To avoid further confusing use of the word "claim," we are

declaratory relief prayer.

It is a truism that the Declaratory Judgment Act "does not itself confer federal subject matter jurisdiction," Ans.Br. 33, but "merely provides an additional remedy in cases where jurisdiction is otherwise established," *id.* These statements follow from the Act's language: "In a case of actual controversy within its jurisdiction, … any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201.

Given the existence of a declaratory relief prayer, defendants' heading II.A says that the *Grable* test "does not apply to claims brought under the Declaratory Judgment Act." That statement, at least, has apparent meaning and can be tested against case law.

Case law contradicts the statement. *Hollyvale Rental Holdings, LLC v. Baum*, No. 2:16-cv-02888-RFB-PAL, 2018 U.S. Dist. LEXIS 56435 (D. Nev. Mar. 31, 2018), was a state-court quiet title action in which plaintiff-counter-defendant Hollyvale sought declaratory relief *inter alia.* Fannie Mae, a defendant, also sought declaratory relief, and removed the case to U.S.

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attempting to use the words "prayer" or "remedy" when referring to declaratory relief.

District Court. Hollyvale filed a motion to remand, leading to the cited decision. The court found that federal question jurisdiction existed, and denied the remand motion, upon applying the *Grable* test.

IV. THERE IS FEDERAL QUESTION JURISDICTION BASED ON THE LAND PATENT *INTER ALIA.*

Defendants' third argument (Ans.Br. 46-48) is that the 1951 Land Patent does not provide a basis for federal question jurisdiction. Defendants mischaracterize the Land Patent as the complaint's sole basis, and go so far as to say it is "undisputable" that the 1946 Airport Act as a basis for the complaint "is a theory the Committee advanced for the first time during this Appeal."[7] Defendants did not raise this point to the district court; instead, the district court raised federal question jurisdiction *sua sponte*, as it was entitled to do.

This first mention of federal question jurisdiction after the Complaint

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[7] On the contrary, the Airport Act is necessary to the theory of the case as stated in the complaint. The complaint alleges that "the airports to be assisted under *Section 16* were limited to those controlled by a public agency…." Compl. ¶ 96, ER-77 (emphasis added). "United States property could then be conveyed, but *only 'to the public agency* …'" Compl. ¶ 97, ER-77. "Act Section 2(a)(7) defined 'public agency' as [list]…. *An Indian tribe is none of these*…." Compl. ¶ 98, ER-77. Defendants try to minimize these statutory citations damaging to its ownership claim as mere "references to the Airport Act's definitional provisions." Ans.Br. 44. That the Airport Act is "silent as to all the matters that make up the Committee's alleged violations" misrepresents the Act (Open.Br. Addendum) and ignores the Complaint's above-cited allegations.

occurred when District Judge Shubb raised the subject in the hearing on defendants' motions to dismiss. Defendants' Answering Brief indulges in lengthy analysis of an exchange in that hearing, as if the exchange had been supported by written briefing on 28 U.S.C. § 1331. Ans.Br. 46–47. They fail to mention that no briefing of federal question jurisdiction served to prepare either counsel for that exchange.

Plaintiff did not orally waive the 1946 Act as a basis for federal question jurisdiction. Instead, in the hearing, plaintiff's counsel referred to "1946 Act claims against the non-FAA parties." Transcript, ER-50, line 14.

Next, misquoting this Court and quoting it out of context, defendants rely on a purported quotation that "[f]ederal land patents … do not provide a basis for federal question jurisdiction." Ans.Br. 48 (citing *Virgin v. County of San Luis Obispo*, 201 F.3d 1141, 1143 (9th Cir. 2000)). But this Court's actual words in *Virgin* are, "Federal land patents *and acts of Congress* do not provide *bases* for federal question jurisdiction." (Emphasis added.) By dropping "and acts of Congress," defendants manage to omit statutes, a frequent source of federal questions and—had they left it in—a tipoff to the reader that something is awry in defendants' statement. By misquoting the plural "bases" as the singular "a basis," defendants hide from the reader the fact that their purported quotation omits an entire category of bases.

Defendants go so far as to call the purported quotation from *Virgin* "unequivocal." The actual rule is not nearly that definite, for *Virgin* itself reflects that the rule has exceptions. For all these reasons, the purported rule that "[f]ederal land patents … do not provide a basis for federal question jurisdiction" is not worthy of reliance.

V. PLAINTIFF HAS A PRIVATE RIGHT OF ACTION INVOLVING CALIFORNIA LAW.

Defendants' fourth argument (Ans.Br. 49-53) is that under *Raypath, Inc. v. City of Anchorage*, 544 F.2d 1019 (9th Cir. 1976), plaintiff, as a "stranger" to the 1951 Land Patent, lacks a private right of action concerning that Patent—or concerning another authority that defendants seek to ignore: the Federal Airport Act of 1946. Defendants raised neither version of that argument to the district court.

A. The 1946 Act and the Land Patent Must Be Read Together.

Two authorities in this action—the Federal Airport Act of 1946[8] and its implementing Federal Land Patent of 1951—are inextricably intertwined. Defendants' argument against implying a right of action for plaintiff—a right, defendants say, stemming from the Patent not the Act—improperly separates the Act from the Land Patent.

[8] Pub. L. No. 377, enacted May 13, 1946, repealed by Pub. L. 91-358, May 21, 1970. The Act thus was in effect at the making of the 1951 Land Patent.

The Act allowed federal property to be conveyed, but only to a "public agency." Compl. ¶ 97, ER-77. The Patent implementing the Act, moreover, made its grant to the City "and to *its successors in function forever*." Compl. ¶ 100, ER-77 (quoting Patent at 4) (emphasis added). "4. Any *subsequent transfer* of the property interest conveyed hereby will be made subject to *all* the covenants, conditions, and *limitations contained in this instrument*." Compl. ¶ 102, ER-77 (quoting Patent ¶ 4) (emphasis added).

Defendants' contrivance of separating two inextricably intertwined authorities—the Act, and the Land Patent implementing the Act—clashes with the principle that the meaning of laws is derived by reading them in context. Standards "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946).

"[W]hile legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context." *Bostock v. Clayton County,* 140 S. Ct. 1731, 1750 (2020).

"Statutory language must be read in context [since] a phrase 'gathers meaning from the words around it.'" *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (quoting *Jones v. United States*, 527 U.S. 373, 389 (1999)). A word used in a statute will have "a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972).

This need for context and setting also inheres in the *in pari materia* canon of statutory construction, which informs us that laws "[o]f the same matter" or "on the same subject" (Black's Law Dict. (5th ed. 1981) p. 1004) should be construed together so that all parts of the governing scheme are given effect. "Statutory provisions *in pari materia* normally are construed together to discern their meaning." *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 801–02 (D.C. Cir. 2002) (citations omitted).

The Federal Airport Act of 1946 aimed to establish a federal program for the development of civil aviation airports within the United States. E.g., Act § 3, Act § 4 (Addendum to Open.Br.) Toward that end, the Act mandated a national airport plan encompassing airport classifications as defined by the Civil Aeronautics Administration (now the Federal Aviation Administration).

As pointed out above, the Patent implementing the Act granted the airport land to the City "and to *its successors in function forever*." And, "4. Any *subsequent transfer* of the property interest conveyed hereby will be

made subject to *all* the covenants, conditions, and *limitations contained in this instrument*." Thus, the "successors in function forever" limitation binds the City in its attempted transfer to the Tribe. "Successor in function" means more than a mere "successor in interest"; at minimum, it binds the landowners to the "public agency" limitation of the Act and the Patent when making a transfer.

The 1946 Act defined "public agency" as "the United States Government or an agency thereof; a State, the Territory of Alaska, the Territory of Hawaii, or Puerto Rico, or an agency of any of them; a municipality or other political subdivision; or a tax-supported organization." Act § 2(a)(7), Addendum to Open.Br.

B. California Law Seeks Remedies for All Wrongs.

Cal. Civ. Code § 3523, enacted in 1872, provides: "For every wrong there is a remedy." This principle has guided the California courts in dealing with denials of remedies, including denials based on sovereign immunity.

In *Faria v. San Jacinto Unified Sch. Dist.*, 50 Cal. App. 4th 1939 (1996), the school district demoted an assistant principal because of an arrest for an alcohol-related misdemeanor offense for which he was never convicted, in violation of Education Code § 432.7(a). Although the statute allowed damages to applicants, not employees, the court reasoned that the "general

rule is that '[f]or every wrong there is a remedy'" 50 Cal. App. 4th at 1947 (quoting Civ. Code § 3523). "In accordance with that principle, '[t]he violation of a statute gives to any person within the statute's protection a right of action to recover damages caused by its violation.'" [Citation.] *Id*. The court then held that to enforce the statute's proscription, "a private cause of action is needed," *id*. at 1948, and awarded the plaintiff his actual damages.

Sovereign immunity is a context where the "for every wrong there is a remedy" principle shapes California law. California's highest court took a significant step toward abrogating state sovereign immunity in *People v. Superior Court of San Francisco*, 29 Cal. 2d 754 (Cal. 1947). The State operated the State Belt Railroad, a public carrier for hire running along the San Francisco waterfront. An employee was injured while working on a railroad's car, and sued the railroad. The California Supreme Court held that sovereign immunity did not protect from liability for belt railroad torts.

The California Supreme Court in *People v. Superior Court* also noted that Congress had enacted the Federal Tort Claims Act in 1946. 29 Cal. 2d at 761. The FTCA was effective retroactive to January 1, 1945. The FTCA waives the United States' sovereign immunity for torts, allowing the United States to be liable for its employees' errors and omissions as a private person would be under local law, subject to exceptions and administrative claim

procedures. See 28 U.S.C. §§ 1346(b), 2671–78, 2680. The FTCA was a broad and consequential step by the federal government away from what the California Supreme Court later called "a rule that the federal and state governments did not have to answer for their torts." *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 215 (Cal. 1961).

In abrogating the State's sovereign immunity for liability of the belt railroad, the court in *People v. Superior Court* extended its reasoning to "industrial and commercial" state enterprises. 29 Cal. 2d at 763. Significantly, it took this abrogation step in (like this case) a transportation case.

The 1946 Act was contemporaneous with these events including the FTCA and *People v. Superior Court*. The implementing Land Patent followed them, and its drafters worked with knowledge of them.

California's process of judicially abrogating its sovereign immunity culminated in *Muskopf,* 55 Cal. 2d 211. There, a paying patient alleged that negligence by the hospital staff caused her to fall and further injure the broken hip for which she was being treated.

California's highest court concluded that the State's "rule of governmental immunity from tort liability … must be discarded as mistaken and unjust." *Id.* at 213. "The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of

inertia." *Id.* at 216. That rule "has become riddled with exceptions, both legislative [citations omitted] and judicial [citing, inter alia, *People v. Superior Court*, 29 Cal. 2d 754]. *Id. Muskopf* was "the final step that carries to its conclusion an established legislative and judicial trend." *Id*. at 221.

In 1963, the State enacted a statutory scheme parallel to the Federal Tort Claims Act: the California Tort Claims Act, Cal. Govt. Code § 810 *et seq.* (now, Government Claims Act[9]). The California Act mitigated what remained of the State's sovereign immunity and governed the filing of claims against California governmental entities.

From the enactment of the Federal Airport Act of 1946 until its 1970 repeal, the list of "public agencies" in the 1946 Act included the agencies of the federal government, the Territories, the States, and subdivisions. 60 Stat. 170, § 2(a)(7). All of the "public agencies" in the 1946 Act have had their sovereign immunity abrogated or mitigated. Unlike these "public agencies," the statutory addition of Indian Tribes and pueblos in 1970 created them as a lone immune category of "public agency." The fit with the other—bona fide—"public agencies" is a poor one.

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[9] "Henceforth, we will refer to title 1, division 3.6, parts 1 through 7 of the Government Code (§ 810 et seq.) as the Government Claims Act." *City of Stockton v. Superior Court*, 42 Cal. 4th 730, 742 (Cal. 2007).

In 1951 the United States, under authority of the 1946 Act and in disregard of the concentration camp's historical significance, conveyed 359 acres of the historic Tule Lake concentration camp land to the City of Tulelake, via the Land Patent, to use exclusively as an airport. Compl. ¶ 19, ER-70. In 1974, the City leased the airport property to Modoc County, another public agency.

But in 2018, instead of selling and conveying the airport land to a bona fide "public agency" as the 1946 Act and the Land Patent jointly contemplated, the City transferred the land to the then Modoc Tribe of Oklahoma. Compl. ¶ 43. The Tribe is not the same kind of "public agency" described in the 1946 Act or the Land Patent because the Tribe, unlike the City, the State, or the United States, insists on a sovereign-immunity right not to compensate those who are injured from its conduct or omissions.

C. California Law Voids Contracts Against Public Policy.

According to *Petermann v. Int'l Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 186 (1959), "public policy" means "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."

Statutes and opinions addressing contracts void them if they are "unlawful" or conflict with the state's "public policy." Cal. Civ. Code § 1667,

for instance, defines "not lawful" as "contrary to an express provision of law;" "contrary to the policy of express law, though not expressly prohibited;" or, "otherwise contrary to good morals."

Consonant with Civ. Code § 1667, numerous California decisions have voided contracts that are illegal or contrary to "public policy." In *Altshul v. Sayble*, 83 Cal. App. 3d 153 (Cal. Ct. App. 1978), the court found that a fee-splitting agreement between attorneys representing a common client violated the state's rules of professional responsibility and was, therefore, void and unenforceable. Similarly, *Russell v. Soldinger*, 59 Cal. App. 3d 633 (Cal. Ct. App. 1976) found that an intent to restrict the process between two competing bidders in order to obtain an economic advantage at the expense of an estate sale, rendered the contract of sale "void as against public policy." *Id*. at 645. Further, such an "illegal contract cannot be ratified and generally speaking no person is estopped to assert the illegality." *Id*. at 646.

In *Bovard v. Am. Horse Enters.*, 201 Cal. App. 3d 832 (Cal. Ct. App. 1988), the plaintiff sued on a contract for sale of a corporation whose major business was the manufacture of drug paraphernalia. The court found the contract void as against public policy and unenforceable. In doing so it relied upon § 1667 and the related provision of Civ. Code § 1608, which provides that "if any part of a single consideration for one or more objects, or of several

considerations for a single object, is unlawful, the entire contract is void." The "public policy" for voiding the contract of sale in *Bovard* was "strongly implied" by a statutory prohibition against the possession and use of marijuana. *Id.* at 841. There is, the court said, "no special public interest in the enforcement of this contract, only the general interest in preventing a party to a contract from avoiding a debt." *Id.*

Mabry v. Superior Court, 185 Cal. App. 4th 208 (Cal. Ct. App. 2010), illustrates the judicial practice of California courts in broadly recognizing an implied civil remedy when none is expressly provided. That case involved a statute requiring a lender to contact the borrower to explore options to prevent foreclosure before filing a notice of default. *Mabry* found that requirement may be enforced by an implied private right of action even though no such remedy is expressly conferred by that statute. *Mabry* is instructive here because, in its earlier bill form, it contained an express private right of action that was stripped from it upon final enactment. Despite this seeming indication of legislative intent not to create a private right of action, the *Mabry* court still allowed one, explaining: "[T]he bottom line was an outcome of *silence*, not a clear statement that there should be no individual enforcement." *Id*. at 220 (emphasis added). Thus, silence is not a barrier to a California implied private right of action. This is so even when, as in *Mabry*, there was a

federal statute, the federal Home Owners' Loan Act (12 U.S.C. § 1461), that arguably preempted any state-created implied private remedy.

Muskopf, *supra*, 55 Cal. 2d 211, declares sovereign immunity to be contrary to the public interest. Thus, *Muskopf* represents the "public policy" of California.

In this case, the buyer Tribe's failure to waive its sovereign immunity so that the public could continue to obtain liability redress from the new owner of the airport property renders the sale agreement against California public policy. Likewise, violation occurs in the seller City's failure to insist on such a sovereign immunity waiver. Because the airport sale agreement violates California public policy, the sale is void.

D. *Cort v. Ash* Supports an Implied Right of Action Here.

The Court may look to *Cort v. Ash*, 422 U.S. 66 (1975), and its four factors,[10] in deciding whether a federal-court remedy exists to challenge, under the 1946 Act and the Patent, a sale extinguishing public liability

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[10] *Cort* reads: "First, is the plaintiff one of the class for whose special benefit the statute was enacted, . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of any legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such remedy for the plaintiff? And finally, is the cause of action traditionally relegated to state law, in an area basically the concern of the States so that it would be inappropriate to infer a cause of action based solely upon federal law?" 422 U.S. at 78.

protections. But the guidelines of *Cort v. Ash* are not to be mechanically applied. *Cort* does not bar the courts from implying rights of action. Indeed, "rights of action could be inferred from Congress' failure to deny them." *Implied Causes of Action*, 96 Harv. L. Rev. 236, 238 (1982).

Post-*Cort* authorities recognize exceptions to the rigid application of its four criteria, and clarify that all four parts are neither required to be met, nor accorded equal weight. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 387 (1982) (Congressional action indicates affirmative intention; "Congress could have made its intent clearer only by expressly providing for a private cause of action in the statute"); *Transamerica Mortg. Advisors v. Lewis*, 444 U.S. 11, 18 (1979) (statutory language itself fairly implied a private remedy although providing a private remedy was not expressly mandated by language or legislative history).

The courts have also suggested that actions for equitable relief may be treated differently from damage actions. Their shorthand formulations of this theory are careful to link the requirement of *affirmative* legislative intent with the *damages* remedy. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 820 n.36 (1982) (citing *Merrill Lynch* for the proposition that a "controlling question in implication of statutory causes of action is whether Congress affirmatively intended to *create a damages remedy*" (emphasis added)).

For example, in implying a private right of action for a bank's shareholders for an accounting, the Ninth Circuit said: "[B]ecause the remedy at hand is an *equitable* one, we are more inclined to perceive in Congress' silence a presumption that an individual may pursue a claim." *First Pac. Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1126 (9th Cir. 2000) (emphasis added); see also Note, *Private Rights of Action--Equitable Remedies to Enforce the Medicaid Act--Armstrong v. Exceptional Child Center, Inc.*, 129 Harv. L. Rev. 211, 215–16 (2015) ("[F]or damages . . . the Court has applied a skeptical approach … Yet in suits for *equitable* relief, the approach has remained broad and permissive…" (emphasis added)).

Some Justices' greater willingness to imply a right to injunctive relief than to damages is based on their belief that a litigant may be less likely to bring suit if she has no expectation of monetary recovery but is limited to injunctive relief. See *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 737–38 (1979) [Powell, J., dissenting]. Other Justices suggest that assessing damages shades into policy-making more than does affording injunctive relief. *Transamerica Mtge.*, *supra*, 444 U.S. at 18-24; *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 428-29 (1971) [Black, J., dissenting].

This action seeks only prospective relief and not damages. This fact weighs in favor of implying plaintiff's private right of action.

For the first *Cort* factor, plaintiff's member survivors and descendants seek to walk in the parts of the Tule Lake site where they and their ancestors were forced to live, and two-thirds of that land is within the airport property. Pedestrians on the ground are a good example of persons exposed to airport hazards. Accordingly, the members are to be protected by restricting airport ownership to non-immune bona fide "public agencies" under the 1946 Act.

For the second *Cort* factor, the Land Patent drafters' knowledge of the ongoing erosion of governmental immunity in California strongly suggests that they would pay attention to, and intend, protection of plaintiff's member class of pedestrians from potential landowners that claim broad sovereign immunity.

For the third *Cort* factor, the ownership of airports by non-immune "public agencies" is common practice and is wholly consistent with developing a viable national system of airports.

Finally, for the fourth *Cort* factor, plaintiff's reliance is upon a joint federal-state legal regime and is **not** a matter relegated to state law.

For these reasons, the Court should find an implied private right of action protecting the plaintiff.

VI. SUPPLEMENTAL JURISDICTION

Defendants' fifth argument (Ans.Br. 50-53) is that, assuming no federal question jurisdiction under 28 U.S.C. § 1331, a district court would properly decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367. Plaintiff applied Section 1367 in Open.Br. 20–21.

VII. CONCLUSION

For these reasons, the dismissal for lack of federal question jurisdiction should be reversed. The dismissal of the state-law claims for lack of supplemental jurisdiction should be vacated.

Dated: December 14, 2022

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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