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

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, THE WATER ENVIRONMENT FEDERATION, THE NORTH EAST BIOSOLIDS AND RESIDUALS ASSOCIATION, AND THE NORTHWEST BIOSOLIDS MANAGEMENT ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The National Association of Clean Water Agencies (NACWA), the Water Environment Federation (WEF), the North East Biosolids and Residuals Association (NEBRA), and the Northwest Biosolids Management Association (NBMA) respectfully submit this amici curiae brief in support of Petitioners.[1]

INTERESTS OF THE AMICI CURIAE

NACWA, WEF, NEBRA, and NBMA agree with Petitioners' arguments in their Petition for a Writ of Certiorari and offer the following additional reasons why it is important for the Court to hear this case. Like Petitioners, amici's members nationwide stand to suffer from the Ninth Circuit's substantial narrowing of the Commerce Clause to insulate from federal judicial review in-state discriminatory and burdensome measures like Kern County's Measure E, a county voter initiative which bans the Petitioners' biosolids from Kern County.

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

NACWA is a non-profit advocacy association representing nearly 300 of the nation's publicly owned treatment works (POTWs) that every day treat billions of gallons of wastewater and recycle thousands of tons of biosolids. *See* http://www.nacwa.org. NACWA membership includes public wastewater utilities located all across the United States, including Petitioners the City of Los Angeles, Orange County Sanitation District (OCSD), and County Sanitation District No. 2 of Los Angeles County. NACWA also includes affiliate members involved in the national business of wastewater and biosolids, such as contractors, engineers and consultants. NACWA member agencies serve the majority of the sewered population in the United States and treat and reclaim more than 18 billion gallons of wastewater each day. NACWA advocates the interests of its members in the legislative, regulatory, and litigation arenas. Many NACWA members have first-hand experience with communities like Kern County that have sought to bar out-of-county biosolids from their farmland.

WEF is a non-profit association of over 36,000 professionals and groups advancing science and best practices on water quality and wastewater management, including solids management. *See* http://www.wef.org. WEF is the leading technical and educational organization devoted to water quality and water pollution control. WEF's individual members and 81 affiliated Member Associations work in state and local government, federal agencies, non-profit organizations, academia, industry, and private practice.

WEF supports science-based regulation of land application of biosolids and believes that local bans, particularly those that target biosolids from other jurisdictions, are harmful. In addition, the U.S. Environmental Protection Agency (USEPA) and amici WEF and NACWA together comprise the National Biosolids Partnership, which works with local wastewater agencies to improve, benchmark, and certify their biosolids management programs in accordance with best practices. *See* http://www.biosolids.org.

NEBRA is a non-profit organization in the northeastern United States and eastern Canada dedicated to understanding and facilitating the recycling and beneficial use of biosolids and other residuals as fertilizers, soil amendments, and sources of energy. *See* http://www.nebiosolids.org. NEBRA's membership includes individuals and organizations from the six New England states and eastern Canada, including wastewater treatment facility staff, farmers, environmentalists, compost operators, biosolids recyclers, and others involved with biosolids and other residuals. NEBRA coordinates with other regional organizations in the field of wastewater treatment and biosolids/residuals recycling and is widely recognized as the source for science-based biosolids/residuals information in New England and eastern Canada. Like Petitioners, NEBRA and many of its members have grappled with efforts by local governments to restrict or discriminate against biosolids by place of origin, similar to the situation confronting Petitioners.

NBMA, incorporated in 1993, is a non-profit professional membership association working to advance environmental sustainability through the beneficial use of biosolids. *See* http://www.nwbiosolids.org. NBMA membership spans Alaska, Idaho, Oregon, Washington and British Columbia, with 191 members that include public wastewater agencies and private companies. An estimated 88% of the biosolids produced in the Pacific Northwest is safely and beneficially used in agriculture, forestry, land reclamation, and landscaping. Many of NBMA's biosolids producers supply biosolids to customers across county and state lines, which is an important element of the success of biosolids programs in the northwest. NBMA's biosolids programs rely on the ability to freely transport this valuable commodity and NBMA is concerned with the Ninth Circuit's restriction of NBMA's ability to reach its customers.

Ensuring safe, environmentally sustainable, and cost-effective management of biosolids is a key mandate of amici and their members. Amici are also committed to preserving the ability of municipalities to choose the method of biosolids management that works best for their communities, including the option of land application. Recycling biosolids through land application fulfills these criteria and constitutes an essential component of America's wastewater management system.

Amici have an interest in this case to provide the Court a national perspective on the importance of land application of biosolids to America's clean water

utilities and their many millions of rate payers. Amici also write to underscore the repercussions for clean water utilities and their business and farming partners nationwide that will result from the Ninth Circuit's denial of Petitioners' prudential standing to even assert a Commerce Clause claim against discrimination directed toward out-of-county entities. Amici's members are unified in their concern with the Ninth Circuit's closing the federal courtroom to challenges to blatantly discriminatory local laws based on the happenstance of whether biosolids physically cross a state line.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision that Petitioners are not within the "zone of interests" of the Commerce Clause is important and conflicts with the Court's precedent upon which amici and their members have relied for many years. The Ninth Circuit's decision that biosolids recycling is not an activity in interstate commerce is at odds with the record in this case and the reality of the multi-billion dollar national investment in biosolids recycling in America. If left uncorrected, it will further encourage local activists opposed to biosolids recycling to pursue similar initiatives that discriminate against wastewater treatment plants serving urban communities and thwart federal and state laws and policies that encourage biosolids recycling. Narrowing standing for agencies, businesses, and farmers pursuing biosolids recycling to

challenge land application restrictions will limit biosolids management options, increase sewer rates, deprive thousands of farmers of a valuable and inexpensive fertilizer and soil amendment, and undercut the goals and policies of the federal Clean Water Act. 33 U.S.C. § 1345.

I.

A. A local ban on the land application of biosolids, particularly one imposed by a vast agricultural county like Kern County, substantially affects interstate commerce. Land application of biosolids is practiced nationwide, every day involving thousands of farms in hundreds of counties. It plays an indispensable role in the vital round-the-clock public service of biosolids management pursued by wastewater agencies across the country. Indeed, the majority of biosolids presently produced in the United States are managed through land application. Exempting Measure E from the purview of the Commerce Clause and federal judicial review will jeopardize biosolids programs that are regularly threatened with similar local bans.

B. Recycling of biosolids through land application is a significant undertaking that implicates many facets of the national economy, including millions of residential and business sewage treatment customers, thousands of miles of metropolitan sewer lines that span multiple jurisdictions, complex wastewater treatment plants, fleets of trucks, biosolids

managers, farmers, and the consumers of biosolids-fertilized crops. Biosolids commerce crosses hundreds of county and state lines every day. The trade is national, involving thousands of daily transactions as well as long-term contracts and financial commitments among many parties for goods, services, and capital. The Ninth Circuit's decision overlooks the national commerce in this valuable organic material that is discriminated against and hamstrung by parochial and unscientific local bans like Kern County's.

C. The Ninth Circuit's view that Kern County's land application ban does not implicate the Commerce Clause is incompatible with federal laws and regulations that, promulgated pursuant to the Commerce Clause, directly govern land application activities. This carefully crafted federal regulatory framework enables the safe and beneficial reuse of a valuable byproduct of the modern wastewater treatment process. Exempting discriminatory bans on out-of-jurisdiction biosolids from federal judicial review will encourage more bans, frustrate federal intent, and lead to significant disruption on a national scale of biosolids management programs.

II.

The Ninth Circuit's misapplication of prudential standing also diminishes access to federal courts for POTWs, their contractors, and farmers to challenge local land application bans or other discriminatory biosolids legislation. This is particularly true for

participants in the biosolids market that may not directly ship their biosolids out-of-state but which nevertheless have biosolids management programs, like Petitioners', that are tied to and impact interstate commerce. The strict prudential standing requirements placed on Petitioners by the Ninth Circuit particularly burden those biosolids management programs in geographically large states that by geographical chance need not physically ship biosolids across state lines.[2]

The Ninth Circuit's sua sponte imposition of a stringent prudential standing requirement that denied merits review to Petitioners is contrary to the extensive reach of the Commerce Clause and imposes an arbitrary barrier to access to justice. Indeed, the farmer found to be subject to the Commerce Clause merely by growing wheat for home consumption in *Wickard v. Filburn*, 317 U.S. 111 (1942), would be surprised to learn that the Constitution provides him no protection against local efforts to bar his use of a USEPA-approved and regulated fertilizer produced under the authority of the Clean Water Act.

[2] Kern County, California is one of America's largest counties, larger than the States of Connecticut, Rhode Island and Delaware *combined*, and is located far inland in the country's third-largest state, underscoring how tying standing to crossing a state line is unfair and irrational.

ARGUMENT

I. Parties Engaged in the Many Facets of Biosolids Recycling Are Within the Broad Zone of Interests of the Commerce Clause and Have Prudential Standing

This case is of national importance and should be heard by the Court to preserve federal judicial review of local laws that discriminate against biosolids by place of origin. Biosolids management, and in particular recycling biosolids to farms, forest lands, and mine reclamation, is vital to the nation's wastewater infrastructure and is a large national business. Approximately 16,000 wastewater plants in the United States spend about $65 billion dollars annually, nearly one-third of which is devoted to management of solids residuals from the treatment process. It is clear that the governmental agencies, businesses, professionals, and farms that pursue this trade – such as the eleven varied public and private Petitioners in this case – are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

The Ninth Circuit's refusal to adjudicate the merits of Petitioners' Commerce Clause claim is inconsistent with the Court's well-established jurisprudence on prudential standing. The Ninth Circuit opinion acknowledges Supreme Court precedent finding that the "zone of interests" test "is not meant to be especially demanding;" a plaintiff must only "arguably"

fall within the zone of interests, and a plaintiff's interests will fail only if "*marginally* related to or inconsistent with the purposes implicit" in the dormant Commerce Clause. *City of Los Angeles v. County of Kern,* 581 F.3d 841, 846-847 (9th Cir. 2009); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396 (1987) (emphasis added). Further, the test principally applies to cases examining congressional intent and regulatory interpretations under the Administrative Procedure Act. *Clarke*, 479 U.S. at 400 n.16 ("the test is most usefully understood as a gloss on the meaning of [5 U.S.C.] § 702 . . . it is not a test of universal application"). By contrast, the "zone of interests" test should not impede Petitioners' effort to protect the commonly shared right to engage in commerce free of discriminatory and burdensome local barriers. *See id.* (noting that the Supreme Court has only once addressed the zone of interests test for a Commerce Clause claim, and found it satisfied). In view of the broad scope of the Commerce Clause and the breadth of biosolids commerce and federal biosolids regulation, as explained here and in Petitioners' brief, the prudential standing threshold is satisfied in this case.

Furthermore, the Ninth Circuit's decision ignores decisions of this Court which clearly indicate that discriminatory local waste management laws such as Measure E create the exact kind of bias that dormant Commerce Clause jurisprudence is intended to prevent. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (Commerce Clause protects against local efforts

to "shift the costs of regulation" to outside interests with no say in the local political process). The decision below also overlooks the Court's clear precedent that the reach of the Commerce Clause extends to local governments when they attempt to impede activities that impact interstate commerce. *See Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Natural Res.*, 504 U.S. 353, 361 (1992) ("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.") (striking down law restricting movement of solid waste among counties); *accord Associated Industries 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. Any other approach would frustrate the Commerce Clause's central objective of securing a national 'area of free trade among the several States'") (*quoting Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977)). The Court repeatedly has addressed and protected the rights of parties like Petitioners engaged in the business of waste management and the Ninth Circuit's ruling undercutting that precedent warrants review by this Court.

A. Land Application of Biosolids is a Critical and National Activity

Biosolids are a natural and valuable by-product of the modern wastewater treatment process. As the District Court observed in its ruling, the "collection and treatment of wastewater, and the resulting generation of biosolids that must be recycled or disposed of, 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." *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 871 (C.D. Cal. 2007). Recycling biosolids and their many nutrients to farms, forest lands, and mine reclamation sites has long been the most popular option for biosolids management by local governments that treat wastewater because it is time-tested, cost-effective, sustainable, environmentally sound, endorsed by USEPA, and embraced by farmers and open space advocates.

The latest data compiled in 2004 from state regulatory agencies, USEPA, individual wastewater treatment facilities, and other sources indicate that 7,180,000 dry tons of biosolids were produced and beneficially used or disposed of in the United States during 2004. North East Biosolids and Residuals Association, *A National Biosolids Regulation, Quality, End Use & Disposal Survey Final Report*, at 1 (2007) (NEBRA Report), *available at* http://www.nebiosolids.org/uploads/pdf/NtlBiosolidsReport-20July07.pdf. Production of biosolids on a massive scale is a necessity

of modern life, and the amount of biosolids produced in the United States will increase with population growth. The network of public agencies, contractors, truckers, farmers, and landowners necessary to manage this tonnage of organic material is immense, employing many thousands of professionals, scientists, managers, truckers, farmers and laborers.

The three primary methods of biosolids management in the United States are land application, landfilling, and incineration. *See generally* National Association of Clean Water Agencies, *Biosolids Management Options, Opportunities & Challenges* (2006). National surveys on biosolids use indicate that approximately 55% of all biosolids in the U.S. are recycled through land application for agronomic, silvicultural, and/or land restoration purposes, while 45% are managed primarily through landfills or incineration. NEBRA Report at 1. This means that the majority of biosolids in the U.S. – approximately 3,929,000 tons per year – are beneficially recycled through land application. Many major U.S. cities use land application as a significant component of their biosolids management program, including New York City, Los Angeles and its suburbs, Boston, Charlotte, Chicago, Denver, Houston, Milwaukee, Orlando, Philadelphia, Phoenix, Portland, Seattle/King County, the District of Columbia and its suburbs, and many others.

Proper, safe, and effective management of biosolids is a key part of clean water agencies' environmental mandate, and land application provides an important option for recycling a product with

beneficial properties. The numbers outlined above represent the vast amounts of biosolids that municipal clean water utilities must process and the critical role played by land application in managing this resource. They also suggest the magnitude of the problem that utilities would face if land application was no longer an option due to protectionist measures barring out-of-county biosolids such as that passed by Kern County's voters. If the Kern County ban is allowed to stand, it is very likely that other communities across the nation will erect similar barriers and bans, creating a significant environmental and financial challenge for municipal wastewater treatment agencies nationwide, and the communities they serve, which rely on land application.

B. Land Application of Biosolids is a National Business Intertwined With Interstate Commerce

The Court has always broadly defined the interstate commerce protected by the dormant Commerce Clause and should hear this case to correct the Ninth Circuit's error that threatens to deny Commerce Clause protections to a large sector of the economy. Biosolids management programs, both individually and in the aggregate, are part of interstate commerce and plainly meet the Supreme Court's criteria that they are more than "marginally" related to the purposes implicit in the dormant Commerce Clause. *Cf. National Ass'n of Optometrists and Opticians v. Brown*, 567 F.3d 521, 524 (9th Cir. 2009) (finding

dormant Commerce Clause applicable to case because "retail sale of eyewear involves and affects interstate commerce such that Congress could regulate in that area").

Land application of biosolids occurs in almost all fifty states and the thousands of local biosolids programs have a powerful and pervasive impact on the national economy. The variety and size of the inputs and expenditures for biosolids programs create an aggregate impact on the national economy that belies any characterization of biosolids commerce as a solely intrastate phenomenon with an insignificant effect on the national economy. Plainly, the large-scale biosolids operations of Petitioners encompassing 8,000 acres of land, two large farms, 1,000 tons of biosolids shipped and spread daily with numerous heavy trucks and heavy equipment, and scores of laborers, managers, technicians, have the requisite economic impacts to fall within the zone of interests of the Commerce Clause. *Cf. Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (small summer camp that included out-of-state campers had standing under Commerce Clause).

Every metropolitan wastewater plant and sewage collection system is a multi-billion dollar investment that rivals highways for the scale and magnitude of capital and maintenance costs. Generation of biosolids occurs constantly and is administered by professionals and laborers around the clock. Testing and quality control of biosolids to meet USEPA specifications (as well as any additional state and local

requirements, which are extensive in many states) for trace chemicals, metals, and microorganisms requires thousands of technicians and scientists. Agencies and their contractors purchase and use large numbers of tractor trailers, front-end loaders and spreaders to haul biosolids long distances and spread them across varied terrain, including fields, forests, and mine sites. Trains are also used to transport biosolids across many state lines. At farm and forest sites, more testing and monitoring occurs as biosolids are carefully applied to meet plant needs and avoid adverse impacts on the environment or public health. Farmers are limited by federal law in the crops they can grow on biosolids amended soil and must observe certain harvest restrictions for crops destined for human consumption. *See, e.g.*, 40 C.F.R. Part 503. All of these activities involve, on a national scale, financing, equipment purchases and movement, data management, and personnel relocation.

Biosolids cross state lines in massive amounts. This is not a precondition to standing, as the Ninth Circuit suggested, but instead indisputably qualifies any commerce in biosolids for protection under the Commerce Clause. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (Court's decisions "firmly establish[ ] Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.") (upholding Commerce Clause authority over six cannabis plants grown for home medicinal use). The record in this case reflects that in California alone,

750,000 dry tons of biosolids are produced annually, over 20% of which are currently managed out-of-state. Petitioners' Appendix 141-142(¶¶18-19), 144(¶25). This often means transporting the biosolids to neighboring states for land application or for burial in landfills.[3] It also involves, in a limited number of instances, shipping the residual materials from biosolids, such as the ash that is left over after biosolids are incinerated, across state lines for beneficial reuse or final disposal. POTWs have contractual relationships with engineering, consulting, or management firms to help maintain the necessary equipment for their biosolids programs, to help run the programs more efficiently, or to transport their biosolids residuals. In many instances, the firms contracting with the POTWs for these services are national companies

[3] Petitioners OCSD and City of Los Angeles also ship some of their biosolids out-of-state to Arizona and face the prospect of shipping much larger quantities, at greater expense, should Kern's Measure E ban go into effect. Indeed, Measure E would require the diversion of more than 1,000 tons of biosolids daily, imposing an additional cost of over $4 million annually to the City of Los Angeles alone, and unquantified costs to the broader market from increased uncertainty, scarcity of land application sites, and air pollution and traffic accidents from the greater traveled distances. *See, e.g.*, Petitioners' Supplemental Brief to the Ninth Circuit at 7 (and record evidence cited therein). Moreover, as emphasized by Kern's opposition to a preliminary injunction in this case, Petitioner Shaen Magan (one of the farmers and truckers) is actively engaged in biosolids activities between California and Arizona.

operating across the country.[4] The interstate nature of these contracts, along with the funds that the POTWs pay across state lines to the firms in exchange for their services, obviously impact interstate commerce. Additionally, some utilities sell their highly processed biosolids as commercial fertilizer nationwide.[5]

The effects of biosolids management on interstate commerce are also apparent from the financial and business disruption that would occur if land application programs were forced to cease due to bans like Measure E. The Supreme Court's dormant Commerce Clause jurisprudence has long recognized that a local discriminatory act must be viewed in the context of how similar actions, left unchecked, would impact the national economy. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (court must consider not only "the consequences of the [ordinance] itself, but also . . . how the challenged [ordinance] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation"); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994)

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[4] For instance, New York City currently exports biosolids for land application to Colorado, Florida, and Virginia, among other states.

[5] NACWA member the Milwaukee Metropolitan Sewerage District has sold its highly processed biosolids as commercial fertilizer under the commercial name Milorganite® on the national market for over 80 years.

("If the localities in [other] States impose the type of restriction on the movement of waste . . . the free movement of solid waste in the stream of commerce will be severely impaired."). The Ninth Circuit's decision overlooks the record evidence regarding threats to land application in California from other counties emulating Kern, threats that amici and their members face in other parts of the nation in fulfilling their mission to foster the recycling of biosolids.

The Ninth Circuit decision clashes with this Court's precedent condemning restrictions on commerce based on place of origin and may force POTWs that currently land apply biosolids to begin managing their biosolids through alternative methods such as incineration or landfilling. Many POTWs may not be able to find adequate room in their local landfills to accept the high volume of biosolids produced on a daily basis, thus requiring the shipment of the biosolids great distances across state lines to find landfills with sufficient capacity. POTWs making a switch from land application to either of these other management methods would need to raise significant amounts of capital to make the necessary operational transition and purchase the needed new equipment. This capital oftentimes is raised through a loan or bond issuance obtained through national, interstate financial markets. Additionally, a utility making a major transition in its biosolids management program would need to contract with a variety of engineering and consulting firms to design and install the needed new equipment and facilitate shipment of

that equipment to the POTW. These contracts and shipments will often involve out-of-state actors, thus establishing a clear interstate commerce impact resulting from the utility's altered biosolids management practices in response to a local ban on land application.

C. The Federal Government's Regulation of Biosolids Nationwide Pursuant to Commerce Clause Authority Would Be Undermined By Parochial Bans Unchallengeable in Federal Court

The Ninth Circuit did not address the pervasive federal regulation of land application of biosolids, which by itself should bring Petitioners within the zone of interests for a Commerce Clause challenge. USEPA has directly regulated land application of biosolids since the late 1970s, following Congress' passage of the Clean Water Act pursuant to its Commerce Clause authority. National Research Council, *Biosolids Applied to Land: Advancing Standards and Practices* (2002), at 27 (NRC Report), *available at* http://www.epa.gov/waterscience/biosolids/nas/complete.pdf. In 1987, Congress amended the Clean Water Act to require USEPA to develop comprehensive rules for land application. 33 U.S.C. § 1345. USEPA complied with this directive in 1993 by publishing updated regulations on biosolids at 40 C.F.R. Part 503. The current federal Part 503 regulations are the product of decades of scientific research, including thousands of public comments and independent review. Another key element of the federal regulatory program to

maintain the safety of land application of biosolids is USEPA's promulgated industrial pretreatment regulations, 40 C.F.R. Part 403, to prevent the introduction of pollutants into the municipal system; like Part 503, these regulations apply to wastewater utilities nationwide. There are also a number of other federal biosolids policies that have been promulgated over the past three decades, formulated by USEPA in conjunction with other federal agencies and representing USEPA's long-standing policy of promoting the beneficial use of biosolids across the U.S. *See* NRC Report at 28; USEPA, *Policy on Municipal Sludge Management*, 49 Fed. Reg. 24,358 (June 12, 1984); USEPA, et al., *Interagency Policy on Beneficial Use of Municipal Sewage Sludge on Federal Land*, 56 Fed. Reg. 33,186 (July 18, 1991). In promulgating its Part 503 regulations in 1993, USEPA called biosolids a "valuable resource" and "encourage[d] the beneficial use of sewage sludge (e.g., through land application). . . ." 58 Fed. Reg. 9,248, 9,324 (Feb. 19, 1993).

These items all reflect a broad federal commitment, under Commerce Clause authority, to the beneficial reuse of biosolids, including land application, as well as a concerted effort to establish a scientifically sound, comprehensive national biosolids management program. The Ninth Circuit's exemption of Measure E from Commerce Clause scrutiny is inconsistent with Congress' recognition of, and USEPA's authority to regulate, biosolids land application as a vital part of the national economy. That Congress and USEPA have codified savings clauses that preserve a role for

consistent local (and state)[6] regulation of land application does not alter the fact that Petitioners' activities fall within the scope of the Commerce Clause. Affording individual communities like Kern County impunity to discriminate against out-of-county actors that happen to be in-state would undermine this carefully calibrated regulatory system and create significant complications in the national management of biosolids.

II. The Ninth Circuit's Decision Unfairly Denies Access to Federal Court

Biosolids management programs and local barriers to their free movement and use implicate a large national economic activity subject to regulation under all aspects of the Commerce Clause. Biosolids plainly are an article in commerce under the Court's holdings and participants in biosolids recycling should have standing to challenge discriminatory burdens, whether imposed at the state or county line. The Ninth Circuit's decision creates a specific and troubling access to justice issue for agencies, contractors and farmers in geographically large states, such as Petitioners, whose biosolids management programs do not physically ship across state lines the particular biosolids banned by a local ordinance.

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[6] At the state level, over thirty states have enacted their own biosolids regulations in addition to the federal standards.

The Ninth Circuit's prudential standing test for challenging land application bans essentially requires the physical movement of biosolids across state lines, and thereby imposes a significant new burden that is inconsistent with both the actual business of biosolids management as practiced in national commerce and the litigation to date over the issue.[7] The Ninth Circuit's decision creates a distinction between those POTWs that ship biosolids out-of-state and those that do not, when they may suffer the same economic harm from discriminatory local bans. The decision further relegates those POTWs that do not ship their biosolids directly out-of-state to litigating the issue of discriminatory local land application bans in state courts that are not as familiar with federal Commerce Clause and Clean Water Act issues and that are not as well-positioned as federal courts to hear and decide these complex issues. These state forums will also be in the jurisdiction that passed the offending legislation and will be subject to intense pressure to uphold bans targeting urban wastes from outside the county.

The Ninth Circuit's arbitrary hurdle discriminates against POTWs that do not transport biosolids

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[7] The prudential standing of Petitioners was not challenged in the District Court, and other federal courts have heard Commerce Clause challenges to local biosolids bans without questioning the standing of contractors and farmers to bring such claims. *See, e.g., O'Brien v. Appomattox County,* 2002 U.S. Dist. LEXIS 22549 *2 (W.D. Va. 2002); *Synagro-WWT, Inc. v. Rush Twp.*, 204 F. Supp. 2d 827, 842-43 (M.D. Pa. 2002); *Welch v. Rappahannock County*, 888 F. Supp. 753 (W.D. Va. 1995).

out-of-state and unfairly prevents utilities from accessing the federal court system to challenge land application bans. This result holds even if the overall impact on interstate commerce from the biosolids program that does not ship out-of-state is just as significant as another, similar-sized program that does ship out-of-state. The lower court ruling means that the City of Phoenix, Arizona, for example, could secure federal court review if it intended to ship biosolids to Kern County, but Southern California biosolids generators and contractors cannot. This result is plainly at odds with the Court's precedent on both prudential standing and the Commerce Clause.

Given the smaller physical distances between state boundaries, many POTWs in the eastern part of the country have biosolids programs that involve the physical shipment of residuals over state lines. By contrast, similar POTWs are located in the midwestern or western part of the nation, where the overall physical size of states tends to be larger and much greater distances separate state boundaries.[8] This

[8] A perfect example is NACWA member the City of Philadelphia which, located in southeastern Pennsylvania and very close to borders with the states of New Jersey, Delaware, and Maryland, ships a significant portion of its biosolids across state lines to Maryland and Virginia and thus would presumably meet the Ninth Circuit's prudential standing test to protect those operations. By contrast, Petitioners, all located along the Southern California coast and a significant distance from any state boundaries, are prevented from bringing a federal Commerce Clause claim in federal court against the Kern County ban

(Continued on following page)

geographical reality places the latter POTWs and others involved in biosolids commerce in large western states such as California at a significant disadvantage relative to their eastern counterparts when it comes to accessing federal courts to challenge discriminatory local bans on land application. Given this disparate impact on POTWs in larger states, the Ninth Circuit's decision should be reviewed to prevent POTWs, their contractors, and farmers from losing access to federal courts to challenge discriminatory local legislation.

CONCLUSION

The Court has never hesitated to address and protect legal rights involving unpopular but necessary articles of commerce, such as solid waste. In the seminal 1976 case striking down New Jersey's ban on out-of-state garbage, the Court found unlawful "the attempt by one State to isolate itself from a problem common to many. . . ." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). The Court should act again to ensure that the biosolids likewise are deemed articles in commerce entitled to Commerce Clause protections in the face of local legislation discriminating against biosolids on the basis of their origin. NACWA, WEF, NEBRA, and NBMA support

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because none of the biosolids shipments currently cross state lines.

Petitioners' request for a writ of certiorari and believe a writ should issue.

Respectfully Submitted,

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Dated: April 16, 2010