No. 18-16663

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND, a Municipal Corporation, and The People of the State of California, acting by and through the Oakland City Attorney Barbara J. Parker; CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and The People of California, acting by and through the San Francisco City Attorney Dennis J. Herrera,
Plaintiffs-Appellants,
v.
B.P. P.L.C., a public limited company of England and Wales; CHEVRON CORPORATION, a Delaware corporation; CONOCOPHILLIPS, a Delaware corporation; EXXON MOBIL CORPORATION, a New Jersey corporation; ROYAL DUTCH SHELL PLC, a public limited company of England and Wales; and DOES, 1 through 10,
Defendants-Appellees.

On Appeal From The United States District Court, Northern District of California
Case Nos. 3:17-cv-06011-WHA, 3:17-cv-06012-WHA (Hon. William H. Alsup)

AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF REVERSAL

James R. Williams, County Counsel
Greta S. Hansen, Chief Assistant County Counsel
Laura S. Trice, Lead Deputy County Counsel
Tony LoPresti, Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
70 W. Hedding Street, East Wing, 9th Floor
San José, California 95110

Attorneys for *Amicus Curiae*
California State Association of Counties

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the California State Association of Counties represents that it is a non-profit mutual benefit corporation, which does not offer stock and which is not a subsidiary or affiliate of any publicly owned corporation.

INTERESTS OF AMICUS CURIAE[1]

The California State Association of Counties (CSAC) is a non-profit corporation whose membership is comprised of all fifty-eight California counties. All of CSAC's member counties bear responsibility for preserving the public health, safety, and welfare within their borders. Each of these counties has a unique geography—some are mountainous, some forested, some coastal, and some all three. Each county is home to a diverse set of industries—from energy production to technology to farming—and has a different approach to local policy.

But all of the counties share an interest in preserving California's public nuisance law as a mechanism for responding to the hazards that threaten their communities and redressing the resulting harms. The counties are further united in their position that California public nuisance claims, as state law causes of action, when filed in state court should remain there, absent extraordinary circumstances not present in this case. And, similarly, the counties have a collective stake in ensuring that California courts can exercise personal jurisdiction over defendants who commit

---

[1] Filing of this brief was authorized by CSAC's Litigation Overview Committee, which is comprised of County Counsels throughout the state. All parties have consented by stipulation to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission.

intentional torts that cause harm to California communities. CSAC thus submits this brief in support of Appellants to request that this Court reverse the district court's rulings, which improperly refused to return state law claims to state court and compounded its error by declining to exercise personal jurisdiction over out-of-state corporations that caused extensive harm to California communities.

INTRODUCTION

Although only state law is at issue in this case, the district court erred by impliedly holding that federal common law completely preempts Plaintiffs' state law nuisance claims. It does not. The California Legislature codified the State's public nuisance law, in an exercise of its police powers, to enable local governments to redress widespread harms within their communities. Public nuisance causes of action thus allow local governments to carry out their obligation to preserve community wellbeing, and local governments have brought such actions to address diverse and grave threats. The district court erred by stripping Plaintiffs of their right to vindicate these purely state law claims in state court.

Further, contrary to Defendants' arguments below, the federal government's involvement in regulating harms that flow from Defendants' alleged wrongful conduct is not a sufficient basis for removal jurisdiction and cannot justify tying the hands of local governments and severely limiting the use of a critical tool for protecting local communities. Instead, state public nuisance law fits comfortably

alongside federal regulation as a complement to the federal regime. California courts have frequently applied public nuisance law to remedy harmful conduct even when a defendant's conduct was federally regulated, and this Court has endorsed that practice. Indeed, this parallel scheme of federal regulation and state law torts is a hallmark of cooperative federalism.

The Clean Air Act exemplifies this system of federal, state, and local cooperation—and illustrates its necessity. Although the Clean Air Act imposes federal regulation of greenhouse gas emissions and displaced federal common law as it relates to those emissions, it does not provide any federal mechanism for local governments to remedy local harms, and it *explicitly preserves* state law actions, like public nuisance, to avoid creating a gap. Were this Court to accept the argument that the Clean Air Act completely preempts state law causes of action in matters implicating greenhouse gas emissions, States and local governments would be virtually helpless to require air polluters to shoulder the costs of remediating harms stemming from their polluting activities.

A ruling that Plaintiffs' state law claims cannot exist alongside the Clean Air Act would disrupt the system of cooperative federalism that lies at the foundation of our nation's regulatory system and would seriously undermine the ability of California governmental entities to protect the health, safety, and welfare of their residents. CSAC thus asks the Court to reject the Defendants' invitation to improperly insert the

federal courts into this issue of state law and reverse the district court's ruling denying remand.

However, should the Court determine that removal jurisdiction is proper, CSAC urges the Court to determine that there is specific personal jurisdiction over Plaintiffs' claims against the four out-of-state Defendants. Here the Plaintiffs allege that Defendants purposefully engaged in conduct directed at California, perpetrated an intentional tort through that conduct, and are causing massive harm to California as a result. Under Ninth Circuit precedent articulated in *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991), *Harris Rutsky & Co. Insurance Services v. Bell & Clements Ltd.*, 328 F.3d 1122 (9th Cir. 2003), causal conduct committed both within and outside the forum state gives rise to specific jurisdiction if the harm to the Plaintiff is the product of an intentional tort and occurs within the forum state. Here, the alleged harm is to California communities themselves, creating an especially close relationship between Defendants' conduct and Plaintiffs' claims. Plaintiffs have clearly established the requisite nexus to establish specific jurisdiction under this precedent. The Court should reject the district court's elevated standard for specific jurisdiction as out of step with Ninth Circuit precedent, and a subversion of the notions of fair play and substantial justice that undergird the specific jurisdiction inquiry.

ARGUMENT

A. Plaintiffs' State Law Claims Belong in State Court.

This case was originally filed in state court by local governments, alleging exclusively state law claims against Defendants. The district court determined it had original jurisdiction because Plaintiffs' claims are governed by federal common law. ER at 29. In arriving at this conclusion, the district court disregarded the important role that public nuisance law plays in California. Moreover, to the extent Defendants argue here that the Clean Air Act bars Plaintiffs' public nuisance claim, their arguments disregard the Act's text and intent and undermine the critical importance of state law actions alongside federal regulation in our regime of cooperative federalism.

1. California's Public Nuisance Cause of Action Represents an Important Exercise of State Police Powers to Address Harms to Local Communities.

"The States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). The Supreme Court has long acknowledged the important role of the States, and by extension localities as subdivisions of the States, in exercising police powers to deal with "all the great public needs." *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911). In California, the Legislature recognized the important role public nuisance

doctrine plays in addressing those great public needs and codified public nuisance law as a powerful tool to safeguard the public's interests. *See* Cal. Civ. Code §§ 3479-80; *see also People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1997) ("[A] principal office of the centuries-old doctrine of the 'public nuisance' has been the maintenance of public order—tranquility, security and protection.").

The California public nuisance statutes represent a legislative judgment that a cause of action protecting against an array of communal harms is necessary to safeguard the wellbeing of the people of California. While California courts have defined some of the contours of public nuisance, "the ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature." *Acuna*, 929 P.2d at 606; *see also People v. Lim*, 118 P.2d 472, 476 (Cal. 1941) ("The courts have thus refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance."). By statute, the California Legislature has defined nuisance to include "[a]nything which is injurious to health, . . . obstruct[s] the free use of property, . . . or unlawfully obstructs the free passage or use" of certain areas. Cal. Civ. Code § 3479.[2]

---

[2] To be actionable, the injury, offense, or obstruction must also be "unreasonable." *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 697 (Cal. 1996). And "[t]he primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct." *Id.*

Further, the Legislature has empowered localities to sue to remedy these conditions when the conditions impact "an entire community or neighborhood, or any considerable number of persons." *Id.* at §§ 3480, 3494.

The California Supreme Court has explained that public nuisance law reflects an understanding that local governments have "not only a right to maintain a decent society, but an obligation to do so." *Acuna*, 929 P.2d at 603 (internal citations and quotation marks omitted). The harms local governments have addressed through public nuisance causes of action, though always tied to the legislative definition, are extensive and varied: the presence of toxic lead paint in the interior of homes in local communities, *ConAgra Grocery Prod. Co.*, 17 Cal.App.5th 51, 66-77 (2017); illegal gambling activities, *Lim*, 118 P.2d at 474; abandoned housing units that "presented a fire hazard of the most extreme character," *San Diego Cty. v. Carlstrom*, 196 Cal.App.2d 485, 488, 489-91 (1961); gang activity that made it dangerous for people to leave their houses, *Acuna*, 929 P.2d at 618; and improperly disposed of dry-cleaning chemicals that were leaching into ground water, *City of Modesto v. Dow Chem. Co.*, 19 Cal.App.5th 130, 135 (2018), to name just a few. *See also Ileto v. Glock Inc.*, 349 F.3d 1191, 1211-14 (9th Cir. 2003) (*Ileto I*) (determining that plaintiffs had sufficiently alleged a California

public nuisance cause of action based on allegations concerning a gun manufacturers' marketing and distribution of firearms).[3]

In these cases, without a public nuisance cause of action, parties whose conduct had harmed the community might have dodged responsibility for redressing the harmful conditions they had created. Where harm is spread broadly across the community, local governments are often best situated to remedy the harm, both because they have an obligation to preserve local order and because they are well-positioned to understand the threats their communities face. And the California Legislature codified the public nuisance cause of action because, without it, local governments would often be powerless to remedy—or prevent—widespread harm. *See Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal.App.4th 292, 309-10 (2006) (explaining that, unlike other tort law claims, public nuisance actions allow a public entity itself to act on behalf of a community that has been subjected to a widespread hazard.). Using California public nuisance law, localities can prevent future harm from a present perilous condition, rather than being unable to act until a harm is complete or reduced to pursuing inadequate remedies under a limited federal regime. *See id.*

---

[3] *Ileto* was removed from state court on the basis that a defendant was an instrumentality of a foreign state. *See Ileto v. Glock, Inc.*, 194 F.Supp.2d 1040, 1044 (C.D. Cal. 2002); *see also* 28 U.S.C. §§ 1330(a), 1603(a) (providing for original jurisdiction in district courts in suits against instrumentalities of foreign states).

Further, public nuisance law can play an important role in remedying harms caused to a community when a wrongdoer promotes its product, while concealing that using the product will cause harm. *See ConAgra,* 17 Cal.App.5th at 102–03. In such situations, where regulators may be unaware of a product's risk—because a defendant concealed such risks—or statutory law has not yet quite caught up to addressing the harms, a defendant can be held accountable in public nuisance for intentionally promoting a product it knows will cause sweeping harm to the community. *See id.* at 120; *see also Soto v. Bushmaster Firearms Int'l, LLC*, No. 19832, 2019 WL 1187339, at *7 (Conn. Mar. 19, 2019) ("The regulation of advertising that threatens the public's health, safety, and morals has long been considered a core exercise of the states' police powers."). Plaintiffs' efforts here to hold Defendants accountable for their alleged misrepresentations of their product fall in line with this use of public nuisance law.

The indispensable role that public nuisance plays in California law militates against removal here. As the Ninth Circuit has explained, "the federal character of our judicial system recognizes that matters of state law should first be decided by state courts when possible, not federal courts." *Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.*, 834 F.3d 998, 1003 (9th Cir. 2016) (citations and quotation marks omitted). The district court's decision not to remand this case failed to demonstrate proper comity to the state courts regarding this state law matter.

2. As Part of the Scheme of Cooperative Federalism, State Public Nuisance Actions Have an Important Role to Play in Redressing Harms that Are Also Subject in Some Respects to Federal Regulation.

As noted in Appellants' briefing, Appellants' Opening Brief at 19-20, the Clean Air Act contains a savings clause that clearly permits states, local governments, or other authorities to bring actions "to seek enforcement of any emission standard or limitation *or to seek any other relief*." 42 U.S.C. § 7604(e) (emphasis added). And for good reason: the Clean Air Act's limited remedies do not include damages for harms to individuals or communities stemming from pollution, and Clean Air Act penalties are generally deposited into a fund to be used by the EPA for enforcement. *Id.* § 7604(g)(1); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").[4] Congress's decision to allow parallel state law claims also makes sense in light of its understanding, as evidenced in the Clean Air Act, that localities are best suited to deal with the alleged air-pollution harms stemming from the challenged conduct here. *See Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 670–71 (9th Cir. 2003); *see also Nat'l Audubon Soc. v. Dep't of Water*,

---

[4] Courts have discretion to order the use of up to $100,000 in civil penalties for "beneficial mitigation projects" that "enhance the public health or the environment." 42 U.S.C. § 7604(g)(2). But where extensive harm stems from an actor's unreasonable conduct, this payment will be insufficient to remedy the harm to a community.

869 F.2d 1196, 1203 (9th Cir. 1988) ("[T]here is not 'a uniquely federal interest' in protecting the quality of the nation's air. Rather, the primary responsibility for maintaining the air quality rests on the states.").

As this Court has ruled, plaintiffs may bring state law public nuisance suits against legal, regulated industries. *Ileto I*, 349 F.3d at 1214; *see also ConAgra*, 17 Cal.App.5th at 73 (although lead paint could lawfully be sold at the time the defendant companies marketed it to homeowners, their wrongful advertising nonetheless caused a nuisance). And numerous federal courts have allowed state law causes of action to go forward even when the conduct that gave rise to the state law cause of action was subject to federal regulation. *See, e.g.*, *Ileto I*, 349 F.3d at 1214 (ruling that federal regulation of firearms did not prevent plaintiffs from pursuing state law public nuisance claim);[5] *Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 529 (1992) (ruling that state law claims for fraudulent misrepresentation, conspiracy to misrepresent or conceal material facts, and breach of express warranty in connection with the sale of cigarettes

---

[5] The plaintiffs' claims in *Ileto* against a federally licensed manufacturer and a federally licensed seller of firearms were dismissed in an ensuing appeal following congressional enactment of a law that explicitly prohibited most civil actions against federally licensed gun manufacturers and sellers. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009) (*Ileto II*); *see also* 15 U.S.C. § 7901. But it was only this enactment that destroyed the plaintiffs' claims, not the preexisting regulatory scheme around firearms. *See Ileto I*, 349 F.3d at 1214. Because Congress had created protections for only federally licensed manufacturers and sellers, the plaintiffs' claims against an unlicensed foreign manufacturer were allowed to go forward. *Ileto II*, 565 F.3d at 1145.

were not preempted by federal regulations that dictated a specific warning be placed on cigarettes); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65, 95–96 (2d Cir. 2013) (upholding a jury verdict finding Exxon Mobil liable under state law for the contamination of ground water with MTBE, even though the Clean Air Act had required that some oxygenating additives, such as MTBE, be included in gasoline).

In re Volkswagen is particularly instructive here. In that case, the State of New Mexico brought a state law public nuisance claim against Volkswagen in connection with its installation of software in its cars designed to cheat federal and state emissions tests. *In re Volkswagen*, MDL No. 2672, 2017 WL 2258757, at *4 (N.D. Cal. May 23, 2017). In its order remanding the case, the district court reasoned that while there is an extensive federal regulatory scheme under the Clean Air Act that applies to automobile emissions, New Mexico did not need to touch on that scheme to prove its nuisance claim; instead "New Mexico [had] to prove only that Volkswagen's emissions . . . interfered with the public's common right to clean air, and clean water." *Id.* at *11 (quotation marks and alteration omitted); *see also Lougy v. Volkswagen Grp. of Am., Inc.*, No. CV 16-1670 (JLL), 2016 WL 3067686, at *3 (D. N.J. May 19, 2016) (also rejecting Volkswagen's argument that federal regulations prohibiting Volkswagen's alleged conduct justified removal of state law claims). Thus, that court

determined that federal regulations and state nuisance law could play parallel roles, without either collapsing into the other.

Indeed, in enacting a scheme of federal regulation, Congress may choose to rely on state law to redress harms to individuals or particular communities when it "determine[s] that widely available state rights of action provide[] appropriate relief for injured" parties. *Wyeth v. Levine*, 555 U.S. 555, 574 (2009). Further, because the federal government's resources are finite and federal oversight of massive industries necessarily can only ever be partial, state tort and nuisance law can serve as important complements to federal regulation, operating as a means for uncovering wrongdoing or addressing unanticipated hazards. *See id.* at 578-79.

It would be untenable if the mere existence of federal regulation of an industry stripped localities of the ability to bring state law claims against actors within that industry. Such sweeping federal preemption would leave local governments hamstrung in their efforts to remedy harm to their communities, particularly where, as here, Congress has not provided the full suite of remedies that state law supplies. And it would run flatly contrary to principles of federalism the Supreme Court has articulated. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.").

B. Personal Jurisdiction Is Proper Because Plaintiffs Demonstrated a Nexus Between the Defendants' Contacts with the State and the Alleged Harm to the State.

The district court further erred in ruling that Plaintiffs failed to establish personal jurisdiction over the four out-of-state Defendants.[6] To meet the second prong of the three-prong test[7] for specific jurisdiction—the prong on which the district court based its ruling—Plaintiffs must show a "nexus" between a defendant's forum-related conduct and the harm to plaintiff. *Shute*, 897 F.2d at 385. Plaintiffs easily meet that standard.

The second prong of the Ninth Circuit's specific jurisdiction test requires that a plaintiff's claim "arises out of or relates to the defendant's forum-related activities." *In re W. States Wholesale Nat'l Gas Antitrust Litig.*, 715 F.3d 716, 742 (9th Cir. 2013). In *Shute*, the Ninth Circuit adopted the "but-for" test to determine whether a plaintiff's claims satisfy this second prong. 897 F.2d at 385. The *Shute* court explained that the

---

[6] Of course, if the Court agrees this matter should have been remanded to state court, it need not reach the issue of personal jurisdiction at all.

[7] The Ninth Circuit applies a three-prong test to determine whether a court can exercise specific jurisdiction: "(1) the defendant must either purposefully direct his activities toward the forum state or purposefully avail himself of the privileges of conducting activities in the forum; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable." *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017) (internal quotations omitted).

but-for test requires only that there is "some nexus between the cause of action and the defendant's activities in the forum," and concluded that a more "restrictive reading of the 'arising out of' requirement is not necessary" because defendants may establish in the third prong of the personal jurisdiction test that the defendants' contacts with the forum are "too attenuated" to conform with Due Process requirements. *Id.* The *Shute* court warned that demanding more than a nexus between plaintiff's claim and the defendant's forum-related activities "would represent an unwarranted departure from the core concepts of 'fair play and substantial justice' which are central to due process analysis in the context of the exercise of personal jurisdiction." *Id.* at 385-86 (citing *Int'l Shoe v. Wash.*, 326 U.S. 310, 316 (1945)). The Ninth Circuit has repeatedly applied the nexus standard since *Shute*. *See, e.g.*, *In re W. States Wholesale Nat'l Gas Antitrust Litig.*, 715 F.3d at 742 ("A lawsuit arises out of a defendant's contacts with the forum state if a direct nexus exists between those contacts and the cause of action."); *Fireman's Fund Ins. Co. v. Nat'l Bank of Cooperatives*, 103 F.3d 888, 894 (9th Cir. 1996) (same).

When a defendant commits an intentional tort and its activities suffice to meet the "purposeful direction" standard applicable to the first prong of the personal jurisdiction test, the Ninth Circuit has held that a defendant's conduct has a sufficient nexus with the forum state for purposes of the second prong of the test if the alleged harm to the plaintiff occurs within that state. *Harris Rutsky*, 328 F.3d at 1131. In

Harris Rutsky, the plaintiff, a California insurance company, alleged that the defendant, a London-based United Kingdom corporation, tortiously interfered with the plaintiff's contract with another company based in the United Kingdom. *Id.* at 1127-28. After finding that the plaintiff met the first prong of the specific jurisdiction test because the defendant intentionally directed activities related to the plaintiff's claim into the forum state, the court turned to the second prong of the personal jurisdiction test. *Id.* at 1131-32. The court held that because the defendant "had ongoing contacts with the forum state over a four-year period, and its alleged tortious conduct in London had the effect of injuring [plaintiff] in California," there was an adequate nexus to satisfy the Ninth Circuit's but-for test. *Id.* at 1132; *see also CE Distrib., LLC v. New Sensor Corp.*, 380 F.3d 1107, 1111–12 (9th Cir. 2004) (applying *Harris Rutsky* and holding that "[i]n the face of [defendant]'s awareness of the harm to [plaintiff]'s exclusive business located in Arizona, and because of the intentional nature of [defendant]'s action" the first two requirements for specific jurisdiction were met); *Synoptek, LLC v. Synaptek Corp.*, 326 F. Supp. 3d 976, 985 (C.D. Cal. 2017) (applying *Harris Rutsky*)).

In the context of intentional torts, this analysis makes good sense. To satisfy the "purposeful direction" test, a Plaintiff must show that a defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Yahoo! Inc. v. La Ligue*

Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc). This analysis already inquires into whether intentionally tortious acts were directed toward the forum state and once a court confirms that harm did indeed result from those acts in the forum state, it has established that the claim "relates to the defendant's forum-related activities." *See id.* That is all the second prong requires. *See id.*

Here, the out-of-state Defendants have conceded for purposes of personal jurisdiction that they purposely directed activities causing climate change into California. Accordingly, applying *Harris Rutsky*, Plaintiffs meet the second prong of the personal jurisdiction test because the "alleged tortious conduct [outside the forum state] had the effect of injuring [Plaintiffs] in California." *See Harris Rutsky*, 328 F.3d at 1132. Indeed, Plaintiffs seek redress for the allegedly severe impacts to the California communities they represent and the costly measures they consider critical to protect those communities. The out-of-state Defendants may not evade the Court's jurisdiction simply because they engaged in causal conduct both in California *and elsewhere*. Because Defendants engaged in relevant conduct within California, and because Plaintiffs have been harmed within California, there is a sufficient nexus between Plaintiffs' claims and the forum state.

The district court's order upends the Ninth Circuit's precedent articulated in *Shute* and *Harris Rutsky*. Even though the out-of-state Defendants concede that they

directed activities alleged to have caused climate change harm into California, and Plaintiffs allege that climate change causes harm to their communities, the court ruled that Plaintiffs did not meet the second prong of the personal jurisdiction test because they did not allege that Defendants' conduct solely within California was an independent cause of that harm. ER at 7. In other words, instead of requiring a direct nexus, the district court required an *exclusive* nexus. That is an impossible standard to meet because the cause of the alleged damage in this case cannot, by its very nature, be isolated within any one state's boundaries.

The district court's error is particularly egregious because Defendants here are alleged to have committed an intentional tort against the State itself. In determining whether there is specific jurisdiction, "[t]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011); *see also Walden v. Fiore*, 571 U.S. 277, 286 (2014) ("Due process requires that a defendant be haled into court in a forum State *based on his own affiliation with the State* . . . ." (internal citations and quotation marks omitted) (emphasis added)). Here, Plaintiffs are two local governments—political subdivisions of California—and the People of the State of California. Thus, Defendants are alleged to have committed an intentional tort *directly against the sovereign itself*. *See* Cal.

Gov. Code § 100 (cases brought in the name of "The People of the State of California" are brought on behalf of the sovereign). If a defendant reaches out and participates in an intentional tort against a sovereign, that sovereign is surely justified in subjecting a defendant to judgment for damage the defendant intentionally caused to it.[8]

The test for specific jurisdiction is supposed to be a "flexible and context-specific" test that evolves as the nation's technology and economy—and the impacts of that technology and economy—evolve. *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1067 (9th Cir. 2014). The district court's order applies an overly rigid rule that would effectively preclude the courts of *any* state from exercising specific jurisdiction in cases addressing the impacts of the widespread environmental threats that are emerging as a result of today's technological and economic expansion. The Ninth Circuit's precedent in *Shute* and *Harris Rutsky* provides the requisite flexibility necessary for courts to rightfully exercise jurisdiction over cases involving the local effects of sprawling, multifaceted environmental harms. The district court's order does not. Instead, the order directly contravenes the Ninth Circuit's warning that applying too

---

[8] The Supreme Court has also observed that "it is beyond dispute" that a state has a significant interest in redressing injuries that occur within a state, and that that interest can be a "surrogate" for the factors relevant to the due process equation. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984). A state's interest is only compounded when the injury not only occurs in the state but is to the state itself.

rigid a standard when evaluating the second prong of the specific jurisdiction test "would represent an unwarranted departure from the core concepts of 'fair play and substantial justice.'" *Shute*, 897 F.2d at 385-86 (citing *Int'l Shoe*, 326 U.S. at 316). This Court should reverse the district court's order on personal jurisdiction and confirm that when an entity intentionally acts to harm a state and that state itself suffers harm, specific jurisdiction in that state is proper.[9]

CONCLUSION

Parallel state law causes of action proceeding alongside congressional regulatory schemes are a classic feature of federalism. This system allows the federal government to set standards that govern nationally while continuing to vest in states and local governments responsibility for addressing specific local harms and impacts. Indeed, this is precisely the type of cooperation for which the Clean Air Act provides. And California public nuisance law fits neatly into this scheme by giving localities a tool to redress those harms that threaten wide swaths of their communities. This Court should allow cooperative federalism to function as intended and remand this case to state court. Further, if the Court reaches the issue of personal jurisdiction

---

[9] As Appellants point out in their Opening Brief, Appellants' Opening Brief at 57-58, Defendants failed to carry the heavy burden below of showing that the exercise of specific jurisdiction would be unreasonable. Accordingly, if the Court agrees that Plaintiffs' allegations meet the first two prongs of the specific jurisdiction test, there is no need for further consideration in the district court.

(and it need not), it should reverse the district court's imposition of an elevated standard that is out of sync with Ninth Circuit precedent. The Court should instead re-affirm that when a defendant purposefully directs harm-causing conduct into the forum state, and a plaintiff—particularly a public entity—incurs harm within that state, there is a sufficient nexus between the defendant's conduct and the plaintiff's claims to justify specific jurisdiction.

Dated: March 20, 2019

Respectfully Submitted,

COUNTY OF SANTA CLARA
JAMES R. WILLIAMS,
County Counsel

By: /s/ Tony LoPresti
Tony LoPresti

Greta S. Hansen
Laura S. Trice
Tony LoPresti
OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
70 W. Hedding St., East Wing, 9th Floor
San José, CA 95110
(408) 299-5900

Attorneys for *Amicus Curiae*
California State Association of Counties

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 5,116 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2010 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Tony LoPresti
Tony LoPresti

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Tony LoPresti
Tony LoPresti