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

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INTRODUCTION

Public Resources Code section 3106 does not impliedly preempt policies LU-1.22 and LU-1.23 of Monterey County's initiative Measure Z.[1]

Plaintiffs have not identified any clear statement of preemptive intent in section 3106 or elsewhere in the statutory scheme. None exists. For nearly a century, courts have affirmed local governments' power to regulate, and even prohibit, oil and gas development. Against this backdrop, the Legislature enacted several provisions—including one adopted in 2022—demonstrating a clear intent to *preserve* local governments' authority over oil and gas activities. Plaintiffs' arguments and the Court of Appeal's Opinion[2] below conflict with the statutory scheme and this Court's preemption jurisprudence. Accordingly, this Court should reverse.

Plaintiffs' claims rest on three assertions. Each is demonstrably wrong.

First, Plaintiffs incorrectly contend that section 3106 "mandates" increased production by *requiring* the state oil and gas supervisor ("Supervisor") to approve certain methods and practices of oil and gas production. Section 3106 *allows* the

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

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

Supervisor to approve a "method or practice." But section 3106 does not *mandate* approval, as Plaintiffs conceded in their Joint Answer to the Petition for Review (at pp. 32-33). Plaintiffs also fail to address the considerable evolution of the statutory scheme since 1961, when the language on which they rely was added to section 3106. Today, the goals of protecting property, public health, the environment, and the climate predominate, and the statutory scheme calls for less oil production—not more.

Second, Plaintiffs incorrectly contend that the Supervisor's authority to permit oil and gas activities—including drilling of new wells and injection of wastewater—is "exclusive" of local authority. Again, Plaintiffs are wrong. The Legislature has expressly and repeatedly recognized that local governments may authorize, regulate, and even completely prohibit oil and gas based on health, safety, and environmental concerns. These express statutory provisions show that preserving local authority over oil and gas remains a core legislative purpose.

Third, Plaintiffs mischaracterize Measure Z as a covert attempt to regulate methods and practices of oil extraction they claim can be regulated only by the state. But Measure Z on its face is a county general plan amendment—a core exercise of Monterey County's land use authority over *whether* and *where* oil and gas activities occur, not *how* they are conducted. All of Plaintiffs' arguments—but particularly their field preemption claims—depend on pretending Measure Z is something other than what the voters enacted.

Plaintiffs' false premises fatally undercut their arguments. Their implied field preemption claims fail because the Legislature has expressly acknowledged and preserved local government authority. Their claim that Measure Z is "contradictory or inimical" to section 3106 misapplies this Court's precedent. And their argument that Measure Z conflicts with the purposes of section 3106 not only invents a "mandate" to increase production where none exists, but also is rooted in an "obstacle" preemption theory never adopted by this Court. The argument also flies in the face of the statutory scheme's other express purposes: respect for local government authority, and preservation of health, safety, the environment, and the climate. Measure Z is not an obstacle to legislative purpose.

The interpretation of section 3106 advanced by Plaintiffs and adopted by the Court of Appeal, in contrast, *would* obstruct clear legislative intent. Statutory provisions acknowledging the right of local governments to authorize, regulate, and prohibit oil and gas development would be rendered meaningless. Although Plaintiffs claim this case would not affect traditional zoning, they offer no rational way to draw a line between permissible and impermissible local action. Plaintiffs dismiss this threat, pointing out that Monterey County did not appeal the trial court's decision below. But the California State Association of Counties—representing every county in California—has joined multiple amicus curiae briefs and letters below and in this Court raising the alarm. More than a century of settled law and practice could be swept away, and local governments would face a perilous new

era where industry could attack virtually any restriction on oil and gas—even basic, decades-old zoning restrictions.

Some of these same Plaintiffs are already raising section 3106 in challenges to zoning laws creating buffers between oilfields and homes or schools.[3] They are even arguing section 3106 leaves the state Supervisor no choice but to maximize production by approving permit applications.[4] None of this is accidental. Plaintiffs are asking this Court to rewrite the statutory scheme for the benefit of the oil industry. Their arguments are both radical and wrong.

The Constitution reserves the power to protect health, safety, and welfare to local governments and the people. The Legislature may constrain that power; but to do so, it must speak with clear preemptive intent. It has not done so here. On the contrary, the Legislature has gone out of its way to *preserve* local power to address local concerns. The Court of Appeal's judgment

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[3] Petitioners' Phase 1 Joint Opening Brief at 21-29, *Aera Energy LLC. V. County of Ventura* (Super. Ct. Ventura County, filed Oct. 15, 2020, No. 56-2020-00546180).

[4] See *Chevron U.S.A. Inc. v. Newsom et al.* (Super. Ct. Kern County, filed Mar. 17, 2022, No. 22-100636); *Western States Petroleum Assn. v. Newsom et al.* (Super. Ct. Kern County, filed Oct. 10, 2021, No. 21-102380); *Aera Energy LLC v. Newsom* (Super. Ct. Kern County, filed Mar. 30, 2022, No. 22-100748) [three cases seeking to compel state to issue hydraulic fracturing permits]; *Aera Energy LLC v. Cal. Geologic Energy Management Div. et al.* (Super. Ct. Kern County, filed Jan. 18, 2022, No. 22-100141) [seeking to compel state approval of applications to drill new wells].

should be reversed and the case remanded for consideration of the issues not reached below.

STANDARD OF REVIEW

Plaintiffs' facial preemption challenges to Measure Z—the only claims at issue here—present pure questions of law that are reviewed de novo. (*Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 718; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1168.)

Plaintiffs incorrectly contend this Court should defer to the lower courts' "factual findings." (See, e.g., Chevron Br. at p. 28; Eagle Br. at p. 20; Aera Br. at p. 34.[5]) This Court considers "the text of [Measure Z] itself, not its application to any particular circumstances or individual." (*T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1117 ("*T-Mobile*").) Therefore, Plaintiffs' assertions about the effect of Measure Z on particular individuals or operations are irrelevant to their facial preemption claims. This Court's de novo review is not "limited by" the lower courts' interpretations of Measure Z or the evidence considered. (*City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 753.) No deference to their "factual findings" is appropriate.

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[5] Intervenors' Opening Brief is cited as "Int. Br." Plaintiffs' answering briefs are cited respectively as "Chevron Br.," "Aera Br.," "Eagle Br.," "NARO Br.," and "CRC Br." Trio Petroleum, LLC, et al. filed only a joinder to Chevron's brief.

Furthermore, a strong presumption against preemption applies to land use measures like Measure Z that address significant and varied local concerns. (Int. Br. at pp. 29-30; *City of Riverside v. Inland Empire Patients Health & Wellness Center* (2013) 56 Cal.4th 729, 755-56 ("*City of Riverside*"); *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 ("*Big Creek*"). Aera and Chevron claim a presumption in favor of preemption applies here. (Aera Br. at p. 34; Chevron Br. at pp. 58-60.) However, the cases they cite involved local attempts to regulate "social behavior" and "daily life," not land use; indeed, both cases acknowledge that land use regulations are entitled to a presumption *against* preemption. (*Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 101; *People v. Nguyen* (2014) 222 Cal.App.4th 1168, 1186.)

The presumption against preemption reflects—and protects—fundamental constitutional interests. Monterey County's police power arises from the Constitution, not from legislative reservation or delegation. (Cal. Const., art. XI, § 7.) The critical question, therefore, is not whether section 3106 *reserves* local authority, as both the Court of Appeal and Plaintiffs mistakenly suggest. (See, e.g., Opinion at p. 9; Chevron Br. at p. 41.) Rather, the question is whether the Legislature has clearly stated its intent to *divest* local governments of their inherent constitutional power. (*T-Mobile*, 6 Cal.5th at p. 1118.) It has not.

ARGUMENT

I. Plaintiffs misinterpret section 3106.

Plaintiffs' case for preemption rests on two false assertions about section 3106: (1) that the section "mandates" that the state both maximize production and permit certain extraction methods and practices (see, e.g., Chevron Br. at p.48; Eagle Br. at p. 37); and (2) that the statute assigns "exclusive" authority to the Supervisor to permit drilling and other activities (see, e.g., Aera Br. at p. 40; Chevron Br. at pp. 52-53). The statute's text, context, and history show that both assertions are wrong.

A. Section 3106 neither mandates approval of any particular recovery technique nor encourages maximum production.

Section 3106 does not "mandate" the maximization of oil production. Nor does section 3106 require that the state permit, or that any operator use, any particular extraction technique. Rather, section 3106 merely *allows* the Supervisor to permit "methods and practices" used to increase ultimate recovery where the Supervisor finds those methods and practices "suitable." (§ 3106, subd. (b); Int. Br. at pp. 13-14.) Thus, the statute does not require the Supervisor to approve every (or any) proposed method or practice that might extract more oil. Nor does section 3106 require oil and gas *operators* to employ any particular extraction technique. The section states that where otherwise silent, and absent an agreement to the contrary, oil and gas leases must be interpreted to *allow* operators to carry out a range of "methods and processes." (§ 3106, subd. (b).) It explicitly does not "impose[]

a legal duty … to conduct these operations." (*Ibid*.) These parallel provisions addressing the Supervisor's authority and lease interpretation confirm that the intent of section 3106 is to allow—not mandate—the use of certain practices, provided the state finds them suitable and the parties to an oil and gas lease agree. Section 3106 is permissive, not prescriptive.

Plaintiffs conceded in their Joint Answer that "section 3106 *does not mandate State approval of any particular method or practice*." (Joint Answer at pp. 32 (italics added).) Now, however, at least some Plaintiffs argue the opposite, claiming that "section 3106 mandates that certain oil recovery techniques be permitted, including wastewater injection." (Chevron Br. at p. 48; see also Eagle Br. at p. 37.) These Plaintiffs are wrong.

The legislative history of the 1961 amendments to section 3106 on which Plaintiffs rely confirms the Legislature's narrow, modest purpose: clarifying that secondary recovery operations are permissible under the statute and allowable—but not required—under private leases. (See Int. Br. at pp. 15-16.) For example, while the first version of the 1961 amendments introduced in the Legislature "include[d] the *right*" of oil and gas operators to use certain secondary recovery techniques, subsequent amendments replaced this language with "deemed to *allow*," and further

clarified that operators have no duty to carry out these techniques. (RJN[2]A:20, 22-23, 62 [emphasis added].[6])

Plaintiffs largely decline to address this legislative history. (See Aera Br. at pp. 22-23; Eagle Br. at pp. 7-8; NARO Br. at p. 16.) Chevron quotes a few isolated phrases, but none evinces an intent to mandate increased production. (Chevron Br. at p. 16 [citing RJN[2]A:99-102].) Rather, each document shows the Legislature intended no more than to clarify the Supervisor's authority to *allow* secondary recovery techniques that were already being approved. (RJN[2]A:99 [Legislative Analyst describing changes as "technical" and "provid[ing]the necessary authorization" for the supervisors to do work they "have already been doing … in this area"], 100 [Natural Resources Director describing changes as "technical"].) Indeed, the Director of Finance stated that the amendment was "designed to set forth authority for actions which have been performed by the Oil and Gas Supervisor in the past ... on the basis that the law did not prohibit such action." (RJN[2]104.) Senator Miller described the bill as "correct[ing] some defects in existing law" to "assist oil operators in the use of secondary recovery operations." (RJN[2]A:102.) But Senator Miller's letter does not suggest the amendments were intended to *mandate* that the Supervisor

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

approve, or that any operator carry out, any particular technique. Plaintiffs are wrong to claim otherwise.

Plaintiffs also ignore that the Legislature's purposes have evolved since 1961 to emphasize climate, health, and environmental protection. Most recently, the Legislature banned the approval of new oil and gas wells within 3,200 feet of homes and schools to protect public health, while preserving local authority to adopt even stricter standards and reemphasizing the Supervisor's obligation to prevent harm. (Stats. 2022, ch. __, § 2 (S.B. 1137) [adding §§ 3281, 3289, 3291].)[7] The Legislature also *prohibited* the injection of captured carbon dioxide for enhanced oil recovery while requiring the Air Resources Board to prioritize "reducing fossil fuel production in the state." (Stats. 2022, ch. __ (S.B. 905) [adding § 3132; Health and Saf. Code § 39741.1, subd. (b)(5)].) Today's statutory scheme does not promote oil and gas production.

B. Section 3106 does not vest exclusive authority in the Supervisor.

Plaintiffs also incorrectly claim the Supervisor has "exclusive" authority under section 3106 to permit oil production

[7] Governor Newsom signed several climate-related bills, including S.B. 1137 and S.B. 905, on September 16, 2022. (See https://www.gov.ca.gov/2022/09/16/governor-newsom-signs-sweeping-climate-measures-ushering-in-new-era-of-world-leading-climate-action/ (Sept. 16, 2022).) Chapter citations were not yet available at the time this brief was finalized.

methods and practices. (See, e.g., Aera Br. at p. 40; Chevron Br. at p. 52.) Nothing in the text of section 3106 supports this claim.

Although section 3106 is silent as to local authority, the statutory context demonstrates that the Supervisor's authority to permit oil and gas operations—including the drilling of new wells—is *not* exclusive. If the Legislature wants to provide for exclusive state regulatory authority, it knows how to do so. In the forestry context, for example, the Legislature mandated zoning of certain lands for timber production and specified that logging on those lands "shall be regulated solely pursuant to state statutes and regulations." (*Big Creek*, *supra*, 38 Cal.4th at p. 1155 (quoting Gov. Code § 51115).) It has done nothing of the kind here.

On the contrary, the statutory scheme expressly recognizes and preserves local authority. For example, section 3203.5 requires operators to submit a copy of the "local land use authorization" for "installation" of a new well—i.e., local permission for drilling—with each notice of intention seeking the Supervisor's approval for new wells. Chevron contends section 3203.5 merely requires that operators show consistency with "permissible land uses as regulated by local zoning laws." (Chevron Br. at p. 43.) That contention necessarily concedes that a local ordinance determining whether and where "installation" of a new well may occur is a "permissible" land use regulation. Moreover, section 3012 also acknowledges that cities may "prohibit" the "drilling" of oil and gas wells. Both sections refute

Plaintiffs' argument that the Supervisor has exclusive authority to authorize the "drilling" of new wells as a "method and practice."

Plaintiffs next incorrectly claim that section 3106 gives the Supervisor exclusive authority to balance increased oil production with protecting the environment and public health. (Chevron Br. at pp. 36-37 [discussing purported "dual mandate"]; see also Aera Br. at pp. 40-41; Eagle Br. at pp. 7-10.) That the Supervisor must prevent environmental damage, however, does not show the Legislature intended to *prohibit* local governments from doing so. Again, the statute's text and context show the opposite. Section 3690, for example, expressly preserves the "existing right of cities and counties to enact and enforce laws and regulations regulating the *conduct and location* of oil production activities, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection" (italics added). Numerous judicial decisions have also upheld local governments' police power to protect their residents from harm caused by oil and gas activities. (See Int. Br. at pp. 18-19.) The Attorney General likewise found that the Legislature has *not* precluded local regulation for purposes of "environmental protection." (See 59 Ops.Cal.Atty.Gen. 461, 479 (1976) ("AG Opinion").) And just this year, the Legislature made clear that new provisions strengthening health and safety protections "do[] not prohibit a city, county, or city and county from imposing more stringent regulations, limits, or prohibitions on oil and gas development."

(Stats. 2022, ch. __ (S.B. 1137), § 2 [adding § 3289, subd. (b)].) Plaintiffs' argument that *only* the Supervisor may consider public health, safety, and environmental protection in relation to oil and gas production has no basis in the statute's text and ignores its context. There is no "dual mandate," much less one vested exclusively in the Supervisor.

In sum, Plaintiffs' preemption arguments depend entirely on a misreading of section 3106 that lacks support in the statute's text, history, and context. That lack of support is fatal to their claims.

II. Plaintiffs mischaracterize Measure Z.

A. Measure Z is a traditional land use measure.

Plaintiffs' arguments also depend on mischaracterizing Measure Z as something other than a "land use" measure. And while Plaintiffs' complaints depend on their assertions about Measure Z's purported *effects*, this Court's facial inquiry depends only on Measure Z's *text*. (*T-Mobile*, *supra*, 6 Cal.5th at pp. 1117, 1125; see also *Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933; *Cal. Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177, 189.) For both reasons, Plaintiffs' arguments lack merit.

Measure Z is a land use measure. It amends the Land Use Element of the Monterey County General Plan and other land use planning documents that govern whether and where certain

land uses are allowed in the County. (AR[1]127-36.[8]) General plans must by statute include a "land use element" that "designates" the "general location and extent of the uses of the land," including for "industry" and other "private uses of land." (Gov. Code § 65302, subd. (a).) General plans also must address "the conservation, development, and utilization of natural resources, including ... minerals, and other natural resources." (*Id.*, subd. (d)(1).) Planning for development of land for mineral and natural resource production is not only squarely within the County's land use authority, but also required by statute.

Plaintiffs concede that zoning ordinances are "land use" regulations. (See, e.g., Chevron Br. at pp. 43-44, 54; Eagle Br. at pp. 48-49.) Yet they fail to acknowledge the same is true for general plan amendments like Measure Z. This Court has called the general plan a "'constitution' for future development … located at the top of the 'hierarchy of local government law regulating land use.'" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773 (quoting *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540 and *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183).) Zoning ordinances sit below the general plan in the land use hierarchy and must be consistent with the general plan. (Gov. Code § 65860; *Lesher*, 52 Cal.3d at p. 541 ["The tail does not wag the dog. The general plan is the charter to which the ordinance

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

must conform."].) General plans, like zoning ordinances, regulate land use. Measure Z, above all else, is a general plan amendment. As such, Measure Z is necessarily a land use measure.

Plaintiffs nonetheless insist Measure Z cannot be a land use measure because of the *effect* they claim it will have on specific oil and gas operations. (See, e.g., Aera Br. at pp. 27-28 [claiming Measure Z "in effect" forbids steam flooding]; *id.* at p. 67 [asserting "practical impact" is to "erode steam flooding and reinjection methods"]; Eagle Br. at p. 51 [arguing Measure Z has the "effect of obstructing certain subsurface activities"].) But nearly a century of case law reflects that local governments' regulation of oil and gas operations lies within their traditional zoning and police power. (Int. Br. at pp. 18-19.) Regardless, in a facial preemption challenge, only the text of a measure is relevant; its hypothetical effect on particular individuals or operations is not. (*T-Mobile*, *supra*, 6 Cal.5th at pp. 1117, 1125.) Claims about Measure Z's purported effects cannot change what it is: a land use measure.

B. Measure Z addresses only *whether* and *where* oil and gas operations occur, not *how* they are carried out.

Plaintiffs' related argument that Measure Z is a "pretext" for regulating oil production operations fares no better. They claim that Measure Z does not operate like a typical land use regulation because—in their view—it dictates *how* operators drill wells, dispose of wastewater, and manage steam flooding operations. (See, e.g., Eagle Br. at pp. 48-52; Chevron Br. at pp.

54-56; NARO Br. at pp. 20-21; Aera Br. at pp. 66-67.) But nothing in Measure Z's text regulates *how* oil and gas operations are carried out.

None of the cases Plaintiffs cite for their "pretext" theory is on point. Aera (at pp. 67-68) cites *L.I.F.E. Committee v. City of Lodi* (1989) 213 Cal.App.3d 1139, which held that an initiative expressly requiring voter approval of a general plan amendment before land could be annexed to the City of Lodi conflicted with state laws precluding voter approval of annexation proposals. (*Id.* at pp. 1147-48.) Measure Z contains nothing remotely akin to the general plan approval requirement in *L.I.F.E. Committee*. It does not—directly or indirectly—attempt to regulate anything about *how* oil and gas operations are conducted. That it might have some *effect* on operations is both unsurprising and irrelevant to Plaintiffs' facial challenge. (See *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th 536, 561-62 [ordinance reflecting valid local purpose not preempted solely because of secondary effect on "field arguably preempted by the state"].)

Chevron's reliance on *Monterey Oil Co. v. City of Seal Beach* (1953) 120 Cal.App.2d 41 and *Desert Turf Club v. Board of Supervisors* (1956) 141 Cal.App.2d 446 (Chevron Br. at pp. 56-57) is similarly misplaced. *Monterey Oil* held that a local building permit requirement could not be enforced for structures necessary to drill on state-owned submerged lands over which the state, by statute, had "exclusive jurisdiction." (120 Cal.App.2d at

pp. 42-43.) However, the court declined to address the validity of the permit requirement as applied to state-owned uplands "over which the state does not have exclusive control." (*Id.*, at p. 44.) Plaintiffs have never argued Measure Z regulates state-owned submerged lands, and nothing in *Monterey Oil* forecloses local regulation of drilling-related surface land uses elsewhere.

Desert Turf Club falls even further from the mark. There, the court held that in denying a permit for a horse racing track, a county improperly relied on *moral* concerns addressed exclusively by state law rather than *land use* concerns over which the county properly had jurisdiction. The court remanded the case so the county could reconsider the permit under the "proper field" of its zoning authority. (141 Cal.App.2d at pp. 455-56.) Here, Measure Z regulates land use, which *Desert Turf Club* itself recognizes is the County's "proper field." Moreover, voters' motivations for supporting Measure Z (e.g., health, safety, or climate concerns) are irrelevant. (See *Cal. Grocers*, *supra*, 52 Cal.4th at p. 190 [clarifying that the "ultimate question" is not whether local legislation has an improper motive, but whether it in fact regulates in the very field reserved to the state].)

Measure Z prohibits certain land uses in unincorporated areas of Monterey County. It addresses only *whether* and *where*, not how, oil and gas operations occur. Plaintiffs appear to contend that if a land use regulation specifically identifies the activity being prohibited, it is no longer a land use regulation, but rather an indirect regulation of the activity. Even if this were

correct, it would not be dispositive. In *Big Creek*, *supra*, this Court acknowledged that a land use prohibition may in some general sense regulate the prohibited activity, yet it nonetheless upheld an ordinance prohibiting logging in certain zones despite a statute expressly preempting local regulation of the "conduct" of timber operations. (38 Cal.4th at pp. 1153-57.) In any event, to comport with due process, land use regulations *must* precisely identify what activities they permit or prohibit. (See, e.g., *Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 308-11 [holding ordinance unconstitutionally vague for failure to define feature of antenna array subject to specific height limitation].) Measure Z describes the land uses that it phases out and prohibits. That does not make it a "pretext" for regulation of anything other than land use.

Measure Z is a land use measure. It phases out and eventually prohibits wastewater disposal wells, and it prohibits the drilling of new oil and gas wells. Indeed, *the statute itself* describes local approval for "installation of a well" as a "land use authorization." (§ 3203.5.) As a land use measure, Measure Z is entitled to a strong presumption against preemption, and it must be found valid absent a clear indication of preemptive intent. (*Big Creek*, *supra*, 38 Cal.4th at p. 1149.)

C. Plaintiffs exaggerate Measure Z's effects.

Contrary to Plaintiffs' assertions, Measure Z does not prohibit all wastewater injection in the County. (Chevron Br. at pp. 22-23.) Nor does it prohibit steam flooding (Aera Br. at p. 27;

Eagle Br. at pp. 1, 13-14). Measure Z applies only to "the injection of oil and gas wastewater into a well for underground storage or disposal" (AR[1]129), not to existing enhanced oil recovery or steam flooding wells. And even prohibited disposal operations may extend for up to fifteen years (AR[1]128), not just five years (Chevron Br. at pp. 22-23).

D. Plaintiffs' factual assertions rest on untested declarations that are irrelevant to the purely legal issue before this Court.

Plaintiffs' assertions regarding the scope and effect of Measure Z rely on improper, extra-record declarations they filed in the trial court. (Chevron Br. at pp. 19-23; Aera Br. at pp.11-20; Eagle Br. at pp. 3-6.) Plaintiffs cite this material, however, without disclosing that the Court of Appeal disregarded all of it as irrelevant.

The factual assertions in Plaintiffs' declarations were never tested below through discovery or cross-examination. They could not be. The trial court divided the case into phases and limited the first phase to "challenges to the validity of the ordinance on its face." (RT[2]303; AA[7]1567[9].) Accordingly, the trial court prohibited discovery and live testimony. (See, e.g., RT[2]303-04; RT[3]637; RT[7]1890.) Plaintiffs nonetheless filed more than a dozen declarations. Intervenors objected, arguing that the purely

[9] Citations to the Reporter's Transcript are in the format "RT[Volume Number]page number:line number." Citations to the Appellant's Appendix are in the form "AA[Volume Number]page number."

legal issues presented by Plaintiffs' facial challenges to Measure Z rendered extensive extra-record evidence irrelevant and unnecessary. (See Appellants' Opening Brief, No. H045791 ("AOB"), at pp. 58-65 (Dec. 12, 2018); Appellants' Reply Brief, No. H045791, at pp. 94-103 (July 29, 2019).)

Ultimately, the trial court not only admitted, but expressly relied on, Plaintiffs' extra-record declarations in ruling on their facial preemption claims. (See AA[31]7550-53, 7578.) Following entry of judgment, Intervenors appealed the trial court's evidentiary rulings. (See AOB, at pp. 58-65 (Dec. 12, 2018).)

The Court of Appeal's Opinion addressed evidentiary issues only briefly, holding that because preemption presents a pure issue of law, "[n]one of the evidence to which [Intervenors] object[] has any relevance to the state law preemption issue that we find dispositive in this case." (Opinion at p. 22.) Accordingly, the Court of Appeal found no basis for reversal on evidentiary grounds, but rather "disregarded this evidence and decided this case as a matter of law." (*Ibid.*)

The untested assertions in Plaintiffs' declarations are no more relevant in this Court than they were below. Like the Court of Appeal, this Court should disregard them.

III. Section 3106 does not preempt Measure Z.

A. The Legislature has never expressly preempted local authority over oil and gas drilling.

As discussed in Intervenors' Opening Brief, the Legislature has never *expressly* preempted local regulation of oil and gas activities. (Int. Br. at pp. 18-22.) At least some Plaintiffs agree (see Eagle Br. at p. 45 [acknowledging that Division 3 of the Public Resources Code "lacks an express preemption provision"]), and none has ever identified an express preemption clause in the statute. Indeed, section 3106 does not mention local government or preemption at all. Thus, by definition, the statute does not *expressly* manifest preemptive intent. (See *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 902-03.) This Court accordingly limited its grant of review to whether section 3106 *impliedly* preempts Measure Z.

NARO argues for the first time in this Court that section 3106 expressly preempts Measure Z. (NARO Br. at pp. 2-6.) NARO claims it raised this argument in its first amended complaint. (*Id.*, at pp. 3-4, fn.1.) However, NARO's complaint alleges only that section 3106 "expressly *delegated*" certain authority to the Supervisor (AA[6]1352 (italics added)), not that section 3106 expressly *preempted* local authority.[10] NARO did not

[10] To the extent NARO is arguing that any authority "expressly" delegated to the Supervisor by section 3106 is exclusive, and therefore preempts Measure Z (see NARO Br. at p. 3), its argument invokes *implied* preemption—and is incorrect for the reasons stated herein and in Intervenors' Opening Brief.

identify any express preemption language in its briefs to the trial court (AA[9]2076-2117; AA[19]4566-4593) or in its brief to the Court of Appeal. The Court therefore need not consider this argument. (Cal. Rules of Court, rule 8.516(a)(1); see also *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481.)

B. The Legislature's express recognition of local authority bars Plaintiffs' implied preemption claims.

Intervenors' Opening Brief detailed numerous provisions in state oil and gas statutes expressly recognizing and preserving the right of local governments to prohibit, authorize, or otherwise regulate oil and gas activities. (Int. Br. at pp. 20-22, 45.) Such statutes are "*bars* to implied preemption." (*Big Creek*, *supra*, 38 Cal.4th at p. 1157 (italics added).) Indeed, "'[p]reemption by implication of legislative intent *may not be found* when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations.'" (*Ibid.* (quoting *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 485) (italics added); see also *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 94, fn.10 [recognition and preservation of local authority is "convincing evidence" statutory scheme not intended to occupy field].)

Several Public Resources Code provisions foreclose any finding of implied preemption. Section 3012—which Plaintiffs completely fail to address—recognizes that cities may *prohibit*

"drilling" outright.[11] Section 3203.5 requires operators to provide "a copy of the local land use authorization that supports the installation of a well" when submitting a "notice of intention," which under section 3203 must be filed with the Supervisor prior to "commencing the work of drilling the well." (§ 3203, subd. (a).) Both sections reveal *express* legislative intent to allow local governments to decide whether to authorize or prohibit the drilling of new wells. This express intent is fatal to Plaintiffs' claim that section 3106 assigns exclusive authority over "drilling" new wells to the Supervisor, and to the rest of Plaintiffs' implied preemption arguments.

Section 3690's non-preemption clause sweeps even more broadly. Enacted in 1971 as part of a chapter addressing unitized field operations, section 3690 preserves "any *existing* right of cities and counties to enact and enforce laws and regulations regulating the *conduct and location* of oil *production* activities, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection." (§ 3690 (italics added).) That enactment—ten years after the amendments to section 3106 on which Plaintiffs rely—recognized that cities and counties already

[11] The Legislature's last amendment to section 3012, which postdated the 1961 amendments to section 3106, maintained section 3012's acknowledgment that cities may prohibit drilling. (Stats. 1972, ch. 898, § 1; RJN[6]394.)

had an "existing" right to "enact and enforce" regulations of both the "conduct" and the "location" of "oil production activities."

Plaintiffs' attempts to avoid the Legislature's express non-preemption of local regulation fail. Chevron asserts that section 3690's effect is limited only to the "chapter" in which it appears. (Chevron Br. at p. 42 [citing chapter 3.5 of Division 3 of the Public Resources Code]; see also NARO Br. at p. 13.) Not so. Language in a new chapter that refers to an "existing" right must refer to rights that already existed prior to the chapter's enactment. Indeed, if Plaintiffs were correct that the 1961 amendments to section 3106 were intended to eliminate local authority, there would have been no "existing" local authority to preserve when the Legislature enacted section 3690 ten years later. The Legislature's 1971 adoption of section 3690 thus conclusively demonstrates that the 1961 amendments to section 3106 did *not* eliminate local authority.

Eagle and NARO, in contrast, argue that section 3690 limits local authority to the specific regulatory activities enumerated in the section.[12] (See Eagle Br. at pp. 45-46; NARO Br. at pp. 12-14.) The argument contravenes settled rules of statutory construction. First, the Legislature preserved "*any* existing right" of local governments to regulate the location and conduct of oil production activities. "Any" is "a term of broad

[12] Unlike Chevron, Eagle apparently concedes that the "exceptions described" in section 3690 apply throughout the statutory scheme, not just within chapter 3.5. (Eagle Br. at p. 45.)

inclusion, meaning 'without limit and no matter what kind.'" (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 635 [quoting *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798].) Second, "including, but not limited to" is "a term of enlargement, and signals the Legislature's intent that a statute applies to items not specifically listed in the provision." (58 Cal.Jur.3d Statutes, § 145; see also *County of Butte v. Department of Water Resources* (2022) 13 Cal.5th 612, 661 [construing non-preemption clause in federal statute as not limited to matters expressly reserved].) Section 3690's express preservation of "zoning" power thus must be read as including similarly fundamental exercises of land use authority, such as the general plan amendments adopted by Measure Z. Third, section 3690 expressly preserves local authority to regulate the "*conduct* and location of *oil production activities*." (Italics added.) Plaintiffs thus cannot be correct that the Legislature has nonetheless implicitly occupied the field of "regulating oil and gas production." (Eagle Br. at p. 46.)

Section 3690 and other express provisions recognizing and preserving local authority (e.g., sections 3012, 3160(n), 3203.5, and the new section 3289 added by S.B. 1137) bar Plaintiffs' implied preemption arguments. (*Big Creek*, *supra*, 38 Cal.4th at p. 1157 [noting that Court need not have addressed implied preemption in light of express preservation of local authority].) This alone warrants reversal.

C. Plaintiffs' field preemption arguments fail.

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

The Legislature has not occupied the entire field of oil and gas regulation to the exclusion of local action. (Int. Br. at pp. 41-42.) Below, none of the Plaintiffs argued complete field preemption. Indeed, Aera called the argument an "irrelevant straw-man" and conceded "[n]o Respondent has made such an argument." (Aera Energy LLC's Respondent's Brief, No. H045791, at p. 36.)

But now Aera argues the opposite—that the State has occupied the entire "field of regulation of oil and gas production."[13] (Aera Br. at p. 65.) Aera's argument founders on the same statutory provisions, discussed in Part III.B, *supra*, that recognize and preserve local authority. Indeed, section 3690 expressly preserved the "existing" right of cities and counties to regulate both the "conduct" and "location" of "oil *production* activities." (§ 3690.) The Legislature cannot simultaneously have occupied the entire field of regulation of "oil and gas production" and also preserved the "existing" right of cities and counties to

[13] Aera's position appears to differ from those of other Plaintiffs. Chevron and Eagle contend only that state law has "fully occupied the field of regulating subsurface activity related to oil and gas production." (Chevron Br. at p. 62; Eagle Br. at p. 38.) NARO states that it is "not arguing that the legislature has fully occupied the entire field of oil and gas regulation" and joins in Chevron's argument. (NARO Br. at p. 12.)

regulate "oil production activities." Aera's argument contradicts the plain statutory text and must be rejected.

2. Measure Z does not intrude on any purportedly preempted portion of the field.

All Plaintiffs appear to contend that the Legislature has occupied at least a portion of the field of oil and gas regulation. Their attempts to delineate this partial field, however, are imprecise and inconsistent. They variously describe this purportedly preempted field as involving "subsurface" (or "down-hole") activities (e.g., Eagle Br. at p. 38; Chevron Br. at p. 62; NARO Br. at p. 7), or oil and gas "operations" (e.g., Chevron Br. at p. 61), or regulation of "production" (e.g., Eagle Br. at pp. 45-46; Aera Br. at p. 65). They rely not only on section 3106, but also on other statutory provisions and regulations that address specific technical matters, as well as on the Attorney General's 1976 opinion discussing preemption in the oil and gas context. (Chevron Br. at pp. 63-66; Eagle Br. at pp. 38-44; Aera Br. at pp. 65-69; NARO Br. at pp. 6-7.) Variations and imprecision aside, these arguments generally boil down to an assertion that state law precludes local regulation of *how* oil and gas operations are conducted.

Plaintiffs' arguments thus depend entirely on their mischaracterization of Measure Z. On its face—which is what matters here (*T-Mobile*, *supra*, 6 Cal.5th at pp. 1117, 1125)—Measure Z does not regulate *how* operators dispose of wastewater, *how* they drill wells, or *how* they maintain steam

flooding operations. (See Parts II.B and II.C, *supra*.) Accordingly, even if state regulations governing *how* these operations occur as a technical matter could be read as preempting a portion of the field, Measure Z would lie outside that portion.

For example, Chevron cites state regulations governing certain technical aspects of underground injection, including requirements to provide studies and adhere to well construction and testing requirements. (Chevron Br. at pp. 67-68.) Eagle similarly points to statutes and regulations addressing "technical, operational requirements" attendant to oil and gas development. (Eagle Br. at pp. 43-44.) Yet Measure Z does not attempt to alter or supplant any of these requirements. It does not dictate *how* operations occur, only *whether* and *where* they may occur.

Plaintiffs' arguments also fail to the extent they are based on assertions about Measure Z's purported effects rather than its actual text. Chevron's argument that Measure Z's new wells prohibition is preempted, for example, turns entirely on untested and self-serving assertions about the *effect* the prohibition might have on efforts to maintain the "steam chest" at the San Ardo oilfield. (Chevron Br. at pp. 69-70.) But Chevron's focus on *effects* only serves to illustrate that Measure Z does *not* regulate "downhole" activity. The measure's prohibition applies to all new oil and gas wells, regardless of what techniques might be used in drilling or what specific production methods they might support. (AR[1]129.) Measure Z says nothing about how a "steam chest"

should be created or maintained. It also "does not affect oil and gas wells drilled prior to [its] Effective Date and which have not been abandoned." (*Ibid.*) The facial validity of an initiative cannot turn on the specifics of how it affects a particular operator. The fact that Measure Z may affect whether operations occur does not mean the measure directly or indirectly regulates the conduct of those operations.

Plaintiffs' reliance on cases like *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, and *American Financial Services Association v. City of Oakland* (2005) 34 Cal.4th 1239, is therefore misplaced. (Chevron Br. at pp. 66-69; Eagle Br. at pp. 45-48.) In both *O'Connell* and *American Financial*, cities sought to regulate exactly the same activities that the state had already regulated in a comprehensive fashion. (*O'Connell*, 41 Cal.4th at p. 1071 [holding ordinance providing for forfeiture of vehicles used by drug buyers preempted where state comprehensively regulated forfeiture of vehicles used in drug crimes]; *American Financial*, 34 Cal.4th at p. 1256 [holding city ordinance regulating predatory mortgage lending tactics preempted where ordinance regulated same tactics "in parallel fashion" with comprehensive state law].) Unlike the ordinances at issue in those cases, Measure Z does not duplicate or attempt to alter the state laws Plaintiffs claim occupy the field—that is, technical and safety standards for casing strength, blowout prevention, and other similarly specific aspects of oil and gas operations. Rather, Measure Z simply prohibits certain oil and gas-related land uses.

In addition, unlike the ordinance challenged in *American Financial*, which this Court noted was the only "instance in over 150 years of state history where a municipality had attempted to regulate mortgage lending" (34 Cal.4th at p. 1255), Measure Z is consistent with nearly a century of judicial decisions upholding the power of local governments to regulate, and to prohibit, oil and gas operations. (Int. Br. at pp. 18-19 [collecting cases].) Two of these decisions, *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, and *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, squarely addressed preemption. (Int. Br. at p. 19.) NARO claims the 1961 amendments to section 3106 implicitly overruled *Beverly Oil*. (NARO Br. at p. 16.) But in 1964, this Court in *Higgins* upheld a Santa Monica initiative measure that banned "drilling" and incidental "operations" citywide against a preemption claim based on state laws governing leasing of tidelands. (*Higgins*, 62 Cal.2d at pp. 27-28, 31-32.) Had the 1961 amendment to section 3106 worked the sea change Plaintiffs attribute to it, the plaintiffs or the Court in *Higgins* would have mentioned it. That they did not strongly implies the 1961 amendments were as modest and limited in scope as the legislative history demonstrates. (See Part I.A, *supra*.)

Plaintiffs' reliance on the Attorney General's 1976 opinion is similarly unavailing, primarily because they ignore the opinion's actual conclusions. The AG Opinion distinguished between prohibitory ordinances like Measure Z, which the opinion concluded likely would not be preempted, and ordinances regulating the "manner" of oil and gas operations, which the

opinion concluded might be preempted. (Int. Br. at pp. 50-52; 59 Ops.Cal.Atty.Gen. at pp. 461, 467-68.) The AG Opinion predicated this distinction largely on *Beverly Oil*—which, contrary to NARO's suggestion, the Attorney General still viewed as good law. (59 Ops.Cal.Atty.Gen. at p. 468.)

The AG Opinion concluded that because local governments may prohibit *all* oil and gas operations within their territory, they may also prohibit *specific types* of operations. Three examples in the AG Opinion illustrate this conclusion. First, the AG Opinion found a Napa County regulation requiring a use permit valid "since the county may prohibit operations in all areas or selected parts of its territory." (*Id.* at pp. 491-92.) Second, the opinion validated a Beverly Hills ordinance prohibiting both the deepening of existing wells and "drilling for oil and gas from surface locations within the city limits or slant-drilling wells into the city limits from outside except in designated areas," and requiring that "all slant-drilled wells surfaced outside the city must enter the city below a depth of 500 feet." (*Id.* at p. 483.) Although these requirements "deal[t] with subsurface operations," the AG Opinion concluded they were "within the local authority to prohibit operations" and "justified by exercise of the police power in the local interest." (*Ibid.*) Third, the opinion endorsed a City of Torrance ordinance requiring a conditional use permit "for secondary recovery operations (gas injection, water injection, etc.), as well as a drilling permit." (*Id.* at pp. 488-89.) It concluded that "[u]nder its authority to prohibit all drilling within the city limits, land use permits appear proper

with regard to secondary recovery operations since such operations may represent a different land use than primary operations and may have an effect on the surface in phases not preempted by the Supervisor." (*Id.* at p. 489.)

Like the Beverly Hills slant-drilling provisions or the City of Torrance's conditional use permit for secondary recovery operations, Measure Z's prohibition of new wells and land uses related to wastewater disposal are valid *specific* exercises of Monterey County's *general* authority to "prohibit all drilling" within its boundaries and to regulate land uses associated with "secondary" operations. (*Id.* at p. 489.) Under the AG Opinion, whether these specific prohibitions arguably affect "subsurface" operations is beside the point.

Plaintiffs' attempt to stretch the field of "subsurface" regulation to encompass Measure Z is not only erroneous, but also extreme. If Measure Z's mere identification of the land uses it prohibits—drilling of new wells and wastewater disposal—were held to be akin to regulation of "subsurface" methods of extraction, virtually any land use or zoning regulation addressing oil and gas could be subject to challenge. Indeed, under Plaintiffs' argument, any zoning measure that affected operations in any way could be preempted. Plaintiffs' "partial" field would swallow the whole.

D. Measure Z is not contradictory or inimical to section 3106.

Despite Plaintiffs' attempts to muddy the waters, the Court's precedent is clear: a local law is "contradictory" or "inimical" to state law only if it requires what state law forbids or forbids what state law demands. (*Big Creek*, *supra*, 38 Cal.4th at p. 1161.) If a *regulated entity* may reasonably comply with state and local law, there is no conflict. (*Ibid.*; *City of Riverside, supra*, 56 Cal.4th at pp. 754-55.) Contrary to Plaintiffs' claims, *Big Creek*, *City of Riverside*, and *T-Mobile* all support this formulation of the test—and Measure Z's validity. (Int. Br. at pp. 34-40.)

Big Creek squarely held that local ordinances are not "contradictory or inimical" to state statutes unless they "prohibit what the statute commands or command what it prohibits." (*Big Creek*, *supra*, 38 Cal.4th at p. 1161.) The Court found no conflict because it was "reasonably possible for a timber operator to comply with both" state and local law by refraining from timber operations in the zones where they were prohibited. (*Ibid.*) The Court also observed that the local ordinance's effect of placing trees off limits to logging did not conflict with the state statute's encouragement of "maximum sustained production of high-quality timber products," because the state statute did not "require that every harvestable tree be cut." (*Ibid.*) The state forestry statutes at issue there also expressly preserved local government authority. (*Id.* at pp. 1157, 1162.) These same factors are present here. Section 3106 does not command the Supervisor

to permit, or operators to undertake, any particular oil and gas activity. Nor does it require that every drop of oil be extracted. Rather, as Plaintiffs concede (see Chevron Br. at pp. 16-17; Eagle Br. at pp. 8-9), subdivision (d) of section 3106 encourages "wise development" to aid in environmental protection. Operators also may reasonably comply with both state and local law by refraining from using land in Monterey County for wastewater disposal and drilling new wells. The statutory scheme likewise preserves local government authority.

Plaintiffs' attempts to dismiss *Big Creek* fail. For example, Chevron and Eagle both assert that the state statute in *Big Creek* preempted only local regulation of "the conduct of timber operations" while leaving room for local zoning regulations. (Chevron Br. at p. 46; Eagle Br. at p. 33.) They then argue that *Big Creek* does not apply here because Measure Z regulates "methods and practices" of oil and gas production rather than zoning or land use (Chevron Br. at pp. 46-47), and because Measure Z prohibits activities throughout Monterey County rather than only in certain zones. (Chevron Br. at pp. 55-56.) Again, however, Measure Z addresses only *whether* and *where* oil and gas operations occur, now *how* they occur. (See Parts II.B, III.C.2, *supra*.) Moreover, even the differences between *Big Creek* and this case highlight Measure Z's validity. First, while the forestry statutes in *Big Creek* expressly *preempted* county regulation of the "conduct" of timber operations (38 Cal.4th at pp. 1147, 1152), section 3690 expressly *preserves* local authority to regulate the "conduct" of oil production activities. The new

section 3289 (enacted in S.B. 1137) further acknowledges local authority to impose more stringent health and safety regulations than state law requires. Second, the statutory scheme in *Big Creek* created timber production zones in which local governments expressly could not prohibit timber operations. (*Id.* at p. 1148.) The Legislature has not done the same for oil and gas. *Big Creek* resoundingly supports Measure Z's validity.

Plaintiffs next attempt to distinguish *City of Riverside*, *supra*, 56 Cal.4th 729, which upheld a citywide ban on medical marijuana distribution facilities. Plaintiffs contrast what they characterize as "limited" state laws decriminalizing medical cannabis with section 3106, which Plaintiffs contend "mandates that certain oil recovery techniques" be permitted. (Chevron Br. at pp. 47-48; Eagle Br. at pp. 36-37.) *City of Riverside*, however, illustrates the high bar this Court demands for finding an ordinance inimical to a state statute. The statutes at issue in *City of Riverside* expressly declared a "right" of patients to "obtain and use medical marijuana" and sought to "promote uniform and consistent application" among local governments. (*City of Riverside*, *supra*, 56 Cal.4th at p. 744.) The Court, however, found the statute's "operative steps" were "modest," and did not *require* the activities that the ordinance prohibited. (*Id.* at pp. 744, 754-55.) Because "[p]ersons who refrain from" engaging in the prohibited conduct "are in compliance with both the local and state enactments," the Court found no conflict. (*Ibid.*)

Section 3106's "operative steps" are similarly modest. In particular, subdivision (b) clarifies that the Supervisor may authorize the use of secondary recovery techniques when they are "suitable" under the circumstances of each case. It also establishes that oil and gas leases and contracts, where they do not expressly state otherwise, should be deemed to allow secondary recovery techniques, provided that they have been approved by the Supervisor. Neither of these modest steps requires that any oil and gas activity be permitted. An operator thus may comply with both state and local law by refraining from locally prohibited conduct.

Plaintiffs similarly fail to distinguish *T-Mobile*, *supra*, in which this Court upheld a San Francisco ordinance regulating the aesthetics of telecommunications facilities installed in public rights-of-way. Chevron and Eagle argue that the state statute at issue there differs from section 3106 because it "contained no mandate as to any specific state policies" and did not address aesthetics. (Chevron Br. at pp. 48-50; Eagle Br. at pp. 34-36.) Plaintiffs again miss the critical point. The statute's purpose in *T-Mobile* was to "grant[ ] telephone corporations the right to install lines on public roads without obtaining a local franchise." (*T-Mobile, supra*, 6 Cal.5th at pp. 1121-22.) Because the city ordinance did not "require plaintiffs to obtain a local franchise," the Court held that the ordinance's regulation of aesthetics "is not inimical to the statute." (*Id.* at p. 1122.) Here, section 3106 expressly *disclaims* any intent to create a right or duty to carry out particular operations. Because Measure Z does not prohibit

anything section 3106 requires or require anything it prohibits, and because an operator may reasonably comply with both by refraining from prohibited land uses, Measure Z does not conflict with section 3106.

Having failed to show that Measure Z is preempted under this Court's established test for "contradictory or inimical" preemption, Plaintiffs try to reframe the test, arguing that Measure Z "forbids" *the Supervisor* from carrying out a purported "dual mandate" to increase production while protecting the environment. (Eagle Br. at p. 28.) Measure Z does not affect the Supervisor at all. Moreover, section 3106 neither *requires* that the Supervisor approve any particular oil and gas activity (see Part I.A, *supra*) nor conveys exclusive authority to the Supervisor (see Part I.B, *supra*). The mere grant of concurrent authority to a state official does not cause a conflict with local regulation. (See *Big Creek*, *supra*, at p. 1147 [discussing statutes requiring state approval of timber harvesting plans].) Measure Z does not prohibit anything section 3106 requires of either regulated entities or the Supervisor.

Plaintiffs also ignore this Court's precedent in arguing that complying with Measure Z would not be "reasonably possible" *as a policy matter*. (Aera Br. at pp. 44-46; see also Eagle Br. at p. 32.) Both *Big Creek* and *City of Riverside* conclusively establish that complying with state and local laws by refraining from locally prohibited activities is "reasonably possible." (*Big Creek*, *supra*, 38 Cal.4th at p. 1161; *City of Riverside*, *supra*, 56 Cal.4th

at pp. 754-55.) There is no authority for the freewheeling policy inquiry Plaintiffs propose. Aera (at p. 46) claims *San Francisco Apartment Association v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 481 shows otherwise, but the case is inapposite. There, the court held that a local ordinance limiting landlords' use of units removed from the residential rental market conflicted with statutes creating an "absolute right [for landlords] to exit the residential business." (3 Cal.App.5th at p. 477.) Because state law created an "unfettered" right, local restrictions on that right were not reasonable. (*Ibid.*) Here, section 3106 creates no rights, let alone "absolute" or "unfettered" ones. Measure Z is not "contradictory or inimical" to section 3106.

E. Measure Z does not frustrate or obstruct the Legislature's purpose.

Plaintiffs' arguments—and the Court of Appeal's holding—invoke federal obstacle preemption principles, not state "contradictory or inimical" principles. Citing *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, and Justice Liu's concurring opinion in *City of Riverside*, Plaintiffs argue that Measure Z impermissibly forbids activities that section 3106 purportedly intends to promote. (Aera Br. at pp. 36, 38-39, 45-46; Chevron Br. at p. 33; Eagle Br. at p. 26; Opinion at pp. 18-20.) These are obstacle preemption arguments. Indeed, the portion of *Great Western Shows* cited by Plaintiffs and the Court of Appeal expressly addresses federal obstacle preemption. (*Great Western Shows, supra*, 27 Cal.4th at p. 868 [discussing *Blue*

Circle Cement, Inc. v. Board of County Commissioners of County of Rogers (10th Cir. 1994) 27 F.3d 1499].)

Ultimately, however, the label makes little difference. Whether the Court views Plaintiffs' arguments as asserting federal "obstacle" preemption, or as an offshoot of "contradictory or inimical" preemption, Measure Z is not preempted because it does not frustrate the purposes of section 3106 or the statutory scheme.

1. The Court should not adopt obstacle preemption, but if it does, it should exercise restraint given the significant constitutional and separation of powers interests at stake.

This Court has never expressly decided whether federal obstacle preemption principles are "coextensive" with state preemption principles. (*T-Mobile*, *supra*, 6 Cal.5th at p. 1123.) It need not and should not do so here. (See Int. Br. at pp. 62-64.) But if it does, an unequivocal showing of preemptive intent should be required.

Under federal obstacle preemption, courts identify the purposes of a federal statute and analyze whether a state law would frustrate or stand as an obstacle to achieving those purposes. (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955.) Thus, obstacle preemption may devolve into a "'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,'" (*Wyeth v. Levine* (2009) 555 U.S. 555, 588 [Thomas, J., concurring]), rather than the requisite "focused

inquiry into 'whether there exists an *irreconcilable* conflict'" between the two enactments. (*County of Butte*, *supra*, 13 Cal.5th at p. 660 [quoting *Rice v. Norman Williams Co.* (1982) 458 U.S. 654, 659] (emphasis added).) For these reasons, this Court has presumed Congress does not intend to interfere with state sovereignty absent "unmistakably clear language" to the contrary. (*Id.* at pp. 16-17.)

Like the states in relation to Congress, local governments in California possess regulatory powers reserved by the Constitution, not merely delegated by statute. (Cal. Const. art. XI, § 7; *T-Mobile*, *supra*, 6 Cal.5th at p. 1118.) For the same reasons, the Court should require "unmistakably clear language" before finding local enactments in conflict with state purposes — particularly in areas where local governments have traditionally exercised authority.

This Court's decisions already reflect an appropriately restrained approach to conflict preemption. The Court has carefully scrutinized legislative purposes to determine whether they reflect a specific intent to exclude local authority and present truly irreconcilable conflicts. For example, in *Great Western Shows*, *supra*, the Court held that a local ordinance prohibiting gun shows on county property did not conflict with state statutes regulating gun shows because the latter did not "promot[e] or encourag[e] gun shows" or "mandate that counties use their property for such shows."(27 Cal.4th at pp. 868, 870; see also *City of Riverside*, *supra*, 56 Cal.4th at pp. 760-61 [declining

to find preemption where state statutes did not "mandate that local jurisdictions permit" locally prohibited activity].) These decisions illustrate the "demanding" threshold for finding a conflict with the purposes of state statutes. (See *County of Butte*, *supra*, 13 Cal.5th at p. 660.)

Aera and Eagle propose a conflict preemption test that eliminates this demanding threshold. Their test asks only (1) whether the Legislature "promote[s] (or ... *authorize[s]*) a particular action *by placing the power to regulate the activity in the hands of the State*" and (2) whether the local ordinance forbids "the state-promoted activity." (Aera Br. at pp. 39-40 (emphasis added); see also Eagle Br, at pp. 26-27.) Plaintiffs cite no authority for this formulation, and there is none.

Plaintiffs' test—and the Court of Appeal's holding below—would find preemptive intent without the "unmistakably clear language" obstacle preemption requires. Preemption requires much more than state encouragement of or concurrent authority over an activity. In *Big Creek*, for example, the Court upheld a zoning ordinance prohibiting timber harvesting despite state laws encouraging "maximum sustained production." (*Big Creek, supra*, 38 Cal.4th at pp.1147, 1161.) Moreover, a state agency's statutory authority to permit timber harvesting did not mean local zoning prohibitions were preempted: "That the state has sought to reduce and control [the impacts of an activity] through general regulation does not preempt local zoning control, any more than the state and federal regulation of industrial air

pollution would preclude a local zoning authority from relying on air pollution as a reason for excluding industrial plants from residential districts." (*Id.* at pp. 1159-60.) Aera's and Eagle's proposed tests not only conflict with *Big Creek*, but also would open countless local land use restrictions to challenge. Any local zoning or permitting decision related to a project that also requires authorization from a state agency—e.g., in areas ranging from air and water quality to coastal and wildlife protection—would become targets for preemption challenges on the theory that the local restriction "forbids" an activity that the State intended to "authorize."

Aera's and Eagle's tests also conflict with *City of Riverside*. There, the Court distinguished *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516 because the statute promoting certain activities in that case "*specifically provided* that local zoning rules ... could not be used to exclude" those activities, while the statutes at issue in *City of Riverside* imposed "no similar limits." (*City of Riverside*, *supra*, 56 Cal.4th at p. 758.) Like the statutes in *City of Riverside*, section 3106 contains no clear language limiting local authority.

Finally, by abandoning the requirement for a clear statement of preemptive intent, Plaintiffs' new preemption test raises significant constitutional concerns. The California Constitution reserves police powers to local governments. (Cal. Const., art. XI, § 7.) The Legislature may explicitly or implicitly override that reservation, but in either case, a "clear statement"

of preemptive intent is required (See *Big Creek*, *supra*, 38 Cal.4th at p. 1161; *City of Riverside*, *supra*, 56 Cal.4th at p. 744.) The "clear statement" rule respects local governments' constitutional authority and prevents courts from unwarranted encroachments upon local prerogatives, particularly in areas over which local governments traditionally have exercised control, including land use. (See *T-Mobile*, *supra*, 6 Cal.5th at p. 1116.)

In evaluating both "obstacle" and "contradictory or inimical" arguments, this Court has always insisted on a clear statement of preemptive intent and an *actual*, irreconcilable conflict to find preemption. Plaintiffs' proposed tests require neither, and thus depart substantially from this Court's precedent.

2. Even under Plaintiffs' self-serving view of obstacle preemption, Measure Z is not preempted.

Plaintiffs' obstacle preemption arguments turn not on section 3106 alone—which they misconstrue (see Part I, *supra*)—but on the "purpose and intended effects" of the statutory scheme "as a whole." (*Bronco Wine Co.*, *supra*, 33 Cal.4th at p. 992.) These purposes include protecting the environment and public health and reducing greenhouse gas emissions while meeting the state's energy needs during the transition to clean energy (Int. Br. at pp. 56-62; §§ 3106, 3011), *and* promoting local authority to regulate in an environmentally protective manner (see §§ 3012, 3203.5, 3690; see also S.B. 1137 [adding § 3289, subd. (b)]). Measure Z furthers these purposes.

a. The statutory scheme as a whole prioritizes environmental and climate protection.

Plaintiffs fundamentally misconstrue the purposes of section 3106 and the statutory scheme as a whole. Contrary to Plaintiffs' reading, subdivision (b) of section 3106 does not declare a statutory purpose of maximizing production. (Chevron Br. at pp. 15-16.) Rather, it defines the type of operations the Supervisor *may* permit—that is, "methods and practices known to the oil industry for the purpose of increasing the ultimate recovery" of oil and gas. As the legislative history shows, this language was added solely to clarify the Supervisor's authority to approve secondary recovery operations. (RJN[2]A:99, RJN[2]A:102, 104.)

Similarly, while the "policy of this state" language in subdivision (b) references "increasing ... recovery," the *operative* step taken to serve this policy merely provides default rules for lease interpretation that apply absent "an express provision to the contrary." Such limited operative steps are not a statement of preemptive intent. "We cannot employ the Legislature's expansive declaration of aims to stretch the [statute's] effect beyond a reasonable construction of its substantive provisions." (*City of Riverside*, *supra*, 56 Cal.4th at p. 760.)

Section 3106 also does not promote, let alone mandate, the use of any particular *techniques* to increase production. (See Chevron Br. at pp. 30, 52; Aera Br. at pp. 24, 61) For example, subdivision (b) does not direct the Supervisor to allow any

particular operation, only those that are "suitable." Even the specifically enumerated techniques in subdivision (b) are not "tools" for maximizing production, as Plaintiffs insist (see Aera Br. at pp. 42-43, 54-55; Eagle Br. at pp. 8, 28), but rather are examples of practices that *could be* permitted *if* approved by the Supervisor and not expressly disallowed by lease terms. Plaintiffs concede nothing in the statute requires the Supervisor to approve these techniques. (Joint Answer at pp. 32-33 ["section 3106 does not mandate State approval of any particular method or practice."].) Statutory references to and regulation of these activities do not equate to encouragement or promotion. (See *Great Western Shows*, *supra*, 27 Cal.4th at p. 868 [finding no evidence regulations of gun shows indicated "a stated purpose of promoting or encouraging gun shows"].)

Plaintiffs also err in asserting that the Supervisor has a "dual mandate" to balance increased production with environmental protection, which they claim are co-equal priorities. (Chevron Br. at p. 36; Eagle Br. at p. 9.) The statutory scheme prioritizes environmental protection, not increased production. Section 3106 itself demonstrates the Legislature's commitment to environmental protection by requiring the Supervisor to "prevent, as far as possible, damage to life, health, property and natural resources." (§ 3106, subd. (a).) Subdivision (b) prioritizes subdivision (a)'s environmental considerations by directing the Supervisor "also" to supervise oil and gas production so as to permit only those methods and practices that are "suitable." And Plaintiffs concede that the Legislature's

"encourage[ment]" of "the wise development of oil and gas" in subdivision (d) was primarily intended to promote environmental protection. (See Chevron Br. at pp. 16-17; Eagle Br. at pp. 8-9.)

To avoid this environmental focus, Plaintiffs promote a vision of section 3106 frozen in 1961, stressing that the language of subdivision (b) has not substantially changed since that time. (See Chevron Br. at p. 41; Aera Br. at p. 24.) The rest of section 3106 and the statutory scheme undermine this argument. Subdivision (d)'s direction to administer the statute to "best meet oil and gas needs in this state" and encourage the "wise" development of oil and gas necessarily reflect the Legislature's recognition that what is "wise" and what will "best meet oil and gas needs" will change over time.

Section 3011, adopted in 2019, reflects exactly this type of change by declaring that the "purposes" of the statutory scheme include "protecting public health and safety and environmental quality, including reduction and mitigation of greenhouse gas emissions associated with the development of hydrocarbon[s] ... in a manner that meets the energy needs of the state." Section 3011 also directs the Supervisor to cooperate with other stakeholders to further the state's climate and clean energy goals. These provisions reveal the Legislature's broader intent to meet the state's energy needs increasingly through clean energy, and decreasingly through further oil and gas development.

Plaintiffs attempt to dismiss as irrelevant several Executive Orders declaring state policies to decrease reliance on

fossil fuels. The attempt fails. California's executive and legislative branches have developed world-leading climate, health, and environmental protections in an iterative fashion. In 2018, Governor Brown's Executive Order No. B-55-18 established a new statewide goal of achieving carbon neutrality by 2045, while acknowledging California's policy of cutting petroleum use in transportation by 45% by 2030. (RJN[7]D:477-78.) The Legislature enacted section 3011 the very next year. In 2020, Governor Newsom's Executive Order No. N-79-20 established a goal of eliminating new petroleum-fueled car and truck sales by 2035. (RJN[7]E:480-84.) He also directed state regulators to "expedite the responsible closure and remediation of former oil extraction sites" and to "[p]ropose a … draft rule that protects communities and workers from the impacts of oil extraction." (*Id.*, at p. 483.)

In 2022, the Legislature adopted and codified several of these executive directives.[14] A.B. 1757 specifically referenced Governor Brown's Executive Order No. B-55-18 and California's policy of reducing petroleum use in transportation. (Stats. 2022, ch. __, § 1, subd. (a)(8), (11)(B).) S.B. 1137 banned the approval of new oil and gas wells within 3,200 feet of homes and schools to protect public health. (Stats. 2022, ch. __, § 2 [adding § 3281].) A.B. 1279 codified Governor Brown's goal of achieving "carbon neutrality" by 2045 into law. (Stats. 2022, ch. __, § 2 [adding

[14] Chapter citations were not available at the time this brief was finalized. (See fn. 7, supra.)

Health & Saf. Code § 38562.2, subd. (c)(1)].) S.B. 905 established a framework for promoting the capture and underground sequestration of carbon dioxide and required the Air Resources Board, in implementing the framework, to prioritize "reducing fossil fuel production in the state." (Stats. 2022, ch. __, § 2 [adding Health & Saf. Code 39741.1, subd. (b)(1), (5)].) S.B. 905 also prohibited the injection of captured carbon dioxide for enhanced oil recovery. (*Id.*, § 4 [adding § 3132, subd. (b)].) Read as a whole, the statutory scheme—consistent with the goals of the executive orders—now clearly mandates less oil development, not more.

The Legislature's purposes expressly include environmental and climate protection. Measure Z does not obstruct these purposes.

b. The Legislature's goals include preserving local regulatory authority.

Plaintiffs ignore that the statutory scheme's purposes also include *preserving* local authority. For example, Section 3012 states that cities may prohibit "drilling" entirely. This plain text is *fatal* to Plaintiffs' obstacle preemption arguments. The very act Plaintiffs say would conflict with section 3106's purposes—a local prohibition of "drilling"—is expressly contemplated by the statute. Tellingly, not one of Plaintiffs' opposition briefs even mentions section 3012.

Other sections of the code similarly reflect the Legislature's intent that local and state governments exercise concurrent authority over oil and gas regulation—and particularly over environmental and safety considerations. As discussed above in Part III.B, *supra*, section 3690 preserves the "existing right of cities and counties" to regulate "the conduct and location of oil production activities," including "zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection." Section 3203.5 requires operators submitting a notice of intent to drill a new well to include "a copy of the local land use authorization that supports the installation of a well." These provisions' emphasis on shared authority demonstrates that the Legislature did not intend the Supervisor to go it alone. Far from granting the Supervisor exclusive authority, the statutory scheme shows that the Legislature's objectives include *preservation* of local authority.

Plaintiffs' arguments that section 3106 conveys *exclusive* authority to the Supervisor (see Chevron Br. at pp. 11, 35, 52; Aera Br. at p. 40; Eagle Br. at p. 38; NARO Br. at p. 10) fail for the same reasons. For example, Aera argues that the section's "continuous use of the word 'shall' makes clear DOGGR has *exclusive* authority" to implement the alleged "dual mandate" (Aera Br. at p. 40), leaving no room for local regulation. Not so. Again, numerous statutory provisions show the Supervisor's authority to protect public health and the environment is *not* exclusive. (See §§ 3012, 3203.5, 3690, and the new § 3289.) Section 3106's use of the word "shall" has nothing to do with

exclusivity. Instead, "shall" requires the Supervisor to consider the factors enumerated by the Legislature *when* the Supervisor acts.

NARO suggests that sections 3275 and 3276, which ratify the Interstate Compact to Conserve Oil and Gas, show that the Legislature allegedly mandated that the Supervisor alone must balance increased production with environmental protection. (NARO Br. at p. 8.) These sections require the compacting states to enact regulations to reduce waste of oil and gas, but not at all costs. (See § 3276 [state regulations must reduce waste "within reasonable limits"].) Nothing in these sections indicates any intent to shift the balance of authority among the state and its local governments. Indeed, they specifically disclaim any intent to "promote regimentation" in the compacting states' regulatory approaches. (§ 3276 [Interstate Compact art. V].)

Read as a whole, the statutory scheme promotes local authority. Measure Z does not obstruct this purpose.

c. This Court's decisions discussing obstacle preemption show Measure Z is not preempted.

Measure Z does not frustrate the statutory scheme's purposes or stand as an obstacle to the achievement of the state's goals. Rather, Measure Z furthers the scheme's express purpose of allowing local governments to enact environmentally protective oil and gas regulation. Measure Z also advances the state's environmental and clean energy goals by reducing greenhouse

gas emissions associated with oil and gas production in Monterey County, as well as by decreasing the state's entanglement with fossil fuels. (See AR[1]126-27 [San Ardo oil is among the most carbon-intensive in the world]; § 3011 [adding purposes of reducing greenhouse gas emissions and furthering state's climate and clean energy goals to statutory scheme regulating oil and gas development]; S.B. 905 (2022) [adding Health & Saf. Code § 39741.1, subd. (b)(5)] [requiring state to prioritize "[r]educing fossil fuel production" in carrying out carbon sequestration program].) Because Measure Z is consistent with—and certainly does not create an irreconcilable conflict with—state statutes, it is not preempted.

Plaintiffs' arguments that Measure Z frustrates the purposes of section 3106 rely primarily on the concurring opinion in *City of Riverside* and language in *Great Western Shows*. But under the reasoning of either opinion, Measure Z is not preempted.

The *City of Riverside* concurrence states that a local law that "prohibits an activity that state law intends to promote is preempted." (56 Cal.4th at p. 764.) The concurrence nevertheless agreed with the majority that a complete local ban on medical marijuana dispensaries was *not* preempted, because the state law at issue in the case did "not clearly authorize or intend to promote" those facilities. (*Id.* at p. 765.) Section 3106's goals are even more modest. Unlike the statutes in *City of Riverside*, which declared a right of patients to obtain medical marijuana and

promoted uniform local application of the law (*id.* at pp. 744, 759), section 3106 does not create a right or duty to carry out any extraction method, require local government approval of operations, or otherwise mandate or promote maximum extraction. Like the medical marijuana statutes, moreover, section 3106's operative steps—granting the Supervisor non-exclusive authority to permit certain activities, when appropriate, but not *requiring* that any activity be permitted, and establishing default lease interpretation rules—are limited. Under either opinion in *City of Riverside*, section 3106 lacks a clear indication of preemptive intent.

Great Western Shows similarly supports a finding of no preemption. *Great Western Shows* summarizes a line of cases involving the federal Resource Conservation and Recovery Act ("RCRA") as holding that when a statute "seeks to promote a certain activity," local regulation "cannot be used to completely ban the activity or otherwise frustrate the statute's purposes."[15]

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[15] That line of cases includes *Blue Circle Cement, Inc. v. Board of County Commissioners of County of Rogers* (10th Cir. 1994) 27 F.3d 1499. Both *City of Riverside* and *Great Western Shows* distinguish *Blue Circle Cement*, which is similarly inapposite here. *Blue Circle Cement* described RCRA as a federal scheme that "enlists the states and municipalities to participate in a 'cooperative effort with the federal government'" to manage waste. (*Blue Circle Cement*, 27 F.3d at p. 1506.) Thus, a local prohibition of "activities that RCRA is designed to promote" directly conflicted with the federal scheme to enlist states and local governments as partners in pursuing federal objectives. (*Ibid.*) Here, the state oil and gas statutes do not enlist local

(27 Cal.4th at p. 868.) *Great Western Shows* nevertheless held that a local ordinance completely banning gun shows on County property did not conflict with state regulations because those regulations did not promote or encourage gun shows and left room for local regulation. (See *id.* at p. 864 [quoting Penal Code § 12071: licensees "shall be entitled to conduct business as authorized herein at any gun show or event in the state ..., provided the person complies with ... all applicable local laws"].) Like the gun show regulations, section 3106 does not unequivocally encourage or promote oil and gas development, and the statutory scheme contemplates local regulation. (See §§ 3012, 3203.5, 3160, subd. (n), 3690, and the new § 3289.)

Chevron (at pp. 33-34, 38, 45) also cites extensively to *Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, but the case is inapposite. *Fiscal* involved actual, irreconcilable conflicts between state and local law. In that case, the court held that a local ordinance prohibiting virtually all city residents from possessing handguns directly contradicted state statutes, including state laws preventing local governments from requiring permits or licenses for firearm possession. (*Id.* at pp. 906-11). *Fiscal* also found that a local ordinance prohibiting *sales* of firearms conflicted with a state statute "guarantee[ing]" City residents a right to "purchase"

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governments in promoting oil and gas development. Rather, they expressly acknowledge local authority to regulate and even to *prohibit* oil and gas activities entirely. (See §§ 3012, 3203.5, 3160, subd. (n), 3690).

firearms. (*Id.* at p. 911.) State oil and gas statutes include no provision similar to the gun control statute prohibiting local licenses or permits regulating possession. Instead, section 3106 is *silent* as to local authority, and other sections expressly preserve a local regulatory role. Section 3106 also does not guarantee operators a right to undertake any oil and gas activity.

Indeed, *Fiscal* illustrates that the gun control and oil and gas statutory schemes are nothing alike. Chevron suggests that the statutes in *Fiscal*, which did not *mandate* gun sales, are analogous to section 3106, which similarly does not mandate oil and gas production. (Chevron Br. at p. 45 [citing *Fiscal*, *supra*, 158 Cal.App.4th at pp. 914-15].) Chevron's analogy is inapt. In *Fiscal*, state law guaranteed a right to purchase firearms. (158 Cal.App.4th at p. 911.) Section 3106, in contrast, conveys no right and imposes no duty to carry out any particular activity.[16] Further, the legislative history of state gun control regulations speaks *directly* to preemption of local authority. (*Id.* at p. 914.) Indeed, the Legislature has repeatedly responded to local gun control regulations with specific statutes restraining local authority. (See *id.* at pp. 906-909; see also *Great Western Shows, supra*, 27 Cal.4th at pp. 861-63.) Here, in contrast, the

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[16] *Northern California Psychiatric Society*, *supra*, which NARO cites for the proposition that local ordinances cannot prohibit activities encouraged by state statutes (NARO Br. at p. 19), is inapposite for the same reason. State law there guaranteed a *right* to a type of mental health treatment that a local ordinance prohibited. (*Northern Cal. Psychiatric Society*, *supra*, 178 Cal.App.3d at pp. 103-04.)

Legislature has repeatedly acknowledged and preserved local authority, effectively affirming a century of judicial decisions upholding local power to regulate and prohibit oil and gas development. (See Int. Br. at pp. 18-19.)

Plaintiffs also argue that Measure Z is preempted because it "interferes with the *methods* by which the [state] statute was designed to reach [its] goal." (Aera Br. at p. 59 [citing *International Paper Co. v. Oullette* (1987) 479 U.S. 481].) *Oullette* is inapposite. There, the Supreme Court held that the Clean Water Act's provisions delegating pollutant discharge standards to the federal government and "source" states preempted a non-source state's attempts to regulate pollution from a neighboring source state. (*Id.* at p. 494.) Even though the non-source state's regulation and the federal statute both advanced the goal of eliminating water pollution, the Court held that the non-source state's regulation circumvented the statutory scheme's design by regulating in a realm delegated to source states. (*Ibid.*) Measure Z suffers no such flaws. Because the oil and gas statutes preserve local authority and do not convey exclusive authority to the Supervisor, Measure Z does not interfere with the design of section 3106 or the statutory scheme as a whole.

Finally, Plaintiffs' briefs contain a few passing references to statutes beyond section 3106 that Plaintiffs argue conflict with Measure Z. For example, Eagle contends that Measure Z's prohibitions conflict with section 3602.1, which authorizes the Supervisor to approve proposals to drill wells "at whatever

locations he deems advisable" for the purpose of developing heavy oil and gas. The statutory context, however, completely belies Plaintiffs' claim. Section 3602.1 appears within a chapter addressing well spacing. The chapter begins with section 3600, which declares that "any well hereafter drilled for oil and gas ... located within" certain distances of parcel boundaries, public roadways, or other wells "is a public nuisance." Section 3602.1 creates a narrow exception, allowing the Supervisor to approve wells without regard to the well-spacing rule in section 3600, "and such wells shall not be classed as public nuisances." Section 3602.1 has no bearing beyond the well-spacing context.

Finally, Chevron argues that Measure Z's wastewater disposal provision is preempted because it "prohibits a specific subsurface production technique that state law permits and that DOGGR has approved." (Chevron Br. at pp. 67-69.) The state regulations Chevron cites, however, concern *how* injection may proceed, not *whether* wastewater disposal or storage may proceed. Measure Z does not conflict with these regulations.[17]

In short, Plaintiffs' argument that Measure Z frustrates the purposes of section 3106 fails. Section 3106 contains no mandate to promote oil production. It neither requires the Supervisor to

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[17] To the extent Chevron's argument concerning regulations adopted as part of the state's Underground Injection Control ("UIC") program under the federal Safe Drinking Water Act presents federal preemption questions, the Court of Appeal did not reach those questions, and they are beyond the scope of the issues presented for review.

approve any particular practice nor conveys exclusive authority to the Supervisor. Nor does it create any "dual mandate" requiring the Supervisor alone to balance promoting production with protecting the environment. Rather, the Legislature created a statutory scheme that respects local government authority to determine whether and where oil and gas development occurs, and to adopt environmentally protective rules where development is allowed. Measure Z furthers these purposes and regulates in harmony with the state's objectives. Plaintiffs have failed to demonstrate preemption.

IV. The judgment below should be reversed and the case remanded for consideration of issues the Court of Appeal did not reach.

Because it found Measure Z preempted by section 3106, the Court of Appeal did not reach other issues raised in Intervenors' appeal. Intervenors request that this Court reverse the judgment below and remand to the Court of Appeal for consideration of these unresolved issues. Remand is the appropriate remedy for issues that were briefed before, but not reached by, that court. (See *Hamilton v. Asbestos Corp. Ltd.* (2000) 22 Cal.4th 1127, 1149-50.)

For example, the parties briefed whether Measure Z's wastewater disposal and new wells provisions were severable. (AOB, at pp. 56-58; Aera Energy LLC's Respondent's Brief, No. H045791, at pp. 50-52 (April 19, 2019); Appellants' Reply Brief, No. H045791, at pp. 91-94 (July 29, 2019).) The Court of Appeal did not reach the issue. Should this Court determine that only

one of the two provisions is preempted, the Court should remand the question of whether the preempted provision is severable to the Court of Appeal.[18]

Intervenors also appealed the trial court's conclusion that Measure Z would cause a facial taking of Plaintiff California Resources Corporation's ("CRC") property. The parties extensively briefed the takings question below, but the Court of Appeal declined to reach it. (See, e.g., AOB, at pp. 46-56; Opinion at p. 20, fn. 17.) CRC now asserts that the trial court's takings holding "stands." (CRC's Joinder and Respondent's Brief at p. 2.) Intervenors appealed the trial court's takings holding, however, and briefed it before the Court of Appeal. To the extent CRC is suggesting that Intervenors have somehow waived the takings issue by not including it in their petition for review, CRC has itself waived this argument by failing to support it with any citation to authority. (See *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830.) In any event, this Court reviews decisions of the Court of Appeal, not trial court judgments. (Cal. Const. art. VI, § 12, subd. (b); see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶¶ 13:4, 6.) Intervenors' appeal of the trial court's ruling that Measure Z caused a facial taking of CRC's property remains unresolved. Thus, the Court should direct the Court of Appeal to resolve this issue on remand.

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[18] Alternatively, Intervenors would submit concise supplemental briefing addressing severability upon the Court's request.

CONCLUSION

In their facial preemption challenge to Measure Z, Plaintiffs bear the burden of demonstrating clear preemptive intent. They have not carried that burden. Their arguments—and the Court of Appeal's conclusions below—rest on misinterpretations of section 3106, mischaracterizations of Measure Z, misapplication of this Court's precedent, and misapprehension of the Legislature's affirmative recognition that local governments play a critical role in regulating oil and gas development in California. Measure Z does not conflict with section 3106 or the statutory scheme as a whole. Intervenors thus respectfully request that the Court reverse the judgment below and remand for consideration of issues not yet addressed.

DATED: September 16, 2022 SHUTE, MIHALY & WEINBERGER LLP

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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' REPLY BRIEF contains 13,973 words, including footnotes, as determined by the word count of the computer used to prepare this brief.

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PROOF OF SERVICE

Chevron U.S.A., Inc., et al. v. County of Monterey, et al.
California Supreme Court 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 San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

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Executed on September 16, 2022, at Union City, California.

David Weibel

STATE OF CALIFORNIA
Supreme Court of California

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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.

9/16/2022

Date

/s/David Weibel

Signature

Bundy, Kevin (231686)

Last Name, First Name (PNum)

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