No. _____

In The
Supreme Court of the United States

CITY OF LOS ANGELES, *et al.*,

Petitioners,

v.

COUNTY OF KERN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that an in-state plaintiff lacks prudential standing under the "zone of interest" test to assert a dormant Commerce Clause challenge to a local ordinance that impedes the flow of commerce, contrary to the holdings of the First and Eighth Circuits.

PARTIES

Petitioners (Plaintiffs-Appellees before 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, individually and d/b/a Honey Bucket Farms and Tule Ranch/Magan Farms

Western Express, Inc.

Sierra Transport, Inc.

California Association of Sanitation Agencies

Respondents (Defendants-Appellants before the Ninth Circuit):

County of Kern

Kern County Board of Supervisors

Intervenors before the District Court:

Arvin-Edison Water Storage District

Association of Irritated Residents

Kern County Water Agency

Kern Water Bank Authority

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners 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 company owns 10% or more of any of their respective stock. The remaining Petitioners are either governmental or non-corporate parties.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-17) is reported at 581 F.3d 841.

The decision of the district court granting Petitioners' motion for summary judgment (App., *infra*, 18-101) is reported at 509 F. Supp. 2d 865. The order of the district court granting a permanent injunction against Respondents (App., *infra*, 102-04) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on September 9, 2009. A petition for rehearing was denied on December 15, 2009. (App., *infra*, 107-08.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, the relevant provisions of the Federal Clean Water Act governing the use or disposal of sewage sludge, 33 U.S.C. § 1345, and the introduction to the Environmental Protection Agency regulations applicable to the final use or disposal of sewage sludge, 40 C.F.R. § 503.1, are set forth in the Appendix. (App., *infra*, 109, 112-21.)

The district court had jurisdiction over Appellees' federal claims under 28 U.S.C. §§ 1331, 1337, 1343 and 2201, and over their state-law claims under 28 U.S.C. § 1367. (App., *infra*, 109-12.)

STATEMENT OF THE CASE

I. Facts of the Underlying Litigation

Petitioners are public and private entities and individuals from throughout California – including the largest city in the state, private contractors, and farmers – that run some of the most successful recycling programs in the United States today. Petitioners City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles County collect and treat wastewater from more than 10 million residents of Southern California, process the sewage to generate a product – "biosolids" – and then recycle the biosolids to farmland. The biosolids are used as fertilizer to grow crops for animal feed at three farming sites in Kern County, California, and at sites in Arizona. Biosolids replace chemical fertilizers and improve soil quality.

Biosolids are the product of sewage sludge after it has been treated pursuant to Environmental Protection Agency ("EPA") regulations. 509 F. Supp. 2d at 870-71 (App., *infra*, 23-24) (district court findings of undisputed fact). They are nutrient-rich organic

matter and make excellent fertilizer and soil conditioner. (Bahr Decl.[1] ¶ 10, App., *infra*, 136-37.) "Land application," that is, recycling biosolids as agricultural fertilizer, is one of the principal ways of managing sewage sludge in the United States. *See* 509 F. Supp. 2d at 870-71 (App., *infra*, 23) (district court findings of undisputed fact). In 2003, EPA estimated that approximately 60% of sewage sludge nationwide was recycled and applied to farmland. *Id.* at 871 (App., *infra*, 23). EPA promotes land application of biosolids as a safe and beneficial way of recycling sewage wastewater. *Id.* at 871-72 (App., *infra*, 25). Decades of experience with land application and research by EPA and the scientific community, including two reviews by committees of the National Academy of Sciences, have uncovered no evidence that land application of biosolids is unsafe. *Id.* (App., *infra*, 25-28).[2]

California produces approximately 750,000 dry tons of biosolids per year, and disposes of 69% of it through options involving land application. (Bahr

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[1] The declaration of Larry Bahr (App., *infra*, 131-47 (exhibit omitted)), an expert on regional biosolids management in California, was submitted by Petitioners in support of their Motion for a Preliminary Injunction, which the district court granted, *City of L.A. v. County of Kern*, 462 F. Supp. 2d 1105 (C.D. Cal. 2006).

[2] Indeed, the National Association of Clean Water Agencies and the Water Environment Federation submitted amicus briefs to the Ninth Circuit in support of Petitioners, explaining that the land application of biosolids is stringently regulated, scientifically sound, and poses negligible health risks to surrounding communities.

Decl. ¶¶ 18-19, App., *infra*, 141-42.) As the district court found, biosolids management is a "constant, non-discretionary governmental function." 509 F. Supp. 2d at 871 (App., *infra*, 25). Landfill sites in California are scarce, and more than 20% of California's biosolids are currently managed out-of-state. (Bahr Decl. ¶ 25, App., *infra*, 144.) Petitioner Orange County Sanitation District already ships some of its biosolids to Arizona. (Ghirelli Decl.[3] ¶ 6, ER 177.)

Since 1994, Petitioners have successfully land applied biosolids at Green Acres Farm, Honey Bucket Farms, and Tule Ranch, encompassing over 8,000 acres of farmland in the unincorporated area of Kern County.[4] 509 F. Supp. 2d at 873-75 (App., *infra*, 28-34) (district court findings of undisputed fact); (Bahr Decl. ¶ 24, App., *infra*, 143-44). The County acreage provides biosolids management for approximately one-third of California's biosolids. (Bahr Decl. ¶ 24, App., *infra*, 143-44.) Petitioner City of Los Angeles invested approximately $28 million to buy and improve the Green Acres site, and currently employs a full-time staff of farmers, contractors, employees, and engineers who oversee and implement the transportation,

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[3] The declaration of Robert P. Ghirelli (ER 175-179), a manager of Petitioner Orange County Sanitation District, was submitted by Petitioners in support of their Motion for a Preliminary Injunction.

[4] For ease of reference, the political entity (including its Board of Supervisors) will henceforth be referred to as "Kern," and the geographical area as "the County."

land application, and farming operations. (Minamide Decl. ¶¶ 7, 23, ER 122, 128.)[5] The City has committed to beneficially reuse 100% of its biosolids through land application, and has ceased to dispose of biosolids in landfills, which is not a beneficial use. (*Id.* ¶ 19, ER 126.)

Kern itself ships its biosolids to a local composting company, for sale to private firms outside the County. 509 F. Supp. 2d at 875 (App., *infra*, 35) (district court findings of undisputed fact). Moreover, local cities within the County – including the City of Bakersfield, with a population of over 300,000 – apply biosolids on land in their incorporated areas. *Id.* at 876 (App., *infra*, 36).

In 2006, a state senator sponsored the "Keep Kern Clean Ordinance" ("Measure E"), which bans the land application of biosolids in the unincorporated areas of the County. *See id.* at 876-77 (App., *infra*, 37-39). The initiative campaign made clear that Measure E targeted out-of-county biosolids producers. *Id.* Exhorted by anti-Los Angeles slogans such as "Measure E will stop L.A. from dumping on Kern," and "we've got a bully next door, flinging garbage over his fence into our yard," County voters passed Measure E. *Id.* Violation of Measure E is a misdemeanor punishable

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[5] The declaration of Traci J. Minamide, P.E., assistant director of the Los Angeles Bureau of Sanitation, was submitted by Petitioners in support of their Motion for a Preliminary Injunction. It can be found in Appellants' Excerpts of Record submitted to the Ninth Circuit ("ER") at ER 120-137.

by a fine of not more than $500 or imprisonment for not more than six months. *Id.* (*See* Measure E, App., *infra*, 122-29.)

Petitioners are the only entities affected by Measure E. On its face, Measure E applies to both in-county and out-of-county waste generators (*see* Measure E, App., *infra*, 122-29), but in practice, in-county biosolids generators such as Bakersfield, the largest city in the County, are located in the *in*corporated areas of the county and therefore may continue to apply biosolids on their land. 509 F. Supp. 2d at 885-86 (App., *infra*, 60-62). Kern itself may also continue to ship its biosolids outside the county to a composting company. *Id.* (App., *infra*, 60). Thus, as the district court found, Measure E affects only, and discriminates against, out-of-county interests.

Measure E's enforcement would compel Petitioners to divert thousands of tons of biosolids weekly from their long-operating recycling operations in California to Arizona and elsewhere, significantly increasing costs to them (and therefore to ratepayers) and pollution from long-distance transportation. (Bahr Decl. ¶¶ 24-25, 27-28, App., *infra*, 143-46; Minamide Decl. ¶¶ 33-37, 41-42, ER 131-32, 134-35.) If Measure E is enforced, annual costs to Petitioners will likely increase by two-thirds, if not more. (Minamide Decl. ¶ 33, ER 131.) Air emissions caused by Petitioners' shipping of biosolids will more than double. (*Id.* ¶ 46, ER 136.)

II. The District Court Litigation

Facing the imminent shutdown of their biosolids programs, Petitioners sued Kern in the Central District of California, alleging that Measure E violates the dormant Commerce Clause and the Equal Protection Clause, is preempted by federal and state laws, and constitutes an invalid exercise of Kern's police power. The district court had jurisdiction over Appellees' federal claims under 28 U.S.C. §§ 1331, 1337, 1343 and 2201, and their state-law claims under 28 U.S.C. § 1367. (*See* App., *infra*, 109-12.)

The district court dismissed Petitioners' preemption claims under the Clean Water Act and the California Water Code, *City of L.A. v. County of Kern*, No. CV 06 5094, 2006 WL 3073172 (C.D. Cal. Oct. 24, 2006), but granted Petitioners' request for a preliminary injunction halting enforcement of Measure E, *City of L.A. v. County of Kern*, 462 F. Supp. 2d 1105 (C.D. Cal. 2006).

Kern then moved for summary judgment on all claims; Petitioners filed a cross-motion for summary judgment on their state law preemption claim and, in their opposition to Kern's summary judgment motion, asked the district court to enter summary judgment in their favor on the Commerce Clause and police power claims.

II. Disposition in the District Court

The district court concluded that Measure E discriminated against interstate commerce in effect. *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 881-88 (C.D. Cal. 2007) (App., *infra*, 50-65). The court found that "the campaign attacks on 'Los Angeles sludge' . . . graphically expose Measure E's objective of removing Plaintiffs' operations from the County. . . . But at the same time that Measure E is forcing [Petitioners] out of Kern County, it allows in-county sludge producers to continue disposing of their biosolids locally." *Id.* at 870 (App., *infra*, 21).

The court therefore applied strict scrutiny and, finding that Kern had non-discriminatory alternatives to regulate land application, granted summary judgment in favor of Petitioners. *Id.* at 887-88 (App., *infra*, 64-65). The court noted that "the record reflects that nearly 61% of Kern County's registered voters live in incorporated areas of the County. This means that over three-fifths of the decision-makers tolerate local disposition of locally generated biosolids, but have prevented out-of-county recyclers from engaging in precisely the same activity. . . ." *Id.* at 886 (App., *infra*, 61).

The court also separately held that Measure E was preempted by the California Integrated Waste Management Act. *Id.* at 890-98 (App., *infra*, 65-89). The court entered judgment pursuant to Federal Rule of Civil Procedure 54(b) and issued a permanent

injunction restraining the enforcement of Measure E on September 5, 2007. (App., *infra*, 102-04.)

IV. Opinion of the Ninth Circuit

On appeal, the Ninth Circuit panel held that the district court should not have reached the merits of Petitioners' dormant Commerce Clause claim because Petitioners lacked prudential standing to sue under the dormant Commerce Clause. *City of Los Angeles v. County of Kern*, 581 F.3d 841 (9th Cir. 2009) (App., *infra*, 1-17). In the district court, Kern did not challenge the Petitioners' standing and in the court of appeals Kern initially took the position that it had waived the issue. The panel decided to reach prudential standing *sua sponte*. *Id.* at 845-46 (App., *infra*, 8-11).

In the Ninth Circuit's view, "[t]he interest the recyclers seek to secure is their ability to exploit a portion of the *intra*state waste market – they want to be able to ship their waste from one portion of California to another." *Id.* at 847 (App., *infra*, 14). The Ninth Circuit held that transporting biosolids from one part of California to another "in no way burdens the recyclers' protected interest in the interstate waste market," and thus Petitioners fell outside the "zone of interests protected by the [dormant Commerce] clause." *Id.* at 848 (App., *infra*, 14). The court "decline[d] to expand the zone of interest protected by the [dormant Commerce] Clause to purely intrastate disputes." *Id.*

V. What Is at Stake in This Case

This case concerns the biosolids generated by over 10 million people and whether those biosolids will continue to be recycled on farms in Southern California, or whether a discriminatory local voter initiative may upend this long-standing practice, immune from Constitutional review. Petitioners have spent tens of millions of dollars of public moneys to purchase, develop, and upgrade the farmland, wastewater facilities, and trucking infrastructure necessary for their biosolids recycling programs. (*See, e.g.*, Minamide Decl. ¶ 31, ER 130.) This public investment is at risk, as well as the millions of dollars of future costs entailed by forced closing of the farms.

Kern's ban, if upheld, likely will encourage other rural counties to enact similar bans or onerous restrictions. Such bans will likely in turn lead to retaliatory measures from out-of-county interests. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.") Measure E's discriminatory "Not In My Back Yard" intent is precisely the type of protectionist behavior that this Court's dormant Commerce Clause jurisprudence seeks to prevent. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (dormant Commerce Clause protects against 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").

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this case directly conflicts with decisions of the First and Eighth Circuits, and with this Court's precedents defining the scope of the Commerce Clause. Moreover, the question presented is both important and recurring. Accordingly, the Court should grant this petition.

First, review is warranted because the Ninth Circuit's decision directly conflicts with the decisions of the First and Eighth Circuits. *See Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 183 (1st Cir. 1999); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1379 (8th Cir. 1997). Both *Houlton Citizens' Coalition* and *Ben Oehrleins* expressly hold that an in-state plaintiff conducting only in-state economic activity has prudential standing to assert a dormant Commerce Clause challenge to a local ordinance. That is, both of those Circuits have adopted an understanding of the zone of interest protected by the dormant Commerce Clause that is directly at odds with the holding of the Ninth Circuit below. Indeed, the Ninth Circuit panel expressly acknowledged the split with the Eighth Circuit. 581

F.3d at 849 n.8 (App., *infra*, 16) ("we decline to follow" *Ben Oehrleins*).

Second, the decision below conflicts with this Court's decisions defining the scope of the Commerce Clause and the interests it was designed to protect. This Court's cases make clear that the transport of biosolids from one part of California to another and their recycling pursuant to EPA regulations substantially affects interstate commerce and therefore falls within the purview of the dormant Commerce Clause. The decision below conflicts with this Court's holding 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." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361 (1992) (emphasis added).

This Court's case law "firmly establishes Congress' power to regulate *purely local activities* that are part of an economic 'class of activities' that *have a substantial effect* on interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005) (emphasis added). The dormant Commerce Clause reaches just as far, for "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572-74 (1997) (quoting and applying *Hughes*).

Under modern Commerce Clause jurisprudence, Congress may regulate the transport and use of products such as biosolids within a state. Indeed, Congress routinely regulates in-state economic activity – such as by banning race and gender discrimination, regulating employee welfare benefit plans, and prescribing minimum wages and environmental protections – for businesses that operate solely in-state, on the theory that this economic activity substantially affects interstate commerce. The Ninth Circuit's holding that the large-scale shipment and recycling of biosolids within California – and the economic consequences on interstate markets and pricing from relocating that shipment and farming activity to Arizona – do not even implicate the zone of interests protected by the dormant Commerce Clause is flatly contrary to this Court's precedent.

Third, the standing question presented in this case is important and recurring, and the Ninth Circuit's decision will have significant deleterious effects. The decision below effectively shields from any judicial review state and local laws that violate the dormant Commerce Clause whenever the effects of those protectionist laws fall principally on in-state actors, and even where, as here, the law interferes with important federal economic and environmental policies and overturns long-standing expectations and tens of millions of dollars in long-term investments by public and private entities.

Review by this Court is needed to resolve the irreconcilable conflict among the courts of appeals over

who has prudential standing to enforce the requirements of the Commerce Clause and to ensure that the Clause is not violated at will by localities seeking to advance parochial interests that impede the flow of commerce.

For these reasons, the Court should grant this petition for certiorari.

I. The Ninth Circuit's Decision Directly Conflicts with Decisions of the First and Eighth Circuits

The Ninth Circuit below adopted an interpretation of the dormant Commerce Clause that directly conflicts with the holdings of two other federal Circuits. Both the First Circuit in *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), and the Eighth Circuit in *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), have held that an in-state plaintiff conducting only in-state economic activity has prudential standing to assert a dormant Commerce Clause challenge to a local ordinance. The Ninth Circuit in this case acknowledged that its decision conflicted with *Ben Oehrleins*, *see* 581 F.3d at 849 n.8 (App., *infra*, 16) ("we decline to follow" *Ben Oehrleins*), but did not acknowledge the split with *Houlton Citizens' Coalition*.[6]

[6] Plaintiffs cited *Houlton Citizens' Coalition* to the Ninth Circuit in their supplemental brief on prudential standing. *See*

(Continued on following page)

In *Ben Oehrleins*, in-state haulers and processors challenged a local ordinance that required waste designated for in-state disposal to pass through designated facilities. The Eighth Circuit analyzed whether the plaintiffs had Article III standing and prudential standing. The court explained that "[e]ven if a plaintiff meets the minimum constitutional requirements for standing, there are prudential limits on a court's exercise of jurisdiction." 115 F.3d at 1378. One such prudential limit is that "plaintiffs alleging a violation of a constitutional or statutory right must demonstrate that they are within the zone of interests of the particular provision invoked," *id.* at 1379 (citation and quotation marks omitted) – the same zone of interests test the Ninth Circuit applied in this case, *see* 581 F.3d at 846 (App., *infra*, 11). "To satisfy this prudential requirement, a plaintiff must show that 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Ben Oerhleins*, 115 F.3d at 1379 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

The Eighth Circuit found there was "no question" that the "various waste haulers and processors[ ] have standing." *Id.* The ordinance in question "prohibits haulers from delivering designated waste to

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Appellees' Supplemental Brief, filed March 30, 2009, at 12-13 (App., *infra*, 167).

non-designated facilities," and "[h]aulers who violate the Ordinance are subject to a wide variety of sanctions." *Id.* "Furthermore, the Ordinance harms processors such as the landfill plaintiffs who wish to participate in the market for Hennepin County waste by prohibiting access to that waste." *Id.* The court accordingly held that the haulers and processors had Article III standing, and "we see no prudential barriers to standing" either. *Id.*

The Ninth Circuit panel acknowledged that in *Ben Oehrleins*, "the Eighth Circuit found that in-state haulers and processors had standing to challenge a local ordinance that required waste designated for in-state disposal to pass through designated facilities." 581 F.3d at 849 n.8 (App., *infra*, 16). The Ninth Circuit asserted, however, that "[t]hat decision was made in a single, conclusory sentence, which we decline to follow." *Id.* But its dismissive view is not a fair characterization of *Ben Oehrleins*. The Eighth Circuit discussed Article III and prudential standing together for the hauler and processor plaintiffs in a four-paragraph discussion, not in a single, conclusory sentence. *See* 115 F.3d at 1378-79.

Moreover, the First Circuit found *Ben Oehrleins* persuasive and followed it in a decision that is equally, if not more, sharply in conflict with the Ninth Circuit's decision here. In *Houlton Citizens' Coalition*, the plaintiffs challenged a 1997 local ordinance that required all generators of residential rubbish within the Town of Houlton "either to use Houlton's chosen

contractor to transport their trash, or to haul it themselves." 175 F.3d at 181. The First Circuit held that it could reach the merits of the dormant Commerce Clause challenge to the ordinance, because one of the plaintiffs in that case – Faulkner, a "local trash hauler[ ]," *id.* at 182 – had prudential standing, *id.* at 183.

Faulkner's economic injury was that "[h]e has lost the business of his residential customers in Houlton." *Id.* at 183. Significantly, the First Circuit held that "Faulkner's claim to standing *is not damaged because he failed to allege that he hauled garbage out-of-state or planned to do so.*" *Id.* (emphasis added). The court explained that "an in-state business which meets constitutional and prudential requirements due to the direct or indirect effects of a law purported to violate the dormant Commerce Clause has standing to challenge that law." *Id.* (citing, *inter alia*, *Ben Oehrleins*).

The Ninth Circuit's holding in this case directly conflicts with the First Circuit's decision in *Houlton Citizens' Coalition*. The Ninth Circuit held that Petitioners here lack prudential standing to assert a dormant Commerce Clause claim because they transport goods only within one state – but the First Circuit held that very fact to be immaterial to prudential standing under the dormant Commerce Clause. 175 F.3d at 183.

II. The Ninth Circuit's Decision Conflicts with This Court's Precedent

The Ninth Circuit's holding that the shipment of biosolids "from one portion of California to another" does not "burden[ ] the recyclers' protected interest in the interstate waste market," 581 F.3d at 847-48 (App., *infra*, 14), conflicts with this Court's precedent and unduly restricts the application of the Commerce Clause. The shipment of biosolids from one location to another in California occurs in interstate commerce. That is why, for example, trucking companies have to comply with federal minimum wage and overtime laws and environmental regulations – even if the companies' trucks do not cross a state border. For more than a century, this Court has identified three general categories in which Congress is authorized to engage under its commerce power. *Gonzalez v. Raich*, 545 U.S. 1, 16 (2005). "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce." *Id.* at 16-17 (citations omitted).

This Court repeatedly has held that a local law which impermissibly regulates interstate commerce is not saved by the fact that it also discriminates against certain in-state actors. *See C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4

(1951); *Brimmer v. Rebman*, 138 U.S. 78 (1891). In *Brimmer*, the Court struck down a Virginia state law criminalizing the sale in Virginia of meat that had traveled more than 100 miles from the place of slaughter unless the seller paid a heavy charge for a local inspection of the meat. The Court noted:

> Nor can this statute be brought into harmony with the constitution by the circumstance that it purports to apply alike to the citizens of all the states, including Virginia; for 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 a statute.

Id. at 82-83; *see C & A Carbone*, 511 U.S. at 391 ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."). In other words, the law impermissibly sought to regulate interstate commerce and was therefore unconstitutional, even though it discriminated against some Virginia meat producers as well as out-of-state meat producers. Under the Ninth Circuit's decision here, by contrast, a Virginia meat producer would have to face the criminal sanction imposed by the facially unconstitutional statute, even though an Illinois producer engaging in exactly the same commercial activity and inhibited by exactly the same law would be protected by the dormant Commerce Clause. This cannot be the correct outcome.

Moreover, this Court's case law "firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17 (citations omitted). The Court applied the substantial effects test in *Wickard v. Filburn*, in which it upheld the application of the Agricultural Adjustment Act of 1938 "to production not intended in any part for commerce but wholly for consumption on [respondent's] farm." 317 U.S. 111, 118 (1942). "In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions." *Raich*, 545 U.S. at 19. Likewise, in *Raich*, the Court upheld a federal prohibition on the local cultivation and use of marijuana in California on the theory that "leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Id.* Accordingly, it is well established that intrastate conduct that substantially affects interstate commerce comes within the scope of the interstate Commerce Clause.

Wickard and *Raich* dealt with Congress' affirmative power to regulate under the Commerce Clause, rather than the scope of the dormant Commerce Clause. However, this Court also has explained that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control

or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979).

In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), the Court held that the dormant Commerce Clause reaches in-state conduct that has a substantial effect on interstate commerce. In that case, the Court struck down a state property tax because its exemption for property owned by charitable institutions excluded organizations that were operated principally for the benefit of nonresidents. The defendant in that case, the Town of Harrison, argued (as the Ninth Circuit held here) that the dormant Commerce Clause had no application at all because the plaintiff's business – operating a summer camp – occurred entirely within the state of Maine. *Id.* at 572.

This Court disagreed. It stated that "[s]ummer camps are comparable to hotels that offer their guests goods and services that are consumed locally." *Id.* at 573. Previously, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court had upheld federal regulation of local hotels on the ground "that commerce was substantially affected by private race discrimination that limited access to the hotel and thereby impeded interstate commerce in the form of travel." *Camps Newfound/Owatonna*, 520 U.S. at 573. Accordingly, the Court explained that "[a]lthough *Heart of Atlanta* involved Congress' *affirmative* Commerce Clause powers," the reasoning of that case applied equally to a dormant Commerce Clause claim. 520 U.S. at 574 (emphasis added).

Here, the undisputed evidence shows that Petitioners' conduct in transporting and farming with biosolids within California as part of wastewater management and pollution control, and the effect of Measure E on those activities, substantially affects interstate commerce. For example, Petitioners submitted the Declaration of Larry Bahr, an expert on regional biosolids management in California, on behalf of Petitioner California Association of Sanitation Agencies ("CASA").[7] (*See* App., *infra*, 130-47.) Mr. Bahr's declaration explains at length the economic impact that Kern's Measure E would have on regional markets given the scarcity of landfills that will take biosolids. For example, Measure E would result in "higher landfill 'tipping fees' to accept biosolids and possibly longer hauling distances." (Bahr Decl. ¶ 22, App., *infra*, 143.) His declaration also describes the "out-of-state impacts" caused by Measure E "as more California agencies look to Arizona and other locations for alternatives for reuse and disposal," noting that "this will increase biosolids management costs for sanitation agencies and their ratepayers," as well as "cause collateral environmental impacts such as air emissions." (*Id.* ¶ 25, App., *infra*, 144.) These effects on regional pricing are the same type of substantial effect on interstate

[7] *See supra* n.1. Petitioner CASA has 119 public agency members that expend tens of millions of dollars annually to recycle 84% of the biosolids generated in their communities for beneficial uses.

commerce that this Court found in *Wickard*, *Raich*, *Brimmer*, and *C & A Carbone* to implicate interstate commerce.

The Ninth Circuit's response to this was to hold that even if all of that is true, Petitioners in *this* case do not have standing because *their* interests do not implicate interstate commerce: "The interest the recyclers seek to secure is their ability to exploit a portion of the *intra*state waste market – they want to be able to ship their waste from one portion of California to another." 581 F.3d at 847 (App., *infra*, 14). But the Ninth Circuit's view that shipping biosolids from one part of California to another and the related recycling work does not occur in interstate commerce conflicts with the long-standing and well established judicial interpretation of the Commerce Clause. *Brimmer*, *Dean Milk Co.*, and *C & A Carbone* all held that a local attempt to regulate interstate commerce is not made constitutional by the fact that it also discriminates against in-state actors. *Wickard* and *Raich* held that intrastate conduct that substantially affects interstate commerce falls within the scope of the Commerce Clause. And *Hughes* and *Camps Newfound/Owatonna* held that the dormant Commerce Clause is just as broad as the affirmative Commerce Clause. (Indeed, they are the same clause. *See* U.S. Const., art. I, § 8, cl. 3 (App., *infra*, 109).)

In fact, the Ninth Circuit's holding that the intrastate shipment of biosolids does not occur in interstate commerce is similar to the *rejected* argument in *Camps Newfound/Owatonna* that a summer

camp that operated entirely in Maine could not raise a dormant Commerce Clause claim. Nor does the Ninth Circuit's holding address this Court's repeated admonitions that restrictions on interstate commerce erected by political subdivisions of states are equally subject to dormant Commerce Clause scrutiny. *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 359 (1992) ("[P]olitical subdivisions [] may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through the subdivisions of the State, rather than through the State itself."); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994) ("[D]iscrimination is appropriately assessed with reference to the specific subdivision in which applicable laws reveal differential treatment.").

Further, the Ninth Circuit's holding that "[t]he interest the recyclers seek to secure, . . . to ship their waste from one portion of California to another" is outside interstate commerce, 581 F.3d at 847 (App., *infra*, 14), is illogical. Presumably, Petitioners must comply with federal minimum wage laws and other federal employment regulations when they employ truck drivers to transport biosolids within California. Since the drivers and the biosolids travel in the same truck, it is difficult to understand how one of them is traveling in interstate commerce while the other is not.

Indeed, the Ninth Circuit's view that only the "*intra*state waste market" is at issue in this case, *id.*, conflicts with the fact that Petitioners' land application of biosolids in the County is subject to EPA's

Part 503 regulations establishing national standards for land application, *see* 40 C.F.R. § 503.1 (App., *infra*, 120-21). EPA promulgated those regulations pursuant to the federal Clean Water Act, *see* 33 U.S.C. § 1345 (App., *infra*, 112-20), which was enacted pursuant to the interstate Commerce Clause, *see Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001). If Petitioners' land application programs do not implicate interstate commerce, how can EPA regulate local land application at all?

Congress, in enacting § 1345 of the Clean Water Act, recognized that the nation's wastewater infrastructure – including the beneficial use of sewage sludge through land application – is a vital part of the national economy. Furthermore, farming with biosolids, both to meet wastewater treatment needs and to grow crops for sale into the interstate (and here, international) markets plainly satisfies the tests for interstate commerce set in *Wickard* and *Raich*. Even more so for a prudential standing test, which this Court said "is not meant to be especially demanding," the interests of at least one of the eleven Petitioners (including a trade association representing 119 wastewater agencies statewide) in the transport and use of biosolids are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396, 399 (1987). Like the stock exchanges found to have prudential standing to mount a Commerce Clause challenge to a

discriminatory state tax in *Boston Stock Exchange v. State Tax Commission*, the eleven diverse Petitioners here are "asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory [barriers to] their business and they allege that the [barrier] indirectly infringes on that right. Thus, they are 'arguably within the zone of interest to be protected . . . by the . . . constitutional guarantee in question.'" 429 U.S. 318, 320 n.3 (1977) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp.*, 397 U.S. 150, 153 (1970)).

The transport of biosolids from one location in California to another and their recycling pursuant to federal regulations constitute interstate commerce. The Ninth Circuit's holding to the contrary conflicts with this Court's established precedent. This Court should issue the writ of certiorari to correct this error.

III. The Standing Question Presented in This Case Is Important and Recurring

The Ninth Circuit's opinion has a significant impact on the scope of the dormant Commerce Clause. The decision below holds that local laws seeking to advance parochial interests are effectively immune from review under the dormant Commerce Clause as long as they primarily burden in-state actors. In large states such as California, Texas, or Florida, an enormous amount of economic activity does not cross a state border. If all of this economic activity is outside the dormant Commerce Clause, any given state's

cities and counties are now free to launch trade wars against each other – precisely the sort of conduct that a protectionist ordinance such as Measure E invites. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

This case illustrates the dangers of shielding local ordinances from dormant Commerce Clause scrutiny where the burden falls primarily on in-state actors. Here, the ordinance at issue interferes with important federal economic and environmental policies, and overturns long-standing expectations and tens of millions of dollars in long-term investments by public and private entities. EPA began actively promoting the recycling of biosolids more than 30 years ago, after the United States Congress banned ocean disposal of biosolids. (Bahr Decl. ¶ 14, App., *infra*, 139. *see* 509 F. Supp. 2d at 871, App., *infra*, 25 (district court findings of undisputed fact).) By 2003, approximately 60% of sewage sludge nationwide was treated and applied to farmland. *Id.* (App., *infra*, 23). As the district court found, the collection and treatment of wastewater "is a constant, non-discretionary governmental function. In other words, government agencies cannot decide to stop producing biosolids and instead must find ways to manage those that are produced." *Id.* (App. *infra*, 25). Many of America's

largest cities – including Chicago, Denver, Philadelphia, Seattle, Charlotte, New York City, and many others – depend on land application of biosolids and need access to the federal courts when rural counties target their biosolids with discriminatory restrictions.[8]

California wastewater agencies manage approximately 750,000 dry tons of biosolids per year, and, consistent with EPA's policy and regulations, dispose of more than 500,000 tons of that via options involving land application. (Bahr Decl. ¶¶ 18-19, App., *infra*, 141-42.) The City of Los Angeles generates 700 tons of biosolids a day, and is committed to recycling all of it via land application. (Minamide Decl. ¶ 31, ER 130.) Orange County Sanitation District generates approximately 680 tons of biosolids a day, and recycles 60% of it through land application. (Ghirelli Decl. ¶ 6, ER 177.) At this time, approximately one-third of all the biosolids generated in California are recycled through the facilities in the County, which Respondents now seek to close. (Bahr Decl. ¶ 24, App., *infra*, 143-44.)

Petitioners have spent tens of millions of dollars on long-term contracts and improvements in the County. Since 1994, Petitioner City of Los Angeles

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[8] *See generally* amicus brief submitted to the Ninth Circuit by the National Association of Clean Water Agencies (explaining widespread and critical role of land application in biosolids management nationwide).

has focused on building a long-term land application program at Green Acres; the City bought the site outright in 1999 for nearly $10 million, and spent a further $3 million constructing permanent improvements on it. (Minamide Decl. ¶¶ 22, 31, ER 127-28, 130; *see id.* ¶ 43, ER 135 ("The only reason the City purchased Green Acres was to land apply responsibly and farm with biosolids, and there is no indication that the Farm will be economically viable without the use of biosolids.").) When Kern passed an ordinance in 1999 regulating the quality of biosolids applied in the County, the City in good faith spent more than $15 million upgrading its wastewater treatment facilities to comply with Kern's requirements. (*Id.* ¶ 21-22, ER 127-28.)

Banning land application of biosolids in the County and forcing Petitioners to move their long-standing programs elsewhere will impose enormous costs on the governmental Petitioners, and therefore on their ratepayers. For example, enforcement of Measure E will increase costs to the City of Los Angeles by at least two-thirds, if not significantly more, a difference of more than $4 million a year. (*Id.* ¶¶ 33-37, ER 131-32.) Such a major change in Petitioners' biosolids program will also incur enormous administrative costs over several years of planning. (*E.g.*, *id.* ¶¶ 42-44, ER 134-35.)

Enforcement of Measure E also will significantly increase air pollution in Southern California. Currently, the Green Acres site alone receives and processes approximately 26 tractor trailer loads of

biosolids per day. 509 F. Supp. 2d at 873 (App., *infra*, 29) (district court findings of undisputed fact). Enforcement of Measure E will force Petitioners to ship their biosolids to sites as far as 350 miles away. (Minamide Decl. ¶ 34, ER 131.) This change will more than double the air pollution produced by Petitioners' recycling programs. (*Id.* ¶ 46, ER 136.)

Kern is a leading agricultural county. Its ban, if upheld, will likely encourage other counties to enact similar bans or onerous restrictions on biosolids land application, compelling wastewater agencies to compete further for the dwindling land application sites, and ultimately forcing more and more of California's biosolids to be shipped out of state. (*See* Bahr Decl. ¶ 27, App., *infra*, 145.) As the district court opinion pointed out, there are "no 'Friends of Sludge' to mount opposition" to such initiatives. 509 F. Supp. 2d at 869 (App., *infra*, 19). Measure E will severely destabilize biosolids management in California, and its ripple effects will only cause more irreparable harm to a vital, multi-million dollar market.

These harmful economic and environmental effects are the logical result of shielding local ordinances from dormant Commerce Clause scrutiny where in-state actors are the targeted parties. The Ninth Circuit's decision unleashes every municipality to engage in openly discriminatory trade wars against other municipalities in the same state, which undoubtedly will have a significant effect on interstate commerce. The Ninth Circuit's decision is contrary to those of the First and Eighth Circuits, is in sharp

conflict with this Court's precedents, and presents recurring problems that warrant this Court's review.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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Dated: March 15, 2010

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF LOS ANGELES; ORANGE COUNTY SANITATION DISTRICTS; RESPONSIBLE BIOSOLIDS MANAGEMENT, INC.; R & G FANUCCHI INC.; SIERRA TRANSPORT INC.; CALIFORNIA ASSOCIATION OF SANITATION AGENCIES; SHAEN MAGAN, individually and dba's Honey Bucket Farms; Tule Ranch/ Magan Farms; WESTERN EXPRESS INC.,

Plaintiffs-Appellees,

and

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

Intervenors,

v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,

Defendants-Appellants.

No. 07-56564

D.C. No.
CV-06-05094-GAF

OPINION

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

Argued and Submitted March 2, 2009
Submission vacated March 19, 2009
Resubmitted September 9, 2009
Pasadena, California

Filed September 9, 2009

Before: Diarmuid F. O'Scannlain, Pamela Ann Rymer, and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge O'Scannlain

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James Sullivan, Water Environment Federation, Alexandria, Virginia, filed a brief on behalf of Amicus Curiae Water Environment Federation.

Keith J. Jones, National Association of Clean Water Agencies, Washington, District of Columbia, filed a brief on behalf of Amicus Curiae National Association of Clean Water Agencies. Nathan Gardner-Andrews, National Association of Clean Water Agencies, Washington, District of Columbia, was also on the brief.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether recyclers challenging a local ordinance that bans a particular method of waste disposal have prudential standing to raise its constitutionality under the dormant Commerce Clause.

I

A

The fact that the subject matter of the case before us involves sewage sludge will be of no surprise to those familiar with the negative implications of the Commerce Clause. For our purposes, sludge is the "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage." 40 C.F.R. § 503.9(w). Here, we deal with the "land application" of "biosolids": essentially, a particular recycling method which involves the use of treated sludge as fertilizer.[1] *See* 40 C.F.R. § 503.11(h) ("Land application is the spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil.").

In 2006, voters in Kern County, California ("Kern"), adopted a local ordinance ("Measure E" or the "Ordinance") by ballot initiative that makes it

[1] The local ordinance before us defines biosolids as "treated solid, semi-solid or liquid residues generated during the treatment of sewage in a wastewater treatment works and includ[ing] material derived from or containing sewage sludge such as compost and pelletized sewage sludge, irrespective of where generated, produced or treated." The measure describes land application as "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."

"unlawful for any person to Land Apply Biosolids to property within the unincorporated area of the County." Violation of the Ordinance is a misdemeanor punishable by "a fine of not more than $500 or by imprisonment of not more than six months." By its terms, the Ordinance applies to both in-county and out-of-county waste generators. In practical effect, however, because Kern does not currently apply its biosolids to land within the county, Measure E does not directly impact Kern's own waste disposal programs.

Prior to the Ordinance, in-state waste generators frequently disposed of their biosolids by land application at various farms throughout the unincorporated area of Kern County.[2] For example, the City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles County ship large amounts of waste generated by their residents to Green Acres, Honey Bucket Farms, and Tule Ranch. If these generators were precluded from land applying their biosolids in Kern County, they would be required to find alternative locations to dispose of their sludge. They have submitted declarations pointing to Arizona as a probable destination, and asserting that this site change would result in increased transportation costs.

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[2] Consequently, campaign literature supporting the passage of Measure E claimed that it would "stop L.A. from dumping on Kern."

B

These out-of-county generators, along with waste transporters and in-county farmers (collectively, "the recyclers"), filed suit in the United States District Court for the Central District of California. They alleged that Measure E violated the dormant Commerce Clause and the Equal Protection Clause and was preempted by the Federal Clean Water Act, the California Integrated Waste Management Act ("CIWMA"), and the California Water Code. They also asserted that it constituted an invalid exercise of Kern's police power. The district court initially dismissed the Clean Water Act and the California Water Code claims under Federal Rule of Civil Procedure 12(b)(6), while granting the recyclers' request for a preliminary injunction halting enforcement of Measure E. The parties filed cross motions for summary judgment.

The district court granted Kern's motion for summary judgment on the recyclers' equal protection claim, and denied summary judgment on the police power claim, citing the existence of disputed facts. As for the dormant Commence [sic] Clause, the district court concluded that Measure E discriminated against interstate commerce in effect. Accordingly, the court applied strict scrutiny, determined the Ordinance could not survive, and granted summary judgment in favor of the recyclers. The district court also exercised supplemental jurisdiction over the recyclers' CIWMA claim under 28 U.S.C. § 1367 and held that Measure E was preempted by state law.

Kern timely filed this appeal, challenging only the district court's rulings on the dormant Commerce Clause and state-law preemption claims.

II

We first assess whether the recyclers have standing to bring suit under the dormant Commerce Clause. That inquiry involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin,* 422 U.S. 490, 498 (1975). "Constitutional [or "Article III"] standing concerns whether the plaintiff's personal stake in the lawsuit is sufficient to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend under Article III, § 2." *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.,* 219 F.3d 895, 899 (9th Cir. 2000); *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-60 (1992). These limits are jurisdictional: they cannot be waived by any party, and there is no question that a court can, and indeed must, resolve any doubts about this constitutional issue sua sponte. *See, e.g., Indep. Living Ctr. of S. Cal., Inc. v. Shewry,* 543 F.3d 1050, 1064-65 (9th Cir. 2008). Here, no party contends the recyclers lack Article III standing, and we are independently satisfied that they have met the requirements of *Lujan.*

Over and above the limits of Article III, however, there exists a body of "judicially self-imposed limits on the exercise of federal jurisdiction," *Allen v.*

Wright, 468 U.S. 737, 751 (1984), "founded in concern about the proper – and properly limited – role of the courts in a democratic society," *Warth,* 422 U.S. at 498. Citing their nonconstitutional nature, we have previously held that these requirements, commonly referred to as "prudential" standing, "can be deemed waived if not raised in the district court." *Bd. of Natural Res. v. Brown,* 992 F.2d 937, 946 (9th Cir. 1993).[3]

A

Because Kern admittedly failed to raise prudential standing before the district court,[4] we must satisfy ourselves that we should address the matter in the first instance. At times, we have exercised our prerogative to "deem" this issue waived in such circumstances. *See, e.g., Laub v. U.S. Dep't of Interior,* 342 F.3d 1080, 1087 n.6 (9th Cir. 2003); *Pershing*

[3] Other circuits have taken a different tack. *See Am. Immigration Lawyers Ass'n v. Reno,* 199 F.3d 1352, 1357-58 (D.C. Cir. 2000) (prudential standing is non-waivable); *Cmty. First Bank v. Nat'l Credit Union Admin.,* 41 F.3d 1050, 1053 (6th Cir. 1994) (same); *Thompson v. County of Franklin,* 15 F.3d 245, 248 (2d Cir. 1994) (same).

[4] Kern's appeal was confined to the district court's rulings on the federal constitutional question and state law preemption. We had concerns, however, as to whether the recyclers had prudential standing to bring this claim under the dormant Commerce Clause. Accordingly, we directed the parties to discuss the issue at oral argument and requested that they file supplemental briefs.

Park, 219 F.3d at 899-900. Past practice, however, does not preclude our consideration of the subject in the case at hand. Rather, the permissive language in our caselaw – "can be deemed" – indicates that the choice to reach the question lies within our discretion. We are also mindful of the Supreme Court's description of constitutional *and* prudential standing as "threshold determinants of the propriety of judicial intervention." *Warth,* 422 U.S. at 518.

The Seventh Circuit's opinion in *Mainstreet Organization of Realtors v. Calumet City,* 505 F.3d 742 (7th Cir. 2007), is instructive. In that case, the court reached the issue of prudential standing, despite the "wrinkle" that "the City did not argue [prudential standing] until [the panel] raised the issue at oral argument." *Id.* at 747. "[N]onconstitutional lack of standing," according to the Seventh Circuit, "belongs to an intermediate class of cases in which a court can notice an error and reverse on the basis of it even though no party has noticed it and the error is not jurisdictional, at least in the conventional sense." *Id.*; *see also id.* at 747-48 (citing failure to exhaust state remedies in habeas cases and abstention as examples); *cf. Tenet v. Doe,* 544 U.S. 1, 6 n.4 (2005) ("[A]pplication of the *Totten* rule of dismissal, like the abstention doctrine . . . *or the prudential standing doctrine,* represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction." (emphasis added) (citation omitted)).

Thus, we may cite a party's "failure to invoke [prudential standing]" as "a ground for refusing to invoke it" on our own initiative: such failure, however, does not bar our examination of the matter. *Mainstreet,* 505 F.3d at 749. "In other words, [we] may raise an unpreserved prudential-standing question on [our] own, but unlike questions of constitutional standing, [we are] not obliged to do so." *Rawoof v. Texor Petroleum Co.,* 521 F.3d 750, 757 (7th Cir. 2008).

We recognize that at times, the "prudential objectives[ ] thought to be enhanced" by standing restrictions "cannot be furthered" by consideration of an unpreserved argument. *See Craig v. Boren,* 429 U.S. 190, 193-94 (1976). Here, we have provided the parties with an opportunity fully to brief the issue, and further development of the record would not aid our decisionmaking process. Those briefs indicate that at least one of the parties (Kern) "resist[s]" an "authoritative . . . determination" by this court. *Id.* at 193. Our disposition of the prudential standing question might also affect the district court's decision under 28 U.S.C. § 1367 to exercise jurisdiction over the state-law claims.

Perhaps most importantly, a ruling on prudential standing could obviate the need to rule on the merits of the dormant Commerce Clause challenge. In such circumstances, "we are guided by the traditional principle that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available. This rule against

unnecessary constitutional adjudication applies even when neither the trial court nor the parties have considered the nonconstitutional basis for decision." *Correa v. Clayton,* 563 F.2d 396, 400 (9th Cir. 1977) (internal quotation marks and citations omitted).

[1] Accordingly, we choose to exercise our discretion to rule on the recyclers' prudential standing to bring this suit.

B

[2] Several doctrines fall under the rubric of "prudential standing." Here, we consider only "the zone of interests test[, which] governs claims under the Constitution in general, and under the negative [dormant] Commerce Clause in particular." *Individuals for Responsible Gov't, Inc. v. Washoe County,* 110 F.3d 699, 703 (9th Cir. 1997) (second alteration in original) (internal quotation marks and citation omitted); *see also Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 396 (1987) (noting that interests must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (internal quotation marks and citation omitted)). While the test "is not meant to be especially demanding," *Clarke,* 479 U.S. at 399, a party's "complaint must 'fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Washoe County,* 110 F.3d at 703 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church &*

State, Inc., 454 U.S. 464, 475 (1982)). Thus, this prudential standing requirement "denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the [relevant constitutional provision]." *Id.* (alterations in original) (internal quotation marks and citation omitted).

[3] Accordingly, to "ascertain whether [the recyclers] have standing to raise the dormant Commerce Clause challenge in the present case, [we] must . . . determine[ ] whether their interests bear more than a marginal relationship to the purposes underlying the dormant Commerce Clause." *Id.* We have previously concluded that the "chief purpose underlying [the] Clause is to limit the power of States to erect barriers against interstate trade." *Id.* (internal quotation marks and citation omitted); *see also Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.,* 504 U.S. 353, 359 (1992) ("[T]he 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'" (alternation [sic] in original) (quoting *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 535 (1949))).[5] The question, therefore, is whether the recyclers' claims "bear more than a marginal relationship" to claims addressing a state or

[5] A state's political subdivisions are likewise precluded from impeding interstate commerce. *See, e.g., Carbone,* 511 U.S. at 390.

county's effort to erect barriers to interstate commerce.

Our decision in *Washoe County* provides the answer to this question. In that case, we addressed Nevada county ordinances which required residents to employ garbage collection services run by "the County and its authorized agents or contractees." *Washoe County,* 110 F.3d at 701. "[P]rior to enactment of the ordinances, [some residents had] transported their garbage across state lines for disposal at the dump sites in . . . California." *Id.* at 703. Displeased with paying for a service they did not desire, these residents brought suit, alleging that the ordinance violated the dormant Commerce Clause insofar as it "prevent[ed] them from utilizing dump sites outside the State of Nevada." *Id.* at 702. We held that though the residents met the constitutional requirements for standing, they failed to satisfy the prudential limitations. *Id.* at 702, 704. Paying for unwanted garbage collection services – even if one had previously dumped out of state – was "an injury not even marginally related to the purposes underlying" the Clause. *Id.* at 703. We posited that even if all residents forced to pay for garbage collection services had previously transported their waste across state lines, the litigants' claim could not meet the zone of interests test. "Their injury (being forced to pay for services they did not want) would exist even if the [garbage collection service] were to dump all the garbage it collects from Nevada across the state line in California. Under those circumstances, the Washoe

County ordinance would impose no barrier to interstate commerce." *Id.* at 703-04; *see also On the Green Apartments L.L.C. v. City of Tacoma,* 241 F.3d 1235, 1239-40 (9th Cir. 2001) (reaching the same conclusion with respect to a similar waste disposal ordinance).

[4] Such analysis controls the case at hand. The interest the recyclers seek to secure is their ability to exploit a portion of the *intra*state waste market – they want to be able to ship their waste from one portion of California to another. But as we have said, the "chief purpose underlying [the dormant Commerce] Clause is to limit the power of States to erect barriers against *inter*state trade." *Washoe County,* 110 F.3d at 703 (emphasis added) (internal quotation marks and citation omitted). Nothing in Measure E hampers the recyclers' ability to ship waste out of state. Likewise, no recycler claims to apply out-of-state waste to land in Kern County. In short, Measure E in no way burdens the recyclers' protected interest in the interstate waste market. We decline to expand the zone of interests protected by the Clause to purely intrastate disputes.

[5] The recyclers miss the point when they contend that if Measure E stands, some of them will be forced to pay higher fees to ship their waste to different sites, likely in Arizona. While this injury-in-fact suffices for Article III purposes, *see Washoe County,* 110 F.3d at 702, it is insufficient to establish prudential standing. As the name implies, the zone of interests test turns on the *interest* sought to be

protected, not the *harm* suffered by the plaintiff. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153 (1970) ("[The zone of interests test] concerns . . . the question whether the *interest* sought to be protected by the complainant is arguably . . . protected or regulated by the statute or constitutional guarantee in question." (emphasis added)). Financial injury, standing alone, does not implicate the zone of interests protected by the dormant Commerce Clause. That financial injury must somehow be tied to a barrier imposed on interstate commerce. The recyclers here have not established that requisite link.[6] Like the residents in *Washoe County,* they would suffer the same injury (being forced to pay higher prices for biosolid disposal) if Measure E permitted land application from *out-of-state* entities, but prohibited land application from *in-state* entities. "Under those circumstances," Measure E would "impose no barrier to interstate commerce," *Washoe County,* 110 F.3d at 704, yet the harm to the recyclers would be the same.[7] Therefore, we cannot conclude that the

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[6] The recyclers contend that they generally engage in interstate commerce and that the Supreme Court has described waste as an article of interstate commerce. *See Fort Gratiot,* 504 U.S. at 359. Neither fact, however, links the financial injury they allege in this case with an impediment to interstate commerce.

[7] For this reason, the recyclers' claims are more analogous to the claims of the residents in *Washoe County, see* 110 F.3d at 703; *On the Green,* 241 F.3d at 1239-40, than the apartment complex in *On the Green, see* 241 F.3d at 1241. Moreover, the ordinance in *On the Green* barred the plaintiff from engaging in

(Continued on following page)

recyclers alleged injury is tied to the purposes animating the dormant Commerce Clause.

In their supplemental brief, the recyclers discuss a number of cases where courts have determined that in-state plaintiffs have prudential standing to bring suit under the dormant Commerce Clause. *See, e.g., Carbone,* 511 U.S. at 387-88; *Gen. Motors Corp. v. Tracy,* 519 U.S. 278, 286-87 (1997); *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality,* 511 U.S. 93, 97-98 (1994); *Huish Detergents,* 214 F.3d at 711-12. All of those cases, however, involve impediments to in-state plaintiffs' access to out-of-state markets, restrictions on the ability of out-of-state entities to make use of in-state plaintiffs' services, or burdens on out-of-state entities which were passed on to in-state plaintiffs. *See Carbone,* 511 U.S. at 388; *Tracy,* 519 U.S. at 286-87; *Or. Waste Sys.,* 511 U.S. at 96-97; *Huish Detergents,* 214 F.3d at 711.[8] No such allegations are present in this case. Rather, the recyclers either

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interstate commerce. Measure E creates no such prohibition. *Cf. Huish Detergents, Inc. v. Warren County,* 214 F.3d 707, 711 (6th Cir. 2000) (concluding that prudential standing was established when plaintiffs' financial injury would disappear "if it could hire a waste hauler to transport its waste *out-of-state*" (emphasis added)).

[8] In *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County,* 115 F.3d 1372 (8th Cir. 1997), the Eighth Circuit found that in-state haulers and processors had standing to challenge a local ordinance that required waste designated for in-state disposal to pass through designated facilities. *Id.* at 1377-79. That decision was made in a single, conclusory sentence, which we decline to follow. *Id.* at 1379.

contend that Measure E prevents them from shipping their waste intrastate, or that they are denied the benefits of such shipments. As we have discussed above, such circumstances do not implicate the interests protected by the dormant Commerce Clause.

[6] Accordingly, because the recyclers' injury is not even "marginally related" to the interests the Clause seeks to safeguard, they lack prudential standing to bring their federal constitutional claim.

III

[7] Based on the foregoing, we dismiss the recyclers' claims under the dormant Commerce Clause. With that, we are left with a complex question of state-law preemption. Because our dismissal of the federal constitutional claim may materially alter the district court's decision to exercise supplemental jurisdiction over the preemption claim, *see, e.g., Golden v. CH2M Hill Hanford Group, Inc.,* 528 F.3d 681, 684 (9th Cir. 2008), we vacate its judgment and remand the state-law claim for reconsideration of the factors listed in 28 U.S.C. § 1367.

DISMISSED in part, VACATED in part, and REMANDED.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES, et al., Plaintiffs, v. COUNTY OF KERN, et al., Defendants.	**Case No. CV#06-5094 GAF (VBKx)** **ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT, PLAINTIFFS' MOTION TO STRIKE** (Filed Aug. 10, 2007)

I.

INTRODUCTION

Plaintiffs City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles County generate large amounts of sewage treatment residues known as "sludge" or "biosolids," some substantial portion of which they ship to farmland located in unincorporated areas of Kern County for use as fertilizer. This arrangement has, perhaps predicably [sic], aroused substantial local opposition in Kern County even though the EPA considers land application to be a safe, effective means of recycling biosolids.

That opposition reached a fever pitch in 2006 when a local State Senator sponsored a ballot initiative known as Measure E, which sought to ban land application of biosolids in the unincorporated areas of

the County. The initiative campaign included colorful attacks on "Los Angeles sludge" and drew on long-simmering anti-Southern California sentiment for support. There being no "Friends of Sludge" to mount opposition to the initiative, the ordinance passed overwhelmingly, and therefore threatened to permanently ban Plaintiffs from further land application at their Kern County facilities. And though the ban may at first impression appear to eliminate all land application of sludge in Kern County, it actually imposes relatively few burdens on in-county interests. Without acknowledging any irony, Kern County ships its materials to a local composting company for sale to private firms out of its jurisdiction. Moreover, local cities continue to apply biosolids on land in their incorporated areas which are outside of Kern County's jurisdiction. By contrast, Measure E would effectively force Plaintiffs out of the County.[1]

In an effort to preserve their biosolids recycling programs, the government Plaintiffs, along with private firms and individuals that handle the material, filed suit against Defendants Kern County and Kern County Board of Supervisors (collectively "Kern") on a variety of constitutional and statutory grounds. After dismissing some of their claims, *City of Los Angeles v. County of Kern,* No. CV 06-5094, 2006 WL 3073172 (C.D. Cal. Oct. 24, 2006) ("*Kern I*"), this Court

[1] For convenience, the Court refers to the political entity as "Kern" and the geographic region as the "County."

preliminarily enjoined enforcement of Measure E, as it concluded that Plaintiffs, though not likely to succeed on their Equal Protection claim, demonstrated irreparable harm and a likelihood of success on their claims that Measure E (1) violated the dormant Commerce Clause; (2) was preempted by the California Integrated Waste Management Act ("CIWMA"); and (3) exceeded Kern's police power under the California Constitution. *City of Los Angeles v. County of Kern,* 462 F. Supp. 2d 1105 (C.D. Cal. 2006) ("*Kern II*").

Kern has now moved for summary judgment on all claims, and Plaintiffs have filed a cross motion for summary judgment on the CIWMA claim. In their opposition to Kern's motion for summary judgment, Plaintiffs also ask the Court to enter summary judgment in favor of their Commerce Clause and police power claims (though not in favor of their Equal Protection claim).

The Court agrees with Kern that Plaintiffs' Equal Protection claim fails as a matter of law. Measure E rationally furthers legitimate local interests in guarding against potential environmental harm and nuisance associated with biosolids, and Plaintiffs have failed to demonstrate that these purposes were merely pretextual. Although the campaign attacks on "Los Angeles sludge" certainly demonstrated animosity towards the government Plaintiffs, this animosity was directly related to the perceived harm Measure E legitimately sought to redress. In short, Plaintiffs were rationally perceived as polluters, and so a campaign including rhetoric against them does

not mean Measure E's stated environmental purposes were mere pretext for something more nefarious. Moreover, Measure E advanced Kern's environmental interests by banning the perceived pollutants. Measure E is therefore not irrational, and thus survives scrutiny under the Equal Protection clause.

By contrast, Measure E faces stricter scrutiny under the Commerce Clause because of the ban's discriminatory effects against interstate commerce when viewed County-wide. In short, while the campaign attacks on "Los Angeles sludge" are compatible with Measure E's apparent legitimate purpose under Equal Protection jurisprudence, the attacks graphically expose Measure E's objective of removing Plaintiffs' operations from the County as a whole, which would force them to locate and develop alternate recycling sites, most probably in Arizona. But at the same time that Measure E is forcing Los Angeles and others out of Kern County, it allows in-county sludge producers to continue disposing of their biosolids locally, thus accomplishing its legitimate environmental purpose through impermissible means. This discriminatory effect requires the Court to subject Measure E to strict scrutiny, which it cannot withstand because Kern could easily have guarded against the perceived environmental harm with a more tailored regulation regarding the location, quality, and volume of biosolids that could be applied to land. Plaintiffs therefore prevail as a matter of law on their Commerce Clause claim.

Also meritorious is Plaintiffs' CIWMA claim. Plaintiffs present the same argument that the Court accepted in granting the preliminary injunction: that CIWMA expresses a statewide policy of promoting recycling over other disposal methods for "solid waste," which the statute defines to include biosolids. Therefore, Plaintiffs argue, a ban on land application frustrates this statutory purpose and thus is invalid because of conflict preemption, notwithstanding a savings clause that allows local regulations so long as they do not conflict with the policies expressed by the statute. Though Kern advances a barrage of arguments to the contrary, each is fairly easily rejected.

Finally, the Court cannot summarily resolve the police powers cause of action. Kern's motion against this claim is based solely on arguments that – incorrectly – contend Measure E is exempt from the "regional welfare" doctrine which limits exercises of the police power. On the other hand, Plaintiffs' motion fails because disputes remain as to the impact of their biosolids operations on the local environment and the impact of Measure E on the surrounding region.

However, because the police powers claim would involve significant expense to litigate and because Plaintiffs' Commerce Clause and CIWMA preemption claims entitle them to all the relief sought, the Court shall grant Plaintiffs' request for entry of final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

II.

STATEMENT OF FACTS

The following facts are undisputed and reflect the Court's ruling on the parties' evidentiary objections.

A. Overview of Biosolids

EPA regulations define "sewage sludge," also referred to as "biosolids," as the "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works." 40 C.F.R. § 503.9(w). Municipalities typically dispose of sewage sludge in one of several ways, one of which is known as "land application." "Land application" means 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. *Id.* § 503.9(h). In 2003, the EPA estimated that approximately 60 percent of sewage sludge nationwide was treated and applied to farmland; of the remaining 40 percent, 17 percent was buried in landfills, 20 percent was incinerated, and 3 percent was used as landfill or mine reclamation cover. 68 Fed. Reg. 68817 (Dec. 10, 2003). The EPA estimates that sludge is applied to approximately 0.1% of available agricultural land in the United States. (Pls'. Ex. 11 [National Research Council Report: Biosolids Applied to Land: Advancing Standards and Practices, 2002] at 311.)

The EPA regulations of biosolids are codified at 40 C.F.R. § 503 and are known commonly as the "Part 503" regulations. Part 503 differentiates between Class A and Class B sewage sludge depending on the concentration of pathogens, disease causing micro-organisms, remaining after treatment. *See* 40 C.F.R. § 503.32. While Class A sewage sludge is sufficiently treated to essentially eliminate pathogens, Class B sewage sludge is treated only to substantially reduce them. *See id.* For these reasons, the requirements for, and restrictions placed on, land application of Class B sewage sludge are more stringent than those imposed on Class A sewage sludge. *See id.* For example, Part 503 requires controls on Class B sites such as restrictions on human access to the farm fields and setbacks from property lines that guarantee safety. *See id.* § 503.32(b)(5). By contrast, Class A biosolids have almost no restrictions on human handling, *see id.* § 503.32(a), and are often bagged for retail sale to home gardeners, (Pls'. Ex. 4 [Page P.I. Decl.] ¶ 11).

In addition to pathogens, the Part 503 rules also limit the amounts of trace metals that can be found in biosolids at the parts per million level. 40 C.F.R. § 503.13. Biosolids that are sufficiently low in metals qualify as "Exceptional Quality" ("EQ"), and the EPA allows wider use of such biosolids

B. LAND APPLICATION IN GENERAL

The 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." (Defs'. Separate Statement of Undisputed Material Facts in Opp. to Pls'. Mot. ("DOSSUF") ¶ 10.) In other words, government agencies cannot decide to stop producing biosolids and instead must find ways to manage those that are produced. (Pls'. Ex. 18 [Bahr P.I. Decl.] ¶ 11.) Government agencies generally regard land application to be the best way to manage the material. The parties agree that land application constitutes a "beneficial use" of biosolids, and indeed the EPA explains that it adopted the term "biosolids" so as "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 condition)." (Minamide Decl. ¶ 6, Ex. A ["A Guide to Biosolids Risk Assessments for the EPA Part 503 Rule"].) The EPA has also stated that "[b]eneficial use of biosolids reclaims a wastewater residual, converting it into a resource that is recycled to land." (*Id.* ¶ 7, Ex. B ["A Plain English Guide to the EPA Part 503 Biosolids Rule"].) The EPA therefore promotes land application. (Defs'. Ex. 13 [2000 EPA Audit Report: Biosolids Management and Enforcement] at ii.)

At the same time, the EPA has consistently recognized at least the potential that biosolids could be dangerous. The preamble to the Part 503 regulations, which were published in 1993, acknowledges that they "may not regulate all pollutants in sewage sludge that may be present in concentrations that adversely affect public health and the environment."

58 F.R. 9248-01. The preamble also acknowledges uncertainties in several important aspects of the risk assessment on which the Part 503 regulations are based, including uncertainties concerning the impacts of land application of biosolids on human health, plant toxicity, wildlife, and ground water. *Id.*

In light of these uncertainties, the EPA called for further research. In 1996, the EPA asked the National Academy of Sciences to study the safety and practicality of using biosolids in human food crop production. The resulting report concluded that land application presented negligible risk to humans and the environment and also provided many benefits. (Pls'. Ex. 10 [1996 Report: Use of Reclaimed Water and Sludge in Food Crop Production] at 305.) The committee that authored the report also noted that there had been no reported outbreaks of infectious disease associated with a population's exposure to adequately treated biosolids. (Page Decl. ¶ 14.) According to the chair of the 1996 committee, this observation remains accurate. (*Id.*)

Research on biosolids continued. In 2002, the EPA asked the National Research Council ("NRC") of the National Academy of Sciences to evaluate the Part 503 regulations by evaluating the technical methods and approaches used to establish chemical and pathogen standards for biosolids, focusing specifically on human health protection (and not ecological or agricultural issues) The NRC found:

> There is no documented scientific evidence that the Part 503 rule has failed to protect public health. However, additional scientific work is needed to reduce persistent uncertainty about the potential for adverse human health effects from exposure to biosolids. There have been anecdotal allegations of disease, and many scientific advances have occurred since the Part 503 rule was promulgated. To assure the public and to protect public health, there is a critical need to (1) update the scientific basis of the rule to ensure that the chemical and pathogen standards are supported by current scientific data and risk-assessment methods, (2) demonstrate effective enforcement of the Part 503 rule, and (3) validate the effectiveness of biosolids-management practices.

(Defs'. Ex. 12 [2002 NRC Report: Biosolids Applied to Land] at 4.) With respect to health effects, the NRC study stated that "[t]oxic chemicals, infectious organisms, and endotoxins or cellular material may all be present in biosolids" and "[t]here are anecdotal reports attributing adverse health effects to biosolids exposures, ranging from relatively mild irritant and allergic reactions to severe and chronic health outcomes." (*Id.* at 5.)

The NRC study further stated that although "a causal association between biosolids exposures and adverse health outcomes has not been documented . . . [t]o date, epidemiological studies have not been conducted on exposed populations, such as biosolids

appliers, farmers who use biosolids on their fields, and communities near land-application sites." (*Id.* at 121-22.) Because of the anecdotal reports of adverse health effects, the public concerns, and the lack of epidemiological investigation, the study concluded that EPA should conduct further research that examine exposure and potential health risks to worker and residential populations. (*Id.*)

Further research has since occurred, but as yet has uncovered nothing that would change the EPA's conclusion that land application in compliance with the Part 503 regulations is safe. (Pls'. Ex. 7 [Pepper. Suppl. P.I. Decl.] ¶ 7.)

C. The Parties and Their Biosolids Operations

1. Plaintiffs

a. The City of Los Angeles Operation

Plaintiff City of Los Angeles ("the City") has been land applying biosolids in Kern County since 1994. (DOSSUF ¶ 1.) The City collects wastewater generated by residential, commercial, and industrial users in Los Angeles and surrounding communities, and then treats this wastewater at its Hyperion, Terminal Island, Glendale, and Tillman treatment and water reclamation plants. The wastewater treatment process generates solid residuals, which are then further treated and eventually reconstituted into biosolids at the City's Hyperion and Terminal Island plants. (*Id.* ¶ 2.)

The City then sends its biosolids to a site known as "Green Acres" in the unincorporated area of Kern County, which it purchased in 1999 for $15 million. (Pls'. Ex. 1 [Minamide P.I. Decl.] ¶ 7.)[2] The site is a 4,700-acre piece of land about 15 miles southwest of Bakersfield and about 120 miles north of Los Angeles, and is a functioning farm that mainly grows crops used for animal feed. (*Id.* ¶¶ 7, 20, 23, 27; Johnson Decl. ¶ 7.) The Green Acres biosolids program is administered by Plaintiff Responsible Biosolids Management, Inc. ("RBM"), which has been under contract with the City since 1996. (Pls'. Ex. 2 [Stockton P.I. Decl.] ¶ 8.) RBM subcontracts some amount of the hauling responsibilities to Plaintiff Sierra Transport, Inc., which involves approximately 26 tractor trailer loads of biosolids a day. (Pls'. Ex. 2 [Stockton P.I. Decl.] at 14.) Plaintiff R & G Fanucchi, Inc. performs the farming at Green Acres and has contracted with Los Angeles since 2003 to land apply a minimum of 200,000 tons of biosolids there each year. (Pls'. Ex. 20 [Fannuchi [sic] P.I. Decl.] ¶ 3.) All biosolids applied to land at Green Acres are Class A EQ. (Pls'. Ex. 1 [Minamide P.I. Decl.] ¶ 7.)

Green Acres has been described by one expert as "one of the best monitored and professionally operated land application sites." (Pls'. Ex. 4 [Gerba P.I.

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[2] Documents cited with the designation "P.I." are declarations originally submitted in support of Plaintiffs' preliminary injunction motion and which have been resubmitted in support of the cross motions for summary judgment.

Decl.] ¶ 10.) In addition, the Green Acres site is particularly well-suited for land application because its soil contains multiple layers of silt known as hardpan. The hardpan helps to protect groundwater, which, beneath Green Acres, is extremely deep below the surface. (Pls'. Ex. 2 [Stockton P.I. Decl.] ¶ 32.) Further, Green Acres is easily accessible by nearby highways, including Interstate 5 and California Highway 119. (Pls'. Ex. 2 [Stockton P.I. Decl.] ¶ 32.) Land use in the vicinity of Green Acres is predominantly agricultural, consisting of range land, dairies, and irrigated row crops. Oil fields are also nearby, and there are no adjacent residences. (Pls'. Ex. 3 [Johnson P.I. Decl.] ¶ 8; Pls'. Ex. 5 [Gerba P.I. Decl.] ¶ 10.) Experts have opined that the biosolids operation at Green Acres presents no threat to the environment that is discernable – at least based on current science. (Pls'. Ex. 3 [Johnson P.I. Decl.] ¶ 18; Pls'. Ex. 6 [Pepper P.I. Decl.] ¶ 8.)

Though remote, Green Acres impacts negatively on certain activities. It emanates strong odors and attracts an unusual amount of flies – conditions which can be observed en route to and at the nearby Buena Vista Aquatic Recreation Area, making water-skiing there less enjoyable (Frantz Decl. ¶¶ 17, 19.)[3]

[3] The declaration of Tom Frantz is offered by Intervenor Association of Irritated Residents ("AIR") in support of Kern's reply papers Plaintiffs move to strike the entire declaration because it was offered for the first time in a reply. However, while the Ninth Circuit has held that new evidence should not be presented in a reply brief, it also allows district courts to

(Continued on following page)

Green Acres also lies adjacent to the Kern Water Bank, which sits atop an underground aquifer used to store water for extraction during dry years. (Defs'. Ex. 41 [Parker Decl.] ¶¶ 2, 8.) Particularly when water is extracted during dry years, groundwater levels can drop rapidly, potentially causing groundwater from

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consider such evidence after giving the non-moving party an opportunity to respond *Provenz v. Miller,* 102 F 3d 1478, 1483 (9th Cir. 1996) (citing *Black v. TIC Inv. Corp.,* 900 F.2d 112, 116 (7th Cir 1990)) Here, the Court allowed Plaintiffs to respond to the portions of Kern's reply brief which cited the Frantz declaration by filing a sur-reply. (Order of July 24, 2007 re: Further Briefing.) Therefore, the Court shall consider the portions of the Frantz Declaration that are otherwise admissible, as are the portions cited above. However, the Court agrees with Plaintiffs that significant portions of the Frantz Declaration are inadmissible. Frantz does not explain how his status as a farmer in Kern County qualifies him as an expert on the effects of biosolids, and virtually all of his testimony is based not on his personal knowledge, but rather his concerns and beliefs. Such testimony is inadmissible on summary judgment. *See* Fed. R. Civ. P. 56(e); Fed. R. Evid. 701, 702; *Bank Melli Iran v. Pahlavi,* 58 F.3d 1406, 1412 (9th Cir. 1995) (declarations must be on personal knowledge to carry weight at summary judgment). Moreover, to the extent AIR offers Frantz's beliefs as evidence of Measure E's benign intent, the evidence does not support this proposition because Frantz does not declare that he voted for, drafted, or participated in the campaign for the Measure. Therefore, the factual assertions in paragraphs 4 through 16, 18, and 20 through 39 of the Frantz Declaration are inadmissible, and Plaintiffs' motion to strike them is **GRANTED**, as is the motion to strike the Appendices to the Frantz Declaration, which are scientific studies identifying potential risks from biosolids, but are without foundation without Frantz's testimony. The motion to strike is **DENIED**, however, as to paragraphs 17 and 19, cited above.

under Green Acres to move into the aquifer. (*Id.* ¶ 9.) The same is true for the Arvin-Edison aquifer, which is twelve miles from Green Acres. (Defs'. Ex. 40 [Collup Decl. ¶ 12.) Notably, however, the record contains no evidence that the groundwater beneath Green Acres has been contaminated,[4] and indeed results of groundwater monitoring and sampling data from the region since 1975 indicate no significant impacts to groundwater quality resulting from application of biosolids at Green Acres. (Pls'. Ex. 3 [Johnson P.I. Decl.] ¶ 8.)

b. Orange and Los Angeles Counties' Operations

Plaintiffs Orange County Sanitation District ("OCSD") and County Sanitation District No. 2 of Los Angeles County ("CSD No. 2") operate wastewater treatment plants in Orange County and Los Angeles

[4] Intervenor Kern County Water Agency proffers the testimony of its general manager, James Beck, who opines that sewage sludge poses a threat to adjacent groundwater banking facilities. He bases this opinion on a University of California study, which is not in the record, that found the crops grown on sludged land did not "take up" all the salts introduced by the sludge From this, Beck infers that to the extent sludge contains contaminants, those contaminants could remain behind in the soil and eventually make their way into the groundwater. (Beck Decl. ¶¶ 5-8.) Beck does not explain his qualifications as an expert, however, and they are not facially apparent from his position Therefore, Beck's opinion testimony shall not be considered, and Plaintiffs' motion to strike it is **GRANTED**. *See* Fed. R. Civ. P. 56(e); Fed. R. Evid. 701, 702.

County, respectively, which generate biosolids that are recycled by Plaintiff Shaen Magan at sites in Kern County known as Honey Bucket Farms and Tule Ranch. (DOSSUF ¶ 4.) OCSD has been land applying biosolids under contract at Tule Ranch since 1996. (*Id.* ¶ 5.) Similar to the arrangement used by the City, OCSD collects wastewater generated by residential, commercial, and industrial users within its service area in Orange County, and then treats this wastewater at two treatment plants, where a portion of the wastewater solid residuals are collected, treated further, and reconstituted into biosolids. The biosolids are then reused as a fertilizer and a soil conditioner at Tule Ranch. (*Id.* ¶ 6.) The biosolids OCSD ships to Kern meet the Class A and EQ standards. (Pls'. Ex. 24 [Ghirelli P.I. Decl.] ¶¶ 3, 6-7.)

CSD No 2 collects wastewater from 78 cities and from the unincorporated areas of Los Angeles County located outside the City of Los Angeles. CSD No. 2 treats this wastewater in its 11 treatment plants, and then conveys the solid materials in the wastewater to its Joint Water Pollution Control Plant, where these materials are separated, given additional treatment, and processed into biosolids for beneficial reuse. (DOSSUF ¶ 8.) CSD No. 2 sends its biosolids to Honey Bucket Farms. (*Id.* ¶ 9.)

The record contains far less information about Tule Ranch and Honeybucket [sic] Farms than it does concerning Green Acres Nevertheless, no party has contended there is any significant difference between

the sites,[5] and indeed, the arrangements are similar in several important respects. At each Kern County location, the City's, OCSD's, and CSD No. 2's biosolids are used as a nutrient supplement and soil amendment on acreage used to grow animal feed crops. (*Id.* ¶¶ 3, 6, 9.) If the sites in Kern County became unavailable, Plaintiffs would be required to find alternative sites, most probably in Arizona (Pls'. Ex. 18 [Bahr P.I. Decl.] ¶ 9), which would significantly increase transportation costs and impose greater environmental impact from vehicle emissions, both due largely to the increased hauling distances. (Pls'. Ex. 19 [Stahl P.I. Decl.] ¶ 17; Pls'. Ex. 1 [Minimide [sic] P.I. Decl.] ¶¶ 32-37.)

2. KERN'S BIOSOLIDS

Before the Kern County Board of Supervisors adopted biosolids ordinances in 1999 and 2002, Kern land applied its sewage sludge to an 1,100-acre farm that it owns in the unincorporated areas of the County. (Pls'. Response to Defs' Separate Statement ("PSGI") ¶ 25.) However, Kern does not currently apply any of its own biosolids to Kern farmland, and

[5] However, the record includes a December 2006 report authored after an unannounced inspection by an officer of the California Regional Water Quality, which found that Tule Ranch/Honeybucket [sic] Farms was not in violation of any regulations, but rated the sites a 3 out [sic] 5 for overall facility operations, which indicated they were merely "satisfactory" (Defs'. Ex. 16 [Inspection Report] at 1, 2.)

has not since at least 2004. Instead, the Kern Sanitation Authority currently sends its biosolids to a private contractor, San Joaquin Composting ("SJC"), which processes them further and sells them as compost to private firms. No in-county government entity currently applies biosolids to land in Kern's jurisdiction. (*See* Defs'. Separate Statement in Reply to Pls'. Response to Defs'. Separate Statement SGI ("DRSGI") ¶¶ 105-106.)[6]

D. Regulation of Biosolids in Kern County

1. Kern's Regulation of Biosolids Prior to Measure E

Kern has had two biosolids ordinances prior to Measure E. First, Kern began regulating land application of biosolids in 1998, when it required that the biosolids meet the standards for Class A and Class B biosolids. *County Sanitation Dist. No. 2 of L.A. County v. County of Kern,* 127 Cal. App. 4th 1544, 1568 (Ct. App. 2005) ("*County Sanitation*"). Second, in 1999, Kern adopted an ordinance that phased out the land application of Class B biosolids over a three-year period. And after the three-year phase-out, the 1999

[6] Under Measure E, however, compost sold by SJC could not be applied to land in Kern's jurisdiction, and therefore Kern staffers have expressed some concern that SJC would stop accepting biosolids from Kern. (Pls'. Ex. 9 [McCutcheon Decl.] Ex. A [Memo to Kern Board of Supervisors] at 298-99.) In any event, Kern effectively relies on SJC to sell its biosolids to firms in jurisdictions that will allow land application

ordinance allowed only Class A EQ biosolids. *Id.* at 1568 n.34; 40 C.F.R. 503.13(b)(3).

2. CITIES WITHIN KERN COUNTY

Because the incorporated areas of the County necessarily lie beyond Kern's jurisdiction, Cal. Const. art. XI, § 7, Kern has never regulated the land application of biosolids by the several cities in the County that land apply biosolids on farm land within city limits. These cities include Bakersfield, *see* B.M.C. § 8.90.020(A) (allowing land application of Class A EQ biosolids to city owned or operated farmland), Taft, Wasco, and Delano (Pls'. Ex. 2 [Stockton P.I. Decl.] ¶ 20; Stahl P.I. Decl. ¶ 12 (stating that incorporated areas in Kern County allow Class B biosolids); *see also* Pls.' Ex. 9 [McCutcheon P.I. Decl.], Ex. A at 299 (opining that Measure E could force Kern to find incorporated cities in the County to accept its biosolids for land application)). Nearly 44% of Kern County voters reside in Bakersfield, while only 39% percent [sic] reside in unincorporated areas (as of August 2, 2007). *See* http://elections.co.kern.ca.us/Elections/districtcountstatistics.asp (last visited Aug. 2, 2007).[7]

[7] The Court takes judicial notice of the Bakersfield Municipal Code and the Kern County voter registration statistics Fed. R. Evid. 201(b)-(d).

3. MEASURE E

a. The Campaign

Dubbed the "Keep Kern Clean Ordinance of 2006," Measure E was sponsored by Dean Florez, a State Senator whose district encompasses portions of Kern County, including portions of Bakersfield, and who had previously introduced statewide legislation that would have prohibited local governments from exporting their sewage sludge to other counties unless there were no feasible local disposal option. S.B. 926 (Cal. 2005). Indeed, Measure E's initiative campaign made clear that the target was sludge from out-of-county. It included such statements as:

- "Measure E will stop L.A. from dumping on Kern"
- "We will proclaim our independence from polluting Southern California and Los Angeles."
- "[W]e've got a bully next door, flinging garbage over his fence into our yard"
- "A lot of voters are just kind of tired of being the dumping ground for everyone else in the state. . . . Enough sludge, enough sexual predators, enough prisons, enough dairies. When does the county stand up for itself?"

(Stockton P.I. Decl. ¶ 19; Pls. Ex. 19 [Editorial, Take Your Sludge and Shove It!, Bakersfield Californian] at B-8.) Moreover, the campaign website, http://www.keepkernclean.com, includes graphics that state

"Keep L.A. Sludge out of Kern County" and depict stacked outhouses, with the top labeled "LA COUNTY" and the bottom labeled "KERN COUNTY." It also contains a link to an online editorial that states:

> Until Kern County voters say no to sludge and YES to Measure E, every man, woman and child who lives here will have to put up with Southern California dumping its human and industrial waste on us.
>
> Why? Because Kern County is the cheapest place for Southern California to dump the chemical and biological-laced goo that is scraped from the bottoms of its sewer plants.
>
> . . .
>
> Measure E on the June ballot will prohibit the land application of sludge in unincorporated areas of Kern County. Southern California will have to find a better, safer way to dispose of its goo, which contains heavy metals, industrial solvents, feces, medical waste and pharmaceuticals.

http://www.bakersfield.com/135/story/48404.html.

Another link from the campaign website leads to an article that states:

> Fearful of deteriorating air and water quality, many folks in [Kern] county have about had it with the daily parade of trucks dumping sewage sludge onto their fields. On top of that, they can't stand what is viewed as Los

> Angeles' imperial attitude, such as recent reports that social workers in Los Angeles County had given homeless people one-way bus tickets to Bakersfield, the largest city in Kern County.
>
> In fact, many residents are simply sick of Los Angeles.
>
> . . .
>
> "The valley is home to every one of the 11 prisons built since 1990,". . . . "We have waste-burners and tire-burners and proposals for even more garbage. At some point, there's enough critical mass that people say: 'No more. That's not our future.'"[8]

Not surprisingly, on June 6, 2006, the voters of Kern County adopted Measure E with over 83% of the vote. (Pls'. Response to Defs'. Separate Statement of Undisputed Material Facts ("PRSSUF") ¶ 1.)

b. The Ordinance

Measure E repealed Chapter 8.05 of the Ordinance Code of Kern County and enacted a new Chapter 8.05, which prohibits the land application of all biosolids in the unincorporated areas of Kern County. K.C.O.C. §§ 8.05.10, 8.050.40(A). The ordinance defines "land apply" as "the spraying, spreading or other placement

[8] The Court considers these statements not for their truth, but as evidence of the campaign strategy and thereby the voters' intent in enacting Measure E.

of Biosolids onto the land surface, the injection of Biosolids below the land surface, or the incorporation of Biosolids into the soil." *Id.* § 8.05.030(E).

Excluded from the general ban are biosolid products purchased from retail outlets and used primarily for residential purposes in limited quantities. *See id.* § 8.05.030(B). Violations of the ordinance constitute misdemeanors punishable by fines and imprisonment. *Id.* § 8.05.060.

The stated purpose and intent of Measure E are as follows:

> There are numerous serious unresolved issues about the safety, environmental effect, and propriety of land applying Biosolids or sewage sludge, even when applied in accordance with federal and state regulations. Biosolids may contain heavy metals, pathogenic organisms, chemical pollutants, and synthetic organic compounds, which may pose a risk to public health and the environment even if properly handled. . . . Land spreading of biosolids . . may cause loss of confidence in agricultural products from Kern County.

Id. § 8.05.010.

Measure E is at issue here.

IV.

DISCUSSION

A. The Cross Motions for Summary Judgment

1. The Legal Standard

The Court assesses the motions under the usual standard, which permits entry of judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, the Court must first decide whether there exist "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). If the facts are not in dispute, then the Court determines whether the moving party is entitled to judgment as a matter of law. Further, where summary judgment is not proper on the entire claim, under Rule 56(d) the Court may grant partial summary judgment on discrete elements of the claim. Fed. R. Civ. P. 56(d); *Lies v. Farrell Lines, Inc.,* 641 F.2d 765, 769 (9th Cir. 1981)

"On cross motions for summary judgment, the burdens faced by the opposing parties vary with the burden of proof they will face at trial. When the moving party will have the burden of proof at trial, his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than

for the moving party." *Seagate Tech., Inc. v. St. Paul Fire & Marine Ins. Co.,* 11 F. Supp. 2d 1150, 1152 (N.D. Cal. 1998). On the other hand, "a moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the nonmoving party the burden of raising genuine issues of fact by substantial evidence." *Id.*

2. THE EQUAL PROTECTION CLAUSE CLAIM

Plaintiffs claim that Measure E violates the Equal Protection Clause, U.S. Const., amend. XIV, § 1, by treating biosolids differently than other fertilizers, which they claim present equal if not greater public health risks. The Court disagrees and concludes Kern's motion for summary adjudication of this claim has merit.

a. Overview of Equal Protection Doctrine

Where, as here, the classification at issue does not involve fundamental rights or suspect classes, it comports with the Equal Protection Clause "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe,* 509 U.S. 312, 319-20 (1993). Under rational basis analysis, a "classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' A State,

moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 320 (citations omitted). Indeed, a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (citation omitted). "The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Id.* at 321 (quoting *Metropolis Theatre Co. v. Chicago,* 228 U.S. 61, 69-70 (1913)). Moreover,

> [e]vils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The prohibition of the Equal Protection Clause goes no further than the ***invidious*** discrimination.

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 316 (1993) (emphasis added). Therefore, under rational basis review:

> the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally ***may have*** been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (emphasis added) (citations omitted)

Because the rational basis standard requires great deference to legislative judgments, a plaintiff who brings an equal protection claim attacking a regulatory statute like the one at issue in this case bears the burden to negate every conceivable basis that might support the challenged statute. *Beach Comm'ns* [sic], 508 U.S. at 315. A plaintiff may carry this burden by demonstrating that the defendant's proffered purposes were merely pretextual. This may be accomplished when confronted with a defense motion for summary judgment by "creating a triable issue of fact that either: (1) the proffered rational basis was ***objectively*** false; or (2) the defendant ***actually*** acted based on an improper motive." *Squaw Valley Dev. Co. v. Goldberg,* 375 F.3d 936, 946 (9th Cir. 2004) (emphases added) (citations omitted); *see also, e.g., Armendariz v. Penman,* 75 F.3d 1311, 1327 (9th Cir. 1996) (plaintiffs "raised a triable issue of fact as to whether the [City's] asserted rationale of directing efforts to enforce the housing code at high-crime areas was merely a pretext" for obtaining their property at low prices). As the Court explains below, nothing in this record suggests that the justifications for the enactment of Measure E were pretextual.

b. Analysis

i. Measure E's Stated Purposes Were Not Pretextual and Were Legitimate

Here, Measure E recites a variety of legitimate purposes, including a generalized concern for health and safety, nuisance abatement from unpleasant odors associated with biosolids, and protection of the "confidence" in agricultural products from Kern County. K.C.O.C. § 8.05.010. And contrary to Plaintiffs' contention (Opp. at 11-13), no evidence indicates that these stated purposes were pretextual even though the campaign in favor of Measure E appears to have played on regional rivalries and was clearly targeted at Plaintiffs, as it involved a variety of creative slogans referring to "L.A. sludge." (*See* Stockton P.I. Decl. ¶ 19; Pls. Ex. 19 [Editorial, Take Your Sludge and Shove It!, Bakersfield Californian] at B-8.) Nothing in these statements indicates a ***bare*** desire to harm Plaintiffs unrelated to the environmental harms they were perceived to be causing and which Kern could legitimately redress. Rather, the statements merely reflect an indisputable fact – that Southern California counties were the ones introducing the perceived pollutant to Kern's jurisdiction. Put simply, although the campaign indicated frustration and even animosity towards Plaintiffs, these feelings were directly related to Measure E's stated environmental purposes. Thus, though animus may have been a significant element of the campaign, that fact alone does not establish a violation of the Equal

Protection Clause. As the Supreme Court has explained: "Although such biases [as negative attitudes and fear] may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

In short, Measure E sought to address perceived pollution, and Plaintiffs were perceived polluters. Even the campaign references to sexual predators and prisons were mere rhetoric to illustrate that, in the view of the campaign, sludge was something harmful to the County that was introduced by outsiders. For that reason, the campaign rhetoric does not reasonably lead to the inference that Measure E's stated environmental purpose was a pretext to conceal some other, unconstitutional, objective.

ii. Measure E Rationally Furthers Its Stated Purposes

If one considers the scope and impact of Measure E apart from the campaign rhetoric, one can readily determine that it is rationally related to its purposes. Measure E's drafters and supporters could rationally speculate that land application of biosolids would present unknown future health risks that would be avoided by banning the practice. They also could properly be concerned that the reputation of Kern's agricultural products would be adversely affected if the County became known as a dumping

ground for the refuse of Southern California residents. Indeed, a 1996 NRC study states that adverse public perception of the use of sewage sludge in food crop production is a serious problem and that "public perception does not necessarily depend on objective, scientific evidence." (Defs'. Ex. 20 at 158-59.) The 1996 NRC study also stated:

> [The major business risk for farmers and food processors . . . is stigmatization of the product and its source. This leads to loss of customer confidence, choice of competing products, and loss of market share on regional and even national scales. Even if contamination or injury causation is unproved, these consequences may occur because widespread media coverage, speculations, or allegations may be enough to make the retailers and consumers reject the product.

(*Id*. at 171.)

The NRC study also concluded that "the risks from negative public perception could be substantial. Negative public perception of food crops produced using treated wastewater or sludge could have detrimental impacts on consumer demand and the profit and survival of firms." (*Id*. at 160.)[9]

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[9] Kern also contends that major food processors such as Heinz U.S.A. and Del Monte do not accept agricultural products grown on soil treated with sewage sludge. Its evidence in support of this purported fact, however, is correspondence to a paralegal that works for defense counsel. Therefore, the evidence

(Continued on following page)

Plaintiffs object to the above evidence, contending that because their biosolids are applied on acreage used only to grow animal feed, concerns related to food for human consumption are irrelevant. The objection misses the point. Evidence concerning public perception regarding food products confirms (as if it needed confirming) that factors other than scientific realities frequently affect the public's beliefs about its food supply. Since perception can become reality for those involved in agri-business, Kern could rationally conclude that a complete ban on the land application of biosolids with [sic] its jurisdiction rationally furthers Kern's agricultural reputation. Thus, even if Plaintiffs themselves do not grow food for human consumption, that fact alone would not render Measure E irrational as applied to them. Rather than adopting a potentially cumbersome program to ensure that no crops grown with biosolids are used for human consumption, Kern may simply have preferred not to incur the risks of being associated with biosolids at all. The choice to enact a blanket ban was not irrational.[10]

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must be disregarded as without foundation and inadmissible hearsay.

[10] Plaintiffs purport to controvert the claimed purpose of guarding Kern's agricultural reputation with a report from the California State Water Resources Control Board that stated "[W]ith respect to the use of biosolids in the production of food crops [California farmers] are at no marketing disadvantage with respect to any other agricultural region in the U S or the world." (Pls'. Ex. 12 [State Water Resources Control Board,

(Continued on following page)

Finally, the record also includes evidence that some problems, including the potential for offensive odors, cannot be eliminated even at the "best run" biosolid disposal operations. (Defs'. Ex. 19 [1999 EPA Report: Biosolids Generation, Use, and Disposal in the United States] at 41.) This confirms that Measure E rationally furthered its stated purpose of avoiding nuisances associated with biosolids.

For these reasons, Measure E comports with the Equal Protection Clause, notwithstanding a variety of evidence in the record that biosolids present only negligible risks to human health when applied in conformity with federal regulations. As the Supreme Court has emphasized, a "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or

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Final Statewide Program EIR Covering General Waste Discharge Requirements for Biosolids Land Application (July 2004)] at 2-81.) The reason this was so, however, was simply that "No state within the U.S. bans the application of biosolids to food crops. Further, the land application of biosolids to agricultural lands producing food crops is a common practice in many areas of the world that also import food crops to the U.S." (*Id*.) Therefore, far from concluding that the public was ***unconcerned*** with biosolids, the State Board merely concluded that with most sources of food coming from regions that used biosolids, all growers were essentially on a level playing field when viewed in the abstract. The report made no findings with respect to regions that experienced particularly high concentrations of biosolid application, or that became notorious for the practice. Therefore, the report does not negate the rationality of the belief that Kern agricultural products could suffer if the County continued to be used for biosolids.

empirical data." *Heller*, 509 U.S. at 320 (citation omitted). This means that, for Equal Protection purposes, Kern voters were not obligated to make a decision based on cutting edge research: Measure E comports with the Equal Protection Clause unless it was ***irrational***, and on this record, it was not.

Therefore, Kern's motion for summary judgment on the Equal Protection claim is **GRANTED**.

3. THE COMMERCE CLAUSE CLAIM

Plaintiffs' Commerce Clause claim fares better, largely because they have carried their burden to demonstrate Measure E's effect of discriminating against interstate commerce, thereby subjecting the ordinance to strict scrutiny which it cannot survive.

a. Overview of the Dormant Commerce Clause

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, affirmatively grants Congress plenary power to regulate commerce and limits the power of states and local government to adopt ordinances that interfere with interstate commerce, even "[w]hen legislating in areas of legitimate local concern, such as environmental protection and resource conservation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). Because Congress has absolute authority in the regulation of commerce, it may legislatively exempt local ordinances from the Commerce Clause's restrictions.

"Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983) (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 769 (1945)). However, Supreme Court precedent teaches that such authorization must be clearly expressed by Congress, and in the absence of such a clear expression courts should not assume Congress has authorized a discriminatory or burdensome local regulation. *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003).

Where the Commerce Clause does apply, the level of scrutiny depends on whether the ordinance at issue "discriminates" against interstate commerce. "[L]aws that discriminate against interstate commerce face 'a virtually per se rule of invalidity.'" *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Because of this "virtually per se rule," precedent dictates that discriminatory statutes should be subjected to strict scrutiny and should be upheld "only if the government can demonstrate both that the law serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or Waste Sys., Inc. v. Or. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994).

By contrast, laws that do not discriminate against interstate commerce face a more deferential standard. Under the so-called "*Pike* test," "non-discriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id*. (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

b. Application

i. Biosolids Are Articles in Interstate Commerce

A local government's regulation of waste and waste disposal constitutes "regulation of interstate commerce" where the regulation's economic effects are interstate in reach. *E.g.*, *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 389 (1994); *see also Conservation Force, Inc. v. Manning*, 301 F.3d 985, 993 (9th Cir. 2002) ("To determine whether the dormant Commerce Clause is applicable, we ask . . . whether the activity regulated . . . has a 'substantial effect' on interstate commerce such that Congress could regulate the activity."). Here, the record reflects that disposal sites for biosolids are relatively scarce (Pls'. Ex. 19 [Stahl P.I. Decl.] ¶ 16), and that elimination of the sites in Kern County, California will likely lead to diversion of the material to Arizona (*id.* ¶ 16; Pls'. Ex. 1 [Minimide [sic] P.I. Decl.] ¶ 9). This suffices to bring Measure E within the ambit of the Commerce Clause. *See, e.g.*, *C & A Carbone*, 511 U.S. at 389.

Although *C & A Carbone* involved a restriction that barred out-of-state waste haulers from bringing refuse across state lines, Kern's status as a county and not a state does not render the Commerce Clause inapplicable. "[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." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361 (1992); *see also Dean Milk Co. v. Madison*, 340 U.S. 349, 354-56 (1951) (invalidating an ordinance that barred certain milk producers from selling milk within city limits); *BFI Med. Waste Sys. v. Whatcom County*, 983 F.2d 911, 913 (9th Cir. 1993) (citing *Fort Gratiot* for the proposition that "out-of-county waste bans are per se unconstitutional"). Indeed, discrimination against out-of-county entities would, a fortiori, discriminate against out-of-state entities and therefore be subject to the virtual per se rule of invalidity.

ii. Congress Has Not Exempted Measure E From Commerce Clause Limitations

Kern argues vigorously that Measure E is immune from attack under the Commerce Clause because Congress has specifically authorized local regulations of biosolids. (Defs'. Mot. at 2-9; Defs'. Reply at 1-4.) In support, Kern cites a provision in the Clean Water Act, which provides:

> The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

33 U.S.C. § 1345(e).

The legislation, properly construed and understood, provides no support of Kern's position. As the Court has explained twice previously, *Kern I*, 2006 WL 3073172, at *7; *Kern II*, 462 F. Supp. 2d at 1113, section 1345(e), though contemplating local legislation regarding sludge disposal, contains no language remotely approaching authorization of local legislation that discriminates against or unduly burdens interstate commerce. As already noted, congressional approval for local regulation in general does not render the Commerce Clause inapplicable. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). Rather, the question is whether Congress has made unmistakably clear its intent to "remove federal constitutional constraints" and thereby "sustain state legislation from attack under the Commerce Clause." *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 959-60 (1982). As the Court in *Maine v. Taylor* explained:

> [B]ecause of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional direction to do so has been unmistakably clear. . . . Maine identifies nothing . . . that suggests Congress wished to validate state laws that would be unconstitutional without federal approval.

477 U.S. at 138-39 (citation and internal quotation marks omitted); *see also Hillside Dairy*, 539 U.S. at 68 ("Because § 144 does not clearly express an intent to insulate California's pricing and pooling laws from a Commerce Clause challenge, the Court of Appeals erred in relying on § 144 to dismiss the challenge."); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155 n.21 (1982) (holding that Congress had "convincingly" though not "expressly" "announced that Indian taxes do not threaten its latent power to regulate interstate commerce"). Because Kern cites no such expression of congressional intent here, the Commerce Clause analysis applies to the Court's consideration of Measure E.[11]

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[11] Kern unpersuasively argues that Measure E is not subject to such analysis, citing *Western & Southern Life Insurance Co. v. State Bd. of Equalization*, 451 U.S. 648, 653-54 (1981) for the proposition that congressional approval or authorization of a local regulation in general suffices to immunize an ordinance from a Commerce Clause attack. But that case does not support Kern's position either, as the Court there concluded Congress

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had authorized discriminatory state insurance regulations in large part because of a statutory provision stating:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, ***and that silence on the part of the Congress shall not be construed to impose any barrier*** to the regulation or taxation of such business by the several States.

Id. at 653 (citing 15 U.S.C. § 1011) (emphasis added). Moreover, the Court also noted that Congress had enacted the legislation in question – the McCarran-Ferguson Act – in the wake of a Commerce Clause case that overruled prior jurisprudence to hold that insurance was "commerce" and thus subject to Commerce Clause analysis in the first instance. *Id*. at 654-55. Therefore, contrary to Kern's suggestion, *Western & Southern Life Insurance* is merely another example of the Supreme Court demanding convincing evidence of Congressional intent to allow local legislation that would otherwise transgress the Commerce Clause before it will deem the Commerce Clause analysis inapplicable. To the same effect, and unhelpful to Kern for similar reasons, is *Northeast Bancorp, Inc., v. Bd. of Governors*, 472 U.S. 159, 174 (1985), which also inquired into Congress' intent to allow ***discriminatory*** state regulations. Even less helpful is *Oxygenated Fuels Ass'n, Inc. v. Davis*, 331 F.3d 665, 666 (9th Cir. 2003), which merely held that a California regulation banning MTBE in gasoline was not preempted by the Clean Air Act and in no way involved Commerce Clause analysis. Kern is therefore left only with the district court's opinion in *Oxygenated Fuels Ass'n, Inc v Davis*, 163 F. Supp. 2d 1182, 1188 (E.D. Cal. 2001), which, though reaching a result consistent with the position Kern advocates, provided no analysis that addressed the Supreme Court authority cited above, and thus is unpersuasive.

iii. Measure E's Effect Is To Discriminate Against Interstate Commerce, And It Cannot Survive Strict Scrutiny

Having concluded that Congress has not exempted Measure E from Commerce Clause analysis, the Court begins by noting that Measure E does not discriminate on its face; by its terms, it bans all biosolids regardless of their origin. *See* K.C.O.C. §§ 8.04.040(A), 8.05.050(A), 8.05.060. However, even absent facial discrimination, a court may find that a state law violates the Commerce Clause on proof either of discriminatory effect, or of discriminatory purpose. *Minnesota*, 449 U.S. at 741 n.15. Based on that proposition, Plaintiffs contend that, despite Measure E's facial neutrality, it nonetheless transgresses the Commerce Clause because its underlying purpose and effect is to discriminate against biosolids from the City and other Southern California communities. (Pls'. Opp. at 6.) The Court previously found Plaintiffs were likely to prevail with this position, *Kern II*, 462 F. Supp. 2d at 1113-15, and, upon careful consideration, now holds that they have done so.

Even though for Equal Protection purposes the antagonism toward Los Angeles in particular and Southern California in general fails to negate a legitimate environmental concern about the land application of biosolids within Kern County, Commerce Clause jurisprudence focuses on a different set of concerns – the discriminatory impact of the legislation on commerce or articles in commerce. In that

regard, one cannot ignore the campaign rhetoric, which included such statements as "Measure E will stop L.A. from dumping on Kern" and "[W]e've got a bully next door, flinging garbage over his fence into our yard." While these sorts of statements do not suggest that Measure E was enacted for the purpose of protecting local industry at the expense of outside businesses, they amply demonstrate that the initiative was not so subtly animated by a specific desire to exclude Plaintiffs' biosolids from the County.[12] And

[12] Kern cites California law for the proposition that the campaign rhetoric here is irrelevant to the voters' intent because it was not part of the official ballot materials. (Defs'. Rebuttal at 4-5.) However, Kern's California authorities are distinguishable because they concern reluctance to resolve ***statutory ambiguities*** by looking to materials not before the voters. *See In re First Trust Deed & Investment, Inc.*, 253 F.3d 520, 530 (9th Cir. 2001) (under California rule of statutory construction, courts may not "consider the motives or understandings of an individual legislator even if he or she authored the statute"), *Horwich v. Superior Court*, 21 Cal. 4th 272, 277 n.4 (1999) (declining to resolve ambiguity in Proposition 213 by looking to "matters [that] were not directly presented to the voters"); *Robert L. v. Superior Court*, 30 Cal. 4th 894, 904-05 (2003) (same, citing *Horwich*). Here, the campaign rhetoric was assuredly before the voters (as it was disseminated on the internet on the campaign website and reflected on the websites of mainstream media), and is relevant here not to resolve an ambiguity, but to assess voters' ***potentially wrongful intent*** – a use adopted by controlling Supreme Court authority which, contrary to Kern's suggestion, cannot be limited to the Equal Protection context. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982). Indeed, at least one federal court of appeals has, in a dormant Commerce Clause case, been willing to assess the intent of a local ordinance by looking directly to the intent of its drafters. *S.D. Farm*

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while excluding Plaintiffs' biosolids from disposal in the County, Measure E has virtually no impact on in-county biosolid programs, as Kern's biosolids could continue to be shipped to SJC, and cities in the County were permitted to continue to allow land application within their corporation limits.

In these circumstances, the record compels only one conclusion: Measure E's drafters and proponents, though perhaps genuinely motivated by concern about the environmental impact of biosolids, reacted to this problem by banning land application in areas used by out-of-county entities, while tolerating it in areas used by in-county entities. This resulting disparity was not merely an incidental effect – rather, it was certainly intended, as evidenced by a campaign with the theme of independence from Southern California bullies. Having reached this conclusion, it follows that Measure E must be subjected to strict scrutiny not because of an illegitimate purpose, *Minnesota*, 449 U.S. at 463, 470 nn.7, 15 (presence of genuine environmental purpose precludes application of strict scrutiny on purpose grounds), but rather because the legislation was intended to and does have a discriminatory effect. *See Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th Cir. 2005) (noting that the rule of strict scrutiny for Commerce Clause claims applies "where legislation results in 'patent discrimination

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Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596 (8th Cir, 2003). The Court finds this approach persuasive here as well.

against interstate trade.'" (quoting *Philadelphia*, 437 U.S. at 624)). Although the circumstances presented in this case are out of line with the more usual pattern of discrimination in Commerce Clause jurisprudence, Measure E must be tested under the strict scrutiny standard because the legislation plainly discriminates, and was intended to discriminate, against out-of-county sludge.

To circumvent this analysis, Kern argues that Measure E regulates entirely even handedly within the unincorporated areas of the County. (Defs'. Reply at 7-8.) The argument ignores reality: 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. (*See* Pls'. Ex. 18 [Bahr P.I. Decl.] ¶ 11 (noting costs required to initiate a new biosolids program).) No city within the County applies biosolids to land in the unincorporated areas, and Kern itself sends its biosolids to SJC. (DRSGI ¶¶ 105-106.) Although the application of the biosolids ban to SJC's compost presents some threat to Kern's current disposal method (Pls'. Ex. 9 [McCutcheon Decl.] Ex. A [Memo to Kern Board of Supervisors] at 298-99), the SJC arrangement insulates Kern in an important way from Measure E's burdens, as Kern can continue sending its material there so long as SJC finds enough buyers in neighboring jurisdictions. As a result, even confined to the unincorporated areas of the County, Measure E's

burdens fall significantly heavier on Plaintiffs than they do on Kern.

Second, and more importantly, the Court cannot ignore the fact that incorporated cities within Kern County continue to allow land application of biosolids, in some cases of lesser quality that Plaintiffs'. This, coupled with the overwhelming evidence of intent to exclude out-of-county sludge from the County as a whole, compels the conclusion that Measure E has the practical effect of allowing Kern County municipalities to continue applying their biosolids within the County's borders, but preventing out-of-county jurisdictions from doing so. It may not be appropriate to consider the extra-jurisdictional effects of legislation in every case, but ignoring the conduct of Kern County municipalities would impose an artificiality on the analysis that would undermine the very purpose of long-standing Commerce Clause jurisprudence. This is especially true in this case where the record reflects that nearly 61% of Kern County's registered voters live in incorporated areas of the County. This means that over three-fifths of the decision-makers tolerate local disposition of locally generated biosolids, but have prevented out-of-county recyclers from engaging in precisely the same activity by banning the operation of any biosolid recycling facilities in the unincorporated areas of the County. This constitutes a discriminatory effect far too conspicuous to hide behind the jurisdictional limits of Kern itself. *Cf., e.g.*, *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (holding that courts must consider the

practical effect of the law, including how it interacts with the laws of other jurisdictions, in considering the Commerce Clause analysis); *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1190 (9th Cir. 1990) (same, citing *Healy*). And as the Supreme Court noted in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Authority*.

> Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.

127 S. Ct. 1786, 1797 (2007); *see also Maine*, 477 U.S. at 149 n.19 (explaining that the Commerce Clause does not allow locales to further legitimate environmental purposes by forcing outsiders to "bear the brunt of the conservation program for no apparent reason other than that they lived and voted in other" jurisdictions). That is what happened here. Measure E shifts the costs resulting from its regulation almost entirely to out-of-county interests through an initiative process that was unchecked by the operation of the normal political restraints, such as an organized local opposition. The Supreme Court teaches that this sort of discriminatory legislation transgresses the dormant Commerce Clause absent the most persuasive local justification.

Kern may protest that, even viewed from the perspective of the County as a geographical region and not simply as a political entity, Measure E has no discriminatory effect because Plaintiffs would be free to land-apply biosolids in incorporated areas of the County. While tempting, this position would require the Court to ignore undisputed evidence in the record. First, it is undisputed that Measure E's likely effect is to cause Plaintiffs to ship their biosolids to Arizona. While the record does not foreclose the possibility that Plaintiffs could simply use land in their own jurisdictions, their undisputed willingness to accept the greater distance to Arizona leads only to the inference that they could not simply resort to the incorporated areas of the County.

Moreover, Kern itself submitted a staff report opining that, should Measure E cause SJC to stop accepting Kern biosolids, Kern could be in the position of having to "[f]ind an incorporated city in the County that would accept [Kern] generated biosolids." (Pls'. Ex. 9 [McCutcheon Decl.] Ex. A [Memo to Kern Board of Supervisors] at 299.) The expression of this concern suggests that the cities themselves exercise some de facto control over imports, which, in combination with the anti-Los Angeles rhetoric, suggests they would not accept Plaintiffs' biosolids, thereby leading to a County-wide import ban in practical effect.

But even more significant evidence of Measure E's intended effect comes from the campaign materials: Measure E would assertedly kick Los Angeles sludge

out of Kern County. Indeed, it would be strange to think that residents of the County would tolerate Los Angeles "dumping" on its more densely populated incorporated areas when they objected so strongly to the affront to their unincorporated areas. Therefore, the Court must take the rhetoric at face value. Given the overwhelming evidence that excluding "L.A. sludge" from the County was the campaign's intent, the only reasonable inference is that Measure E would force Plaintiffs' operations out of the County entirely and not merely divert them to incorporated areas.

By contrast, no evidence indicates Plaintiffs could use incorporated areas for their biosolids programs. Thus, the Court finds that Measure E [sic] Plaintiffs have established Measure E's discriminatory effect as a matter of law, and therefore that Measure E must satisfy strict scrutiny. *E.g.*, *United Haulers*, 127 S. Ct. at 1793.

Strict scrutiny means Measure E violates the Commerce Clause unless Kern can demonstrate it was the only available means to address its legitimate environmental concerns. *Id*. Kern makes no attempt to do so, and on this record, alternatives certainly exist. Rather than a complete ban on biosolids, Kern could simply have regulated the volume, location, and quality of the biosolids it allowed to be land applied. Kern offers no argument why such methods would have been infeasible or inadequate to address its concerns, and therefore it cannot carry its burden to defend Measure E against strict scrutiny.

Accordingly, the Court holds Measure E violates the Commerce Clause, and therefore Plaintiff's [sic] motion for summary judgment on this claim is **GRANTED** and Kern's is **DENIED**.

4. THE CIWMA PREEMPTION CLAIM

Plaintiffs also claim that Measure E is preempted by the CIWMA. Kern defends against this theory by contending Plaintiffs lack standing to raise it, and that even if they had standing, CIWMA does not preempt Measure E. The Court disagrees and concludes Plaintiffs are entitled to summary adjudication on this cause of action.

a. Standing

Parties invoking federal courts' jurisdiction bear the burden to demonstrate a "case or controversy" within the meaning of Article III of the United States Constitution. *E.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Standing is an essential component of the case or controversy requirement, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), is required with respect to each form of relief sought, *Lewis v. Casey*, 518 U.S. 343, 358-59 n.6 (1996), and is a hurdle that, contrary to Defendants' suggestion, Plaintiffs easily clear here.

The core constitutional components of standing are (1) an injury in fact (2) that is fairly traceable to the action complained of (3) such that the relief

sought would likely redress the injury. *Lujan*, 504 U.S. at 560-61; *see also Lyons*, 461 U.S. at 107 & n.8 (plaintiff seeking injunctive relief must establish likelihood of ***future*** injury). Kern erroneously contends that Plaintiffs fail to make this showing. It is undisputed that the government Plaintiffs currently (and have since the mid 1990s) applied their biosolids to land within Kern County. Their ability to do so in the future would be effectively eliminated should Measure E be enforced, because the private Plaintiffs which administer their biosolids programs would face fines and imprisonment for violating the ordinance. *See* K.C.O.C. § 8.05.60. Moreover, Kern has made no suggestion that it does not intend to enforce the overwhelmingly popular ordinance. As a result, ***each*** Plaintiff has shown the risk of an imminent injury, fairly traceable to enforcement of Measure E, that would be redressed (i.e., prevented) by an order declaring the ordinance invalid and enjoining its enforcement. *Cf. Kern II*, 462 F. Supp. 2d at 1119-21 (concluding that each Plaintiff established irreparable harm for purposes of the preliminary injunction analysis). This showing far exceeds Article III's minimum requirement, as the presence in a suit of ***even one*** party with standing is sufficient to make a claim justiciable. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999).

Kern also argues that, as to their CIWMA claim, Plaintiffs fail to meet the prudential standing requirement that their complaint fall within the "zone of interests to be protected or regulated by the statute

or constitutional guarantee in question." *E.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982). Kern's contention rests on the argument that Plaintiffs have not shown that their biosolid programs in Kern County are included in their or their host jurisdictions' integrated waste management plans, which are documents mandated by the CIWMA. *See* Cal. Pub. Res. Code §§ 40900, 41000, 41300. According to Kern, this means that Plaintiffs have not established that their biosolids programs fall within CIWMA's coverage, and thus that Measure E does not invade any interest of Plaintiffs that is protected by the CIWMA. (Defs'. Opp. at 6.)[13]

Again, however, Kern's argument misses the mark. Although Plaintiffs take the bait and respond by insisting that the CIWMA does cover their

[13] Kern also suggests that the Plaintiffs' purported failure to create proper integrated waste management plans means that Plaintiffs cannot demonstrate an injury in fact. (Defs'. Opp. at 6.) This argument is perplexing, without authority, and appears merely to conflate the injury in fact inquiry with the prudential "zone of interest" inquiry. Kern also attempts to inject this argument into the substantive preemption analysis (*see* Defs'. Mot. at 21-22), as it contends. "Since Plaintiffs have elected not to bring their land application of biosolids in Kern County within the [CIWMA]'s purview, the Act does not preempt or conflict with Measure E." (*Id*. at 22.) To state this argument is essentially to refute it: the contention fails because once Plaintiffs have established standing, the CIWMA claim is essentially a straightforward exercise in statutory interpretation, and in no way turns on the particular conduct in which Plaintiffs engage.

conduct, the proper inquiry is not whether Plaintiffs' claims are within the zone of interest of the ***CIWMA***, because they bring no claim arising under that statute itself. Rather, their CIWMA preemption claims invoke ***the California Constitution***, which provides: "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 laws." Cal. Const., art. XI, § 7 (emphasis added).[14] As discussed in greater detail below, this constitutional provision operates in a manner analogous to the federal constitution's Supremacy Clause, U.S. Const. art. VI, cl. 2, preempting local legislation that either expressly or impliedly conflicts with state statutes. *Compare, e.g.*, *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 817-18 (2004) (listing ways that state law can preempt local ordinances), *with Mich. Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (listing ways that federal law can preempt state law). In part, by restricting the power of cities and counties, Article

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[14] At oral argument, counsel for Kern protested that Plaintiffs' Complaint relied only on the CIWMA and did not mention the California Constitution, and therefore that the relevant zone of interest is CIWMA's. Kern reads the Complaint too narrowly. Plaintiffs clearly alleged that Measure E "is preempted because it conflicts with the purposes and policies of the [C]IWMA" (Compl. ¶ 103.) By alleging that Measure E was preempted by state law, Plaintiffs implicitly invoked the provision of the State Constitution that requires local law to conform to statewide enactments. This suffices to bring Plaintiffs' claim within the zone of interest of Cal. Const, art. XI, § 7.

XI, § 7 guarantees that individuals and entities in California will be subject only to local laws consistent with the will of the state legislature and constitutional framers, and thereby effectuates a fundamental aspect of California's republican form of government. It follows, therefore, that Article XI, § 7's "zone of interest" encompasses claims by plaintiffs whose conduct would be restricted by a local ordinance they challenge as preempted, even if the plaintiffs do not assert rights protected by the preempting statute itself. *Cf. Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk*, 91 F.3d 1240, 1260 (9th Cir. 1996) (Reinhardt, J., dissenting) (disagreeing with panel majority that student plaintiffs lacked a particularized injury, and further arguing that they brought claims that were arguably within the zone of interests of . . . the Supremacy Clause, as they challenge[d] the enforcement of an assertedly preemptive state law"); *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 72-74 (1st Cir. 2001) ("[In] a preemption-based challenge under the Supremacy Clause . . . it is the interests protected by the Supremacy Clause, not by the preempting statute, that are at issue."); *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000) ("a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption"); *ANR Pipeline Co. v. Okla. Corp. Comm'n*, 860 F.2d 1571, 1579 (10th Cir. 1988) (holding that plaintiffs whose conduct was subject to allegedly preempted state laws asserted claims

that fell "within the zone of interest protected by the Supremacy Clause"); *see also Taubman Realty Group Ltd. P'ship v. Mineta*, 320 F.3d 475, 481 n.3 (4th Cir. 2003) (positing in dicta that the plaintiff "does not have to meet the additional standing requirement involving the zone of interests test with respect to its Supremacy Clause claim").

Accordingly, Plaintiffs have established the core constitutional components of standing, and no prudential limitation prohibits them from claiming that Measure E is preempted by the CIWMA.

The Court now turns to the merits of that claim.

b. Preemption by the CIWMA

Plaintiffs contend Measure E is preempted because it thwarts the CIWMA's express purpose of promoting recycling of wastes such as biosolids before other methods of disposal. The Court previously agreed with Plaintiffs in ruling on the motion to dismiss and the motion for the preliminary injunction, and it does so again.

i. Overview of State Preemption Principles

As mentioned above, the preemption analysis under state law is analogous to that under federal law. A county or city may only make and enforce ordinances and regulations that are "not in conflict with general laws." Cal. Const. art. XI, § 7. "Local

legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates, ***contradicts***, or enters an area fully occupied by general law, either expressly or by legislative implication."[15] *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 747 (1994) (citations and quotation marks omitted, emphasis added). "Local 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).

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[15] The *Morehart* court uses the term "by legislative implication" somewhat imprecisely here. California cases use "preemption by implication" to mean "field preemption;" that is, the preemption that occurs when a "subject is so completely covered by general law that it clearly has become exclusively a matter of state concern" *City of Dublin v. County of Alameda*, 14 Cal App. 4th 264, 276 (Ct. App. 1993). In other words, "preemption by implication" does not mean the opposite of "express preemption," which is how the *Morehart* court seems to use it. *Morehart* means only that, for example, a local ordinance purporting to set a minimum drinking age lower than the state's is "impliedly preempted" even if the state statute does not expressly prohibit local ordinances from lowering the minimum Such a local ordinance would be "impliedly preempted" even though it were not "preempted by implication" The distinction is important, because as in its motion to dismiss, much of Kern's briefs here cite case law addressing the narrow circumstances in which California will find "preemption by implication" (i.e., field preemption). (Defs'. Opp. at 16-17; Defs'. Mot. at 14-15 (citing *City of Dublin*, 14 Cal. App. 4th at 276; *Waste Res. Techs. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 307 (Ct. App. 1994)), These rules are inapposite because Plaintiffs concede that Measure E is not subject to field preemption and instead merely assert conflict preemption.

The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1149 (2006).

ii. Application

(1). The CIWMA Preempts Measure E

When enacted in 1989, the CIWMA required local governments to adopt waste management plans to divert 25% of the solid waste produced in their jurisdictions from landfills by 1995 and 50% by 2000. Cal. Pub. Res. Code § 41780. Additionally, the CIWMA provides:

> In implementing this division, the board and local agencies ***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. For wastes that cannot feasibly be reduced at their source,

> recycled, or composted, the local agency may use environmentally safe transformation or environmentally safe land disposal, or both of those practices.

Cal. Pub. Res. Code § 40051 (emphases added). The CIWMA defines "solid waste" to include sewage sludge, *id.* § 40191, and "recycling" to include "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. Indeed, it is undisputed that land application of biosolids, therefore, constitutes recycling of solid waste within the meaning of the statute.

The CIWMA thus uses mandatory language to require that local agencies such as Kern recycle solid wastes – including biosolids – that cannot be eliminated through source reduction, Moreover, it mandates that they "maximize" all "feasible" methods of recycling, and it does so specifically to further the goal of diverting solid waste from landfills *Valley Vista Servs, Inc. v. City of Monterey Park*, 118 Cal. App. 4th 881, 886 (Ct. App. 2004) (citing *City of Alhambra v. P.J.B. Disposal Co.*, 61 Cal. App. 4th 136, 138 (Ct. App. 1998)); *see also Waste Mgmt. of the Desert, Inc. v. Palm Springs Recycling Ctr., Inc.*, 7 Cal. 4th 478, 494 (1994); *County Sanitation*, 127 Cal. App. 4th at 1567 ("This legislation caused sewage sludge to be diverted from disposal in landfills in

favor of recycling it as a fertilizer applied to agricultural land.").

Given CIWMA's mandate to recycle solid waste, Measure E's ban on land application of biosolids amounts to a ban on activity that the state statute attempts to promote. As the Court held in ruling on the motion for the preliminary injunction:

> In light of this mandatory language, CIWMA's savings clause offers Kern little comfort. Although the act allows local regulations that do not conflict with state policies, Cal. Pub. Res. Code § 40053, the California Supreme Court has indicated 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 W. Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853, 868, (2002) (citing *Blue Circle Cement, Inc. v. Board of County Commissioners of County of Rogers*, 27 F.3d 1499, 1506-07 (10th Cir.1994)); *cf. Int'l Bhd. of Elec. Workers v. City of Gridley*, 34 Cal. 3d 191, 193 (1983) ("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 [its] declared policies and purposes. . . ."); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 869 (holding that a

> "saving clause . . . does not bar the ordinary working of conflict pre-emption principles").

Kern II, 462 F. Supp. 2d at 1115-16. Therefore, for the same reasons that allowed Plaintiffs to survive the motion to dismiss and to prevail on the motion for the preliminary injunction, the Court concludes that Measure E is inimical to the goals of the CIWMA, contradicts it, and is therefore preempted.

(2). Kern's Counterarguments Are Unavailing

Kern makes a variety of contentions otherwise, some of which merely repackage contentions the Court has previously rejected, and some of which are new. Each lacks merit.

(a). The Water Board's Authority Is Irrelevant

Kern first argues that Measure E does not conflict with the CIWMA and is therefore not preempted because (1) the CIWMA provides that it does not constrain the authority of the State Water Board, and (2) Measure E is a local regulation authorized by Water Code section 13274 and requirements promulgated by the State Water Board for the land application of biosolids. (Defs'. Opp. at 7-9; Defs'. Mot. at 18-21.) The first premise is uncontested; the CIWMA provides:

> (a) This division, or any rules or regulations adopted pursuant thereto, is not a limitation on the power of any ***state agency*** in the enforcement or administration of any provision of law which it is specifically authorized or required to enforce or administer, including, but not limited to, the exercise by the state water board or the regional water boards of any of their powers and duties pursuant to Division 7 (commencing with Section 13000) of the Water Code . . . .

Cal. Pub. Res. Code § 40055(a) (emphasis added).[16] But this provision simply does not take Kern where it wants to go because Kern is not a ***state agency***, and thus section 40055(a) does not exempt its conduct from the limitations imposed by the CIWMA. In other words, section 40055(a) merely allocates jurisdiction between ***state regulatory agencies***, and does not purport to describe the power of ***local government agencies***.

Moreover, Kern's second premise is flawed because neither the Water Code nor the Water Board's regulations purport to "authorize" local regulations of biosolids, nor to delegate the Water Board's authority

[16] The reference in section 40055(a) to "[t]his division" means Division 30 of the Public Resources Code, which encompasses the entire CIWMA, including its policy in favor of recycling in section 40051.

to local agencies such as Kern, Cal. Water Code § 13274(i) provides only that:

> Nothing ***in this section*** restricts the authority of a local government agency to regulate the application of sewage sludge and other biological solids to land within the jurisdiction of that agency, including, but not limited to, the planning authority of the Delta Protection Commission, the resource management plan of which is required to be implemented by local government general plans.

(emphasis added). Similarly, the state Water Board's General Order 2004-0012 merely states that ***its own provisions*** do not preempt local agencies' authority to regulate biosolids. (Hogan Decl., Ex. 5 [General Order] ¶ 20.)[17] In other words, neither section 13274 nor the General Order purport to confer

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[17] The General Order states that "it does not preempt or supercede the authority of local agencies to ***prohibit***, restrict, or control the use of biosolids subject to their control, as allowed under current law." (Hogan Decl., Ex. 5 [General Order] ¶ 20.) The word "prohibit" suggests that the state Water Board thought it was "saving" local agencies' power to enact complete bans on land application – a power the Court concludes was already curtailed by the CIWMA. Notably, however, the General Order does not purport to interpret the provisions of the CIWMA, and in any event Kern does not now argue that any deference is required to this apparently erroneous administrative interpretation, probably because the Court previously declined to do so. *Kern II*, 462 F. Supp. 2d at 1116 n.3. Rather, Kern essentially argues that the Order itself constitutes a delegation of the Water Board's authority. As explained above, the Court disagrees

any authority at all to local agencies, much less the Water Board's authority to regulate biosolids unconstrained by the ***CIWMA***. Rather, both provisions are merely savings clauses themselves, and neither can "save" what CIWMA has already curtailed.

(b). The CIWMA Does Not Conflict with the Water Code, Nor with the Federal Clean Water Act

Like its first argument, Kern's second contention overlooks the difference between an affirmative grant of authority and the mere absence of a restriction. Kern contends (Defs'. Opp. at 9-12; Defs'. Mot. at 15-18) that if the CIWMA were construed to prohibit local bans on land application of biosolids, it would conflict with the provisions of the Water Code known as the Porter-Cologne Act, Cal. Water Code §§ 13000, *et seq.*, which do not require local government to allow land application. To resolve this conflict, Kern urges the Court to allow the Water Code to control because it is a specific statute that governs biosolids and therefore, Kern argues, takes precedence over the CIWMA's more general policy in favor of recycling solid waste. (Deis'. Opp. at 9-13.) Again, Kern is wrong.

While an interpretive canon does hold that a more specific state statute will control a more general one, *e.g., Pac. Lumber Co. v. State Water Res. Control Bd.*, 37 Cal. 4th 921, 942 (2006), this rule "only applies when an ***irreconcilable*** conflict exists between

the general and specific provisions," *id.* (emphasis added). But here, no such conflict exists. As explained above, the relevant provision of the Porter-Cologne Act is merely ***a savings clause*** providing that section 13274 of the Water Code does not restrict local agencies' authority to regulate biosolids. *See* Cal. Water Code § 13274(i). Because the savings clause ***is not an affirmative grant of authority***, it is easily reconciled with the CIWMA's independent restrictions: put simply, the Porter-Cologne Act does not purport to authorize what the CIWMA prohibits. Therefore, the more general statute does not conflict at all, let alone irreconcilably, with the more specific one.

Equally unavailing is Kern's contention (Defs'. Opp. at 12) that the CIWMA conflicts with Cal. Water Code § 13263(g), which states: "No discharge of waste into the waters of the state, whether or not the discharge is made pursuant to waste discharge requirements, shall create a vested right to continue the discharge. All discharges of waste into waters of the state are privileges, not rights." This provision offers Kern little help because, as Plaintiffs correctly note, they have not contended that Measure E infringes on a "right" to land apply biosolids, nor does their position imply that the CIWMA purports to create such a "right." Obviously, parties that recycle solid waste must do so in accordance with valid health and safety restrictions – such as the previous Kern biosolid ordinance, which limited the pathogen content of the sludge that could be used as fertilizer,

and was therefore entirely consistent with the CIWMA's priority in favor of recycling. For CIWMA to preempt Measure E is entirely consistent with the lack of a "right" to discharge waste.

Additionally, Kern argues bizarrely (Opp. at 12-13; Mot. at 16) that if the CIWMA were construed to prohibit local bans on land application, it would somehow "conflict" with the federal Clean Water Act. Kern does not explain this position in any detail or even cite to a specific provision in the Clean Water Act, but its citations to *United States v. Cooper*, 173 F.3d 1192, 1200 (9th Cir. 1999), and *Welch v. Board of Supervisors of Rappahannock County, Virginia*, 888 F. Supp. 753, 759-60 (W.D. Va. 1995), suggest that it again has confused the absence of a restriction with an express grant of authority. As this Court noted in ruling on the motion to dismiss, both *Cooper* and *Welch* merely held that the Clean Water Act itself did not preempt local biosolids bans (a construction upon which this Court relied in dismissing Plaintiffs' Clean Water Act claim). *Kern I*, 2006 WL 3073172, at *11-12. But merely because the Clean Water Act ***does not preempt*** local bans on land application does not mean that it ***expressly authorizes*** them despite state constitutional limitations to the contrary.

Therefore, the CIWMA interpretation advanced by Plaintiffs does not conflict with the state Water Code, nor with the federal Clean Water Act, and thus those provisions do not control the outcome here.

(c). The CIWMA's Savings Clauses Do Not Rescue Measure E

The next portion of Kern's argument (Defs'. Opp. at 13-18) essentially contends that Measure E is not preempted because it falls within the scope of two statutes that allow local control, Cal. Pub. Res. Code §§ 40059 and 41851. In its introduction to this argument, however, Kern attempts some further misdirection: it cites case law that stands for the proposition that "preemption by implication" will not be found when the Legislature has expressed its intent to allow local regulations, or where there is a significant local interest to be served that may differ from one locality to another. *Waste Res. Techs. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 304 (Ct. App. 1994); *City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 276 (Ct. App. 1993). While both propositions are correct, they are essentially irrelevant here because as the cited cases indicate, they are rules to guide the analysis of "preemption by implication" – the term California courts use for "field" preemption. As a result, the rules have no application here because Plaintiffs assert not field preemption, but conflict preemption. Kern thus mischaracterizes the very nature of Plaintiff's [sic] preemption argument, which, even if Plaintiffs are correct, leaves local governments substantial room to regulate in ways consistent with Cal. Pub. Res. Code § 40051 and with the pecularities of local waste management interests.

The substance of Kern's argument fares no better. First, contrary to Kern's suggestion, Measure E is

not saved by Cal. Pub. Res. Code § 40059(a), which provides in full:

> (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.

(emphases added). "Solid waste handling" is defined as "the collection, transportation, storage, transfer, or ***processing*** of solid wastes," *Id.* § 40195 (emphasis added). "Processing" in turn includes "recycling" of solid waste. *Id.* § 40172. From this, Kern argues that

the CIWMA authorizes local governments to determine the nature, location, and extent of recycling activities in their jurisdictions, and that this authority includes the power to ban land application of biosolids. (Defs'. Opp. at 16.)

This argument amounts to sleight of hand. By focusing on the meaning of the phrase "solid waste handling," Kern asks the Court to ignore the other crucial modifiers in section 40059(a), which limit counties' plenary authority to matters "of local concern" and "services." As Plaintiffs note, California courts have consistently interpreted this statute to preserve local power over trash haulers and garbage collection ***services***, *see Rodeo Sanitary Dist. v. Bd. of Supervisors*, 71 Cal. App. 4th 1443, 1451 (Ct. App. 1999); *Valley Vista Servs., Inc.*, 118 Cal. App. 4th at 890; *Waste Res. Techs.*, 23 Cal. App. 4th at 309, but Kern cites no case that has construed it to allow a city or county to completely ban a particular ***method*** of recycling. And, in the Court's view, the statute does not save Measure E here because Measure E is not a regulation of the ***services*** that support land application, but rather the practice itself. Nor does it address other "[a]spects of solid waste handling which are of local concern," Cal. Pub. Res. Code § 40059(a)(1), as it purports to address health and safety priorities that will not vary across communities. Put simply, Kern has not attempted merely to regulate the particular locations at which land application may take place. Rather, Measure E is a jurisdiction-wide ban that has not been supported by any evidence or

argument that Kern County's unique local circumstances make it less appropriate than other jurisdictions for land application. Indeed, the stated justification for Measure E is that biosolids are so inherently dangerous that they cannot be used as fertilizer even when they comply with sophisticated safety requirements mandated by state and federal regulators. To construe this as a "local concern" would deprive the words of all meaning, and thereby allow communities to opt out of the mandatory hierarchy in Cal. Pub. Res. Code § 40051 – a result which the Legislature could not have intended when it crafted a provision centered on waste hauling ***services***. Therefore, the Court rejects Kern's reliance on Cal. Pub. Res. Code § 40059(a).[18]

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[18] The Court's conclusion finds support in at least two interpretive canons. First, "every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." *Select Base Materials v. Board of Equalization*, 51 Cal. 2d 640, 645 (1959). Kern's reading of § 40059(a) would violate this canon by essentially ignoring § 40051. Second, under the principle of ejusdem generis, courts "should construe a statute's general terms following specific terms as embracing only objects similar in nature to the specific terms." *E.g., Fogarty v City of Chico*, 148 Cal. App. 4th 537, 544 (Ct. App. 2007). Kern's reading would violate this canon by interpreting "of local concern" to mean something far different than the other terms that accompany it, which address "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***" Cal Pub. Res. Code § 40059 (a) (emphasis added). In other words, although Kern has articulated permissible ***interests*** that Measure E rationally furthers, *see supra* Parts IV.A-B, the Court

(Continued on following page)

The second savings clause Kern invokes is Cal. Pub. Res. Code § 41851, which is more obviously irrelevant. (Defs'. Opp. at 6, 14, 19; Defs'. Mot. at 15.) The section provides: "Nothing ***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). "[T]his chapter" refers to chapter 7 of the Public Resources Code, which encompasses sections 41800 through 41851 but ***not*** the mandate in section 40051. Therefore, the savings clause in section 41851 has no bearing here.

(d). The CIWMA Does Not Leave Cities and Counties Free to Ban "Feasible" Methods of Recycling

Kern also argues that because the CIWMA does not mandate ***particular methods*** of recycling over others, it is free to ban one such method. (Defs'. Opp. at 16-17.) Kern cites *City of Dublin* for this proposition, but that case dealt not with a manner of ***recycling***, but with a county initiative which banned ***incineration*** of solid waste. 14 Cal. App. 4th at 278. Though the CIWMA did not preempt the incineration ban, this was because nothing in the CIWMA required

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does not construe § 40059(a) to allow plenary pursuit of such interests. Local interests are not necessarily, and are not here, matters "of local concern."

counties to allow incineration, since "'[e]nvironmentally safe transformation and environmentally safe land disposal' are ***last*** in the [CIWMA]'s priority list of waste management practices, and are to be promoted '***at the discretion of the city or county***.'" *Id.* (citing Cal. Pub. Res. Code § 40051(a)) (first emphasis added). Here, by contrast, recycling is first on the CIWMA's priority list after source reduction, and is not something that cities or counties are given discretion whether to promote. *See* Cal. Pub. Res. Code § 40051(a). Therefore, *City of Dublin* is easily distinguished, leaving Kern's position without authority.

Moreover, Kern is wrong when it suggests that the CIWMA tolerates all bans on particular methods of recycling. The statute specifically mandates that local governments "[m]aximize 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(b) (emphases added). Kern has not argued that land application is not a "feasible" method of recycling within the meaning of the statute, likely because the practice is widespread, encouraged by the federal Environmental Protection Agency, and has been ongoing in Kern County itself since the mid 1990s. (*See, e.g.*, Pls'. Ex. 11 [National Research Council Report: Biosolids Applied to Land: Advancing Standards and Practices, 2002] at 313 ("The committee recognizes that land application of biosolids is a widely used, practical option for managing the large volume of sewage sludge generated at

wastewater treatment plants that otherwise would largely need to be disposed of at landfills or by incineration."); Pls'. Ex. I [Minimide P.I. Decl.] ¶¶ 19-21.) Therefore, Kern cannot escape CIWMA's mandate to "maximize" the practice.

(e). CIWMA Preemption Does Not Mandate That Counties Accept Recycling Materials from Other Jurisdictions

Next, Kern argues that the CIWMA "does not require a city or county to allow other local agencies to conduct their recycling activities in its jurisdiction." (Defs'. Opp. at 19.) Kern is correct, but the point is irrelevant. While CIWMA is neutral with regard to recycling activities across counties, Measure E does not merely prohibit land application of out-of-county biosolids (likely because its drafters were familiar with Commerce Clause jurisprudence that would look unfavorably on such an approach). Rather, Measure E is a broad ban of an entire method of recycling, which Kern has not argued is "infeasible." Therefore, the absence in CIWMA of a mandate to accept materials from other jurisdictions offers Kern no comfort here.

(f). That Measure E Only Prohibits a Particular Method of an Encouraged Activity Does Not Save It from the Rule in Blue Circle Cement

As noted above, the California Supreme Court has indicated 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 W. Shows, Inc.*, 27 Cal. 4th at 868 (citing *Blue Circle Cement*, 27 F.3d at 1506-07). Although the quoted language is merely the court's distillation of the rule from *Blue Circle Cement*, which it then distinguished, Kern acknowledges the rule and does not contend that the state high court would reject it if squarely presented with the question. (*See* Defs'. Opp. at 19; Defs'. Mot. at 16.) Rather, Kern contends that Measure E does not fall within the rule, because the ordinance prohibits only one manner of use of one type of material. (Defs'. Opp. at 19; Defs'. Mot. at 23.) In other words, Kern argues that because Measure E is not a ***complete ban*** on solid waste recycling, it is not preempted.

This argument fails for two reasons. First, Kern overlooks the portion of the *Blue Circle Cement* rule that states "local regulation cannot be used to completely ban the activity ***or otherwise frustrate*** the statute's purpose." *Great W. Shows, Inc.*, 27 Cal. 4th at 868 (citing *Blue Circle Cement*, 27 F.3d at 1506-07)

(emphasis added). Thus, contrary to Kern's suggestion, the absence of a complete ban is not dispositive. Moreover, the Legislature expressed its purpose to encourage recycling of biosolids themselves by including them in the definition of solid waste, *see* Cal. Pub. Res. Code § 40191, which is not at all surprising given that the generation of biosolids that must be recycled or disposed of, is a "constant, non-discretionary governmental function." (DOSSUF ¶ 10.) Therefore, 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, notwithstanding the fact that at a high level of abstraction, it is not a complete ban on the recycling of solid waste.

Therefore, the Court rejects Kern's final argument against CIWMA preemption. Plaintiffs' motion for summary adjudication of this claim is **GRANTED** and Kern's is **DENIED**.

5. THE POLICE POWERS CLAIM

Finally, Plaintiffs contend Measure E exceeds Kern's police power under the California Constitution because it is not reasonably in the welfare of the region as a whole. As discussed below, the Court cannot summarily adjudicate this claim in favor of either party.

a. Overview of California's Constitutional Restriction on the Police Power

In contrast to the Equal Protection claim, Kern cannot defend against Plaintiffs' police powers claim merely by resort to rational speculation. In California, a local government's exercise of its police power, Cal. Const. art. XI, § 7, is valid if "if [sic] it is fairly debatable that the restriction ***in fact*** bears a reasonable relation to the general welfare." *Associated Home Builders of the Greater E. Bay Inc. v. City of Livermore*, 18 Cal. 3d 582, 601 (1976) ("*Associated Home Builders*") (emphasis added). "[I]f a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region." *Id.*

In evaluating ordinances with effects on surrounding communities, the court must identify and weigh the competing interests affected by the ordinance and ask "whether the ordinance, in light of its probable impact, represents a reasonable accommodation" of those competing interests. *Id.* at 609. Although the Court may elect to defer to the judgment of the local entity,

> [j]udicial deference is not judicial abdication. The ordinance must have a ***real and substantial relation*** to the public welfare. There must be a reasonable basis ***in fact, not in fancy***, to support the legislative

> determination . . . [a]lthough in many cases it will be 'fairly debatable' that the ordinance reasonably relates to the regional welfare. . . .

Id. (emphases added).

b. Kern's Motion

Kern advances four arguments against Plaintiffs' police powers claim, each of which lacks merit. First, it contends that the *Associated Home Builders* doctrine applies only to local enactments that limit immigration into a community. (Defs'. Mot. at 23-24.) This argument makes far too much of a phrase in the introduction of *Associated Home Builders*, where the California Supreme Court stated:

> We take this opportunity, therefore, to reaffirm and clarify the principles which govern validity of land use ordinances ***which substantially limit immigration into a community***; we hold that such ordinances need not be sustained by a compelling state interest, but are constitutional if they are reasonably related to the welfare of the region affected by the ordinance.

18 Cal. 3d at 589. From this, Kern argues that the *Associated Home Builders* "regional welfare" doctrine applies only to ordinances affecting immigration and that, therefore, Plaintiffs' police power claim fails because they offer no evidence that Measure E affects immigration. (Defs'. Mot. at 2324.) Kern is wrong. A

full reading of *Associated Home Builders* indicates the court merely used the language above to frame the issue before it, which concerned a local moratorium on residential building permits until local educational, sewage disposal, and water facilities complied with specified standards 18 Cal. 3d at 588. The court considered the regional welfare not because of the ordinance's subject matter, but because it imposed effects on citizens of surrounding communities. Using language generally applicable to land use ordinances of all stripes, the court stated:

> We . . . reaffirm the established constitutional principle that a local land use ordinance falls within the authority of the police power if it is reasonably related to the public welfare. Most previous decisions applying this test, however, have involved ordinances without substantial effect beyond the municipal boundaries. The present ordinance, in contrast, significantly affects the interests of nonresidents who are not represented in the city legislative body and cannot vote on a city initiative. We therefore believe it desirable for the guidance of the trial court to clarify the application of the traditional police power test to an ordinance which significantly affects nonresidents of the municipality.
>
> When we inquire whether an ordinance reasonably relates to the public welfare, inquiry should begin by asking Whose welfare must the ordinance serve. In past cases,

> when discussing ordinances without significant effect beyond the municipal boundaries, we have been content to assume that the ordinance need only reasonably relate to the welfare of the enacting municipality and its residents. But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.

Id. at 607. Thus, as the *Associated Home Builders* court made clear, the salient feature of the ordinance at issue was not simply that it affected immigration, but rather that it invoked the police power and had substantial effects on citizens outside the city's borders.[19] So too does Measure E.

Second, Kern is incorrect when it cites *City of Cupertino v. City of San Jose*, 33 Cal. App. 4th 1671 (Ct. App. 1995), for the proposition that California courts have limited *Associated Home Builders* to "growth control and housing ordinances." (Defs'. Mot. at 24.) In *Cupertino*, the court held the regional

[19] The *Associated Home Builders* court explained that the reason such enactments had to be viewed from the perspective of the affected region was that in enacting a land use regulation, the local government was acting as a delegate of the state's police power and therefore was restricted in the same manner as the state. 18 Cal. 3d at 608 (citing *S. Burlington County N A.A.C.P. v. Mount Laurel Twp.*, 336 A 2d 713, 726 (NJ. 1975))

welfare constraint on the police power did not apply to a local tax on landfill space because the tax invoked ***a different source of local power*** – the power of a charter city to tax under the "municipal affairs" clause of Article XI, Section 5, subdivision (a) of the California Constitution. 33 Cal. App. 4th at 1677. Although *Cupertino* declined to expand the regional welfare doctrine to "municipal affairs" enactments, it never purported to narrow *Associated Home Builders* to particular types of police power enactments. *See id.* And contrary to Kern's suggestion, *Cupertino* also did not purport to exclude harmful effects such as impacts on commerce and contracts from the regional welfare doctrine. *See id.* at 1677-78.[20] Therefore, because *Cupertino* did not address limitations on the police power, it is inapposite here.

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[20] *Cupertino* reasoned that it should not ***expand*** the regional welfare doctrine to cover the landfill tax because outsiders could avoid its essentially economic effects simply by declining to ship their waste into the jurisdiction. 33 Cal. App. 4th at 1677-78. The court distinguished *Associated Home Builders* as presenting less avoidable harmful effects because the ban on residential housing permits would force dwellings that would otherwise have been built in Livermore to be built instead in surrounding communities. *Id.* at 1677. However, even if this "avoidability" rationale were a basis for ***narrowing*** the regional power doctrine to exempt certain police power enactments, it would not save Measure E from scrutiny. As indicated above, Measure E applies to Kern's biosolids as well, which means that the biosolids it pays its private contractor (SJC) to process cannot be applied to land in Kern's jurisdiction. Therefore, Measure E would force surrounding communities to accept Kern's biosolids, as the only market for SJC's compost would be

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Third, the Court is unpersuaded by Kern's rhetorical argument that health and safety measures should be exempt from limitations on the police power generally. (Defs'. Mot. at 24.) Although health and safety purposes are certainly laudatory and may well weigh heavily as the court evaluates whether an enactment is a reasonable accommodation of the competing interests, it would be bizarre if an ordinance could avoid scrutiny entirely merely by adopting the label "health and safety." As this case itself illustrates, a purported health and safety enactment may have wide-ranging effects on surrounding communities, and may simply seek to cure such hypothetical ills as to be unreasonable in light of the burdens it imposes. *Cf. Kassel*, 450 U.S. at 670 ("Regulations designed for that salutary purpose [of public safety] nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause."). Moreover, nearly all exercises of the police power purport to advance health and safety purposes, and therefore the regional welfare doctrine would be rendered toothless if health and safety purposes exempted an enactment from scrutiny. *See City of Cupertino*, 33 Cal. App. 4th at 1677 ("The purpose of the [police] power is to permit cities to promote the

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in jurisdictions that allowed land application Measure E therefore has unavoidable effects on surrounding communities, and thus *Cupertino* presents no principled reason to distinguish *Associated Home Builders* from the instant case.

health and safety of their residents. . . ." (citing *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 159-60 (1976))). Therefore, the Court holds that Measure E does not avoid the regional powers doctrine simply because it advances a health and safety purpose.

Finally, the Court finds no merit to Kern's assertion that the regional welfare doctrine is rendered inapplicable because federal and state statutes contemplate some local regulation of biosolids. (Defs'. Mot. at 24-25.) As discussed above in the context of Plaintiffs' CIWMA claim, the federal and state savings clauses do not purport to free local enactments from all conceivable limitations. They thus cannot save Measure E if it otherwise violates the regional welfare doctrine.

These being Kern's only attacks against the police powers claim, Kern's motion for summary adjudication on this cause of action is **DENIED**.

c. Plaintiffs' Motion

Plaintiffs contend they are entitled to summary judgment on the police powers claim because they have presented evidence that Measure E will impose severe economic impacts on Plaintiffs' land application programs, increased costs and fewer biosolids management options on wastewater agencies throughout the state, and harmful effects on the regional environment. (Pls'. Opp. at 23.)

The Court agrees that Plaintiffs have introduced such evidence. It also concludes that Measure E would not reasonably further the regional welfare if its inevitable, practical effect were merely to shift biosolids – which are inevitably generated – from relatively safe sites in Kern to sites that were less safe or further away. But the Court cannot agree that Plaintiffs are entitled to summary adjudication. First, questions of fact remain as to whether Green Acres is as well-suited to land application as Plaintiffs contend. Kern has introduced evidence that the site attracts large amounts of flies and emits noxious odors, which disrupt a nearby recreation area. (Frantz. Decl. ¶¶ 17, 19.) The record also indicates that Green Acres lies adjacent to one water banking facility and a short distance from another, and that the groundwater from beneath Green Acres could flow into the water banks when water is extracted from them during dry seasons. (Defs'. Ex. 41 [Parker Decl.] ¶ 2, 6-9; Defs'. Ex. 40 [Collup Decl. ¶ 12.) Even given the apparently low ***likelihood*** that land application Green Acres would introduce contaminants into the groundwater (Pls'. Ex. 3 [Johnson P.I. Decl.] ¶ 8), the ***tremendous amount*** of harm to the water banks that could result is sufficiently palpable that a trier of fact could conclude Green Acres is not an ideal location. *Cf. United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) ("if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < [is less than] PL."). And the record contains virtually no evidence concerning Tule Ranch or Honeybucket [sic]

Farms, which means Plaintiffs have not yet carried their burden to demonstrate that restrictions on these facilities could not reasonably further the regional welfare.

Second, a trier of fact could also conclude that Measure E's harmful impacts would largely result from the government Plaintiffs' choice to ship their biosolids far from their home jurisdictions. As noted above, the record contains no evidence as to why the government Plaintiffs elect not to dispose the materials closer to home. If the reason were that no suitable, closeby [sic] sites were reasonably available, that would suggest Kern was the best option and therefore that Measure E did not accommodate the regional welfare. But the record would equally support an inference that the government Plaintiffs send their biosolids to Kern out of the same "not in my backyard" mentality that appears to have motivated Measure E. From this inference, the trier of fact might properly conclude that it was "fairly debatable" that Measure E's burdens on the region were justified by the local interest in unnecessarily serving as a dumping ground for other communities' waste.

As a result, the Court cannot conclude as a matter of law that Measure E is not reasonably related to the regional welfare. Plaintiffs' motion for summary adjudication of the police powers claim is therefore **DENIED**.

B. PLAINTIFFS' REQUEST FOR ENTRY OF JUDGMENT

Correctly anticipating that at least one of their claims could not be resolved summarily, Plaintiffs request entry of final judgment on the CIWMA claim. The request is governed by Rule 54(b), which provides in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . .

Fed. R. Civ. P. 54(b). Although the Ninth Circuit was at one point somewhat skeptical of Rule 54(b) judgments, *see Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981) ("Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants. . . ."), the "present trend is toward greater deference to a district court's decision to certify," *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797-98 (9th Cir. 1991) (citations and quotation marks omitted) (criticizing *Morrison-Knudsen* as "outdated and overly restrictive"). Indeed, the Circuit has stated relatively recently that "issuance of a Rule 54(b) order is a fairly

routine act that is reversed only in the rarest circumstances." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067-68 n.6 (9th Cir. 2002).

Under even the more stringent approach, however, Rule 54(b) certification is appropriate here for several reasons. First, Plaintiffs agree that the remaining claims will be moot if the CIWMA issue is affirmed on appeal, as the CIWMA claim will afford them complete relief against enforcement of Measure E. The same reasoning applies to the Commerce Clause claim, and perhaps even more so because that claim arises under 42 U.S.C. § 1983. Moreover, the sole remaining claim involves an unusual application of the police powers doctrine in the field of municipal waste management, and therefore would inevitably require the Court to adjudicate novel questions of state law. Comity dictates that the Court avoid doing so unnecessarily. Finally, as discussed above, the police powers claim is extremely fact-intensive, and would require a good deal of discovery concerning the local effects of biosolids application in Kern County and the availability of alternative sites in the Southern California area. The parties have an interest in avoiding the time and expense of this exercise if possible.

For all these reasons, and also because Kern does not contend otherwise, the Court concludes the Rule 54(b) request has merit and that there is "no just reason for delay" of judgment.

V.

CONCLUSION

Kern's motion for summary adjudication of the Equal Protection is **GRANTED**, but its motions are denied as to all other claims, Plaintiffs' motions for summary adjudication of the Commerce Clause and CIWMA claims are **GRANTED**, while their motion for summary judgment on the police powers claim is **DENIED**. Plaintiffs' motion for entry of judgment is **GRANTED**. Plaintiff shall submit a proposed judgment in accordance with this opinion.

IT IS SO ORDERED.

DATED: August 9, 2007

/s/ Gary Feess
Judge Gary Allen Feess
United States District Court

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES, et al., Plaintiffs, v. COUNTY OF KERN, et al., Defendants.	**Case No. CV#06-5094 GAF (VBKx)** **FINAL JUDGMENT PURSUANT TO RULE 54(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE** (Filed Sep. 5, 2007)

This action came for hearing on July 9, 2007, on the parties' cross-motions for summary judgment, the Honorable Gary Allen Feess, Judge of the United States District Court for the Central District of California, presiding. The issues in this matter having been duly heard and a written order having been issued on August 9, 2007, it is **ORDERED** and **ADJUDGED** as follows:

1. Judgment is entered in favor of Plaintiffs and against Defendants on Plaintiffs' first and fourth claims for relief as follows:

   A. The Court grants declaratory relief for Plaintiffs on both claims. The "Keep Kern Clean Ordinance of 2006," which Kern County voters adopted as Measure E in June 2006, is hereby declared unlawful because it violates the Commerce Clause of the United States Constitution and is preempted by the

California Integrated Waste Management Act. Measure E is therefore null and void.

B. The Court grants injunctive relief for Plaintiffs on both claims. Defendant Kern County, Kern County Board of Supervisors, and all of their officers, employees, and agents, shall be and hereby are, permanently enjoined and prohibited from directly or indirectly enforcing or implementing any of the provisions or requirements of Measure E.

2. Judgment is entered in favor of Defendants and against Plaintiffs on Plaintiffs' second claim for relief for alleged violation of the Equal Protection Clause of the United States Constitution.

3. Pursuant to the Order re Defendants' Motions to Dismiss entered on October 24, 2006, Plaintiffs' third claim for relief for alleged preemption by the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and fifth claim for relief for alleged preemption by the California Water Code, Cal. Water Code § 13274, are dismissed.

4. There is no just reason to delay entry of judgment on Plaintiffs' first, second, third, fourth, and fifth claims. Accordingly, the Court hereby enters final judgment as set forth above pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

5. Plaintiffs are awarded their costs, in the amount of $_____.

6. The Court retains jurisdiction to enforce its August 9, 2007 Order and this final judgment.

DATED: September 4, 2007

/s/ Gary Feess
Judge Gary Allen Feess
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF LOS ANGELES; ORANGE COUNTY SANITATION DISTRICTS; RESPONSIBLE BIOSOLIDS MANAGEMENT, INC.; R & G FANUCCHI INC.; SIERRA TRANSPORT INC.; CALIFORNIA ASSOCIATION OF SANITATION AGENCIES; SHAEN MAGAN, individually and dba's Honey Bucket Farms; Tule Ranch/Magan Farms; WESTERN EXPRESS, INC.,

Plaintiffs-Appellees,

and

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

Intervenors,

v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,

Defendants-Appellants.

No. 07-56564

D.C. No. CV-06-05094-GAF

Central District of California, Los Angeles

ORDER

(Filed Jan. 8, 2010)

Before: O'SCANNLAIN, RYMER, and WARDLAW, Circuit Judges.

Appellee's motion for stay of the issuance of the mandate pending application for writ of certiorari is granted. Fed. R. App. P. 41(b).

Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF LOS ANGELES; ORANGE COUNTY SANITATION DISTRICTS; RESPONSIBLE BIOSOLIDS MANAGEMENT, INC.; R & G FANUCCHI INC.; SIERRA TRANSPORT INC.; CALIFORNIA ASSOCIATION OF SANITATION AGENCIES; SHAEN MAGAN, individually and dba's Honey Bucket Farms; Tule Ranch/Magan Farms; WESTERN EXPRESS, INC.,

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v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,

Defendants-Appellants.

No. 07-56564

D.C. No. CV-06-05094-GAF

Central District of California, Los Angeles

ORDER

(Filed Dec. 15, 2009)

Before: O'SCANNLAIN, RYMER, and WARDLAW, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35.

The petition for rehearing and petition rehearing en banc is therefore DENIED.

US Const. art. I, § 8., cl. 3.

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

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28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 U.S.C. § 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided*, *however*, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11706 or 14706 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to

any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

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28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> **(1)** To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> **(2)** To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
>
> **(3)** To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal

rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section –

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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28 U.S.C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such

declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

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33 U.S.C. § 1345. Disposal or use of sewage sludge

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) Regulations

(1) Regulations

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall –

(A) identify uses for sludge, including disposal;

(B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(2) Identification and regulation of toxic pollutants

(A) On basis of available information

(i) Proposed regulations

Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final regulations

Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others

(i) Proposed regulations

Not later than July 31, 1987, the Administrator shall identify those toxic

pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each pollutant for each such use identified under paragraph (1)(A).

(ii) Final regulations

Not later than June 15, 1988, the Administrator shall promulgate the regulations required by subparagraph (B)(i).

(C) Review

From time to time, but not less often than every 2 years, the Administrator shall review the regulations promulgated under this paragraph for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements of this paragraph.

(D) Minimum standards; compliance date

The management practices and numerical criteria established under subparagraphs (A), (B), and (C) shall be adequate to protect public health and the environment from any

reasonably anticipated adverse effects of each pollutant. Such regulations shall require compliance as expeditiously as practicable but in no case later than 12 months after their publication, unless such regulations require the construction of new pollution control facilities, in which case the regulations shall require compliance as expeditiously as practicable but in no case later than two years from the date of their publication.

(3) Alternative standards

For purposes of this subsection, if, in the judgment of the Administrator, it is not feasible to prescribe or enforce a numerical limitation for a pollutant identified under paragraph (2), the Administrator may instead promulgate a design, equipment, management practice, or operational standard, or combination thereof, which in the Administrator's judgment is adequate to protect public health and the environment from any reasonably anticipated adverse effects of such pollutant. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(4) Conditions on permits

Prior to the promulgation of the regulations required by paragraph (2), the Administrator

shall impose conditions in permits issued to publicly owned treatment works under section 1342 of this title or take such other measures as the Administrator deems appropriate to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge.

(5) Limitation on statutory construction

Nothing in this section is intended to waive more stringent requirements established by this chapter or any other law.

(e) Manner of sludge disposal

The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

(f) Implementation of regulations

(1) Through section 1342 permits

Any permit issued under section 1342 of this title to a publicly owned treatment works or any other treatment works treating domestic sewage shall include requirements for the use and disposal of sludge that implement the regulations

established pursuant to subsection (d) of this section, unless such requirements have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act [42 U.S.C. 6921 et seq.], part C of the Safe Drinking Water Act [42 U.S.C. 300h et seq.], the Marine Protection, Research, and Sanctuaries Act of 1972 [16 U.S.C. 1431 et seq., 1447 et seq.; 33 U.S.C. 1401 et seq., 2801 et seq.], or the Clean Air Act [42 U.S.C. 7401 et seq.], or under State permit programs approved by the Administrator, where the Administrator determines that such programs assure compliance with any applicable requirements of this section. Not later than December 15, 1986, the Administrator shall promulgate procedures for approval of State programs pursuant to this paragraph.

(2) Through other permits

In the case of a treatment works described in paragraph (1) that is not subject to section 1342 of this title and to which none of the other above listed permit programs nor approved State permit authority apply, the Administrator may issue a permit to such treatment works solely to impose requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section. The Administrator shall include in the permit appropriate requirements to assure compliance with the regulations established pursuant to subsection (d) of this section. The Administrator shall establish procedures for issuing permits pursuant to this paragraph.

(g) Studies and projects

(1) Grant program; information gathering

The Administrator is authorized to conduct or initiate scientific studies, demonstration projects, and public information and education projects which are designed to promote the safe and beneficial management or use of sewage sludge for such purposes as aiding the restoration of abandoned mine sites, conditioning soil for parks and recreation areas, agricultural and horticultural uses, and other beneficial purposes. For the purposes of carrying out this subsection, the Administrator may make grants to State water pollution control agencies, other public or nonprofit agencies, institutions, organizations, and individuals. In cooperation with other Federal departments and agencies, other public and private agencies, institutions, and organizations, the Administrator is authorized to collect and disseminate information pertaining to the safe and beneficial use of sewage sludge.

(2) Authorization of appropriations

For the purposes of carrying out the scientific studies, demonstration projects, and public information and education projects authorized in this section, there is authorized to be appropriated for fiscal years beginning after September 30, 1986, not to exceed $5,000,000.

(June 30, 1948, ch. 758, title IV, § 405, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 884; amended Pub. L. 95-217, §§ 54(d), 68, Dec. 27, 1977, 91 Stat. 1591, 1606; Pub. L. 100-4, title IV, § 406(a)-(c), (f), Feb. 4, 1987, 101 Stat. 71, 72, 74.)

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40 C.F.R. § 503.1 Purpose and applicability.

(a) Purpose. (1) This part establishes standards, which consist of general requirements, pollutant limits, management practices, and operational standards, for the final use or disposal of sewage sludge generated during the treatment of domestic sewage in a treatment works. Standards are included in this part for sewage sludge applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator. Also included in this part are pathogen and alternative vector attraction reduction requirements for sewage sludge applied to the land or placed on a surface disposal site.

(2) In addition, the standards in this part include the frequency of monitoring and record-keeping requirements when sewage sludge is applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator. Also included in this part are reporting requirements for Class I sludge management facilities, publicly owned treatment works (POTWs) with a design flow rate equal to or greater than one million gallons per day, and POTWs that serve 10,000 people or more.

(b) *Applicability*. (1) This part applies to any person who prepares sewage sludge, applies sewage sludge to the land, or fires sewage sludge in a sewage sludge incinerator and to the owner/operator of a surface disposal site.

(2) This part applies to sewage sludge applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator.

(3) This part applies to the exit gas from a sewage sludge incinerator stack.

(4) This part applies to land where sewage sludge is applied, to a surface disposal site, and to a sewage sludge incinerator.

INITIATIVE MEASURE TO BE SUBMITTED
DIRECTLY TO THE VOTERS

The County Counsel of Kern County has prepared the following title and summary of the chief purposes and points of the proposed measure.

BIOSOLIDS LAND APPLICATION BAN: INITIATIVE ORDINANCE. Prohibits the land application of biosolids in the unincorporated area of Kern County. "Biosolids" are treated solid, semi-solid or liquid residue generated during the treatment of sewage in a wastewater treatment facility. Land application of any materials containing biosolids is prohibited immediately. In addition, the ban prohibits the discharge of biosolids to surface waters and surface water drainage courses and prohibits leaching or other introduction of biosolids to groundwater aquifers. Biosolids, packaged for routine retail sales through regular retail outlets, which are primarily used for residential purposes in limited amounts are permissible and are excluded from the ban.

Existing permit holders have six months to discontinue the land application of biosolids. An appeal procedure is established to request an extension of time to discontinue such application if special circumstances exist which create a hardship for those who have installed or constructed permanent improvements relating to the land application of biosolids. The final step of the appeal process is a hearing

before the Kern County Board of Supervisors, which may grant an extension not to exceed six months.

Violation of the ordinance is a misdemeanor punishable by a fine of not more than $500 or not more than six months in prison, or both, for each day of violation. An offender may also be required to pay for cleanup and disposal costs.

KEEP KERN CLEAN ORDINANCE OF 2006

THE PEOPLE OF THE COUNTY OF KERN, STATE OF CALIFORNIA, DO HEREBY ORDAIN AS FOLLOWS:

Section 1. This ordinance shall be known as the "Keep Kern Clean Ordinance of 2006". It shall take effect and be in full force immediately upon passage by the People of Kern County, and shall be published and processed in the manner required by the law of the State of California and Kern County.

Section 2. Chapter 8.05 of the Ordinance Code of Kern County is hereby repealed and a new Chapter 8.05 is hereby enacted to read as follows:

CHAPTER 8.05
LAND APPLICATION OF BIOSOLIDS

8.05.10 PURPOSE AND INTENT

There are numerous serious unresolved issues about the safety, environmental effect, and propriety of land

applying Biosolids or sewage sludge, even when applied in accordance with federal and state regulations. Biosolids may contain heavy metals, pathogenic organisms, chemical pollutants, and synthetic organic compounds, which may pose a risk to public health and the environment even if properly handled. Sampling and other monitoring mechanisms are not feasibly capable of reducing the risks associated with Biosolids to a level acceptable to the people of Kern County. Land spreading of Biosolids poses a risk to land, air, and water, and to human and animal health. It may cause loss of confidence in agricultural products from Kern County. It causes the loss of productive agricultural lands [sic] capacity for human food production for significant periods of time. It presents a risk of airborne Biosolid particulate matter in circumstances unique to Kern County. It presents risks of unique odor, insect attraction, and other nuisances which are unacceptable to the people of Kern County and cannot be feasibly controlled to a risk level acceptable to the people of Kern County.

For each of the foregoing reasons, individually and collectively, and in order to promote the general health, safety and welfare of Kern County and its inhabitants, it is the intent of this Chapter that the land application of Biosolids shall be prohibited in the unincorporated area of Kern County.

8.05.020 AUTHORITY

This Chapter is adopted pursuant to the initiative power of the People of Kern County and the police power of Kern County as set forth in Article XI, Section 7, of the California Constitution. In addition, the Clean Water Act, 33 U.S.C. Section 1345, U.S. EPA regulations, 40 C.F.R. Part 503, and California Water Code Section 13274 recognize the authority of local government to impose more stringent requirements on the use or disposal of sewage sludge in order to protect public health and the environment from any adverse effect from sewage sludge.

8.05.030 DEFINITIONS

A. "Agency" means an authorized representative of the Environmental Health Services Department of the County of Kern.

B. "Biosolids" are treated solid, semi-solid or liquid residues generated during the treatment of sewage in a waste-water treatment works and includes a material derived from or containing sewage sludge such as compost and pelletized sewage sludge, irrespective of where generated, produced or treated. These residues include, but are not limited to, scum or solids removed in primary, secondary or advanced wastewater treatment processes and material derived from sewage sludge. Biosolids, as used in this chapter, excludes 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.

C. “County” means the County of Kern, State of California.

D. “Hardship” means a substantial economic burden imposed on a person after due consideration of potential alternative methods of disposal.

D. “Land Apply” means 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.

E. “Permit” means a land application permit issued by the County under the provisions of former Chapter 8.05.

F. “Person” means any individual, firm, partnership, joint venture, association, corporation, estate, trust, receiver, syndicate, entity, city, county or other political subdivision or public agency, or any other group or combination acting as a unit.

G. “Site” means the area of land covered by a permit issued under former Chapter 8.05.

8.05.040 BIOSOLIDS PROHIBITED

A. It shall be unlawful for any person to Land Apply Biosolids to property within the unincorporated area of the County. Any Site for which a Permit was issued prior to the effective date of this Chapter shall have six (6) months from the effective date of this Chapter to discontinue land application of Biosolids.

B. The discharge of Biosolids to surface waters or surface water drainage courses, including wetlands and water ways, or the leaching or other introduction of Biosolids or any constituent of Biosolids to groundwater aquifers is prohibited.

8.05.050 APPEAL PROCESS

A. Any person who has installed or constructed permanent improvements related to the Land Spreading of Biosolids who contends there are special circumstances which render the discontinuance of land application of Biosolids a Hardship, may request in writing filed with the Agency within thirty (30) days of the effective date of this Chapter, and the Agency may grant up to an additional three (3) months of time for the discontinuance of the land spreading of Biosolids commensurate with the circumstances creating the Hardship. If the Agency has not acted within sixty (60) days of the filing of the request, the request shall be deemed denied and the time for filing an appeal pursuant to subdivision B of this section shall begin to run.

B. Any denial of such a request may be appealed to the Board of Supervisors. Any appeal shall be made by filing a written request for a hearing before the Board of Supervisors with the Clerk of the Board not more than ten (10) calendar days after notice of the denial has been delivered. Upon receipt of a written request for a hearing, the Clerk of the Board shall set the matter for public hearing on a date not more than sixty (60) calendar days following receipt of such

written request, and shall give the applicant, any person who has requested in writing from the Clerk notice under this section, and the Board of Supervisors at least thirty (30) calendar days written notice of the time, date, and place of the hearing. After the hearing, the Board of Supervisors shall issue its written decision and finding on the appeal within thirty (30) calendar days after the close of the hearing. If making a finding of Hardship, the Board of Supervisors may grant up to the six months of additional time. Such decision shall be final.

8.05.060 PENALTY FOR VIOLATION

Any person violating any provision of this chapter is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $500 or by imprisonment of not more than six months or both for each offense. Every violation of this chapter shall be construed as a separate offense for each day during which such violation continues and shall be punishable as provided in this section. The Court or the County may also demand and require the violator to clean up at the violator's expense any illegally applied or deposited Biosolids and dispose of it in an approved, environmentally safe and clean manner.

Section 3. If any clause, provision, sentence, or paragraph of this ordinance, or the application thereof, is deemed to be invalid as to any person, entity, establishment, or circumstance, such invalidity shall not affect the other provisions of this ordinance which

shall still remain in effect, and to that end, it is hereby declared that the provisions of this ordinance are severable.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES; ORANGE COUNTY SANITATION DISTRICT; COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY; RESPONSIBLE BIOSOLIDS MANAGEMENT, INC., R&G FANUCCHI, INC.; SHAEN MAGAN, both individually and d/b/a HONEY BUCKET FARMS and TULE RANCH/MAGAN FARMS; WESTERN EXPRESS INC.; SIERRA TRANSPORT, INC.; CALIFORNIA ASSOCIATION OF SANITATION AGENCIES,

Plaintiffs,

v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,

Defendants.

No. CV 06-5094 GAF (VBKx)

DECLARATION OF LARRY BAHR IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: October 16, 2006
Time: 9:30 a.m.
Place: 255 East Temple St., Room 740
Los Angeles, CA 90012

Judge:
Hon. Gary A. Feess

(Filed Sep. 18, 2006)

I, Larry Bahr, declare as follows:

EXPERIENCE, QUALIFICATIONS, AND SUMMARY OF OPINION

1. I am the Regulatory Program Director for the Fairfield-Suisun Sewer District (FSSD) and have been employed by FSSD for 14 years. The FSSD provides wastewater treatment for over 130,000 citizens in central Solano County, which is located approximately mid-way between Sacramento and the San Francisco Bay area. As Regulatory Program Director, I am responsible for insuring compliance with all federal, State, and local regulations and requirements that govern the FSSD's operation. Establishing and maintaining a compliant biosolids management program is a key aspect of these duties.

2. I submit this Declaration in support of Plaintiffs' motion for a preliminary injunction. I have been asked to provide this Declaration by Plaintiff California Association of Sanitation Agencies ("CASA") and am doing so without compensation. The facts stated in this Declaration are based on my personal knowledge and a review of reports and documents that are customarily relied upon by professionals in my field. I could and would competently testify to the facts stated in this declaration if called upon to do so.

3. My professional opinion is that the Kern County Biosolids Ban ("Kern Ban") scheduled to take effect in January 2007 is now and will cause increased prices and operational challenges for biosolids

management for many California sanitation agencies, including agencies other than the Plaintiffs and agencies outside of Southern California. California sanitation agencies will face greater difficulty finding and paying for land application services and for other methods of biosolids management, such as composting and disposal in landfills. These difficulties in securing sound and safe outlets for biosolids will harm many of the member agencies of Plaintiff CASA and the ratepayers these agencies serve, who must pay for increased costs for biosolids management. A preliminary injunction that stays the effective date of the Kern Ban will lessen these impacts.

4. I earned a B. S. in Environmental Microbiology from Montana State University in 1974 and am a California Grade V Wastewater Operator and an Ohio Grade III Wastewater Operator.

5. I have over 30 years operational and management experience with wastewater treatment plants in Colorado, Texas, Mississippi, Ohio, and California. I managed a large biosolids land application program and wastewater treatment plant for the Miami Conservancy District in Dayton, Ohio, and have managed a biosolids land application project in California.

6. Throughout my career I have been active in national and statewide professional organizations regarding wastewater and biosolids and have gained a thorough knowledge of issues affecting biosolids management, including the impacts of local regulations. I am a member of the Strategic Planning

Workgroup formed by CASA to develop and update CASA's strategic business plan for biosolids. I am an active member of the Bay Area Clean Water Agencies' (BACWA) Biosolids Committee and Air Committee and am past Chair of the Permit Committee. Each of these committees provides technical and policy advice to San Francisco Bay Area wastewater treatment agencies within its areas of interest and expertise. I am a past president of the Sacramento Area Section of the California Water Environment Association, which addresses both the interests and the training needs of Sacramento Area wastewater agencies. In addition, I am a member of the State Water Resources Control Board's Wastewater Operator Certification Technical Advisory Committee, the Napa Flood Control District's Technical Advisory Panel, the EPA Region IX Nutrient Criteria Development Technical Advisory Group, the American Chemical Society, the Water Environment Federation, the National Association of Clean Water Agencies' Air Regulatory Committee, and the Air and Waste Management Association. I attend local, State, and national meetings of these and other organizations in my field and occasionally deliver papers and presentations. I am a founding member of the Bay Area Stormwater Management Agencies Association and a former member of the Solano County Independent Solid Waste Hearing Panel.

THE FAIRFIELD-SUISUN SEWER DISTRICT

7. The FSSD provides high level wastewater treatment for the Cities of Fairfield and Suisun City, including Travis Air Force Base. The FSSD's Wastewater Treatment Plant in Fairfield has a permitted capacity of 23.7 million gallons per day and produces annually approximately 3,000 dry tons of biosolids. It is considered a medium-sized wastewater treatment facility.

8. The FSSD has an environmental goal of beneficially using biosolids, which includes land application in all its forms. FSSD currently reuses 100% of biosolids as alternative daily cover at the local landfill. Alternative daily cover is a type of beneficial use in which a thin layer of biosolids is applied over the top of municipal refuse at the conclusion of each day of operations. The cover improves decomposition of the solid waste, replaces soil that would have to be excavated to fulfill the need, and insures that disease carrying vectors (such as rats and sea gulls) do not have access to the solid waste.

9. The FSSD recognizes that, within California, options for management of biosolids are rapidly narrowing, in part due to "not in my back yard" public sentiment. Landfill space is at a premium and not likely to increase in the near future. Biosolids production volume is directly related to the population served and continues each day regardless of the desires of those who would limit management options. In early 2006, a Biosolids Management Master

Plan was undertaken by the FSSD to identify and develop long term biosolids management options that are stable, environmentally sound, and economically viable. Key to this master planning effort is the availability of all management options approved under United States Environmental Protection Agency ("EPA") and California regulations, including biosolids land application. As explained further below, the Kern Ban undercuts the strategic plan of FSSD and many other sanitation agencies.

THE MANAGEMENT AND REGULATION OF BIOSOLIDS AND THE NEGATIVE EFFECTS OF THE KERN BAN

A. Biosolids, Federal Regulation under Part 503, and Beneficial Use

10. The term "sewage sludge" refers to the solid material produced by the wastewater treatment processes. When sewage sludge is properly treated pursuant to federal regulations, it becomes "biosolids."[1] Biosolids are nutrient-rich organic matter and can be beneficially used and applied like a fertilizer to improve and maintain productive soils and

[1] The term "biosolids" has been used exclusively in the wastewater profession and academia for many years for treated solid residuals, in contrast to the inaccurate and pejorative term "sewage sludge." The most recent National Academy of Sciences study of land application recognized the distinction and chose the word "biosolids" as the preferred term. NAS, *Biosolids Applied to Land: Advancing Standards and Practices* (2002).

stimulate plant growth. When beneficially used, biosolids are generally managed in four forms: as a moist, cake-like soil amendment, dried pellets, liquid biosolids, or compost. With advancements in technology, processed biosolids can also be used in a fifth form, as a fuel source. Biosolids can also be managed in landfills when beneficial use options are not available or accessible.

11. It bears emphasizing that the creation of biosolids is non-discretionary – that is, public wastewater agencies cannot stop producing biosolids. With projected population growth and advances in wastewater treatment technology, the amount of biosolids generated is only going to increase in the coming years. Further, it takes a period of years to develop new options for managing biosolids because of the large capital and time investments required for infrastructure, technology, human resources, and regulatory approvals. While agencies need to be able to rely on all beneficial use options for their planning, at a minimum, proper biosolids management necessitates that options not be prohibited or restricted on very short notice, as the Kern Ban is attempting to do. If a key option (such as land application in Kern County) disappears, there rarely are economical, environmentally sound and lawful alternatives that can be quickly implemented. In addition, stockpiling biosolids is not an option. Biosolids must go somewhere and there must be available options that are legal and environmentally sound.

12. Biosolids management options are rooted in the federal regulatory scheme. The federal Clean Water Act requires that wastewater agencies treat their biosolids to stringent safety standards before they can be land applied to farm fields, regardless of the form the biosolids take (cake, pellets, liquid, or compost). Biosolids regulations adopted by U.S. EPA, which are codified at 40 C.F.R. Part 503, are comprehensive, risk-based rules designed to protect human health and the environment from pollutants of concern that may be present in wastewater. The rules were based on extensive scientific peer review, and were adopted following public review and comment in a lengthy, multi-year rule-making process in the late 1980s and early 1990s. The safety of land application through compliance with the EPA's Part 503 regulations has been endorsed in two studies by the National Academy of Sciences (in 1996 and 2002) and in a detailed statewide Environmental Impact Report prepared by the California State Water Resources Control Board in 2004. The 2002 National Academy of Sciences report concludes "there is no documented scientific evidence that Part 503 has failed to protect public health."

13. In its Part 503 rules, the EPA established three categories of biosolids for regulatory purposes: Class B biosolids, Class A biosolids and Class A Exceptional Quality biosolids. *See generally* EPA, *A Plain English Guide to the EPA Part 503 Biosolids Rule* (1994). Class B Biosolids are biosolids in which 99% of pathogens have been eliminated, and the

remaining pathogens rapidly die off when the biosolids are applied to soils, essentially becoming pathogen free within a short period following application. Class A Biosolids are biosolids that are further processed and treated, and are essentially free of pathogens prior to land application. Class A Exceptional Quality (EQ) are Class A biosolids that meet stringent pollutant concentration requirements for the trace amounts of metals found in biosolids at the parts per million level (e.g., cadmium, zinc).

14. The beneficial reuse of biosolids is a national policy articulated by the United States Congress when it banned ocean disposal of biosolids more than 30 years ago. Congress directed EPA to develop regulations for the disposal and utilization of sewage sludge, which led directly to the adoption of the Part 503 regulations in 1993. *See* 58 Fed. Reg. 9248 (Feb. 19, 1993). EPA adopted land application as the single largest management option, recognizing biosolids as "a valuable resource" and "useful as a fertilizer and a soil conditioner" when land applied. 58 Fed. Reg. at 9249 (Feb. 19, 1993). EPA further stated its "preference . . . for local communities to reuse [biosolids] in beneficial ways" and that it would "actively promote" such practices. *Id.* at 9258. EPA's Part 503 rules serve as a regulatory floor upon which states can build additional regulations to improve public confidence in land application of biosolids.

B. Regulation of Biosolids In California.

15. In California, the State Water Resources Control Board ("State Board") regulates land application of biosolids through a detailed General Order, promulgated in 2004, that mandates many additional regulations and protections, such as requirements that each land application site be approved before any biosolids are land applied. The Regional Water Quality Control Boards use the General Order or issue local permits to exercise control over biosolids uses.

16. The State Board's General Order (which is attached to this declaration as Exhibit A) is the culmination of a multi-year effort to determine the appropriate level of regulation for biosolids reuse. The General Order is based on a 600-page Environmental Impact Report ("EIR") that found land application to be a safe and beneficial way to manage biosolids. The EIR determined that Class A biosolids and Class B biosolids, when land applied according to Part 503 and the General Order, were equally safe practices. The EIR is widely recognized in the biosolids field as one of the most thorough and comprehensive reviews of land application.

17. In its General Order, the State Board adopted a statewide policy, based on the EIR's extensive scientific investigation, which reaffirms and encourages the beneficial use of biosolids. The General Order finds that biosolids are "beneficial to agricultural" and "improve agricultural productivity,"

and it describes the specific benefits from use of biosolids as a soil amendment. (General Order at ¶ 7). The General Order concludes that "[t]he beneficial use of biosolids through land application under this General Order is environmentally sound and preferable to non-beneficial disposal." (General Order at ¶ 11).

C. Biosolids Management Options in California.

18. Wastewater agencies in California generally meet their obligations for managing approximately 750,000 dry tons of biosolids produced per year through a combination of (a) land application (including composting and marketable products such as bagged pellets); (b) use of biosolids as a daily cover material at landfills to prevent wind-blown garbage and other nuisances; and (c) disposing of biosolids in landfills (which is not regulated by the EPA's Part 503 regulations and is not a beneficial use).

19. An analysis of EPA Region IX Part 503 compliance reports for 2004 that were submitted by California's wastewater agencies (the latest statistics available) reveals the following distribution for biosolids management:

a)	Composting	27%
b)	Landfill Cover (ADC)	19%
c)	Out-of-State Management	18%
d)	Land Application (Class A Biosolids)	17%
e)	Land Application (Class B Biosolids)	7%

f)	Disposal in Landfills	4%
g)	Incineration	3%
h)	Surface Disposal	2%
i)	Storage	2%
j)	Other	1%

A number of these options (options a, c, d and e) involve land application in one form or another. Collectively, options involving land application account for 69% of all of the biosolids generated by Californians.

20. Thus, land application of biosolids in various forms is the primary management tool for biosolids in California. As explained above, changing these management options takes years of planning and investment and can not be done rapidly without great expense and logistical challenges.

21. The capacity of California landfills to receive biosolids for basic, non-beneficial disposal is very limited and many landfills refuse biosolids because of management concerns regarding a semi-liquid waste and occasionally because of public perception obstacles. In November 2005, wastewater agencies in northern California conducted a survey of existing capacity at landfills within 200 miles of San Francisco that had been identified as sites that would accept biosolids. This survey revealed that landfill disposal is diminishing as a viable option. Of the 31 landfill sites surveyed, four indicated that they either do not or are not permitted to take biosolids; one facility planned to close in the next several months, seven either were unreachable or the phone was

disconnected, and one was a duplicate listing. Of the remaining 18 sites, nine accept in-county material only. Therefore, there are only nine landfills within 200 miles of San Francisco that will accept biosolids from out-of-county sources.

22. As California landfill sites close or further restrict the acceptance of biosolids, agencies compete for this scarce resource, which results in both higher landfill "tipping fees" to accept biosolids and possibly longer hauling distances to reach landfills that will take biosolids. This increases the costs to public wastewater agencies, and their ratepayers, as these agencies attempt to find ways of managing their biosolids. The Kern Ban will exacerbate this trend.

23. In southern California, there is even less landfill capacity to absorb the tonnage that will be displaced by the Kern Ban. Very limited biosolids management capacity exists at the Puente Hills Landfill for the Los Angeles County Sanitation District, and at the Prima Deshecha Landfill (located in San Juan Capistrano) for the South Orange County Clean Water Agencies.

24. California sanitation agencies have consistently worked with farmers and stakeholders in rural counties to explain land application and improve acceptance of the practice, and have achieved many successes in this regard. The complete ban on land application in Kern County, passed by voter initiative with no foundation in data, fact-finding or analysis, places unprecedented pressures on the management

options available to sanitation agencies. Removing the Kern County acreage (totaling over 8,000 acres at two large farm sites), which currently provides biosolids management for approximately one-third of California's biosolids, will force the tonnages of biosolids managed by agencies utilizing the land base in Kern County into the market for other competitive biosolids management options, including composting, landfilling, and alternative daily cover.

25. The Kern Ban will also have out-of-state impacts as more California agencies look to Arizona and other locations for alternatives for reuse and disposal. Currently, over 20% of California's biosolids are being managed out-of-state, compared with little or none in 2002. This percentage will increase substantially due to the enactment of the Kern Ban and restrictions that other California localities may pass or tighten in its wake. And as more and more of California's biosolids are managed out-of-state, this will increase biosolids management costs for sanitation agencies and their ratepayers, particularly transportation costs to haul biosolids hundreds of miles from coastal cities to far away farm land. Such practices are contrary to sound and economical biosolids management and also cause collateral environmental impacts such as air emissions.

26. While options such as use of biosolids as fuel are being considered and are in the pilot stage in some instances, these options will not be available over the short-term (next 3-5 years) to handle any significant volume of biosolids. Energy production

from biosolids refers to the creation of power generated by the combustion or oxidation of biosolids through either the creation of fuel char, pyrolysis, gasification, incineration or co-combustion. To date, the use of these technologies for biosolids management has not been feasible due to the very high cost of access to these technologies and the absence of any operating facilities specifically designed to accept biosolids. While increasing attention is being paid to biosolids-to-energy projects, wide-scale adoption of these projects has yet to be achieved in California. Despite popular attention and commercial interest, the creation of energy products from biosolids has yet to be proven as a feasible and sustainable biosolids management option.

D. Additional Impacts of the Kern Ban.

27. Bans on land application in particular force wastewater agencies to attempt to compete for the increasingly limited land application options that remain available. This issue is a growing problem and it affects not only larger municipalities, but also many smaller wastewater agencies that are unable to develop new biosolids management options. Kern County's Ban, if upheld, will likely encourage other rural counties to enact similar bans or onerous restrictions simply because of Kern County's size and leadership among agricultural counties.

28. Kern County's tightening of its land application regulations in recent years, and in particular its

ban of Class B biosolids in 2003, already has led to significant price increases for public wastewater agencies and thus their ratepayers, and has placed significant constraints on available management options. If allowed to take effect, the Kern Ban, which is a largely unprecedented total ban on land application, will exacerbate this problem and will have wide impacts throughout the state on sanitation agencies and the farmers that like to use biosolids.

29. For example, since Kern County adopted a ban on Class B biosolids in 1999 (effective in January 2003), biosolids management fees for biosolids land application in southern California have risen dramatically – from a low of $20 per wet ton in the mid-1990's, to more than $30 per wet ton for Class B biosolids land application through 2003, to well in excess of $40 per wet ton for Class A biosolids land application since 2003. Composting costs are even higher and, as noted above, landfilling options are very limited. The Kern Ban will drive costs higher and will also create uncertainties for public wastewater agencies that make responsible management very difficult, such as the uncertainty regarding the viability of land application in other California counties and in Arizona.

CONCLUSION

30. In summary, the Kern Ban will cause financial damages and management problems for California sanitation agencies well beyond Kern County by

limiting biosolids management options, increasing costs, and making the challenges facing public wastewater agencies more difficult. California wastewater agencies depend on the availability of sufficient land for biosolids application for the long-term sustainability of sound, lawful and environmentally friendly biosolids management.

31. Allowing land application to continue in Kern County, on the other hand, would likely have a calming effect on the biosolids market, stabilizing costs to public agencies and their ratepayers, and restoring certainty regarding the availability of land application pursuant to federal and California law.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and accurate.

Executed this 15th day of September at Napa, California.

/s/ Larry Bahr
Larry Bahr
Regulatory Program Director
Fairfield-Suisun Sewer District

[Exhibit A Omitted In Printing]

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Rules

Other Authorities

INTRODUCTION

The Court has ordered supplemental briefing on the following two questions: (1) whether Appellees have prudential standing to maintain a suit under the dormant Commerce Clause; and (2) whether the Court must dismiss Appellees' state law claims should it determine that Appellees fail to satisfy the prudential limitations on standing.

As to the first question, Kern has waived any challenge to Appellees' prudential standing by failing to raise the issue before the district court, and the Court should not consider the issue further. If the Court does reach the issue, Appellees have prudential standing for their Commerce Clause claim. Appellees are a diverse coalition of eleven parties – including biosolids generators, truckers, managers and farmers, as well as a statewide trade association consisting of more than 100 member agencies – and they assert their own rights and interests to pursue commerce in biosolids unimpeded by unconstitutional local barriers. Their interests fall within the generous "zone of interests" protected by the Commerce Clause. Despite Kern's assertions to the contrary, Appellees' physical

locations in-state do not diminish their prudential standing in this case.

As to the second question, the Court is not required to dismiss Appellees' state law claims if it determines that Appellees lack prudential standing under the dormant Commerce Clause. A court must dismiss a plaintiff's supplemental state law claims if it does not have *jurisdiction* over any of the federal law claims asserted in the case. However, such a dismissal is not required if a court disposes of the federal law claims on non-jurisdictional grounds. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[W]hen a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over pendent state-law claims."). Here, the district court dismissed Appellees' federal Clean Water Act and Equal Protection claims *on the merits*. It therefore retained supplemental jurisdiction over Appellees' state law claims based on the California Integrated Waste Management Act and the California police powers doctrine. Kern never challenged this exercise of jurisdiction. In addition, Ninth Circuit precedent makes clear that unlike Article III standing, prudential standing is not a jurisdictional requirement; thus, dismissal of the dormant Commerce Clause claim on this ground would also not eliminate supplemental jurisdiction over the state law claims.

I. APPELLEES HAVE PRUDENTIAL STANDING TO MAINTAIN THEIR DORMANT COMMERCE CLAUSE CLAIM

A. Kern Has Waived Any Prudential Standing Challenge

Kern concedes that its challenge to prudential standing is barred under the Court's precedent because it was not raised below. *Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000) ("a party waives objections to nonconstitutional standing not properly raised before the district court"). Kern states that it has preserved this argument for a possible future request for *en banc* review, which is its sole remedy.

The Court recognized this limitation in its February 27, 2009 and March 19, 2009 Orders, and should adhere to it now.[1] *Pershing* embodies the key distinction between the "irreducible constitutional minimum" of jurisdictional Article III standing, and non-jurisdictional prudential concerns that, like other defenses, are waived if not raised below. *Pershing*, 219 F.3d at 900. As this Court recently reiterated, "[u]nlike the Article III standing inquiry, whether [plaintiff] maintains prudential standing is not a jurisdictional limitation on our review." *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065

[1] As a procedural matter, the Court would not be addressing the argument *sua sponte* because Kern has expressly requested such relief from an *en banc* panel.

n.17 (9th Cir. 2008) (internal quotation marks omitted) (examining Article III standing *sua sponte*, but declining to consider prudential standing). While pointing out a circuit split on this issue, Kern omits that the Ninth Circuit is not alone in its position. *See Ensley v. Cody Res., Inc.*, 171 F.3d 315, 320 (5th Cir. 1999) (prudential standing objection, brought after district court judgment, was waived).

The Court's consideration of prudential standing would flout this Ninth Circuit rule and elevate prudential standing on a par with constitutional standing. Moreover, an untimely prudential standing challenge deprives a plaintiff of the opportunity to prove its standing with facts in the trial court with due notice. To consider prudential standing for the first time on appeal would condone "eleventh-hour" defenses to the detriment of the parties and judicial economy. *See Bd. of Nat. Res. v. Brown*, 992 F.2d 937, 945-46 (9th Cir. 1993) (untimely prudential standing challenge would "impermissibly [] foster repetitive and time-consuming litigation under the guise of caution and prudence") (quoting *Craig v. Boren*, 429 U.S. 190, 193-94 (1976)); *cf. Pershing*, 219 F.3d at 900 (rejecting "eleventh-hour challenge" to prudential standing brought on the eve of trial).

B. Appellees Have Prudential Standing for Commerce Clause Purposes

When not waived, the Ninth Circuit has recognized several nonconstitutional "principles of prudential

standing," functioning as "rule(s) of practice" or "judicially self-imposed limits on the exercise of federal jurisdiction" beyond constitutional standing requirements. *Pershing*, 219 F.3d at 899. Courts retain greater discretion and flexibility to weigh prudential considerations in a given case than for the "rigorous Art. III requirements themselves." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80-81 (1978) (declining to apply prudential limitations "to all cases as a matter of course").

Here, Kern invokes two common prudential principles: (i) Appellees must assert their own rights and interests, and (ii) those interests must fall within the zone of interests protected by the Commerce Clause. Appellants' Opening Brief ("AOB") at 37. But Appellees' Commerce Clause claim does not run afoul of either prudential concern offered by Kern. As a threshold matter, only one of the eleven Appellees must show prudential standing. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999) ("one party with standing is sufficient to make a claim justiciable"). The record in this case – developed without any question raised on prudential standing – confirms that some or all of the eleven diverse Appellees have prudential standing.

1. Appellees Assert Their Own Interests

Kern argues that plaintiffs "generally must assert [their] own legal rights and interests [rather than those of] third parties." *Valley Forge*, 454 U.S. at 474. Appellees easily meet this standard. Appellees have introduced evidence of Measure E's targeted shutdown of their operations, the harms Appellees will suffer as a result, and the effects on the broader biosolids market. *See* pp. 7-9, *infra*; Joint Brief of Appellees ("JBA") at 18-19 (and evidence cited therein). This case simply does not involve the typical derivative standing questions that occur in associational, taxpayer, or shareholder suits. *See*, *e.g.*, *Valley Forge*, 454 U.S. at 466-67.

2. Appellees' Claim Fits Within the Broad "Zone of Interests" Protected By the Dormant Commerce Clause

Appellees' interests must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987) (upholding standing for statutory claim). The Supreme Court has stated that this test "is not meant to be especially demanding." *Id.* at 399. A plaintiff fails this test only if its interests are "marginally related to or inconsistent with the purposes implicit" in the dormant Commerce Clause. *See id*. at 399; *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110

F.3d 699, 704 (9th Cir. 1997) (citing *Clarke* in Commerce Clause case).[2] Here, this test is easily satisfied.

(1) Plaintiffs' Activities and Measure E's Impacts Implicate Interstate Commerce

Kern argues that Appellees cannot invoke a cognizable right under the Commerce Clause because "Plaintiffs' sludge disposal occurs entirely within California." AOB at 37. Kern is wrong on the law and the facts. Fundamentally, the Supreme Court has long recognized that "waste is an article of commerce" subject to the Commerce Clause. *BFI Med. Waste Sys. v. Whatcom County*, 983 F.2d 911 (9th Cir. 1993) (citing *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 359 (1992)). Likewise, local ordinances "are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow" and they are "no less discriminatory because in-state or in-town processors

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[2] The Supreme Court has cautioned that the zone of interests test is best suited to claims based on the Administrative Procedure Act and other statutes and may be inappropriate for Commerce Clause and other constitutional-based claims where congressional intent is not at issue. *See Clarke*, 479 U.S. at 400 n.16 (noting that the Supreme Court has only once addressed the zone of interests test for a Commerce Clause claim, and found it satisfied); *see also* Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the "Zone of Interests" Test Should Not Apply to Constitutional Cases*, 48 Ariz. L. Rev. 23, 24-26 (2006).

are also covered by the prohibition." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389, 391 (1994).

Moreover, even employing Kern's standard, Kern's assertion is factually incorrect. Kern has conceded that Plaintiff OCSD ships biosolids to Arizona. AOB at 9 ("Thirty percent of OCSD's biosolids are land applied in unincorporated Kern County; the remainder is composted in Riverside, or land applied or composted and landfilled in Arizona"); ER177(¶6). Plaintiff City of Los Angeles has also recycled biosolids in Arizona, SER124-27, and it sells feed crops grown with biosolids on its farm in Kern to an international market. ER162.

Measure E imposes consequences for Appellees' interests and biosolids operations that extend beyond California. The municipal generators have testified to the lack of suitable land application sites in California, and correspondingly, the ban's immediate forced diversion of more than 1,000 tons of Appellees' biosolids per day, or approximately one third of California's biosolids, most likely to Arizona. *See JBA* at 18-19 (and evidence cited therein); ER150, 157. Larry Bahr, a member of CASA's Strategic Planning Workshop and a Northern California sewer district manager, explained the regional biosolids management and cost consequences following Measure E's removal of many thousands of acres from land application. ER585, 587, 593-96. Kern did not contest this evidence.

Measure E would further increase prices and uncertainty in and beyond California for biosolids management options. ER585(¶3), 593(¶21), 595-96(¶¶27-29). The Bahr declaration explains that "as more and more of California's biosolids are managed out-of-state, this will increase biosolids management costs for sanitation agencies and their ratepayers." ER594. This disruption and cost to the regional biosolids market belies Kern's suggestion that closing Kern to biosolids recycling somehow "benefits" interstate commerce, and illustrates that Kern's argument here turns the dormant Commerce Clause doctrine on its head. *See* JBA at 27-28. The notion that increased revenues for out-of-county and out-of-state recipients of a product banned elsewhere justifies the ban is absent from the Supreme Court's dormant Commerce Clause jurisprudence.

(2) In-State Plaintiffs Have Prudential Standing to Pursue a Commerce Clause Claim

It is of no consequence that Appellees are physically located in-state. They generate, transport, trade and use a commodity in interstate commerce and are harmed by a ban that shields Kern from the shared challenge of managing biosolids. The law does not require the artifice of an out of state plaintiff to sustain a Commerce Clause claim.

The dormant Commerce Clause, defined as the negative or dormant implication of the Commerce

Clause, prevents local discriminatory or burdensome interference with any commerce that is subject to Congress' far-reaching affirmative Commerce Clause powers. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996) (invalidating tax scheme). It assures "free access to every market in the Nation," *Dennis v. Higgins*, 498 U.S. 439, 449-50 (1991) (internal citation omitted), and prevents "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 waste imports for landfilling). The Supreme Court has held that the Commerce Clause reaches local laws where impacts to the national market could be anticipated. *See*, *e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (local wheat production); *Gonzales v. Raich*, 544 U.S. 1, 22 (2005) (local manufacture and possession of marijuana).

Here, Appellees seek to enforce the proscription that a "political subdivision[ ] may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce *through the subdivisions of the State*, rather than through the State itself." *Fort Gratiot*, 504 U.S. at 361 (invalidating ban on county waste imports) (emphasis added); *see also BFI Med. Waste Sys.*, 983 F.2d at 913 (invalidating county medical waste ban, as "out-of-county waste bans are *per se* unconstitutional"). Appellees also seek to avoid the financial and logistical upheaval in the vital public infrastructure for biosolids, should Measure E be upheld and "excite those jealousies and

retaliatory measures the Constitution was designed to prevent." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); ER595. These protected interests go beyond "arguably" falling within the relevant zone of interests; they go to the heart of the dormant Commerce Clause.

That Appellees are based in California does not alter this conclusion. The Supreme Court has adjudicated dormant Commerce Clause cases brought by in-state entities alleging in-state and out-of-state effects, unconcerned with any prudential standing limitation. *See*, *e.g.*, *id*. at 388-89 (invalidating flow control ordinance in challenge brought by local recycler); *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 97-98 (1994) (striking down solid waste surcharge in suit brought by local disposers); *GMC v. Tracy*, 519 U.S. 278, 286-87 (1997) (permitting in-state firm to challenge natural gas taxes on Article III standing and omitting any discussion of prudential concerns, and further collecting additional Supreme Court cases holding likewise).

The trio of cases cited in the Court's March 19 Order similarly demonstrate that the geographic location of a plaintiff is of no moment. *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699 (9th Cir. 1997); *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997). Beginning with the Court's opinion in *Washoe County*, 110 F.3d at 702-04, each of these cases held that *individual* waste

generators' desire to escape unwanted, yet mandatory, municipal garbage services was "not even marginally related to the purposes underlying the dormant Commerce Clause." Their injuries, consisting of higher than desired garbage bills, were in no way affected by the waste's destination following collection. *On the Green*, 241 F.3d at 1239-40. *Ben Oehrleins* additionally held that such individuals ran afoul of limitation on third-party claims by pursuing claims belonging to their waste haulers.

In contrast, Appellees work with biosolids at every stage of the flow of commerce, and their interests are tied directly to the available geographic locations to carry out their work. By arbitrarily enacting a physical barrier to out-of-county biosolids in Kern County, Kern targeted Appellees' operations for sudden closure, increased the costs of managing biosolids on now scarcer suitable land, and imposed those costs solely on unrepresented out-of-County interests. Appellees' injuries "disappear" if the permanent injunction of Measure E is affirmed. *See Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 711-12 (6th Cir. 2000) (similarly distinguishing *Washoe County* and *Ben Oehrleins*).

Indeed, Appellees' interests align with the in-state entities excluded from the local market and found to satisfy the zone of interests test in the Court's cited cases. In *On the Green*, this Court determined that the in-state self-hauler had prudential standing to challenge a flow control provision, since its "injury would be remedied if it could take its

garbage outside the city." 241 F.3d at 1241. *See also Ben Oehrleins*, 115 F.3d at 1379 (waste processors and haulers, at least some of whom were in-state, had prudential standing).

Other Courts of Appeals similarly have accorded prudential standing to in-state plaintiffs bringing Commerce Clause claims. For example, the First Circuit found that an in-state waste hauler demonstrated constitutional and prudential standing (to the benefit of all plaintiffs) to challenge a municipal waste management scheme. *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 182-83 (1st Cir. 1999). *Houlton* observed that the hauler's status as "a classic plaintiff asserting his own economic interests under the Commerce Clause" meant that he "avoid[ed] any [prudential standing] concerns." *Id*. at 183. More importantly, the First Circuit, citing *GMC* and *Ben Oehrleins*, made clear that his "claim to standing is not damaged because he failed to allege that he hauled garbage out-of-state or planned to do so. . . . Thus, an in-state business which meets constitutional and prudential requirements due to the direct or indirect effects of a law purported to violate the dormant Commerce Clause has standing to challenge that law." *Id.*; *see also Huish*, 214 F.3d at 711-12 (in-state plaintiff had prudential standing to

challenge an exclusive franchise scheme for collection and processing of all local solid waste).[3]

Accordingly, Appellees have prudential standing to sue under the dormant Commerce Clause.

II. DISMISSAL OF APPELLEES' STATE LAW CLAIMS IS NOT REQUIRED IN ANY EVENT

If this Court finds that Appellees do not have prudential standing to maintain their dormant Commerce Clause claim, the Court may decide Appellees' state law claims. The dismissal of supplemental state law claims is not required when a court disposes of federal law claims on non-jurisdictional grounds. Here, the district court dismissed Appellees' federal Clean Water Act claim on the merits on a motion to dismiss, and it entered summary judgment on their Equal Protection claim on the merits. Accordingly, the district court had supplemental jurisdiction to resolve Appellees' state law claims. In addition, a ruling by

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[3] The Fifth Circuit is the only Court of Appeals to apply an elevated zone of interest test to find that plaintiffs not shipping waste interstate could not challenge a flow control ordinance as discriminatory. *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498-500 (5th Cir. 2004). This requirement is unique, and arguably contradicts the Supreme Court's invalidation of a similar flow control ordinance in *C & A Carbone*. Moreover, the court did find that plaintiffs had standing for purposes of the *Pike* balancing test. *Id*. at 500-01.

this Court that Appellees' lacked prudential standing under the dormant Commerce Clause would, under Ninth Circuit precedent, also be a non-jurisdictional basis for dismissal.

A. Dismissal Of Supplemental State Law Claims Is Not Required Where The Court Disposes Of Federal Law Claims On Non-Jurisdictional Grounds

When a federal court dismisses a plaintiff's federal claims on non-jurisdictional grounds, the court is not required to dismiss the plaintiff's supplemental state law claims. Rather, "[d]istrict courts have the discretion to retain jurisdiction over pendent (now supplemental) state law claims when the accompanying federal question claim falls out." *In re Kieslich*, 258 F.3d 968, 970 (9th Cir. 2001); *see also Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001) ("If the district court dismisses all federal claims on the merits, it has discretion under § 1367(c) to adjudicate the remaining claims. . . ."); *Arbaugh*, 546 U.S. at 514.

As the District of Columbia Circuit explained in *Saksenasingh v. Sec'y of Educ.*, 126 F.3d 347, 351 (D.C. Cir. 1997) (emphasis added):

> Under 28 U.S.C. § 1367, which governs supplemental jurisdiction, the District Court may, at its discretion, continue to entertain supplemental jurisdiction even after it 'has dismissed all claims over which it has

> original jurisdiction.' 28 U.S.C. § 1367(c)(3). If the District Court had original jurisdiction, but dismissed for ***non-jurisdictional reasons***, then it could maintain supplemental jurisdiction at its discretion. If it dismissed the underlying claim on jurisdictional grounds, then it could not exercise supplemental jurisdiction.

In its March 19 Order, the Court cited *Scott v. Pasadena Unified Sch. Dist.,* 306 F.3d 646, 664 (9th Cir. 2002), which is not to the contrary. *Scott* found that the plaintiffs lacked Article III standing, which is a jurisdictional prerequisite to judicial review.[4] The Court therefore held that dismissal of the plaintiffs' supplemental state law claims was required. *Id.* at 664 ("By finding that Scott did not have standing to assert her federal equal protection claim, we have determined that the district court *lacked subject matter jurisdiction.* Thus, we have no discretion to retain supplemental jurisdiction over Scott's state law claims.") (emphasis added.)[5] By contrast, such a

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[4] In *Scott*, there was no Article III standing – and thus no subject matter jurisdiction – because there was no threatened or actual harm to the plaintiffs. Here, by contrast, Appellees' standing to bring suit under Article III has not, and cannot, be disputed.

[5] *Scott* cited two other cases for the same proposition that the dismissal of all federal claims for lack of jurisdiction required the dismissal of supplemental state law claims. *See Herman Family Revocable Trust*, 254 F.3d at 803 (case involving sale of vessel did not trigger federal admiralty jurisdiction and without subject matter jurisdiction court was required to dismiss supplemental state law claims); *Musson Theatrical, Inc.*

(Continued on following page)

dismissal is not required where the court disposes of the plaintiff's federal law claims for non-jurisdictional reasons.

1. The District Court Dismissed Two of Appellees' Claims on the Merits and Retained Supplemental Jurisdiction

In this case Appellees asserted three federal claims – that Measure E is preempted by the federal Clean Water Act (ER905-06), that it violates the Equal Protection Clause (ER905), and that it violates the Dormant Commerce Clause (ER903-04). The district court dismissed Appellees' federal Clean Water Act claim on the merits on a motion to dismiss. ER861-66. By contrast, the district court ruled that Appellees did state a claim under the Equal Protection Clause at the pleading stage, ER859-60, but it then ruled against the claim on the merits on summary judgment. ER19-24.

Those were non-jurisdictional grounds for disposing of Appellees' federal claims. Regardless of how this Court ultimately rules on whether Appellees' have prudential standing to sue under the dormant

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v. Fed. Express Corp., 89 F.3d 1244, 1255 (6th Cir. 1996) (observing that if a court dismisses a plaintiff's federal claims for lack of subject matter jurisdiction under Rule 12(b)(1), "then supplemental jurisdiction can never exist," since a court "has no discretion to exceed the scope of its Article III power").

Commerce Clause, the presence of these other federal claims, which were dismissed *on the merits,* gave the district court supplemental jurisdiction to decide Appellees' remaining state law claims. *In re Kieslich,* 258 F.3d at 970; *Herman Family Revocable Trust*, 254 F.3d at 806.

Moreover, the decision whether to exercise supplemental jurisdiction over state law claims after federal law claims have been dismissed on the merits is discretionary in the district court in the first instance, not in this Court. *See Acri v. Varian Assocs., Inc.,* 114 F.3d 999, 1000-01 (9th Cir. 1997) (*en banc*). When Kern moved for summary judgment, it did not ask the district court to decline to exercise supplemental jurisdiction over Appellees' state law claims in the event that it dismissed all of the federal law claims. To the contrary, Kern asked the district court to rule on all of Appellees' claims on the merits. ER651-86. Having invited the district court to adjudicate the merits of Appellees' state law claims, Kern is now barred on appeal from contending that so doing was an imprudent exercise of supplemental jurisdiction. *See Acri,* 114 F.3d at 1000 ("Thus, while a district court must be sure that it has federal jurisdiction under § 1367(a), once it is satisfied that the power to resolve state law claims exists, the court is not required to make a § 1367(c) analysis unless asked to do so by a party. For the same reason, we are not required to step in *sua sponte* on appeal to undo an unchallenged exercise of supplemental jurisdiction.").

Accordingly, Appellees' federal Clean Water Act and Equal Protection Clause claims gave the district court supplemental jurisdiction over their state law claims.

B. Prudential Standing Is Not a Jurisdictional Limitation

In addition, under Ninth Circuit law, a dismissal of Appellees' dormant Commerce Clause claim on prudential standing grounds would be a dismissal for non-jurisdictional reasons. As a result, such a dismissal would not preclude this Court from "continu[ing] to entertain supplemental jurisdiction" over Appellees' state law claims. *See Saksenasingh,* 126 F.3d at 351.

The Ninth Circuit is unequivocal that prudential standing is not a jurisdictional requirement. For example, in *Board of Natural Resources*, 992 F.2d 945-46, several counties in Washington state alleged (among other claims) that a federal statute containing a ban on the export of unprocessed timber contravened the Tenth Amendment. In defending the statute, the federal government argued for the first time on appeal that the counties could not assert the State's interests and that as a result they lacked prudential standing to bring a Tenth Amendment claim.

While the Court recognized that *jurisdictional* limitations such as Article III standing cannot be waived and may be raised at any time, it also made

clear that prudential standing is not jurisdictional: "Unlike the requirement that a litigant demonstrate an injury in fact, the rule against third-party standing *is not a jurisdictional limitation on our review, but a prudential one*." *Id.* (emphasis added). Because prudential standing is *not* jurisdictional, the Court treated it differently from constitutional standing, and ruled that the issue was waived due to the defendants' failure to raise it below. *Id.* at 946.

The Ninth Circuit reiterated the principle that prudential standing is not jurisdictional in *Pershing,* 219 F.3d at 899-900. In that case, the district court, in response to a claim on the eve of trial that the plaintiffs lacked standing, addressed the issue of constitutional standing but ruled that the defendants waived their prudential standing claims by not raising them in a timely manner.

The Ninth Circuit reviewed the plaintiffs' constitutional standing *de novo,* noting that "[b]ecause issues of constitutional standing are jurisdictional, they must be addressed whenever raised." *Id.* at 899. But the Court went on to explain: "By contrast, a party waives objections to nonconstitutional standing not properly raised before the district court." *Id.* The Court further explained that the defendants' prudential standing claims raised "*nonjurisdictional* standing issues." *Id.* at 900 (emphasis added; citation omitted).

In September 2008, the Ninth Circuit reaffirmed that prudential standing is not a jurisdictional

requirement. The Court stated: "Unlike the Article III standing inquiry, whether [the plaintiff] maintains prudential standing 'is not a jurisdictional limitation on our review.'" *Shewry*, 543 F.3d at 1064-65 n.17 (quoting *Brown,* 992 F.2d at 945-46). The Court therefore recognized that "our independent obligation to examine our own jurisdiction" did not encompass claims of prudential standing. *Id.* at 1064-65 & n.17 (internal quotation marks omitted).

In sum, it is well-established in the Ninth Circuit that prudential standing is not a jurisdictional requirement. Thus, a finding that Appellees lack prudential standing for the Commerce Clause claim would be a ruling on non-jurisdictional grounds, and would not require dismissal of Appellees' state law claims.

DATED: March 30, 2009

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I am over eighteen years of age, not a party in this action, and employed in San Francisco County, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for mail/fax/hand delivery/ next business day Federal Express delivery, and they

are deposited that same day in the ordinary course of business.

On March 30, 2009, I served the attached:

APPELLEE'S SUPPLEMENTAL BRIEF

☒ (BY MAIL) by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California in sealed envelope(s) with postage prepaid, addressed as set forth below. I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence is deposited with the United States Postal Service the same day it is left for collection and processing in the ordinary course of business.

☒ (VIA EMAIL) by transmitting via email the document(s) listed above on this date before 5:00 p.m. PST to the person(s) at the email address(es) set forth below.

SEE ATTACHED SERVICE LIST

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made and that this declaration was executed on March 30, 2009, at San Francisco, California.

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