In The

Supreme Court of the United States

CITY OF LOS ANGELES, *et al.*,

Petitioners,

v.

COUNTY OF KERN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that an in-state plaintiff lacks prudential standing under the "zone of interest" test to assert a dormant Commerce Clause challenge to a local ordinance that impedes the flow of commerce, contrary to the holdings of the First and Eighth Circuits.

PARTIES

Petitioners (Plaintiffs-Appellees before the Ninth Circuit):

City of Los Angeles

Orange County Sanitation District

County Sanitation District No. 2 of Los Angeles County

Responsible Biosolids Management, Inc.

R&G Fanucchi Farms, Inc.

Shaen Magan, individually and d/b/a Honey Bucket Farms and Tule Ranch/Magan Farms

Western Express, Inc.

Sierra Transport, Inc.

California Association of Sanitation Agencies

Respondents (Defendants-Appellants before the Ninth Circuit):

County of Kern

Kern County Board of Supervisors

Intervenors before the District Court:

Arvin-Edison Water Storage District

Association of Irritated Residents

Kern County Water Agency

Kern Water Bank Authority

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners Responsible Biosolids Management, Inc., R&G Fanucchi, Inc., Western Express, Inc., Sierra Transport, Inc., and California Association of Sanitation Agencies state that each has no parent corporation and that no publicly-held company owns 10% or more of any of their respective stock. The remaining Petitioners are either governmental or non-corporate parties.

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The opinion of the court of appeals (App., *infra*, 1-17) is reported at 581 F.3d 841.

The decision of the district court granting Petitioners' motion for summary judgment (App., *infra*, 18-101) is reported at 509 F. Supp. 2d 865. The order of the district court granting a permanent injunction against Respondents (App., *infra*, 102-04) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on September 9, 2009. A petition for rehearing was denied on December 15, 2009. (App., *infra*, 107-08.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, the relevant provisions of the Federal Clean Water Act governing the use or disposal of sewage sludge, 33 U.S.C. § 1345, and the introduction to the Environmental Protection Agency regulations applicable to the final use or disposal of sewage sludge, 40 C.F.R. § 503.1, are set forth in the Appendix. (App., *infra*, 109, 112-21.)

The district court had jurisdiction over Appellees' federal claims under 28 U.S.C. §§ 1331, 1337, 1343 and 2201, and over their state-law claims under 28 U.S.C. § 1367. (App., *infra*, 109-12.)

STATEMENT OF THE CASE

I. Facts of the Underlying Litigation

Petitioners are public and private entities and individuals from throughout California – including the largest city in the state, private contractors, and farmers – that run some of the most successful recycling programs in the United States today. Petitioners City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles County collect and treat wastewater from more than 10 million residents of Southern California, process the sewage to generate a product – "biosolids" – and then recycle the biosolids to farmland. The biosolids are used as fertilizer to grow crops for animal feed at three farming sites in Kern County, California, and at sites in Arizona. Biosolids replace chemical fertilizers and improve soil quality.

Biosolids are the product of sewage sludge after it has been treated pursuant to Environmental Protection Agency ("EPA") regulations. 509 F. Supp. 2d at 870-71 (App., *infra*, 23-24) (district court findings of undisputed fact). They are nutrient-rich organic

matter and make excellent fertilizer and soil conditioner. (Bahr Decl.[1] ¶ 10, App., *infra*, 136-37.) "Land application," that is, recycling biosolids as agricultural fertilizer, is one of the principal ways of managing sewage sludge in the United States. *See* 509 F. Supp. 2d at 870-71 (App., *infra*, 23) (district court findings of undisputed fact). In 2003, EPA estimated that approximately 60% of sewage sludge nationwide was recycled and applied to farmland. *Id.* at 871 (App., *infra*, 23). EPA promotes land application of biosolids as a safe and beneficial way of recycling sewage wastewater. *Id.* at 871-72 (App., *infra*, 25). Decades of experience with land application and research by EPA and the scientific community, including two reviews by committees of the National Academy of Sciences, have uncovered no evidence that land application of biosolids is unsafe. *Id.* (App., *infra*, 25-28).[2]

California produces approximately 750,000 dry tons of biosolids per year, and disposes of 69% of it through options involving land application. (Bahr

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[1] The declaration of Larry Bahr (App., *infra*, 131-47 (exhibit omitted)), an expert on regional biosolids management in California, was submitted by Petitioners in support of their Motion for a Preliminary Injunction, which the district court granted, *City of L.A. v. County of Kern*, 462 F. Supp. 2d 1105 (C.D. Cal. 2006).

[2] Indeed, the National Association of Clean Water Agencies and the Water Environment Federation submitted amicus briefs to the Ninth Circuit in support of Petitioners, explaining that the land application of biosolids is stringently regulated, scientifically sound, and poses negligible health risks to surrounding communities.

Decl. ¶¶ 18-19, App., *infra*, 141-42.) As the district court found, biosolids management is a "constant, non-discretionary governmental function." 509 F. Supp. 2d at 871 (App., *infra*, 25). Landfill sites in California are scarce, and more than 20% of California's biosolids are currently managed out-of-state. (Bahr Decl. ¶ 25, App., *infra*, 144.) Petitioner Orange County Sanitation District already ships some of its biosolids to Arizona. (Ghirelli Decl.[3] ¶ 6, ER 177.)

Since 1994, Petitioners have successfully land applied biosolids at Green Acres Farm, Honey Bucket Farms, and Tule Ranch, encompassing over 8,000 acres of farmland in the unincorporated area of Kern County.[4] 509 F. Supp. 2d at 873-75 (App., *infra*, 28-34) (district court findings of undisputed fact); (Bahr Decl. ¶ 24, App., *infra*, 143-44). The County acreage provides biosolids management for approximately one-third of California's biosolids. (Bahr Decl. ¶ 24, App., *infra*, 143-44.) Petitioner City of Los Angeles invested approximately $28 million to buy and improve the Green Acres site, and currently employs a full-time staff of farmers, contractors, employees, and engineers who oversee and implement the transportation,

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[3] The declaration of Robert P. Ghirelli (ER 175-179), a manager of Petitioner Orange County Sanitation District, was submitted by Petitioners in support of their Motion for a Preliminary Injunction.

[4] For ease of reference, the political entity (including its Board of Supervisors) will henceforth be referred to as "Kern," and the geographical area as "the County."

land application, and farming operations. (Minamide Decl. ¶¶ 7, 23, ER 122, 128.)[5] The City has committed to beneficially reuse 100% of its biosolids through land application, and has ceased to dispose of biosolids in landfills, which is not a beneficial use. (*Id.* ¶ 19, ER 126.)

Kern itself ships its biosolids to a local composting company, for sale to private firms outside the County. 509 F. Supp. 2d at 875 (App., *infra*, 35) (district court findings of undisputed fact). Moreover, local cities within the County – including the City of Bakersfield, with a population of over 300,000 – apply biosolids on land in their incorporated areas. *Id.* at 876 (App., *infra*, 36).

In 2006, a state senator sponsored the "Keep Kern Clean Ordinance" ("Measure E"), which bans the land application of biosolids in the unincorporated areas of the County. *See id.* at 876-77 (App., *infra*, 37-39). The initiative campaign made clear that Measure E targeted out-of-county biosolids producers. *Id.* Exhorted by anti-Los Angeles slogans such as "Measure E will stop L.A. from dumping on Kern," and "we've got a bully next door, flinging garbage over his fence into our yard," County voters passed Measure E. *Id.* Violation of Measure E is a misdemeanor punishable

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[5] The declaration of Traci J. Minamide, P.E., assistant director of the Los Angeles Bureau of Sanitation, was submitted by Petitioners in support of their Motion for a Preliminary Injunction. It can be found in Appellants' Excerpts of Record submitted to the Ninth Circuit ("ER") at ER 120-137.

by a fine of not more than $500 or imprisonment for not more than six months. *Id.* (*See* Measure E, App., *infra*, 122-29.)

Petitioners are the only entities affected by Measure E. On its face, Measure E applies to both in-county and out-of-county waste generators (*see* Measure E, App., *infra*, 122-29), but in practice, in-county biosolids generators such as Bakersfield, the largest city in the County, are located in the *in*corporated areas of the county and therefore may continue to apply biosolids on their land. 509 F. Supp. 2d at 885-86 (App., *infra*, 60-62). Kern itself may also continue to ship its biosolids outside the county to a composting company. *Id.* (App., *infra*, 60). Thus, as the district court found, Measure E affects only, and discriminates against, out-of-county interests.

Measure E's enforcement would compel Petitioners to divert thousands of tons of biosolids weekly from their long-operating recycling operations in California to Arizona and elsewhere, significantly increasing costs to them (and therefore to ratepayers) and pollution from long-distance transportation. (Bahr Decl. ¶¶ 24-25, 27-28, App., *infra*, 143-46; Minamide Decl. ¶¶ 33-37, 41-42, ER 131-32, 134-35.) If Measure E is enforced, annual costs to Petitioners will likely increase by two-thirds, if not more. (Minamide Decl. ¶ 33, ER 131.) Air emissions caused by Petitioners' shipping of biosolids will more than double. (*Id.* ¶ 46, ER 136.)

II. The District Court Litigation

Facing the imminent shutdown of their biosolids programs, Petitioners sued Kern in the Central District of California, alleging that Measure E violates the dormant Commerce Clause and the Equal Protection Clause, is preempted by federal and state laws, and constitutes an invalid exercise of Kern's police power. The district court had jurisdiction over Appellees' federal claims under 28 U.S.C. §§ 1331, 1337, 1343 and 2201, and their state-law claims under 28 U.S.C. § 1367. (*See* App., *infra*, 109-12.)

The district court dismissed Petitioners' preemption claims under the Clean Water Act and the California Water Code, *City of L.A. v. County of Kern*, No. CV 06 5094, 2006 WL 3073172 (C.D. Cal. Oct. 24, 2006), but granted Petitioners' request for a preliminary injunction halting enforcement of Measure E, *City of L.A. v. County of Kern*, 462 F. Supp. 2d 1105 (C.D. Cal. 2006).

Kern then moved for summary judgment on all claims; Petitioners filed a cross-motion for summary judgment on their state law preemption claim and, in their opposition to Kern's summary judgment motion, asked the district court to enter summary judgment in their favor on the Commerce Clause and police power claims.

II. Disposition in the District Court

The district court concluded that Measure E discriminated against interstate commerce in effect. *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 881-88 (C.D. Cal. 2007) (App., *infra*, 50-65). The court found that "the campaign attacks on 'Los Angeles sludge' . . . graphically expose Measure E's objective of removing Plaintiffs' operations from the County. . . . But at the same time that Measure E is forcing [Petitioners] out of Kern County, it allows in-county sludge producers to continue disposing of their biosolids locally." *Id.* at 870 (App., *infra*, 21).

The court therefore applied strict scrutiny and, finding that Kern had non-discriminatory alternatives to regulate land application, granted summary judgment in favor of Petitioners. *Id.* at 887-88 (App., *infra*, 64-65). The court noted that "the record reflects that nearly 61% of Kern County's registered voters live in incorporated areas of the County. This means that over three-fifths of the decision-makers tolerate local disposition of locally generated biosolids, but have prevented out-of-county recyclers from engaging in precisely the same activity. . . ." *Id.* at 886 (App., *infra*, 61).

The court also separately held that Measure E was preempted by the California Integrated Waste Management Act. *Id.* at 890-98 (App., *infra*, 65-89). The court entered judgment pursuant to Federal Rule of Civil Procedure 54(b) and issued a permanent

injunction restraining the enforcement of Measure E on September 5, 2007. (App., *infra*, 102-04.)

IV. Opinion of the Ninth Circuit

On appeal, the Ninth Circuit panel held that the district court should not have reached the merits of Petitioners' dormant Commerce Clause claim because Petitioners lacked prudential standing to sue under the dormant Commerce Clause. *City of Los Angeles v. County of Kern*, 581 F.3d 841 (9th Cir. 2009) (App., *infra*, 1-17). In the district court, Kern did not challenge the Petitioners' standing and in the court of appeals Kern initially took the position that it had waived the issue. The panel decided to reach prudential standing *sua sponte*. *Id.* at 845-46 (App., *infra*, 8-11).

In the Ninth Circuit's view, "[t]he interest the recyclers seek to secure is their ability to exploit a portion of the *intra*state waste market – they want to be able to ship their waste from one portion of California to another." *Id.* at 847 (App., *infra*, 14). The Ninth Circuit held that transporting biosolids from one part of California to another "in no way burdens the recyclers' protected interest in the interstate waste market," and thus Petitioners fell outside the "zone of interests protected by the [dormant Commerce] clause." *Id.* at 848 (App., *infra*, 14). The court "decline[d] to expand the zone of interest protected by the [dormant Commerce] Clause to purely intrastate disputes." *Id.*

V. What Is at Stake in This Case

This case concerns the biosolids generated by over 10 million people and whether those biosolids will continue to be recycled on farms in Southern California, or whether a discriminatory local voter initiative may upend this long-standing practice, immune from Constitutional review. Petitioners have spent tens of millions of dollars of public moneys to purchase, develop, and upgrade the farmland, wastewater facilities, and trucking infrastructure necessary for their biosolids recycling programs. (*See, e.g.*, Minamide Decl. ¶ 31, ER 130.) This public investment is at risk, as well as the millions of dollars of future costs entailed by forced closing of the farms.

Kern's ban, if upheld, likely will encourage other rural counties to enact similar bans or onerous restrictions. Such bans will likely in turn lead to retaliatory measures from out-of-county interests. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.") Measure E's discriminatory "Not In My Back Yard" intent is precisely the type of protectionist behavior that this Court's dormant Commerce Clause jurisprudence seeks to prevent. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (dormant Commerce Clause protects against local efforts to "shift[ ] the

costs of regulation" to outside interests with no say in the local political process and to sidestep "those political restraints normally exerted when interests within the state are affected").

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this case directly conflicts with decisions of the First and Eighth Circuits, and with this Court's precedents defining the scope of the Commerce Clause. Moreover, the question presented is both important and recurring. Accordingly, the Court should grant this petition.

First, review is warranted because the Ninth Circuit's decision directly conflicts with the decisions of the First and Eighth Circuits. *See Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 183 (1st Cir. 1999); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1379 (8th Cir. 1997). Both *Houlton Citizens' Coalition* and *Ben Oehrleins* expressly hold that an in-state plaintiff conducting only in-state economic activity has prudential standing to assert a dormant Commerce Clause challenge to a local ordinance. That is, both of those Circuits have adopted an understanding of the zone of interest protected by the dormant Commerce Clause that is directly at odds with the holding of the Ninth Circuit below. Indeed, the Ninth Circuit panel expressly acknowledged the split with the Eighth Circuit. 581

F.3d at 849 n.8 (App., *infra*, 16) ("we decline to follow" *Ben Oehrleins*).

Second, the decision below conflicts with this Court's decisions defining the scope of the Commerce Clause and the interests it was designed to protect. This Court's cases make clear that the transport of biosolids from one part of California to another and their recycling pursuant to EPA regulations substantially affects interstate commerce and therefore falls within the purview of the dormant Commerce Clause. The decision below conflicts with this Court's holding that "a State (*or one of its political subdivisions*) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce *through subdivisions of the State*, rather than through the State itself." *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 361 (1992) (emphasis added).

This Court's case law "firmly establishes Congress' power to regulate *purely local activities* that are part of an economic 'class of activities' that *have a substantial effect* on interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005) (emphasis added). The dormant Commerce Clause reaches just as far, for "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572-74 (1997) (quoting and applying *Hughes*).

Under modern Commerce Clause jurisprudence, Congress may regulate the transport and use of products such as biosolids within a state. Indeed, Congress routinely regulates in-state economic activity – such as by banning race and gender discrimination, regulating employee welfare benefit plans, and prescribing minimum wages and environmental protections – for businesses that operate solely in-state, on the theory that this economic activity substantially affects interstate commerce. The Ninth Circuit's holding that the large-scale shipment and recycling of biosolids within California – and the economic consequences on interstate markets and pricing from relocating that shipment and farming activity to Arizona – do not even implicate the zone of interests protected by the dormant Commerce Clause is flatly contrary to this Court's precedent.

Third, the standing question presented in this case is important and recurring, and the Ninth Circuit's decision will have significant deleterious effects. The decision below effectively shields from any judicial review state and local laws that violate the dormant Commerce Clause whenever the effects of those protectionist laws fall principally on in-state actors, and even where, as here, the law interferes with important federal economic and environmental policies and overturns long-standing expectations and tens of millions of dollars in long-term investments by public and private entities.

Review by this Court is needed to resolve the irreconcilable conflict among the courts of appeals over

who has prudential standing to enforce the requirements of the Commerce Clause and to ensure that the Clause is not violated at will by localities seeking to advance parochial interests that impede the flow of commerce.

For these reasons, the Court should grant this petition for certiorari.

I. The Ninth Circuit's Decision Directly Conflicts with Decisions of the First and Eighth Circuits

The Ninth Circuit below adopted an interpretation of the dormant Commerce Clause that directly conflicts with the holdings of two other federal Circuits. Both the First Circuit in *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999), and the Eighth Circuit in *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), have held that an in-state plaintiff conducting only in-state economic activity has prudential standing to assert a dormant Commerce Clause challenge to a local ordinance. The Ninth Circuit in this case acknowledged that its decision conflicted with *Ben Oehrleins*, *see* 581 F.3d at 849 n.8 (App., *infra*, 16) ("we decline to follow" *Ben Oehrleins*), but did not acknowledge the split with *Houlton Citizens' Coalition*.[6]

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[6] Plaintiffs cited *Houlton Citizens' Coalition* to the Ninth Circuit in their supplemental brief on prudential standing. *See*

(Continued on following page)

In *Ben Oehrleins*, in-state haulers and processors challenged a local ordinance that required waste designated for in-state disposal to pass through designated facilities. The Eighth Circuit analyzed whether the plaintiffs had Article III standing and prudential standing. The court explained that "[e]ven if a plaintiff meets the minimum constitutional requirements for standing, there are prudential limits on a court's exercise of jurisdiction." 115 F.3d at 1378. One such prudential limit is that "plaintiffs alleging a violation of a constitutional or statutory right must demonstrate that they are within the zone of interests of the particular provision invoked," *id.* at 1379 (citation and quotation marks omitted) – the same zone of interests test the Ninth Circuit applied in this case, *see* 581 F.3d at 846 (App., *infra*, 11). "To satisfy this prudential requirement, a plaintiff must show that 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Ben Oerhleins*, 115 F.3d at 1379 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

The Eighth Circuit found there was "no question" that the "various waste haulers and processors[] have standing." *Id.* The ordinance in question "prohibits haulers from delivering designated waste to

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Appellees' Supplemental Brief, filed March 30, 2009, at 12-13 (App., *infra*, 167).

non-designated facilities," and "[h]aulers who violate the Ordinance are subject to a wide variety of sanctions." *Id.* "Furthermore, the Ordinance harms processors such as the landfill plaintiffs who wish to participate in the market for Hennepin County waste by prohibiting access to that waste." *Id.* The court accordingly held that the haulers and processors had Article III standing, and "we see no prudential barriers to standing" either. *Id.*

The Ninth Circuit panel acknowledged that in *Ben Oehrleins*, "the Eighth Circuit found that in-state haulers and processors had standing to challenge a local ordinance that required waste designated for in-state disposal to pass through designated facilities." 581 F.3d at 849 n.8 (App., *infra*, 16). The Ninth Circuit asserted, however, that "[t]hat decision was made in a single, conclusory sentence, which we decline to follow." *Id.* But its dismissive view is not a fair characterization of *Ben Oehrleins*. The Eighth Circuit discussed Article III and prudential standing together for the hauler and processor plaintiffs in a four-paragraph discussion, not in a single, conclusory sentence. *See* 115 F.3d at 1378-79.

Moreover, the First Circuit found *Ben Oehrleins* persuasive and followed it in a decision that is equally, if not more, sharply in conflict with the Ninth Circuit's decision here. In *Houlton Citizens' Coalition*, the plaintiffs challenged a 1997 local ordinance that required all generators of residential rubbish within the Town of Houlton "either to use Houlton's chosen

contractor to transport their trash, or to haul it themselves." 175 F.3d at 181. The First Circuit held that it could reach the merits of the dormant Commerce Clause challenge to the ordinance, because one of the plaintiffs in that case – Faulkner, a "local trash hauler[ ]," *id.* at 182 – had prudential standing, *id.* at 183.

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

The Ninth Circuit's holding in this case directly conflicts with the First Circuit's decision in *Houlton Citizens' Coalition*. The Ninth Circuit held that Petitioners here lack prudential standing to assert a dormant Commerce Clause claim because they transport goods only within one state – but the First Circuit held that very fact to be immaterial to prudential standing under the dormant Commerce Clause. 175 F.3d at 183.

II. The Ninth Circuit's Decision Conflicts with This Court's Precedent

The Ninth Circuit's holding that the shipment of biosolids "from one portion of California to another" does not "burden[ ] the recyclers' protected interest in the interstate waste market," 581 F.3d at 847-48 (App., *infra*, 14), conflicts with this Court's precedent and unduly restricts the application of the Commerce Clause. The shipment of biosolids from one location to another in California occurs in interstate commerce. That is why, for example, trucking companies have to comply with federal minimum wage and overtime laws and environmental regulations – even if the companies' trucks do not cross a state border. For more than a century, this Court has identified three general categories in which Congress is authorized to engage under its commerce power. *Gonzalez v. Raich*, 545 U.S. 1, 16 (2005). "First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce." *Id.* at 16-17 (citations omitted).

This Court repeatedly has held that a local law which impermissibly regulates interstate commerce is not saved by the fact that it also discriminates against certain in-state actors. *See C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4

(1951); *Brimmer v. Rebman*, 138 U.S. 78 (1891). In *Brimmer*, the Court struck down a Virginia state law criminalizing the sale in Virginia of meat that had traveled more than 100 miles from the place of slaughter unless the seller paid a heavy charge for a local inspection of the meat. The Court noted:

> Nor can this statute be brought into harmony with the constitution by the circumstance that it purports to apply alike to the citizens of all the states, including Virginia; for a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such a statute.

Id. at 82-83; *see C & A Carbone*, 511 U.S. at 391 ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."). In other words, the law impermissibly sought to regulate interstate commerce and was therefore unconstitutional, even though it discriminated against some Virginia meat producers as well as out-of-state meat producers. Under the Ninth Circuit's decision here, by contrast, a Virginia meat producer would have to face the criminal sanction imposed by the facially unconstitutional statute, even though an Illinois producer engaging in exactly the same commercial activity and inhibited by exactly the same law would be protected by the dormant Commerce Clause. This cannot be the correct outcome.

Moreover, this Court's case law "firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17 (citations omitted). The Court applied the substantial effects test in *Wickard v. Filburn*, in which it upheld the application of the Agricultural Adjustment Act of 1938 "to production not intended in any part for commerce but wholly for consumption on [respondent's] farm." 317 U.S. 111, 118 (1942). "In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions." *Raich*, 545 U.S. at 19. Likewise, in *Raich*, the Court upheld a federal prohibition on the local cultivation and use of marijuana in California on the theory that "leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Id.* Accordingly, it is well established that intrastate conduct that substantially affects interstate commerce comes within the scope of the interstate Commerce Clause.

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

or regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979).

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

This Court disagreed. It stated that "[s]ummer camps are comparable to hotels that offer their guests goods and services that are consumed locally." *Id.* at 573. Previously, in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), the Court had upheld federal regulation of local hotels on the ground "that commerce was substantially affected by private race discrimination that limited access to the hotel and thereby impeded interstate commerce in the form of travel." *Camps Newfound/Owatonna*, 520 U.S. at 573. Accordingly, the Court explained that "[a]lthough *Heart of Atlanta* involved Congress' *affirmative* Commerce Clause powers," the reasoning of that case applied equally to a dormant Commerce Clause claim. 520 U.S. at 574 (emphasis added).

Here, the undisputed evidence shows that Petitioners' conduct in transporting and farming with biosolids within California as part of wastewater management and pollution control, and the effect of Measure E on those activities, substantially affects interstate commerce. For example, Petitioners submitted the Declaration of Larry Bahr, an expert on regional biosolids management in California, on behalf of Petitioner California Association of Sanitation Agencies ("CASA").[7] (*See* App., *infra*, 130-47.) Mr. Bahr's declaration explains at length the economic impact that Kern's Measure E would have on regional markets given the scarcity of landfills that will take biosolids. For example, Measure E would result in "higher landfill 'tipping fees' to accept biosolids and possibly longer hauling distances." (Bahr Decl. ¶ 22, App., *infra*, 143.) His declaration also describes the "out-of-state impacts" caused by Measure E "as more California agencies look to Arizona and other locations for alternatives for reuse and disposal," noting that "this will increase biosolids management costs for sanitation agencies and their ratepayers," as well as "cause collateral environmental impacts such as air emissions." (*Id.* ¶ 25, App., *infra*, 144.) These effects on regional pricing are the same type of substantial effect on interstate

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[7] *See supra* n.1. Petitioner CASA has 119 public agency members that expend tens of millions of dollars annually to recycle 84% of the biosolids generated in their communities for beneficial uses.

commerce that this Court found in *Wickard*, *Raich*, *Brimmer*, and *C & A Carbone* to implicate interstate commerce.

The Ninth Circuit's response to this was to hold that even if all of that is true, Petitioners in *this* case do not have standing because *their* interests do not implicate interstate commerce: "The interest the recyclers seek to secure is their ability to exploit a portion of the *intra*state waste market – they want to be able to ship their waste from one portion of California to another." 581 F.3d at 847 (App., *infra*, 14). But the Ninth Circuit's view that shipping biosolids from one part of California to another and the related recycling work does not occur in interstate commerce conflicts with the long-standing and well established judicial interpretation of the Commerce Clause. *Brimmer*, *Dean Milk Co.*, and *C & A Carbone* all held that a local attempt to regulate interstate commerce is not made constitutional by the fact that it also discriminates against in-state actors. *Wickard* and *Raich* held that intrastate conduct that substantially affects interstate commerce falls within the scope of the Commerce Clause. And *Hughes* and *Camps Newfound/Owatonna* held that the dormant Commerce Clause is just as broad as the affirmative Commerce Clause. (Indeed, they are the same clause. *See* U.S. Const., art. I, § 8, cl. 3 (App., *infra*, 109).)

In fact, the Ninth Circuit's holding that the intrastate shipment of biosolids does not occur in interstate commerce is similar to the *rejected* argument in *Camps Newfound/Owatonna* that a summer

camp that operated entirely in Maine could not raise a dormant Commerce Clause claim. Nor does the Ninth Circuit's holding address this Court's repeated admonitions that restrictions on interstate commerce erected by political subdivisions of states are equally subject to dormant Commerce Clause scrutiny. *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 359 (1992) ("[P]olitical subdivisions [] may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through the subdivisions of the State, rather than through the State itself."); *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 650 (1994) ("[D]iscrimination is appropriately assessed with reference to the specific subdivision in which applicable laws reveal differential treatment.").

Further, the Ninth Circuit's holding that "[t]he interest the recyclers seek to secure, . . . to ship their waste from one portion of California to another" is outside interstate commerce, 581 F.3d at 847 (App., *infra*, 14), is illogical. Presumably, Petitioners must comply with federal minimum wage laws and other federal employment regulations when they employ truck drivers to transport biosolids within California. Since the drivers and the biosolids travel in the same truck, it is difficult to understand how one of them is traveling in interstate commerce while the other is not.

Indeed, the Ninth Circuit's view that only the "*intra*state waste market" is at issue in this case, *id.*, conflicts with the fact that Petitioners' land application of biosolids in the County is subject to EPA's

Part 503 regulations establishing national standards for land application, *see* 40 C.F.R. § 503.1 (App., *infra*, 120-21). EPA promulgated those regulations pursuant to the federal Clean Water Act, *see* 33 U.S.C. § 1345 (App., *infra*, 112-20), which was enacted pursuant to the interstate Commerce Clause, *see Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001). If Petitioners' land application programs do not implicate interstate commerce, how can EPA regulate local land application at all?

Congress, in enacting § 1345 of the Clean Water Act, recognized that the nation's wastewater infrastructure – including the beneficial use of sewage sludge through land application – is a vital part of the national economy. Furthermore, farming with biosolids, both to meet wastewater treatment needs and to grow crops for sale into the interstate (and here, international) markets plainly satisfies the tests for interstate commerce set in *Wickard* and *Raich*. Even more so for a prudential standing test, which this Court said "is not meant to be especially demanding," the interests of at least one of the eleven Petitioners (including a trade association representing 119 wastewater agencies statewide) in the transport and use of biosolids are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396, 399 (1987). Like the stock exchanges found to have prudential standing to mount a Commerce Clause challenge to a

discriminatory state tax in *Boston Stock Exchange v. State Tax Commission*, the eleven diverse Petitioners here are "asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory [barriers to] their business and they allege that the [barrier] indirectly infringes on that right. Thus, they are 'arguably within the zone of interest to be protected . . . by the . . . constitutional guarantee in question.'" 429 U.S. 318, 320 n.3 (1977) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp.*, 397 U.S. 150, 153 (1970)).

The transport of biosolids from one location in California to another and their recycling pursuant to federal regulations constitute interstate commerce. The Ninth Circuit's holding to the contrary conflicts with this Court's established precedent. This Court should issue the writ of certiorari to correct this error.

III. The Standing Question Presented in This Case Is Important and Recurring

The Ninth Circuit's opinion has a significant impact on the scope of the dormant Commerce Clause. The decision below holds that local laws seeking to advance parochial interests are effectively immune from review under the dormant Commerce Clause as long as they primarily burden in-state actors. In large states such as California, Texas, or Florida, an enormous amount of economic activity does not cross a state border. If all of this economic activity is outside the dormant Commerce Clause, any given state's

cities and counties are now free to launch trade wars against each other – precisely the sort of conduct that a protectionist ordinance such as Measure E invites. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.").

This case illustrates the dangers of shielding local ordinances from dormant Commerce Clause scrutiny where the burden falls primarily on in-state actors. Here, the ordinance at issue interferes with important federal economic and environmental policies, and overturns long-standing expectations and tens of millions of dollars in long-term investments by public and private entities. EPA began actively promoting the recycling of biosolids more than 30 years ago, after the United States Congress banned ocean disposal of biosolids. (Bahr Decl. ¶ 14, App., *infra*, 139. *see* 509 F. Supp. 2d at 871, App., *infra*, 25 (district court findings of undisputed fact).) By 2003, approximately 60% of sewage sludge nationwide was treated and applied to farmland. *Id.* (App., *infra*, 23). As the district court found, the collection and treatment of wastewater "is a constant, non-discretionary governmental function. In other words, government agencies cannot decide to stop producing biosolids and instead must find ways to manage those that are produced." *Id.* (App. *infra*, 25). Many of America's

largest cities – including Chicago, Denver, Philadelphia, Seattle, Charlotte, New York City, and many others – depend on land application of biosolids and need access to the federal courts when rural counties target their biosolids with discriminatory restrictions.[8]

California wastewater agencies manage approximately 750,000 dry tons of biosolids per year, and, consistent with EPA's policy and regulations, dispose of more than 500,000 tons of that via options involving land application. (Bahr Decl. ¶¶ 18-19, App., *infra*, 141-42.) The City of Los Angeles generates 700 tons of biosolids a day, and is committed to recycling all of it via land application. (Minamide Decl. ¶ 31, ER 130.) Orange County Sanitation District generates approximately 680 tons of biosolids a day, and recycles 60% of it through land application. (Ghirelli Decl. ¶ 6, ER 177.) At this time, approximately one-third of all the biosolids generated in California are recycled through the facilities in the County, which Respondents now seek to close. (Bahr Decl. ¶ 24, App., *infra*, 143-44.)

Petitioners have spent tens of millions of dollars on long-term contracts and improvements in the County. Since 1994, Petitioner City of Los Angeles

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[8] *See generally* amicus brief submitted to the Ninth Circuit by the National Association of Clean Water Agencies (explaining widespread and critical role of land application in biosolids management nationwide).

has focused on building a long-term land application program at Green Acres; the City bought the site outright in 1999 for nearly $10 million, and spent a further $3 million constructing permanent improvements on it. (Minamide Decl. ¶¶ 22, 31, ER 127-28, 130; *see id.* ¶ 43, ER 135 ("The only reason the City purchased Green Acres was to land apply responsibly and farm with biosolids, and there is no indication that the Farm will be economically viable without the use of biosolids.").) When Kern passed an ordinance in 1999 regulating the quality of biosolids applied in the County, the City in good faith spent more than $15 million upgrading its wastewater treatment facilities to comply with Kern's requirements. (*Id.* ¶ 21-22, ER 127-28.)

Banning land application of biosolids in the County and forcing Petitioners to move their long-standing programs elsewhere will impose enormous costs on the governmental Petitioners, and therefore on their ratepayers. For example, enforcement of Measure E will increase costs to the City of Los Angeles by at least two-thirds, if not significantly more, a difference of more than $4 million a year. (*Id.* ¶¶ 33-37, ER 131-32.) Such a major change in Petitioners' biosolids program will also incur enormous administrative costs over several years of planning. (*E.g.*, *id.* ¶¶ 42-44, ER 134-35.)

Enforcement of Measure E also will significantly increase air pollution in Southern California. Currently, the Green Acres site alone receives and processes approximately 26 tractor trailer loads of

biosolids per day. 509 F. Supp. 2d at 873 (App., *infra*, 29) (district court findings of undisputed fact). Enforcement of Measure E will force Petitioners to ship their biosolids to sites as far as 350 miles away. (Minamide Decl. ¶ 34, ER 131.) This change will more than double the air pollution produced by Petitioners' recycling programs. (*Id.* ¶ 46, ER 136.)

Kern is a leading agricultural county. Its ban, if upheld, will likely encourage other counties to enact similar bans or onerous restrictions on biosolids land application, compelling wastewater agencies to compete further for the dwindling land application sites, and ultimately forcing more and more of California's biosolids to be shipped out of state. (*See* Bahr Decl. ¶ 27, App., *infra*, 145.) As the district court opinion pointed out, there are "no 'Friends of Sludge' to mount opposition" to such initiatives. 509 F. Supp. 2d at 869 (App., *infra*, 19). Measure E will severely destabilize biosolids management in California, and its ripple effects will only cause more irreparable harm to a vital, multi-million dollar market.

These harmful economic and environmental effects are the logical result of shielding local ordinances from dormant Commerce Clause scrutiny where in-state actors are the targeted parties. The Ninth Circuit's decision unleashes every municipality to engage in openly discriminatory trade wars against other municipalities in the same state, which undoubtedly will have a significant effect on interstate commerce. The Ninth Circuit's decision is contrary to those of the First and Eighth Circuits, is in sharp

conflict with this Court's precedents, and presents recurring problems that warrant this Court's review.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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