No. S210150
(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.

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Respondents and their *amici* told the Court of Appeal that this was a case of statewide importance. Pet. 6. They now seek to disavow that claim on the ground that the standards for publication and granting review are different. Answer 14. However, Appellants do not contend that review should be granted merely because the Court of Appeal correctly recognized that its decision should be published. Instead, review should be granted because Respondents and their *amici* were right the first time: whether local agencies can ban land application *is* an issue of statewide importance.

Respondents attempt to obscure this fact by raising a series of procedural arguments. *First*, they argue that the Petition should be denied because this is an appeal from the grant of a preliminary injunction, and the case would have to return to the Superior Court regardless of the Court's decision. Answer 4. But the Court has often decided preliminary injunction appeals, even though the Court's decision expressly contemplated further proceedings in the trial court. *See, e.g.*, *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 55 Cal. 4th 1083, 1104 (2012) (reversing decision granting preliminary injunction and remanding for further proceedings), *petition for cert. filed*, 81 U.S.L.W. 3560 (U.S. Mar. 25, 2013) (No. 12-1162); *People v. Cole*, 38 Cal. 4th 964, 992 (2006) (affirming decision granting preliminary injunction and remanding for further proceedings); *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 890 (2003) (reversing decision denying preliminary injunction and remanding for further proceedings).

Second, Respondents cite the fact that the County does not challenge the trial court's finding that the balance of hardships tips in their favor. Answer 4. However, the balance of hardships is irrelevant. The trial court abused its discretion if it incorrectly determined that Respondents are likely to prevail on the merits. *See Hunt v. Superior Court*, 21 Cal. 4th 984, 999-1000 (1999)

(determining whether plaintiffs had a probability of success even though trial court found that balance of hardships tipped in their favor).

Third, Respondents cite the fact that the Court of Appeal's preemption and police powers holdings present alternate grounds for affirmance. *See* Answer 4. But alternative holdings are both binding on the lower courts. *Bank of Italy v. Bentley*, 217 Cal. 644, 650 (1933). Consequently, the fact that the Court of Appeal found that Respondents were likely to succeed on both their preemption and police power claims makes this case more worthy of review, not less.

Fourth, and finally, Respondents cite the fact that they raised contentions regarding the timeliness of their complaint that neither the trial court nor the Court of Appeal addressed. Answer 10. This proves nothing. As Respondents themselves acknowledge, this Court's function is to shape California law, not to correct lower court error. *See id.* at 15 ("alleged error alone does not justify review"). Accordingly, the review-worthiness of the Court of Appeal's decision depends on what that court decided, not on what it failed to decide.

For these reasons, the importance of the Court of Appeal's decision is not minimized by the procedural posture of this case. Accordingly, we turn to Respondents' discussion of the issues the Petition presents.

ARGUMENT

I.

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

Respondents do not deny that a conflict exists over the meaning of 28 U.S.C. §1367(d), both nationwide and between the California Courts of Appeal. But they attempt to minimize the conflict, calling it "stale" and the County's view of the law

"outdated." Answer 3, 5. However, as long as neither *Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998), nor *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298 (2001), has been disapproved by this Court, trial courts throughout the state will be free to choose between their conflicting interpretations of Section 1367(d), and litigants will be deprived of clear guidance in an area where bright-line rules are desirable.

Nor can this issue be resolved definitively by the federal courts. By its terms, Section 1367(d) applies only to claims that have been dismissed for want of jurisdiction by a federal court. Accordingly, the overwhelming majority of these claims will be refiled *in state court*. The federal courts therefore cannot provide a definitive interpretation of Section 1367(d). That can only come from the state courts.[1]

Respondents' suggestion that the Section 1367(d) issue should be left to "continue to develop and percolate through the courts" (Answer 7) is therefore meritless. Percolation may be prudent where no conflict exists.[2] But here one does, and has existed for a

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[1]The only federal court to adopt one of the two conflicting interpretations of Section 1367(d) arose when some of the supplemental claims dismissed by one federal court were refiled in another federal action. *See In re Vertrue Mktg. & Sales Practice Litig.*, 712 F. Supp. 2d 703, 710 (N.D. Ohio 2010), *aff'd*, —Fed. App'x—, No. 10-3928, 2013 WL 1607295 (6th Cir. Apr. 16, 2013). This is unlikely to recur.

[2]Respondents cite one treatise's recognition that the Court sometimes lets issues "percolate" before granting review. *See* Answer 7 (quoting JON B. EISENBERG ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶13:73.1, at 13.19 (2012). However, they ignore the very next sentence, which indicates that the time for "percolation" is over once a conflict exists: "Whenever possible, a petition for review should demonstrate that an issue has indeed 'percolated'—*e.g.*, *through conflicting decisions on point*—and that the case is a good 'vehicle' for resolving the issue (because of a well-developed factual record, etc.)." *Id.* (emphasis added). (Nor did a conflict exist in the other authority cited by Respondents, *Brown v. Texas*, 522 U.S. 940, 943 (1997).)

dozen years. The Court should not let the conflict fester for another decade.

Respondents also argue that the "strength and simplicity" of the Court of Appeal's opinion makes further review unnecessary. Answer 8. However, the Court of Appeal's view that it adopted "the natural interpretation" of Section 1367(d) is erroneous. As even one of the cases adopting the Suspension Approach recognizes, "[m]ost of the courts that have been called upon to construe the meaning of 'tolled' as used in the context of statutes of limitations, including under § 1367(d), have recognized that the term can have more than one meaning." *Turner v. Kight*, 957 A.2d 984, 989 (Md. Ct. App. 2008). As a result, most courts have recognized that Section 1367(d) is ambiguous. *See id.* ("If the learned appellate judges around the country cannot agree on the meaning and application of the phrase, it cannot be said to have only one reasonable interpretation"). Indeed, the cases often use "tolled" in a manner that is incompatible with the Suspension Approach. *See* Pet. 12-13 (quoting *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. Nov. 19, 2001), and *Berke v. Buckley Broad. Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003)). As these cases implicitly recognize, "tolling" has a "natural" meaning that accords with the Extension Approach. Similarly, the Supreme Court recognized in *Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983), that a tolling statute can have several different "tolling effects." *See also id.* at 655 ("The federal civil rights statutes do not provide for a specific statute of limitations, establish rules regarding the tolling of the limitations period, or prescribe the effect of tolling"). Accordingly, the Court of Appeal's interpretation of Section 1367(d) is not as "natural" as Respondents suggest.

Respondents' "policy" argument fares no better. They say that the Suspension Approach they prefer "works no prejudice to the defendant because the federal filing gives the defendant notice that it also faces state law claims." Answer 9. However, the

purposes that statutes of limitation serve (*see* Pet. 15-16) are frustrated just as much by delay in refiling a state law claim that has been dismissed by a federal court as by delay in filing a federal lawsuit in the first instance. While defendants receive notice when a supplemental claim is first filed in federal court, the utility of that notice disappears when a plaintiff lets its state law claims remain in limbo for months or potentially years after dismissal by a federal court. In that event, the plaintiff's failure to refile its state law claims promptly in state court can cause the same kind of prejudice that the statute of limitations is intended to prevent. For that reason, the *Kolani* court was correct in holding that the Extension Approach "upholds the policy of the statute of limitations, by *limiting* the time to refile, and thus assuring that claims will be *promptly* pursued in any subsequent action." *Kolani*, 64 Cal. App. 4th at 409 (emphases in original).

The "actual facts of this case" prove the point, but not in the way Respondents suggest. Answer 9. Measure E was adopted in June 2006, and became effective on July 22, 2006. 1 AA 13. Respondents' federal case was filed on August 15, 2006 (1 AA 140) and it was dismissed on November 9, 2010. 1 AA 272-79. Assuming *arguendo* that the three-year statute applies, and that it began to run when Measure E became effective, under the Suspension Approach Plaintiffs would have had more than two years and eleven months from November 9, 2010, to refile their federal complaint in state court. In other words, under Plaintiffs' approach, they could have sat idly by until *mid-October 2013*—months from now—before refiling a complaint that had already been the subject of federal litigation for over three years. There is no reason to countenance such a delay, particularly when interpreting a statute that Congress enacted to promote 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; *see* Pet. 13.

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.

Respondents acknowledged in the Court of Appeal that the preemption and police powers issues the Petition presents are of statewide importance. Pet. 6. That importance is underscored by the fact—which Respondents do not deny—that at least fourteen other counties have enacted bans similar to Measure E. *Id.*[3]

Respondents' defense of the Court of Appeal's preemption decision is equally meritless. They claim that the court "interpreted the plain text" of the IWMA. Answer 1. But they cannot show that Measure E is preempted by the plain language of Public Resources Code Section 40051.[4] Implicitly acknowledging that that statute's mandate to "promote" and "maximize" recycling operates only when a public entity is "implementing this division" (*see* Pet. 17-18), they argue that "any local law affecting solid waste or recycling is implementing the IWMA." Answer 16.

This claim—which is unsupported by *any* authority—is wrong. This Court recently reiterated that "a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state." *City of Riverside v. Inland Empire Patient's Health & Wellness Ctr., Inc.* ("*Riverside*"), No. S198638, 2013 WL 1859214, at *9 (Cal. May 6, 2013) (citation and internal quotation marks

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[3]Respondents note that whether an issue is "recurring" is not one of the criteria set forth in Rule 8.500(b)(1). Answer 14. But an issue that is likely to recur because it affects numerous local ordinances is more review-worthy than one that involves a unique local ordinance.

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

omitted). The courts have likewise recognized that local governments regulate solid waste using the police power granted by Article XI, Section 7. *See Valley Vista Servs., Inc. v. City of Monterey Park*, 118 Cal. App. 4th 881, 888 (2004) ("local agencies through their *traditional police power* have played the dominant role in local sanitation matters") (emphasis added). Accordingly, the County's voters were not "implementing this division" when they adopted Measure E, and the Ordinance therefore is not preempted by Section 40051.

Respondents' reliance on the "plain text" of the IWMA likewise disappears when it comes to Section 40059. They do not attempt to square their argument with the language of the statute, which plainly encompasses Measure E (*see* Pet. 19-20) and which by its terms "overrides or supersedes any other provisions of the . . . Act which might indicate to the contrary." *Rodeo Sanitary Dist. v. Bd. of Supervisors*, 71 Cal. App. 4th 1443, 1451 (1999) (citation and internal quotation marks omitted). Instead, they simply reiterate that the Legislature could not have intended to let Kern County "ban . . . California's primary method of recycling thousands of tons of sewage sludge." Answer 16. But the statute that the Legislature actually passed—as opposed to the one envisioned by Respondents and the Court of Appeal—neither addressed nor resolved the tensions that this case poses between local autonomy and the Act's recycling goals. *See* Pet. 4-5, 20-21.

Because Respondents cannot show that the Legislature meant to preempt local ordinances like Measure E, this Court's recent decision in *Riverside* is dispositive, for multiple reasons. *First*, *Riverside* reaffirmed the primacy of local control over land use, a policy that the Court of Appeal in this case ignored. *See Riverside*, 2013 WL 1859214, at *2 ("inherent local police power" under Article XI, Section 7 "includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed").

Second, *Riverside* reaffirmed the presumption *against* preemption when the Legislature regulates in an area historically subject to local control, a presumption that the Court of Appeal likewise ignored. *Id.* at *4 ("when local government regulates in an area over which it traditionally has exercised control . . . California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute") (citation and internal quotation marks omitted; emphasis in original).

Third, *Riverside* recognized that preemption will not be found where local interests differ from one jurisdiction to another. *Id.* at *5 ("if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption") (citation and internal quotation marks omitted); *id.* at *15 ("The presumption against preemption is additionally supported by the existence of significant local interests that may vary from jurisdiction to jurisdiction"). That rule applies here. Just as some cities may be "well suited" to marijuana dispensaries (*id.* at *15), some counties 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). Moreover, the County's interests are diametrically opposed to the interests asserted by Respondent public entities. Accordingly, this case is one where "significant local interests" differ, and the presumption against preemption therefore applies.

The Court of Appeal's decision in this case therefore conflicts with *Riverside* in multiple respects. At a minimum, then, a remand for reconsideration in light of *Riverside* is required. But even if that were not true, the Petition provides an opportunity for this Court to clarify state conflict preemption law, and thereby resolve several issues left open by *Riverside*.

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

In *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139 (2006), a closely divided Court explained that "a local ordinance is not impliedly preempted by conflict with state law unless it mandates what state law expressly forbids, or forbids what state law expressly mandates." *Id.* at 1161 (citations, brackets and internal quotation marks omitted). However, less than a year later, in an opinion by the author of the three-Justice dissent in *Big Creek Lumber*, the Court invalidated a local ordinance on conflict preemption grounds without applying this test. *Action Apartment Ass'n v. City of Santa Monica*, 41 Cal. 4th 1232 (2007).

This Court's recent decision in *Riverside* creates further uncertainty regarding the test for conflict preemption. In that case, the Court's unanimous opinion stated, citing *Big Creek Lumber* and other cases, that

> [t]he "contradictory and inimical" form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (*Riverside*, 2013 WL 1859214, at *5 (citations omitted))

Then the Court applied the test and found that Riverside's zoning ordinance prohibiting medical marijuana dispensaries was not preempted:

> Nor do we find an "inimical" contradiction or conflict between the state and local laws, in the sense that it is impossible simultaneously to comply with both. Neither the CUA nor the MMP *requires* the cooperative or collective cultivation and distribution of medical marijuana that Riverside's ordinance deems a prohibited use of property within the city's boundaries. Conversely, Riverside's ordinance requires no conduct that is forbidden by the state statutes. Persons who refrain from operating medical marijuana facilities in Riverside are in compliance with both the local and state enactments." (*Id.* at *14 (emphasis in original))

Justice Liu (who joined the majority opinion) wrote a concurring opinion stating that whether a plaintiff can comply with both state and local law is not an infallible guide to preemption. As the concurrence stated,

> If state law authorizes or promotes, but does not require or demand, a certain activity, and if local law prohibits the activity, then an entity or individual can comply with both state and local law by not engaging in the activity. But that obviously does not resolve the preemption question. To take an example from federal law, the Federal Arbitration Act (FAA) promotes arbitration, and a state law prohibiting arbitration of employment disputes would be preempted. Such preemption obtains even though an employer can comply with both the FAA, which does not *require* employers to enter into arbitration agreements, and the state law simply by choosing not to arbitrate employment disputes. (*Id.* at *20 (Liu, J., concurring) (emphases in original))

Accordingly, Justice Liu proposed that state law incorporate the federal "obstacle preemption" standard, under which a state law is preempted *either* when a party cannot comply with both state and federal requirements *or* where state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at *20 (Liu, J., concurring) (quoting *Sprietsma v. Mercury Maine*, 537 U.S. 51, 64–65 (2002)). Justice Liu therefore argued that a "[l]ocal law that prohibits an activity that state law intends to promote is preempted, even though it is possible for a private party to comply with both state and local law by refraining from that activity." *Riverside*, 2013 WL 1859214, at *20.

However, this test is problematic in cases like *Riverside* and this one, where the statute claimed to preempt a local ordinance combines a broad statement of purpose with limited means. For example in *Riverside*, the Court stated that while the Medical Marihuana Program statute ("MMP") was enacted to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects," the "steps the MMP took in pursuit of those objectives were limited and

specific." 2013 WL 1859214, at *6 (citation and internal quotation marks omitted); *accord, id.* at *17 ("though the Legislature stated it intended the MMP to 'promote' uniform application of the [Compassionate Use Act] and to 'enhance' access to medical marijuana through collective cultivation, the MMP itself adopts but limited means of addressing these ideals").

The same is true here. The IWMA contains a lot of broad, precatory language about the importance of recycling and the need for regional solutions to solid waste issues.[5] But the means it adopted to serve these purposes are limited: Section 40051 requires public agencies to "promote" and "maximize" recycling only when they are "implementing this division"—*i.e.*, implementing the Act. A focus on statutory purpose to the exclusion of statutory text runs the risk of expanding preemption far beyond anything contemplated by the Legislature.

Indeed, this is precisely why the Court has expressed skepticism about importing "obstacle preemption" into California law. As a unanimous Court stated in *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal. 4th 929 (2007), "pre-emption analysis is not [a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict." *Id.* at 939-40 (citations and internal quotation marks omitted).[6] Indeed, obstacle preemption has been roundly criticized as an unwarranted departure from textual reliance as the primary means of statutory interpretation. *See Note, Preemption As Purposivism's Last Refuge*, 126 HARV. L. REV. 1056 (2013).

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[5] *E.g.*, §§40000(e), 40001(a), 40001(b), 40002.

[6] *Cf. Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 176 n.9 (2000) ("Identification of the laudable purpose of a statute alone is insufficient to construe the language of the statute").

Fortunately, a better preemption test covers the situation where local law prohibits activity that state law supposedly promotes and it is possible to comply with both laws by refraining from the prohibited activity. In such cases, the local law should be preempted if, and only if, it impairs an affirmative right granted by state law. *See, e.g.*, *Action Apartment Ass'n*, 41 Cal. 4th at 1243 (local law preempted that impaired state-protected privilege to file lawsuits without fear of retaliation); *Fiscal v. City & County of San Francisco*, 158 Cal. App. 4th 895, 915 (2007) (local law preempted when it impaired the right to sell certain handguns); *Los Angeles Lincoln Place Investors, Ltd. v. City of Los Angeles*, 54 Cal. App. 4th 53, 64 (1997) (local law preempted that impaired landlord's right under state law to stop renting property). This test does not help Respondents because no one contends that the IWMA gives them an affirmative right to land apply biosolids in Kern County. But it does permit preemption in cases where a court can sensibly infer that local law impairs rights or privileges granted by state law.

This case therefore gives the Court an opportunity to clarify California law regarding conflict preemption, and to set forth a coherent and manageable standard for determining when a local prohibition is preempted by state law.

III.

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

In trying to minimize the importance of the police powers issue presented by the Petition, Respondents overlook the important constitutional principle at stake. As the Court stated in *Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976), the "regional welfare" doctrine applies to local ordinances because "the interests of nonresidents . . . are not represented in the city legislative body and cannot vote on a city

initiative." *Id.* at 607. Accordingly, nonresidents are at the mercy of the local political process, and therefore need the protection afforded by the "regional welfare" doctrine to ensure that their otherwise unrepresented interests are taken into account.

However, that is not true when *the Legislature* has resolved the conflicting interests of local governments. In that case, the Legislature *itself* has balanced the competing interests and decided what constitutes a reasonable accommodation. Accordingly, there is no need for judicial intervention under the "regional welfare" doctrine.

For that reason, contrary to Respondents' argument, Article XI, Section 7 is not the only constitutional provision at issue. "[T]he separation of powers doctrine (Cal. Const., art III, § 3) obliges the judiciary to respect the separate constitutional roles of the Executive and the Legislature." *Butt v. State*, 4 Cal. 4th 668, 695 (1992). In other words, "where [the] Legislature has enacted statutes expressly intended to address issues of public policy raised in litigation, judicial restraint is called for, and courts should decline the invitation to undo what the Legislature has done." *O'Connell v. Superior Court*, 141 Cal. App. 4th 1452, 1476 (2006) (citation and internal quotation marks omitted).

That is exactly what Respondents want the courts to do here. The Legislature has enacted "a comprehensive statewide program for solid waste management" (*Waste Mgmt. of the Desert, Inc. v. Palm Springs Recycling Ctr.*, 7 Cal. 4th 478, 484 (1994)), 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. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 306 (1994). 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. Accordingly, the Court should grant review to consider whether the regional welfare doctrine should be applied in a

context where the Legislature has already considered the regional interests at stake, and struck its own balance in comprehensive legislation.

CONCLUSION

The Petition for Review should be granted.

DATED: May 23, 2013.

Respectfully,

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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 **Reply to Answer to Petition for Review** contains 4,197 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: May 23, 2013.

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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 May 23, 2013, I served the following document(s):

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Dated: May 23, 2013

Bryan J. Gresham

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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