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Supreme Court of California
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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

PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Intervenors and Appellants Protect Monterey County and Dr. Laura Solorio (collectively "Intervenors") respectfully petition for review of the published opinion of the Court of Appeal, Sixth District, in *Chevron U.S.A., Inc., et al. v. County of Monterey* (October 12, 2021, H045791; Greenwood, P.J., Elia, J., and Bamattre-Manoukian, J.) ("Opinion").

No petition for rehearing was filed in the Court of Appeal. The Opinion became final on November 11, 2021. (Cal. Rules of Court, rule 8.264(b)(1).) This petition is timely filed under California Rule of Court, rule 8.500(e)(1). A copy of the Opinion is attached as Exhibit A.

ISSUE PRESENTED FOR REVIEW

Does Public Resources Code section 3106, which articulates general principles governing state oversight of oil and gas operations and interpretation of oil and gas leases, impliedly preempt provisions of Monterey County's initiative "Measure Z" that prohibit land uses in support of oil and gas wastewater injection and the drilling of new wells?

GROUNDS FOR REVIEW

The voters of Monterey County adopted "Measure Z" in November 2016. Measure Z is an initiative land use measure intended to protect the County's water and quality of life from damage caused by oil and gas development. As relevant here, Measure Z amended the Monterey County General Plan and

other County land use documents by adding two policies that (1) prohibited land uses in support of oil and gas wastewater injection and phased out existing injection uses over 5-15 years, and (2) prohibited land uses in support of drilling new oil and gas wells, but did not affect existing wells. Both policies applied in all unincorporated areas of the County.

The Opinion concludes that Public Resources Code section 3106 conflicts with and preempts these policies.[1] The Opinion relied on language added to the statute in 1961 that authorizes the state oil and gas supervisor to permit a range of "methods and practices" the supervisor may deem "suitable" for increasing hydrocarbon production. (Opinion at pp. 9-10.) The court construed Measure Z's land use policies as prohibiting specific "methods and practices" that section 3106 not only "encourages," but also gives the state oil and gas supervisor express authority to "permit." (Opinion at pp. 2, 9, 18-19.)

Review of the Court of Appeal's decision is warranted and should be granted for two reasons.

First, review is necessary to settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).) The Opinion's radical new interpretation of the Legislature's 1961 amendments to section 3106 calls into question whether and to what extent local governments may continue to prohibit or otherwise regulate *any* land uses related to oil and gas activities. Local governments and the state have shared parallel authority over oil and gas

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

development for decades. State statutes regulating oil and gas—including section 3106—developed alongside and in harmony with a century of case law affirming local police power to prohibit drilling operations. The Legislature has never expressly preempted or acted to limit local power in this area; on the contrary, the Public Resources Code expressly acknowledges and preserves city and county authority. (See, e.g., §§ 3012, 3690.)

The basic understanding that has guided cities, counties, the state, and industry for decades was established by a 1976 opinion of the California Attorney General addressing the preemptive effect of the state's oil and gas regulatory regime, including section 3106. (59 Ops.Cal.Atty.Gen 461 (1976).) Based on this understanding, it has long been settled that cities and counties have the power to decide in the first instance whether oil and gas land uses are prohibited or permitted in all or part of their jurisdictions, while the state regulates technical aspects of oil and gas exploration and production in areas where such activities are allowed.

The Opinion's novel reading of section 3106 runs directly counter to this settled understanding, creating uncertainty and unwarranted litigation risk for local governments throughout the state. Measure Z's provisions are consistent with numerous examples of local ordinances the Attorney General found *not* preempted by section 3106 or any other state law. Moreover, although the Opinion asserts that it leaves local zoning and permitting authority intact (see, e.g., Opinion at pp. 2, 19, fn. 16), the court's sweeping rationale calls this assertion into doubt.

Indeed, the Opinion's interpretation of section 3106 as "encouraging" drilling and as expressly assigning permitting authority to the state oil and gas supervisor could be wielded against virtually any local regulation that prohibits, restricts, or otherwise regulates new drilling or other operations in all or part of a local jurisdiction. The League of California Cities and California Association of Counties—representing local governments with a broad range of approaches to oil and gas regulation—warned the Court of Appeal about this risk in an amicus curiae brief below. Review and reversal of the Opinion are necessary to restore the settled understanding of shared state and local regulatory authority over oil and gas.

Second, review is necessary to secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).) This Court has formulated clear and comprehensive tests to identify whether a local enactment "conflicts" with general law where, as here, the Legislature has not expressly preempted local authority. (See, e.g., *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-98.) As relevant here, implied preemption may arise either (1) where the local enactment is "contradictory" and "inimical" to state law, or (2) where the Legislature has manifested its intent to occupy the "area" or "field" of regulation to the exclusion of local power. (*Id.* at pp. 897-98, 904; see also, e.g., *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1121-22 ("*T-Mobile*"); *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56

Cal.4th 729, 743 ("*Riverside*"); *Big Creek Lumber Co v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1157-58 ("*Big Creek*").)

This Court's test for "contradictory and inimical" preemption considers whether a local enactment requires what state law prohibits or prohibits what state law demands; if *a regulated entity* reasonably may comply with both state and local law, including by refraining from activity local law prohibits, there is no conflict. (See, e.g., *Riverside*, *supra*, 56 Cal.4th at pp. 754-55; *Big Creek*, *supra*, 38 Cal.4th at p. 1161.) Here, section 3106 does not require regulated entities—oil and gas operators—to carry out any particular "method or practice." To the contrary, the statute expressly states that oil and gas leases do not create any legal duty to conduct specific operations. (§ 3106, subd. (b).) Accordingly, an operator could comply with both Measure Z and section 3106 by refraining from drilling new wells or injecting wastewater.

The Opinion sidesteps this Court's focus on regulated entities entirely. Instead, the Opinion creates an entirely new test, finding Measure Z preempted because it purportedly "*forbids the State* from permitting certain methods and practices." (Opinion at p. 19 (italics added).) But nothing in section 3106 *requires* the state oil and gas supervisor to permit any specific method or practice of extraction; rather, as the Opinion itself appears to recognize, section 3106 merely *authorizes* state approval. (See Opinion at pp. 2, 9, 18-19.) Under this Court's precedent, therefore, Measure Z is not "contradictory and inimical" to section 3106 because it neither forbids any

activity the statute compels nor requires any activity the statute prohibits.

Indeed, the Opinion's main rationale for finding Measure Z preempted—that section 3106 assigns authority to permit "methods and practices" to the state—sounds squarely in *field* preemption, not "contradictory and inimical" preemption. However, the express reservation of local authority in state statutes (e.g., sections 3012 and 3690) *precludes* any finding that the Legislature has occupied the field to the exclusion of local authority here. (See *Big Creek*, *supra*, 38 Cal.4th at p. 1157.) And although the Opinion expressly declines to address field preemption (Opinion at p. 7, fn. 8), the Opinion's assertion that it does not affect local zoning or permitting (*id.* at pp. 2, 19, fn. 16), however dubious, similarly forecloses a conclusion that the Legislature has occupied the field. Accordingly, neither this Court's test for "contradictory and inimical" nor its test for field preemption can be satisfied here.

The Opinion nonetheless finds a fatal conflict between Measure Z and section 3106. Its quotation from the single case cited in support of its holding (see Opinion at pp. 19-20, quoting *Great Western Shows v. County of Los Angeles* (2002) 27 Cal.4th 853 ("*Great Western*")) suggests that the Court of Appeal adopted an "obstacle preemption" theory grounded in federal statutes and cases this Court has unfailingly distinguished and never expressly endorsed. (*T-Mobile*, *supra*, 6 Cal.5th at p. 1123; *Riverside*, *supra*, 56 Cal.4th at pp. 759-61; *Great Western*, at pp. 868-69.) Because the Opinion is published, Superior Courts must

now puzzle out whether to follow the clear rules this Court has laid down or to follow the Opinion's radically expanded view of what constitutes a "conflict" between state and local law. Under this Court's precedents, local enactments like Measure Z are not preempted. But under the Opinion, the oil industry will surely assert they are—and will doubtlessly subject local governments to constant threats of costly litigation on this basis. Review is therefore necessary to secure uniformity of decision as to which tests for preemption govern analysis of California statutes and local enactments.

The Court's decision to grant or deny review here will have immense practical consequences. At this moment, several local governments have recently adopted or are considering local ordinances that would prohibit new drilling and other operations in all or part of their jurisdictions. For example:

• In September 2020, the Ventura County Board of Supervisors adopted a general plan policy that "new discretionary oil wells" be located at least 2,500 or 1,500 feet respectively from schools and residential dwellings.[2] Additional new policies prohibited trucking of oil and water and flaring of produced gas from "new discretionary oil wells."[3]

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[2] Ventura County General Plan, p. 6-12 (Policy COS-7.2) (Sept. 2020), available at https://docs.vcrma.org/images/pdf/planning/plans/Final_2040_General_Plan_docs/VCGPU_06_COS_Element_2020_09_15_web.pdf .

[3] *Id.* at p. 6-13 (Policies COS-7.7 and COS-7.8).

• On September 15, 2021, the Los Angeles County Board of Supervisors unanimously adopted a motion directing preparation of amendments to the County Code that "[p]rohibit all new oil and gas extraction wells in all zones" and "[d]esignate all existing oil and gas extraction activities . . . as legal nonconforming uses in all zones."[4]

• On October 25, 2021, Culver City adopted an ordinance prohibiting "new or expanded oil and gas activity such as drilling of new wells, redrilling or deepening of existing wells or the erection or installation of any derrick, structure, facilities or equipment related to oil and gas production" in all zones within the city and requiring termination of existing non-conforming uses.[5]

Each of these local enactments is consistent with the settled understanding that cities and counties may prohibit new drilling and other oil and gas operations in all or part of their territory. Yet numerous legal challenges are already pending in Ventura County Superior Court claiming that section 3106 and other provisions of state law preempt Ventura County's general

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[4] Los Angeles County Board of Supervisors, Statement of Proceedings (Sept. 15, 2021), Agenda Item 22, pp. 29-30, available at http://file.lacounty.gov/SDSInter/bos/sop/1112973_091521.pdf.

[5] City of Culver City, Ordinance No. 2021-016 (Oct. 25, 2021) (amending Culver City Code § 17.16.010), available at https://www.culvercity.org/files/content/public/city-hall/get-involved/inglewood-oil-field/21-10-25__ord-2021-016-approving-zca-p2021-0036-zca-to-terminate-nonconforming-oil-and-gas-use-by-nov24-2026.pdf.

plan policies and a related oil and gas permitting ordinance.[6] In Culver City, the oil industry has cited this Opinion in support of preemption claims and explicitly threatened "lengthy and extraordinarily expensive litigation."[7]

The Opinion is thus already giving the oil industry a brand new argument that a few words added to section 3106 sixty years ago tie the hands of local government. Cities and counties adopting or implementing oil and gas regulations similar to those that local governments have implemented for decades face new uncertainty and risk arising from the Opinion's misreading of section 3106 and the relevant statutory context and its distortion of this Court's long-standing tests for analyzing preemption claims. Review should be granted and the Court of Appeal's judgment should be reversed.

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[6] See, e.g., *Aera Energy v. County of Ventura* (No. 20-546180); *California Resources Corporation v. County of Ventura* (No. 20-546189); *Western States Petroleum Association v. County of Ventura* (No. 20-546193); *Lloyd Properties v County of Ventura* (No. 20-546196); *Western States Petroleum Association v. County of Ventura* (No. 20-547988); *Carbon California v. County of Ventura* (No. 20-548181); *National Association of Royalty Owners v. County of Ventura* (No. 21-550558).

[7] City of Culver City, City Council hearing video at approx. 1:18:56 (Oct 25, 2021) (Heather Pearce for Sentinel Peak Resources), available at http://culver-city.granicus.com/player/clip/2237?view_id=1&meta_id=200240&redirect=true; City of Culver City, City Council hearing video at approx. 44:55-46:30 (October 18, 2021) (Nikki Carlsen, Alston & Bird, for Sentinel Peak Resources), available at http://culver-city.granicus.com/player/clip/2228?view_id=1&redirect=true.

STATEMENT OF THE CASE

I. The Voters of Monterey County Adopt Measure Z.

Monterey County's voters adopted Measure Z by a wide margin at the November 2016 general election. (AR[3]399.)[8] Measure Z was enacted to protect public health, safety, and the environment from damage caused by oil and gas drilling and production in the County. (AR[1]121.) The County's strong agricultural industry relies heavily on clean groundwater. (AR[1]122-23.) Its tourism industry depends on the County's scenic vistas and clean air. (AR[1]125.) Oil and gas operations threaten these values by releasing hazardous air pollutants, degrading scenery, and harming wildlife. (AR[1]124-26.) Surface spills and hazardous releases from oil and gas operations put water supplies at risk. (AR[1]123-24.) Oil and gas operations in the County also contribute to climate change; crude oil from the County's San Ardo field is among the most carbon-intensive in the world. (AR[1]126-27.)

Measure Z amended the County's General Plan by adding three new policies identifying "Prohibited Land Uses" that applied "within the County's unincorporated area." (AR[1]127-29.) Land Use Policy LU-1.21 prohibited the "development, construction, installation, or use of any facility, appurtenance, or

[8] Citations to documents in the appellate record are formatted as follows. Citations to the Administrative Record are in the format "AR[volume number]page." Citations to the Appellants' Appendix are in the format "AA[volume number]page." Citations to the Reporter's Transcript are in the format "RT[volume number]page:line."

above-ground equipment . . . in support of" hydraulic fracturing and other types of well stimulation. (AR[1]127-28.) Land Use Policy LU-1.22 prohibited the "development, construction, installation, or use of any facility, appurtenance, or above-ground equipment . . . in support of oil and gas wastewater injection or oil and gas wastewater impoundment" for storage or disposal purposes, but also allowed existing land uses of this nature to continue during an amortization period of five to fifteen years. (AR[1]128-29.) Land Use Policy LU-1.23 prohibited the "drilling of new oil and gas wells," but likewise "[did] not affect" existing oil and gas wells "drilled prior to [Measure Z's effective date] and which have not been abandoned." (AR[1]129.) The measure made substantively identical changes to other County land use plans. (See AR[1]129-36.)

Measure Z also directed the County to refrain from applying these policies if they would interfere with vested or constitutional rights. (AR[1]137.) Section 6(B) mandated that the measure's provisions "*shall not apply*" if they would "violate the constitution or laws of the United States or the State of California." (*Ibid.* (italics added).) And Section 6(C) directed the County to grant exemptions, at a property owner's request, if necessary to avoid an uncompensated taking of private property. (*Ibid.*)

II. The Oil Industry Challenges Measure Z.

On December 14, 2016, Chevron U.S.A., Inc., et al. and Aera Energy LLC filed petitions for writ of mandate and complaints alleging, among other things, that Measure Z was

preempted by state and federal law and caused a facial, unconstitutional taking of private property. (AA[1]28-54, 55-82.) On the same day, the Superior Court approved stipulations staying enforcement and implementation of most of Measure Z. (AA[1]92-96, 97-101.) Four additional groups of oil companies and mineral rights holders filed similar challenges.[9] (See AA[3]623-48 (California Resources Corporation); AA[4]870-944 (National Association of Royalty Owners-California Inc., et al.); AA[5]972-997 (Eagle Petroleum LLC); AA[5]998-1028 (Trio Petroleum LLC et al.).) The Superior Court granted Intervenors, the initiative's proponents, leave to intervene in defense of the initiative. (AA[5]1128-30.)

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

III. The Superior Court Finds Measure Z Preempted in Part.

After a four-day trial (see generally RT volumes 5-8), the Superior Court granted some of Plaintiffs' claims and denied others. (AA[31]7545-93.) The court denied Plaintiffs' preemption challenge to Measure Z's policy LU-1.21, which prohibited land uses in support of well stimulation, for lack of standing because

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

no Plaintiff claimed to have plans to use well stimulation. (AA[31]7565-68.) In contrast, the court found policies LU-1.22 and LU-1.23 preempted, holding that they intruded on exclusive state and federal authority and conflicted with what the court interpreted as state and federal policies prioritizing oil production over local protections for health and the environment. (*See* AA[31]7569-79.) The court found that policy LU-1.21 could be severed from the other two policies. (AA[31]7579-81.)

The Superior Court also rejected all but one of the Plaintiffs' facial takings claims. (AA[31]7587-90.) The court concluded that Measure Z's provision prohibiting new wells caused a facial taking by eliminating the economic value of undeveloped mineral rights held by Plaintiff California Resources Corporation ("CRC"). (AA[31]7587.) The court further held that Measure Z's exemption process provided an inadequate administrative remedy for takings and violated due process. (AA[31]7581-85.) The court either rejected or declined to reach Plaintiffs' other claims. (AA[31]7554-61, 7590-91.)

On March 1, 2018, the court filed its final judgment, issued a writ of mandate, and enjoined the County from implementing Measure Z's wastewater and new wells policies. (AA[32]7685-87, 7737-38.) Intervenors filed a timely Notice of Appeal on March 26, 2018.[10] (AA[32]7748.)

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

IV. The Court of Appeal Concludes Section 3106 of the Public Resources Code Preempts Portions of Measure Z.

On October 12, 2021, the Court of Appeal issued its published Opinion affirming the Superior Court's judgment and finding policies LU-1.22 and LU-1.23 preempted.[11] The Opinion characterized drilling of new wells and wastewater injection as "operational aspects of oil drilling operations . . . committed by section 3106 to the State's discretion" and concluded that "local regulation of these aspects would conflict with section 3106." (Opinion at p. 2.)

The Court of Appeal recited this Court's long-established test for determining whether a local enactment "conflicts with" state law. (Opinion at pp. 6-7, citing *Sherwin-Williams*, *supra*, 4 Cal.4th at pp. 897-98.) Under this test, a conflict exists if local law "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Sherwin-Williams*, at p. 897 (internal quotation marks & citation omitted).) Because the court found Measure Z "*conflicts* with section 3106," it did not consider whether "the State has preempted the *field* of oil and gas regulation." (Opinion at p. 7, fn. 8 (italics in original).)

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

After quoting section 3106 in its entirety (*id.* at pages 8-9), the court found that the statutory text supported the Superior Court's conclusion:

> Section 3106 identifies the State's *policy* as "*encourag*[*ing*] the wise development of oil and gas resources," and expressly provides that the State will supervise the drilling of oil wells "so as to *permit*" the use of "*all*" practices that will increase the recovery of oil and gas. [Citation.] In doing so, section 3106 plainly lodges the authority to permit "all methods and practices" firmly *in the State's hands*. Section 3106 makes no mention whatsoever of any reservation to local entities of any power to limit the State's authority to permit well operators to engage in these "methods and practices."

(Opinion at p. 9 (all italics added by Court of Appeal).) The court found the "legislative history . . . consistent with our understanding of the statute's text." (*Id.* at p. 9.) The court did not discuss any legislative history materials, but merely observed that the language "critical . . . for our purposes" was "added in 1961." (*Id.* at p. 10.)

The Opinion dismissed as irrelevant several other provisions in the state's oil and gas statutory scheme that acknowledge and preserve local authority, finding that none "reflect[s] that the authority vested in the State by section 3106 to decide whether to permit oil and gas operational 'methods and practices' is to be shared with local entities." (*Id.* at p. 11.) The court also dismissed a line of cases dating back to 1925 affirming that local governments may regulate, and even prohibit, oil and gas operations under their police power, finding that none of

these cases resolved the preemption question at issue here. (*Id.* at pp. 13-15.)

Although Measure Z by its terms addresses only where and whether wastewater injection and the drilling of new wells can occur, the Court of Appeal agreed with the Superior Court's characterization of Measure Z as regulating "the *conduct* of oil and gas operations and *specific production techniques*" rather than land use. (Opinion at p. 15 (quotation marks and brackets omitted; italics in original); see also *id.* at p. 16 [characterizing "new wells" and "wastewater injection" as "operational methods and practices"].) In the court's view, because Measure Z "permitted continued operation of existing wells but barred new wells and wastewater injection even if the new wells and wastewater injection would be on the same land as the existing operation," it did not regulate "'where and whether' oil drilling would occur . . . but rather *what* and *how* any oil drilling operations could proceed [*sic*]." (*Id.* at pp. 15-16 (italics in original).) The court concluded that Measure Z conflicts with section 3106 because it "ban[s] activities that section 3106 not only promotes and encourages, but also explicitly places the authority to permit in the hands of the State." (*Id.* at p. 16.) The court also "[saw] no need to rely on" the 1976 Attorney General's opinion that has guided local government regulation of oil and gas activities for decades, relegating its discussion of the opinion to a footnote. (*Id.* at p. 16, fn. 14.)

Finally, the court distinguished several of this Court's cases that found local regulations were *not* "contradictory or inimical"

to state law. (*Id.* at pp. 17-19.) The court quoted the test established by this Court: "The contradictory and inimical form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. No inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (*Id.* at pp. 17-18 (quoting *T-Mobile*, *supra*, 6 Cal.5th at p. 1121 (internal quotation marks and citations omitted)); see also Opinion at 18-19 (quoting *Big Creek*, *supra*, 38 Cal.4th at p. 1161).) However, the court did not address whether an oil and gas operator could comply with both Measure Z and section 3106. Instead, the court found Measure Z conflicted with section 3106 because it prohibited "methods and practices" that (in the court's view) state law both encourages and "places the authority to permit . . . in the hands of the state." (Opinion at p. 18.) The court further concluded that Measure Z "*forbids the State from permitting* certain methods and practices." (*Id.* at p. 19 (italics added).)

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

preempted by state law, the court did not reach whether federal law also preempted the measure or whether it caused a facial taking of private property. (*Id.* at p. 20, fn.17.)

ARGUMENT

I. The Opinion Raises an Important Issue as to Whether Section 3106 Prevents Cities and Counties from Prohibiting or Otherwise Regulating Oil and Gas-Related Land Uses, as They Have Done for More Than a Century.

The Opinion adopts a radical reinterpretation of section 3106 that ignores the statutory and judicial context, upends settled expectations, and threatens to undermine a wide range of long-established local regulatory practices.

Section 3106 does not require local governments to allow oil and gas land uses. Indeed, it says nothing at all about local authority. Rather, the section has two modest goals. First, it establishes general guidelines governing the state oil and gas supervisor's "supervision" of "the drilling, operation, maintenance, and abandonment of wells" and production facilities. (§ 3106, subds. (a),(b).) These factors include both "prevent[ing], as far as possible, damage to life, health, property, and natural resources" (*id.*, subd. (a)) and "supervis[ing]" operations "so as to permit the owners or operators of the wells to utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of underground hydrocarbons and which, in the opinion of the supervisor, are suitable for this purpose in each proposed case" (*id.*, subd. (b)). Second, section 3106 establishes default rules for interpreting oil

and gas leases. As a matter of state policy, oil and gas leases must be interpreted as allowing the lessee or operator "to do what a prudent operator using reasonable diligence would do," including using certain specified "methods and processes" for removing hydrocarbons when "approved by the supervisor." (*Id.*, subd. (b).) However, the statute also expressly provides that "nothing contained in this section imposes a legal duty . . . to conduct these operations." (*Ibid.*)

Section 3106 "encourage[s] wise development" of oil and gas resources. (*Id.*, subd. (d).) It does not mandate that either the state or local governments allow certain methods and practices, nor does it require oil and gas operators to carry them out.

A. The Power of Local Governments to Regulate Oil and Gas Land Uses Has Been Settled for Many Decades.

1. A Century of Case Law Confirms Local Police Power to Regulate and Prohibit Oil and Gas.

The statutory scheme of which section 3106 is a part developed in tandem with a century-old line of cases affirming local government power to regulate and even to prohibit oil and gas operations. In 1925, this Court recognized local governments' "unquestioned" right to use their police power—and specifically their land use authority—to regulate oil and gas operations. (*Pacific Palisades Assn v. City of Huntington Beach* (1925) 196 Cal. 211, 217.) Subsequent cases affirmed local zoning authority over oil and gas. (See, e.g., *Marblehead Land Co. v. City of Los Angeles* (9th Cir. 1931) 47 F.2d 528, 532; *Friel v. County of Los*

Angeles (1959) 172 Cal.App.2d 142, 157.) Based on the same reasoning, courts have upheld local governments' power to prohibit oil and gas entirely within their jurisdictions. (*Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, 555; *see also Wood v. City Planning Com.* (1955) 130 Cal.App.2d 356, 364.)

Cases in this line have directly addressed state oil and gas statutes. In *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 555, this Court upheld a local zoning regulation that prohibited the drilling of new wells in certain zones despite acknowledging overarching interests in oil and gas development articulated in state law. The Court noted that "[t]he policy in this state favors the conservation of oil deposits through statutory regulation" and that the people of the state "have a 'primary and supreme interest' in oil deposits." (*Id.* at p. 558 (citing Pub. Resources Code div. 3, ch. 1 and quoting § 3400).) "Nevertheless," the Court held, "city zoning ordinances prohibiting the production of oil in designated areas have been held valid." (*Id.* at p. 558.) In *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, this Court similarly held that state statutes dictating how the city may execute oil leases on tide and submerged lands did not abrogate a city's right to determine whether those lands should be developed for oil and gas in the first place. (*Id.* at p. 32.)

These cases provide the judicial context against which state oil and gas statutes—including section 3106—must be understood. The Legislature "is deemed to be aware of existing laws and judicial decisions construing the same statute in effect

at the time legislation is enacted, and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*People v. Castillolopez* (2016) 63 Cal.4th 322, 331 (internal quotation marks and citation omitted).) The 1961 amendments to section 3106 on which the Opinion relies were adopted after this Court's decision in *Beverly Oil*, but nothing in the text of those amendments expresses any intent to limit or overrule the decision. (AA[27]6495-98.) Indeed, although the Legislature has amended California's oil and gas statutes several times over the last century (see AA[27]6421-6611), it has never abrogated any of these cases or otherwise expressly preempted local authority.

2. The Legislature Has Repeatedly Affirmed Local Power to Regulate and Prohibit Oil and Gas.

When the Legislature has spoken, it has acknowledged and preserved local authority. For example, section 3012 expressly acknowledges that cities may prohibit "the drilling of oil wells." (§ 3012.) The Legislature first recognized this authority in 1915 and incorporated it into the Public Resources Code in 1939. (AA[27]6423, 6451, 6454.) This recognition remains in section 3012 to this day.

The Opinion dismissed section 3012 as irrelevant because the statute says that state regulation continues to apply to existing wells if a city prohibits new drilling. (Opinion at p. 11.) The court concluded the statute "therefore provides no support for [the] argument that the State has ceded to local entities any of the State's authority over oil drilling operational methods and

practices." (*Ibid.*) But the "drilling of oil wells"—which the Opinion construes as a "method or practice" (*id.* at page 16)—is exactly what section 3012 acknowledges cities "may hereafter" completely prohibit. Section 3012 thus *expressly allows* cities to prohibit the drilling of new wells. Accordingly, contrary to the Opinion, section 3012 *does* "cede[] to local entities" at least some of the State's authority to authorize drilling.

The Legislature added another express non-preemption clause—section 3690—to the statutory scheme in 1971. In enacting a new chapter 3.5 of the Public Resources Code, the Legislature stated that "[t]his chapter shall not be deemed a preemption by the state of any *existing right of cities and counties* to enact and enforce laws and regulations *regulating the conduct and location* of oil production activities, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection." (§ 3690 (italics added).) The enactment of section 3.5 thus not only acknowledged the existence of local power to regulate both the "conduct and location" of oil production activities, but expressly preserved that "existing" power against preemption claims.

Moreover, the Legislature adopted section 3690's express non-preemption language in 1971, after the 1961 amendments to section 3106 on which the Opinion relies. Had the Legislature intended its 1961 amendments to preclude any local regulation of the "conduct . . . of oil production activities," as the Opinion concludes, there would have been no "existing right of cities and

counties" for the Legislature to preserve in 1971. The power of local governments to regulate land use and protect health and safety arises from the Constitution itself, not the particulars of the statutory scheme. (See *T-Mobile*, *supra*, 6 Cal.5th at p. 1118 [question is not whether statute creates a specific source of local power, but rather whether the statute "divests the [local government] of that power"]; *Riverside*, *supra*, 56 Cal.4th at pp. 742, 754, fn. 8 [local land use authority derives from Constitution and inherent police power, not statutory delegation].) Section 3690 expressly confirms that local governments retained that "existing" power even after the 1961 amendments to section 3106.

3. A 1976 California Attorney General Opinion Settled the Boundary Between State and Local Authority Over Oil and Gas.

Until the Opinion, no published decision had addressed the preemptive effect, if any, of section 3106. This long-standing judicial silence likely reflects the influence of the 1976 opinion of the Attorney General that comprehensively addressed the balance of power between state and local governments.[12] (59 Ops.Cal.Atty.Gen. 461 (1976) (hereafter "AG Opinion" or "AG Op.").) The AG Opinion clearly demonstrates that Measure Z is a valid exercise of Monterey County's power to prohibit oil and gas operations in all or part of its territory.

The AG Opinion reviewed many of the cases discussed above, concluding that they affirm local authority to prohibit

[12] A copy of the AG Opinion appears in the Appellants' Appendix. (AA[13]2989-3021.)

drilling in all or part of a local jurisdiction. (AG Op. at p. 467-68.) In particular, the AG Opinion read *Beverly Oil* as holding that this prohibitory power is *not* preempted. (*Id.* at p. 468.) The AG Opinion concluded, however, that none of these cases addressed local regulation of the "manner" in which specific oil and gas operations are carried out. (*Id.* at p. 468-69.)

In this context, the AG Opinion considered the preemptive effect of section 3106 and other statutory and regulatory provisions. (*Id.* at pp. 469-75). Based on these statutes and regulations, the AG Opinion concluded that the state had fully occupied the regulatory field with respect to "certain phases" of development, which the opinion characterized generally as "subsurface" phases. (*Id.* at pp. 477-78.) On the other hand, the AG Opinion concluded that the state had not occupied the field with respect to "land use, environmental protection, aesthetics, public safety, and fire and noise prevention." (*Id.* at p. 479.) Provided that local regulation did not directly interfere with a specific plan, method, or operation approved by the state for the subsurface phases of oil and gas development, the AG Opinion found it likely would not raise preemption concerns. (See *id.* at pp. 478-79.)

Accordingly, the AG Opinion generally concluded that local governments not only may prohibit all new oil and gas operations (including the drilling of new wells), but also may prohibit particular kinds of operations. The AG Opinion illustrated these conclusions with concrete examples. For instance, the AG Opinion determined that state statutes assigning oil and gas

permitting authority to the state *did not* "nullify a valid prohibition of drilling . . . by a county or city in all or part of its territory." (*Id.* at p. 480.) Consistent with this conclusion, the AG Opinion found that lesser prohibitions against certain specific operations similarly were *not* preempted. (See, e.g., *id.* at pp. 482 [finding local governments retain power to regulate "surface aspects" of "pumps, tanks, and oil field surface installations and equipment" despite "very broad" state authority to regulate same], 483 [discussing ordinances prohibiting drilling, redrilling, or deepening wells from surface locations within city limits, as well as ordinance prohibiting slant-drilled wells surfaced outside city limits from entering city limits at depth of less than 500 feet], 488-89 [upholding conditional use permit requirement for "secondary recovery operations (gas injection, water injection, etc.)" as valid under city's "authority to prohibit all drilling within the city limits"], 491 [finding ordinance deeming oil and gas production a non-conforming use valid], 491-92 [affirming county use permit requirement "since the county may prohibit operations in all areas or in selected parts of its territory"].) Only where a local enactment attempted to regulate specific standards or practices already addressed by state statutes or regulations did the AG Opinion find preemption likely. (See, e.g., *id.* at pp. 480-82 [finding local standards for well casing strength, shut-off tests, remedial work, and abandonment likely preempted], 487-88 [concluding that detailed blowout prevention, cementing, and abandonment requirements were likely preempted].)

The AG Opinion thus drew a reasonable line between local and state authority, affirming both local governments' power to determine whether oil and gas uses are allowed within their jurisdictions and the state's authority to regulate technical aspects of exploration and production. The AG Opinion has proven both durable and influential; Chevron's counsel described it to the trial court as a non-controversial interpretation that "stood the test of time." (RT[5]1252:5-10, 13-14.) And it did—until now.

B. The Opinion's Radical Interpretation of Section 3106 Creates Profound Uncertainty and Increases Litigation Risk for Local Governments.

Review is warranted because the Opinion raises an important question of law by disturbing the settled understanding of the balance of power between state and local government. The Opinion reaches this extreme result by misreading both Measure Z and section 3106. First, the Opinion misreads Measure Z's express prohibition of *land uses* in support of wastewater injection and the drilling of new wells as an implicit attempt to regulate "methods and practices" used in oil and gas extraction. (Opinion at p. 18.) The Opinion then concludes Measure Z conflicts with state law because section 3106 purportedly (1) "encourages" certain "methods and practices," including both wastewater injection and the drilling of new wells, and (2) assigns the state oil and gas supervisor authority to permit these "methods and practices." (Opinion at pp. 9, 18-19.)

For decades, local governments have regulated whether and where the "drilling" of new wells may occur within their jurisdictions. As both the statutory scheme and AG Opinion confirm, the "drilling" of new oil and gas wells has long been understood to be a land use subject to local control and prohibition, not a "method or practice" exclusively regulated by the state. (§§ 3012, 3690; AG Op. at pp. 467-68, 480, 483, 491-92.) Based on the AG Opinion, local governments have understood this same authority as extending to prohibition of particular oil and gas land uses, even where those land uses have some connection to particular extraction methods and practices. (See AG Op. at pp. 482, 483, 488-89 [affirming power to regulate "surface aspects" of tanks, sumps, and other installations, as well as power to prohibit certain slant-drilled wells and power to require permits for "secondary recovery" operations like water injection].) Measure Z's wastewater injection and new wells provisions are therefore squarely in line with the examples of non-preempted actions outlined in the AG Opinion.

The Opinion claims that it should not be read as precluding local governments from confining oil and gas operations to certain zones or requiring local permits. (Opinion at pp. 2, 19, fn. 16.) But this claim is difficult to square with the Opinion's conclusion that Measure Z's land use prohibition against drilling new wells improperly regulates a "method or practice" that section 3106 encourages, and for which it assigns permitting authority to the state. The Opinion thus threatens to convert section 3106 into a cudgel the oil industry can use to threaten

cities and counties over virtually any local oil and gas zoning regulation—even regulations that would *permit* the drilling of new oil and gas wells as a conditional use. The Opinion thus creates uncertainty and unwarranted litigation risk for local governments, raising a critically important statewide question that demands this Court's review.

II. The Opinion Threatens Uniformity of Decision as to the Correct Test for Evaluating Whether a Local Enactment Conflicts with State Law.

Review also is warranted because the Opinion undermines this Court's long-established tests for determining whether a local enactment is void due to a conflict with general law.

The Opinion finds that Measure Z conflicts with section 3106 for two reasons. The first reason—that Measure Z prohibits certain "methods and practices" that section 3106 "encourages" (Opinion at pp. 9, 18-19)—does not present a "contradictory and inimical" conflict under this Court's precedent. A statute's mere "encouragement" of an activity is insufficient to demonstrate preemptive intent. (*T-Mobile*, *supra*, 6 Cal.5th at p. 1123 [holding statute encouraging technological advancement in telecommunications not preempted by ordinance requiring local review of facilities' aesthetics because "no legislation pursues its objectives at all costs"]; *Riverside*, *supra*, 56 Cal.4th at pp. 753-54, 759-61 [finding complete local prohibition of medical cannabis facilities not preempted despite statute declaring a "right" of patient access to cannabis and encouraging uniform local regulation]; *Big Creek*, *supra*, 38 Cal.4th at p. 1161 [concluding local ordinance prohibiting logging in certain zones was not

preempted despite statutory goal of "maximum sustained production" of timber products].) If it did, this Court's decisions in *T-Mobile*, *Riverside*, and *Big Creek* all would have come out differently.

The court's second reason—that Measure Z prohibits activities for which section 3106 assigns permitting authority to the state oil and gas supervisor (Opinion at pp. 18-19)—similarly muddles the law. Under this Court's cases, a "contradictory and inimical" conflict arises only where a local ordinance "directly requires what the state statute forbids or prohibits what the state enactment demands." (*T-Mobile*, *supra*, 6 Cal.5th at p. 1121 (quoting *Riverside*, *supra*, 56 Cal.4th at p. 743).) Accordingly, if *a regulated entity* can reasonably comply with both state and local law—including by refraining from the activity local regulations prohibit—there is no conflict. (*Riverside*, at pp. 754-55 [holding that persons who "refrain from operating medical marijuana facilities" can comply with both state law encouraging patient access and local prohibition of facilities]; *Big Creek*, *supra*, 38 Cal.4th at p. 1161 [concluding "it is reasonably possible for a timber operator" to comply with both state forestry law encouraging "maximum sustained production" and local zoning ordinance "placing some trees . . . off limits to logging"].) Here, because section 3106 *expressly disclaims* any intent to create a legal duty for oil and gas operators or lessees to use any particular method or practice (§ 3106, subdivision (b)), Measure Z does not forbid anything section 3106 demands of regulated entities.

Rather than apply this Court's precedent to the plain text of Measure Z and section 3106, the Opinion invents a different test: it finds a conflict because Measure Z purportedly "*forbids the State* from permitting certain methods and practices." (Opinion at p. 19 (italics added).) Measure Z does not even mention "the State," much less "forbid" it from doing anything. Moreover, section 3106 does not *require* the state to approve any particular method or practice. (§ 3106, subd. (b).) The Opinion itself holds only that section 3106 *allows* the oil and gas supervisor to permit methods and practices. (See Opinion at pp. 2 [supervisor "has the authority to decide whether to permit" new wells or wastewater injection], 9 [section 3106 "lodges the authority to permit" methods and practices in state's hands], 18 [section 3106 "places the authority to permit these methods and practices in the hands of the State"], 19 [section 3106 "mandates that the State be the entity deciding whether to permit those methods and practices"].)

By shifting its focus from regulated entities to the state itself, the Opinion radically expands this Court's test for "contradictory and inimical" preemption. This expansion could have implications well beyond the oil and gas context. Any local prohibition in an area where the state has some permitting or approval role could be construed as *prohibiting the state* from allowing an activity, even if regulated entities reasonably could comply with both state and local law by refraining from the activity. For example, a local ordinance prohibiting construction in wetlands or streambeds could be construed as prohibiting the Department of Fish and Wildlife from approving streambed

alteration agreements. (See Fish & Game Code §§ 1601 et seq.) Or a local ordinance prohibiting certain industrial uses could be read as infringing on an air district's authority to adopt regulations that permit stationary sources of air pollution to use various means of emissions control. (See Health & Safety Code § 40001.) Virtually any land use regulation affecting an activity that also requires a state permit could be called into question.

The Opinion's conclusion that Measure Z conflicts with section 3106 because the statute assigns permitting authority to the state seems to invoke field preemption, not "contradictory and inimical" preemption. (See, e.g., *Big Creek*, *supra*, 38 Cal.4th at pp. 1157-60 [holding that state forestry statutes, including requirement for state-approved timber harvesting plan, did not fully or partially occupy field of forestry regulation to exclusion of local zoning power].) Here, the Legislature similarly has not occupied the entire field, but rather has expressly *preserved* local authority both to prohibit drilling and to "regulat[e] the conduct and location of oil production activities." (§§ 3012, 3690; see *Big Creek*, *supra*, 38 Cal.4th at p. 1157; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 94, fn.10.) Tellingly, the Opinion never explicitly holds that any approval authority vested in the state by section 3106 is *exclusive*. (See Opinion at pp. 2, 9, 18-19.) Indeed, the Opinion's attempt to narrow its own reach by preserving some degree of local zoning and permitting authority (Opinion at pp. 2, 19, fn. 16) implicitly concedes that the Legislature has not occupied the field here. In any event, because the court "determine[d] that Measure Z *conflicts* with section

3106," it declined to "consider plaintiffs' claim that the State has preempted the *field* of oil and gas regulation." (Opinion at p. 7, fn. 8.) Accordingly, neither "contradictory and inimical" preemption nor field preemption—at least as this Court has defined those theories—supports the Opinion's conclusions. Only by radically expanding the former test and sidestepping the latter can the Opinion hold Measure Z invalid.

Lacking any basis in this Court's state preemption jurisprudence, the Opinion instead appears to rely primarily on an amorphous federal "obstacle preemption" theory that this Court has repeatedly rejected and never expressly adopted. Indeed, the Opinion cites *only one case* in support of its holding, quoting *Great Western* for the proposition that a local regulation cannot completely ban an activity that a state statute seeks to promote. (Opinion at pp. 19-20 (quoting *Great Western*, *supra*, 27 Cal.4th at p. 868); see also *T-Mobile*, *supra*, 6 Cal.5th at p. 1123 [describing "obstacle preemption" as a "theory" that "local law would be displaced if it hinders the accomplishment of the purposes behind a state law"].) The Opinion does not discuss the facts or holding of *Great Western*, which upheld a county's ban on gun shows on county-owned property. (*Great Western*, at pp. 873, 868-69.) Instead, the Opinion takes a single quotation out of its context—a discussion of federal cases arising under the federal Resource Conservation and Recovery Act that this Court was *distinguishing* (*Great Western*, at pp. 867-69)—and misleadingly presents it as a principle of California law. (Opinion at pp. 19-20.) In so doing, the Opinion fails to acknowledge that this Court has

repeatedly rejected obstacle preemption arguments (see, e.g., *T-Mobile*, at p. 1123; *Riverside*, *supra*, 56 Cal.4th at pp. 760-61; *Great Western*, at pp. 867-68) and has never adopted the theory as the law of this state. (*T-Mobile*, at p. 1123; but see *Riverside*, at p. 764 [conc. op. of Liu, J., accepting obstacle preemption as valid theory but declining to find ordinance prohibiting medical cannabis facilities preempted].)

Even if obstacle preemption were a valid theory here, Measure Z would not be preempted. Like the telecommunication facilities statute in *T-Mobile*, which did not pursue its technological advancement objectives "at all costs" (*T-Mobile*, at p. 1123), or the medical cannabis statutes in *Riverside*, which declared a broad "right" of patient access but chose only modest means to achieve that goal (*Riverside*, at pp. 759-61), section 3106 does not elevate oil and gas production over all other concerns. Moreover, unlike the federal Resource Conservation and Recovery Act cases that gave rise to the obstacle preemption theory, section 3106 does not affirmatively "enlist" local governments in any "cooperative effort" to promote oil and gas development. (See *Great Western*, *supra*, 27 Cal.4th at p. 868.) Section 3106 does not mention local governments at all. Measure Z presents no obstacle to its goals.

The Opinion thus not only fails to follow this Court's established tests for determining whether a local enactment conflicts with general law, but also appears to create entirely new and inconsistent tests for this purpose. Moreover, bereft of any support for its conclusions in this Court's precedent, the Opinion

instead appears to rely on an implicit and unexplained obstacle preemption theory that further threatens the uniformity of state preemption law. Review is therefore necessary to ensure that Superior Courts and other Courts of Appeal understand the scope of California preemption law and apply it consistently.

CONCLUSION

The Opinion needlessly calls into question the long-established power of local governments to prohibit, regulate, or even issue conditional use permits for oil and gas development, creating immense uncertainty and litigation risk. It also conflicts with and muddles California precedent governing preemption analysis, which could have implications far beyond the oil and gas context.

Intervenors therefore respectfully request that this Court grant review and reverse the Court of Appeal's judgment.

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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 PETITION FOR REVIEW contains 8,249 words, including footnotes, as determined by the word count of the computer used to prepare this brief.

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PROOF OF SERVICE

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Case No. H045791
California Court of Appeal, Sixth District

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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240 Church Street
Salinas, California 93901

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Executed on November 19, 2021, at Union City, California.

David Weibel

EXHIBIT A

Filed 10/12/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CHEVRON U.S.A., INC. et al., Plaintiffs and Respondents, v. COUNTY OF MONTEREY, Defendant; PROTECT MONTEREY COUNTY et al., Interveners and Appellants.	H045791 (Monterey County Super. Ct. No. 16CV003978)

Appellant Protect Monterey County (PMC) appeals from the trial court's judgment striking down a County ordinance banning "land uses in support of" new oil and gas wells and "land uses in support of" wastewater injection in unincorporated areas of Monterey County. These ordinances were enacted as part of Measure Z, an initiative sponsored by PMC and passed by Monterey County voters. The trial court upheld, in part, a challenge to Measure Z by plaintiffs, numerous oil companies and other mineral rights holders in Monterey County.[1] PMC contends that the trial court erroneously

[1] Six separate actions were consolidated below. One was brought by Aera Energy LLC (Aera). A second action was brought by Chevron U.S.A. Inc. and a group of other entities, which we will refer to collectively as Chevron. A third action was brought by California Resources Corporation (CRC). The fourth action was brought by National Association of Royalty Owners-California, Inc. and various individuals and entities, which we will refer to collectively as NARO. A fifth action was brought by Eagle Petroleum, LLC (Eagle). The sixth action was brought by Trio Petroleum LLC and

concluded that these two components of Measure Z were preempted by state and federal laws and that they constituted a facial taking of the property of some plaintiffs. PMC also contends that the trial court made prejudicially erroneous evidentiary rulings.

We find that the trial court correctly concluded that these two components of Measure Z are preempted by Public Resources Code section 3106.[2] Section 3106 explicitly provides that it is the State of California's oil and gas supervisor who has the authority to decide whether to permit an oil and gas drilling operation to drill a new well or to utilize wastewater injection in its operations. These operational aspects of oil drilling operations are committed by section 3106 to the State's discretion and therefore local regulation of these aspects would conflict with section 3106. Our narrow holding does not in any respect call into question the well-recognized authority of local entities to regulate the location of oil drilling operations, a matter not addressed by section 3106 or Measure Z.

Because we uphold the trial court's decision on the grounds of state law preemption, we need not consider whether Measure Z is also preempted by federal law or constituted a facial taking of plaintiffs' property. We also need not address PMC's challenge to the trial court's evidentiary rulings as those rulings play no role in the resolution of the state law preemption issue, which is an entirely legal issue. We affirm the trial court's judgment.

I. MEASURE Z

Measure Z was a citizens' initiative on the November 2016 Monterey County ballot entitled: "Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative." It proposed to amend Monterey County's general plan to add three new land

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two other corporations, which we will refer to collectively as Trio. The six actions were consolidated by the trial court for the Phase 1 trial.

[2] All further statutory references are to the Public Resources Code unless otherwise indicated.

use policies. LU-1.21, which is not at issue in this appeal, would prohibit "Land Uses . . . in support of well stimulation treatments" throughout the County's unincorporated areas.[3] LU-1.22 would prohibit "Land Uses . . . in support of oil and gas wastewater injection or oil and gas wastewater impoundment" throughout the County's unincorporated areas. LU-1.23 would prohibit "Land Uses in Support of Drilling New Oil and Gas Wells" anywhere in the County's unincorporated area. Measure Z also would amend Monterey County's local coastal program and its Ford Ord Master Plan to add identical prohibitions.

Measure Z contained a section setting forth "exemptions" for "any person or entity exercising a vested right obtained pursuant to State law" and provided for "a reasonable amortization period" for phasing out uses that were inconsistent with Measure Z's provisions. Measure Z also stated that its provisions would not be applied to the extent "that they would violate the constitution or laws of the United States or the State of California." Measure Z authorized the Board of Supervisors to grant an exception to a property owner if the application of Measure Z would result in an unconstitutional taking.

Measure Z identified its purpose as "protect[ing] Monterey County's water, agricultural lands, air quality, scenic vistas, and quality of life" by "prohibit[ing] and phas[ing] out land uses in support of oil and gas wastewater . . . disposal using injection wells or disposal ponds in the County's unincorporated area" and "prohibit[ing] drilling new oil and gas wells in the County's unincorporated area." Measure Z asserted that

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[3] Chevron conceded at the outset of the Phase 1 trial that it was not using well stimulation techniques or hydraulic fracturing at the San Ardo Field, where Chevron's Monterey County drilling operations were located. However, Chevron argued that "the possibility that Chevron might in the future use well stimulation or may need to or may decide to, that's enough for standing." NARO also conceded that "nobody's using hydrofracturing at the moment and probably—maybe never again in the County of Monterey." The trial court ultimately rejected plaintiffs' challenges to LU-1.21 based on its finding that they lacked standing to challenge that aspect of Measure Z. That ruling is not at issue in this appeal.

these policies would "promote[] and protect[] the health, safety, welfare, and quality of life of County residents . . . ." Measure Z was passed by the voters in November 2016.

II. PROCEDURAL BACKGROUND

Beginning in December 2016, plaintiffs filed multiple mandate petitions and complaints for declaratory and injunctive relief and for inverse condemnation against defendant County of Monterey (the County).[4] Plaintiffs alleged that Measure Z was preempted by state and federal law and would result in an unconstitutional taking of their property. The court stayed the effective date of Measure Z after the County and plaintiffs stipulated to a stay. PMC intervened in the actions.[5]

After a multi-day trial that consisted entirely of argument by counsel based on voluminous declarations and exhibits, the court issued an extensive statement of decision. The court found that plaintiffs lacked standing to challenge LU-1.21 because no plaintiff was using or proposing to use any well stimulation treatments in Monterey County. The court found that LU-1.21 was severable from LU-1.22 and LU-1.23.

The court proceeded to plaintiffs' challenge to LU-1.22, which barred wastewater injection and impoundment. The court credited plaintiffs' arguments that this aspect of Measure Z was preempted by state law. The court rejected PMC's claim that Measure Z was simply a "land use" prohibition. The court characterized this argument as "clearly a pretextual attempt to do indirectly what it cannot do directly." The court focused on the lack of any "meaningful distinction between wastewater injection and impoundment on the one hand, and surface equipment and activities in support of wastewater injection and

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[4] The court consolidated the six cases filed by plaintiffs for purposes of the "Phase 1" trial, which was to resolve the facial challenges to Measure Z, including preemption and takings. The County has not appeared in this appeal.

[5] The Center for Biological Diversity (the Center) also sought to intervene. The trial court denied the Center's motion, but granted PMC's motion to intervene. The court also permitted PMC's spokesperson, Dr. Laura Solorio, to intervene. We will refer to PMC and Solorio collectively as PMC.

impoundment on the other." The court eschewed the distinction between surface and subsurface activities and instead concluded that the key issue was whether Measure Z "regulates the *conduct* of oil and gas operations or their permitted *location*." The court viewed LU-1.22 as "regulat[ing] a specific *production technique* . . . ." The court found it significant that "Measure Z is a ban on specific production techniques *not* a total ban on oil operations." Because, in the trial court's view, state law "fully occupies the area of the manner of oil and gas production," and LU-1.22 "seeks to regulate the manner of oil and gas production," the court found that LU-1.22 was preempted. The court also found that LU-1.22 conflicted with section 3106. In addition, the court found that LU-1.22 conflicted with the state's authority under the federal Safe Drinking Water Act (SDWA) because the State, not local authorities, was authorized to make the findings that Measure Z purported to make regarding whether underground wastewater injection would endanger drinking water sources. Thus, the SDWA also preempted LU-1.22.

The court proceeded to LU-1.23. It found that the ban on new wells conflicted with the SDWA because LU-1.23 necessarily banned wastewater injection. It also found that the new well ban was preempted because it would prevent plaintiffs from maintaining the "steam chest" that was "necessary to their profitable operation" and from drilling new wells for wastewater disposal purposes as permitted by section 3106.

The court then addressed the facial takings claim. The court found that the exemption procedure provided for in Measure Z violated due process so plaintiffs were not required to exhaust administrative remedies. The court found that LU-1.22 and LU-1.23 would cause a facial taking as to those plaintiffs who had no active wells, but no remedy was necessary because those two provisions were preempted. As to those plaintiffs who had active wells, the court found no facial taking.

The court entered judgment and issued a writ of mandate directing the County to invalidate LU-1.22 and LU-1.23. PMC timely filed a notice of appeal from the judgment.[6]

III. DISCUSSION

A. State Law Preemption

PMC contends that the trial court erred in finding that LU-1.22 and LU-1.23 are preempted. Plaintiffs maintain that Measure Z[7] is preempted under state law because it conflicts with section 3106.

"Under article XI, section 7 of the California Constitution, '[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*.' [¶] 'If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.' [Citations.] [¶] 'A conflict exists if the local legislation " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' [Citations.] [¶] Local legislation is 'duplicative' of general law when it is coextensive therewith. [Citation.] [¶] Similarly, local legislation is 'contradictory' to general law when it is inimical thereto. [Citation.] [¶] Finally, local legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in

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[6] Some of the other parties also filed notices of appeal, but all of them subsequently dismissed their appeals.

[7] We refer to these two policies as Measure Z in our analysis for ease of reference, even though Measure Z also encompasses LU-1.21, which is not at issue in this appeal and which the trial court did not find preempted. Our references to Measure Z should not be misunderstood to include LU-1.21.

such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality [citations]." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-898, fn. omitted, italics added.) "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149 (*Big Creek*).) "Whether state law preempts a local ordinance is a question of law that is subject to de novo review." (*Roble Vista Associates v. Bacon* (2002) 97 Cal.App.4th 335, 339.)

The trial court found that Measure Z is preempted by state law because, among other things, Measure Z *conflicts* with section 3106, which not only *permits* and *encourages* the drilling of new wells and the use of wastewater injection but explicitly *vests in the State the authority to permit* this conduct.[8] Since Measure Z *prohibits* all wastewater injection and bans new well drilling, the trial court found that section 3106 preempts Measure Z.

PMC argues that Measure Z is not preempted by state law because "California oil and gas statutes and regulations expressly acknowledge and affirm local authority, precluding a finding that the state has completely occupied the field," and "state law addresses only specific, technical aspects of oil and gas production, leaving local governments free to exercise their traditional authority over land use, health, and safety to protect communities from harm."

Plaintiffs' position, on the other hand, is that section 3106 "*mandate*[*s*] that oil and gas producers *be allowed* to undertake wastewater injection projects properly approved

[8] As we determine that Measure Z *conflicts* with section 3106, we need not consider plaintiffs' claim that the State has preempted the *field* of oil and gas regulation.

by the Oil and Gas Supervisor and also be *allowed* to undertake oil and gas well drilling projects properly approved by the Oil and Gas Supervisor."

We begin with the text of section 3106:

"(a) The [State Oil and Gas] supervisor[9] shall so supervise the drilling, operation, maintenance, and abandonment of wells and the operation, maintenance, and removal or abandonment of tanks and facilities attendant to oil and gas production, including pipelines not subject to regulation pursuant to Chapter 5.5 (commencing with [s]ection 51010) of Part 1 of Division 1 of Title 5 of the Government Code that are within an oil and gas field, so as to prevent, as far as possible, damage to life, health, property, and natural resources; damage to underground oil and gas deposits from infiltrating water and other causes; loss of oil, gas, or reservoir energy, and damage to underground and surface waters suitable for irrigation or domestic purposes by the infiltration of, or the addition of, detrimental substances. [¶] (b) The supervisor shall also supervise the drilling, operation, maintenance, and abandonment of wells so as to permit the owners or operators of the wells to utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of underground hydrocarbons and which, in the opinion of the supervisor, are suitable for this purpose in each proposed case. To further the elimination of waste by increasing the recovery of underground hydrocarbons, it is hereby declared as a policy of this state that the grant in an oil and gas lease or contract to a lessee or operator of the right or power, in substance, to explore for and remove all hydrocarbons from any lands in the state, in the absence of an express provision to the contrary contained in the lease or contract, is deemed to allow the lessee or contractor, or the lessee's or contractor's successors or assigns, to do what a prudent operator using reasonable diligence would do, having in mind the best interests of the lessor, lessee, and the state in producing and removing hydrocarbons, including, but not

[9] Section 3004 provides: " 'Supervisor' means the State Oil and Gas Supervisor."

limited to, the injection of air, gas, water, or other fluids into the productive strata, the application of pressure heat or other means for the reduction of viscosity of the hydrocarbons, the supplying of additional motive force, or the creating of enlarged or new channels for the underground movement of hydrocarbons into production wells, when these methods or processes employed have been approved by the supervisor, except that nothing contained in this section imposes a legal duty upon the lessee or contractor, or the lessee's or contractor's successors or assigns, to conduct these operations. [¶] (c) The supervisor may require an operator to implement a monitoring program, designed to detect releases to the soil and water, including both groundwater and surface water, for aboveground oil production tanks and facilities. [¶] (d) To best meet oil and gas needs in this state, the supervisor shall administer this division so as to encourage the wise development of oil and gas resources." (§ 3106.)

We agree with plaintiffs that the text of section 3106 supports the trial court's preemption finding. Section 3106 identifies the State's *policy* as "*encourag*[*ing*] the wise development of oil and gas resources," and expressly provides that *the State* will supervise the drilling of oil wells "so as to *permit*" the use of "*all*" practices that will increase the recovery of oil and gas. (§ 3106, italics added.) In doing so, section 3106 plainly lodges the authority to permit "all methods and practices" firmly in *the State's hands*. Section 3106 makes no mention whatsoever of any reservation to local entities of any power to limit the State's authority to permit well operators to engage in these "methods and practices."

The legislative history of section 3106 is consistent with our understanding of the statute's text. Section 3106 was originally enacted in 1939 when the Public Resources Code was first created. (Stats. 1939, ch. 93, § 3106.) At that time, section 3106 provided: "The supervisor shall so supervise the drilling, operation, maintenance, and abandonment of wells as to prevent, as far as possible, damage to underground oil and gas deposits from infiltrating water and other causes, loss of oil and gas, and damage to

underground and surface waters suitable for irrigation or domestic purposes by the infiltration of, or the addition of, detrimental substances, by reason of the drilling, operation, maintenance, or abandonment of wells." (Stats. 1939, ch. 93, § 3106, p. 1112.) We see no indication in this original version of section 3106 of any preemption of local authority.

However, the language of subdivision (b) of section 3106, which is the critical one for our purposes, was added in 1961.[10] (Stats. 1961, ch. 2074, § 1.) It read essentially as it reads today. Subdivision (a) was amended in 1970 to require the supervisor to "*prevent, as far as possible, damage to life, health, property, and natural resources . . .* " (Stats. 1970, ch. 799, § 1, italics added.) While the 1970 amendment acknowledged the potential for negative local impacts from oil drilling operations, section 3106 continued to lodge the power to supervise these operations in the hands of the State.

In 1972, the text that is now subdivision (d) was added. (Stats. 1972, ch. 898, § 7.) The legislative history identifies the purpose of this amendment as "strengthen[ing] the role" of the California Department of Conservation's Division of Oil, Gas, and Geothermal Resources (DOGGR),[11] the State entity supervising oil drilling and operations, "in dealing with environmental problems." (Resources Agency's Enrolled Bill Rep. on Sen. Bill No. 1022 (1972 Reg. Sess.) August 11, 1972.) There have been no subsequent material amendments to section 3106.[12]

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[10] A 1957 amendment added "or reservoir energy" after "loss of oil, gas". (Stats. 1957, ch. 405, § 7.) It made no other change.

[11] DOGGR became the Division of Geologic Energy Management (CalGEM) on January 1, 2020. (§ 3002.) We continue to refer to it as DOGGR in this opinion as the trial court and the parties have done.

[12] The 1989 amendment added additional methods to the second paragraph, and added a third paragraph, before the final sentence, giving the supervisor authority to impose a monitoring program. (Stats. 1989, ch. 1383, § 2.) The 1994 amendment granted the supervisor authority over tanks, pipelines, and other facilities. (Stats. 1994, ch. 523, §3.)

PMC argues that, despite the language of section 3106 lodging the authority to supervise and permit oil and gas operational "methods and practices" throughout the State, the State's statutes and regulations have "explicitly recognized and preserved local authority." Yet none of the statutes identified by PMC as preserving local authority reflect that the authority vested in the State by section 3106 to decide whether to permit oil and gas operational "methods and practices" is to be shared with local entities.[13]

PMC first points to section 3012, which provides: "The provisions of this division apply to any land or well situated within the boundaries of an incorporated city in which the drilling of oil wells is now or may hereafter be prohibited, until all wells therein have been abandoned as provided in this chapter." (§ 3012.) We note that section 3012 predates the enactment of subdivision (b) of section 3106. (Stats. 1939, ch. 93, § 3012, p. 1110.) What is important to observe about section 3012 is that while it recognizes that a city may ban oil operations entirely, at the same time it mandates that *the State* continue to exercise authority over any existing oil wells. It therefore provides no support for PMC's argument that the State has ceded to local entities any of the State's authority over oil drilling operational methods and practices.

PMC also directs our attention to section 3690, which provides: "This chapter [(chapter 3.5)] shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities, including, but not limited to, zoning, fire prevention,

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[13] Division 3 of the Public Resources Code contains a large number of statutes regulating oil and gas. Chapter 1, article 3 regulates well stimulation treatments. (§§ 3150-3161.) Article 4 regulates the operation of oil and gas wells. (§§ 3200-3238.) Section 3203 authorizes the supervisor to approve the drilling of a well. Article 4.4 regulates oil and gas production facilities. (§§ 3270-3270.6.) Article 6 establishes an administrative appeal process for challenging orders by the supervisor. (§§ 3350-3359.) Chapter 3 regulates the spacing of wells. (§§ 3600-3609.) Chapter 3.5 deals with "unit operations."

public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection." Although this language on its face might seem to provide some support for PMC's argument, its limitation to chapter 3.5 reflects otherwise. Chapter 3.5 concerns "unit operations," and consists of sections 3630 through 3690, which obviously does not include section 3106. Thus, section 3690's provision that *chapter 3.5* does not preempt local regulations provides no support for the proposition that *section 3106* does not preempt local regulation of oil drilling operational methods and practices.

PMC argues that the Legislature's 2013 enactment of Senate Bill No. 4 demonstrates that section 3106 does not preempt local authority over oil and gas drilling operational methods and practices. Senate Bill No. 4 addressed only "hydraulic fracturing and other well stimulation treatments," which are not at issue in this appeal. (Stats. 2013, ch. 313, § 1.) PMC identifies two provisions of Senate Bill No. 4 that, in PMC's view, preserved local authority. Section 3160, subdivision (n) provides: "This article [(article 3, sections 3150 through 3161, which concern well stimulation)] does not relieve the division or any other agency from complying with any other provision of existing laws, regulations, and orders." Section 3161, subdivision (b)(1)(C) concerns environmental review of an oil well operator's use of well stimulation pending the adoption of state regulations addressing well stimulation. Section 3161 provides that the environmental review of such use is to be done by DOGGR, but this subdivision provides that "[t]his paragraph does not prohibit a local lead agency from conducting its own EIR."

PMC claims that section 3160, subdivision (n) requires compliance with local regulations, thereby implying that local entities retain the power to regulate oil drilling operational methods and practices. The narrow scope of section 3160, subdivision (n) belies this claim. That subdivision applies only to well stimulation and concerns the obligations of DOGGR and other agencies. Nothing in that subdivision implicates the provisions of section 3106, subdivision (b) that we find preempt Measure Z. Similarly,

section 3161, subdivision (b)(1)(C) is also limited to well stimulation and does not explicitly or implicitly grant local entities the power to regulate anything other than well stimulation, which is not at issue in this appeal. Clearly, the Legislature may choose to carve out some oil drilling operational methods and practices for the exercise of shared regulatory power between local entities and the State. At most, these statutes may show that the Legislature carved out well stimulation methods and practices as an area of shared regulatory authority.

PMC also suggests that there is no preemption because provisions in plaintiffs' leases require them to comply with local laws. The leases themselves are not state laws and cannot conflict with state laws. We see nothing in these standard lease provisions, requiring the operators to comply with all laws and regulations, to suggest that *the State* was ceding all or part of its authority under section 3106, subdivision (b) to local entities.

PMC and the amici make much of a line of authority affirming that local regulation of oil and gas drilling is *within the police power* of local entities, and they argue that this line of authority rebuts any preemption claim.

California courts have long viewed local zoning regulation of oil and gas drilling to be within a local entity's police power. Nearly a century ago, the California Supreme Court reversed the dismissal of an action by an oil company against a city because the local regulation had targeted one oil company's land but not that of its competitors, but the court acknowledged that local regulation of "the business of operating oil wells" was properly within the local entity's police power. "A municipality is not permitted, under the guise of regulating business and segregating it to a particular district, to grant a monopoly to business establishments and enterprises already situated in unrestricted districts. [Citation.] The City of Huntington Beach has the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing." (*Pacific Palisades Asso. v. City of Huntington Beach* (1925) 196 Cal. 211, 216-217.)

In *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, an oil company challenged a city's ordinance banning new oil wells and prohibiting redrilling of existing wells to new depths. The California Supreme Court rejected the challenge. "It must be deemed to be well settled that the enactment of an ordinance which limits the owner's property interest in oil bearing lands located within the city is not of itself an unreasonable means of accomplishing a legitimate objective *within the police power of the city*." (*Id.* at p. 558, italics added.)

In *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, the California Supreme Court considered whether a 1939 City of Santa Monica initiative prohibiting oil drilling could properly be applied to tidelands that the State had explicitly granted power over to the city. (*Id.* at pp. 26-28.) The *Higgins* court rejected the argument that state laws had *preempted the field* with respect to oil drilling *on tidelands*. It found that state laws limited to tidelands had expressly vested discretion in the city to decide whether there should be oil drilling on the tidelands. (*Id.* at p. 32.)

Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach (2001) 86 Cal.App.4th 534 involved, among other things, whether a citizens' initiative banning oil drilling in the city was a valid exercise of the city's police power. (*Id.* at pp. 543-545, 548.) The court held: "Enactment of a city ordinance prohibiting exploration for and production of oil, unless arbitrary, is a valid exercise of the municipal police power." (*Id.* at p. 555.)

The mere fact that *some* local regulation of oil and gas drilling is within a local entity's police power does not resolve the question of whether a particular local regulation is *preempted* by a particular state law. If a local regulation conflicts with a state law, the local regulation exceeds the local entity's power. (Cal. Const. art. XI, § 7 ["A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws"].) With the exception of *Higgins*, none of these cases even considered whether an otherwise valid local

regulation was preempted by state law. *Pacific Palisades* predated the enactment of the Public Resources Code, and *Beverly Oil* predated the addition of the language that now appears in section 3106, subdivision (b). While *Hermosa Beach* came after the language that became subdivision (b) was added to section 3106, the Court of Appeal did not consider whether the local regulation was preempted. "[I]t is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) *Higgins* considered a preemption argument, but that argument was limited to specific state laws concerning tidelands over which the State, in that case, had expressly granted the local entity full authority. We find no support for PMC's argument in this line of authority.

PMC contends that Measure Z's provisions are not preempted because "the state's oil and gas rules narrowly address only the manner in which operations are carried out, not whether or where oil and gas resources should be developed." PMC asserts that "state law's exclusive focus on the technical manner in which oil and gas production occurs leaves ample room for the exercise of local police power and land use authority." PMC argues that Measure Z controls only "where and whether" oil drilling occurs, which it contends are outside the purview of the State's laws.

PMC's myopic view of Measure Z's provisions cannot be reconciled with the actual import of those provisions. The trial court found that Measure Z "regulates the *conduct* of oil and gas operations" and "specific *production technique*[*s*]" rather than the use of land. We agree. Measure Z did not identify *any* locations *where* oil drilling may or may not occur. Instead, it permitted continued operation of existing wells but barred new wells and wastewater injection even if the new wells and wastewater injection would be on the same land as the existing operation. These provisions did not regulate "where and whether" oil drilling would occur on land in the unincorporated areas of the County

but rather *what* and *how* any oil drilling operations could proceed.[14] Operations could proceed only if they involved no new wells and no wastewater injection, which are operational methods and practices.

An accurate characterization of Measure Z's provisions is at the crux of the dispute between PMC and plaintiffs. While Measure Z does not regulate many of the technical aspects of oil drilling operations addressed by the voluminous state statutes and regulations, it does ban activities that section 3106 not only promotes and encourages, but also explicitly places the authority to permit in the hands of the State. Consequently, Measure Z conflicts with section 3106. The fact that Measure Z repeatedly uses the words "use of land" and "land use" does not obliterate the inescapable fact that Measure Z would ban specific oil and gas drilling operational methods and practices that section 3106 places solely under the authority of the State.

PMC insists that Measure Z does not conflict with section 3106.[15] It cites *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264 for the proposition that a state law that "permits but does not require" a particular practice does not preempt a local

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[14] We decline to resolve the parties' dispute over whether Measure Z regulates "subsurface" activity as the resolution of that specific dispute is unnecessary to our analysis. We also see no need to rely on the 1976 Attorney General's opinion that the parties both rely on as we review this legal issue de novo. Nevertheless, we note that the 1976 Attorney General's opinion is consistent with our view. It found that "certain phases of oil and gas activities are of statewide rather than local concern and that any local regulation in conflict with those phases would therefore be ineffective; in our view, the state has so fully occupied these certain phases that there is no room left for local regulation." (59 Ops.Cal.Atty.Gen. 461, 477.) Having different regulations in different locations would be particularly problematic where oil and gas deposits extended under the boundaries of multiple local jurisdictions. (*Ibid.*) The Attorney General concluded that this preemption of local control extended to anything that the supervisor had approved. (*Id.* at p. 478.)

[15] The parties argue at length over whether Measure Z is entitled to a presumption against preemption. We see no need to address these competing arguments as any presumption was amply rebutted in this case. Preemption is established as a matter of law.

entity from banning that practice. (*Id.* at p. 278.) In *Dublin*, a County initiative banned incineration and promoted recycling. A state law permitted incineration. The Court of Appeal found no preemption because "several sections of the [state] Act demonstrate that the decision to permit or disallow incineration is a matter for the discretion of each city or county." (*Ibid*.) The same cannot be said here. Although PMC argues otherwise, it has failed to identify any provision of state law that, contrary to section 3106, reflects that the Legislature intended to reserve all or part of the authority to make decisions about whether an oil drilling operation should be permitted to drill new wells or utilize wastewater injection for the discretion of local entities. Instead, section 3106 explicitly encouraged all methods that would increase oil production, including wastewater injection, and, crucially, placed the decision-making power in the State.

PMC also relies on *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476 (*Mendocino*). In that case, the California Supreme Court found that a local ordinance was not preempted because the state laws required compliance with local regulations and lodged "wide discretion" in local authorities, a situation which is not present here. (*Id.* at pp. 486-487.) The *Mendocino* case also did not involve a *conflict* between local and state law, but instead a question of *field* preemption. (*Id.* at pp. 486-488.)

PMC contends that conflict preemption does not apply here because section 3106 does not "demand" what Measure Z "forbids." It argues that Measure Z "does not require the Supervisor to permit any specific practice." PMC misreads the authorities it cites.

In *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, the California Supreme Court observed: " 'The "contradictory and inimical" form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands.' [Citations.] '[N]o inimical conflict will be found where it is reasonably possible to comply with both the state and

local laws.' " (*Id*. at p. 1121.) In *T-Mobile*, unlike here, the state statutes made no mention of the subject matter addressed by the local ordinance so there was no conflict. Here, section 3106 specifically addresses the drilling of wells and the injection of wastewater, encourages both practices, and, critically, explicitly places the authority to permit these methods and practices in the hands of the State. It is not possible for the authority to permit these methods and practices to rest in the State's hands if the local ordinance forbids these methods and practices. As the two laws conflict with respect to who controls the use of these methods and practices, the local ordinance must yield to the supreme state law.

PMC's reliance on *Big Creek* is also misplaced. The state law in *Big Creek* contained an *express* preemption clause that was limited to " 'the *conduct* of timber operations,' " while at the same time "general forestry law . . . expressly recognize[d] local zoning authority." (*Big Creek*, *supra*, 38 Cal.4th at pp. 1151, 1157, italics added.) The local zoning ordinance limited timber operations to certain zoning districts. (*Id.* at p. 1157.) The California Supreme Court, noting that state law expressly favored permitting local entities " ' "the maximum degree of control over local zoning matters," ' " held that the local zoning ordinance was not expressly preempted because it did not involve the "conduct" of timber operations. (*Id.* at pp. 1151-1157.) The court proceeded to consider whether the local zoning ordinance was impliedly preempted and decided that it was not. (*Id*. at p. 1157.)

PMC relies on the following passage: "[A] local ordinance is not impliedly preempted by conflict with state law unless it 'mandate[s] what state law expressly forbids, [or] forbid[s] what state law expressly mandates.' [Citation.] That is because, when a local ordinance 'does not prohibit what the statute commands or command what it prohibits,' the ordinance is not 'inimical to' the statute. [Citation.] Here, County's ordinances are not impliedly preempted by conflict with state forestry law because it is reasonably possible for a timber operator to comply with both. [¶] The zone district

ordinance does not mandate what general forestry law forbids or forbid[] what general forestry law mandates. While the forestry laws generally encourage 'maximum sustained production of high-quality timber products . . . while giving consideration to' competing values (§ 4513), they do not require that every harvestable tree be cut. Accordingly, County's zoning ordinance does not conflict with state law simply because it may have the effect of placing some trees, at least temporarily, off limits to logging. Nor does it appear the Board has adopted for Santa Cruz, or any other county, rules that comprehensively address appropriate geographical locations within the county for timber harvesting." (*Big Creek*, *supra*, 38 Cal.4th at p. 1161, fn. omitted.)

Big Creek is not inconsistent with our analysis. Section 3106, unlike the state forestry laws in *Big Creek*, explicitly places the authority to permit new wells and wastewater injection in the hands of the State, while Measure Z bans those methods and practices. Measure Z is not a local zoning ordinance that simply regulates the location of oil drilling operations. Instead, it bans particular methods and practices. Thus, Measure Z forbids the State from permitting certain methods and practices, while section 3106 encourages those methods and practices and mandates that the State be the entity deciding whether to permit those methods and practices. The conflict here, unlike the situation in *Big Creek*, is not limited to a general State policy encouraging oil drilling and a local ordinance restricting where drilling may take place.

The fact that state law leaves room for *some* local regulation of oil drilling, such as zoning regulations identifying *where* oil drilling will be permitted in a locality, does not mean that the County has the authority to ban all new wells and all wastewater injection under Measure Z.[16] "[W]hen a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity,

[16] Nothing in this opinion should be construed to cast any doubt on the validity of local regulations requiring permits for oil drilling operations or restricting oil drilling operations to particular zoning districts. This case involves no such regulations.

local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 868.) Here, section 3106's provisions placing the authority to permit certain oil and gas drilling operational methods and practices in the hands of the State would be entirely frustrated by Measure Z's ban on some of these methods and practices. We conclude that Measure Z is preempted by state law. It follows that we need not consider PMC's challenges to the trial court's rulings that Measure Z is invalid on federal preemption and takings grounds.[17]

B. Evidentiary Issues

PMC contends that the trial court denied it "a fair trial" because the court admitted irrelevant evidence proffered by plaintiffs and denied PMC and the County the opportunity to "contest Plaintiffs' evidence through discovery and cross-examination."

At the outset of the case, the court expressed the view that "discovery on the validity and preemption issues" was not "necessary" because these were "questions of law." PMC expressly agreed. When the court decided to have a Phase 1 trial that would "be limited to challenges to the validity of the ordinance on its face," which included the preemption and takings issues, the court envisioned little need for discovery or evidence. Plaintiffs sought to provide "some information about our operations." They argued that evidence was essential to show that Measure Z would take "all the economically viable use" of the property. The County and PMC disagreed. Their position was that such information would be beyond the scope of a facial challenge. The court suggested that there was a middle ground that could be addressed by means of a stipulated set of facts, since it needed "a basic understanding of what . . . the permits that are issued allow." At the same time, the court took the position that "I don't need testimony at this phase."

[17] Because we do not reach these issues, we deny Chevron's April 2019 request for judicial notice, as it concerns only the federal preemption issue.

Plaintiffs filed many declarations and requests for judicial notice in support of their Phase 1 arguments along with many exhibits.[18] The County filed a declaration and a request for judicial notice in support of its Phase 1 opposition argument. PMC filed a request for judicial notice of 13 items in support of its Phase 1 opposition argument.

PMC also filed written objections to plaintiffs' declarations.[19] PMC complained generally that, due to the lack of discovery, it had been deprived of the opportunity to challenge the information in the declarations. PMC also made voluminous specific objections based on lack of foundation, relevancy, improper legal opinion, speculation, the secondary evidence rule, "inadmissible opinion," and "improper opinion." The County joined in those objections and made some of its own. Plaintiffs challenged these objections. They also objected to some of the evidence offered by the County and PMC.

The Phase 1 trial was limited to standing, preemption, facial takings, due process procedural and vagueness challenges (to the procedures for resolving takings claims), a single-subject challenge, and general plan consistency challenges.[20] At the commencement of the trial in November 2017, the court noted that it had "read voluminous materials about 2 feet thick" that included not only opening statements but also "deeds to property and mineral rights; declarations from geologists and petroleum engineers; materials from the Environmental Protection Agency, [DOGGR], and the state

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[18] Aera filed three declarations in support of its Phase 1 arguments. CRC filed five declarations and numerous exhibits in support of its Phase 1 arguments. CRC also made a request for judicial notice. NARO filed two declarations along with their accompanying exhibits. Chevron submitted six declarations and their accompanying exhibits. Chevron also submitted a glossary of terms. Eagle submitted two declarations with exhibits. Plaintiffs also submitted a joint request for judicial notice of 80 exhibits.

[19] Plaintiffs also filed supplemental declarations and additional judicial notice requests. PMC and the County also objected to plaintiffs' supplemental declarations and supplemental requests for judicial notice.

[20] The court rejected the single-subject rule challenge and the general plan consistency challenges, and those rulings are not challenged on appeal.

Water Resources Control Board; declarations from former officials with [DOGGR]; ballot measure materials and photos of campaign materials and news clips, which is not to say that all of the above are admissible." The court noted that much of this material was related to standing. The court "reassure[d]" PMC "that you're not waiving your objections by failing to repeat them here in the court. We don't need to take the time to do that." The court made specific rulings on the evidentiary objections in its statement of decision, sustaining some and overruling others. The court pointed out that much of plaintiffs' evidence was needed only because PMC had ultimately contested standing.

As PMC concedes, "[p]reemption presents a pure question of law." Indeed, PMC asks us to disregard the evidence to which it objects and decide the issues as a matter of law. None of the evidence to which PMC objects has any relevance to the state law preemption issue that we find dispositive in this case. Consequently, PMC's claims that the trial court erred in admitting irrelevant evidence and denying discovery and cross-examination could not provide a basis for reversal because PMC could not have been prejudiced by any of the evidentiary or discovery rulings that it challenges. It follows that we need not devote any analysis to these contentions as we have disregarded this evidence and decided this case as a matter of law.

IV. DISPOSITION

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

_____

GREENWOOD, P.J.

_____

BAMATTRE-MANOUKIAN, J.

Chevron v. County of Monterey
H045791

Trial Court:	Monterey County Superior Court Superior Court No.: 16CV003978
Trial Judge:	Honorable Thomas W. Wills
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Counsel for Amicus Curiae: CENTER ON RACE, POVERTY & THE ENVIRONMENT; COMMITTEE FOR A BETTER ARVIN	Paulina Nicole Torres
Counsel for Amicus Curiae: LEAGUE OF CALIFORNIA CITIES; CALIFORNIA STATE ASSOCIATION OF COUNTIES	Sean Bernard Hecht UCLA School of Law Benjamin Avi Harris Chambers of Judge Stephen V. Wilson

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 11/19/2021 by Tayuan Ma, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **TEMP-Z7RC2C76**
Lower Court Case Number:

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11/19/2021

Date

/s/David Weibel

Signature

Bundy, Kevin (231686)

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