IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CIVIL CASE NOS. A130682, A130734, A130735, A132844
(CONSOLIDATED CASES)

SIERRA CLUB,
Petitioner, Respondent and Cross-Appellant,
v.
COUNTY OF SOLANO, et al.,
Respondents, Appellants, and Cross-Respondents,

POTRERO HILLS LANDFILL
Real Party In Interest, Appellant, and Cross-Respondent

BLT ENTERPRISES OF SACRAMENTO, et al.
Intervenors, Appellants, and Cross-Respondents.

On Appeal from the Superior Court for Solano County
Honorable Paul L. Beeman
Solano County Superior Court; Case No. FCS034073

NORTHERN CALIFORNIA RECYCLING ASSOCIATION,
Petitioner and Respondent,
v.
COUNTY OF SOLANO,
Respondent and Appellant.

On Appeal from Superior Court for Solano County,
Honorable Paul L. Beeman
Solano County Superior Court; Case No. FCS033687

SUBSTAINABILITY, PARKS, RECYCLING AND WILDLIFE
LEGAL DEFENSE FUND,
Petitioner, Respondent, and Cross-Appellant,
v.
COUNTY OF SOLANO, et al.,
Respondents, Appellants, and Cross-Respondents,

POTRERO HILLS LANDFILL, et al.,
Real Parties In Interest, Appellants, and Cross-Respondents,

TRASHPROS LLC, et al.,
Intervenors and Appellants.

On Appeal from the Superior Court for Solano County
Honorable Paul L. Beeman
Solano County Superior Court; Case No. FCS033700

AMICUS BRIEF OF NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, CALIFORNIA REFUSE AND RECYCLING COUNCIL, LOS ANGELES COUNTY WASTE MANAGEMENT ASSOCIATION, SOLID WASTE ASSOCIATION OF ORANGE COUNTY, AND THE INLAND EMPIRE DISPOSAL ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST AND APPELLANTS POTRERO HILLS LANDFILL, ET AL.

Appeal from the Superior Court for Solano County
Honorable Paul L. Beeman
Solano County Superior Court Case Nos. FCS034073, FCS033687, FCS033700
(Consolidated Cases)

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A130682 Division 3

(Consolidated Cases No. A130682, A130734, A130735, and A132844)

Case Name: Sierra Club v. County of Solano, et al.

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IF SUBMITTED AS A STAND-ALONE DOCUMENT, SUBMIT A SEPARATE PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE.

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I. INTRODUCTION

The processing, transport, recycling and disposal of waste is an important component of the United States economy. The ability to manage the movement across local, regional, and state lines of the quarter-billion tons of solid waste Americans produce annually is a critical component of the national infrastructure, economy, and public health. Acceptable methods of regulating the movement and management of solid waste have been a focus of dormant Commerce Clause jurisprudence ever since the United States Supreme Court definitively ruled that waste materials are articles in commerce and subject to the protection of the dormant Commerce Clause. (*City of Philadelphia v. New Jersey* (1978) 437 U.S. 617.)

For decades, the courts have struck down protectionist barriers such as Solano County's Measure E ("Measure E") as incompatible with the dormant Commerce Clause. Here, Respondents argue that the local nature of this regulation removes it from the reach of the dormant Commerce Clause, on the assumption that Measure E, as rewritten by the trial court, would still allow *out of state* operations to dispose of their waste in the County, thus alleviating concerns implicating interstate commerce. This simplistic conclusion is contrary to decades of U.S. Supreme Court and lower court decisions finding that the dormant Commerce Clause protects all commerce tied to the national economy, not just goods that physically cross state lines. Neither California's counties, nor the thousands of counties and townships throughout the rest of the nation, stand alone as economic islands around which the free flow of commerce may be diverted. Building a virtual wall around Solano County ("County") and allowing the County to impose a de facto ban on the importation of solid waste from the

57 other counties in the state, the admitted result of Measure E, has a profound impact on the market for solid waste as an article of interstate commerce.

Should this court allow Measure E to stand, and the trial court's analysis to control, dormant Commerce Clause protections would be significantly narrowed, particularly in large states like California, where significant interstate commerce occurs far from state borders. In the wake of an eviscerated dormant Commerce Clause, amici anticipate a patchwork of discriminatory and protectionist solid waste bans from cities and counties across the country. The trial court's reasoning would permit local and parochial majorities to enact discriminatory measures against all manner of goods and services, not merely solid waste. These local entities, often themselves creatures of the states, will be able to achieve through ordinance and initiative what respondents concede the states are prohibited from pursuing. For the National Solid Wastes Management Association ("NSWMA"), its fellow amici, and their members throughout California and across the country, the source of these discriminatory trade barriers—city, county or state-- is immaterial. The ultimate impact of allowing Measure E and its counterparts to stand would be to undermine a national market that provides a safe and secure system of solid waste management and disposal, and to exempt from constitutional control other local trade barriers and discriminatory laws. The amici, representing thousands of businesses across California and the nation and their millions of employees, urge this court not to allow such a result.

II. INTERESTS OF AMICI

The NSWMA is the national trade association for the solid waste and recycling industry, with more than 350 members that operate in all

fifty states, including California. NSWMA's members include waste haulers and the owners of landfills, transfer stations, recycling centers, and other solid waste management facilities, all of whom rely heavily on the free flow of solid waste in and across cities, counties, and states to operate their businesses, and many of whom will be harmed by the promulgation of the types of protectionist and discriminatory measures embodied in Measure E.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM serves as a voice for the manufacturing community and the leading advocate for sensible government policies that help manufacturers create jobs. NAM joins as amicus in this case to emphasize that the legal and economic harms at stake reach much farther than a dispute over one landfill, and the trial court's limited definition of interstate commerce will expose many billions of dollars of economic activity to discrimination by thousands of local governments, ultimately acting as a barrier to future economic growth.

The California Refuse Recycling Council ("CRRC") is a non-profit trade association representing solid waste and recycling companies with operations in California. The delivery of waste services in California is largely privatized, and most Californians receive solid waste services from the private sector represented by the CRRC. CRRC members engage in every aspect of solid waste handling, and are responsible for the development and operation of most of the solid waste infrastructure in the state, including waste transfer, disposal, processing, recycling, conversion, and composting facilities.

The Los Angeles County Waste Management Association ("LACWMA"), the Solid Waste Association of Orange County ("SWAOC"), and the Inland Empire Disposal Association ("IEDA") are regional, non-profit trade associations comprised of waste collection and recycling firms. More than 17 million people reside in the four county area (Los Angeles, Orange, San Bernardino, Riverside) served by the member companies of these associations. Association members operate a variety of solid waste programs and facilities, ranging from landfills to materials recovery (recycling) facilities, compost facilities, and transfer stations. The member companies employ over 10,000 workers. These companies participate in waste management systems and programs that rely, to varying degrees, on the ability to move solid waste across city and county boundaries. Their facility construction financing arrangements contemplate a reliable and steady flow of waste material, and any significant disruption or interruption in that flow of material may impair their ability to repay those loans.

The California Manufacturers and Technology Association ("CMTA") is a non-profit trade association working to improve and enhance a strong business climate for California's 30,000 manufacturing, processing, and technology based companies. CMTA works to develop balanced laws, effective regulations, and sound public policies to stimulate economic growth and create new jobs while safeguarding the state's environmental resources. CMTA represents businesses from the entire manufacturing community – an economic sector that generates more than $250 billion every year and employs more than 1.5 million Californians.

III. ARGUMENT

Amici adopt the positions of Appellants Potrero Hills Landfill, et al. as set forth in their opening and reply briefs. We write separately to emphasize the impact to businesses nationally, and the country's solid waste infrastructures in particular, if local regulations with significant economic impacts are deemed to be beyond the reach of the dormant Commerce Clause. We also write to highlight three significant issues raised by the trial court's decision to rewrite and uphold Measure E that are contrary to a large body of dormant Commerce Clause jurisprudence.

First, the trial court erred in ruling that a rewritten Measure E that discriminates only against other Californians does not implicate constitutionally protected commerce. The country's solid waste disposal infrastructure, without question a part of interstate commerce, is dependent on the free flow of commerce through cities, counties, and states. A restriction of this trade, even if effective only as among counties within a state, would effectively derail the successful and efficient system for management of waste. Second, Measure E's express discrimination against outsiders is a classic example of a type of local ordinance that is *per se* illegal under a dormant Commerce Clause analysis. In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources* (1992) 504 U.S. 353 (hereafter *Ft. Gratiot*), the United States Supreme Court specifically addressed the issue of political subdivisions of a state attempting to curtail the movement of articles of commerce through subdivisions of the State, rather than through the State itself, and found that such measures may not avoid the strictures of the Commerce Clause. Finally, the trial court did not adhere to the prescribed steps for dormant Commerce Clause analysis. The Commerce Clause "serves an important – indeed, irreplaceable – function as a mandate for economic cooperation and

unification." J. Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone and its Progeny* (1996) 7 Villanova Env. L.J. 203, 260. The analysis and conclusion that Measure E does not implicate the dormant Commerce Clause is contrary to the broad definition of commerce articulated by the U.S. Supreme Court and the many lower court decisions which have routinely held that such an inquiry requires more than a cursory examination of whether a particular product travels across state lines. The dormant Commerce Clause also requires examination of whether (1) the economic effects of the ordinance are interstate in reach, and (2) what effect would arise if not one, but many jurisdictions or every jurisdiction adopted similar legislation. Here, the effects of Measure E do not end at the state line, and the disruption that will result from enactments of similar restrictions by local jurisdictions across the country has prompted amici's participation in this case.

A. American Waste Management Depends on the Continued Free Flow of Commerce Among and Through Counties, Cities, and States

Uninhibited movement of solid waste is a fundamental component of our national waste management infrastructure. The $60 billion dollar American solid waste industry and its integrated waste management system is premised on the role of solid waste as an article of interstate commerce, and its free flow both intrastate and interstate is essential to the system's viability. Virtually every state and numerous counties in the United States both import and export solid waste.[1] Bans or restrictions based on

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[1] See e.g., Eduardo Ley, Molly K. Maccauley & Stephen W. Salant (2002) *Spatially and Intertemporally Efficient Waste Management: The Costs of Interstate Trade Restrictions*, 43 J. of Env. Economics and Mgmt 188, 190 (As of 1997, "almost all states routinely import and export some waste . . . not just to neighboring states but frequently much longer distances." Moreover, "MSW [municipal solid waste] generation has tended to increase

jurisdiction of origin are highly impractical and irrational due to the integrated stream of commerce in which solid waste transport and disposal operates. Waste generated across the country is frequently consolidated and processed at regional transfer stations, and only then transported to its ultimate disposal location. However, waste delivered from transfer stations is recorded by identifying the jurisdiction in which the transfer station operates, and thus out-of-state waste processed at a transfer station may not be recorded or identified as originating from an out-of-state source. (Appellants Consolidated Index at p. 1040, Declaration of Scott Schreiber in support of Real Party in Interest Potrero Hills Landfill, Inc.) (hereafter "Decl. of Schreiber") As a result, a de facto ban on "inter-county" waste disposal could also exclude "out of state" waste, in direct conflict with the Commerce Clause.

For example, approximately two tons of waste received by the Potrero Hills Landfill ("PHLF") in the first quarter of 2001, designated as originating from a transfer station in Pittsburg, California actually originated in Michigan. (Decl. of Schreiber, Appellants Consolidated Index at p. 1040.) In addition, waste brought in via airplane from other states at the sizeable Travis Air Force Base facility would be reported as originating at the Base, rather than the true place of origin. Allowing county-by-county protectionist bans such as Measure E would precipitate a patchwork structure of access to solid waste disposal markets that would defeat the existing system and raise costs for businesses, governments, and their customers and ratepayers. Solid waste companies have relied on nondiscriminatory waste policies of local governments to develop a robust and environmentally protective system of effectively managing America's

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about 5% per year in recent years" so the amount of waste involved in commerce has grown since 1997).

waste. Over the past twenty-five years, as environmental safeguards at landfills have become more sophisticated and expensive, thousands of local dumps have closed and been replaced by a much smaller number of larger regional, highly engineered sanitary landfills. (Appellants Consolidated Index at p. 768, Declaration of Mark P. Berkman, Ph.D in support of Real Party in Interest Potrero Hills Landfill, Inc.) These facilities, many of which generate renewable energy from landfill gas,[2] typically manage waste from multiple jurisdictions. Nationally, a small percentage of solid waste is managed in the city or county in which it is generated, and this is true in California as well. Data collected by CalRecycle in 2009 shows just how interconnected California counties, and how dependent they are on each other for the safe and efficient disposal of their solid waste.

Thus, the implementation of Measure E is more than one county's isolated preference to exclude out-of-county waste; the ordinance would represent a tear in the fabric of the national solid waste disposal infrastructure. Allowing Measure E to stand as rewritten by the trial court could have dramatic adverse consequences for amici curiae and their members. Thus, we urge the court to examine Appellants' dormant Commerce Clause claims in this context, and with these potential consequences in mind.

B. The Dormant Commerce Clause Does Not Distinguish Out-Of-County Waste Bans From Out-of-State Waste Bans

The numerous dormant Commerce Clause cases dealing with solid waste provide a wealth of precedent to guide this court's analysis,

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[2] For information regarding the generation of renewable energy from landfill gas, see the United States Environmental Protection Agency's Landfill Methane Outreach Program, available at http://www.epa.gov/lmop/

beginning with *Ft. Gratiot*. Several cases followed in rapid succession, including *BFI Medical Waste Sys. v. Whatcom County* (9th Cir. Wash. 1992) 983 F.2d 911 (hereafter *BFI*), which confirmed that "[u]nder Fort Gratiot, out-of-county waste bans are pro [sic] se unconstitutional." (*BFI* at p. 913.) Similarly, *C & A Carbone, Inc. v. Town of Clarkstown* (1994) 511 U.S. 383 (hereafter *Carbone*), found a local flow control ordinance to be in violation of the dormant Commerce Clause. Neither Respondents nor the trial court have provided a sound rationale for departing from *BFI* to uphold Measure E.

The trial court distinguished *BFI*, characterizing the holding as dicta because the restriction at issue in the case was "an outright ban." (Trial Court Decision at 3:9-25.) This distinction is unavailing, however, as any amount of discrimination rounds afoul of the dormant Commerce Clause. There is no "*de minimis*" defense to a Commerce Clause violation: discrimination is impermissible regardless of the magnitude and scope. The determinative question is whether discrimination has occurred. (*Camps Newfound/Owatonna v. Town of Harrison* (1997) 520 U.S. 564, 581, fn15.)

Moreover, Measure E is a de facto ban that would close Solano County to all but a *de minimis* volume of commerce in solid waste, recyclables and compostables, and was only "saved" in the view of the trial court by its revision of the ordinance to recast Measure E as allowing import of waste from other states. Respondents claim the unambiguous holding of *BFI* that out-of-county waste bans are unconstitutional should somehow be interpreted as applying only to out-of-county bans that discriminate against out-of-state business interests. A straightforward reading of *BFI* does not support this conclusion, and indeed waste from Washington State was also subject to the ban. As numerous courts have found, *Ft. Gratiot* and *BFI* stand for the unequivocal proposition that

out-of-county waste bans are unconstitutional. (See, e.g., *Ecological Sys. v. City of Dayton* (Ohio 2002) 2002 Ohio App. LEXIS 354; *Mullis Tree Serv. v. Bibb County* (M.D. Ga. 1993) 822 F.Supp. 738, 748; *Fulton County v. City of Atlanta* (Ga. 2006) 280 Ga. 353.) Such a conclusion is compelled in this case as well, as Measure E is an out-of-county waste ban that runs afoul of dormant Commerce Clause protections.

C. The Trial Court's Dormant Commerce Clause Analysis Fails to Analyze the Interstate Economic Effects of Measure E and the Consequences of Similar Legislation

Intrastate waste, particularly in the volumes that flow through California, has a large connection to interstate commerce and is subject to the strictures of the dormant Commerce Clause. This underlying concept—that intrastate activity has effects on interstate commerce—allows the federal government to undertake a wide range of regulation that illustrates how squarely the ubiquitous waste industry falls within the definition of interstate commerce. For example, the Ninth Circuit ruled earlier this year that the federal government may regulate species under the Endangered Species Act even where the species are only found in small pockets of a single state (See *San Luis & Delta-Mendota Water Auth. v. Salazar* (9th Cir. 2011) 638 F.3d 1163)[3]. This expansive power is consistent with the

[3] The Ninth Circuit relied on Supreme Court precedent that "Congress has the power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce . . . when a statute is challenged under the Commerce Clause, courts must evaluate the aggregate effect of the statute (rather than an isolated application) in determining whether the statute relates to 'commerce or any sort of economic enterprise'." The court also held that simply because a regulation "ensnares some purely intrastate activity" does not mean it is immune from the reach of the Commerce Clause, as Congress has the power to regulate purely intrastate activity as long as the activity is being regulated under a general regulatory scheme that bears a "substantial" relationship to interstate commerce. (*San Luis & Delta-*

Court's equally broad pronouncement in 2005 that the Commerce Clause allows the federal government to regulate six marijuana plants grown in a private residence for private consumption in a single state. (See *Gonzales v. Raich* (2005) 545 U.S. 1.) The rationale of these cases logically extends to the flow of solid waste, which is undeniably an article of interstate commerce of local and national importance and for which there are robust interstate and intrastate markets. Because the reach of the dormant Commerce Clause extends as far as Congress' affirmative power, even intrastate waste is protected against exclusionary import restrictions erected at the local jurisdiction. The U.S. Supreme Court has rejected a "two-tiered definition of commerce" and held that just as Congress has the affirmative power to regulate the interstate movement of goods, restrictions on the movement of those goods are not free from constitutional scrutiny. (See *Camps Newfound/Owatonna v. Town of Harrison, supra,* 520 U.S. 564, 584; see also *Philadelphia v. New Jersey* (1978) 437 U.S. 617, 621-623 and *Hughes v. Oklahoma* (1979) 441 U.S. 322, 326, fn2.)

Importantly, the trial court also overlooked another step of Commerce Clause analysis. The court should have considered the aggregate effects of Measure E on commerce in solid waste, and whether this commerce is in any way part of the national economy. Courts must evaluate the economic consequences of the statute, rather than take an isolated view of whether a good or product crossed state lines, in determining whether the statute relates to commerce or any sort of economic enterprise. (*San Luis & Delta-Mendota Water Auth. v. Salazar, supra,* 638 F.3d at p. 1175.) Here, the trial court agreed that to the extent Measure E "would limit the importation of waste from out of state" the

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Mendota Water Auth. v. Salazar, supra, 638 F.3d at pp. 1174-1175, internal citations omitted.)

ordinance would present dormant Commerce Clause concerns. The trial court focused almost exclusively on the direct importation of solid waste from out of state, and where the physical waste was generated, an overly narrow reading of dormant Commerce Clause jurisprudence. The dormant Commerce Clause analysis embraces not only the direct, physical prohibition on the importation of certain goods, or restrictions based on where such goods are generated, but also the indirect and cumulative economic impacts of barriers such as Measure E.

First, the trial court is required to consider not only the direct access to local landfills by out-of-state and out-of-county operators, but the larger economic impact of the ban on interstate commerce as a whole. This issue was squarely addressed in *Carbone*, where the Supreme Court found that a local flow control ordinance did in fact regulate interstate commerce despite the local entity's contention that its ordinance reached only waste within its jurisdiction. The Supreme Court there noted that:

> While the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach . . . the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste . . . . The ordinance thus deprives out-of-state businesses of access to a local market. (*Carbone, supra,* 511 U.S. at p. 389.)

A facially discriminatory import barrier such as Measure E that walls off significant commerce in solid waste is more offensive than the indirect discrimination of the flow control measure struck down in *Carbone*. Thus, akin to the arguments of the local regulating entity in support of the flow control ordinance in *Carbone*, the trial court's reasoning in this case is premised "on an outdated and mistaken concept of what constitutes interstate commerce." (*Ibid.*) Similarly, the Eighth Circuit

struck down a referendum on Commerce Clause grounds because it prevented a landfill from opening, and held that in this context "[t]o determine whether there was any discrimination, we must look to *the effects on the garbage market . . .* (*SDDS, Inc. v. State of South Dakota* (8th Cir. 1995) 47 F.3d 263, 271, fn12, emphasis added.) The Ninth Circuit recently reaffirmed the necessity of examining the broader economic impact of discriminatory measures on interstate commerce, noting that the Commerce Clause:

> . . . protects the vitality of the national market for goods and services, not the location of a particular participant, and thus a state burdens the rights of its own residents as well as those of other states when it burdens interstate commerce. Although the dormant Commerce Clause primarily targets discrimination against out-of-state economic activity, under *Pike* it prohibits all unjustifiable burdens on interstate commerce. (*Yakima Valley Memorial Hospital v. Washington State Dept of Health* (9th Cir. Wash. Aug. 19, 2011, NO. 10-35497) 2011 U.S. App. LEXIS 17222.)

Second, the trial court analyzed the dormant Commerce Clause claims purely as they related to the particular parties to the suit, and without considering the potential impacts on interstate commerce if other localities were to pass similar ordinances. Again, this analysis is far too narrow under dormant Commerce Clause jurisprudence. As the Supreme Court has confirmed on numerous occasions in this context, the political subdivisions of a state do not have "power to discriminate against interstate commerce that the State lacked in the first instance." (*Associated Industries of Missouri v. Lohman* (1994) 511 U.S. 641, 653.) Both the trial court's decision and Respondents' position focus too narrowly on the source and application of the restraint, and not on Measure E's aggregate effects and ultimate impact on interstate commerce.

Similar contentions regarding the scope of the dormant Commerce Clause by local jurisdictions have been found too limited in scope specifically because such arguments ". . . account only for the particular ordinance at issue and its effects upon the particular parties" before the court. (*U & I Sanitation v. City of Columbus* (8th Cir. 2000) 205 F.3d 1063, 1071-1072 (hereafter *U & I Sanitation*).) Most notably, the Eighth Circuit found that ". . . in assessing the extent to which a state or local law incidentally burdens interstate commerce, our analysis is not limited to the burdens suffered by the particular parties before us. *Rather, we must adopt an aggregate analysis whereby we consider the interstate effect on the recyclables market if several jurisdictions were to adopt similar ordinances*." (*U & I Sanitation, supra,* 205 F.3d at pp. 1071-1072, emphasis added.) The court explained:

> When evaluating the ordinance's impact upon interstate commerce, we must ascertain 'what effect would arise if not one, but many or every, [jurisdiction] adopted similar legislation.' . . . Assuming, as we must, that all cities such as Columbus enacted flow control ordinances like the one at issue here, the interstate market in recyclable materials extracted from solid waste could be substantially diminished or impaired, if not crippled. (*U & I Sanitation, supra,* 205 F.3d at pp. 1071-1072, internal citations omitted; see also *Healy v. Beer Inst.* (1989) 491 U.S. 324, 336 and *Wyoming v. Oklahoma* (1992) 502 U.S. 437, 453.)

If Measure E is allowed to stand, a similar result will follow. If individual counties in California (or indeed, various counties in other states) were allowed to enact protectionist regulations, the effect would be to substantially diminish and impair the interstate market in solid waste. Moreover, the operation of environmentally safe and efficient regional landfills such as PHLF would be significantly threatened, and California counties that do not have their own active, permitted landfills would be

forced to ship waste to increasingly distant landfills not subject to similar import restrictions, at increasingly higher costs. (Decl. of Scheiber at p. 1045.) The trial court erred in concluding that simply because Measure E, as judicially rewritten, would not directly ban the disposal of waste by out-of-state interests, the ordinance has no impact on interstate commerce and does not implicate the dormant Commerce Clause. The reach of the Constitution is not so constrained.

Many California communities will be vulnerable if the balkanization of waste disposal occurs due to diminished dormant Commerce Clause restraints on local governments. In many cities in large states such as California and other western states, the disposal of waste materials occurs in a different local jurisdiction, often in the same state, than the location in which those wastes were generated. For example, because the City and County of San Francisco does not have any landfills, much of the solid waste collected there is disposed at various landfills in California located in several other counties. Solid waste generated in Portland Oregon is generally disposed at an in-state landfill in Morro County. Similarly, much of the solid waste collected in the City of Phoenix, the fifth largest city in the United States, is disposed at a landfill outside the city limits in the State of Arizona.[4] At least 9 of California's 58 counties have no landfills. (Appellants Real Parties in Interest and Intervenors, Potrero Hills Landfill's

[4] This occurs throughout the United States as well. For example, Philadelphia sends its waste to landfills in central Pennsylvania; Atlanta's waste materials are disposed in several landfills in Georgia; and some of New York City's waste materials are disposed in upstate New York. Communities throughout the United States, both large and small, dispose their waste at facilities located in the same state but outside their county or city.

Opening Brief at p. 90.) Further, exports and imports of waste destined for landfills in California and other states vary widely by county.[5]

Hundreds of millions of dollars have been invested in reliance on the ability to move waste from crowded cities to permitted disposal facilities that comply with applicable federal law and regulations. If the jurisdictions that host these facilities can ban the waste, the cost-effective and environmentally protective system established in each of these locations would be disrupted, and waste-generating communities would have to quickly construct and begin operating one or more waste disposal facilities within their city limits. Yet the process of securing property and obtaining state permits to construct and operate such facilities often takes five to ten years. Only decades of strict scrutiny under the dormant Commerce Clause has deterred localities from succumbing to hostilities aimed at solid waste disposal and enacting a patchwork of bans against inter-county movement of solid waste.

IV. CONCLUSION

The highly integrated interstate and intrastate market for solid waste, and the people who depend on it, will suffer from implementation of Measure E and ordinances like it. Whether these protectionist and discriminatory measures are adopted by cities, counties, or states, the interstate market in solid waste will be affected in the form of reduced opportunities and increased costs for disposal. This will, in turn, have a

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[5] See California Integrated Waste Management Board, *Landfill Tonnage Reports*, *at* http://www.ciwmb.ca.gov/landfills/Tonnages (last visited October 1, 2009) (annual waste data by county or by landfill), and *California Counties Disposal Destination Data*, *at* http://www.ciwmb.ca.gov/lgcentral/summaries/CountyInfo.asp (last visited October 1, 2009) (county-by-county annual waste inflow and outflow maps and data, from 1999 to 2004).

direct impact on the economics of operating in the national solid waste market. As the Supreme Court has recognized, if it is interstate commerce "that feels the pinch, it does not matter how local the operation which applies the squeeze." (*United States v. Women's Sportswear Mfrs. Ass'n* (1949) 336 U.S. 460, 464.)

The principles announced in the trial court's ruling could authorize widespread economic protectionism by localities against "outsider" goods and services. Measure E falls squarely within the proscribed discrimination against commerce long condemned by the United States Constitution, and amici urge this Court to so rule.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c).)

The text of this APPELLANTS' OPENING BRIEF is 4,422 words as counted by the Microsoft Word X for Mac word processing program used to generate the document.

Respectfully Submitted,

DATED: September 6, 2011

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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California 95814. I am over the age of 18 years and not a party to the foregoing action.

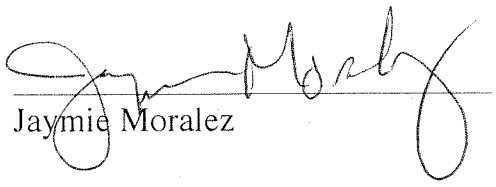
On September 6, 2011, I served the following document:

AMICUS BRIEF OF NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, CALIFORNIA REFUSE AND RECYCLING COUNCIL, LOS ANGELES COUNTY WASTE MANAGEMENT ASSOCIATION, SOLID WASTE ASSOCIATION OF ORANGE COUNTY, AND THE INLAND EMPIRE DISPOSAL ASSOCIATION IN SUPPORT OF REAL PARTIES IN INTEREST AND APPELLANTS POTRERO HILLS LANDFILL, ET AL.

__X__ (by mail) on all parties in said action, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

SEE ATTACHED MAILING LIST

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on September 6, 2011, at Sacramento, California.



Jaymie Moralez

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