No. F063381
(Tulare County Super. Ct. No. VCU242057)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF LOS ANGELES, *ET AL.*,
Plaintiffs and Respondents,

v.

COUNTY OF KERN and KERN COUNTY BOARD OF SUPERVISORS,
Defendants and Appellants.

Appeal From An Order Granting A Preliminary Injunction
Tulare County Superior Court
(Hon. Lloyd L. Hicks, Presiding)

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned counsel of record for Defendants and Appellants County of Kern and Kern County Board of Supervisors certifies that as of this date, County of Kern and Kern County Board of Supervisors know of no entity or person that must be listed under Rule 8.208(e)(1) or (2).

Dated: January 13, 2012.

STEVEN L. MAYER

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Other Authorities

TABLE OF AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns a Kern County ordinance, known as Measure E, that bans the land application of treated sewage sludge, or "biosolids," in the County's unincorporated areas. "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." 1 Appellants' Appendix ("AA") 39 (Measure E §8.05.030(D)).

The trial court entered a preliminary injunction restraining the County from enforcing Measure E against the Plaintiffs until final judgment. Defendants County of Kern and the Kern County Board of Supervisors have appealed from that order. However, they do not ask this Court to reweigh the balance of hardships found by the trial court. Instead, this brief focuses exclusively on the legal issues presented by the trial court's findings that Plaintiffs had shown a likelihood of success on two of their claims. The first asserts that Measure E is preempted by the California Integrated Waste Management Act ("Act") while the second contends that Measure E is an unlawful exercise of the County's police power because it does not "reasonably accommodate the regional welfare." 1 AA 18 (¶75).

Both of these claims were originally brought in federal court. However, the District Court declined to exercise supplemental jurisdiction and dismissed them without prejudice. Because Plaintiffs failed to refile these claims in state court within thirty days of the dismissal, the claims are time-barred.

The governing statute is 28 U.S.C. §1367(d), which provides that "[t]he period of limitations'" for any claim within the supplemental jurisdiction of a federal court "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." The state and federal courts, including the California courts, have adopted two different interpretations of this statute. Four courts,

including the Third District, have held that Section 1367(d) suspends the statute of limitations while a supplemental claim is pending in federal court. Under this interpretation, once the claim is dismissed a plaintiff can "tack on" to the thirty-day period provided by Section 1367(d) any portion of the state-law limitations period that had not expired when the plaintiff filed in federal court. Alternatively, four courts, including the Second District, have held that Section 1367(d) merely extends the time to file a state court complaint to thirty days after dismissal if the statute runs while a supplemental claim in pending in federal court. Both interpretations are consistent with the statutory language. *See* Part I(A), *infra*.

Accordingly, the Court is free to adopt the interpretation of the statute that best serves Congressional intent. That is the second interpretation, under which all otherwise time-barred supplemental claims must be refilled within thirty days after dismissal.

Section 1367(d) was enacted to provide a "straightforward tolling rule" that applies when a state law claim is dismissed without prejudice by a federal court. *Jinks v. Richland County*, 538 U.S. 456, 463 (2003). Giving all plaintiffs the same thirty-day period to refile their time-barred claims in state court accomplishes this goal. Moreover, it does so while simultaneously protecting both the interests of defendants and the state courts in prompt adjudication and the interests of plaintiffs in having enough time to put a new caption on an existing complaint. In contrast, giving plaintiffs thirty days plus whatever unexpired portion of the statute remained when the federal case was filed is unnecessary to protect plaintiffs' rights and would permit lengthy and unwarranted delays in resolving cases on the merits. Congress would not have enacted such a statute as part of a larger bill intended to reduce the cost and delay caused by federal litigation.

Under this interpretation of Section 1367(d), Plaintiffs had to refile their state-law claims in state court within 30 days after they were dismissed by the federal court. They did not do so. Those claims are therefore time-barred, and the trial court erred in holding that Plaintiffs were likely to prevail on them. *See* Part I(B), *infra*.

Plaintiffs' claim that Measure E is preempted by the Act also fails on its merits. Because the Act legislates in an area—waste disposal—where local governments have traditionally played a dominant role, Plaintiffs have the burden of showing preemption. *See* Part II(A), *infra*. They cannot meet that burden. The Act requires public entities to prepare comprehensive "integrated waste management plans" governing the waste generated within their borders. These plans must comply with Public Resources Code Section 40051(a), which requires cities and counties to "promote . . . [r]ecycling and composting," and Section 40051(b), which requires them to "[m]aximize the use of all feasible . . . recycling . . . options in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal."[1] However, both prongs of Section 40051 expressly apply *only* when a local agency is "implementing this division"—*i.e.*, preparing the waste management plans required by the Act. *Id.*

That sounds the death knell for Plaintiffs' preemption claim. The County's voters were not implementing the Act when they adopted Measure E. Instead, Measure E was enacted pursuant to the police power granted to local entities by Article XI, Section 7 of the California Constitution. Accordingly, Section 40051 does not preempt Measure E. *See* Part II(B), *infra*.

Other portions of the Act and its implementing regulations confirm this conclusion. The integrated waste management plans that each county must prepare include a "Source Reduction

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[1]Unless otherwise indicated, all statutory references are to the Public Resources Code.

and Recycling Element," which is "a program for management of solid waste generated with the unincorporated area of the county, consistent with the waste management hierarchy provided in Section 40051." §41301. While the plans and the SRREs are submitted to the State for review and approval, nothing in that approval process "shall infringe on the existing authority of counties and cities to control land use or make land use decisions." §41851. Similarly, one of the Act's implementing regulations requires each jurisdiction "to consider changing its own zoning and building code practices to encourage recycling." 14 CAL. CODE REGS. tit. 14, §18735.3(b). However, if each jurisdiction has no legal obligation to change its own ordinances to encourage recycling of the waste *it* generates, *a fortiori* public agencies have no legal obligation to amend their laws to permit recycling *by others*. Finally, the Act contains several provisions that enable waste disposal issues to be solved on a regional basis. However, it made participation in these regional agencies and districts *voluntary*. §§40971, 49010, 49110. These provisions, too, would be superfluous if one public entity could use the Act as a crowbar to compel another entity to permit recycling of the first entity's solid waste. *See* Part II(C), *infra*.

Moreover, even if the Act contained a preemptive policy of promoting recycling in general, that policy does not extend to recycling biosolids. In particular, the Act requires local agencies to increase their diversion of solid waste by recycling and source reduction. §41780. However, they may only receive "diversion credit" for recycling sewage sludge if the State first finds, after a public hearing and on the basis of substantial evidence, that the sludge "will not pose a threat to public health or the environment for the reuse which is proposed." §41781.1(a)(1). Plaintiffs do not allege that any such finding has been made in this case. Hence, the Act does not preempt a local ordinance that prohibits their land application. *See* Part II(D), *infra*.

Finally, Measure E is protected against preemption by Section 40059(a). That statute recognizes the authority of California's counties to determine . . . [a]spects of solid waste handling which are of local concern, including . . . the nature, location, and extent of providing solid waste handling services." "Solid waste handling" includes "the processing of solid waste" (§40195), and "processing" includes "recycling." §40172. Prohibiting a particular method (land application) of recycling a particular kind of solid waste (biosolids) within the County's unincorporated areas controls the "nature, location, and extent" of recycling. Hence, the local autonomy preserved by Section 40059(a) necessarily includes the right to enact Measure E. By its terms Section 40059(a) prevails over "any other provision of law." Accordingly, even if there were a conflict between Section 40051 and Measure E, the latter would not be preempted because it falls within Section 40059(a). *See* Part II(E), *infra.*

The trial court also found that Plaintiffs were likely to prevail on their claim that Measure E is an unconstitutional exercise of the County's police power because it does not reasonably accommodate the competing interests of Plaintiffs and the County. That claim fails for reasons similar to Plaintiffs' preemption claim. As just noted, Section 40059(a) protects the power of California's counties to determine the "nature, extent, and location" of recycling, "notwithstanding any other provision of law." This protection overrides both statutory and decisional law. *In re Marriage of Dover*, 15 Cal. App. 3d 675, 678 n.3 (1971). Accordingly, the judicially crafted "regional welfare" doctrine cannot trump the County's exercise of power protected by Section 40059(a). Similarly, imposing a duty on the County to accommodate the sewage sludge generated by Plaintiffs would upset the Act's carefully crafted balance between state and local authority. *See* Part III, *infra.*

STATEMENT OF FACTS

Sewage treatment plants process wastewater from homes and businesses, resulting in sewage sludge that can be further treated to produce biosolids. 1 AA 6 (¶20). Sewage sludge not so treated must be put in landfills or incinerated. *Id.* (¶21). Federal and state regulations permit biosolids to be disposed of by land application.

The EPA regulates sewage sludge disposal in regulations codified at 40 C.F.R. §503 and known as the "Part 503" regulations. *See County Sanitation Dist. No. 2 v. County of Kern*, 127 Cal. App. 4th 1544, 1563 (2005) ("*CSD2*"). The regulations divide biosolids into Class B, treated to reduce pathogen concentration, and Class A, treated to virtually eliminate pathogens. 40 C.F.R. §503.32. In addition, biosolids low in eight trace metals qualify as "Exceptional Quality" ("EQ") and may be used with fewer restrictions. *Id.* §503.13(b)(3), Table 3; U.S. ENVIRONMENTAL PROTECTION AGENCY, *Environmental Regulations and Technology: Control of Pathogens and Vector Attraction in Sewage Sludge* 5 (July 2003). Nevertheless, the National Research Council of the National Academy of Sciences ("NRC") has found that "[t]oxic chemicals, infectious organisms, and endotoxins or cellular material may all be present in biosolids." NATIONAL RESEARCH COUNCIL, *Biosolids Applied to Land: Advancing Standards and Practices* (2000) ("*Bio-solids Applied to Land*"), *available at* http://www.nap.edu/openbook.php?record_id=10426&page=5.

Although the EPA promotes the land application of biosolids, it "has consistently recognized at least the potential that biosolids could be dangerous." *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 871 (C.D. Cal. 2007). The preamble to the Part 503 regulations acknowledges that they "'may not regulate all pollutants in sewage sludge that may be present in concentrations that may adversely affect public health and the environment.'" 58 Fed. Reg. 9248, 9253. "The preamble also

acknowledges uncertainties . . . concerning the impacts of land application or biosolids on human health, plant toxicity, wildlife, and ground water." *City of Los Angeles*, 509 F. Supp. 2d at 872. Moreover, in 2000 the EPA's Inspector General concluded that that agency "does not have an effective program for ensuring compliance" with the Part 503 regulations and therefore "cannot assure the public that current land application practices are protective of human health and the environment." U.S. ENVIRONMENTAL PROTECTION AGENCY, Office of Inspector General Audit Report, *Water Biosolids Management and Enforcement*, Report No. 2000-P-10 at ii (Mar. 20, 2000), *available at* http://www.epa.gov/oig/reports/2000/00P0010.pdf.

In 2002, "the EPA asked the National Research Council ("NRC") . . . 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)." *City of Los Angeles*, 509 F. Supp. 2d at 872. While the NRC found "no documented scientific evidence that the Part 503 rule has failed to protect public health" (*Biosolids Applied to Land* at page=4), it acknowledged "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 page=5. The NRC also "found the technical basis of the 1993 [Part 503] chemical standards for biosolids to be outdated" as there "have been substantial advances in risk assessment since then, and there are new concerns about some adverse health outcomes and chemicals not originally considered." *Id.* at page=12. The NRC concluded that the EPA's chemical standards "cannot with confidence be stated to be adequately protective for all of the regulated pollutants." *Id.* at page=239.

In addition, the NRC has found that land application raises "'nuisance' risks to community quality of life and property values, such as odors, traffic, and the attraction of vermin to sludge

application sites." NATIONAL RESEARCH COUNCIL, *Use of Reclaimed Water and Sludge in Food Crop Production* (1996) ("*Use of Reclaimed Water*"), *available at* http://www.nap.edu/openbook.php?record_id=51578&page=160. Indeed, the EPA says that "even the best run operations may emit offensive odors" (U.S. ENVIRONMENTAL PROTECTION AGENCY, *Biosolids Generation, Use, and Disposal in the United States* 41 (1999) ("*Biosolids Generation*"), *available at* http://www.epa.gov/osw/conserve/rrr/composting/pubs/biosolid.pdf), and that such odors not only cause "public concern" themselves, but also "trigger fears that 'foul-smelling' residues from municipalities and industry must be toxic and harmful." *Id.* at 40.

Land application also raises economic concerns. The NRC has recognized that "[d]espite the existence of extensive [federal] regulations, public perceptions of significant risks associated with beneficial land application persist in some areas." *Use of Reclaimed Water* at page=171. As the NRC explained, "[t]he major business risk for farmers and food processors . . . is stigmatization of the product and its source," which can "lead[] to loss of customer confidence, choice of competing products, and loss of market share on regional and even national scales." *Id.* at page=160.

All these concerns have led the County to enact increasingly stringent rules regulating land application. The County first adopted an "interim urgency ordinance" in 1998 that required land appliers to follow "specified management practices, site restrictions and other requirements." *CSD2*, 127 Cal. App. 4th at 1568. Then, in 1999, it adopted a new ordinance that first precluded land application of Class B biosolids in new sites and then prohibited land application of all biosolids other than Class A EQ. *See id.* A group of plaintiffs, including many of the Plaintiffs in this case, challenged that ordinance on a variety of grounds, but most of these challenges were rejected by this Court in *CSD2*.

In June 2006, the County's voters approved a ballot initiative that bans the land application of biosolids in the County's unincorporated areas. 1 AA 13 (¶43). Measure E's stated purpose and intent echoes many of the concerns expressed by EPA and NRC over the years:

> 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 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. (1 AA 38 (Measure E §8.05.10))

STATEMENT OF THE CASE

Plaintiffs comprise governmental entities and private businesses that have allegedly been land applying biosolids in Kern County since the early 1990s. 1 AA 3 (¶3). They claim that Measure E "will impose millions of dollars in costs on Plaintiffs to find alternative locations for reuse or disposal of their biosolids." *Id.* (¶5).

Shortly after the passage of Measure E, Plaintiffs filed a lawsuit in federal district court challenging the validity of Measure E on federal and state law grounds (the "Federal Case"). Plaintiffs' federal complaint asserted, *inter alia*, that Measure E (1) violates the dormant Commerce Clause, (2) is preempted by the Act, and (3) constitutes an invalid exercise of the County's police power.

1 AA 139-177. The District Court granted a preliminary injunction, finding that Plaintiffs were likely to prevail on each of these claims. *City of Los Angeles v. County of Kern*, 462 F. Supp. 2d 1105, 1111 (C.D. Cal. 2006). Thereafter, the court granted summary judgment to Plaintiffs on their Commerce Clause and state-law preemption claims, but found that disputed facts precluded summary judgment on their police power claim. *City of Los Angeles*, 509 F. Supp. 2d at 869-70.

On appeal, the Ninth Circuit held that Plaintiffs lacked prudential standing to assert their Commerce Clause claim. *City of Los Angeles v. County of Kern*, 581 F.3d 841 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3355 (2010). The court therefore dismissed Plaintiffs' federal claim and remanded the case to the District Court to determine whether to exercise supplemental jurisdiction over Plaintiffs' preemption and police powers claims. *Id.* at 849. The District Court then declined to exercise supplemental jurisdiction and, on November 9, 2010, dismissed the Federal Case. 1 AA 274-79.

On January 26, 2011, Plaintiffs filed the present case, reasserting their claims that Measure E is preempted by the Act (1 AA 17-18 (¶¶63-72)); is an improper exercise of Kern County's police powers (1 AA 18 (¶¶73-78)); and violates the federal Commerce Clause (1 AA 19-20 (¶¶79-90)).[2] Defendants filed a demurrer (1 AA 108), which the Court overruled as to the first two of these claims and sustained with leave to amend as to the third. 2 AA 514-15; 3 AA 658-59.

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[2]Plaintiffs also added two new claims that were never made in the federal case: that Measure E "constitutes an undue burden on commerce in violation of the California Constitution" (1 AA 20-21 (¶¶91-98)) and violates the California Constitution by "arbitrarily banning the land application only of biosolids originating outside of Kern County." 1 AA 21 (¶¶99-105). Like Plaintiffs' federal commerce clause claim, these claims are not at issue in the present appeal because the trial court did not rely on them in granting a preliminary injunction. *See* 3 AA 665-66.

At about the same time, Plaintiffs filed several motions for preliminary injunction. 1 AA 40, 280; 2 AA 296, 375. After briefing and argument, the trial court granted the motions, finding that Plaintiffs were likely to prevail on their preemption and police powers claims and that the balance of hardships tipped in their favor. 3 AA 668-72. Defendants timely appealed the order granting the injunction. 3 AA 696-701.

STATEMENT OF APPEALABILITY AND STANDARD OF REVIEW

The order granting a preliminary injunction is appealable under Code of Civil Procedure Section 904.1(a)(6).

If the trial court grants an injunction, as the Superior Court did here, an appellate court must reverse if it finds that the trial court abused its discretion in holding that the plaintiff had shown a probability of success. *See, e.g., City of Riverside v. Inland Empire Patient's Health & Wellness Ctr.*, 200 Cal. App. 4th 885, 893 (2011). However, "[n]otwithstanding the applicability of the abuse of discretion standard of review, the specific determinations underlying the superior court's decision are subject to appellate scrutiny under the standard of review appropriate to that type of determination." *Smith v. Adventist Health System/West*, 182 Cal. App. 4th 729, 739 (2010).

"Whether local ordinances are unconstitutional or preempted by state statutes are questions of law subject to our de novo review." *County of Los Angeles v. Hill*, 192 Cal. App. 4th 861, 867 (2011). That standard of review therefore governs this appeal.

ARGUMENT

I.

PLAINTIFFS' PREEMPTION AND POLICE POWERS CAUSES OF ACTION ARE BARRED BY 28 U.S.C. §1367(d).

Plaintiffs' preemption and police powers causes of action were both asserted in the Federal Case that was dismissed on November 9, 2010. *See* p.9, *supra.* 28 U.S.C. §1367(d) required Plaintiffs to refile those claims in state court within 30 days of their dismissal—*i.e.*, by December 9, 2010. They did not do so. Instead, Plaintiffs waited until January 26, 2011—78 days after the Federal Case was dismissed—to file this action. Accordingly, Plaintiffs' first and second causes of action are time-barred, and the trial court should not have held that Plaintiffs have a probability of success of prevailing on either claim.

28 U.S.C. §1367(a) gives federal district courts supplemental jurisdiction over state law claims "that are so related to claims in the action within [the federal district court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Accordingly, where a plaintiff has a federal claim, and can therefore invoke the jurisdiction of a federal court, he can join a state law claim with the federal claim if the "state and federal claims . . . derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). However, if the federal claim is resolved in the defendant's favor, the federal court can—and frequently does—dismiss the state claims without prejudice, as the District Court did here. 1 AA 274-79.

Prior to 1990, no federal statute governed how state statutes of limitations would apply in such circumstances. As a result, federal district courts faced with remanding a state law claim that might be time-barred had "three basic choices." *Jinks v. Richland County*, 538 U.S. 456, 462 (2003). "First, they could condition dismissal of the state-law claim on the defendant's

waiver of any statute-of-limitations defense in state court." *Id.* at 463; *see, e.g., Duckworth v. Franzen*, 780 F.2d 645, 657 (7th Cir. 1985); *Fin. Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982). Second, if the defendant refused to waive the defense, federal courts "could retain jurisdiction over the state-law claim even though it would more appropriately be heard in state court." *Jinks*, 538 U.S. at 463; *see Newman v. Burgin*, 930 F.2d 955, 963-64 (1st Cir. 1991) (collecting cases). Third, federal courts "could dismiss the state-law claim but allow the plaintiff to reopen the federal case if the state court later held the claim to be time barred." *Jinks*, 538 U.S. at 463; *see, e.g., Rheaume v. Texas Dep't of Pub. Safety*, 666 F.2d 925, 932 (5th Cir. 1982).

None of these alternatives was satisfactory. The first depended on the defendant's willingness to waive the statute of limitations. The second frustrated the statutory policies limiting federal jurisdiction. The third was inefficient. *See Jinks*, 538 at 463.

28 U.S.C. §1367(d) was enacted to provide "a straightforward tolling rule in place of this regime." *Jinks*, 538 U.S. at 463. It provides that "[t]he period of limitations'" for any supplemental claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. §1367(d)). The statute therefore "prevent[s] the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks*, 538 U.S. at 459. This provision "is significant, because without it, federal litigants would be left to the vagaries of state tolling laws." DENIS F. MCLAUGHLIN, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. S. L. J. 849, 982 (1992).

In the twenty years since its adoption, both the California courts and courts across the county have adopted two conflicting views of how Section 1367(d) operates when, as in this case, a state statute of limitations expires while a supplemental claim is

pending in federal court.[3] Four courts, including the Second District, have held that in such cases the plaintiff must file a state court complaint within thirty days of the date its federal claim is dismissed. *See Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998); *accord, Berke v. Buckley Broad. Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003); *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. 2001); *Huang v. Ziko,* 511 S.E.2d 305 (N.C. Ct. App. 1999). Under this interpretation, Section 1367(d) extends the time to file a state court complaint to thirty days after dismissal. Accordingly, we shall refer to this interpretation as the "Extension Approach." *See In re Vertrue Mktg. & Sales Practices Litig.*, 712 F. Supp. 2d 703, 723 (N.D. Ohio 2010) ("*Vertrue*") (adopting same terminology).

Four other courts, including the Third District, have held that a plaintiff can "tack on" to the thirty-day period provided by Section 1367(d) any portion of the state-law limitations period that had not expired when the plaintiff filed in federal court. *See Bonifield v. County of Nevada*, 94 Cal. App. 4th 298 (2001); *accord, Vertrue*, 712 F. Supp. 2d 703 (N.D. Ohio 2010); *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755 (Minn. Ct. App. 2010); *Turner v. Kight*, 957 A.2d 984 (Md. Ct. App. 2008). Under this approach, Section 1367(d) suspends the operation of a state statute of

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[3]"The statute of limitations for asserting an infringement of constitutional rights is one year." *Coral Constr., Inc. v. City & County of San Francisco*, 116 Cal. App. 4th 6, 27 (2004). Plaintiffs' claim that Measure E is an unconstitutional exercise of the County's police power is therefore subject to a one-year statute of limitations. Their claim that Measure E is preempted by state law is subject to the three-year statute of limitations contained in Code of Civil Procedure Section 338(a). *See Travis v. County of Santa Cruz*, 33 Cal. 4th 757, 772 (2004) (preemption claim governed by three-year statute unless specific, shorter statute applies).

Measure E was enacted in 2006, and Plaintiffs' causes of action accrued at that time. *See Coral Constr., Inc.*, 116 Cal. App. 4th at 27. Accordingly, both the one-year and the three-year statutes expired while the Federal Case was pending.

limitation while the case is pending in federal court, and the statute begins to run again thirty days after the case is dismissed. Accordingly, we shall refer to this approach as the "Suspension Approach." *See Vertrue*, 712 F. Supp. 2d at 723.

As we discuss below, most of the courts that have addressed the issue have held that the Extension Approach best accommodates the competing interests at stake: it allows ample time for plaintiffs to refile their dismissed claims in state court while ensuring that they will do so promptly. *See* p.21, *infra.* Nevertheless, the courts adopting the Suspension Approach have held that these policy considerations are trumped by the statutory language:

> "The point . . . that an extension approach is entirely satisfactory to avoid forfeitures and that a suspension approach is not necessary to achieve that objective, is undoubtedly true. The fact that a better mechanism—one less intrusive on State sovereignty and interests—could, or perhaps *should*, have been chosen does not require a conclusion that Congress intended that mechanism if the language it used indicates otherwise.' (*Vertrue*, 712 F. Supp. 2d at 724 (quoting *Turner*, 957 A. 2d at 992) (emphasis in original))

That rationale was adopted by the Superior Court in this case, which followed *Vertrue* and held that the Suspension Approach was "consistent with the plain language of the statute," which the Extension Approach "do[es] not credit." 2 AA 514.

The trial court erred. The ambiguous language of 28 U.S.C. §1367(d) is susceptible to both the Extension Approach and the Suspension Approach. *See* Part I(A), *infra.* Consequently, the Court is free to adopt the former approach, which is both faithful to the statutory language and represents the most sensible resolution of the competing interests at stake. *See* Part I(B), *infra.*

A. The Language Of 28 U.S.C. §1367(d) Is Consistent With Both The Extension Approach And The Suspension Approach.

28 U.S.C. §1367(d) provides that "[t]he period of limitations for any claim asserted under [28 U.S.C. §1367(a)] . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." The courts adopting the Suspension Approach have advanced two reasons why this language compels adoption of that interpretation. *See Vertrue*, 712 F. Supp. 2d at 724; *Goodman*, 777 N.W.2d at 758-61; *Turner*, 957 A.2d at 987-93; *Bonifield*, 94 Cal. App. 4th at 303.

First, these courts have held that the Suspension Approach is correct because "tolled" means "suspended." For example, the Court in *Bonifield v. County of Nevada* stated that "[t]o toll the statute of limitations period means to suspend the period, such that the days remaining begin to be counted after the tolling ceases." *Bonifield*, 94 Cal App. 4th at 303 (quoting *Woods v. Young*, 53 Cal. 3d 315, 326 n.3 (1991)). Accordingly, *Bonifield* held that "section 1367(d) operates at a minimum as follows: The days left in the statute of limitations period at the time the federal claim was filed begin to run after the tolling ceases, i.e., on the 31st day after the federal claim is dismissed." *Id.*

This reasoning is faulty because it ignores the distinction the Supreme Court has made between the "tolling" of a statute of limitations and the "tolling effect" that governs once the tolling period comes to an end. In *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), the Supreme Court considered the "tolling effect" that the filing of a class action would have on plaintiffs who were unnamed class members of a class the district court eventually declined to certify. "The parties agree[d] that the statute of limitations was tolled during the pendency of the . . . class action, but they disagree[d] as to the effect of the tolling." *Id.* at 652. Moreover, the Court went on to explain that the tolling of a statute of limitations can have several different tolling effects, including

the operation of a fixed limitations period for the filing of a new action:

> This opinion uses the word "tolling" to mean that, during the relevant period, the statute of limitations ceases to run. "Tolling effect" refers to the method of calculating the amount of time available to file suit *after tolling has ended.* The statute of limitations might merely be suspended; if so, the plaintiff must file within the amount of time left in the limitations period. If the limitations period is renewed, then the plaintiff has the benefit of a new period as long as the original. *It is also possible to establish a fixed period such as six months or one year during which the plaintiff may file suit, without regard to the length of the original limitations period or the amount of time left when tolling began.* (*Id.* at 652 n.1 (emphases added))

As *Fumero Soto* expressly recognizes, the fact that a statute of limitations is "tolled," and therefore "ceases to run," does not require that the unexpired statutory period be available for filing once the tolling period ends. Instead, "when a statute of limitations is tolled, the 'tolling effect' may suspend the statute of limitations during the relevant time period, renew the statute when tolling ceases, or trigger a savings statute without regard to the original limitations period." *Great Plains Trust Co. v. Union Pac. R.R.*, 492 F.3d 986, 998 (8th Cir. 2007). Accordingly, Section 1367(d)'s use of the phrase "shall be tolled" does not necessarily mean that that plaintiff can use the unexpired portion of the statute once tolling ends. The central premise supporting *Bonifield*'s interpretation of Section 1367(d) is therefore erroneous.[4]

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[4] *Bonifield* also erred in relying on the definition of "tolling" contained in a California case to interpret a federal statute. *See* 94 Cal. App. 4th at 303 (quoting *Woods*, 53 Cal. 3d at 326 n.3). In that context, *Bonifield* should have looked to the Supreme Court's holding in *Fumero Soto* that the "tolling" of a statute can have several different "tolling effects" rather than the definition of "tolling" used by a California court.

Second, courts adopting the Suspension Approach have also relied on the fact that, under the Extension Approach, Section 1367(a) has no effect unless the statute of limitation expires while a state law claim is pending in federal court. The *Vertrue* court thought that result was incompatible with the statutory language:

> [T]he statutory language is written such that *any* claim filed "*shall be*" tolled. In order to give effect to the plain meaning and mandatory nature of the language, this Court finds that extension approach must be rejected. On its face, Section 1367(d) must have a tolling effect on all supplemental state law claims. (*Vertrue*, 712 F. Supp. 2d at 724 (emphases in original))

Accordingly, *Vertrue* held that "[t]he suspension approach is the only approach that comports with the plain meaning of the statute. By essentially 'stopping the clock' during the pendency of the federal lawsuit, all claims receive a tolling benefit and the statute can be uniformly applied." *Id.* at 724.[5]

This is a classic "bootstrap" argument, because it assumes the premise that it seeks to prove. It starts by assuming that "shall be tolled" means "shall be suspended" and then "proves" that the "Suspension Approach" is the correct interpretation of Section 1367(d) because it suspends the running of the limitations period in all cases in which a state law claim is brought in federal court and then dismissed. However, "shall be tolled" can also mean "shall not expire." *See Berke*, 821 A.2d at 123 ("we are satisfied that the 'tolling' provision of the statute refers to the period between the running of the statute while the action is pending in the federal court and thirty days following the final judgment of the federal court declining to exercise supplemental jurisdiction"). In that event, the statute applies in all cases where the limitations period ends when a state law claim is pending in federal court. Under this interpretation, the statute is tolled in all cases

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[5] *Accord, Goodman*, 777 N.W.2d at 760.

where it needs to be tolled—no more and no less. *Vertrue* thus erred in holding that "the only reading of Section 1367(a) that gives meaning to all of the words chosen by Congress is the suspension approach." 712 F. Supp. 2d at 724.

At bottom, both *Bonifield* and *Vertrue* are wrong because they rest on the premise that "tolled" has a single, fixed meaning that is incompatible with the Extension Approach. To the contrary, "[m]ost of the courts that have been called upon to construe the meaning of 'tolled' as used in the context of statutes of limitations, including under §1367(d), have recognized that the term can have more than one meaning." *Turner v. Kight*, 957 A.2d 984, 989 (Md. Ct. App. 2008). As a result, most courts have recognized that 28 U.S.C. §1367(d) is ambiguous. *See id.* ("Several of the cases dealing with the application of §1367(d) acknowledge, tacitly or directly, that the phrase in question could be construed in different manners, and, indeed, the courts have split on what the proper interpretation should be. If the learned appellate judges around the country cannot agree on the meaning and application of the phrase, it cannot be said to have only one reasonable interpretation"); *Berke*, 821 A.2d at 123. Accordingly, *Bonifield* and *Vertrue* err in holding that that the language of Section 1367(d) requires application of the Suspension Approach. Likewise, the trial court erred in following *Vertrue* and holding that its interpretation of 28 U.S.C. §1367(d) was compelled by the statutory language.

Finally, the language of Section 1367(d) is compatible with the Extension Approach for one additional reason that neither *Bonifield* nor *Vertrue* address. Courts "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Accordingly, when Congress enacted Section 1367(d), it is presumed to have known that the Supreme Court in *Fumero Soto* had expressly recognized only eight years earlier that a "tolling" statute can have one of several different "tolling effects." Yet Congress did not specify what the

"tolling effect" of the statute would be. That leaves the Court free to adopt the interpretation of the statute that is most faithful to both the language used by Congress and the goals that Congress wanted to further in enacting the statute.

B. The Extension Approach Best Accommodates The Competing Interests At Stake By Avoiding The Forfeiture Of State Law Claims Pending In Federal Court While Giving Plaintiffs Ample Opportunity To Refile Such Claims Once Dismissed.

Section 1367(d) was enacted "[t]o prevent the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks*, 538 U.S. at 459. Both the Extension Approach and the Suspension Approach accomplish this goal, because both prevent state statutes of limitations from expiring while a federal court is considering a supplemental claim. However, the Suspension Approach frustrates both the broader objectives Congress sought to achieve in passing the statute that contains Section 1367(d) and the goals furthered by state statutes of limitations. The Extension Approach suffers from neither of these defects.

"Congress enacted the supplemental jurisdiction statute, 28 U.S.C. §1367, as part of the Judicial Improvements Act of 1990." *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533, 540 (2002).[6] Congress enacted the Act, in turn, "to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes." S. REP. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

The Extension Approach furthers this goal because it accommodates and balances the interests of both plaintiffs and defendants. It protects plaintiffs in two different ways. It assures

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[6]As used in this portion of the brief, "Act" refers to this federal statute.

plaintiffs "that state-law claims asserted under §1367(a) will not become time barred while pending in federal court." *Jinks*, 538 U.S. at 464. Moreover, it provides "a brief window of protection that allows the plaintiff to file in state court without having to face a limitations defense." 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §106.66[3][c] at 106-101 (3d ed. 2011).

Thirty days to refile a dismissed claim is long enough to accomplish Section 1367(d)'s purpose. By definition, all claims subject to the statute will already have been included in a complaint filed in federal court, so that the plaintiff will already have completed its pre-complaint investigation and drafted its initial pleading. Accordingly, all the plaintiff has to do to comply with Section 1367(d) is amend the caption on its complaint, copy the state law claims previously alleged in the federal complaint and file the new complaint in state court. These ministerial tasks can be readily accomplished within thirty days. Accordingly, the Extension Approach "affords plaintiff[s] a reasonable time within which to get the case refiled" because "30 days is ample time for a diligent plaintiff to refile his claims and keep them alive." *Kolani v. Gluska*, 64 Cal. App. 4th at 402, 409 (1998).

For that reason, the Extension Approach furthers the goals that Congress sought to achieve in enacting Section 1367(d). *See Berke*, 821 A.2d at 123 ("The evident purpose of the statute is only to preserve a plaintiff's right of access to the state court for a minimum thirty-day period in order for it to assert those state causes over which the federal court has declined to exercise jurisdiction and as to which the statute of limitations has run before that declination"). "At the same time, [the Extension Approach] upholds the policy of the statute of limitations, by *limiting* the time to refile, and thus assuring that claims will be *promptly* pursued in any subsequent action." *Kolani*, 64 Cal. App. 4th at 409 (emphasis in original). It therefore is fair to both plaintiffs and defendants, as Congress intended. *See* p.20, *supra*.

In contrast, the Suspension Approach gives plaintiffs an unnecessary benefit while frustrating both of the goals Congress sought to further in passing the Judicial Improvements Act and the similar purposes served by state statutes of limitation. Because plaintiffs need no more than thirty days to refile their supplemental claims (*see* p.21, *supra*), the courts adopting the Extension Approach have correctly recognized that "a 30-day grace period sufficiently prevents the harm envisioned by Congress." *Vertrue*, 712 F. Supp. 2d at 724. Accordingly, giving plaintiffs the benefit of whatever limitations period was unexpired when its case was filed in federal court "is not needed to avoid forfeitures" caused by the dismissal of state law claims by a federal court. *Kolani*, 64 Cal. App. 4th at 409.[7]

Moreover, giving plaintiffs whatever remaining state-law limitations period exists when their federal claims are dismissed will often result in excessive delays. As even the courts adopting the Suspension Approach have conceded, that interpretation of Section 1367(d) "may serve to drastically extend the statute of limitations." *Vertrue*, 712 F. Supp. 2d at 724. As the *Vertrue*

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[7] *Accord, Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. Nov. 19, 2001):

> Subdivision (d) of §1367 recognizes the serious statute of limitations problem a claimant may have after supplemental jurisdiction has been declined in a federal action. It may now be too late under the state statute of limitations to bring a state action on the claim. Subdivision (d) answers this dilemma by assuring that the claim shall have at least a 30-day period for the state action after the claim is dismissed by the federal court. Clearly, Congress's main concern centered on the specific problem arising from the dismissal of state claims by a federal court where the limitations period expired during the pendency of the claims in federal court. Because of inconsistencies in how state law addressed these situations, Congress responded with the 30-day grace period, so that a complainant would be guaranteed at least that amount of time to renew the claims in state court. (*Id.* at *4 (citation and footnote omitted))

court explained, even when "a case is pending in federal court for a significant time, none of that time is counted against the running of the statute of limitations." *Id.* Accordingly, under the Suspension Approach, "a plaintiff could sit idly by and let years pass before pursuing the claim in state court." *Id.*

When Congress passed the Judicial Improvements Act, it recognized that the federal courts "are suffering today under the scourge of two related and worsening plagues," the first of which was the fact that "the costs of civil litigation, and delays that contribute to those costs, are high and are increasing." S. REP. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804. These costs and delays would be exacerbated by an interpretation of Section 1367(a) that gave plaintiffs lengthy and unnecessary periods of time to refile dismissed claims in state court. It is therefore not surprising that the Act's legislative history gives no indication that Congress meant to significantly expand the time within which state law claims dismissed by a federal court may be refilled in state court. *See Zhang Gui Juan*, 2001 WL 34883536, at *3 ("the secondary materials give no hint of any 'built-in' tacking provision as being a part of subdivision (d)").

In addition, the Suspension Approach "is contrary to the policy in favor of prompt prosecution of legal claims" embodied in state statutes of limitation. *Huang v. Ziko*, 511 S.E.2d 305, 308 (N.C. Ct. App. 1999).[8] Statutes of limitation "protect defendants from the stale claims of dilatory plaintiffs" and "stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 395 (1999). They

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[8] *Accord, Kolani.* 64 Cal. App. 4th at 409 (Suspension Approach is "unreasonable" and "does significant harm to the statute of limitations policy"); *Berke*, 821 A.2d at 123 ("Despite its ambiguous use of the word 'tolling,' we do not believe that the federal statute intends a result that would permit a gross protraction of the limitations period in clear contravention of the underlying policy of statutory limitations on the time for bringing suit").

"enable defendants to marshal evidence while memories and facts are fresh and . . . provide defendants with repose for past acts." *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 755 (1998). They "are not mere technical defenses, allowing wrongdoers to avoid accountability. Rather, they mark the point where, in the judgment of the legislature, the equities tip in favor of the defendant (who may be innocent of wrongdoing) and against the plaintiff (who failed to take prompt action)." *Pooshs v. Philip Morris USA, Inc.*, 51 Cal. 4th 788, 797 (2011) (citation omitted).

The Suspension Approach frustrates these policies because it enables plaintiffs to sit on their claims—often for long periods of time—following their dismissal by a federal court. Moreover, as the *Kolani* court recognized, the Suspension Approach contradicts the established rule, followed in both California and "the majority of jurisdictions," that "'[i]n the absence of a statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice to him.'" *Kolani*, 64 Cal. App. 4th at 409 (quoting *Wood v. Elling Corp.*, 20 Cal. 3d 353, 359 (1977)); *accord, Huang*, 511 S.E.2d at 308. Frustrating these state policies might be warranted if the Suspension Approach served some overriding federal purpose. As discussed above, however, it does not.

Finally, Congress intended Section 1367(d) to provide "a straightforward tolling rule" that would be "conducive to the administration of justice." *Jinks*, 538 U.S. at 463. The Extension Approach does just that by providing a fixed 30-day period for refiling of otherwise time-barred state law claims after their dismissal by a District Court. This straightforward rule is simple for litigants to understand and for courts to apply consistently. In contrast, the Suspension Approach requires calculation of the remaining "unexpired" limitations period for each state law claim

following federal dismissal. Such a standard is neither straightforward nor conducive to the efficient administration of justice, because it requires applying differing limitations periods for differing state law causes of action, for which the exact dates of accrual often are unclear and disputed, such as where the discovery rule applies. *See, e.g., Prudential Home Mortgage Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1246 (1998) (applying delayed discovery rule); *compare id.* at 1252-56 (Rylaarsdam, J., dissenting) (rejecting application of rule).

No injustice will result from applying the Extension Approach to this case. Plaintiffs have never offered any excuse for their failure to refile their state law claims until 78 days after dismissal. As a result, here, as in *Kolani*, Plaintiffs "made no showing justifying the 78-day delay from dismissal of the federal suit to refiling in state court." 64 Cal. App. 4th at 410. Their claims are therefore time-barred.

II.

PLAINTIFFS CANNOT SHOW A PROBABILITY OF SUCCESS ON THEIR PREEMPTION CLAIM BECAUSE MEASURE E IS NOT PREEMPTED BY STATE LAW.

In granting a preliminary injunction, the trial court held that "it is reasonably probable" that Plaintiffs will prevail on their claim that Measure E is preempted by the Act. 3 AA 665. As we now show, that ruling would still be legally erroneous even if Plaintiffs' preemption claim were not barred by 28 U.S.C. §1367(d).

A. Plaintiffs Must Show A "Clear Indication Of Preemptive Intent" To Overcome The Presumption Against Preemption.

Because California law "presume[s] the validity of local ordinances" (*Water Quality Ass'n v. County of Santa Barbara*, 44 Cal. App. 4th 732, 740 (1996)), 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). That burden is particularly heavy in this case, for three separate and independently sufficient reasons. *First*, "when local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." *Id.* (emphasis in original). The reason for this presumption is simple: "'it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.'" *Id.* at 1149-50 (citation omitted). Accordingly, Measure E is protected by the long-established principle that "[l]and use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution." *Id.* at 1151.

Second, Measure E also concerns another area long subject to local control in California: public health and safety. "Traditionally, the cities and counties have adopted regulations for the protection and preservation of public health." *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 484 (1984). Indeed, "[t]he Legislature has not only recognized the rights of counties to regulate to preserve and protect public health but has imposed a duty to regulate." *Id.*; *see* HEALTH & SAFETY CODE §101025 ("The board of supervisors of each county shall take measures as may be necessary to preserve and protect the public health in the unincorporated territory of the county, including, if indicated, the adoption of ordinances, regulations and orders not in conflict with general laws . . ."). "[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found." *Deukmejian*, 36 Cal. 3d at 484.

Third, and most importantly, the handling of solid waste has also been a traditional subject of local control. California's "local agencies through their traditional police power have played the dominant role in local sanitation matters." *Valley Vista Servs., Inc. v. City of Monterey Park*, 118 Cal. App. 4th 881, 888 (2004). "Prior to [the Act's] passage, courts accepted that, state legislation notwithstanding, the dominant role in refuse handling belonged to localities." *Waste Res. Techs., Inc. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 307 (1994). As a result, the statutes regulating waste management prior to the Act "were viewed as acknowledging that allowance had to be made for 'the unique circumstances of individual communities' and that the Legislature had therefore 'empowered local governments to adopt refuse regulations which would best serve the local public interest.'" *Id.* (quoting *City of Camarillo v. Spadys Disposal Serv.*, 144 Cal. App. 3d 1027, 1031 (1983)).

The Act did not represent "a fundamental change in the Legislature's traditional outlook towards the subject of waste handling." *Waste Res. Techs.*, 23 Cal. App. 4th at 309. Accordingly, courts interpreting the Act have found "no legislative intent to displace deeply entrenched local authority." *Id.* That is not surprising, for the Act "was in large measure a consolidation and recodification of existing law." *Id.* at 307. In fact, the Act "looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority." *Id.* at 306. Indeed, no case holds that the Act preempts any local ordinance. In contrast, several cases hold just the contrary. *See, e.g., Valley Vista Servs.*, 118 Cal. App. 4th at 886-91 (Act did not preempt local ordinance prohibiting existing hauler from soliciting new business); *Waste Res. Techs.*, 23 Cal. App. 4th at 304-09 (Act did not preempt City's ability to grant exclusive franchise).

The trial court's preemption rulings ignored these principles. The court did not discuss California's history of local control over

land use, public health and solid waste or the cases holding that the Act left these local powers undisturbed. Instead, the court held that Measure E conflicts with the Act because the ordinance completely bans one particular method of recycling biosolids while "'[t]he Act . . . requires the use of recycling . . . to reduce the amount of solid waste going into landfills . . .'" 3 AA 665 (citation omitted).

This holding is wrong as a matter of law for multiple reasons, which we now discuss.

B. Measure E Is Not Preempted By Section 40051 Because The County Was Not Implementing The Act When Its Voters Adopted The Ordinance.

The trial court based its holding that Plaintiffs were likely to prevail on their preemption claim on the premise that Measure E conflicts with the "declared policy of the Act . . . to promote source reduction, recycling, and reuse of solids to reduce the amount going into landfills." 3 AA 664.

The policy cited by the trial court is set forth in Section 40051(a), which requires each local agency, in "implementing this division," to

> [p]romote 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.

Section 40051(b) similarly requires local agencies, in "implementing this division," to "[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."

The trial court interpreted Section 40051 as a command to California's local agencies to promote or maximize recycling in *all* of their activities—*i.e.*, when they dispose of *their own* sludge *and* when they adopt legislation governing waste generated by themselves *and other* local agencies. In fact, however, the Act

contains no such sweeping mandate. Instead, the requirements contained in Sections 40051(a) and (b) are all limited by the prefatory language "[i]n implementing this division." "This division" includes the entire Act, which is Division 30 of the Health and Safety Code. But that is the beginning and the end of Section 40051's reach. Accordingly, the requirements in Section 40051 that local agencies "promote" and "maximize" recycling apply *only* when a public agency is implementing the Act.

The trial court reached the contrary result only because it quoted a sentence from this Court's decision in *CSD2* out of context. The Court in that case recognized, in language quoted by the trial court, that the Act "'requires the use of recycling and source reduction to reduce the amount going into landfills.'" 3 AA 665 (quoting *CSD2*, 127 Cal. App. 4th at 1566). However, the sentence immediately following—which the trial court did *not* quote—described how this reduction was to be achieved:

> *More specifically, counties were required to adopt integrated waste management plans that described how 25 percent of the solid waste stream would be recycled, reduced or composted by 1995 and how 50 percent would be achieved by 2000.* (127 Cal. App. 4th at 1566-67 (citations and footnote omitted; emphasis added))

The portion of the integrated waste management plan that describes how these goals will be met is the "'source reduction and recycling element' (SRRE), a plan for the management and reduction of solid waste" that each county and city must adopt. *City of Dublin v. County of Alameda*, 14 Cal. App. 4th 264, 271 (1993). Each county's SRRE and the SRREs prepared by the cities within the county are included in that county's integrated waste management plan. §41750(a), (b). But these SRREs, and the plans of which they are a part, *apply only to the waste generated within the planning jurisdiction.* For example, the County SRRE "shall set forth a program for management of solid waste generated with[in] the unincorporated area of the county." §41301. Similarly, each county SRRE must contain a "county special waste component" that shall "address the disposition of

sewage sludge *generated in the jurisdiction of the county.*" §41450 (emphasis added). The analogous provisions for city SRREs and special waste components similarly apply only to waste generated within the city. *See* §§41001, 41250.

This statutory scheme explains what Section 40051(a) and (b) mean when they require public agencies to "promote" and "maximize" recycling "[i]n implementing this division"—*i.e.*, in implementing the Act. Cities and counties implement the Act when they prepare and adopt integrated waste management plans and SRREs governing the waste they generate. Consequently, Section 40051(a) and (b) require public agencies to "promote" and "maximize" recycling when they implement the Act by preparing and adopting plans and elements governing the disposal *of their own waste.*

No such requirement applies when a public agency regulates waste generated *by others.* Such regulations do not implement the Act. Instead, such regulations, including Measure E, are enacted pursuant to the police power granted by Article XI, Section 7 of the California Constitution.[9] Indeed, Measure E itself recites that it was enacted pursuant to the voters' authority under this provision. *See* 1 AA 38 (Measure E §8.05.20) ("Authority") ("This Chapter is adopted pursuant to the initiative power of the People of Kern County and the police power of Kern County was set forth in Article XI, Section 7 of the California Constitution"). Hence, the County's voters were *not* "implementing this division"—*i.e.*, implementing the Act—when they adopted Measure E. The adoption of the Ordinance was therefore not subject to, and cannot be preempted by, Section 40051.

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[9]Article XI, Section 7 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."

C. Other Provisions Of The Act And Its Implementing Regulations Confirm That It Does Not Preempt Local Land Use Ordinances Such As Measure E.

Numerous provisions of the Act, and its implementing regulations, confirm that the waste management plans and SRREs that local agencies prepare are subject to local land use ordinances. Accordingly, the Act accommodates local land use regulation rather than preempting it.

After the SRREs are prepared and incorporated into county-wide integrated waste management plans, the plans must be approved by the county and a majority of the cities which contain a majority of the population in the incorporated areas. §41760. The plans and SRREs then must be submitted to the California Department of Resources Recycling and Recovery ("Department"). §§40110; 41750(a), (b).[10] The Department can approve the plan and the SRRE only if it finds that they are "in compliance with" the portion of the Act that includes Section 40051. §41800(a). If the plan and SRRE are conditionally approved, the city or county must submit a compliance schedule, which the Department must approve or disapprove. §§41810.1(a), (b). If the plan and SRRE, or the compliance schedule, are disapproved and a notice of deficiency is issued, the city or county must correct the deficiencies and resubmit the plan and SRRE. §§41810.1(c); 41811. Once the report is approved, each jurisdiction must submit annual reports showing the progress made in implementing the SRRE (§41821(b)(2)), which are subject to periodic review (§41825), and the plans and SRREs

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[10]Administration of the Act used to be the responsibility of the California Integrated Waste Management Board. But the Board was abolished in 2010 and its responsibilities were transferred to the Department. The statutes describing the Board's functions were left unchanged, but "board" was redefined to mean the Department. §40110. Consequently, the statutes cited in text that describe administration of the Act still refer to the "board" even though it no longer exists.

themselves must also be reviewed and revised, if necessary, every five years. §41770(a). Finally, the Department can issue compliance orders and impose administrative penalties of up to $10,000/day if the agency does not make "all reasonable and feasible efforts" to comply with those orders. §§41825(b), (c), (e)(1); 41850. Accordingly, the preparation and approval process for the plans and SRREs provides multiple means of ensuring that all public agencies promote and maximize recycling of the waste they generate in compliance with the statutory mandates contained in Section 40051(a) and (b).

This process does not trump local regulations such as Measure E. Section 41851 provides that nothing in the chapter of the Act that requires the Department to approve waste management plans and SRREs "shall infringe on the existing authority of counties and cities to control land use or make land use decisions." Accordingly, nothing in the Act gives local governments the right to circumvent local land use regulations in the jurisdictions to which they export their solid waste. *A fortiori*, the Act does not prohibit local governments from adopting solid waste ordinances that restrict the recycling of waste generated by others.

The Act might well have been more efficient had it given the Department (or, for that matter, the courts) power to suspend local ordinances upon a showing that such ordinances made the Act's recycling mandates more difficult to achieve. But the courts have recognized that "some of the seeming lack of clarity or apparent logical gaps in the statute may be the result of deliberate choices by the Legislature rather than inadvertence." *Rodeo Sanitary Dist. v. Bd. of Supervisors*, 71 Cal. App. 4th 1443, 1453 (1999). Accordingly, the Court must interpret "the act as it is written, not . . . a different, perhaps broader, version that could have been, or still may be, enacted." *Waste Mgmt. of the Desert,*

Inc. v. Palm Springs Recycling Ctr., Inc., 7 Cal. 4th 478, 490 (1994). The Act "as it is written" does not preempt Measure E.[11]

This conclusion is underscored by the Act's implementing regulations. California Code of Regulations, Title 14, Section 18735.3(b) requires each jurisdiction "to *consider* changing its own building and zoning code practices to encourage recycling" (emphasis added). But if each jurisdiction has no legal obligation to change *its own* ordinances to encourage recycling of the waste *it* generates, *a fortiori* public agencies have no legal obligation to amend their laws to permit recycling by others. Indeed, if the trial court were correct in holding that the Act *required* each local entity to enact laws that maximize recycling and *preempted* laws that did not do so, this regulation would be anomalous.

To be sure, the Legislature that passed the Act knew that "[l]ocal conditions transcending city or county boundaries might require collection and disposal to be handled on a regional basis." *Waste Res. Techs.*, 23 Cal. App. 4th at 307. It therefore "made provision in the Act for the creation and operation of regional agencies, garbage disposal districts, and garbage and refuse disposal districts." *Id.* at 307-08 (citations omitted). However, the Legislature made participation in these regional agencies and districts *voluntary*. §§40971, 49010, 49110. Similarly, the Act requires the Department in adopting regulations to "take into account . . . [t]he importance of promoting regional cooperation among local agencies . . . to the extent that this cooperation will result in more cost-effective and efficient implementation of this

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[11]Leaving such policy questions to the Legislature is particularly important because compelling one jurisdiction to accept biosolids generated by others could lead to absurd or undesirable results. If cities and counties could compel other jurisdictions to accept their biosolids, as Plaintiffs seek to do here, the recipient jurisdictions could retaliate by compelling the first jurisdiction to accept *their* sludge. Such scenarios raise policy issues that the Legislature is far better able than the courts to evaluate.

division." §40911(b). These provisions would make no sense if the Act compelled counties to accept sewage sludge from cities and counties outside their borders with or without *regional cooperation.*

If the Legislature wishes to strike a different balance between local control and regional cooperation in the future, it is free to do so. But until that time, the Court should decline Plaintiffs' invitation to impose duties on the County that do not appear in the Act.

D. Even If Section 40051 Required The County To Promote Recycling In General, That General Policy Does Not Extend To Plaintiffs' Land Application.

The trial court apparently believed that Measure E conflicts with Section 40051 because the statute's endorsement of recycling in general includes a specific endorsement of land applying biosolids. That assumption is wrong, as several provisions of the Act demonstrate.

Section 41780 required each city and county to adopt SRREs that diverted 25% of its solid waste from landfill disposal or "transformation" (incineration) by recycling, source reduction or composting by January 1, 1995, and 50% by January 1, 2000. However, not every attempt to recycle sewage sludge counts toward these goals. Section 41781.1 provides that "the diversion of sludge may be counted toward the diversion requirements established under Section 41780" only if the Department has made a "finding at a public hearing, based upon substantial evidence, that the sludge has been adequately analyzed and will not pose a threat to public health or the environment for the reuse which is proposed." §41781.1(a)(1). Thus, far from uncritically promoting the recycling of sewage sludge, the Act endorses it *only*

if it has been found by the Department to be safe for public health and the environment.[12]

Plaintiffs do not allege in their Complaint that the Department has made any such finding with respect to their land application activities. Nor did they introduce evidence of any such finding in support of their motions for preliminary injunction. Consequently, the trial court erred in assuming that Section 40051's *general* endorsement of recycling constitutes a *specific* endorsement of Plaintiffs' land application. Accordingly, the court likewise erred in enjoining the County from enforcing Measure E against the Plaintiffs.

E. Measure E Is Protected Against Preemption By Section 40059(a).

Even if Measure E came within the scope of Section 40051, it would still not be preempted because of Section 40059(a). That statute provides, in relevant part, that, "[n]otwithstanding any other provision of law, each county . . . may determine . . . [a]spects of solid waste handling which are of local concern, including, but not limited to, . . . [the] nature, location, and extent of providing solid waste handling services." Because its introductory clause provides that Section 40059(a) prevails over "any

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[12]Similarly, Sections 50000 and 50000.5 impose detailed requirements—including local approval and judicial review—on every attempt to construct a new "solid waste facility" or expand an existing one before a countywide integrated waste management plan for the relevant jurisdiction is approved. However, Section 50002(b) creates a limited exemption from these approval requirements for "[t]he application to land of agricultural products derived from municipal sewage sludge for use as a fertilizer material, based on a finding by the [Department] that the nature of the solid waste poses no significant threat to the public health, the public safety, or the environment . . . ." Thus, Section 50002(b) exempts land application from administrative and judicial scrutiny *only* if the Department makes specified findings that it is consistent with public health and the environment.

other provision of law," the statute "overrides or supersedes any other provisions of the . . . Act which might indicate to the contrary." *Rodeo Sanitary Dist.*, 71 Cal. App. 4th at 1451 (citation and internal quotation marks omitted). Thus, even if the trial court had correctly concluded that Measure E conflicted with Section 40051, the Ordinance would not be preempted because it comes within the area of local control protected by Section 40059(a).

The words of the statute are unambiguous. As indicated above, Section 40059 preserves local authority over the "*nature, location, and extent* of providing solid waste handling services." (Emphasis added.) The Act defines "solid waste handling" as "the collection, transportation, storage, transfer, or processing of solid waste." §40195. "Processing" in turn means "the reduction, separation, recovery, conversion, or recycling of solid waste." §40172. Thus, "solid waste handling includes recycling—of solid waste." *Waste Mgmt. of the Desert, Inc.*, 7 Cal. 4th at 488 (emphasis omitted). Because "solid waste" includes biosolids, Section 40059(a) preserves local authority to determine "the nature, location, and extent" of recycling that form of waste. Consequently, the statute necessarily preserves local autonomy over "the nature, location, and extent" of land application: the precise subject of Measure E.

Moreover, even if Measure E did not regulate the "nature, location and extent of providing solid waste handling services," Section 40059(a) also precludes preemption of local laws regulating *other* "aspects of solid waste handling which are of local concern." Measure E's statement of purpose and intent states that the Ordinance was motivated, at least in part, by the desire to prevent "loss of confidence in agricultural products from Kern County." 1 AA 38 (Measure E §8.05.10). That concern, in what Plaintiffs concede is "one of the country's largest producers of agricultural products" (1 AA 11 (¶37)), is unquestionably legitimate, as well as local. Moreover, Measure E also states that it is

intended to prevent "loss of productive agricultural lands capacity for human food production for significant periods of time." 1 AA 38 (Measure E §8.05.10). That, too, is a quintessentially "local concern." Accordingly, the County's attempt to address these concerns through Measure E is protected against preemption by Section 40059(a) even if the Ordinance does not regulate the "nature, location and extent of providing solid waste handling services."

F. Conclusion: Plaintiffs Cannot Show A Probability Of Success Of Prevailing On Their Preemption Claim.

Plaintiffs' preemption claim is based wholly on the abstract contention that the Act "preempts [Measure E] because the [Act] mandates recycling which [Measure E] prohibits." 1 AA 51. Once this contention is rejected, Plaintiffs' preemption cause of action must fall. The trial court therefore erred in holding that Plaintiffs were likely to prevail on this cause of action.

III.

PLAINTIFFS CANNOT SHOW A PROBABILITY OF SUCCESS ON THEIR POLICE POWERS CLAIM BECAUSE THE "REGIONAL WELFARE" DOCTRINE DOES NOT APPLY TO MEASURE E.

Plaintiffs' "police powers" claim asserts that Measure E does not "reasonably accommodate the regional welfare" and is therefore invalid under *Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976). 1 AA 18 ¶¶75-78. This claim fails for many of the same reasons as Plaintiffs' preemption claim.[13]

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[13]The County did not challenge the substantive validity of Plaintiffs' police powers claim in the trial court. But the contention that this claim fails to state a cause of action can be raised for the first time on appeal. CODE CIV. PROC. §430.80(a); *Cedars-Sinai Med. Ctr. v. Superior Court*, 18 Cal. 4th 1, 7 n.2 (1998).

In *Homebuilders*, the Court held that a local land use regulation that has a regional impact must "reasonably relate[] to the general welfare of the region it affects." 18 Cal. 3d at 610. To make this determination, a court must first "identify the competing interests affected by" the ordinance. *Id.* at 608. It must then determine "whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests." *Id.* at 609.

The trial court found that "there is a very reasonable probability" that Plaintiffs will prevail on their claim that Measure E is invalid under *Homebuilders* because "'E' represents no accommodation. A complete ban precludes an 'accommodation.'" 3 AA 664. In contrast, "[a] reasonable accommodation would seem to be the [County's] 1999 ordinance, restricting the land application to 'A' grade biosolids." *Id.* Consequently, under the trial court's ruling, the County *cannot* ban land application completely. Instead, it must permit at least some sludge from outside the County to be land applied in the unincorporated areas.

The trial court's ruling represents an unwarranted extension of the "regional welfare" doctrine for at least two reasons. First, as discussed above Section 40059(a) recognizes the County's power to determine "[a]spects of solid waste handling which are of local concern, including, but not limited to, . . . [the] nature, location, and extent of providing solid waste handling services." Moreover, under the statute such power exists "[n]otwithstanding any other provision of law." *Id.* That expansive phrase makes Section 40059(a) "controlling over both statutory and decisional law." *In re Marriage of Dover*, 15 Cal. App. 3d 675, 678 n.3 (1971).

For the reasons set forth above, Measure E comes within the County's reserved power under Section 40059(a) to determine both "the nature, extent, and location" of recycling and its power to determine *other* "aspects of solid waste handling which are of local concern." *See* pp.36-37, *supra*. And because that power

exists "[n]otwithstanding any other provision of law," it can neither be preempted by the Act nor subject to the judicially-created "regional welfare" doctrine.

Second, even apart from Section 40059(a), interpreting the "regional welfare" doctrine to impose a duty on the County to accept Plaintiffs' sludge would upset the balance between state and local authority that the Legislature enacted when it passed the Integrated Waste Management Act. The Act "sets forth a comprehensive statewide program for solid waste management" (*Waste Mgmt. of the Desert, Inc.*, 7 Cal. 4th at 484), that "looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority." *Waste Res. Techs.*, 23 Cal. App. 4th at 306. However, interpreting the "regional welfare doctrine" to preclude the County from prohibiting land application destroys the "regulatory independence and authority" that the Act preserved for local public entities.

This case is therefore analogous to, and should be governed by, the decisions refusing to impose common law duties at odds with a comprehensive scheme adopted by the Legislature. For example in *I.E. Associates v. Safeco Title Insurance Co.*, 39 Cal. 3d 281 (1985), the Supreme Court considered whether "a trustee in a nonjudicial foreclosure has a common law duty to make reasonable efforts to contact a defaulting trustor/debtor." *Id.* at 283. The Court declined to impose such a duty because it would upset the Legislature's "carefully crafted balancing of the interests of beneficiaries, trustors, and trustees." *Id.* at 288. As the Court explained:

> Beneficiaries . . . want quick and inexpensive recovery of amounts due under promissory notes in default. Trustors, on the other hand, need protection against the forfeiture of valuable property rights. Trustees, the middlemen, need to have clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation. In taking all of these concerns into account, the

statutes strike an overall balance favoring the protection of trustors.

> The Legislature's decision not to require the trustee to search for the trustor's current address, but to compel him to use it if it is actually known, is consistent with this careful balancing of competing interests . . . whereas imposing on the trustee a duty of taking reasonable steps to discover the trustor's current address would bring far more cost and uncertainty into the system. (*Id.* at 288-89 (citations omitted))

The same logic applies here. As we have seen, prior to passage of the Act local governments played the dominant role in waste management. *See* p.27, *supra*. The Act did not diminish this role; instead, it continues to place the primary responsibility for waste management, and the preparation of waste management plans, on local agencies. *Id.* Moreover, neither the Act as a whole nor the preparation and approval of waste management plans preempts local agencies in their capacity as waste regulators. *See* Part I(B), *supra*. Indeed, the Act's implementing regulations merely suggest—but do not require—that cities and counties amend their local land use ordinances to encourage recycling. *See* p.33, *supra*. The Act also makes regional cooperation between local public entities voluntary, not mandatory. *See* pp.33-34, *supra*. Finally, and most importantly, the Act does not "require a city or county to allow other local agencies to conduct their recycling activities in its jurisdiction." *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 897 (C.D. Cal. 2007) (citation and internal quotation marks omitted).

Imposing an open-ended requirement that local agencies accommodate regional waste disposal needs upsets the carefully crafted balance between state and local responsibility that the Legislature adopted when it adopted the Act. It makes the courts part of a waste management process that is currently the domain of state and local governments. It hobbles local planning by imposing new and unforeseeable obligations on cities and counties to accommodate waste produced by others. And—most important—it substitutes judicial coercion for the voluntary

regional efforts encouraged by the Act. In short, the courts should not rush in and require regional accommodation where the Legislature has refused to do so.

CONCLUSION

The order granting a preliminary injunction should be reversed.

Dated: January 13, 2012.

Respectfully,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO
CAL. R. CT. 8.204(c)(1))

Pursuant to California Rule of Court 8.204(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached Appellants' Opening Brief contains 12,694 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

Dated: January 13, 2012.

STEVEN L. MAYER

PROOF OF SERVICE

COURT OF APPEAL, FIFTH APPELLATE DISTRICT
CASE NO. F063381
CITY OF LOS ANGELES VS. COUNTY OF KERN, ET AL.,
CASE NO. VCU 242057

I am over the age of eighteen years and not a party to the within-entitled action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024.

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The documents were served as follows:

☒ **By U.S. mail**. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in Item 3 and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed at San Francisco, California on January 13, 2012.

CHRISTOPHER S. ROBERTS