No. S210150
(Court of Appeal Case No. F063381)
(Tulare County Superior 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

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

The Court of Appeal's unanimous opinion properly upheld a preliminary injunction against enforcement of a voter initiative named Measure E, Kern County's ban on Respondents' recycling of biosolids on farmland in the County. In doing so, the Court of Appeal became the third court, joining the trial court and a federal district court, to independently conclude on broad-based legal and factual grounds that an injunction against Measure E was appropriate.

Kern's petition for review offers no compelling reason for this Court to review, let alone reverse, the Court of Appeal's interlocutory opinion upholding the latest of three separate injunctions that have been in place since shortly after the passage of Measure E in 2006. The Court of Appeal simply acknowledged the one-sided balance of harms favoring an injunction, interpreted the plain text of a federal and a state statute, and applied a well-established California constitutional law principle to the present facts. Kern identifies neither an important conflict in authority for this Court to resolve nor any unsettled major question of law requiring this Court's review. *See* Cal. R. Ct. 8.500(b)(1).

Instead, Kern's petition repeats the merits arguments and authorities that have been considered and uniformly rejected by the Court of Appeal and the state and federal trial courts. Kern's disagreement with the Court of Appeal and its desire to reiterate its arguments before this Court are not grounds to grant review.

Moreover, all questions of fact and law were correctly decided below. Respondents' claims are timely, not only under the "natural interpretation" of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d) (Slip Op. at 18), but also on other grounds that the Court of Appeal did not need to reach. The opinion also correctly found that

Measure E unconstitutionally exceeds Kern's police power because it damages Southland public agencies and makes no accommodation of the regional welfare. Finally, the statewide recycling mandate under the Integrated Waste Management Act ("IWMA") preempts Measure E's conflicting ban on such recycling despite Kern's attempts to narrow that statute. Kern's petition should be denied.

STATEMENT OF FACTS

The Court of Appeal set forth a comprehensive and accurate statement of facts in its opinion, which this Court should accept consistent with Cal. R. Ct. 8.500(c)(2). Slip. Op. at 4-16. In sum, Respondents are Southland local governments, contractors, and a statewide association engaged in the constant and nondiscretionary governmental obligation to collect, treat, and recycle biosolids, the nutrient-rich, organic byproduct of municipal wastewater treatment. *Id.* at 7-8. The predominant form of biosolids recycling in California and nationwide is land application to farmland. *Id.* at 4. Respondents are challenging Measure E, a ballot measure passed by Kern County voters that bans Respondents' longstanding and safe land application in sparsely populated areas of the County but does not affect ongoing land application within the cities in the County where most of those voters reside. *Id.* at 8-10. Respondents presented detailed testimony and analysis from numerous experts that land application of biosolids in Kern County poses little risk and provides significant benefits, and both the trial court and the Court of Appeal reviewed this evidence and agreed. *See generally* Respondents' Appendix.

REASONS FOR DENYING REVIEW

This Court may order review of a Court of Appeal decision "[w]hen necessary to secure uniformity of decision or to settle an important question

of law." Cal. R. Ct. 8.500(b)(1).[1] Otherwise, "[t]he supreme court's focus is not on correction of error by the court of appeal in a specific case." Jon B. Eisenberg, Ellis J. Horvits & Justice Howard B. Wiener (Ret.), *California Practice Guide: Civil Appeals and Writs*, § 13:1, at 13-1 (2012) (citing *People v. Davis*, 147 Cal. 346, 348 (1905)). This standard has been the law for over a century.

Kern's petition does not show that this case meets the criteria for securing uniformity or legal importance. There are no conflicting decisions on the substantive issues in the case – Kern identifies no contrary IWMA or police power case law. The stale conflict over a federal tolling statute presented by a Court of Appeal decision fifteen years ago and now in the minority does not merit review by this Court. Federal case law and recent decisions in other jurisdictions agree with the interpretation of 28 U.S.C. § 1367(d) adopted by the courts below. Further, the Court of Appeal issued straightforward and unremarkable findings on Respondents' likelihood of success on their police power and IWMA claims, leaving no unsettled important legal issue for this Court's review. Thus, Kern is left only with its merits arguments, which identify no points or authorities unaddressed by the Court of Appeal, and alone cannot justify this Court granting a petition for review.[2]

In addition, the posture of this case favors denial of Kern's petition. While this Court has authority to review interlocutory orders under Cal. R.

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[1] The other three grounds for review are inapplicable and Kern's petition does not contend otherwise. Cal. R. Ct. 8.500(b)(2)-(4).

[2] Respondents do not concur with Kern's "Issues Presented," which contravene this Court's requirement for a "concise, nonargumentative statement of the issues presented for review" by assuming the conclusions of Kern's merits arguments below. Petition ("Pet.") at 1; Cal. R. Ct. 8.504(b)(1). The only issue before the Court at this point is whether review of the Court of Appeal's affirmance of the preliminary injunction against enforcement of Measure E is "necessary to secure uniformity of decision or to settle an important question of law." Cal. R. Ct. 8.500(b)(1).

Ct. 8.500(a)(1), the case would come before this Court on Kern's appeal of a preliminary injunction decision that was based on two alternative grounds. The finality of the proceedings and judgment below that is the hallmark of most appellate review is absent here, and the case would have to return to the Superior Court regardless of the Court's decision.

Moreover, review of the preliminary injunction is unwarranted because the injunction simply maintains the decades-long status quo of land application of biosolids in Kern County; Kern does not contest on appeal the finding that the practice is safe and beneficial. As this Court has held, "[t]he ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." *IT Corp. v. Cnty. of Imperial,* 35 Cal. 3d 63, 73 (1983). Kern on appeal alleges no such interim harm. Kern's failure to demonstrate harm to its own interests from continued land application renders it even more unlikely that, even if its petition were granted, Kern could satisfy its burden to prove the abuse of discretion necessary to overturn the preliminary injunction. Slip Op. at 3, 16-17; *IT Corp*, 35 Cal. 3d at 69 ("A trial court will be found to have abused its discretion only when it has exceeded the bounds of reason or contravened the uncontradicted evidence.") (internal citations and quotations omitted). In sum, nothing forecloses Kern from petitioning this Court for review on any underlying rulings on appeal of a final judgment, and the Court should not favor this petition for a review of a preliminary injunction over the many petitions for review of final judgments.

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I. REVIEW IS NOT NECESSARY TO SECURE UNIFORMITY OF DECISION OR TO SETTLE AN IMPORTANT QUESTION OF LAW REGARDING THE TIMELINESS OF RESPONDENTS' CLAIMS.

A. Case Law Interpreting 28 U.S.C. § 1367(d) Has Trended Toward Its Plain Text and the Suspension Approach.

Kern's petition asks this Court to resolve a conflict among California's appellate districts and a "national split" interpreting 28 U.S.C. § 1367(d). Kern mischaracterizes the state of the law. The one federal case on point, the two decisions by the highest courts of other states, and the most recent prior Court of Appeal decision all embrace the interpretation of § 1367(d) adopted by the courts below. Any conflict posed by one fifteen-year-old Court of Appeal decision that adopted a contrary view of a federal statute and has become an outlier does not justify review by this Court.

Section 1367(d) provides that "[t]he period of limitations for any claim asserted under [federal supplemental jurisdiction] ... shall be tolled while the [federal] claim is pending and for a period of 30 days after it is dismissed." Respondents timely refiled their action in state court with, at most, 102 days of the three-year statute of limitations period having run.

Decisions interpreting Section 1367(d) have moved towards uniform application of the statute's plain text to suspend the running of the statute of limitations while the state claims are in federal court, the approach adopted by the Court of Appeal here. Under this "suspension approach," the state statute of limitations stops running while the claim is pending in federal court and for 30 days after it is dismissed, and begins running again after that period expires. Slip. Op. at 18-19. Kern advocates a different "extension approach" based on policy grounds divorced from the statutory language. Under Kern's outdated view, Section 1367(d) has meaning only in cases when the state statute of limitations "expires" during the pendency of the federal claim (despite that it is "tolled" during this period), and in

that instance the state limitations period is replaced by a new 30-day limitations period after the federal case is dismissed. *Id.*; Pet. at 11.

The trend, in California and in federal courts and state supreme courts around the country, is to adhere to the statute's plain language and the suspension approach. This displaces the earlier cases adopting the policy-driven extension approach to Section 1367(d) advocated by Kern. Kern's petition relies on three state cases (and one unpublished case from the Mariana Islands) no more recent than 2003, and none from a state's highest court. Pet. at 3, *Kolani v. Gluska*, 64 Cal. App. 4th 402, 410-411 (1998); *Huang v. Ziko*, 511 S.E. 2d 305, 308 (N.C. Ct. App. 1999) (relying on "the policy in favor of prompt prosecution of legal claims" in adopting extension approach); *Berke v. Buckley Broadcasting Corp.*, 821 A.2d 118, 123 (N.J. Super. Ct. App. Div. 2003) (despite the statutory language, "we do not believe that the federal statute intends a result that would permit a gross protraction of the limitations period"); *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. Nov. 19, 2001).

By contrast, more recent cases have found that Section 1367(d) is amenable to only the single interpretation reflected in its plain text. The Court of Appeal specifically considered and refuted *Kolani* in a decision just three years later and in the decision below, and *Kolani* has not been favorably cited since on Section 1367(d) grounds. Slip Op. at 17-21 (adopting the "natural interpretation" of § 1367(d)); *Bonifield v. Cnty. of Nevada*, 94 Cal. App. 4th 298, 303-04 (2001) ("Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.") (internal citation omitted). Also instructive, the only federal court to squarely interpret this federal law has upheld its plain language, as the Court of Appeal did here. *In re Vertrue Mktg. and Sales Practices Litig.*, 712 F. Supp. 2d 703, 724 (N.D.

Ohio 2010) ("the only reading . . . that gives meaning to all of the words chosen by Congress" is the plain text approach). The highest courts of two states have reached the same result. *Goodman v. Best Buy*, 777 N.W.2d 755, 760 (Minn. 2010) (extension approach "creat[es] ambiguity where none exists by reading missing words or conditions into the statute"); *Turner v. Kight*, 957 A.2d 984, 992 (Md. 2008) (following *Bonifield* after textual analysis).[3]

The case law in California has naturally moved toward the plain text approach that suspends the running of the statute. The legacy of one conflicting opinion regarding the meaning of a federal statute does not merit review by this Court, particularly in the context of an appeal of a preliminary injunction. Rather, the Court should let this trend continue to develop and percolate through the courts. *See* Eisenberg, Horvits & Wiener, *supra*, § 13:73.1, at 13-19 ("Sometimes the supreme court will wait for an issue to be debated thoroughly—or 'percolate'—in the courts of appeal before review is granted"); *Brown v. Texas*, 522 U.S. 940, 943 (1997) (Stevens, J., on denial of certiorari) ("[T]he likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

B. Interpretation of 28 U.S.C. § 1367(d) Does Not Present an Important Unsettled Question of Law.

Petitioners assert that the Court of Appeal was "incorrect" in concluding that the suspension approach is the "best reading" of the statutory language. Pet. at 13. But Kern's disagreement with the Court of Appeal and desire for another level of appeal cannot force this Court's review. *See Davis*, 147 Cal. at 350 ("The state has done its full duty in providing appellate relief for its citizens when it has provided one court to

[3] Kern miscites *Goodman* and *Turner* as lower appellate cases. Pet. at iii, 3.

which an appeal may be taken as of right. There is no abstract or inherent right in every citizen to take every case to the highest court.") In any event, the strength and simplicity of the Court of Appeal's opinion underscores that further appellate review of this issue is unnecessary.

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

As the Court of Appeal held, "the natural interpretation" of Section 1367(d) is that "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." Slip Op. at 18. Kern's interpretation is "not equally plausible"; "[i]f 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." Slip Op. at 20. This federal statute has been interpreted the same way in federal court. *In re Vertrue*, 712 F. Supp. 2d at 724.

Finally, the Court of Appeal considered and rejected the same policy considerations Kern proffers in its petition. Slip Op. at 21. The Court of Appeal discerned no ubiquitous rule favoring a shorter limitations period because giving defendants repose is balanced by the goal that "meritorious claims can have their day in court." *Id.* As the U.S. Supreme Court has held in another context, suspending the limitations period "is in no way

inconsistent with the functional operation of a statute of limitations." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (finding "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action"); *see also In re Vertrue*, 712 F. Supp. 2d at 724 (noting "the suspension approach is consistent with *American Pipe*"). The same is true here; the time period to prosecute claims derives from the operation of the state statute of limitations, and Section 1367(d)'s suspension of that period while a claim is pending in federal court works no prejudice to the defendant because the federal filing gives the defendant notice that it also faces state law claims.

Kern's repeated hypotheticals of "excessive delays" caused by the Court of Appeal's adherence to the suspension approach also ring hollow because they bear no relationship to the actual facts of this case, where Respondents' conduct was not dilatory. *See* Pet. at 15. Respondents filed their original federal court action almost immediately after passage of Measure E. After the dismissal of the federal suit in November 2010, there was uncertainty regarding the status of Measure E. One week after receiving an enforcement notice from Kern in January 2011, Respondents filed a new lawsuit in state court. Kern's facile assertion that filing a new complaint in state court is "ministerial" (Pet. at 14) ignores the realities of litigation involving large public agencies and multiple parties, particularly in the uncommon circumstances here where Respondents had prevailed on the merits of multiple claims, were dismissed from federal court on unusual standing grounds, retained a successful federal claim to be decided anew in state court, and hoped for resolution of the matter. Kern also identifies no prejudice it has suffered as a result of the Court of Appeal's ruling, other than it must defend Measure E on the merits.

C. Kern's Petition Should Be Denied Because It Is Not Dispositive of the Timeliness of Respondents' Claims.

Even if Kern's petition presented a significant conflict or unsettled important question of law regarding the federal tolling statute, which it does not, this case does not serve as an appropriate vehicle for this Court's review because the interpretation of 28 U.S.C. § 1367(d) is not a dispositive issue in this case.

Kern's petition omits other timeliness grounds raised by Respondents and briefed by the parties. *See, e.g.*, 2 Appellants' Appendix ("AA") 392-95. Because the trial court overruled Kern's demurrer based on Section 1367(d), and the Court of Appeal similarly rejected Kern's Section 1367(d) argument when raised on appeal of the preliminary injunction, there has been no occasion to decide Respondents' argument that their claims are timely under Cal. Code Civ. Proc. § 355. In addition, neither court opined on Respondents' argument that their claims accrued on January 19, 2011. On that date, Kern first stated its intent to enforce Measure E against Respondents by sending a letter stating that Respondents "are now subject to the provisions of Measure E," and that Respondents had "six (6) months from the date of this letter to discontinue the land application of biosolids." Slip Op. at 12; 2 AA 413. This January 19 letter was an enforcement action that caused Respondents' claims to accrue anew. Kern's petition for interlocutory review should be denied because a ruling in Kern's favor would not end the litigation.

II. THE COURT OF APPEAL'S CONCLUSION THAT RESPONDENTS ARE LIKELY TO SUCCEED ON THEIR REGIONAL WELFARE CLAIM DOES NOT RAISE A CONFLICT OR AN IMPORTANT UNSETTLED QUESTION OF LAW.

The Court of Appeal agreed with the trial court that, based on the extensive evidence of the one-sided damage Measure E would inflict on the

Southland's wastewater infrastructure, Respondents were likely to succeed on their claim that Measure E exceeds Kern's constitutional police power. This fact-based ruling is not unusual and does not create a conflict, and therefore no further review is justified.

The California Constitution requires localities to reasonably accommodate the regional welfare in exercising their police powers, or risk violating article XI, section 7 of the Constitution. *See* Slip Op. at 30-31, n.14. This Court held that the California Constitution limits the police power of local governments by prohibiting local enactments that unreasonably burden regional interests beyond the political boundaries of the locality. *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 604 (1976). "[I]f a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region." *Id.* at 601. When presented with such a question, a court must identify and weigh the competing interests affected by the ordinance and inquire "whether the ordinance, in light of its probable impact, represents a reasonable accommodation" of those competing interests. *Id.* at 609. This is a mixed question of law and fact. *Id.* at 602 (issue is whether "it is fairly debatable that the restriction *in fact* bears a reasonable relation to the general welfare") (emphasis added); *id.* at 609 ("There must be a reasonable basis in fact, not in fancy, to support the legislative determination.").[4]

Here, both the trial court and the Court of Appeal found that Respondents are likely to succeed on the merits of their regional welfare

[4] The regional welfare doctrine is well-established in California law and has been applied in multiple reported decisions. *See, e.g., Smith v. Cnty. of L.A.*, 211 Cal. App. 3d 188, 201 (1989); *Lee v. City of Monterey Park*, 173 Cal. App. 3d 798, 804-805 (1985); *Arnel Dev. Co. v. Costa Mesa* 126 Cal. App. 3d 330, 337-340 (1981).

claim because "the evidence presented so far shows – undisputably 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. at 33 (emphasis in original). Kern's petition does not contend that this holding rooted in a factual determination was inaccurate.[5] For this reason alone, Kern's petition cannot be granted.

Moreover, Kern does not cite any case in conflict with the Court of Appeal's ruling. Nor does Kern demonstrate how this mixed legal and factual ruling regarding Measure E presents an unsettled legal issue of broader import for this Court's review.

Instead, Kern's petition argues the merits of the police power claim. Specifically, Kern alleges that Measure E is somehow legislatively immune from the constitutional regional welfare doctrine, claiming the Court of Appeal's decision "upsets the carefully crafted balance between state and local responsibility that the Legislature adopted when it adopted the [IWMA]." Pet. at 26. Kern ignores the regional welfare doctrine's roots in the California Constitution, and offers no authority permitting a county ordinance to abrogate a constitutional principle and expand local police power. Because the principle in this case derives from the Constitution, Kern's argument that "this case is . . . analogous to the decision refusing to impose *common law* duties at odds with a comprehensive scheme adopted by the Legislature" is misplaced. Pet. at 26 (emphasis added). Moreover,

[5] For instance, Kern does not dispute that the effects of Measure E will be felt across the region, or that Measure E will drive up the costs of Respondents' biosolids management programs by millions of dollars each year – an increase which will affect business and resident ratepayers across southern California. *See* Respondents' Appendix ("RA") 101-02 (¶¶16-20), 106 (¶37), 066-67 (¶¶34-39), 109 (¶2). Nor does Kern dispute Measure E's adverse environmental impacts to the region because of increased pollution to transport biosolids to Arizona and the decline in soil quality in Kern without biosolids. RA 058 (¶11), 067 (¶36), 071 (¶48).

Kern employs the incorrect premise that there is a "carefully crafted balance" between Measure E and the IWMA implicated in this case. Kern offers no evidence that the legislature intended to displace the regional welfare doctrine with respect to solid waste management, let alone that it successfully could do so. Indeed, Kern's police power argument relies entirely on the merits of Kern's view of the IWMA, which was rejected by the courts below.

Finally, as it did before the Court of Appeal, Kern exaggerates the extent of the police power ruling. The gist of Kern's argument is that the courts below somehow imposed a duty upon Kern to accept Plaintiffs' biosolids, and that this alleged duty is inconsistent with the IWMA. Pet. at 25. Neither the trial court nor the Court of Appeal issued such a ruling. As the Court of Appeal affirmed, "[t]he 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." Slip Op. at 27 n.13. The only duty imposed by the regional welfare doctrine is consideration of and reasonable accommodation of competing interests. *See Livermore*, 18 Cal. 3d 582 at 609. Kern did neither when enacting Measure E. No further clarification by this Court is needed.

III. THE COURT OF APPEAL'S CONCLUSION THAT RESPONDENTS ARE LIKELY TO SUCCEED ON THEIR PREEMPTION CLAIM DOES NOT RAISE A CONFLICT OR AN IMPORTANT UNSETTLED QUESTION OF LAW.

The Court of Appeal affirmed the preliminary injunction on the alternative ground that "the superior court was correct when it determined that plaintiffs likely will succeed on the merits of their CIWMA preemption claim." Slip Op. at 30. Kern's petition does not identify any conflicting IWMA preemption case; indeed, each court to consider the issue with respect to Measure E has reached the same result and found preemption.

Moreover, the Court of Appeal's opinion applying established California preemption law principles to the IWMA implicates no unsettled important issue of law. Kern's petition again relies solely on merits arguments about the IMWA and preemption generally.

Kern relies on Respondents' publication requests to the Court of Appeal in an attempt to bolster the importance of the IWMA preemption issue. Pet. at 6, 17. But publication is not a ground for this Court's review. Kern conflates the separate standard for publication under Cal. R. Ct. 8.1105(c) and the narrower standard for review by this Court under Cal. R. Ct. 8.500(b). The latter provides that this Court may order review of a Court of Appeal decision "when necessary to secure uniformity of decision or to settle an important question of law." The former sets forth nine possible grounds for publication, some of which were cited in Respondents' requests and do not match criteria for this Court's review. Kern argues that Respondents' letters demonstrate that the IWMA preemption issue raises "a recurring question of great importance," Pet. at 17, but "recurring" is absent from the Rule 8.500(b) standard for review. Regardless, that the Court of Appeal's decision is important to Respondents and others and merits publication does not make it a case of importance to the development of California law on an unsettled issue so as to justify review by this Court.

Equally unavailing is Kern's argument for review based on anti-biosolids ordinances in other jurisdictions that could be affected by the Court of Appeal's decision. Pet. at 6-7, 17. At the outset, Kern's petition contradicts itself, elsewhere claiming "it is pure speculation whether additional jurisdictions would enact similar ordinances if Measure E is upheld." Pet. at 21. Moreover, Kern's recognition of other localities' similar police powers only reinforces the Court of Appeal's reasoning and illustrates the "fiefdom" concern inimical to the IWMA. Slip Op. at 13 ("California does not consist of 58 separate fiefdoms, or of three or four

separate regions, all insular from each other.") (citing trial court opinion "meriting reproduction at length"); *id.* at 25 n.12 ("In arguing that we should not worry about future ordinances of other jurisdictions, Kern County is asking us to give it a special dispensation to exercise a power the law could not confer on all other local governments consistently with the CIWMA.").

Although alleged error alone does not justify review, Kern contends that the "need for review is underscored by the fact that the Court of Appeal erred in finding preemption." Pet. at 17. Kern has shown no error here. Kern repeats the same arguments against preemption that have been fully considered and rejected by three separate courts – the federal district court (three times – on motion to dismiss, preliminary injunction, and summary judgment), the Tulare County Superior Court (twice – on demurrer and preliminary injunction), and the Court of Appeal.[6]

For example, Kern again argues that Section 40051's phrase "implementing this division" sharply limits "Section 40051's mandate to 'promote' and 'maximize' recycling" and that Kern County was not "implementing the IWMA" when it passed Measure E. Pet. at 17-18. The Court of Appeal pointed out that Kern's interpretation of that phrase "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. at 25. Kern's petition offers no new evidence on what this purportedly "qualifying" phrase actually means, or how it operates to save

[6] *City of Los Angeles v. Cnty. of Kern,* No. 06-5094, 2006 U.S. Dist. LEXIS 81417 (C.D. Cal. 2006) (denying motion to dismiss); *City of Los Angeles v. Cnty. Of Kern*, 462 F. Supp. 2d 1105, 1115-1122 (C.D. Cal. 2006) (granting preliminary injunction); *City of Los Angeles v. Cnty. of Kern*, 509 F. Supp. 2d 865, 888-902 (C.D. Cal. 2007) (granting partial summary judgment to Plaintiffs), *rev'd on standing grounds*, 581 F.3d 841 (9th Cir. 2009); 3 AA 674-86 (overruling demurrer); 3 AA 687-95 (granting preliminary injunction); Slip Op. at 24-30 (affirming order granting preliminary injunction).

Measure E. *See* Pet. at 4. The IWMA relies on local implementation of its statewide recycling mandate; any local law affecting solid waste or recycling is implementing the IWMA, which is why the IWMA forbids conflicting police power measures. Pub. Res. Code § 40053. Kern's invented IWMA exception for any purported police power measure would expand Kern's powers and swallow the IWMA statewide recycling mandate.[7]

Similarly, Kern repeats its argument that IWMA Section 40059 somehow saves Measure E from preemption. Pet. at 19. Prior court rulings considering this provision have held that it is a savings clause that protects local regulation of trash hauling and garbage collection franchises.[8] The Court of Appeal did not opine on that point, but held that "[e]ven 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 the statute to authorize local bans on major, widespread, comprehensively regulated methods of recycling." Slip Op. at 30. The court's determination of what local authority is preserved under the IWMA considered the "entire statutory scheme" of the IWMA and reached the only plausible conclusion – Kern's ban on California's primary method of recycling thousands of tons of sewage sludge daily poses a huge conflict

[7] Indeed, Kern is attempting to legislatively obtain such authority that it cannot hold under the existing IWMA. Kern's representative in the California Assembly introduced a bill on March 19, 2013, that has one purpose: to grant Kern County, and only Kern County, authority to ban biosolids land application within its borders. *See* AB 371, available at http://www.leginfo.ca.gov (last visited May 10, 2013).

[8] *City of Los Angeles*, 509 F. Supp. 2d at 894-895; *Rodeo Sanitary Dist. v. Bd. of Supervisors*, 71 Cal. App. 4th 1443, 1451 (1999); *see also Valley Vista Servs., Inc. v. City of Monterey Park*, 118 Cal. App. 4th 881, 890 (2004) (surveying legislative history showing that Section 40059 concerns franchises for garbage collection); *Waste Res. Techs. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 302 (1994) (Section 40059 preserved city's power "to grant an exclusive refuse collection permit"); *City of Alhambra v. P.J.B. Disposal Co.*, 61 Cal. App. 4th 136, 138-41 (1998) (Section 40059(a) allowed city to issue exclusive franchise for trash hauling).

with the statute, and localities do not have any such authority to countermand state law. *Id.*

Kern also contends that the Court of Appeal "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." Pet. at 22. This is incorrect. In its opinion, the court laid out the longstanding state law preemption principles, and then applied them. Slip Op. at 22-23 (citing the California Constitution and three leading preemption cases decided by this Court).

The Court of Appeal began with the conflict preemption standard. *See id.* at 22 (setting forth constitutional requirement that local ordinances be "not in conflict with general laws" (citing Cal. Const., art. XI, § 7)); *id.* at 23 ("an ordinance is 'contradictory' to general law when it is inimical thereto" (citing *Sherwin-Williams Co. v. City of Los Angeles* 4 Cal. 4th 893, 898 (1993)). *See also* Pub. Res. Code § 40053 (police power ordinances may not conflict with IWMA). Although the Court of Appeal discussed *Great Western Shows, Inc. v. Cnty. of Los Angeles*, 27 Cal. 4th 853 (2002) (citing *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs*, 27 F.3d 1499 (10th Cir. 1994)), noting it was "appropriate" in light of the similarly broad statute at issue in that case, it did not, as Kern claims, "solely" rely on that case in finding a likelihood of preemption. Slip Op. at 23-24. Rather, the Court emphasized its conclusion that Respondents are likely to succeed on their IWMA preemption claim because Measure E conflicts with the IWMA under established preemption principles. *See id.* at 24 (holding Measure E's ban "inimical to the CIWMA.").

Moreover, the Court of Appeal's analysis of *Blue Circle Cement* was hardly a "novel" application of law. This Court has at least twice cited and discussed the preemption principles of *Blue Circle Cement* without criticism, including in last week's decision in *City of Riverside v. Inland*

Empire Patient's Health & Wellness Center, Inc., et al. See Great Western Shows, 27 Cal. 4th at 868; *Riverside*, No. S198638, Slip Op. at 34-35 (Cal. May 6, 2013) (analyzing preemption standard of *Blue Circle Cement*, and finding it inapplicable to the specific statutes at issue in *Riverside*); *cf. Int'l Bd. of Elec. Workers v. City of Gridley*, 34 Cal. 3d 191, 202 (1983) (finding local regulation which "would frustrate the declared policies and purposes" of statute "impermissible"). These cases demonstrate that *Blue Circle Cement* is consistent with California's preemption jurisprudence, and the Court of Appeal did not err in discussing it.[9] *See also City of Los Angeles*, 2006 U.S. Dist. LEXIS 81417 at *38 n.4 (federal court concluding "that the California Supreme Court would endorse *Blue Circle Cement* if squarely presented with the question.").

Finally, Kern asks the Court to "grant review and hold the case" until a decision has been issued in *Riverside*. Pet. at 24. This Court decided *Riverside* on May 6, 2013, and the opinion in that case provides no basis to grant review or to remand to the Court of Appeal for further consideration. *Riverside* does not change any preemption standards, and its application of those standards is consistent with the Court of Appeals' ruling in this case. In short, *Riverside* does not make review or remand here necessary, and thus the Court should reject Kern's request.

Riverside concerned a zoning ordinance enacted by the City of Riverside banning medical marijuana dispensaries ("MMDs") in the city, and this Court held that the ban is not preempted by state law (specifically, the Compassionate Use Act of 1996 ("CUA") and the Medical Marijuana

[9] Further, Kern's objection in its petition to *Blue Circle Cement* contradicts its earlier acknowledgment that this case is consistent with California law. *See City of Los Angeles*, 509 F. Supp. 2d at 897 (citing Kern's summary judgment briefs which recognized "a local regulation may be invalid if it 'goes too far' and completely bans an activity a statute seeks to promote" and cited *Great Western Shows*, 27 Cal. 4th at 867-868 and *Blue Circle Cement*, 27 F.3d at 1506-07).

Program ("MMP")). *See generally Riverside*, No. S198638 (Cal. May 6, 2013). In reaching this holding, *Riverside* applied the same uniform and well-established California tests for preemption used by the Court of Appeal in this case. *Compare* Slip Op. at 22-23, *with Riverside* at 9-10. *Riverside* announces no new law warranting review of this case, and the concurrence further makes clear that the opinion effectuates no change in preemption law. Moreover, much of the Court's analysis in *Riverside* tiered from prior Court decisions narrowly delineating the scope of preemption under the CUA and MMP. There is no such case law constraining the IWMA.

Kern alternatively urges the Court to remand the case for reconsideration in light of *Riverside*, arguing that affirmance of *Riverside* will raise inconsistency with the Court of Appeal decision in this case. Pet. at 24. With the *Riverside* ruling now in hand, plainly there is no inconsistency in the preemption rulings of these two cases. In its *Riverside* preemption analysis, the Court first looked closely at the CUA and MMP to determine the statutes' purposes as embodied in their texts, and concluded the CUA and MMP to be narrow in scope, providing only limited immunity from state criminal and nuisance laws for use, cultivation, and possession of medical marijuana. *Riverside*, S19863 at 3, 4, 11-25. The Court found the City of Riverside's zoning ban did not conflict with the narrow goals of the CUA and MMP, and therefore it was not preempted. *Id.* at 3.

The Court of Appeals in this case followed the same steps in finding that Measure E was likely to be preempted by the IWMA. It first carefully considered the language of the IWMA to determine its purpose(s), and concluded that it broadly mandates localities to "'promote' and 'maximize' recycling" and prioritize recycling over waste disposal. Slip. Op. at 21-23; *see also* Pub. Res. Code, §§ 40051, 40052. The Court of Appeal then correctly held that Measure E's ban on biosolids recycling conflicts with

this broad mandate of the IWMA. Slip Op. at 24 ("A total ban . . . is inimical to the CIWMA.").[10]

Contrary to Kern's argument, this Court's finding that the City of Riverside ban is not preempted by the specific immunity provisions of the *CUA and MMP* has little bearing on whether Measure E is preempted by the *IWMA* – a very different statute that carries affirmative mandates for local governments to promote recycling of wastes and bars conflicting police power measures. Nor, as Kern suggests, does affirmance of *Riverside* stand broadly for the principle that local bans should be interpreted as a permissible form of regulation in all instances, and require the Court of Appeal to revisit its preemption ruling in this case. In fact, this Court expressly declined to address that issue in *Riverside*, and thus Kern's request for remand on this basis is also unfounded. *Riverside*, at 25 n.8 (stating that the Court is not persuaded that voters and legislature intended CUA and MMP to provide affirmative authority for total bans, "[b]ut we need not resolve the point."). Accordingly, Kern's request for review or reconsideration based on *Riverside* should be denied.

IV. CONCLUSION

Kern has not shown that this Court's review of the preliminary injunction is necessary or appropriate at this stage. Kern's petition should be denied and this case should now return to the Superior Court for resolution.

[10] The ban at issue in *Riverside* also differs because, unlike Measure E, there were no arguments that it affects the regional welfare, and there was no claim that it was motivated by discriminatory intent. The medical marijuana patients affected by the Riverside ban are likely to be Riverside residents.

Dated: May 13, 2013

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CERTIFICATION

Pursuant to California Rules of Court 8.504(d)(1), and in reliance upon the word count feature of the software used and not counting words excluded under Rule 8.504(d)(3), I certify that this ANSWER TO PETITION FOR REVIEW contains 5,853 words.

Dated: May 13, 2013

Zachary M. Norris

PROOF OF SERVICE

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

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Dated: May 13, 2013

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PROOF OF SERVICE