No.
(Court of Appeal No. F063381)
(Tulare County Super. Ct. No. VCU242057)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF LOS ANGELES, *ET AL.*,
Plaintiffs and Respondents,

v.

COUNTY OF KERN and KERN COUNTY BOARD OF SUPERVISORS,
Defendants and Appellants.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. When a federal court declines to hear state-law claims within its supplemental jurisdiction and dismisses them without prejudice, and the statute of limitations has run while the state law claims were pending in federal court, does 28 U.S.C. §1367(d) give the plaintiff thirty days in which to refile in state court, as the Court of Appeal held in *Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998), or is the thirty days extended by the remaining limitations period that existed when the plaintiff filed its federal action, as the Court of Appeal held in *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298 (2001)?

2. Does the Integrated Waste Management Act, Public Resources Code Sections 40000-49620, which requires local agencies to "promote" and "maximize" recycling when implementing the Act, preempt a county ordinance that bans one form of recycling of one kind of solid waste, when the County's voters were not implementing the Act when they adopted the ordinance and when the Court of Appeal found preemption only by adopting a novel federal law preemption standard that has never been used by the California courts as the sole basis for invalidating a local ordinance?

3. Does the "regional welfare" doctrine, which requires that a local land use regulation that has a regional impact must "reasonably relate[] to the general welfare of the region it affects" (*Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 610 (1976)), invalidate a local government's ban on recycling one form of solid waste when the Legislature, in passing a comprehensive solid waste management statute, made regional cooperation voluntary rather than mandatory?

INTRODUCTION

This case concerns a Kern County ordinance, known as Measure E, that bans the land application of treated sewage sludge, or "biosolids," in the County's unincorporated areas.

"Land application" means "the spraying, spreading or other placement of Biosolids onto the land surface, the injection of Biosolids below the surface, or the incorporation of Biosolids into the soil." 1 Appellants' Appendix ("AA") 39 (Measure E §8.05.030(D)). The trial court entered a preliminary injunction restraining the County from enforcing Measure E against the Plaintiffs until final judgment. Defendants County of Kern and the Kern County Board of Supervisors appealed from that order, and the Court of Appeal affirmed.

The Court of Appeal's decision presents for review one unresolved issue of federal law, as to which the Courts of Appeal in this State (and the courts of many other states) are in conflict. In addition, it presents an important and unresolved issue of state law preemption that affects cities and counties throughout California. Finally, it presents a novel and problematic application of the judicially created "regional welfare doctrine," whereby the Court of Appeal has effectively mandated regional cooperation with respect to solid waste management even though the Legislature made regional cooperation in this area voluntary rather than mandatory.

1. Federal district courts have supplemental jurisdiction over state law claims "that are so related to claims in the action within [the federal district court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. §1367(a). Accordingly, where a plaintiff has a federal claim within the jurisdiction of a federal court, he can join a state law claim if the "state and federal claims . . . derive from a common nucleus of operative fact." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). However, if the federal claim is resolved in the defendant's favor, the federal court can—and frequently does—dismiss the state claims without prejudice, as the District Court did here. 1 AA 274-79.

How much time the plaintiff has to refile his state law claims in state court is governed by 28 U.S.C. §1367(d). That statute provides that "[t]he period of limitations'" for any supplemental claim "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. §1367(d)). The statute therefore "prevent[s] the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks v. Rockland Cnty.*, 538 U.S. 456, 459 (2003).

In the twenty years since its adoption, both the California courts and courts across the country have adopted two conflicting views of how Section 1367(d) operates when, as in this case, a state statute of limitations expires while a supplemental claim is pending in federal court. Four courts, including the Second District, have held that in such cases the plaintiff must file a state court complaint within thirty days of the date its federal claim is dismissed. *See Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998); *accord, Berke v. Buckley Broad. Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003); *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. 2001); *Huang v. Ziko*, 511 S.E.2d 305 (N.C. Ct. App. 1999). Five other courts, including the Third District and the Fifth District in this case, have held that a plaintiff can "tack on" to the thirty-day period provided by Section 1367(d) any portion of the state-law limitations period that had not expired when the plaintiff filed in federal court. *See Bonifield v. Cnty. of Nevada*, 94 Cal. App. 4th 298 (2001); *accord, In re Vertrue Mktg. & Sales Practice Litig.*, 712 F. Supp. 2d 703 (N.D. Ohio 2010); *Goodman v. Best Buy, Inc.*, 777 N.W.2d 755 (Minn. Ct. App. 2010); *Turner v. Kight*, 957 A.2d 984 (Md. Ct. App. 2008); Slip Op. 17-21. Under the latter approach, Section 1367(d) suspends the operation of a state statute of limitation while the case is pending in federal court, and the statute begins to run again thirty days after the case is dismissed.

The Court should grant review to resolve the conflict and hold that a plaintiff has only thirty days in which to refile its state law claims. That approach conforms to the statutory language and best resolves the conflicting interests at stake. *See* Part I, *infra*.

2. The Court of Appeal also erred in holding that Measure E was preempted by the Integrated Waste Management Act (the "Act"). While the court held that Measure E was preempted by Public Resources Code Section 40051(a) and (b) (Slip Op. 23), these statutes require that local public agencies "promote" and "maximize" recycling only when "implementing this division"—*i.e.*, when implementing the Act. Accordingly, by their express terms, these requirements apply only when a local agency is implementing the Act, such as preparing the integrated waste management plans that the Act requires. However, the County was not implementing the Act when its voters adopted Measure E; instead, the voters were invoking the police power granted by Article XI, Section 7. Accordingly, Measure E is not preempted by Section 40051.

The Court of Appeal rejected this "plain language" interpretation of Section 40051 (even though it adopted a "plain language" interpretation of 28 U.S.C. §1367(d)) on the ground that upholding Measure E "would not be consistent with a statute that requires all local governments to adhere to waste management plans in which recycling is maximized." Slip Op. 25. But the fact that the Act might have been more efficient had it preempted local ordinances *whenever* they arguably made achieving the Act's recycling goals does not authorize the courts to disregard qualifying language from a statute that the Legislature included. CODE CIV. PROC. §1858 ("In the construction of a statute . . . the office of the Judge is simply to declare and ascertain what is in terms or substance contained therein; not to insert what has been omitted or omit what has been inserted"). Moreover, the courts have recognized that "some of the seeming lack of clarity or apparent logical gaps in the [Act] may be the result of deliberate

choices by the Legislature rather than inadvertence." *Rodeo Sanitary Dist. v. Bd. of Supervisors*, 71 Cal. App. 4th 1443, 1453 (1999). Accordingly, the Court must interpret "the act as it is written, not . . . a different, perhaps broader, version that could have been, or still may be, enacted." *Waste Mgmt. of the Desert, Inc. v. Palm Springs Recycling Ctr., Inc.*, 7 Cal. 4th 478, 490 (1994). The Act "as it is written" does not preempt Measure E, because it was not adopted in the course of "implementing this division." The Court should grant review to correct the Court of Appeal's contrary ruling on this important issue. *See* Part II(A), *infra*.

In reaching the opposite result, the Court of Appeal applied a federal preemption test that has never been used as the sole basis for state preemption. In *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853 (2002), the Court cited a federal case (*Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs*, 27 F.3d 1499 (10th Cir. 1994)), for the proposition that "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, regulation cannot be used to ban the activity or otherwise frustrate the statute's purpose." 27 Cal. 4th at 868. But the Court in *Great Western* found *Blue Circle Cement* "distinguishable" (*id.*), and therefore had no reason to decide whether this federal standard was part of California law. Now, however, for the first time, a California court has applied this novel standard to preempt a local ordinance without relying on the traditional preemption tests recognized by this Court. *See* Slip Op. 24 ("Under this analysis, which we find persuasive here . . ."). For this reason, too, the preemption issue deserves review. At the very least, the Court should remand this case for reconsideration in light of the Court's forthcoming decision in *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.*, No. S198638 (argued Feb. 5, 2013). *See* Part II(B), *infra*.

3. Finally, review is warranted to consider the Court of Appeal's novel application of the "regional welfare doctrine." That doctrine, which is entirely judge-made, requires that a local land use regulation that has a regional impact must "reasonably relate[] to the general welfare of the region it affects." *Associated Homebuilders, Inc.*, 18 Cal. 3d at 610 (1976). However, this doctrine has been applied in only a few cases, and never in a context where the Legislature had previously adopted a comprehensive statute covering the same subject that made regional cooperation voluntary rather than mandatory. The Court of Appeal's decision to rush in where the Legislature feared to tread raises novel separation of powers issues that should be resolved by this Court. *See* Part III, *infra*.

Each of these three issues would be review-worthy in and of itself. Taken together, these issues present an especially strong case for review. Indeed, Respondent City of Los Angeles has already acknowledged that the Court of Appeal's opinion "impacts not only the parties to the present action, but local governments and agencies throughout the state." Letter from James B. Slaughter to Court of Appeal, dated Feb. 27, 2013, at 2. Another Respondent has stated that the Opinion addresses "a matter of great and continuing public interest." Letter from Paul J. Beck to Court of Appeal, dated Mar. 4, 2013, at 2. And one *amicus* has argued that the case "is of national importance" (Letter from Nathan Gardner-Andrews to Court of Appeal, dated Feb. 27, 2013, at 1) and another said it was "of national significance." Letter from Amanda Waters to Court of Appeal, dated Mar. 1, 2013, at 1.

These statements are well-founded. As Respondent California Association of Sanitation Agencies told the Court of Appeal, numerous other counties have enacted local ordinances that are similar or identical to Measure E. *See* Letter from Roberta L. Larson to Court of Appeal, dated Mar. 4, 2013, at 2 ("Larson Letter"). Stanislaus and San Joaquin counties have banned all

land application of biosolids. STANISLAUS COUNTY CODE §9.34.040; SAN JOAQUIN COUNTY CODE §5-9102. San Luis Obispo County has banned all land application except for small amounts. SAN LUIS OBISPO COUNTY CODE §8.13.030. Sutter County has banned all land application except for biosolids bagged and sold at retail. SUTTER COUNTY HEALTH & SANITATION CODE §715-030. And Imperial County has banned the importation of biosolids. IMPERIAL COUNTY CODE Measure X §2 (2007). "In addition, practical bans have been adopted in at least 14 other counties across the state." Larson Letter at 2. Accordingly, the decision in this case will affect not only the parties and their residents (who constitute a sizable swath of Southern California) but all of the counties that have similar or identical ordinances and all of the local entities that ship their biosolids to them.

STATEMENT OF FACTS

Local governments continuously collect and treat municipal sewage and must dispose of the byproducts of sewage treatment. Slip Op. 4. These byproducts, known as sewage sludge or biosolids, can be put in landfills, incinerated, or used as agricultural fertilizer ("land application"). *Id.* In 2009, 61% of biosolids generated by sewage treatment plants in California were land applied. *Id.*

Land application of biosolids is subject to federal, state, and local regulation. Slip Op. 4. Federal regulations divide biosolids into Class A and Class B according to the quantity of pathogenic microorganisms remaining after treatment. *Id.* Class A biosolids are treated to eliminate virtually all pathenogenic microorganisms. *Id.* at 5. Federal regulations allow them to be applied to land with few restrictions and also allow them to be bagged and sold for home gardening use. *Id.* In Class A Exceptional Quality (EQ) biosolids, eight trace metals may be present in concentrations no greater than a specified level. *Id.*

The State Water Resources Control Board has imposed additional regulations in the form of a general order issued in 2004, Water Quality Order No. 2004-0012-DWQ. Slip Op. 5. This general order requires each land application site to be approved before biosolids are applied. *Id.*

Before Measure E, Kern County permitted land application of Class A EQ biosolids. Slip Op. 5. This ordinance was challenged unsuccessfully by the same respondents that brought this case. *County Sanitation Dist. No. 2 v. County of Kern*, 127 Cal. App. 4th 1544 (2005). Although Respondents contended that this ordinance was invalid for multiple reasons, they did not contend that it was preempted by the Act. *See id.*

Government regulators have generally maintained that land application of biosolids is safe and have promoted it as an effective means of disposing of sewage treatment byproducts without landfilling or incineration. Slip Op. 5. Nevertheless, land to which biosolids have been applied may emit a foul odor and attract flies. *Id.* at 7. Indeed, the EPA says that "even the best run operations may emit offensive odors" (U.S. ENVIRONMENTAL PROTECTION AGENCY, *Biosolids Generation, Use, and Disposal in the United States* 41 (1999) ("*Biosolids Generation*"), *available at* http://www.epa.gov/osw/conserve/rrr/composting/pubs/biosolid.pdf), and the District Court that heard the Respondents' federal case found that Los Angeles' land application site "emanates strong odors and attracts an unusual amount of flies." *City of Los Angeles v. Cnty. of Kern*, 509 F. Supp. 2d 865, 873 (C.D. Cal. 2007), *rev'd on other grounds*, 581 F.3d 841 (9th Cir. 2009).

In 1994, the City of Los Angeles began to land apply biosolids at Green Acres Farm, a 4,700-acre farm in the unincorporated area of Kern County. Slip Op. 7. The city purchased the farm in 1999 for almost $10 million. *Id.* When Kern County restricted land application to Class A EQ biosolids, Los Angeles spent about $15 million to upgrade its sewage treatment plants to enable

them to process biosolids to the required quality level. *Id.* Today, about 75 percent of the biosolids generated by Los Angeles's sewage treatment plants are applied at Green Acres Farm. *Id.*[1]

The County's voters approved Measure E in June 2006. Slip Op. 9. Shortly thereafter, Respondents filed a federal lawsuit challenging the Ordinance's validity on federal and state law grounds (the "Federal Case"). Plaintiffs' federal complaint asserted, *inter alia*, that Measure E (1) violates the dormant Commerce Clause, (2) is preempted by the Act, and (3) constitutes an invalid exercise of the County's police power. 1 AA 139-77. The District Court granted a preliminary injunction, finding that Plaintiffs were likely to prevail on each of these claims. *City of Los Angeles v. Cnty. of Kern*, 462 F. Supp. 2d 1105, 1111 (C.D. Cal. 2006). Thereafter, the court granted summary judgment to Plaintiffs on their Commerce Clause and state-law preemption claims, but found that disputed facts precluded summary judgment on their police power claim. *City of Los Angeles*, 509 F. Supp. 2d at 869-70.

On appeal, the Ninth Circuit held that Respondents lacked prudential standing to assert their Commerce Clause claim. *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841 (9th Cir. 2009). The court therefore dismissed Respondents' federal claim and remanded the case to the District Court to determine whether to exercise supplemental jurisdiction over Plaintiffs' preemption and police powers claims. *Id.* at 849. The District Court then declined to exercise supplemental jurisdiction and, on November 9, 2010, dismissed the Federal Case. 1 AA 274-79.

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[1]Respondents County Sanitation District No. 2 of Los Angeles County and Orange County Sanitation District used to land apply their biosolids in Kern County at property owned by former Respondent Shaen Magan. But they no longer do so, which is why Magan dismissed his claims against the County and those of an entity he owns known as Western Express while this appeal was pending. At the present time, the City of Los Angeles is the only entity land applying its biosolids in the county.

More than two-and-a-half months later, on January 26, 2011, Plaintiffs filed the present case, reasserting their claims that Measure E is preempted by the Act (1 AA 17-18 (¶¶63-72)); is an improper exercise of Kern County's police powers (1 AA 18 (¶¶73-78)); and violates the federal Commerce Clause (1 AA 19-20 (¶¶79-90)).[2]

Respondents then filed several motions for preliminary injunction. 1 AA 40, 280; 2 AA 296, 375. The trial court granted the motions, finding that Respondents were likely to prevail on their preemption and police powers claims and that the balance of hardships tipped in their favor. 3 AA 668-72.

Appellants did not contend on appeal that the trial court had abused its discretion in finding that the balance of hardships tipped in Respondents' favor. *See* Slip Op. 3. Instead, they contended that reversal was required because the court had erroneously concluded that Respondents were likely to succeed on their preemption and police power claims. The Court of Appeal recognized that, because the trial court had granted a preliminary injunction, reversal was required "if the trial court abused its discretion in concluding that plaintiffs are likely to succeed on at least one cause of action." *Id.* at 17. Nevertheless, it affirmed, finding that (1) Respondents' preemption and police power claims were not time-barred by 28 U.S.C. §1367(d) (*id.* at 17-21); and (2) Respondents were likely to prevail on each of these claims. *Id.* at 21-34.

The Court of Appeal's opinion was originally unpublished. *See* Ex. A. However, after all the Respondents and two *amici* requested publication on the ground that the Opinion was of

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[2]Plaintiffs also added two new claims that were never made in the Federal Case that were based on the California Constitution. *See* 1 AA 20-21 (¶¶91-98); 21 (¶¶99-105). Like Plaintiffs' federal commerce clause claim, these claims are not at issue in the present appeal because the trial court did not rely on them in granting a preliminary injunction. *See* 3 AA 665-66.

statewide, or even national, importance (*see* pp.6-7, *supra*), on March 12 the court ordered that the Opinion be published. Ex. B.

REASONS FOR GRANTING REVIEW

I.

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

As the Court of Appeal recognized, state and federal courts around the country have adopted two conflicting interpretations of how 28 U.S.C. §1367(d) operates when, as in this case, a state statute of limitations expires while a supplemental claim is pending in federal court. *See* Slip Op. 18-19. Under the "Extension Approach," the plaintiff must file a state court complaint within thirty days of the date its federal claim is dismissed. *Id.* at 19. In contrast, under the "Suspension Approach," a plaintiff can "tack on" to the thirty-day period provided by Section 1367(d) any portion of the state-law limitations period that had not expired when the plaintiff filed in federal court. *Id.* at 18-19.

California mirrors the national split. The Second District has adopted the Extension Approach. *Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998). In contrast, the Third District in *Bonifield v. County of Nevada*, 94 Cal. App. 4th 298 (2001), and the Fifth District in this case have opted for the Suspension Approach.

As these decisions demonstrate, this conflict is both recurring and important. While federal litigants often join state-law claims to their federal claims, those claims are usually dismissed if the federal claims are resolved against the plaintiff early in the litigation. 13D CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §3567, at 332 (2008) ("The commonest example of when a court might decline supplemental jurisdiction is when the jurisdiction-invoking claim is dismissed relatively early in the proceedings. In such a case, most courts will decline to exercise supplemental jurisdiction"). How the state law limitations period

is calculated will therefore affect numerous cases. Moreover, unless the existing conflict is resolved definitively, California litigants and lawyers will be unsure as to what 28 U.S.C. §1367(d) means and trial courts will be sure to reach conflicting decisions.[3]

Moreover, the conflict should be resolved in favor of the Extension Approach. The Court of Appeal adopted the contrary interpretation because it found that the Suspension Approach best conformed to the statutory language. Slip Op. 20. The court stated that "[s]ubstitut[ing] the word[ ] 'suspend' . . . for 'toll[ ]'" in the statute "makes sense and straightforwardly expresses the meaning for which plaintiffs contend." *Id.* In contrast, the court found that substituting "extended" for "tolled" "is obscure and would be an obtuse way of expressing the meaning for which Kern contends." *Id.*

However, there is a third possibility that the Court of Appeal did not consider: the approach taken by the courts that have adopted the Extension Approach. Under this approach, "tolled" means "shall not expire." For example, the court in *Berke v. Buckley Broadcasting Corp.*, 821 A.2d 118 (N.J. Super. Ct. App. Div. 2003), gave "tolling" this precise meaning: "[W]e are satisfied that the 'tolling' provision of the statute refers to the period between the running of the statute while the action is pending in the federal court and thirty days following the final judgment of the federal court declining to exercise supplemental jurisdiction." *Id.* at 123. Similarly, in *Zhang Gui Juan v. Commonwealth*, No. 99-032, 2001 WL 34883536 (N.M.I. Nov. 19, 2001), the court adopted the Extension Approach, stating that "§ 1367(d) operates only to toll the limitations statute during the specified period,

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[3]Although review by the United States Supreme Court is theoretically available to resolve this federal issue, it is not clear whether any decision that this Court might reach would be "final" for purposes of 28 U.S.C. §1257 and thus reviewable by that Court. *See generally Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 476-87 (1975).

and to allow a party to refile within 30 days after dismissal from federal court." *Id.* at *4. Accordingly, the Court of Appeal was incorrect in concluding that the Suspension Approach is the best reading of the statutory language.

That leaves the courts free to adopt the interpretation of Section 1367(d) that is most consistent with congressional intent and that best accommodates the competing interests at stake. With respect to intent, Section 1367(d)'s immediate purpose was "[t]o prevent the limitations on . . . supplemental claims from expiring while the plaintiff was fruitlessly pursuing them in federal court." *Jinks*, 538 U.S. at 459. Both the Extension Approach and the Suspension Approach accomplish this goal, because both prevent state statutes of limitations from expiring while a supplemental claim is being litigated in federal court. However, the Suspension Approach frustrates both the broader objectives Congress sought to achieve in passing the statute that contains Section 1367(d) and the goals furthered by state statutes of limitations. The Extension Approach suffers from neither of these defects.

"Congress enacted the supplemental jurisdiction statute, 28 U.S.C. §1367, as part of the Judicial Improvements Act of 1990." *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 540 (2002). Congress enacted the Act, in turn, "to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes." S. REP. NO. 101-416, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804.

The Extension Approach furthers this goal because it accommodates and balances the interests of both plaintiffs and defendants. It protects plaintiffs in two different ways. It assures plaintiffs "that state-law claims asserted under §1367(a) will not become time barred while pending in federal court." *Jinks*, 538 U.S. at 464. Moreover, it provides "a brief window of protection that allows the plaintiff to file in state court without having to

face a limitations defense." 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE §106.66[3][c], at 106-101 (3d ed. 2011).

Thirty days to refile a dismissed claim is long enough to accomplish Section 1367(d)'s purpose. By definition, all claims subject to the statute will already have been included in a complaint filed in federal court, so that the plaintiff will already have completed its pre-complaint investigation and drafted its initial pleading. Accordingly, all the plaintiff has to do to comply with Section 1367(d) is amend the caption on its complaint, copy the state law claims previously alleged in the federal complaint and file the new complaint in state court. These ministerial tasks can be readily accomplished within thirty days. Accordingly, the Extension Approach "affords plaintiff[s] a reasonable time within which to get the case refiled" because "30 days is ample time for a diligent plaintiff to refile his claims and keep them alive." *Kolani*, 64 Cal. App. 4th at 409.[4]

For that reason, the Extension Approach furthers the goals that Congress sought to achieve in enacting Section 1367(d). *See Berke*, 821 A.2d at 123 ("The evident purpose of the statute is only to preserve a plaintiff's right of access to the state court for a minimum thirty-day period in order for it to assert those state causes over which the federal court has declined to exercise jurisdiction and as to which the statute of limitations has run before that declination"). "At the same time, [the Extension Approach] upholds the policy of the statute of limitations, by *limiting* the time to refile, and thus assuring that claims will be *promptly* pursued in any subsequent action." *Kolani*, 64 Cal. App. 4th at 409 (emphasis in original). It therefore is fair to both plaintiffs and defendants, as Congress intended. *See* p.13, *supra*.

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[4]Indeed, in some instances, such as certain actions under CEQA, the Legislature has given plaintiffs only 30 days to file their entire case. *See, e.g.*, PUB. RES. CODE §21167(b), (c), (e).

In contrast, the Suspension Approach gives plaintiffs an unnecessary benefit while frustrating both of the goals Congress sought to further in passing the Judicial Improvements Act and the similar purposes served by state statutes of limitation. Because plaintiffs need no more than thirty days to refile their supplemental claims (*see* p.14, *supra*), the courts adopting the Extension Approach have correctly recognized that "a 30-day grace period sufficiently prevents the harm envisioned by Congress." *Vertrue*, 712 F. Supp. 2d at 724. Giving plaintiffs the benefit of whatever limitations period was unexpired when its case was filed in federal court "is not needed to avoid forfeitures" caused by the dismissal of state law claims by a federal court. *Kolani*, 64 Cal. App. 4th at 409; *accord*, *Zhang Gui Juan*, 2001 WL 34883536, at *4.

Moreover, giving plaintiffs whatever remaining state-law limitations period exists when their federal claims are dismissed—in *addition* to 30 more days—will often result in excessive delays. As even the courts adopting the Suspension Approach have conceded, that interpretation of Section 1367(d) "may serve to drastically extend the statute of limitations." *Vertrue*, 712 F. Supp. 2d at 724. As the *Vertrue* court explained, even when "a case is pending in federal court for a significant time, none of that time is counted against the running of the statute of limitations." *Id.* Accordingly, under the Suspension Approach, "a plaintiff could sit idly by and let years pass before pursuing the claim in state court." *Id.*

In addition, the Suspension Approach "is contrary to the policy in favor of prompt prosecution of legal claims" embodied in state statutes of limitation. *Huang v. Ziko*, 511 S.E.2d 305, 308 (N.C. Ct. App. 1999).[5] Statutes of limitation "protect defendants from

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[5] *Accord*, *Kolani*, 64 Cal. App. 4th at 409 (Suspension Approach is "unreasonable" and "does significant harm to the statute of limitations policy"); *Berke*, 821 A.2d at 123 ("Despite its ambiguous use of the word 'tolling,' we do not believe that the federal

(continued . . .)

the stale claims of dilatory plaintiffs" and "stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 395 (1999). They "enable defendants to marshal evidence while memories and facts are fresh and . . . provide defendants with repose for past acts." *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 755 (1998). They "are not mere technical defenses, allowing wrongdoers to avoid accountability. Rather, they mark the point where, in the judgment of the legislature, the equities tip in favor of the defendant (who may be innocent of wrongdoing) and against the plaintiff (who failed to take prompt action)." *Pooshs v. Philip Morris USA, Inc.*, 51 Cal. 4th 788, 797 (2011) (citation omitted). The Suspension Approach frustrates these policies because it enables plaintiffs to sit on their claims—often for long periods of time—following their dismissal by a federal court.

Finally, Congress intended Section 1367(d) to provide "a straightforward tolling rule" that would be "conducive to the administration of justice." *Jinks*, 538 U.S. at 463. The Extension Approach does just that by providing a fixed 30-day period for refiling of otherwise time-barred state law claims after their dismissal by a District Court. This straightforward rule is simple for litigants to understand and for courts to apply consistently. In contrast, the Suspension Approach requires calculation of the remaining "unexpired" limitations period for each state law claim following federal dismissal. Such a standard is neither straightforward nor conducive to the efficient administration of justice, because it requires applying differing limitations periods for differing state law causes of action, for which the exact dates of accrual often are unclear and disputed, such as where the

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(. . . continued)
statute intends a result that would permit a gross protraction of the limitations period in clear contravention of the underlying policy of statutory limitations on the time for bringing suit").

discovery rule applies. *See, e.g.*, *Prudential Home Mortg. Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1246 (1998) (applying delayed discovery rule); *compare id.* at 1252-56 (Rylaarsdam, J., dissenting) (rejecting application of rule). In this respect, too, the Suspension Approach fails to further the congressional purpose in enacting the bill of which Section 1367(d) is a part.

II.

THE COURT SHOULD DETERMINE WHETHER LOCAL BANS ON LAND APPLICATION ARE PREEMPTED BY STATE LAW.

A. The Petition Presents An Important And Unresolved Issue Of State Preemption Law.

As Respondent California Association of Sanitation Agencies told the Court of Appeal, numerous counties have enacted local ordinances that are either legal or practical bans on land applying biosolids. *See* pp.6-7, *supra*. Accordingly, whether such ordinances are preempted by the Integrated Waste Management Act is a recurring question of great importance, as all the Respondents recognized in their letters successfully seeking publication. *See* p.6, *supra*.

Moreover, the need for review is underscored by the fact that the Court of Appeal erred in finding preemption. The court found that Plaintiffs were likely to prevail on their preemption claim because Public Resources Code "Section 40051 requires local agencies like Kern County and the City of Los Angeles to '[p]romote' and '[m]aximize' recycling." Slip Op. 23.[6] But the statutory language provides that Section 40051's mandate to "promote" and "maximize" recycling applies only when a public agency is "implementing this division"—*i.e.*, only when it is

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

implementing the Act.[7] That forecloses Plaintiffs' preemption claim, because the County's voters were not implementing the Act when they adopted Measure E. Instead, Measure E was adopted pursuant to the police power granted to cities and counties by Article XI, Section 7 of the California Constitution. Indeed, Measure E itself recites that it was enacted "pursuant to the initiative power of the People of Kern County and the police power of Kern County as set forth in Article XI, Section 7, of the California Constitution." 1 AA 38 (Measure E §8.05.20). Unless a critical phrase of Section 40051 is disregarded, and given no effect, the statute does not preempt Measure E.

The Court of Appeal rejected this argument, without even attempting to explain how its interpretation of the statute could be squared with the statutory language. Instead, it announced in an *ipse dixit* that the County's interpretation of Section 40051 "cannot be correct, at least in the circumstances of this case." Slip Op. 25. The court explained:

> Land application of biosolids is a widely used, widely accepted, comprehensively regulated method by which municipalities fulfill their obligation to reduce the flow of waste to landfills. . . . One jurisdiction's action to ban it, and to interfere with other jurisdictions' efforts to comply

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[7]The full text of Section 40051 is as follows:

> *In implementing this division*, the board and local agencies shall do both of the following:
>
> (a) Promote the following waste management practices in order of priority: (1) Source reduction. (2) Recycling and composting. (3) Environmentally safe transformation and environmentally safe land disposal, at the discretion of the city or county.
>
> (b) Maximize the use of all feasible source reduction, recycling, and composting options in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal. For wastes that cannot feasibly be reduced at their source, recycled, or composted, the local agency may use environmentally safe transformation or environmentally safe land disposal, or both of those practices. (Emphasis added)

> with their CIWMA obligations, is not consistent with a statutory scheme that presumes all jurisdictions will have access to crucial waste-stream-reduction methods. (*Id.*)

This proves too little. The Legislature may well have *presumed* that all jurisdictions would have access "to crucial waste-stream-reduction methods." But it took no steps to give that presumption preemptive force when one jurisdiction regulates solid waste produced by another. To be sure, the Legislature that passed the Act knew that "[l]ocal conditions transcending city or county boundaries might require collection and disposal to be handled on a regional basis" (*Waste Res. Techs. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 307 (1994)), and "made provision in the Act for the creation and operation of regional agencies, garbage disposal districts, and garbage and refuse disposal districts." *Id.* at 307-08 (citations omitted). However, the Legislature made participation in all these regional agencies and districts *voluntary*. §§40971, 49010, 49110. These statutes are therefore incompatible with an interpretation of the Act that has the effect of forcing one local jurisdiction to accept another's biosolids.

Moreover, what the Legislature *did* say about local autonomy undermines the Court of Appeal's claim that the Legislature meant to preempt local ordinances like Measure E. Section 40059 provides, in relevant part, that, "[n]otwithstanding any other provision of law, each county . . . may determine . . . [a]spects of solid waste handling which are of local concern, including, but not limited to, . . . [the] nature, location, and extent of providing solid waste handling services." Because its introductory clause provides that Section 40059(a) prevails over "any other provision of law," the statute "overrides or supersedes any other provisions of the . . . Act which might indicate to the contrary." *Rodeo Sanitary Dist.*, 71 Cal. App. 4th at 1451 (citation and internal quotation marks omitted).

The words of Section 40059(a), like those in Section 40051, are unambiguous. Section 40059 preserves local authority over the "*nature, location, and extent* of providing solid waste handling

services." (Emphasis added.) The Act defines "solid waste handling" as "the collection, transportation, storage, transfer, or processing of solid waste." §40195. "Processing" in turn means "the reduction, separation, recovery, conversion, or recycling of solid waste." §40172. Accordingly, "solid waste handling includes recycling—of solid waste." *Waste Mgmt. of the Desert, Inc.*, 7 Cal. 4th at 488 (emphasis omitted). Because "solid waste" includes biosolids, Section 40059(a) preserves local authority to determine "the nature, location, and extent" of recycling that form of waste. Consequently, the statute necessarily preserves local autonomy over "the nature, location, and extent" of land application: the precise subject of Measure E.

As with Section 40051, the Court of Appeal in interpreting Section 40059 refused to believe that the Legislature meant what it said. Instead, again without explaining how the language of the statute could be squared with its interpretation, the court said that "we do not consider it likely that the Legislature intended the words of that statute to authorize local bans on major, widespread, comprehensively regulated methods of recycling. . . . [I]t is highly unlikely that the legislators would have authorized major incursions on those goals in such vague terms." Slip Op. 30.

The Court of Appeal got the wrong answers because it asked the wrong question. Instead of interpreting Sections 40051 and 40059 as if the Act had had been the product of immaculate conception divorced from the political process, the court should have placed the Act squarely within California's long tradition of local autonomy over solid waste management. Had it done so, it could not have so easily dispensed with the statutory language.

"Prior to [the Act's] passage, courts accepted that, state legislation notwithstanding, the dominant role in refuse handling belonged to localities." *Waste Res. Techs.*, 23 Cal. App. 4th at 307. As a result, the statutes regulating waste management prior to the Act "were viewed as acknowledging that allowance

had to be made for 'the unique circumstances of individual communities' and that the Legislature had therefore 'empowered local governments to adopt refuse regulations which would best serve the local public interest.'" *Id.* (quoting *City of Camarillo v. Spadys Disposal Serv.*, 144 Cal. App. 3d 1027, 1031 (1983)).

The Act did not represent "a fundamental change in the Legislature's traditional outlook towards the subject of waste handling." *Waste Res. Techs.*, 23 Cal. App. 4th at 309. Accordingly, courts interpreting the Act have found "no legislative intent to displace deeply entrenched local authority." *Id.* That is not surprising, for the Act "was in large measure a consolidation and recodification of existing law." *Id.* at 307. Consequently, if the Act's drafters had intended to displace long-entrenched local authority over solid waste management, and prohibit local bans on particular forms of recycling, they would have said so explicitly or by clear implication. "Like Holmes's dog that did not bark,[8] the fact the Legislature did neither of these things is instructive" and suggests that the Legislature did not intend to preempt local ordinances like Measure E. *Elsner v. Uveges*, 34 Cal. 4th 915, 933 (2004).

At bottom, the Court of Appeal was motivated by concern that "[i]f we held that Kern County is empowered to ban land application of biosolids, we would necessarily be implying that all counties and cities are empowered to do the same." Slip Op. 25. But there is no evidence that the Legislature addressed itself to that concern. After all, it is pure speculation whether additional jurisdictions would enact similar ordinances if Measure E is upheld. Some jurisdictions, particularly in economically distressed rural areas, may want to import biosolids to support the local economy or give local farmers the benefits that Plaintiffs claim derive from land application. 1 AA 6-7 (¶¶20-21). In any event, the

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[8] *See* Arthur Conan Doyle, *Silver Blaze* in THE COMPLETE SHERLOCK HOLMES 347 (1960).

Legislature's failure to provide a solution for a problem that had never occurred prior to the Act and that, indeed, has not yet occurred in the more than two decades since the Act was enacted (despite the enactment of numerous local ordinances restricting land application) is no reason for the Court to balance the competing interests itself and impose duties on local governments that the Legislature did not see fit to adopt. *See, e.g.*, *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1168 (1991) ("In the absence of clear legislative direction, which the general anti-discrimination provisions of the Unruh Act do not provide, we are unwilling to engage in complex economic regulation under the guise of judicial decisionmaking"); *cf. id.* at 1168 n.15 (collecting cases noting "the inappropriateness of judicial intervention in complex areas of economic policy").

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

The Court of Appeal was able to reach the result that it did only because it failed to apply the usual tests for state law preemption and instead applied a novel federal standard that has never been the sole basis for state preemption. In *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853 (2002), the Court "discussed (but had no occasion to adopt)" (Slip Op. 23) a federal preemption standard set forth in *Blue Circle Cement, Inc. v. Board of County Commissioners*, 27 F.3d 1499 (10th Cir. 1994). Under this standard, "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." *Great W.*, 27 Cal. 4th at 868 (citing *Blue Circle Cement*, 27 F.3d at 1506-07). However, neither *Great*

Western nor any other California case has used this standard as the sole basis for invalidating a local ordinance.[9]

That is exactly what the Court of Appeal did here. Finding the *Blue Circle Cement* test "appropriate," the court held that "Measure E is likely to be held invalid because land application of biosolids, which undisputedly allows solid waste to be disposed of through recycling instead of in landfills or incinerators, is an activity the CIWMA seeks to promote and Measure E purports totally to ban." Slip Op. 24.

This bootstrap conclusion illustrates why mechanically applying tests imported from another jurisdiction is no substitute for analysis. The premise of the court's conclusion was that the *Blue Circle Cement* test is triggered because the Act promotes land application as a form of recycling. In fact, Section 40051's mandate to "promote" and "maximize" recycling applies only when a public agency is implementing the Act. *See* pp.17-18, *supra*. Accordingly, the Court of Appeal's analysis assumed the very point it intended to prove.

This mistake would not have been made had the Court of Appeal applied California preemption law. Under the traditional preemption test, conflict preemption occurs only when a local law prohibits what state law commands or commands what state law forbids, or it is impossible to comply with both state and local law (*Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1161 (2006)), or when a local law impairs the exercise of a

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[9]In *Fiscal v. City & County of San Francisco*, 158 Cal. App. 4th 895 (2007), the court cited *Great Western* for the proposition that "total bans are not viewed in the same manner as added regulations, and justify greater scrutiny." *Id.* at 915. But that aspect of the court's decision involved a local ordinance that banned the sale of all firearms within the city. The court held that the ordinance impaired gun rights protected by state law, and was therefore preempted, because "the state and local acts are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." *Id.* *Fiscal* therefore had no need to rely on the *Blue Circle Cement* test.

right granted by state law. *Action Apartment Ass'n v. City of Santa Monica*, 41 Cal. 4th 1232, 1243 (2007) (local ordinance prohibiting landlords from filing certain unlawful detainer actions preempted because it impaired "the utmost freedom of access to the courts" protected by state law). Measure E satisfies none of these tests. The Court should grant review to determine whether the federal *Blue Circle Cement* test for determining whether federal law preempts state law may be used to determine whether state law preempts a local ordinance.

Alternatively, the Court should grant review and hold the case for its forthcoming decision in *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.*, No. S198638 (argued Feb. 5, 2013). The Court of Appeal in this case distinguished between regulating land application, which it thought might be permissible, and banning it, which it thought was not. *See* Slip Op. 24 (County previous biosolids regulation "might be acceptable under CIWMA," but "[a] total ban . . . is inimical to the [Act]"). In contrast, the Court of Appeal in *City of Riverside* held that "[a] ban or prohibition is simply a type or means of restriction or regulation." *City of Riverside v. Inland Empire Patient's Health & Wellness Ctr.*, 200 Cal. App. 4th 885, 906 (2011), *pet'n for rev. granted.* Should this Court affirm the Court of Appeal's decision in *City of Riverside*, at the very least it should remand this case for reconsideration by the Court of Appeal in light of the Court's decision in *City of Riverside.*

III.

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

In *Associated Homebuilders, Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976), the Court held that a local land use regulation that has a regional impact must "reasonably relate[] to the general welfare of the region it affects." 18 Cal. 3d at 610. To make this

determination, a court must first "identify the competing interests affected by" the ordinance. *Id.* at 608. It must then determine "whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests." *Id.* at 609.

The Court of Appeal held that Plaintiffs were likely to prove that Measure E was not "a reasonable accommodation of the competing interests" because "the evidence presented so far shows—undisputedly for purposes of this appeal—considerable hardship to waste-generating municipalities around the region if Measure E is enforced and no offsetting hardship to Kern County if it is not enforced." Slip Op. 33 (emphasis omitted). However, the court's ruling is not limited to the state of the record. To the contrary, the court expressly held that "an ordinance by which one local government obstructs others' efforts by banning a major form of recycling within its jurisdiction fails to accommodate the regional welfare." *Id.* Fairly read, then, the opinion stands for the proposition that all local ordinances that ban "major forms of recycling" are invalid under the "regional welfare" doctrine.

The trial court's ruling represents an unwarranted extension of this doctrine. Interpreting the "regional welfare" doctrine to impose a duty on the County to accept Plaintiffs' sludge would upset the balance between state and local authority that the Legislature enacted when it passed the Integrated Waste Management Act. The Act "sets forth a comprehensive statewide program for solid waste management" (*Waste Mgmt. of the Desert, Inc.*, 7 Cal. 4th at 484), that "looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority." *Waste Res. Techs.*, 23 Cal. App. 4th at 306. However, interpreting the "regional welfare doctrine" to preclude the County from prohibiting land application destroys the "regulatory independence and authority" that the Act preserved for local public entities.

This case is therefore analogous to the decisions refusing to impose common law duties at odds with a comprehensive scheme adopted by the Legislature. For example in *I.E. Associates v. Safeco Title Insurance Co.*, 39 Cal. 3d 281 (1985), this Court considered whether "a trustee in a nonjudicial foreclosure has a common law duty to make reasonable efforts to contact a defaulting trustor/debtor." *Id.* at 283. The Court declined to impose such a duty because it would upset the Legislature's "carefully crafted balancing of the interests of beneficiaries, trustors, and trustees." *Id.* at 288.

The same logic applies here. As we have seen, prior to passage of the Act local governments played the dominant role in waste management. *See* p.21, *supra*. The Act did not diminish this role; instead, it continues to place the primary responsibility for waste management, and the preparation of waste management plans, on local agencies. *Id.* The Act also makes regional cooperation between local public entities voluntary, not mandatory. *See* p.19, *supra*. Finally, and most importantly, the Act does not "require a city or county to allow other local agencies to conduct their recycling activities in its jurisdiction." *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 897 (C.D. Cal. 2007) (citation and internal quotation marks omitted).

Imposing an open-ended requirement that local agencies accommodate regional waste disposal needs upsets the carefully crafted balance between state and local responsibility that the Legislature adopted when it adopted the Act. It makes the courts part of a waste management process that is currently the domain of state and local governments. It hobbles local planning by imposing new and unforeseeable obligations on cities and counties to accommodate waste produced by others. And—most important—it substitutes judicial coercion for the voluntary regional efforts encouraged by the Act. The courts should not rush in and require regional accommodation where the Legislature has refused to do so.

CONCLUSION

The Petition for Review should be granted.

Dated: April 22, 2013.

Respectfully,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.504(d)(1)

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached **Petition for Review** contains 8,390 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Dated: April 22, 2013

STEVEN L. MAYER

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