CA No. 07-56564
DC No. 06-5094

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF LOS ANGELES; ORANGE COUNTY SANITATION DISTRICT; COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY; RESPONSIBLE BIOSOLIDS MANAGEMENT, INC.; R&G FANUCCHI FARMS, INC.; SHAEN MAGAN, BOTH INDIVIDUALLY AND D/B/A HONEY BUCKET FARMS AND TULE RANCH/MAGAN FARMS; WESTERN EXPRESS, INC.; SIERRA TRANSPORT, INC.; AND CALIFORNIA ASSOCIATION OF SANITATION AGENCIES,

PLAINTIFFS-APPELLEES,

v.

COUNTY OF KERN AND KERN COUNTY BOARD OF SUPERVISORS,

DEFENDANTS-APPELLANTS,

ARVIN-EDISON WATER STORAGE DISTRICT, ASSOCIATION OF IRRITATED RESIDENTS, KERN COUNTY WATER AGENCY, KERN WATER BANK AUTHORITY,

INTERVENORS.

On Appeal from the United States District Court
for the Central District of California
Hon. Gary A. Feess, District Court Judge

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs-Appellees Responsible Biosolids Management, Inc., R&G Fanucchi, Inc., Western Express, Inc., Sierra Transport, Inc., and California Association of Sanitation Agencies state that each has no parent corporation and that no publicly held corporation owns 10% or more of any of their respective stock. The remaining Plaintiffs-Appellees are either governmental or non-corporate parties.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over Appellees' federal claims (Excerpts of Record ("ER") 903-06) under 28 U.S.C. §§ 1331, 1343 and 2201, and their state-law claims (ER907-10) under 28 U.S.C. § 1337. This Court has appellate jurisdiction over the District Court's (i) grant of a permanent injunction restraining the enforcement of Measure E under 28 U.S.C. § 1292(a)(1), and (ii) entry of a Rule 54(b) final judgment under 28 U.S.C. § 1291.

The District Court entered judgment under Fed. R. Civ. Proc. 54(b) and issued a permanent injunction on September 5, 2007. ER1-2. Defendants County of Kern and Kern County Board of Supervisors (collectively, "Kern") appealed on September 24, 2007. ER58.

STATEMENT OF ISSUES

1. Whether Kern's Measure E violates the dormant Commerce Clause by barring Southern California biosolids generators from lawfully recycling biosolids on Kern County farmland.

2. Whether Measure E is preempted by the California Integrated Waste Management Act because it prohibits substantially all recycling of biosolids by Plaintiffs in Kern County.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Farming with biosolids is a great success of recycling and environmentally sustainable wastewater treatment practiced everyday by many thousands of farmers and wastewater agencies worldwide. This case concerns the biosolids generated by over 10,000,000 people and whether their biosolids will continue to be recycled on farms near Southern California, or whether a local voter initiative may upend this long-standing practice.

A. Biosolids

All wastewater treatment plants process wastewater from homes and businesses, resulting in sewage sludge that must be recycled or disposed of daily. ER287-88(¶10), 588(¶11). Nationwide, most sewage sludge is further treated to produce a useful product – biosolids. According to the U.S. Environmental Protection Agency ("EPA"), "[a]bout 60 percent of all sewage sludge is treated to generate biosolids that are beneficially used as a fertilizer on farmland." 68 Fed. Reg. 68,813-01, 68,817 (Dec. 10, 2003); *see also* ER749. Whether used by farmers or home gardeners, biosolids provide an effective organic fertilizer that enhances soil quality, provides essential nutrients for plant growth, and replaces chemical fertilizers. ER162-63(¶¶9-11); 603(¶7); Supplemental Excerpts of Record ("SER") 82(¶14).

Biosolids pose negligible health and environmental risks when used in compliance with EPA's regulations. SER235 (EPA reiterating its "long-standing position that the beneficial application of biosolids to provide crop nutrients or to condition the soil is not only safe but good public policy"); ER445-46(¶18) (Professor Page, Professor Emeritus of Soil Science at UC Riverside, reinforcing the National Academy of Science's conclusion that land application of biosolids "when practiced in accordance with existing federal guidelines and regulations, presents negligible risk to the consumer, to crop production, and to the environment"); ER495(¶7) (Professor Gerba, Professor of Soil, Water and Environmental Science at the University of Arizona, explaining that decades of research and data collection in both laboratory and field studies have established that land application "poses negligible risks" to the public and the environment); SER105-06(¶7) (Professor Pepper, Director of the University of Arizona's National Science Foundation Water Quality Center, emphasizing "the absence of any credible, data-supported studies linking biosolids to environmental or health risks").

B. Federal Regulation of Biosolids

In the late 1980s, Congress required the phase-out of ocean disposal of biosolids and directed EPA to develop comprehensive rules governing biosolids recycling and disposal, including land application. *See* 33 U.S.C. § 1345. After

years of research, in 1993 EPA adopted regulations establishing national standards for land application. 40 C.F.R. Part 503. EPA's Part 503 regulations, among other controls, (i) limit the amounts of trace metals in biosolids and cumulative loading of metals in farm fields; (ii) mandate standards for the 99% reduction ("Class B" biosolids) or essential elimination ("Class A" biosolids) of microorganisms; and (iii) establish minimum operational controls, including limits on the amount of biosolids that may be applied (the agronomic rate), buffer zones, and restrictions on the timing and selection of crops. Part 503 also imposes vigorous monitoring, recordkeeping and reporting requirements to ensure that land appliers comply with the regulations and do not pose a threat to public health or the environment. 40 C.F.R. §§ 503.16-18. Part 503 represents EPA's determination that these controls "adequately protect public health and the environment from all reasonably anticipated adverse effects." 58 Fed. Reg. 9,248-01, 9,249 (Feb. 19, 1993) (Preamble to Part 503).

EPA uses the term "biosolids" to "emphasize the beneficial nature of this valuable, recyclable resource (*i.e.*, the use of the nutrients and organic matter in biosolids as a fertilizer or soil conditioner)." SER157, 166 (EPA's *Guide to the Biosolids Risk Assessments for the EPA Part 503 Rule*). EPA has further explained that the "[b]eneficial use of biosolids reclaims a wastewater residual, converting it into a resource that is recycled to land." SER172, 235 (EPA's *Plain English Guide*

to EPA Part 503 Biosolids Rule). Accordingly, "EPA promotes land application." ER795 (EPA, *Water: Biosolids Management and Enforcement*).

As required by Section 405(d)(2) of the Clean Water Act, 33 U.S.C. § 1345(d)(2), and its responsibility for Part 503, EPA continues basic research and data gathering to guarantee the safety of land application. *See, e.g.*, 58 Fed. Reg. at 9,249; 68 Fed. Reg. 75,531 (Dec. 31, 2003) (EPA, *Final Agency Response to the National Research Council Report on Biosolids Applied to Land and the Results of EPA's Review of Existing Sewage Sludge Regulations*). For example, in 1996, EPA asked the National Academy of Sciences ("NAS") to evaluate the safety of using biosolids in human food crop production. The resulting report by the NAS' National Research Council ("NRC"), *Use of Reclaimed Water and Sewage Sludge in Food Crop Production*, concluded that land application presented negligible risk to humans and the environment, while providing many benefits. ER579. The NRC emphasized the absence of any reported outbreaks of infectious disease associated with exposure to adequately treated biosolids. ER443-44(¶14). According to the committee chair for the report, this finding remains accurate. ER445-46(¶18) (Declaration of Professor Page).

In 2000, EPA asked the NRC to evaluate the technical methods used to develop Part 503, focusing on human health protection. ER750. The NRC's 2002 report, *Biosolids Applied to Land: Advancing Standards and Practices*, found

that "[t]here is no documented scientific evidence that the Part 503 rule has failed to protect public health," and that "a causal association between biosolids exposures and adverse health outcomes has not been documented." ER752-53. The NRC noted there have been "anecdotal allegations" of disease (ER752), and recommended continued research on potential health risks. ER771-72. Neither the 1996 nor the 2002 NRC reviews of land application called for any changes in current practices or regulations, and the research since 2002 has uncovered nothing to change EPA's conclusion that land application in compliance with Part 503 is safe. SER106-07, 110, 111-13(¶¶ 8, 9, 13, 16, 17, 19) (Declaration of Professor Pepper).

In recent correspondence concerning Kern's Measure E, EPA reiterated that "[w]astewater agencies across the county have widely relied upon land application as a method for managing biosolids," and that land application is "clearly an important option for municipalities to have" and "should be available to all municipalities wherever possible . . . ." SER121 (Letter from J. Hanlon, Director, EPA's Office of Wastewater Management (Sept. 15, 2006)). EPA concluded: "Published research and major scientific reviews by EPA, the Water Environment Research Foundation, and others, in addition to the results of successful land application systems across the country, continue to demonstrate that the practice, when conducted in compliance with the Part 503 requirements, is

protective of public health and the environment." *Id.* The District Court here similarly found, after reviewing the extensive record of safe biosolids recycling in Kern and elsewhere, that "while applying sewage sludge to agricultural land may provoke a visceral response in lay observers, the available evidence suggests that the practice has been undertaken safely throughout the United States without any indication of environmental or health impacts . . . ." ER823.

C. California's Regulation of Biosolids

1. The CIWMA

In 1989 California enacted the California Integrated Waste Management Act ("CIWMA"), which reflected the Legislature's recognition that "[b]y 1988, landfills throughout the state were nearly filled." *Valley Vista Servs. v. City of Monterey Park*, 118 Cal. App. 4th 881, 886 (2004); *see* Cal. Pub. Res. Code §§ 40000-49620. The statute requires that the Integrated Waste Management Board and local agencies such as Kern "shall . . . [p]romote the following waste management practices in order of priority: (1) Source reduction; (2) Recycling and composting; [and] (3) Environmentally safe transformation and environmentally safe land disposal." Cal. Pub. Res. Code § 40051(a). The Legislature declared that "market development" for recycled products "is the key" to the CIWMA's success. *Id.* § 40001(c). The CIWMA defines "solid waste" to include biosolids. *Id.* § 40191.

The CIWMA was a significant factor in promoting land application of biosolids in California: "This legislation caused sewage sludge to be diverted from disposal in landfills in favor of recycling it as a fertilizer applied to agricultural land." *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern*, 127 Cal. App. 4th 1544, 1567 (2005). In 1989, Plaintiff City of Los Angeles stopped landfilling biosolids, and began a program, still in effect, of recycling 100% of its biosolids through land application and some composting. ER353(¶19); SER136(¶4). Before the CIWMA, Plaintiff County Sanitation District No. 2 of Los Angeles County ("CSD No. 2") disposed of biosolids primarily in landfills. After the CIWMA was enacted, CSD No. 2 began its land application program, which remains in effect today. ER643-44(¶¶4, 6).

Statewide, approximately 69% of biosolids are recycled through land application in some form. ER591-93(¶¶19-20).[1] However, the number of viable land application sites in California is very limited, and a land application ban would create significant obstacles for sanitation agencies in finding sound options for managing their biosolids. ER171(¶16), 358(¶34), 595(¶27).

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[1] The CIWMA promotes both recycling and composting. Cal. Pub. Res. Code § 40051(a)(2). For biosolids, these amount to the same thing, as composted biosolids are then land applied. *See* ER591-93(¶19).

2. Water Code Section 13274

California Water Code Section 13274 was enacted in 1995 to streamline and promote land application of biosolids. This provision required the issuance of waste discharge requirements for land application, which "supersede regulations adopted by any other state agency to regulate sewage sludge . . . applied directly to agricultural lands." Cal. Water Code §§ 13274(a)(1), (d). The Assembly Committee report on the bill that enacted Section 13274 explained that the law would facilitate the land application permit process, observing that "biosolids from sewage treatment plants are collected for beneficial use as a soil amendment and fertilizer. Agricultural use of these solids avoids disposal of the material in the land fill facilities." SER146; *see also* SER151.

To implement Section 13274, in 2004 the State Water Resources Control Board adopted a General Order setting statewide standards that encourage and permit land application. The Order's detailed requirements include site restrictions, management practices and a monitoring and reporting program to enhance environmental protection. ER598-640.[2] The Order, supported by a 600-

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[2] The Order specifies various groundwater protections, including requiring monitoring when the depth to groundwater is less than 25 feet. ER625-26. The depth to groundwater at Los Angeles' Green Acres Farm far exceeds this. ER411-12(¶¶22-25).

page Environmental Impact Report that exhaustively reviewed the scientific literature and data, concludes that land application of biosolids is "environmentally sound and preferable to non-beneficial disposal." ER590-91(¶¶15-17), ER605(¶11). Land application at Los Angeles' Green Acres Farm is permitted under both the General Order and pre-existing site-specific requirements issued by the Central Valley Regional Water Quality Control Board. ER355-56(¶26); *see also* ER874(¶3) (describing permits authorizing operations at Plaintiff Magan's Tule Ranch farm).

D. Kern's Regulation of Biosolids Before Measure E

Land application at Green Acres is also regulated by, and has continuously complied with, Kern's local regulations since the passage of Kern's first biosolids ordinance in 1998, which imposed controls in addition to the federal and state requirements. ER146(¶17); *see CSD No. 2*, 127 Cal. App. 4th at 1568. In 1999, Kern adopted a new ordinance prohibiting land application of "Class B" biosolids and permitting only "Class A," "Exceptional Quality" biosolids after 2002. *See* ER15.

As Kern admits, in light of its Class B ban, the only remaining land application sites in unincorporated County areas are Plaintiffs' two farms, which total approximately 1% of County farmland under cultivation. ER147-48(¶20); SER349 (Kern stating that "the only 'farmers' using biosolids in Kern County,

who may consider switching to other fertilizers when [Measure E's] ban takes effect, are [Plaintiffs] Shaen Magan and the City of Los Angeles"). As the District Court found, "the record indicates that the only two sites in Kern's jurisdiction where land application occurs are Plaintiffs' Green Acres and Tule Ranch sites . . . , and there is no evidence that an in-county producer . . . currently applies its biosolids to land in the unincorporated areas." ER 832-33.

E. Plaintiffs' Biosolids Programs

1. City of Los Angeles

Los Angeles has been land applying biosolids at Green Acres Farm in unincorporated Kern County since 1994. ER284-85(¶1), 141(¶8).[3] Kern itself suggested the remote area southwest of Bakersfield where Green Acres is located as an ideal site for land application. ER146(¶17).

Recycling Process. Los Angeles collects and treats wastewater generated by residential, commercial and industrial users; the treatment process generates solid residuals, which are collected, treated further and reconstituted into biosolids. ER285(¶2). The biosolids are then used as a fertilizer and soil

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[3] Los Angeles contracts with Plaintiff Responsible Biosolids Management ("RBM") to oversee the transport of the City's biosolids to Green Acres and to manage land application there. Plaintiff Sierra Transport, under a contract with RBM, trucks the biosolids to Green Acres; Plaintiff Fanucchi conducts the farming

(Footnote Continued on Next Page.)

conditioner at Green Acres, instead of using conventional fertilizers, to grow animal feed crops (corn, wheat, sudan grass, alfalfa and milo) for sale to local dairies and for export. ER285(¶3), 162(¶5). The City's collection and treatment of wastewater, and the resulting generation of biosolids that must be recycled or disposed of, is a constant, non-discretionary governmental function. ER287-88(¶10).

Investment in Green Acres. Due to the success of the City's land application program at Green Acres, Los Angeles purchased the farm in 1999 for $9.63 million. ER354(¶20), 355(¶23). The City expended an additional $3 million to build various improvements to the farm to further support this program. ER355(¶23).

In response to Kern's Class B ban, Los Angeles invested an additional $15 million to upgrade its treatment facilities to produce Class A, Exceptional Quality biosolids to meet Kern's new requirements. ER354-55(¶22), 349-50(¶7). These are biosolids that meet stringent requirements for the elimination of pathogens and for very low trace amounts of metals. ER352(¶¶14-15), 589-90(¶13). Due to these efforts and the effectiveness of its biosolids management

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(Footnote Continued from Previous Page.)

operations. ER141-42(¶¶8-9), 155(¶4), 161(¶3), 355(¶24), 356(¶27).

program, in 2003 Los Angeles became only the second entity in the country to receive the prestigious Environmental Management System certification from the National Biosolids Partnership. ER357(¶30).

Compliance and Safety. Land application at Green Acres has complied, and continues to comply, with all federal, state and Kern's pre-Measure E testing, monitoring and reporting requirements. ER142-43(¶10), 146(¶17), 354(¶21), 355-56(¶26), 438(¶1). After visiting Green Acres and evaluating many years of data, four experts – spanning the fields of microbiology, soil chemistry, and hydrogeology – independently concluded that Los Angeles' land application program presents negligible risk to human health and the environment. ER403(¶1), 405(¶6), 414-17(¶¶31-36), 417-18(¶¶38-39), 418 (hydrogeology expert concluding, after reviewing extensive groundwater monitoring data, that the "biosolids recycling program at Green Acres Farm has not resulted in impacts to groundwater quality"), 441(¶9), 445-46(¶¶17-18) (Professor Page concluding that land application operations at Green Acres "are in compliance with regulatory requirements, and present negligible risk to public health and the environment"); ER493(¶2), 496-99(¶¶8-12) (Professor Gerba concluding that risks from pathogens from land application at Green Acres "are essentially non-existent" and that "I can not envision a plausible hypothesis for possible contamination of the groundwater by pathogens"); SER77-81(¶¶4, 6-10, 14) (Professor Pepper concluding that land

application at Green Acres is "safe and sustainable" and "poses negligible risk to the neighboring communities"). The Kern County Water Resources Committee reached a similar conclusion in 2003: "The predominant body of evidence has failed to establish a clear indication of risk to either humans or natural resources due to land application activities when those activities are conducted in accordance with existing regulations." SER68.

2. Orange County Sanitation District & County Sanitation District No. 2 Of Los Angeles County

Plaintiff Orange County Sanitation District ("OCSD") has been land applying biosolids at Tule Ranch in unincorporated Kern County since 1996, and Plaintiff CSD No. 2 has provided biosolids to County farmers for land application since 1994. ER286-87(¶¶4-5, 7, 9). Plaintiff Shaen Magan owns Tule Ranch and Honey Bucket Farms and contracts with OCSD and CSD No. 2 to land apply some of their biosolids. ER874-75(¶¶1-4).[4]

As with Los Angeles, the biosolids generated from OCSD's and CSD No. 2's wastewater treatment processes are used as a fertilizer and soil conditioner to grow animal feed crops. ER286-87(¶¶6, 8-9). As with Green Acres, the

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[4] Magan also owns Western Express, which trucks the biosolids for land application. ER874-75(¶4).

biosolids applied on Magan's farmlands are regulated by federal, state and Kern requirements and are treated to meet Class A, Exceptional Quality standards. *See* ER170(¶13), 176-77(¶¶5-7).

3. California Association of Sanitation Agencies

Plaintiff California Association of Sanitation Agencies ("CASA") is a non-profit mutual benefit association representing 115 cites, counties and special districts statewide. CASA's members have many years of experience with successful land application and its benefits. Many CASA members land apply their biosolids, which is an indispensable option for sustainable biosolids recycling. The elimination of land application would greatly reduce the options for CASA's members in managing their biosolids. CASA's members have already suffered increased costs (which will be borne by their ratepayers) and uncertainty due to Measure E's enactment. ER585(¶3), 587(¶9), 595-96(¶¶27-29).

F. Kern's Biosolids Program

The Kern Sanitation Agency ("KSA") operates a wastewater treatment plant that produces biosolids, as well as an adjacent farm located in unincorporated Kern County. ER738(¶3), 741. KSA formerly land applied biosolids at its farm, but ceased this practice "several years" before Measure E was enacted. ER738-39(¶¶3, 6-7), 741. Since 2004, KSA has contracted with San

Joaquin Composting, which processes KSA's biosolids into compost. *Id.*; SER7(¶105).[5]

G. Measure E

Measure E became effective on July 21, 2006. *See* ER826. Measure E broadly prohibits "the spraying, spreading or other placement of Biosolids onto the land surface, the injection of Biosolids below the surface, or the incorporation of Biosolids into the soil." ER919 (Measure E) §§ 8.05.030(D), 8.05.040(A). Measure E defines "biosolids" to include any composted material containing biosolids. ER918-19 § 8.05.030(B).

Measure E does not apply to cities within Kern County such as Bakersfield, Taft, Wasco, and Delano, which continue to land apply biosolids – in some cases Class B biosolids – within their city limits. ER147-48(¶20), 169-70(¶12). As the District Court observed, over 60% of Kern voters reside in these cities. ER15-16 & n.7.

The Measure E campaign materials before these voters targeted out-of-County biosolids and attacked Plaintiffs, exploiting various anti-Los Angeles

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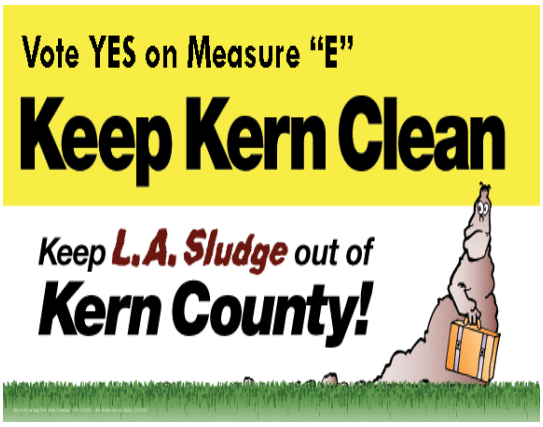
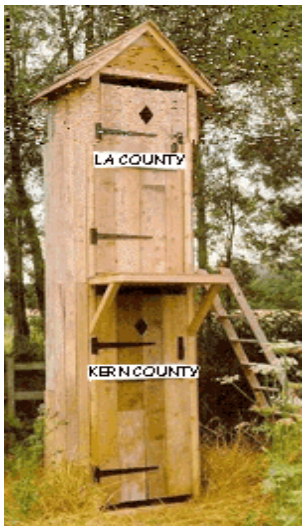
[5] Another land applier, USA Transport, had its land application permit revoked in 2006 before Measure E's ban became effective and for reasons unrelated to the ban, as it was violating rules prohibiting mixing biosolids with hazardous wastes. ER706(¶53); SER317-35.

slogans such as "Measure E will stop L.A. from dumping on Kern," "We will proclaim our independence from polluting Southern California and Los Angeles," and "[W]e've got a bully next door, flinging garbage over his fence into our yard." ER147(¶19); *see also* ER 16-17, SER115-16. "Keep Kern Clean," the political action committee that spearheaded the campaign, stated on its website: "By working together we can protect Kern County from becoming a dumping ground for other cities' and counties' waste problems."[6] Keep Kern Clean also posted on its website and disseminated the following crude caricatures directed at Plaintiffs:





6 *See* http://web.archive.org/web/20060602163831/http://keepkernclean.com/.

SER368.[7] Measure E targeted Los Angeles' biosolids, even though Kern itself ships chemical and petroleum wastes to Los Angeles. SER371 n.2. Measure E's proponents did not provide or rely upon data, analysis, or public hearings. ER594(¶24).

Plaintiffs were the only land appliers who would have been affected by Measure E's enforcement. ER147-48(¶20); SER349; *see* ER30-31 (District Court finding that "out-of-county interests are the only ones directly applying biosolids to land in the unincorporated areas, and therefore they will be the only ones to incur the significant transaction costs associated with the termination and relocation of their Kern County operations"); ER832-33.

Measure E's enforcement would have compelled Los Angeles and its co-Plaintiffs to divert more than 1,000 tons of biosolids daily from their long-operating farms in Kern to other sites in Arizona or elsewhere. ER358(¶¶33-34), 361(¶41), 594-95(¶25), 171-72(¶16-17), 149(¶25); SER124-25, 126-27(¶¶3-4, 6-7,

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[7] *See also* Steve Chawkins, *Sludge Ban Is Primed to Pass*, LOS ANGELES TIMES, May 2, 2006, at B1, *available at* LEXIS, Mega News File ("The initiative's website features a two-story outhouse labeled 'L.A. County' on top and 'Kern County' on the bottom."); Kerry Cavanaugh, *Green Acres Ain't the Place To Be*, THE DAILY NEWS OF LOS ANGELES, Feb. 19, 2006, at N1, *available at* LEXIS, Mega News File ("Los Angeles sanitation officials are portrayed as 'sludge peddlers.'").

9). Given the scarcity of viable land application sites in California (ER171(¶16), 358(¶34), 595(¶27)), OCSD already has to send some of its biosolids to Arizona. Appellants' Opening Brief ("AOB") at 9; ER177(¶6).

Because of this scarcity and limited landfill capacity, and Kern's size and leadership among California's agricultural counties, just the prospect of Measure E triggered uncertainty in the biosolids market – if enforced, Measure E would increase prices for land application and other biosolids management options and magnify the challenges facing many California sanitation agencies. ER585(¶3), 593(¶21), 595-96(¶¶27-29), 350(¶8), 357-62(¶31-45); SER126(¶¶6-7). If allowed to stand, Measure E would also likely spur other rural communities to enact similar bans, thereby exacerbating these problems. ER595(¶27), 171(¶16); SER127(¶10).

II. PROCEDURAL BACKGROUND

Plaintiffs' Complaint challenging Measure E alleged violations of the Commerce Clause, Equal Protection and the California police powers doctrine, and preemption by the Clean Water Act, California Integrated Waste Management Act and California Water Code. ER903-10. The District Court's ruling on Kern's motion to dismiss (ER846-872) is available at 2006 U.S. Dist. LEXIS 81417 (C.D. Cal. Oct. 24, 2006). The court's ruling issuing a preliminary injunction restraining Measure E's enforcement (ER822-45) is reported at 462 F. Supp. 2d 1105 (C.D.

Cal. 2006). The court's ruling on the parties' cross-motions for summary judgment (ER3-57), holding that Measure E violates the Commerce Clause and is preempted by the CIWMA, is reported at 509 F. Supp. 2d 865 (C.D. Cal. 2007). The court entered judgment under Rule 54(b) on September 5, 2007. ER1-2.

SUMMARY OF ARGUMENT

The United States Constitution vests in Congress authority over interstate commerce. Art. I, § 8, cl. 3. The "dormant" aspect of the Commerce Clause bars state and local authorities from adopting discriminatory or burdensome measures interfering with this federal prerogative. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996). Measure E's biosolids ban is illegal because biosolids are articles in interstate commerce and Measure E discriminates against and heavily burdens out-of-County biosolids and their movement in interstate commerce. Measure E is discriminatory in purpose and effect because the campaign for Measure E shows its discriminatory purpose and the ban's effects fall only on out-of-County biosolids and out-of County communities where these biosolids will have to be land applied. Under long-standing precedent, this discriminatory measure faces "a virtual per se rule of invalidity" subject to strict scrutiny, a test Kern makes little effort to, and cannot, meet. *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quotation marks omitted).

In invalidating Measure E, the District Court joined the long line of Supreme Court and Ninth Circuit cases enforcing the constitutional protections for free-flowing commerce in the face of local economic and political whims, fears, and biases. *See, e.g.*, *Conservation Force v. Manning*, 301 F.3d 985, 998-99 (9th Cir. 2002) ("The Commerce Clause . . . was included in the Constitution to prevent state governments from imposing burdens on unrepresented out-of-state interests merely to assuage the political will of the state's represented citizens.").

On appeal, Kern argues that this case does not meet the low bar to show "interstate commerce," but the uncontroverted evidence clearly shows impacts on the interstate biosolids and solid waste market. Kern further argues there is no discrimination because Measure E is facially neutral, imposes equal burdens on Kern, and does not benefit local interests at the expense of unrepresented outsiders. The District Court, however, properly looked behind Measure E's text and assessed the reality Measure E sought to create.

The Commerce Clause protects against "efforts by one [region] to isolate itself in the stream of interstate commerce from a problem shared by all." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623, 629 (1978) (invalidating ban on out-of-state waste going to in-state landfills). Excluding biosolids generated by densely populated regions that lack the capacity to manage them internally shifts the problem from Kern to other rural jurisdictions that would have

equal reason to adopt their own bans. Allowing Measure E and its burdens on interstate commerce to stand, including forcing Los Angeles and its co-Plaintiffs to pick up and move their biosolids operations from their long-operating farms in Kern to other sites in Arizona and elsewhere, would likely "excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). In contrast, affirming the ruling below and preserving the free flow of biosolids commerce benefits even Kern, which exports some of its own chemical and petroleum wastes to Los Angeles. *See* page 18; *see also Philadelphia*, 437 U.S. at 629 ("the Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now" from insular local measures by others); *United States v. Manning*, 434 F. Supp. 2d 988, 1012 (E.D. Wash. 2006) (invalidating statewide ballot initiative barring radioactive waste imports and noting that the enacting state sent its own wastes out-of-state).

Measure E is also preempted by the CIWMA. This state law requires local agencies such as Kern to promote recycling and to maximize the use of all feasible recycling options. Cal. Pub. Res. Code § 40051. The CIWMA's declared "purpose" is to promote recycling "to the maximum extent feasible." *Id.* § 40052. Here, it is undisputed that land application of biosolids is a feasible method of recycling that has been ongoing in Kern since at least 1994. Land application is

the primary method of recycling biosolids throughout California and nationwide. The historical impetus for land application in California was in fact the CIWMA's enactment. The District Court properly held that Measure E's prohibition of the primary method of recycling biosolids conflicts with the CIWMA's recycling mandate and is therefore preempted.

STANDARD OF REVIEW

"The district court's grant of summary judgment is reviewed *de novo*." *Qwest Commc'ns v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006).

ARGUMENT

I. MEASURE E VIOLATES THE DORMANT COMMERCE CLAUSE

Measure E's plainly discriminatory purpose and effects led the District Court to apply the Supreme Court's per se rule of invalidity. Kern identifies no reversible error in the District Court's reasoning or conclusions on the dormant Commerce Clause. This Court should affirm.[8]

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[8] The District Court did not need to decide whether Measure E's burdens are "clearly excessive" compared to its benefits. *Pike v. Bruce Church*, 397 U.S. 137 (1970). Should this Court reverse, the Commerce Clause claim, as Kern acknowledges (AOB at 36), should be remanded for application of the *Pike* balancing test.

A. Biosolids Fall Within The Broad Scope Of The Commerce Clause

To invoke the protections of the Commerce Clause, a party need only satisfy a low threshold to show that the challenged regulation has economic effects that are interstate in reach. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) ("In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one."); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 573 (1997) ("Even when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.") (citations and quotation marks omitted). The District Court easily found that threshold was met here.[9] This finding comports with the Supreme Court's categorical holding that "solid waste, even if it has no value, is an article of commerce." *Fort Gratiot Sanitary Landfill v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 359 (1992).

Kern asserts the Commerce Clause is inapplicable to Measure E because it is a county ordinance, not a state law, and because its impact fell only on biosolids generators within California. Neither point has merit.

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[9] The court also rejected Kern's argument, abandoned on appeal, that Congress expressly authorized local biosolids bans. ER26-28.

The Supreme Court has repeatedly ruled that county measures are no less subject to Commerce Clause scrutiny than state laws: "[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Id.* at 363; *see also BFI Med. Waste Sys. v. Whatcom County*, 983 F.2d 911, 913 (9th Cir. 1993) ("out-of-county waste bans are pro [sic] se unconstitutional").

Nor is a measurable, direct effect on interstate transactions required for a Commerce Clause claim. All that is necessary is that a local measure may interfere with the market for a product flowing in interstate commerce. *Gonzales*, 545 U.S. at 22 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."). The Supreme Court has even subjected to Commerce Clause analysis local laws regulating purely intrastate activities, where the national market could be affected. *See, e.g., id.*; *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). "[T]he critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

Measure E's interference with interstate commerce in biosolids is evident. If allowed to stand, Measure E would force Los Angeles and its co-

Plaintiffs to divert more than 1,000 tons of biosolids daily from their long-operating farms in Kern to Arizona or elsewhere. *See* pages 18-19. As Kern acknowledges, OCSD already has to send some of its biosolids out-of-state. *Id.*

More broadly, Measure E would increase prices and magnify the challenges facing many sanitation agencies, who have no choice but to generate and manage biosolids. *See* page 19. Due to the diminishing availability of land application sites and landfill capacity, just the prospect of Measure E has heightened uncertainty in the biosolids market. *Id.*

Measure E's broad impact becomes even more apparent when prospectively aggregated with similar bans elsewhere. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (court must consider not only "the consequences of the [ordinance] itself, but also . . . how the challenged [ordinance] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation"); *C & A Carbone*, 511 U.S. at 406 ("If the localities in [other] States impose the type of restriction on the movement of waste . . . the free movement of solid waste in the stream of commerce will be severely impaired."); *see also U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1072 (8th Cir. 2000) (aggregating potential effects of similar ordinances elsewhere). If upheld, Measure E would likely spur rural

communities elsewhere to pass similar bans (*see* page 19), thereby stifling biosolids commerce altogether.

Kern argues that Measure E's forced diversion of Southern California biosolids to Arizona would "benefit" interstate commerce. AOB at 20. But dictating that Southern California municipalities bear the added cost of shipping their biosolids greater distances places artificial and expensive barriers on interstate commerce, rather than providing benefits. The object of the Commerce Clause is not necessarily to increase the volume of interstate transactions, but rather to defeat impediments to the flow of interstate commerce caused by local protectionist biases. *See, e.g., H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 539 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer . . . will have free access to every market in the Nation . . . and no foreign state will by customs duties or regulations exclude them."); *Conservation Force*, 301 F.3d at 995-96 ("By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent.") (quoting *Camps*, 520 U.S. at 578).

The cases Kern cites for its "benefit" claim are readily distinguished. Neither *Ben Oehrleins v. Hennepin County*, 115 F.3d 1372, 1385-88 (8th Cir. 1997), *Nat'l Audubon Soc'y v. Davis*, 307 F.3d 835, 857-59 (9th Cir. 2002), nor *Reynolds v. Buchholzer*, 87 F.3d 827, 830-31 (6th Cir. 1996), involved

discrimination against outsiders. In *Ben Oehrleins*, a county ordinance imposed local burdens on local actors without impeding interstate waste shipments; in fact, the Court invalidated a provision applicable to unrepresented out-of-county interests, and remanded even the intrastate waste provisions for *Pike* balancing. California's ban on the sale of furs captured in-state in prohibited traps in *Nat'l Audubon Soc'y*, and the ban on in-state walleye fishing in *Reynolds*, both *expanded* the market for out-of-state products rather than *closing* access to local markets. In fact, the ban in *Nat'l Audubon Soc'y* specifically exempted out-of-state furs. Measure E, in contrast, does not create new opportunities in Kern for out-of-County enterprises.

In sum, Measure E impacts interstate commerce in biosolids and is subject to Commerce Clause scrutiny.[10]

B. Measure E Discriminates Against Plaintiffs And Interstate Commerce

The Supreme Court has long applied a "virtual per se rule of invalidity" against discriminatory local laws, whether the discrimination is found

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[10] Kern asserts Appellees lack standing because they do not themselves ship biosolids interstate. Kern acknowledges this argument is foreclosed because it was not raised below and foreshadows a request for *en banc* review. AOB at 37-38. In any event, Kern's assertion is defeated by its concession that OCSD ships biosolids to Arizona. *Id.* at 9.

in the law's purpose, effects, or both. Discrimination manifests itself in many ways, including favoring local interests or sheltering the locality from burdens sustained by interstate markets. Discriminatory measures can be sustained only upon a showing that there is no other means to advance a legitimate local need. *United Haulers Ass'n v. Oneida Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1793 (2007). Kern makes no such showing here.

1. Kern Voters Adopted Measure E To Stop Los Angeles Area Municipalities From Land Applying Their Biosolids

The Commerce Clause prohibits state or local measures that have the purpose of targeting, or that in effect target, interstate commerce. *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose . . . or discriminatory effect . . ") (citations omitted). The Supreme Court in *Bacchus* invalidated a Hawaii liquor pricing law based on evidence of legislative intent to advantage in-state interests at the expense of out-of-state liquor sellers. *Id.* A local law may also be illegal, regardless of purpose, if its effect is discriminatory. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977) (invalidating discriminatory labeling law "even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace"). Evidence of discriminatory intent provides a useful context for

understanding the effects. *See Nat'l Ass'n of Optometrists & Opticians v. Lockyer*, 463 F. Supp. 2d 1116, 1130-31 (E.D. Cal. 2006) (purpose evidence may "buttress the conclusion that the regulatory scheme is in fact an instance of economic protectionism").

Kern voters enacted Measure E to stop Los Angeles and other Southern California entities from land applying biosolids in the County. The campaign for Measure E demonstrated a fundamental animus towards out-of-County interests, using crude caricatures directly targeting Los Angeles and a rallying cry of "Keep L.A. Sludge out of Kern County!" *See* pages 17-18 & nn. 6-7.

The District Court appropriately considered these campaign materials as probative of the voters' intent to exclude outside interests. ER29 n.12; *see also Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982). These materials are particularly relevant here given courts' scrutiny of initiative measures, which are subject to the whim of the masses and lack the "more detailed and deliberate approach" normally associated with the legislative process. *Manning*, 434 F. Supp. 2d at 1014 (invalidating ballot initiative barring imports of radioactive waste). Federal courts have not hesitated to invalidate even statewide voter initiatives with broad popular support. *Id.*; *see also S.D. Farm Bureau v. Hazeltine*, 340 F.3d 583, 593-97 (8th Cir. 2003) (invalidating initiative restricting in-state farming by out-of-

state entities); *Jones v. Gale*, 470 F.3d 1261, 1270 (8th Cir. 2006) (invalidating initiative barring purchase of farm and ranch lands by out-of-state entities). As with these measures, the blunt and avowed purpose of excluding Southern California biosolids from Kern is sufficient reason to invalidate Measure E.

2. Measure E's Superficial Neutrality Cannot Mask Kern's Discrimination

Measure E's clear purpose and effects are not mitigated by its facially neutral terms. ER 918 § 8.05.040. An ordinance's crafted facial neutrality does not shield it from Commerce Clause scrutiny. Rather, the Court must look behind the text for evidence of more "ingenious" discrimination. *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 (1994). The Supreme Court has long held that "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Fort Gratiot*, 504 U.S. at 361-62 (quoting *Brimmer v. Rebman*, 138 U.S. 78, 82-83 (1891)). Here, the record demonstrates that Measure E, "in its practical operation," affects only out-of-County biosolids. *West Lynn Creamery*, 512 U.S. at 201; *see* pages 15-16 & n.5, 18.

Moreover, a full review of Measure E shows that it is not facially neutral. One of Measure E's express goals – to prevent a "loss of confidence in

agricultural products from Kern County" (ER918 § 8.05.010) – is unabashedly protectionist. This is undeniable evidence that Measure E was intended to shift to other jurisdictions whatever perceived detrimental effects land application may have. *See Oregon Waste Systems v. Dep't of Environmental Quality*, 511 U.S. 93, 98 (1994); *Maine v. Taylor*, 477 U.S. 131, 181 (1986) (out-of-state residents cannot be "forced to bear the brunt of the conservation program"); *Fulton*, 516 U.S. at 330-31 (noting that invalidating protectionist laws under the Commerce Clause "effectuates the Framers' purpose to prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole") (citations omitted); *Government Suppliers Consolidating Servs.* v. *Bayh*, 975 F.2d 1267, 1280-81 (7th Cir. 1992) (finding stated interest in "commercial reputation" unworthy of deference). As the District Court explained, "there is little question that Measure E was enacted in part to benefit in-county economic interests" and thus "because of – rather than despite – its impacts on articles of commerce flowing from" outside Kern County. ER832.

3. Measure E Discriminates In Effect Against Interstate Commerce

Even without Measure E's blatant anti-Los Angeles purpose, the measure is unlawful because it affects only out-of-County biosolids. Plaintiffs' operations applying biosolids generated in Southern California would be

terminated, while biosolids generated in-County would be unaffected. *See* pages 15-16 & n.5, 18. Further, Kern's agricultural interests would be promoted by shifting elsewhere land application's perceived burdens. The Supreme Court recently cautioned that skepticism is appropriate of local efforts to "shift the costs of regulation" to outside interests with no say in the local political process and to sidestep "those political restraints normally exerted when interests within the state are affected." *United Haulers*, 127 S. Ct. at 1797.[11]

Kern contends that measures targeting outsiders are authorized by *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), which upheld a Maryland statute banning gasoline producers and refiners from simultaneously operating retail service stations in the state. That statute, like Measure E, harmed outsiders exclusively. But the similarity ends there. In *Exxon*, there were no in-state producers or refiners. The affected entities were not identified by the fact they were outsiders, but by the nature of their companies. Outsider gasoline dealers that were not also producers and refiners were free to continue operating

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[11] On May 19, 2008, the Supreme Court issued another dormant Commerce Clause ruling. *Dep't of Revenue of Kentucky v. Davis*, No. 06-666, 553 U.S.__ (2008). The Court upheld an in-state bond tax exemption because of the historic deference toward local financing mechanisms and because the state acted not as a regulator but as a market participant, entitling it to greater leeway in favoring its own

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Maryland service stations, and overall the flow of gasoline into Maryland was unimpeded. *Id.* at 126, n.15. The Supreme Court explained that the Maryland law "does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce." *Id.* at 126. Measure E in practical effect exhibits all of these flaws.

Measure E targeted Plaintiffs' biosolids based on their origin outside Kern, while local biosolids generators escaped any impacts. Here, as in *Bayh*, which distinguished *Exxon* and invalidated a waste hauling ban, "those engaged in intra[county] waste disposal have not been forced to alter their business practices in order to comply with the statute . . . while those engaged in hauling out-of-[county] waste will have to change drastically their method of operation . . . ." *Bayh*, 975 F.2d at 1279. If enforced, Measure E would end the flow of biosolids into Kern, diverting them to Arizona or elsewhere – a clear impact on an interstate market that was absent in *Exxon*. *See Exxon*, 437 U.S. at 127-28; *Kleenwell Biohazard Waste & Gen. Ecology Consultants v. Nelson*, 48 F.3d 391, 397 (9th

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interests. Slip Op. at **13, 18-19. Under Measure E, Kern is not a market

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Cir. 1995) (explaining *Exxon*'s holding that burdens only on individual firms but not on the broader market do not, alone, show discrimination against interstate commerce).

Kern denies the existence of discrimination on several grounds. First, Kern asserts the Court must disregard that Measure E permitted Kern County cities to continue their own land application activities. Second, it argues that Measure E's alleged current, and potential future, impacts on Kern's own biosolids activities dispel any discrimination. Finally, it contends that Measure E does not favor local interests over outsiders. Each of these arguments withers under scrutiny.

Measure E's proponents chose the vehicle of a county initiative to implement their campaign to stop land application by Los Angeles and its co-Plaintiffs. A county ordinance typically cannot govern the actions of incorporated cities in the county, but county voters in those cities are not similarly powerless. Over 60 percent of Kern's voters reside in cities that remain free to land apply biosolids within their borders. ER15-16 & n.7. In choosing to adopt Measure E, while taking no action against land application in their own cities, Kern voters undeniably discriminated against Southern California biosolids.

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participant but acts as a regulator of recycling activities on private farmland.

Kern itself ceased land applying biosolids "several years" before Measure E's enactment and contracted with San Joaquin Composting for managing its biosolids.[12] There is no evidence that SJC ever land applied Kern-generated biosolids in unincorporated County areas, or that it was doing so when Measure E was enacted. *See* pages 15-16 & n.5, 18.[13] As Kern has admitted, Plaintiffs' are the only land appliers who would be affected by Measure E. SER349.

Kern argues that Measure E prevents it from resuming its former land application activities, and hypothesizes that Measure E may one day impair its ability to send biosolids to SJC. AOB at 23-25. Kern reasons that because Measure E prohibits using compost derived from biosolids, SJC must sell the compost it produces from Kern's biosolids for use outside Kern's unincorporated areas; if Measure E reduced SJC's ability to sell its compost, it might respond by accepting fewer biosolids from Kern. AOB at 12-13, 24. But no record evidence

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[12] Another land applier, USA Transport, had its land application permit revoked before Measure E's ban became effective and for reasons wholly unrelated to the ban. *See* page 16 n.5.

[13] Kern asserts the Court must infer that SJC was land applying in Kern's unincorporated areas when Measure E was enacted, but the evidence Kern cites shows merely that between 2003 and 2006 SJC composted some CSD No. 2 biosolids and land applied them somewhere "in Kern County and other counties." AOB at 11 (citing ER644(¶5)). The suggestion that SJC was land applying either CSD No. 2 or Kern-generated biosolids *in unincorporated County areas* is pure speculation.

permits an assessment of these hypothetical future impacts on Kern. More importantly, no case supports the proposition that present discrimination is overcome by possible future impacts on the immediately advantaged locality. The cases Kern cites – *Proctor & Gamble v. City of Chicago*, 509 F.2d 69, 81 (7th Cir. 1975), and *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997) – do not address future impacts on the state or local entity enacting the challenged regulation.

Nor are Measure E's discriminatory effects ameliorated by the fact that the Plaintiffs who reside in Kern would suffer from Measure E. A ban on outsider products is no less discriminatory because it harms local handlers of the banned product.

Kern asserts there is no unlawful discrimination because Measure E does not advantage local competitors over outsiders. But a Commerce Clause violation does not depend on benefits to a local entity that are of the same kind or degree as the burdens imposed on outsiders. *See, e.g., Granholm*, 544 U.S. at 473-76 (finding winery laws discriminatory without requiring evidence that in-state wineries gain from out-of-state wineries' resulting lost sales). Even looking at competition in the most literal sense, however, Measure E clearly favors locals over outsiders.

First, to the extent Measure E limits perceived adverse impacts from land application of biosolids, Kern voters have implicitly stated that they are

willing to tolerate the nature and volume of land application conducted by Kern County cities, but nothing more. The Plaintiff municipalities and these cities are therefore in direct competition for land application capacity in Kern, and the costs of the Kern voters' decision to limit this capacity is borne only by Plaintiffs. As the District Court observed, Kern's incorporated cities lack sufficient additional land application capacity, since Plaintiffs' only alternatives to Measure E are to relocate to Arizona or find other alternatives, not to land apply in Bakersfield or other Kern cities. ER32-33; *see* pages 18-19. Measure E's removal of a large area of a leading agricultural county from land application would constrain the market and increase costs for land application and other biosolids management options. *See* page 19. Kern voters insulated their own cities' continued land application and forced only out-of-County entities to incur the costs of "procuring alternate means of disposal in an increasingly competitive marketplace." ER833.

Measure E also illegally seeks to protect Kern's agricultural resources at the expense of out-of-County interests. One of the ban's stated purposes is to insulate Kern agribusiness from the alleged stigma of land application. ER918 § 8.05.010. Measure E seeks to advantage Kern agribusiness by providing biosolids-free agriculture, while agricultural interests in other communities, where Plaintiffs would be forced send their biosolids, would bear the alleged burden that Plaintiffs' biosolids represent. The Supreme Court has repeatedly cautioned that

"a state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders." *Oregon Waste Systems,* 511 U.S. at 107; *Hughes v. Oklahoma*, 441 U.S. 332, 335 n.15 (1979) ("States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce.").

Through Measure E, Kern unconstitutionally sought to "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Philadelphia,* 437 U.S. at 628. Measure E is clearly discriminatory in effect.

4. Local Waste Management Decisions Are Not Immune From Commerce Clause Scrutiny

That waste disposal may be characterized as a traditional local function does not authorize discrimination or exempt local regulations from Commerce Clause scrutiny. *See, e.g., Minn. v. Clover Leaf Creamery*, 449 U.S. 456, 471 (1981) ("When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause."). Indeed, the cases Kern cites show that discriminatory solid waste measures are routinely invalidated. *See Fort Gratiot,* 504 U.S. at 367; *Philadelphia,* 437 U.S. at 629; *Chemical Waste Mgmt. v. Hunt,* 504 U.S. 334, 344-

46 (1992). "[E]venhanded, nondiscriminatory limitation[s] . . . that do[] not discriminate on the basis of the waste's origin," such as universally applicable volume or flow requirements, could be sustained. *Chambers Medical Technologies v. Bryant*, 52 F.3d 1252, 1258 (4th Cir. 1995). But those characteristics do not describe Measure E, a complete ban that in purpose and effect applies only to outsiders. *See, e.g., Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994) (applying Commerce Clause scrutiny to wildlife ownership and importation ban, and upholding ban only after finding it did not "result in the citizens of Washington receiving benefits that are denied to others" or excessively burden interstate commerce).

5. Health And Safety Measures Do Not Escape Commerce Clause Scrutiny

Even if Measure E were not just an attack on Southern California biosolids and were, as it professes to be, an effort to protect "public health and the environment," ER918 § 8.05.010, its discriminatory nature would still require its invalidation. It is well-established that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981); *see also Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951) ("A different view, that the ordinance is valid simply because it professes to be a health measure, would mean

that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.").

Here, the District Court justifiably looked beyond Measure E's stated health and safety purpose. First, the District Court observed that the suggestion that Measure E was a neutral health and safety measure was implausible given that 60% of the voters who enacted Measure E resided in cities where land application of biosolids (in some cases, Class B biosolids) continues unabated in much closer proximity to residents. ER15-16, 30-32. Second, the record demonstrates that Plaintiffs' operations pose negligible environmental and health risks. *See* pages 3, 13-14.[14] Third, even if Kern had legitimate concerns, they would not constitute a license to discriminate and impose all of the costs of regulation on unrepresented out-of-County interests. *United Haulers*, 127 S. Ct. at 1797. Finally, as discussed above, Measure E expressly purports to promote local agribusiness. *See Clover Leaf Creamery*, 449 U.S. at 471 ("If a state law purporting to promote environmental purposes is in reality simple economic protectionism, we have

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[14] One declarant attributes flies and odors to operations at Green Acres, but such conditions, if they exist, would not distinguish Green Acres from other, nearby agricultural operations and do not rise to the level of a health or environmental

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applied a virtually per se rule of invalidity.") (citing *Philadelphia*, 437 U.S. at 624) (quotation marks omitted).

C. Kern Failed To Show The Absence Of Any Less Discriminatory Alternative To Measure E

Because Measure E is discriminatory, it is subject to the "strictest scrutiny" and must be invalidated absent "a showing that [Kern] has no other means to advance a legitimate local purpose." *United Haulers*, 127 S. Ct. at 1793; *Oregon Waste Systems*, 511 U.S. at 101; *C & A Carbone*, 511 U.S. at 392 (noting that this "rigorous scrutiny" is satisfied only in a "narrow class of cases"). Kern made no effort to carry this burden below and its arguments on appeal are inadequate to the task.

Kern's main justification for its ban is that the uncertainties about the environmental and health effects of land application are so great that only a total ban can address them. Kern argues that no quality, location, or volume-based restrictions unrelated to the biosolids' origin are adequate to deal with these concerns. AOB at 35-36.

This argument suffers from two principal flaws. First, Kern voters outlawed only Plaintiffs' operations in unincorporated County areas. But Kern

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threat. The District Court appropriately found that this one piece of evidence did

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cannot justify a ban on some land application operations but not others, especially others closer to population centers that use lower-quality biosolids. *See Hazeltine*, 340 F.3d at 595 ("A low probability of effectiveness can be indirect evidence of discriminatory purpose.").

Second, Kern's argument lacks factual support. *Maine v. Taylor*, 477 U.S. at 148, which Kern cites, upheld a ban on importing out-of-state live baitfish, but only after a full evidentiary hearing addressing the harm to Maine fisheries and the absence of reasonable alternative measures. *Id.* at 140-43. The record here fails to show that banning Plaintiffs' biosolids operations was the only means for Kern voters to address any legitimate concerns they may have about land application. Instead, the ban was the voters' simplest means of accomplishing their goal to "Keep L.A. Sludge out of Kern County!" *See* pages 17-18 & nn. 6-7. The Commerce Clause does not permit this result. *See Hazeltine*, 340 F.3d at 596 (finding intent "to restrict in-state farming by out-of-state corporations and syndicates in order to protect perceived local interests . . . bespeaks of 'the economic protectionism that the Commerce Clause prohibits.'") (quoting *West Lynn Creamery*, 512 U.S. at 205).

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not raise an issue of fact that could justify Measure E's discrimination.

II. MEASURE E IS PREEMPTED BY THE CALIFORNIA INTEGRATED WASTE MANAGEMENT ACT

The District Court correctly held that Measure E is also invalid because it is preempted by the California Integrated Waste Management Act ("CIWMA"). This Court should affirm.

The CIWMA establishes a comprehensive scheme addressing the handling and disposal of solid waste, which is defined to include biosolids. The statute's paramount goal is the "reduction, recycling, or reuse of solid waste generated in the state," and the statute expressly requires local agencies such as Kern to "promote" the recycling of solid waste. Cal. Pub. Res. Code §§ 40000(e), 40051(a). Measure E conflicts with the CIWMA by prohibiting the recycling of biosolids by Plaintiffs. It is preempted, and Kern's arguments to the contrary lack merit.

A. The CIWMA Mandates Recycling Of Biosolids

The CIWMA "governs all solid waste activity in California." 12 Witkin, *Summary of California Law* (10th ed. 2005 & 2006 Supp.), Real Property § 908, at p. 1096. "Solid waste" includes biosolids. Cal. Pub. Res. Code § 40191.

The CIWMA's "goals were to reduce, recycle and reuse solid waste to the extent possible." *Valley Vista Servs.*, 118 Cal. App. 4th at 886; Cal. Pub. Res. Code § 40052. To achieve these goals, local agencies were required to divert from

landfills 25% of the solid waste produced in their jurisdictions by 1995, and 50% by 2000, through source reduction, recycling and composting. Cal. Pub. Res. Code § 41780.

The CIWMA enacts a state policy that promotes recycling "to the maximum extent feasible": "The *purpose* of this division is to reduce, *recycle*, and reuse solid waste generated in the state *to the maximum extent feasible* in an efficient and cost-effective manner . . . ." *Id.* § 40052 (emphasis added).

The CIWMA directs that local agencies such as Kern "*shall* do both of the following:"

> "(a) *Promote* the following waste management practices in order of priority:
>
> (1) Source reduction.
>
> (2) *Recycling and composting*.
>
> (3) Environmentally safe transformation and environmentally safe land disposal, at the discretion of the city or county.
>
> (b) *Maximize the use of all feasible source reduction, recycling, and composting options* in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal."

Id. § 40051 (emphasis added).

The mandate to promote and maximize recycling is not optional. The statute gives local agencies "discretion" on whether to use *non*-beneficial methods

of disposal – *i.e.*, "transformation" (which includes incineration) and "land disposal." *Id.* § 40051(a)(3); *City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 278 (1993). But local agencies *lack* discretion for recycling, which they *must* promote. Cal. Pub. Res. Code § 40051(a)(2).

Local agencies also lack the discretion under the CIWMA to adopt rules that conflict with the statute. Local land use regulations are valid *only* if they "*do not conflict with* or impose lesser requirements than the policies, standards, and requirements of [the CIWMA]. . . ." *Id.* § 40053 (emphasis added).

B. Kern's Ban Conflicts With The CIWMA's Recycling Mandate

Land application undisputedly constitutes recycling. The CIWMA defines recycling as "the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and returning them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace." *Id.* § 40180.

Plaintiffs' beneficial reuse of biosolids meets this definition. Plaintiffs reconstitute solid wastewater residuals – which would otherwise become solid waste (*id.* § 40191) – into biosolids, which are returned to the "economic mainstream" and "used in the marketplace" as a fertilizer and soil conditioner. *See*

pages 2, 11-12, 14-15. EPA specifically refers to land application as recycling, since biosolids are a "valuable, recyclable resource," and the "[b]eneficial use of biosolids reclaims a wastewater residual, converting it into a resource that is recycled to land." ER288(¶¶11-12).

It is also undisputed that in California and nationwide, land application is not only the most common method of recycling biosolids, it is more common than all other biosolids management options combined. *See* pages 2, 8 (60% of the nation's biosolids are land applied). Land application is California's "primary management tool" for biosolids, and 69% of California's biosolids are land applied in one form or another. ER591-93(¶¶19-20). This is a direct result of the CIWMA, which "caused sewage sludge to be diverted from disposal in landfills in favor of recycling it as a fertilizer applied to agricultural land." *CSD No. 2*, 127 Cal. App. 4th at 1567.

Measure E, however, prohibits this recycling. Measure E defines "biosolids" and "land apply" so broadly that it prohibits virtually all forms of biosolids recycling, including any use of composted or pelletized biosolids, and any placement of biosolids onto land, injection beneath the land surface or incorporation into soil. ER918-19 §§ 8.05.030(B) & (D), 8.05.040(A).

Kern makes the semantic argument that "Measure E does not ban composting or pelletization, as long as the resulting compost or pellets are not

applied within the County." AOB at 51. In other words, the compost or pellets cannot actually be *recycled* in unincorporated Kern, since any use of them would constitute prohibited "land application." ER919 § 8.05.030(D). But the CIWMA's self-declared "purpose" is "to reduce, *recycle, and reuse* solid waste generated in the state *to the maximum feasible*," and the act therefore requires local agencies such as Kern to "*maximize*" the use of all feasible recycling options. Cal. Pub. Res. Code §§ 40051(b), 40052 (emphasis added). In turn, the CIWMA defines recycling as reconstituting materials that would otherwise become solid waste into new products "to be *used* in the marketplace." *Id.* § 40180 (emphasis added). The product's beneficial *use* is the essential part of recycling under the CIWMA.

Yet, Measure E *bans* land application, the most common and feasible option for using and recycling biosolids. *See* pages 2, 8. Kern cannot evade Measure E's clear conflict with the CIWMA.

C. Measure E Is Preempted By The CIWMA

Local legislation such as Measure E that conflicts with the purpose of a state law is preempted and void. Under California law, "[l]ocal legislation in conflict with general law is void." *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 747 (1994) (citations and quotation marks omitted). "[L]ocal legislation is contradictory to general law when it is inimical thereto," *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 898 (1993) (citation and quotation marks

omitted), such as when it "would frustrate the declared policies and purposes" of state law, *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591, 597 (1984) (citation and quotation marks omitted); *see also Int'l Brotherhood of Elec. Workers v. City of Gridley*, 34 Cal. 3d 191, 201-02 (1983) (preempting local ordinance that interfered with state-law policies and purposes).

The California Supreme Court has stated that "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation *cannot be used to completely ban the activity or otherwise frustrate the statute's purpose*." *Great Western Shows v. County of Los Angeles*, 27 Cal. 4th 853, 868 (2002) (emphasis added) (citing *Blue Circle Cement v. Bd. of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994)). That is precisely what Measure E attempts to do by banning what the CIWMA requires and promotes.

Kern takes issue with the California Supreme Court's statement in *Great Western* regarding conflict preemption, asserting the statement is based on federal law and has never been adopted as a state-law preemption standard. AOB at 50-51. But the California Supreme Court in *Great Western* specifically articulated and applied this standard in the context of a *state-law* preemption claim involving a county ordinance prohibiting gun sales on county property. *Great Western* found there was no preemption – not because the standard it enunciated

was a "federal" one that did not apply – but because: (a) there was no evidence in the state gun show statutes indicating a legislative purpose of promoting or encouraging gun shows, and (b) the county was not banning all gun shows within its jurisdiction, but merely disallowing gun shows on county-owned property. 27 Cal. 4th at 868. Here, by contrast, the CIWMA expresses a clear purpose of promoting recycling of solid wastes, and Measure E is a complete ban on land application – the most common and feasible biosolids recycling option – within Kern's jurisdiction.

Kern's attempt to narrow the grounds for preemption is without support. According to Kern, a local law must actually mandate what state law forbids, or forbid what state law mandates – such that it is literally impossible to comply with both laws – before the local law is preempted. AOB at 49; *see id.* at 50 ("Merely prohibiting what state law *promotes*, rather than *commands*, is not enough . . ."") (original emphasis). That is wrong and would not help Kern even if it were the law.

First, Measure E does prohibit what state law requires. The CIWMA requires that Kern "shall . . . [p]romote" recycling and shall "[m]aximize the use of all feasible" recycling options. Cal. Pub. Res. Code § 40051. Measure E does the opposite, by banning California's primary management tool for recycling biosolids.

Measure E also more broadly frustrates the CIWMA's stated purpose: "to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible." *Id*. § 40052. "If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature." *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 911 (2008).

A local law is preempted when it is "inimical to the important *purposes* of the" state law, even if it is possible to comply with both. *Action Apartment Ass'n v. City of Santa Monica*, 41 Cal. 4th 1232, 1243 (2007) (emphasis added). There, the California Supreme Court invalidated – on conflict preemption grounds – a local ordinance prohibiting a landlord from bringing any action to recover possession of a rental housing unit based upon facts which the landlord has no reasonable cause to believe to be true. *Id*. at 1243. The ordinance did not prohibit anything commanded by state law. No state law commands landlords to file factually baseless unlawful detainer actions.

Rather, the Court invalidated the ordinance because it undermined the "purpose[]" of the state-law "litigation privilege," which is to allow "freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." *Id*. (citation omitted). The Court explained that the ordinance "would

have a chilling effect on landlords pursuing evictions through the courts." *Id*. at 1244.

It was the *dissent* that made the argument Kern makes here. Justice Corrigan argued that the ordinance did not conflict with the state litigation privilege, stating: "It is not 'inimical' to the privilege in the relevant sense; it 'does not prohibit what the statute commands or command what it prohibits.'" *Id.* at 1253 (Corrigan, J., dissenting) (citation omitted). But the majority rejected this view because it "misconstrues . . . the nature of preemption." *Id*. at 1250 n.5.

Nor is *Action Apartment Association* unusual. California courts have long rejected the notion that local laws may frustrate the declared purposes of state law. *See, e.g., Seal Beach Police Officers Ass'n*, 36 Cal. 3d at 597 ("'Although the Legislature did not intend to preempt all aspects of labor relations in the public sector, we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the [state] Act.'") (quoting *Huntington Beach Police Officers' Ass'n v. City of Huntington Beach*, 58 Cal. App. 3d 491, 501-02 (1976)).

This tenet remains true for local land use and public health regulations, notwithstanding Kern's contrary arguments. AOB at 39-40. California courts invalidate such local regulations when they conflict with state-law purposes, even if the regulations do not literally command what state law

forbids or forbid what state law commands. *See, e.g., Water Quality Ass'n v. County of Santa Barbara*, 44 Cal. App. 4th 732, 739-49 (1996) (municipal ordinances setting minimum salt efficiency ratings for water softeners that were higher than the minimum required by state law were preempted because they undermined the state law's purpose of making available throughout California water that complied with minimum state requirements); *L.A. Lincoln Place Investors, Ltd. v. City of Los Angeles*, 54 Cal. App. 4th 53, 64 (1997) (ordinance limiting the use of property when a landlord invokes the Ellis Act was preempted because its practical effect was "to impose 'a prohibitive price on the exercise of the [landlord's] right' under the Ellis Act") (citation omitted).

There are no cases holding that California localities may enact laws that undermine state policy. Kern's extensive reliance on *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139 (2006), is misplaced. There, the California Supreme Court rejected a conflict preemption challenge to a local zoning ordinance regulating timber harvesting. The Court found that the state forestry laws "generally encourage 'maximum sustained production of high-quality timber products . . . while giving consideration to' competing values." *Id*. at 1161 (quoting the forestry law). While the plaintiffs were concerned that local zoning could be used to prohibit timber harvesting altogether, the Court found that the ordinance "does not have that effect, nor does it appear that any county has

attempted such a result." *Id*. at 1160-61. To the contrary, the Court held that the ordinance gave appropriate consideration to the "competing values" specified in the state law, and was not a ban on anything encouraged by state law. *Id*. at 1161 ("To require that commercial timber harvesting occur on land in a 'timberland production' or other specified zone is no more a ban on timber harvesting than a regulation requiring that industrial land uses occur on land zoned 'industrial' is a ban on factories.").

Measure E, by contrast, conflicts with the CIWMA's primary purpose – to promote recycling "to the maximum extent feasible." Cal. Pub. Res. Code § 40052. The District Court was right that "Measure E's total ban on a major method of recycling – with only a *de minimis* exemption for residential fertilizer products – clearly frustrates the CIWMA's purpose." ER49. Measure E is preempted.

D. Kern's Arguments Against Preemption Lack Merit

Kern's various arguments against the preemption of Measure E lack merit. Kern attempts to justify overriding the CIWMA's recycling mandates by strained interpretations of the act's subsidiary provisions. The District Court correctly rejected Kern's arguments, which fare no better on appeal.

1. The Garbage Collection Exemption Does Not Empower Kern To Override The CIWMA's Recycling Mandate

Kern's principal claim is that Measure E is saved by the garbage collection exception in California Public Resources Code Section 40059(a). Kern is wrong. Section 40059(a) preserves local power over the grant of franchises for garbage collection and has nothing to do with Measure E. It states:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:
>
> > (1) Aspects of solid waste handling which are of local concern, including, but not limited to, *frequency of collection*, *means of collection* and *transportation*, *level of services*, *charges and fees*, and *nature, location, and extent of providing solid waste handling services*.
> >
> > (2) Whether the services are to be provided by means of *nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding*, or if, in the opinion of its governing body, the public health, safety, and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding. The authority to provide solid waste handling services may be granted under terms and conditions prescribed by the governing body of the local governmental agency by resolution or ordinance.
>
> (b) Nothing in this division modifies or abrogates in any manner either of the following:

> (1) *Any franchise previously granted* or extended by any county or other local governmental agency.
>
> (2) Any contract, license, or any permit *to collect solid waste* previously granted or extended by a city, county, or a city and county.

Cal. Pub. Res. Code § 40059 (emphasis added). Subsection (a)(1)'s reference to "solid waste handling services" means "the collection, transportation, storage, transfer, or processing of solid wastes." *Id.* § 40195.

All cases interpreting Section 40059 confirm that it "specifically preserves the [local] power over garbage collection." *Rodeo Sanitary Dist. v. Bd. of Supervisors*, 71 Cal. App. 4th 1443, 1451 (1999); *see also Valley Vista Servs.*, 118 Cal. App. 4th at 890-91 (surveying legislative history showing that Section 40059 concerns garbage collection franchises); *Waste Res. Techs. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 302, 308-09 (1994) (Section 40059 preserved city's power "to grant an exclusive refuse collection permit"); *City of Alhambra v. P.J.B. Disposal Co.*, 61 Cal. App. 4th 136, 138-41 (1998) (Section 40059(a) allowed city to issue exclusive trash hauling franchise).

Kern argues that although no case supports its broad view that Section 40059 insulates Measure E from preemption, somehow the statute should be read that way. AOB at 43-44. But the statutory text defeats this claim. Section 40059(a) refers to the "frequency of collection," the "means of collection," the "transportation," "level of services, "charges and fees," and "nature, location, and

extent" of providing solid waste handling services. Those terms are all comfortably read as referring to garbage collection – *i.e.*, how often garbage gets picked up; how much and what sorts of refuse are collected; what types of trucks, dumpsters and containers are used; and how much residents have to pay. *See generally Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1159-60 (1991) (under California law, when a statute lists specific categories of items, more general words will be construed to apply only to things of the same nature as the specific categories listed).

Section 40059(a)(2) confirms this reading. It states that localities can determine "[w]hether *the services*" – those just referenced – are provided by "nonexclusive franchise, contract, license, permit . . . either with or without competitive bidding." Cal. Pub. Res. Code § 40059(a)(2) (emphasis added). This language makes perfect sense in the context of municipal contracts with private garbage collectors, where franchising and competitive bidding issues commonly arise. Kern overreaches in asserting that Section 40059(a) is a broad grant of legislative authority to ban major methods for recycling solid wastes such as biosolids. What does Measure E or land application at Plaintiffs' farms have to do with "franchise[s]" or "competitive bidding"?

Kern notes that the definition of "solid waste handling services" includes "processing" solid waste, and that "processing" includes "recycling." *Id.*

§§ 40195, 40172. That is true. Garbage collectors also pick up recycling. All of the garbage collection matters in Section 40059(a) apply equally to recycling collection; as the California Supreme Court explained, "solid waste handling includes recycling – of solid waste." *Waste Mgmt. of the Desert v. Palm Springs Recycling Ctr.*, 7 Cal. 4th 478, 488 (1994). Like all cases interpreting Section 40059(a), *Waste Management* involved a garbage collection franchise. *Id*. at 481. The Court's holding was simply that Section 40059(a) covered the collection of recycling, not just the collection of, literally, garbage. *Id*. at 488.

Section 40059(b) further confirms that Section 40059(a) applies only to garbage collection services. Section 40059(b) provides that nothing in Section 40059(a) modifies or abrogates "[a]ny franchise previously granted" or "any contract, license, or any permit to collect solid waste previously granted or extended . . . ." Cal. Pub. Res. Code § 40059(b). Subsection (b) was therefore designed to protect existing garbage collection franchisees and contract holders from the municipality's authority under subsection (a) over garbage collection services. That subsection (b) protected existing franchises and contracts "to collect

solid waste" reinforces the reading that the subject matter of subjection (a) is indeed the collection of solid waste.[15]

Finally, Kern's broad reading of Section 40059(a) would render key provisions of the CIWMA superfluous. The statute's very "purpose" is "to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible." *Id.* § 40052. The statute therefore requires that Kern "shall . . . [p]romote" recycling. *Id.* § 40051(a)(2). And local regulations are valid only if they "do not conflict with" the CIWMA's "polices, standards and requirements." *Id.* § 40053. If Kern is correct that Section 40059(a) saves from preemption an outright ban on the primary method of biosolids recycling in California, then the purposes, policies and requirements set out in Sections 40051, 40052 and 40053 would be a dead letter. That cannot be the law, and it is not. *See, e.g., AT&T v. Cent. Office Tel.*, 524 U.S. 214, 228 (1998) (savings clause must be construed reasonably because "the act cannot be held to destroy itself") (citation and quotation marks omitted).

Section 40059(a) does not save Measure E. Measure E does not establish a franchise or a fee for garbage collection, specify the manner or

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[15] Other references to "solid waste handling services" in the CIWMA show that the term refers to garbage collection. *See e.g.*, Cal. Pub. Res. Code §§ 49520-

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frequency of garbage collection, or relate to anything else addressed in Section 40059(a).

2. Kern Cannot Use Its Police Powers To Override The CIWMA's Recycling Mandate

Kern next claims that the CIWMA's recycling mandate in Section 40051 does not apply to Measure E, since the initiative was an exercise of Kern's police power, not an action "implementing" the CIWMA. AOB at 48, 52. That argument ignores Section 40052, which enacts a stand-alone policy in favor of recycling, without the "implementing" language Kern relies on in Section 40051. It also ignores the fact that the CIWMA broadly governs all solid waste management activity in California. *See* page 44. Any local ordinance regulating solid waste management "implements" the CIWMA. Measure E directly impedes the CIWMA's implementation, and its mandate to reduce the amount of waste sent to landfills, by carving out a class of waste – sewage sludge – that cannot be recycled within Kern's jurisdiction.

Kern's assertion that when it passed Measure E it was not implementing the CIWMA – but was instead acting under article XI, section 7 of the state constitution – is no response. "'Under article XI, section 7 of the

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24, 49501, 49510.

California Constitution, [a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict* with general [state] laws.'" *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1067 (2007) (quoting *Sherwin-Williams Co.*, 4 Cal. 4th at 897) (emphasis added). "'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.'" *Id*. (quoting same). Kern may not purport to use its police powers to countermand the recycling mandate imposed by state law. Indeed, that is the essence of conflict preemption. *See Fiscal*, 158 Cal. App. 4th at 903, 911.

3. Kern's Ban Targets The Primary Means Of Recycling Biosolids In California And Cannot Be Characterized As A Minor Infringement On Recycling

Kern also contends that even if there is a policy in the CIWMA to promote and maximize recycling, which there is, Measure E does not conflict with that policy. AOB at 58-60. Again, Kern is wrong.

The undisputed record evidence shows that Measure E conflicts with the CIWMA's recycling mandate. Specifically: (1) the majority of all biosolids nationwide are land applied; (2) 69% of California's biosolids are land applied in one form or another; (3) the CIWMA directly caused the diversion of California's biosolids from landfills to beneficial reuse through land application; (4) land application in Kern is "feasible" within the meaning of the CIWMA, as it has been

ongoing at Plaintiffs' farms for years in an environmentally safe manner; and (5) Measure E purports to ban land application virtually across the board. *See* pages 2, 7, 11, 13-16. These facts establish a significant conflict, not merely a technical or minor one.

Kern argues that "Measure E applies to only one kind of solid waste – sewage sludge. It does not affect, much less ban, recycling anything else." AOB at 51. But the CIWMA requires Kern to maximize "all" feasible recycling options, with the goal of recycling solid wastes "to the maximum extent feasible." Cal. Pub. Res. Code §§ 40051(b), 40052. A prohibition on *the most feasible* method of recycling biosolids – which wastewater agencies have no choice but to generate and manage on a constant basis – plainly conflicts with the CIWMA's requirements, even if it stops short of banning *all* possible methods of recycling *everything*.[16]

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[16] On appeal, Kern abandons the claim that Measure E's *de minimis* retail sales exception saves it from preemption. That exception applies only to "biosolid products that are in a bag or container packaged for routine retail sales through regular retail outlets which are primarily used for residential purposes in limited quantities." ER918-19 § 8.05.030(B). This extremely restrictive exception does not comport with the CIWMA's broad directives to "[p]romote" and "[m]aximize" recycling. Cal. Pub. Res. Code § 40051.

4. The Out-Of-County Origin Of Plaintiffs' Biosolids Does Not Save Measure E From Preemption

Kern tries to blur the distinction between the Commerce Clause and CIWMA, asserting the CIWMA does not give local agencies a right to "import" their biosolids into neighboring jurisdictions. AOB at 52-54. This is a red herring.

That Measure E was aimed at out-of-County biosolids is one reason why it violates the Commerce Clause, but it has nothing to do with the CIWMA. Measure E is preempted by the CIWMA because it broadly prohibits recycling of biosolids within Kern's jurisdiction. For purposes of the CIWMA, it does not matter where the biosolids come from.

Kern asserts that Plaintiffs lack standing to challenge Measure E because their biosolids are not *generated* in Kern County (AOB at 54), but this claim misconstrues the nature of preemption. As the District Court explained, because a preemption claim is based on the California Constitution, the issue of whether Plaintiffs' claims are within the CIWMA's zone of interests is irrelevant. Thus, the District Court found that Plaintiffs had standing under the California Constitution, for the simple reason that their conduct was restricted by Measure E. ER34-37. Kern does not even attempt to address this ruling.

Kern's position also ignores the statutory text and is illogical. The CIWMA's stated policy is to "reduce, recycle, and reuse solid waste *generated in*

the state to the maximum extent feasible." Cal. Pub. Res. Code § 40052 (emphasis added). In enacting the CIWMA, the Legislature found that "[t]he reduction, recycling or reuse of solid waste *generated in the state* will, in addition to preserving landfill capacity in California, serve to conserve water, energy, and other natural resources within this state, and to protect the state's environment." *Id.* § 40000(e) (emphasis added). The Legislature also observed that, at the time the CIWMA was enacted, "[o]ver 90% of *California's* solid waste [was] disposed of in landfills," and it emphasized the need for a "coherent state policy to ensure that the *state's solid waste* is managed in an effective and environmentally sound manner." *Id.* § 40000(b), (c) (emphasis added). The CIWMA addresses all solid waste *generated in California*, and does not endorse Kern's view that one county may ban the recycling of materials that come from other counties.

Further, as evidenced by the act's stated policy and basic requirements, the protected activity under the CIWMA is not the *generation* of biosolids, but their *recycling*. *See, e.g., id.* §§ 40051 (requiring local agencies to promote recycling and maximize all feasible recycling options), 40052 (CIWMA's purpose is to reduce, recycle, and reuse solid waste). It is undisputed that Plaintiffs' land application constitutes recycling of biosolids, the land application occurs in unincorporated Kern County, and Measure E bans Plaintiffs' land

application programs. *See* pages 11-12, 14-16. The District Court correctly found that Plaintiffs have standing.

Kern also observes that the CIWMA authorizes local agencies to join together to form regional agencies if "[l]ocal conditions transcending city or county boundaries might require collection and disposal to be handled on a regional basis." AOB at 52 (quoting *Waste Res. Techs*., 23 Cal. App. 4th at 307); *see also* Cal. Pub. Res. Code §§ 40970-71. Kern says that participation in those regional agencies is voluntary. AOB at 52.

Kern's point is immaterial. If two cities want to form a regional agency to jointly handle their waste collection and disposal, they are free to do so. But whether they do or not, both cities must comply with the CIWMA's overarching requirement to promote and maximize recycling to the maximum extent feasible. Cal. Pub. Res. Code §§ 40051, 40052. Nothing in the CIWMA's regional agency provisions alters the statute's broader substantive requirements.

5. The CIWMA Provisions Governing Source Reduction And Recycling Elements Do Not Save Measure E From Preemption

Kern next contends that Measure E is not preempted because the CIWMA's "basic device for fulfilling the recycling mandates contained in Section 40051 is the 'source reduction and recycling element' ('SRRE')." AOB at 54.

Kern essentially posits that it need only comply with the SRRE requirements and is not otherwise obliged to meet the CIWMA's recycling mandates. This claim is at odds with the CIWMA's text and structure.

Part 2 of the CIWMA (Cal. Pub. Res. Code §§ 40900 *et seq.*) requires every California city and county to divert from landfills – through source reduction, recycling or composting – 50% of the solid wastes it generates. *Id.* § 41780(a)(2). To that end, each city and county is required to adopt an SRRE addressing the different wastes it generates, including biosolids, and the different ways of managing them. *Id.* §§ 41000-41260 (cities); 41300-41460 (counties).

Kern argues that a local ordinance would be preempted by the CIWMA *only* if and when the ordinance "makes it impossible" to meet part 2's diversion and SRRE requirements. AOB at 56. But Kern has conflated these requirements *with the independent requirements of part 1*.

The CIWMA (which comprises the entire Division 30 of the California Public Resources Code) has *eight* parts. Cal. Pub. Res. Code §§ 40000-49620. Part 1 establishes broad requirements governing the entire division. Significantly, this is where the CIWMA's overarching recycling mandates appear. *See id.* §§ 40051 ("[i]n implementing *this division*," local agencies such as Kern must promote recycling and maximize use of all feasible recycling options), 40052 (emphasis added) ("The purpose of *this division* is to reduce, recycle, and reuse

solid waste generated in the state to the maximum extent feasible . . .") (emphasis added).

Part 2, which requires each locality to divert its own wastes from landfills and formulate a plan for doing that, is narrower than part 1. It is true that part 2's diversion requirements are an important step in promoting part 1's recycling mandate. Part 2 – by forcing each locality to quantify the solid waste it generates and develop a detailed plan to meet specific numerical targets, and by authorizing the California Integrated Waste Management Board ("Waste Board") to review and enforce those plans – is a useful mechanism to promote recycling.[17]

But Kern errs in asserting that part 1's recycling mandates have no meaning beyond part 2's diversion requirements. "It is a cardinal rule of statutory construction that in attempting to ascertain the legislative intention, effect should be given as often as possible to the statute as a whole and to every word and

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[17] As Kern observes, the regulations implementing part 2 require that Kern consider changing its zoning laws to meet the diversion requirements. AOB at 55, (citing 14 Cal. Code Regs. § 18735.3(b), which states: "The jurisdiction shall consider changing zoning and building code practices to encourage recycling of solid wastes"). Kern reads this as if it were a savings clause for local ordinances, but in fact it is a requirement that localities consider changing their zoning laws to comply with part 2's diversion requirements. In any event, the regulation concerns only the obligations in part 2, *see* 14 Cal. Code Regs. § 18730, whereas the recycling mandate is in part 1, *see* Cal. Pub. Res. Code §§ 40051-52, which also

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clause, thereby leaving no part of the provision useless or deprived of meaning." *Leavitt v. County of Madera*, 123 Cal. App. 4th 1502, 1514 (2004) (citation and quotation marks omitted). Kern's position violates this rule because it deprives part 1 of independent legal effect.

Kern's error is reflected in other arguments. Kern observes that each SRRE must include a plan for "the disposition of sewage sludge generated in the jurisdiction of the [city or county]." AOB 55 (quoting Cal. Pub. Res. Code §§ 41250, 41450). According to Kern, this shows that sewage sludge is a matter of local concern. But in fact, a locality's SRRE must address *all* types of solid wastes generated by the locality because the focus of the SRRE, and indeed of all of part 2, is on each locality's reducing the amount of solid waste it generates.

Similarly, the SRRE must comply with the portion of the CIWMA that includes Section 40051. *See* Cal. Pub. Res. Code § 41800(a). From this, Kern infers that the recycling mandates in Sections 40051 and 40052 have no meaning *other* than in connection with the content of an SRRE. But Kern has it backwards. Sections 40051 and 40052 establish an overarching requirement to promote and

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states that local regulations are valid only if they do not conflict with that mandate, *id*. § 40053.

maximize recycling of solid wastes; the SRRE provisions relied on by Kern merely clarify that SRREs must comply with this broader mandate.[18]

Kern also relies on Section 41851, which provides that "[n]othing *in this chapter* shall infringe on the existing authority of counties and cities to control land use or to make land use decisions, and nothing *in this chapter* provides or transfers new authority over that land use to the board." Cal. Pub. Res. Code § 41851 (emphasis added). But "this chapter" refers to chapter 7 of part 2, concerning the Waste Board's SRRE approval process – which is not implicated here and is immaterial to the Court's preemption analysis. The broad recycling mandates are contained in chapter 1 of part 1. And *that* chapter is unambiguously clear about the effect of local regulations that conflict with the statute's recycling mandates: "*This division*, or any rules or regulations adopted pursuant thereto, is not a limitation on the power of a city, county, or district to impose and enforce reasonable *land use conditions or restrictions* . . . if the conditions or restrictions

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[18] Kern also cites a staff "agenda item" presented at an April 2004 Waste Board meeting stating that "[l]and application projects must comply with local laws, ordinances, and regulations." AOB at 56. Plaintiffs do not dispute that general statement or contend that the CIWMA preempts the entire field of biosolids regulation. But the CIWMA does preempt Measure E's outright *ban* on land application, which conflicts with the CIWMA's recycling mandates and cannot be saved by a statement in an agency staff report.

do not conflict with or impose lesser requirements than the *policies*, standards, and requirements of this division . . . ." *Id.* § 40053 (emphasis added).

The Legislature was not silent about what happens to land use restrictions that "conflict with" the recycling mandates in part 1. They are preempted.

6. The CIWMA Provisions Regarding Waste Diversion Credits Do Not Save Measure E From Preemption

Finally, Kern argues that the CIWMA's "endorsement" of land application "is far more qualified" than the District Court believed. AOB at 58. Kern again ignores the CIWMA's text and structure.

Land application of biosolids counts toward the diversion credits in part 2 only if the Waste Board has made a finding that the biosolids "will not pose a threat to public health or the environment." Cal. Pub. Res. Code § 41781.1. So, Kern says, the statute's endorsement of land application is not "uncritical[]" but applies only if the biosolids are "safe for public health and the environment." AOB at 58-60.

That is wrong. Diversion credits under the CIWMA are *aggregate*; they measure the *net* amount of solid waste disposal in the present as compared to the base year of 1990, when the CIWMA took effect. *Id.* §§ 41780.2(b), (c) (the "total disposal allowable" is computed by reference to the "total amount of base-

year solid waste generation"), 41781(c) (establishing 1990 as the base year). Thus, Los Angeles does not claim diversion credits for biosolids because it was already land applying biosolids by 1990. SER136-37(¶¶4,6). In other words, the City's land application is included in the baseline against which the City must make *further* solid waste diversions. SER137(¶7).

If Plaintiffs are forced to terminate land application, and instead to landfill or incinerate their biosolids, that would count *against* the diversion requirements. In the jargon of the statute, Plaintiffs (or the municipalities they serve) would then have to increase other "source reduction, recycling, and composting activities" (Cal. Public Resources Code § 41780(a)(1)) to keep the "total disposal allowable" (*id.* § 41780.2(c)) within the statutory limits. Put simply, the CIWMA penalizes localities that backslide on recycling. Or, to use Kern's terminology, the CIWMA "endorses" feasible methods of recycling currently in use, and it punishes localities that discontinue them. The public health determination Kern refers to in section 41781.1 is relevant only for localities that seek *additional* diversion credits for land application beyond the baseline. *See* Cal. Pub. Res. Code § 41781.1(a).

In any case, Measure E bans virtually all land application of biosolids by Plaintiffs, despite the strong evidentiary record establishing the safety of their

land application programs. *See* pages 13-14. Measure E conflicts with the CIWMA's basic purpose and requirements, and it is preempted.

CONCLUSION

Kern's Measure E violates the Commerce Clause and is preempted by the California Integrated Waste Management Act. The Court should affirm the District Court's judgment.

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STATEMENT OF RELATED CASES

There are no known related cases.

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CERTIFICATE OF COMPLIANCE

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