S210150

No.
(Court of Appeal No. F063381)
(Tulare County Super. Ct. No. VCU242057)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

PETITION FOR REVIEW

ARNOLD & PORTER LLP
STEVEN L. MAYER (No. 62030)
steve.mayer@aporter.com
3 Embarcadero Center
10th Floor
San Francisco, California 94111
Telephone: 415.471.3100
Facsimile: 415.471.3400

JEROME B. FALK, JR. (No. 39087)
jerryfalk20@gmail.com
Three Embarcadero Center
10th Floor
San Francisco, California 94111
Telephone: 415.738.8442
Facsimile: 415.471.3400

COUNTY OF KERN
THERESA A. GOLDNER (No. 107344)
COUNTY COUNSEL
tgoldner@co.kern.ca.us
MARK L. NATIONS (No. 101838)
DEPUTY COUNTY COUNSEL
mnations@co.kern.ca.us
1115 Truxtun Avenue, 4th Floor
Bakersfield, California 93301
Telephone: 661.868.3800
Facsimile: 661.868.3805

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

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

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ISSUES PRESENTED

1. When a federal court declines to hear state-law claims within its supplemental jurisdiction and dismisses them without prejudice, and the statute of limitations has run while the state law claims were pending in federal court, does 28 U.S.C. §1367(d) give the plaintiff thirty days in which to refile in state court, as the Court of Appeal held in *Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998), or is the thirty days extended by the remaining limitations period that existed when the plaintiff filed its federal action, as the Court of Appeal held in *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298 (2001)?

2. Does the Integrated Waste Management Act, Public Resources Code Sections 40000-49620, which requires local agencies to "promote" and "maximize" recycling when implementing the Act, preempt a county ordinance that bans one form of recycling of one kind of solid waste, when the County's voters were not implementing the Act when they adopted the ordinance and when the Court of Appeal found preemption only by adopting a novel federal law preemption standard that has never been used by the California courts as the sole basis for invalidating a local ordinance?

3. Does the "regional welfare" doctrine, which requires that a local land use regulation that has a regional impact must "reasonably relate[] to the general welfare of the region it affects" (*Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 610 (1976)), invalidate a local government's ban on recycling one form of solid waste when the Legislature, in passing a comprehensive solid waste management statute, made regional cooperation voluntary rather than mandatory?

INTRODUCTION

This case concerns a Kern County ordinance, known as Measure E, that bans the land application of treated sewage sludge, or "biosolids," in the County's unincorporated areas.

"Land application" means "the spraying, spreading or other placement of Biosolids onto the land surface, the injection of Biosolids below the surface, or the incorporation of Biosolids into the soil." 1 Appellants' Appendix ("AA") 39 (Measure E §8.05.030(D)). The trial court entered a preliminary injunction restraining the County from enforcing Measure E against the Plaintiffs until final judgment. Defendants County of Kern and the Kern County Board of Supervisors appealed from that order, and the Court of Appeal affirmed.

The Court of Appeal's decision presents for review one unresolved issue of federal law, as to which the Courts of Appeal in this State (and the courts of many other states) are in conflict. In addition, it presents an important and unresolved issue of state law preemption that affects cities and counties throughout California. Finally, it presents a novel and problematic application of the judicially created "regional welfare doctrine," whereby the Court of Appeal has effectively mandated regional cooperation with respect to solid waste management even though the Legislature made regional cooperation in this area voluntary rather than mandatory.

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

How much time the plaintiff has to refile his state law claims in state court is governed by 28 U.S.C. §1367(d). That statute provides that "[t]he period of limitations'" for any supplemental claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. §1367(d)). The statute therefore "prevent[s] the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks v. Rockland Cnty.*, 538 U.S. 456, 459 (2003).

In the twenty years since its adoption, both the California courts and courts across the country have adopted two conflicting views of how Section 1367(d) operates when, as in this case, a state statute of limitations expires while a supplemental claim is pending in federal court. Four courts, including the Second District, have held that in such cases the plaintiff must file a state court complaint within thirty days of the date its federal claim is dismissed. *See Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998); *accord, Berke v. Buckley Broad. Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003); *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. 2001); *Huang v. Ziko*, 511 S.E.2d 305 (N.C. Ct. App. 1999). Five other courts, including the Third District and the Fifth District in this case, have held that a plaintiff can "tack on" to the thirty-day period provided by Section 1367(d) any portion of the state-law limitations period that had not expired when the plaintiff filed in federal court. *See Bonifield v. Cnty. of Nevada*, 94 Cal. App. 4th 298 (2001); *accord, In re Vertrue Mktg. & Sales Practice Litig.*, 712 F. Supp. 2d 703 (N.D. Ohio 2010); *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755 (Minn. Ct. App. 2010); *Turner v. Kight*, 957 A.2d 984 (Md. Ct. App. 2008); Slip Op. 17-21. Under the latter approach, Section 1367(d) suspends the operation of a state statute of limitation while the case is pending in federal court, and the statute begins to run again thirty days after the case is dismissed.

The Court should grant review to resolve the conflict and hold that a plaintiff has only thirty days in which to refile its state law claims. That approach conforms to the statutory language and best resolves the conflicting interests at stake. *See* Part I, *infra*.

2. The Court of Appeal also erred in holding that Measure E was preempted by the Integrated Waste Management Act (the "Act"). While the court held that Measure E was preempted by Public Resources Code Section 40051(a) and (b) (Slip Op. 23), these statutes require that local public agencies "promote" and "maximize" recycling only when "implementing this division"—*i.e.*, when implementing the Act. Accordingly, by their express terms, these requirements apply only when a local agency is implementing the Act, such as preparing the integrated waste management plans that the Act requires. However, the County was not implementing the Act when its voters adopted Measure E; instead, the voters were invoking the police power granted by Article XI, Section 7. Accordingly, Measure E is not preempted by Section 40051.

The Court of Appeal rejected this "plain language" interpretation of Section 40051 (even though it adopted a "plain language" interpretation of 28 U.S.C. §1367(d)) on the ground that upholding Measure E "would not be consistent with a statute that requires all local governments to adhere to waste management plans in which recycling is maximized." Slip Op. 25. But the fact that the Act might have been more efficient had it preempted local ordinances *whenever* they arguably made achieving the Act's recycling goals does not authorize the courts to disregard qualifying language from a statute that the Legislature included. CODE CIV. PROC. §1858 ("In the construction of a statute . . . the office of the Judge is simply to declare and ascertain what is in terms or substance contained therein; not to insert what has been omitted or omit what has been inserted"). Moreover, the courts have recognized that "some of the seeming lack of clarity or apparent logical gaps in the [Act] may be the result of deliberate

choices by the Legislature rather than inadvertence." *Rodeo Sanitary Dist. v. Bd. of Supervisors*, 71 Cal. App. 4th 1443, 1453 (1999). Accordingly, the Court must interpret "the act as it is written, not . . . a different, perhaps broader, version that could have been, or still may be, enacted." *Waste Mgmt. of the Desert, Inc. v. Palm Springs Recycling Ctr., Inc.*, 7 Cal. 4th 478, 490 (1994). The Act "as it is written" does not preempt Measure E, because it was not adopted in the course of "implementing this division." The Court should grant review to correct the Court of Appeal's contrary ruling on this important issue. *See* Part II(A), *infra*.

In reaching the opposite result, the Court of Appeal applied a federal preemption test that has never been used as the sole basis for state preemption. In *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853 (2002), the Court cited a federal case (*Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs*, 27 F.3d 1499 (10th Cir. 1994)), for the proposition that "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, regulation cannot be used to ban the activity or otherwise frustrate the statute's purpose." 27 Cal. 4th at 868. But the Court in *Great Western* found *Blue Circle Cement* "distinguishable" (*id.*), and therefore had no reason to decide whether this federal standard was part of California law. Now, however, for the first time, a California court has applied this novel standard to preempt a local ordinance without relying on the traditional preemption tests recognized by this Court. *See* Slip Op. 24 ("Under this analysis, which we find persuasive here . . ."). For this reason, too, the preemption issue deserves review. At the very least, the Court should remand this case for reconsideration in light of the Court's forthcoming decision in *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.*, No. S198638 (argued Feb. 5, 2013). *See* Part II(B), *infra*.

3. Finally, review is warranted to consider the Court of Appeal's novel application of the "regional welfare doctrine." That doctrine, which is entirely judge-made, requires that a local land use regulation that has a regional impact must "reasonably relate[] to the general welfare of the region it affects." *Associated Homebuilders, Inc.*, 18 Cal. 3d at 610 (1976). However, this doctrine has been applied in only a few cases, and never in a context where the Legislature had previously adopted a comprehensive statute covering the same subject that made regional cooperation voluntary rather than mandatory. The Court of Appeal's decision to rush in where the Legislature feared to tread raises novel separation of powers issues that should be resolved by this Court. *See* Part III, *infra*.

Each of these three issues would be review-worthy in and of itself. Taken together, these issues present an especially strong case for review. Indeed, Respondent City of Los Angeles has already acknowledged that the Court of Appeal's opinion "impacts not only the parties to the present action, but local governments and agencies throughout the state." Letter from James B. Slaughter to Court of Appeal, dated Feb. 27, 2013, at 2. Another Respondent has stated that the Opinion addresses "a matter of great and continuing public interest." Letter from Paul J. Beck to Court of Appeal, dated Mar. 4, 2013, at 2. And one *amicus* has argued that the case "is of national importance" (Letter from Nathan Gardner-Andrews to Court of Appeal, dated Feb. 27, 2013, at 1) and another said it was "of national significance." Letter from Amanda Waters to Court of Appeal, dated Mar. 1, 2013, at 1.

These statements are well-founded. As Respondent California Association of Sanitation Agencies told the Court of Appeal, numerous other counties have enacted local ordinances that are similar or identical to Measure E. *See* Letter from Roberta L. Larson to Court of Appeal, dated Mar. 4, 2013, at 2 ("Larson Letter"). Stanislaus and San Joaquin counties have banned all

land application of biosolids. STANISLAUS COUNTY CODE §9.34.040; SAN JOAQUIN COUNTY CODE §5-9102. San Luis Obispo County has banned all land application except for small amounts. SAN LUIS OBISPO COUNTY CODE §8.13.030. Sutter County has banned all land application except for biosolids bagged and sold at retail. SUTTER COUNTY HEALTH & SANITATION CODE §715-030. And Imperial County has banned the importation of biosolids. IMPERIAL COUNTY CODE Measure X §2 (2007). "In addition, practical bans have been adopted in at least 14 other counties across the state." Larson Letter at 2. Accordingly, the decision in this case will affect not only the parties and their residents (who constitute a sizable swath of Southern California) but all of the counties that have similar or identical ordinances and all of the local entities that ship their biosolids to them.

STATEMENT OF FACTS

Local governments continuously collect and treat municipal sewage and must dispose of the byproducts of sewage treatment. Slip Op. 4. These byproducts, known as sewage sludge or biosolids, can be put in landfills, incinerated, or used as agricultural fertilizer ("land application"). *Id.* In 2009, 61% of biosolids generated by sewage treatment plants in California were land applied. *Id.*

Land application of biosolids is subject to federal, state, and local regulation. Slip Op. 4. Federal regulations divide biosolids into Class A and Class B according to the quantity of pathogenic microorganisms remaining after treatment. *Id.* Class A biosolids are treated to eliminate virtually all pathenogenic microorganisms. *Id.* at 5. Federal regulations allow them to be applied to land with few restrictions and also allow them to be bagged and sold for home gardening use. *Id.* In Class A Exceptional Quality (EQ) biosolids, eight trace metals may be present in concentrations no greater than a specified level. *Id.*

The State Water Resources Control Board has imposed additional regulations in the form of a general order issued in 2004, Water Quality Order No. 2004-0012-DWQ. Slip Op. 5. This general order requires each land application site to be approved before biosolids are applied. *Id.*

Before Measure E, Kern County permitted land application of Class A EQ biosolids. Slip Op. 5. This ordinance was challenged unsuccessfully by the same respondents that brought this case. *County Sanitation Dist. No. 2 v. County of Kern*, 127 Cal. App. 4th 1544 (2005). Although Respondents contended that this ordinance was invalid for multiple reasons, they did not contend that it was preempted by the Act. *See id.*

Government regulators have generally maintained that land application of biosolids is safe and have promoted it as an effective means of disposing of sewage treatment byproducts without landfilling or incineration. Slip Op. 5. Nevertheless, land to which biosolids have been applied may emit a foul odor and attract flies. *Id.* at 7. Indeed, the EPA says that "even the best run operations may emit offensive odors" (U.S. ENVIRONMENTAL PROTECTION AGENCY, *Biosolids Generation, Use, and Disposal in the United States* 41 (1999) ("*Biosolids Generation*"), *available at* http://www.epa.gov/osw/conserve/rrr/composting/pubs/biosolid.pdf), and the District Court that heard the Respondents' federal case found that Los Angeles' land application site "emanates strong odors and attracts an unusual amount of flies." *City of Los Angeles v. Cnty. of Kern*, 509 F. Supp. 2d 865, 873 (C.D. Cal. 2007), *rev'd on other grounds*, 581 F.3d 841 (9th Cir. 2009).

In 1994, the City of Los Angeles began to land apply biosolids at Green Acres Farm, a 4,700-acre farm in the unincorporated area of Kern County. Slip Op. 7. The city purchased the farm in 1999 for almost $10 million. *Id.* When Kern County restricted land application to Class A EQ biosolids, Los Angeles spent about $15 million to upgrade its sewage treatment plants to enable

them to process biosolids to the required quality level. *Id.* Today, about 75 percent of the biosolids generated by Los Angeles's sewage treatment plants are applied at Green Acres Farm. *Id.*[1]

The County's voters approved Measure E in June 2006. Slip Op. 9. Shortly thereafter, Respondents filed a federal lawsuit challenging the Ordinance's validity on federal and state law grounds (the "Federal Case"). Plaintiffs' federal complaint asserted, *inter alia*, that Measure E (1) violates the dormant Commerce Clause, (2) is preempted by the Act, and (3) constitutes an invalid exercise of the County's police power. 1 AA 139-77. The District Court granted a preliminary injunction, finding that Plaintiffs were likely to prevail on each of these claims. *City of Los Angeles v. Cnty. of Kern*, 462 F. Supp. 2d 1105, 1111 (C.D. Cal. 2006). Thereafter, the court granted summary judgment to Plaintiffs on their Commerce Clause and state-law preemption claims, but found that disputed facts precluded summary judgment on their police power claim. *City of Los Angeles*, 509 F. Supp. 2d at 869-70.

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

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[1]Respondents County Sanitation District No. 2 of Los Angeles County and Orange County Sanitation District used to land apply their biosolids in Kern County at property owned by former Respondent Shaen Magan. But they no longer do so, which is why Magan dismissed his claims against the County and those of an entity he owns known as Western Express while this appeal was pending. At the present time, the City of Los Angeles is the only entity land applying its biosolids in the county.

More than two-and-a-half months later, on January 26, 2011, Plaintiffs filed the present case, reasserting their claims that Measure E is preempted by the Act (1 AA 17-18 (¶¶63-72)); is an improper exercise of Kern County's police powers (1 AA 18 (¶¶73-78)); and violates the federal Commerce Clause (1 AA 19-20 (¶¶79-90)).[2]

Respondents then filed several motions for preliminary injunction. 1 AA 40, 280; 2 AA 296, 375. The trial court granted the motions, finding that Respondents were likely to prevail on their preemption and police powers claims and that the balance of hardships tipped in their favor. 3 AA 668-72.

Appellants did not contend on appeal that the trial court had abused its discretion in finding that the balance of hardships tipped in Respondents' favor. *See* Slip Op. 3. Instead, they contended that reversal was required because the court had erroneously concluded that Respondents were likely to succeed on their preemption and police power claims. The Court of Appeal recognized that, because the trial court had granted a preliminary injunction, reversal was required "if the trial court abused its discretion in concluding that plaintiffs are likely to succeed on at least one cause of action." *Id.* at 17. Nevertheless, it affirmed, finding that (1) Respondents' preemption and police power claims were not time-barred by 28 U.S.C. §1367(d) (*id.* at 17-21); and (2) Respondents were likely to prevail on each of these claims. *Id.* at 21-34.

The Court of Appeal's opinion was originally unpublished. *See* Ex. A. However, after all the Respondents and two *amici* requested publication on the ground that the Opinion was of

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[2]Plaintiffs also added two new claims that were never made in the Federal Case that were based on the California Constitution. *See* 1 AA 20-21 (¶¶91-98), 21 (¶¶99-105). Like Plaintiffs' federal commerce clause claim, these claims are not at issue in the present appeal because the trial court did not rely on them in granting a preliminary injunction. *See* 3 AA 665-66.

statewide, or even national, importance (*see* pp.6-7, *supra*), on March 12 the court ordered that the Opinion be published. Ex. B.

REASONS FOR GRANTING REVIEW

I.

THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN *KOLANI* AND *BONIFIELD* REGARDING THE MEANING OF 28 U.S.C. §1367(d).

As the Court of Appeal recognized, state and federal courts around the country have adopted two conflicting interpretations of how 28 U.S.C. §1367(d) operates when, as in this case, a state statute of limitations expires while a supplemental claim is pending in federal court. *See* Slip Op. 18-19. Under the "Extension Approach," the plaintiff must file a state court complaint within thirty days of the date its federal claim is dismissed. *Id.* at 19. In contrast, under the "Suspension Approach," a plaintiff can "tack on" to the thirty-day period provided by Section 1367(d) any portion of the state-law limitations period that had not expired when the plaintiff filed in federal court. *Id.* at 18-19.

California mirrors the national split. The Second District has adopted the Extension Approach. *Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998). In contrast, the Third District in *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298 (2001), and the Fifth District in this case have opted for the Suspension Approach.

As these decisions demonstrate, this conflict is both recurring and important. While federal litigants often join state-law claims to their federal claims, those claims are usually dismissed if the federal claims are resolved against the plaintiff early in the litigation. 13D CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §3567, at 332 (2008) ("The commonest example of when a court might decline supplemental jurisdiction is when the jurisdiction-invoking claim is dismissed relatively early in the proceedings. In such a case, most courts will decline to exercise supplemental jurisdiction"). How the state law limitations period

is calculated will therefore affect numerous cases. Moreover, unless the existing conflict is resolved definitively, California litigants and lawyers will be unsure as to what 28 U.S.C. §1367(d) means and trial courts will be sure to reach conflicting decisions.[3]

Moreover, the conflict should be resolved in favor of the Extension Approach. The Court of Appeal adopted the contrary interpretation because it found that the Suspension Approach best conformed to the statutory language. Slip Op. 20. The court stated that "[s]ubstitut[ing] the word[ ] 'suspend' . . . for 'toll[ ]'" in the statute "makes sense and straightforwardly expresses the meaning for which plaintiffs contend." *Id.* In contrast, the court found that substituting "extended" for "tolled" "is obscure and would be an obtuse way of expressing the meaning for which Kern contends." *Id.*

However, there is a third possibility that the Court of Appeal did not consider: the approach taken by the courts that have adopted the Extension Approach. Under this approach, "tolled" means "shall not expire." For example, the court in *Berke v. Buckley Broadcasting Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003), gave "tolling" this precise meaning: "[W]e are satisfied that the 'tolling' provision of the statute refers to the period between the running of the statute while the action is pending in the federal court and thirty days following the final judgment of the federal court declining to exercise supplemental jurisdiction." *Id.* at 123. Similarly, in *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. Nov. 19, 2001), the court adopted the Extension Approach, stating that "§ 1367(d) operates only to toll the limitations statute during the specified period,

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[3]Although review by the United States Supreme Court is theoretically available to resolve this federal issue, it is not clear whether any decision that this Court might reach would be "final" for purposes of 28 U.S.C. §1257 and thus reviewable by that Court. *See generally Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975).

and to allow a party to refile within 30 days after dismissal from federal court." *Id.* at *4. Accordingly, the Court of Appeal was incorrect in concluding that the Suspension Approach is the best reading of the statutory language.

That leaves the courts free to adopt the interpretation of Section 1367(d) that is most consistent with congressional intent and that best accommodates the competing interests at stake. With respect to intent, Section 1367(d)'s immediate purpose was "[t]o prevent the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks*, 538 U.S. at 459. Both the Extension Approach and the Suspension Approach accomplish this goal, because both prevent state statutes of limitations from expiring while a supplemental claim is being litigated in federal court. However, the Suspension Approach frustrates both the broader objectives Congress sought to achieve in passing the statute that contains Section 1367(d) and the goals furthered by state statutes of limitations. The Extension Approach suffers from neither of these defects.

"Congress enacted the supplemental jurisdiction statute, 28 U.S.C. §1367, as part of the Judicial Improvements Act of 1990." *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 540 (2002). Congress enacted the Act, in turn, "to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes." S. REP. NO. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

The Extension Approach furthers this goal because it accommodates and balances the interests of both plaintiffs and defendants. It protects plaintiffs in two different ways. It assures plaintiffs "that state-law claims asserted under §1367(a) will not become time barred while pending in federal court." *Jinks*, 538 U.S. at 464. Moreover, it provides "a brief window of protection that allows the plaintiff to file in state court without having to

face a limitations defense." 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §106.66[3][c], at 106-101 (3d ed. 2011).

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

For that reason, the Extension Approach furthers the goals that Congress sought to achieve in enacting Section 1367(d). *See Berke*, 821 A.2d at 123 ("The evident purpose of the statute is only to preserve a plaintiff's right of access to the state court for a minimum thirty-day period in order for it to assert those state causes over which the federal court has declined to exercise jurisdiction and as to which the statute of limitations has run before that declination"). "At the same time, [the Extension Approach] upholds the policy of the statute of limitations, by *limiting* the time to refile, and thus assuring that claims will be *promptly* pursued in any subsequent action." *Kolani*, 64 Cal. App. 4th at 409 (emphasis in original). It therefore is fair to both plaintiffs and defendants, as Congress intended. *See* p.13, *supra*.

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[4]Indeed, in some instances, such as certain actions under CEQA, the Legislature has given plaintiffs only 30 days to file their entire case. *See, e.g.*, PUB. RES. CODE §21167(b), (c), (e).

In contrast, the Suspension Approach gives plaintiffs an unnecessary benefit while frustrating both of the goals Congress sought to further in passing the Judicial Improvements Act and the similar purposes served by state statutes of limitation. Because plaintiffs need no more than thirty days to refile their supplemental claims (*see* p.14, *supra*), the courts adopting the Extension Approach have correctly recognized that "a 30-day grace period sufficiently prevents the harm envisioned by Congress." *Vertrue*, 712 F. Supp. 2d at 724. Giving plaintiffs the benefit of whatever limitations period was unexpired when its case was filed in federal court "is not needed to avoid forfeitures" caused by the dismissal of state law claims by a federal court. *Kolani*, 64 Cal. App. 4th at 409; *accord*, *Zhang Gui Juan*, 2001 WL 34883536, at *4.

Moreover, giving plaintiffs whatever remaining state-law limitations period exists when their federal claims are dismissed—in *addition* to 30 more days—will often result in excessive delays. As even the courts adopting the Suspension Approach have conceded, that interpretation of Section 1367(d) "may serve to drastically extend the statute of limitations." *Vertrue*, 712 F. Supp. 2d at 724. As the *Vertrue* court explained, even when "a case is pending in federal court for a significant time, none of that time is counted against the running of the statute of limitations." *Id.* Accordingly, under the Suspension Approach, "a plaintiff could sit idly by and let years pass before pursuing the claim in state court." *Id.*

In addition, the Suspension Approach "is contrary to the policy in favor of prompt prosecution of legal claims" embodied in state statutes of limitation. *Huang v. Ziko*, 511 S.E.2d 305, 308 (N.C. Ct. App. 1999).[5] Statutes of limitation "protect defendants from

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[5]*Accord*, *Kolani*, 64 Cal. App. 4th at 409 (Suspension Approach is "unreasonable" and "does significant harm to the statute of limitations policy"); *Berke*, 821 A.2d at 123 ("Despite its ambiguous use of the word 'tolling,' we do not believe that the federal

(continued . . .)

the stale claims of dilatory plaintiffs" and "stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 395 (1999). They "enable defendants to marshal evidence while memories and facts are fresh and . . . provide defendants with repose for past acts." *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 755 (1998). They "are not mere technical defenses, allowing wrongdoers to avoid accountability. Rather, they mark the point where, in the judgment of the legislature, the equities tip in favor of the defendant (who may be innocent of wrongdoing) and against the plaintiff (who failed to take prompt action)." *Pooshs v. Philip Morris USA, Inc.*, 51 Cal. 4th 788, 797 (2011) (citation omitted). The Suspension Approach frustrates these policies because it enables plaintiffs to sit on their claims—often for long periods of time—following their dismissal by a federal court.

Finally, Congress intended Section 1367(d) to provide "a straightforward tolling rule" that would be "conducive to the administration of justice." *Jinks*, 538 U.S. at 463. The Extension Approach does just that by providing a fixed 30-day period for refiling of otherwise time-barred state law claims after their dismissal by a District Court. This straightforward rule is simple for litigants to understand and for courts to apply consistently. In contrast, the Suspension Approach requires calculation of the remaining "unexpired" limitations period for each state law claim following federal dismissal. Such a standard is neither straightforward nor conducive to the efficient administration of justice, because it requires applying differing limitations periods for differing state law causes of action, for which the exact dates of accrual often are unclear and disputed, such as where the

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(. . . continued)

statute intends a result that would permit a gross protraction of the limitations period in clear contravention of the underlying policy of statutory limitations on the time for bringing suit").

discovery rule applies. *See, e.g., Prudential Home Mortg. Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1246 (1998) (applying delayed discovery rule); *compare id.* at 1252-56 (Rylaarsdam, J., dissenting) (rejecting application of rule). In this respect, too, the Suspension Approach fails to further the congressional purpose in enacting the bill of which Section 1367(d) is a part.

II.

THE COURT SHOULD DETERMINE WHETHER LOCAL BANS ON LAND APPLICATION ARE PREEMPTED BY STATE LAW.

A. The Petition Presents An Important And Unresolved Issue Of State Preemption Law.

As Respondent California Association of Sanitation Agencies told the Court of Appeal, numerous counties have enacted local ordinances that are either legal or practical bans on land applying biosolids. *See* pp.6-7, *supra*. Accordingly, whether such ordinances are preempted by the Integrated Waste Management Act is a recurring question of great importance, as all the Respondents recognized in their letters successfully seeking publication. *See* p.6, *supra*.

Moreover, the need for review is underscored by the fact that the Court of Appeal erred in finding preemption. The court found that Plaintiffs were likely to prevail on their preemption claim because Public Resources Code "Section 40051 requires local agencies like Kern County and the City of Los Angeles to '[p]romote' and '[m]aximize' recycling." Slip Op. 23.[6] But the statutory language provides that Section 40051's mandate to "promote" and "maximize" recycling applies only when a public agency is "implementing this division"—*i.e.*, only when it is

[6]Unless otherwise noted, all statutory citations in Parts II and III of this Petition are to the Public Resources Code.

implementing the Act.[7] That forecloses Plaintiffs' preemption claim, because the County's voters were not implementing the Act when they adopted Measure E. Instead, Measure E was adopted pursuant to the police power granted to cities and counties by Article XI, Section 7 of the California Constitution. Indeed, Measure E itself recites that it was enacted "pursuant to the initiative power of the People of Kern County and the police power of Kern County as set forth in Article XI, Section 7, of the California Constitution." 1 AA 38 (Measure E §8.05.20). Unless a critical phrase of Section 40051 is disregarded, and given no effect, the statute does not preempt Measure E.

The Court of Appeal rejected this argument, without even attempting to explain how its interpretation of the statute could be squared with the statutory language. Instead, it announced in an *ipse dixit* that the County's interpretation of Section 40051 "cannot be correct, at least in the circumstances of this case." Slip Op. 25. The court explained:

> Land application of biosolids is a widely used, widely accepted, comprehensively regulated method by which municipalities fulfill their obligation to reduce the flow of waste to landfills. . . . One jurisdiction's action to ban it, and to interfere with other jurisdictions' efforts to comply

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

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

> with their CIWMA obligations, is not consistent with a statutory scheme that presumes all jurisdictions will have access to crucial waste-stream-reduction methods. (*Id.*)

This proves too little. The Legislature may well have *presumed* that all jurisdictions would have access "to crucial waste-stream-reduction methods." But it took no steps to give that presumption preemptive force when one jurisdiction regulates solid waste produced by another. To be sure, the Legislature that passed the Act knew that "[l]ocal conditions transcending city or county boundaries might require collection and disposal to be handled on a regional basis" (*Waste Res. Techs. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 307 (1994)), and "made provision in the Act for the creation and operation of regional agencies, garbage disposal districts, and garbage and refuse disposal districts." *Id.* at 307-08 (citations omitted). However, the Legislature made participation in all these regional agencies and districts *voluntary*. §§40971, 49010, 49110. These statutes are therefore incompatible with an interpretation of the Act that has the effect of forcing one local jurisdiction to accept another's biosolids.

Moreover, what the Legislature *did* say about local autonomy undermines the Court of Appeal's claim that the Legislature meant to preempt local ordinances like Measure E. Section 40059 provides, in relevant part, that, "[n]otwithstanding any other provision of law, each county . . . may determine . . . [a]spects of solid waste handling which are of local concern, including, but not limited to, . . . [the] nature, location, and extent of providing solid waste handling services." Because its introductory clause provides that Section 40059(a) prevails over "any other provision of law," the statute "overrides or supersedes any other provisions of the . . . Act which might indicate to the contrary." *Rodeo Sanitary Dist.*, 71 Cal. App. 4th at 1451 (citation and internal quotation marks omitted).

The words of Section 40059(a), like those in Section 40051, are unambiguous. Section 40059 preserves local authority over the "*nature, location, and extent* of providing solid waste handling

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

As with Section 40051, the Court of Appeal in interpreting Section 40059 refused to believe that the Legislature meant what it said. Instead, again without explaining how the language of the statute could be squared with its interpretation, the court said that "we do not consider it likely that the Legislature intended the words of that statute to authorize local bans on major, widespread, comprehensively regulated methods of recycling. . . . [I]t is highly unlikely that the legislators would have authorized major incursions on those goals in such vague terms." Slip Op. 30.

The Court of Appeal got the wrong answers because it asked the wrong question. Instead of interpreting Sections 40051 and 40059 as if the Act had had been the product of immaculate conception divorced from the political process, the court should have placed the Act squarely within California's long tradition of local autonomy over solid waste management. Had it done so, it could not have so easily dispensed with the statutory language.

"Prior to [the Act's] passage, courts accepted that, state legislation notwithstanding, the dominant role in refuse handling belonged to localities." *Waste Res. Techs.*, 23 Cal. App. 4th at 307. As a result, the statutes regulating waste management prior to the Act "were viewed as acknowledging that allowance

had to be made for 'the unique circumstances of individual communities' and that the Legislature had therefore 'empowered local governments to adopt refuse regulations which would best serve the local public interest.'" *Id.* (quoting *City of Camarillo v. Spadys Disposal Serv.*, 144 Cal. App. 3d 1027, 1031 (1983)).

The Act did not represent "a fundamental change in the Legislature's traditional outlook towards the subject of waste handling." *Waste Res. Techs.*, 23 Cal. App. 4th at 309. Accordingly, courts interpreting the Act have found "no legislative intent to displace deeply entrenched local authority." *Id.* That is not surprising, for the Act "was in large measure a consolidation and recodification of existing law." *Id.* at 307. Consequently, if the Act's drafters had intended to displace long-entrenched local authority over solid waste management, and prohibit local bans on particular forms of recycling, they would have said so explicitly or by clear implication. "Like Holmes's dog that did not bark,[8] the fact the Legislature did neither of these things is instructive" and suggests that the Legislature did not intend to preempt local ordinances like Measure E. *Elsner v. Uveges*, 34 Cal. 4th 915, 933 (2004).

At bottom, the Court of Appeal was motivated by concern that "[i]f we held that Kern County is empowered to ban land application of biosolids, we would necessarily be implying that all counties and cities are empowered to do the same." Slip Op. 25. But there is no evidence that the Legislature addressed itself to that concern. After all, it is pure speculation whether additional jurisdictions would enact similar ordinances if Measure E is upheld. Some jurisdictions, particularly in economically distressed rural areas, may want to import biosolids to support the local economy or give local farmers the benefits that Plaintiffs claim derive from land application. 1 AA 6-7 (¶¶20-21). In any event, the

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[8] *See* Arthur Conan Doyle, *Silver Blaze* in THE COMPLETE SHERLOCK HOLMES 347 (1960).

Legislature's failure to provide a solution for a problem that had never occurred prior to the Act and that, indeed, has not yet occurred in the more than two decades since the Act was enacted (despite the enactment of numerous local ordinances restricting land application) is no reason for the Court to balance the competing interests itself and impose duties on local governments that the Legislature did not see fit to adopt. *See, e.g.*, *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1168 (1991) ("In the absence of clear legislative direction, which the general anti-discrimination provisions of the Unruh Act do not provide, we are unwilling to engage in complex economic regulation under the guise of judicial decisionmaking"); *cf. id.* at 1168 n.15 (collecting cases noting "the inappropriateness of judicial intervention in complex areas of economic policy").

B. The Petition Also Presents An Important Issue Regarding The Tests For State Preemption.

The Court of Appeal was able to reach the result that it did only because it failed to apply the usual tests for state law preemption and instead applied a novel federal standard that has never been the sole basis for state preemption. In *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853 (2002), the Court "discussed (but had no occasion to adopt)" (Slip Op. 23) a federal preemption standard set forth in *Blue Circle Cement, Inc. v. Board of County Commissioners*, 27 F.3d 1499 (10th Cir. 1994). Under this standard, "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." *Great W.*, 27 Cal. 4th at 868 (citing *Blue Circle Cement*, 27 F.3d at 1506-07). However, neither *Great*

Western nor any other California case has used this standard as the sole basis for invalidating a local ordinance.[9]

That is exactly what the Court of Appeal did here. Finding the *Blue Circle Cement* test "appropriate," the court held that "Measure E is likely to be held invalid because land application of biosolids, which undisputedly allows solid waste to be disposed of through recycling instead of in landfills or incinerators, is an activity the CIWMA seeks to promote and Measure E purports totally to ban." Slip Op. 24.

This bootstrap conclusion illustrates why mechanically applying tests imported from another jurisdiction is no substitute for analysis. The premise of the court's conclusion was that the *Blue Circle Cement* test is triggered because the Act promotes land application as a form of recycling. In fact, Section 40051's mandate to "promote" and "maximize" recycling applies only when a public agency is implementing the Act. *See* pp.17-18, *supra*. Accordingly, the Court of Appeal's analysis assumed the very point it intended to prove.

This mistake would not have been made had the Court of Appeal applied California preemption law. Under the traditional preemption test, conflict preemption occurs only when a local law prohibits what state law commands or commands what state law forbids, or it is impossible to comply with both state and local law (*Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1161 (2006)), or when a local law impairs the exercise of a

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[9]In *Fiscal v. City & County of San Francisco*, 158 Cal. App. 4th 895 (2007), the court cited *Great Western* for the proposition that "total bans are not viewed in the same manner as added regulations, and justify greater scrutiny." *Id.* at 915. But that aspect of the court's decision involved a local ordinance that banned the sale of all firearms within the city. The court held that the ordinance impaired gun rights protected by state law, and was therefore preempted, because "the state and local acts are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." *Id.* *Fiscal* therefore had no need to rely on the *Blue Circle Cement* test.

right granted by state law. *Action Apartment Ass'n v. City of Santa Monica*, 41 Cal. 4th 1232, 1243 (2007) (local ordinance prohibiting landlords from filing certain unlawful detainer actions preempted because it impaired "the utmost freedom of access to the courts" protected by state law). Measure E satisfies none of these tests. The Court should grant review to determine whether the federal *Blue Circle Cement* test for determining whether federal law preempts state law may be used to determine whether state law preempts a local ordinance.

Alternatively, the Court should grant review and hold the case for its forthcoming decision in *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.*, No. S198638 (argued Feb. 5, 2013). The Court of Appeal in this case distinguished between regulating land application, which it thought might be permissible, and banning it, which it thought was not. *See* Slip Op. 24 (County previous biosolids regulation "might be acceptable under CIWMA," but "[a] total ban . . . is inimical to the [Act]"). In contrast, the Court of Appeal in *City of Riverside* held that "[a] ban or prohibition is simply a type or means of restriction or regulation." *City of Riverside v. Inland Empire Patient's Health & Wellness Ctr.*, 200 Cal. App. 4th 885, 906 (2011), *pet'n for rev. granted.* Should this Court affirm the Court of Appeal's decision in *City of Riverside*, at the very least it should remand this case for reconsideration by the Court of Appeal in light of the Court's decision in *City of Riverside.*

III.

THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE REGIONAL WELFARE DOCTRINE APPLIES TO LOCAL SOLID WASTE ORDINANCES.

In *Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976), the Court held that a local land use regulation that has a regional impact must "reasonably relate[] to the general welfare of the region it affects." 18 Cal. 3d at 610. To make this

determination, a court must first "identify the competing interests affected by" the ordinance. *Id.* at 608. It must then determine "whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests." *Id.* at 609.

The Court of Appeal held that Plaintiffs were likely to prove that Measure E was not "a reasonable accommodation of the competing interests" because "the evidence presented so far shows—undisputedly for purposes of this appeal—considerable hardship to waste-generating municipalities around the region if Measure E is enforced and no offsetting hardship to Kern County if it is not enforced." Slip Op. 33 (emphasis omitted). However, the court's ruling is not limited to the state of the record. To the contrary, the court expressly held that "an ordinance by which one local government obstructs others' efforts by banning a major form of recycling within its jurisdiction fails to accommodate the regional welfare." *Id.* Fairly read, then, the opinion stands for the proposition that all local ordinances that ban "major forms of recycling" are invalid under the "regional welfare" doctrine.

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

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

The same logic applies here. As we have seen, prior to passage of the Act local governments played the dominant role in waste management. *See* p.21, *supra*. The Act did not diminish this role; instead, it continues to place the primary responsibility for waste management, and the preparation of waste management plans, on local agencies. *Id.* The Act also makes regional cooperation between local public entities voluntary, not mandatory. *See* p.19, *supra*. Finally, and most importantly, the Act does not "require a city or county to allow other local agencies to conduct their recycling activities in its jurisdiction." *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 897 (C.D. Cal. 2007) (citation and internal quotation marks omitted).

Imposing an open-ended requirement that local agencies accommodate regional waste disposal needs upsets the carefully crafted balance between state and local responsibility that the Legislature adopted when it adopted the Act. It makes the courts part of a waste management process that is currently the domain of state and local governments. It hobbles local planning by imposing new and unforeseeable obligations on cities and counties to accommodate waste produced by others. And—most important—it substitutes judicial coercion for the voluntary regional efforts encouraged by the Act. The courts should not rush in and require regional accommodation where the Legislature has refused to do so.

CONCLUSION

The Petition for Review should be granted.

Dated: April 22, 2013.

Respectfully,

ARNOLD & PORTER LLP
STEVEN L. MAYER

JEROME B. FALK, JR.

COUNTY OF KERN
THERESA A. GOLDNER
MARK L. NATIONS

HOGAN LAW APC
MICHAEL M. HOGAN

By: _____
STEVEN L. MAYER

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

CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.504(d)(1)

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached **Petition for Review** contains 8,390 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Dated: April 22, 2013

STEVEN L. MAYER

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF LOS ANGELES et al., Plaintiffs and Respondents, v. COUNTY OF KERN et al., Defendants and Appellants.	F063381 (Super. Ct. No. VCU242057) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Arnold & Porter, Jerome B. Falk, Steven L. Mayer, Sara J. Eisenberg; Theresa A. Goldner, County Counsel, Mark L. Nations, Deputy County Counsel; Hogan Guiney Dick, Michael M. Hogan; Hogan Law, Michael M. Hogan, for Defendants and Appellants.

Carmen A. Trutanich, City Attorney, Valerie Flores, Managing Assistant City Attorney, Edward M. Jordan, Assistant City Attorney; Beveridge & Diamond, Gary J. Smith, Zachary M. Norris, James B. Slaughter, for Plaintiffs and Respondents City of Los Angeles, Responsible Biosolids Management, Inc., R&G Fanucchi, Inc., and Sierra Transport, Inc.

Lewis Brisbois Bisgaard & Smith, Daniel V. Hyde and Paul J. Beck for Plaintiff and Respondent County Sanitation District No. 2 of Los Angeles County.

Woodruff Spradlin & Smart, Bradley R. Hogin for Plaintiff and Respondent Orange County Sanitation District.

Law Offices of Michael J. Lampe, Michael J. Lampe for Plaintiffs and Respondents Shaen Magan, Honey Bucket Farms, Tule Ranch/Magan Farms, and Western Express, Inc.

Somach Simmons & Dunn, Robert L. Larson for Plaintiff and Respondent California Association of Sanitation Agencies.

Freeman Freeman Smiley, Christopher M. Westhoff; National Association of Clean Water Agencies, Nathan Gardner-Andrews for National Association of Clean Water Agencies as Amicus Curiae on behalf of Plaintiffs and Respondents.

Barg Coffin Lewis & Trap, Marc A. Zeppetello for Water Environment Federation as Amicus Curiae on behalf of Plaintiffs and Respondents.

-ooOoo-

Measure E is a Kern County ballot measure that was designed to ban in unincorporated areas of the county the use of agricultural fertilizer made from recycled municipal sewage sludge. The application of this fertilizer, known in the industry as "biosolids," is a major, widespread, comprehensively regulated form of recycling upon which many municipalities' waste management systems depend. In fact, Kern cities, including Bakersfield, Taft, Wasco and Delano, continue to apply biosolids to farmland in incorporated areas, which are unaffected by Measure E.

If enforced, Measure E would have the effect of preventing plaintiff City of Los Angeles and others (including Kern County itself) from continuing to apply biosolids in unincorporated areas as a means of disposing of sewage sludge on farms they either own or contract with in Kern County. The litigation has been proceeding through federal and state courts for more than six years. Most recently, the complaint was refiled in the

superior court after a federal district court's judgment invalidating the measure was vacated for reasons having nothing to do with the merits. Just as the district court had done earlier, the superior court issued a preliminary injunction to prevent the measure from taking effect, and defendant Kern County appeals.

Just like the district court and the superior court, we conclude that a preliminary injunction was appropriate. We agree with both courts that plaintiffs were reasonably likely to succeed on two of their contentions: (1) that Measure E is preempted by the California Integrated Waste Management Act (Pub. Resources Code, § 40000 et seq.) (CIWMA), and (2) that Measure E conflicted with a state constitutional principle known as the regional welfare doctrine and therefore exceeded Kern County's authority.

We are confident the superior court did not abuse its discretion in granting a preliminary injunction in this case. First and foremost, the superior court, in a determination not challenged by any party in this appeal, concluded there was *no evidence at all* of hardship to Kern County if the injunction were granted. The proponents of Measure E insisted that land application of biosolids is dangerous, but the record in this case so far does not support their view. At the same time, there is a substantial likelihood of harm, including irreparable harm, to plaintiffs if the preliminary injunction is not granted.

A preliminary injunction should be granted when the moving party shows that it is likely to succeed on the merits of a cause of action and the balance of hardships resulting from granting or not granting the injunction tips in the moving party's favor. The more likely it is that the moving party will prevail on the merits, the less strongly the balance of hardships needs to tip in its favor. In light of the undisputed lack of a showing of hardship to Kern County, we conclude plaintiffs' showing of a likelihood of success on the merits was more than sufficient.

FACTUAL AND PROCEDURAL HISTORIES

Local governments in California and elsewhere are continuously obliged to collect and treat municipal sewage and to dispose of the byproducts of sewage treatment. (*City of Los Angeles v. County of Kern* (C.D.Cal. 2007) 509 F.Supp.2d 865, 871 (*Los Angeles v. Kern II*).) These byproducts, known as sewage sludge or biosolids[1] (*City of Los Angeles v. County of Kern* (C.D.Cal. 2006) 462 F.Supp.2d 1105, 1109 (*Los Angeles v. Kern I*); 40 C.F.R. § 503.9(w)), have often been disposed of by placing them in landfills or incinerating them. In California, however, local governments are mandated by the CIWMA to reduce their streams of solid waste going to landfills and incinerators. (Pub. Resources Code, § 40051.)[2] One way in which they do this is to make their biosolids available for use as an agricultural fertilizer. This use is known as "land application" of biosolids. (*Los Angeles v. Kern I, supra,* 462 F.Supp.2d at p. 1109.) As of 2009, 61 percent of biosolids generated by sewage treatment plants in California were disposed of via land application.

Land application of biosolids is subject to federal, state, and local regulations. In 1993, the United States Environmental Protection Agency (EPA) issued Part 503 of title 40 of the Code of Federal Regulations (Part 503), which divides biosolids into a Class A and a Class B according to the quantity of pathogenic microorganisms remaining after treatment. (40 C.F.R. § 503.32.) Class B biosolids are treated to eliminate 99

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[1]Although these two terms are sometimes used interchangeably, more precise definitions stipulate that sewage sludge may be untreated, whereas biosolids have undergone treatment to meet regulatory standards. (U.S. Environmental Protection Agency, Environmental Regulations and Technology, Control of Pathogens and Vector Attraction in Sewage Sludge (July 2003) p. 1 <http://water.epa.gov/scitech/wastetech/biosolids/upload/2007_05_31_625r92013_625R92013.pdf> (as of Feb. 7, 2013).) The material at issue in this case is biosolids in this more precise sense, and we will use that term in the remainder of this opinion.

[2]Subsequent statutory references are to the Public Resources Code unless otherwise noted.

percent of these microorganisms. The federal regulations allow land application of them with site controls, such as restrictions on human access to the farm fields and setbacks from property lines.

Class A biosolids are treated to eliminate virtually all pathenogenic microorganisms. The federal regulations allow them to be applied to land with few restrictions and also allow them to be bagged and sold for home gardening use. A yet higher-quality grade is Class A Exceptional Quality (EQ) biosolids. In these, eight trace metals may be present in concentrations no greater than a specified level. EQ biosolids are not subject to Part 503's general requirements and management practices for land application. (U.S. Environmental Protection Agency, Environmental Regulations and Technology, Control of Pathogens and Vector Attraction in Sewage Sludge (July 2003) 5;[3] 40 C.F.R. § 503.13(b)(3), Table 3.) The State Water Resources Control Board (SWRCB) has imposed additional regulations in the form of a general order issued in 2004, Water Quality Order No. 2004-0012-DWQ.[4] This general order requires each land application site to be approved before any biosolids are applied. Before Measure E, Kern County also regulated land application of biosolids. These regulations included a prohibition on land application of all biosolids except Class A EQ biosolids. For purposes of this appeal, it is undisputed that plaintiffs complied with all the regulations in place before Measure E.

Government regulators have generally maintained that land application of biosolids is safe and have promoted land application as a beneficial use of biosolids, as well as an effective means of disposing of the byproducts of sewage treatment without landfilling or incineration. (*Los Angeles v. Kern II, supra*, 509 F.Supp.2d at p. 871.) In

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[3]<http://water.epa.gov/scitech/wastetech/biosolids/upload/2007_05_31_625r92013_625R92013.pdf> (as of Feb. 7, 2013).

[4]<www.swrcb.ca.gov/board_decisions/adopted_orders/water_quality/2004/wqo/wqo2004-0012.pdf> (as of Feb. 7, 2013).

2002, at the request of the EPA, the National Research Council (NRC) evaluated the effectiveness of Part 503 in protecting human health. (*Los Angeles v. Kern II, supra,* at p. 872.) The NRC found "'no documented scientific evidence that the Part 503 rule has failed to protect public health.'" (*Ibid.*) It called for "'additional scientific work is needed to reduce persistent uncertainty'" arising from anecdotal allegations of disease, as well as to ensure that the regulation's standards were supported by current data and methods, that the management practices called for by the regulations were effective, and that the regulations were being enforced. (*Ibid.*) Additional research followed but found nothing to undermine the conclusion that land application of biosolids in compliance with the Part 503 regulations presents minimal risk to human health. (*Ibid.*)

When the SWRCB issued its regulations, it relied on a statewide program environmental impact report (EIR) it had commissioned. (California SWRCB Statewide Program Environmental Impact Report Covering General Waste Discharge Requirements for Biosolids Land Application.[5]) The EIR concluded that the environmental impacts of land application of biosolids in compliance with the regulations would be less than significant. (California SWRCB, General Waste Discharge Requirements of Biosolids Land Application Draft Statewide Program EIR (Feb. 2004) at p. ES-14 & table ES-1.[6]) Kern County, in its pre-Measure E regulations restricting land application to Class A EQ biosolids, stated that it "recognize[d] that exceptional quality biosolids ... are considered by the U.S. Environmental Protection Agency to be a product, whether distributed in bulk form, bags or other containers, that can be applied as freely as any other fertilizer or soil amendment to any type of land." The county stated, however, that it would "evaluate the need for further regulation" in the future.

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[5]<www.swrcb.ca.gov/water_issues/programs/biosolids/peir.shtml> (as of Feb. 7, 2013).

[6]<www.swrcb.ca.gov/water_issues/programs/biosolids/peir/execsummary.pdf> (as of Feb. 7, 2013).

Apart from safety, land to which biosolids have been applied may have nuisance issues. It may emit a foul odor and attract flies. (*Los Angeles v. Kern II, supra*, 509 F.Supp.2d at p. 873; U.S. EPA, Biosolids Generation, Use, and Disposal in The United States (Sept. 1999) 40-41.)[7]

When the Legislature enacted the CIWMA in 1989, plaintiff City of Los Angeles adopted a policy of beneficially reusing 100 percent of its biosolids and disposing of none of them in landfills. In 1994, it began a program of applying biosolids as fertilizer at Green Acres Farm, a 4,700-acre farm in the unincorporated area of Kern County, 15 miles southwest of Bakersfield and 120 miles north of Los Angeles. The city purchased the farm in 1999 for almost $10 million. When Kern County adopted the regulations restricting land application to Class A EQ biosolids, Los Angeles spent about $15 million to upgrade its sewage treatment plants to enable them to process biosolids to the required quality level. Today, about 75 percent of the biosolids generated by Los Angeles's sewage treatment plants are applied at Green Acres Farm.

Plaintiffs County Sanitation District No. 2 of Los Angeles County and Orange County Sanitation District began supplying biosolids to farmers for land application in the unincorporated area of Kern County beginning in 1994 and 1996, respectively. Plaintiff Responsible Biosolids Management, Inc., contracts with Los Angeles to manage the transportation of biosolids to Green Acres Farm and the application of biosolids there. Plaintiff Sierra Transport, Inc., contracts with Responsible Biosolids Management, Inc., to carry biosolids from Los Angeles to Green Acres Farm by truck. Plaintiff R&G Fanucchi, Inc., contracts with Los Angeles to carry out the farming operations at Green Acres Farm. Plaintiff California Association of Sanitation Agencies is a nonprofit corporation representing cities and other public agencies that provide sewer service to

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[7]<www.epa.gov/wastes/conserve/composting/pubs/biosolid.pdf> (as of Feb. 7, 2013).

over 90 percent of those Californians who have sewer service. It maintains a biosolids program designed to promote the recycling of biosolids.[8]

In June 2006, Measure E was placed on the Kern County ballot. Known as the "Keep Kern Clean Ordinance of 2006," it included the following statement:

> "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."

The federal district court described the anti-Los Angeles tone of the yes-on-E campaign. The court quoted the following campaign statements: "'Measure E will stop L.A. from dumping on Kern'"; "'We will proclaim our independence from polluting

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[8]Former plaintiffs Shaen Magan and Western Express, Inc., have dismissed their claims in this case. Their appeal was dismissed by order of this court filed August 21, 2012. Magan owns Tule Ranch, a farm located in Kern County that contracted for biosolids with County Sanitation District No. 2 of Los Angeles County and Orange County Sanitation District. Western Express, Inc., is a trucking company owned by Magan's family that hauled biosolids for the farms.

Southern California and Los Angeles'"; "'A lot of voters are just kind of tired of being the dumping ground for everyone else in the state.... Enough sludge, enough sexual predators, enough prisons, enough dairies. When does the county stand up for itself?'" (*Los Angeles v. Kern II, supra,* 509 F.Supp.2d at p. 876.) The campaign web site featured "graphics that state 'Keep L.A. Sludge out of Kern County' and depict stacked outhouses, with the top labeled 'LA COUNTY' and the bottom labeled 'KERN COUNTY.'" (*Ibid.*) The web site had a link to an editorial stating:

> "'Until Kern County voters say no to sludge and YES to Measure E, every man, woman and child who lives here will have to put up with Southern California dumping its human and industrial waste on us. [¶] Why? Because Kern County is the cheapest place for Southern California to dump the chemical and biological-laced goo that is scraped from the bottom of its sewer plants. [¶] Measure E on the June ballot will prohibit the land application of sludge in unincorporated areas of Kern County. Southern California will have to find a better, safer way to dispose of its goo, which contains heavy metals, industrial solvents, feces, medical waste and pharmaceuticals.'" (*Los Angeles v. Kern II, supra*, 509 F.Supp.2d at p. 877.)

The district court quoted more campaign material of similar character (*Los Angeles v. Kern II, supra,* 509 F.Supp.2d at p. 877) and stated that the material was relevant to show the voters' intent (*id.* at p. 885, fn. 12). Some of these, and other similar, examples of campaign literature, are quoted in the record in this case as well. Measure E passed with over 83 percent of the vote. (*Id.* at p. 877.)

Measure E did not affect the *incorporated* areas of the county and could not have done so as those areas are outside the county's jurisdiction. Cities in Kern County apply biosolids to farmland within city boundaries. The district court stated that these cities include Bakersfield, Taft, Wasco, and Delano. The district court also stated that 61 percent of Kern County's voters live in incorporated areas (*Los Angeles v. Kern II, supra*, 509 F.Supp.2d at p. 886), including 44 percent in Bakersfield alone (*id.* at p. 876), and that "[t]his means that over three-fifths of the decision-makers tolerate local disposition of locally generated biosolids, but have prevented out-of-county recyclers from engaging

in precisely the same activity by banning the operation of any biosolid recycling facilities in the unincorporated areas of the County" (*id.* at p. 886).

Plaintiffs filed suit in federal court shortly after Measure E's passage. Their complaint alleged that Measure E contravened the negative or dormant implications of the commerce clause of the federal Constitution, violated the equal protection clause of the federal Constitution, exceeded the county's police power by violating the regional welfare doctrine, and was preempted by the federal Clean Water Act, the CIWMA, and provisions of the California Water Code. The complaint prayed for declaratory judgment, an injunction, and damages.

The district court granted plaintiffs' request for a preliminary injunction on November 20, 2006. (*Los Angeles v. Kern I, supra,* 462 F.Supp.2d at pp. 1108-1109.) It found that plaintiffs were likely to succeed on the merits of three claims: the dormant commerce clause violation, CIWMA preemption, and exceeding the county's police power by violating the regional welfare doctrine. (*Los Angeles v. Kern I, supra,* at pp. 1112, 1115, 1117.) The court also found that the balance of hardships tipped sharply in plaintiffs' favor. (*Id.* at p. 1119.) Los Angeles would lose some of the value of the $10 million it had spent buying Green Acres Farm and the $15 million it had spent upgrading its facilities to comply with Kern County's earlier regulations. It also would face increased costs of $4 million annually to operate a program of applying biosolids to land at another location. County Sanitation District No. 2 of Los Angeles County and Orange County Sanitation District would need to dispose of more biosolids in landfills and would incur costs in sending their biosolids to more distant sites. (*Ibid.*) 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. (*Id.* at p. 1120.) The harm to Kern County from biosolids

application, by contrast, was "merely potential, and not yet supported by substantial evidence." (*Id.* at p. 1121.)

On August 10, 2007, the district court granted plaintiffs' motion for summary adjudication on two causes of action and entered judgment for plaintiffs. (*Los Angeles v. Kern II, supra*, 509 F.Supp.2d at pp. 865, 902.) The court ruled that there were no triable issues of material fact about, and that plaintiffs were entitled to judgment as a matter of law on, the dormant commerce clause claim and the CIWMA preemption claim. (*Los Angeles v. Kern II, supra,* at pp. 878, 881, 888, 898.) The court found it could not grant summary adjudication on plaintiffs' police powers/regional welfare claim. It believed the resolution of this claim depended on remaining factual questions about the suitability of Green Acres Farm as a site for biosolids application and the reasons for Los Angeles's decision to use Green Acres Farms instead of a site closer to the city. (*Id.* at pp. 898, 901.) The court entered judgment for plaintiffs even though it had not granted summary adjudication on all claims because its rulings on the dormant commerce clause and the CIWMA preemption rendered the remaining claims moot. (*Los Angeles v. Kern II, supra,* at p. 902.)

Without reaching the merits of any of plaintiffs' claims, the Ninth Circuit in 2009 dismissed plaintiffs' dormant commerce clause claim and vacated the district court's judgment. (*City of Los Angeles v. County of Kern* (9th Cir. 2009) 581 F.3d 841, 849.) The Court of Appeals held that plaintiffs lacked prudential standing to bring the dormant commerce clause claim in federal court because, being located in the same state as defendants, their interest in sending biosolids to Kern County did not fall within the zone of interests protected by the dormant commerce clause doctrine. (*Id.* at pp. 847-848.) The court vacated the entire judgment of the district court and remanded with instructions to that court to consider whether it should exercise supplemental jurisdiction over the CIWMA preemption claim. (*City of Los Angeles v. County of Kern, supra,* at p. 849.) In an unpublished order filed November 9, 2010, the district court declined to exercise

supplemental jurisdiction and dismissed the case, leaving plaintiffs to pursue relief in state court. The court stated that principles of comity strongly supported dismissal because the remaining state-law issues raised "sensitive issues about the allocation of state and local power in California," which would be better resolved in state court.

On January 19, 2011, Kern County sent plaintiffs an enforcement notice stating that plaintiffs were subject to Measure E and must stop applying biosolids within six months of the date of the letter. Plaintiffs filed their complaint in superior court on January 26, 2011.[9] The complaint alleged CIWMA preemption, the police power/regional welfare doctrine claim, and the dormant commerce clause claim. It also alleged two additional claims based on the California Constitution.

Plaintiffs moved for a preliminary injunction. In an order meriting reproduction at length here, the Tulare County Superior Court found that plaintiffs had shown a likelihood of success on the merits of the police power/regional welfare claim and the CIWMA preemption claim. It also found that plaintiffs had shown a balance of hardships tipping sharply in their favor:

> "[On the police power/regional welfare doctrine claim:] Legislation is a valid exercise of the police power if it is reasonably related to the general welfare, with the caveat (Associated Home Builders v. Livermore (1976) 18 Cal. 3d 582) that if the enactment has an effect beyond the territory of the enacting local government, the general welfare to be considered is that of the entire affected area and not just that of the local jurisdiction.
>
> "The enactors must identify, consider, and weigh any competing interests affected. The question for a reviewing court is whether, considering the extraterritorial effect of the ordinance, it represents a reasonable accommodation of any competing interests.
>
> "The record is devoid of any consideration of any competing interests, and of any attempt to accommodate any competing interests. Since 'E' was

[9]The clerk's stamp on the copy of the complaint included in the appellate record shows only that the complaint was *received* on January 26, 2011, not that it was filed on that date, but the parties agree that this is the correct filing date.

enacted by initiative, there is no legislative history to look at. We are left with campaign material, which, as a generality, seems to be an indication the proponents were seeking to prevent big LA from taking advantage of little Kern by exporting its foul products to Kern and dumping them in Kern.

"The competing interests here are Kern's need to protect its citizens from the unknown potential harm from biosolids, and their alleged effect on the reputation of Kern's agricultural products, versus LA's need to dispose of biosolids in an environmentally appropriate and least costly manner.

"There is no law with statewide application which prohibits the land application of biosolids.

"There are federal and state laws and regulations which contemplate the propriety of the land application of biosolids, and which regulate that activity.

"California does not consist of 58 separate fiefdoms, or of three or four separate regions, all insular from each other. As noted by the Court of Appeal in County Sanitation [Dist. No. 2] v. County of Kern (2005) 127 Cal. App. 4th 1544, in the context of effects to be considered in an EIR, localities cannot retreat into isolationism and ignore this fact. We all live here, and what any state actor does elsewhere may affect us all.

"LA cannot engage in 'source reduction.' Its population is increasing. It has to do something with its biosolids, and whatever it does, and wherever it does it, someone will be affected.

"A reasonable accommodation would seem to be the 1999 ordinance, restricting the land application to 'A' grade biosolids.

"'E' represents no accommodation. A complete ban precludes an 'accommodation.'

"The court thus finds that there is a very reasonable probability that LA will prevail on the theory that 'E' is invalid as beyond the scope of an allowed police power measure. [¶] ... [¶]

"[On the CIWMA preemption claim:] The declared policy of the Act is to promote source reduction, recycling, and re-use of solids to reduce the amount going into landfills.

"Kern argues that the Act only 'promotes' but does not require this. However, as stated by the Court of Appeal in County Sanitation District No. 2, supra, the Act '... requires the use of recycling and source reduction to reduce the amount of solid waste going into landfills ...' and 'this legislation caused sewage sludge to be diverted from disposal in landfills in favor of recycling it—as a fertilizer applied to agricultural ... land.'

"The Act allows local regulation not in conflict with the policies of the Act, but a complete ban is not a permitted regulation.

"'E' takes away as to Kern County a method of disposing of biosolids that state law specifically requires be promoted by local governments.

"The court finds that it is reasonably probable that LA will prevail on the theory that 'E' is invalid as contrary to state law. [¶] ... [¶]

"[On the balance of hardships:] LA presents declarations from qualified individuals with first hand knowledge of the sites and, particularly as to [Green Acres], who have studied the test reports relating to the subject biosolids.

"These experts opine that continued biosolid applications will not [affect] the groundwater; will not [affect] the water banks nearby; that metals will not leach down anywhere near the water level. They opine that the net effect of the application is a benefit to Kern, in that it improves the soil and allows marginal land to grow crops.

"LA presents declarations from qualified persons with respect to the costs incurred to date, and additional significant costs, and expenses which would be incurred in effectuating alternatives to continued Kern application, and the adverse environmental effects of some of these.

"Other Plaintiffs present declarations regarding the [effect] on their business and employees' jobs were land application to be stopped by Kern.

"LA also discusses the time which would be required to set up and start operations with alternatives, specifically [a composting facility].

"Kern presents a declaration, without reference to the subject sites and conditions, to the effect that there is some literature in the United States (without differentiating between 'A' and 'B' classes) indicating there could possibly be some as yet unknown risks which biosolids could pose.

"Kern also now claims there are composting businesses in Kern with permits sufficient to handle the quantity of biosolids being applied by LA. However, there is no evidence these sites would take it all, or of how long a process would be required to do so (LA says at least 18 months).

"Kern presents declarations from water bank operators, with no admissible information other than that the banks are in the area of [Green Acres].

"Kern presents no evidence of any actual harm to the environment: to the air, water, or soil, as a result of LA's continued application of biosolids.

"Kern does present individual complaints of adjacent (for the most part) employees to the effect that the two farms smell bad, and that there are many flies in their area adjacent to the farms.

"Per other declarations, there are also dairies in the area. Dairies are famous for the pervasive odor of urine and manure, and for flies. The same goes, to a lesser extent, for cattle ranches and horse ranches.

"The declarants are careful to say the smell is 'different' from dairy smell (but do not compare on an offensiveness scale).

"It cannot be ascertained from the declarations the extent to which the flies result from the application of biosolids, or from other uses, nor the extent to which there may also be smell from dairies, the cattle ranch, and the horse operation.

"There is some degree of smell inherent in agricultural operations. Dairies smell; feedlots smell. Dairies are frequently scraped, and the untreated manure applied to other ag land as fertilizer, causing that land to smell.

"Dairy pond water is also frequently used for irrigation, also causing smell from the watered land.

"There are fly and odor control requirements in LA's Water Quality Permit, with only one fly violation noted years ago.

"The [L]egislature has long recognized that a problem, consisting mainly of many nuisance suits, was being caused by residential encroachment into ag areas, particularly dairies (e.g. Chino).

"This resulted in the [L]egislature enacting, in 1981, the 'right to farm' law (Civil Code section 3481.5), under which any farm (or processing plant, CC

section 3482.6) legally in operation for three years could not be declared a nuisance due to a change in the area.

"These complaints represent something those of us who live in agricultural areas know we simply have to put up with as part of our local ag based economy.

"The declarants here report an annoyance to their olfactory sensibilities (with apologies to Justice Richli for stealing [her] phrase) in the nature of a private nuisance. This does not represent a health and safety issue.

"LA seeks to preserve the long time status quo. The private nuisance aspects are limited to a few individuals working immediately adjacent to the property. Kern presents no evidence whatsoever of any health and safety or environmental actual harm.

"LA presents evidence of substantial monetary harm and the inability to quickly adapt to alternatives. Individual Plaintiffs present evidence of irreparable harm consisting of job losses.

"There is no public policy reason to deny the injunction, and a good public policy reason to grant it.

"The court finds that there is no evidence at all that Kern will suffer any harm or injury by the grant of the injunction, and that there is a substantial likelihood of significant, and some irreparable, harm to Plaintiffs if the injunction is denied."

DISCUSSION

The granting of a preliminary injunction is governed by Code of Civil Procedure section 526. The trial court must consider two interrelated factors: (a) the likelihood that the plaintiff will succeed on the merits at trial, and (b) a comparison of the harm the plaintiff will suffer without the injunction with the harm the defendant will suffer with it. (*King v. Meese* (1987) 43 Cal.3d 1217, 1226.) The more likely it is that the plaintiff will prevail on the merits, the less severe must be the harm it will suffer if the injunction does not issue. (*Id.* at p. 1227.)

We review the trial court's decision for an abuse of discretion. (*King v. Meese, supra*, 43 Cal.3d at p. 1226.) Where, as here, the superior court has granted the

injunction, the restrained defendant can prevail on appeal by showing that the court abused its discretion as to only one of the two factors. (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749 (*Smith*).) Kern County is therefore correct in its assertion that we must reverse if the trial court abused its discretion in concluding that plaintiffs are likely to succeed on at least one cause of action, even if plaintiffs have proved that the balance of hardships tips in their favor. At the same time, the *degree* of likelihood of success on the merits that plaintiffs had to show is affected by Kern County's undisputed total failure to show any hardship to it from the granting of the injunction.

Under the abuse of discretion standard, to the extent that the challenged ruling was based on factual findings, we affirm if the ruling is supported by substantial evidence. To the extent that the ruling was based on pure conclusions of law, we review it independently. (*Smith, supra*, 182 Cal.App.4th at p. 739.)

I. The limitations period under 28 United States Code section 1367(d)

Kern County first argues that plaintiffs cannot succeed on the merits because their complaint was untimely filed in the superior court. Plaintiffs maintain that it was filed timely. The dispute arises from the parties' competing interpretations of subsection (d) of 28 United States Code section 1367, a federal statute that governs the limitations period for refiling a dependent claim in state court after it has been dismissed by a federal court. In our view, plaintiffs' interpretation is correct.

28 United States Code section 1367(a) provides that federal district courts have supplemental jurisdiction over claims that are part of the same case or controversy as claims over which those courts have original jurisdiction. Section 1367(c) provides that the district courts may decline this supplemental jurisdiction under certain circumstances. Section 1367(d) provides for an extended statute of limitations for the refiling in state court of claims as to which supplemental jurisdiction has been declined. It states that "[t]he period of limitations for any claim asserted under subsection (a) ... shall be tolled

while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

Plaintiffs argue for the natural interpretation of this language: The statute of limitations stops running while the claim is pending in federal court and for 30 days after it is dismissed; then the statute of limitations begins to run again from the point where it left off. So, for instance, suppose a state law claim has a statute of limitations of one year, and the plaintiff files it in federal court six months after it accrues. Later, the federal court decides not to exercise supplemental jurisdiction over the claim and dismisses it. At that point, the statute of limitations begins to run again and the plaintiff has the remaining six months plus the 30 days added by 28 United States Code section 1367(d) to refile in state court. Under this interpretation, the statute of limitations stopped running in this case when plaintiffs filed their complaint in federal court shortly after Measure E's passage in 2006 and did not begin to run again until 30 days after the district court dismissed the case on November 9, 2010, so that plenty of time remained when plaintiffs filed the complaint in superior court in January 2011.[10]

Plaintiffs rely on the Third District Court of Appeal's opinion in *Bonifield v. County of Nevada* (2001) 94 Cal.App.4th 298, 303-304 and on a federal district court opinion, *In re Vertrue Marketing & Sales Practices Litigation* (N.D. Ohio 2010) 712 F.Supp.2d 703, 724. Those cases state that the running of the limitations period is *suspended* during the pendency of the claim in federal court and for 30 days after its dismissal; plaintiffs consequently refer to their interpretation of 28 United States Code

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[10]The parties agree that the limitations period for plaintiffs' CIWMA preemption claim is three years. For the police power/regional welfare claim, plaintiffs say the period is three years, while Kern County says it is one year. It is unnecessary to resolve this dispute, as it has no effect on the outcome. Plaintiffs' complaint was timely if plaintiffs' interpretation of 28 United States Code section 1367(d) is correct and untimely if Kern County's interpretation is correct, regardless of whether the one-year or three-year statute applies.

section 1367(d) as the suspension approach. *Bonifield* holds: "To toll the statute of limitations period means to suspend the period, such that the days remaining begin to be counted after the tolling ceases." (*Bonifield, supra*, at p. 303.) In consequence, after dismissal, a plaintiff has that number of days plus 30 days to refile in state court. (*Id.* at p. 304.) Plaintiffs also cite out-of-state cases reaching the same conclusion. (*Goodman v. Best Buy, Inc.* (Minn. 2010) 777 N.W.2d 755, 761-762; *Turner v. Kight* (Md. 2008) 957 A.2d 984, 992.)

Kern County's interpretation of 28 United States Code section 1367(d) is that the limitations period is not suspended while the claim is pending in federal court, and instead continues to run during that time; but if it would otherwise expire during that time or during the 30 days after dismissal, then it is extended until the 30th day after dismissal. Kern County relies on the Second District Court of Appeal's opinion in *Kolani v. Gluska* (1998) 64 Cal.App.4th 402 (*Kolani*), on two out-of-state cases (*Berke v. Buckley Broadcasting Corp.* (N.J.Super.A.D. 2003) 821 A.2d 118; *Huang v. Ziko* (N.C.Ct.App. 1999) 511 S.E.2d 305), and on an unpublished case from the Supreme Court of the Commonwealth of the Northern Mariana Islands (*Juan v. Government of Commonwealth of Northern Mariana Islands* (N.M.I.) 2001 WL 34883536), all interpreting 28 United States Code section 1367(d) in this way. Kern County refers to these courts' interpretation as the extension approach.

Kern County also cites *Chardon v. Fumero Soto* (1983) 462 U.S. 650, in which the Supreme Court discussed different kinds of "tolling effect" a law that tolls a limitations period can have. A tolling effect is "the method of calculating the amount of time available to file suit after tolling has ended. The statute of limitations might merely be suspended; if so, the plaintiff must file within the amount of time left in the limitations period. If the limitations period is renewed, then the plaintiff has the benefit of a new period as long as the original. It is also possible to establish a fixed period such as six months or one year during which the plaintiff may file suit, without regard to the length of

the original limitations period or the amount of time left when tolling began." (*Id.* at p. 652, fn. 1.)

Kern contends that the suspension approach and the extension approach are equally plausible readings of the words of the statute, and that we must break the tie in favor of the extension approach because of policy considerations identified by the *Kolani* court. In that court's view, the suspension approach is "unreasonable" since it is "not needed to avoid forfeitures, because 30 days is ample time for a diligent plaintiff to refile his claims and keep them alive." (*Kolani, supra*, 64 Cal.App.4th at p. 409.) The suspension approach also would do "significant harm to the statute of limitations policy," which the court described as ensuring prompt filing of claims. (*Ibid.*)

The two approaches are not equally plausible readings of the statutory language, however. Kern is correct that there is authority for the view that "toll" does not always equal "suspend," but that is what it most plausibly means in the context at issue here. The alternative argued for by Kern—that "toll" means "extend"—simply does not fit into the sentence Congress drafted. What happens if we substitute the words "suspend" and "extend" for "toll" in that sentence? "The period of limitations for any claim ... shall be *suspended* while the claim is pending and for a period of 30 days after it is dismissed" makes sense and straightforwardly expresses the meaning for which plaintiffs contend. "The period of limitations for any claim ... shall be *extended* while the claim is pending and for a period of 30 days after it is dismissed," by contrast, is obscure and would be an obtuse way of expressing the meaning for which Kern contends. The fact that other meanings of "toll" have been identified in case law therefore sheds no light on what "toll" means *here*. If Congress had intended the rule Kern supports, it could have written that the "period of limitations for any claim that would otherwise expire while it is pending or during a period of 30 days after it is dismissed shall be extended by 30 days from the time of dismissal," or something similar. It did not.

Further, it is far from clear that policy reasons favor Kern's interpretation. In essence, Kern says it is better policy not to exclude the time when the case was pending in federal court from the calculation of the limitations period because that way claims must be refiled sooner after dismissal. That policy is better for defendants, of course—just as the plaintiffs' approach is better policy for plaintiffs. We, however, are neutral as between pro-defense and pro-plaintiff policy considerations. The law does encourage prompt filing of claims, but it balances that concern with a concern for ensuring that meritorious claims can have their day in court. There is no rule that, where one interpretation of a statute results in a longer limitations period and another results in a shorter, a court should always choose the shorter. There being no policy factor favoring either side here, the linguistic considerations discussed above carry the day.

For these reasons, we reject Kern County's argument that plaintiffs' complaint was not timely filed in the superior court.

II. Preemption by the CIWMA

When it enacted the CIWMA in 1989, the Legislature set out to reduce the quantity of solid waste being sent to landfills and incinerators statewide. Section 41780 required every city and county to use source reduction, recycling, and composting to divert 25 percent of its solid waste from landfills and incinerators by January 1, 1995, and 50 percent by January 1, 2000. The key provision of the CIWMA for purposes of this case, section 40051, provides:

> "In implementing this division, the board and local agencies shall do both of the following:
>
> "(a) Promote the following waste management practices in order of priority:
>
> "(1) Source reduction.
>
> "(2) Recycling and composing.

"(3) Environmentally safe transformation and environmentally safe land disposal, at the discretion of the city or county.

"(b) Maximize the use of all feasible source reduction, recycling, and composting options in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal. For wastes that cannot feasibly be reduced at their source, recycled, or composted, the local agency may use environmentally safe transformation or environmentally safe land disposal, or both of those practices."[11]

Section 40052 reinforces the mandates of section 40051. It explains that the overarching purposes of the CIWMA include maximizing recycling:

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

Finally, in section 40053, the Legislature made it clear that, although local government was still authorized to make its own regulations on land use and solid waste management facilities, these regulations would be valid only if reasonable and consistent with the CIWMA and its policies:

"This division, or any rules or regulations adopted pursuant thereto, is not a limitation on the power of a city, county, or district to impose and enforce reasonable land use conditions or restrictions on solid waste management facilities in order to prevent or mitigate potential nuisances, if the conditions or restrictions do not conflict with or impose lesser requirements than the policies, standards, and requirements of this division and all regulations adopted pursuant to this division."

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[11]The term "board" originally referred to the Integrated Waste Management Board. That agency has been abolished and "board" has been redefined to refer to the Department of Resources Recycling and Recovery. (§ 40110.) "Transformation" includes incineration. (§ 40201.)

Under state law preemption principles, a county is authorized to make ordinances only if they are "not in conflict with general laws." (Cal. Const., art. XI, § 7.) "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) A conflict exists if an ordinance """"contradicts""" general law (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747), and an ordinance is "'contradictory' to general law when it is inimical thereto" (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898).

We agree with plaintiffs that they are likely to prevail on their claim that the CIWMA preempts Measure E. Section 40051 requires local agencies like Kern County and the City of Los Angeles to "[p]romote" and "[m]aximize" recycling. An ordinance of one local government that prohibits, within its jurisdiction, the employment by another local government of a major, widely accepted, comprehensively regulated form of recycling is not consistent with this mandate.

In *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, the California Supreme Court discussed (but had no occasion to adopt) a federal case containing an analysis that is helpful here. *Blue Circle Cement, Inc. v. Board of County Com'rs* (10th Cir. 1994) 27 F.3d 1499, 1506-1507, considered a local ordinance that purported to grant local authorities discretion to ban industrial waste disposal and treatment facilities within a county, even though the federal Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.) had as one of its main purposes the enlistment of state and local governments in a cooperative effort to facilitate the recovery of materials and energy from solid waste. The Court of Appeals held that the federal statute did not permit a total ban on industrial waste facilities because the use of these to recover resources was an activity encouraged by that statute. Our Supreme Court stated that the case stood for "the proposition that when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that

activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." (*Great Western Shows, supra*, at p. 868.)

Under this analysis, which we consider appropriate here, Measure E is likely to be held invalid because land application of biosolids, which undisputedly allows solid waste to be disposed of through recycling instead of in landfills or incinerators, is an activity the CIWMA seeks to promote and Measure E purports totally to ban. Some local regulation of biosolids may be compatible with the CIWMA. For instance, in *County Sanitation Dist. No. 2 v. County of Kern, supra*, 127 Cal.App.4th at pages 1557-1558, we upheld over several challenges not involving the CIWMA the Kern County regulation that preceded Measure E and that restricted land application to class A EQ biosolids. That regulation might be acceptable under the CIWMA as well. A total ban, however, is inimical to the CIWMA.

Kern County's several counterarguments are unpersuasive. It first contends that plaintiffs cannot bear the heavy burden of demonstrating preemption because solid waste was "a traditional subject of local control" before the passage of the CIWMA and because, under the CIWMA, a large role remains for local government, which is charged with formulating and implementing waste management plans. Kern County accuses the trial court of ignoring these propositions, but we perceive no deficiency in its order in this regard. The fact that solid waste management was a subject of local control before the CIWMA, and the fact that local government is still involved in solid waste management under the CIWMA, cannot save Measure E from preemption if Measure E conflicts with the CIWMA.

Kern County next contends that the potential preemptive scope of section 40051 is strictly limited by its opening phrase, "In implementing this division ...." It asserts that this phrase means local governments are required to promote and maximize recycling and other waste-stream-reduction methods only when setting up and carrying out their own waste management reduction plans as required by the CIWMA. They are under no

obligation to do so when regulating waste generated outside their jurisdictions. It maintains that when its voters adopted Measure E, they were not implementing the CIWMA, so the requirements of section 40051 are irrelevant.

This cannot be correct, at least under the circumstances of this case. Land application of biosolids is a widely used, widely accepted, comprehensively regulated method by which municipalities fulfill their obligation to reduce the flow of waste to landfills. Kern County jurisdictions use it just as others do. One jurisdiction's action to ban it, and to interfere with other jurisdictions' efforts to comply with their CIWMA obligations, is not consistent with a statutory scheme that presumes all jurisdictions will have access to crucial waste-stream-reduction methods. If we held that Kern County is empowered to ban land application of biosolids, we would necessarily be implying that all counties and cities are empowered to do the same. As the superior court observed, Los Angeles has to do something with its biosolids. The same goes for every city and county in the state. Kern County asks us to adopt a position that would authorize all local governments to say "not here." That principle would not be consistent with a statute that requires all local governments to adhere to waste management plans in which recycling is maximized. The CIWMA announces statewide goals and means to achieve them. Kern County claims an entitlement to ban those means and thwart the achievement of those goals for others so long as it is complying with its own obligation to reduce the flow of waste it collects itself. This claim will likely be rejected in a trial on the merits.[12]

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[12]In its reply brief, Kern County refers to the implication that all cities and counties could ban biosolids as a "'slippery slope' argument" and as "speculative." We are speaking here, however, not about the mere possibility that other jurisdictions could ban biosolids, but about the necessary logical implication upholding Measure E would have: the implication that cities and counties are free to make important forms of waste-stream reduction unavailable to each other. That implication is in conflict with the goals of the CIWMA right now, not in a speculative future. In arguing that we should not worry about future ordinances of other jurisdictions, Kern County is asking us to give it special dispensation to exercise a power the law could not confer on all other local governments consistently with the CIWMA.

Section 40052 supports our conclusion. It states as *two separate* purposes of the CIWMA the maximizing of recycling and the specification of local governments' responsibilities in managing their own jurisdictions' waste. This further undermines Kern County's notion that the mandates of section 40051 relate only to local governments' plans to manage their own jurisdictions' waste.

Kern County next offers an argument based on section 41851. That section provides that "[n]othing in this chapter shall infringe on the existing authority of counties and cities to control land use or make land use decisions, and nothing in this chapter provides or transfers new authority over that land use to the board." Kern County says this provision means the CIWMA does not preempt Measure E. Since sections 40051 and 40052 are not in the same chapter as section 41851, however, it is difficult to see how the disclaimer about what that chapter does not do could negate the preemptive effect of sections 40051 and 40052.

In an attempt to meet this problem, Kern County says that the chapter containing section 41851 delineates procedures for the creation and approval of local governments' waste management programs, that the approval is given by the board (i.e., now, the Department of Resources Recycling and Recovery), and that therefore the board's approval authority cannot infringe on the existing authority of counties to make land use decisions. In our view, all this is irrelevant to the preemption question. The statute clearly states a purpose of requiring all jurisdictions to maximize recycling and other methods of waste-stream reduction, and Kern's position would allow all jurisdictions to undermine that purpose by banning methods of waste-stream reduction. Whether the Department of Resources Recycling and Recovery could theoretically order a city or county not to ban a major waste-stream-reduction method is not a question we need to answer as it would have no bearing on this case.

Kern County next cites section 18735.3(b) of title 14 of the California Code of Regulations, a provision promulgated pursuant to the CIWMA. That regulation requires

each city and county to "consider changing zoning and building code practices to encourage recycling of solid wastes, such as, rezoning to allow siting of a drop-off recycling center in residential neighborhoods or revising building codes to require adequate space be allotted in new construction for interim storage of source-separated materials." Kern County says this implies that local governments can change their ordinances to encourage recycling if they want to do so, but they are never required to change them for that purpose; consequently, the superior court was wrong to find that Measure E is likely to be held invalid.

The regulation does not support Kern County's conclusion. The regulators' decision to require cities and counties to consider whether any of their ordinances should be changed to encourage recycling is entirely consistent with the court's decision that one ordinance illegally blocks recycling. To tell governments they may encourage recycling voluntarily by changing their ordinances does not imply that they may ban major forms of recycling if they wish.[13]

Kern County next contends that plaintiffs' biosolids application activities do not count as recycling for purposes of the CIWMA. This is so, Kern County maintains, because section 41781.1 allows governments to receive credit toward their solid-waste-diversion goals based on land application of biosolids only if the Department of Resources Recycling and Recovery makes findings after a hearing that the biosolids will

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[13]At this point in its argument, Kern County inserts a footnote stating that it would be wrong to uphold a decision "compelling one jurisdiction to accept biosolids generated by others" because this could lead to "scenarios" in which a jurisdiction "could retaliate by compelling the first jurisdiction to accept *their* sludge." This description of the superior court's injunction is not logical. The law, as interpreted by the superior court, does not "compel" anyone to "accept" anyone's biosolids. It lifts a local regulation that forbade landowners from willingly engaging in a farming practice they considered beneficial. The only way in which Kern County could "retaliate" would be by finding a farmer in Los Angeles or Orange County who wanted to apply biosolids, or buying a farm and doing it for itself. This would not involve compelling anyone to accept biosolids.

not pose a threat to public health or the environment. The purpose of this requirement is to ensure that "each sludge diversion, for which diversion credit is sought, meets all applicable requirements of state and federal law, and thereby provides for maximum protection of the public health and safety and the environment." (§ 41781.1, subd. (b).) Plaintiffs do not claim there were any administrative hearings or findings regarding their biosolids. They state, instead, that they never sought diversion credit for their biosolids activities (at least as to plaintiff City of Los Angeles) because they began recycling the waste before the CIWMA took effect, so that activity was included in the baseline from which additional reductions were required to be made.

Kern County's view misses the point. The goal of the CIWMA is to reduce the stream of waste going to landfills and incinerators, regardless of what counts for diversion credit. Measure E thwarts an important category of recycling that reduces the waste stream going to landfills. The illegality of this does not depend on whether plaintiffs are receiving diversion credit for any particular biosolids. To put the point another way: If we adopted Kern County's position, then all cities and counties would be free to ban land application of biosolids at all locations, including those for which a hearing had been held and approval given; and this would not be consistent with the statute's goal of maximizing waste-stream reduction. In fact, the presence in the CIWMA of procedures for approving the use of land application of biosolids as a way of reaching diversion goals *supports* the contention that the CIWMA preempts Measure E. These procedures presuppose that land application of biosolids will not be banned but will be an available method of reducing cities' and counties' waste streams when (as is undisputedly the case here) the biosolids satisfy state and federal regulatory standards. By banning land application, even when it does meet those standards, Measure E *directly conflicts* with section 41781.1.

The fact that plaintiffs' biosolids are not being counted toward their diversion goals fails to support Kern County's position in another way as well. If plaintiffs become

unable to apply their biosolids in Kern County, they presumably will be required to find other locations in which to apply them or to reduce other portions of their waste stream. They cannot adhere to their diversion targets if waste that was recycled when their baseline was determined is no longer recycled. Measure E therefore would directly undermine plaintiff agencies' ability to comply with the CIWMA even though their land application of biosolids is not being counted as diversion.

Finally, Kern County claims Measure E is saved from preemption by section 40059, subdivision (a), which provides:

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

Kern County asserts that, because solid waste includes biosolids, "handling" includes "processing" (§ 40195), "processing" includes "recycling" (§ 40172), and land application is a form of recycling, it has authority to "determine" the "nature, location, and extent" (§ 40059, subd. (a)) of land application of biosolids. This includes Measure E's determination that, within Kern County's jurisdiction, the location will be nowhere and the extent will be none. Further, even without applying some of these definitions, land application of biosolids is among the "[a]spects of solid waste handling

which are of local concern" (§ 40059, subd. (a)(1)). Plaintiffs counter with the argument that section 40059, subdivision (a), is designed to preserve local control over trash hauling and garbage collection, and has nothing to do with authorizing local governments to ban recycling methods. They cite a number of cases dealing with section 40059 in the context of trash hauling and garbage collection.

It is unnecessary for us to hold that the application of section 40059 is limited to local regulation of trash hauling and garbage collection. Even accepting for the sake of argument Kern County's view that section 40059 has a more general scope, we do not consider it likely that the Legislature intended the words of that statute to authorize local bans on major, widespread, comprehensively regulated methods of recycling. In light of the description we have given of the overarching goals of the CIWMA, it is highly unlikely that the legislators would have authorized major incursions on those goals in such vague terms. As we have said, the proposition Kern asks us to endorse would authorize all cities and counties to ban land application of biosolids. Considering the major role land application has taken on for the disposal of our state's sewage, this interpretation of section 40059 would be at odds with the statutory scheme as a whole. When construing statutes, we are obligated to look to the entire statutory scheme in interpreting particular provisions "so that the whole may be harmonized and retain effectiveness." (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814.) We therefore reject Kern County's interpretation.

For all these reasons, we conclude that the superior court was correct when it determined that plaintiffs likely will succeed on the merits of their CIWMA preemption claim.

III. The regional welfare doctrine

In *Associated Home Builders Etc., Inc. v. City of Livermore, supra,* 18 Cal.3d 582 (*Associated Home Builders*), our Supreme Court held that the California Constitution imposes on the police power of local governments a limitation requiring local enactments

not to conflict with the general welfare or the public welfare. (*Associated Home Builders, supra,* at p. 604.)[14] The basic principle is that "a local land use ordinance falls within the authority of the police power if it is reasonably related to the public welfare." (*Id.* at p. 607.) The test courts are to apply in reviewing the validity of ordinances is that, "'[i]f the validity ... be fairly debatable, the legislative judgment must be allowed to control.' [Citation.]" (*Id.* at p. 605.) Further, "[t]he burden rests with the party challenging the constitutionality of an ordinance to present the evidence and documentation which the court will require in undertaking this constitutional analysis" (*id.* at p. 609), and ordinances "are presumed to be constitutional, and come before the court with every intendment in their favor" (*id.* at pp. 604-605). At the same time, "judicial deference is not judicial abdication. The ordinance must have a *real* and substantial relation to the public welfare," and "[t]here must be a reasonable basis in fact, not in fancy, to support the legislative determination." (*Id.* at p. 609.)

Special considerations apply where, as here, the ordinance affects state residents outside the enacting jurisdiction:

> "When we inquire whether an ordinance reasonably relates to the public welfare, inquiry should begin by asking *whose* welfare must the ordinance serve. In past cases, when discussing ordinances without significant effect beyond the municipal boundaries, we have been content to assume that the ordinance need only reasonably relate to the welfare of the enacting municipality and its residents. But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited

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[14]The court's opinion never specifies exactly which provision of the state Constitution it is interpreting in imposing this limitation, but we assume it is article XI, section 7, which provides for local governments' police power and requires local enactments not to conflict with general law. (See, e.g., *McKay Jewelers v. Bowron* (1942) 19 Cal.2d 595, 600-601 [interpreting police power conferred by former art. XI, § 11 of Cal. Const., predecessor to current art. XI, § 7, as limited by requirement of substantial relation to general welfare].)

viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.

> "These considerations impel us to the conclusion that the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects. If its impact is limited to the city boundaries, the inquiry may be limited accordingly; if, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region." (*Associated Home Builders, supra*, 18 Cal.3d at p. 607, fn. omitted.)

Under circumstances like those, a court reviewing an ordinance must "determine whether a challenged restriction reasonably relates to the regional welfare." (*Associated Home Builders, supra*, 18 Cal.3d at p. 608.) This determination involves three steps. First, the court must "forecast the probable effect and duration of the restriction." (*Ibid.*) Second, the court is to "identify the competing interests affected by the restriction." (*Ibid.*) Finally, the court is required to "determine whether the ordinance, in light of its probable impact, represents a reasonable [accommodation] of the competing interests." (*Id.* at p. 609, fn. omitted.)

In *Associated Home Builders*, which involved an ordinance barring the construction of new housing in a city until the city's school, sewer, and water facilities met certain standards, our Supreme Court held that the trial court erred in granting the challengers' motion for judgment on the pleadings and on certain stipulated facts. (*Associated Home Builders, supra*, 18 Cal.3d at pp. 588, 590, 610-611.) Our Supreme Court held that the challengers had not presented the evidence necessary to show the ordinance's impacts; for instance, there was no evidence about whether the city had undertaken to construct the improvements to the schools, sewer, and water system that would allow housing construction to proceed. (*Id.* at pp. 609-610.) Consequently, an adverse impact on the regional welfare had not been shown and the presumption of constitutionality had not been rebutted. The court remanded the case for further proceedings. (*Id.* at pp. 610-611.)

In the present case, our discussion of the balance of hardships above illuminates the question of reasonable accommodation of the region's welfare. It is likely plaintiffs will succeed on the merits of this claim because the evidence presented so far shows—undisputedly for purposes of this appeal—considerable hardship to waste-generating municipalities around the region if Measure E is enforced and *no* offsetting hardship to Kern County if it is not enforced. Other facts may be developed in a trial or in a record supporting a party's motion for summary judgment.[15] As the record stands now, however, we can only say it is likely that plaintiffs will succeed in showing that Measure E does not strike a reasonable accommodation of the competing interests and that there is no fair argument that Measure E promotes the general welfare of the region.

The CIWMA reinforces this conclusion. In light of the CIWMA's mandate that all local governments reduce the stream of solid waste going to landfills and incinerators, it is likely that an ordinance by which one local government obstructs others' efforts by banning a major form of recycling within its jurisdiction fails to accommodate the regional welfare. If it were upheld, then every jurisdiction would be authorized to make a similar enactment, thus preventing California as a whole from recycling its biosolids without imposing them on other states.

Kern County argues that the regional welfare doctrine does not apply because section 40059, subdivision (a), authorizes local governments to ban recycling methods.

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[15]We need not comment on what other evidence, if any, would be relevant to demonstrating whether Measure E reasonably accommodates the regional welfare. That is a matter for the superior court to determine in the first instance. In this context, at the summary judgment stage, the district court considered important such matters as "whether Green Acres is as well-suited to land application as Plaintiffs contend," how likely it is that runoff from Green Acres Farm would contaminate nearby water banks, and whether plaintiffs use sites in Kern County because none closer to home are available or only because they want the biosolids not to be near them. (*Los Angeles v. Kern II, supra,* 509 F.Supp.2d at p. 901.) Plaintiffs might urge the superior court to find that evidence at this level of detail is unnecessary. We express no opinion.

We have already explained why this is not a correct interpretation of section 40059, subdivision (a).

Kern County also argues that the regional welfare doctrine does not require invalidation of Measure E because the CIWMA contemplates that local governments will have an important role in managing waste and will retain some regulatory independence. As we have explained, it is true that the CIWMA enlists local governments in the effort to formulate and execute waste management plans and allows local governments to make regulations not in conflict with the CIWMA (§ 40053), but it is likely that plaintiffs will succeed in their claim that Measure E *is* in conflict with the CIWMA.

DISPOSITION

The order granting the preliminary injunction is affirmed. Costs on appeal are awarded to plaintiffs.

Wiseman, Acting P.J.

WE CONCUR:

Levy, J.

Cornell, J.

F063381

Steven L. Mayer
Arnold & Porter LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF LOS ANGELES et al., Plaintiffs and Respondents, v. COUNTY OF KERN et al., Defendants and Appellants.	F063381 (Super. Ct. No. VCU242057) **ORDER ON REQUEST FOR PUBLICATION**

The requests for publication of the opinion in the above-entitled action filed on February 28, March 1, March 4, and March 5, are granted. The nonpublished opinion meets the standards for publication specified in California Rules of Court, rule 8.1105, and it is ordered that the opinion be certified for publication, in its entirety, in the official reports.

Wiseman, Acting P.J.

WE CONCUR:

Levy, J.

Cornell, J.

F063381

Steven L. Mayer
Arnold & Porter LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

PROOF OF SERVICE

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

On April 22, 2013, I served the following document(s):

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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.

Dated: April 22, 2013.

Myrna M. Da Cunha

SERVICE LIST
Case No. F063381

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

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

Edward McClaren Jordan, Esq.
Office of the City Attorney
200 N. Main Street, Ste. 700
Los Angeles, CA 90012

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

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

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

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

Bradley R. Hogin, Esq.
WOODRUFF, SPRADLIN & SMART
A Professional Corporation
555 Anton Boulevard, Suite 1200
Costa Mesa, CA 92626
TEL: 714/558.7000
FAX: 714/83.7787
Email: Bhogin@wss-law.com

Attorneys for Plaintiffs & Respondents Orange County Sanitation District; California California Association of Sanitation Agencies

Michael J. Lampe, Esq.
Michael P. Smith, Esq.
Law Offices of Michael P. Lampe
108 W. Center Avenue
Visalia, CA 93291
TEL: (559) 738-5975
FAX: (559) 738-5644
Email: mjl@lampe-law.com

Attorneys for Plaintiff & Respondent Shaen Magan, Both Individually and D/B/A Honey Bucket Farms and Tule Ranch/Magan Farms; and Western Express, Inc.

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

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

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

Mark L. Nations, Esq.
Office of the County Counsel
1115 Truxtun Avenue, 4th Floor
Bakersfield, CA 93301
TEL: 661/868.3800
FAX: 661/868.3805
Email: mnations@co.kern.ca.us

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

Client

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

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

Christopher Martin Westhoff
Freeman Freeman Smiley LLP
1888 Century Park East, Suite 1900
Los Angeles, CA 90012-4131

Attorneys for National Association of Clean Water Agenices : Amicus Curiae for Respondent

Marc A. Zeppetello
Barg Coffin Lewis & Trapp LLP
350 California Street, 22nd Floor
San Francisco, CA 94104

Attorneys for Water Environment Federation : Amicus Curiae for Respondent

Clerk
California Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721-3004

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

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