S271869

IN THE SUPREME COURT OF CALIFORNIA

CHEVRON U.S.A., INC., et al.

Plaintiffs and Respondents,

vs.

COUNTY OF MONTEREY, et al.

Defendants;

PROTECT MONTEREY COUNTY and DR. LAURA SOLORIO

Intervenors and Appellants.

After a Decision by the Court of Appeal
Sixth Appellate District, Case No. H045791

Appeal from a Judgment Entered in Favor of Plaintiffs
Monterey County Superior Court
Case No. 16-CV-3978 and consolidated cases
Honorable Thomas W. Wills, Judge

INTERVENORS' OPENING BRIEF

Catherine Engberg (SBN 220376)
*Kevin P. Bundy (SBN 231686)
Aaron M. Stanton (SBN 312530
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Engberg@smwlaw.com
Bundy@smwlaw.com
Stanton@smwlaw.com

*Deborah A. Sivas (SBN 135446)
Environmental Law Clinic
Mills Legal Clinic at Stanford
Law School
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 723-0325
Facsimile: (650) 723-4426
Dsivas@stanford.edu

(Additional attorneys listed on next page)

*Hollin Kretzmann (SBN 290054)
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, California 94612
Telephone: (510) 844-7100
Facsimile: (510) 844-7150
Hkretzmann@biologicaldiversity.org

*Michael Geibelson (SBN 179970)
Robins Kaplan LLP
2049 Century Park East, #3400
Los Angeles, California 90067
Telephone: (310) 552-0130
Facsimile: (310) 229-5800
MGeibelson@RobinsKaplan.com

Attorneys for Intervenors and Appellants
PROTECT MONTEREY COUNTY and DR. LAURA SOLORIO

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ISSUE PRESENTED

Does Public Resources Code section 3106 impliedly preempt provisions LU-1.22 and LU-1.23 of Monterey County's initiative "Measure Z"?

INTRODUCTION

For more than a century, local governments and the state have shared regulatory authority over oil and gas drilling and production in California. Cities and counties have determined whether and where to allow oil and gas activities within their jurisdictions, and the courts have repeatedly upheld their power to do so. The state, in turn, has adopted a scheme of technical and safety regulations governing drilling where local governments allow it to occur. Over time, the Legislature has shifted the primary purpose of state regulation from preventing waste of oil and gas to protecting health, safety, water, and the climate. Yet the Legislature has never once precluded local governments from exercising their police power to prohibit some or all oil and gas operations, in some or all locations, within their boundaries.

The Court of Appeal's opinion below upends this century-old balance of power. Seizing on a handful of words in Public Resources Code[1] section 3106, the court held that Monterey County's Measure Z—a land use measure that prohibits the drilling of new oil and gas wells and land uses associated with oilfield wastewater disposal in unincorporated areas of the

[1] All further undesignated statutory references are to the Public Resources Code.

County—conflicts with state law. (*Chevron U.S.A., Inc., v. County of Monterey* (2021) 70 Cal.App.5th 153.)[2] According to the Court of Appeal, Measure Z cannot stand because it interferes with section 3106's grant of authority to permit, and desire to encourage, certain "methods and practices" of oil and gas extraction.

In so holding, the Court of Appeal failed to follow this Court's rules for determining whether a local enactment conflicts with general state law. The court disregarded the threshold rule for preemption analysis: the strong presumption against preemption applicable to traditional land use measures like Measure Z. Moreover, under any of this Court's preemption tests, Measure Z does not conflict with section 3106. Measure Z is not "contradictory" or "inimical" to section 3106 because section 3106 does not mandate anything Measure Z prohibits; indeed, section 3106 does not mandate that the state approve, or that any oil and gas operator employ, any particular method or practice of extraction. Nor does section 3106 evince any clear legislative intent to occupy the field of oil and gas regulation, either as a whole or only as to the conduct of oil and gas operations. Further, Measure Z dictates *where* new wells and wastewater-related land uses are prohibited—in unincorporated Monterey County—not *how* those operations take place.

Rather than follow this Court's precedent, the Court of Appeal concluded that Measure Z frustrates section 3106's

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[2] Citations to the Court of Appeal's "Opinion" in this brief are to the slip opinion attached to the Petition for Review.

purpose of encouraging oil and gas production. This conclusion echoes an "obstacle" preemption theory, imported from federal law, that numerous federal courts have criticized as vague, subjective, and corrosive to the separation of powers, and that this Court has never explicitly adopted. But even if this Court were to adopt obstacle preemption—which it need not and should not do here—Measure Z would still be valid. The purposes of section 3106 and the statutory scheme have evolved over time to prioritize health, safety, environmental protection, and achievement of the state's climate goals—goals that require California to move away from fossil fuels, not extract every remaining drop of oil from the ground. Measure Z does not frustrate these purposes.

Indeed, Measure Z is consistent with how California's local governments have regulated oil and gas for more than a century pursuant to their land use power, which derives from the inherent police power reserved in article XI, section 7 of the Constitution. As amici curiae the League of California Cities and California State Association of Counties demonstrated below and in their letter supporting this Court's review, local governments have adopted a range of approaches—from permit streamlining to outright prohibition—depending on local conditions. Variability among cities and counties is a strength, not a weakness, of California's scheme.

Affirmance of the Court of Appeal's opinion would not only upend California's time-tested system of oil and gas regulation, it also would require equally radical changes in this Court's

decades-old approach to preemption. Intervenors Protect Monterey County and Dr. Laura Solorio thus respectfully request that this Court confirm its long-standing preemption jurisprudence and reverse the judgment below.

STATUTORY BACKGROUND AND CONTEXT

A. Section 3106 guides state oil and gas regulation, but it does not mandate any specific practices or restrict local authority.

Section 3106(a) requires the state oil and gas supervisor to "supervise the drilling, operation, maintenance, and abandonment of wells" and associated production facilities "so as to prevent, as far as possible, damage to life, health, property, and natural resources[,]" damage to underground oil and gas deposits, "loss of oil, gas, or reservoir energy," and "damage to underground and surface waters suitable for irrigation or domestic purposes." (§ 3106, subd. (a).) Subdivision (c) furthers these goals by allowing the supervisor to require monitoring of ground- and surface-water contamination from aboveground tanks and facilities.[3]

Section 3106(b) also authorizes the supervisor to allow a range of production techniques if consistent with the purposes of subdivision (a). Specifically, the supervisor "shall *also* supervise the drilling, operation, maintenance, and abandonment of wells so as to permit the owners or operators of the wells to utilize all methods and practices known to the oil industry for the purpose

[3] For the convenience of the Court, the full text of section 3106 is attached as Exhibit A hereto.

of increasing the ultimate recovery of underground hydrocarbons and *which, in the opinion of the supervisor, are suitable* for this purpose in each proposed case." (*Id.*, subd. (b) (italics added).) Section 3106(b) also establishes that where otherwise silent, private oil and gas leases are interpreted to allow operators to use certain specified "methods or processes" for removing hydrocarbons, including injection of water and other substances and application of heat, "when these methods or processes have been approved by the supervisor." (*Ibid.*) However, "nothing contained in this section imposes a legal duty ... to conduct these operations." (*Ibid.*) Private parties can contract around these interpretive rules, which apply only absent "an express provision to the contrary" in a lease or contract. (*Ibid.*)

By its plain terms, therefore, section 3106 "encourage[s] the wise development" of oil and gas resources in a manner that prevents damage to health, property, natural resources, and water quality. (*Id.*, subds. (a), (d).) It neither commands the supervisor to allow, nor requires any operator to carry out, any particular extraction method or practice. Nor does it declare a policy encouraging maximum production of oil and gas. Rather, section 3106 issues guidance to the supervisor in supervising an environmentally risky activity.

B. The statutory text on which the appellate court decision turned does not override the statute's environmentally protective purposes.

The Court of Appeal found that the language of subdivision (b), added to section 3106 in 1961, was "critical" to its

conclusions. (Opinion at p. 10; see AA[27]6495-6496[4] (Stats. 1961, ch. 2074, § 1).) That language—which clarifies the supervisor's qualified authority to approve new extraction methods—addressed concerns about declining oil production; it expressly authorizes the supervisor to allow certain "secondary recovery operations" (i.e., the "methods and practices" for increasing oil and gas production discussed in Section 3106(b)). (See RJN[2]A:102[5] [noting that "secondary recovery operations" are "becoming more important each year as California's production declines," and that the amendments will "assist" operators in their use].) Neither the text nor the legislative history of the 1961 amendment contains any discussion of local authority to regulate oil and gas, let alone any discussion of circumscribing that authority. (RJN[2]A:19-145.)

At the time of the 1961 amendments, the supervisor had "already been doing work" to permit secondary recovery operations, but the law did not clearly support the supervisor's authority to do so. (RJN[2]A:99; see also RJN[2]A:102 [noting that the amendments "correct some defects in existing law and ... add new language beneficial to the oil industry"].) The amendments "merely provide[d] the necessary authorization" to the supervisor to continue. (RJN[2]A:99.)

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[4] Citations to the Appellant's Appendix are in the form "AA[Volume Number]page number."

[5] Citations to Intervenors' Motion Requesting Judicial Notice, filed concurrently with Intervenors' Opening Brief, are in the form "RJN[Volume Number]Exhibit letter:page number."

The amendments did not require the supervisor to permit, or any operator to carry out, secondary recovery operations. Only methods that are "suitable ... in each proposed case" could be permitted. (§ 3106, subd. (b).) What is "suitable," moreover, is determined by reference to the protective purposes of subdivision (a). (See § 3106, subd. (b) [stating that the supervisor "shall *also* supervise the drilling, operation, maintenance, and abandonment of wells," in language parallel to that in subd. (a)] (emphasis added).)

The 1961 amendments also clarified that oil and gas leases silent about secondary recovery techniques would be "deemed" to allow them. (RJN[2]A:28*;* § 3106, subd. (b).) The lease interpretation provision, however, did not convey any rights. While an early version of the 1961 amendment stated that leases silent about secondary recovery operations "include[ ] the right" to conduct such operations, later versions eliminated the reference to rights and instead proposed that such leases should be "deemed to allow" those operations. (RJN[2]A:22.) Moreover, even that allowance was limited to only those "methods or processes" that have been "approved by the supervisor." (§ 3106, subd. (b).) The Legislature also expressly clarified that section 3106 does not "impose[ ] a legal duty" to conduct secondary recovery operations. (*Ibid*.)

The Legislature has amended section 3106 several times since 1961. These amendments steadily increased the section's

emphasis on environmental protection.[6] None of the amendments limited or even referenced local authority. For example, in response to the 1969 Santa Barbara oil spill, the Legislature required the supervisor to do everything possible to prevent "damage to life, health, property, and natural resources." (AA[27]6506 (Stats. 1970, ch. 799, p. 1514, § 1); RJN[3]B:220 [explaining the bill's origins in the "Santa Barbara oil spill disaster in early 1969"].)

In 1972, the Legislature added what is now subdivision (d) to section 3106, directing the supervisor to "administer this division so as to encourage the wise development of oil and gas resources." (AA[27]6523 (Stats. 1972, ch. 898, p. 1595, § 7).) The bill was intended to "strengthen[ ] the role of [CalGEM][7] in dealing with environmental problems." (RJN[6]C:456, 462; see also RJN[6]C:435 [stating that the new provisions were "necessary to allow [CalGEM] to deal effectively with present day problems confronting the petroleum industry," including "the need for authority to control and mitigate environmental problems such as auxiliary wells, disposition of water, and requirements of notice before work on a well commences"].) The Legislature further amended section 3106 in 1989 and 1994 to expand the supervisor's authority over tanks, pipelines, and other

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[6] As far back as 1939, section 3106 addressed protection of water quality. (See AA[27]6456 (Stats. 1939, ch. 93, p. 1111, § 3106).)

[7] This brief refers to the California Division of Geologic Energy Management ("CalGEM") by its current name rather than its former name (the Division of Oil, Gas and Geothermal Resources, or "DOGGR"). (See Opinion at p. 10, fn. 11.)

production facilities and to allow the supervisor to require water quality monitoring. (§ 3106, subds. (b), (c); Stats. 1989, ch. 1383, § 2; Stats. 1994, ch. 523, § 3).

In sum, even if the 1961 amendments were intended to "encourage" the use of secondary recovery operations or increase the "percentage" of oil recovery in some fashion (see RJN[2]A:100), the Legislature neither mandated any such operations nor created any right or duty to carry them out. Moreover, any modest "encouragement" of extraction in the 1961 version of section 3106 has been outweighed by the environmentally protective purposes of later amendments.

C. Section 3106 must be interpreted in light of a century of caselaw preserving local authority to prohibit oil and gas development.

The adoption and amendment of California's oil and gas statutes, including section 3106, occurred against a judicial background confirming local authority to regulate and prohibit oil and gas development. In 1925, this Court recognized local governments' "unquestioned" right to use their police power to regulate oil and gas operations. (*Pacific Palisades Assn. v. City of Huntington Beach* (1925) 196 Cal. 211, 217.) Subsequent cases affirmed that authority. (See, e.g., *Marblehead Land Co. v. City of Los Angeles* (9th Cir. 1931) 47 F.2d 528, 532; *Friel v. County of Los Angeles* (1959) 172 Cal.App.2d 142, 157.) Based on the same reasoning, courts have upheld local governments' power to entirely prohibit oil and gas within their jurisdictions. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86

Cal.App.4th 534, 555; see also *Wood v. City Planning Com.* (1955) 130 Cal.App.2d 356, 364.)

Cases in this line have directly addressed state oil and gas statutes. In *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 555, this Court upheld an ordinance prohibiting drilling and deepening wells in certain zones. The Court acknowledged that "[t]he policy in this state favors the conservation of oil deposits through statutory regulation" and that the people of the state "have a 'primary and supreme interest' in oil deposits," but "[n]evertheless" held that "city zoning ordinances prohibiting the production of oil in designated areas have been held valid." (*Id.* at p. 558 [citing Pub. Resources Code div. 3, ch. 1 and quoting § 3400].) In *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, this Court similarly held that state statutes governing oil leases on tide and submerged lands did not abrogate an initiative ordinance that prohibited all oil and gas exploration citywide; notwithstanding state law, the city retained the right to determine whether tide and submerged lands should be developed for oil and gas in the first place. (*Id.* at pp. 27, 31-32.)

The Legislature "is deemed to be aware of existing laws and judicial decisions construing the same statute in effect at the time legislation is enacted, and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*People v. Castillolopez* (2016) 63 Cal.4th 322, 331 (internal quotation marks and citation omitted).) Despite numerous cases upholding local authority to prohibit oil and gas activities, the Legislature has never limited that authority.

D. Other statutory provisions acknowledge and preserve local regulatory authority and promote environmental protection.

Indeed, when the Legislature has spoken, it has acknowledged and preserved local authority. For example, section 3012 expressly acknowledges that cities may prohibit "the drilling of oil wells." (§ 3012 [acknowledging the division's application to "any land or well situated within ... an incorporated city in which the drilling of oil wells is now or may hereafter be prohibited."].) The Legislature first recognized this authority in 1915. (AA[27]6451 (Stats.1915, ch. 718, p. 1419, § 53).)

The Legislature also adopted an express *non-preemption* clause in 1971, making clear that its adoption of a new chapter of code "shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities." (§ 3690.) The non-preemption clause thus acknowledged and expressly preserved local governments' already "existing" power to regulate both the "conduct and location" of oil production activities against any claim that the new chapter had a preemptive effect. Had the Legislature intended the 1961 amendment of section 3106 to preclude local regulation of either the "conduct" or "location" of oil and gas activities, there would have been no "existing right of cities and counties" for the Legislature to preserve in 1971.

The Legislature again preserved local regulatory authority when it adopted state rules for well stimulation in Senate Bill 4

(Stats. 2013, ch. 313). First, the Legislature stated that SB 4 did not relieve "any [government] agency from complying with any other provision of existing laws, regulations, and orders." (§ 3160, subd. (n).) The Assembly Floor Analysis of the bill confirms this clause was intended in part to preserve local governments' ability to "enforce [their] own approval authority." (AA[16]3802-03.) Second, SB 4 expressly preserved local lead agencies' ability to review well stimulation activities under the California Environmental Quality Act (CEQA). (§ 3161, subd. (b)(3)(C).) Because CEQA requires review only where agencies have discretionary authority to approve or carry out a project (see § 21065), SB 4's preservation of local CEQA review authority necessarily acknowledges local power to allow, condition, or deny well stimulation operations. Finally, CalGEM's regulations implementing SB 4 acknowledge that "local agencies" have "jurisdiction over the location" of well stimulation activities. (Cal. Code Regs., tit. 14, § 1782, subd. (a)(9).)

Most recently, the Legislature specifically acknowledged local land use authority over the drilling of new wells. Section 3203.5, adopted in 2021, requires that operators include "a copy of the local land use authorization that supports the installation of a well" in a notice of intent to drill a new well filed with the supervisor under section 3203.

The Legislature has also continued to strengthen protections for the public, climate, and environment throughout the statute, including by adding section 3011 in 2019. That section includes among the overall purposes of state oil and gas

regulation "protecting public health and safety and environmental quality, including reduction and mitigation of greenhouse gas emissions associated with the development of hydrocarbon and geothermal resources in a manner that meets the energy needs of the state." (§ 3011, subd. (a).) Section 3011 also directs the supervisor to coordinate with state agencies and others "in furtherance of the goals of the California Global Warming Solutions Act of 2006 ... and to help support the state's clean energy goals." (§ 3011, subd. (b).) Although section 3106 had long prioritized environmental protection, section 3011 removes any doubt that the statutory purposes include protecting public health, reducing greenhouse gas emissions, and supporting clean energy.

STATEMENT OF THE CASE

A. The voters' adoption of Measure Z.

Monterey County historically authorized oil and gas operations under open-ended use permits. (AR[1]122.)[8] These permits purported to allow operators to drill new wells without County oversight or environmental review. (*Ibid.*) Concerned that the County's lax regulation exposed them to adverse impacts of oil production, residents petitioned the County for stronger regulations, but the Board of Supervisors refused. (*Ibid.*)

The proponents of Measure Z believed the County's failure to act threatened significant local interests. The County relies heavily on groundwater and the Salinas River watershed, where

[8] Citations to the Administrative Record are in the form "AR[Volume Number]page number."

groundwater supplies are increasingly scarce. (AR[1]122-23.) The agricultural industry, the County's leading industry and one of its largest employers (AR[1]124), depends on groundwater. Oil and gas production competes with agriculture for limited supplies (AR[1]122-23), and oil spills, leaks, and wastewater injection threaten water quality (AR[1]123).

Expanded oil and gas production also threatens tourism, the County's second-largest industry. (AR[1]125.) Monterey County boasts beautiful scenery that has inspired Californians for generations.[9] (AR[1]125.) Monterey Bay National Marine Sanctuary, the Elkhorn Slough, Pinnacles National Park, and Big Sur top the list of scenic attractions. (*Ibid.*) The County's destinations not only attract human visitors; they also provide habitat for sensitive wildlife species, including southern sea otters, steelhead, and the California condor. (*Ibid.*) In contrast, oil derricks, drill rigs, pumping units, and other industrial facilities scar the County's scenic beauty. (*Ibid.*) Production-related activity at well sites—including grading, construction, the passage of heavy trucks, and the associated noise, air, and water pollution—also degrades and destroys habitat. (*Ibid.*) Blighted vistas discourage residents as well as tourists. As one resident stated to the County's Board of Supervisors, "this is a beautiful country. ... We don't want to see pump jacks all over." (AR[1]51.)

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[9] "I remember that the Gabilan Mountains to the east of the valley were light gay mountains full of sun and loveliness, and a kind of invitation, so that you wanted to climb into their warm foothills almost as you want to climb into the lap of a beloved mother." John Steinbeck, *East of Eden*.

Finally, oil production in Monterey County poses a unique threat to the climate. Crude oil from the county's San Ardo field is among the most carbon-intensive in the world because it is particularly thick and heavy. (AR[1]126-27.) Its production utilizes energy-intensive methods like steam injection, increasing its contribution to climate change. (*Ibid*.)

In light of the County's failure to address these problems, local residents embarked on a grassroots campaign, collecting signatures for an initiative to "protect Monterey County's water, agricultural lands, air quality, scenic vistas, and quality of life" from damage caused by oil and gas operations. (AR[1]121.) That initiative, Measure Z, added three Land Use Policies to the County's General Plan[10] governing land uses in unincorporated areas of the County:

(1) Land Use Policy LU-1.21 prohibited land uses in support of hydraulic fracturing and other types of well stimulation (AR[1]127-28);

(2) Land Use Policy LU-1.22 prohibited the "development, construction, installation, or use of any facility, appurtenance, or above-ground equipment ... in support of oil and gas wastewater injection or oil and gas wastewater impoundment," while allowing existing uses of this nature to continue for five to fifteen years (AR[1]128-29); and

[10] Measure Z also made corresponding changes to the County's Local Coastal Program and Fort Ord Master Plan. (AR[1]129-36.)

(3) Land Use Policy LU-1.23 prohibited "the drilling of new oil and gas wells," but did not affect existing wells "drilled prior to [Measure Z's effective date] and which have not been abandoned" (AR[1]129).

Measure Z directed the County to refrain from applying these policies if they would interfere with vested or constitutional rights. (AR[1]137.) The measure mandated that its provisions "shall not apply" if they would "violate the constitution or laws of the United States or the State of California." (*Ibid.*) It also directed the County to grant exemptions if necessary to avoid unconstitutional takings of private property. (*Ibid.*)

Voters approved Measure Z by a wide margin. (AR[3]399.)

B. Proceedings before the Superior Court and Court of Appeal.

On December 14, 2016, Chevron U.S.A., Inc., et al. and Aera Energy LLC filed petitions for writ of mandate and complaints alleging, among other things, that Measure Z, on its face, was preempted by state and federal law and caused an unconstitutional taking of private property. (AA[1]28-54, 55-82.) On the same day, the Superior Court approved stipulations staying enforcement and implementation of most of Measure Z. (AA[1]92-96, 97-101.) Four additional groups of oil companies and mineral rights holders filed similar challenges.[11] (See AA[3]623-48 (California Resources Corporation ("CRC")); AA[4]870-944 (National Association of Royalty Owners-California Inc., et al.

[11] The six groups of oil industry petitioners and plaintiffs are referred to collectively as "Plaintiffs."

("NARO")); AA[5]972-997 (Eagle Petroleum LLC); AA[5]998-1028 (Trio Petroleum LLC et al.).) The Superior Court granted Intervenors, as Measure Z's proponents, leave to intervene. (AA[5]1128-30.)

The Superior Court divided the case into phases. Phase 1 addressed threshold legal issues raised in Plaintiffs' writ petitions, including their facial preemption and takings challenges. (RT[2]303:14-17[12]; AA[7]1567.) The court also consolidated the six cases "for purposes of the Phase 1 issues." (AA[7]1565.)

After a four-day trial, the Superior Court granted some of Plaintiffs' claims and denied others. (AA[31]7545-93.) The court denied Plaintiffs' preemption challenge to Measure Z's policy LU-1.21, regarding well stimulation, for lack of standing because no Plaintiff claimed to have plans to use well stimulation. (AA[31]7565-68.) In contrast, the court found policies LU-1.22 and LU-1.23 preempted, holding that they intruded on exclusive state and federal authority and conflicted with what the court interpreted as state and federal policies prioritizing oil production over local protections for health and the environment. (See AA[31]7569-79.) The court found that policy LU-1.21 could be severed from the other two policies. (AA[31]7579-81.)

The Superior Court also rejected all but one of the Plaintiffs' facial takings claims. (AA[31]7587-90.) The court concluded that Measure Z's provision prohibiting new wells

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[12] Citations to the Reporter's Transcript are in the format "RT[Volume Number]page number:line number."

eliminated the economic value of CRC's undeveloped mineral rights. (AA[31]7587.) The court further held that Measure Z's takings exemption procedure provided an inadequate administrative remedy and violated due process. (AA[31]7581-85.) The court either rejected or declined to reach Plaintiffs' other claims. (AA[31]7554-61, 7590-91.)

On March 1, 2018, the court filed its final judgment, issued a writ of mandate, and enjoined the County from implementing Measure Z's wastewater and new wells policies. (AA[32]7685-87, 7737-38.) Intervenors timely appealed.[13] (AA[32]7748.)

On October 12, 2021, the Court of Appeal affirmed the Superior Court's judgment and found policies LU-1.22 and LU-1.23 preempted.[14] The court's opinion ("Opinion") characterized the drilling of new wells and wastewater injection as "operational aspects of oil drilling operations . . . committed by section 3106 to the State's discretion" and concluded that "local regulation of these aspects would conflict with section 3106." (Opinion at p. 2.) The court reasoned:

> Section 3106 identifies the State's *policy* as "*encourag*[*ing*] the wise development of oil and gas resources," and expressly provides that *the State* will supervise the drilling of oil wells "so as to *permit*" the use of "*all*" practices that will increase the recovery of

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[13] The County and most of the Plaintiffs also filed notices of appeal, all of which were subsequently dismissed. (See Opinion at p. 6, fn. 6.)

[14] Because Plaintiffs either abandoned or did not file cross-appeals, the Court of Appeal found that the Superior Court's ruling addressing policy LU-1.21 was not at issue on appeal. (Opinion at pp. 4, 6, fn. 6.)

> oil and gas. [Citation.] In doing so, section 3106 plainly lodges the authority to permit "all methods and practices" firmly *in the State's hands*. Section 3106 makes no mention whatsoever of any reservation to local entities of any power to limit the State's authority to permit well operators to engage in these "methods and practices."

(Opinion at p. 9 (italics in original).) The court found that Measure Z conflicts with section 3106 because it prohibits "methods and practices" that (in the court's view) state law both encourages and "places the authority to permit . . . in the hands of the state." (Opinion at p. 18.) The court further concluded that Measure Z "forbids the State from permitting certain methods and practices." (*Id.* at p. 19.) Because the court found Measure Z "*conflicts* with section 3106," it did not consider whether "the State has preempted the *field* of oil and gas regulation." (Opinion at p. 7, fn. 8 (italics in original).)

The court cited only one case in support of its holding, quoting *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 868, for the proposition that where a statute seeks to promote a certain activity, local regulation cannot completely ban the activity or otherwise frustrate the statute's purpose. (Opinion at pp. 19-20.) The court reiterated that Measure Z's ban on certain "methods and practices" would frustrate "section 3106's provisions placing the authority to permit" those practices "in the hands of the State." (*Id.* at p. 20.)

Having found Measure Z preempted by state law, the court did not reach whether federal law also preempted the measure or

whether it caused a facial taking of private property. (*Id.* at p. 20, fn.17.)

This Court granted review on January 26, 2022.

STANDARD OF REVIEW

Whether state law preempts a local ordinance presents a question of law subject to de novo review. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1168.) This Court "[is] not limited by the trial court's interpretation [of the measure], nor by the evidence" presented to that court. (*City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 753.) "The party claiming preemption has the burden of proof." (*T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1116 ("*T-Mobile*").)

Here, Plaintiffs brought their preemption claims as facial challenges to Measure Z. Accordingly, the Court considers "the text of the measure itself, not its application to any particular circumstances or individual." (*T-Mobile*, *supra*, 6 Cal.5th at p. 1117.) Contentions about the measure's effects on individuals and "hypothetical future harm" are "not cognizable in a facial challenge." (*Id.* at p. 1125.)

A strong presumption against preemption applies to land use measures like Measure Z. When evaluating local government action "'in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume' the regulation is not preempted unless there is a clear indication of preemptive intent." (*Id.* at p. 1116 [quoting *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th

1139, 1149 ("*Big Creek*")].) The Court has been "particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.'" (*Big Creek*, 38 Cal.4th at 1149 [quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707]; see also *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 755-56 ("*City of Riverside*").)

The presumption against preemption is thus particularly strong here because cities and counties have significant local interests in oil and gas regulation that vary across jurisdictions. The voters of Monterey County determined that new oil and gas wells and wastewater injection would harm the county's dominant agriculture and tourism industries, threaten public welfare, and contribute to climate change. (AR[1]124-27.) As described by amici before the Court of Appeal, other cities and counties have regulated oil and gas differently based on their own local interests. (Amici Curiae Brief, League of California Cities and California State Association of Counties, No. H045791, at pp. 18-23.) Under these circumstances, a court "cannot lightly assume ... the Legislature intended to impose a 'one size fits all' policy, whereby each and every one of California's diverse counties and cities must allow" the same uses of land. (*City of Riverside*, *supra*, 56 Cal.4th at pp. 755-56.)

In light of the strong presumption against preemption, Plaintiffs bear the burden of identifying a clear indication of preemptive intent in section 3106.

ARGUMENT

In determining that Measure Z "conflicts" with section 3106, the Court of Appeal failed to apply this Court's long-established tests for determining whether a conflict exists. When properly applied, this Court's preemption tests show that Measure Z neither contradicts section 3106 nor intrudes on any field of regulation the Legislature has occupied. Because there is no conflict, the judgment should be reversed.

The California Constitution provides that a county "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) Local legislation is preempted only if it "conflicts with" state law. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) A conflict exists if the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Ibid.*) As relevant here,[15] implied preemption may arise either (1) where the local enactment is "contradictory" and "inimical" to state law, or (2) where the Legislature has manifested its intent to completely or partially occupy the "field" of regulation to the exclusion of local power. (*Id.* at pp. 897-98, 904; see also, e.g., *T-Mobile*, *supra*, 6 Cal.5th at pp. 1121-22; *City of Riverside*, *supra*, 56 Cal.4th at p. 743; *Big Creek*, *supra*, 38 Cal.4th at pp. 1157-58.)

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[15] No party claimed below that Measure Z is expressly preempted or that it duplicates section 3106.

Measure Z does not conflict with state law. First, the measure is not contradictory and inimical to section 3106. Because that section does not require local governments to allow oil and gas development—or operators to pursue it—the measure does not "directly require[ ] what the state statute forbids or prohibit[ ] what the state enactment demands." (*T-Mobile*, *supra*, 6 Cal.5th at p. 1121; *City of Riverside*, *supra*, 56 Cal.4th at p. 743.) An operator may reasonably comply with both state and local law by refraining from conducting prohibited oil and gas activities in the County. (See *City of Riverside*, *supra*, 56 Cal.4th at pp. 754-55 [finding no inimical conflict between state and local law where a regulated entity could reasonably comply with both].)

Second, Measure Z does not intrude upon any field that section 3106 might exclusively occupy. The Legislature's repeated, express acknowledgment and preservation of local authority foreclose any conclusion that it intended to occupy the entire field of oil and gas regulation. (See *Big Creek*, *supra*, 38 Cal.4th at pp. 1153, 1157.) Moreover, unlike the forestry statutes in *Big Creek* (*see id.* at p. 1151), nothing in section 3106 or elsewhere expressly prohibits local regulation of the "conduct" of oil and gas operations. Section 3106's references to the "methods and practices" the supervisor may approve (if appropriate under the circumstances and consistent with other statutory purposes) are too narrow, limited, and qualified to support an inference that the Legislature intended to foreclose local regulation of oil and gas operations. (See *City of Riverside*, *supra*, 56 Cal.4th at p.

755). Plaintiffs' insistence that local governments may regulate only "where," and not "how," oil and gas operations are conducted primarily rests not on section 3106, but rather on an opinion of the Attorney General concluding that local regulation of specific technical and safety standards might intrude on areas of regulation fully occupied by the state. (59 Ops.Cal.Atty.Gen. 461 (1976).) But the AG Opinion also found that numerous ordinances that *prohibited* oil and gas operations—i.e., ordinances like Measure Z—were *not* preempted.

Declining to follow any of this Court's established preemption tests, the Court of Appeal apparently turned to a different theory—federal "obstacle" preemption—that this Court has never explicitly adopted. (See *T-Mobile*, *supra*, 6 Cal.5th at p. 1123.) To preserve the balance of powers between the legislative and judicial branches, the Court should not adopt this theory now. But even if this Court were to adopt "obstacle" preemption into California law, Measure Z is not preempted because it does not frustrate the Legislature's objectives. Section 3106 and the statutory scheme as a whole have evolved over time to prioritize environmental protection, circumscribing any limited way in which the 1961 amendments to section 3106 might have encouraged certain methods of oil and gas production. Measure Z is consistent with the Legislature's overall purposes of reducing environmental damage and greenhouse gas emissions.

I. Measure Z is not "contradictory" or "inimical" to section 3106.

The Court of Appeal concluded that Measure Z's prohibitions on land uses in support of wastewater injection and

the drilling of new wells "conflict[ ]" with section 3106. (Opinion at pp. 7, 19.) But the court failed to actually apply this Court's long-established test for determining whether a local measure is "contradictory" or "inimical" to general law. Had it done so, it necessarily would have found no preemption.

Contradictory or inimical preemption "does not apply" unless the challenged local ordinance "directly requires what the state statute forbids or prohibits what the state enactment demands." (*T-Mobile*, *supra*, 6 Cal.5th at p. 1121.) Accordingly, where it is "reasonably possible to comply with both the state and local laws," no conflict will be found. (*Ibid.*) The test focuses on whether a *regulated entity* reasonably may comply with both state and local law. If so, there is no conflict. (*City of Riverside*, *supra*, 56 Cal.4th at pp. 754-55; *Big Creek*, *supra*, 38 Cal.4th at p. 1161.)

Measure Z is not contradictory or inimical to section 3106. Section 3106 does not impose any requirements or prohibitions, or create any rights or duties, for oil and gas operators that contradict Measure Z's prohibitions on land uses in support of wastewater injection and drilling new wells. Nor does section 3106(b) promote oil and gas extraction over other values. On the contrary, as evidenced by subdivision (b)'s introductory phrase—"shall *also* supervise"—any decision by the supervisor to permit certain methods and practices must first take into account the overriding considerations in subdivision (a) and elsewhere in the statutory scheme, such as preventing damage to health, property, water quality, and the climate. (§§ 3011, 3106, subd. (a).) The

section says *nothing* about local authority over oil and gas regulation.

Moreover, while section 3106 uses the word "shall" in describing how the supervisor must supervise oil and gas operations, it does not mandate that the supervisor permit (or that operators employ) any specific practice. Plaintiffs concede as much. (Joint Answer to Petition for Review, at pp. 32-33.) Rather, the supervisor "shall also supervise" operations "so as to permit" only those "methods and practices" of increasing hydrocarbon recovery that the supervisor finds "suitable." (§ 3106, subd. (b).) Section 3106 also establishes that oil and gas leases should be interpreted to allow the lessee or operator to use certain specified "methods and processes" for removing hydrocarbons, but only when those methods are "approved by the supervisor." (*Ibid*.) And nothing in section 3106 "imposes a legal duty ... to conduct these operations." (*Ibid*.)

Accordingly, section 3106 does not mandate that either the state or local governments allow any particular methods and practices. Nor does it require oil and gas operators to use them. An oil and gas operator may comply with both section 3106 and Measure Z by refraining from drilling new wells or engaging in wastewater injection in unincorporated areas of Monterey County. As such, Measure Z is not contradictory or inimical to section 3106.

This Court reached a similar conclusion in *Big Creek*. The state laws at issue there both encouraged "maximum sustained production of high quality timber products" *and* expressly

assigned the California Department of Forestry authority to permit timber harvesting. (38 Cal.4th at pp. 1147 [discussing the "[s]ite-specific timber harvesting plan that must be submitted to the [state forestry] department"], 1161 [noting statutory "encourage[ment] of maximum sustained production"].) This Court nonetheless upheld a county zoning ordinance prohibiting both commercial timber operations and land uses in support of helicopter logging in certain zones. The Court reasoned that "it [was] reasonably possible for a timber operator to comply with both" state law and the local ordinance, in part because the state laws did not require cutting down every tree. (*Id.* at p. 1161 ["While the forestry laws generally encourage 'maximum sustained production ... while giving consideration to' competing values ... , they do not require every harvestable tree be cut."].) Section 3106 does not require or even encourage "maximum" production. Even if it did—and were thus more directly analogous to the timber statute—it certainly does not require extraction of every last drop of oil. And an oil and gas operator can comply with both state and local law by refraining from the land uses prohibited by Measure Z.

Likewise, in *City of Riverside*, this Court upheld a citywide land use ordinance prohibiting medical marijuana dispensaries. Challengers asserted that the ordinance conflicted with statewide initiative statutes declaring that "Californians have the right to obtain and use marijuana for medical purposes," encouraging "safe and affordable distribution" of marijuana, and promoting the statutes' "uniform and consistent application" across

jurisdictions. (*City of Riverside*, *supra*, 56 Cal.4th at p. 744.) The Court nonetheless upheld the city's prohibition, finding that the "operative steps" taken by the relevant state statutes were "modest" and "limited," and did not "require" any conduct the city's ordinance prohibited. (*Id.* at pp. 744-45, 754-55, 759-60.) One could comply with both state and local law by refraining from operating dispensaries in Riverside. (*Id.* at pp. 754-55.) So it is here. Section 3106 does not create any rights. (See Statutory Background and Context, *supra*, § B.) And its "operative steps"—allowing the supervisor to permit certain practices where "suitable" in light of environmental, health, and safety considerations and establishing default rules for lease interpretation—are modest and limited. Section 3106 also does not "require" any conduct whatsoever, much less any conduct Measure Z prohibits. Oil and gas operators reasonably can comply with both.

T-Mobile is similarly instructive. There, this Court held that a statute requiring local governments to allow construction of telecommunications facilities in public rights-of-way did not preempt a city ordinance regulating the appearance of those facilities. (6 Cal.5th at pp. 1121-22.) Because the city's inherent land use authority included the power to regulate aesthetics, the statute's silence on aesthetic considerations did not implicitly divest the city of that authority. (*Id.* at pp. 1118, 1122 ["Because section 7901 says nothing about the aesthetics or appearance of telephone lines, the Ordinance is not inimical to the statute."].) Further, the statute's goal of technological advancement was "not

paramount to all others," and thus left room for local regulation. (*Id.* at 1123.) Here, section 3106 says *nothing at all* about local regulatory authority. And it is rife with language limiting extraction. Thus, under *T-Mobile*, there is no contradictory or inimical conflict.

The Court of Appeal's contrary holding conflicts with this Court's precedent and should be reversed. Neither of the Court of Appeal's reasons for finding a conflict between Measure Z and section 3106 applies or satisfies this Court's tests for contradictory or inimical preemption.

The court found first that Measure Z purportedly prohibits certain "methods and practices" that section 3106 "encourages." (Opinion at pp. 16, 18, 19-20.) Under this Court's precedent, however, a statute's mere "encouragement" of an activity is insufficient to demonstrate preemptive intent. (*City of Riverside*, *supra*, 56 Cal.4th at pp. 753-54, 759-61 [finding local prohibition of medical cannabis facilities not preempted despite statute declaring a "right" of patient access to cannabis and encouraging uniform local regulation]; *T-Mobile*, *supra*, 6 Cal.5th at p. 1123 ["no legislation pursues its objectives at all costs"]; *Big Creek*, *supra*, 38 Cal.4th at p. 1161 [statute encouraging "maximum sustained production" of timber products did not require "every harvestable tree" to be cut].) And, as described above, any "encouragement" of methods and practices that Measure Z might offer is limited. Indeed, the court's rationale seems to rely more on "obstacle" preemption than contradictory or inimical preemption. As discussed in Section III, *infra*, obstacle

preemption is not the law in California—and even if it were, Measure Z would not run afoul of it.

The Court of Appeal's second rationale is that Measure Z conflicts with section 3106 because it "forbids the State from permitting certain methods and practices, while section 3106 ... mandates that the State be the entity deciding whether to permit those methods and practices." (Opinion at p. 19.) Again, however, the relevant question under this Court's cases is whether a *regulated entity* can comply with both state and federal law. (See *City of Riverside*, *supra*, 56 Cal.4th at pp. 754-55; *Big Creek*, *supra*, 38 Cal.4th at p. 1161.) Indeed, although the forestry statutes in *Big Creek* similarly granted a state agency authority to permit commercial logging operations (*id.* at p. 1147), this Court found a county ordinance prohibiting logging in certain zones not preempted because a *timber operator* reasonably could comply with both state and local law. (*Id.* at p. 1161.) The state's hypothetical authority to permit operations that the local government had prohibited was immaterial. Likewise here, Measure Z does not "forbid" the state from doing anything. Section 3106 does not *require* the supervisor to permit any particular method or practice. Thus, the ordinance does not prohibit anything that the state statute requires. (See *Great Western*, *supra*, 27 Cal.4th at p. 866 ["Although the gun show statutes regulate ... the sale of guns at gun shows, and therefore contemplate such sales, the statutes do not mandate such sales, such that a limitation of sales on county property would be in direct conflict with the statutes."].)

Indeed, the Court of Appeal's conclusion that section 3106 assigns authority to permit "methods and practices" to the state sounds more in field preemption than in contradictory and inimical preemption. (See *Sherwin-Williams Co.*, supra, 4 Cal.4th at p. 898 [describing field preemption as concerning whether subject matter is "exclusively a matter of state concern" or "partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action."].) But as described in Section II, *infra*, section 3106 does not convey exclusive authority to the supervisor.

Under this Court's long-established tests for contradictory or inimical preemption, Measure Z is not preempted.

II. Section 3106 neither completely nor partially occupies the field of oil and gas regulation to the exclusion of Measure Z.

The Court of Appeal declined to address Plaintiffs' field preemption arguments. (Opinion at p. 7, fn. 8.) Regardless, field preemption provides no ground for affirming the Court of Appeal's judgment.

A local ordinance may be impliedly preempted if it enters a field that the Legislature has occupied for itself. As relevant here, state law impliedly occupies a field when either (1) the subject is "so fully and completely covered" by state law "as to indicate that it has become exclusively a matter of state concern," or (2) the subject is partially covered by state law "couched in such terms as to indicate clearly that a paramount state concern will not

tolerate further or additional local action." (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at p. 898.)[16]

Here, the Legislature's long history of preserving local regulatory authority—particularly against the backdrop of a century of case law upholding local power to prohibit oil and gas—forecloses any conclusion that the Legislature has occupied the entire field of oil and gas regulation. Nor has the Legislature impliedly occupied any portion of that field that would preclude a traditional, prohibitory land use measure like Measure Z.

A. The Legislature has not fully occupied the field of oil and gas regulation.

Plaintiffs have never seriously contended that section 3106 or the state's regulatory scheme completely occupy the field of oil and gas regulation; indeed, one plaintiff conceded below that it does not. (Aera Energy LLC's Respondent's Brief, H045791, at p. 36.) On the contrary, the statutory scheme expressly recognizes and preserves local authority. (See Statutory Background and Context, *supra* [discussing §§ 3012; 3160, subd. (n); 3161, subd. (b)(3)(C); 3203.5; 3690].) Such recognition of local authority provides "convincing evidence" that the Legislature did not intend to occupy the field and undermines any contrary inferences. (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 94-95 & fn. 10; *People ex. rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 485; see also *Sherwin-Williams*

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[16] Plaintiffs have not argued the third form of implied field preemption; i.e., that Measure Z has an "adverse effect ... on the transient citizens of the state [that] outweighs the possible benefit to the locality." (*See ibid.*)

Co., *supra*, 4 Cal.4th at p. 904 [finding no exclusive coverage of a field where "other related statutory provisions affirmatively authorize or allow local governments to act" in that field].)

Moreover, the Legislature has repeatedly affirmed local authority against the backdrop of a century of case law upholding local authority to regulate and/or prohibit oil and gas development. (See Statutory Background and Context, *supra*, Section C [collecting cases].) The Legislature is "deemed to ... have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*Castillolopez*, *supra*, 63 Cal.4th at p. 331 (internal quotation marks and citation omitted).) Despite numerous cases upholding local authority to prohibit oil and gas activities, the Legislature never limited that authority in section 3106 or elsewhere. The Legislature has not completely occupied the field of oil and gas regulation.

B. Section 3106 contains no evidence of legislative intent to preempt local authority to prohibit "methods and practices" of oil and gas production.

Plaintiffs have argued that Measure Z improperly regulates the *conduct* of oil and gas operations, a portion of the regulatory field they claim the state has reserved to itself. The argument misconstrues section 3106 and mischaracterizes Measure Z.

As a threshold matter, nothing in section 3106 suggests that the supervisor's discretionary authority to permit certain "methods and practices" where "suitable" excludes any and all local regulation touching on the same methods and practices. Unlike the forestry statues in *Big Creek*, which expressly

preempted local regulation of the "conduct" of timber operations (and the Court still found no preemption of local authority to prohibit certain operations) (38 Cal.4th at pp. 1152-53), state oil and gas statutes have expressly *preserved* the "existing right of cities and counties to enact and enforce laws and regulations regulating the *conduct* and location of oil production activities." (§ 3690 (emphasis added).)

Nor does section 3106 evince any intent to preempt local authority to prohibit *land uses* in support of certain "methods and practices" of oil and gas production. Subdivision (a) requires the supervisor to prevent damage to health, property, water, and natural resources in the course of supervising oil and gas wells. Subdivision (b) clarifies both that the supervisor may allow secondary recovery techniques where "suitable" and that leases otherwise silent on the question are "deemed to allow" those techniques. Subdivision (c) authorizes the supervisor to require operators to monitor for air and water contamination from their operations. And subdivision (d) notes that the supervisor shall encourage the "wise development" of the state's oil and gas resources. In other words, section 3106 is *entirely silent* as to anything bearing on local authority.

The Court of Appeal apparently read this silence as a sign of preemptive intent. But in so doing, the court overlooked the *constitutional* basis for local regulatory authority and inverted the presumption against preemption. The court reasoned that "Section 3106 makes no mention whatsoever of any reservation to local entities of any power to limit the State's authority to permit

well operators to engage in these 'methods and practices.'" (Opinion at p. 9; see also *id.* at p. 17 [stating that Intervenors "failed to identify any provision of state law that ... reflects that the Legislature intended to reserve all or part of the authority to make decisions about whether an oil drilling operation should be permitted ... for the discretion of local entities."].) The county's land use authority, however, derives not from any "reservation" in a state statute, but rather from the inherent police power reserved in article XI, section 7 of the Constitution. Put another way, the question is not whether a statute has reserved or delegated local authority, but whether the Legislature has clearly demonstrated an intent to divest local governments of the constitutional authority they already have. (*T-Mobile*, *supra*, 6 Cal.5th at p. 1118; *City of Riverside*, *supra*, 56 Cal.4th at pp. 742-43.)

Section 3106 and its history demonstrate no such preemptive intent. The 1961 amendments which added the "methods and practices" language merely clarified what had previously been unclear—that the supervisor could permit "secondary recovery operations," and that oil and gas leases silent about such methods would be "deemed" to allow them. (See Statutory Background and Context, *supra,* § B.) The legislative history of the 1961 amendment lacks any discussion of local authority to regulate oil and gas, much less reveals any intent to limit it. (*Ibid.*) Further, none of the subsequent amendments to section 3106 (in 1970, 1972, 1989, and 1994) limited, or even referenced, local authority. (*Ibid.*)

Indeed, the Legislature's repeated recognition and preservation of local regulatory authority preclude a finding of preemptive intent here. (*Big Creek*, *supra*, 38 Cal.4th at p. 1157.) Section 3203.5—added by the Legislature in 2021—is particularly illustrative. An oil and gas operator must file with the state a "written notice of intention" to "commence drilling" a new well. (§ 3203, sub. (a).) Section 3203.5 requires the operator to submit "a copy of the local land use authorization that supports the installation of a well" with the notice. Section 3203.5 thus expressly acknowledges that local land use agencies may "authorize" the "installation of a well"—i.e., permit the drilling of new wells. Section 3203.5 thus categorically forecloses any interpretation of section 3106 that suggests the supervisor has exclusive authority to permit the "method and practice" of "drilling" new wells or any other wells that require a notice of intention to drill.

Further, local governments regulate oil and gas in a wide variety of ways depending on local conditions—from total bans to blanket permits, and everything in between. (See Amici Curiae Brief, League of California Cities and California State Association of Counties, No. H045791, at pp. 20-23.) The Legislature's silence in the face of this diversity further supports the continued vitality of local regulatory authority. (See *Castillolopez*, *supra*, 63 Cal.4th at p. 331 [the Legislature is assumed to be aware of the relevant regulatory context].) The reality of oil and gas regulation in California also demonstrates the far-reaching and potentially absurd consequences of the

Court of Appeal's ruling. If prohibiting "the drilling of new wells" could be read as impermissibly regulating a "method and practice," even the most basic local zoning ordinance could be called into question.[17] Commonplace, decades-old ordinances prohibiting new wells within residential zones, for example, or within 300 feet of a school, could suddenly face challenges. The Court of Appeal's opinion could fundamentally alter the landscape of oil and gas regulation in California. Nothing in section 3106 suggests that the Legislature intended such a sweeping outcome.

C. Measure Z is a land use ordinance that regulates *where* and *whether* certain operations may occur, not *how* they occur.

Even if the Legislature had occupied the field of regulating the "conduct" of oil and gas operations, Measure Z would not be preempted. Measure Z regulates where and whether land may be used to support oil and gas wastewater disposal and the drilling of new wells. It does not regulate the conduct of those operations. In concluding otherwise (Opinion at p. 15), the Court of Appeal ignored Measure Z's plain text and purpose.

Measure Z amends the Land Use Element of the Monterey County General Plan (AR[1]127), coastal "Land Use Plans," (AR[1]129-33), and the Fort Ord Master Plan (AR[1]133-36). As a general plan amendment, Measure Z "*is an act of formulating basic land use policy*, for which localities have been

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[17] The court disclaimed any intent to invalidate such ordinances (Opinion at 19, fn. 16), but its rationale sweeps far more broadly.

constitutionally endowed with wideranging discretion." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 781-82 (emphasis added).) A general plan not only regulates land use directly, but also governs zoning ordinances, which must be consistent with the general plan. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544.) Measure Z directs the County to amend its zoning ordinances "as necessary to ensure consistency" with the measure. (AR[1]138-39.)

Policies LU-1.22 and LU-1.23 expressly address land use. They prohibit the "development, construction, installation, or use of any facility, appurtenance, or above-ground equipment ... in support of oil and gas wastewater injection" and "the drilling of new oil and gas wells." (AR[1]128-29.) These provisions do not dictate *how* a new well should be drilled or operated—only that a new well may not be drilled in the unincorporated county. They do not alter or supplant any technical standards for wastewater injection, or dictate *how* wastewater injection should occur—only that it may not occur in the unincorporated county. To the extent that the provisions even mention any particular "method or practice" of oil and gas production, they do so only to specify what land uses are prohibited (i.e., land uses in support of wastewater injection and the drilling of new wells).

Before the trial court and Court of Appeal, Plaintiffs argued that Measure Z's regulation of land uses was a "pretext" for substantive regulation of oil and gas production techniques. (Respondent's Brief by Chevron U.S.A. Inc., H045791, at p. 60; Aera Energy LLC's Respondent's Brief at p. 45; Respondents'

Brief by NARO et al. at pp. 12-13, 24.) The measure's real purpose, according to Plaintiffs, was to make maintenance of the "steam chest"—a mass of steam forced underground to boost oil recovery through the application of heat and pressure—impossible, eventually causing the end of profitable oil and gas activities in the county. (See Respondent's Brief by Chevron U.S.A. Inc. at pp. 16, 52; Aera Energy LLC's Respondent's Brief at pp. 15, 23; Respondents' Brief by NARO et al. at pp. 12-13, 16).

Plaintiffs' facial challenge to Measure Z, however, must rise or fall on the measure's text—not on assertions about its purported effects or its application to any particular circumstances. (*T-Mobile*, *supra*, 6 Cal.5th at p. 1117.) The text of Measure Z says nothing about a steam chest, nor about ending all oil and gas operations in the county. On the contrary, Policy LU-1.22 allows wastewater injection operations to continue for five to fifteen years after the Measure's effective date, and Policy LU-1.23 expressly does not affect existing wells. (AR[1]128-29.) Moreover, Measure Z's prohibition against new wells does not specify *how* those wells might have been drilled or operated. Plaintiffs' "steam chest" argument concerns "hypothetical future harm" that is "not cognizable in a facial challenge." (*T-Mobile*, *supra*, 6 Cal.5th at p. 1124.)

Like Plaintiffs, the Court of Appeal disregarded Measure Z's text in concluding that it "did not regulate 'where and whether' oil drilling would occur," but rather "*what and how*" operations could proceed. (Opinion at pp. 15-16 (italics in original).) Measure Z, however, does not propose any standards

governing the drilling of new wells or wastewater injection; it merely says that they may not occur in the unincorporated areas of the County, not "how" they may occur. (See *Big Creek*, *supra*, 38 Cal.4th at pp. 1154-56 [upholding zoning law regulating locations of activities despite state law expressly preempting local regulations of "how" those activities occur].) The Court of Appeal's conclusion that Measure Z did not identify "*any* locations *where* oil drilling may not occur" (Opinion at p. 15) is simply wrong. Measure Z squarely answers the questions of "whether" and "where" wastewater injection and new wells may occur—i.e., "not in unincorporated Monterey County." Nor is Measure Z somehow suspect, or not really a land use measure, because it applies countywide. (See Opinion at p. 15; Respondent's Brief by Chevron U.S.A. Inc., H045791, at pp. 60-61.) *City of Riverside* upholds such a jurisdiction-wide land use prohibition. (56 Cal.4th at p. 761, fn. 12.)

The Court of Appeal also found Measure Z suspect because it "permitted continued operation of existing wells but barred new wells and wastewater injection even if the new wells and wastewater injection would be on the same land as the existing operation." (Opinion at p. 15.) This reflects a misunderstanding of basic principles of land use law. Over time, zoning regulations routinely may prohibit new and expanded land uses that once were allowed, while continuing to permit existing "nonconforming" uses of the same kind to continue in the same locations. (See, e.g., *San Diego County v. McClurken* (1951) 37 Cal.2d 683, 686). This Court has upheld the continued

authorization of nonconforming uses as a valid means for localities to protect public welfare without impairing existing rights. (See, e.g., *Beverly Oil Co.*, *supra*, 40 Cal.2d at pp. 555, 559; *Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 882-83, *reversed on other grounds*, (1981) 453 U.S. 490.) Measure Z's preservation of nonconforming uses is a common feature of land use regulation, not an indication of any pretextual attempt to regulate something else.

Measure Z's land use provisions regulate "where" and "whether" oil and gas operations may occur, not "how" they occur. Even under Plaintiffs' partial field preemption theory, Measure Z must survive.

D. Measure Z is valid under the Attorney General's Opinion Plaintiffs relied on below.

Plaintiffs' argument that Measure Z is a "pretext" for regulating the conduct of oil and gas operations rather than their location draws on a distinction between technical specifications regarding largely "down-hole or subsurface" oil and gas operations and land use regulation articulated in a 1976 Opinion of the Attorney General. (59 Ops.Cal.Atty.Gen. 461, 461-62 (1976) ("AG Opinion"); see, e.g., Respondent's Brief by Chevron U.S.A. Inc. at pp. 40-41, 60; Respondents' Brief by NARO et al. at pp. 12-13.) But even if one were to agree with the partial field preemption line drawn by the AG Opinion nearly 50 years ago, Measure Z would still fall solidly on the "not preempted" side of that line.

The AG Opinion concludes that the state has largely occupied the field of technical regulations of "down-hole or

subsurface [oil and gas] operations," particularly where the state regulates "plans of operation, methods, materials, procedures or equipment to be used," to the exclusion of local authority. (*Id.* at pp. 461-62.) In contrast, because "the state has not fully occupied the field" of "land use control and environmental protection," the Attorney General concludes more stringent local regulation in this area is not preempted. (*Id.* at p. 462).

Although the AG Opinion questions whether local governments can regulate the "manner" of oil and gas operations (*id.* at p. 461), it nonetheless recognizes local governments' authority to validly *prohibit* some or all oil and gas operations in all or part of their jurisdictions. The AG Opinion cites *Beverly Oil*'s holding that ordinances prohibiting oil operations were valid despite "statutory regulation" and notes that other cases cited in *Beverly Oil* also upheld prohibitory ordinances. (*Id.* at p. 468.) The Attorney General concludes that those cases did not address whether local governments can regulate *how* oil operations are "carr[ied] out." (*Id.* at pp. 467-68.) However, the Attorney General Opinion also concludes based on the same cases that "cities and counties may prohibit oil and gas operations within their boundaries." (*Id.* at p. 468; see also *id.* at pp. 491-92 [concluding Napa County "may prohibit operations *in all areas or selected parts* of its territory"] (emphasis added).) The AG Opinion thus confirms that a local land use measure related to oil and gas is not preempted simply because it applies countywide rather than only in certain zones.

The Attorney General Opinion therefore questions only whether local governments may regulate *how* operations are carried out, not *where* or *whether* operations can occur in the first place. Indeed, the key distinction in the opinion is not between "surface" and "subsurface" activities, but rather between what the Attorney General viewed as comprehensive state regulation of technical safety standards, (see *id.* at pp. 471-75 [discussing state standards for, e.g., casing strength and blowout prevention]), and local governments' authority to restrict or prohibit some or all operations altogether.

The Attorney General also found local governments may use their prohibitory authority to ban certain *types* of operations notwithstanding an incidental effect on "subsurface" activity. Thus, for example, the AG Opinion deemed valid ordinances that (1) prohibited the redrilling or deepening of existing wells (*id.* at p. 483); (2) required slant-drilled wells surfaced outside city limits to "enter the city below a dept of 500 feet" (*ibid.*); and (3) required permits for "secondary recovery operations (gas injection, water injection, etc.)" (*id.* at pp. 488-89). Each ordinance, the Attorney General found, appeared valid as an application of local prohibitory authority.

Accordingly, even if Plaintiffs were correct that the state has occupied a narrow, technical field of regulating *how* certain oil and gas operations are conducted, they have not shown the state has thereby precluded local control of *where and whether* those operations occur. (*Big Creek*, *supra*, 38 Cal.4th at pp. 1157-60.) Even where the Legislature has regulated a portion of a field

with considerable specificity, local governments may exercise their traditional police power outside the regulated area. (See *Great Western Shows*, *supra*, 27 Cal.4th at pp. 866-67; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 295-96; see also, e.g., *City and County of San Francisco v. Post* (2018) 22 Cal.App.5th 121, 135-37 [state law prohibiting housing discrimination based on narrow definition of "source of income" did not preempt ordinance prohibiting "source of income" discrimination based on broader definition]; *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 560 [state law regulating education, licensing, and discipline of veterinarians and establishing sanitary standards did not preempt ordinance prohibiting declawing of cats].) Measure Z falls well outside of any portion of the field that section 3106 might occupy.

III. Measure Z would not be preempted under a federal "obstacle" preemption theory, and this Court need not—and should not—import such a theory into California law.

The Court of Appeal concluded that provisions of section 3106 purportedly "placing the authority to permit ... methods and practices in the hands of the State" were "entirely frustrated by Measure Z's ban on some of these methods and practices." (Opinion at p. 20.) The court premised its conclusion on *Great Western*'s discussion of federal "obstacle" preemption principles. (Opinion at p. 19 ["'[W]hen a statute or statutory scheme seeks to promote a certain activity ... , local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's

purpose.' (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 868.)"].)

This Court has never expressly determined whether federal obstacle preemption is coextensive with California law. (See *T-Mobile*, *supra*, 6 Cal.5th at p. 1123.) It need not do so here because Measure Z does not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the Legislature]." (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955 [quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67].) On the contrary, Measure Z furthers section 3106's purposes, including safety, environmental protection, and the reduction of greenhouse gases. (§ 3106, subd. (a); see also § 3011.) To the extent that language added to section 3106 in 1961 encouraged production at the time in a modest way by allowing the supervisor to approve secondary recovery techniques and establishing default lease provisions, that goal has since been further limited by subsequent environmentally protective amendments. Measure Z does not obstruct the purposes of the statutory scheme.

Moreover, federal courts have criticized obstacle preemption as improperly encouraging judges to legislate in the guise of divining and interpreting unstated statutory purposes. The power to preempt local law should be left where it belongs: with the Legislature. This Court should not import obstacle preemption into California law.

A. Measure Z does not frustrate the purposes of section 3106.

Were the Court to conduct an obstacle preemption analysis, Measure Z would still not be preempted. Under obstacle preemption, local law is displaced "if it hinders the accomplishment of the purposes behind a state law." (*T-Mobile*, *supra*, 6 Cal.5th at p. 1123.) The Court looks to the statutory text, the statutory scheme, the legislative history, and other indicia of intent to divine the Legislature's purposes. (See, e.g., *Bronco Wine Co.*, *supra*, 33 Cal.4th at pp. 956-977.) The Court then asks whether the local law "stand[s] as an obstacle" to the achievement of those purposes. (*Id.* at p. 989.) "What constitutes a 'sufficient obstacle is a matter of judgment, to be informed by examining the [state] statute *as a whole* and identifying its purpose and intended effects.'" (*Id.* at p. 992 [quoting *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 373] (italics added).)

To the extent that the Court of Appeal relied on an obstacle preemption theory, it short-circuited the critical analysis of statutory purpose. The court identified section 3106's purposes as "encourag[ing]" certain "methods and practices" and "placing the authority to permit [those] methods and practices in the hands of the State." (Opinion at pp. 19, 20.) But the court never grappled with the statutory text and purpose "as a whole," and both belie the court's conclusion. Indeed, the Court of Appeal's holding "is not an application of [the applicable] preemption standards, it is but a conclusory statement of pre-emption." (*Gade v. National*

Solid Wastes Management Assn. (1992) 505 U.S. 88, 109-110 (Kennedy, J., concurring).)

First, it cannot be said that one of section 3106's purposes is to assign exclusive authority over oil and gas regulation to the supervisor. The section's text, the numerous cases upholding local authority to prohibit oil and gas, the presumption against preemption, and the statutory scheme's repeated acknowledgment of local authority conclusively show otherwise. (See *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 321 ["[W]hile the Organic Foods Act surely gives [federal agencies] a leading role in monitoring grower behavior, nothing in the text of the act or its evident purposes suggests Congress intended that role to be exclusive."]; *Wyeth v. Levine* (2009) 555 U.S. 555, 574 ["[Congress's] silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness."].) Indeed, by requiring operators to provide a copy of the local land use authorization allowing installation of a new well, section 3203.5 forecloses any conclusion that the supervisor's permitting authority is exclusive.

The Court of Appeal also misconstrued section 3106 as primarily concerned with "encouraging" methods and practices of extraction. (Opinion at p. 19.) On the contrary, section 3106's purposes have long included environmental protection. Even in 1939, section 3106 addressed protection of water quality. (See AA[27]6456 (Stats. 1939, ch. 93, p. 1111, § 3106).) Today,

environmentally protective purposes predominate. Section 3106, subdivision (a), expressly requires the supervisor to prevent damage to "life, health, [and] property," "natural resources," and "underground and surface waters." (§ 3106, subd. (a); RJN[3]B:155, 213, 217, 218 [legislative history describing these goals as "specifically mentioned objectives"].). Subdivision (c), which allows the supervisor to require operators to monitor soil and water for contamination, shares these goals. Likewise, subdivision (d), the section's "wise development" provision, was added to "strengthen[ ] the role of the Division of Oil and Gas in dealing with environmental problems." (RJN[6]C:456, 462.) Indeed, subdivision (d) was initially conceived of as—and still offers—"a means of providing protection *for the public*." (RJN[6]C:404 (emphasis added).)

Section 3011, enacted in 2019, further confirms the environmentally protective purposes of the statutory scheme as a whole. The purposes of California's oil and gas statutes now expressly include "protecting public health and safety and environmental quality, including reduction and mitigation of greenhouse gas emissions associated with the development of hydrocarbon and geothermal resources in a manner that meets the energy needs of the state." (§ 3011, subd. (a).) The Legislature also directed the supervisor to work to meet the goals of the California Global Warming Solutions Act of 2006 "and to help support the state's clean energy goals." (*Id.*, subd. (b).). The Global Warming Solutions Act currently requires the state to reduce its greenhouse gas emissions to 40% below 1990 levels by

2030. (See Health & Safety Code §§ 38550, 38556.) The state's "clean energy goals" include electrifying the vehicle fleet "to reduce petroleum use … and to achieve greenhouse gas emissions reduction goals" (Pub. Util. Code § 740.12, subd. (a).), cutting petroleum use in transportation by 45% by 2030 (RJN[7]D:477-78 [Governor's Exec. Order No. B-55-18 (Sept. 10, 2018) (Brown)]), and eliminating the sale of new petroleum-fueled cars and trucks by 2035 (RJN[7]E:480-84 [Governor's Exec. Order No. N-79-20 (Sept. 23, 2020) (Newsom)]).[18]

The supervisor's first charge in section 3106(a) is to "prevent, as far as possible, damage to life, health, property, and natural resources…." The Legislature has made clear that doing so includes reducing greenhouse gas pollution from oil and gas, while meeting "the energy needs of the state." (§ 3011, subd. (a).) Today, the "energy needs of the state" must be met by rapidly eliminating oil and gas while increasing clean, renewable energy. This requires *less* oil production, not more. (See, e.g., RJN[7]E:481, 483 [executive order noting that the state "must focus on the impacts of oil extraction as it transitions away from fossil fuel," including by ending the issuance of hydraulic fracturing permits by 2024 and issuing a rule that "protects communities and workers from the impacts of oil extraction"].) In

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[18] Through three administrations, California Governors have established climate and clean energy goals through executive orders. (See *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1157 [recognizing climate policy established by executive order and discussing Governor's Exec. Order No. S-3-05 (June 1, 2005) (Schwarzenegger)].)

light of section 3011, moreover, section 3106(d)'s parallel reference to "*best* meet[ing] oil and gas needs in California" now further demands a similar interpretation. (*People v. Black* (1982) 32 Cal.3d 1, 5-8 [similar language in different parts of a statutory scheme should be interpreted harmoniously].) Today, the "wise development" of oil and gas resources means extracting and burning less fossil fuel.

To the extent any language in section 3106(b) still can be read as encouraging oil and gas production, it hardly does so at all costs. The 1961 amendments to section 3106 were intended to clarify the supervisor's authority to permit secondary recovery techniques, not to promote their use in all circumstances. (See RJN[2]A:99.) Nor does section 3106 require the supervisor to approve, or any operator to carry out, any particular method or practice. Moreover, the section's reference to "increasing ... ultimate recovery" is not an expression of statutory purpose. Rather, the phrase "methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of underground hydrocarbons" simply *defines* the "methods and practices" that the supervisor may permit—i.e., it describes the category of secondary recovery techniques. (§ 3106, subd. (b).)

Moreover, subdivision (b) of section 3106 does not and cannot override the environmentally protective purposes established in subdivisions (a) and (d), section 3011, and the rest of the statutory scheme. Section 3106 allows the supervisor to authorize only those methods and practices that are "suitable" for use; and the supervisor must determine what is "suitable" in

light of the environmental, safety, and public health purposes of subdivision (a). (§ 3106, subd. (b) [requiring that "[t]he supervisor shall *also* supervise," referencing and incorporating the purposes of subdivision (a)].) The statute also has been amended many times since 1961. Each time, the Legislature *increased* protection for the public and the environment. The Court of Appeal's selective, acontextual, and ahistorical focus on the clauses added in 1961 not only disregards the purposes of the statutory scheme as a whole, but also threatens to upend a century of settled law and practice.

Measure Z does not obstruct section 3106's environmental, public health, safety, or clean energy purposes. Measure Z does not even prohibit all oil and gas production. It prohibits the drilling of new wells, but this prohibition does not affect existing wells. It similarly prohibits wastewater injection, but allows operators to continue existing wastewater disposal uses for five to fifteen years. Measure Z's prohibitions aim to protect groundwater quality, prevent air pollution and habitat degradation, and protect the climate (AR[1]122-27), which is entirely consistent with the statute's environmentally protective purposes. And even if Measure Z were to result in decreased production over time, this would be entirely consistent with the state's climate and energy goals.

This Court has repeatedly rejected obstacle preemption arguments similar to those advanced by Plaintiffs below and embodied in the Court of Appeal Opinion here. In *T-Mobile*, the Court upheld a San Francisco ordinance regulating the aesthetics

of telecommunications facilities despite a statute granting companies the right to build facilities in public rights-of-way. (6 Cal.5th at p. 1123.) Stating that "[n]o legislation pursues its objectives at all costs," the Court observed that "the Legislature made clear that the goal of technological advancement is not paramount to all others" by including limiting clauses in the statute. (*Ibid.*) Here, the Legislature has made equally clear that section 3106 prioritizes environmental protection over increased production. Similarly, the ordinance prohibiting marijuana dispensaries in *City of Riverside* did not "frustrate" the state law's operation because nothing in state law "mandate[d] that local jurisdictions permit such activities." (56 Cal.4th at pp. 760-61.) The same holds here: nothing in section 3106 mandates that the supervisor approve, or that any operator carry out, any particular method or practice of extraction. Even *Big Creek*, which did not directly address obstacle preemption, is instructive. Although the state law at issue there encouraged "maximum sustained production" of timber products, it did not "require that every harvestable tree be cut." (38 Cal.4th at p. 1161.) Here, section 3106 read as a whole is not about "encouraging" production, let alone "maximizing" production—and neither it nor the statutory scheme overall requires that every drop of oil be recovered. On the contrary, the Legislature has brought the state's oil and gas statutes into line with its climate and clean energy goals, all of which contemplate steep and rapid reductions in reliance on fossil fuels.

Finally, the single piece of legislative history cited by the Court of Appeal cuts against implied obstacle preemption. The court noted that the 1972 amendment adding section 3106(d)'s "wise development" provision sought to "strengthen[ ] the role" of CalGEM "in dealing with environmental problems." (Opinion at p. 10; see also RJN[6]C:456, 462.) A stronger role for the State does not imply a lesser role for local governments: more stringent local regulation to protect the environment would further the purposes advanced by the 1972 amendment and the statute as a whole.

To the extent the Court of Appeal relied on obstacle preemption, it misapplied that law, too. The court's narrow focus on a few phrases from 1961 ignored the text and purposes of the statutory scheme as a whole. Measure Z does not stand as an obstacle to, or frustrate, those purposes.

B. The Court should not import federal obstacle preemption into California law.

While this Court has occasionally considered obstacle preemption arguments (see *Great Western*, *supra*, 27 Cal.4th at pp. 867-70; *City of Riverside*, *supra*, 56 Cal.4th at pp. 760-61), the Court "has never said explicitly whether state preemption principles are coextensive with the developed federal conception of obstacle preemption." (*T-Mobile*, *supra*, 6 Cal.5th at p. 1123; but see *City of Riverside*, 56 Cal.4th at pp. 763-64 (Liu, J., concurring) [stating certain federal conflict preemption principles "no doubt apply to" California law].) Because Measure Z would not be preempted even under an obstacle preemption theory, the Court need not do so here.

If the Court takes up the question, however, it should decline to import federal obstacle preemption doctrine into its evaluation of purported conflicts between state and local law. Federal courts have criticized the doctrine for obliging judges to insert themselves into what should be legislative processes. (See *Geier v. American Honda Motor Co., Inc.* (2009) 529 U.S. 861, 907-08, 911 (Stevens, J., dissenting) [stating that the obstacle preemption doctrine is "potentially boundless (and perhaps inadequately considered)," with a tendency to lead to "exercise[s] in free-form judicial policymaking."]; *Gade*, *supra*, 505 U.S. at p. 111 (Kennedy, J., concurring) [cautioning that obstacle preemption can lead to a "free wheeling judicial inquiry" that could "undercut the principle that it is Congress rather than the courts that pre-empts state law."].) These threats to the separation of powers arise from inherent flaws in obstacle preemption doctrine. For example, the doctrine encourages judges to discern a single purpose from statutes with complex and occasionally contradictory goals. (*Pharmaceutical Research & Manufacturers of America v. Walsh* (2003) 538 U.S. 644, 678 (Thomas, J., concurring).) Thus, obstacle preemption can result in "the arbitrary selection of one purpose to the exclusion of others," encouraging judges to erase legislative compromises and statutory nuance. (*Ibid.*; see also *Wyeth*, *supra*, 555 U.S. at p. 587 (Thomas, J., concurring).) Obstacle preemption also "encourages an overly expansive reading of statutory text" that "leads [courts] to assume that [the legislature] wanted to pursue [its] policies 'at all costs'—even when the text reflects a different balance."

(*Wyeth*, *supra*, 555 U.S. at p. 601.) Obstacle preemption doctrine thus undercuts the separation of powers among all three branches of government: it expands judicial power at the expense of the Legislature while undermining local governments' ability to execute their authority. Put simply, adding an obstacle preemption test will inevitably result in many more laws being held preempted, simply because judges will have many more ways to find them preempted.

The Court's existing state law preemption tests strike a balance that better honors legislative intent and limits "judicially manufactured policies." (See *id.* at p. 604.) This Court has properly rejected obstacle preemption arguments when they have arisen. (See, e.g., *City of Riverside*, *supra*, 56 Cal.4th at p. 760-61 [finding no preemption of a local prohibition on dispensaries where state law did not mandate that local jurisdictions permit such activities]; *T-Mobile*, *supra*, 6 Cal.5th at p. 1123 [finding no preemption where state law made clear that its goal was "not paramount to all others" and left room for local regulation in pursuit of other, non-contradictory goals].) Opening the door to even more vague, subjective obstacle preemption claims could have unintended consequences well beyond the oil and gas context. California preemption doctrine is not broken, and there is no need to fix it.

CONCLUSION

Under any of this Court's established preemption tests, Measure Z does not conflict with section 3106. It does not mandate anything the statute prohibits or prohibit anything the

statute requires. Nor does Measure Z intrude on any field of regulation the state may occupy. It does not regulate the conduct of oil and gas extraction methods and practices. Rather, it does what countless other local land use measures have done for decades: it declares where certain land uses may not occur. Measure Z lies squarely within the voters' constitutional power. The Court of Appeal's judgment to the contrary should be reversed.

DATED: March 28, 2022

SHUTE, MIHALY & WEINBERGER LLP

By: _____

KEVIN P. BUNDY
CATHERINE C. ENGBERG
AARON M. STANTON

Attorneys for Intervenors and Appellants PROTECT MONTEREY COUNTY and DR. LAURA SOLORIO

CERTIFICATE OF WORD COUNT

In accordance with California Rules of Court Rule 8.504(d)(1), I certify that, exclusive of this certification and the other exclusions referenced in Rule of Court 8.204(c)(3), this **INTERVENORS' OPENING BRIEF** contains 13,584 words, including footnotes, as determined by the word count of the computer used to prepare this brief.

DATED: March 28, 2022

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Kevin P. Bundy

CATHERINE C. ENGBERG
KEVIN P. BUNDY
AARON M. STANTON
Attorneys for Intervenors and Appellants
PROTECT MONTEREY COUNTY and DR. LAURA SOLORIO

EXHIBIT A

PUBLIC RESOURCES CODE - PRC

DIVISION 3. OIL AND GAS [3000 - 3865] *(Division 3 enacted by Stats. 1939, Ch. 93.)*

CHAPTER 1. Oil and Gas Conservation [3000 - 3473] *(Chapter 1 enacted by Stats. 1939, Ch. 93.)*

ARTICLE 2. Administration [3100 - 3115] *(Article 2 enacted by Stats. 1939, Ch. 93.)*

3106. (a) The supervisor shall so supervise the drilling, operation, maintenance, and abandonment of wells and the operation, maintenance, and removal or abandonment of tanks and facilities attendant to oil and gas production, including pipelines not subject to regulation pursuant to Chapter 5.5 (commencing with Section 51010) of Part 1 of Division 1 of Title 5 of the Government Code that are within an oil and gas field, so as to prevent, as far as possible, damage to life, health, property, and natural resources; damage to underground oil and gas deposits from infiltrating water and other causes; loss of oil, gas, or reservoir energy, and damage to underground and surface waters suitable for irrigation or domestic purposes by the infiltration of, or the addition of, detrimental substances.

(b) The supervisor shall also supervise the drilling, operation, maintenance, and abandonment of wells so as to permit the owners or operators of the wells to utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of underground hydrocarbons and which, in the opinion of the supervisor, are suitable for this purpose in each proposed case. To further the elimination of waste by increasing the recovery of underground hydrocarbons, it is hereby declared as a policy of this state that the grant in an oil and gas lease or contract to a lessee or operator of the right or power, in substance, to explore for and remove all hydrocarbons from any lands in the state, in the absence of an express provision to the contrary contained in the lease or contract, is deemed to allow the lessee or contractor, or the lessee's or contractor's successors or assigns, to do what a prudent operator using reasonable diligence would do, having in mind the best interests of the lessor, lessee, and the state in producing and removing hydrocarbons, including, but not limited to, the injection of air, gas, water, or other fluids into the productive strata, the application of pressure heat or other means for the reduction of viscosity of the hydrocarbons, the supplying of additional motive force, or the creating of enlarged or new channels for the underground movement of hydrocarbons into production wells, when these methods or processes employed have been approved by the supervisor, except that nothing contained in this section imposes a legal duty upon the lessee or contractor, or the lessee's or contractor's successors or assigns, to conduct these operations.

(c) The supervisor may require an operator to implement a monitoring program, designed to detect releases to the soil and water, including both groundwater and surface water, for aboveground oil production tanks and facilities.

(d) To best meet oil and gas needs in this state, the supervisor shall administer this division so as to encourage the wise development of oil and gas resources.

(Amended by Stats. 1994, Ch. 523, Sec. 3. Effective January 1, 1995.)

PROOF OF SERVICE

Chevron U.S.A., Inc., et al. v. County of Monterey, et al.
Case No. S271869

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 2049 Century Park East, #3400, Los Angeles, California 90067. My email address is lyoon@robinskaplan.com.

On March 28, 2022, I served true copies of the following document(s) described as:

INTERVENORS' OPENING BRIEF with EXHIBIT A

on the parties in this action as follows:

Michael Geibelson
Glenn Danas
Robins Kaplan LLP
2049 Century Park East, #3400
Los Angeles, California 90067
Telephone: (310) 552-0130
Facsimile: (310) 229-5800
MGeibelson@RobinsKaplan.com
GDanas@RobinsKaplan.com

Deborah A. Sivas
Environmental Law Clinic
Mills Legal Clinic at
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610
Telephone: (650) 723-0325
Facsimile: (650) 723-4426
dsivas@stanford.edu

Hollin Kretzmann
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, California 94612
Telephone: (510) 844-7100
Facsimile: (510) 844-7150
hkretzmann@biologicaldiversity.org

Attorneys for Intervenors, Appellants, and Cross-Respondents
PROTECT MONTEREY COUNTY and DR. LAURA SOLORIO

Jeffrey D. Dintzer
Matthew C. Wickersham
Alston & Bird LLP
333 South Hope St., 16th Floor
Los Angeles, CA 90071-3004
Telephone: (213) 576-1063
Facsimile: (213) 576-1100
jeffrey.dintzer@alston.com
matt.wickersham@alston.com

Attorneys for Plaintiffs, Respondents and Cross-Appellants CHEVRON U.S.A. INC.; KEY ENERGY SERVICES, LLC; ENSIGN UNITED STATES DRILLING (CALIFORNIA) INC.; MAUREEN WRUCK; GAZELLE TRANSPORTATION, LLC; PETER ORRADRE; MARTIN ORRADRE; JAMES ORRADRE; THOMAS ORRADRE; JOHN ORRADRE; STEPHEN MAURICE BOYUM; and SAN ARDO UNION ELEMENTARY SCHOOL DISTRICT

Theodore J. Boutrous, Jr.
Dionne Garlick
Dana L. Craig
Gibson, Dunn & Crutcher LLP
333 So. Grand Ave., 54th Fl.
Los Angeles, CA 90071-3197
Telephone: (213) 229-7804
Facsimile: (213) 229-6804
tboutrous@gibsondunn.com
dgarlick@gibsondunn.com
dcraig@gibsondunn.com

Attorneys for Plaintiffs, Respondents and Cross-Appellants CHEVRON U.S.A. INC.; KEY ENERGY SERVICES, LLC; ENSIGN UNITED STATES DRILLING (CALIFORNIA) INC.; MAUREEN WRUCK; GAZELLE TRANSPORTATION, LLC; PETER ORRADRE; MARTIN ORRADRE; JAMES ORRADRE; THOMAS ORRADRE; JOHN ORRADRE; STEPHEN MAURICE BOYUM; and SAN ARDO UNION ELEMENTARY SCHOOL DISTRICT

Andrew A. Bassak
Christopher A. Rheinheimer
Hanson Bridgett LLP
425 Market Street, 26th Floor
San Francisco, CA 94111
Telephone: (415) 777-3200
Facsimile: (415) 541-9366
abassak@hansonbridgett.com
crheinheimer@hansonbridgett.com

Attorneys for Plaintiff, Respondent and Cross-Appellant AERA ENERGY, LLC

Donald C. Oldaker
Clifford & Brown
A Professional Corporation
Attorneys at Law
1430 Truxtun Ave., Suite 900
Bakersfield, CA 93301
Telephone: (661) 322-6023
Facsimile: (661) 322-3508
doldaker@clifford-brownlaw.com

Attorneys for Plaintiff, Respondent and Cross-Appellant EAGLE PETROLEUM, LLC

Matt Kline
O'Melveny & Myers LLP
1999 Avenue of the Stars, 8th Fl.
Los Angeles, CA 90067-6035
Telephone: (310) 246-6840
Facsimile: (310) 246-6779
mkline@omm.com

Attorneys for Plaintiff, Respondent and Cross-Appellant CALIFORNIA RESOURCES CORPORATION

Heather A. Welles
Dimitri D. Portnoi
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: (310) 246-6840
Facsimile: (310) 246-6779
hwelles@omm.com
dportnoi@omm.com

Attorneys for Plaintiff, Respondent and Cross-Appellant CALIFORNIA RESOURCES CORPORATION

Gene Tanaka
Shawn Haggerty
Best Best & Krieger
2001 North Main St., Suite 390
Walnut Creek, CA 94596
Telephone: (925) 977-3300
Facsimile: (925) 977-1870
gene.tanaka@bbklaw.com

Attorneys for Defendant, Appellant and Cross-Respondent
COUNTY OF MONTEREY

Barton H. Thompson
O'Melveny & Myers LLP
2765 Sand Hill Road
Menlo Park, CA 94025
Telephone: (650) 723-2518
bthompson@omm.com

Attorneys for Plaintiff, Respondent and Cross-Appellant
CALIFORNIA RESOURCES CORPORATION

Jacqueline M. Zischke
A Professional Corporation
P.O. Box 1115
Salinas, CA 93902
Telephone: (831) 761-8714
Facsimile: (888) 385-9198
jzischkelaw@charter.net

Attorneys for Plaintiffs and Respondents
NATIONAL ASSOCIATION OF ROYALTY OWNERS-CALIFORNIA, INC., et al.

Jason Retterer
David Balch
JRG Attorneys at Law
318 Cayuga Street
Salinas, CA 93901
Telephone: (831) 754-2444
Facsimile: (831) 754-2011
Jason@jrgattorneys.com
David@jrgattorneys.com

Attorneys for Plaintiff, Respondent and Cross-Appellant
TRIO PETROLEUM, LLC

Leslie J. Girard
County Counsel
County of Monterey
168 West Alisal St., 3rd Floor
Salinas, CA 93901-2439
Telephone: (831) 755-5045
girardlj@co.monterey.ca.us

Attorneys for Defendant and Respondent
COUNTY OF MONTEREY

Edward S. Renwick
Hanna & Morton LLP
444 South Flower St., #2530
Los Angeles, CA 90071
Telephone: (213) 628-7131
Facsimile: (213) 623-3379
erenwick@hanmor.com

Attorneys for Plaintiffs and Respondents
NATIONAL ASSOCIATION OF ROYALTY OWNERS-CALIFORNIA, INC., et al.

Sean B. Hecht
UCLA School Of Law
385 Charles E. Young Drive E
Los Angeles, CA 90095-1476
Telephone: (310) 794-5272
Facsimile: (310) 206-1234
hecht.elc@law.ucla.edu

Attorney for Amici Curiae
League of California Cities and
California State Association of
Counties

Julia K. Forgie
Damon Nagami
Nat. Resources Defense Council
1314 2nd Street
Santa Monica, CA 90401-1103
Telephone: (310) 434-2300
jforgie@nrdc.org
dnagami@nrdc.org

Attorneys for Amicus Curiae
Natural Resources Defense
Council

Daniel Ress
Center on Race, Poverty &
the Environment
1012 Jefferson Street
Delano, CA 93215
Telephone: (661) 720-9140
Facsimile: (661) 720-9483
dress@crpe-ej.org

Attorney for Amicus Curiae
Center on Race, Poverty &
the Environment

Alison Hahm
Communities for a Better
Environment
6325 Pacific Boulevard
Huntington Park, CA 90255
Telephone: (323) 826-9771
Facsimile: (323) 588-7079
ahahm@cbecal.org

Attorney for Amicus Curiae
Communities for a Better
Environment

Todd W. Smith
Ragghianti | Freitas LLP
1101 5th Avenue, Suite 100
San Rafael, CA 94901
Telephone: (415) 453-9433
Facsimile: (415) 453-8269
tsmith@rflawllp.com

Attorneys for Plaintiffs, Respondents and Cross-Appellants CHEVRON U.S.A. INC.; KEY ENERGY SERVICES, LLC; ENSIGN UNITED STATES DRILLING (CALIFORNIA) INC.; MAUREEN WRUCK; GAZELLE TRANSPORTATION, LLC; and SAN ARDO UNION ELEMENTARY SCHOOL DISTRICT

James R. Williams
County Counsel
Elizabeth Vissers
Deputy County Counsel
Office of the County Counsel
County of Santa Clara
70 West Hedding Street
East Wing, 9th Floor
San Jose, CA 95110
Telephone: (408) 299-5900
elizabeth.vissers@cco.sccgov.org

Attorneys for Amicus Curiae COUNTY OF SANTA CLARA

California Court of Appeal
Sixth Appellate District
333 W. Santa Clara St., #1060
San Jose, CA 95113

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Executed on March 28, 2022, at Los Angeles, California.

Lina Yoon

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CHEVRON U.S.A. v. COUNTY OF MONTEREY (PROTECT MONTEREY COUNTY)**
Case Number: **S271869**
Lower Court Case Number: **H045791**

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Sean Hecht Frank G. Wells Environmental Law Clinic 181502	hecht@law.ucla.edu	e-Serve	3/28/2022 7:51:54 PM
Theodore Boutrous Gibson Dunn & Crutcher LLP 132099	tboutrous@gibsondunn.com	e-Serve	3/28/2022 7:51:54 PM
Jeffrey Dintzer Alston & Bird LLP 139056	jeffrey.dintzer@alston.com	e-Serve	3/28/2022 7:51:54 PM
Dione Garlick Gibson, Dunn & Crutcher 293012	dgarlick@gibsondunn.com	e-Serve	3/28/2022 7:51:54 PM
Andrew Bassak Hanson Bridgett LLP 162440	abassak@hansonbridgett.com	e-Serve	3/28/2022 7:51:54 PM
Donald Oldaker Clifford and Brown 166230	doldaker@clifford-brownlaw.com	e-Serve	3/28/2022 7:51:54 PM
Kevin Bundy	bundy@smwlaw.com	e-	3/28/2022

Shute, Mihaly & Weinberger LLP 231686		Serve	7:51:54 PM
Leslie Girard Monterey County Counsel	girardlj@co.monterey.ca.us	e-Serve	3/28/2022 7:51:54 PM
Gene Tanaka Best Best & Krieger LLP 101423	gene.tanaka@bbklaw.com	e-Serve	3/28/2022 7:51:54 PM
Todd Smith Ragghianti Freitas LLP	tsmith@rflawllp.com	e-Serve	3/28/2022 7:51:54 PM
Deborah Sivas Mills Legal Clinic at Stanford Law School 135446	dsivas@stanford.edu	e-Serve	3/28/2022 7:51:54 PM
Michael Geibelson Robins Kaplan LLP 179970	mgeibelson@robinskaplan.com	e-Serve	3/28/2022 7:51:54 PM
Hollin Kretzmann Center For Biological Diversity 290054	hkretzmann@biologicaldiversity.org	e-Serve	3/28/2022 7:51:54 PM
Jacqueline Zischke Attorney at Law 171670	jzischkelaw@charter.net	e-Serve	3/28/2022 7:51:54 PM
Jason Retterer JRG Attorneys at Law 194651	jason@jrgattorneys.com	e-Serve	3/28/2022 7:51:54 PM
Edward Renwick Hanna and Morton LLP 29325	erenwick@hanmor.com	e-Serve	3/28/2022 7:51:54 PM
Barton Thompson Attorney at Law 72927	bthompson@omm.com	e-Serve	3/28/2022 7:51:54 PM
Alison Hahm Communities for a Better Environment 336969	ahahm@cbecal.org	e-Serve	3/28/2022 7:51:54 PM
Julia Forgie NRDC 304701	jforgie@nrdc.org	e-Serve	3/28/2022 7:51:54 PM
Elizabeth Vissers Office of the County County, County of Santa Clara 321365	elizabeth.vissers@cco.sccgov.org	e-Serve	3/28/2022 7:51:54 PM
Matthew Kline O'Melveny & Myers LLP 211640	mkline@omm.com	e-Serve	3/28/2022 7:51:54 PM
Matthew C. Wickersham 241733	matt.wickersham@alston.com	e-Serve	3/28/2022 7:51:54 PM
Dana L. Craig	dcraig@gibsondunn.com	e-Serve	3/28/2022 7:51:54 PM
Christopher A. Rheinheimer 253890	crheinheimer@hansonbridgett.com	e-Serve	3/28/2022 7:51:54 PM

Heather A. Welles 302256	hwelles@omm.com	e-Serve	3/28/2022 7:51:54 PM
Dimitri D. Portnoi 282871	dportnoi@omm.com	e-Serve	3/28/2022 7:51:54 PM
Glenn Danas 270317	gdanas@robinskaplan.com	e-Serve	3/28/2022 7:51:54 PM
David Balch 226519	david@jrgattorneys.com	e-Serve	3/28/2022 7:51:54 PM
Daniel Ress	dress@crpe-ej.org	e-Serve	3/28/2022 7:51:54 PM
Damon Nagami	dnagami@nrdc.org	e-Serve	3/28/2022 7:51:54 PM

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/28/2022

Date

/s/Kevin Bundy

Signature

Bundy, Kevin (231686)

Last Name, First Name (PNum)

Shute, Mihaly & Weinberger LLP

Law Firm