CA No. 07-56564
DC No. 06-5094

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

CITY OF LOS ANGELES; ORANGE COUNTY SANITATION DISTRICT; COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY; RESPONSIBLE BIOSOLIDS MANAGEMENT, INC.; R&G FANUCCHI FARMS, INC.; SHAEN MAGAN, BOTH INDIVIDUALLY AND D/B/A HONEY BUCKET FARMS AND TULE RANCH/MAGAN FARMS; WESTERN EXPRESS, INC.; SIERRA TRANSPORT, INC.; AND CALIFORNIA ASSOCIATION OF SANITATION AGENCIES,

PLAINTIFFS-APPELLEES,

v.

COUNTY OF KERN AND KERN COUNTY BOARD OF SUPERVISORS,

DEFENDANTS-APPELLANTS,

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

INTERVENORS.

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

# PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC


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## I. INTRODUCTION

Plaintiffs are public entities from throughout California – including the largest city in the state – as well as their private contractors and farmers, that run some of the most successful recycling programs in the United States today. Plaintiffs City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles County serve more than 10 million residents of Southern California, treat the wastewater from their homes and businesses, and recycle it into biosolids – an effective organic fertilizer used to grow crops for animal feed. Since 1994 Plaintiffs have successfully used biosolids in place of chemical fertilizers at Green Acres Farm and Tule Ranch located in the unincorporated area of Kern County, California.

In 2006, Kern County voters – exhorted by anti-Los Angeles slogans such as "Measure E will stop L.A. from dumping on Kern," and "We will proclaim our independence from polluting Southern California and Los Angeles" – passed Measure E, which bans the land application of biosolids in the unincorporated areas of Kern County. Plaintiffs are the only entities affected by Measure E. Biosolids generators located in Kern County, such as the City of Bakersfield, are in the *in*corporated areas of the county and hence immune from the Measure.[1]

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[1]The crude caricatures directed at Plaintiffs, and in support of Measure E, made

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Plaintiffs sued Kern County alleging, among other claims, that Measure E violates the dormant Commerce Clause. The district court agreed. *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 881-88 (C.D. Cal. 2007). But on appeal the panel held that the district court should not have reached the merits, holding that Plaintiffs lack prudential standing to sue under the dormant Commerce Clause. *City of Los Angeles v. County of Kern*, No. 07-56564, __ F.3d __, 2009 WL 2871514 (9th Cir. Sept. 9, 2009). In the panel's view, "[t]he interest the recyclers seek to secure is their ability to exploit a portion of the *intra*state waste market – they want to be able to ship their waste from one portion of

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plain the intent to target Plaintiffs in particular:

California to another." Opinion at 12871.[2] The panel held that transporting biosolids from one part of California to another "in no way burdens the recyclers' protected interest in the interstate waste market," and thus Plaintiffs fell outside the "zone of interests protected by the [dormant Commerce] clause." *Id*.

This Court should grant rehearing or rehearing en banc because the panel's decision conflicts with Supreme Court precedent, creates an inter-Circuit conflict with the First and Eighth Circuits and creates an intra-Circuit conflict. *See* Fed. R. App. Proc. 35(b); 9th Cir. R. 35-1 (criteria for rehearing en banc).

The transport of biosolids from one part of California to another substantially affects interstate commerce and therefore falls within the purview of the dormant Commerce Clause. The panel's decision conflicts with the rule that "a State (*or one of its political subdivisions*) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce *through subdivisions of the State*, rather than through the State itself." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 361 (1992) (emphasis added).

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[2] Citations to the panel's opinion are to the pagination in the slip opinion, which is attached.

Supreme Court case law "firmly establishes Congress' power to regulate *purely local activities* that are part of an economic 'class of activities' that *have a substantial effect* on interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005) (emphasis added). The dormant Commerce Clause reaches just as far, for "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572-74 (1997). Hence, "[t]o determine whether the *dormant* Commerce Clause is applicable, we ask . . . whether the activity regulated . . . has a 'substantial effect' on interstate commerce *such that Congress could regulate the activity*." *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 993 (9th Cir. 2002) (emphasis added).

Under modern Commerce Clause jurisprudence, Congress may regulate the transport of products such as biosolids within a state. Indeed, Congress routinely regulates in-state economic activity – such as by banning race and gender discrimination, regulating employee welfare benefit plans, prescribing minimum wage laws and environmental protections – for businesses that operate solely in-state, on the theory that this economic activity substantially affects interstate commerce. The panel's holding that the large-scale shipment of

biosolids within California – and the economic consequences on interstate markets and pricing from relocating that shipment to Arizona – does not even implicate the zone of interests protected by the dormant Commerce Clause is flatly contrary to Supreme Court precedent.

Second, the Court should grant rehearing or rehearing en banc because the panel's decision creates a circuit split with the First and Eighth Circuits. *See Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 183 (1st Cir. 1999); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1379 (8th Cir. 1997). Both *Houlton Citizens' Coalition* and *Ben Oehrleins* held that an in-state plaintiff conducting only in-state economic activity had prudential standing to assert a dormant Commerce Clause challenge to a local ordinance. Indeed, the panel acknowledged the split with the Eighth Circuit. *See* Opinion at 12873, n.8 ("we decline to follow" *Ben Oehrleins*).

Third, the panel's decision creates an intra-Circuit conflict with *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001). *On the Green* held that prudential standing exists when the forced diversion of commerce from one location to another (i.e., the claimed dormant Commerce Clause violation) is the cause of the plaintiff's financial injury. The standard is easily satisfied here, where Plaintiffs have submitted evidence, as the panel

acknowledged, that allowing Measure E to go into effect would result in the diversion of biosolids to Arizona, at increased cost to Plaintiffs. Opinion at 12865.

For these reasons, the court should grant rehearing or rehearing en banc.

## II. THE PANEL'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT

The panel's holding that the shipment of biosolids "from one portion of California to another" does not "burden[] the recyclers' protected interest in the interstate waste market" (Opinion at 12871) conflicts with Supreme Court precedent and is incorrect. The shipment of biosolids from one location to another in California occurs in interstate commerce. That is why, for example, trucking companies have to comply with federal minimum wage and overtime laws and environmental regulations – even if the company's trucks do not cross a state border. For "more than a century," the Supreme Court has "identified three general categories in which Congress is authorized to engage under its commerce power." *Raich*, 545 U.S. at 16. "First, Congress can regulate the channels of interstate commerce." *Id*. "Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce." *Id*. at 16-17. "Third, Congress has the power to regulate activities that substantially affect interstate commerce." *Id*. at 17.

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

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

when relied on to support some exertion of federal control or regulation." *Hughes*, 441 U.S. at 326, n.2.

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

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

Commerce Clause powers," the reasoning of that case applied equally to a *dormant* Commerce Clause claim. 520 U.S. at 574 (emphasis added).

Drawing on these precedents, this Circuit has likewise held that the reach of the dormant Commerce Clause is just as broad as Congress' ability to legislate affirmatively under the Commerce Clause: "To determine whether the dormant Commerce Clause is applicable, we ask . . . whether the activity regulated . . . has a 'substantial effect' on interstate commerce such that Congress could regulate the activity." *Conservation Force*, 301 F.3d at 993.

Here, the undisputed evidence shows that Plaintiffs' conduct in transporting biosolids within California, and the effect of Measure E on that transport, substantially affects interstate commerce. Plaintiffs submitted the Declaration of Larry Bahr, an expert on regional biosolids management in California, on behalf of Plaintiff California Association of Sanitation Agencies[3] ("CASA"). Excerpts of Record ("ER") 585-97. Mr. Bahr's declaration explains at length the economic impact that Kern's Measure E would have on regional markets given the scarcity of landfills that will take biosolids. For example, Measure E would result in "higher landfill 'tipping fees' to accept biosolids and

[3] Plaintiff CASA has 119 public agency members that expend tens of millions of dollars annually to recycle 84 percent of the biosolids generated in their

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possibly longer hauling distances." ER593-94. His declaration also describes the "out-of-state impacts" caused by Measure E "as more California agencies look to Arizona and other locations for alternatives for reuse and disposal," noting that "this will increase biosolids management costs for sanitation agencies and their ratepayers," ER594, as well as "cause collateral environmental impacts such as air emissions." ER595. These effects on regional pricing are the same type of substantial effect on interstate commerce that the Supreme Court found in *Wickard* and *Raich* to implicate interstate commerce.

The panel's response to this was to hold that even if all of that is true, the Plaintiffs in *this* case do not have standing because *their* interests do not implicate interstate commerce: "The interest the recyclers seek to secure is their ability to exploit a portion of the *intra*state waste market – they want to be able to ship their waste from one portion of California to another." Opinion at 12871. But the panel's view that shipping biosolids from one part of California to another does not occur in interstate commerce conflicts with the longstanding and well established judicial interpretation of the Commerce Clause. *Wickard* and *Raich* held that intrastate conduct that substantially affects interstate commerce falls

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communities for beneficial uses.

within the scope of the Commerce Clause – and the evidence shows those substantial effects here. Moreover, *Hughes v. Oklahoma* and *Camps Newfound/Owatonna* held that the dormant Commerce Clause is just as broad as the affirmative Commerce Clause. (Indeed, they are the same clause. *See* U.S. Const., art I, § 8, cl. 3.) The panel's holding that the intrastate shipment of biosolids does not occur in interstate commerce is similar to the rejected argument in *Camps Newfound/Owatonna* that a summer camp that operated entirely in Maine could not raise a dormant Commerce Clause claim.

Further, the panel's holding that "[t]he interest the recyclers seek to pursue . . . to ship their waste from one portion of California to another" is outside interstate commerce is illogical. Presumably, Plaintiffs must comply with federal minimum wage laws and other federal employment regulations when they employ truck drivers to transport biosolids within California. Since the drivers and the biosolids travel in the same truck, it is difficult to understand how one of them is traveling in interstate commerce while the other is not.[4]

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[4] Indeed, the panel's view that only the "*intra*state waste market" is at issue in this case, Opinion at 12871, conflicts with the fact that Plaintiffs' land application of biosolids in Kern County is subject to the Environmental Protection Agency's Part 503 regulations that establish national standards for land application that govern the Plaintiffs' generation, testing, application, and farming with biosolids. 40 C.F.R. Part 503. EPA promulgated those regulations pursuant to the Clean Water

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The transport of biosolids from one location in California to another is interstate commerce. The panel's holding to the contrary conflicts with established Supreme Court precedent. This Court should grant rehearing or rehearing en banc to resolve this conflict.

## III. THE PANEL'S DECISION CREATES AN INTER-CIRCUIT CONFLICT

The Court should also grant rehearing and rehearing en banc because the panel's decision creates a circuit split with the First and Eighth Circuits. *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), and *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), held that an in-state plaintiff conducting only in-state economic activity has prudential standing to assert a dormant Commerce Clause challenge to a local ordinance. The panel in this case acknowledged that its decision conflicted with

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Act, *see* 33 U.S.C. § 1345, which was enacted pursuant to the interstate Commerce Clause. *See generally Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001). If Plaintiffs' land application programs do not implicate interstate commerce, how can EPA regulate local land application at all?

*Ben Oehrleins*, *see* Opinion at 12873, n.8 ("we decline to follow" *Ben Oehrleins*), but did not acknowledge the split with *Houlton Citizens' Coalition*.[5]

In *Ben Oehrleins*, in-state haulers and processors challenged a local ordinance that required waste designated for in-state disposal to pass through designated facilities. The Eighth Circuit analyzed whether the plaintiffs had Article III and prudential standing. The court explained that "[e]ven if a plaintiff meets the minimum constitutional requirements for standing, there are prudential limits on a court's exercise of jurisdiction." 115 F.3d at 1378. One such prudential limit is that "plaintiffs alleging a violation of a constitutional or statutory right must demonstrate that they are within the zone of interests of the particular provision invoked," *id*. (citation and quotation marks omitted) – the same zone of interests test the panel applied in this case. *See* Opinion at 12869. "To satisfy this prudential requirement, a plaintiff must show that 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" 115 F.3d at 1379 (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

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[5] Plaintiffs cited *Houlton Citizens' Coalition* to the panel in their supplemental brief on prudential standing. *See* Appellees' Supplemental Brief, filed March 30,

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The Eighth Circuit found there was "no question" that the "various waste haulers and processors[] have standing." *Id.* The ordinance in question "prohibits haulers from delivering designated waste to non-designated facilities," and "Haulers who violate the Ordinance are subject to a wide variety of sanctions." *Id.* "Furthermore, the Ordinance harms processors such as the landfill plaintiffs who wish to participate in the market for Hennepin County waste by prohibiting access to that waste." *Id.* The court accordingly held that the haulers and processors had Article III standing, and "we see no prudential barriers to standing" either. *Id.*

The panel acknowledged that in *Ben Oehrleins*, "the Eighth Circuit found that in-state haulers and processors had standing to challenge a local ordinance that required waste designated for in-state disposal to pass through designated facilities." Opinion at 12873, n.8. The panel asserted, however, that "[t]hat decision was made in a single, conclusory sentence, which we decline to follow." *Id.* But that is not a fair characterization of *Ben Oehrleins*. The Eighth Circuit discussed Article III and prudential standing together for the hauler and

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2009, at 12-13.

processor plaintiffs in a four-paragraph discussion, not in a single, conclusory sentence. 115 F.3d at 1378-79.

Moreover, the First Circuit found *Ben Oehrleins* persuasive and followed it in a decision that is even more sharply in conflict with the panel's decision here. In *Houlton Citizens' Coalition*, the plaintiffs challenged a 1997 local ordinance that required all generators of residential rubbish within the Town of Houlton "either to use Houlton's chosen contractor to transport their trash, or to haul it themselves." 175 F.3d at 181. The First Circuit held that it could reach the merits of the dormant Commerce Clause challenge to the ordinance, because one of the plaintiffs in that case – Faulkner, a "local trash hauler[], *id*. at 182 – had prudential standing.

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

The panel's holding in this case directly conflicts with the First Circuit's decision in *Houlton Citizens' Coalition*. The panel held that the Plaintiffs here lack prudential standing to assert a dormant Commerce Clause claim because they transport biosolids from one location in California to another – but the First Circuit held that very fact to be immaterial to prudential standing under the dormant Commerce Clause. 175 F.3d at 183.

Moreover, this circuit split on whether an in-state plaintiff can assert a dormant Commerce Clause challenge to a local ordinance that impedes the flow of commerce has a significant impact on the scope of the dormant Commerce Clause. In a state the size of California, an enormous amount of economic activity does not literally cross a state border. If all of this economic activity is outside the dormant Commerce Clause, California's cities and counties are now free to launch trade wars against each other – precisely the sort of conduct that a protectionist ordinance such as Measure E invites. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

## IV. THE PANEL'S DECISION CREATES AN INTRA-CIRCUIT CONFLICT

Finally, the panel's decision creates an intra-Circuit conflict with *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001), concerning the standard for determining prudential standing to assert a dormant Commerce Clause claim. *On the Green* held that prudential standing exists when the forced diversion of commerce from one location to another (i.e., the claimed dormant Commerce Clause violation) is the cause of the plaintiff's financial injury.

Specifically, the plaintiff in *On the Green* was an apartment complex located in the City of Tacoma, which enacted an ordinance that, among other things, required trash self-haulers to bring their trash to the city dump instead of disposing it elsewhere. *Id*. at 1237, 1240. The plaintiff claimed that this requirement was effectively a "disposal monopoly," in violation of the dormant Commerce Clause. *Id*. at 1240.

The Court found that the plaintiff had prudential standing because "On the Green's complaint here is that it is forced to pay higher prices to dispose of its garbage at the city dump." *Id*. at 1241. "On the Green has alleged that it would pay substantially less to dump at other landfills." *Id*. "Hence, On the Green's injury would be remedied if it could take its garbage outside the city," and the plaintiff "has satisfied the prudential component of standing." *Id*.

*On the Green* distinguished a previous Ninth Circuit decision, *Individuals for Responsible Government, Inc. v. Washoe County*, 110 F.3d 699 (9th Cir. 1997), which held that the individual household generators in that case lacked prudential standing to challenge a local ordinance that required residents to subscribe to garbage collection services from a specified provider, reasoning that there was no causal relationship between the forced relocation of commerce and the plaintiffs' injury. *On the Green*, 241 F.3d at 1241 ("In *Washoe*, however, we placed significant weight on the fact that the plaintiffs' injury would continue even if the garbage collectors dumped all their garbage out of state."). Rather, in *Washoe*, the plaintiffs' injury – "being forced to pay for services they do not want," 110 F.3d at 703 – would occur no matter where the specified provider disposed of the garbage. *Id*. at 704 ("Thus, the appellants' interests are, at best, marginally related to . . . the purposes implicit in the dormant Commerce Clause.") (citation and quotation marks omitted).

Under *On the Green*, this should be an easy case. As the panel acknowledged, if Plaintiffs are "precluded from land applying their biosolids in Kern County, they would be required to find alternative locations to dispose of their sludge. They have submitted declarations pointing to Arizona as a probable destination, and asserting that this site change would result in increased transportation costs." Opinion at 12865. *On the Green* found prudential standing

where the plaintiff's "injury would be remedied if it could take its garbage outside the city," 241 F.3d at 1241; here, Plaintiffs have shown they would incur increased expense from shipping biosolids outside the state.

Moreover, Plaintiffs here are not merely individual households or a single apartment complex, as in *Washoe* or *On the Green* respectively, but multiple public entities and their contractors that provide wastewater treatment and recycling services to more than 10 million people. The panel also overlooked the Plaintiff CASA, which represents nearly the entire biosolids market in California and an integral part of the nationwide market, and whose members engage in interstate commerce. The scope of commerce at issue here, and its substantial effect on interstate commerce, far exceeds what was at issue in *Washoe*, or even *On the Green*.

The panel's response to this precedent was to repeat its earlier mistake that the shipment of biosolids within California does not count as interstate commerce. The panel found that "Like the residents in *Washoe County*, [Plaintiffs] would suffer the same injury (being forced to pay higher prices for biosolid disposal) if Measure E permitted land application from *out-of-state* entities, but prohibited land application from *in-state* entities." Opinion at 12872. But that is equivalent to saying that Plaintiffs lack prudential standing because they would suffer the same injury – increased biosolids disposal cost – if Kern violated

the dormant Commerce Clause in a slightly different way. Under Supreme Court precedent, for Kern County to prohibit land application from other in-state entities would violate the rule that "a State (*or one of its political subdivisions*) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce *through subdivisions of the State*," *Fort Gratiot*, 504 U.S. at 361 (emphasis added); *see also BFI Medical Waste Sys. v. Whatcom County*, 983 F.2d 911, 913 (9th Cir. 1992) ("Under *Fort Gratiot*, out-of-county waste bans are *per se* unconstitutional."). The panel's reasoning is not consistent with the test set forth in *On the Green* and *Washoe*, which looks to whether the plaintiff's injury is causally related to a forced relocation of commerce – a standard that is satisfied here.

## V. CONCLUSION

For the foregoing reasons, the Court should grant rehearing or rehearing en banc of the panel's decision.

DATED: September 23, 2009

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## CERTIFICATE OF COMPLIANCE

## (FED. R. APP. PROC. 32(A)(7)(C); 9TH CIR. R. 40-1(A))

This brief has 4,199 words, according to the word-processing system used to prepare it.

DATED: September 23, 2009

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## PROOF OF SERVICE

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

On September 23, 2009, I served the attached:

**PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC**

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s/Kelley A. Garcia
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**ATTACHMENT: PANEL OPINION (9TH CIR. R. 40-1(C))**

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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

*Plaintiffs-Appellees,*

and

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

*Intervenors,*

v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,

*Defendants-Appellants.*

No. 07-56564

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

R & G FANUCCHI, INC.; SIERRA TRANSPORT INC.; RESPONSIBLE BIOSOLIDS MANAGEMENT, INC.,
*Plaintiffs-Appellants,*

and

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

v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,
*Defendants-Appellees.*

No. 08-56622
D.C. No. 2:06-cv-05094-GAF-VBK
OPINION

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

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

Filed September 9, 2009

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

Opinion by Judge O'Scannlain

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

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

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## OPINION

O'SCANNLAIN, Circuit Judge:

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

# I

## A

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

In 2006, voters in Kern County, California ("Kern"), adopted a local ordinance ("Measure E" or the "Ordinance") by ballot initiative that makes it "unlawful for any person to Land Apply Biosolids to property within the unincorporated area of the County." Violation of the Ordinance is a misdemeanor punishable by "a fine of not more than $500 or by imprisonment of not more than six months." By its terms, the Ordinance applies to both in-county and out-of-county waste generators. In practical effect, however, because Kern does not currently apply its biosolids to land within the county,

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

Measure E does not directly impact Kern's own waste disposal programs.

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

B

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

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

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

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

## II

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

Over and above the limits of Article III, however, there exists a body of "judicially self-imposed limits on the exercise of federal jurisdiction," *Allen v. Wright*, 468 U.S. 737, 751 (1984), "founded in concern about the proper—and properly limited—role of the courts in a democratic society," *Warth*, 422 U.S. at 498. Citing their nonconstitutional nature, we have previously held that these requirements, commonly referred to as "prudential" standing, "can be deemed waived if not raised in the district court." *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 946 (9th Cir. 1993).[3]

A

Because Kern admittedly failed to raise prudential standing before the district court,[4] we must satisfy ourselves that we should address the matter in the first instance. At times, we have exercised our prerogative to "deem" this issue waived in such circumstances. *See, e.g.*, *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1087 n.6 (9th Cir. 2003); *Pershing Park*, 219 F.3d at 899-900. Past practice, however, does not preclude our consideration of the subject in the case at hand. Rather, the permissive language in our caselaw—"can be deemed"—indicates that the choice to reach the question lies within our discretion. We are also mindful of the Supreme Court's description of constitutional *and* prudential standing as "threshold determinants of the propriety of judicial intervention." *Warth*, 422 U.S. at 518.

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

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

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

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

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

court's decision under 28 U.S.C. § 1367 to exercise jurisdiction over the state-law claims.

Perhaps most importantly, a ruling on prudential standing could obviate the need to rule on the merits of the dormant Commerce Clause challenge. In such circumstances, "we are guided by the traditional principle that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available. This rule against unnecessary constitutional adjudication applies even when neither the trial court nor the parties have considered the nonconstitutional basis for decision." *Correa v. Clayton*, 563 F.2d 396, 400 (9th Cir. 1977) (internal quotation marks and citations omitted).

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

B

**[2]** Several doctrines fall under the rubric of "prudential standing." Here, we consider only "the zone of interests test[, which] governs claims under the Constitution in general, and under the negative [dormant] Commerce Clause in particular." *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 703 (9th Cir. 1997) (second alteration in original) (internal quotation marks and citation omitted); *see also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987) (noting that interests must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (internal quotation marks and citation omitted)). While the test "is not meant to be especially demanding," *Clarke*, 479 U.S. at 399, a party's "complaint must 'fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Washoe County*, 110 F.3d at 703 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)). Thus, this

prudential standing requirement "denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the [relevant constitutional provision]." *Id.* (alterations in original) (internal quotation marks and citation omitted).

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

Our decision in *Washoe County* provides the answer to this question. In that case, we addressed Nevada county ordinances which required residents to employ garbage collection services run by "the County and its authorized agents or contractees." *Washoe County*, 110 F.3d at 701. "[P]rior to enactment of the ordinances, [some residents had] transported their garbage across state lines for disposal at the dump sites in . . . California." *Id.* at 703. Displeased with paying for a service they did not desire, these residents brought suit, alleging that

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

the ordinance violated the dormant Commerce Clause insofar as it "prevent[ed] them from utilizing dump sites outside the State of Nevada." *Id.* at 702. We held that though the residents met the constitutional requirements for standing, they failed to satisfy the prudential limitations. *Id.* at 702, 704. Paying for unwanted garbage collection services—even if one had previously dumped out of state—was "an injury not even marginally related to the purposes underlying" the Clause. *Id.* at 703. We posited that even if all residents forced to pay for garbage collection services had previously transported their waste across state lines, the litigants' claim could not meet the zone of interests test. "Their injury (being forced to pay for services they did not want) would exist even if the [garbage collection service] were to dump all the garbage it collects from Nevada across the state line in California. Under those circumstances, the Washoe County ordinance would impose no barrier to interstate commerce." *Id.* at 703-04; *see also On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1239-40 (9th Cir. 2001) (reaching the same conclusion with respect to a similar waste disposal ordinance).

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

**[5]** The recyclers miss the point when they contend that if Measure E stands, some of them will be forced to pay higher

fees to ship their waste to different sites, likely in Arizona. While this injury-in-fact suffices for Article III purposes, *see Washoe County*, 110 F.3d at 702, it is insufficient to establish prudential standing. As the name implies, the zone of interests test turns on the *interest* sought to be protected, not the *harm* suffered by the plaintiff. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) ("[The zone of interests test] concerns . . . the question whether the *interest* sought to be protected by the complainant is arguably . . . protected or regulated by the statute or constitutional guarantee in question." (emphasis added)). Financial injury, standing alone, does not implicate the zone of interests protected by the dormant Commerce Clause. That financial injury must somehow be tied to a barrier imposed on interstate commerce. The recyclers here have not established that requisite link.[6] Like the residents in *Washoe County*, they would suffer the same injury (being forced to pay higher prices for biosolid disposal) if Measure E permitted land application from *out-of-state* entities, but prohibited land application from *in-state* entities. "Under those circumstances," Measure E would "impose no barrier to interstate commerce," *Washoe County*, 110 F.3d at 704, yet the harm to the recyclers would be the same.[7] Therefore, we cannot conclude that the recyclers alleged injury is tied to the purposes animating the dormant Commerce Clause.

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

[7]For this reason, the recyclers' claims are more analogous to the claims of the residents in *Washoe County*, *see* 110 F.3d at 703; *On the Green*, 241 F.3d at 1239-40, than the apartment complex in *On the Green*, *see* 241 F.3d at 1241. Moreover, the ordinance in *On the Green* barred the plaintiff from engaging in interstate commerce. Measure E creates no such prohibition. *Cf. Huish Detergents, Inc. v. Warren County*, 214 F.3d 707, 711 (6th Cir. 2000) (concluding that prudential standing was established when plaintiffs' financial injury would disappear "if it could hire a waste hauler to transport its waste *out-of-state*" (emphasis added)).

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

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

## III

**[7]** Based on the foregoing, we dismiss the recyclers' claims under the dormant Commerce Clause. With that, we are left with a complex question of state-law preemption. Because our dismissal of the federal constitutional claim may

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

materially alter the district court's decision to exercise supplemental jurisdiction over the preemption claim, *see, e.g.*, *Golden v. CH2M Hill Hanford Group, Inc.*, 528 F.3d 681, 684 (9th Cir. 2008), we vacate its judgment and remand the state-law claim for reconsideration of the factors listed in 28 U.S.C. § 1367.

DISMISSED in part, VACATED in part, and REMANDED.