Case No. F063381
(Tulare County Superior 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

On Appeal from an Order Granting a Preliminary Injunction
Tulare County Superior Court
(Hon. Lloyd L. Hicks, Presiding)

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[See signature pages for other parties and counsel.]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned counsel of record for Plaintiffs and Respondents City of Los Angeles, Responsible Biosolids Management, Inc., R&G Fanucchi, Inc. and Sierra Transport, Inc. certifies that as of this date, City of Los Angeles, Responsible Biosolids Management, Inc., R&G Fanucchi, Inc. and Sierra Transport, Inc. know of no person or entity that must be listed pursuant to Rule 8.208(e)(1) or (2).

Dated: May 14, 2012

Zachary M. Norris

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INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court properly entered a preliminary injunction against enforcement of Measure E, Kern County's ban on Plaintiffs' application of biosolids to farmland in the County. The trial court rejected the same legal arguments Kern makes on appeal and found on a detailed record that biosolids recycling is safe, is important for Southern California's wastewater infrastructure, and benefits farmland in Kern County. The trial court became the second court in five years to enjoin Measure E on broad-based grounds, effectively reinstating the federal court's preliminary injunction entered shortly after the passage of Measure E in 2006. *City of Los Angeles v. Cnty.* of Kern, 462 F. Supp. 2d 1105, 1118 (C.D. Cal. 2006) ("Kern I") (granting preliminary injunction); *see City of Los Angeles v. Cnty. of Kern*, 509 F. Supp. 2d 865, 876-77 (C.D. Cal. 2007) ("Kern II") (granting summary judgment to Plaintiffs), overruled on other grounds in *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841 (9th Cir. 2009) ("Kern III").

In this interlocutory appeal, Kern does not dispute the trial court's finding that the balance of harms favors the Plaintiffs. Instead, Kern raises only what it couches as legal issues associated with the two claims (of Plaintiffs' four total claims) that were addressed in the opinion below and found sufficient for the issuance of a preliminary injunction. Appellants' Opening Brief ("AOB") at 1. Kern's arguments have been closely reviewed and rejected in both the state and federal courts and do not provide a basis to overturn the preliminary injunction.

At the outset, Kern contends that Plaintiffs' claims are time-barred under the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d). The trial court properly overruled Kern's demurrer on this issue, and this Court should not hear an impermissible appeal of a demurrer in the guise of a preliminary injunction appeal. In any case, Plaintiffs filed their federal

action less than a month after the original effective date of Measure E, and promptly filed this action 78 days after the dismissal of the federal action and one week after Kern informed Plaintiffs of its intent to enforce Measure E. Because the applicable statute of limitations period was tolled during the pendency of the federal action and for 30 days thereafter, Plaintiffs' claims are timely. The Court should disregard Kern's efforts to evade "the clear, plain language of the statute," as recognized by the trial court, 2 AA 514, and should instead adopt the well-reasoned, most recent holdings of the trial court, this Court, and the only federal district court to consider the issue, all of which rejected Kern's position. *See infra* Section I.a.

Even if the Court were to accept Kern's strained reading of Section 1367(d), Plaintiffs' claims are still timely for a variety of reasons that the trial court did not need to consider, and that Kern's brief fails to acknowledge. First, Section 355 of the Code of Civil Procedure affords Plaintiffs one year from the reversal of the federal district court's judgment to file the present action. Second, Plaintiffs' claims accrued upon Kern's enforcement of Measure E on January 19, 2011. *See infra* Section I.b, I.c.

The Court should likewise uphold the trial court's findings that the Plaintiffs are likely to succeed on their claims that Measure E exceeds the County's police powers because of its adverse impacts to biosolids recycling in California and that the Integrated Waste Management Act ("IWMA") preempts Measure E. In enacting Measure E, Kern County voters consciously erected a protectionist barrier against commerce in biosolids, imposing significant burdens and economic harms solely on entities beyond their borders while shielding its own local resources from imagined threats of biosolids. The trial court recognized that Measure E impermissibly exceeds Kern's police power by making no accommodation of the regional welfare. Contrary to Kern's assertion, this was a mixed determination of law and fact, and the Court's review of this ruling is not

de novo. In its interlocutory appeal, Kern attempts to evade the regional welfare doctrine altogether by ignoring the facts and offering new arguments that misrepresent the trial court's police power ruling. Ultimately, Kern's arguments are misplaced because the IWMA neither displaces limits on Kern's exercise of its police power nor licenses Kern to discriminate against or ignore the regional welfare. *See infra* Section II.

The IWMA's statewide recycling mandate also preempts Measure E. The IWMA establishes a hierarchy of recycling over disposal and other waste management methods, and requires that local governments such as Kern County "shall . . . promote . . . recycling . . . [and] maximize the use of all feasible source reduction, recycling, and composting options." Pub. Res. Code § 40051. Measure E, far from promoting and maximizing the use of recycling options, bans the primary means of recycling biosolids in California and the nation – land application – and is thus in conflict with the IWMA.

Kern's appeal largely raises the same IWMA arguments rejected not only by the trial court below, but also repeatedly by the federal district court. Kern's assertion that it was not "implementing the Act" when it passed Measure E, but instead was exercising its police power, would lead to the absurd result that local governments could pass with impunity laws that conflict with the IWMA. Kern's appropriation of unfettered police power over biosolids recycling finds no basis in the IWMA. The IWMA is a comprehensive statutory scheme addressing the handling and disposal of solid waste, and Kern's argument that a local government is only subject to the IWMA's recycling mandate when it handles its own waste ignores the IWMA's structure and overarching policies. Kern's reliance on Public Resource Code Section 40059(a), which the federal district court characterized as a "sleight of hand," is similarly misplaced. That provision preserves local control over the grant of franchises for garbage collection

and hauling and has nothing to do with Measure E's ban on biosolids recycling. In short, Kern's claim that several of IWMA's subsidiary provisions trump the statute's statewide recycling mandate and thereby eviscerate the statute's express purposes withers under scrutiny. *See infra* Section III.

For these reasons, the Court should affirm the Order granting a preliminary injunction.

STATEMENT OF FACTS

I. The Plaintiffs

For nearly two decades Plaintiff City of Los Angeles ("City") has safely and successfully recycled biosolids at Green Acres Farm, a remote 4,700-acre farm southwest of Bakersfield owned by the City. 1 Appellants' Appendix ("AA") 8 (¶28); Respondents' Appendix ("RA") 057 (¶9). In conjunction with its co-Plaintiffs, the City utilizes biosolids to grow a variety of animal feed crops in the otherwise alkaline soil. *Id.* The City contracts with Plaintiff Responsible Biosolids Management ("RBM") to oversee the transport of the City's biosolids to Green Acres and to manage land application there. RA 074 (¶8). Plaintiff Sierra Transport, under a contract with RBM, trucks the biosolids to Green Acres. RA 093 (¶5). Plaintiff Fanucchi conducts the farming operations. RA 089 (¶1). The City land applies only Class A-Exceptional Quality ("EQ") biosolids, which meet the U.S. Environmental Protection Agency's ("EPA") most protective standards for elimination of pathogens and reduction of trace metals. RA 062 (¶23). Over the years, the City has continuously tested and monitored its operations and provided thousands of biosolids and soils reports to Kern County, the State, and EPA in compliance with all applicable requirements. RA 063-64 (¶¶26-28), 075 (¶10).

Plaintiff Orange County Sanitation District ("OCSD") land applied biosolids at Tule Ranch in unincorporated Kern County beginning in 1996, and Plaintiff Los Angeles County Sanitation District No. 2 ("CSD No. 2") began providing biosolids to County farmers for land application beginning in 1994. RA 119 (¶4), 111-112 (¶11). Plaintiff Shaen Magan owns Tule Ranch and Honey Bucket Farms and contracted with OCSD and CSD No. 2 to land apply some of their biosolids. RA 119 (¶1). Magan also owns Western Express, which trucks biosolids for land application. RA 119-120 (¶4). As with the City of Los Angeles, the biosolids generated from OCSD's and CSD No. 2's wastewater treatment processes have been used as a fertilizer and soil conditioner to grow animal feed crops. RA 120 (¶6). As with Green Acres, the biosolids applied on Magan's farmlands have been regulated by federal, state and Kern requirements and are treated to meet Class A, Exceptional Quality standards. *Id.*

Plaintiff California Association of Sanitation Agencies ("CASA") is a non-profit mutual benefit association representing over 115 cities, counties and special districts statewide that expend tens of millions of dollars annually to recycle the vast majority of the biosolids generated in their communities for beneficial uses. 1 AA 5-6 (¶16); RA 097 (¶4). CASA's members have many years of experience with successful land application and its benefits. Land application remains an indispensable option for many CASA members' sustainable biosolids recycling programs. RA 101-102 (¶¶16-20).

II. Plaintiffs' Biosolids Recycling

In granting a preliminary injunction against Kern's biosolids ban, the trial court held that Kern had not presented any evidence that Plaintiffs' land application of biosolids threatened harm to the environment, health or safety. 3 AA 666-67. Kern asserts that its present appeal does not challenge those factual findings, but rather "focuses exclusively on the legal

issues" before the trial court. AOB at 1. Kern then inappropriately attacks those factual findings and attempts to impugn the safety of biosolids and Plaintiffs' operations with general allegations – not raised before the trial court – that have nothing to do with biosolids recycling as practiced by the Plaintiffs. AOB at 6-9. Kern's contentions are contradicted by the detailed factual and expert record upon which the trial court, and the federal district court before it, enjoined Measure E.

Biosolids are the nutrient-rich, organic byproduct of municipal wastewater treatment. 1 AA 6 (¶20). Collection and treatment of municipal wastewater, and the resulting generation of biosolids that must be recycled or disposed of, are constant, non-discretionary governmental functions. RA 059 (¶12). After treatment in accordance with rigorous federal and state regulatory standards, biosolids are recycled to farmland across America as an effective, organic fertilizer and soil conditioner rich in nitrogen, phosphorus, and trace elements essential for plant growth. RA 099-100 (¶9). Recycling of biosolids avoids adverse environmental impacts of landfill disposal or incineration. Land application has thrived for decades in California, including Kern County, and nationally; 61% of the 661,000 dry metric tons of biosolids produced in California in 2009 were land applied. RA 106 (¶34).

Several leading experts with decades of experience spanning the fields of microbiology, soil chemistry, and hydrogeology scrutinized Plaintiffs' land application operations and pored over substantial volumes of site-specific data in 2006 and again in 2011. Based on these firsthand assessments, each expert unequivocally concluded that Green Acres is well run and that continued land application poses no harm to the environment, health, or safety. Dr. Albert Page, Professor Emeritus of Soil Science at the University of California Riverside, reviewed the "unusually robust amount of data" at Green Acres and concluded that "there is no appreciable threat

to public health or the environment from continued land application." RA 019 (¶3), 021-22 (¶10). Dr. Ian Pepper, a Professor of Agriculture and Director of the Environmental Research Laboratory of the University of Arizona, drawing upon his experience at hundreds of other land application sites, determined that Plaintiffs' recycling at Green Acres poses "negligible risk to human health and the environment" and instead creates "a sustainable ecosystem that actually benefits the Kern County environment." RA 007 (¶14), 009 (¶18). Dr. Charles Gerba, Professor of Microbiology at the University of Arizona, found that Green Acres is an ideal location for land application and that this long-standing practice "presents no immediate or long term threat from enteric pathogens." RA 016-17 (¶¶13-14). Thomas Johnson, P.E., an expert in hydrogeology, concluded that over a decade of monitoring data demonstrated the absence of adverse groundwater impacts at Green Acres. RA 050 (¶56), 141 (¶¶4-6). In addition, the City, its contractors, CSD No. 2, and Shaen Magan submitted several detailed declarations describing the complex, highly regulated processes to ensure safe generation and management of Class A-EQ biosolids. *See, e.g.*, RA 059-64 (¶¶13-18, 23, 26-28), 109-112 (¶¶4-12), 119 (¶3), 121-22 (¶12), 148-49 (¶¶11-13).

After Plaintiffs' 18 years of biosolids recycling in Kern County, including the nearly six years of this litigation, Kern has been unable to produce any evidence of harm stemming from these activities, notwithstanding Kern's oversight role. The trial court found "no evidence" that Plaintiffs' activities pose a risk, and Kern by its own admission does not challenge that conclusion in this appeal. 3 AA 666-67. This holding is consistent with the federal district court's finding, on a similar record, that "undisputed evidence shows that the biosolids operations at Green Acres . . . presents no discernible threat to public health," and that "the only evidence of environmental harm at Green Acres is no evidence at all."

Kern I, 462 F.Supp.2d at 1118. Thus, the trial court's decision to enjoin Measure E involved a truly one-sided balance of harms favoring Plaintiffs.

Kern's appeal brief likewise does not question any aspect of Plaintiffs' operations, or even the safety of Class A-EQ biosolids as a class. Rather, Kern offers cherry-picked quotes (from sources not raised in the trial court) regarding biosolids generally, which do not differentiate between Class A-EQ, Class A, or Class B biosolids. Kern misrepresents these sources, as well as the state of the law and science.

Plaintiffs' land application of biosolids is subject to a comprehensive, overlapping regime of federal, state, and local law. *See, e.g.*, RA 059-64 (¶¶13-18, 23, 26-28), 109-112 (¶¶4-12), 119 (¶3), 121-22 (¶12), 148-49 (¶¶11-13). Since its promulgation in 1993 of 40 C.F.R. Part 503 – the baseline federal regulations governing land application – EPA has continued basic scientific research and data gathering to verify and guarantee the safety of land application. RA 130-131 (¶7). These intensive scientific risk assessments have consistently reaffirmed the safety of land application and have not called for any changes in current practices or regulations. *Id.* Kern cites a 1996 National Research Council ("NRC") study, chaired by Plaintiffs' expert Professor Page, as raising biosolids nuisance risks. AOB at 6. But that study concluded that land application presented negligible risk to humans and the environment, which Professor Page confirmed is still true today. RA 24 (¶15). Likewise, the 2000 EPA Inspector General Audit Report cited by Kern did not question the safety of land application performed in accordance with Part 503, as at Green Acres.

The 2002 NRC Report that Kern cites, which Plaintiffs' experts Professor Pepper and Greg Kester co-authored, made the "overarching finding" that "there is no documented scientific evidence that the Part 503 rule has failed to protect public health" and further found that a causal association between biosolids exposures and adverse health outcomes has

not been documented. RA 007 (¶15). While undertaking an action plan to conduct further research in response to the 2002 NRC Report, EPA has found it unnecessary to amend Part 503, and indeed has continued to *promote* land application of biosolids. *See* EPA, Final Agency Response to the National Research Council Report on Biosolids Applied to Land and the Results of EPA's Review of Existing Sewage Sludge Regulations, 68 Fed. Reg. 75,531 (Dec. 31, 2003). Other scientists leading the development of additional biosolids data, including Professor Pepper, have reached consistent results. *See* RA 007 (¶15).

At the state level, the State Water Resources Control Board issued a 2004 General Order allowing land application of biosolids, supported by an environmental impact report setting forth more than 600 pages of scientific analysis. RA 104-05 (¶¶30-32). Kern County's preexisting biosolids ordinance imposed a series of additional requirements, including restriction to Class A-EQ biosolids, with which Green Acres has complied. 1 AA 27-35 (Kern County Code, Chapter 8.05.030.J (2002)). Under that ordinance, Kern "recognize[d] that exceptional quality biosolids, as defined in this chapter, are considered by the U.S. Environmental Protection Agency to be a product, whether distributed in bulk form, bags or other containers, that can be applied as freely as any other fertilizer or soil amendment to any type of land." *Id.* at 27. Throughout the 2000s, Kern obtained significant confirmatory data regarding the safety of land application through permitting, reporting, testing, and inspection of Class A-EQ land application. *Id.* at 30-35.

The limited operation of Kern's biosolids ban, targeting only Plaintiffs' continued land application, further belies Kern's purported health and safety concerns underlying Measure E. The ban applies in the County's unincorporated areas, where only Plaintiffs land apply biosolids. 1 AA 13-14 (¶47). The ban does not apply to Bakersfield and other cities

in Kern County, where land application of thousands of tons of biosolids (principally Class B, not Class A-EQ) continues unabated. *Id.* Thus, Kern County voters, the majority of whom live in these cities, passed an initiative that would shut down biosolids recycling by outsiders in remote locations, while preserving land application of less highly treated biosolids in proximity to population centers. Consistently, the ballot campaign reveals the express targeting of out-of-County biosolids and specific, direct attacks on Plaintiffs, employing such slogans as "Measure E will stop L.A. from dumping on Kern," "We will proclaim our independence from polluting Southern California and Los Angeles," and "[W]e've got a bully next door, flinging garbage over his fence into our yard." *See Kern II*, 509 F.Supp.2d at 876-77 (describing campaign materials). Another express stated purpose is to afford Kern agribusiness perceived advantages over competitors affiliated with land application of biosolids. 1 AA 38 (Measure E § 8.05.010).

Kern claims that its alleged health and safety concerns prompted it to "enact increasingly stringent rules regulating land application." AOB at 8. But Kern's voters imposed those new obligations and costs only on Plaintiffs. In passing Measure E, Kern seeks to wall itself off from ubiquitous commerce in biosolids, to the sole detriment of outside interests and to the purported benefit of local agribusiness and Kern County voters, who continue to accept land application within their city boundaries.

III. Past Proceedings and the Rulings Below

Twenty-four days after Measure E's July 22, 2006 original effective date, Plaintiffs filed suit in federal district court challenging Measure E's validity on several federal and state law grounds. 1 AA 139. The district court entered a preliminary injunction on November 22, 2006, on multiple legal and factual grounds. *Kern I*, 462 F.Supp.2d at 1108-1109. Kern did not appeal the preliminary injunction. The district court thereafter granted

summary judgment for Plaintiffs on the IWMA preemption and Commerce Clause claims. *Kern II*, 509 F.Supp.2d at 870. As Kern notes, "disputed facts" precluded summary judgment on the police power claim. AOB at 10.

On appeal, the Ninth Circuit ruled that Plaintiffs lacked prudential standing to pursue their Commerce Clause claim in federal court, but expressly declined to reach the merits of that claim or the IWMA claim. *Kern III*, 581 F.3d at 846, 849. On June 4, 2010 the Ninth Circuit issued its mandate and remanded the case for the district court to determine whether to exercise supplemental jurisdiction over the remaining state law claims. 2 AA 409. On November 9, 2010, the district court declined supplemental jurisdiction, leaving Plaintiffs to pursue their challenge in state court. 1 AA 274.

In the ensuing weeks, the Kern County Board of Supervisors met in closed session to discuss Measure E, with Kern's Public Health Services Department issuing a memorandum "proposing" to enforce Measure E. 2 AA 508. On January 19, 2011, Kern County sent Plaintiffs an enforcement notice stating that, as of the date of the notice, "you are now subject to the provisions of Measure E," and that Plaintiffs had "six (6) months from the date of this letter to discontinue the land application of biosolids." 2 AA 413. The County restarted Measure E's administrative process, inviting Plaintiffs to apply for a hardship extension. 2 AA 413. Plaintiffs filed this action seven days later on January 26, 2011. 1 AA 1.

Kern demurred to the complaint, arguing that Plaintiffs' IWMA and police power claims were time-barred and that Plaintiffs could not prevail on the merits of their IWMA preemption claim. 1 AA 110. On May 26, 2011, the trial court overruled Kern's demurrer. 2 AA 514. Kern did not re-raise its timeliness argument in the preliminary injunction proceeding. On June 9, 2011, the trial court granted Plaintiffs' preliminary injunction

motions. 3 AA 662. The court found that Plaintiffs were likely to prevail on their IWMA and police power claims and, based on the strength of those showings, did not reach Plaintiffs' federal and state Commerce Clause claims. 3 AA 665. The trial court also found that the balance of harms strongly favored Plaintiffs. *Id.* at 665-67.

ARGUMENT

When ruling on a request for a preliminary injunction, the trial court must evaluate two interrelated factors: "(1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary injunction were issued." *Smith v. Adventist Health System/West*, 182 Cal. App. 4th 729, 749 (2010). Kern contests only that Plaintiffs are likely to prevail on the merits of two of their claims. "For this approach to succeed, [Kern] must show that [P]laintiffs were unlikely to succeed on *any* cause of action that would support injunctive relief." *Huong Que, Inc. v. Mui Luu*, 150 Cal. App. 4th 400, 408 (Cal. Ct. App. 2007) (emphasis in original).

I. PLAINTIFFS' PREEMPTION AND POLICE POWERS CLAIMS ARE TIMELY

As a threshold matter, Kern's argument that Plaintiffs' preemption and police powers claims are barred by the statute of limitations is an improper appeal of the trial court's ruling on Kern's demurrer. Code Civ. Proc. § 904.1 (appealable judgments and orders do not include demurrers); *Fontani v. Wells Fargo Invs.*, 129 Cal. App. 4th 719, 736 (Cal. Ct. App. 2005). In *Fontani*, the court refused to review the trial court's demurrer ruling on an appeal of a subsequent anti-SLAPP order, even though the anti-SLAPP appeal required the court to consider the plaintiff's likelihood of success on the merits of the underlying case. *Id.* at 733-735 (considering plaintiff's probability of success). The defendant argued that the demurrer

was reviewable under Code of Civil Procedure § 906, because the demurrer necessarily affects the anti-SLAPP order. *Id.* at 735-36. The *Fontani* Court rejected that argument, holding that consideration of the demurrer ruling "would allow review of an otherwise unreviewable ruling on a demurrer whenever the trial court enters any appealable interlocutory order." *Id.* at 736. Similarly, Kern here seeks interlocutory review of the trial court's demurrer ruling through the vehicle of a preliminary injunction appeal. Kern did not raise its statute of limitations arguments against the preliminary injunction, and the Court should reject its effort to bypass the rule prohibiting appeal of a demurrer ruling by dressing its argument as a preliminary injunction appeal.

Nonetheless, Plaintiffs filed their claims well within the applicable three-year limitations period.[1] Under the plain terms of 28 U.S.C. § 1367, as more recently applied in California and in the only federal court to decide the issue, Plaintiffs timely re-filed their claims in state court with, at most, 72 days of the three-year limitations period having run. Plaintiffs' claims are also timely for reasons that the trial court did not need to reach, including application of the supplemental one-year period under Code of Civil Procedure Section 355 and the accrual of Plaintiffs' claims upon Measure E's enforcement on January 19, 2011.

a. The Plain Language of 28 U.S.C. § 1367(d) Requires Suspension of The Statute Of Limitations

When analyzing a federal statute, the Court must "presume that [Congress] says in a statute what it means and means in a statute what it

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[1] Kern incorrectly asserts that the statute of limitations for the police power claim is one year. AOB at 14, fn. 3, *citing Coral Constr. Inc. v. City & Cnty. of San Francisco*, 116 Cal. App .4th 6, 27 (Cal. Ct. App. 2004). But Kern cites a portion of *Coral Construction* discussing the position of one of the parties to the action, not the court's holding. *See id.* Plaintiff's police powers claim is subject to the three-year statute of limitations under Code of Civil Procedure Section 338(a), which Kern concedes applies to Plaintiff's preemption claim. *Miller v. Bd. Of Medical Quality Assurance*, 193 Cal .App. 3d 1371, 1377 (Cal. 2001) (constitutional claim subject to same statute of limitations as underlying statutory claim).

says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). "[I]f the intent of Congress is clear and unambiguously expressed by the statutory language," further analysis is unnecessary. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007). Every word of the statute should be given effect. *Reiter v. Sonotone Corp.* 442 U.S. 330, 339 (1979).

Under those maxims of statutory construction, this Court, like the trial court, should look to the entirety of Section 1367(d):

> The period of limitations for any claim asserted under [federal supplemental jurisdiction], and for any claim in the same action that is voluntarily dismissed at the same time or after the dismissal of the claim under [federal supplemental jurisdiction], *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. (Emphasis added.)

The most recent cases applying this provision, including the trial court below, the Third District Court of Appeal, and the only federal court squarely addressing the issue, analyzed the statute's language and found it amenable to only a single interpretation – the statute suspends the limitations period while the claims are pending in federal court and for 30 days thereafter. 2 AA 514 (trial court's ruling on Kern's demurrer); *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298, 303 (2001); *In re Vertrue Marketing and Sales Practices Litigation*, 712 F. Supp. 2d 703, 724 (N.D. Ohio 2010); *Goodman v. Best Buy*, 777 N.W.2d 755, 761-762 (Minn. 2010); *see also Turner v. Kight*, 957 A.2d 984, 992 (Md. 2008) (finding the term "tolled" is ambiguous, but following *Bonifield* after textual analysis). Under this "suspension" approach, the time remaining on the state limitations period when the federal claims were filed remains available to a plaintiff after the federal claims are dismissed.

Courts have not always interpreted Section 1367(d) uniformly. Earlier courts adopted the "extension" approach that Kern advocates, basing their decisions entirely on policy grounds divorced from the statutory language. *Kolani v. Gluska*, 64 Cal. App. 4th 402, 410-411 (Cal. Ct. App. 1998) (extension approach sufficient to avoid forfeiture of claims); *Huang v. Ziko*, 511 S.E. 2d 305, 307 (N.C. Ct. Appeal 1999) (relying on "the policy in favor of prompt prosecution of claims"); *Berke v. Buckley Broadcasting Corp.*, 821 A.2d 118, 123 (N.J. Super. Ct. App. Div. 2003) (despite the statutory language, "we do not believe that the federal statute intends a result that would permit a gross protraction of the limitations period"). As Kern would have it, Section 1367(d) confers only 30 days to file claims in state court after dismissal of a federal case if the state statute of limitations expires during the federal case, and is meaningless if the state statute of limitations does not expire during the pendency of the federal action.

Under accepted rules of statutory interpretation, "the only reading of Section 1367(a) that gives meaning to all of the words chosen by Congress is the suspension approach." *In re Vertrue*, 712 F. Supp. 2d at 724. Kern's extension interpretation "creat[es] an ambiguity where none exists by reading missing words or conditions into the statute. Such reasoning would make any statute ambiguous." *Goodman*, 777 N.W.2d at 760. The suspension approach is the only interpretation faithful to the statutory language for three reasons: (1) Section 1367(d) requires that the state limitations period on supplemental state claims be tolled *while those claims are in federal court*, and thus the state limitations period *cannot expire during that time period*; (2) Section 1367(d) requires that tolling *shall* apply unconditionally to all state supplemental claims, not only those for which the limitations period expires while the federal case is pending; and (3) the common meaning of the term "toll" is to *suspend* or *interrupt*.

i. Section 1367(d) Tolls State Supplemental Claims While They Are Pending In Federal Court

Kern's extension approach would require a plaintiff to file a state court complaint within 30 days of dismissal from federal court "when, as in this case, a state statute of limitations *expires while a supplemental claim is pending in federal court*." AOB at 13-14 (emphasis added). But Section 1367(d) requires that "[t]he period of limitations . . . shall be *tolled while the claim is pending*" in federal court. 28 U.S.C. § 1367(d) (emphasis added). If the limitations period is tolled while the federal case is pending, it cannot expire during that time. Indeed, Kern agrees that Section 1367(d)'s purpose was to "*prevent the limitations on . . . supplemental claims from expiring* while the plaintiff was fruitlessly pursuing them in federal court." AOB at 13 (*citing Jinks v. Richland Cnty.*, 538 U.S. 456, 459 (2003)) (emphasis added). Kern's argument is internally inconsistent and impossible to reconcile with the statute's text. Kern asks this Court to either read the phrase "while the claim is pending" out of the statute, or to judicially amend the statute to read "the *expiration of* the statute of limitations . . . shall be tolled." Neither is a sensible reading of the actual words that Congress chose.[2]

The term "toll," as it is used in its context within Section 1367(d), is only susceptible to a single meaning – the statute of limitations clock is temporarily stopped. Kern concedes that, at the very least, "tolling" means that "during the relevant period, the statute of limitations ceases to run." AOB at 17, *citing Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983) (defining "tolling" to mean "the statute of limitations ceases to run," but recognizing that, depending on statutory context, one of three "tolling

[2] As Kern concedes elsewhere in its brief, "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.'" AOB at 32 (citation omitted).

effects" is possible). Employing Kern's own definition of the term "tolling," its reading of Section 1367(d) is indefensible.

Under Section 1367(d), the statute of limitations "ceases to run" during two distinct periods: (1) while the claim is pending in federal court, and (2) for 30 days after the claim is dismissed. Kern, however, asks this Court to hold that the state statute of limitations *continues running* while the federal case is pending by assuming that the statute "expires" while the federal claim is pending. AOB at 13-14. The statute of limitations on a claim cannot expire while it is in federal court because, by operation of Section 1367(d), it "ceases to run." That fallacy undermines the premise of Kern's interpretation of Section 1367(d).

Kern alternately asserts "'shall be tolled' can also mean 'shall not expire,'" citing only a sentence from a New Jersey superior court case that does nothing to support its proposition. AOB at 18, (*quoting Berke,* 821 A.2d at 123). *Berke* did not define the phrase "shall be tolled," or use Kern's term "shall not expire," but instead expressly refused to follow Section 1367(d)'s plain language. 821 A.2d at 123 (holding that Section 1367(d) is not a "'true' tolling statute . . . [d]espite its ambiguous use of the word 'tolling'" because "we do not believe that the federal statute intends a result that would permit a gross protraction of the limitations period"). This Court should not look to *Berke*, which found Section 1367(d) is not a true tolling statute, for its definition of the phrase "shall be tolled." It should instead look to the plain meaning of the phrase, in its statutory context.

ii. Section 1367(d) Applies Unconditionally To All Supplemental State Law Claims

Congress used mandatory language in Section 1367(d) that "[t]he period of limitations . . . *shall* be tolled." 28 U.S.C. § 1367(d). This command is uniform and unconditional. *See Gutierrez De Martinez v.*

Lamagno, 515 U.S. 417, 440 (1995) (use of "shall" in statute means its application is unconditional). The running of the limitations period is thereby suspended on *every* supplemental state claim. *In re Vertrue*, 712 F. Supp. 2d at 723-724. Once the 30 days after dismissal have passed, the limitations period starts to run again, and the claimant has the same amount of days to file as the claimant did when the tolling began. The effect is the same in every case. "The suspension approach is the only approach that comports with the plain meaning of the statute." *Id.* at 724.

Kern nevertheless advocates a conditional reading of the statute, claiming that it applies only "where the limitations period ends when a state law claim is pending in federal court." AOB at 18. Thus, in Kern's words, "the statute is tolled in all cases where it needs to be tolled – no more and no less." *Id.* at 18-19. Neither Kern, nor the courts, are free to graft additional terms on the statute and substitute an opinion of "where the statute needs to be tolled" for that of Congress. Kern's reading of the statute to apply only to claims for which the limitations period ends while federal proceedings are pending is contrary to the plain language of the statute and should be rejected.

iii. To "Toll" Means To Suspend or Temporarily Interrupt

The common meaning of the term "toll," as it is used in Section 1367(d), is to suspend or interrupt the operation of the statute of limitations. *See Turner*, 406 Md. at 181 (the suspension approach is the "more commonly applied conception of tolling [and] is correct"). For example, *Black's Law Dictionary* defines a "tolling statute" as "a law that *interrupts* the running of a statute of limitations." *Black's Law Dictionary* 1495 (7th ed. 1999) (emphasis added). The dictionary definition of "toll" is "to suspend or interrupt (as a statute of limitations)." *Random House Webster's Dictionary* 1991 (2nd ed. 1998). Also persuasive is that

California courts adhere to this understanding of the term, finding that "to 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, *citing Woods v. Young*, 53 Cal. 3d 315, 326 n3 (Cal. 1991) ("Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended"). This Court should apply the common understanding of the term "toll" and adopt the suspension approach.

Kern's sole argument to demonstrate that Section 1367(d) is ambiguous is its claim that "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." AOB at 16. Kern relies on a footnote from the U.S. Supreme Court decision in *Fumero Soto*, which states that, depending on context, a tolling provision can have one of three possible "tolling effects." 462 U.S. at 652 n1. But *Fumero Soto* is not a case interpreting Section 1367(d), and did not consider tolling in that context, which, as discussed above, leaves no doubt as to Congress' intent.

In any event, far from demonstrating that § 1367(d) is compatible with Kern's extension approach, *Fumero Soto* reinforces the primacy of the suspension approach under federal law. *Fumero Soto* considered whether the statutory period was renewed after tolling or whether the *federal common law approach of suspension* applied. *See* 462 U.S. at 655 ("[r]ecognizing the difference between the common-law rule of suspension and the Puerto Rican 'running anew rule'"). Thus, *Fumero Soto* announces a federal common-law preference for suspension, but determined that Puerto Rico law applied under 42 U.S.C. § 1983. *See also American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (holding limitations period is suspended under federal common law); *Crown, Cork & Seal Co.*

v. Parker, 462 U.S. 345, 353-54 (1983) (same). Altogether absent from the *Fumero Soto* decision was any consideration or discussion of Kern's preferred extension approach. 462 U.S. at 653 n1 (possible tolling effects are (1) suspension, (2) renewal, and (3) annulment).

Thus, under *Fumero Soto* and the federal common law cases it construed, federal courts have a strong preference for suspension. In light of that preference, if Congress had intended to merely extend the expiration of the limitations period, as Kern contends, it would have expressly done so, as it has in several other statutory provisions. *See, e.g.* 28 U.S.C. § 2415(e) ("In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, *the action may be recommenced within one year* after such dismissal, regardless of whether the action would otherwise then be barred by this section.") (emphasis added); 49 U.S.C. § 11705(d) ("[t]he limitation periods under subsections (b) and (c) of this section *are extended* for 90 days from the time the rail carrier begins a civil action under subsection (a) of this section) (emphasis added).

iv. Kern's Policy Arguments Are Irrelevant and Misplaced

Kern alleges a litany of horrors if this Court follows § 1367(d)'s plain language. Kern's policy arguments are irrelevant because Congress' intent is clear from the Section 1367(d)'s plain language. "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." *Turner*, 957 A.2d at 992. Even assuming for the sake of argument that the statute were ambiguous, Kern's policy arguments overstate potential negative impacts of the suspension rule, which federal courts favor, and mistake the intent of Section 1367(d).

"The purpose of § 1367(d) is clear and salutary. It protects plaintiffs who choose to assert supplemental state-law claims in a federal action." 13(d) Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3567.4 (Tolling of Supplemental Claims Under 28 U.S.C.A. § 1367(d)) (3d Ed. 2008). Section 1367(d) was passed "[t]o prevent the limitations period on ... supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks*, 538 U.S. at 459. Indeed, "the statute shows a preference for allowing supplemental state claims to be heard in state court." 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 106.66[3][C] AT 106-101 (3D ED. 2011). Thus, Section 1367(d) does not, as Kern claims, invoke the policy considerations of statutes of limitations, which are intended '"to protect defendants from the stale claims of dilatory plaintiffs."' AOB at 23. It is intended to protect "plaintiffs pursuing federal- and state-law claims that 'derive from a common nucleus of operative fact." *Jinks*, 538 U.S. at 463 (citation omitted).

The suspension rule does not prejudice defendants. Kern's own authority admits that "[d]efendant receives notice of the claims, from the filing and service of the federal suit" and that "[d]efense is not prejudiced, since defendant, if diligent, will interview witnesses and gather evidence to meet the claims in the federal suit." *Kolani*, 64 Cal.App.4th at 409; *see also Raygor v. Regents of the University of Minn.*, 534 U.S. 533, 550 (2002) (Stevens, J., dissenting) (in case involving separate Section 1367 issue, noting that "[t]he impact of [Section 1367(d)] on the defendant is minimal, because the timely filing in federal court provides it with the same notice as if a duplicate complaint had also been filed in state court").

Further, the suspension rule does not hinder the prompt prosecution of claims, leading the U.S. Supreme Court to hold that the suspension approach "is in no way inconsistent with the functional operation of a statute of limitations." *American Pipe*, 414 U.S. at 554. The same

reasoning holds true here; any delay results from the operation of the state statute of limitations and the period during which a claim is pending in federal court. Simply stated, if a plaintiff waits until the last day of the state limitations period to file a federal claim, as is its right, and the federal claim is later dismissed, the only impact on the time within which the claim is prosecuted is Section 1367(d)'s 30-day period. As the *Bonifield* Court found, "[b]y no stretch of the imagination can it be said that an additional 30 days unduly compromises the policy in favor of the prompt prosecution of legal claims." 94 Cal. App. 4th at 304.

Kern's policy arguments ring particularly hollow in this case; Plaintiffs' conduct was hardly dilatory. Plaintiffs promptly filed their state court action mere weeks after dismissal of the federal suit, despite having years remaining on their statute of limitations. In the interim, there was uncertainty among the parties regarding the status of Measure E following dissolution of the federal court injunction. This ambiguity was not resolved until January 19, 2011, when Kern notified Plaintiffs of its intent to enforce Measure E, and Plaintiffs filed suit a week later. Kern's facile assertion that filing a new complaint in state court is "ministerial" ignores the realities of litigation, particularly in the unusual circumstances where Plaintiffs had prevailed on the merits of multiple claims but were dismissed from federal court on unusual procedural grounds, and had live federal claims remaining. Plaintiffs timely filed their state claims, and Kern has suffered no prejudice; it simply must defend Measure E on the merits.

b. California Code of Civil Procedure § 355 Provides Plaintiffs a One Year Statute of Limitations After Reversal of the District Court Judgment

The trial court, having overruled Kern's demurrer based on Section 1367(d), had no occasion to consider Plaintiffs' argument that their claims are timely under Section 355 of the Code of Civil Procedure. In the event

this Court disagrees with the trial court's application of Section 1367(d), it should affirm the trial court's order on alternate grounds.

Section 355 provides that "[i]f an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal other than on the merits, a new action may be commenced within one year after the reversal." Section 355 is not limited to actions initially filed in state court. *See Schneider v. Schimmels* 256 Cal. App. 2d 366, 370 (Cal. Ct. App. 1967) ("[t]he purpose of Section 355 is to avoid the harsh forfeiture of a plaintiff's rights where his first action, *wherever it may have been attempted*, has resulted in a judgment later reversed on appeal, or when the action has been thwarted on some procedural ground unrelated to the merits of the claim") (emphasis added) (overruled on other grounds); *see also Allen v. Greyhound Lines, Inc.* 656 F.2d 418, 422 (9th Cir. 1981) ("California still construes its saving statute to apply to actions filed out of state, albeit a judgment for plaintiff must be reversed on appeal.").

Plaintiffs' initial action in the federal district court was commenced "within the time prescribed therefor," having been filed 28 days after Measure E's initial July 22, 2006 effective date. 1 AA 139. The district court's judgment for Plaintiff was "reversed on appeal other than on the merits," with the Ninth Circuit expressly declining to reach the merits. *Kern III*, 581 F.3d at 846 ("a ruling on prudential standing could obviate the need to rule on the merits"). Section 355 affords Plaintiffs one year from the time of reversal to commence their claims, and applies to all of Plaintiffs' claims. *Kenney v. Parks* 137 Cal. 527 (Cal. 1902) (permitting a new action of any kind having as its results the same relief sought in the original action).

Under Federal Rule of Appellate Procedure 41(c), "the mandate is effective when issued." Thus, a district court's ruling is reversed for statute

of limitations purposes upon entry of the mandate that the lower court reverse the judgment. *See U.S. v. Rivera*, 844 F.2d 916, 920 (2nd Cir. 1988) (following mistrial, statute of limitations for new trial runs from entry of mandate); *see also Davis v. United States Steel Corp.* 528 F. Supp. 220, 222 (E.D. Pa. 1981) ("the formality of the entry of a mandate is relevant where certiorari or stays of execution are sought"). In the present case, the Ninth Circuit issued its mandate on June 4, 2010. 2 AA 409. Thus, even if they accrued when Measure E took effect, Plaintiffs' claims are timely under Section 355 because they were filed prior to June 4, 2011.

Section 355's "broad and liberal purpose is not to be frittered away by any narrow construction." *Schneider, v.* at 371 (overruled on other grounds) (quoting Judge Cardozo in *Gaines v. City of New York*, 215 N.Y. 533, 539 (1915), interpreting predecessor statute). Section 355 is an equitable statute "designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits." *Id.* Thus, any hyper-technical reading by Kern should be rejected. Plaintiffs ultimately seek a ruling on the merits of their claims, and fall squarely within Section 355.

c. Kern's January 19, 2011 Enforcement Letter Gave Rise To Plaintiffs' Causes of Action

The trial court also did not consider Plaintiff's argument that its claims accrued on January 19, 2011. On that date, Kern first stated its intent to enforce Measure E against Plaintiffs by sending a letter providing that Plaintiffs "are *now* subject to the provisions of Measure E," and that Plaintiffs had "six (6) months *from the date of this letter* to discontinue the land application of biosolids." 2 AA 413 (emphasis added). The January 19 letter was an enforcement event that caused Plaintiffs' claims to accrue anew. Seven days later, on January 26, 2011, Plaintiffs filed a Complaint challenging both the facial validity of Measure E and Kern's enforcement

of Measure E against Plaintiffs. 1 AA 1. Under the applicable three-year statute of limitations, Code of Civ. Proc. § 338(a), Plaintiffs' causes of action were timely filed.

A cause of action challenging a statute's enforcement accrues upon notice of enforcement against the plaintiff, not upon enactment of the statute. *Travis v. Cnty. of Santa Cruz* 33 Cal. 4th 757, 771 (Cal. 2004); *Howard Jarvis Taxpayers Ass'n v. City of La Habra* 25 Cal. 4th 809, 825 (Cal. 2001). It is of no consequence that a plaintiff also challenges the statute's facial validity where the challenge "is aimed not only at the Ordinance's enactment or existence but also at the County's enforcement of the Ordinance against plaintiff's own property." *Travis*, 33 Cal. 4th at 767.

In *Travis*, an owner of residential properties sought a writ of mandate to enjoin enforcement of an ordinance that imposed rent and occupancy restrictions on secondary dwelling units. *Id.* at 762. The County argued that plaintiff's claim was untimely because plaintiff had not brought its action within 90 days of the ordinance's enactment. The Supreme Court, however, held that the owner, "[h]aving brought his action in a timely way after application of the Ordinance to him . . . may raise in that action a facial attack on the Ordinance's validity." *Id.* at 769. The owner's claims were "not barred merely because similar claims could have been made at earlier times." *Id.* 769; *see also La Habra*, 25 Cal. 4th at 821 (cause of action against statute accrues upon each enforcement action).

Like the plaintiffs in *Travis* and *La Habra*, Plaintiffs in the present action challenge both Kern County's enforcement of Measure E against them and Measure E's facial validity. *See, e.g.* 1 AA 14 (¶50) ("The Kern ban, *on its face and as applied*, is ultra vires . . ..), (¶70) ("*[e]nforcement* of the Kern Ban would produce . . ."), (¶83) ("The Kern Ban, on its face *and as applied* . . .."), (¶94) ("The Kern Ban, on its face *and as applied* . . ."), (¶102) ("The Kern Ban . . . discriminates by *requiring only Plaintiffs* . . . to

cease land application") (emphasis added). Just as in *Travis* and *La Habra*, the statute of limitations on Plaintiffs' claims runs from Kern's enforcement of, not enactment of, Measure E.

Kern asserts that Plaintiffs' causes of action accrued once and for all when Measure E was adopted, although in over 5 years since its passage Measure E has never been enforced against Plaintiffs. AOB at 14 n3. This is not a case involving a statutory provision expressly stating that a cause of action accrues upon a legislative enactment. *Cf. Sonoma v. Superior Court* 190 Cal. App. 4th 1312 (Cal. 2010) (construing Gov't Code § 65009(c)(1), which requires action "within 90 days *after the legislative body's decision*) (emphasis added); *Utility Cost Mgmt. v. Indian Wells Water Dist.* 26 Cal. 4th 1185, 1195 (Cal. 2001) (holding action accrued on ordinance's enactment, because Gov't Code § 66022 expressly states that it runs from the "effective date" of the legislation, but distinguishing cases interpreting Code Civ. Proc. § 338(a)). Rather, cases construing Code Civ. Proc. § 338(a) hold that a cause of action accrues anew upon each enforcement action. *La Habra*, 25 Cal. 4th at 825; *see also City of Arcadia v. State Water Res. Control Bd.* 191 Cal. App. 4th 156, 171-173 (Cal. 2010). Many statutes seek to provide certainty to local governments, but not "at the expense of a fair and reasonable opportunity to challenge an invalid ordinance when it is enforced against one's property" *Travis*, 33 Cal. 4th at 770-771.

Kern's own actions show that Measure E is not self-implementing. The January 2011 enforcement letter informed Respondents that "Measure E is *now* in effect" and they are "*now* subject to the provisions of Measure E." 2 AA 413. It gave Plaintiffs "six (6) months *from the date of this letter* to discontinue the land application of biosolids." *Id.* (emphasis added). Because this six-month period for Plaintiffs' existing operations ran from January 19, 2011, that was the date Measure E became "effective" and

Plaintiffs' causes of action accrued. *See* 1 AA 39 (enforcement of Measure E begins six months after effective date).

Kern's other actions consistently indicate that Measure E is not self-implementing and required County action to be effective. Kern's Public Health Services Department reported to the Board of Supervisors on January 18, 2011 that "Measure E is now in effect, and this Department is *proposing* to implement the provisions of the initiative" and that "[t]he Department is *proposing* to issue immediate notification to all facilities affected and inform them that the Measure E 6-month grace period begins on the date of notice." 2 AA 508 (emphasis added). Kern invited Plaintiffs to file for hardship extensions, initiating the administrative process that Measure E requires to occur "within thirty (30) days of the *effective date* of this Chapter." 1 AA 39. Kern did not reject Plaintiff's biosolids land application permit fee, submitted on January 5, 2011, until January 25, 2011. 2 AA 510. Indeed, even Kern's outside counsel agreed "that Measure E is not self-executing, but would have to be affirmatively enforced by the county." 2 AA 512. Kern gave Plaintiffs every indication that Measure E was not self-implementing, and its efforts to argue to the contrary should be rejected.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR POLICE POWER CLAIM

The trial court held that, based on the detailed record, "there is a very reasonable probability that [Plaintiffs] will prevail on the theory that 'E' is invalid as beyond the scope of an allowed police power measure." 3 AA 664. The trial court's order included findings that Plaintiffs presented evidence from qualified individuals that they would incur "additional significant costs, and expenses," and "affect[s] on their business and employees' jobs" as a result of Measure E. 3 AA 665. In response, Kern entirely ignores these factual findings in its challenge to the trial court's

police power ruling. Instead, Kern offers arguments that are legally flawed and premised on a mischaracterization of the trial court's order.

The gist of Kern's argument is that the trial court interpreted the regional welfare doctrine as somehow imposing a duty upon Kern to accept Plaintiffs' biosolids, and that this alleged duty is inconsistent with the IWMA. *See* AOB at 38-41. As is evident from the preliminary injunction order, the trial court made no such ruling with respect to whether or not Kern must accept biosolids. 3 AA 663-64. This misdirection on the part of Kern misrepresents the core police power issue – Kern's unilateral imposition of an illegal barrier to biosolids which significantly and adversely affects the interests of its neighbors, and the region as a whole. As the trial court recognized, this is precisely the type of action precluded by the regional welfare doctrine. *See* 3 AA 664 ("California does not consist of 58 separate fiefdoms . . . all insular from each other . . . . localities cannot retreat into isolationism and ignore this fact. We all live here, and what any state actor does elsewhere may affect us all.").

At the outset, Kern is incorrect that this ruling is subject to *de novo* review by this Court. As Kern recognizes, "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.*" AOB at 11 (*quoting Smith*, 182 Cal. App. 4th at 739 (emphasis added)). While "issue[s] of pure law not presenting factual issues to be resolved at trial [are subject to] de novo [review]," "the superior court's express and implied findings of fact are accepted by appellate courts if supported by substantial evidence." *14859 Moorpark Homeowner's Assn. v. VRT Corp.*, 63 Cal. App. 4th 1396, 1403 (1998); *Smith*, 182 Cal. App. 4th at 739. Kern's brief does not address at all, much less dispute, the trial court's factual findings underlying its determination that Plaintiffs are likely to succeed on their police power claim. *See* 3 AA 664; AOB at 37-41. But

that omission does not change the nature of the ruling or this Court's standard of review.

The proper question when considering the merits of a challenge under the regional welfare doctrine, and the one addressed by the trial court, is whether "it is fairly debatable that the restriction *in fact* bears a reasonable relation to the general welfare." *Assoc. Home Builders of the Greater Eastbay, Inc. v. City of Livermore,* 18 Cal. 3d 582, 602 (Cal. 1976) (emphasis added); 3 AA 663-64. If the answer to this question is no, then the ordinance is invalid. *See id.* "[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.* The court must identify and weigh the competing interests affected by the ordinance and inquire "whether the ordinance, in light of its probable impact, represents a reasonable accommodation" of those competing interests. *Id.* at 609.

The trial court concluded with respect to Measure E that "the record is devoid of any consideration of any competing interests, and of any attempt to accommodate any competing interests." 3 AA 664. The record contained ample evidence of the region's competing interests. To cite one example, Plaintiff CSD No. 2, which serves "approximately 5 million people within 73 cities . . . within a service area of more than 650 square miles" presented evidence to the trial court that its biosolids management costs would increase from $37.50 per ton to at least $60.00 per ton due to Measure E. RA 109 (¶2), 112 (¶13), 114 (¶19).

In its appeal, Kern does not contest that Measure E affects the surrounding region, nor does it contest the trial court's evaluation of the record or its factual findings. *See generally* AOB at 37-41. Kern does not dispute that the effects of Measure E will be felt across the region, or that

Measure E will drive up the costs of Plaintiffs' biosolids management programs by millions of dollars each year—an increase which will affect business and resident ratepayers across southern California. *See* RA 101-02 (¶¶ 16-20), 106 (¶37) , 066-67 (¶¶ 34-39), 109 (¶2). Kern does not dispute that Measure E will negatively affect the environment of the region by requiring Plaintiffs to truck their biosolids significant distances, including to Arizona, resulting in greatly increased fuel combustion and air pollution. *See id.* RA 058 (¶11), 067 (¶36), 071(¶48). Therefore, the trial court's ruling is supported by substantial evidence, and this Court's inquiry should stop there.

On appeal, Kern attempts to recast its police power arguments in legal and rhetorical terms to evade the regional welfare doctrine altogether. First, Kern argues that Section 40059(a) of the IWMA "saves" Measure E from any application of the regional welfare doctrine. As explained more fully in Section III.d. *infra*, this argument is unavailing, and was rejected by the federal district court. *See Kern II*, 509 F. Supp. 2d at 895 ("contrary to Kern's suggestion, Measure E is not saved by Cal. Pub. Res. Code § 40059(a)"). Kern's brief omits key passages from Section 40059(a) which clearly show that the provision relates to the grant of franchises for garbage collection and in no way authorizes Measure E's ban on the recycling of biosolids.

Because Kern's Section 40059(a) textual argument has no merit, its related claim that Section 40059(a) "overrides" the entire regional welfare doctrine must also be rejected. As the federal district court found, the IWMA Section 40059(a) "savings clause[] [does] not purport to free local enactments from all conceivable limitations. [It] thus cannot save Measure E if it is otherwise violates the regional welfare doctrine." *Kern II*, 509 F. Supp. 2d at 900.

Even if this Court were to accept Kern's overextension of Section 40059 beyond garbage collection, it does not follow that this provision displaces a the regional welfare doctrine, which is rooted in the California Constitution. Kern argues that Section 40059 applies "[n]otwithstanding any other provision of law," which includes the "judicially crafted" regional welfare doctrine. AOB at 5, 38-39. However, Kern's attempt to downgrade the regional welfare doctrine is unavailing. In *Livermore*, the Supreme Court of California was interpreting the scope of Article XI, Section 7 of the California Constitution when applying the regional welfare doctrine, not statutory or common law. *See Livermore*, 18 Cal. 3d at 603-10. The regional welfare doctrine is well-recognized as a "constitutional principle." *Id.* at 607 (referring to the regional welfare doctrine as an "established constitutional principle"); *see also Smith v. Cnty. of L.A.*, 211 Cal.App. 3d 188, 201 (Cal. Ct. App.1989) (describing consideration of regional welfare as a "constitutional responsibility"). As a constitutional principle, the regional welfare doctrine cannot be summarily supplanted by statute. Moreover, Kern's police power is limited by the language of the California Constitution itself, which restricts the exercise of police power to "within [the county's] limits." Cal. Const., art. XI § 7.

Kern next mischaracterizes the trial court opinion as holding that because Measure E is a ban there is no accommodation. *See* AOB at 38. On that basis, Kern further argues that the trial court "impos[ed] a duty" upon Kern to accept biosolids. *Id.* at 39. This is a straw man. As stated above, the trial court evaluated the record before it and found no evidence of Kern's consideration or accommodation of competing interests. 3 AA 664. The trial court did not rule that the regional welfare doctrine imposes a duty on Kern to accept biosolids. *See* 3 AA 663-64. The only duty imposed by the regional welfare doctrine is consideration of and reasonable

accommodation of competing interests. *See Livermore*, 18 Cal. 3d 582 at 609. As Kern implicitly concedes, it did neither when enacting Measure E.

Finally, Kern argues that the trial court's ruling upsets the "carefully crafted balance" between local and state government forged by the legislature under the IWMA. *See* AOB at 5, 39-40. This reasoning is backwards. As a preliminary matter, as shown *infra* in Section III, the IWMA's recycling mandate prohibits local governments from enacting recycling bans such as Measure E, and therefore there is no such "carefully crafted balance" between Measure E and the IWMA implicated in this case.

Under Kern's theory, a local ordinance may be enacted *without any* consideration of outside interests. This represents *no* balance between local and state government. This Court should consider the full ramifications of Kern's theory. If the protections of the regional welfare doctrine are eliminated, every county in California could enact a ban on biosolids such as Measure E, and this would destroy all potential for local and state cooperation, paralyze the statewide biosolids market, and eviscerate the ability of other state actors to economically manage their biosolids. *See generally* RA 100-02 (¶¶11-20). Indeed, it is the regional welfare doctrine which ensures a balance between local and outside interests. The doctrine places a limit on the police power of localities in order to afford outsiders legal protection against parochial, exclusionary measures like Measure E, and preserves valid actions by local governments by requiring "reasonable" accommodation of competing regional interests. *Livermore*, 18 Cal. 3d at 609-610; *Arnel Dev. Co. v. City of Costa Mesa* 126 Cal. App. 3d 330, 337-340 (Cal. Ct. App.1981).

This Court should reject Kern's argument that the IWMA constitutes an unlimited grant of police power to localities. Under that scenario, California would be a state of "58 separate fiefdoms," which is exactly the undesirable result that the regional welfare doctrine was designed to avoid.

See 3 AA 664. The trial court's ruling appropriately applied California's police power limitations to strike the proper balance between preserving local authority over solid waste and protecting against parochial, exclusionary local enactments like Measure E.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR PREEMPTION CLAIM

The trial court correctly held that Plaintiffs are also likely to prevail on their claim that Measure E is preempted by California's IWMA because Measure E bans biosolids recycling, which "state law specifically requires be promoted by local governments." 3 AA 665. This Court should join the trial court and every court decision on the merits of Plaintiffs' preemption claim and affirm the trial court's ruling for Plaintiffs. *See Kern I*, 462 F. Supp. 2d at 1115-1117 (granting Plaintiffs' motion for preliminary injunction); *Kern II*, 509 F. Supp. 2d at 888-898 (granting summary judgment for Plaintiffs).

The IWMA preempts the Measure E because the former mandates recycling and the latter prohibits it. As Kern concedes, the IWMA establishes a comprehensive scheme addressing the handling and disposal of solid waste, which is defined to include biosolids. AOB at 39. The statute's paramount goal is the "reduction, recycling, or reuse of solid waste generated in the state," and the statute expressly requires local agencies such as Kern to "promote" the recycling of solid waste. Pub. Res. Code §§ 40000(e), 40051(a). As the federal district court concluded, "[t]he IWMA thus uses mandatory language to require that local agencies such as Kern recycle solid wastes – including biosolids." *Kern II*, 509 F. Supp. 2d at 891. Kern's ban is contrary to, and preempted by, the IWMA.

a. A Local Measure in Conflict with State Law Is Invalid

A county may only make and enforce ordinances that are "not in conflict with general laws." Cal. Const. art. XI, § 7. "Local legislation in

conflict with the general law is void. Conflicts exist if the ordinance . . . contradicts . . . general law." *Morehart v. Cnty. of Santa Barbara* (1994) 7 Cal. 4th 725, 747. "[L]ocal legislation is contradictory to general law when it is inimical thereto," *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 898 (1993) (citations and quotation marks omitted), such as when it "would frustrate the declared policies and purposes" of state law, *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591, 597 (1984) (citations and quotation marks omitted); *see also Int'l Bhd. of Elec. Workers v. City of Gridley*, 34 Cal. 3d 191, 201-02 (1983) (preempting local ordinance that interfered with state-law policies and purposes).

"[W]hen a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation *cannot be used to completely ban the activity or otherwise frustrate the statute's purpose*." *Great Western Shows v. Cnty. of Los Angeles*, 27 Cal. 4th 853, 868 (Cal. 2002) (emphasis added) (citing *Blue Circle Cement v. Bd. of County Commissioners*, 27 F.3d 1499 (10th Cir. 1994)); *see also City of Lake Forest v. Evergreen Holistic Collective*, 203 Cal. App. 4th 1413, 1448 (Cal. Ct. App. 2012) ("a contradiction arises when a local ordinance prohibits what a statute authorizes, rendering the local ordinance inimical to the statute"). That is precisely what Measure E attempts to do; it bans what the IWMA requires and promotes.

b. The IMWA Mandates Recycling of Biosolids

As Kern concedes, the IWMA "'sets forth a comprehensive statewide program for solid waste management.'" AOB at 39: (*citing Waste Mgmt. of the Desert, Inc. v. Palm Springs Recycling Cntr., Inc.* 7 Cal. 4th 478, 490 (Cal. 1994)); *see also* 12 Witkin, *Summary of California Law* (10th ed. 2005 & 2006 Supp.), Real Property § 908, at 1096 (the

IWMA "governs *all solid waste activity* in California") (emphasis added). "Solid waste" includes biosolids. Pub. Res. Code § 40191.

The IWMA enacts a state policy that promotes recycling "to the maximum extent feasible." *Id.* § 40052. It directs that local agencies such as Kern "*shall* do both of the following:"

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

Id. § 40051 (emphasis added).

The mandate to promote and maximize recycling is not optional. The statute gives local agencies "discretion" on whether to use *non*-beneficial methods of disposal, *i.e.* transformation (which includes incineration) and "land disposal." *Id.* § 40051(a)(3); *City of Dublin v. Cnty. of Alameda*, 14 Cal. App. 4th 264, 278 (Cal. Ct. App. 1993). But local agencies lack discretion as to recycling in all forms, which they *must* promote. Pub. Res. Code § 40051(a)(2).

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

i. Measure E Conflicts With the IWMA's Recycling Mandate

Kern does not dispute that Plaintiffs' land application constitutes recycling. Plaintiffs reconstitute solid wastewater residuals – which would otherwise become solid waste (*id.* § 40191) – into biosolids, which are returned to the "economic mainstream" as a fertilizer and soil conditioner. 1 AA 6. 61% of California's biosolids are currently beneficially land applied, in large part because of the IWMA's requirements. RA 106 (¶34).

Measure E, however, would prohibit this recycling. The IWMA requires that Kern, like other local governmental entities, "shall . . . [p]romote" recycling and shall "[m]aximize the use of all feasible" recycling options. Pub. Res. Code § 40051. Measure E does the opposite by banning land application, the most common and feasible option for recycling biosolids. 1 AA 38-39. Measure E defines "biosolids" and "land apply" so broadly that it prohibits virtually all forms of biosolids recycling, including any use of composted or pelletized biosolids, and any placement of biosolids onto land, injection beneath the land surface, or incorporation into soil. 1 AA 39. Kern cannot escape Measure E's clear conflict with the IWMA.

ii. Measure E Frustrates the IWMA's Purpose

Measure E frustrates the IWMA's stated purpose: "to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible." Pub. Res. Code § 40052. Despite the IWMA's express purpose, Measure E bans the prevailing method of biosolids recycling in California. 1AA 38. "If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature." *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 911 (Cal. Ct. App. 2008).

A local law is preempted when it is "inimical to the important *purposes* of the" state law, even if it is technically possible to comply with

both. *Action Apartment Ass'n v. City of Santa Monica*, 41 Cal. 4th 1232, 1243 (Cal. 2007) (emphasis added); *see also Seal Beach Police Officers Ass'n*, 36 Cal. 3d at 597 ("'Although the Legislature did not intend to preempt all aspects of labor relations in the public sector, we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the [state] Act.'") (quoting *Huntington Beach Police Officers' Ass'n v. City of Huntington Beach*, 58 Cal. App. 3d 491, 501-02 (Cal. Ct. App.1976)).

This tenet remains true for local laws purportedly concerning land use or public health, notwithstanding Kern's contrary claims. *See* AOB at 25-27. California courts strike down local land use and public health rules when they conflict with the purposes of state law, even if the rules do not literally command what state law forbids or forbid what state law commands. *See, e.g., Water Quality Ass'n v. Cnty. of Santa Barbara*, 44 Cal. App. 4th 732, 739-49 (Cal. App. 1996) (municipal ordinances setting minimum salt efficiency ratings for water softeners that were higher than the minimum required by state law were preempted because they undermined the state law's purpose of making water that complied with minimum state requirements available throughout California); *L.A. Lincoln Place Investors, Ltd. v. City of Los Angeles*, 54 Cal. App. 4th 53, 64 (Cal. Ct. App. 1997) (ordinance limiting the use of property when a landlord invokes the Ellis Act was preempted because its practical effect was "to impose 'a prohibitive price on the exercise of the [landlord's] right' under the Ellis Act") (citation omitted).

Measure E conflicts with the express purpose of the IWMA, to promote recycling "to the maximum extent feasible." Pub. Res. Code § 40052. The trial court correctly ruled that Plaintiffs are likely to prevail on their preemption claim.

c. Kern Cannot Use Its Police Power to Countermand the IWMA

Kern's assertion that when it passed Measure E it was not implementing the IWMA – but was instead acting under article XI, Section 7 of the State Constitution – is a red herring. The IWMA's scope is broad; as Kern notes, it encompasses solid waste management statewide. AOB at 39. Any local laws concerning solid waste disposal and recycling are therefore implementing the IWMA. Kern's narrow reading of the statute would lead to the absurd result that the IWMA's mandates apply only to local actions consistent with the Act, but local actions conflicting with the IWMA could be taken with impunity. Kern may not purport to use its constitutional police power authority to countermand the recycling mandate imposed by state law.

Kern's contention that the IWMA reaches only local governments' attempts to govern their own waste ignores the statute's plain language and purpose. The Legislature enacted the IWMA as the "coherent state policy to ensure that the state's solid waste is managed in an effective and environmentally sound manner." Pub. Res. Code § 40000(c). The IWMA requires local agencies to "make adequate provision for solid waste handling, *both* within their respective jurisdiction *and in response to regional needs . . . .*" *Pub. Res. Code* § 40002 (emphasis added). It calls for "effective and coordinated approach[es] to the safe management of all solid waste generated within the state" and "regional cooperative efforts" from the state and its many political subdivisions. *Id.* § 40001(a), (b). The Kern ban not only violates Kern County's mandate under the IWMA to promote and maximize recycling options, it also obstructs the Southland's ability to manage its waste in accordance with the IWMA's mandates. To ensure that local bodies such as Kern cannot thwart such efforts, the IWMA contains a preemption clause that upholds local regulation of solid waste

only if it is "*reasonable*" and "*do[es] not conflict* with the... *policies*, standards, and *requirements* of [the IWMA]." *Id.* § 40053 (emphasis added). In short, the IWMA is a comprehensive statutory scheme that does not permit local recycling bans such as Measure E.

Kern incorrectly suggests that it need only comply with the IWMA's source reduction and recycling element ("SRRE"), and is not otherwise obligated to meet the IWMA's recycling mandate. AOB at 28-32. Under the IWMA, cities and counties are required to develop integrated waste management plans demonstrating how they would reduce waste disposal in landfills using SRREs. Pub. Res. Code § 41750(a), (b). Kern infers that the recycling mandates in Sections 40051 and 40052 have no meaning other than in connection with the content of an SRRE. But Kern has it backwards. Sections 40051 and 40052 establish an overarching requirement to promote and maximize recycling of solid wastes. The SRREs are themselves subsidiary to, and must be in compliance with, the recycling mandate. Pub. Res. Code § 41800(a). Kern's contention that the recycling mandate is somehow modified or limited by SRREs must be rejected.

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

use conditions or restrictions . . . if the conditions or restrictions *do not conflict with* or impose lesser requirements than the *policies*, standards, and requirements of *this division* . . .." *Id.* § 40053 (emphasis added). The Legislature was not silent about what happens to land use restrictions that "conflict with" the recycling mandates in Sections 40051 and 40052. They are preempted.

d. The Garbage Collection Exemption Does Not Empower Kern to Override the IWMA's Recycling Mandate

Kern claims that the garbage collection exemption of Public Resources Code Section 40059(a) saves Measure E. Kern is wrong. Indeed, the federal district court characterized this argument as a "sleight of hand." *Kern II*, 509 F. Supp. 2d at 895. Section 40059(a) preserves local power over the grant of franchises for garbage collection and has nothing to do with Measure E. It states:

> (a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:
>
> (1) Aspects of solid waste handling which are of local concern, including, but not limited to, *frequency of collection*, *means of collection* and *transportation*, *level of services*, *charges and fees*, and *nature, location, and extent of providing solid waste handling services*.
>
> (2) Whether the services are to be provided by means of *nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding*, or if, in the opinion of its governing body, the public health, safety, and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding. The authority to provide solid waste handling services may be granted under terms and conditions prescribed by the governing body of the local governmental agency by resolution or ordinance.

> (b) Nothing in this division modifies or abrogates in any manner either of the following:
>
> > (1) *Any franchise previously granted* or extended by any county or other local governmental agency.
> >
> > (2) Any contract, license, or any permit *to collect solid waste* previously granted or extended by a city, county, or a city and county.

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

Every case interpreting Section 40059 has confirmed that it "preserve[s] local power over trash haulers and garbage collection services." *Kern II*, 509 F. Supp. 2d at 894-895; *Rodeo Sanitary Dist. v. Board of Supervisors*, 71 Cal. App. 4th 1443, 1451 (Cal. Ct. App. 1999); *see also Valley Vista Servs,* 118 Cal. App. 4th at 890 (surveying legislative history showing that Section 40059 concerns franchises for garbage collection); *Waste Res. Techs. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 302 (Cal Ct. App. 1994) (Section 40059 preserved city's power "to grant an exclusive refuse collection permit"); *City of Alhambra v. P.J.B. Disposal Co.*, 61 Cal. App. 4th 136, 138-41 (Cal. Ct. App. 1998) (Section 40059(a) allowed city to issue exclusive franchise for trash hauling). Measure E, however, is not a regulation of the *services* that support land application; it is a ban of the practice itself.

The statutory text supports that interpretation. Section 40059(a) refers to the "frequency of collection," the "means of collection," the "transportation," "level of services, "charges and fees," and "nature, location, and extent" of providing solid waste handling services. Those terms are all comfortably read as referring to garbage collection – *i.e.*, how

often garbage gets picked up; how much and what sorts of refuse are collected; what types of trucks, dumpsters and containers are used; and how much residents have to pay. *See generally Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1159-60 (1991) (when a statute lists specific categories of items, more general words will be construed to apply only to things of the same nature as the specific categories listed).

Subsection (a)(2) confirms this reading. It states that localities can determine "[w]hether *the services*" – those just referenced in (a)(1) – are provided by "nonexclusive franchise, contract, license, permit . . . either with or without competitive bidding." Cal. Pub. Res. Code § 40059(a)(2) (emphasis added). This language makes perfect sense in the context of municipal contracts with private garbage collectors, where franchising and competitive bidding issues commonly arise. But Kern overreaches in asserting that Section 40059(a) is a broad grant of legislative authority to ban major methods of recycling solid wastes such as biosolids. That the IWMA preserves some local authority over waste management services does not immunize from preemption Measure E's flat prohibition of biosolids application in unincorporated Kern County. *See Lincoln*, 54 Cal. App. 4th 53 (applying conflict preemption even where state law provides for local authority in areas such as housing regulation).

Finally, Kern's broad reading of Section 40059(a) would render key provisions of the IWMA superfluous. The very "purpose" of the statute "is to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible." *Id.* § 40052. Thus, in implementing the statute, Kern "shall . . . [p]romote . . . [r]ecycling and composting." *Id.* § 40051(a)(2). And local regulations are valid only if they "do not conflict with" the IWMA's "polices, standards and requirements." *Id.* § 40053. If Kern is correct that Section 40059(a) saves from preemption an outright ban on the primary method of biosolids recycling used in California, then

the purposes, policies and requirements set out in Sections 40051, 40052 and 40053 would be surplusage. That is not the law. *See, e.g., AT&T v. Central Office Tel.*, 524 U.S. 214, 228 (1998) (savings clause must be construed reasonably because "the act cannot be held to destroy itself") (citation and quotation marks omitted). In sum, Kern cannot rely upon Section 40059(a) to "opt out of the mandatory hierarchy in [Section 40051]." *Kern II*, 509 F. Supp. 2d at 896.

e. IWMA Provisions Regarding Waste Diversion Credits Do Not Save Measure E From Preemption

Kern implies that IWMA's recycling mandate does not apply if the biosolids in question do not count toward satisfying the Act's waste diversion requirements. AOB at 34-35. Kern is wrong. IWMA's provisions regarding diversion credits are irrelevant to the preemption analysis because whether or not the Plaintiffs claim diversion credits for its biosolids has nothing to do with whether Kern is subject to the IWMA's recycling mandate. Furthermore, as discussed above, the recycling mandate supersedes IWMA's SRRE and waste diversion requirements.

Kern's implication that the City's biosolids are not "endorsed" under the IWMA is mistaken. The City of Los Angeles does not claim diversion credits for its biosolids land application activities because it has been recycling biosolids since before 1990, and thus its biosolids recycling is included in the baseline against which it must make *further* solid waste diversion. Pub. Res. Code § 41781(c) (establishing 1990 as the baseline for diversion credits). Therefore, the City has had no occasion to seek, and the Department no occasion to grant, a determination under Section 41781. Its waste diversion and endorsement arguments are thus meritless.

IV. CONCLUSION

Measure E, a discriminatory county voter initiative adopted amid misinformation and crude anti-Los Angeles prejudice, flouts numerous

constitutional and statutory limits on local legislation. The trial court correctly found that Measure E should be enjoined during the pendency of this case because of its likely illegality and because biosolids recycling is environmentally sound and an important part of Southern California's infrastructure. The Court should affirm the trial court's judgment granting a preliminary injunction.

Dated: May 14, 2012

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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 Respondents' Brief contains 13,656 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

Dated May 14, 2012.

Zachary M. Norris

PROOF OF SERVICE

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At the time of service I was over 18 years of age and not a party to this action. My business address is 456 Montgomery Street, Suite 1800, San Francisco, California 94104.

On May 14, 2012, I caused the:

RESPONDENTS' BRIEF

to be served on the persons below:

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The documents were served by the following means:

☒**BY UNITED STATES MAIL.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in San Francisco, California and deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid 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 that 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 also served an electronic copy of the documents to the Supreme Court of the State of California before 5:00 p.m. today.

Dated: May 14, 2012

Sheila Griffin

PROOF OF SERVICE