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' REPLY BRIEF

ARNOLD & PORTER LLP
JEROME B. FALK, JR. (No. 39087)
STEVEN L. MAYER (No. 62030)
SARA J. EISENBERG (No. 269303)
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: 415.471.3100
Facsimile: 415.471.3400

COUNTY OF KERN
THERESA A. GOLDNER (No. 107344)
MARK L. NATIONS (No. 101838)
1115 Truxtun Avenue, Fourth Floor
Bakersfield, California 93301
Telephone: 661.868.3800
Facsimile: 661.868.3805

HOGAN LAW APC
MICHAEL M HOGAN (No. 95051)
225 Broadway, Suite 1900
San Diego, California 92101
Telephone: 619.687.0282
Facsimile: 619.234.6466

Attorneys for Defendants and Appellants
County of Kern and Kern County Board of Supervisors

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes and Court Rules

Other Authorities

ARGUMENT

I.
PLAINTIFFS' PREEMPTION AND POLICE POWERS CLAIMS ARE BARRED BY 28 U.S.C. §1367(d).

A. This Issue Is Properly Before The Court.

Plaintiffs cite *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4th 719 (2005), *disapproved on other grounds*, *Kibler v. Northern Inyo County Local Hospital District*, 39 Cal. 4th 192, 203 n.5 (2006), for the proposition that the statute of limitations issue is not properly before the Court. RB 12-13. They are wrong. In *Fontani*, the court held that it would not consider the merits of a trial court's decision overruling a demurrer in an appeal from the denial of an anti-SLAPP motion where "the merits of the order overruling the demurrer have no bearing on the validity of the order denying the anti-SLAPP motion." 129 Cal. App. 4th at 736. But the court also stated that "where the propriety of an otherwise nonappealable order affects the validity of an anti-SLAPP order, an appeal will lie from the otherwise nonappealable order." *Id.*

That rule applies where a statute of limitations issue affects the validity of an order granting a preliminary injunction. In *Aiuto v. City & County of San Francisco*, 201 Cal. App. 4th 1347 (2011), the defendant, like the County here, contended on appeal from an order granting a preliminary injunction that the trial court had erred because the plaintiff's causes of action were time-barred. Plaintiff contended that "the court's ruling on the applicability of the statute of limitations to plaintiffs' claims is not at issue in this appeal." *Id.* at 1355. But the court disagreed, stating that "[w]hen the likelihood of prevailing on the merits depends on a question of law, such as construing the applicable statutes of limitation, an appellate court can independently determine whether the trial court's interpretation was correct as a matter of law and, therefore, whether there was a possibility of success on the merits." *Id.*

The same is true here. If Plaintiffs' police powers and preemption claim are time-barred, they cannot show a likelihood of success on the merits. The limitations issue is therefore properly before the court.

B. Plaintiffs' Claims Are Barred By 28 U.S.C. §1367(d) Because They Did Not File This Case Within Thirty Days After Their State Law Claims Were Dismissed By The Federal District Court.

Plaintiffs concede, as they must, that the courts have adopted two conflicting interpretations of how 28 U.S.C. §1367(d) operates when, as in this case, a state statute of limitations expires while a supplemental claim is pending in federal court. Under the "Extension Approach," the plaintiff must file a state court complaint within thirty days of the date its federal claim is dismissed. In contrast, under the "Suspension Approach," 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* AOB 13-15.

Plaintiffs' arguments for adopting the Suspension Approach rely heavily on the assertion that that result is compelled by "the plain language of 28 U.S.C. §1367(d)." RB 13; *see generally* RB 13-20. As a result of their "plain language" argument, they contend that the policy reasons supporting application of the Extension Approach are "irrelevant and misplaced." RB 20. Indeed, they ignore the inclusion of 28 U.S.C. §1367(d) in a broader bill designed to promote judicial efficiency and economy. Accordingly, we shall first demonstrate that Plaintiffs' "plain language" argument is meritless and then show why consideration of Congress's intent requires interpreting the ambiguous statutory language in favor of the Extension Approach.

1. Section 1367(d)'s Use Of The Word "Tolled" Does Not Require Adoption Of The Suspension Approach.

The heart of Plaintiffs' argument is the claim that "[t]he 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." RB 16. In other words, Plaintiffs say, "tolled" invariably means "suspended," thereby compelling adoption of the Suspension Approach. This contention is wrong for multiple reasons.

First, it misreads the case law. As even one of the cases adopting the Suspension Approach recognizes, "[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"). Indeed, the cases often use "tolled" in a manner that is incompatible with the Suspension Approach. For example, in *Juan v. Commonwealth of Northern Mariana Islands*, No. 99-032, 2001 WL 34883536 (N.M.I. Nov. 19, 2001), the court adopted the Extension Approach, stating that "§ 1367(d) operates only to toll the limitations statute during the specified period, and to allow a party to refile within 30 days after dismissal from federal court." Accordingly, this court recognized that "tolling" can mean "prevent from expiring." *Id.* at *4. The court in *Berke v. Buckley Broadcasting Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003), gave "tolling" exactly the same meaning: "[W]e 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." *Id.* at 123. Plaintiffs' claim that the courts adopting the Extension Approach "bas[ed] their decisions entirely on policy grounds divorced from the statutory language" (RB 15) is therefore erroneous.

Second, Plaintiffs' "tolling" argument fails to account for the Supreme Court's recognition in *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), that a tolling statute can have several different "tolling effects." 462 U.S. at 652 n.1; *see also id.* at 655 ("The federal civil rights statutes do not provide for a specific statute of limitations, establish rules regarding the tolling of the limitations period, or prescribe the effect of tolling"). Indeed, their attempt to minimize the importance of that principle moves from non-sequitur to nonsense.

Plaintiffs begin with a proposition that is true but irrelevant: that *Fumero Soto* does not construe Section 1367(d). That is hardly surprising, since (as the County pointed out in its Opening Brief), the statute was passed eight years after *Fumero Soto* was decided. AOB 19-20.[1] But then Plaintiffs go on to say that "*Fumero Soto* announces a federal common-law preference for suspension." RB 19. This is neither true nor relevant. *Fumero Soto* expressly held that "[t]he Court of Appeals correctly rejected the argument that *American Pipe* establishes *a uniform federal rule of decision that mandates suspension* . . . whenever a federal court action tolls a statute of limitations." 462 U.S. at 662 (emphasis added).[2] It therefore *rejected* a "federal common law

---

[1]Likewise, Plaintiffs have no answer to the County's argument (AOB 19-20) that Section 1367(d) should be construed in light of *Fumero Soto*'s then-recent recognition that the "tolling" of a statute of limitations can have several different "tolling effects."

[2]The Court was concerned with suspension vis-à-vis renewal, because the Puerto Rico statute at issue in that case was a

(continued . . .)

preference for suspension." Even if that were not true, no supposed federal common law rule could govern interpretation of a federal statute that Congress passed precisely because the common law had led to a jumble of conflicting rules and results. *See* AOB 12-13. As a result, interpretation of 28 U.S.C. §1367(d) is governed not by "federal common law," but by the statute's language and purpose. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("our sole task in this case is one of statutory construction" by "examining the language and purpose of the statute").

Third, and finally, even if Plaintiffs' reliance on the supposed single meaning of "tolled" had more merit than it does, focusing on a single word, to the exclusion of everything else, is the wrong way to read a statute. Instead, "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

Here is where Plaintiffs' analysis falls short. For, as we now show, neither the "whole statutory text" nor the "purpose and context" of Section 1367(d) supports the Suspension Approach.

2. The "Whole Statutory Text" Accommodates Both The Suspension Approach And The Extension Approach.

Plaintiffs' attempts to discern the meaning of Section 1367(d) from the whole of its text are merely disguised iterations of their "'tolled' means 'suspended'" argument. For example, they contend that the Extension Approach is wrong because if the limitations period applicable to a state-law claim is tolled while a case is pending in federal court, the statute cannot expire while the case is *sub judice*. *See* RB 17 ("Kern . . . asks this Court to hold

---

(. . . continued)

renewal statute, not an extension statute. But that does not make *Fumero Soto*'s rejection of a federal preference for suspension irrelevant.

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") (emphases omitted). But Kern has never made any such argument. No one—neither Kern nor Plaintiffs—contends that the statute of limitations for a supplemental claim expires while the claim is being litigated in federal court. All Kern contends is that if the statute *would otherwise have* expired while the case is pending but for the statute, the plaintiff has thirty days from dismissal in which to refile its case. There is nothing inconsistent about that.

Plaintiffs' argument that the Suspension Approach is required because it tolls the statute in all cases (RB 17-18) is likewise wide of the mark. As the County demonstrated in the Opening Brief, this argument assumes the very thing it needs to prove: that "tolled" means "suspended." AOB 18-19. Conversely, if "shall be tolled" means "shall not expire," the statute is given effect in all cases where it applies—*i.e.*, in all cases where the limitations period would run but for the statute. That is as consistent with the statutory language as the interpretation proffered by Plaintiffs—and much more consistent with the statutory purpose and context.

3. The Extension Approach Furthers Congress's Intent; The Suspension Approach Does Not.

Plaintiffs contend that "Kern's policy arguments overstate potential negative impacts of the suspension rule . . . and mistake the intent of Section 1367(d)." RB 20. The first contention ignores the facts of this case while the second ignores the statutory context.

Plaintiffs attempt to minimize the impact of the Suspension Approach by positing a case where a plaintiff files a federal case on the last possible day, and then gets the benefit of the additional thirty days provided by Section 1367(d) when its state law claims are dismissed by the federal court. RB 22. In such a case, they say, "the only impact on the time within which the claim is

prosecuted is Section 1367(d)'s 30-day period." *Id.* That is true but irrelevant, for precisely the same result would occur in that case regardless of whether the Suspension Approach or the Extension Approach applies.

This case provides a far more realistic scenario for evaluating the delay inherent in adopting the Suspension Approach. Plaintiffs allege that Measure E was adopted in June 2006, and became effective on July 22, 2006. 1 AA 13. They filed their federal case on August 15, 2006 (1 AA 140) and it was dismissed on November 9, 2009. 1 AA 272-79. Assuming *arguendo* that the three-year statute applies (RB 13 n.1), and that it began to run when Measure E became effective, under the Suspension Approach Plaintiffs would have had more than two years and eleven months from November 9, 2009, to refile their federal complaint in state court. In other words, under Plaintiffs' approach, they could have sat idly by until mid-October 2012 before refiling a complaint that had already been the subject of federal litigation for over three years.

Plaintiffs do not claim that tolerating such delay furthers *any* discernable statutory purpose. Instead, they attempt to sidestep the issue by contending that Section 1367(d) is not a statute of limitation and therefore does not "invoke the policy considerations of statutes of limitations." RB 21. But Section 1367(d) was part of the Judicial Improvements Act of 1990, the purpose of which is "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. As the facts of this case demonstrate, that purpose would be frustrated, not furthered, by giving plaintiffs the full period of time during which their case was pending in federal court *plus* thirty days *plus* the full unexpired period in the state limitations period in which to refile a complaint that has already been drafted, filed and litigated for several years.

Moreover, the purpose Plaintiffs *do* identify for Section 1367(d) does not support their interpretation either. Plaintiffs argue that "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.'" RB 21 (quoting *Jinks v. Richland County*, 538 U.S. 456, 459 (2003)). But that purpose does not answer the interpretive question at issue here, because it is fully served by preventing the limitations period from expiring while a state law claim is pending in federal court and for thirty days thereafter.

Finally, Plaintiffs err in asserting that the Suspension Approach does not prejudice Defendants. RB 21. As the County showed in its Opening Brief, statutes of limitation "protect defendants from the stale claims of dilatory plaintiffs" (*Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 395 (1999)) and "provide defendants with repose for past acts." *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 755 (1998). These purposes are frustrated just as much by delay in refiling a state law claim that has been dismissed by a federal court as by delay in filing a federal lawsuit in the first instance. While defendants receive notice when a supplemental claim is first filed in federal court, the utility of that notice disappears when a plaintiff lets its state law claims remain in limbo for months or potentially years after dismissal by a federal court. In that event, the plaintiff's failure to refile its state law claims promptly in state court can cause the same kind of prejudice that the statute of limitations is intended to prevent. For that reason, the *Kolani* court was correct in holding that 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 v. Gluska*, 64 Cal. App. 4th 402, 409 (1998) (emphasis in original). In contrast, 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).[3]

C. Section 355 Does Not Save Plaintiffs' Claims.

28 U.S.C. §1367(d) gives a plaintiff thirty days to refile his state law claims after dismissal "unless State law provides for a longer tolling period." Respondents contend that the 30-day filing deadline set forth in Section 1367(d) does not apply to their claims because Code of Civil Procedure Section 355 provides for a one-year tolling period. RB 22-24. Respondents are wrong. Section 355 does not apply to this case. And even if it did, the action would still be untimely because it was not brought within one year of the Ninth Circuit's reversal of the District Court's judgment.

Section 355 "provides an extremely narrow exception to the sometimes harsh dictates of the statute of limitations." *Hull v. Cent. Pathology Serv. Med. Clinic*, 28 Cal. App. 4th 1328, 1334 (1994). Indeed, it applies only "in the uncommon situation where a judgment in favor of the plaintiff is reversed on appeal for procedural reasons *which require the filing of a new action*." *Id.* (emphasis added); *accord,* 3 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* §738 (2008) (statute "applies, of course, only when the reversal is for such a defect as to require the filing of a new action"). Accordingly, Section 355 does not apply in the more usual situation where, following a reversal, the case is remanded to the trial court for further proceedings. *See Watterson v. Owens River Canal Co.*, 190 Cal. 88 (1922) (Section 355 did not

---

[3] *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").

apply where judgment in plaintiff's favor was reversed on appeal and case remanded to the trial court, where plaintiff's complaint was ultimately dismissed on a nonsuit); WILLIAM F. RYLAARSDAM & PAUL TURNER, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL—STATUTES OF LIMITATIONS ¶4:1611 (2012) (Section 355 "has limited application to judgments of California courts because most reversals of a judgment in favor of plaintiff result in a *new trial*. . . , rather than a new lawsuit") (emphasis in original). Indeed, "[a] plaintiff who elects to continue proceedings in the original lawsuit following reversal and is unsuccessful cannot then rely on § 355 to commence another lawsuit." 1 ANN TAYLOR SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES §25.68 (2012). Such is the case here.

In this case, the Ninth Circuit remanded the case to the District Court for further proceedings. *City of Los Angeles v. County of Kern*, 581 F.3d 841, 849 (2009). On remand, Respondents argued that the District Court should exercise supplemental jurisdiction over their preemption and police powers claims (the same claims reasserted in the first and second causes of action in this case) and reinstate its final judgment in favor of Plaintiffs. 2 AA 433-59. The District Court disagreed. The court declined to exercise supplemental jurisdiction and dismissed the case, and Respondents did not appeal. 1 AA 274-79. In other words, Respondents' case was dismissed, and a new state court action required, as a result of the *District Court*'s dismissal on supplemental jurisdiction grounds—and *not* because the Ninth Circuit reversed the District Court's prior judgment. This takes the case out of Section 355's narrow scope and places it squarely within Section 1367(d), which requires that pendent state law claims that the District Court declined to adjudicate be refiled within thirty days.

Even if Section 355 did apply to this case, Respondents' claims would still be untimely, because this action was not filed within one year of the Ninth Circuit's reversal of the District

Court's judgment. That is the proper date from which to measure the one-year period. Respondents cite *United States v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988), a criminal case involving the Speedy Trial Act, for the proposition that following a mistrial, the statute of limitations does not start running until the Court of Appeals issues its mandate. RB 24.[4] But several other courts have held, in situations much more analogous to this one, that the statute of limitations begins to run when the appellate court issues its decision—*not* upon issuance of the mandate. In *Tattletale Portable Alarm Sys., Inc. v. Calfee, Halter & Griswold LLP*, 772 F. Supp. 2d 893 (S.D. Ohio 2011), for example, the court held that an action was timely under a virtually identical Ohio statute because "[t]he decision of the Tenth District Court of Appeals affirming the Franklin County Court of Common Pleas' decision was issued on March 26, 2009" (*id.* at 895), and the "Plaintiff filed the instant action within one year of *that date*." *Id.* at 896 (emphasis added); *see also Kelly v. Capital One, N.A.*, 717 F. Supp. 2d 805, 807 (E.D. Wis. 2010) (holding that the statute of limitations began to run on the date the Seventh Circuit filed its opinion reversing class certification, and explicitly rejecting the plaintiffs' argument that it ran from the date the mandate issued).

Here, the Ninth Circuit issued its decision on September 9, 2009, yet Plaintiffs did not file this action until January 26, 2011—more than a year later.[5]

---

[4]The only other case Plaintiffs cite in support of their position—*Davis v. United States Steel Corp.*, 528 F. Supp. 220, 222 (E.D. Pa. 1981)—supports the County. The issue in that case was when tolling stopped on individual Title VII claims that had been previously been part of a class action. The defendant argued that tolling stopped when the Court of Appeals decided that the class action could not adjudicate the individual claims. In contrast, the plaintiffs argued that tolling ended only when the mandate issued after the Court of Appeals' decision. *Id.* The Court *rejected* plaintiffs' contention. *Id.*

[5]Measuring the one-year period from the date of decision

(continued . . .)

D. Plaintiffs' Claims Accrued When Measure E Was Enacted In 2006.

Plaintiffs claim that the statute of limitations began to run on January 19, 2011, when the County notified them that Measure E had been in effect since the District Court's dismissal of the federal case and the consequent vacatur of the injunction previously issued by that court. RB 24. This contention ignores the allegations of their own Complaint. That Complaint challenges the validity of what Plaintiffs characterize as the "Kern Ban." 1 AA 2 (¶1), 13-17 (¶¶43-62). And, as the Complaint acknowledges, "[t]he substance of the Kern Ban is contained in two sentences" found in Measure E. 1 AA 13 (¶44). The first sentence makes it unlawful to land apply biosolids within the unincorporated areas of the County. *Id.* The second sentence provides that previously permitted sites shall have six months to discontinue land application. *Id.*

Although this six month period can be—and has been—extended by administrative action, once the statute becomes effective, Measure E is a flat prohibition. Other than an initial hardship delay, which was twice granted to Plaintiffs—Measure E contains no provisions for administrative waivers, exemptions, permits or variances. Accordingly, Plaintiffs' claims arise from the enactment of Measure E, not from any administrative decision taken by the County in the course of its implementation. Indeed, Plaintiffs' state-court Complaint does not even mention the January 2011 letter that Plaintiffs now say started the

---

(. . . continued)

means that in some cases, like this one, the period will begin to run while the plaintiff files a petition for certiorari to the Supreme Court. This is consistent with the rule that filing such a petition does not extend the 30-day period mandated by 28 U.S.C. §1367(d). *See Kendrick v. City of Eureka*, 82 Cal. App. 4th 364 (2000).

statute of limitations to run. The statute of limitations therefore began to run when Measure E was adopted.[6]

Plaintiffs rely on the fact that their Complaint includes allegations attacking Measure E "as applied." 2 AA 393. But "[t]he mere inclusion of the words 'as applied' [in] the prayer for relief is not determinative." *County of Sonoma v. Superior Court*, 190 Cal. App. 4th 1312, 1326 n.11 (2010). Instead, a court must determine whether the complaint "assert[s] an injury arising solely from the Ordinance's enactment." *Id.* at 1326. In *County of Sonoma*, the court held that the statute began to run when the assertedly invalid zoning ordinance was enacted, not when the County sent plaintiff a "stop order" informing it that it needed a zoning permit. *Id.* The court held that "because 'there was no administrative adjudicatory decision related to [plaintiff's] claims,' the limitations period cannot have commenced on any date other than the effective date of the Ordinance." *Id.* at 1327.

So it is here. Plaintiffs are not challenging any administrative decision made by the County—indeed, the only administrative decision the County made was to twice *grant* Plaintiffs' application for a delay of Measure E's effective date. Instead, as

---

[6]Plaintiffs recognized as much when they filed their federal lawsuit. There they alleged that "an actual case or controversy . . . exists between Plaintiffs and Defendants *as a result of Kern County's enactment of the Ban* and its conflict with the Plaintiffs' rights to land apply biosolids under federal and state law and previous Kern County ordinances. . . . Defendant Kern County *has blocked* lawful commerce in biosolids." 1 AA 143 (¶¶9, 10) (emphases added).

Moreover, the January 19 letter does not say what Plaintiffs say it does. While it gave Plaintiffs a second six-month extension to begin to comply with Measure E, it did not state that that was the ordinance's effective date. To the contrary, the letter stated that Measure E had been in effect since the federal District Court dismissed Plaintiffs' federal case. 2 AA 413 ("On November 9, 2010 the federal trial judge dismissed the lawsuit, thereby dissolving the injunction against the implementation of Measure E. With this new ruling, Measure E is now in effect").

the Complaint makes clear, Plaintiffs are attacking the "Kern Ban" itself—*i.e.*, Measure E's prohibition of land application. Their claims therefore arose when Measure E was adopted.[7]

The cases Plaintiffs cite are not to the contrary. In each of them, the plaintiff was challenging something other than the ministerial decision to enforce a previously enacted ordinance. For example, in *Travis v. County of Santa Cruz*, 33 Cal. 4th 757 (2004), the Court held that the plaintiff could challenge the county's imposition of permit conditions, as well as the ordinance authorizing imposition of the conditions, because issuance of the permit "required more than a purely mechanical or arithmetic process on [the county's] part." *Id.* at 770. Similarly, in *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 25 Cal. 4th 809 (2001), the Court held that the statute of limitations began to run each time the plaintiff paid a city tax, which caused a legally separate injury that could be redressed either by a writ of mandate or an action for refund. *Id.* at 812, 818-25.

These cases are therefore inapposite. In this case, the County did nothing more than indicate its intention to enforce a county ordinance that had previously been enjoined by a federal court. That act involved no administrative discretion. Consequently, the statute began to run when Measure E was enacted.

---

[7]Indeed, since Plaintiffs allege that they are the only entities affected by Measure E (1 AA 21 (¶102) (Measure E "unjustly discriminates by requiring only Plaintiffs, generating and handling out-of-county biosolids, to cease land application of biosolids")), they necessarily claim that Measure E can never be validly enforced against *anyone*. Accordingly, there is no meaningful distinction between a facial and an "as-applied" challenge in this case.

II.

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

As Appellants demonstrated in their Opening Brief, Plaintiffs bear the burden of showing that the Act is preempted—a burden that is particularly heavy in this case. AOB 25-28. Plaintiffs do not disagree; instead, they simply ignore the presumption against preemption mandated by prior case law. Similarly, they ignore the cases, such as *Waste Resource Technologies, Inc. v. Department of Public Health*, 23 Cal. App. 4th 299 (1994), holding that the California Integrated Waste Management Act ("CIWMA" or "Act") did not represent "a fundamental change in the Legislature's traditional outlook towards the subject of waste handling," because it reflected "no legislative intent to displace deeply entrenched local authority." *Id.* at 309. They likewise ignore this Court's controlling decision in *County Sanitation District No. 2 v. County of Kern*, 127 Cal. App. 4th 1544 (2005) ("*CSD2*"), which expressly linked the Act's recycling mandate to its requirement that local governments prepare waste management plans. And—most notably—they ignore the statutory language making the "recycling mandates" contained in Public Resources Code Section 40051(a) and (b) applicable *only* when public entities are "implementing this division"—*i.e.*, implementing the Act.[8] For these and other reasons, Plaintiffs' preemption claim must be rejected.

A. Measure E Does Not Conflict With The Act.

1. Measure E Does Not Conflict With Section 40051.

Plaintiffs' preemption claim is based on the assertion that the Act "mandates recycling and [Measure E] prohibits it." RB 33.

---

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

The primary basis for this claim is Section 40051, which according to Plaintiffs requires local entities in California to "promote" and "maximize" recycling whenever they attempt to regulate solid waste. *See* RB 33, 35.

Plaintiffs' reliance on Section 40051 ignores this Court's recognition in *CSD2* that the Act's recycling requirements are linked to the preparation of waste management plans meeting increasing recycling targets. There the Court stated:

> Other California legislation affecting the disposal and use of sewage sludge is the California Integrated Waste Management Act of 1989, which requires the use of recycling and source reduction to reduce the amount of solid waste going into landfills. 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))

This Court's analysis of the Act in *CSD2* was entirely accurate. The only operative portion of the Act that requires public entities to "promote" or "maximize" recycling is Section 40051, subdivisions (a) and (b).[9] However, although one would never know it from Plaintiffs' briefs (*see, e.g.*, RB 35 (quoting statute

---

[9]The full text of Section 40051 is as follows:

> *In implementing this division*, the board and local agencies shall do both of the following:
>
> (a) Promote the following waste management practices in order of priority: (1) Source reduction. (2) Recycling and composting. (3) Environmentally safe transformation and environmentally safe land disposal, at the discretion of the city or county.
>
> (b) Maximize the use of all feasible source reduction, recycling, and composting options in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal. For wastes that cannot feasibly be reduced at their source, recycled, or composted, the local agency may use environmentally safe transformation or environmentally safe land disposal, or both of those practices. (Emphasis added.)

without the critical language)), these requirements are prefaced—and therefore limited—by the words "in implementing this division." Accordingly, the Act requires public entities in California to "promote" or "maximize" recycling only when they are implementing its provisions.

This language cannot be ignored. In the first place, the words of a statute are the most reliable indicator of what the statute means and the Legislature's intent. So the Legislature must have meant *something* by including this language in Section 40051. Yet Plaintiffs never explain how this language limits the scope of the Act's recycling mandates.

In fact, they say just the opposite. They contend, as they must, that a local public entity "implements this division" *whenever* it enacts a law regulating solid waste disposal and recycling. *See* RB 38 ("Any local laws concerning solid waste disposal and recycling are therefore implementing the IWMA"). Therefore, according to Plaintiffs, the "implementing" language of Section 40051 imposes no limit as all on the statute's scope.

There are multiple reasons why this contention is wrong. *First*, it violates the rule that "courts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous." *Klein v. United States*, 50 Cal. 4th 68, 80 (2010). Yet Plaintiffs' interpretation of the "implementing" language renders it meaningless and, therefore, superfluous.

Second, it misconstrues the Act's scope. Plaintiffs say that that scope is "broad" and "encompasses solid waste management statewide." RB 38. But that does not mean that local governments implement the Act when they regulate solid waste management. To the contrary, the courts have repeatedly held (in cases which Plaintiffs ignore) that "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) (emphasis added).

Moreover, the cases also recognize that 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, the Act did not displace the traditional source of local government's power to regulate solid waste: the police power granted by Article XI, Section 7. The County's voters were using *that* power—and not implementing the Act—when they passed Measure E. Indeed, Measure E itself recites (in language that Plaintiffs ignore) that it was enacted pursuant to the voters' authority under Article XI, Section 7. *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 as set forth in Article XI, Section 7, of the California Constitution"). Accordingly, the County's voters were not "implementing this division" when they enacted Measure E. It is therefore outside the scope of Section 40051's recycling requirements.[10]

Plaintiffs likewise err in asserting that the County's construction of the "implementing" language in Section 40051 would lead to an absurd result. Contrary to Plaintiffs' argument, giving meaning to the words used by the Legislature would not mean that the Act would preempt "only local actions consistent with the Act." RB 38. Instead, the Act would continue to invalidate local government action taken pursuant to the Act that contravenes its requirements. If, for example, a county required that

---

[10]Plaintiffs also cite the statement in the County's Opening Brief that the Act "'sets forth a comprehensive statewide program for solid waste management.'" RB 34 (quoting AOB 39). This is grasping at straws, for the full sentence of which Plaintiffs quote only a portion does not support their position: "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." AOB 39 (emphasis added).

waste generated within a county be landfilled rather than recycled, that would violate the Act, because these changes would be reflected in the county's own waste management plan, which all parties agree must comply with Section 40051. §41800(a).

Finally, the County showed in its Opening Brief that the Act treats land application more critically, and less favorably, than all other forms of recycling. That is because land application counts as recycling for purposes of meeting the Act's diversion goals only if the State 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); *see* AOB 34-35.

Plaintiffs have no response other than to say that one of the Plaintiffs—the City of Los Angeles— is not claiming diversion credit for *its* land application. RB 43. This misses the point, which is that *the Act* differentiates between land application and other forms of recycling, recognizing that it—unlike other forms of recycling—can "pose a threat to public health or the environment." §41781.1(a)(1). Accordingly, the only land application that the Act endorses—by counting it against the diversion goals—is land application for which the State has made the relevant finding. That does not help Plaintiffs, for it is undisputed that their land application has never gone through the public hearing process required by Section 41781.1(a)(1).

2. Measure E Does Not Conflict With Section 40052.

In an effort to circumvent the limit that Section 40051 places on its supposed mandates, Plaintiffs cite Section 40052, which lists the Act's purposes.[11] But this statute provides no basis for preemption.

---

[11]Section 40052 provides as follows:

The purpose of this division is to reduce, recycle, and

(continued . . .)

In the first place, the only portion of this statute that expressly applies to local governments is the last clause, which declares that one of the purposes of the Act is "to specify the responsibilities of local governments to develop and implement integrated waste management programs." This portion of the statute imposes no general duties on local entities to maximize recycling. To the contrary, it supports the County's interpretation of Section 40051, by linking the responsibilities of local government under the Act to the development and implementation of waste management plans. *See* AOB 29-33; *see* pp.18-19, *supra.*

Nor can a basis for preemption be found in the remaining portions of Section 40052, which do not even mention local governments. Statutes that identify a legislative purpose help courts interpret the laws to which they refer *if* those laws are ambiguous and need construction. But they do not impose substantive requirements not contained elsewhere in a statute's text. Nor can such requirements be added by the courts in order to accomplish a statute's stated purposes. *See* CODE CIV. PROC. §1858 ("In the construction of a statute . . . the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted . . ."). As a result, courts will not rely on statutory purpose alone to accomplish a result that is not supported by the remainder of a statute:

> Identification of the laudable purpose of a statute alone is insufficient to construe the language of the statute. To reason from the evils against which the statute is aimed in order to determine the scope of the statute while

---

(. . . continued)

> reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner to conserve water, energy and other natural resources, to protect the environment, to improve regulation of existing solid waste landfills, to ensure that new solid waste landfills are environmentally sound, to improve permitting procedures for solid waste management facilities, and to specify the responsibilities of local governments to develop and implement integrated waste management programs.

> ignoring the language itself of the statute is to elevate substance over necessary form. The language in which the statute is cast confines and channels its purpose. Without due attention to the statutory terms, the statute becomes an open charter, a hunting license to be used where any prosecutor, plaintiff and judge sees an evil encompassed by the statutes' purpose. To the contrary, statutory interpretation must start with the words that define and cabin its laudable purposes. (*Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 176 n.9 (2000) (citation and internal quotation marks omitted))[12]

Accordingly, Section 40052's description of the Act's purposes cannot enlarge the mandates it imposes on local governments.

3. Measure E Does Not Conflict With Section 40053.

Section 40053 provides that the Act "is not a limitation on the power of a city, county, or district to impose and enforce reasonable land use conditions . . . in order to prevent or mitigate potential nuisances, if the conditions or restrictions do not conflict with . . . the policies, standards, and requirements of this division and all regulations adopted pursuant to [the Act]." Plaintiffs assume this statute has independent preemptive force. *See* RB 35. But its language provides only that the Act does *not* preempt "reasonable land use conditions" where there is no conflict with its "policies, standards, and requirements." Therefore, the statute merely prevents courts from using the doctrine of *field* preemption to nullify local land use ordinances that do not conflict with the Act's provisions. It does not provide an independent basis for courts to invoke *conflict* preemption. *See* CODE CIV. PROC. §1858.[13]

---

[12]*Accord, Howard Jarvis Taxpayers Ass'n v. City of Riverside*, 73 Cal. App. 4th 679, 687 (1999) (provision requiring that initiative "be liberally construed to effectuate its purposes" "does not license either enlargement or restriction of its evident meaning") (citations and internal quotation marks omitted).

[13]This common sense interpretation of Section 40053 is

(continued . . .)

Moreover, even if Section 40053 affirmatively provided that local land use ordinances *would* be preempted if they conflicted with the Act's "policies, standards, and requirements," the only "policies, standards, and requirements" that Plaintiffs suggest conflict with Measure E are those contained in Sections 40051 and 40052. As discussed above, however, neither statute preempts Measure E. Accordingly, neither does Section 40053.

4. Measure E Does Not Conflict With The Remaining Provisions Of The Act Cited By Plaintiffs.

Finally, Plaintiffs cite several other provisions of the Act that generally describe its stated goals. *See* RB 33 (citing §40000(e)); RB 38 (citing §§40000(c), 40001(a),(b) & 40002). Some of these provisions merely describe some of the Act's stated purposes. *See, e.g.*, §40000(c) (Act enacted because "there presently is no coherent state policy to ensure that the state's solid waste is managed in an effective and environmentally sound manner"); §40000(e) (describing reasons for promoting "reduction, recycling, or reuse of solid waste"). Like Section 40052, these provisions do not themselves impose a mandate on local entities. *See* pp.20-21, *supra.*

Other provisions that Plaintiffs cite express the Legislature's hope that the state and local governments, and local governments collectively, will cooperate in achieving the Act's goals. *See, e.g.*, §40001(a) ("the responsibility for solid waste management is a shared responsibility between the state and local governments");

(. . . continued)

supported by its placement in the CIWMA. Each of the next three sections of the statute provides that CIWMA does not limit pre-existing legal authority. *See* §40054 (Act does not impair government officials' power to enjoin nuisances); §40055 (Act does not limit power of other state agencies); §40056 (Act does not limit private nuisance actions). These statutes are relevant to interpreting Section 40053. *See, e.g., People v. Martinez*, 11 Cal. 4th 434, 443, 451 (1995) (construing statute by comparison to its statutory neighbors).

§40001(b) ("it is the policy of the state to assist local governments in minimizing duplication of effort, and in minimizing the costs incurred, in implementing this division through the development of regional cooperative efforts and other mechanisms which comply with this division"). Another provision announces a state policy to require local governments to "to make adequate provision for solid waste handling, both within their respective jurisdictions and in response to regional needs consistent with the policies, standards, and requirements of this division." §40002.

All of these provisions have one thing in common. They simply express state policy and nothing more. As a result, none contains language requiring the state or local governments to do—or prevent them from doing—*anything*. For example, Plaintiffs say that the Act "requires local agencies to 'make adequate provision for solid waste handling, both within their respective jurisdiction and in response to regional needs.'" RB 38 (quoting §40002) (emphases omitted). This contention—which rests on a misleadingly truncated quotation—is not true. Section 40002 does not mandate local agencies to accept waste produced by others.[14] Instead, it simply "encourage[s]" regional cooperation, by means that are poles apart from forcing one local entity to accept the waste generated by others. As the court explained in *Waste Resource Technologies*:

---

[14]The sentence from which Plaintiffs have misleadingly quoted reads as follows:

> As an essential part of the state's comprehensive program for solid waste management, and for the preservation of health and safety, and the well-being of the public, the Legislature declares that it is in the public interest for the state, as sovereign, to authorize and require local agencies, as subdivisions of the state, to make adequate provision for solid waste handling, both within their respective jurisdictions and in response to regional needs consistent with the policies, standards, and requirements of this division and all regulations adopted pursuant to this division.

> Local conditions transcending city or county boundaries might require collection and disposal to be handled on a regional basis, and the Legislature encouraged such efforts (see §§ 40001, subd. (b), 40002, 41791.2). It therefore made provision in the Act for the creation and operation of regional agencies (§§ 40970-40975), garbage disposal districts (§§ 49000-49050), and garbage and refuse disposal districts (§§ 49100-49195). (23 Cal. App. 4th at 307-08)

All these methods of regional cooperation are *voluntary*, and therefore entirely consistent with the structure of the Act. In contrast, Plaintiffs' attempt to force the County to involuntarily accept their biosolids goes far beyond anything the Legislature contemplated—and anything ever approved by the courts. Indeed, even the federal District Court that temporarily enjoined Measure E pointed out that 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).[15]

In short, these provisions are purely precatory, and impose no duties that can be enforced by a court. *See, e.g., Tomra Pac., Inc. v. Chiang*, 199 Cal. App. 4th 463, 490-91 (2011) (Budget Act provisos expressing Legislature's intent that loans from special fund to general fund be repaid so as to ensure that program supported by special fund not be adversely affected by the loans were merely "[p]recatory statements of intent" that did not impose "an affirmative duty enforceable through a writ of mandate"); *Shamsian v. Dep't of Conservation*, 136 Cal. App. 4th 621, 621, 640-41 (2006) (statute providing that "[t]he responsibility to provide convenient, efficient, and economical redemption opportunities rests jointly with manufacturers, distributors, dealers,

---

[15]Nor, of course, does the Act give the *state courts* authority to enforce any obligation on the County's part to accept Plaintiffs' biosolids.

recyclers, processors, and the Department of Conservation" did not create affirmative duties).

B. Measure E Cannot Be Invalidated On The Ground That It Purportedly Interferes With The Act's Purposes.

Since Plaintiffs cannot show that a conflict exists between Measure E and any of the substantive provisions of the Act, they are forced to rely on the claim that the Ordinance is preempted because it would "frustrate the declared policies and purposes" of state law." RB 34 (citation and internal quotation marks omitted). There are multiple reasons why this contention is wrong.

First, Plaintiffs' preemption claim is wholly abstract. Plaintiffs have never contended, or even pled, that compliance with both Measure E and the Act is impossible. In fact, their brief implicitly disclaims any such contention. *See* RB 36-37 ("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") (citation and internal quotation marks omitted). Indeed, Plaintiffs have never even pled that Measure E will make it more difficult for them to meet the Act's diversion goals. In short, then, their claim that Measure E frustrates the Act's purposes is a restatement of their contention that the Ordinance forbids what Measure E requires, and should be rejected for the same reasons.

Second, state law preemption requires more than a showing that a local measure has different, and contradictory, purposes to those embodied in a state statute. While Plaintiffs cite several cases to support their preemption argument (RB 36-37), these cases hold only that a local ordinance cannot impair *affirmative privileges or rights* granted by state law. Consequently, the language Plaintiffs cite must be limited by the context of the cases in which is appears. As the Supreme Court has repeatedly recognized, "[i]t is a foundational principle that: '[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.'" *Harris v. Capital Growth Investors XIV*,

52 Cal. 3d 1142, 1157 (1991) (quoting *Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 734-35 (1989)).

For example, in *Action Apartment Ass'n v. City of Santa Monica*, 41 Cal. 4th 1232 (2007), the Court held that a local ordinance prohibiting landlords from filing certain unlawful detainer actions was preempted by the litigation privilege embodied in Civil Code Section 47(b), which gives landlords "the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." 41 Cal. 4th at 1243 (citation and internal quotation marks omitted). This holding was based on the Court's finding that the local ordinance, which authorized "actions alleging that a landlord had improperly filed an action to recover possession of rental housing would severely restrict landlords' freedom of access to the courts." *Id.*

Similarly, in *Fiscal v. City & County of San Francisco*, 158 Cal. App. 4th 895 (2007), the court held that a local ordinance banning the sale, distribution, transfer and manufacture of all firearms within the city was preempted, *inter alia*, by the Unsafe Handgun Act, which banned the sale of certain guns while providing that other guns "may be sold" in the state. The court held that "the state and local acts are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." *Id.* at 915. Here, by contrast, Plaintiffs do not contend that compliance with both the Act and Measure E is impossible. *See* p.25, *supra*.

In *Huntington Beach Police Officers' Ass'n v. City of Huntington Beach*, 58 Cal. App. 3d 492 (1976), state law gave local employee unions the right to bargain about wages, hours and other terms and conditions of employment. However, a city adopted a resolution "purporting to render work schedule nonnegotiable." *Id.* at 503. The court held that the resolution

conflicted "with . . . the mandatory language of [the state statute]." *Id.*[16]

In *Water Quality Ass'n v. County of Santa Barbara*, 44 Cal. App. 4th 732 (1996), a statute provided that the residential use of water was a right "'that should be interfered with only when necessary for specified health and safety purposes' and that 'on-site water softening or conditioning shall be available only as hereinafter set forth.'" *Id.* at 738 (emphases omitted) (quoting HEALTH & SAFETY CODE §116775). A related statute provided that "no residential water softening . . . appliance shall be installed" unless its minimum salt efficiency rating was "no[t] less than 2850 grains of hardness." 44 Cal. App. 4th at 738-39 (emphasis omitted) (quoting HEALTH & SAFETY CODE §116785). The court held that a local ordinance requiring water softeners to have a higher minimum efficiency conflicted with these statutes: "The Act expressly permits only the limitations set forth therein. By creating further restrictions, the City's ordinance directly conflicts with the limitations in the Act." 44 Cal. App. 4th at 742.

Finally, in *Los Angeles Lincoln Place Investors, Ltd. v. City of Los Angeles*, 54 Cal. App. 4th 53 (1997), a state statute (the "Ellis Act") prohibited local ordinances from interfering with a landlord's right to stop renting property. A city ordinance denied a demolition permit to a landlord unless it agreed not to permit certain uses on its property for ten years. The court held that the ordinance was preempted because it "impermissibly infringed on the owner's right to simply go out of the rental business . . . based on conditions which are not a part of the Ellis Act." *Id.* at 64.

---

[16] *See also Int'l Bhd. of Elec. Workers v. City of Gridley*, 34 Cal. 3d 191, 202 n.12 (1983) (city resolution permitting revocation of union recognition as sanction for participation in illegal strike conflicted with Legislature's determination that employees could choose their own representatives except "as otherwise provided by the Legislature") (citation, internal quotation marks and emphasis omitted).

In each of these cases the preempted local ordinance impaired an affirmative right granted by state law: the right to file a lawsuit without fear of derivative liability (*Action Apartments*), the right to sell certain handguns (*Fiscal*), the right of employee organizations to bargain about work schedules (*Huntington Beach*), the right to obtain water for residential use provided minimum water softening standards were met (*Water Quality Ass'n*) and the right of landlords to go out of business (*Lincoln Place*). Even Plaintiffs do not contend that the Act, as construed by the trial court, gives them an affirmative right to dump sludge in the County's unincorporated area. *See* RB 31. These decisions are therefore inapposite.[17]

Finally, Plaintiffs cite *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853 (2002), for the proposition that "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, regulation cannot be used to ban the activity or otherwise frustrate the statute's purpose." RB 34 (quoting 27 Cal. 4th at 868). But the language Plaintiffs quote does nothing more than describe a *federal* preemption test articulated in cases that the California Supreme Court found "distinguishable." 27 Cal. 4th at 868. *Great Western* therefore had no reason to decide whether this federal standard was part of California law. Plaintiffs' reliance on *Great Western* therefore violates the rule that "[a]n opinion is not authority for a point not raised, considered, or resolved therein." *Styne v. Stevens*, 26 Cal. 4th 42, 57 (2001).

---

[17]In addition to the cases discussed in text, Plaintiffs also cite *City of Lake Forest v. Evergreen Holistic Collective*, 203 Cal. App. 4th 1413 (2012), *petition for review granted*, 140 Cal. Rptr. 3d 795 (Cal. May 16, 2012). RB 34. That case is no longer citable, now that review has been granted by the California Supreme Court. CAL. R. CT. 8.1105(e), 8.1115(a).

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

Even if Measure E somehow conflicted with other provisions of the Act, it would be protected against preemption by Section 40059(a). While Plaintiffs label that statute as the "garbage collection exemption" (RB 40)—words that appear nowhere in the Act or in any case interpreting it—the statutory language undermines Plaintiffs' mischaracterization.

Section 40059(a) preserves local autonomy over the "nature, location, and extent of providing solid waste handling services." Two separate provisions of the Act undermine Plaintiffs' contention that the "solid waste handling services" over which Section 40059(a) preserves local autonomy relate only to garbage collection.

The first statute is Section 40057, a statutory neighbor of Section 40059. That statute provides: "Each county . . . which provides solid waste handling services shall provide for those services, including, but not limited to, *source reduction*, *recycling*, *composting activities*, and the collection, transfer, and *disposal* of solid waste within or without the territory subject to its solid waste handling jurisdiction." (Emphasis added.)

As this statute indicates, the "solid waste handling services" covered by the Act include the entire panoply of services addressing solid waste, from source reduction to composting. None of these services is limited to garbage collection, and some of them—such as source reduction, composting and recycling—don't involve garbage collection at all. Plaintiffs offer no reason why "solid waste handling services" should mean one thing in Section 40057 and something quite different in Section 40059. To the contrary, the two statutes should be read *in pari materia*. *IBM v. State Bd. of Equalz'n*, 26 Cal. 3d 923, 932 (1980). The "solid waste handling services" covered by Section 40059(a) must therefore be the same as the "solid waste handling services" referred to in Section 40057, which include recycling and, consequently, land application.

Section 40195 leads to the same conclusion. As Plaintiffs acknowledge (RB 41), that statute defines "solid waste handling" as "the collection, transportation, storage, transfer, or processing of solid wastes." §40195. "Processing" includes recycling (§40172) and Plaintiffs do not deny that "recycling" includes land application.

Consequently, both Section 40057 and Section 40195 confirm that Section 40059(a) preserves local autonomy over the "nature, location, and extent" of land application. Measure E addresses this precise subject. Prohibiting a particular method (land application) of recycling a particular kind of solid waste (biosolids) is a way of controlling the "nature" of recycling. *See City of Alhambra v. P.J.B. Disposal Co.*, 61 Cal. App. 4th 136, 141 (1998) ("Section 40059 confirms the City's right to determine the frequency *and means* of solid waste handling services") (emphasis added). Similarly, prohibiting land application within the county's unincorporated areas controls the "extent" and "location" of recycling. Hence, the local autonomy preserved by Section 40059(a) necessarily includes the right to enact Measure E. Plaintiffs therefore err in arguing that "the statutory text supports" their interpretation of Section 40059(a). RB 41.[18]

The cases construing Section 40059(a) do not support Plaintiffs' interpretation. While these cases address various aspects of garbage collection, at most they demonstrate what no one disputes: that *some* of the "solid waste handling services" covered by Section 40059(a) relate to garbage collection. *No* case supports

---

[18]The text of the Act likewise contradicts Plaintiffs' unsupported assertion that Measure E is preempted because it "is not a regulation of the *services* that support land application; it is a ban of the practice itself." RB 41 (emphasis in original). Plaintiffs' distinction between "services" and "practices" has no basis in the Act's language. Moreover, Section 40057 unambiguously states that recycling *is* a "solid waste handling service[]," the precise term used in Section 40059(a).

Plaintiffs' claim that the "solid waste handling services" covered by the statute are limited to that subject.[19]

Nor can Plaintiffs rely on the rule that "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." RB 42. While some of the areas reserved contained in Section 40059(a) are specific and others are general, the Legislature specifically chose to make "all of the following" matters listed in Section 40059(a) exempt from state control. This phrase strongly implies that *each* specific item listed in Section 40059(a) stands on its own, without being limited by the others. The doctrine of *ejusdem generis* therefore does not apply.

Nor can Plaintiffs rely on the provisions of Section 40059(a)(2) to interpret Section 40059(a)(1). *See* RB 42. The introductory phrase "including all of the following" indicates that Subsections 40059(a)(1) and (a)(2) are disjunctive, not conjunctive. Accordingly, the Legislature must have intended to preserve local autonomy over any matter addressed by *either* subdivision (a)(1) or (a)(2). Plaintiffs err in contending that the latter subdivision limits the former.

Moreover, even if the "solid waste handling services" covered by Section 40059(a) were limited to garbage collection, Plaintiffs would not be helped. The statute *also* preserves local autonomy over any other "aspect[] of solid waste handling" that is of "local concern." This portion of the statute applies to this case because (as the Opening Brief demonstrated), Measure E bans a solid waste handling service which raises numerous "local concerns," such as flies and odors. AOB 36-37. Plaintiffs have no response.

---

[19]Even the federal district court that invalidated Measure E held only that Section 40059 has been "interpreted . . . to preserve local power over trash haulers and garbage collection services." *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d at 895 (emphasis omitted). It did not hold that the statute's reach was limited to these areas.

Finally, Plaintiffs say that Kern's interpretation of Section 40059(a) renders "key provisions of the [Act] superfluous." RB 42. Not so. While the rest of the Act gives local agencies specific *goals* to meet in disposing of their solid waste, Section 40059(a) gives each agency discretion in choosing the *means* to meet those goals within the confines of applicable law. Accordingly, Plaintiffs' claim that giving effect to Section 40059(a)'s plain language would nullify the remainder of the Act is wide of the mark.

III.

PLAINTIFFS CANNOT SHOW A PROBABILITY OF SUCCESS ON THEIR POLICE POWERS CLAIM.

The County's Opening Brief contended that the courts should not use the police powers doctrine to impose duties on local entities to accept waste produced by others where the Legislature has enacted a comprehensive scheme governing waste management that declines to impose any such obligations. AOB 37-41. Plaintiffs agree that the Act "establishe[d] a comprehensive scheme addressing the handling and disposal of solid waste, which is defined to include biosolids." RB 33. Yet they continue to assert a police powers claim that seeks to substitute judicial activism for the carefully crafted balance of state and local power that the Legislature adopted when it passed the Act. RB 27-33.

Plaintiffs first argue that the County has misconstrued the Superior Court's order as imposing a duty to accept Plaintiffs' biosolids. RB 28. The pages Plaintiffs cite (3 AA 663-64) undermine this contention. There the Superior Court held that: (1) a local ordinance that has an extraterritorial effect must "represent[] a reasonable accommodation of any competing interests"; (2) a "complete ban" like Measure E "precludes 'accommodation'"; and (3) the County's prior biosolids ordinance, which restricted land application to Class A biosolids, "would seem to be" a "reasonable accommodation." 3 AA 663-64. This message is

unmistakable: a ban on land application is invalid while lesser regulations may be acceptable. If this is not a square holding that the County may not prohibit *all* land application, what is it?

Next, Plaintiffs say that this aspect of the trial court's ruling is not subject to *de novo* review and chide the County for ignoring the trial court's factual findings. RB 28-30. However, the County contends that the "regional welfare" doctrine cannot invalidate Measure E *as a matter of law*. *See, e.g.*, AOB 40 ("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"). That issue is purely legal, and therefore neither subject to substantial evidence review nor dependent on the trial court's factual findings.

Plaintiffs then challenge the County's contention that Section 40059(a) undermines application of the "regional welfare" doctrine to Measure E. RB 30. Part of this argument reprises Plaintiffs' erroneous contention that this statute merely "relates to the grant of franchises for garbage collection" (*id.*), which we have already disposed of. The remainder contends that even if Measure E is protected by Section 40059(a)(1), the "notwithstanding any other provision of law" in that statute would not protect the Ordinance against a constitutional challenge.

The County does not disagree that no statute could immunize Measure E against a constitutional challenge that does not depend on conflict with state law. But that principle does not make Section 40059(a)—or the Act as a whole—irrelevant to Plaintiffs' police power claim. As we have seen, and as the Court of Appeal held in *Waste Resource Technologies*, there are numerous provisions in the Act that encourage local governments to work together to solve regional disposal problems. *See* 23 Cal. App. 4th at 307-09. But they have one common theme: they are all *voluntary*. Put simply, no provision in the Act requires any local agency unilaterally to make *any* accommodation—

reasonable or otherwise—for waste produced by others. Since one of the Act's stated purposes is to ensure that "local agencies . . . make adequate provision for solid waste handling, both within their respective jurisdiction and in response to regional needs" (§40002), the Legislature's decision to accomplish this purpose by voluntary rather than coercive means must have been a considered policy choice.[20] That policy choice should prevent this Court from rushing in where the Legislature has feared to tread. Or, to put the issue another way, the Act's reliance on voluntary action by local entities *itself* represents the "reasonable accommodation of competing interests" with which courts should not interfere under the "regional welfare" doctrine.

Finally, Plaintiffs offer a "slippery slope" argument, contending that if the "regional welfare" doctrine does not apply to solid waste disposal, "California would be a state of '58 separate fiefdoms,'" and each county could enact an ordinance like Measure E. RB 32 (citation omitted). But it is pure speculation whether other jurisdictions might enact similar ordinances if Measure E is upheld. Some jurisdictions, particularly in economically distressed rural areas, may want to import biosolids to support the local economy or give local farmers the benefits that Plaintiffs claim derive from land application. 1 AA 6-7 (¶¶20-21). In any event, the speculative possibility that other jurisdictions might enact ordinances similar to Measure E is no reason to hold the measure invalid now. *See DeVita v. County of Napa*, 9 Cal. 4th 763, 793 (1995) (rejecting contention that general plans could not be amended by initiative because of "the mere possibility" that giving electorate that right would frustrate the statutory purposes for requiring local governments to adopt general plans). In

---

[20]The Legislature may have decided to try voluntary encouragement before coercion or it simply may have been unwilling to impinge on what had historically been a local responsibility. However, *why* the Legislature made this policy choice is irrelevant.

other words, the Legislature's failure to provide a solution for a problem that has not occurred in the more than two decades since the Act was enacted is no reason for the Court to balance the competing interests itself and impose duties on local governments that the Legislature did not see fit to adopt. *See, e.g., Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1168 (1991) ("In the absence of clear legislative direction, which the general anti-discrimination provisions of the Unruh Act do not provide, we are unwilling to engage in complex economic regulation under the guise of judicial decisionmaking"); *cf. id.* at 1168 n.15 (collecting cases noting "the inappropriateness of judicial intervention in complex areas of economic policy").

CONCLUSION

The order granting a preliminary injunction should be reversed.

Dated: July 26, 2012.

Respectfully,

ARNOLD & PORTER LLP
JEROME B. FALK, JR.
STEVEN L. MAYER
SARA J. EISENBERG

COUNTY OF KERN
THERESA A. GOLDNER
Mark L. Nations

HOGAN LAW APC
MICHAEL M. HOGAN

By: Steven L. Mayer /SJE
STEVEN L. MAYER

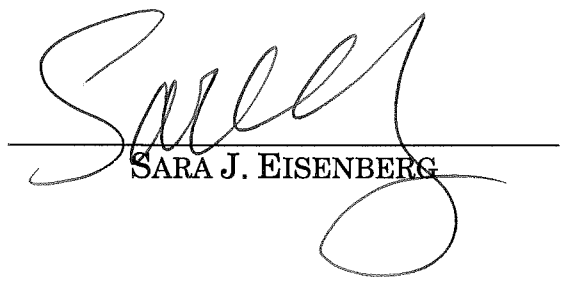
Attorneys for Appellants County of Kern and Kern County Board of Supervisors

31906265vF

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' Reply Brief contains 11,038 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

Dated: July 26, 2012



SARA J. EISENBERG

31906265vF

PROOF OF SERVICE

I am over eighteen years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is Three Embarcadero Center, 7th Floor, San Francisco, CA 94111-4024.

On July 26, 2012, I served the following document(s):

APPELLANTS' REPLY BRIEF

I served the document(s) on the following person(s):

SEE ATTACHED SERVICE LIST

The document(s) was served by the following means:

By U.S. mail. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above.

I 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.

Dated: July 26, 2012

Myrna Da Cunha

Myrna M. Da Cunha

SERVICE LIST
Case No. F063381

Daniel V. Hyde, Esq.
Paul J. Beck, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
221 North Figueroa Street, Suite 1200
Los Angeles, CA 90012
TEL: 213/250.1800
FAX: 213/580.7995
Email: hyde@lbbslaw.com
beck@lbbslaw.com

Attorneys for Plaintiff/Respondent County Sanitation District No. 2 of Los Angeles County

Roberta Larson, Esq.
SOMACH, SIMMONS & DUNN
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
TEL: 916/446.7979
FAX: 916/446.8199
Email: blarson@somachlaw.com

Attorneys for Plaintiff/Respondent California Association of Sanitation Agencies

Bradley R. Hogin, Esq.
Edward L. Bertrand, Esq.
Ricia R. Hager, Esq.
WOODRUFF, SPRADLIN & SMART
A Professional Corporation
555 Anton Boulevard, Suite 1200
Costa Mesa, CA 92626
TEL: 714/558.7000
FAX: 714/83.7787
Email: Bhogan@wss-law.com
Ebertrand@wss-law.com
Rhager@wss-law.com

Attorneys for Plaintiff/Respondent Orange County Sanitation District

Carmen A. Trutanich, Esq.
City Attorney
Valerie Flores, Esq.
Managing Assistant City Attorney
Edward M. Jordan, Esq.
Assistant City Attorney
CITY OF LOS ANGELES
800 City Hall East
200 North Main Street
Los Angeles, CA 90012-4131
TEL: 213/978.8100
FAX: 213/978.8312
Email: ted.jordan@lacity.org

Attorneys for Plaintiffs/Respondents City of Los Angeles, Responsible Biosolids Management, Inc. R&G Fanucchi, Inc., and Sierra Transport, Inc.

James B. Slaughter, Esq. *(pro hac vice)*
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005-3311
TEL: (202) 789-6000
FAX: (202) 789-6190
Email: jslaughter@bdlaw.com

Attorneys for Plaintiffs/Respondents City of Los Angeles, Responsible Biosolids Management, Inc, R&G Fanucchi, Inc. and Sierra Transport, Inc.

Gary J. Smith, Esq.
Zachary M. Norris, Esq.
BEVERIDGE & DIAMOND
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
TEL: (415) 262-4000
FAX: (415) 262-4040
Email: gsmith@bdlaw.com
znorris@bdlaw.com

Attorneys for Plaintiffs/Respondents City of Los Angeles, Responsible Biosolids Management, Inc, R&G Fanucchi, Inc., and Sierra Transport, Inc.

Client
Theresa A. Goldner, Esq.
County Counsel
Mark Nations, Esq.
Chief Deputy County Counsel
Charles F. Collins, Esq.
COUNTY OF KERN
Administrative Center
1115 Truxtun Avenue, Fourth Floor
Bakersfield, CA 93301
TEL: 661/868.3800
FAX: 661/868.3805
Email: tgoldner@co.kern.ca.us
ccolins@co.kern.ca.us
mnations@co.kern.ca.us

Attorneys for Defendants/Appellants County of Kern and Kern County Board of Supervisors

Michael M. Hogan, Esq.
HOGAN LAW APC
225 Broadway, Suite 1900
San Diego, CA 92101
TEL: 619/687.0282
FAX: 619/234.6466

Attorneys for Defendants/Appellants County of Kern and Kern County Board of Supervisors

Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

(4 copies)

Hon. Lloyd L. Hicks
Judge of the Superior Court
Tulare County Superior Court
Visalia Division
221 S. Mooney Boulevard
Visalia, CA 93291

Clerk
Tulare County Superior Court
Visalia Division
221 S. Mooney Boulevard
Visalia, CA 93291