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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., *Petitioners and Respondents,*

v.

COUNTY OF MONTEREY, ET AL., *Defendants*

PROTECT MONTEREY COUNTY and LAURA SOLORIO, *Intervenors and Appellants*.

REVIEW AFTER AND DECISION BY THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT, CASE NO. H045791

APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF MONTEREY
THE HONORABLE THOMAS W. WILLS, JUDGE
CIVIL CASE NO. 16CV003978 AND CONSOLIDATED CASES

ANSWERING BRIEF ON BEHALF OF EAGLE PETROLEUM, LLC

(PLAINTIFF AND PETITIONER IN CIVIL CASE NO. 17CV000935)

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INTRODUCTION

In November 2016 Monterey County voters approved Measure Z, a ballot initiative marketed to capitalize on media-hyped "anti-fracking" sentiments. As the measure's proponents likely knew, Monterey County's oil-bearing formations are not susceptible to "fracking" and other than a few failed attempts, no efforts have been, or are likely to be made to use fracking as a recovery technique.

But Measure Z did more. In addition to its "anti-fracking" provision, Measure Z sought to put an end to oil production in Monterey County by depriving mineral owners of any means to handle the massive amounts of salt water produced along with the oil, of the ability to use steam flooding as a production technique through the implementation of Policy LU-1.22, which purported to forbid any surface activities supporting the impoundment or disposal of wastewater, and Policy LU-1.23 which prohibited the drilling of wells to support oil and gas production.

In 2018 the Monterey County Superior Court held that both Policies were preempted by both state and federal law and enjoined implementation of Measure Z. The Sixth District Court of Appeal unanimously affirmed the Superior Court's decision in 2021. This Court granted review and asked the parties to brief the question whether Public Resources Code section 3106 impliedly preempts provisions LU-1.22 and LU-1.23.

Eagle Petroleum, LLC joins with the other Plaintiffs and Appellees including Chevron U.S.A, Inc, Aera Energy LLC, California Resources Corporation, Trio Petroleum, and NARO-CA, et al. in urging this Court to add its voice to those that have previously answered that question in the affirmative.

As explained below, and in the briefs filed by the other Appellees, the two Policies in issue directly conflict with the mandate given through Section 3106 to California's oil and gas regulatory agency, the Geologic Energy Management Division of the Department of Conservation ("CalGEM,[1]") to supervise and encourage the wise development of the state's oil and gas resources through any means the agency considers suitable, taking into account the dual purpose of optimizing oil recovery while simultaneously preventing, as far as possible, damage to life, health, property and natural resources. Not only is Measure Z preempted by the express provisions of Section 3106, but because Division 3 of the Public Resources Code and its related regulations comprise a comprehensive scheme through which CalGEM is assigned the task of determining which production methods and practices are suitable in each case to achieving the two goals set out in

[1] CalGEM was previously known as the Division of Oil, Gas and Geothermal Resources, or "DOGGR." For convenience, Eagle refers to the agency by its current name and any references to "DOGGER" in the record should be read to refer to "CalGEM."

Section 3016, the total ban on certain activities that are an essential part of any oil operation must be held impliedly preempted and void.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Oil and Gas Production in California and Monterey County

Oil and natural gas have been produced commercially in California for over 140 years from many giant oil fields located in the southern and central portion of the state. California ranks fourth in total U.S. oil production and produces nearly 500,000 barrels of oil each day. (10 AA 2422:14-17.) Monterey County is California's fourth largest oil producing county and produces an average of 20,000 barrels per day, or slightly under $1 billion worth of oil per year from oil fields at San Ardo, Lynch Canyon, and King City.

Oil was discovered in Monterey County in 1947. (7 AA 1637; 9 AA 2233:22.) Oil has been produced from the giant San Ardo oil field primarily operated by Chevron U.S.A., Inc. ("Chevron") and Aera Energy LLC. ("Aera") (7 AA 1638) since approximately 1950 (7 AA 1637-1638,) and from the much smaller oil field at Lynch Canyon operated by Eagle since approximately 1962 (7 AA 2481: 16-17.) Both oil fields operate under use permits issued more than 60 years ago. (11 AA 2646 (San Ardo); 15AA 3584 (Lynch Canyon),) and a 1980 Condition Use Permit granted to Mobil Oil. (7 AA 1703.)

Monterey County's oil reserves lie in a relatively small, sparsely populated, and arid area in the Southeast part of the County, adjacent to Kern and San Luis Obispo Counties, far from the scenic vistas and tourism that Monterey voters were told Measure Z was intended to protect. (10 AA 2422:18-22; 15 AA 3662.) The nearest town, San Ardo, has approximately 500 residents who depend on the nearby oil fields for their income and as a source of business. (9 AA 2276.) Property tax revenues from the oil producers support the local school district, (9 AA 2276,) and even non-oilfield workers depend on the oil companies and their workers for the economic existence. (9 AA 2277.)

The County's oil-bearing formations occur at depths between 1,800 feet and 2,200 feet. (31 AA 7546.) The oil deposits themselves are extremely viscous (i.e., thick) and as a result producers must inject heated steam into the oil-bearing formations to reduce the oil's viscosity so it will flow more readily into the oil wells where it can be pumped to the surface. (31 AA 7546.)

As fluids are removed from the reservoir in a steam flood, the injected steam fills the pore spaces creating a "steam chest" (9 AA 2250 3-22; 7 AA 1651-1652) but the decreased pressure allows the influx of cooler water from the edges of the oil-bearing formation which threatens to collapse the "steam chest." (31 AA 7547) In order to combat the influx of cold water into the steam chest, operators must constantly drill new wells both to replace their producing wells as existing wells

become non-productive and to maintain the steam chest by injecting steam in different locations. (31 AA 7547.)

Maintaining a steam chest requires constant drilling to replace and side-track non-productive wells and to drill new wells at the perimeter of the steam chest to avoid the collapse of the steam chest through the intrusion of formation water (31 AA 7547) If new wells cannot be drilled the steam chest will collapse and oil production will decline rapidly and end in less than 5 years. (31 AA 7547.)

The County's oil-bearing formations naturally contain large amounts of water in addition to oil. (31 AA 7546.) Since it is not possible to selectively produce only the oil (7 AA 1664; 7 AA 1804 20-22 and 1805:6-7,) fluid production from oil wells in the County averages approximately 95% water and 5% oil. (31 AA 7547.)

The water that is brought to the surface is salty and cannot be used as drinking water or for agricultural purposes. (7 AA 1803 25-18.) These large volumes of produced water must and can lawfully be managed by using it to d=generate steam or by lawfully reinjecting it.

As fluids are produced, they are sent to a central processing facility where the water and oil are separated using a gravity-settling process. (7 AA 1657; 10 AA 2247 26 – 2248 15) The oily produced water is then processed to remove residual oil and used to: (a) produce steam, which is reinjected to enhance production, (b) injected underground into approved and permitted injection wells, or, (c) in one case, a

portion is purified through a Reverse Osmosis plant and used to recharge the water table or released into wetlands areas. (7 AA 1664; 9 AA 2245:18 – 2249 2; 10 2483 8-13.) The remaining brine and much of the produced water is reinjected underground through disposal wells permitted by CalGEM, into formations specifically approved and exempted by DOGGR and the EPA for that purpose. (9 AA 2246-2247.)

The produced water reinjected through steam flooding and water disposal wells does not serve as a source of drinking water for humans or animals (15-AA-3645,) and is not reasonably expected to supply a public water system. (15-AA-3645, 3656) The State, through CalGEM and the State Water Board, has determined that the reinjection of the produced water does not endanger relevant water sources under the Safe Water Drinking Act. (See 12-AA-2918-2920 and 31-AA-7576 [trial court's statement of decision crediting evidence of aquifer exception as demonstrating the State determined the reinjection methods at San Ardo Field do not endanger relevant water sources])

There is no economically feasible method for disposing of most of the oil and gas wastewater other than legally injecting it into underground oil-bearing formations (7 AA 1806:1-3) and there is thus no economically feasible way to produce oil if wastewater disposal is banned. It is no exaggeration to say that if

reinjection of wastewater is prohibited then oil production operations cannot occur and will have to cease immediately. (9 AA 2248 17 –2249 2.)

B. Every Aspect of Oil and Gas Production in California is Subject to Comprehensive Regulation through the Oil and Gas Supervisor Intended to Promote Oil Recovery, While Simultaneously Protecting Life, Health, Property and Natural Resources

California's oil and gas industry is comprehensively governed by Division 3 of the Public Resources Code (Pub. Res. Code, §§ 3000, *et seq*.) and associated regulations. (14 Cal. Code of Regs., §§ 1712, *et seq*.) (31 AA 7561) CalGEM is the state agency principally responsible for administering these rules and regulations and supervising oil and gas activities. (See e.g., Pub. Res. Code, § 3106, subd. (a).)

California's policy with respect to the oil and gas industry is principally contained in Public Resources Code section 3106 which expresses the dual policy goals of (1) promoting the efficient and effective management and development of underground resources, and (2) protecting the public health and the environment and confers on CalGEM the task of implementing and balancing those goals.

Section 3016's history underscores its scope and purpose. As originally enacted section 3106 charged CalGEM's predecessor agency with the duty to "supervise the drilling, operation, maintenance, and abandonment of wells."

In 1961, the Legislature added optimizing recovery of oil and gas, and directed CalGEM to "*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*." (§ 3106, subd. (b), italics added.) The 1961 amendment included express provisions describing some of the methods to be used to enhance oil recovery by adding express language that "*to further the elimination of waste by increasing the recovery of underground hydrocarbons,* the grant in an oil and gas lease or contract to a lessee or operator of the right or power … is deemed to allow the lessee or contractor … *to do what a prudent operator using reasonable diligence would do* … including … 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, … 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 [CalGEM]."].) (Emphasis added.)

In the 1970s, the Legislature amended subdivision (a) of Section 3106 to stress the statute's second purpose—public health and environmental protection - by expressly stating that while discharging its duty to prevent waste by increasing the ultimate recovery of hydrocarbons, CalGEM was also "to prevent, *as far as possible*, damage to life, health, property, and natural resources."

In 1972, to strengthen CalGEM's role in supervising oil operations "in dealing with environmental problems" the text which reads: "[t]o *best* meet oil and

gas needs in this state, [CalGEM] shall administer this division so as to *encourage the wise development of oil and gas resources*" was added. (See § 3106, subd. (d).) (*Chevron U.S.A., Inc. v. County of Monterey* (2021) 70 Cal.App.5th 153, 165 (*Chevron*).)

Critically, the amendments addressing the statute's second purpose of preventing, *as far as possible*, damage to life, health, property and *encouraging* the *wise development* or oil and gas resources, expressed no intent to diminish or subordinate the Section's primary purpose of optimizing the recovery of oil and gas to that of preventing damage *as far as possible*, or to limit the directive allowing operators *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.*"

As currently written, Section 3106 requires CalGEM to balance increasing oil production with preventing, as far as possible, damage to life, health, property, and natural resources. The Legislature has never expressed in any way that either purpose is subordinate to the other but has instead consistently maintained language mandating pursuit of both goals while seeking to achieve the ultimate purpose of ensuring the state's energy needs are met.

To achieve these dual purposes, and its goal, of safe and efficient oil and gas production, the legislature has given CalGEM a vast array of tools.

There are enactments in the Public Resources Code that address notices of intent to drill and abandon wells (§§ 3203, 3229); bonding (§§ 3204-3207); idle wells (§§ 3206 – 3206.5); well abandonment (§ 3208); recordkeeping (§§ 3210-3216); blowout prevention (§ 3219); use of well casing to prevent water pollution (§ 3220); monitoring of the amounts and disposition of oil, gas and produced water (§ 3227); protection of water supplies (§§ 3222, 3228); repairs (§ 3225); regulation of production facilities (§ 3270); management of deserted wells and facilities (§ 3237); management of hazardous wells and facilities which includes the power to acquire property by eminent domain if necessary (§§ 3250 - 3258); waste of gas (§§ 3300-3314); subsidence (§§ 3315, 3347); spacing of wells (§§ 3600-3609); unit operations (§§ 3635-3690); and regulation of oil sumps (§§ 3780-3787).

Buttressing the foregoing statutes is an extensive set of related regulations codified in the California Code of Regulations, title 14, §§ 1712, *et seq*., addressing "critical wells" (§ 1720); well spacing and set back requirements (§§ 1721 – 1721.7); well pooling (§ 1721.8); conduct of operations and provision of contingency plans for oil spills (§§ 1720 and 1722.9); well casing requirements (§ 1722.3); plugging and abandonment operations (§§ 1723 -1723.8); underground injection control (§ 1724.5 – 1724.13); testing and management of idle wells (§§ 1772 – 1772.5);

pipeline management (§ 1774.2); oilfield waste (§ 1775); well site and lease restoration (§ 1776); maintenance and monitoring of production facilities, safety systems and equipment (§§ 1777 – 1777.3); well maintenance histories (§ 1777.4); enclosure specifications (§ 1778); aquifer exemption deadlines (§ 1779.1); well stipulation treatments (§§ 1780 – 1789); methane gas hazard reduction assistance programs (§ 1790); and unit operations. (§ 1810.)

Measure Z's attempt to ban specific activities under the guise of prohibiting surface uses based solely on their specific subsurface effect runs afoul of Section 3106's delegation of authority to CalGEM and impermissibly enters CalGEM's exclusive domain and obstructs administration of the laws whose implementation CalGEM is charged with overseeing.

II. PROCEDURAL HISTORY

A. Monterey Voters Adopted Measure Z in November 2016 in an Effort to End Oil Production in Monterey County

On March 17, 2015, the Monterey County Board of Supervisors rejected a proposed interim urgency ordinance prohibiting well stimulation treatments ("WST") in the County. (1 AR at pp. 1-16 and p. 113.) Intervenor Protect Monterey County ("PMC") was formed in reaction to this decision to develop an initiative to not only ban hydraulic fracturing (*i.e.*, "fracking") but to eventually end oil production in the County. (2 AA 395:6-13.) Measure Z - a countywide ballot initiative submitted by PMC to the County Registrar of Voters in February 2016 was

approved for inclusion on the November 2016 Ballot (1 AR 118–145, 190 and 195) and was approved by voters on November 8, 2016. (2 AR 392.)

Although Measure Z was packaged and sold to appeal to public "anti-oil" sentiment as an "anti-fracking" ordinance aimed at protecting underground drinking water sources, no fracking was taking place in Monterey County, nor were producers applying to for permits to conduct fracking operations. Although fracking had been used experimentally around 2007 on two or three occasions, those efforts failed, and further attempts were abandoned. (31 AA 7545-7546)

Measure Z went far beyond banning non-existent "fracking" activities; and did more than merely prohibit "risky" underground injection techniques as it claims. Far from the minimal restrictions the public was told Measure Z would impose, Measure Z overhauled the Monterey County General Plan, local coastal Land Use Plans, and the Fort Ord Master Plan to: (1) prohibit WST, (2) "phase-out" all "wastewater" injection and impoundment, and (3) prohibit any drilling of new oil and gas wells. (1 AR 154–156.)

To accomplish its end, Measure Z first prohibited "[t]he development, construction, installation, or use of any facility, appurtenance, or above-ground equipment, whether temporary or permanent, mobile, or fixed, accessory or

principal, in support of Well Stimulation Treatments."[2] (1 AR 155.) ("LU-1.21.")

Next, Measure Z prohibited "[t]he development, construction, installation, or use of any facility, appurtenance, or above-ground equipment, whether temporary or permanent, mobile, or fixed, accessory or principal, in support of oil and gas wastewater[3] injection or oil and gas wastewater impoundment." (*Id.*) ("LU-1.22.") "No exception is made for treated produced water (*Id.*)[4] Existing nonconforming injection and impoundment uses must be discontinued within five years of the effective date of Measure Z. (*Id.*)[5]

Finally, Measure Z prohibited "[t]he drilling of new oil and gas wells" (1 AR

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[2] "Well stimulation treatments" are defined as "any treatment of a well designed to enhance oil and gas production or recovery by increasing the permeability of the formation," explicitly including hydraulic fracturing and acid well stimulation, but excluding "steam flooding, water flooding, or cyclic steaming and . . . routine well maintenance, . . . or routine activities that do not affect the integrity of the well or the formation." (1 AR 155.)

[3] Oil and gas wastewater" is "wastewater brought to the surface in connection with oil or natural gas production."

[4] Produced water refers to water extracted from an oil-bearing formation during the process of extracting oil. (9 AA 2241:26- 2242:21.) In Monterey County, production wells extract ten to twenty times more produced water than oil. (9 AA 2244:3-11; 10 AA 2480:22-27.)

[5] Measure Z purports to authorize the County Planning Commission to extend otherwise prohibited injection and impoundment activities on a case-by-case basis for up to ten additional years. (1 AR 155.) Any extension is limited to "the minimum length of time necessary to provide a reasonable amortization period pursuant to state law," and only if the Planning Commission determines the operator had a "vested right" to engage in the otherwise prohibited activities. (*Ibid.*)

156)[6] defined as "wells drilled for the purpose of exploring for, recovering, or aiding in the recovery of, oil and gas." (*Id*.) (LU-1.23.) This prohibition would preclude drilling new wells, and side-tracking existing wells, a common practice by oil operators to restore a non-productive well by drilling out the side of the existing wellbore and completing a new bottom hole segment of the existing well. (9 AA 2254:10-14 and 2256:1-19.)

B. After a Four-Day Bench Trial, the Superior Court found Measure Z was Preempted and Enjoined its Implementation

Shortly after Measure Z became effective, on December 14, 2016, Chevron and Aera petitioned the Superior Court for writs of mandate directing the County to invalidate Measure Z, alleging, *inter alia*, that Measure Z was preempted by state and federal law and constituted an unconstitutional taking of property. (1 AA at pp. 28 – 54, and 55 – 82.) Concurrently Chevron, Aera and the County stipulated to an order staying implementation of Measure Z during the pendency of the dispute. (1 AA at pp. 92-96 and 97-101.)

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[6] Measure Z also purports to allow the Board of Supervisors to grant, upon request of the affected property owner, an exception to application of any provision of Measure Z if the Board "finds, based on substantial evidence, that both (1) the application of that provision of this Initiative would constitute an unconstitutional taking of property, and (2) the exception will allow additional or continued land uses only to the minimum extent necessary to avoid such a taking." (1 AR 160)

Between March 3, 2017, and March 23, 2017, Eagle and three more plaintiff groups joined Chevron and Aera by filing complaints and petitions for writs of mandate seeking to invalidate Measure Z. [7] On March 17, 2017, the court entered an order allowing PMC and Dr. Laura Solorio, a Measure Z proponent, to intervene in the actions filed by Chevron and Aera. (5 AA at pp. 1062-1064.)[8]

On April 18, 2017, the Court ordered the dispute addressed in "phases" (Reporter's Transcript of Proceedings ("RT")[9] Volume 2 p. 303:9-17) and consolidated the cases for the first three phases. (2 RT 305:24-25; 3 RT 671:18-19.)

The first phase was heard over four days between November 13 and 16, 2017. (32 AA 7871) On January 25, 2018, the Court filed its Final Statement of Decision in which it concluded that Measure Z's Policy LU-1.22 banning wastewater injection and Policy LU-1.23 banning the drilling new wells were preempted by state and federal law. (31 AA 7568 - 7577; 31 AA 7577 - 7579.)

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[7] CRC commenced Action No. 17CV000790 on March 3, 2017 (3 AA 623;) NARO filed Case No. 17CV000871 on March 13, 2017 (4 AA 870;) Eagle commenced Case No. 17CV000935 on March 13, 2017 (5 AA 972;) and Trio filed Case No. 17CV001012 on March 23, 2017 (5 AA 998)

[8] PMC and Dr. Solorio are hereafter referred to collectively as "Intervenors."

[9] All future references to the Reporter's Transcript of Proceedings are abbreviated "RT" for convenience. Future citations thereto will identify the Volume Number, specify "RT" and then identify the page or pages and lines referred to. (e.g., 2 RT p. 303:9-17.)

The Court found that LU-1.22's ban on wastewater injection invades a regulatory area fully occupied by the state of California by (a) seeking to regulate subsurface oil and gas activities under the guise of a land use regulation prohibiting surface activities and equipment "*in support of*" certain oil recovery techniques; and (b) regulating specific production techniques used on land permitted for oil and gas operations. (31 AA 7569 - 7572.) The Court found the ban on wastewater injection to be "irreconcilable with provisions of general law" expressed in Public Resources Code, section 3106, subdivision (b) which delegate supervisory responsibilities to the state oil and gas supervisor, with a directive to permit owners or operators to "utilize all methods and practices known to the oil and gas industry" to maximize production. (31 AA 7572.) Although not an issue here, the Court also found Policy LU-1.22 to be preempted on federal preemption grounds because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (31 AA 7574 - 7577)

The Court also found that the new well prohibition of Policy LU-1.23 to be preempted because it "interfere[s] with or impede[s]' California's UIC program." (31 AA-7578 [citing 42 U.S.C. § 300h(b)(2)],) and that Policy LU-1.23 "impermissibly prohibits certain production techniques in direct conflict with [CalGEM's] mandate." (31 AA 7578.)

The Court declined to rule on the "fracking ban" set forth in LU-1.21 finding the Respondents lacked standing because no Respondent currently engages, or proposes to engage, in fracking in Monterey County, (31 AA 7564 7568) but expressly stated that if, in the future, any application for an exemption to LU-1.21's ban were made and denied, the applicant would establish standing to bring a facial challenge to LU-1.21 at that time. (31 AA 7568.)

The trial court made other rulings not under consideration here, including a determination that Measure Z effectuates a taking with respect to certain of CRC's properties and on NARO's argument that Measure Z is inconsistent with the County's General Plan. (31 AA 7557; 31 AA 7590-7591.)

C. The Court of Appeal Affirms the Trial Court and Holds that Measure Z's Wastewater and New Wells Prohibitions Are Preempted

PMC appealed the Trial Court's judgment contending the trial court erred in finding that the bans imposed by LU-1.22 and LU-1.23 were preempted by Section 3106 arguing they are traditional "land use" policies within the police power of the county, and contending that "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." (*Chevron U.S.A., Inc. v. County of Monterey* (2021) 70 Cal.App.5th 153, 163 (*Chevron*).)

In response, Appellees contended the trial court properly found Measure Z was preempted by Section 3106 because that section "*mandate*[*s*] that oil and gas producers *be allowed* to undertake wastewater injection projects properly approved 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." (*Ibid.*) (Italics in original.)

In its decision published on October 12, 2021, the Court of Appeal agreed with Appellees, affirming the Trial Court's state law preemption finding and concluding that "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. [Citations.] 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.'" (*Id.* at p. 164.) (Italics in original)

The appellate court noted that PMC "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 operations should be permitted to drill new wells or utilize wastewater injection for the

discretion of local entities" (*Id.* at p. 170,) and that "[i]nstead, section 3106 explicitly encouraged all methods that would increase oil production, including wastewater injection, and, crucially, placed the decisionmaking power in the state." (*Ibid*.)

The appellate court concluded, as a matter of law, that Measure Z was preempted by state law under conflict preemption principles because "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." (*Id.* at pp. 172 and 174.)

Because the Court of Appeal held Measure Z was preempted by state law for conflicting with Section 3106, it declined to reach the question whether Measure Z was preempted by federal law. (*Id.* at p. 172.)

D. The Supreme Court Grants Intervenors' Petition for Review

PMC filed a Petition for Review ("Petition") in this Court in November 2021 arguing that the Court of Appeal's opinion "threatens" uniformity of decision as to the correct test for evaluating whether a local ordinance conflicts with state law, (Petition at pp. 34-40) and contending that in making its decision the Court of Appeal had improperly relied on "obstacle preemption" which has not been expressly recognized by this Court. (Pet. at pp. 38-40.)

Appellees jointly opposed the Petition arguing this Court's review was not necessary because the Court of Appeal had properly applied conflict preemption principles from its jurisprudence (Joint Answer to Pet. at pp. 28-31,) and had not departed from this Court's existing implied preemption jurisprudence in making its decision. (*Id.* at pp. 33-34)

In January, this Court granted the Petition for review, and ordered the parties to brief the following issue: "Does Public Resources Code section 3106 impliedly preempt provisions LU-1.22 and LU-1.23 of Monterey County's initiative 'Measure Z?'"

STANDARD OF REVIEW

In reviewing a judgment granting a writ of mandate an Appellate Court applies the substantial evidence standard of review to the court's factual findings, but independently review its findings on legal issues. (*Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1186.) The trial court's interpretation of statutes, including local ordinances and municipal codes, is subject to de novo review." (*Ibid*.)

The rules governing review of local initiatives that conflict with a higher authority are the same as those construing constitutional provisions and statutes which is to determine and effectuate the intent of the enacting body. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933.) To accomplish

this, the Court begins with the text as the first and best indicator of intent. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321.) The inquiry is a textual analysis that proceeds "by ascribing to words their ordinary meaning, while taking "account of related provisions and the structure of the relevant statutory and constitutional scheme." (*California Cannabis Coalition, supra*, 3 Cal.5th at p. 933.) If the language is clear and unambiguous, the plain meaning governs. (*Ibid*.) Only where the language is ambiguous will a court consider extrinsic evidence. (*Ibid.)*

ARGUMENT

"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 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.)

Applying the foregoing principles to the text and purpose of Measure Z, the Monterey Superior Court and the Court of Appeal each recognized Measure Z's purported prohibitions on certain "land uses" for what they were - improper attempts by local government to strip DOGGR of its regulatory power and to change how oil and gas production activities are undertaken in Monterey County (and ultimately to end oil and gas production in the county) by banning specific practices within CalGEM's purview to supervise and permit. (31 AA 7570; *Chevron*, *supra,* 70 Cal.App.5th at p. 172.) Both courts concluded that Measure Z was preempted by general law because the provisions of Policies LU-1.22 and LU-1.23 affecting injection of produced water and drilling of new wells directly conflict with CalGEM's duty under Section 3106 to supervise oil and gas activities "so as to

permit the owners and operators of wells to use all methods and practices known to the oil industry for the purpose of increasing the recovery of underground hydrocarbons." (31 AA 7572 and 7578; *Chevron*, *supra,* 70 Cal.App.5th at p. 172.)

The determination that Measure Z is preempted by Section 3106 should be affirmed because it is clear that allowing local legislation that bans underground injection and the drilling of new wells directly interferes with and frustrates CalGEM's obligation under the Public Resources Code to exercise its own judgment and to how best to administer oil and gas activities so as to "encourage the *wise development* of oil and gas resources" by the use of all methods and practices known to the oil industry for the purpose of *increasing* the ultimate recovery of underground hydrocarbons that are, in the *Supervisor's* opinion, suitable for the purpose in each proposed case while at the same time preventing, as far as possible, damage to life, health, property, and natural resources." (§ 3106.) (Emphasis added.)

This delegation of responsibility leaves no room for local regulation. CalGEM is given the authority to permit *all* methods and practices of oil production, including, steam flooding, well drilling and reinjection of produced saline water, while being charged with the duty to determine how those methods and practices could be effectively applied to optimize oil and gas production while simultaneously preventing, as far as possible, harm to life, health, property, or natural resources.

Because Measure Z does nothing in terms of identifying specific areas where additional regulation is needed to address a particular local concern it fails as a land use ordinance. Instead, by imposing a total ban on specific activities that are otherwise allowed, *only* in instances where those activities are undertaken for purposes of producing oil and gas, Measure Z exposes itself as a device intended to interfere with CalGEM's performance of its duties.

Measure Z's complete ban on steam flooding, reinjection, and well-drilling strips CalGEM of the ability to perform its mandate because it takes away CalGEM's statutorily mandated decision-making power, replacing it with an outright ban, everywhere in the unincorporated areas of Monterey County, with no consideration whatsoever of the dual policy goals CalGEM is mandated to pursue through the exercise of its expert judgment.

Although PMC argues the contrary, this Court has consistently held a local ordinance's prohibition of a State-promoted and regulated activity results in conflict preemption of the local law. (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 868 (*Great Western*).) Because Section 3106 promotes, and declares a state policy favoring the safe production of oil and gas under CalGEM's direct supervision, Measure Z's prohibition on two activities that are an indispensable part of producing oil and gas is impermissible and preempted due to its direct conflict with Section 3106

Even if there is no conflict or obstacle preemption, however, Section 3106 and the remainder of Division 3 of the Public Resources Code, together with the Regulations adopted to implement the Division, evidence the Legislature's intent to fully occupy the field of oil and gas production. Viewed from that perspective, Measure Z's ban on specific oil and gas production activities improperly enters that field and is thus preempted and void. In either case, the Court should hold that Measure Z is preempted.

A. Measure Z's Ban on the Management of Wastewater and the Drilling of New Wells Would Directly Conflict with CalGEM's Obligation Under Section 3106 to Permit Activities It Considers to Be Suitable and Is Therefore Preempted

Intervenors' principal criticism of the court of appeal's decision in both their Opening Brief and their Petition for Review is an assertion that the court of appeal "failed to actually apply this Court's long-established test for determining whether a local measure is "contradictory" or "inimical" to general law." (See Int. Br. at p. 34, and Pet. at pp. 34-40.) As support, Intervenors argue that this Court's case law establishes that "contradictory" or "inimical" preemption *only* applies where the challenged local regulation "directly requires what the state statute forbids or prohibits what the state enactment demands," and that "where it is reasonably possible to comply with both the state and local laws," no conflict will be found. (Int. Br. at p. 34, citing to *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107, 1121 (*T-Mobile*).)

This Court has not expressed the requirements for conflict preemption so narrowly or so inflexibly, however. Instead, this Court has recognized that conflicts may arise, and preemption may apply when a state statute has as its purpose the advancement of certain activities and local regulation frustrates that purpose. In such cases, "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits a more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate its purpose." (*Great Western*, *supra,* 27 Cal.4th at p. 868, italics added; see also *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc*. (2013) 56 Cal.4th 729, 763-64 (Liu, J., concurring) [explaining that conflict preemption includes where a local ordinance "prohibits not only what a state statute 'demands' but also what the statute permits or authorizes"].)

To determine whether a local ordinance conflicts, and is therefore preempted by a superior state statute, two things must be shown.

- First, it must appear that the superior statute either prohibits, or requires, permits, or promotes a certain activity by placing the power to regulate that activity in the hands of the State, and
- Second, it must appear that the local regulation contravenes the purpose of the state statute either by requiring that which is

forbidden, or by forbidding or preventing that which is required, permitted, or promoted.

In this case, because CalGEM is required to permit the activities Measure Z seeks to ban if, in the CalGEM supervisor's opinion they are suitable to a proposed case in carrying out Section 3106'a dual purposes, the total ban imposed by Measure Z directly conflicts with CalGEM's obligations and is preempted.

Oil and gas activities in California are administered by the Department of Conservation under CalGEM's direct supervision. Section 3016, subd. (d) directs that "[t]o best meet the oil and gas needs in this state, the [CalGEM] supervisor shall administer this division so as to *encourage the wise development of oil and gas resources*." (§ 3106, subd. (d).) (Italics added.)

This language is preceded by two provisions which set out the statute's dual focus that CalGEM (a) . . . "shall 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 . . . so to "prevent, as far as possible, damage to life, health, property, and natural resources" (§ 3106, subd. (a)) and that CalGEM "shall also supervise the drilling, operation, maintenance, and abandonment of wells so as to permit owners and operators 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." (§ 3106, subd. (b), italics added.)

CalGEM's duty to supervise all oil and gas activities is further buttressed by the provisions of section 3011 which direct the CalGEM supervisor to "coordinate with other state agencies and entities described in section 38501 of the Health and Safety Code to help meet the state's clean energy goals, and section 3013 that provides that the division "shall be liberally construed to meet its purposes" and delegates to the director of the Department of Conservation and the CalGEM supervisor "all powers . . . which may be necessary to carry out the purposes of this division."

Under the plain wording of Section 3016, CalGEM has the *exclusive* authority and duty to supervise all oil and gas operations within the state in a manner that both promotes oil and gas extraction, and prevents, as far as possible, damage to life, health, property, and natural resources. (§ 3106, subds. (a)-(b), (d).) Among the methods provided for CalGEM to discharge its obligations are steam flooding, reinjection of wastewater, and drilling of new wells, subject to an array of specific requirements, all of which are administered by CalGEM. (See § 3106, subd. (b) [declaring it the "policy of this state" oil and gas lessees and their contractors be allowed to "do what a prudent operator would do, having in mind the best interests of the lessor, lessee and the state" including but not limited to "the injection of air,

gas, water, … the application of pressure heat or other means for the reduction of viscosity of the hydrocarbons, … the creating of enlarged or new channels for the underground movement of hydrocarbons into production wells."].)

Accordingly, the first element for preemption is satisfied because the Legislature has clearly required CalGEM to supervise oil and gas production is a manner that balances the goal of enhancing oil production to meet the state's energy needs, with the goal of preventing, as far as possible, damage to life, health, property, and natural resources.

There can be little debate that the prohibition on impoundment or reinjection of wastewater and the drilling of new wells imposed by LU-1.22 and LU-1.23 conflict directly with Section 3106's mandated promotion of oil and gas production methods because they specifically eliminate CalGEM's ability to permit owners and operators of wells to utilize *all methods and practices* known to the industry and deemed suitable by the CalGEM supervisor in a proposed case.

Because Measure Z eliminates DOGGR's ability to carry out the statute's dual purposes of promoting oil and gas production while protecting the environmental and public health by approving and permitting critical activities, it conflicts with Section 3106 and is preempted. (*Great Western Shows*, *supra,* 27 at p. 868.) LU-1.22 which bans the impoundment or disposal of produced water, and the injection of steam would eliminate fluid production altogether, since oil cannot be produced

preferentially to the huge volumes of water that accompany it, and in combination with LU-1.23, which prohibits the drilling of new wells, would effectively destroy the ability for operators to maintain a steam chest. (7-AR-1668-1670.)

Recognizing the special needs of heavy oil projects the legislature enacted Public Resources Code section 3602.1 which provides that where a parcel of land contains hydrocarbons too heavy or viscous to produce by normal means, "the [CalGEM] supervisor may approve proposals to drill wells wherever he deems advisable for the purpose of proper development of such hydrocarbons by the application of pressure, heat, or other means for the reduction of oil viscosity . . ." Measure Z's new well ban collides directly with this mandate by prohibiting new wells, even where the Supervisor deems the drilling advisable. If Measure Z stands, therefore, CalGEM will be hamstrung in supervising oil and gas activities to encourage the wise development of oil and gas resources and to increase the ultimate recovery of underground hydrocarbons.

Although Intervenors argue that it is possible for oil producers comply with both Measure Z and Section 3106 by refraining from conducting "prohibited" oil and gas activities in Monterey County (Int. Br. at p. 32,) that simplistic suggestion ignores both the integral nature of the "prohibited" activities to oil and gas production, the fact the CalGEM supervisor is the arbiter of what activities are, and

are not suitable, and the fact that discontinuing the "prohibited" activities will result in waste, and a loss of recoverable oil and gas..

There is little doubt the question that whether it is *reasonable* to comply with the state law and the local ordinance is part of the equation. (*City of Riverside*, *supra*, 56 Cal.4th at p. 743,) however Intervenors' suggestion that it is possible to comply with both Measure Z and Section 3016 by halting oil producing activities in Monterey County altogether ignores the mandate of Section 3016 that CalGEM "increase" the ultimate recovery of oil and highlights the reason Measure Z is preempted.

If the analysis were as simple as Intervenors suggest no local ordinance would ever be preempted by state law and local governments would be free to frustrate the state's policy goals and render the State's regulatory mechanism superfluous by banning activities exclusively regulated and promoted by the State. No state policy would be safe from local interference, and no state agency could evenly administer its programs without being concerned that local government might negate its efforts. Even in cases where local regulation of a state regulated activity is permitted, a local regulation that totally bans the regulated activity is not permitted. (*Great Western Shows, supra,* 27 Cal.4th at pp. 867–868; see also *City of Riverside*, *supra,* 56 Cal.4th at pp. 763-64 (Liu, J., concurring) ["If state law authorizes or promotes, but does not require or demand, a certain activity, and if local law prohibits the activity,

then an entity or individual can comply with both state and local law by not engaging in the activity. But that obviously does not resolve the preemption question. … Local law that prohibits an activity that state law intends to promote is preempted, even though it is possible for a private party to comply with both state and local law by refraining from that activity."].)

The activities of handling and disposing of produced water, drilling new wells, and injecting steam underground can only be avoided by abandoning oil and gas production altogether, which is not *reasonable,* and which would completely undermine one of the statute's dual purposes and specifically declared policies. (See § 3106, subd. (b) [CalGEM's mandate to regulate oil and gas operations is "for the *purpose of ultimately increasing* the recovery of underground hydrocarbons"], italics added; see also *ibid.* [declaring it the "policy of this State" to allow oil and gas producers and lessees to contract for steam flooding, reinjection, and well-drilling "when these methods or processes … have been approved by [CalGEM]."] If CalGEM's dual mandate is to be accomplished in Monterey County, Measure Z must be declared preempted.

Intervenors' argument concerning conflict preemption relies heavily on its apparent misunderstanding of Court's opinions in *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139 (*Big Creek*); *T-Mobile*, *supra*; and *City of Riverside*, *supra*, (Int. Br. at pp. 38-40.) Intervenors' reliance on those cases is

misplaced, since none of them involved a state mandate for a regulatory agency to promote and oversee a specific activity whose enhancement was declared to be the state's policy or a local ordinance that sought to prohibit an activity state law sought to promote.

In *Big Creek*, for example, the defendant County amended its zoning laws to restrict timber harvesting operations to areas zoned for timber production, mineral extraction industrial, or parks, recreation, and open space." (*Big Creek Lumber Co. v. County of Santa Cruz*, *supra*, 38 Cal.4th at p. 1146.) The plaintiff sued, arguing that state forestry statutes preempted the local zoning ordinances. Noting that the state statutes contained an express preemption provision that preempted only the "conduct of timber operations," but in other provisions, "i deferred a number of important zoning decisions to local authority" (*Id.*, at pp. 1151, 1153,) this Court ruled that state law did not preempt the ordinances. (*Id.,* at p. 1146.)

As the court of appeal observed in its opinion, "Measure Z is not a local zoning ordinance that simply regulates the location of oil drilling operations. Instead, it bans specific, identified methods and practices." (*Chevron*, *supra*, 70 Cal.App.5th at p. 172.)

If put into effect, Measure Z's impact would go far beyond that of a typical zoning ordinance regulating where certain activities may and may not occur. If implemented, Measure Z would ban the specific enhanced recovery techniques

needed to extract Monterey County's heavy crude oil, thus directly frustrating Section 3016's goal of increasing the ultimate recovery of oil and gas. And would prevent oil and gas operators from lawfully reinjecting any produced water into exempt aquifers through lawfully permitted injection wells, which is a necessary operational technique required to safely and efficiently dispose of the vast amounts of salty, low-quality water produced with the oil. (9 AA 2244, ¶ 32.) Similarly, Measure Z would prevent drilling new wells, an activity that is clearly required to produce oil, and to manage a steam flood project.

As the court of appeal observed, "Measure Z forbids the State from permitting certain methods and practices, while section 3106 encourages [them] and mandates that the State be the entity deciding whether to permit those methods and practices." (*Ibid.*) Further, "[t]he 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." (*Ibid.*)

Intervenors reliance on *T-Mobile*, *supra*, is equally unavailing. In *T-Mobile* a group of telecommunication companies challenged a San Francisco ordinance limiting where telecommunications equipment could be placed based on its aesthetic impact. (*T-Mobile*, *supra*, 6 Cal.5th at p. 1114). In its effect, the challenged ordinance specified certain areas for heightened aesthetic review and allowed installation of equipment only where the San Francisco Planning Department

determined the installation would not significantly degrade the area's aesthetic attributes. (*Id*., at pp. 1114-1115.)

The plaintiffs argued that the ordinance was preempted by state law that provided telephone corporations "may construct . . . telephone lines along any public road . . . in such manner and at such points as not to incommode the public use of the road or highway." (*Id.*, at p. 1115.) This Court, however, held that the state statute did not preempt the local ordinance because the "statute and the ordinance can operate in harmony" since the statute simply "ensures that telephone companies are not required to obtain a local franchise, while the Ordinance ensures that lines and equipment will not unreasonably incommode public road use." (*Id*. at p. 1125.)

T-Mobile is distinguishable on its face. In *T-Mobile*, the state statute in issue contained no mandate as to any specific state policies, whereas section 3106 expressly sets forth specific state policies that CalGEM is required to advance, but which Measure Z frustrates. Further, the ordinance in *T-Mobile* was not a prohibition on any activities deemed to be permissible by the State, and the local ordinance did not ban placement of the equipment altogether, but merely regulated placement of the telephone poles based on aesthetic attributes. Here, by contrast, Measure Z bans activities the State has expressly said are permitted to further an express state policy, thereby engaging in regulatory management of oil and gas operations – a task delegated to CalGEM, unrelated to any land use considerations.

The court of appeal thus correctly rejected Intervenors' interpretation of *T-Mobile*: "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, in sharp contrast, section 3106 "explicitly places the authority to permit [certain] methods and practices in the hands of the State" (*Chevron*, *supra*, at p. 171,) which are then forbidden by Measure Z. As the court of appeal observed, "[i]t 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," and because "the two laws conflict with respect to who controls the use of these methods and practices, the local ordinance must yield to the superior state law." (*Ibid.*)

Finally, in *City of Riverside,* this Court rejected a claim that a state statute preempted local land use ordinances that classified medical marijuana dispensaries as a nuisance and prohibited them. (*City of Riverside, supra,* 56 Cal.4th at p. 737.) There, despite the defendants' reliance on statements that the statute in issue, the Compassionate Use Act ("CUA"), was intended to promote consistent application of its terms, across the state and to enhance access of patients and caregivers to medical marijuana, the Court found that the CUA was a "limited measure" whose substantive provisions simply removed certain specified state law sanctions for certain marijuana activities" and created "no comprehensive scheme for the

protection or promotion of facilities that dispense medical marijuana." (*Id*., at pp. 759-760 and fn. 12.)

Section 3106, by contrast, declares increased oil recovery to be a state policy goals, and mandates that certain oil recovery techniques including wastewater injection and drilling be permitted. Where the CUA's provisions only decriminalized certain activities related to marijuana use and cultivation, which was something the local regulations forbidding the dispensaries entirely did not address, here Measure Z directly bans activities that section 3106 not only permits, but directs CalGEM to permit where, in CalGEM's opinion, such activities are suitable to a proposed case. Notwithstanding Intervenors' arguments to the contrary, the plain conflict between section 3106, which mandates that certain operational practices be permitted where CalGEM properly deems appropriate, and Measure Z, which bans such activities, creates an irreconcilable conflict between state and local law which requires that Measure Z be declared preempted and void.

If the Court applies its well-established test for preemption to the statute and local ordinance in issue, the result is clear. State law places the power and duty to carry out the dual statutory purposes in the *exclusive* hands of the state and imposes upon CalGEM the exclusive responsibility to determine the means and methods to be used in accomplishing those purposes, and yet the local ordinance completely bans those means and methods and thereby conflicts with the state's ability to carry

out its mandate. To achieve the state's purpose, the superior state's law thus must preempt the local ordinance that conflicts with it and prevents CalGEM from fulfilling its obligations.

B. Measure Z is Also Preempted Because It Enters a Field Fully Occupied by State Law and Regulation.

Since the court of appeal found a conflict between Measure Z and section 3106, the court of appeal did not reach the question of whether the State has fully occupied the field of oil and gas operations so as to preempt local regulation. (*Chevron*, *supra*, 70 Cal.App.5th at p. 163, fn. 8.).) Field preemption through the operation of Section 3106, however, provides an independent basis for affirming the decision below that state law preempts Measure Z.

California has enacted a complex, comprehensive system of laws and regulations that governs all subsurface activity related to oil and gas production. That regulatory scheme is so expansive and all-encompassing that it has fully occupied the field of regulating subsurface activity related to oil and gas production and provides an independent basis to conclude that state law the preempts Measure Z regarding management of produced wastewater, underground wastewater injection and the drilling of new wells, leaving no room for local regulation.

In charging CalGEM with the responsibility "to supervise and protect" California's subsurface energy deposits (Pub. Res. Code, § 3400) the Legislature through Section 3106 mandated that CalGEM supervise the drilling, operation,

maintenance, and abandonment of wells and . . . facilities attendant to oil and gas production "so as to encourage the wise development of oil and gas resources" (*Id.*, § 3106, subd. (d),) . . . 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," (*Id.*, § 3106, subd. (a),) and to permit owners and operators of wells to "utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of hydrocarbons, and which in the opinion of the supervisor, are suitable for the purpose in each proposed case. (*Id*., § 3106, subd. (b).)

In directing CalGEM to "supervise the drilling, operation, maintenance and abandonment of wells so as to permit the owners and operators of 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," the legislature plainly contemplated that CalGEM would have authority over underground injection of produced water, and the drilling of new wells. The wording of section 3106 brings to bear the entire scope of Division 3 of the Public Resource Code and its associated regulations and leaves no room for local governments to "second guess" the opinion

of the DOGGR supervisor by further regulating how the practices the Supervisor is required to allow through local land use policies such as Measure Z whose objective is to ban the same practices.

That was the conclusion reached in 1976 by the California Attorney General in a published opinion (59 Ops.Cal.Atty.Gen. 461, see 13 AA 2988-3021.) addressing the preemptive intent of Public Resources Code section 3106 and Division 3 of the Public Resources Code. According to the Attorney General, those laws preempt nearly all local regulations of oil and gas production so that the state may "conserve, protect and prevent waste of those resources while simultaneously encouraging the ultimate recovery of them." (13 AA 2997.)

The Attorney General explained that preemption is necessary because "[o]il, gas and geothermal resources are flung far and wide around the state; to leave the simultaneous regulation of their development to various local entities would subject development of the state's fuel resources to the 'checkerboard of regulations[.]'" (13 AA 3005.)

The Attorney General noted that the laws administered by CalGEM "have assumed added importance" over the years (13 AA 2997) and that the Public Resources Code has grown to reflect both "growing concern over the limited nature of energy resources," balanced with the "additional purpose" to protect "life, health, property, and natural resources." (*Ibid.*) To achieve these purposes, state law

requires "uniform regulation" of subsurface activities by CalGEM, to the exclusion of supplemental local regulation. (13 AA 3005.)

According to the Attorney General, "where state regulation approves of or specifies plans of operations, methods, materials, procedures, or equipment to be used by the well operator or where activities are to be carried out under the direction of [CalGEM], there is no room for local regulation." (*Id.* at p. 462.) The Attorney General concluded "that for the most part such activities are confined to down-hole or subsurface operations." (*Ibid.*; see also *id.* at p. 467 [finding that "statutory and regulatory provisions appear to occupy fully the underground phase of oil and gas activities"].)

The Attorney General further stated that even though local governments may institute "more stringent, supplemental regulations" based on local land use concerns, those regulations may "not conflict with, interfere with, or frustrate the state's regulation for purposes of conservation and protection of resources." (13 AA 3007The Attorney General concluded any regulation on the "manner" of production short of "a complete prohibition of oil and gas activity" within a specified area is preempted. (13 AA 3006-3007.)

CalGEM itself has agreed with the Attorney General's view concluding that CalGEM "occupies the field" of subsurface regulation and that "no other State or

local agencies can impose regulations or mitigation on top of those imposed by [CalGEM] in that context." (12 AA 2902.)

To partially explain the breadth of CalGEM's regulatory coverage, the Public Resources Code states that oil and gas "[d]rilling shall not commence until approval is given by" CalGEM; though if CalGEM fails to respond to a drilling application within 10 days, "that failure shall be considered as an approval[.]" (Pub. Res. Code, § 3203, subd. (a).) The requirement of CalGEM approval covers "any oil or gas well for the discovery of oil or gas; any well on lands producing or reasonably presumed to contain oil or gas; any well drilled for the purpose of injecting fluids or gas for stimulating oil or gas recovery, repressuring or pressure maintenance of oil or gas reservoirs, or disposing of waste fluids from an oil or gas field; any well used to inject or withdraw gas from an underground storage facility; or any well drilled within or adjacent to an oil or gas pool for the purpose of obtaining water to be used in production stimulation or repressuring operations." (*Id.*, § 3008, subd. (a).)

Once drilling operations commence, CalGEM brings to bear a broad array of regulations covering every aspect of subsurface activities, including casing requirements (*14 Cal. Code of Regs.* §§ 1722.2–1722.4), blowout prevention (*id.*, § 1722.5), drilling fluids (*id.*, § 1722.6), directional surveys (*id.*, § 1722.7), and record and data requirements. (*Id.*, §§ 1724–1724.2, 1724.7–1724.8.)

Next, because DOGGR must "permit the owners or operators of the wells to utilize all methods and practices known to the industry for the purpose of increasing the ultimate recovery of underground hydrocarbons" (Pub. Res. Code, § 3106, subd. (b),) once a well is drilled, DOGGR continues to exercise significant regulatory control to encourage increased hydrocarbon recovery, while simultaneously protecting the environment. DOGGR must, "by regulation, prescribe minimum facility maintenance standards for all production facilities in the state," including leak detection, corrosion prevention, tank inspection, valve and gauge maintenance, and other requirements. (*Id.*, § 3270, subd. (a),) as a result of which CalGEM has imposed requirements for spill contingencies (*14 Cal. Code of Regs.*, § 1722.9), plugging and abandonment *id.*, §§ 1723–1723.7), idle wells (*id.*, § 1723.9), critical wells (*id.*, §§ 1724.3–1724.4), and underground injection and disposal wells (*id.*, §§ 1724.6, 1724.10).

CalGEM also administers underground injection activities(Pub. Res. Code, §§ 3130–3132), well stimulation (*id.*, §§ 3150–3161), natural gas storage wells (*id.*, §§ 3180–3187), abandoned wells (*id.*, §§ 3240–3241), hazardous wells (*id.*, §§ 3250–3258), sumps (*id.*, §§ 3780–3787), subsidence (*id.*, §§ 3315–3347), used oil (*id.*, §§ 3460–3494), methane gas hazards (*id.*, §§ 3850–3865), wasted resources (*id.*, §§ 3300–3314, 3500–3503), and geothermal resources (*id.*, §§ 3700–3776, 3800–3827). In exercising its authority, CalGEM is further obligated to levy annual

charges on subsurface energy operations that "are necessary in the exercise of the police power of the State." (*Id.*, § 3400.)

All these technical, operational requirements are implemented through regulations specifically intended to protect the environment during subsurface production. (*14 Cal. Code of Regs.*, §§ 1750–1789.) To ensure CalGEM actively monitors these activities "[w]ritten approval of the Supervisor is required prior to commencing drilling, reworking, injection, plugging, or plugging and abandonment operations" (*Id.*, § 1714) and once approved, "[o]perations approved by the Division shall not deviate from the approved program." (*Id.*, § 1722, subd. (g).)

The drilling and placement of wells to maximize production, and the lawful and necessary practice of injection of produced wastewater into formation approved by CalGEM for that purpose are very obviously two of the "methods and practices" the CalGEM Supervisor is compelled to permit if they are "suitable" in the "supervisor's opinion. Measure Z intrudes into an area reserved exclusively to CalGEM by imposing additional (and completely unrealistic) requirements that CalGEM regulate oil and gas activities in Monterey County without the ability to approve the drilling of new wells, and without the ability to approve or continue programs of steam injection and underground water injection.

"[I]t is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute." (*Citation.)*

(*American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1252.) (*American Financial*.) The rule consistently applied is that "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 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*, *supra*, 4 Cal.4th at p. 898.)

Even though Division 3 of the Public Resources Code lacks an express preemption provision, the very limited exceptions described, *inter* alia, in Section 3690 [stating that any existing rights of local government to regulate in areas of fire prevention, noise, hours of operation, fencing, appearance, abandonment and inspection are not preempted] and the extensive and all-encompassing nature of the statutes and regulations that CalGEM is directed to employ in supervising oil and gas activities to accomplish Section 3016's dual objectives show the Legislature's

intention to fully occupy the field of managing and regulating oil and gas production where those activities occur.

"'Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme.' (*Citations*) 'State regulation of a subject may be so complete and detailed as to indicate an intent to preclude local regulation. [Citations.] In this connection it may be significant that the subject is one which … requires uniform treatment throughout the state. (*Citation*.)'" (*American Financial, supra*, 34 Cal.4th at p. 1252.)

"'The denial of power to a local body when the state has preempted the field is . . . a rule of necessity, based upon the need to prevent dual regulations that could result in uncertainty and confusion. . . . 'Whenever the Legislature has seen fit to adopt a general scheme for the regulation of a particular subject, the entire control over whatever phases of the subject are covered by state legislation ceases as far as local legislation is concerned.' (Citations.)" (*Ibid*.)

American Financial, *supra*, which involved the regulation of predatory lending practices, and in which this Court held that a local Ordinance addressing the same issues was preempted because it duplicated and contradicted state law (*Id*., at p. 1264,) relied on *Wilson v. Breville* (1957) 47 Cal.2d 852, (*Wilson*) in which this

Court held that an individual seeking compensation for a taking does not lose his claim by failing to file it with a city as required by the city charter since the exercise of eminent domain was a matter of statewide concern, (*Id*., at p. 859), *Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, (*Eastlick*) in which this Court held that a city could not, in its charter, impose additional requirements on a party making a claim for personal injuries than those addressed in legislation covering the presentation of such claims (*Id*., at p. 667,) and *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, (*Birkenfeld*) in which a charter city's "requirement that landlords obtain certificates of eviction before seeking repossession of rent-controlled units" could not stand in the face of state statutes that fully occupy the field of landlord's possessory remedies because requiring "landlords to fulfill the elaborate prerequisites for the issuance of a certificate of eviction by the rent control board before they commence the [state] statutory proceeding would nullify the intended summary nature of the remedy." (*Id*. at p. 151.)

By analogy to federal preemption law, the Court further concluded that the Ordinance "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the Legislature. (*Citation*)].)[10] (*American Financial, supra*, 34 Cal.4th at p. 1258.)

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[10] Eagle joins in the briefing submitted by Chevron and Aera addressing in a comprehensive fashion the application of concepts of federal "obstacle preemption"

The statutes and regulations governing oil and gas activities in California exceed in scope and depth the statutory areas addressed in *American Financial*, *Wilson*, *Eastlick*, and *Birkenfeld* and concern a subject that requires uniform treatment throughout the state under the guidance of the agency charged with administering the activity.

As was the case with the Ordinance in *American Financial*, *supra*, Measure Z "is not supplementary legislation that in other contexts might be allowed, but a line-item veto of those policy decisions by the Legislature with which the [County] disagrees. In revisiting this area fully occupied by state law, [it] undermines the considered judgments and choices of the Legislature and is therefore preempted." (*American Financial*, *supra*, 34 Cal.4th at pp. 1256-1257.)

C. Measure Z Is Not a Land Use Ordinance

Although Intervenors argue that Measure Z is merely a local "land use" regulation which should not be preempted, that characterization is transparently inaccurate. Setting aside the label attached to it by its proponents, Measure Z does not operate like a typical land use regulation. It places no conditions on oil and gas production activities related to density, design, or proximity to other activities by establishing set-back limits or zoning amendments that would restrict subsurface

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and urges the Court to clarify that local legislation that frustrates, hinders, or stands as an obstacle to the accomplishment of a state's policy goals is preempted and void.

activities to non-residential zones. (See e.g., *Marblehead Land Co. v. City of L.A.* (9th Cir. 1931) 47 F.2d 528, 532 [holding that the production of oil in residential areas "would be entirely out of harmony with the development of the neighborhood"]; and *Beverly Oil Co. v. City of L.A.* (1953) 40 Cal.2d 522, 558 [holding that local governments may "prohibit . . . the production of oil in designated areas" subject to due process].) Nor does it require that the County take aesthetics or historical preservation of the County into account in determining where oil and gas operations would be appropriate. (*T-Mobile*, *supra*, 6 Cal.5th at pp. 1114-1115.)

Instead, Measure Z prohibits activities *solely because* and *only when* they support critical aspects of oil production. For example, Measure Z's Policy LU-1.22 prohibits *"[t]he development, construction, installation, or use of any facility, appurtenance, or above-ground equipment, whether temporary or permanent, mobile, or fixed, accessory or principal, in support of oil and gas wastewater injection or oil and gas wastewater impoundment*" within the unincorporated areas of Monterey County. (AR 155) LU-1.22 defines "oil and gas wastewater injection" as "injection of oil and gas wastewater into a well for underground storage or disposal (AR 156) and further defines "oil and gas wastewater" as "wastewater brought to the surface in connection with oil or natural gas production, including flowback fluid and produced water." (AR 156)

Thus, under Measure Z a company that sells and installs water pumps or tanks in Monterey County may deliver and install a water pump or tank to transfer or store irrigation water, but may not deliver or install the same pump or tank at the same location if their end use is transferring or storing water produced from an oil well to a facility for reinjection or use in steam flooding, even if DOGGR would permit that activity.

Similarly, Measure Z's Policy LU-1.23 prohibits *"[t]he drilling of new oil and gas wells*" within the unincorporated areas of Monterey County. (AR 155) As defined in LU-1.23 an "oil and gas well" is *any well* "drilled for the purpose of exploring for, recovering, or aiding in the recovery of, oil and gas." (AR 155) Through use of the word "aiding," LU-1.23 bans not only wells drilled to produce oil and gas, but steam injection, observation, monitoring, and even water wells drilled to replace the produced water, whose re-use as injected steam is banned by LU-1.22.

Thus, under LU-1.23, a water well contractor who may freely drill a water well for agricultural purposes, is prohibited from drilling exactly the same water well at exactly the same location for an oil company seeking water for purposes of drilling a new well, not because there is any difference in the well, or its impact on the land where it is drilled, but solely because the end use of the water it provides is supporting underground oil and gas activities.

Thus, unlike the ordinance addressed in *Big Creek Lumber Co.*, *supra*, where the Court held that a local land use ordinance that "restricted timber harvesting to specified zone districts" was not preempted by state law, which otherwise preempted "local regulations of the conduct of timber operations," (*Big Creek Lumber Co.*, *supra*, 38 Cal.4th at p. 1158,) because "an ordinance that avoids speaking to *how* timber operations may be conducted and addresses only *where* they may take place falls short of being a clear attempt to regulate the conduct thereof." (*Id.* at pp. 1152–53, quotations omitted,) Measure Z makes no attempt to say *where* any specific activities may occur within the County or even whether those activities, taken in isolation, may or may not occur at any given location, except to say that these activities may not occur anywhere at all *if* they are undertaken as part of two activities that are an inherent part of operating an oil field. Measure Z's purported "surface" regulations are thus defined solely with respect to their *sub*surface functions and unlike the ordinance in *Big Creek Lumber Co.*, which sought only to regulate where an activity might occur, Measure Z has the clearly intended effect of obstructing certain subsurface activities making them impossible to perform. (See *Id.*)

Ultimately, Measure Z does not impose reasonable additional restrictions on an activity permitted and promoted by state law to adjust for local concerns; but instead, it blockades undertaking a lawful activity that state law not only allows, but

encourages subject to DOGGR's oversight, even if DOGGR approves and encourages the activity. "[T]otal bans are not viewed in the same manner as added regulations and justify greater scrutiny." (*Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 915.)

In this case the court of appeal saw through the "land use ordinance" ruse and correctly rejected Intervenors' argument that Measure Z only controls "where and whether" certain activities occur, noting in the process that "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." (*Chevron, supra,* 70 Cal.App.5th at p. 169.)

As the court of appeal correctly observed, under Measure Z, oil and gas "[o]perations could proceed only if they involved no new wells and no wastewater injection, which are operational methods and practices." (*Ibid.*) As did two previous courts, this court should ignore the self-serving "land use" label and see Measure Z for what it truly is - an impermissible attempt to blockade oil and gas operations in Monterey County that directly interferes with CalGEM's duty to administer those same operations through Section 3106 in a way that balances the state's need for oil and gas production to meet its energy needs, while preventing, as far as possible, damage to life, health property, and natural resources.

CONCLUSION

By banning the ability of oil and gas operators to undertake specific processes necessary to the production of oil and gas, Measure Z directly enters a field that the state has fully occupied, and in the process conflicts directly with Section 3106's mandate that CalGEM supervise oil and gas activities in California in a manner designed to encourage the wise development of oil and gas and increase the ultimate recovery of hydrocarbons while also preventing, as far as possible, damage to life health, property and natural resources. As a result, it should be held is preempted by Section 3106, and void and the Court of Appeal's opinion should be affirmed.

Dated: June 27, 2022

CLIFFORD & BROWN
A Professional Corporation

By: /s/ *Donald C. Oldaker*
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for Eagle Petroleum, LLC

WORD COUNT CERTIFICATION

Pursuant to Rules 8.204(c)(1) and 8.486(a)(6) of the California Rules of Court I certify that this Brief contains 13,045 words, inclusive of footnotes, but not including table of contents, table of authorities, the caption page, or this Certification page.

Dated: June 27, 2022

CLIFFORD & BROWN
A Professional Corporation

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S271869 – CHEVRON U.S.A. v. COUNTY OF MONTEREY

(*PROTECT MONTEREY COUNTY*)

STATE OF CALIFORNIA, COUNTY OF KERN

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/s/ KATHLEEN HARLESTON
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[78840-2]

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Case No. 17-CV-3000790

National Association of Royalty Owners-California, Inc. v. County of Monterey, et al.
Case No. 17-CV-000871

Eagle Petroleum, LLC v. County of Monterey, et al.
Case No. 17-CV-000935

Trio Petroleum, LLC v. County of Monterey, et al.
Case No. 17-CV-001012

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