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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF TULARE

CITY OF LOS ANGELES, *et al.*,

Plaintiffs,

v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,

Defendants.

No. VCU 242057

PLAINTIFFS' REPLY BRIEF

Date: September 15, 2016
Dep't: 2
Judge: Hon. Lloyd L. Hicks

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INTRODUCTION AND SUMMARY

Kern County's Opening Brief overlooks that an eight-day trial featuring eight experts and twelve fact witnesses did not support its fears and speculation regarding biosolids recycling. Kern does not discuss how witness after witness vouched for the safety of land application and did not articulate a tangible harm or genuine risk. The preponderance of the evidence showed that Kern's concerns over biosolids are speculative and have not materialized after twenty-two years of successful land application at Green Acres Farm. Kern's legal arguments fare no better, repackaging arguments rejected by this court, the court of appeal, and the district court going back to 2006.

For example, the County's attempt to save Measure E from preemption relies on a novel view of California preemption law and ignores the controlling preemption clause of the Integrated Waste Management Act ("IWMA") that forbids localities from imposing local restrictions that conflict with the "policies, standards and requirements" of the IWMA. Pub. Res. Code § 40053. Realizing that Measure E is the opposite of the IWMA mandates that local governments "promote . . . recycling . . . [and] maximize the use of all feasible source reduction, recycling, and composting options . . . ." *id.* at § 40051, Kern continues to incorrectly portray the IWMA's mandates as requirements solely for Plaintiffs and not the County. Kern alleges that the existence of alternative biosolids management options enables Plaintiffs to "comply" with the IWMA, when the relevant legal question is whether Measure E conflicts with Kern's fulfillment of its obligation to *promote and maximize all* feasible recycling options, including the land application of biosolids. *Id.*

Faced with the proof that Measure E burdens Plaintiffs with no legitimate benefit to Kern, the County misstates the legal standard under the regional welfare doctrine as simply whether it is "fairly debatable that [Measure E] reasonably relates to the regional welfare." Kern Br. 19:23. To the contrary, the California Supreme Court has consistently applied a three-part test under the regional welfare doctrine, assessing whether the challenged law "reasonably relate[s] to the welfare of the region affected by the ordinance" and "represents a reasonable accommodation of the competing interests." *Compare* Kern Br. 19:22-24 *with Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 589, 609 ("*Associated Home Builders*"). Kern avoids the applicable regional welfare test because Measure E offers no accommodation to Plaintiffs.

Kern's defense of Measure E's violation of the Commerce Clause defines interstate commerce and discrimination in an artificially narrow way that flouts many decades of precedent striking down local laws that burden outsiders to the advantage of insiders. No movement of biosolids from Arizona or Nevada into Kern County is necessary. Kern overlooks that the United States Supreme Court's expansive definition of interstate commerce certainly includes multi-million dollar, federally-regulated wastewater infrastructure activities like biosolids management. Kern also argues for rigid definitions of discrimination and cannot rebut that Measure E – with its presumption that biosolids are harmful – intends to advantage Kern County at the expense of outsiders (including Arizona) who receive both Kern's and others' purportedly dangerous biosolids. At the same time, Kern hardly disputes Measure E's burden on biosolids commerce within California, instead attempting to limit California's commerce protections to the tax context in spite of the California Supreme Court's express adoption of federal Commerce Clause jurisprudence.

Kern's inability to prove any harm or tangible risk from biosolids recycling forces it to fall back on speculation and avoid discussion of the conclusions of experts and regulators at trial. Kern's Brief repeatedly labels the soil and groundwater at Green Acres Farm as "contaminated," a charge Kern's experts levied not once at trial. Nor could any expert attribute to biosolids even the sporadic and miniscule detections of select trace organics. Kern's Brief is silent on the contribution of Bakersfield effluent which, as confirmed through Kern's testing in 2015, contains the same trace organics and has been applied in far greater volumes and for several more years than biosolids at Green Acres. Post-trial, the County cites new EPA general health advisories for PFOA and PFOS in drinking water to suggest some potential for risk specifically from biosolids, when Kern concedes its groundwater measurements for these chemicals remain well below those advisory, non-regulatory values and that even those minute levels cannot be attributed to biosolids recycling.

In contrast to Plaintiffs' testimony at trial, Kern's Brief says nothing about the robust system of risk-based regulation of land application at the federal, state, and local level – Kern just summarily deems it inadequate, with little or no expert testimony to support this position. Similarly, Kern overlooks testimony at trial from visitors to the farm that directly contradicts its exaggerated allegations of flies and odors.

The County's Brief does not seriously dispute Measure E's burdens on the regional welfare and the biosolids market, which Kern failed at trial to mitigate. Instead, Kern dismisses the costs of abandoning land application in Kern and urges "alternative" biosolids management options that trial showed were expensive, distant, or often unavailable. Nor does Kern explain why, if there are burdens associated with hosting biosolids application sites, those should be borne only by others. Kern does not address the likelihood that other California localities would follow the lead of a large agricultural county like Kern and also ban land application. The County doubles down on its mistaken notion that the two in-county private composting facilities are biosolids recycling, when producing a Class A EQ biosolids product (whether at the Hyperion plant or a Kern composting facility) is only the first, basic step in the process. The recycling only occurs when the product is added to the soil – the step barred by Measure E.

Kern sidesteps the evidence that Measure E always has been and remains a politically motivated effort, founded on regional hostility with only a veneer of legitimate public policy. Kern has advanced no argument that changes the fundamental bias driving Measure E, the absence of any meaningful justification for the ban, and the serious burdens the ban imposes on Plaintiffs, California sanitation agencies, and the biosolids market. Measure E's interference with state law, stark discrimination against outsiders, and concrete harm to biosolids management compel the conclusion that Measure E is preempted and unconstitutional.

ARGUMENT

I. MEASURE E IS PREEMPTED UNDER THE IWMA.

For years, Kern has failed to persuade any court that it can reconcile the core conflict between Measure E's broad prohibition on biosolids recycling in unincorporated Kern County and the IWMA's mandate and purpose that localities promote and maximize *all* feasible recycling options. Plaintiffs' post-trial brief ("Pls.' Br."), and the court of appeal's 2013 opinion, comprehensively explained why Measure E is preempted. Kern's Brief adds nothing new post-trial, and again concedes that "[t]o be sure, the Court of Appeal held in this case, on the preliminary injunction record, that Plaintiffs were likely to prevail on their preemption claim." Kern Br. 9:28-10:1. Kern is reduced to arguing that some significant change in California preemption law now

requires the Court to condone Kern's ban on land application so long as the affected biosolids volumes do not go to landfills and can be diverted from Kern to more distant places that have not yet enacted similar bans. There is no change in the law, and certainly none in the IWMA's text that controls the preemption analysis here. Both the IWMA itself and California preemption law, even as misconstrued by Kern, confirm that Measure E should be declared invalid and enjoined.

A. Kern Ignores the IWMA's Plain Text and Incorrectly Reads Legislative History.

Plaintiffs agree with Kern that "[t]he language of the statute is clear." Kern Br. 12:1-2. The difference is that Kern disregards that statutory language, including the IWMA's (i) express preemption clause at § 40053; (ii) expansive objectives at § 40052; and (iii) dual mandate to promote and maximize all feasible recycling at § 40051(a) and (b). Kern cannot purport to interpret the IWMA while ignoring its terms.

Fatal to Kern's position is its omission of the IWMA's own preemption provision, which broadly preempts local measures that conflict with the IWMA's "policies, standards, and requirements." Pub. Res. Code § 40053. As Plaintiffs have shown, this statutory provision renders inapplicable California case law on implied conflict preemption. Pls.' Br. 31-33. Indeed, Kern's favorite preemption case similarly recognizes the controlling effect of a "clear indication of preemptive intent from the Legislature." Kern Br. 8:22-23 (quoting *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 743). Here, the Legislature's preemptive intent is plain. Measure E countermands the IWMA's recycling mandate by completely and permanently closing Kern County's immense farmland acreage to the recycling of biosolids (including composted biosolids). *See* Stips. 12-20, 25, 31-33 (Tab A).[1] This conflict requires invalidation of Measure E under § 40053.

To avoid that result, Kern tries to constrict the policies, standards, and requirements of the

[1] As in their opening brief, Plaintiffs have reproduced in a separate appendix relevant excerpts of key trial exhibits cited in this reply brief. The reproduced exhibits are denoted by (Tab) following the citation in the text. Tab A is the previously filed Stipulated Facts for Trial. The complete versions of the exhibits, and all other admitted exhibits, are included in the trial binders and thumb drive earlier provided to the Court, and Plaintiffs will reproduce any of those documents upon request.

IWMA to a single "goal" of "reduction of landfill disposal." Kern Br. 12:1. Kern misreads the IWMA, which creates a comprehensive scheme requiring localities to promote and maximize all recycling options, and nowhere excuses Kern from this responsibility. Pls.' Br. 31-35. Kern quotes part of § 40051(b) to support its myopic focus on landfills but fails to apprehend the meaning of even that excerpt, which mentions reduction of "*transformation and* land disposal" – i.e., not only landfill disposal, but incineration and other disposal as well. Pub. Res. Code §§ 40051(b), 40201 (defining "transformation"). More importantly, Kern does not account for the operative language of § 40051(b) wherein the Legislature prescribed the means to achieve its broad goals: "*maximize* the use of *all* feasible" recycling methods. *Id.* § 40051(b). As the court of appeal found, "the CIWMA announces statewide goals and means to achieve them." *City of Los Angeles v. County of Kern* (2013) 154 Cal.Rptr.3d 122, 139 ("*Kern IV*"). Nor does Kern bring up its nondiscretionary duty under § 40051(a) to "promote" recycling as a "priority" after source reduction. *Id.* § 40051(a); *id.* § 40051 ("local agencies shall do both of the following ...."). Likewise, Kern's Brief omits § 40052, which lays out the IWMA's multifaceted "purpose," including to "reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost-effective manner." *Id.* § 40052.

Contrary to its concession that the IWMA is clear, the County offers scattered legislative history to attempt to constrain the IWMA to a law only concerned with reducing landfill disposal. Kern Br. 12:3-12. In construing statutes, courts "look first to the words of the statute" to determine the legislature's intent. *Klein v. U.S.* (2010) 50 Cal.4th 68, 77; *see also Henson v. C. Overaa & Co.* (2015) 238 Cal.App.4th 184, 198 ("we need not look to the legislative history as the statutory text is clear"). Then, if the "statutory text is ambiguous, or it otherwise fails to resolve the question of its intended meaning, courts look to the statute's legislative history and the historical circumstances behind its enactment." *Id.* Here, no one disputes that the statute is clear, making the legislative history immaterial.

Kern's effort fails also because the legislative history only amplifies that the IWMA is a sweeping mandate to recycle solid waste, including by land application of biosolids, rather than a standalone statement of aversion to landfills. Every piece of legislative history cited by Kern shows

the expansive reach of the IWMA and reinforces that the Legislature's intent was to mandate and promote all available methods for recycling solid waste. For example, the "Background on AB 939" prepared by Assemblyman Bryon Sher states:

> It is clear that continued reliance on the 'dump or burn' policies of the 1970's will result in a serious statewide garbage crisis by the mid-1990's. California solid waste management policy should be rewritten to place a greater emphasis on a multi-faceted approach to address the state's garbage woes....[*G]reater emphasis should be placed on recycling, source reduction, composting, and other methods* to reduce the amount of waste disposed...The state should establish an integrated waste management policy which relies on a diversity of approaches.

Defendants' Request for Judicial Notice in Support of Defendants' Post-Trial Opening Brief ("RJN") Ex. 3, p.1 (emphasis added). The other legislative history provided by Kern contains similar statements focused on maximizing recycling.[2]

B. Land Application Is Feasible and Kern's Police Powers Do Not Override the IWMA's Mandates.

Kern does not dispute that recycling under the IWMA encompasses land application of biosolids, and has stipulated that land application has long been the leading method of recycling biosolids. *See id.* §§ 40180, 40191 (defining recycling and solid waste); Stips. 30, 163, 164; Ex. 448 (EPA 2014 biosolids statistics in California). Moreover, after repeatedly refusing to stipulate pre-trial that there is no disputed issue of fact on whether land application of biosolids is feasible under the IWMA, Kern's post-trial Brief does not even argue the point. A total ban on the most common method of biosolids recycling is antithetical to the IWMA's unambiguous purpose and is preempted.

Kern also finds no refuge from preemption in its invocation of a locality's "traditional" regulatory role in public health and safety, which is no more than a recitation of the police power

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[2] *See* RJN Ex. 4, p. 2 ("it is the policy of the Legislature and the State that recycling and resource recovery should be encouraged to reduce landfill disposal and litter"); *id.* p. 3 (this bill "[r]ecasts current state solid waste management policy to establish an integrated waste management hierarchy which emphasizes source reduction, reuse, recycling, environmentally safe landfilling and incineration, in that order"); *id.* pp. 4-5 (this bill "focuses on recycling as one strategy to stave off California's impending garbage crisis"); *id.* p. 6 (comparing AB 939 to competing bill AB 1948 and explaining that AB 939 "imparts" the "source reduction, reuse and recycling ... hierarchy more comprehensively throughout solid waste management law"); RJN Ex. 5, pp. 2, 4 (containing same statements as in RJN Ex. 4 pp. 2-5 above); RJN Ex. 6, pp. 1, 2, 4 (same).

authority of local governments that is always subject to state legislation and constitutional limits. Kern Br. 8:21-9:27. As a preliminary matter, this argument rings hollow in the absence of any evidence at trial of a threat to public health or safety from biosolids. Nonetheless, both the IWMA and the California Constitution disallow conflicting local measures, regardless of their purported subject matter. Pub. Res. Code § 40053; Cal. Const., art. XI, § 7; *Kern IV*, 154 Cal.Rptr.3d at 138-39 ("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's efforts to carve out police power authority to ban land application all lack merit:

- First, Kern claims exclusive power to "zone land use," but Measure E's text nowhere invokes zoning or land use, and zoning authority is simply another police power authority that cannot be used to ban land application on farmland in contravention of state law. *See, e.g.*, *O'Brien v. Appomattox County* (W.D. Va. 2002) 293 F.Supp.2d 660, 662-64 (finding state law preemption of biosolids bans over invocation of zoning authority); *Synagro-WWT, Inc. v. Rush Twp.* (M.D. Pa. 2003) 299 F.Supp.2d 410, 419-20 (same); *Blanton v. Amelia County* (Va. 2001) 540 S.E.2d 869, 875 (same).

- Second, Kern invokes "public health and safety," asserting a duty to regulate under Health & Safety Code § 101025. That provision speaks to measures "not in conflict with general laws" and does not override the IWMA's specific preemption text.

- Third, Kern claims "the handling of solid waste has also been a subject of local control," but this merely rehashes Kern's argument rejected since 2006 that § 40059 of the IWMA saves Measure E from preemption. Land application is not "handling" under the IWMA. Pub. Res. Code § 40195 ("handling" includes "collection, transportation, storage, transfer, or processing of solid wastes"). The "[a]spects of solid waste handling which are of local concern" include items such as "frequency of collection," "charges and fees," and the "nature location, and extent of providing solid waste handling services." *Id.* § 40059. That inapplicable trash hauler provision also formed the basis for the two cases constituting the support for Kern's statement that "numerous cases have rejected preemption claims under the IWMA." Kern Br. 9:24; *see also Kern IV*, 154 Cal.Rptr.3d at 142 (rejecting Kern's now-abandoned argument that § 40059 saves Measure E from preemption).

Kern's police power does not override the IWMA. Nor does the IWMA divest Kern of authority to appropriately supplement state and federal regulation of land application, as opposed to expressly or practically banning the practice altogether through Measure E.

C. Measure E is Preempted Even under Kern's Erroneous "Impossibility Test."

Brushing aside the IWMA's preemption clause, Kern argues that Measure E is not preempted

under what Kern calls "the prevailing standard for conflict preemption of local authority by state law," which Kern contends requires Plaintiffs to show "that it is impossible to comply with both the IWMA and Measure E." Kern Br. 14:24-25. Kern alone declares a sea change throughout California preemption law from one California Supreme Court case (*Riverside*) and one court of appeal case (*Kirby*) analyzing the same two narrow state medical marijuana laws bearing no resemblance to the comprehensive IWMA. In contrast to Plaintiffs, Kern is silent on the specifics of the statutes and the inquiries in those two cases, which do not alter the preemption law that has been applied in this litigation since 2006 to find Measure E preempted.[3] *See* Pls.' Br. 35-37.

The Court need not reach the issue of the appropriate conflict preemption standard because Kern further errs in applying its own "impossibility" test to this case. *See id.* Kern fails to explain how it derives from *Riverside* or *Kirby* that "conflict preemption requires a showing that the *Plaintiff* cannot comply simultaneously with state and local law." Kern Br. 10 (emphasis added). Again, Kern asks the wrong question. The issue has always been whether *Kern* can simultaneously discharge its IWMA duties to promote and maximize all feasible recycling methods while banning all land application of biosolids via Measure E. Kern cannot do so, and the court of appeal agreed. Pls.' Br. 36 (quoting *Kern IV*, 154 Cal.Rptr.3d at 138). Kern has never been able to square Measure E with the IWMA's mandates; Kern's post-trial Brief is no different.

Plaintiffs' opening brief established that obstacle preemption also renders Measure E invalid. Pls.' Br. 33-35. Kern denies the existence of obstacle preemption in California, yet fails to acknowledge the many California cases recognizing this well-established preemption principle, including *Riverside* and *Kirby*. *See id.* Obstacle preemption cases like *Fiscal v. City and County of S.F.* (2008) 158 Cal.App.4th 895, 911, are consistent with *Riverside* and *Kirby*. Those latter two cases simply found that obstacle preemption did not apply to two California medical marijuana laws

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[3] Kern states that the City asked for depublication of *Kirby* because it was "perhaps concerned about the impact on this case." Kern Br. 11 n.5. That is incorrect. The City's letter did not reference the Kern litigation or any impossibility test, but instead urged depublication to protect the City's criminal enforcement of an ordinance targeting illegal medical marijuana dispensaries.

and nowhere declared *Fiscal* or obstacle preemption bad law.[4] Kern's suggestion that Plaintiffs can comply with the IWMA and Measure E by not recycling biosolids in Kern County begs the question to secure the result Kern wants. *See* Kern Br. 15:15-19. As Justice Liu's *Riverside* concurrence explained, the truism that entities can ensure universal compliance simply "by not engaging in the activity" at issue "obviously does not resolve the preemption question." *See id.*; *Riverside*, 56 Cal.4th at 763-764.

Kern's preemption argument diverts attention from Measure E to "Plaintiffs' numerous recycling options other than land application in Kern County." Kern Br. 17:5-6. Even if this factual issue were relevant to the legal question of preemption, which it is not, Kern exaggerates the ease and availability of alternatives, contradicting the trial record. *See* Pls.' Br. 29-30, 37-38. Nowhere does Kern's Brief acknowledge, as stipulated by the parties, the leading role of land application in biosolids recycling. Stips. 30, 164. The County encourages land application but only at sites in Merced County and Arizona hundreds of miles away. Kern Br. 17:20-18:8.

Kern claims biosolids are "an excellent medium for reclamation projects, and mine reclamation is a viable option," citing Greg Kester. *Id.*18 n.11. Mr. Kester actually testified that no such reclamation project has yet occurred in California and any reclamation use would not be widespread or long-term. Trial Tr. vol. 4 (Kester), 89:7-19; vol. 5, 15:18-16:12.

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[4] Similarly, recent California cases involving federal preemption of a state law have recognized obstacle preemption and nowhere limited the application of this principle. For example, last month the California Supreme Court analyzed but found no obstacle preemption based on the narrow scope of the specific federal mining statutes at issue, and reinstated a criminal conviction under California's gold mining laws. *People v. Rinehart* (2016) 206 Cal.Rptr.3d 571, 2006 WL 4434810. Rinehart's analysis of Congress' regulation of federal lands under the Property Clause of the U.S. Constitution, and of controlling U.S. Supreme Court case law preserving state authority over hardrock mining claims on federal lands, does not bear upon the IWMA preemption analysis here. *See id.* at **2, 4. The Court found that the federal mining laws prescribed only the allocation of certain property rights and not the means of mining. *Id.* at **4, 9-11. In contrast, the IWMA has an express preemption provision, and does prescribe the means of achieving its intended goal, which Measure E impedes. In another case decided last month, the court of appeal applied obstacle preemption (and express preemption) in determining that certain claims attacking Medicare Advantage health plans and materials were preempted by the Medicare Act. *Roberts v. United Healthcare Services, Inc.* (2016) 2 Cal.App.5th 132, 148-149.

Kern additionally cites the City's 2015 Request for Proposals yet omits that its scope was biosolids *not land applied at Green Acres* and that the proposals received have not even been deemed to be responsive to or to satisfy all the requirements of the Request for Proposals. Ex. 1060. Kern acts as though these responses are even viable proposals in the first instance when no such conclusion has been reached, which is a prerequisite to any award. *See id.* at 30 (§5.2), 39 (§5.8) (describing process of proposal evaluation and requiring recommendation of evaluation board prior to approval); *see also* Los Angeles City Charter, § 371(a); Los Angeles Administrative Code, §10.15(f)(7). Kern also omits to mention that Kern's favorite "alternative," Liberty Composting, declined to even submit a response to this Request for Proposal to manage any of the City's biosolids. Trial Tr. Vol. 6 (Nolan), 42:17-26.

In another glaring error regarding so-called "alternatives," Kern refers to a "biosolids-to-energy" facility not even in operation. Kern Br. 18:16-18. The Legislature recognized the longtime problems with reliance on waste-to-energy facilities when crafting the IWMA. RJN Ex. 4, pp. 4-5 ("WTE projects have faced similar siting problems to those of landfills. Most major WTE projects slated for construction in the state have been stalled by regulatory and environmental problems or by public opposition."). These obstacles remain. Trial. Tr. vol. 4 (Kester), 87:18-88:2. Kern also cites the City's Terminal Island Renewable Energy facility, but omits that it is the first-of-its-kind deep well injection facility in the United States, operates on an experimental basis, and has faced lengthy stoppages. Pls.' Br. 29-30. None of these options (which also impose additional costs on the Plaintiff public agencies) in any way justifies banning a recycling option recognized under the IWMA that is the leading method for managing biosolids in California and the United States.

Perhaps most misleading is Kern's discussion of composting. Kern repeatedly claims "recycling" recognition for the biosolids processed into compost by two in-county commercial facilities, and avers that Plaintiffs "could also comply with Measure E without reducing the share of biosolids disposed of in the county by one ounce." Kern Br. 2:28-3:1, 13:10-11 ("OCSD recycles 33 percent in Kern County.... CSD2 recycles approximately half in Kern County.... The City can do the same."). *But none of those volumes are recycled in Kern County.* Pls.' Br. 8, 38, 43-44. As Kern admits, making compost does not equate to recycling. Stips. 32, 42-43. Composting simply is a

treatment process to produce a Class A-EQ product; the City's thermophilic digestion at Hyperion is another such process. The ensuing compost must still be land applied. *Id.* Measure E forecloses land application of biosolids, composted or not, within unincorporated Kern County, and Kern's stress on composting as an alternative to land application is spurious.

This last point discredits Kern's refrain that Measure E "merely removes one recycling option in a single county." Kern Br. 16:19-20. Kern understates the import of Measure E, which entirely prohibits the recycling and use of biosolids, including composted biosolids, in the unincorporated areas of Kern County. Each of the "alternatives" that Kern touts, Measure E disallows. It bans the direct land application of biosolids. Ex. 602 (Measure E) § 8.05.040(A). It bans the land application of compost that contain biosolids. *Id.* § 8.05.030(B) (defining "biosolids" to include "compost"). It bans recycling of pelletized sewage sludge. *Id.* It bans deep well injection of biosolids. *Id.* § 8.05.030(E) (defining "land apply" to include sub-surface injection). It bans the use of biosolids as daily cover. *Id.* (defining "land apply" to include any "spreading or other placement of Biosolids onto the land surface"). Given the lack of options, Kern's statement that Measure E "does not increase land disposal" is misdirection, as the statute in fact directs Kern to "reduce" the amount of waste sent to landfills. *See* Kern Br. 12:13, 18:20-21. There is still a large amount of landfilling and incineration of biosolids in California, the reduction of which Kern says is the only purpose of the IWMA, and Measure E's elimination of recycling in the state's third largest county will not reduce that disposal volume. *See, e.g.*, Ex. 448 (nearly 200,000 dry metric tons of biosolids sent to landfills or incinerated in 2014).

Moreover, under the County's view of the law, other places where Kern would redirect biosolids would have the same authority to enact similar bans. The court of appeal recognized this bigger implication of upholding Measure E: "One jurisdiction's action to ban it [land application], 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." *Kern IV*, 154 Cal.Rptr.3d at 139. Thus, Kern's belief that "[t]here is no evidence of a shortage of farmland in the State or in Southern California on which biosolids recycling can be conducted" and that Plaintiffs should look instead to farmland "[f]rom Fresno and

Tulare Counties south to Imperial County" rings hollow. *See* Kern Br. 22:3-9; Trial Tr. vol. 4 (Kester), 90:24-92:9 (discussing Imperial County's land application ban after Kern passed Measure E). Kern does not stand in isolation to the rest of the state and the biosolids market. Measure E is preempted as a matter of law, and a permanent injunction should issue on that ground alone.[5]

II. MEASURE E EXCEEDS KERN'S POLICE POWER.

Kern incorrectly replaces the regional welfare doctrine's balancing test with a "fairly debatable" test because the evidence proved that Measure E does not accommodate California municipalities' shared need to manage biosolids. Kern Br. 19:22-24. This shared need is what the constitution requires police power measures to acknowledge and accommodate through the regional welfare doctrine. To be constitutional under California law, local police power measures must "reasonably relate[] to the welfare of the region affected by the ordinance." *Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 589 ("*Associated Home Builders*"). Measure E plainly is at odds with the regional welfare – in fact, it targets outsiders – and Kern accordingly fails the applicable legal standard. The trial demonstrated that the ban provides no tangible health and safety benefits to Kern or the regional welfare and thus falls far short of justifying the concrete damages it imposes on Plaintiffs' interests.

Kern completely ignores Plaintiffs' police powers argument that Measure E violates the prohibition against arbitrary and discriminatory local measures stated in *In re Lyons* (1938) 27 Cal.App.2d 182. With no basis for unequal treatment of outsiders' and Kern County biosolids, Measure E represents a local law "not founded upon any reasonable ground of classification," and this court should find Measure E "unjustly discriminatory" and "unreasonable, and therefore void." *Id.* at 187.

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[5] Courts in other states that have considered local control of land application of biosolids have found that state law preempts local laws banning or obstructing biosolids recycling. *See, e.g., Washington Department of Ecology v. Wahkiakum Co.* (Wash. App. 2014) 337 P.3d 364; *Liverpool Twp. v. Stephens* (Pa. Cmwlth. 2006) 900 A.2d 1030; *Granville Farms v. Granville Co.* (N.C. App. 2005) 612 S.E.2d 156; *Talbot Co. v. Skipper* (Md. 1993) 620 A.2d 880.

A. Kern's "Fairly Debatable" Standard Misstates the Regional Welfare Doctrine.

Recognizing that Measure E is a solution in search of a problem, Kern presses for an inapplicable "fairly debatable" standard that would weaken *Associated Home Builders*' three-part test for constitutionality. *Associated Home Builders* requires an analysis of (1) "the probable effect and duration" of the restriction, (2) "the competing interests affected by the restriction," and (3) whether the ordinance, in light of its probable impact, represents a "reasonable accommodation of the competing interests," including the interests of impacted communities, with concrete proof of each factor. 18 Cal.3d at 608-611. *See also Arnel Dev. Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 340 (whether an ordinance effects a reasonable accommodation of the competing interests "depend[s] upon a number of factors to be determined by the trial court").

Associated Home Builders did not announce a "fairly debatable" standard for assessing whether a local ordinance violates the regional welfare doctrine. The California Supreme Court cited Kern's "fairly debatable" language only at the outset of its discussion of past police power decisions, and described it as the appropriate standard in federal due process challenges. 18 Cal.3d at 605-07. The Court went on to recognize that this standard was inappropriate for considering the constitutionality of a local ordinance with extraterritorial effects. Accordingly, *Associated Home Builders* established a "proper constitutional test" that clarified how to apply "the traditional police power test to an ordinance which significantly affects nonresidents of the municipality." *Id.*

Since *Associated Home Builders* was decided, courts consistently have applied the three part test and not a "fairly debatable" standard to local police power measures with extraterritorial effects. Pls.' Br. 39:11-21; *see also, e.g., Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 201-02 (county land use decision upheld based on county's consideration and accommodation of the decision's impacts on neighboring jurisdictions); *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 407-15 (San Diego's land use decision with regional ramifications constitutional based on city's consideration of general welfare of entire region). In not one of these regional welfare cases has a court applied Kern's "fairly debatable" standard as dispositive of constitutionality. Tellingly, Kern's only cited authority is not a regional welfare case. *Big Creek Lumber Co. v. County of San Mateo* (1995) 31 Cal.App.4th 418, 429-430 (zoning ordinance

requiring 1,000-foot buffer from timber harvest with no out-of-county effects did not exceed scope of police power).

Accordingly, this court, the district court, and the court of appeal have all correctly applied the *Associated Home Builders* standard to Measure E, and Kern suggests no change in the law. *See, e.g., City of Los Angeles v. County of Kern* (C.D.Cal. 2006) 462 F.Supp.2d 1105, 1117-19 (applying *Associated Home Builders'* standard) ("*Kern I*"); *City of Los Angeles v. County of Kern* (June 9, 2011) Case. No. 242057 at 6 (same) ("*Kern III*"). Kern's stipulation to the fact that Measure E will cost the city an additional three to four million dollars each year alone proves the existence of extraterritorial impacts; the trial also proved Measure E's strain on Plaintiffs OCSD and CSD2 and its damage to regional biosolids management, among other harms. Stip. 86; Pls.' Br. 28:17-30:13.

B. Measure E's Illusory Benefits Are Outweighed by the Proven Harms to the Regional Welfare.

Confronted with Measure E's damage to the regional welfare and Kern's concession that 22 years of land application of biosolids in the County have caused no harm, Kern struggles to mine the record for speculative risks from biosolids that Kern asserts somehow justify a total ban. The "what if" allegations Kern maintains in its Brief are irreconcilable with the voluminous evidence at trial, including from Kern's own witnesses, uniformly demonstrating the benefits and lack of harm or risk from land application. Weighing the competing interests, as *Associated Home Builders* requires, highlights Measure E's failure to accommodate any interests other than Kern's political desire to block Southern California biosolids from Kern County. On the other side of the *Associated Home Builders* balancing test stands Measure E's concrete burdens on Plaintiffs and regional biosolids management. Kern dismisses multi-million dollar burdens and adverse environmental impacts of alternatives as "miniscule" with no trial witnesses to support this characterization. Even if one accepts these costs as minimal, the regional welfare doctrine protects against large and small burdens alike. *Compare Associated Home Builders*, 18 Cal.3d at 588 (regional welfare doctrine protects against burdens to state-wide housing supply caused by freeze on city construction), *with Arnel*, 126 Cal.App.3d at 333 (same, for burdens caused by zoning decision barring construction of one apartment complex).

1. Land application of biosolids is time-tested and safe.

Kern's Brief argues that the Measure E ban is necessary to (1) protect Kern County residents from "long-term potential risks to its land and water from land application," (2) compensate for what Kern views as insufficiently protective federal, state and local regulation and monitoring of Green Acres Farm, and (3) prevent the "significant nuisances" that Kern alleges without evidence are caused by land application of biosolids. Kern Br. 22-23. The trial undercut each of these concerns and none tilts the regional welfare balance in Kern's favor. Measure E cannot mitigate the "potential risks" of land application of biosolids because the risks are unproven and rejected by the evidence, expert opinions, and 22 years of land application at Green Acres Farm. Kern's unfounded criticism of the regulation of Green Acres Farm is not a rationale for Measure E since the regulations have stood the test of critical review (NAS Reports) and time (no documented adverse effects anywhere in the nation after over more than two decades). Kern's allegations of "significant" nuisances from biosolids represent a last-ditch attempt to revive allegations contradicted by numerous witnesses and by the sparse record of complaints. Measure E thus provides no tangible benefits to counter the ban's damage to Plaintiffs and regional biosolids management, and fails the test for constitutionality under the regional welfare doctrine.

a. *Land application poses no appreciable risk to Kern groundwater or soil.*

Both sides' scientific testimony proved that land application of biosolids poses no appreciable risk to human health or the environment, including groundwater and soil. Kern has agreed that there is no evidence of physical injuries or illness to humans or livestock as a result of 22 years of land application at Green Acres Farm, and repeatedly admitted that it does not have health or safety concerns with the land application of biosolids. Stips. 160-161; Trial Tr. vol. 1 (Constantine), 43:2-9. No Kern expert testified to any "contamination" or any harm or risk from land application. Similarly, Kern ignores the numerous conservative protections built into existing federal and state regulations of biosolids, such as pretreatment of industrial wastewater and agronomic rate limits on the volume of biosolids applied.

Kern focuses on the mere presence of a few parts per billion of two perfluorocarbons

("PFCs," specifically PFOA and PFOS) detected in soil and a few parts per trillion of those PFCs detected in groundwater at Green Acres Farm, during the first sampling effort Kern has undertaken in over two decades of regulating land application of biosolids and a decade after Measure E. Kern alleges significant risks from these PFCs yet relies almost exclusively on one exhibit that was not admitted for its truth in support of its allegations of general PFC harms and nowhere singled out biosolids as a key source of these PFCs that are ubiquitous in the environment. Kern Br. 23 n.14, 25:13-14 (citing Ex. 1289); Trial Tr. vol. 7 (Higgins) 130:9-24; Trial Tr. vol. 5 (Scofield) 204:3-16. Kern offered no expert in risk assessment or other disciplines to explain, much less prove, what risk these trace amounts of chemicals actually present in the conditions at Green Acres or other land application sites. As the only risk assessment professional in this case testified in detail, risk determinations involve a scientific assessment based on toxicity, actual routes of exposure, and other factors. Dr. Scofield concluded based on an analysis of the data and conditions at Green Acres Farm that there was negligible risk, including from PFCs. 155:14-156:12, 163:4-164:9, 194:6-8.

Similarly, Kern alleges harms from bioaccumulation of PFCs in wildlife, but cites no testimony that makes any such claim or even mentions wildlife. Kern Br. 25:15-17 (citing Trial Tr. vol. 8 (Higgins), 114:14-118:13). Drs. Pepper and Scofield offered unrebutted testimony at trial that land application of biosolids to farmland benefits soil microorganisms and earthworms and presents no risk to other animals, or to humans as a result of consumption of milk or meat from cattle fed crops grown with biosolids. Trial Tr. vol. 5 (Pepper), 44:5-13, 47:15-16, 80:12-82:10; *id.* (Scofield), 156:7-12, 163:18-164:9, 173:5-23, 197:13-198:19, 204:3-16. As further evidence of the alleged dangers of PFCs, Kern states: "Because of the serious threat to drinking water posed by PFCs, the EPA has an ongoing monitoring regulation for water systems with over 10,000 users, with a reporting level of .02 ug/L, or 20 parts per trillion for PFOA." Kern Br. 26:6-9. This monitoring program is not unique to PFOA; EPA uses it to regulate a wide variety of constituents. Trial Tr. vol. 7 (Higgins), 126:14-127:4 ("It covers a variety of compounds."). Kern construes the "reporting level" as some kind of standard, when in reality Kern's own expert described this as simply the lowest concentration of PFOA which a lab can detect. *Id.* at 193:5-6 (referring to detection limits as "a level the analytical laboratory is comfortable quantifying" PFOA detections).

In any event, Kern's general points about PFCs are divorced from the data regarding Green Acres Farm and provide scant justification for Measure E. Kern's assertion that "[l]ong-term application of biosolids at Green Acres Farm has already led to soil and groundwater contamination by [PFCs]" contradicts the unanimous testimony at trial declining to single out biosolids as the source of existing or future PFCs. Pls' Br. 19:1-24. In fact, no expert witness used the term "contamination" to describe the sampling detections at Green Acres Farm. Professor Higgins admitted that PFCs can enter the soil from "many sources." Trial Tr. vol. 7, 202:26-203:1. Professor Gwynn Johnson acknowledged that she cannot say with a reasonable degree of scientific certainty that the detections of trace organic chemicals in the soil (or any of her other soil data) "are associated with biosolids." Trial Tr. vol. 7, 69:10-20. Kern's hydrogeologist, Gary Hokkanen, not only admitted to being unable to differentiate between biosolids and effluent as source of PFCs in groundwater, but also disclosed that he could not rule out other sources as potential contributors to PFCs in groundwater beneath Green Acres Farm. Trial Tr. vol. 8, 88:17-89:3, 90:19-26. Kern's second hydrogeologist, Tom Haslebacher, did not have any opinion on the source of constituents detected in groundwater. Trial Tr. vol. 8, 11:19-12:1 (summarizing opinions to be offered at trial).[6]

Kern's Brief avoids any discussion of the massive quantities of Bakersfield's effluent applied at Green Acres Farm, a prominent topic during trial. Kern simply states that "[t]he detections of PFCs in the soil are consistent with biosolids as the source." Kern Br. 26:21. Specifically, Kern's attribution of unacceptable risk to PFCs and other trace chemicals from biosolids omits that Bakersfield effluent, and all effluent commonly used for irrigation and groundwater recharge statewide, contains similarly low concentrations of PFCs. Kern also summarily dismisses offsite

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[6] Under California law, the groundwater PFC levels detected at Green Acres Farm do not qualify as "contamination" or "pollution." Water Code § 13050. "'Contamination' means an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease" and "includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected." *Id.* § 13050(k). "'Pollution'" means an alteration of the quality of waters of the state by waste to a degree which unreasonably affects either of the following: (A) The waters for beneficial uses. (B) Facilities which serve these beneficial uses." *Id.* § 13050(l). No trial evidence established either condition.

origination of trace PFCs detected in moving groundwater underlying Green Acres, when in fact expert hydrogeologist Tom Johnson testified at length regarding area sources of ubiquitous trace PFCs to surface and groundwater, including the Kern River flowing through Bakersfield. Kern Br. 27 n.16; Trial Tr. vol. 2, 177:10-16, 203:9-12; vol. 3, 48:15-51:24.

EPA's recent revision of its health advisories for PFOA and PFOS in drinking water does not change the analysis and refutes Kern's argument that EPA has ignored trace chemicals. Kern's own expert was unaware of the fact that such health advisories are designed to be extremely conservative and protective of human health: the recently revised advisory level is designed to protect from a lifetime of consumption of significant amounts of drinking water containing PFCs. Trial Tr. vol. 7 (Higgins), 176:15-178:4 ("I'm not a risk expert or risk assessment expert. I don't recall the conservative assumptions that went into developing [the provisional health advisory]. I reserve that assessment to the risk assessment experts."); RJN Ex.1, p. 54. And as Kern admits, PFCs in groundwater that Kern's litigation experts detected in late 2015 at Green Acres Farm were either below laboratory reporting limits, or at levels no greater than 30 parts per trillion. Kern Br. 26:25-27. These measurements remain well below even the new advisory levels of 70 parts per trillion for PFOA and PFOS, either individually or combined. *Id*; Pls.' Dem. Ex. 25; RJN Ex. 1, pp. 9-10; Ex. 1289, p. 5. Critically, these values, which incorporate many conservative assumptions regarding exposure and potential effects of PFCs, are merely guidance for potential follow-up testing, rather than a risk-based standard. RJN Ex. 1, p. 11 (EPA describing advisory as "informal technical guidance" designed to "provide information for public health officials or other interested groups on pollutants associated with short-term contamination incidents").

Further, the revised health advisories reinforce several conclusions articulated at trial exonerating biosolids as a major source of PFCs in soil or groundwater requiring regulation (let alone a ban). EPA did not predicate its revision on biosolids, but rather on PFOS and PFOA from all sources. EPA reiterated that PFC concerns have been limited to localized areas with large-scale industrial producers of PFCs, such as Decatur, Alabama. RJN Ex. 1, p. 17 ("PFOA and other PFASs have been reported in wastewater and biosolids as a result of manufacturing activities ...."); *id.* p. 23 (Decatur received wastewater from manufacturing facilities in the area); Trial Tr. vol. 7 (Higgins),

207:15-208:1; Trial Tr. vol. 4 (Kester),150:11-151:25. No evidence was presented at trial that the municipal Plaintiffs' customers include the small and declining PFC manufacturing industry.

The advisories also confirm the anticipated decline in PFC concentrations in the United States. Kern RJN Ex. 1, p. 9 (PFC concentrations in blood have decreased); *id.* p. 15 ("Given the limited ongoing uses of PFOA-related chemicals, releases to surface water and groundwater from PFOA are expected to decline."); *id.* p. 17 ("The phase-out of the use of these compounds in the United States is expected to reduce PFASs in biosolids."); Trial Tr. vol. 5 (Scofield), 159:20-160:3; Trial Tr. vol. 5 (Pepper), 75:6-10. Contrary to Kern's assertion, the advisories do not suggest that "the presence of precursor compounds, as well as legacy products and production from outside the United States, would cause PFC concentrations to increase," but merely states that exposure "remains possible" due to residual amounts of PFCs in the environment. *Compare* Kern Br. 26:4-6 *with* RJN Ex. 1, p. 15. EPA's attention to PFCs demonstrates that the regulatory system is working.

Kern continues to assert that PFCs from land applied biosolids pose risks to groundwater resources, but decades of groundwater data speak louder than Kern's stubborn fears. The evidence at trial unequivocally demonstrated that groundwater from beneath Green Acres Farm has never reached any potable water supply, including the Kern Water Bank. Trial Tr. vol. 2 (T. Johnson), 198:1-10, 198:16-24; Trial Tr. vol. 6 (Beck), 92:22-24; Trial Tr. vol. 8 (Haslebacher), 12:10-14. None of Kern's groundwater experts, nor James Beck, former head of the Kern County Water Agency ("KCWA"), could testify to adverse impacts to the Kern Water Bank from Green Acres Farm. Trial Tr. vol. 8 (Haslebacher), 21:1-3, 24:26-25:10; Trial Tr. vol. 6 (Beck), 70:10-12, 91:9-12. Kern and KCWA do not even test for such impacts. Kern in its Brief for the first time also argues about offsite migration generally, but all that shows is the obvious point that groundwater moves. Kern Br. 28:10-13. Kern provided no evidence that dairies or other entities utilizing groundwater south and east of Green Acres Farm have concerns related to Green Acres or are at risk. Indeed, Kern offers no evidence that groundwater flowing from beneath Green Acres Farm to any location would contain harmful levels of PFCs from biosolids. In sum, neither continued land application of biosolids nor Measure E would alter the hydrogeology or water quality in the vicinity of Green Acres Farm, and any claimed groundwater benefit of Measure E is unfounded.

b. ***Regulation of Green Acres Farm is extensive and does not weigh in favor of Measure E under the regional welfare doctrine.***

Kern's allegations that purported federal and state regulatory failure somehow justifies Measure E is brazen in light of Kern's casual abandonment of its regulatory role for biosolids in 2011. Kern equates normal, ongoing scientific due diligence with evidence of danger, and presumes harm from trace constituents in biosolids even after they have been determined not to warrant regulation. More fundamentally, Kern has not identified regulatory violations that have gone uncorrected, and the County has not sought to otherwise enlist assistance from EPA or the State or Regional Water Boards in addressing any concerns regarding land application. Measure E falls on its own shortcomings and Kern's unfounded complaints regarding state and federal regulation do not figure into a regional welfare analysis.

The County's selective presentation of the "events leading to the enactment of" Measure E reinforces that biosolids land application has been steadily regulated and highlights Kern's acknowledgement of the safety of the practice. Kern Br. 5-8; *see* Pls.' Br. 8-16. Each of Kern's prior biosolids ordinances (which involved legislative deliberation, unlike Measure E) rejected a total biosolids ban. The statistics Kern cites for widespread land application in the County in the 1990s and early 2000s demonstrate that Kern County farmers valued this fertilizer. The 2004 attempt by KCWA to relocate land application far from Kern only underscores the uninformed bias and protectionism that preceded Measure E. *See, e.g.*, Trial Tr., vol. 5 (Beck), 82:4-8 (no KCWA study of land application impacts); 84:26-86:4, 86:24-87:19 (no awareness of permit requirements for land application), 88:24-89:15, 91:9-26, 94:2-5, 98:20-25, 104:22-105:8, 105:22-25; *id.* vol. 8 (Haslebacher), 20:23-21:3, 24:25-25:10 (no evidence that any groundwater has entered the Kern Water Bank from Green Acres Farm). Kern omits its unsuccessful efforts in 2004 and 2005, just before Measure E, to obtain special dispensation from the state legislature to allow a ban on the importation of biosolids into Kern County. Finally, Kern invokes a 2005 Kern County Grand Jury report that merely compiled anti-biosolids writings and excluded research that does not support its anti-biosolids conclusions. The Kern County Board of Supervisors never acted upon the Grand Jury report and it was never cited in the campaign materials for Measure E.

Kern's portrayal of EPA as negligent regulator contradicts the evidence presented at trial demonstrating EPA's decades of work regulating biosolids. EPA's regulation of "only" nine metals in 1993 was the result of a ten-year risk assessment evaluating over 400 constituents found in biosolids. Pls.' Br. 10:5-21. EPA considered trace organic compounds, conducted a risk assessment on 15 of them, and ultimately determined that the low risk they pose in biosolids did not merit regulation. Trial Tr. vol. 5 (Kester), 11:24-26. As former biosolids regulator Greg Kester testified, EPA's study of the science behind the Part 503 regulations "was never intended to have an end date." *Id.* at 13:13-14:6; *see also* Pls.' Br. 11:14-12:5. From the onset of the Part 503 regulations, EPA recognized that there would always be "additional pollutants that need to be evaluated." Trial Tr. vol. 5 (Kester), 13:19-21. To this effect, EPA is currently studying 135 constituents that appear in biosolids. *Compare* Ex. 1295, p. 14 (2011 biennial review issued in 2015) with Kern Br. 23:11-13. Rather than over-regulating constituents that pose no risk, this approach allows EPA to evaluate the constantly evolving body of available scientific research, and make informed decisions based on presence or absence of risk. Trial Tr. vol. 4 (Kester), 110:9-111:1, 114:13-115:8.

Allegations that the City has somehow "evaded updating its own Waste Discharge Requirements," ("WDRs") and that the WDRs are insufficiently protective are unsupported by the evidence and have no bearing on the lack of benefit from Measure E. Kern has never contended that Plaintiffs have over-applied biosolids or failed to meet the requirements for Class A-EQ biosolids. Kern would have the City affirmatively seek coverage under the 2004 State General Order, when the trial proved the Regional Board's awareness and approval of the City's current permitting scheme under its 1994 and 1995 Waste Discharge Requirements ("WDRs"). Ex. 1016 (2014 letter from Regional Board to City); S. Stockton Deposition Designations, 139:16-18, 145:19-21 (conversations with Regional Board led to conclusion that 1994 and 1995 WDRs should be left in place) (Tab B). This outcome is unremarkable because the City's WDRs impose nearly identical requirements to the General Order, and none requires additional groundwater monitoring as Kern suggests. Pls.' Br. 12:21-13:10, 21:28-22:5; Trial Tr. vol. 3 (T. Johnson), 62:12-16; S. Stockton Deposition Designations, 146:15-16 (the City's WDRs "are not significantly different" from the General Order) (Tab B); *compare* Ex. 376 (General Order) *with* Exs. 389 (1994 WDR) and 390 (1995 WDR).

Kern's Brief brazenly maintains that the City has intentionally avoided an 18 kg/ha molybdenum cumulative loading limit, when Kern's own witness admitted that this rescinded limit has no application to Green Acres Farm through the General Order or otherwise. Kern Br. 30:8-20; *see* Pls.' Br. 24:10-25:12; Trial Tr. vol. 7 (G. Johnson), 22:2-5; Ex. 376 at 15 ¶ B.5. In fact, Green Acres is nowhere near meeting or exceeding the molybdenum limit in the General Order, which is based not on historical cumulative loading but on soil measurements at the time of elected coverage under the General Order, a distinction Kern still fails to grasp. Pls.' Br. 25:13-26:2. In any event, Kern's actions demonstrate its lack of concern over molybdenum, as it has continuously received farm data, has never sought additional testing, and abandoned its responsibilities to administer its own detailed 2003 ordinance governing land application. Stips. 142, 143; Pls.' Br. 14:7-21.

The County's arguments that the City of Los Angeles should undertake more testing of biosolids and groundwater despite the lack of any problems after 22 years of land application provide little rationale for Measure E, which is a ban regardless of test results. Kern's hypocrisy is evidenced by the fact that the Kern Sanitation Agency ("KSA") and the City of Bakersfield perform only the testing required in their own WDRs and neither tests its biosolids, soil, or groundwater for what Kern calls "emerging contaminants" attributable to biosolids operations. Stips. 140, 141; Mansour Dep. Tr., 59:12-61:11; 62:11-63:18; 65:12-13 (Tab C); Ex. 402 (KSA WDR; no PFC testing required); Ex. 530 (Bakersfield soil analysis report); Ex. 589 (Bakersfield 2014 annual biosolids report); *see also* Trial Tr. vol. 3 (T. Johnson), 7:14-17 (Kern Water Bank does not test its water for emerging contaminants). Nationwide experience and extensive risk assessment has shown that groundwater testing for biosolids land application is not needed. Trial Tr. vol. 4 (Kester), 144:22-146:20.

Similarly, Kern would have the City "upgrade" the existing groundwater monitoring system, when it is not the City's to upgrade. Rather, Kern should direct any criticism of the system to the City of Bakersfield, which retains responsibility for that system. In any event, the system is not deficient, as even Kern's own hydrogeologist did not call for any fix. Trial Tr. vol. 8 (Hokkanen), 106:15-20. Kern mischaracterizes the purpose of the groundwater monitoring system, which was implemented to monitor the City of Bakersfield's effluent disposal at Green Acres Farm. Ex. 1136;

Trial Tr. vol. 3 (T. Johnson), 23:2-16; Trial Tr. vol. 8 (Hokkanen), 105:10-14. Meanwhile, the existence of a groundwater monitoring system provides Green Acres Farm more oversight of its impacts than most land application sites in California and the country. Indeed, neither EPA nor any other biosolids land application site in California requires groundwater monitoring. Trial Tr. vol. 8 (Hokkanen), 105:19-24; Trial Tr. vol. 3 (T. Johnson), 61:17-20. Tellingly, despite a large investment in forensic science in 2015, Kern never sought to conduct routine and inexpensive testing for chlorides, total dissolved solids, or other constituents that Kern maintains the current groundwater monitoring system is inadequate to assess.

Finally, Kern in passing tries to resuscitate its repeatedly rejected argument that the Clean Water Act or California water law somehow insulates Measure E from scrutiny under the regional welfare inquiry or otherwise. Kern Br. 3:18-4:12; *see City of Los Angeles v. County of Kern* (C.D.Cal. 2007) 509 F.Supp.2d 865, 892-93 ("neither the Water Code nor the Water Board's regulations purport to 'authorize' local regulations of biosolids nor to delegate the Water Board's authority to local agencies such as Kern") ("*Kern II*"). The County's argument is meritless: nowhere in section 405(e) of the Clean Water Act does Congress sanction a ban on the land application of biosolids. The Clean Water Act's statement that "[t]he determination of the manner of disposal or use of sludge is a local determination" simply stands for the principle that the choice of management option – land application of biosolids, incineration of biosolids, landfilling of biosolids – is a decision left to the wastewater agency generating the biosolids rather than Congress or the EPA. 33 U.S.C. § 1345(e); *Kern II*, 509 F.Supp.2d at 883 (Clean Water Act does not authorize discriminatory local regulation). Deference to local choice of a federally sanctioned practice, as the Clean Water Act provides for, is not the same thing as allowing a complete ban of a federally-approved practice.

Nor does any part of the Porter Cologne Water Quality Control Act authorize a ban on the land application of biosolids. Kern focuses on the State Water Quality Control Board's 2004 General Order as evidence of its alleged authority to enact Measure E. But the General Order creates no authority for a ban. Ex. 376. It simply exercises the State Board's existing authority under California law to establish general waste discharge requirements for similarly situated land application operations. Water Code § 13274; *Kern II*, 509 F.Supp.2d at 892-93 ("[T]he state Water Board's

General Order 2004–0012 merely states that ***its own provisions*** do not preempt local agencies' authority to regulate biosolids.... In other words, neither section 13274 nor the General Order purport to confer any authority at all to local agencies, much less the Water Board's authority to regulate biosolids unconstrained by the CIWMA.") (emphasis in original); *see also City of Los Angeles v. County of Kern* (C.D.Cal. 2006) 2006 WL 3073172, at *14 (rejecting Kern argument that Water Code provided authority to ban land application and that Water Code overrode IWMA).

c. *Kern's witnesses could not meaningfully attribute flies and odors to Green Acres Farm.*

Kern solicited a few witnesses to testify at trial to their belief that they experienced extreme odors and flies off-site from Green Acres Farm that were caused by biosolids. This anecdotal evidence provides no meaningful support for sustaining a ban on an approved farm fertilizer in an agricultural area. Moreover, that evidence is sharply contradicted by the record that the County has received at most only three odor or fly complaints regarding Green Acres Farm since 2003, three years before Measure E was passed, with none even alleged in the last five years. Stip. 146; Trial Tr. vol. 1 (Constantine), 29:1-18. *See also* Ex. 438 ("On all permitted biosolids sites, we have received fewer than 10 complaints since the program began in the late 1990's.") (Tab D). Not one of Kern's witnesses made a complaint to Green Acres Farm, the City, the County, or the Regional Board. Pls.' Br. 26:8-10; *see also* G. Jhaj Deposition Designations, 36:24-37:14 (Tab E); D. Walker Depositions Designations, 38:2-40:22 (Tab F); T. Martin Deposition Designations, 43:5-24. Indeed, the alleged odors and flies are not interfering with these witnesses' livelihoods or well-being: despite her allegations submitted via deposition, one of Kern's witnesses intends to build a strip mall next to her existing gas station business across the street from Green Acres Farm. G. Jhaj Deposition Designations, 33:10-19 (Tab E).

Allegations of agricultural nuisances are of little legal significance in light of the California Legislature's preclusion of such claims against longstanding farms. Civ. Code § 3842.5 (Right to Farm Act). *See also* Pls.' Br. 26:13-22. As this Court wrote in its 2011 preliminary injunction opinion, California's Right to Farm Act codifies that nuisance conditions may at times be attendant to farm work and are not actionable. *See also B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929,

959 ("Agriculture occupies a favored position in this state, and accordingly the Legislature has imposed severe limitations upon the ability of local governments, agencies, districts, private parties, and the courts, to declare or complain of agricultural practices under the law of public and private nuisance."); *Rancho Viejo LLC v. Tres Amigos Viejos LLC* (2002) 100 Cal.App.4th 550, 562-63.

Nor could any Kern witness credibly differentiate between or attribute flies or odors to biosolids at Green Acres Farm versus one of the many nearby dairies. *See, e.g.*, D. Walker Deposition Designations, 66:20-25 ("Q. If you had to rank [dairy farms] on that same scale, with ten being the most offensive smell you can imagine, one being hardly offensive or not offensive at all, how would you rank -- A. I would rank it just about the same as biosolids.") (Tab F); T. Martin Deposition Designations, 73:16-25 (rating Green Acres Farm a seven, and dairies a six, on a scale of offensiveness up to ten) (Tab G). Attributing flies and odors between substantially similar agricultural operations is a complex task best suited for an expert, and Kern offered none at trial. *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1373 (for subjects in which "the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation").

2. Kern cannot refute Measure E's burden on the regional welfare.

Kern dismisses Measure E's damage to Plaintiffs as infinitesimal, focusing on what it characterizes as "miniscule" costs per individual ratepayer while ignoring other concrete harms Plaintiffs proved at trial. This is easy for Kern to do, since these costs are paid entirely by outsiders. Kern's superficial position that it has already shouldered its "fair share" of the regional biosolids burden by hosting two tax-paying, private compost-generating operations fails because these facilities (little different from the City's Hyperion wastewater plant in that they both generate Class A-EQ biosolids for land application) do not recycle the biosolids; they merely generate material that must be applied outside of Kern County. The existence of Liberty Composting and South Kern does not change the fact that Measure E mandates that all composted biosolids generated in Kern (including from those facilities) must be sent out of the County to be land applied, despite the abundance of local farmland. Stips. 32, 43.

Measure E increases the costs of biosolids management by millions of dollars annually for

Plaintiffs, undermines the City's $28 million investments in Green Acres Farm, removes the security and certainty of directly owned and managed biosolids management sites, and impedes Plaintiffs' and other California sanitation agencies' efforts to safely manage biosolids. Pls.' Br. 27:19-29:15, 42:11-14. Kern downplays these costs ("less than a dollar per sewer user"), but Plaintiffs could end up bearing millions of dollars every year without passing them onto customers due to requirements that utilities only increase sewer service charges for good cause and after conducting a public hearing with an opportunity for protests, of which no particular outcome is guaranteed. Pls.' Br. 64:16-19. Kern also overlooks the inevitable air pollution impacts that will ensue should Measure E necessitate the transport of Southern California biosolids hundreds of additional miles to Arizona, Merced County, or elsewhere. *Id.* at 30:5-9, 42:23-43:2. Similarly, Kern fails to consider Measure E's precedential impact, enabling similar actions across the state and threatening to undermine California's biosolids market. *Id.* at 43:18-44:5.

The loss of Green Acres Farm as a management option owned and directly overseen by the City is another specific damage that Measure E will inflict on an outsider with no off-setting benefits to Kern. *See* Stip. 151 (City would not own or directly oversee any other outside sites); Trial Tr. vol. 2 (Sullivan), 127:4-16 (CSD2 owns only its new composting facility); Stip. 120 ("OCSD does not own any land or facilities receiving its biosolids."). Measure E will prevent the City's use of this safe, highly regulated option, and will prevent other entities from pursuing similar dependable land application sites in Kern County.

Kern argues that the costs of Measure E could be mitigated by the availability of alternative biosolids management options or available farmland in other parts of the State. As explained in section I *supra*, the trial record proved that the supposed alternatives are more expensive, less practical, or simply do not exist now or in the near future.

Measure E plainly harms the regional welfare with no countervailing benefit from eliminating land application of biosolids in a vast agricultural county. Kern struggles to show how the regional welfare is respected when the purpose of Measure E is to ensure that all biosolids, including KSA biosolids, are exported elsewhere in the region, imposing on outsiders the alleged burdens of this ubiquitous product. Measure E's heavy-handed ban on critical public infrastructure is

just the sort of police power ordinance that the regional welfare doctrine protects against.

III. MEASURE E VIOLATES THE FEDERAL COMMERCE CLAUSE'S PROHIBITION AGAINST DSICRIMINATORY AND BURDENSOME LOCAL REGULATION OF COMMERCE.

Faced with ample trial evidence of how Measure E only burdens outsiders and particularly Plaintiffs, Kern struggles to shield Measure E from a dormant Commerce Clause analysis through narrow interpretations of Commerce Clause jurisprudence. For example, facing Measure E's indisputable discriminatory intent, Kern asserts that discriminatory intent is not relevant in a dormant Commerce Clause analysis, brushing aside U.S. and California Supreme Court precedent and the fact that, as in this case, discriminatory intent and effects go together. Likewise, the County's retreat behind the "facial neutrality" of Measure E continues to ignore the stipulated facts that Measure E caused no changes to how Kern County (or its cities) managed their biosolids. Stips. 40, 41, 46-47, 51-56. Kern makes no attempt to overcome the presumption of invalidity that attaches to a discriminatory ordinance because it cannot show that Measure E was the only available means for resolving its alleged health and environmental concerns. Nor does Kern dispute the relevance and damage to biosolids management if other counties begin passing similar bans, an inquiry relevant to both discriminatory effect and *Pike*'s undue burdens test. Pls.' Br. 58:18-59:4, 64:23-26.

A. Measure E Falls Squarely Within the Commerce Clause's Purview.

Plaintiffs' trial evidence proved that the multi-million dollar, federally-regulated biosolids infrastructure activities in California come under the definition of commerce protected by the federal Constitution, and Kern does not contest the broad purview of the Commerce Clause. Instead, Kern seeks to limit the Commerce Clause protections to goods that physically cross state lines and to private rather than public entities that suffer discrimination. But ample precedent prevents barriers to trade in articles of commerce that trade within the state and forbids discrimination against public entities like the City, OCSD and CSD2.

1. The Commerce Clause prevents discriminatory and burdensome local regulation of articles of interstate commerce.

Kern's attempt to classify this case as a "purely intrastate dispute" disregards the U.S.

Supreme Court's precedent protecting local commerce that involves trade or activities that Congress could affirmatively regulate. *See, e.g.*, *Hughes v. Oklahoma* (1979) 441 U.S. 322, 326 n.2 ("The definition of 'commerce' is the same when relied to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation."); Pls.' Br. 47:10-50:4. Kern would have this Court forgo a dormant Commerce Clause analysis because Measure E has not yet prohibited any out-of-state entity from land applying its biosolids in Kern County. Kern relies on a hyper-literal interpretation of the term "interstate commerce" while overlooking the proof at trial of a large biosolids industry in California, which in any event heavily relies on Arizona farms and fertilizes crops for export out of state.[7] Although Kern asserts that Measure E's burdens are minimal, Kern does not deny that local biosolids bans can and do inhibit the biosolids market, which qualifies as protected commerce. *See, e.g.*, Trial Tr. vol. 4 (Kester) 71:1-7 ("[A]ny prohibition, such as Measure E, thwarts the [biosolids] market and impedes its use."); *id.* 94:3-11 (biosolids bans and restrictive ordinances "create an uncertain future in terms of where [sanitation agencies] are going to be able to manage their biosolids"). Measure E thus unconstitutionally "thwart[s] the regulatory power granted by the commerce clause to Congress" and cannot be upheld. *United States v. Wrightwood Dairy Co.* (1942) 315 U.S. 110, 119.[8]

Kern also asks this Court to cabin the Commerce Clause's reach to discrimination against out-of-state entities. However, "to discriminate against out-of-county interests . . . by definition . . . include[s] discrimination against out-of-state interests." *County Sanitation Dist. No. 2 of Los Angeles*

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[7] *Cf. Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County* (8th Cir. 1997) 115 F.3d 1372, 1387 ("The plaintiffs argue that 'interstate commerce' means more than 'goods crossing state lines.' This proposition is undoubtedly correct: even a non-discriminatory law may unconstitutionally burden interstate commerce.") (court applied *Pike* test to flow control ordinances expressly targeting commerce within a state).

[8] Kern again relies heavily on the Ninth Circuit's 2009 prudential standing decision that the Measure E challenge belonged in state court. *City of Los Angeles v. County of Kern* (9th Cir. 2009) 581 F.3d 841, 845-46. This Court previously has observed that the prudential standing decision is not applicable to the merits of the Commerce Clause challenge. Pls' Br. 46 n.10. The California Supreme Court has explained that the "zone of interests" doctrine at issue in the Ninth Circuit case does not limit state court jurisdiction. *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166 (zone of interests doctrine inapplicable under California law).

County v. County of Kern (2005) 127 Cal.App.4th 1544, 1613 n.74 ("*CSD2*") ("Thus, even though the record does not show any sewage sludge originating outside California was ever shipped to Kern County, we will treat plaintiffs' arguments as implicating interstate commerce."). No case Kern cites stands for the proposition that the dormant Commerce Clause is unconcerned with in-state discrimination against trade in items like biosolids that come under the authority of the Commerce Clause. While Kern will likely stress that the fact patterns in many cases finding Commerce Clause violations involve state laws and some out-of-state goods or waste, the law simply does not limit Commerce Clause protection to physical interstate commerce. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown* (1994) 511 U.S. 383, 390 ("[T]he ordinance erects no barrier to the import or export of any solid waste [but] the article of commerce here is not so much the waste itself, but rather the service of processing and disposing of it. With respect to this stream of commerce, the ordinance discriminates, for it allows only the favored operator to process waste that is within the town's limits. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.").[9]

Kern's superficial argument that Measure E will "create" and somehow benefit interstate commerce imposes an artificial limit on Commerce Clause jurisprudence that is not supported in the case law or the facts proved at trial. Courts have frequently struck down waste importation bans, which could also have been construed as generating more commerce outside of the state. *See, e.g., Or. Waste Systems v. Dep't of Envtl. Quality of State of Or.* (1994) 511 U.S. 93; *Chemical Waste*

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[9] *See also Envtl. Waste Reductions, Inc. v. Reheis* (N.D. Ga. 1994) 887 F. Supp. 1534, 1568 ("a legislative provision which limits the movement of waste between counties in Georgia based solely on its geographic origin has economic effects interstate in reach and thus discriminates against interstate commerce"); *Diamond Waste, Inc. v. Monroe County* (11th Cir. 1991) 939 F.2d 941, 943 (invalidating an ordinance purporting to restrict waste from being "transported into (the county) from other counties and locations"); *Northeast Sanitary Landfill, Inc. v. South Carolina Dep't of Health & Envtl. Control* (D.S.C. 1992) 843 F.Supp. 100, 109 (invalidating an ordinance limiting a landfill's waste stream to a seven county region because "(i)f a county or region could ban the importation of waste at the county or region border, then the cumulative effect of such bans by all or many of the counties would have the same effect as a state-wide ban"); *Coastal Carting Ltd. v. Broward County*, (S.D. Fla. 1999) 75 F.Supp.2d 1350, 1354 (rejecting a county's argument that county export barriers would not affect interstate commerce due to the county's location at the "extreme southern end of the Florida peninsula").

Management, Inc. v. Hunt (1992) 504 U.S. 334; *City of Philadelphia v. New Jersey* (1978) 437 U.S. 617. The fact that Measure E will cause an increased volume of biosolids to be sent to Arizona – at great expense to the biosolids market – only confirms the interstate nature of this dispute and the disruption to the free flow of an article in commerce. Nor does anyone outside of Kern County have a political voice in the County's decision to burden the biosolids market and export a perceived threat to Arizona. The Supreme Court in *United Haulers* observed that the "dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when 'the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.'" *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Auth.* (2007) 550 U.S. 330, 345 (*quoting Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 767–768, n.2).

2. The dormant Commerce Clause protects private and public entities alike from discrimination.

Kern incorrectly argues that the Commerce Clause prohibits discrimination against "economic interests" while permitting discrimination against "public entities." No cases, including Kern's cited authorities, stand for this proposition: Kern seeks a new carve-out from Commerce Clause jurisprudence that has long protected public and private entities engaged in managing waste, a frequent target of discriminatory local laws. Pls.' Br. 47:10-50:4. Kern's extrapolation from the Supreme Court's decisions in *United Haulers* and *Davis* to legitimize Measure E goes too far. Kern Br. 44:12-45:3 (citing *United Haulers*, 550 U.S. at 336-37 (government may constitutionally favor its own waste processing facility to advance legitimate, not protectionist, local goals); *Dep't of Revenue of Kentucky v. Davis* (2008) 553 U.S. 328, 342-43 (tax code can constitutionally favor state-issued bonds over other states' bonds to increase funding for public services)). Neither case marked a significant change in Commerce Clause law. Here, Kern County does not seek to favor a county-owned facility of any sort for a narrow government interest; instead, Measure E is a blanket ban that affects an entire industry of public and private sector actors, and is fully subject to the Commerce Clause.

Kern's attempt to divorce "economic interests" from "political entities" ignores the fact that many political entities have economic interests warranting the Commerce Clause's protections that courts will and have protected from discrimination, even when that discrimination is between public entities. *See, e.g., Philadelphia* , 437 U.S. at 629 (state ban on importation of out-of-state waste unconstitutionally discriminated against the City of Philadelphia and other public entities); *Wyoming v. Oklahoma* (1992) 502 U.S. 437, 446, 455 (requirement that Oklahoma coal-fired electric generating plants burn at least 10 percent Oklahoma coal discriminated against the state of Wyoming, which suffered corresponding decreases in tax revenues from lost coal sales). Even where courts have not found discrimination between public entities, they have still entertained claims of discrimination under the Commerce Clause, undermining Kern's argument that such discrimination cannot possibly offend the Commerce Clause. *See, e.g., Town of Southold v. Town of East Hampton* (2d Cir. 2007) 477 F.3d 38, 48 (analysis of whether East Hampton, New York law requiring permit to use town ferry terminal discriminates against Connecticut town).

B. Measure E Intended to Exclude All Out-of-County and Out-of-State Biosolids from Kern County.

1. Unconstitutional discrimination can be found on the basis of discriminatory purpose.

Kern relies on dicta in a handful of cases to argue that discriminatory intent alone is insufficient to invalidate Measure E under the Commerce Clause. The County's analysis is incorrect. The Eighth Circuit, for example, struck down a state voter initiative solely because of evidence that the voters intended to discriminate against out-of-state corporations. *S.D. Farm Bureau v. Hazeltine* (8th. Cir. 2003) 340 F.3d 583, 596 ("[W]e rest our conclusion on the evidence in the record of a discriminatory purpose underlying Amendment E. As a result, we do not consider the other two tests, or the second tier analysis, the Pike balancing test."); *see also Waste Management Holdings, Inc. v. Gilmore* (4th Cir. 2001) 252 F.3d 316, 336 (striking down state waste transportation laws because "no reasonable juror could find that in enacting the statutory provisions at issue Virginia's General Assembly acted without a discriminatory purpose"); *Hunt v. Wash. St. Apple Advertising Com.* (1977) 432 U.S. 333, 352-53 ("[W]e need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand

[due to discriminatory effects and lack of justification for prohibitions on grade labeling of apples]").

Every Commerce Clause inquiry begins with determining whether the per se rule of invalidity should apply, the threshold question being whether the ordinance discriminates in intent or effect. Pls.' Br. 51-52. As Kern acknowledges, the Supreme Court has long held that the finding that a local law "constitutes economic protectionism may be made on the basis of either discriminatory purpose or discriminatory effect." *Chemical Waste Mgmt.,* 504 U.S. at 344 n.6 (internal citations omitted); *Bacchus Imports, Ltd. v. Dias* (1984) 468 U.S. 263, 270 (same); *Maine v. Taylor* (1986) 477 U.S. 131, 148 n. 19 (the per se rule of invalidity applies equally to "laws motivated solely by a desire to protect local industries from out-of-state competition" and to laws with discriminatory effects). What Kern does not mention is that the California Supreme Court also has stated that discriminatory intent is sufficient to invalidate a law under the dormant Commerce Clause. *Pac. Merchant Shipping Ass'n v. Voss*, 12 Cal.4th 503, 517 (1995) ("Such discrimination may take any of three forms: first, the state statute may facially discriminate against interstate or foreign commerce; second, it may be facially neutral but have a discriminatory purpose; third, it may be facially neutral but have a discriminatory effect.").

Just this year, the Supreme Court and the Fourth Circuit emphasized looking beyond an enacting body's stated justification for a law to assess the intent of the legislators in determining whether a law was unconstitutional or illegal. *Foster v. Chatman* (2016) 136 S.Ct. 1737, 1748 (striking of two African American jurors motivated by unconstitutional racial bias; "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial ... evidence of intent as may be available") (*quoting Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 429 U.S. 252, 266)*; North Carolina State Conference of N.A.A.C.P. v. McCrory* (4th Cir. 2016) --- F.3d ---, 2016 WL 4053033 (court assessed legislators' motives in passing facially neutral voting restrictions to find racially discriminatory intent in violation of Equal Protection Clause and Voting Rights Act). Here, Plaintiffs have proven by a preponderance of the evidence that Measure E was motivated by an intent to discriminate against out-of-county biosolids, and coupled with evidence that only outsiders to Kern County were affected, Measure E is unconstitutional under the per se analysis.

Kern's emphasis on the lack of reported case law striking down laws based on intent alone (while inaccurate) is an academic exercise: intent will typically be accompanied by a discriminatory effect in order to damage a party such that a lawsuit is necessary and practical. Each case Kern cites upholds a statute with no discriminatory effects to speak of, unlike the trial evidence here demonstrating Measure E's discriminatory effects and burdens. *Wal-Mart Stores, Inc. v. City of Turlock* (E.D. Cal. 2006) 483 F.Supp.2d 987, 1012 (county prohibition on development of discount superstores produced no discriminatory effects due to its evenhanded application); *Int'l Franchise Ass'n, Inc. v. City of Seattle* (9th Cir. 2015) 803 F.3d 389, 401-402 (ordinance imposing differential minimum wage schedule for large versus small employers did not discriminate against interstate commerce where plaintiffs presented no evidence of intent to burden out-of-state business and insufficient evidence of discriminatory effect); *Burbank-Pasadena Airport Auth. v. City of Burbank* (1998) 64 Cal.App.4th 1217, 1224 (city parking tax applied equally to all transient lots in city; court did not rule out applicability of intent, but evidence of intent was minimal). None of these cases countermands established constitutional law that ordinances can violate the Commerce Clause based on discriminatory intent and that intent can be inferred from a variety of evidence. Kern's reliance on these cases also misconstrues Plaintiffs' principal argument on discriminatory intent, i.e., that Measure E should be struck down due to its significant discriminatory burdens, which are accompanied and highlighted by discriminatory intent. In any event, intent can and does prove illegality under the Commerce Clause, and Kern does not dispute the existence or validity of this authority.

2. Kern asks this Court to ignore relevant evidence proving Measure E's discriminatory intent.

The trial proved that Measure E was motivated by an intent to discriminate against out-of-county biosolids, and by definition out of-state biosolids. *CSD2,* 127 Cal.App.4th at 1613 n.74. Sixty-one percent of those who voted for Measure E live closer to legally land applied Kern County biosolids (Class B) than the land application they chose to ban in unincorporated part of the county (Class A-EQ). Stips. 34-36, 41. This fact, combined with the abundance of entreaties to voters vilifying "L.A. Sludge" and imploring voters to "Send the Sludge Packing!", prove the regional

hostilities motivating Measure E. Stips. 154-155; Ex. 491 (Measure E campaign website). Pls.' Br. 55-59.

Confronted with the damning body of advertisements for Measure E, Kern tries to exclude the evidence by arguing that campaign materials are irrelevant in discerning voter intent and that Plaintiffs must produce surveys or exit polls. Kern Br. 37:13-14. Kern relies on statutory interpretation cases construing the substantive meaning of the law, despite the federal district court's rejection of this exact argument, and despite this Court's denial of Kern's in limine motion to bar intent evidence. The intent of the voters is critical in federal constitutional claims, and all available evidence should be considered. *Kern II*, 509 F.Supp.2d at 885 n.12.

Kern does not address the body of cases in which courts relied upon campaign materials to ascertain voter intent, and did not expressly require what Kern calls "direct evidence of voter intent" such as surveys or polls. For example, in *S.D. Farm Bureau v. Hazeltine*, the Eighth Circuit found discriminatory purpose behind a voter initiative prohibiting corporate involvement in farming based on a pro-con statement for the referendum circulated to the voters. 340 F.3d at 593-94. The pro-con statement included language explaining that the referendum would "give[] South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations." *Id.* Finding this statement to be "brimming with protectionist rhetoric," the court invalidated the referendum. *Id.* at 593, 596. As explained in Plaintiffs' post-trial brief, courts have repeatedly inferred voter intent from surrounding circumstances and an absence of evidence supporting an initiative's stated purpose, rather than demanding the precise type of evidence Kern desires. Pls.' Br. 54:17-57:19; *see also, e.g., Bates v Jones* (9th Cir. 1997) 131 F.3d 843, 846 (determining voters' understanding of initiative's ultimate effects based on simultaneous competing initiatives); *SDDS Inc. v. South Dakota*, 47 F.3d 263, 269-70 (protectionist propaganda and absence of standards for voters to evaluate efficacy of proposed waste facility proved discriminatory intent).

Plaintiffs have provided numerous additional examples of Measure E's discriminatory intent, including failed political attempts to ban the importation of biosolids into the County; an absence of evidence that the electorate had any basis to assess Measure E's purported efficacy toward its

purported environmental or health benefits; and a similar lack of evidence that Kern investigated whether Measure E would in fact achieve such goals or whether alternatives to a complete ban would be equally effective. Pls.' Br. 53:23-58:1. Courts have recognized each of these types of evidence as indicia of constitutionally significant discriminatory intent. *Id.*; *see also Waste Management Holdings*, 252 F.3d at 336 ("Our conclusions [of discriminatory intent] rest upon the historical background of and sequence of events leading up to the General Assembly's enactment of and Governor Gilmore's signing into law the statutory provisions at issue," including evidence of anti-New York City sentiment regarding importation of solid waste to Virginia landfills). This evidence of the political background of Measure E provides additional grounds to hold the ban per se invalid.

C. Measure E Excludes Out-of-County Biosolids While County Land Application Programs Persist.

Kern does not deny that Measure E bars outsiders from land applying in unincorporated Kern County while land application of less highly treated Class B biosolids continues unabated in Bakersfield and other Kern cities. Stips. 39-41. Kern instead maintains that, because no Kern County land applier specifically benefits from Measure E, Measure E has no discriminatory effects. Kern Br. 40:17-18. To the contrary, over a century of dormant Commerce Clause jurisprudence prohibits discrimination in its many forms and does not require that the favored and the disfavored entities are identical businesses. The Commerce Clause is a broad prohibition against economic isolation and protectionism, whether of favored businesses (here, Liberty Composting and Kern agriculture), favored municipalities (Bakersfield), or natural resources (sending Kern's biosolids out of county so that Kern County alone is biosolids-free). For example, in *Philadelphia*, the Supreme Court rejected New Jersey's argument that the state's ban on the importation of out-of-state waste had no discriminatory effects because "no New Jersey commercial interests stand to gain advantage over competitors from outside the state" as a result of the ban. *Philadelphia*, 437 U.S. at 626. The Court found discriminatory effects based on the state ban's differential treatment of in- versus out-of-state wastes. *Id.* at 626-27 ("whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some

reason, apart from their origin, to treat them differently").

Philadelphia also recognized discriminatory effects where a State "accord[s] its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Id.* (internal citations omitted). The Supreme Court has repeatedly cautioned that "a state may not accord its own inhabitants a preferred right of access over consumers in other states to natural resources located within its borders." *Or. Waste Systems*, 511 U.S. at 107; *Hughes*, 441 U.S. at 335 n.15 ("States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce."); *see also Conservation Force, Inc. v. Manning* (9th Cir. 2002) 301 F.3d 985, 995-96 (preferred access to elk for Arizona hunters subject to strict scrutiny and remanded for fact finding).

Kern invokes the Supreme Court's decision upholding a Maryland law structuring the petroleum distribution business in *Exxon Corp. v. Governor of Maryland* to support the County's narrow construction of discriminatory effects. (1978) 437 U.S. 117. The challenged law in *Exxon* prohibited gasoline producers and refiners from simultaneously operating in-state retail service stations in Maryland, a state with no in-state producers or refiners. *Id.* at 120, 125. Unlike Measure E, the *Exxon* statute did not exclude all outsiders, "prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Id.* at 126. In fact, the law in *Exxon* applied evenhandedly to all outsiders. *Id.* Measure E, conversely, exhibits all those flaws: it prohibits the flow of biosolids into Kern County, increases the cost of biosolids management on a regional basis, and targets Plaintiffs' biosolids based on their origin outside Kern County, while local generators continue land applying unaffected. *See Gov't Suppliers Consolidating Servs., Inc. v. Bayh* (7th Cir. 1992) 975 F.2d 1267, 1279 (distinguishing *Exxon* where statute at issue "effected an economic barrier against the importation of municipal waste."). Similarly, *National Ass'n of Optometrists & Opticians v. Harris* (9th Cir. 2012) 682 F.3d 1144, which upheld state regulations structuring the delivery of optometry services and goods, did not block movement of articles in commerce like Measure E does.

Plaintiffs have demonstrated benefits to in-county businesses at Plaintiffs' expense. As advocated by Kern, local composting entities such as Liberty Composting and South Kern Industrial

Center Composting Facility may receive additional volumes of biosolids. Pls.' Br. 52:16-53:5. While Kern entities enjoy additional business, Plaintiffs will be barred from land applying in Kern County, and the City will be forced to send its biosolids elsewhere, at additional cost. At the same time, Measure E would free Kern County agricultural operations from the purported risks of land application of biosolids, while exporting the same risks to the areas where Plaintiffs will be forced to divert their biosolids.

Kern tries to dismiss these discriminatory effects as incidental based on the assumption that Measure E is facially neutral. Kern Br. 40:15-17. However, Measure E's agricultural protectionist text refutes any claim of facial neutrality: Measure E was designed expressly to prevent the "loss of confidence in agricultural products from Kern County." Ex. 602. Courts have repeatedly found similar language dispositive of discriminatory intent. Pls.' Br. 52:8-15. The ban's effect of excluding out-of-county interests from land application in Kern County while exporting any alleged risks accompanying land application of biosolids to those states and counties are thus far from incidental; in fact, as discussed above, they are intentional. Even if Measure E were facially neutral, such facial neutrality cannot save a statue with discriminatory effects. *Dean Milk Co. v. City of Madison* (1951) 340 U.S. 349, 354 (Commerce Clause protections not limited to the "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods"); *W. Lynn Creamery, Inc. v. Healy* (1994) 512 U.S. 186, 201 (Commerce Clause "forbids discrimination, whether forthright or ingenious"); *Pac. Merchant Shipping Ass'n,* 12 Cal.4th at 517 (facially neutral laws may still discriminate in intent and effect).[10]

Kern adds nothing new to its well-worn argument, rejected by the district court, that the County lacks jurisdiction over Bakersfield and therefore the voters cannot be found to have discriminated in favor of the jurisdiction where most of them lived. The issue here is the conduct of

[10] The *CSD2* court's conclusion that Kern's Class B ban favoring Kern agriculture did not undermine facial neutrality is distinguishable: the Class B ban at issue did not prohibit the land application of all biosolids in Kern County, a much heavier burden. Plaintiffs in this case have presented ample evidence of intent to benefit Kern County at the expense of Plaintiffs and other outsiders, demonstrating not just a possibility but an intended consequence. *See CSD2*, 127 Cal.App.4th at 1613-14; Pls.' Br. 52:15 n.13.

the voters, and "in the case of an initiative measure, the enacting body is the electorate as a whole." *Perry v. Schwarzenegger* (N.D. Cal. 2009), 264 F.R.D. 576, 582; *see* Pls.' Br. 59. Kern's refrain that "the County's voters and the voters who live in each of the County's cities are not the same people" is factually incorrect. Kern Br. 39:26-27; Stips. 35-37. In any event, the discrimination in favor of local land application by Bakersfield voters is just one manifestation of Measure E's favoritism for a variety of County interests.

D. Measure E's Burdens Outweigh Its Lack of Benefits under the *Pike* Test.

Despite the fact that a trial was held on the Commerce Clause claims, Kern devotes little attention to the *Pike* balancing test, instead recycling legal arguments that would preclude any trial. The exhaustive examination of all of Kern's allegations regarding biosolids established that Measure E's burdens are "clearly excessive in relation to [its] putative local benefits." *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142. As discussed above and in Plaintiffs' opening brief, Measure E's burdens are plentiful and serious. Pls.' Br. 61:20-65:7. Kern offers nothing but illusory justifications for upholding Measure E under *Pike*, referencing the same unproven health risks and "dangerous perfluorchemicals" that cannot even be attributed to land application of biosolids, and the same allegations of "foul odors beyond those generated by cattle and dairy operations." Kern Br. 46:11-18.[11]

Such little and unproven benefit does not justify even incidental burdens on interstate commerce. *See, e.g., U & I Sanitation v. City of Columbus* (8th Cir. 2000) 205 F.3d 1063, 1070-71 (illusory benefits of solid waste flow control mandates fail to justify ordinance's incidental burdens under *Pike*); Pls.' Br. 62:18-63:15. For instance, the Supreme Court struck down state regulations limiting the length and configuration of semi-trailer trucks in light of their failure to "make some contribution to highway safety" and their imposition of substantial burdens on the movement of goods. *Raymond Motor Transp., Inc. v. Rice* (1978) 434 U.S. 429, 444-46. *See also Union Pac. R.R. Co. v. California Pub. Utilities Com.* (9th Cir. 2003) 346 F.3d 851, 870-72 (regulation requiring

[11] Kern also makes no effort to show that Measure E's alleged purposes of protecting health and the environment could have only been served through a ban rather than available nondiscriminatory alternatives, a relevant factor under *Pike*. *Pike*, 397 U.S. at 142.

specific train car configuration failed *Pike* test due to burdens of mandating such configuration while incurring minimal safety benefits). Compared to other cases where *Pike* balancing went to trial, Measure E clearly fails.

Kern's use of the *CSD2* decision to evade a *Pike* analysis is equally futile. The *CSD2* court's decision not to conduct *Pike* analysis was based on the judgment that the Kern County Board of Supervisors' restriction of biosolids to Class A-EQ was a permissible regulation under the federal Clean Water Act (yet still violated CEQA). 127 Cal.App.4th at 1614; Pls.' Br. 62 n.14. *CSD2* rendered its *Pike* decision after it had already determined that the prior Kern measure was non-discriminatory. By contrast, Measure E is a total ban and exhibits multiple types of discrimination. Nothing in *CSD2* forecloses *Pike* balancing in this case, and that balance favors Plaintiffs.

IV. MEASURE E ENCUMBERS THE FREE FLOW OF COMMERCE WITHIN CALIFORNIA.

Kern does not dispute the burdens Measure E imposes on commerce within California. Instead, Kern invests a total of eight sentences and no authority to defend this separate claim, arguing that California's commerce protections are limited to discriminatory taxes and repeating that Measure E is not discriminatory. Neither argument is well founded.

California's commerce protections extend to all types of commerce by virtue of the California Supreme Court's express adoption of parallel state commerce protections to the federal doctrine. *City of Los Angeles v. Shell Oil Co.* (1971) 4 Cal.3d 108, 119 ("The basic policy underlying the commerce clause of the Federal Constitution – to preserve the free flow of commerce among the states to optimize economic benefits – is equally applicable to intercity commerce within the state."); Pls.' Br. 65:14-67:9. Numerous California courts have struck down or analyzed burdensome local laws based on these principles. *See* Pls.' Br 65:14-67:9. The federal Commerce Clause is not artificially limited to tax situations, and therefore neither are California's analogous protections. Kern cites no authority limiting California's commerce protections to the tax context, and none exists. In fact, California courts have applied these principles in non-tax settings. *See, e.g., Meridian Ltd. v. Sippy* (1924) 54 Cal.App.2d 214, 218 (city ordinance requiring local inspection of milk sold in city unconstitutionally established "prohibitive trade barrier"); *In re Robinson* (1924) 68

Cal.App.744, 751-52 (ordinance requiring licensure of out-of-city door-to-door salesmen but not salesmen employed by a business with brick-and-mortar locations within the city unconstitutional); *Ex parte Haskell* (1896) 112 Cal.412, 419 (license requirement for in- but not out-of-city residents would be unconstitutional).

Further, Plaintiffs have established Measure E's discrimination in intent and effect against out-of-state and out-of-county biosolids. As explained above, Kern's attempt to limit the definition of "discrimination" to ordinances that burden out-of-county interests to advance their identical local competitors is unsupported by the law. Even if one accepts Measure E as nondiscriminatory, the ban fails under other indicia for unlawful restraints on commerce that have been accepted in the federal context, and thus are also applicable here based on California's express adoption of federal commerce principles. *City of Los Angeles*, 4 Cal.3d at 119. As discussed above, Measure E's undue burdens on the California biosolids market are clearly excessive in relation to its purported local benefits. *Pike*, 397 U.S. at 142.

V. ALL PARTIES ARE ENTITLED TO A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF.

A. OCSD and CSD2 Proved an Ongoing Need for and Interest in Land Application in Kern County and Their Controversy with Kern Over Measure E Remains.

Kern argues that a ruling in favor of Plaintiffs OCSD and CSD2 would "have no practical impact" on OCSD or CSD2 as these entities have not land applied in Kern County since 2008 and 2012, respectively. But these two major Southern California biosolids generators proved at trial that overcoming Measure E's barrier to biosolids recycling is important for both agencies' management of biosolids going forward. Their claims obviously present an ongoing controversy that entitles them and all Plaintiffs (including the City and CASA) to full declaratory and injunctive relief. Kern's focus on OCSD and CSD2 also overlooks that all Plaintiffs jointly presented a facial challenge to the constitutionality of Measure E that seeks to invalidate Measure E in its entirety and warrants a permanent injunction, the relief granted by the district court against Measure E in 2007. "A successful challenge to the facial constitutionality of a law invalidates the law itself." *Foti v. City of Menlo Park* (9th Cir. 1998) 146 F.3d 629, 635.

To overcome a claim of mootness, a claim must simply present an existing controversy. *See Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453 (citing 1*Corpus Juris Secundum* § 17d). A party seeking a judicial declaration of rights must only "demonstrate the reality of his interest in a present adjudication." *See California Water & Telephone Company, v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 25. In *California Water & Telephone*, the court found that, despite not being in violation of an ordinance regulating water service, utility companies and an association to which they belonged had an interest in obtaining a declaration regarding the validity of the ordinance and that their interest was neither remote nor academic as the ordinance had a continuing effect upon the utility companies' business. *Id.* at 26.

Measure E's impacts on OCSD are significant and continuing. OCSD manager James Colston testified that Measure E's elimination of a low-cost management option has increased OCSD's biosolids management costs by approximately $700,000 per year. Trial Tr. vol. 2 (Colston), 73:25, 80:7, 118:12-119:12. Mr. Colston explained that OCSD stopped land applying in Kern County in part because of the uncertainty about the legality of Measure E, and also that OCSD would be interested in resuming land application in Kern County if Measure E is overturned. *Id.* at 55:12-13; 58:13; 80:8, 81:19.

Likewise, Plaintiff CSD2 also proved a keen interest in the adjudication of the constitutionality of Measure E. Kern acknowledges that Measure E prohibits the land application of derivatives of biosolids, including compost, within unincorporated portions of Kern County. Stips. 42, 43. CSD2 manager Michael Sullivan testified that the agency recently began operation of Tulare Lake, a large composting facility in Kings County that converts biosolids into compost. This compost could be sold by CSD2 for land application within Kern County without restriction if not for Measure E. CSD2 has a financial interest in having Measure E enjoined to reopen Kern farmland and landscaping sites to the use of composted biosolids. Trial Tr. vol. 2 (Sullivan), 127:4-128:7, 130:8-131:5. This obvious point is not "speculative," as Kern asserts, but a real and present interest entitling CSD2 to declaratory and injunctive relief.

None of Kern's cases supports its mootness argument because they involve discrete enforcement actions or permit approvals, not broad, facial constitutional challenges to a county-wide

ordinance. *See City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068 (controversy between city and marijuana dispensary moot because the injunction at issue had expired prior to the appeal and the dispensary operator had vacated the property); *M.T. Thome v. Honcut Dredging Co.* (1941) 43 Cal.App.2d 737, 741 (no injunction stopping mining activities merited because mining companies had "neither operated their mining enterprises *nor threatened to do so*" in some time) (emphasis added); *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939 (appeal challenging the approval of a proposed shopping center mooted because of developer's abandonment of the project, the city's rescission of resolutions approving the project, and the lack of other legal prerequisites). Here, unlike all of Kern's mootness cases, all Plaintiffs have a constant, growing need to recycle biosolids and a desire to do so in Kern County. There exists a very real and ongoing controversy between OCSD/CSD2 and Kern regarding the enforceability of Measure E.

The County further argues that because OCSD and CSD2 generate Class B biosolids which were banned under a previous ordinance, a ruling enjoining enforcement of Measure E would "have no practical impact" on OCSD or CSD2. This is incorrect; OCSD and CSD2 can convert Class B biosolids to Class A biosolids through lime-stabilization prior to land application, as they did onsite in Kern County until recently. Trial Tr. vol. 2 (Colston), 59:11-60:1.

B. OCSD and CSD2 Are Entitled to Injunctive Relief.

As a corollary to its mootness argument, Kern argues that OCSD and CSD2 have not presented evidence entitling them to injunctive relief. But OCSD and CSD2 have proven their entitlement to an injunction against the enforcement of Measure E by demonstrating their ongoing need to access Kern County farmland for recycling biosolids.

California courts have broad authority to enjoin unconstitutional laws. *See, e.g., Conover v. Hall* (1974) 11 Cal.3d 842, 850 ("provisions [of code regarding enjoining enforcement of statutes] do not apply to an unconstitutional or invalid statute or ordinance and … courts have full authority to enjoin the execution of such enactments"); *Ebel v. City of Garden Grove* (1981) 120 Cal.App.3d 399, 410 (injunction appropriate remedy for facially unconstitutional statute). Here, both because of the unconstitutionality of Measure E and because of their equitable need for relief, OCSD and CSD2

are entitled to an injunction. They have in the past and may in the future make use of Kern County farmland for land application of biosolids and compost containing biosolids.

Plaintiffs have jointly asserted four claims and jointly established facts necessary to prove each of these claims, entitling all Plaintiffs to a declaratory judgment and a permanent injunction enjoining the enforcement of Measure E. All of the experts for Plaintiffs testified on behalf of all Plaintiffs; expert Greg Kester also represented Plaintiff CASA, of which OCSD and CSD2 are members; and high-level managers from OCSD and CSD2 testified regarding specific burdens Measure E places on them. The evidence presented by Plaintiffs regarding the regional welfare, burdens on the biosolids market, and the proven safety of land application are common to all Plaintiffs.

Kern relies primarily on *San Leandro Rock Co. v. City of San Leandro* (1982) 136 Cal.App.3d 25, for the proposition that an injunction against an ordinance must be specific to the challenging plaintiff, and that the injunction cannot enjoin the ordinance generally. But *San Leandro Rock* was an "as applied" challenge to the ordinance, not a facial challenge. A facial challenge to the constitutionality of an ordinance does not consider the application of the ordinance "to the particular circumstances of an individual." *Tobe, et al, v. City of Santa Ana, et al.* (1995) 9 Cal.4th 1069, 1084. Here, all Plaintiffs have shown that they are entitled to an injunction on both facial and "as applied" grounds, including a preemption claim that will void Measure E. Simply stated, if Measure E is found to be unconstitutional, all plaintiffs are entitled to a permanent injunction enjoining the enforcement of Measure E. As the federal district court ordered in 2007, Measure E should be declared "null and void" and "permanently enjoined." *Los Angeles v. Kern*, Final Judgment (Sept. 4, 2007) (Tab H).

VI. CONCLUSION

The Court now has the advantage of a full evidentiary record testing Measure E against the federal and California constitutional safeguards that limit local police power. Kern County, armed with technical talent, discovery tools, and decades of experience with land application, largely conceded the safety and benefits of land application and could not make a case that the risk warranted this extraordinary voter initiative. Constitutional protections for preemption, regional

welfare, and free trade should be upheld against a biased and unsupported legislative act reflecting the whims of the voters on one day. Plaintiffs, representing many millions of rate payers for sewage services, request that a judgment and permanent injunction issue against Measure E on all counts.

DATED: September 15, 2016

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF TULARE:

I am employed in the County of Tulare, State of California. I am over the age of 18 and not a party to the within action. My business address is 108 West Center Avenue, Visalia, California 93291.

On September 15, 2016, I served the foregoing document described as PLAINTIFFS' REPLY BRIEF; and PLAINTIFFS' APPENDIX OF KEY EXHIBITS TO REPLY BRIEF via email and Federal Express over night mail, postage prepaid, on the following interested parties:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

DEBRAH E. SCOTT

SERVICE LIST

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[Tulare County Superior Court Case No. 242057]

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