No. 09-1111

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

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondents' Opposition mischaracterizes the question presented as whether "Petitioners' interests in *not* engaging in interstate commerce or avoiding the incremental cost of engaging in such commerce come within the 'zone of interests' protected by the Commerce Clause." (Opp. at i; *see also* Opp. at 12, 17-18.) The question actually presented is whether Petitioners lack prudential standing to challenge a local ordinance that denies them access to a local market merely because Petitioners are in the same state as Respondents. The district court has already held that Measure E impermissibly burdens interstate commerce in violation of the Commerce Clause,[1] and the Ninth Circuit did not disagree. Rather, the Ninth Circuit held that even assuming the unconstitutionality of Measure E, Petitioners lack

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[1] The district court explained that "the record reflects that disposal sites for biosolids are relatively scarce . . . and that elimination of the sites in Kern County will likely lead to diversion of the material to Arizona." Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 52. The district court concluded:

> [T]he record compels only one conclusion: Measure E's drafters and proponents, though perhaps genuinely motivated by concern about the environmental impact of biosolids, reacted to this problem by banning land application in areas used by out-of-county entities, while tolerating it in areas used by in-county entities. This resulting disparity was not merely an incidental effect – rather, it was certainly intended, as evidenced by a campaign with the theme of independence from Southern California bullies. (Pet. App. at 59.)

prudential standing to assert the constitutional challenge because the transport of biosolids from one part of California to another falls outside the "zone of interests" protected by the dormant Commerce Clause. On this point, the Courts of Appeals are split. The Ninth Circuit's decision conflicts with decisions of both the First and Eighth Circuits, as well as with this Court's precedents. Respondents' arguments to the contrary mischaracterize the holdings of the First and Eighth Circuits, and disregard the breadth of this Court's Commerce Clause jurisprudence.[2]

I. The Courts of Appeals Are Split on the Question Presented by the Petition

The First and Eighth Circuits have expressly held that an in-state plaintiff has prudential standing to challenge a discriminatory local measure, *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), and the Ninth Circuit in the opinion below expressly

[2] Respondents devote the first six pages of their Opposition to a selective discussion of evidence in the record below. In the interest of space, Petitioners briefly respond with two observations. First, the district court thoroughly addressed all the evidence in this case in two lengthy published opinions (*see* Pet. App. at 18-101). The court found that extensive research by the EPA and the scientific community has uncovered no evidence that land application of biosolids is unsafe. (*Id.* at 25-28.) Second, Respondents' six-page discussion has nothing to do with prudential standing, the issue raised by this Petition.

disagreed with the Eighth Circuit's holding, 581 F.3d 841, 849 n.8 (9th Cir. 2009) (Pet. App. at 16 n.8) ("[W]e decline to follow" *Ben Oehrleins.*). Thus, despite Respondents' circumlocutions (Opp. at 14-17), there is no question that there is a circuit split on this issue.

Respondents' efforts to distinguish *Houlton* and thus downplay the split with the First Circuit (Opp. at 16-17) are unavailing. The First Circuit squarely held that an in-state garbage hauler who had never alleged "that he hauled garbage out-of-state or planned to do so" nonetheless had standing to bring a dormant Commerce Clause challenge to a discriminatory local ordinance. 175 F.3d at 183. The decision is therefore directly on point. Respondents' assertion that "[n]o Court of Appeals . . . has ever held that the desire to reap the benefits of *intrastate* commerce . . . comes within the zone of interests protected by the Commerce Clause" (Opp. at 12 (quotation marks omitted)) is incorrect.

Moreover, in their haste to distinguish *Houlton* because it involved a flow-control measure (Opp. at 16-17), Respondents contradict themselves. Respondents sanction the *Houlton* in-state hauler's attempt "to access part of the market in interstate waste" in the same state as himself, because his goal was "congruent" with the Commerce Clause's goal to limit interstate barriers. (Opp. at 17.) This argument undermines Respondents' (and the Ninth Circuit panel's) position that Petitioners must actually be engaged in out-of-state commerce to claim such an

interest as their own. (*E.g.*, Opp. at 11-12; Pet. App. at 14.)

Second, the Eighth Circuit in *Ben Oehrleins* found prudential standing for both the in- and out-of-state plaintiffs in that case. 115 F.3d at 1379 ("There is no question that the *Oehrleins* plaintiffs, that is, various waste haulers and processors, have standing."); *see Houlton*, 175 F.3d at 183 (citing *Ben Oehrleins* for this holding). The Ninth Circuit held the opposite, and explicitly stated that it disagreed with the Eighth Circuit. *City of L.A. v. County of Kern*, 581 F.3d at 849 n.8 (Pet. App. at 16). Thus, there is a plain circuit split on the issue raised by the Petition. Respondents' arguments to the contrary are without merit.

II. Respondents' Attempts To Narrow This Court's Relevant Jurisprudence Are Flawed

Respondents' narrow focus on flow control ordinances (*see* Opp. 12-14) disregards the breadth of this Court's dormant Commerce Clause jurisprudence. The principles laid out in that jurisprudence, and discussed at length in the Petition, demonstrate that Petitioners' interest in this case falls within the Commerce Clause's protection. Indeed, it is telling that Respondents' Opposition ignores this Court's seminal decision in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), which broadly held 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," *id*. at 361 (emphasis added), which is what Measure E does. The arguments Respondents do offer likewise lack merit.

First, Respondents attempt to distinguish between the "scope" and the "zone of interests" of the Commerce Clause. (Opp. at 8, 19-21.) Unsurprisingly, Respondents do not cite any authority to support this distinction, since there is none. The "scope" of the Commerce Clause, *i.e.*, the activities that it can reach, is by definition "interstate commerce." Activities within this broad scope are protectable "interests" under the Commerce Clause. *See generally Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987) (explaining that the scope of the constitutional guarantee defines what the zone of interests protected by it is: the interests must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.") (citation and internal quotation marks omitted).

Second, Respondents acknowledge that EPA regulates the land application of biosolids at Petitioners' two farms pursuant to legislation enacted under the Commerce Clause, but they say that is irrelevant because there is supposedly a difference between the reaches of the affirmative and dormant aspects of the Commerce Clause. (Opp. 21-22.) However, that argument ignores this Court's precedents which hold that the scope of the interests protected

by the affirmative and dormant Commerce Clauses are co-extensive. *E.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 326 n.2 (1979); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997) (quoting *Hughes*). (*See* Pet. at 20-21.); *see also City of Phila. v. New Jersey*, 437 U.S. 617, 622-23 (1978) ("Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement."). Respondents' related arguments about state law (Opp. at 21) are simply irrelevant. The dormant Commerce Clause limits the power of states or their subdivisions to interfere with interstate commerce, even if their legislation involves matters of legitimate local concern; that municipalities and states also play a role in regulating waste does not insulate in-state activities from the zone of interests protected by the Commerce Clause. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

Third, Respondents' entire Opposition and their analysis of this Court's precedents assume that a particular item must physically cross state lines to qualify as "interstate" commerce. (*See, e.g.*, Opp. at 14, 16.) This is of course the erroneous premise of the Court of Appeals' decision that Petitioners ask this Court to correct. As the precedents in the Petition demonstrate, "interstate commerce" is not synonymous with "multi-state commerce." (*See* Pet. at 20-23.) For example, this Court's opinion in *Camps Newfound/Owatonna*, 520 U.S. 564, explains at

length how a measure burdening activities that occur locally can implicate interstate commerce and thus violate the dormant Commerce Clause. *Id.* at 572-75.[3]

Fourth, Respondents also mischaracterize the "purposes served by the Commerce Clause." (Opp. at 17.) The Commerce Clause's purpose is not merely to protect "cheaper interstate disposal alternatives." (*Id.*) Rather, its purpose is to keep the entire national market free of arbitrary, expensive barriers to free trade. Indeed, as demonstrated in this case, Measure E's diversion of Plaintiffs' biosolids to more distant locations including Arizona *increases* the costs of biosolids recycling and adversely affects the biosolids market. As Respondents themselves quote, this Court has stated: "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have *free access to every market in the Nation . . . .*" *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (emphasis added) (quoted at Opp. at 13); *see Dennis v. Higgins*, 498 U.S. 439, 469-50 (1991) (quoting same). It is Measure E, not Petitioners' argument, that is "fundamentally antithetical to the purposes served by the Commerce Clause" (Opp. at 17), since Measure E aims to deprive Petitioners of access to a local market, and to "isolate [Kern County] in the stream of interstate

[3] Despite Respondents' protestations (Opp. at 22-23), *Camps Newfound/Owatonna* therefore stands for precisely the propositions for which Petitioners cited it (Pet. at 12, 21, 23).

commerce from a problem shared by all." *City of Phila.*, 437 U.S. at 623.

Fifth, for the proposition that "the Commerce Clause does not invalidate local measures that benefit interstate commerce," Respondents cite cases upholding statewide measures. (*See* Opp. at 18 n.8 (citing *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir. 2002) and *Reynolds v. Buchholzer*, 87 F.3d 827, 830 (6th Cir. 1996)); Opp. at 18 n.9 (citing *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429 (2005))). These cases are inapposite for two reasons.

As an initial matter, the district court expressly found, and the Ninth Circuit's decision assumed, that Measure E *substantially burdens*, not benefits, interstate commerce. The prudential standing question presented in this case therefore cannot be avoided by asserting, contrary to the posture of this case, that Measure E benefits interstate commerce.

In any event, the cases Respondents cite stand for the proposition that a state may impose an obligation on all of its citizens while expressly exempting those outside the jurisdiction. *American Trucking* involved a state-imposed trucking fee applicable to transactions within the state. 545 U.S. at 431. The fur-trapping provision in *National Audubon Society* restricted the use of certain types of traps, and sales of furs caught by using those traps within California. 307 F.3d at 843. The statutes in *Reynolds* limited fishing within Ohio of certain species from Lake Erie.

87 F.3d at 829 n.1. In each instance, those facing the burden were those who had enacted it. *See United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342, 345 (2007). But in this case, Kern's ban is a local effort to impose trade restrictions *discriminating against and burdening outsiders*, unrepresented by the enacting jurisdiction, including both those elsewhere in-state and those out-of-state. Moreover, even if Measure E had adverse impacts on in-County economic interests, that would not be enough to exempt it from Commerce Clause review. *E.g.*, *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.").

III. The Issue Here Is Important and Recurring

Respondents' argument that there is no regulation currently in effect elsewhere exactly like Measure E (Opp. at 25) misses the point. While land application is itself a vital, nationwide economic activity (*see, e.g.*, NACWA Amici Brief at 12-14), the Ninth Circuit's ruling is not limited to particular types of products. The Ninth Circuit's opinion applies to all economic activity that does not cross a state border, insulating any discriminatory local ordinances from Commerce Clause challenges brought by in-state plaintiffs. The implications of the panel's decision thus reach far beyond this litigation alone.

Respondents' argument that the prudential standing issue may not be outcome-determinative of this entire lawsuit (Opp. at 24-25) hardly means that this issue does not "matter to . . . the litigants" (*id.* at 25). The Ninth Circuit's decision is clearly outcome-determinative of Petitioners' federal claim. Respondents have prudential standing, and are entitled to their day in court. Allowing the Ninth Circuit panel to wrongly deny Respondents prudential standing for their Commerce Clause claim will result in unnecessary remand proceedings in the lower courts, and may cause the action to be dismissed from federal court altogether, forcing state courts to rehear the entire litigation thus far.

IV. Measure E Does Not Discriminate in Favor of the Government

Respondents' argument that Measure E discriminates between public entities and is therefore immune from scrutiny under the Commerce Clause (Opp. at 27-28) misreads this Court's precedents.

This Court recognizes a "market-participant" exception to the Commerce Clause for "States that go beyond regulation and themselves 'participat[e] in the market.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008) (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976)). In *Davis*, this Court explained the difference between its decisions in two waste processing cases, *United Haulers*, 550 U.S. 330, and *C & A Carbone*, 511 U.S. 383, as a consequence of

the market-participant exception; the measure at issue in *United Haulers* explicitly benefitted a processing plant owned and operated by a public authority in New York state, whereas the measure at issue in *C & A Carbone* benefitted a private processing facility. *Davis*, 553 U.S. at 339-40 & n.8. In *Davis* itself, the measure at issue was a Kentucky tax exemption on bonds issued by the state or its political subdivisions. *Id.* In both *United Haulers* and *Davis*, this Court held that because the measures at issue specifically favored government entities fulfilling governmental obligations, they fell under the market-participant exception and did not violate the dormant Commerce Clause. As this Court explained in *Davis*, "The point of asking whether the challenged governmental preference operated to support a traditional public function was . . . to find out whether the preference was for the benefit of a government fulfilling governmental obligations *or for the benefit of private interests, favored because they were local*." *Id.* at 341 n.9 (emphasis added).

The market-participant exception cannot save Measure E. Kern County is not a market participant. It does not own or run a biosolids business that Measure E favors. Rather, Measure E targets all out-of-county entities involved in the biosolids trade (whether public or private, and Petitioners here are both), and in effect favors the in-county private entities that continue to land-apply biosolids within Kern County's incorporated areas. As stated in Measure E, it also favors in-county residents and

agricultural interests who gain the supposed advantage of Kern County natural resources free of outsiders' biosolids that must now be land applied elsewhere. Under *Davis*'s rubric, Measure E's preference is for the benefit of private interests, favored because they are local. *See id.* Therefore, the market-participant exception does not protect it.

V. Petitioners Do Not Seek To Abolish Any Standing Requirements

Respondents conclude their Opposition with a parade of horribles they say will result if this Court holds that Petitioners have prudential standing to challenge Measure E. (*See* Opp. at 29.) Respondents assert that "Measure E does not affect *any* existing interstate commerce," but somehow, "[i]f Petitioners can nevertheless challenge the ordinance as a violation of the Commerce Clause, *every* measure adopted by a state or local government that adversely affects local businesses will be subject to federal court scrutiny . . . " (*Id*.) This assertion is not only illogical but wrong.

It is only when localities seek to erect barriers to trade that the Commerce Clause comes into play. The threshold requirement for a dormant Commerce Clause claim has nothing to do with the law of standing, as Kern seems to suggest. Rather, on the merits, a local ordinance that does not discriminate against or unduly burden interstate commerce to the advantage of local interests does not violate the

dormant Commerce Clause. Here, by contrast, the district court found on undisputed facts that Measure E does affect interstate commerce and does violate the Commerce Clause. And the Ninth Circuit did not reverse either of those merits determinations. Rather, it held that even assuming Measure E is unconstitutional, Petitioners supposedly lack standing to challenge it. That holding walls off large categories of in-state plaintiffs, particularly in geographically large states, from asserting meritorious challenges to local ordinances that, like Kern's Measure E, are also unconstitutional. Nothing in this Court's precedents sanctions such a narrow view of prudential standing, which stands in sharp contrast to the Court's holdings concerning the broad reach of the Commerce Clause.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition, and in the briefs of the Amici supporting Petitioners, a writ of certiorari should issue.

Respectfully submitted,

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