S271869

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiffs and Respondents,

v.

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

Monterey County Superior Court Case No. 16-CV-3978
(and consolidated cases), The Hon. Thomas Wills

AERA ENERGY LLC'S ANSWERING BRIEF

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INTRODUCTION

This dispute involves a voter initiative (Measure Z) that was marketed to voters as a ban against fracking in Monterey County (where no fracking occurs). In reality, however, Measure Z was a veiled attempt to usurp the power of the State to regulate production of oil and gas extraction methods. Measure Z would effectively ban the practices of "steam flooding," the "reinjection" of excess produced fluids to return them to the subsurface, and the drilling of new wells in Monterey County, where the ban of any of these legislatively sanctioned production techniques would portend the end of the primary oil extraction method that powers the county's economy. Those methods are specifically enumerated in Public Resources Code Section 3106, subdivision (b) where the State is empowered to *authorize*, promote and otherwise regulate such methods.[1]

The trial court and Court of Appeal correctly held that Measure Z was impliedly preempted by state law because it directly conflicts with the mandate provided by the State under Section 3106. They also concluded that Measure Z was

[1] Unless otherwise specified, all undesignated section references are to the Public Resources Code.

effectively a ban on well drilling, steam flooding, and reinjection in Monterey County.

Throughout its Opening Brief, Appellant Protect Monterey County and Dr. Laura Solorio (collectively, "PMC") argue the Court of Appeal applied the wrong test and only needed to consider whether it would be *impossible* for oil producers to comply with Measure Z and Section 3106. This is not the proper preemption test as construed by this Court, and PMC's advocating for such a narrow and rigid construction of the legal standard must be rejected.

Instead, this Court has always recognized that where a state mandates the promotion or encouragement of a specific activity, a complete prohibition of the activity by local regulation is impermissible. Measure Z does exactly that. The Court can and should affirm the opinion below on that basis alone.

Alternatively, this Court should formally adopt the primarily-federal "obstacle preemption" test and affirm the rulings below because Measure Z frustrates the dual purposes of the statute *to permit* oil and gas production methods to increase ultimate recovery of underground hydrocarbons, while balancing

that purpose against preventing, as far as possible, damage to life, health, property, and natural resources.

Finally, as a third basis to affirm the Court of Appeal, this Court should hold that Measure Z is preempted because the Legislature occupied the field of regulating oil and gas production in enacting the applicable Public Resources Code sections.

STATEMENT OF THE CASE

I. Statement of Facts

A. The History of Oil and Gas Production in San Ardo Field and Its Benefits to the Local Community

Appellant Aera Energy LLC ("Aera") is one of the major operators in San Ardo Field, which together with Lynch Canyon comprise Monterey County's two oil-producing fields. (7-AA-1637-1638 [8/10/2017 Independent Expert Report admitted in trial court proceedings]; 31-AA-7546.) San Ardo Field was discovered in 1947 and is located in the upper Salinas Valley of Monterey County, approximately 65 miles south of Salinas along Highway 101 and 20 miles north of Paso Robles. (7-AA-1637) It measures approximately six miles in length by two and a half miles in width, an area of approximately 4,200 surface acres. (7-AA-1802) There are more than 1.3 million acres of agricultural

lands in Monterey County, and approximately 2.4 million acres of total land. (1-AA-46 [Measure Z, ¶ 8].) That means San Ardo Field comprises roughly 0.32% (4,200 of 1,300,000 acres) of the total agricultural lands and roughly 0.17% (4,200 of 2,400,000 acres) of the total area in the county.

San Ardo Field is the eighth most productive oil field in California, and thirteenth largest for recovering oil, from which two billion barrels of "original oil in place" already have been recovered. (7-AA-1669) If operations continue at their projected pace, San Ardo Field is expected to produce an additional 850 million barrels of economically recoverable crude oil over the next 100 years. (7-AA-1669–1670)

Aera and its predecessors have responsibly operated their oil and gas exploration, development, and production business at San Ardo Field since the 1950s. (7-AA-1637) Aera's oil and gas interests in the San Ardo Field stem from (1) five leases entered into between various property owners in Monterey County and Aera's predecessors in interest, Mobil Oil and Jergins Oil Company; and (2) a 1980 Conditional Use Permit granted to Mobil Oil by Monterey County. (7-AA-1703)

In the small town of San Ardo (with an approximate population of 500 people), the oil and gas industry directly provides hundreds of jobs, and supports small businesses. (9-AA-2274–2275) For example, the Superintendent of the San Ardo Union Elementary School District ("School District") testified below that the School District "receives significant revenue from the property tax dollars connected to the oil fields in the district." (9-AA-2277) The oil and gas industry allows for the city to obtain certain bonds approved in elections that help the local community, including a $6.8 million bond for the School District approved by voters in 2016. (9-AA-2276) In addition to the jobs provided by the oil and gas producers like Aera, collateral jobs such as those employees who work at the School District depend on the industry's continued existence. (9-AA-2277–2278)

B. San Ardo Field's Formations Contain Oil Trapped In Reservoirs That Is Pumped To The Surface

In oil fields like San Ardo Field, oil is found in layers called "formations," located hundreds or thousands of feet beneath the ground surface. (7-AA-1641) Oil is trapped in an "anticline" structure shaped like an upside down bowl that prohibits the upward flow of reservoir fluids. (7-AA-1623–1624 [Figure 1

showing illustration of anticline structure with multiple zones for the seal rock, reservoir rock, and source rock]) Oil and gas forms and pushes up against a layer of seal rock at the top of the formation that prevents oil and gas from rising above the reservoir rock. (7-AA 1623)

There is a significant volume of salt-laden "saline water" along with the oil in the formations (roughly 95% saline water, and 5% oil). (7-AA-1625, 1653 [Independent Expert Report chart showing the "water cut" or the amount of saline water present as a percentage of total fluids]) Because oil is less dense than water, the oil and gas naturally migrates upwards through the reservoir rock layer of the formation, displacing the co-existing saline water. (7-AA-1624) Oil engineers drill wells to extract the oil by creating a path for fluids within the reservoir rock to travel to the surface. Depending on the placement of the wells, initially it may be possible to produce oil or gas containing very little water, and without mechanical assistance. (7-AA-1624–1627) As production progresses over time, however, reservoir pressure drops to where the fluids will not flow to the surface without assistance. (7-AA-1626–1627) Pumping techniques are then used to bring the fluids to the surface. (7-AA-1627) The saline water in the

reservoir rock is unavoidably drawn into production wells where it is brought to the surface with the oil. (7-AA-1624)

San Ardo Field has two primary oil-producing reservoirs, the Lombardi Sands Formation and the Aurignac Sands Formation (the "formations"). (7-AA-1641–1644, 1803; 15-AA-3643–3646) The formations begin at roughly 1,800 feet, and 2,200 feet below ground. (7-AA-1641–1644, 1803; 15-AA-3643–3646) The freshwater in the area of the oil field is geologically isolated from the oil bearing formations, as the oil bearing formations are more than 1,600 feet deeper than the deepest known freshwater within San Ardo Field. (15-AA-3640; 7-AA-1803)

C. Steam Flooding Is Used at San Ardo Field, Not Hydraulic Fracturing, and Non-Potable, Unusable Saline Water Produced With Oil Is Reinjected Back Into the Subsurface or Disposed

The Hydraulic Fracturing method of extracting oil, commonly known as "fracking," is not currently used by producers at San Ardo Field, primarily because the formations are comprised of loose, highly permeable sand (like that found in a child's sandbox), and there is no technical reason to employ fracking in such conditions. (7-AA-1580, 1617) There have been

only two or three fracking treatments used at San Ardo Field in its history, performed on a trial basis in 2007 and subsequently abandoned. (7-AA-1617)

Instead of fracking, producers extract oil through a method called "steam flooding," a technique dating back to 1957. (7-AA-1806) The crude oil produced at San Ardo Field is "heavy," which means it is highly viscous (like roofing tar) and cannot naturally flow into the production wells drilled by engineers. (7-AA-1644, 1645 [Figure 15 Comparing Viscosity Of Light And Heavy Crude]) To recover the oil, steam is injected into the oil reservoir to create a "steam chest"–an expanding bubble of steam over the oil throughout the formation where the steam heats the heavy oil below. (7-AA-1644, 1647–1652) When the steam chest heats the oil within San Ardo Field, it lowers the oil's viscosity allowing a greater portion of the oil to be recovered. (7-AA-1648–1649)

The steam chest in the formations at San Ardo Field must be continuously sustained and expanded, through close monitoring and attention to the temperature and pressure of the steam chest. (9-AA-2249–2254) Sustaining the steam chest also requires drilling new wells because without new wells and continuous steam injection as the steam chest expands, oil would

revert to its natural state (i.e. heavy and highly viscous), rendering it impossible for producers to extract it. (9-AA-2249–2254)

A steam chest takes many years to develop and if an oil producer like Aera were to stop drilling wells or to stop adding steam to the formations, the steam chest would collapse. (9-AA-2257–2258) Texaco stopped continuous steam injection at a steam flooding operation in San Ardo Field and the steam chest immediately collapsed, which completely halted oil production. (9-AA-2257–2258)

The steam flooding method unavoidably brings saline water along with the oil to the surface because, in San Ardo Field, saline water makes up roughly 95% of the total naturally occurring fluids in the reservoir. (7-AA-1653, 1805) For each barrel of oil recovered from the San Ardo Field, fourteen to nineteen barrels of saline water are produced. The saline water that comes to the surface is not suitable for drinking by humans or animals, nor is it suitable for irrigation because of its poor water quality and salinity. (7-AA-1805)

Staggering quantities of saline water are brought to the surface with the oil, making it a challenge to reuse or dispose of

this non-potable water. Since 2009, the San Ardo Field saline water production has exceeded 300,000 barrels per day. (7-AA-1663, 1805) There is no economically viable method to legally dispose of the massive volume of water produced other than to return it to the underground formations from which it came. (7-AA-1806) When the mixture of saline water and oil reaches the surface, producers thoroughly remove the crude oil and solids from the water, and then "reinject" the water, or return it to the formations, either as water or steam. (7-AA-1805) Roughly 44% (or roughly 145,000 barrels) of the saline water brought to the surface is reinjected for steam flooding, meaning it is recycled back into the steam chest. (7-AA-1805; 24-AA-5829 [chart showing how much saline water brought to surface is reinjected through the various methods]) Another 43% of the water is reinjected through disposal wells, a process regulated and approved by the State of California Department of Conservation's Division of Oil, Gas, and Geothermal Resources ("DOGGR").[2]

[2] DOGGR has since been renamed as the Geologic Energy Management Division, also often referred to as "CalGEM." DOGGR is used hereinafter to remain consistent with the usage of the decisions below.

(24-AA-5829) The remaining 10% of the saline water is converted to fresh water through a reverse osmosis unit, with the remaining 3% brine stream reinjected through the disposal wells. (9-AA-2340; 24-AA-5829)

The saline water reinjected and disposed through steam flooding in San Ardo Field does not currently serve as a source of drinking water for humans or animals. (15-AA-3645) The saline water is not reasonably expected to supply a public water system. (15-AA-3645, 3656) The saline water has no other beneficial use (aside from reinjection for steam flooding) due to the presence of hydrocarbons, the depth of the formations where it is located, and the poor quality of the water in its original state. (15-AA-3655–3658)

The State, through DOGGR and the State Water Board, has determined that the reinjection of saline water at San Ardo Field does not endanger relevant water sources under the Safe Water Drinking Act. (See 12-AA-2918–2920 [letter from Chief Deputy Director of State Water Board indicating approval of an aquifer exemption], 2922–2924 [DOGGR's Notice of Proposed Aquifer Exemption of approval of aquifer exemption for the San Ardo Field], 2925–2928 [State Water Board's 2017 statement of

basis for expansion of aquifer exception at San Ardo Field and explaining that saline water used for reinjection is not a source of drinking water]; see also 31-AA-7576 [trial court's statement of decision crediting evidence of aquifer exemption as demonstrating the State determined the reinjection methods at San Ardo Field do not endanger relevant potable water sources])

Drilling new wells in San Ardo Field is crucial to the steam flooding process because over time the size of the steam zone increases and flow rates of the fluids decline. (7-AA-1649) Therefore, to maintain production rates, producers must regularly drill new wells for steam flooding and reinjection to be able to continue to recover oil. (7-AA-1649) Many wells that stop being productive are shut in, plugged or abandoned. (7-AA-1655)

At the time of the trial in this dispute (year-end 2017), approximately 2,764 wells had been drilled in the 70 years of operations at San Ardo Field, only 731 of which (26%) were active wells. (7-AA-1655) San Ardo's wells account for 94% of the active wells and 97% of the oil production in Monterey County. (7-AA-1655)

D. The State Comprehensively Regulates Reinjection of Produced Water and Mandates DOGGR To Supervise and Permit Producers to Use All Methods and Practices for Oil Extraction

The California Legislature has adopted a comprehensive statutory scheme to promote the conservation of oil and gas and to regulate virtually all aspects of their operation. At the federal level, Congress also comprehensively regulates "Class II" Injection wells pursuant to the UIC Program, which was created by the EPA through the Safe Drinking Water Act. The scope of the federal statutes is not described herein because federal preemption of Measure Z is not an issue before the Court.

Specific statutory provisions relating to oil and gas operations in California are located in the Public Resources Code, and include the notice of intent to drill and abandon wells (§§ 3203, 3229); bonding (§§ 3204–3207); well abandonment (§ 3208); recordkeeping (§§ 3210–3216); blowout prevention (§ 3219); use of well casing to prevent water pollution (§ 3220); protection of water supplies (§§ 3222, 3228); repairs (§ 3225); regulation of production facilities (§ 3270); waste of gas (§§ 3300–3314); subsidence (§§ 3315, 3347); spacing of wells (§§ 3600–3609); unit operations (§§ 3635–3690); and regulation of oil sumps (§§ 3780–

3787). There are also a number of related regulations codified in the California Code of Regulations, title 14, §§ 1712, et seq.

The statutory scheme lodges the power to administer oil and gas operations with DOGGR. (§ 3106.) The statute states the dual purposes of (1) promoting the increased total recovery of oil and gas; and (2) protecting public health and the environment. (§ 3106.)

The statute's initial clause at the time of enactment, now located in part of Section 3106 subdivision (a), provided a mandate to DOGGR to "supervise the drilling, operation, maintenance, and abandonment of wells."

In 1961, the Legislature added subdivision (b), expressing an objective for increased recovery of oil and gas, and mandating DOGGR to supervise methods to carry out that purpose. Specifically, DOGGR "*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*. …" (§ 3106, subd. (b), italics added.) Thus, the first of the dual purposes—to increase recovery of underground hydrocarbons—was expressly

stated by the Legislature. (§ 3106, subd. (b).) The Legislature also expressly enumerated methods for carrying out that purpose, including steam flooding, reinjection, and the drilling of wells within subdivision (b), so long as those methods have been approved by DOGGR. (§ 3106, subd. (b) ["[I]t 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 … 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 [DOGGR]."].)

In the 1970s, the Legislature added two amendments to Section 3106 that further articulated its second purpose—public health and environmental protection. First, in 1970, the Legislature amended subdivision (a) so that DOGGR's regulatory mandate included "to prevent, as far as possible, damage to life, health, property, and natural resources." Next, in 1972, the text

that is now subdivision (d) was added, which reads: "To best meet oil and gas needs in this state, [DOGGR] shall administer this division so as to encourage the wise development of oil and gas resources." (§ 3106, subd. (d).) The legislative history of the 1972 amendment indicates the Legislature's goal was to strengthen DOGGR's role in supervising oil operations "in dealing with environmental problems." (*Chevron U.S.A., Inc. v. County of Monterey* (2021) 70 Cal.App.5th 153, 165 (*Chevron*).)

But critically, the 1970 and 1972 amendments did not abrogate Section 3106 subdivision (b) or erode the first statutory purpose to increase recovery of oil and gas by mandating DOGGR to promote and authorize utilizing all methods and practices, and the Legislature continued to express that statutory purpose and to lodge the power to regulate such methods with DOGGR.

In 1989 and 1994, two further amendments were added, now located in subdivision (c), which empowered DOGGR to implement a monitoring program to detect releases to the soil and water for aboveground oil production tanks and facilities.

Accordingly, as currently constructed, Section 3106 charges DOGGR with balancing the dual purposes of increased oil production while avoiding damage to life, health, property, and

natural resources in the course of pursuing increased production, to the extent possible. Through that mandate to regulate methods and practices for oil and gas production, DOGGR has a number of tools to achieve the statute's dual purposes, including promoting and authorizing steam flooding, reinjection, and well-drilling, where DOGGR deems appropriate. The Legislature has never expressed a preference between the dual purposes, or indicated that one purpose is paramount over the other.

II. Procedural History

A. Measure Z Is Marketed as an Anti-Fracking Voter Initiative Despite its Broader Reach and Is Adopted By Voters in 2016

The Measure Z voter initiative was included on the November 2016 ballot for Monterey County after it was rejected by the Monterey County Board of Supervisors. (31-AA-7545) Appellant PMC was formed in response to the Board of Supervisor's rejection of Measure Z as a proposed interim ordinance to prohibit well stimulation treatments, or fracking. (5-AA-1207–1209) The voter initiative to adopt Measure Z was pitched to voters as an anti-fracking ban, even though there was no fracking occurring in Monterey County, nor were producers applying to utilize the fracking method for oil recovery—in fact,

there had only been two or three known instances of fracking in Monterey County dating back to 2007, which were conducted on a trial basis and subsequently abandoned. (31-AA-7545–7546)

But Measure Z was not limited to a ban on fracking—it went further, targeting the oil and gas industry's ability to continue operating in Monterey County.[3] Though less transparent to the voters, the ballot measure included prohibitions of two essential technical elements of heavy oil production – steam flooding and the return of produced water to the subsurface – where the banning of either would effectively terminate oil production operations at San Ardo Field, if implemented.

[3] The anti-fracking prohibition is located in Policy LU-1.1 and not at issue in this appeal because the trial court concluded that Appellees lacked standing to challenge the fracking ban because the practice was not occurring in Monterey County. (31-AA-7565–7568) The conclusion was not challenged in the Court of Appeal proceedings. (*Chevron*, *supra,* 70 Cal.App.5th at p. 160, n. 3.)

1. Measure Z bans "wastewater reinjection" and "impoundment" methods to prevent oil producers from treating and returning to the subsurface the vast quantities of non-potable, unusable saline water that is brought to the surface with the oil.

Policy LU-1.2 bans "land uses" in support of so-called wastewater injection and impoundment (i.e. reinjection through steam flooding and disposal of saline water). The policy bars "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." (1-AA-51) "Oil and gas wastewater injection" is defined as "injection of oil and gas wastewater into a well for underground storage or disposal," and "impoundment" is defined as "the storage or disposal of oil and gas wastewater in depressions or basins in the ground, whether manmade or natural, lined or unlined, including percolation ponds and evaporation ponds." (1-AA-48) Thus, in effect, Policy LU-1.2 forbids steam flooding, and the reinjection and disposal of saline water, because producers are prohibited from returning

the excess saline water (more than 300,000 barrels per day) into the ground through "storage," "injection," and "disposal."[4]

2. Measure Z also bans the drilling of new oil and gas wells, effectively putting an expiration date on steam flooding operations at San Ardo Field.

Policy LU-1.23 immediately bars the drilling of any new oil wells "for the purpose of exploring for, recovering, or aiding in the recovery of, oil and gas." (1-AA-48) Measure Z thereby limits any future production of oil and gas at the San Ardo Field to existing wells while there are areas of the San Ardo Field expected to produce oil and where wells currently do not exist. (7-AA-1667—1669)

Because new wells must be drilled in order to maintain the steam chest, the practical effect of Policy LU-1.23's prohibition on drilling new wells will be to end steam flooding at San Ardo. (7-AA-1668—1670)[5] With the end of steam flooding, the steam chest will collapse, and oil production at San Ardo Field will end. (7-AA-1669—1670)

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[4] Policy LU-1.22 is hereinafter referred to as the "Wastewater and Impoundment Ban."

[5] Policy LU-1.23 is hereinafter referred to as the "New Wells Prohibition."

B. The Trial Court Finds that the Wastewater Ban and Prohibition on New Wells Are Preempted by Section 3106

In December 2016, Aera and Appellee Chevron USA Inc. filed petitions for a writ of mandate alleging that Measure Z was preempted by Section 3106. (1-AA-28) Measure Z was stayed by stipulation until the resolution of Appellees' claims. (31-AA-7547—7548) The other Appellees, which include producers and entities that own the mineral rights at San Ardo Field (among others), filed related lawsuits. (31-AA-7548) In March 2017, PMC intervened in the trial court action, arguing that Measure Z's Wastewater and Impoundment Ban and New Wells Prohibition were valid exercises of Monterey County's police power, and not preempted by Section 3106. (31-AA-7569)

In November 2017, the trial court held a four-day bench trial for "Phase I" of the case, which encompassed the preemption challenges to Measure Z, and issued a final statement of decision on January 25, 2018. (31-AA-7545—7591) The trial court found Measure Z was invalid on federal preemption grounds (31-AA-7574—7579), not at issue here. (31-AA-7582—7583) The trial court further found that California law preempted Measure Z's Wastewater and Impoundment Ban and New Wells Prohibition

by (1) directly conflicting with Section 3106; and (2) by entering the field occupied by the State for oil and gas operations under Section 3106. (31-AA-7568—7579) The trial court found the following:

- The Wastewater and Impoundment Ban was "contradictory" to Section 3106 and that "[b]y enacting this statute, the Legislature expressly declared the state's policy regarding, inter alia, wastewater injection. Policy LU-1.22, then, is irreconcilable with state policy." (31-AA-7572)

- The New Wells Prohibition "impermissibly prohibits certain production techniques" and therefore "directly conflicts with DOGGR's mandate" under Section 3106. (31-AA-7578)

- Measure Z is not a "land use" measure and its "purported prohibition on certain 'land uses' is clearly a pretextual attempt to do indirectly what it cannot do directly." (31-AA-7570)

- That "California's state oil and gas legal and regulatory scheme fully occupies the area of the manner of oil and gas production," and thus Measure Z is preempted because it "seeks to regulate the manner of oil and gas production by restricting particular production techniques." (31-AA-7572)

In March 2018, the trial court entered judgment, issued a writ of mandate and enjoined the County from implementing Measure Z's wastewater ban and prohibition on drilling new wells. (32-AA-7680)

C. The Court of Appeal Affirms the Trial Court and Holds That Measure Z's Wastewater and Impoundment Ban and New Wells Prohibition Are Preempted By Section 3106

PMC appealed the trial court's judgment contending the trial court erred in finding that 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 "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*, *supra,* 70 Cal.App.5th at p. 163.) In response, Appellees contended the trial court properly found Measure Z was preempted by Section 3106 because the State's mandate that DOGGR supervise and permit reinjection methods was completely prohibited by, and thus in direct conflict with, Measure Z. (*Ibid.*)

In October 2021, the Court of Appeal issued a published decision 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.)

- Measure Z was thus 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 p. 172.)

- 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 operation should be permitted to drill new wells or utilize wastewater injection for the discretion of local entities." (*Id.* at p. 170.)

- Its conclusions should not be construed to cast doubt on the validity of local zoning regulations that restrict oil production to certain geographic locations because Measure Z "involves no such regulations." (*Id.* at p. 172, n. 16)

Because the Court of Appeal held Measure Z was preempted by state law for conflicting with Section 3106, it declined to consider whether the trial court erred in determining that Measure Z impermissibly entered the field occupied by the State regarding oil and gas regulation, or whether Measure Z

was preempted by federal law. (*Chevron*, *supra,* 70 Cal.App.5th at p. 163, n. 14.)

D. This Court Grants PMC's Petition for Review

In November 2021, PMC filed a Petition for Review ("Petition") in this Court 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) PMC also argued that the Court of Appeal improperly relied on "obstacle preemption" which has not been expressly recognized by this Court. (Petition at pp. 38-40)

Appellees jointly opposed the Petition, arguing this Court's review was not necessary because the Court of Appeal properly applied conflict preemption principles from its jurisprudence. (Joint Answer to Petition at pp. 28-31) Appellees also argued that the Court of Appeal's opinion did not depart from this Court's existing implied preemption jurisprudence. (*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

An appellate court reviews a trial court's grant of a writ of mandate for substantial evidence as to the trial court's factual findings, and reviews legal determinations de novo. (*Citizens for Amending Proposition L v. City of Pomona* (2018) 28 Cal.App.5th 1159, 1186.) "Interpretation of statutes … is subject to de novo review." (*Ibid.*)

In determining whether a local law conflicts with state law, this Court gives "effect to the intended purpose of the provisions at issue." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933.) 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." (*Ibid.*)

Where the subject matter covered by a local ordinance is "one of general or statewide concern, the Legislature has paramount authority; and if the Legislature has enacted general legislation covering that matter, in whole or in part, there must be a presumption that the matter has been preempted." (*Northern California Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 107 (*Nor. Cal. Psychiatric*).)

ARGUMENT

A county's regulation, including land use regulations will conflict with state law, resulting in preemption, where the local regulation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-898 (*Sherwin-Williams*).) "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]." (*Ibid.*)

Here, Measure Z is impliedly preempted by Section 3106, under *three* separate and independent bases. First, Measure Z directly conflicts with Section 3106 by interfering with DOGGR's mandate to balance and implement the dual purposes of the statute to increase the ultimate production of subsurface oil and gas while protecting the environment. To enable DOGGR to discharge its mandatory duty to balance the dual purposes of Section 3106, the Legislature granted DOGGR the authority to permit *all* methods and practices of oil production, including, steam flooding, well drilling and reinjection of produced saline water. Measure Z eviscerates this power through a complete ban on steam flooding, reinjection, and well-drilling. PMC argues the Court of Appeal applied the wrong test for conflict preemption, but 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*).)

Second, Measure Z frustrates, hinders, and stands as an obstacle to Section 3106's dual purposes by effectively preventing DOGGR from fulfilling its mandate to permit efficient and effective oil and gas production, while achieving protection of public and environmental health.

And finally, even if there is no conflict or obstacle preemption, Section 3106 demonstrates the Legislature's intent to fully occupy the field of oil and gas production because it enacted a comprehensive statutory scheme for oil and gas production. Accordingly, under any of the three tests, Measure Z is preempted and the Court of Appeal decision should be affirmed.

I. Measure Z's Wastewater and Impoundment Ban and New Wells Prohibition Are Preempted Because They Conflict with Section 3106's Mandate that DOGGR Carry Out the Statute's Dual Purposes

The central conceit of PMC's Opening Brief ("Op. Br."), and its Petition for Review, is that the Court of Appeal "failed to actually apply this Court's long-established test" for conflict preemption. (Op. Br. at p. 34; see also Petition at pp. 34-40) Not so.

According to PMC, this Court's case law establishes that a local ordinance is "contradictory" or "inimical" for preemption purposes, *only* where the challenged local regulation "directly requires what the state statute forbids or prohibits what the state enactment demands." Thus, PMC contends, the Court of Appeal failed to apply the right test. (Op. Br. at p. 34, citing to *T-Mobile*, *supra,* 6 Cal.5th at p. 1121.) But this Court has not required such a rigid and narrow construction of the conflict preemption standard. So the Court of Appeal did get it right.

This Court has expressed that 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." (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 743 (*City of Riverside*).) It has also said that "no inimical conflict will be found where it is *reasonably* possible to comply with both the state and local laws." (*Ibid.*, italics added.)

As part of that inquiry, this Court has clarified that "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*, *supra,* 56 Cal.4th at pp. 763-764 (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"].)

PMC argues the Court of Appeal applied a federal "obstacle preemption" analysis. (Op. Br. at pp. 11-12, 33) But the Court of Appeal merely cited to *Great Western*, *supra,* 27 Cal.4th at p. 868—a case decided by this Court—for the well-established point that even where the state law leaves room for local regulation, such as with zoning regulations, it is not permissible for the locality to enact a complete ban on an area of regulation placed exclusively in the State's hands. (*Chevron*, *supra,* 70 Cal.App.5th 153 at p. 172.)

Thus, determining whether a local ordinance is in conflict with a state law involves two inquiries: first, does the Legislature require *or* promote (or, to use a similar term, authorize) a particular action by placing the power to regulate the activity in the hands of the State? And second, does the local ordinance

"forbid" (i.e. through a complete ban) the state-promoted activity? Here, both answers are yes.

First, the statutory scheme mandates that DOGGR shall oversee the permitting process for oil and gas production and to carry out the dual purposes of (1) increasing total recovery of oil; while also (2) accounting for the protection of public health and the environment. This is evident in the statutory language:

- DOGGR "*shall* so supervise the drilling, operation, maintenance, and abandonment of wells." (§ 3106, subd. (a), italics added.) It also must do so to "prevent, as far as possible, damage to life, health, property, and natural resources." (§ 3106, subd. (a).)

- DOGGR "*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*." (§ 3106, subd. (b), italics added.)

- DOGGR "*shall* administer this division so as to encourage the wise development of oil and gas resources." (§ 3106 subd. (d), italics added.)

The Legislature's continuous use of the word "shall" makes clear DOGGR has the *exclusive* authority and is *required* to supervise the oil and gas permit process to promote oil and gas extraction, while *also* balancing concerns to public health and the environment. (§ 3106, subds. (a)-(b), (d).) This is not merely

"encouragement" as PMC contends (Op. Br. at pp. 16-17)—DOGGR has a *mandate* to permit, exclude, or otherwise regulate, oil and gas production methods. (§ 3106, subd. (b).) And in promoting the production methods to aid in the recovery of natural resources, DOGGR also has the mandatory authority to regulate the process in a way that balances the goal of promoting oil and gas extraction with public health and environmental concerns. (§ 3106, subds. (a), (d).)

In addition to lodging the power to oversee the permitting process of oil and gas operations, and to regulate such permits to address efficient production and environmental concerns, the statute also provides DOGGR with a number of tools, including authorizing the *specifically enumerated* methods of steam flooding, reinjection of wastewater, and drilling new wells to increase the ultimate recovery of underground hydrocarbons. (§ 3106, subd. (b) [declaring it the "policy of this state" to allow oil and gas contractors and lessees to contract for production of oil and gas through, inter alia, "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 answer to the first question of the Court's test is yes—the Legislature requires a particular action, the permitting of oil and gas production balanced with environmental protection, by placing the power to do so in the hands of the State.

Second, there should be little doubt that Measure Z directly conflicts with Section 3106's mandated promotion of oil and gas production methods because it specifically *eliminates* certain enumerated tools granted to DOGGR by the Legislature to carry out its statutory duties. Measure Z's effect is to enact a *complete ban* of wastewater reinjection and the drilling of new wells. (7-AA-1668 [Independent Expert Report concluding "oil production from the San Ardo Field will be terminated within five years" if Measure Z takes effect and new wells are not drilled], 7-AA-1669 [explaining that the Wastewater and Impoundment Ban "will force operators to end oil production from the San Ardo Field within five years of its effective date."].) The New Wells Prohibition is immediate and would end steam flooding operations at San Ardo Field because over time as existing wells phase out, the steam chest will collapse. (9-AA-2257-2258) And the Wastewater and Impoundment Ban prohibits reinjection and

steam flooding methods. (1-AA-134) Because Measure Z completely eliminates tools provided to DOGGR to carry out the statute's dual purposes of promoting oil and gas production while protecting the environmental and public health, it conflicts with the statute and is preempted. (*Great Western Shows*, *supra,* 27 at p. 868.) We know this is true as Policy LU-1.2 forbids steam flooding, and reinjection and disposal of saline water, making it impossible for producers to treat the excess produced water reasonably through injection, storage or disposal. (1-AA-48.) Moreover, Policy LU-1.23 prohibits the drilling of new wells, which must be installed to maintain the steam chest over time. (7-AA-1668-1670) Put another way, there is simply no way for DOGGR to perform the task it has been charged with if Monterey County is allowed to remove multiple enumerated methods and practices it uses to carry out the statute's dual purposes, thereby making oil extraction impossible. If Measure Z is not invalid, the statute's language will have no purpose, and it will be as if Monterey County voters were permitted to re-write (and eliminate) Section 3106.

In its Petition, PMC argued that a statute's "mere 'encouragement' of an activity is insufficient to demonstrate

preemptive intent." (Petition at p. 34) In a vacuum, that may be true if the activity "encouraged" by the statute did not provide a state entity with a mandate to regulate (as Section 3106 does), and if the local ordinance was not a complete prohibition on the encouraged activity (as Measure Z is). (*Cf. Great Western Shows, supra,* 27 Cal.4th 853 at pp. 868-870 [rejecting argument that local ordinance restricting gun show sales on county property was impliedly preempted by state statutes allowing county to regulate gun shows because the local ordinance did not "propose a complete ban on gun shows within the County"].)

PMC further argues that oil producers can comply with both Measure Z and Section 3106 because producers can simply decide to stop extracting oil in Monterey County. (Op. Br. at p. 32) But it is not *reasonable* for producers to do so because that would render one of the statute's dual purposes and specifically declared policies superfluous and moot. (See § 3106, subd. (b) [DOGGR's mandate to regulate oil and gas operations is "for the *purpose of increasing the ultimate 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 [DOGGR].")[6]

Certainly, part of the Court's conflict preemption test includes the inquiry as to whether it is *reasonable* (i.e. not merely plausible as a technical matter) to comply with the state law and the local ordinance. (*City of Riverside*, *supra*, 56 Cal.4th at p. 743.) But it cannot be as simple and restrictive as PMC wants it to be, which is merely to ask whether a regulated entity could plausibly comply with both state and local law by opting out of the activity completely. (Op. Br. at p. 32) Under that construction of the test, a local ordinance would never be preempted by state law even when it has the effect of a complete ban of an activity exclusively regulated and promoted by the State. That is not, and has never been, the law. (*Great Western Shows, supra,* 27 Cal.4th at pp. 867–868; see also *City of Riverside*, *supra,* 56 Cal.4th at pp. 763-764 (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,

[6] It is also a disingenuous assertion, because it is the equivalent of saying "now that we've effectively banned oil extraction through Measure Z, you should just 'choose' to walk away."

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."]; see also *San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 481 [holding local ordinance's 10-year prohibition on landlords removing rental units from the market was preempted by the State's Ellis Act notwithstanding that the landlords had the right to exit residential rental markets in compliance with both the local ordinance and the Ellis Act].)

PMC's radically narrow construction of the conflict preemption test purportedly rests on three of this Court's opinions. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139 (*Big Creek*); *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107 (*T-Mobile*); *City of Riverside*, *supra,* 56 Cal.4th at p. 729; see, e.g. Op. Br. at pp. 38-40.) But PMC fails to recognize that in each of these cases there was either (1) no state-mandate for the required promotion and regulation of a specific activity to achieve a specific purpose; or

(2) the local ordinance was not a prohibition on the specific subject matter the state law sought to promote. (*Big Creek*, *supra,* 38 Cal.4th at p. 1161 [local zoning ordinance regulating location of timber operations did not conflict with state forestry statutes that encouraged "maximum sustained production of high-quality timber products" and was not a complete prohibition on timber production but merely a zoning law regulating timber production]; *City of Riverside*, *supra,* 56 Cal.4th at p. 758 [state statute providing medical marijuana cooperatives with limited exemptions from state criminal liability did not preempt local ban against medical marijuana distribution facilities because "state law does not 'authorize' activities, to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions"]; *T-Mobile*, *supra,* 6 Cal.5th at pp. 246-247 [local ordinance allowing a city to condition permit approval for wireless telephone line permits on "aesthetic considerations" did not conflict with state statutes regarding the construction of telephone lines because the state law "says nothing about the aesthetics or appearance of telephone lines"].)

Thus, PMC's cited cases are inapplicable to the conflict that exists between Section 3106 and Measure Z. Unlike the local

ordinance in *Big Creek*, Measure Z is a *total* ban against wastewater handling, impoundment and reinjection, and against new well construction in Monterey County despite the State's authorization for DOGGR to allow them. (7-AA-1667 [the Wastewater and Impoundment Ban "is expected to bring an end to existing San Ardo oil and gas operations with expiration of the five-year phase-out period … Measure Z will directly prohibit the impoundment and reinjection of two-thirds of the water produced every day in the San Ardo Field."]; *id.* ["[N]ew wells are required from year to year in order to sustain production rates from the field."]) And unlike the local ordinance in *City of Riverside*, Measure Z is not merely an exemption from state-promoted activities but a complete ban applicable to *all* producers. (1-AA-48-49) Finally, the interplay between the ordinance and state law is distinct from that in *T-Mobile* because Measure Z specifically addresses the activity authorized in Section 3106; indeed, it practically targets it by directly *removing* tools the Legislature provided to DOGGR to carry out its mandatory enforcement of the dual statutory purposes. (Compare 1-AA-48 [Wastewater and Impoundment Ban which prohibits "injection of oil and gas wastewater into a well for underground storage and

disposal"] and 1-AA-48-49 [New Wells Prohibition], with Section 3106, subd. (b) [declaring it the policy of the State to authorize and promote methods for the "injection of air, gas, water, and other fluids," to apply "pressure, heat or other means for the reduction of viscosity" of oil, and to "creat[e] … enlarged or new channels for the underground movement of hydrocarbons into production wells"].)

Finally, if PMC's version of the test—which would only have this Court consider whether it is technically possible or impossible to comply with state and local law—would have a drastic impact on the State's ability to enact legislation free from local interference. For example, accepting PMC's construction could have a ripple effect in other areas of law, such as by curtailing the State's ability to address the current housing crisis by enacting statewide affordable housing legislation. (See, e.g., *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 718 [holding home rule doctrine did not apply and San Jose policy was in conflict with State's affordable housing laws, and therefore preempted.)

Accordingly, as the trial court and Court of Appeal did, this Court need only apply the test it has applied for decades, and

reject PMC's rigid construction of conflict preemption. State law here places the power to carry out the dual statutory purposes of Section 3106 *exclusively* in the hands of the State, provides DOGGR with the means and specifies methods by which it is mandated to balance and to carry out the dual statutory purposes of Section 3106. And yet the local ordinance is a complete ban of means and methods specified by the Legislature, directly conflicting with the State's mandate and DOGGR's ability to carry out that mandate. State law thus must preempt the conflicting local ordinance, and that can be the end of this Court's inquiry. This Court need not consider any other arguments and the Court of Appeal's decision should be affirmed.

II. Measure Z Also Frustrates the Purposes of Section 3106 by Removing DOGGR's Authority To Permit Drilling Of Oil Wells and Wastewater Injection

Alternatively, even if the Court accepts PMC's narrow and unprecedented construction of the conflict preemption standard and holds there is no conflict preemption, the Court should alternatively conclude Measure Z frustrates and hinders the dual purposes of Section 3106 to promote oil and gas production while also promoting public health and environmental protection. The doctrine has been well-established at the federal level and there

is no reason for discarding it at the state level. Moreover, under that test it is even more apparent that Measure Z frustrates the dual purposes of Section 3106.

A. The Court Should Clarify That a Local Regulation Cannot Frustrate, Hinder, or Stand as an Obstacle to a State Statute's Purpose

PMC's argument against applying obstacle preemption sets up a straw man characterizing the doctrine as a remedy for the "need to fix" a "broken" preemption doctrine. (Op. Br. at pp. 63-64) According to PMC, application of the obstacle preemption test would be akin to judicial activism by "import[ing]" the doctrine into California law. (Op. Br. at p. 63) That not only oversimplifies the doctrine, but fails to recognize this Court's consistent application of it.

It is true that the Court recently expressed that it has never said "explicitly whether state preemption principles are coextensive with the developed federal conception of obstacle preemption." (*T-Mobile*, *supra,* 6 Cal.5th at p. 1123.) But the Court has for years incorporated obstacle preemption principles into the analysis of conflict preemption, and implicitly recognized that a local ordinance cannot frustrate or hinder the purpose of a state law. (See *Great Western*, *supra,* 27 Cal.4th at p. 868 [citing

federal law to conclude that "when a statute or statutory scheme seeks to promote a certain activity … [the] local regulation cannot … *frustrate* the statute's purpose."], italics added; *City of Riverside*, *supra,* 56 Cal.4th at p. 764 (Liu, J., concurring) [federal preemption law is a "more complete statement of conflict preemption" which "no doubt applies to California Law"]; *T-Mobile*, *supra,* 6 Cal.5th at p. 1123 [court applied the obstacle preemption test to find no preemption despite its acknowledgment that it has not "explicitly" stated whether the federal and state tests are coextensive].) Even PMC acknowledges the Court has "occasionally considered obstacle preemption arguments." (Op. Br. at p. 62) Thus, the Court is not "fix[ing]" anything or acknowledging the preemption doctrine is "broken" merely by applying the principles that have been evident in its jurisprudence for nearly 20 years.

Perhaps more importantly, PMC's arguments as to *why* the doctrine should *not* apply are not persuasive. The crux of PMC's argument is that the obstacle preemption doctrine "oblig[es] judges to insert themselves into what should be legislative processes." (Op. Br. 63-64 [citing to United States Supreme Court dissenting and concurring opinions by Justices Stevens,

Kennedy, and Thomas, criticizing the doctrine]) But the reality is the obstacle preemption doctrine protects the superior legislative purpose by prohibiting interference by local laws.

Setting aside the irony that PMC now wishes to preserve the State's legislative process (as it also argues for an impossibly difficult standard to demonstrate state preemption of local laws), there is no basis to conclude obstacle preemption—at the federal or state level—amounts to judicial supremacy over the legislative branch. In the U.S. Supreme Court opinion cited by PMC for the dissenting view, the majority opinion adequately explained how Congressional intent is *preserved* through obstacle preemption. (*Geier v. American Honda Motor Co., Inc.* (2000) 529 U.S. 861, 873.)

In *Geier*, the U.S. Supreme Court concluded that a negligence action for defective manufacture of a vehicle was preempted by conflicting with the U.S. Department of Transportation's standards on regulating installation of airbags in vehicles. (*Id.* at pp. 876-877) In construing the conflict preemption test, the majority noted that the Court had "not previously driven a legal wedge" between two types of "conflicts": (1) "'conflicts' that prevent or frustrate the accomplishment of a

federal objective" and (2) "'conflicts' that make it impossible for private parties to comply with both state and federal law." (*Id.* at p. 873) The Court then concluded that Congress "would not want either kind of conflict" and "[n]othing in the statute suggests Congress wanted to complicate ordinary experience-proved principles." (*Id.* at p. 874) Indeed, the majority noted the dissenting opinion—which PMC relies on here—was attempting to impose a new analysis based on its view that obstacle preemption was "inadequately considered," and the majority declined to "further complicate the law with complex new doctrine." (*Ibid.*)

The same reasoning applies here—adopting obstacle preemption does not usurp the power of the Legislature, but preserves it because no Legislature would enact a law with the intent to leave room for a locality to frustrate the legislation's purpose so as to render the law unworkable. Taking the facts here, it would be illogical to conclude the Legislature enacted Section 3106—providing tools for DOGGR to carry out the dual purposes of increasing the ultimate recovery of subsurface oil and gas, while protecting the environment during the process—with the specific intent of allowing a local government to frustrate

DOGGR's implementation of those dual purposes by eliminating the tools specified by the Legislature. Therefore, there is no "threat[] to the separation of powers" by adopting obstacle preemption as PMC contends. (Op. Br. at pp. 63-64)

Another criticism identified by PMC in the non-binding minority opinions it cites to is that "the [obstacle preemption] doctrine encourages judges to discern a single purpose from statutes with complex and occasionally contradictory goals." (Op. Br. at p. 63, citing *Pharmaceutical Research & Manufacturers of America v. Walsh* (2003) 538 U.S. 644, 678 (Thomas, J., concurring) (*Pharmaceutical Research*) [concurring with majority that the statute at issue did not conflict with the federal Medicare Act and Medicaid Act and highlighting the "danger of invoking obstacle pre-emption based on the arbitrary selection of one [statutory] purpose to the exclusion of others"].) Even if it were true that courts would have a difficult time discerning the proper statutory purpose—which seems dubious because courts discern such purposes regularly—that reason alone is insufficient. To adopt the alternative "impossibility conflict" standard as the only means in showing implied preemption does far more damage than simply requiring courts to discern a

legislative purpose where there may be conflicting objectives. Indeed, as noted in Section I, *supra*, the state statute at issue here clearly has dual purposes that empower DOGGR to balance between the two objectives of oil production and environmental protection.

Moreover, Justice Thomas's view in *Pharmaceutical Research* has not prevailed as federal courts continue to apply obstacle preemption and discern the purpose of federal laws (to which there are often more than one) in many different statutory arenas without difficulty. (See, e.g., *Lamps Plus, Inc. v. Varela* (2019) 587 U.S. —— [139 S.Ct. 1407, 1415] [Federal Arbitration Act ("FAA") preempts state law that stands as an obstacle to its purpose of enforcing arbitration agreements according to their terms]; *Hughes v. Talen Energy Marketing, LLC* (2016) 578 U.S. 150, 163 [discerning a purpose under the Federal Power Act to allocate to the Federal Energy Regulatory Commission the exclusive jurisdiction over wholesale rates for the sale of electricity in finding a Maryland law was preempted]; *Hillman v. Maretta* (2013) 569 U.S. 483, 491 (*Hillman*) [in addressing whether Virginia law was preempted by Federal Employees' Group Life Insurance Act of 1954, ascertaining a congressional

purpose of creating a scheme to give priority insurance payouts to designated beneficiaries following an insured's death].)

Accordingly, the Court should adopt the obstacle preemption test and apply it here, and hold Measure Z is preempted.

B. Under Obstacle Preemption, Measure Z Frustrates the State's Dual Purposes of Balancing Increased Oil Production with Environmental Protection

In applying the obstacle preemption test, Measure Z frustrates the purposes of Section 3106. Under the obstacle preemption test, "a local law would be displaced if it hinders the accomplishment of the purposes behind a state law." (*T-Mobile*, *supra*, 6 Cal.5th at p. 248.)[7] That includes any obstacle impending "execution of the full *purposes* and objectives" of the Legislature. (*Ryan v. Editions Ltd. W. Inc.* (9th Cir. 2015) 786 F.3d 754, 761, italics added; *Hines v. Davidowitz* (1941) 312 U.S. 52, 67.) Applying obstacle preemption requires an examination of the statute's purposes, objectives or goals first. (*Hillman*, *supra,*

[7] Certain quotes from cases in this section have changed references to "federal" and "state" law to "state" and "local" law because this argument assumes the Court has adopted the same test used for federal preemption. (See, *supra,* Section II.A.)

569 U.S. at p. 491.) Thus, obstacle preemption proceeds in two steps: (1) determining the applicable purposes of the state law; and (2) determining whether the local ordinance hinders or stands as an obstacle to the state law's purposes and implementation.

Under the first step of the analysis, the statutory purpose may be "readily apparent from the [statute's] text." (*AT&T Mobility v. Concepcion* (2011) 563 U.S. 333, 344.) In *Concepcion*, the United States Supreme Court abrogated a decision of this Court that held class waivers in consumer arbitration agreements were unconscionable because Sections 2, 3 and 4 of the FAA expressed a primary purpose to enforce arbitration agreements according to their terms. (*Id.* at pp. 345-346, abrogating *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 30.)

A statute may also have multiple purposes to which the local ordinance could create a conflict. (*Id.* at p. 360-361 [noting primary purpose was enforcing arbitration agreements but discussing additional purpose of resolution of disputes and rejecting argument by dissent that the additional purpose undermined primary purpose].)

Under step two, the Court's role in conflict preemption is determining whether the local ordinance is "consistent with the structure and purpose of the statute as a whole." (*Gade v. National Solid Wastes Management Ass'n* (1992) 505 U.S. 88, 98 (*Gade*).) In determining whether the local law "stands as an obstacle" to state law, "it is not enough to say that the ultimate goal of both [state and local law] is the same." (*Gade*, *supra,* 505 U.S. at p. 103.) "A [local] law is also preempted if it interferes with the *methods* by which the [state] statute was designed to reach th[at] goal." (*International Paper Co. v. Ouellette* (1987) 479 U.S. 481, 494, italics added.)

Here, under the first step, Section 3106 establishes the dual purposes of increasing the ultimate recovery of underground hydrocarbons while preventing, as far as possible, damage to life, health, property, and natural resources. (See, *supra,* Statement of Facts Section II.D and Argument Section I.) Neither of these purposes is preferred or elevated under the text of the statute. The dual purposes are also "readily apparent" in the statutory language as DOGGR is required to strike a balance between achieving the increasing the ultimate recovery of underground hydrocarbons, while, preventing, to the extent possible, damage

to life, health, property, and natural resources. (§ 3106, subds. (a)-(b), (d); *Concepcion*, *supra,* 563 U.S. at p. 345.) Moreover, one purpose does not undermine the other or exclude one from preempting a local law that frustrates its purpose. (*Concepcion*, *supra,* 563 U.S. at p. 346.)

None of the legislative history provided in PMC's Request for Judicial Notice ("RJN") demonstrates a contrary legislative purpose. (See RJN, Exs. A-C) Though PMC cites to legislative history that describes subdivision (b)'s enactment as encouraging "secondary recovery technique[s]," (Op. Br. at p. 59) the conclusion PMC draws is directly contradicted by the statute's own language that places the power to permit methods for production of oil and gas in the hands of DOGGR. (§ 3106, subd. (b).)

PMC argues that the primary purpose of the statute is environmental protection because that purpose was underlying amendments enacted later in time than subdivision (b). (See, e.g., Op. Br. at pp. 16-18 [characterizing Section 3106, subd. (b) as mere "encouragement" of oil extraction and contending that such a "modest" purpose "has been outweighed by the environmentally protective purposes of later amendments."]; see

also *id.* at p. 33 [arguing that Measure Z is consistent with the legislative purpose of environmental protection].) There are multiple problems with PMC's contention.

First, PMC ignores the *express* purpose in the statutory language for regulating and promoting oil and gas development, which cannot be passed off as "mere encouragement." (§ 3106, subd. (b) [mandating the permitting of "all methods and practices" to recover oil, including through authorizing well-drilling, steam flooding, and reinjection].) Second, as the statute's evolution shows, and as the Court of Appeal recognized, the 1970 and 1972 amendments of the statute "continued to lodge the power to supervise" operations of oil production "in the hands of the State." (*Chevron*, *supra,* 70 Cal.App.5th at p. 165.) Third, in 1976, the Attorney General's opinion contradicts any assertion that the 1970 and 1972 amendments eroded or undermined the statutory purpose of oil production. (59 Ops. Cal. Atty. Gen. 461, 471 [noting that the 1970 amendment "exhibited a limited expansion of the former purposes" of the statute, and the former purposes "were primarily concerned with" natural resource protection and conservation, distribution of oil and gas among property owners and encouraging the wise development of oil and

gas].) Thus, there is no basis to conclude that the statute's primary or overriding purpose is environmental protection.

Additionally, PMC argues that Section 3011 shows the entire statutory scheme has "environmentally protective purposes," that override any other purpose.[8] (Op. Br. at 57.) PMC cites to executive orders purporting to show the State's energy goals and priorities. (Op. Br. at 57-58; RJN, Exs. D-E) PMC's objectionable citation to the Brown and Newsom administration's executive orders appears to be an improper attempt to characterize the State's executive branch as putting its thumb on the scales as to which of Section 3106's dual purposes is superior.

Setting aside the obvious issue that the executive branch does not draft the statute's language, nor determine its purpose and the Brown and Newsom administration's interpretations are coming decades after the applicable statutory provisions were enacted, the executive orders shed no light on any statutory

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[8] Section 3011, subdivision (a) provides: "The purposes of this division include protecting public health and safety and environmental quality, including reduction and mitigation of greenhouse gas emissions associated with the development of hydrocarbon and geothermal resources in a manner that meets the energy needs of the state."

purpose in either Section 3106 or elsewhere in the chapter. (See Aera's Opposition to RJN at pp. 8-14)

Section 3011 notes that the "purposes" of the oil and gas statutes "include protecting public health and safety and environmental quality, including reduction and mitigation of greenhouse gas emissions associated with the development of hydrocarbon and geothermal resources in a manner that meets the energy needs of the state." (§ 3011.) It is not controversial that one of the purposes of the statutory scheme is to have the State balance oil production by considering effects on the environment including through greenhouse gas emissions. But that does nothing to negate the statute's first purpose—development of oil and gas production—and the purpose is not one-sided but a balance between two primary objectives. And if Section 3011, or any other section of the oil and gas laws, were read so that the *only* purpose was regulation of the industry solely for environmental protection, there would be no need for Section 3106, subdivision (b) (or any statute regulating oil production) at all. Therefore, PMC's citation to Section 3011 and the executive branch's views on emissions have no relevance and

are certainly not indicia of any *legislative* intent to eliminate or reduce the oil production purpose of Section 3106.

Having established the competing dual purposes of Section 3106, there is little doubt Measure Z stands as an obstacle to both purposes (and in particular the purpose of increasing production of oil under Section 3106, subdivision (b)) because the Wastewater and Impoundment Ban and New Wells Prohibition effectively would end steam flooding and reinjection at San Ardo Field, taking the regulation of the oil field out of the hands of the state. (See *supra*, section I.A; 7-AA-1668-1670) Thus, Measure Z frustrates the dual purposes of Section 3106 by eliminating the ability of the DOGGR to permit *all* practices as DOGGR seeks to balance and carry out the dual objectives of the statute. At the very least, Measure Z interferes with the "*methods* by which [Section 3106 subdivision (b)] was designed to reach th[e] goals" of increased oil production balanced with environmental protection. (*International Paper Co.*, *supra,* 479 U.S. at p. 494, italics added.)

Accordingly, the Court should conclude that Measure Z stands as an obstacle to Section 3106's dual purposes of natural

resources production and environmental protection and is therefore preempted.

III. Measure Z Enters the Field of Gas and Oil Production Occupied by the State and Is Therefore Preempted

Finally, even if the Court concludes Measure Z neither conflicts with nor stands as an obstacle to Section 3106, it should alternatively conclude that Measure Z is preempted because it enters the field of regulation of oil and gas production in California, an area of law occupied by the State.

The Court of Appeal did not reach the field preemption issue because it concluded Measure Z conflicted with Section 3106. (*Chevron*, *supra,* 70 Cal.App.5th at p. 163, n. 14) But the trial court *did* properly find that Measure Z entered the occupied field of oil and gas production. (31-AA-7571-7572)

A local law is impliedly preempted where it enters a field which the State has occupied for itself. State law occupies a field where the subject matter of the local legislation has been (1) "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern," or (2) "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." (*Sherwin-Williams*, *supra,* 4 Cal.4th at p. 898; see also *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 751; *Nor. Cal. Psychiatric*, *supra,* 178 Cal.App.3d 90, 106-107 ["[I]f the subject matter is one of general or statewide concern, the Legislature has paramount authority"].)

A matter is of "statewide concern" where "the demand for uniformity throughout the state outweighs the needs of local governments to handle problems peculiar to their communities." (*Robins v. Los Angeles County* (1966) 248 Cal.App.2d 1, 9.)

In finding field preemption, the trial court emphasized an Attorney General opinion from 1976, which concluded the statutory scheme supersedes "nearly all local regulations of oil and gas production" and that local ordinances regulating such production "would subject development of the state's fuel resources to [a] checkerboard of regulations." (59 Ops. Cal. Atty. Gen., *supra,* at p. 478.) It went on to note that not every aspect of local control relating to oil and gas operations had been preempted at the time, and that certain local regulations might be tolerated where they (1) did not intrude on an area fully regulated by the state; and (2) were not inconsistent with the state's regulation. (*Id.* at p. 462.) But the opinion concluded:

"Where the statutory scheme or Supervisor specifies a particular method, material or procedure by a general rule or regulation or gives approval to a plan of action with respect to a particular well or field or approves a transaction at a specified well or field, it is difficult to see how there can be any room for local regulation." (*Id.* at p. 478.) Moreover, the legislative intent in enacting Section 3106 was to place authority for permitting certain methods and practices with DOGGR. (See *supra*, Section II.B) Thus, the trial court properly concluded, consistent with the Attorney General's Opinion, that the State occupied the field of oil and gas production, preempting Measure Z.

PMC argues—as it has throughout this litigation—that Measure Z is a "land use" regulation, and thus it only regulates "where" and "whether" operations occur, but not "how" they occur. (Op. Br. at pp. 46-50) PMC's argument relies on Measure Z's language, which repeatedly wedges the terms "land use in support of" into the ordinance (Op. Br. at p. 46)—but, importantly, a pretextual use of language in a local ordinance does not establish that it is a traditional "land use" measure. (*L.I.F.E. Committee v. City of Lodi* (1989) 213 Cal.App.3d 1139, 1143 [city's passage of a self-described "land use" measure for a

citywide vote requirement was not a land use regulation and preempted by state annexation law].)

PMC also contends that Measure Z's practical impact to completely erode steam flooding and reinjection methods in Monterey County should not be considered because only a statue's text matters in a field preemption analysis. (Op. Br. at p. 48) PMC further states that nothing in Measure Z describes a "steam chest … [or] ending all oil and gas operations in the county." (Op. at p. 48) That contention is directly refuted by Measure Z's own language. (1-AA-47-48 [Policy LU-1.2 bans "development, construction, installation, or use of any facility … in support of oil and gas wastewater injection or oil."]; 1-AA-48 [Policy LU-1.23 bans drilling new wells "for the purpose of exploring for, recovering, or aiding in the recovery of, oil and gas."]) To accept PMC's argument, that Measure Z is not a substantive regulation of oil and gas production at San Ardo Field because it fails to specifically use the word "steam chest" or because it did not specifically state the law will end all production of oil on its face, would elevate form over substance—that argument did not fool the trial court or the Court of Appeal,

and it cannot prevail here. Accordingly, Measure Z is preempted for entering a field of law occupied by the State.

CONCLUSION

Measure Z is in direct conflict with Section 3106's mandate for DOGGR to regulate oil and gas production methods to achieve the dual statutory purposes of increasing the ultimate recovery of underground hydrocarbons, while preventing, as far as possible, damage to life, health, property, and natural resources. Measure Z also stands as an obstacle to Section 3106 by frustrating the dual purposes, and enters the state occupied field of oil and gas production. Accordingly, Measure Z is preempted by Section 3106, is void, and the Court of Appeal's opinion should be affirmed.

DATED: June 27, 2022

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.504(d)(1), undersigned counsel certifies that this Aera Energy LLC's Answering Brief consists of 11,988 words, including footnotes but excluding the cover, tables, signature block, and this certificate, according to the word count generated by the program used to prepare this request.

DATED: June 27, 2022

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PROOF OF SERVICE

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

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1676 N. California Blvd., Suite 620, Walnut Creek, CA 94596.

On June 27, 2022, I served true copies of the following document(s) described as:

AERA ENERGY LLC'S ANSWERING BRIEF

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I served the document(s) on the person(s) listed in the Service List by submitting an electronic version of the document(s) to the Court's Electronic Filing System (EFS) operated by ImageSoft True Filing (True Filing) as indicated on the attached service list.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on June 27, 2022, at Concord, California.

/s/ Elaine T. Maestro
Elaine T. Maestro

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