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BOARD OF SUPERVISORS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF TULARE

CITY OF LOS ANGELES, *et al.*,

Plaintiffs,

v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,

Defendants.

No. VCU 242057

Action Filed: January 26, 2011

DEFENDANTS COUNTY OF KERN AND KERN COUNTY BOARD OF SUPERVISORS' POST-TRIAL REPLY BRIEF

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I. INTRODUCTION

This case turns on first principles. The Court's duty is "to determine whether the [statute is] constitutional, not if [it is] a good idea." *Vergara v. State*, 246 Cal. App. 4th 619, 627 (2016). Moreover, local legislation is valid unless there is a "clear and unquestionable" conflict with the state or federal constitution. *Arcadia Unified Sch. Dist. v. State Dep't of Educ.*, 2 Cal. 4th 251, 260 (1992). No such conflict exists in this case, for multiple reasons.

First, Plaintiffs' claim that Measure E is preempted disregards the legal standard applicable to conflict preemption and ignores the text of the supposedly preemptive statute. No "inimical conflict" between state and local law "will be found where it is reasonably possible to comply with both the state and local laws." *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 743 (2013); *Kirby v. Cty. of Fresno*, 242 Cal. App. 4th 940, 954-55 (2015). There is no "inimical conflict" here. The Integrated Waste Management Act ("IWMA") requires local agencies to "[m]aximize the use of all feasible source reduction, recycling, and composting options *in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal*." Pub. Res. Code § 40051(b) (emphasis added). Plaintiffs can comply with both the IWMA and Measure E because compliance with the Ordinance will not increase the amount of biosolids "that must be disposed of by transformation and land disposal." And, even if "obstacle preemption" were part of California preemption law, Measure E does not interfere with the IWMA's goals and purposes for the very same reason. The IWMA was enacted to reduce the amount of waste going to landfills and increase the amount being recycled. Measure E does not interfere with either goal.

Second, Plaintiffs' claim that Measure E violates the "regional welfare" doctrine turns that doctrine on its head. The City's use of a single Kern County farm to dispose of almost 80% of its biosolids does not promote the regional welfare. Instead, it furthers only the City's unilateral interests at the expense of the County and its residents. Nor does Measure E prevent the County from managing its fair share of regional biosolids. To the contrary, the County presently composts hundreds of thousands of tons of biosolids annually from all over Southern California. Consequently, Measure E does nothing more than require the City and other biosolids generators to

diversify their biosolids management and spread the biosolids burden regionally. The other Plaintiffs have done just that, and the City can do the same at minimal cost. Such diversification not invalidating Measure E is what the regional welfare doctrine requires.

Third, Plaintiffs' claim that Measure E violates the Commerce Clause is wrong both factually and legally. Measure E does not interfere with interstate commerce. No Plaintiff has ever sought to land apply biosolids from out of state in Kern County. Accordingly, this is a purely local, intrastate dispute, as the Ninth Circuit concluded in holding that Plaintiffs' cognizable interest in interstate commerce was so lacking that Plaintiffs' federal Commerce Clause claim could not be brought in federal court. *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 847-48 (9th Cir. 2009). Consequently, Plaintiffs' Commerce Clause claim depends on their bald assertion that "interference with transactions crossing a state line is not a necessary element for a federal Commerce Clause violation." (Plaintiffs' Opening Post-Trial Brief ("POB") at 47:6-7.) That premise is inconsistent with numerous recent Supreme Court cases. Even if that were not true, Measure E is not discriminatory in violation of the Commerce Clause. It precludes land application by everyone, not just Plaintiffs. Nor is such discrimination shown merely because the cities within the County have not enacted similar legislation. The failure of *the cities* to legislate does not prove discrimination by *the County*. *Cty. Sanitation Dist. No. 2 of Los Angeles Cty. v. Cty. of Kern*, 127 Cal. App. 4th 1544, 1612 (2005). Finally, because Measure E imposes no burden on interstate commerce, it cannot be invalidated under *Pike* balancing.

Fourth, Plaintiffs' intrastate Commerce Clause claim fares no better. Measure E bans land application regardless of source. Consequently, it does not put out-of-county generators at a competitive disadvantage vis-à-vis in-county generators. It therefore does not discriminate in violation of the implied intrastate commerce clause in the California Constitution.

Fifth, and finally, the claims of Plaintiffs OCSD and CSD2 are moot, and they are not entitled to injunctive relief. Neither currently land applies biosolids in the County's unincorporated areas or has done so for several years. Nor does either Plaintiff plan to land apply biosolids in the unincorporated areas in the future. Moreover, both OCSD and CSD2 generate only Class B biosolids, which cannot legally be land applied in the unincorporated areas under the Ordinance

upheld in *CSD2*. Accordingly, neither Plaintiff could land apply the biosolids they generate in the unincorporated areas even if Measure E were held invalid. Consequently, neither Plaintiff has established the factual predicate for a live controversy with Kern County or met its burden of proof to obtain injunctive relief.

II. MEASURE E IS NOT PREEMPTED.

A. Measure E Does Not Conflict With Section 40053.

Plaintiffs begin their preemption argument with the assertion that preemption "begins and ends" with the text of the IWMA, and, in particular, that "express preemption" by Section 40053 is "dispositive." (POB at 30, 31.) This argument is meritless.

Section 40053 provides that the IWMA "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 [IWMA]." (Emphasis added.) Plaintiffs assume this statute has independent preemptive force. (POB at 31.) But its language provides only that the IWMA does *not* preempt "reasonable land use conditions" unless there is a conflict with its "policies, standards, and requirements." Thus, the statute merely prevents courts from using the doctrine of *field* preemption to nullify local land use ordinances that do not conflict with the IWMA's provisions. Moreover, Plaintiffs' claim that the IWMA *expressly* preempts local law conflicts with the recognition in *Waste Resource Technologies v. Department of Public Health*, 23 Cal. App. 4th 299 (1994), that the statute's express preemptive effect is "very narrow." *Id.* at 306 ("The very narrow express quashing of local power in the [IWMA] undermines plaintiffs' claim of implied preemption").

This reading of Section 40053 is supported by its placement in the IWMA. Each of the next three sections of the Act provides that IWMA does not limit pre-existing legal authority. *See* Pub. Res. Code § 40054 (Act does not impair government officials' power to enjoin nuisances); *id.* § 40055 (Act does not limit power of other state agencies); *id.* § 40056 (Act does not limit private nuisance actions). Section 40053 does the same thing; it preserves, rather than limits, preexisting

local authority over land use.[1]

B. Measure E Does Not Conflict With Sections 40051 Or 40052.

Plaintiffs next contend that Measure E is preempted because it conflicts with the IWMA's "policies, standards, and requirements." (POB at 31:27.) But the only "policies, standards, and requirements" Plaintiffs identify are set forth in Sections 40051 and 40052. The former requires local jurisdictions to "promote . . . recycling . . . [and] maximize the use of all feasible source reduction, recycling, and composting options," while the latter requires local entities to "reduce, recycle, and reuse solid waste generated in this state to the maximum extent feasible." (POB at 32.) Measure E does not conflict with either of these requirements. The twin purposes of the IWMA expressly set forth in these statutes are to "recycle and reuse solid waste . . . to the maximum extent possible" (Section 40052) and, although excised from Plaintiffs' quotation (*see* POB at 32:4-6), "to reduce the amount of solid waste that must be disposed of by transformation and land disposal." (Section 40051). In other words, the "goal of the CIWMA is to reduce the stream of waste going to landfills and incinerators" (*City of Los Angeles v. Cty. of Kern*, 154 Cal. Rptr. 3d 122, 141 (2013), *rev'd on other grounds*, 59 Cal. 4th 618 (2014)), and to increase the amount being recycled. Accordingly, a local ordinance that neither increases "the amount of solid waste that must be disposed of by transformation and land disposal" nor decreases the amount being recycled does not conflict with IWMA, and is therefore not preempted.

Plaintiffs failed to produce any evidence that Measure E will reduce the amount of biosolids being recycled or increase the amount being landfilled. (Defendants' Opening Brief ("DOB") at 16-17.) To the contrary, the evidence showed that the amount of biosolids going to landfills will decrease regardless of whether Measure E is upheld. (*Id.* at 17 n.9.) Consequently, Measure E conflicts neither with Sections 40051 and 40052 nor with the "policies, standards, and requirements" set forth in the IWMA.

[1] These adjoining 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).

C. Measure E Is Not Preempted Because Plaintiffs Can Comply With Both It And The IWMA.

Because Measure E does not conflict with IWMA Sections 40051, 40052, or 40053, it cannot be preempted. Nevertheless, out of an abundance of caution, we address the remaining arguments for preemption made in Plaintiffs' Opening Post-Trial Brief.

The first such argument concerns the standards used by California courts to determine whether local law conflicts with state law, and whether those standards were met in this case. Those standards were recently enunciated in *Kirby v. County of Fresno*, 242 Cal. App. 4th 940 (2015):

> "For purposes of *California preemption doctrine*, a "conflict" exists if the local ordinance (1) duplicates the state statute, (2) contradicts the statute, or (3) enters an area fully occupied by general law. [¶] Conflict of the *contradictory type* exists for purposes of preemption when the local ordinance is 'inimical' to the state statute, *which means* the local 'ordinance directly requires what the state statute forbids or prohibits what the state enactment demands.' Under this test, *no preemption exists 'where it is reasonably possible to comply with both the state and local laws*. Conversely, an inimical contradiction exists where 'it is impossible simultaneously to comply with both' the state and local laws. (*Id.* at 954-55 (citations omitted) (emphasis added))

Kirby followed the California Supreme Court's decision in *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729, 743 (2013), which likewise stated that the "'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands" (citing *Big Creek Lumber*, *Great Western Shows*, and *Sherwin-Williams Co.*). Thus, the *Inland Empire* court continued, "no *inimical* conflict will be found *where it is reasonably possible to comply with both* the state and local laws." *Id.* (emphasis added).

Measure E meets this standard. *First*, Measure E does not require what the IWMA forbids, or prohibit what the IWMA demands. *Inland Empire*, 56 Cal. 4th at 743; *Kirby*, 242 Cal. App. 4th at 954-55. No provision in the IWMA requires Plaintiffs to dispose of biosolids through land application, or gives Plaintiffs an affirmative right to land apply biosolids in Kern County. *See City of Los Angeles v. Cty. of Kern*, 509 F. Supp. 2d 865, 897 (C.D. Cal. 2007) (the IWMA does not "require a city or county to allow other local agencies to conduct their recycling activities in its

jurisdiction.") (citation and internal quotation marks omitted).

Second, as shown in Defendants' opening brief, the evidence at trial demonstrated that it is physically and financially possible for Plaintiffs to comply with both the IWMA and Measure E. (DOB at 11:15-14:1.) Indeed, two of the three Plaintiffs, OCSD and CSD2, already do so, and the City can do so at minimal additional cost. (*Id.*) Plaintiffs cite no evidence to the contrary.[2]

Instead, Plaintiffs attempt to shift the field of battle altogether, contending that it is impossible *for the County* to comply with both the IWMA and Measure E. (POB at 36:7-8.) This argument is based solely on Section 40051, which Plaintiffs say requires the County to "[p]romote recycling" and "[m]aximize the use of all feasible source reduction, recycling, and composting options." *Id.* As shown above, however, this argument depends on a truncated quotation the statute requires public agencies to do these things to achieve a stated purpose: "to reduce the amount of solid waste that must be disposed of by transformation and land disposal." Since Measure E does not interfere with this purpose, Measure E does not conflict with the County's obligations under Section 40051.

Plaintiffs also suggest that *Inland Empire* and *Kirby* are distinguishable because the statutes at issue in those cases were "narrowly written" and "created no comprehensive scheme for the protection or promotion of facilities that dispense medical marijuana," while the IWMA supposedly creates a "comprehensive statewide program to promote and maximize recycling." (POB at 34:15-17.) This contention misses the mark. Whether state law is "comprehensive" may be an important factor in determining whether the Legislature intended *field* preemption of a particular subject area. *E.g.*, *Fiscal v. City & Cty. of San Francisco*, 158 Cal. App. 4th 895, 909-11 (2008) (100 pages of state laws on gun licensing constitutes "a broad, evolutional statutory regime"); *American Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1254-55 (2005) (state law "comprehensively regulates predatory lending practices in home mortgages"). But it has no bearing on *conflict*

[2] Plaintiffs assert that increased costs "could" be borne by sanitation agencies and not their users. (POB at 64:16.) But Plaintiffs simultaneously assert that Measure E "increases costs for public wastewater agencies *and their ratepayers*." (POB at 42:7-8, emphasis added.) Moreover, under Article XIII D, Section 6(d) of the California Constitution, the City can raise sewer rates without a vote of the People.

preemption. Moreover, the ordinances upheld in *Inland Empire* and *Kirby* are similar to Measure E in one important respect: they are all local land use ordinances, an area of traditional local control, and therefore protected by a presumption against preemption. *See Inland Empire*, 56 Cal. 4th at 742-43 (land use regulation is a traditional area of local government control; "California courts will presume . . . such regulation is *not* preempted.") (emphasis in original); *Kirby*, 242 Cal. App. 4th at 957 (same).

Conversely, the IWMA is not as broad and comprehensive as Plaintiffs' claim. Although "the scope of the Waste Management Act is broad, it was not achieved by elbowing local government off the stage." *Waste Res. Techs*, 23 Cal. App. 4th at 306. To the contrary, the IWMA "looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority." *Id.* Accordingly, even if there were some sort of stringent preemption test applicable to "comprehensive" state statutes that left only limited room for local law, that principle would not apply to this case.

Finally, the IWMA is anything but "comprehensive" when it comes to the subject-matter of this case: land application of biosolids. To begin with, the IWMA specifically recognizes the primacy of the state water board in areas within its jurisdiction. *See* Pub. Res. Code § 40055(a) (IWMA "not a limitation on the power of any state agency" in administering its authority, including "the exercise by the state water board or the regional water boards of any of their powers"). The Water Code in turn provides that general waste discharge requirements prescribed by a regional water board "supersede regulations adopted by any other state agency to regulate sewage sludge and other biological solids applied directly to agricultural lands at agronomic rates." Water Code § 13274(d). Moreover, the Water Code also preserves the authority of "a local government agency to regulate the application of sewage sludge and other biological solids to land within the jurisdiction of that agency." Water Code § 13274(i). And State Water Board General Order 2004 on land application of biosolids provides, among other things, that it does not preempt or supersede "the authority of local agencies to prohibit, restrict or control the use of biosolids subject to their control, as allowed under current law." (Tab 16 [EX 1011], at 10.) Given this panoply of statutes and regulations, where the IWMA defers to the Water Code and the Water Code preserves local

authority, Plaintiffs cannot contend that the IWMA gives the state comprehensive authority over biosolids disposal to the exclusion of local bans.[3]

D. California Law Does Not Recognize Obstacle Preemption As A Basis For Determining Whether State Law Preempts Local Law.

Because they cannot meet the test for conflict preemption under *Inland Empire* and *Kirby*, Plaintiffs assert that California preemption law also applies the federal "obstacle preemption" or "frustration of purpose" test to determine state-local preemption. Plaintiffs are wrong on the law, but even if they were right it wouldn't matter.

1. The *Great Western Shows* Rule Is Both Inapplicable To This Case And Not Part Of California Law.

Plaintiffs invoke the principle, mentioned but not applied by the California Supreme Court in *Great Western Shows, Inc. v. Cty. of Los Angeles*, 27 Cal. 4th 853 (2002), that "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." *Id.* at 868 (citation and internal quotation marks omitted). Even if this principle were recognized in California, it is inapplicable to this case. The "certain activity" that the IWMA seeks to promote is recycling in general, and not land application of biosolids in particular. And Measure E does not ban recycling in general, only a particular form of recycling that affects one of the innumerable products that make up the waste stream.

Moreover, the rule mentioned in *Great Western Shows* is not part of California law. Plaintiffs contend that *Great Western Shows* "articulated the principle." (POB at 32:21.) Yes, it did. But the court then found the cases applying this principle "distinguishable." 27 Cal. 4th at 868. It therefore had no reason to decide whether this standard was part of California law.

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[3] Plaintiffs contend the IWMA only allows "restrictions" or "conditions," not "bans." (POB at 33:14-15.) However, under California case law, "restrictions or conditions" plainly encompass prohibitions. *See Kirby*, 242 Cal. App. 4th at 956 n.8 ("The California Supreme Court has interpreted 'regulate' to include the authority to ban such facilities") (citing *Inland Empire*, 56 Cal. 4th at 760); *see also Young v. Dep't of Fish & Game*, 124 Cal. App. 3d 257, 279 (1981) ("power to regulate includes the power to prohibit"); *Personal Watercraft Coal. v. Marin Cty. Bd. of Supervisors*, 100 Cal. App. 4th 129, 150 (2002) (same).

Plaintiffs' claim to the contrary 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).

Plaintiffs attempt to bolster their obstacle preemption argument by asserting that "total bans are not viewed in the same manner as added regulations, and justify greater scrutiny." (POB at 33:8-9 (citation omitted).) This argument is inconsistent with *Inland Empire* and *Kirby*, which both involved "total bans." *See Inland Empire*, 56 Cal. 4th at 737 ("The issue in this case is whether California's medical marijuana statutes preempt a local ban on facilities that distribute medical marijuana."); *Kirby*, 242 Cal. App. 4th at 947 ("The County of Fresno . . . adopted an ordinance that banned marijuana dispensaries, cultivation and storage of medical marijuana in all its zoning districts.") Yet neither court held that such laws were subject to "frustration of purpose" or "obstacle" preemption. Indeed, as discussed in Defendants' Opening Post-Trial Brief, *Kirby* discussed federal-state preemption, including "obstacle" preemption, without importing that test into its simultaneous discussion of state-local preemption. (DOB at 15:20-16:12.)

2. Other California Cases Do Not Recognize Federal Obstacle Preemption As Part of California "Contradictory and Inimical" Preemption.

Plaintiffs' suggestion that other California cases recognize obstacle preemption is equally unavailing. For example, *Fiscal v. City & County of San Francisco*, 158 Cal. App. 4th 895 (2008), primarily involves field preemption. (DOB at 14:19-15:4.) Moreover, in that case San Francisco's ban on possession of handguns in one's home, business, and private property nullified a right that state law expressly granted. (DOB at 15:5-14.) Accordingly, the court's statement that local law cannot frustrate "a broad evolutional, statutory scheme enacted by the Legislature" (158 Cal. App. 4th at 911) is limited to cases where local law attempts to nullify a state-created right. *See Brown v. Kelly Broad. Co.*, 48 Cal. 3d 711, 734-35 (1989) ("It is the general rule that the 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").[4]

[4] To the extent *Fiscal* addressed conflict preemption rather than field preemption, it is inconsistent with *Inland Empire*. 56 Cal. 4th at 743 ("The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the

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Plaintiffs also contend that "many other California cases have recognized obstacle preemption." (POB at 33:7 & n. 3.) Since Plaintiffs have relegated these cases to a footnote, we do the same. Suffice it to say that these cases either involve field preemption or do not address California preemption law at all.[5]

3. Even If Obstacle Preemption Were Part Of California Law, Measure E Would Not Be Preempted.

Even if obstacle preemption were part of California law, Measure E would not be preempted. As discussed above, the IWMA's twin purposes were to increase the amount of waste being recycled and reduce the amount being landfilled. *See* Part II.B, *supra*. Plaintiffs produced no evidence that Measure E frustrates either of these purposes. Measure E therefore does not "stand as an obstacle" to accomplishing the IWMA's purposes.

Plaintiffs attempt to sidestep their failure to produce evidence in support of obstacle preemption by contending that because preemption is a legal issue, the evidence presented at trial is irrelevant. (POB at 36:14.) But the Court held otherwise when it denied summary judgment: "The court cannot conclude that Measure E is preempted by the IWMA as a matter of law." (Tab 122 [Minutes, Summary Judgment, Feb. 5, 2015] at 6.) In so ruling, the Court identified the evidence proffered by Defendants—concerning composting and other options in Kern County, recycling facilities and operations in Southern California, minimal incremental costs, adverse impacts,

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state enactment demands . . . . Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws."). (*See* DOB at 15:15-16:12.)

[5] *E.g.*, *American Fin. Servs. Ass'n v. City of Oakland*, 34 Cal. 4th 1239, 1252, 1257-58, 1264-65 (2005) (field preemption case mentions federal law "by analogy"; conflict preemption never addressed); *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383, 397, 400-03, 405 (1993) (field preemption case mentions frustration where legislative intent was to "fully occupy a particular field"; conflict preemption rejected); *Calguns Found., Inc. v. Cty. of San Mateo*, 218 Cal. App. 4th 661, 670-71 (2013) (ordinance prohibiting gun possession in parks not preempted by express, though limited, field preemption); *Chand v. Bolanos*, 241 Cal. App. 4th 204, 209-11 (2015) (ordinance providing additional remedies for reimbursement from third-party tortfeasors not preempted because state law remedies expressly nonexclusive; no use or endorsement of federal obstacle preemption); *Int'l Bhd. of Elec. Workers, Local Union 1245 v. City of Gridley*, 34 Cal. 3d 191, 195, 197-98 (1983) (no discussion of California preemption law or prevailing preemption standards); *Cty. of Los Angeles v. Los Angeles Cty. Emp. Relations Comm'n*, 56 Cal. 4th 905, 915, 923-25 (2013) (case does not mention preemption).

groundwater risks, accumulation of hazardous chemicals, and lack of effective monitoring and concluded:

> "Defendants have submitted sufficient evidence to show that material facts remain to be determined on issues of whether land application of biosolids remains a feasible recycling option in Kern County or whether the risks in Kern County are great enough and exceed the hardships to Plaintiffs such that an absolute ban of this option would not violate the IWMA." (*Id.*)

Plaintiffs' argument that facts are irrelevant to preemption conflicts with this ruling.

Plaintiffs' argument also depends on the premise that Section 40051 mandates that Kern County maximize "all feasible" means of recycling. (POB at 37:14.) As discussed above, however, this argument ignores the fact that maximizing all feasible recycling methods is simply a means to an end: "to reduce the amount of solid waste that must be disposed of by transformation and land disposal." Pub. Res. Code § 40051(b). Consequently, the County's evidence that compliance with Measure E will not increase landfill disposal is more than relevant: it is dispositive.

III. MEASURE E IS WITHIN THE COUNTY'S POLICE POWER.

Plaintiffs make three arguments in support of their claim that Measure E is invalid under the "regional welfare" doctrine. They say that the voters who enacted the Ordinance did not "consider the regional welfare" (POB at 38-40); that Measure E is not a reasonable accommodation of the competing regional interests (*id.* at 40-44); and that the Ordinance is arbitrary and discriminatory. (*Id.* at 44-45.) None of these claims has merit.

A. Measure E Is Not Invalid For Failure To "Consider" The Regional Welfare.

Plaintiffs argue that Measure E is invalid because the record is "'devoid of any consideration by the Measure E voters' of Plaintiffs' needs to recycle biosolids where . . . farmland is located." (POB at 40:6-7.) Not so. Neither *Associated Home Builders* nor any other California case requires that voters actually consider the regional impact of a local ordinance prior to its passage. Indeed, voters do *not* have to make findings when enacting legislation by initiative *even where* such findings would be required if a city or county enacted the same ordinance. *See Citizens for Planning Responsibility v. Cty. of San Luis Obispo*, 176 Cal. App. 4th 357, 375-76 (2009) ("When the Legislature wrote that 'each county and city shall consider the effect of ordinances adopted pursuant to this chapter on the housing needs of the region . . . and balance these needs against the

public service needs of its residents and available fiscal and environmental resources,' it could not have intended the *electorate* to undertake this process when enacting legislation by initiative") (emphasis in original); *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596 (1976) (notice and hearing provisions of zoning law do not apply to zoning by initiative).

Arnel Development Co. v. City of Costa Mesa, 126 Cal. App. 3d 330 (1981), is not to the contrary. Plaintiffs cite *Arnel* for the proposition that a "*locality's* failure to consider competing regional interests in an attempt to accommodate them will render a local restriction unconstitutional under the regional welfare doctrine." (POB at 39:11-12.) *Arnel* imposes no such requirement. In fact, the trial court in *Arnel* had found that the initiative proponents intended to prevent the development of multi-family housing and selected single family zoning without consideration of zoning alternatives or the best utilization of the property. 126 Cal. App. 3d at 335. But the Court of Appeal found the motives of the voters immaterial: "Defendants contend that the latter findings are not meaningful because the intent and purpose of the proponents are immaterial. They also contend that what was in the minds of the electorate in adopting the initiative is likewise immaterial. We are inclined to agree with these contentions." *Id.* Accordingly, *Arnel* struck down the local initiative at issue because of what it did rather than what the voters thought (or didn't think): the initiative made no "attempt to accommodate competing interests on a regional basis" because it "completely preclude[d] development of multiple family residences in the area." *Id.* at 340.

But even if Plaintiffs were right that the voters who enacted Measure E had to consider the regional welfare, they had the means to do so. As Defendants' Opening Post-Trial Brief demonstrates, Measure E was the culmination of a decade-long discussion and debate in the County about land application. (*See* DOB at 5:12-8:3.) This debate involved numerous public agencies, including the Kern County Board of Supervisors, a Biosolids Oversight Advisory Committee, the Kern County Water Agency, a Biosolids Task Force, and the Kern County Grand Jury. (*Id.*) Plaintiffs participated in this process by attending public hearings and communicating with local decision-makers. The City and OCSD attended Biosolids Task Force meetings and gave presentations about their respective operations. (Tab 40 [EX 1116], at 4-5.) The Task Force

considered the fact that Los Angeles and Orange counties lack available land to "accommodate volumes" of biosolids generated there (Tab 118 [EX 1142], at 19.), and the Grand Jury considered the fact that "Los Angeles, Orange, and other counties have spent large sums of money" on their biosolids operations (Tab 41 [EX 1117], at 5.) Plaintiffs therefore cannot complain that their interests were not considered in the run-up to enactment of Measure E.[6] Moreover, the Court cannot assume that the voters who enacted the Ordinance were unaware of the lengthy deliberations that preceded it. Finally, the fact that prior ordinances allowed some land application to occur in Kern County (POB at 13:11-14:6) does not "preclude the voters . . . from revisiting that question and implicitly striking a different balance." *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 571 (2001).

B. It Is Fairly Debatable That Measure E Is Rationally Related To The Regional Welfare.

Plaintiffs' contention that Measure E does not represent a reasonable accommodation of the competing regional interests at stake is wrong, both legally and factually. To begin with, Plaintiffs claim that application of the "fairly debatable" standard "is not supported by *Associated Home Builders* or other cases." (POB at 40:22-23.) But the California Supreme Court last year held to the contrary. In *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435 (2015), the Court stated, citing *Home Builders* and other cases, that "so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible." *Id.* at 455. The Court then explained what that meant, in terms of applying the "regional welfare" doctrine:

> We review challenges to the exercise of such power deferentially. In deciding whether a challenged [land use] ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor. . . . Nonetheless, as

[6] Plaintiffs also say that the voters had to consider their "need to recycle biosolids where the farmland is located." (POB at 40:7.) But only a small fraction of the farmland in California is located in Kern County. At the time Measure E was enacted California had more than 7 million acres of harvested cropland, 700,000 acres of which (10%) were located in Kern. (DOB at 22:5-6; Tab 1 [Fact Stip.] ¶ 19.) Plaintiffs offered no evidence that Kern County's farmland is uniquely essential to land application. Thus, while Plaintiffs need to recycle their biosolids somewhere, they don't need to do it in the County's unincorporated areas.

> this court explained in *City of Livermore*, although land use regulations are generally entitled to deference, "judicial deference is not judicial abdication. The ordinance must have a *real and substantial* relation to the public welfare. There must be a reasonable basis in fact, not in fancy, to support the legislative determination. Although in many cases it will be 'fairly debatable' that the ordinance reasonably relates to the regional welfare, it cannot be assumed that a land use ordinance can *never* be invalidated as an enactment in excess of the police power." (*Id.* at 455-56 (emphasis added) (citations and some internal quotation marks omitted))

In other words, if it is "fairly debatable" that an ordinance "reasonably relates to the regional welfare," and the relationship is based on "fact, not fancy," the challenged ordinance will be upheld.

Measure E satisfies this test. Plaintiffs say that the Ordinance "imposes heavy burdens on Plaintiffs and the regional welfare, while failing to advance Kern's stated goals of protecting the environment and public health." (POB at 40:15-17.) This contention ignores the evidence.

1. Measure E Does Not Impose "Heavy Burdens" On Plaintiffs Or The Environment.

Plaintiffs claim that Measure E is "forcing Plaintiffs and other land appliers of biosolids out of Kern County . . . forever." (POB at 39:24-40:1) This is false. *First*, two Plaintiffs OCSD and CSD2 voluntarily stopped land applying in Kern County years ago and have no plans to return. (*See* DOB at 13:3-21, 50:9-51:13.) *Second*, the same two Plaintiffs compost hundreds of thousands of tons of biosolids in Kern County annually and may continue to do so irrespective of Measure E. (*Id.* at 21:1-8.) The City can do the same at minimal incremental cost. (*Id.*; *see also* 12:16-20, 13:12-19.) It could utilize a third-party composter like Liberty Composting or Synagro. (*Id.*, Fact Stip. ¶¶ 77-81.) It could also compost at Green Acres Farm, including the use of 200-acre parcel that had been set aside for precisely that purpose by RBM. (Tab 115 [EX 1024] at 16; Tab 116 [EX 1025] at 6; Tab 121 [Steve Stockton Depo.] at 38:9-39:20.) Other recycling methods can also be pursued in Kern County, such as conversion of biosolids to energy. (Tab 7 [TR 5-4-16, at 24:15-25:24.) If Measure E is enforced, the City's annual costs would increase by only $3 to $4 million, or less than a dollar per year per sewer user, a minimal cost that could be further reduced by discounts, volume, and savings in transportation costs through increased use of Los Angeles's TIRE project. (*See* DOB at 20:20-28.)

Nor have Plaintiffs proven that "Measure E disrupts the regional biosolids market." (POB

at 41:2.) Far from showing that Measure E would inflict "net damage to regional biosolids management" (*id.* at 40:14), the evidence demonstrated that Measure E would impact only the City. (DOB at 13:3-23, 50:5-18.) And, as just noted, that impact would be modest, indeed. The City could continue to recycle its biosolids at a minimal increase in cost of less than a dollar per year per sewer user. (*Id.* at 20:21-23.) This modest increase hardly amounts to disruption of the regional biosolids market.

Next, Plaintiffs contend that enforcing Measure E would cause "significant environmental effects beyond Kern's borders." (POB at 42:23.) But Plaintiffs produced no evidence at trial regarding the supposed extra-territorial impacts of enforcing Measure E. Nor did they compare those supposed impacts to the impact of their biosolids disposal on Kern County. In fact, this argument does nothing more than highlight the City's failure to implement a *geographically diversified* biosolids management plan the City proffered when it launched its offsite sludge disposal program in the late 1980s. (DOB at 5:4-5 [Tab 44, EX 1123].) In contrast, the other Plaintiffs *have* diversified their biosolids management practices—apparently without triggering the adverse environmental impacts that Plaintiffs say would result if the City did the same thing.

Likewise, Plaintiffs' assertion that Measure E would result in "increased air pollution" is unsupported and unproven. (POB at 43:2.) Plaintiffs cite testimony from the City (Minamide), OCSD (Colston), and Liberty Composting (Nolan) to support their claim that Measure E "will increase fuel combustion and air pollution" in the region, either because the biosolids must be trucked "to new distant locations" such as Arizona, or compost that is produced in Kern must then be transported elsewhere to be land applied. (*Id.* at 42:24-27.) But there is no evidentiary support for these statements. The City's witnesses never compared the myriad factors that influence carbon emissions and regional air quality—*e.g.*, vehicle type and size, route, topography, traffic conditions, and weather—with respect to land application in Kern County or elsewhere. Consequently, the City's claim that transporting its biosolids outside the County would harm the environment more than continuing to truck nearly 80% from Los Angeles up the I-5 corridor to the San Joaquin Valley

is based on nothing more than speculation.[7] Moreover, Kern cannot be saddled with the assertedly adverse environmental effects of Plaintiffs shipping their biosolids to Arizona. Instead, those effects would result from the City's choice to ship its biosolids there rather than utilize more expensive, but closer options.[8] And if land application is as beneficial as Plaintiffs claim (POB at 43:5-7), Arizona would benefit from, and not be harmed by, Measure E.[9]

Plaintiffs also claim that upholding Measure E would give other jurisdictions the "license" to enact similar legislation. (POB at 43:18.) But 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. Accordingly, it is pure speculation whether additional jurisdictions would enact similar ordinances if Measure E is upheld.

Finally, Plaintiffs assert that Measure E disserves *Kern's* interests as well, because it "deprives farmland of the clear value of biosolids as a soil amendment." (POB at 41:6-7.) But the evidence showed Kern County has a thriving agriculture industry *without* biosolids. Kern County is routinely ranked among the top counties in the state in terms of value of sales for agricultural commodities (such as fruits, tree nuts, and berries), without biosolids. (*E.g.*, Tab 98 [EX 1370] at 7-8; Tab 114[EX 574] at 4.) Consequently, no record evidence suggests that Kern County's farmers want or need biosolids. In fact, the City's own farmer testified that he would not use biosolids on any other farm he works and would not use biosolids on his own nut trees or on any food grown for human consumption. He uses biosolids at Green Acres Farm because the City guarantees him $2 million annually to do so. (DOB at 22, n.13; Tab 110 [Trial Tr. (4-26-16) (R. Fanucchi)] 69:12-

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[7] In fact, reducing the air pollution in Kern County and the San Joaquin Valley caused by the City's trucks would be a significant additional benefit that must be weighed against Plaintiffs' assertion that enforcing Measure E would cause "regional" environmental burdens.

[8] Plaintiffs offered no proof to support their argument that Measure E's inclusion of composted biosolids increases air pollution. Wilson Nolan from Liberty Composting testified only that he works with a compost broker that "locate[s] growers that would like to receive the compost," but there was no evidence of *where* those growers might be located. (Tab 7 [Trial Tr. (May 4, 2016)] 22:1-7.)

[9] Plaintiffs' argument that Measure E would increase use of chemical fertilizers (POB at 16:13-25, 43:7-9) similarly provides no support for their regional welfare argument. Plaintiffs presented no evidence that chemical fertilizers harm the environment or pose greater risks to the environment than biosolids.

70:2, 88:17-89:4, 92:7-93:9, 96:9-97:1.)

2. Measure E Serves Important County Interests.

Plaintiffs contend that Measure E confers no environmental benefit on Kern, and that the voters' fears of harm from biosolids land application are unfounded. (POB at 41:8-10.) But even if the evidence showed "a lack of harm" from Green Acre Farm, Plaintiffs would not benefit.

First, cities and counties do not need to wait until actual harm exists in order to legislate. Instead, they can legislate prophylactically, to minimize the *risk* of future harm. *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 568 (2001) ("In light of the evidence that the dangers posed cannot be mitigated to a level of insignificance, the voters' judgment that the health and safety risks associated with the Macpherson project required prohibition of all oil drilling and production within Hermosa Beach is reasonable"). And that is precisely what Kern County has done here. As the largest recipient of biosolids in Southern California, and the location of what is likely the largest biosolids farm in the United States, Kern County residents have a keen interest in limiting the long-term potential risks to its land and water from land application.[10]

Plaintiffs ignore the substantial evidence concerning the potential risks from land application of biosolids. (*See* DOB 23:7-30:20.) The EPA's current regulation of biosolids is inadequate and the existing regulations do not protect against emerging contaminants. (DOB at 23:7-24:18.) Persistent uncertainty exists about the safety of the Part 503 regulations, as do evolving, ongoing concerns about chemicals in biosolids never considered by the EPA. (*Id.* at 23:22-24:18.)[11] Biosolids contain dangerous perfluorochemicals and the long-term application of biosolids at Green Acres Farm has already led to soil and groundwater contamination by perfluorochemicals. (*Id.* at

[10] Plaintiffs' assertion that Matt Constantine, Kern's Director of Public Health, has "no concerns about risks from biosolids" is false. (POB at 41:18-19.) Instead, he testified only that land application did not pose an "imminent risk," in hours, days or weeks. (Tab 110 [4-26-16] at 43:2-9, 43:19-20, 46:3-17, 46:24-48:14.)

[11] For example, Plaintiffs' expert expressed concern in a 2006 publication that antibiotic resistant bacteria could migrate from "farm to plate" through land applied biosolids, and took ten years to complete additional research. (Tab 112 [5-3-16] at 103:17-22, 104:26-105:26, 109:2-112:4, 148:21-150:7.)

24:19-27:5.)[12] The EPA recently reduced the provisional health advisory level for PFOA in drinking water by a factor of five. (*Id.* at 25:19-26:9.) There are valuable groundwater resources in the vicinity, the Farm overlies a major Kern County aquifer, and the groundwater beneath the Farm can migrate offsite. (*Id.* at 27:6-28:13.)[13] Groundwater monitoring at the Farm is wholly inadequate, the Farm operates under outdated orders, and the City has evaded taking responsibility for implementing adequate monitoring and updated orders. (*Id.* at 28:14-30:20.) In short, the County does not need to wait until the aquifer is tainted, or the ground contaminated beyond repair, in order to act.

Second, even if Kern had to show that land application causes *existing* problems, as well as future risks, it has made the necessary showing. The evidence was overwhelming that the City's land application causes fly and odor nuisances to nearby businesses and residents. (*Id.* at 30:21-33:17.) Eliminating such nuisances is well within the County's power. Code Civ. Proc. § 731 ("A civil action may be brought in the name of the people of the State of California to abate a public nuisance . . . by the district attorney or county counsel of any county in which the nuisance exists"); *Willson v. Edwards*, 82 Cal. App. 564, 569 (1927) (nuisances include "offensive odors and smells"); *Inland Empire*, 56 Cal. 4th at 761 ("Nuisance law is not defined exclusively by what the *state* makes subject to, or exempt from, its own nuisance statutes. Unless exercised in clear conflict with general law, a city's or county's inherent, constitutionally recognized power to determine the appropriate use of land within its borders allows it to define nuisances for local purposes, and to seek abatement of such nuisances") (citations omitted). Yet Plaintiffs simply disregard this interest in their analysis.

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[12] Plaintiffs assert that no expert at trial could "identify the source" of perfluorochemical contamination in soil and groundwater at the Farm. (POB at 19:11-14.) Not so. (*See* evidence cited in DOB at 26:21-24.) Dr. Higgins testified that the "vast majority" of perfluorochemicals in the soil at the Farm resulted from biosolids and that the groundwater findings were "largely" the result of biosolids. (Tab 8 [5-5-16, at 163:7-164:3].) And Dr. Johnson stated there was a "strong correlation" between the soil detections of perfluorochemicals and biosolids, though she could not be "certain" biosolids were the source. (Tab 7 [5-4-16, at 182:19-26]; POB at 19:12-20.)

[13] Plaintiffs contend there is no "potable" water supply underneath Green Acres Farm. (POB at 21:3-4.) Not so. The aquifer underlying Green Acres Farm is designated for "municipal" among other uses, which denotes use for drinking water. (Tab 1, [Fact Stip. ¶132]; Tab 120 [EX 1354] at p. 10.)

3. Measure E Reasonably Accommodates The Competing Interests.

Plaintiffs claim that Measure E "makes no effort to reasonably accommodate the competing regional interests." (POB at 41:3-4.) Not so. Under Measure E, Kern County would continue to compost at least the second largest amount of biosolids in Southern California and has the capacity to be the largest biosolids recycler. (DOB at 21:1-8.) Indeed, at present CSD2 and OCSD compost 200,000 or more tons of biosolids annually in Kern County. And nothing in Measure E prevents the City from composting its biosolids in the County, too. Plaintiffs' argument that Measure E provides "no accommodation of regional biosolids and compost management needs" (POB at 40:8) is not based on the current record before the Court.

In contrast, the City ignores the regional welfare. It insists on putting 80% of its biosolids in Kern County *indefinitely*, notwithstanding the risk and nuisances that its land application poses. That is hardly fair. In contrast, the other two governmental Plaintiffs have accommodated the regional welfare by diversifying their biosolids management practices. The City can do the same, at minimal additional cost. Given this record, the regional welfare doctrine does not require that Kern County be the dumping ground for four-fifths of the City's biosolids.[14]

C. Measure E Is Not Arbitrary Or Discriminatory.

Plaintiffs assert that Measure E exceeds Kern's police powers because it is arbitrary and discriminatory. (POB at 44:12.) Measure E is neither.

Plaintiffs first claim that this case is similar to *In re Lyons*, 27 Cal. App. 2d 182 (1938), where the court struck down an Orange County ordinance banning the importation of solid waste from outside the county. (POB at 44:21.) In *Lyons* the court found no "natural, or intrinsic distinction" between in-county and out-of-county solid waste that would justify the ban, and therefore found the law to be arbitrary and discriminatory. 27 Cal. App. 2d at 189. But unlike the ordinance that was struck down in *Lyons*, Measure E does not distinguish between in-county and

[14] Plaintiffs assert that Kern County must bear almost the entire burden of its biosolids because Los Angeles bears the regional burden of airports and ports. (POB at 43:14-17.) But these massive operations which the City has voluntarily undertaken undoubtedly generate revenue for the City. Moreover, Kern County is not seeking to compel the City to operate an airport or a port.

out-of-county biosolids or biosolids generators, and it is not an importation ban. Anyone may continue to bring biosolids into Kern County for composting, and in-county and out-of-county biosolids generators are equally prohibited from land applying under Measure E.

Next, Plaintiffs cite *LaFranchi v. City of Santa Rosa*, 8 Cal. 2d 331 (1937). (POB at 44:28.) That case is similarly inapposite. There the Court struck down a city's ban on the sale of milk pasteurized outside the city where there was no justification for distinguishing between in-city and out-of-city milk. *Id.* at 336, 338. Again, Measure E is different because it does not discriminate on its face based on the origin of biosolids or the identity of the biosolids generator.

In addition, Plaintiffs argue that Measure E is discriminatory because "Kern voters drew an arbitrary line at the County's border, while countenancing their own continued land application in Kern's cities where more of them live." (POB at 45:8-9.) No such "arbitrary line" exists. Measure E does not apply in the City of Bakersfield because Kern County has no jurisdiction there. Moreover, *County Sanitation District No. 2 v. County of Kern*, 127 Cal. App. 4th 1544 (2005) ("CSD2"), held that Plaintiffs cannot show discrimination under the Commerce Clause by comparing Measure E to hypothetical ordinances that the County's cities have not enacted. (*See* DOB at 39:9-24; *see* Part IV.C.4, *infra*). *A fortiori*, Plaintiffs cannot use the same hypothetical ordinances to show discrimination under the regional welfare doctrine, either.

Plaintiffs allege that "Measure E is arbitrary by definition because it has no scientific basis." (POB at 45:18.) But, as explained at length in the County's opening brief (DOB at 5:2-8:13), and as previously mentioned, Measure E was the culmination of a decade of discussion and debate on land application of biosolids in Kern County that involved public workshops, specially created advisory bodies that reviewed more than 20,000 pages of scientific and technical material both supporting and opposing land application of biosolids, the generation of numerous memoranda and reports, and three prior ordinances regulating biosolids land application in the County. In fact, after having considered all of this analysis, in 2005, the Kern County Grand Jury recommended a ban of all classes of biosolids in the County. (*See id.*) The Kern County Water Agency and the Central Valley Regional Water Quality Control Board have also questioned the City's operation and demonstrated concern for the degradation of groundwater. (DOB at 28:16-27.) Plaintiffs'

disagreement as to the weight of the scientific evidence supporting Measure E does not make the measure arbitrary or discriminatory. A disagreement over the "necessity or propriety of an enactment" is not grounds for invalidation under the police powers test. *Big Creek Lumber Co. v Cty. of San Mateo*, 31 Cal. App. 4th 418, 428-29 (1995).

In granting Kern's motion for summary judgment on Plaintiffs' Equal Protection claim, the federal district court expressly found that "Measure E recites a variety of legitimate purposes" with "no evidence indicat[ing] that these stated purposes were pretextual," and that Measure E "is rationally related to its purposes." *City of Los Angeles v. Cty. of Kern*, 509 F. Supp. 2d 865, 879-881 (2007), *rev'd on other grounds*, 581 F.3d 841 (9th Cir. 2009). The district court further found that "Measure E's drafters and supporters could rationally speculate that land application of biosolids would present unknown future health risks that would be avoided by banning the practice" and that "Measure E rationally furthered its stated purpose of avoiding nuisances associated with biosolids." *Id.* at 880-81. This conclusion disposes of Plaintiffs' "arbitrary and discriminatory" argument.

IV. MEASURE E DOES NOT DISCRIMINATE AGAINST, IMPERMISSIBLY BURDEN, OR REGULATE INTERSTATE COMMERCE.

Plaintiffs assert that Measure E violates the Commerce Clause for three reasons: it is discriminatory in intent, discriminatory in effect, and imposes undue burdens. (POB at 46:2-6.) There are many reasons why these contentions are wrong.

A. Measure E Cannot Violate The Commerce Clause Because It Does Not Interfere With Interstate Commerce.

The first, and most basic, reason why Plaintiffs cannot prove that Measure E violates the federal Commerce Clause is also the simplest: Measure E cannot violate the Commerce Clause because it does not interfere with interstate commerce. It is undisputed that none of the biosolids that Plaintiffs want to land apply in Kern County come from outside California. Indeed, the parties stipulated that no one has ever attempted to land apply out-of-state biosolids in unincorporated Kern County (Tab 1 [Fact Stip. ¶¶ 57-60]), and the evidence showed that it would be impractical to do so. (*See* Tab 121 [S. Stockton Depo.] 99:8-100:9.) In short, as the Ninth Circuit recognized in

dismissing Plaintiffs' Commerce Clause claim, this is a "purely intrastate dispute[]." *City of Los Angeles v. County of Kern*, 581 F.3d at 848.

Instead of attempting to prove that Measure E interferes with interstate commerce, Plaintiffs say such proof is unnecessary. They baldly claim that "interference with transactions crossing a state line is not a necessary element for a federal Commerce Clause violation." (POB at 47:6-7.) In other words, according to Plaintiffs, a law can violate the Interstate Commerce Clause without interfering with interstate commerce.

Plaintiffs provide no support for this remarkable contention, and it is contradicted by a host of precedent. Plaintiffs contend that "no case holds that the transportation of biosolids or any other article in commerce across state lines is required to trigger constitutional protection from local restrictions." *Id.* at 49:15-17. However, numerous Supreme Court precedents squarely hold that a law that does not interfere with or burden interstate commerce cannot violate the Commerce Clause.

For example, in *McBurney v. Young*, U.S. , 133 S. Ct. 1709 (2013) , the Court found that the Commerce Clause was not violated by a state statute which limited to its citizens the right to obtain documents under the state's equivalent of the Public Records Act. The Court first stated that "[t]he 'common thread' among those cases in which the Court has found a dormant Commerce Clause violation is that 'the State *interfered with the natural functioning of the interstate market* either through prohibition or through burdensome regulation.'" *Id.* at 1720 (citation and internal quotation marks omitted; emphasis added). The Court then stated that the challenged statute did not trigger Commerce Clause scrutiny because it caused no such interference: "Because it does not pose the question of the constitutionality of a state law *that interferes with an interstate market* through prohibition or burdensome regulations, this case is not governed by the dormant Commerce Clause." *Id.* (emphasis added).

This principle applies to local ordinances regulating waste. For example, in *On the Green Apartments LLC v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001), the court held that an ordinance requiring that all garbage generated within a city had to be taken to a city landfill was not subject to Commerce Clause scrutiny where the plaintiff alleged only that, but for the Ordinance, it would deposit its garbage in a landfill elsewhere in the State. As the court found, the plaintiff had no

Commerce Clause claim because "the impact of the ordinance is exclusively on intrastate commerce." *Id.* at 1242. "[W]here a complaint alleges only an intrastate burden, then the Commerce Clause is not at all implicated." *Id.*

In contrast, scrutiny under the Commerce Clause *is* triggered when a state or local law interferes with interstate commerce, because the Clause "prevents a State from jeopardizing the welfare of the Nation as a whole by placing burdens on the flow of commerce *across its borders* that commerce wholly within those borders would not bear." *American Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (citations, brackets and internal quotation marks omitted; emphasis added). In other words, state and local laws come "within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1994). If they don't do either of these things, they cannot violate the Commerce Clause.[15]

The only argument that Plaintiffs make in their Opening Post-Trial Brief concerning Measure E's alleged effect on interstate commerce is the claim that Measure E "has and will divert biosolids to Arizona for land application, which provides a physical nexus to interstate commerce." (POB at 49:1-2). But this proves only that out-of-state entities, such as Arizona farmers, may *benefit* from Measure E. That does not help the Plaintiffs. "[M]arket controls that inure to the benefit of out-of-state concerns simply do not constitute 'discrimination' under the Commerce Clause." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1385 (8th Cir. 1997); *accord, Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 450 (6th Cir. 2009) (local law that was "beneficial to out-of-state scrap dealers" did not discriminate in violation of the Commerce Clause); *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir. 2002),

[15] *Accord, Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015) ("A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a *substantial burden* on *interstate commerce*") (emphasis in original); *Waste Mgmt. of Alameda Cty., Inc. v. Biagini Waste Reduction Sys., Inc.*, 63 Cal. App. 4th 1488, 1496 (1998) ("the Commerce Clause protects the *interstate market* . . . from prohibitive or burdensome regulations") (citations and internal quotation marks omitted; emphasis added); *see also Bronco Wine Co. v. Jolly*, 129 Cal. App. 4th 988, 1017 (2005) (determining that challenged statute affected interstate commerce before analysis of Commerce Clause claims).

amended on other grounds, 312 F.3d 416 (9th Cir. 2002) (because initiative banning trade in fur of animals caught in leghold traps did not apply to in-state trade of furs from animals caught with similar traps outside California, it discriminated, if at all, "in favor of interstate commercial activities undertaken by out-of-state actors," and therefore did not violate the Commerce Clause) (emphasis omitted); *Reynolds v. Buchholzer*, 87 F.3d 827, 830 (6th Cir. 1996) (nondiscriminatory ban on commercial walleye fishing in-state did not violate Commerce Clause where "the restrictions act as a boon to out-of-state fishermen who may market their walleye in Ohio without local competition")(citation and internal quotation marks omitted). Nor is the Commerce Clause violated merely because Measure E may create interstate commerce by diverting biosolids that would otherwise be land applied in Kern County to Arizona. *See Grant's Dairy-Maine, LLC v. Comm'r of Maine Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 22 (1st Cir. 2000) (state law that "appears to encourage, rather than discourage, interstate commerce," because the law made it more profitable to sell out-of-state than in-state, did not violate Commerce Clause). Accordingly, Plaintiffs cannot base their Commerce Clause claim on the fact that Measure E may divert their biosolids from California to Arizona. Since that is the only way in which they contend that Measure E will affect interstate commerce, their Commerce Clause claim must fail.

To be sure, Plaintiffs also argue that Measure E burdens interstate commerce because it will increase *their* costs. (*See* POB at 64:15-16 ("Measure E has and will cost the City, OCSD and CSD2 millions of dollars"), *id.* at 64:20 (if Measure E is enforced, "Plaintiffs RBM and R&G Fanucchi will also suffer monetary losses").) But the Commerce "Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978). Accordingly, the fact that Measure E may increase the cost of *intrastate* transactions does not trigger Commerce Clause scrutiny.

In this case, as in *Exxon Corp v. Governor of Maryland*, the challenged law "does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies . . . . The absence of any of these factors fully distinguishes this case from those in which a State has been found to have discriminated against interstate commerce." *Id.* at 126.

B. Whether Biosolids Are An Article Of Commerce Is Irrelevant.

Instead of attempting to prove that Measure E actually interferes with interstate commerce, Plaintiffs' Commerce Clause analysis rests on three irrelevant premises that Kern does not challenge. None of them supports Plaintiffs' Commerce Clause claim.

First, Plaintiffs devote the very first section of their Commerce Clause argument to proving that "[b]iosolids are articles of [interstate] commerce meriting constitutional protection." (POB at 47:11.) But the fact that biosolids are "an article of [interstate] commerce raises, but does not answer, the question whether the . . . statute is unconstitutional." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982). Instead, "[d]etermining the validity of state statutes affecting interstate commerce requires a more careful inquiry." *Id.* As discussed above, that inquiry turns on whether Measure E "burden[s] interstate commerce or impede[s] its free flow" (*C&A Carbone, Inc.*, 511 U.S. at 389), not on whether biosolids in the abstract are articles of commerce.

Of course, the fact that biosolids are part of interstate commerce gives Congress power to regulate both that commerce and intrastate activities that affect it. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005); *Wickard v. Filburn*, 317 U.S. 111 (1942). But Congress's power to regulate does not displace state regulation of the same commerce. *See Grant's Dairy-Maine*, 232 F.3d at 19-20 ("The bare fact that all of Grant's milk is federally regulated [under the Commerce Clause] is simply not enough to render concurrent state regulation of some of its milk unconstitutional"). "In the absence of conflicting federal legislation the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980). For that reason, the fact that Congress' authority under the Commerce Clause "extends to minimal, in-state economic activity" (POB at 48:14) does not establish that Plaintiffs can prove a Commerce Clause violation without showing interference with interstate commerce.[16]

[16] Plaintiffs claim that "when local regulation restricts wastewater plants' ability to meet Clean Water Act requirements, the restrictions of the Commerce Clause are triggered." (POB at 47:18-20.) Plaintiffs cite no case to support this non-sequitur. Nor did they present any evidence that Measure E impairs their ability to comply with federal law.

Second, Plaintiffs correctly note that "Supreme Court jurisprudence has routinely subjected local measures to Commerce Clause scrutiny." (POB at 48:12-13.) But Kern has never contended otherwise. A local ordinance is subject to the same level of Commerce Clause scrutiny as a state law, no more and no less. Consequently, Measure E would violate the Commerce Clause had it discriminatorily affected, or unduly burdened, interstate commerce in biosolids generated by private out-of-state entities. But since Measure E does not do either of these things, it is constitutional.

Third, Plaintiffs take comfort in the fact that "[w]aste materials have received protection from the Supreme Court in numerous cases, in part because they are often the target of discriminatory attacks like Measure E." (POB at 49:5-6.) In fact, the cases Plaintiffs cite prove Kern's point. In every single one of them, the law that the Court invalidated had an existing adverse impact on interstate commerce. *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994) (surcharge on in-state disposal of waste from other states); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 357 (1992) (petitioner could not accept out-of-state waste at its landfill due to challenged ordinance); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992) (higher fee on interstate waste); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978) (ban on out-of-state waste). In short, in all these cases there was actual discrimination against *interstate commerce*—discrimination that (as we now show) does not exist here.[17]

C. Measure E Is Not Discriminatory Under The Commerce Clause.

Plaintiffs stipulated that "Measure E bans land application of biosolids . . . 'irrespective of where generated, produced, or treated.'" (Tab 1 [Fact Stip. ¶¶ 42, 48].) Yet they say that Measure E is discriminatory under the Commerce Clause because it: (1) "expressly protects Kern County agriculture" (POB at 50:10) (2) "expressly targeted Los Angeles biosolids" (*id.* at 50:11-12); and

[17] Likewise, the federal Court of Appeals cases cited by Plaintiffs all involved discrimination against, or interference with, interstate commerce. *See BFI Med. Waste Sys. v. Whatcom Cty.*, 983 F.2d 911, 912 (9th Cir. 1993) (ordinance prohibiting importation of medical waste into county barred shipment of waste originating in another state); *Diamond Waste, Inc. v. Monroe Cty.*, 939 F.2d 941, 944 (11th Cir. 1991) (plaintiff could not import out-of-state waste into county because of import ban).

(3) "only affects out-of-county [but intrastate] biosolids generators" (*id.* at 50:13). Plaintiffs err on all counts.

1. The Fact That Measure E Was Enacted In Part To Protect The Reputation Of The County's Agricultural Products Does Not Make It Discriminatory.

Plaintiffs contend that Measure E is discriminatory because "it expressly protects Kern County agriculture from the perceived threat of biosolids, a threat outsiders are forced to shoulder." (POB at 50:10-11.) This claim is based on the fact that *one* of Measure E's stated purposes is to prevent a "loss of confidence in agricultural products from Kern County." (Tab 55 [EX 1140].) But the Ordinance has many other stated purposes, as well: preventing the "loss of productive agricultural lands capacity for human food production"; eliminating risks to "land, air, and water, and to human and animal health"; and eliminating "odor, insect attraction, and other nuisances."[18] Moreover, Measure E itself provides that it was enacted to further "each" of its stated purposes.

Accordingly, the issue raised by Plaintiffs is whether a local ordinance can be held invalid under the Commerce Clause merely because *one* of its many stated purposes is to advance the economic interests of local businesses. Not surprisingly, the answer is "no," for multiple reasons.

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[18] Measure E describes its "Purpose and Intent" as follows:

> There are numerous serious unresolved issues about the safety, environmental effect, and propriety of land applying Biosolids or sewage sludge, even when applied in accordance with federal and state regulations. Biosolids may contain heavy metals, pathogenic organisms, chemical pollutants, and synthetic organic compounds, which may pose a risk to public health and the environment even if properly handled. Sampling and other monitoring mechanisms are not feasibly capable of reducing the risks associated with Biosolids to a level acceptable to the people of Kern County. Land spreading of Biosolids poses a risk to land, air, and water, and to human and animal health. It may cause loss of confidence in agricultural products from Kern County. It causes the loss of productive agricultural lands capacity for human food production for significant periods of time. It presents a risk of airborne Biosolid particulate matter in circumstances unique to Kern County. It presents risks of unique odor, insect attraction, and other nuisances which are unacceptable to the people of Kern County and cannot be feasibly controlled to a risk level acceptable to the people of Kern County.
>
> For each of the foregoing reasons, individually and collectively, and in order to promote the general health, safety and welfare of Kern County and its inhabitants, it is the intent of this chapter that the land application of biosolids shall be prohibited in the unincorporated area of Kern County. (Tab 55 [EX 1140].)

First, the identical argument was rejected in *County Sanitation District No. 2 of Los Angeles County v. County of Kern*, 127 Cal. App. 4th 1544 (2005) ("*CSD2*"). In that case, the same plaintiffs contended that the County's prior biosolids ordinance violated the Commerce Clause because it was "adopted for the protectionist purpose of banning out-of-county biosolids in order to prevent damage to the reputation of agricultural products grown in Kern County." *Id.* at 1607. But the Court of Appeal rejected the argument, holding that "the possibility that the reputation of agricultural produce from Kern County benefited from the enactment of [the County's prior biosolids ordinance] is not enough to violate the commerce clause." *Id.* at 1613. The court gave two reasons for its holding. First, the court explained that this allegation did not make the County's prior biosolids ordinance discriminatory *against the plaintiffs*:

> the possibility that consumers might view Kern County produce more favorably does not render the ordinance discriminatory against interstate commerce from the perspective of (1) in-county farmers who are selling sewage sludge disposal services and applying biosolids to their land in the unincorporated areas of Kern County or (2) the producers of sewage sludge, regardless of their location, that are buying sewage sludge disposal services. (*Id.*)

Second, the court held that even if the prior biosolids ordinance was enacted to promote Kern County agriculture, "this result was not achieved at the expense of out-of-state competition." *Id.* at 1613-14.

Both reasons are equally applicable here. Like the plaintiffs in *CSD2*, Plaintiffs in this case represent "in-county farmers who are selling sewage sludge disposal services and applying biosolids to their land in the unincorporated areas of Kern County" and (2) "the producers of sewage sludge, regardless of their location, that are buying sewage sludge disposal services." Accordingly, neither group can complain about discrimination against out-of-state agricultural producers. Moreover, like the County's prior biosolids ordinance, any benefit that Kern County agriculture might receive from Measure E "was not achieved at the expense of out-of-state competition." Nothing in Measure E prevents any other jurisdiction from enacting its own bans on land application. Indeed, Plaintiffs' argument that Measure E improperly attempts to promote Kern's agriculture at the expense of other counties' agriculture contradicts their claim that other jurisdictions will enact similar bans if Measure E is upheld. (Pl. Pretrial Mem. at 25:13-14.) *CSD2*

therefore forecloses Plaintiffs' contention that Measure E is invalid because it was motivated in part by the County voters' desire to protect the reputation of the County's agricultural produce.

Second, even apart from *CSD2*, a generalized purpose of promoting local business is not enough to invalidate a law under the Commerce Clause. Indeed, "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984); *see Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("We will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry"); *id.* at 471 n.15 (applying Equal Protection rationale to issue of discriminatory purpose under Commerce Clause). Accordingly, a "state's choice between competing land uses or between alternative environmental protection policies does not implicate the Commerce Clause simply because the alternative chosen may be in the best economic interests of the state as long as the state's choice does not discriminate between in-state and out-of-state competitors." *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 402 (3d Cir. 1987). In other words, the fact that an ordinance was enacted to provide local economic benefits does not make it discriminatory. Something more is needed, such as discrimination against out-of-state business. *See, e.g., W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (state imposed "premium payments" on all milk producers but refunded proceeds only to in-state producers); *Bacchus Imports*, 468 U.S. at 271 (statute taxed liquor from outside the State but exempted locally produced beverages). Thus, in *West Lynn Creamery*, the Court suggested that a state could subsidize local milk producers from its general fund, because that would "impose[] no burden on interstate commerce." 512 U.S. at 195 & n.15. But it could not fund the same subsidies from taxes imposed on out-of-state milk sales, because that "would burden interstate commerce." *Id.*[19]

It is no answer to say that the waste diverted by a local limit or ban must go somewhere else, thereby making the local ordinance discriminatory. To begin with, no farmer, whether in-state or

[19] Indeed, the law could not be otherwise. Many jurisdictions pass laws because their governing bodies believe the laws will benefit local businesses. If that were enough to violate the Commerce Clause, local governments couldn't function.

out-of-state, can be forced to land apply biosolids without his or her consent. Consequently, biosolids will only be land applied where they are welcome *i.e.*, where the farmer in question has decided that the supposed benefits of land application outweigh whatever reputational damage might result.

Moreover, Plaintiffs' argument proves too much. *Every* measure which limits or bans a particular means of waste disposal, and which applies equally to all waste generators, sends the waste in question somewhere else. Nevertheless, the Supreme "Court has indicated that an evenhanded, nondiscriminatory limitation on the amount of waste disposed of that does not discriminate on the basis of the waste's origin would pass constitutional muster." *Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1258 (4th Cir. 1995). For example, in *Fort Gratiot Sanitary Landfill*, the Court invalidated a ban on landfills accepting out-of-county waste, while simultaneously noting that the State "could, for example, limit the amount of waste that landfill operators may accept each year." 504 U.S. at 367. In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), the Court held that a state could alleviate its concern with limited landfill capacity, and still satisfy the dormant Commerce Clause, if it imposed "an evenhanded cap on the total tonnage landfilled" with hazardous waste, "which would curtail volume from all sources." *Id.* at 345. And in *City of Philadelphia v. New Jersey*, the Court invalidated a ban on the importation of most out-of-state waste, while simultaneously noting that "it may be assumed" that the State could protect its environment "by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." 437 U.S. at 626 (emphasis in original); *see also SDDS, Inc. v. South Dakota*, 47 F.3d 263, 269 n.9 (8th Cir. 1995) ("An absolute ban is analogous to a permissible quarantine law. There is a legitimate state interest in environmental protection, and the absolute ban is the best, or at least a permissible, way to achieve this goal"). Since each of the hypothetical ordinances approved in these cases would divert waste away from the enacting jurisdiction, but would nevertheless be constitutional, the same must necessarily be true for Measure E.[20]

[20] A contrary holding would turn the Commerce Clause from a shield against discriminatory legislation into a sword that gave governments and businesses an affirmative right to dump their

Footnote continued on next page

This result is not surprising. Outside the waste management sphere, the courts have repeatedly upheld outright bans that apply equally to local and out-of-state interests. *See, e.g.*, *Clover Leaf Creamery*, 449 U.S. at 471-72 (statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers upheld because it applied "without regard to whether the milk, the containers, or the sellers are from outside the State" and was "therefore unlike statutes discriminating against interstate commerce"); *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948-50 (9th Cir. 2013) (ban on sale in California of foie gras did not violate commerce clause because it did not discriminate based on place of origin); *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1196 (9th Cir. 2007) (Hawaii statute banning parasailing off the coast of Maui during whale mating season was not discriminatory, because it "does not differentiate between residents and nonresidents, or residents and non-citizens"); *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 335 (5th Cir. 2007) (statute that "treats both intrastate and interstate trade of horsemeat equally by way of a blanket prohibition" cannot be "considered economic protectionism"); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1012 (9th Cir. 1994) ("An import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items").

Third, and finally, Plaintiffs' "agricultural protection" theory is wrong on the facts, as well as the law. Even the federal District Court whose opinion Plaintiffs repeatedly cite found no evidence suggesting "that Measure E was enacted for the purpose of protecting local industry at the expense of outside businesses." *City of Los Angeles v. Cty. of Kern*, 509 F. Supp. 2d 865, 885 (C.D. Cal. 2007), *rev'd on other grounds*, 581 F.3d 841 (9th Cir. 2009). Moreover, Plaintiffs'

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refuse wherever they found a landowner willing to accept it. That is not its function. The Commerce Clause does not give "residents of one State a right of access at 'reasonable' prices to resources located in another State that is richly endowed with such resources, without regard to whether . . . residents of the resource-rich State have access to the resources." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981). Accordingly, it does not require a county to allow waste disposal in its territory. *See E. Kentucky Res. v. Fiscal Court*, 127 F.3d 532, 544 (6th Cir. 1997) ("Inasmuch as [plaintiff] argues that the Commerce Clause required Magoffin County to build a landfill within the County, we emphatically reject that argument").

"agricultural protection" theory also contradicts their claims about biosolids. If, as Plaintiffs claim, land application of biosolids "provides significant benefits to the soil and plants" (POB at 1:8), out-of-county farmers will be clamoring for the biosolids diverted by Measure E regardless of any possible impact on the reputation of their produce. In short, Plaintiffs' claim that Measure E is invalid because *one* of its several stated purposes was to protect the reputation of Kern County agriculture has no basis in law or fact.[21]

2. The Commerce Clause Does Not Prohibit Discrimination Against Out-of-County But In-State Entities.

Plaintiffs' claims that Measure E is discriminatory in both intent and effect suffer from the same fundamental defect. In each case, the discrimination Plaintiffs complain about is discrimination *against them*. (*See, e.g.*, POB at 53:23 ("Ejecting Los Angeles biosolids from Kern County was the theme and intent of Measure E").) These claims are meritless because the Commerce Clause does not prohibit discrimination between businesses located in the same state.[22]

The dispositive case is *Waste Management of Alameda County, Inc. v. Biagini Waste Reduction Systems, Inc.*, 63 Cal. App. 4th 1488 (1998). In that case, the City of Oakland enacted an ordinance and approved a franchise agreement that granted a franchisee the exclusive right to collect, transport and process garbage generated within the City's borders. *Id.* at 1492. Another company attempted to pick up city garbage, it was sued by the franchisee, and the company contended in its defense that the franchise ordinance and agreement violated the Commerce Clause. *Id.* at 1493-94. The Court of Appeal rejected the challenge. The court first held that the franchise ordinance "regulates only solid waste generated and processed entirely 'within the City,'" and

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[21] Plaintiffs invoke the rule that "[d]iscriminatory laws motivated by 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity' which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose." (POB at 50:23-51:1 (citations omitted).) But "this rule applies only when *no* legitimate objectives are 'credibly advanced' or where legislation results in 'patent discrimination against interstate trade.'" *Spoklie v. Montana*, 411 F.3d 1051, 1060 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

[22] Nor, *a fortiori*, does the Commerce Clause prohibit discrimination between businesses in the same county. For that reason, Plaintiffs' complaint that "[t]he discrimination of Measure E is further underscored by the advantages that flow from Measure E to Liberty Composting, a competitor of RBM in Kern County" (POB at 52:16-17) is wide of the mark.

therefore imposed "an exclusively intrastate restriction on the processing of waste." *Id.* at 1494. The Court then held that, because the "ordinance is protectionist in its impact," but "only at a local level," it was not discriminatory in violation of the Commerce Clause. As the court stated, the franchise ordinance "may create a monopoly at the local level, but as long as waste is allowed to flow freely in or out of the state, this does not constitute discrimination against interstate commerce." *Id.* at 1497 (quoting *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1385 (8th Cir. 1997)).

Numerous federal cases apply the same principle, particularly in the area of waste management. For example, in *Ben Oehrleins*, the case quoted by *Waste Management*, the court addressed the constitutionality of an amended local ordinance that required waste destined for disposal within the state to use specified transfer stations or processing facilities, but imposed no similar requirement on waste destined for disposal out-of-state. The court held that this restriction did not violate the Commerce Clause. The court first held that the amended ordinance did not discriminate against out-of-state businesses because it affected only intrastate waste:

> We cannot agree with the plaintiffs, however, that the remaining intrastate restriction on the flow of waste also discriminates against interstate commerce. Although the County maintains a monopoly on waste that stays in-state, this does not amount to discrimination because local processors, even the designated facilities, are not being treated preferentially with respect to out-of-state facilities. Here, there is no "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." (115 F.3d at 1385 (citation omitted))

The court then held that the monopoly on handling *intrastate* waste did not violate the Commerce Clause because "the only preference granted to the designated facilities is with respect to other *local* operators." *Id.* (emphasis in original).

Similarly, in *IESI AR Corp. v. Northwest Arkansas Regional Solid Waste Management District*, 433 F.3d 600 (8th Cir. 2006), the court refused to invalidate a local ordinance requiring that solid waste be disposed either at a locally-designated landfill or out-of-state. The court found that the ordinance did not have a discriminatory effect under the Commerce Clause because "[t]he only preferential treatment the regulation bestows is to in-District landfill operators as opposed to other *Arkansas* operators, which 'does not constitute discrimination against interstate commerce.'"

Id. at 605.[23]

The principle that discrimination against in-state entities does not violate the Commerce Clause has been recognized in other contexts, as well. For example, in *Grant's Dairy-Maine, LLC v. Comm'r of Maine Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 21 (1st Cir. 2000), the plaintiff claimed that the Commerce Clause was violated by a state regulation that supposedly put plaintiff, a milk dealer from Northern Maine, "at a competitive disadvantage" compared to comparable milk dealers in Southern Maine. *Id.* at 21-22. But the court rejected the challenge, stating: "This lament should be addressed to the Maine legislature, not to the federal courts. The dormant Commerce Clause does not protect intrastate competition, but, rather, safeguards interstate markets from discriminatory regulation." *Id.* at 22 (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978)).

The only support for Plaintiffs' claim that discrimination against them is tantamount to discrimination against out-of-state entities is a single footnote in *CSD2*. There the court stated:

> If [the County's prior biosolids ordinance] were shown to discriminate against out-of-county interests, that discrimination, by definition, would include discrimination against out-of-state interests. Thus, even though the record does not show any sewage sludge originating outside California was ever shipped to Kern County, we will treat plaintiffs' arguments as implicating interstate commerce. (*CSD2*, 127 Cal. App. 4th at 1613 n.74 (citation omitted))

This footnote will not bear the weight that Plaintiffs place on it, for several reasons. *First*, it is inconsistent with the Supreme Court's subsequent decision in *American Trucking Ass'ns, Inc. v. Michigan Public Service Commission*, 545 U.S. 429 (2005). There the Court held that a fee imposed "only upon intrastate transactions that is, on transactions taking place exclusively within the State's borders" did "not facially discriminate against interstate or out-of-state activities or enterprises." *Id.* at 434. This holding from the Court whose word is paramount with respect to

[23] *Accord, U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1068 n.2 (8th Cir. 2000) (while ordinance requiring intrastate waste to be processed at particular transfer station is "local protectionism," it "constitutionality will be governed by its effects upon interstate, not local, commerce"); *S. Waste Sys., LLC v. City of Coral Springs*, 687 F. Supp. 2d 1342, 1369 (S.D. Fla. 2010) ("Even . . . if Plaintiffs could establish that the flow control regulations were protectionist as to other waste processing facilities within the state, it only establishes a discrimination against intrastate commerce which is not covered by the . . . Commerce Clause").

federal law is inconsistent with the suggestion in *CSD2* that discrimination against out-of-county (but in-State) biosolids is the same as discrimination against out-of-state biosolids.

Second, any such suggestion in the *CSD2* footnote is also inconsistent with *City of Los Angeles v. County of Kern*, 581 F.3d 841 (9th Cir. 2009), which binds the plaintiffs as a matter of collateral estoppel. There the court held that Plaintiffs' desire "to ship their waste from one portion of California to another" was not within the "zone of interests" protected by the Commerce Clause. *Id.* at 847. But the Plaintiffs in that case contended as they do in this case that Measure E discriminated against them in both purpose and effect, and both contentions were upheld by the District Court. *City of Los Angeles v. Cty. of Kern*, 509 F. Supp. 2d 865, 884 (C.D. Cal. 2007). If this were sufficient to prove discrimination under the Commerce Clause, the Ninth Circuit would have affirmed the District Court. But it did just the opposite.[24]

Third, and finally, to the extent it equates discrimination against out-of-county entities with discrimination against out-of-state entities, the *CSD2* footnote is inconsistent with *Waste Management*. There, as just discussed, the court held that an ordinance that created a "monopoly at the local level" was not discriminatory under the Commerce Clause because its "protectionism" was only local. *See* Part IV.C.2, *supra*. That holding conflicts with any suggestion that a local ordinance that supposedly discriminates against out-of-county (but in-state) biosolids generators is guilty of "protectionism" and therefore in violation of the Commerce Clause.

Where "there is more than one appellate court decision, and such appellate decisions are in conflict," the trial court "can and must make a choice between the conflicting decisions." *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 456 (1962). In this case, the choice is clear: the language from *CSD2* that Plaintiffs cite conflicts with subsequent authoritative decisions of the United States Supreme Court on this issue of federal law, as well as with a Ninth Circuit decision

[24] Plaintiffs rely heavily on the district court's decisions that Measure E violated the Commerce Clause, citing these decisions no less than 13 times. But those decisions were reversed by the Ninth Circuit and therefore have no precedential value. Indeed, the Ninth Circuit's holding that Plaintiffs have no cognizable interest under the Commerce Clause much less a valid claim on the merits—underscores the purely intrastate nature of this dispute. *See* Part IV.A, *supra*. In other words, while Plaintiffs may believe that the District Court hit a home run with respect to their Commerce Clause claim, the Ninth Circuit held that Plaintiffs couldn't even get to first base.

that binds the Plaintiffs and another decision of the California appellate courts. Accordingly, this Court should follow the many cases which have held that discrimination between entities located in the same state is not prohibited by the Commerce Clause. Since that is the only discrimination alleged by the Plaintiffs, their claims of discriminatory intent and effect must fail.

3. Measure E Is Not Invalid Due To The Voters' Alleged Discriminatory Intent.

Plaintiffs claim that Measure E is invalid because "[e]jecting Los Angeles biosolids from Kern County was the theme and intent of Measure E." (POB at 53:23.) Even if discrimination against out-of-County (but in-State) biosolids generators were cognizable under the Commerce Clause, this claim would fail for multiple reasons.

a. Measure E Cannot Be Invalidated On The Basis Of Alleged Discriminatory Intent Alone.

Measure E cannot be invalidated due to the voters' allegedly discriminatory intent. As Kern demonstrated in its Opening Post-Trial brief, *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 64 Cal. App. 4th 1217 (1998), stands squarely for the proposition that a local ordinance cannot be invalidated under the federal Commerce Clause on the basis of discriminatory intent alone: "Like the trial court, we decline to rule the [tax] unconstitutional based solely on the alleged discriminatory motives of the city council members who supported it. 'It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" *Id.* at 1224 (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). Indeed, the court could not have been clearer, holding that "the discrimination [the Commerce Clause] prohibits is measured by the economic impact of a local regulation, not the evil motives of local legislators." *Id.*; *see also Cormier v. Cty. of San Luis Obispo*, 161 Cal. App. 3d 850, 858-59 (1984) ("motives of the local officials in passing on a zoning ordinance are irrelevant to any inquiry concerning its reasonableness").

Kern acknowledges that both the United States Supreme Court[25] and the California Supreme Court[26] have occasionally suggested in dicta that a discriminatory purpose would invalidate a state or local ordinance under the Commerce Clause. But "[i]n no Commerce Clause case cited or disclosed by research has a statute or regulation been invalidated solely because of the legislators' alleged discriminatory motives." *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1013 (E.D. Cal. 2006); *accord Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 401-02 (9th Cir. 2015) (plaintiff "cites to no cases in which an ordinance lacking a stated discriminatory purpose was stricken for its impermissible motive"). Accordingly, this Court must follow the square holding in *Burbank* that motive is irrelevant rather than the dicta on which Plaintiffs rely, and hold that the voters' alleged intent in enacting Measure E has no bearing on its validity. *See W. Landscape Constr. v. Bank of America*, 58 Cal. App. 4th 57, 61 (1997) ("The doctrine of precedent, or *stare decisis*, extends only to the *ratio decidendi* of a decision, not to supplementary or explanatory comments which might be included in an opinion").

b. Plaintiffs Have Failed To Prove That Measure E Was Enacted With Discriminatory Intent.

Even if Measure E could be invalidated due to the voters' intent alone, Plaintiffs have failed to prove their case. "The burden to show discrimination [under the Commerce Clause] rests on the party challenging the validity of the statute." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). And where the plaintiff complains that a measure ostensibly adopted for environmental purposes was actually motivated by economic protectionism, the "Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (citation and internal quotation marks omitted) (analyzing legislative motive under Equal Protection Clause); *see id.* at

[25] *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) ("A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect") (citation omitted).

[26] *See Pac. Merchant Shipping Ass'n v. Voss*, 12 Cal. 4th 503, 517 (1995) (laws may violate the Commerce Clause if they are "facially neutral but have a discriminatory purpose").

471 n.15 (same analysis applies to "discriminatory purpose" analysis under Commerce Clause); *accord*, *Int'l Franchise Ass'n*, 803 F.3d at 400; *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1097-98 (9th Cir. 2013).

Although Plaintiffs ignore the presumption articulated in *Clover Leaf Creamery*, it unquestionably applies to this case. As discussed above, the "purpose and intent" provision of Measure E lists a host of environmental purposes that the Ordinance was enacted to further: preventing the "loss of productive agricultural lands capacity for human food production"; eliminating risks to "land, air, and water, and to human and animal health"; and eliminating "odor, insect attraction, and other nuisances." *See* p. 27 n.18, *supra*. Accordingly, under *Clover Leaf Creamery*, these stated purposes must be deemed to be the "actual purposes of [Measure E], unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." 449 U.S. at 463 n.7 (citation and internal quotation marks omitted).

The evidence on which Plaintiffs rely materials from the campaign in support of Measure E (*see* POB at 54:4-16) falls far short of the showing necessary to overcome the presumption that Measure E's stated purposes were its real purposes. In the first place, Measure E was enacted by the voters of Kern County. (Tab 1 [Fact Stip. ¶ 34].) Accordingly, the only intent that matters is their intent. Plaintiffs have failed to produce evidence that any voters saw, much less were persuaded by, the campaign advertisements they rely on. Nor have they introduced direct evidence of voter intent, such as surveys or polls, that would illuminate why the County's voters enacted Measure E.

But even if that were not true, and the campaign materials could serve as indirect evidence of voter intent, they do not prove that the stated environmental purposes of Measure E were merely a pretext for banning out-of-County biosolids. Indeed, they show just the opposite. Even the campaign materials quoted by Plaintiffs cite the risks posed by land application: "L.A. says its harmless and good for us, but if it's so safe, why don't they keep it there?" (POB at 54:15-16 (quoting Ex. 497).) Similarly, the Keep Kern Clean website stated: "Now there's a campaign to move sludge farms off the valley floor for fear that toxins and pathogens contained in the sludge could trickle down to our drinking water supplies underground. And we want to protect our

groundwater from getting polluted[.]" (App'x to POB, Tab U [EX 491].) Accordingly, both the text of Measure E and the campaign materials undermine Plaintiffs' contention that the voters banned land application merely because the biosolids happened to come from outside the County. Instead, the evidence indicates that Measure E was enacted because the voters believed that biosolids were unsafe and a nuisance.

For these reasons, the evidence of discriminatory intent in this case is far more meager than the evidence in the cases Plaintiffs cite finding a discriminatory purpose under the Commerce Clause. For example, in *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995), the court held that a referendum that rescinded legislative approval for a landfill designed to accept out-of-state waste had been enacted for a discriminatory purpose. But *each* of the factors that led the court to that conclusion are absent here. Like a prior initiative, which required that this particular landfill obtain legislative approval, the referendum targeted only a single landfill, and therefore "would not apply to existing or future landfills that dispose of [in-state] waste." *Id.* at 268. That is not true here, where Measure E would unquestionably prevent any future attempts to dispose of Kern County waste by land application. Moreover, in *SDDS* the official ballot argument in support of the referendum specifically targeted out-of-state waste. *See id* Again, that is not true here. And in that case both a state administrative agency and the state Legislature had made formal findings that the defeated landfill was environmentally safe and in the public interest. *See id.* at 265-66. In contrast, neither any Kern County agency nor the County Board of Supervisors had made such findings with respect to either Plaintiffs' land application or land application in general before Measure E was enacted. Finally, the initiative in *SDDS* was the result of "standardless review by the electorate" where the voters had "severely limited information to guide them in evaluating" the proposed facility's effects. *Id.* at 269-70. In contrast, Measure E was the culmination of a decade-long debate regarding land application in the County that involved public workshops, specially-created advisory bodies, the generation of numerous memoranda and reports, and three prior ordinances regulating biosolids land application. (*See* DOB at 5:12-8:3.) Indeed, less than a year before Measure E was adopted, the Kern County grand jury had issued a report, after hearing from experts and reviewing voluminous research, calling for "a complete and outright ban" on land application.

(Tab 41 [EX 1117, at 5].) Nothing even remotely similar happened in *SDDS*.

The other cases Plaintiffs cite to support their "discriminatory intent" argument are equally distinguishable. Unlike Measure E, the law invalidated in *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006), was facially discriminatory. *See id.* at 1268 ("We agree with the district court's holding that 'Initiative 300, on its face . . . favors Nebraska residents'"). Similarly, in that case, unlike this one, a discriminatory purpose was evident from the challenged initiative's text and ballot title. *Id.* at 1269. Likewise, in *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), the court found discriminatory intent based on official ballot arguments and notes of the meetings at which the challenged initiative was drafted. *See id.* at 594. Finally, in *United States v. Manning*, 434 F. Supp. 2d 988 (E.D. Wash. 2006), *aff'd*, 527 F.3d 828 (9th Cir. 2008), the court found that "language within the [challenged law] itself clearly evidences a discriminatory purpose." *Id.* at 1010. In addition, the law invalidated in *Manning* was the successor to a previously enacted measure that had been invalidated as overtly discriminatory, and the new law was intended to accomplish the same purpose, "albeit in a more subtle manner and by a different mechanism." *Id.* at 1011. None of these facts exists here.

4. Measure E Is Not Discriminatory In Effect Because It Does Not Disadvantage Out-Of-County Entities To Benefit Their Local Competitors.

The "modern law of . . . the dormant Commerce Clause is driven by concern about economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008) (internal quotation marks omitted). Accordingly, there is no Commerce Clause discrimination if a law burdens out-of-state businesses without bestowing a corresponding advantage on their local competitors. *See, e.g., Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 49 (2d Cir. 2007) (no discriminatory effect where statute banning all high-speed and vehicular ferries "does not give any advantage to local businesses at the expense of out-of-state competitors"). Because Measure E treats in-County and out-of-County biosolids alike, it confers no benefit on in-County business at the expense of outsiders.

Plaintiffs nevertheless claim that Measure E has a discriminatory effect for three reasons.

First, they complain that "[w]hile Kern County municipalities continue to land apply Class B biosolids within the County's borders, the voters from those same cities decreed that out-of-county jurisdictions could not apply any biosolids anywhere in Kern County." (POB at 58:5-8.) Second, they argue that Measure E discriminates because "[o]ut-of-county interests are the only ones directly land applying biosolids in unincorporated Kern County, and were the only ones doing so at the time of Measure E's passage." (POB at 58:8-9.) Finally, they contend that "[t]he Commerce Clause requires that the discriminatory effects of an ordinance be analyzed from the perspective of the statewide or nationwide impact if the challenged law were replicated elsewhere" and that it would be a "disaster" if other jurisdictions adopted ordinances similar to Measure E. (POB at 58:18-20.) None of these theories supports Plaintiffs' claim that Measure E has a discriminatory effect.

First, no case—other than the reversed District Court opinion supports Plaintiffs' claim that a *County* ordinance like Measure E is constitutionally defective merely because the voters *of the County's cities* have not enacted similar ordinances within their respective jurisdictions. The precise claim was rejected in *CSD2*. In that case, the same plaintiffs sought to prove that the County's prior biosolids ordinance had a discriminatory effect under the Commerce Clause by comparing "(a) the effect of the ordinance within the geographical area that comprises the jurisdiction of County to (b) the effect of other regulations, or the lack of regulations, applicable to the incorporated areas of Kern County." 127 Cal. App. 4th at 1612. However, the court rejected this attempt, holding that "the correct comparison is between the impact of the ordinance on sewage sludge generated outside the jurisdictional authority of County and the impact on sewage sludge generated within that area." *Id.* (citations omitted).

Plaintiffs say *CSD2* is distinguishable because the ordinance upheld in that case was enacted by the County's board of supervisors, while Measure E was enacted by an electorate "where most of the voters came from incorporated areas and could have similarly limited their own land application." (POB at 59:17-18.) So what? As *CSD2* stated, "discrimination is appropriately assessed with reference to *the specific subdivision* in which applicable laws reveal differential treatment." 127 Cal. App. 4th at 1612 (emphasis added) (quoting *Associated Indus. of Mo. v.*

Lohman, 511 U.S. 641, 650 (1994).) The County and the cities in the County are different jurisdictions, and the County's voters and the voters in each of the County's cities are *not the same people*. Accordingly, *CSD2* precludes Plaintiffs' claim that Measure E is discriminatory because the County has banned land application while *other jurisdictions and/or voters* have not.[27]

Second, Plaintiffs claim that Measure E is discriminatory because it only affected out-of-county generators. This contention is equally meritless. The County's Opening Post-Trial Brief cited six cases for the proposition that a local law does not discriminate in violation of the Commerce Clause, even if it affects only entities from outside the enacting jurisdiction, unless it disadvantages outsiders while benefiting their local competitors. (*See* DOB at 40:28-41:27 (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997); *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1042 (9th Cir. 2014); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948 (9th Cir. 2013); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 49 (2d Cir. 2007); and *Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 402 (3d Cir. 1987)).) Plaintiffs cite no case to the contrary. Consequently, the fact that only out-of-county biosolids were being land applied at the time Measure E was enacted does not make the Ordinance unconstitutional.

In all events, Plaintiffs err in suggesting that Measure E adversely affected only out-of-county entities. Measure E prohibits composted biosolids from being land applied in the unincorporated areas, and thereby affected two large composters Synagro and Liberty which are both large local enterprises. (Tab 113 [Tr. 5-4-16, at 29:19-30:21]; Tabs 88, 89 & 117 [EXS 1082,

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[27] In addition, Plaintiffs overshoot the mark when they say that "most of the county's voters come from incorporated areas and could have similarly limited their own land application." (POB at 59:17-18.) The voters in these cities could have exercised the power to ban their own land application only if someone had circulated and qualified an initiative to do so. Plaintiffs have failed to show that any such measure has ever been placed on the ballot in any of the incorporated cities. Consequently, the only fact supporting this discriminatory effect theory is the *failure* of the cities' voters to approve an ordinance that was never placed before them. That is a lot to infer from legislative silence.

Likewise, Plaintiffs engage in unsupported hyperbole when they assert that "[w]hile Kern County municipalities continue to land apply Class B biosolids within the County's borders, the voters from these same cities decreed that out-of-county jurisdictions could not apply any biosolids anywhere in Kern County." (POB at 58:5-8.) Of course, Measure E was not enacted merely by the voters in the County's incorporated areas, nor does it ban land application "anywhere in the County."

1308, 1309].)[28] Moreover, Measure E, if enforced, would also adversely affect the local businesses that land apply biosolids for the governmental Plaintiffs. (Tab 51 [EX 1135 ¶ 13 (Fanucchi)]; *City of Los Angeles v. Cty. of Kern*, 154 Cal. Rptr. 3d 122, 130 (2013) ("Los Angeles's contractors and subcontractors Responsible Biosolids Management, Inc., Sierra Transport, Inc., and R & G Fanucchi, Inc. all would face costs, including risk of total business failure, if Los Angeles were prevented from continuing its biosolids operation at Green Acres."), *rev'd on other grounds*, 59 Cal. 4th 618 (2014). Consequently, the burdens imposed by Measure E have fallen on both local and out-of-county entities. There is no impermissible discriminatory effect.

Third, and finally, because Measure E itself has no discriminatory impact on interstate commerce (*see* Part IV.C, *supra*), Plaintiffs are forced to rely on the assertion that "[t]he Commerce Clause requires that the discriminatory effects of an ordinance be analyzed from the perspective of the statewide or nationwide impact if the challenged law were replicated elsewhere." (POB at 58:18-20.) But the "Court has looked to other laws in cases only where a state law has the practical effect of regulating commerce wholly outside the state, or where inconsistent state safety laws tend to suppress the interstate shipping industry." *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 451 n.2 (6th Cir. 2009) (collecting cases; citations omitted). Neither of these situations exists here. Indeed, Plaintiffs have failed to explain why hypothetical ordinances that might be enacted by other jurisdictions have any bearing on the allegedly *discriminatory effect* of Measure E. *See Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544, 552 n.5 (6th Cir. 2001) (recognizing that "concept" of looking to hypothetical ordinances enacted by other jurisdictions "has more to do with the 'excessive burden' line of analysis than with the 'discrimination' line of

[28] Plaintiffs imply that the County has interpreted Measure E in a discriminatory manner by "allow[ing] local composting facilities to continue business as usual." (POB at 59:7-8.) Not so. Measure E itself permits composting of biosolids to continue, as long as the resulting compost is not land applied in the County. (Tab 113 [Tr. 5-4-16, at 30:26-33:7]; Tab 117 [EX 1082].) While Mr. Fannuchi testified that he had seen Synagro compost delivered to or land applied on nearby farms (Tab 110 [Tr. 4-26-16, at 92:20-26, 103:26-104:12]), Plaintiffs produced no evidence that the County had ever known about much less ignored this violation of Measure E (or any similar violation). And Mr. Nolan from Liberty Composting testified that Liberty has always complied with Measure E's prohibition on land applying compost in the unincorporated areas, except for a few pounds of compost that he brought home. (Tab 113 [Tr. 5-4-16, at 30:19-25].) Plaintiffs' insinuation that Kern has approved violations of the measure tacit or otherwise is simply wrong.

analysis"). And even if burden were relevant to this inquiry, as noted above, Plaintiffs have failed to show that Measure E has *any* impact on interstate commerce (other than possibly causing biosolids to be shipped from California to Arizona). *See* Part IV.A, *supra*. *A fortiori*, Plaintiffs cannot show that the hypothetical ordinances they envision would burden interstate commerce, either. Ten times zero is still zero.[29]

D. Plaintiffs' Undue Burden Claim Is Both Barred By *CSD2* And Meritless.

Under the Commerce Clause balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), a plaintiff contending that a state or local law imposes an undue burden on interstate commerce must show that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. However, as Kern showed in its Opening Post-Trial Brief, Plaintiffs' undue burden claim is foreclosed by *CSD2*. (*See* DOB at 45:15-46:2.)

Plaintiffs contend that *CSD2* is distinguishable because it held only "that the Federal Clean Water Act preserves a role for local biosolids *regulations*," while this case involves a ban. (POB at 62 n.14.) But *CSD2* also held in language Plaintiffs ignore that the County's prior biosolids ordinance was authorized by Congress precisely because Congress had *also* authorized local governments to *prohibit* land application, and the greater power to prohibit included the lesser power to regulate. As the court stated:

> *Because Congress authorized a local ban on the land application of sewage sludge*, one can strongly infer that Congress also authorized local governments to impose a lesser burden on commerce such as the heightened treatment standards [in the County's prior ordinance]." (*CSD2*, 127 Cal. App. 4th at 1610 (citing *Welch v. Bd. of Supervisors*, 888 F. Supp. 753, 757-58 (W.D. Va. 1995) (emphasis added))

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[29] In other words, while adoption of the hypothetical ordinances envisioned by Plaintiffs might affect the biosolids market within California, Plaintiffs have failed to show that it would affect the shipment of biosolids across state lines. Indeed, what the court said in *Maharg*, in rejecting a similar argument, is equally relevant here:

> If every county in both Indiana and Ohio were to adopt a regulatory scheme identical to Van Wert County's, we have no reason to suppose that the movement of waste between the two states would be eliminated or severely impaired. The practical effect of every county's adopting the Van Wert model might well be an increase in the overall level of waste disposal costs, but we do not believe that this can fairly be equated with the balkanization the Commerce Clause is intended to prevent. (249 F.3d at 552-53)

This language was an essential part of *CSD2*'s holding that the County's prior biosolids ordinance was authorized by Congress. Accordingly, it binds this Court and forecloses Plaintiffs' attempt to subject Measure E to *Pike*'s "undue burden" test.

Even if this claim could be considered on the merits, Plaintiffs would not be helped. To meet *Pike*'s first prong, Plaintiffs must show that Measure E imposes "a significant burden on interstate commerce." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1150 (9th Cir. 2012). However, they cannot do so, for as discussed above no evidence indicates that Measure E interferes with the flow of biosolids *between states*. *See* Part IV.A, *supra*. That distinguishes this case from *each* of the cases cited by Plaintiffs in which a state or local law was held invalid after *Pike* balancing. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144 (1970) (order held invalid required company to construct a packing plant in Arizona, and pack its Arizona-grown cantaloupe there, rather than ship them to California for packing); *Union Pacific R.R. Co. v. California Pub. Utils. Comm'n*, 346 F.3d 851, 871 (9th Cir. 2003) (California rule regarding composition of trains would undermine "substantial uniformity" in regulations governing interstate rail system and thereby interfere with interstate commerce); *U&I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069 (8th Cir. 2000) (municipal flow control ordinance prevented plaintiff from sending waste to landfill where much of it could be recycled and become part of stream of interstate commerce); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 438 & n.14 (1978) (state law limiting size of trucks involved in interstate commerce disrupted operations, raised costs by more than $2M, and slowed service); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (statute closed borders of state to low-level radioactive waste); *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 912 (7th Cir. 2003) (statute requiring utility holding companies to be incorporated in the state could impose "substantial" burden on interstate commerce because it could preclude interstate investment in public utilities).

An ordinance fails *Pike* balancing when "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. But where no such burden exists, as in this case, there is nothing to balance. "If a regulation . . . does not impose a significant burden on interstate commerce, it follows that there cannot be a burden on interstate

commerce that is 'clearly excessive in relation to the putative local benefits' under *Pike.*" *National Ass'n of Optometrists*, 682 F.3d at 1155. In such cases, a court "need not determine whether the benefits of a statute are illusory." *Id.* Accordingly, the Court can reject Plaintiffs' claim that Measure E is invalid under *Pike* without determining whether the health and safety benefits of Measure E are "illusory," as Plaintiffs claim. *See Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015) ("Our precedents, however, preclude any judicial assessment of the benefits of a state law and the wisdom in adopting it unless the state statute either discriminates in favor of in-state commerce or imposes a significant burden on interstate commerce") (citation, alterations and internal quotation marks omitted); *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951-52 (9th Cir. 2013) ("under *Pike*, a plaintiff must first show that the statute imposes a substantial burden before the court will determine whether the benefits of the challenged laws are illusory") (citation and internal quotation marks omitted).[30]

Even if there were something to balance, Plaintiffs could not prevail. Their argument under *Pike* is based on primarily on the assertion that the County has failed to prove any harm resulting from land application. (POB at 63:16-64:1.) But Measure E was also enacted to end the "unique odor" and "insect attraction" caused by land application. *See* p. 27 n.18, *supra.* Preventing such nuisances is unquestionably within the County's police power. *See* Part III.B.2, *supra.*[31]

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[30] Plaintiffs cite a handful of older Ninth Circuit cases for the proposition that an "incidental" burden on interstate commerce is enough to trigger *Pike* review. (POB at 62:6-17 (citing *Kleenwell Biohazard Waste & General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995); *Sherwin-Williams v. City & Cty. of San Francisco*, 857 F. Supp. 1355 (N.D. Cal. 1994); and *Grand Canyon Dories, Inc. v. Idaho Outfitters & Guides Bd.*, 709 F.2d 1250 (9th Cir. 1983)).) This proves nothing. No case holds that an "incidental" burden on interstate commerce is enough to invalidate a state or local law under *Pike*, and for good reason. An "incidental" burden on interstate commerce could not possibly be "clearly excessive in relation to the putative local benefits" provided by the challenged law. *Pike*, 397 U.S. at 142. Consequently, even if Measure E had an "incidental" effect on interstate commerce, as opposed to no effect at all, it could not fail *Pike* balancing.

[31] Plaintiffs' Opening Post-Trial Brief does not deny that land application causes flies and odors. Instead, Plaintiffs say only that "Green Acres Farm strives to be a good neighbor" and that "Defendants have received no complaints related to flies and odors at the farm since 2012." (POB at 64:10-12.) So what? These irrelevant claims do not undermine the substantial evidence the County presented concerning the fly and odor nuisances caused by land application. This evidence included the testimony of six past or present neighbors of the Farm (three by deposition), including three witnesses who currently live or work near the Farm, who testified about the significant adverse impact and disruption caused by the Farm's fly and odor problems. (DOB at 31:13-33:6.) Indeed, the City itself admitted fly problems as recently as 2012 and 2013. *Id.* at 31:5-10.

That simple fact compels the conclusion that Measure E is not invalid under *Pike* balancing. "The court cannot invalidate a statute enacted pursuant to the [County's] police power unless it has no reasonable relation to a legislative purpose accomplished by the enactment." *Bronco Wine Co. v. Jolly*, 129 Cal. App. 4th 988, 1024 (2005). Since Measure E will prevent the flies and odors caused by land application, it has a "reasonable relation" to at least two of its stated purposes. Accordingly, the Court cannot hold that the non-existent burden on interstate commerce supposedly imposed by the Ordinance is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

V. MEASURE E DOES NOT VIOLATE THE "INTRASTATE COMMERCE CLAUSE."

Many of the reasons why Measure E does not violate the federal Interstate Commerce Clause are equally applicable to the implied "intrastate commerce clause" in the California Constitution. *First*, even if the California Constitution prohibited "arbitrary and discriminatory local ordinances that favor one jurisdiction at the expense of another" (POB at 65:19-20), Plaintiffs would not be helped. State law precludes Plaintiffs from proving that Measure E is discriminatory on the basis of intent alone. *See* Part IV.C.3.a, *supra*. Nor is Measure E discriminatory in effect. Under *CSD2*, Measure E cannot violate the Commerce Clause—or its supposedly identical equivalent in the California Constitution—merely because the County's cities have failed to enact similar legislation. *See* Part IV.C.4, *supra*. Similarly, even if the State Constitution prohibited local ordinances from discriminating between in-county and out-of-county goods or services, Measure E does not discriminate between in-county and out-of-county businesses or between in-county and out-of-county biosolids. Instead, it bans land application of all biosolids, regardless of where they are generated or who generates them. In short, Measure E cannot be held discriminatory under the implied "intrastate commerce clause" in the California Constitution because it does not put out-of-county biosolids generators "at a competitive disadvantage." *City of Los Angeles v. Shell Oil Co.*, 4 Cal. 3d 108, 119 (1971).

Nor does Measure E violate the "implied intrastate commerce clause" by interfering with the "free flow of goods." (POB at 67:5.) In contrast to the ordinance invalidated in *Meridian, Ltd. v.*

Sippy, 54 Cal. App. 2d 214, 215-16 (1942), which prohibited milk produced outside the city of Stockton from being sold within city limits, Measure E does not close the County's borders to imported biosolids. To the contrary, the City remains free to bring its biosolids into the County for composting, as long as the resulting compost is land applied elsewhere. And the same rules apply to biosolids generated in the County's unincorporated areas. In short, Measure E neither discriminates against Plaintiffs' biosolids nor impedes their movement. Instead, it does nothing more than regulate land use within the County's borders, which is unquestionably within the County's power under Article XI, Section 7 of the California Constitution. *See Bownds v. City of Glendale*, 113 Cal. App. 3d 875, 879 (1980) ("Land use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7").

VI. PLAINTIFFS OCSD AND CSD2 HAVE NOT ESTABLISHED ANY CLAIM AGAINST KERN OR THE RIGHT TO ANY RELIEF.

As demonstrated in Defendants' opening brief, OCSD and CSD2 made no showing at trial that either is entitled to any relief from Kern. (DOB at 48:11-51:9.) Defendants also made this point in their pretrial brief. (*See* Def. Pretrial Br. (filed Apr. 21, 2016) at 21.) Plaintiffs bear the burden of proof on each of their claims, and it is well-established that injunctive relief can be no broader than the evidence on which it is based or the plaintiff who seeks it. Evid. Code §§ 500, 550(b); *San Leandro Rock Co. v. City of San Leandro*, 136 Cal. App. 3d 25, 36-37 (1982). Consistent with the trial evidence, Plaintiffs' opening brief fails to identify any evidence that would entitle OCSD or CSD2 to relief. Because their claims are moot and they are not entitled to injunctive relief, OCSD's and CSD2's claims should be dismissed.

A. OCSD's And CSD2's Claims Are Moot.

Claims are "moot when a court ruling can have no practical impact or cannot provide the parties with effective relief." *Simi Corp. v. Garamendi*, 109 Cal App. 4th 1496, 1503 (2003). As discussed in Kern's opening brief, claims are moot where the activity has ceased or been abandoned, or the circumstances have changed such that the claim would have no practical impact. (*See* DOB at 48:15-49:3 (citing cases).)

OCSD has not land applied in Kern County since 2008, and claims merely that it "would be *interested* in resuming land application in Kern." (POB at 8:16-17 (emphasis added).) CSD2 has not land applied since 2012, and makes no claim even of future interest. The evidence at trial (or lack thereof) bears out the lack of any interest sufficient to support OCSD's and CSD2's claims against Kern. Neither Plaintiff put on any evidence that land application in Kern County is part of its biosolids management plan. Neither Plaintiff owns any land in Kern County upon which to land apply biosolids. Neither Plaintiff has a contract with any farmer, landowner, or biosolids operator in Kern County. Neither Plaintiff has issued a request for proposal for such contracts. Neither party has a permit to land apply biosolids in Kern County nor applied for a permit. (DOB at 49:4-9.) Moreover, OCSD and CSD2 generate only Class B biosolids, which cannot be land applied in the County under the previous biosolids ordinance upheld by the Court of Appeal in *County Sanitation District No. 2*, 127 Cal. App. 4th 1544. (Tab 111 [Trial Tr. (Apr. 27, 2016)], at 53:5-6; Tab 119 [EX 1150], at 1, 3.) Neither Plaintiff identified plans to modify its treatment of sludge to produce Class A-EQ biosolids or facilities in Kern County that will do so. OCSD may be "interested" in land applying in Kern, but an injunction against Measure E would have no "practical impact" on OCSD or CSD2 on this evidentiary record.

Nothing in Plaintiffs' opening brief demonstrates that enjoining Measure E would have any "practical impact" on OCSD or CSD2. Plaintiffs argue that when Measure E was enacted OCSD "lost a viable and low-cost option" in Kern County and now has to rely on farmland further away than Kern in Arizona for land application. (POB at 3:6, 7-8.) But Plaintiffs' account is misleading. Both OCSD and CSD2 utilize a contractor-based approach to biosolids management. (Tab 111 [Trial Tr. (Apr. 27, 2016)] 60:2-9 ("We use a contractor-based approach."); *id.* 124:23-125:7 ("The biosolids management, for the most part, had been through contract operations . . .").) While true that both OCSD and CSD2 had previously land applied biosolids in Kern County at "Tule Ranch" or "Honey Bucket Farms," these Plaintiffs ceased land application in Kern County when their contractor did, choosing to direct some biosolids to Arizona rather than pursue a new contract operation in Kern County. (Tab 111 [Trial Tr. (Apr. 27, 2016)] 55:9-57:22 ("our contractor was moving to Arizona and divesting from Kern"); *id.* 129:22-25 ("Honey Bucket discontinued its land

application in Kern County"); POB at 8:1-3, 8:9-10.)

CSD2's evidence of impact from Measure E is limited to its suggestion that its recently-opened compositing facility in Kings County might be adversely affected by the inability to sell biosolids-based compost in unincorporated Kern County. (POB at 8:3-5.) But CSD2 presented *no* evidence of the marketing of compost from that facility, that the facility has any difficulty disposing of finished compost product, or that selling compost to buyers in unincorporated Kern County was ever part of its plan for the facility. In fact, CSD2 testified that approximately half of the roughly $127 million the districts spent on developing the facility was incurred *after* Measure E was passed and with knowledge of its provisions. (Tab 111 [Trial Tr. (4-27-16)] 132:20-134:15.)

B. OCSD And CSD2 Are Not Entitled To Injunctive Relief.

Each plaintiff must establish the elements of the causes of action upon which it sues, and the entitlement of each to equitable relief. (*See* DOB at 49:12-51:9.) "Absent extraordinary circumstances . . . , injunctive relief will not be granted where events have rendered such relief unnecessary or ineffectual." *Paul v. Milk Depots, Inc.*, 62 Cal. 2d 129, 133 (1964). If some plaintiffs have not shown they are entitled to injunctive relief, the court should not issue broad, generally applicable injunctive relief. In *San Leandro Rock Co.*, the Court of Appeal modified an injunction issued by the trial court against enforcement of a city ordinance banning trucks over four and one-half tons from using certain city streets so that the injunction only applied to the plaintiff in that lawsuit and not more broadly, where the plaintiff had presented evidence that the enforcement of the ordinance would directly impact its business. 136 Cal. App. 3d at 36-37. OCSD and CSD2, by contrast, have not met their burden to prove they are entitled to injunctive relief and a broad injunction that applies to these plaintiffs would be unnecessary and ineffectual.

Plaintiffs' opening brief offers scant information about OCSD's and CSD2's entitlement to relief, if at all. With very few exceptions, Plaintiffs' assertions lump "Plaintiffs" together or mention only Los Angeles. (*See, e.g.*, POB at 40:15 ("Measure E imposes heavy burdens on Plaintiffs"); *id.* at 42:4 ("Measure E's impacts on Plaintiffs are proven and significant"); *id.* at 50:11 ("Measure E's supporters expressly targeted Los Angeles").) Plaintiffs only specifically address OCSD and CSD2 when stating that these two Plaintiffs land apply in Arizona and not in Kern

County (which, as shown above, has nothing to do with Measure E), or, to suggest (without any proof) that CSD2 is concerned about the impact Measure E might have on the marketing of composted biosolids from its Tulare Lake facility. (*See* Part VI.A, *supra*.) These assertions do not establish the elements of the causes of action upon which OCSD and CSD2 have sued the County.

Plaintiffs also argue broad injunctive relief is necessary because Measure E imposes "administrative and cost burdens on [all] Plaintiffs and other California sanitation agencies to manage their biosolids." (POB at 27:22.) This argument is deceptive and unproven. *First*, the cost burden (if any) on OCSD and CSD2 is insubstantial. OCSD posited at trial that the cost of managing its biosolids has increased annually by the equivalent of 28 cents per sewer user since it last land applied in Kern County, but OCSD offered no evidence that enjoining Measure E will have any effect on these costs.

Second, OCSD and CSD2 stopped land applying in Kern County when their contractors ceased operations in 2008 and 2012, respectively. Since that time, OCSD and CSD2 have successfully managed all of their biosolids using a diversified portfolio of contractor-based management options and recycle ninety percent or more of their biosolids. (DOB at 13:3-11; Tab 3 [Trial Tr. (4-27-16)] 154:9-24.)

Third, neither OCSD nor CSD2 offered any evidence that resumption of land application in unincorporated Kern County is part of their management plans, much less that it is necessary. CSD2 testified that of the factors the districts consider in selecting biosolids management options, cost comes in "last." (Tab 111 [Trial Tr. (Apr. 27, 2016)] 140:15-23.) And although OCSD claims it is "interested" in coming back to Kern (POB at 8:17), OCSD agreed in its testimony at trial that cost "was not the decision-making point with respect to [Kern]" and that more important was its desire to "have options available to the district that were closer to home, that were in different markets, and that were in different geographical regions." (Tab 111 [Trial Tr. (4-27-16)] 87:16-88:6; *see also* 86:20-88:6 ("I wouldn't necessarily even call [cost] the driving factor.").) Thus, even if Measure E were permanently enjoined, there is no evidence land application in unincorporated Kern County is a feasible or even likely option for OCSD or CSD2. The broad injunctive relief they seek is unnecessary and ineffectual.

Fourth, as discussed above, both OCSD and CSD2 generate only Class B biosolids, which cannot legally be land applied in the unincorporated areas under the Ordinance upheld in *CSD2*. Accordingly, neither Plaintiff could land apply the biosolids they generate in the unincorporated areas even if Measure E were held invalid. For this reason, too, neither Plaintiff is entitled to an injunction against Measure E.

VII. CONCLUSION

Plaintiffs have not met their burden of proof to demonstrate that Measure E is preempted, exceeds the County's police powers, or violates the federal Commerce Clause or the implicit intrastate commerce clause. Plaintiffs have also failed to demonstrate any need for or entitlement to injunctive relief. Judgment should be rendered in favor of Defendants County of Kern and Kern County Board of Supervisors, so that the will of Kern County's voters may at long last be implemented.

Dated: September 15, 2016

Respectfully,

ARNOLD & PORTER LLP

By: _____
BRIAN K. CONDON
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PROOF OF SERVICE

I, Paulie Davis, declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is 777 S. Figueroa Street, 44th Floor, Los Angeles, California 90017. On September 15, 2016, I served the following document(s) described as follows:

Post-Trial Reply Brief

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California, on September 15, 2016.

Paulie Davis

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