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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

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INTRODUCTION

Intervenors' Petition fails to identify any proper basis for this Court to review the Court of Appeal's unanimous decision applying settled preemption principles to a local initiative—Measure Z—that conflicts with the plain terms of a state statute governing the specific activity in question. The County of Monterey did not even attempt to challenge the trial court's decision finding that Measure Z is preempted, leaving that doomed chore to the initiative's private proponents that intervened in this case. And for good reason: Measure Z bans specific oil and gas production activities that a state statute "not only promotes and encourages, but also explicitly places the authority to permit in the hands of the State." (Opn. at p. 16.) As shown by the Sixth Appellate District's unanimous opinion, this was not even a close call.

The petition palpably fails to articulate any issue worthy of review. That Intervenors may believe that the Court of Appeal got it wrong is both meritless and of no moment. This Court's function is not error correction. (See Cal. Rules of Court, rule 8.500(b).) The Issue Presented is on its face fact-bound and specific to now-defunct Measure Z. (See Pet. at 7.) To try to broaden its appeal, the Petition misrepresents the Court of Appeal's Opinion, distorts its implications, and relies on inapposite precedent. Intervenors claim that the Court of Appeal

adopted a "radical new interpretation" of section 3106 of the Public Resources Code that calls into question whether local governments have "any" land use authority related to oil and gas activities. (Pet. at 8.) But the Opinion is a straightforward application of existing law that rejects the attempt of a sweeping local measure seeking to regulate specific oil and gas operational activities long ago reserved to the State. The Petition identifies no split of authority or conflicting decision on the preemptive effect of section 3106—because there is none. As the Court of Appeal made plain, its "narrow" decision does not affect local governments' established zoning authority to regulate the location of oil drilling operations, which is not addressed by section 3106—or by Measure Z. (Opn. at p. 2.) The Opinion makes clear that it does not question, much less assail, the validity of local regulations to control zoning districts for oil and gas operations, contrary to the Intervenors' claims about the Opinion's impact on local governments. (Opn. at p. 19, fn. 16.)

In sum, the Opinion does not wrestle with or create any conflict among the lower courts or implicate significant or unresolved questions of law. The Court of Appeal correctly affirmed the superior court's rejection of the same "merits" arguments that the Petition tries again to push here. But their repetition makes those arguments no more persuasive than

before, much less worthy of this Court's discretionary review. The Petition should be denied.

FACTUAL BACKGROUND

On March 17, 2015, the Monterey County Board of Supervisors rejected a proposed interim ordinance prohibiting well stimulation treatments, which include hydraulic fracturing or "fracking." (1:AR.1–2.) Intervenor Protect Monterey County ("PMC") was formed in response, with the intention of developing a voter initiative to ban fracking. (6:AA.1448.) Measure Z, the result of PMC's effort, was approved by the voters on November 8, 2016. (2:AR.314; 1:AR.190, 195.)

Measure Z proposed to amend Monterey County's general plan to add three prohibitions on oil and gas activities, only two of which are at issue here. (1:AR.128–29.) First, Policy LU-1.21 would ban well stimulation treatments, including fracking.[1] Second, Policy LU-1.22, would prohibit wastewater injection and impoundment "on all lands within the County's unincorporated area." (1:AR.128–29.) Policy LU-1.22 provides a five-year phase-out for nonconforming underground injection and impoundment, requiring all nonconforming uses to cease operation within five years after Measure Z's effective date. (*Ibid.*) Third, Policy LU-

[1] Because of the manner in which the superior court resolved the case, Policy LU-1.21 was not at issue in the Court of Appeal. (Opn. at p. 3, fn. 3.)

1.23 would prohibit the use of any land located in the County for the "drilling of new oil and gas wells[.]" (1:AR.129.) This provision would ban all new wells, including wells drilled for underground injection or disposal and wells drilled for producing oil and gas. (*Ibid.*)

The campaign to promote Measure Z focused almost entirely on its proposed fracking ban, despite that the sandy nature of oil-bearing strata in the Monterey County oil fields makes fracking unnecessary to extract oil. (See 11:AA.2632–2635; 31:AA.7546.) No fracking currently takes place in the County, and there are only a few reported instances of fracking ever occurring in Monterey County, all of which took place more than a decade ago. (*Ibid.*) By contrast, Measure Z's other two provisions, banning wastewater injection and impoundment and drilling new wells, would dramatically reduce and subsequently eliminate oil production in Monterey County. (31:AA.7546–7547.)

Chevron's operations in Monterey County are confined to the area around the small town of San Ardo, in the southeastern corner of the County. Measure Z would have had cascading impacts on the community at San Ardo, decimating the revenue streams of local businesses and local royalty owners (9:AA.2202) and closing the San Ardo Union Elementary School. (9:AA.2277.) Local royalty owners, small businesses, and the San Ardo Union

Elementary School all joined as co-Plaintiffs in the Chevron action.

PROCEDURAL HISTORY

I. The Superior Court Finds Policies LU-1.22 and LU-1.23 Preempted by State and Federal Law

On December 14, 2016, Chevron, along with local businesses, royalty owners, and the elementary school, filed a petition for writ of mandate and complaint, alleging, among other things, that Measure Z is preempted by state and federal law and would result in an unconstitutional taking of their property. (See 1:AA.55-82). Aera Energy LLC also filed its petition and complaint on December 14, 2016. (1:AA.114–122.) The same day, these Plaintiffs filed a motion to stay Measure Z's effective date, which was granted. (1:AA.83–91, 92–96.)

Four additional groups of oil companies and mineral rights holders subsequently filed similar lawsuits, including California Resources Corporation, National Association of Royalty Owners-California Inc., Eagle Petroleum LLC, and Trio Petroleum LLC. (4:AA.870–944; 5:AA.972–997; 5:AA.998–1028.) The superior court granted a motion to intervene filed by Intervenors PMC and Dr. Laura Solorio, PMC's spokesperson. (5:AA.1062–1064.) The superior court consolidated all six of these cases. (7:AA.1565–1567.)

The superior court divided the case into phases, with "Phase 1" to address facial challenges to Measure Z including preemption and takings. (7:AA.1567.) After the submission of briefing, a four-day trial began on November 13, 2017.

On January 25, 2018, the superior court filed its statement of decision. (31:AA.7545–7593.) In relevant part, the superior court concluded Policies LU-1.22 and LU-1.23 are each preempted by state and federal law. (*Id.* at 7561–7579.) In particular, the superior court found that Measure Z was contrary to the express state policy set forth in Section 3106, which mandates that "[t]he supervisor shall also supervise . . . so as to permit the owners or operators of the wells to utilize all methods and practices known to the oil and gas industry for the purpose of increasing the ultimate recovery of underground hydrocarbons." (§ 3106, subd. (b); 31:AA.7572.) The court found Plaintiffs lacked standing to challenge Policy LU-1.21, because they did not then use well stimulation techniques and were unlikely to do so in the future. (*Id.* at 7568.) The superior court determined that if Measure Z were to become effective, it would constitute a facial taking of California Resources Corporation's property. (*Id.* at 7587.) The superior court denied facial takings claims asserted by the other Plaintiffs, but stated they would have the option to proceed with an as-applied takings claim if Measure Z were implemented. (*Id.* at 7589–7590.)

Following the superior court's entry of judgment and issuance of a writ of mandate directing Monterey County to invalidate Policies LU-1.22 and LU-1.23 (32:AA .7680–7740), the Intervenors timely filed a notice of appeal. (32:AA.7748.) The County of Monterey also filed a notice of appeal (32:AA.7741), but later abandoned it (32:AA.7842–7848).

II. The Court of Appeal Unanimously Affirms the Superior Court's Judgment

The Court of Appeal issued its Opinion on October 12, 2021, affirming the superior court's judgment and concluding that Policies LU-1.22 and LU-1.23 are preempted by state law.

The Court of Appeal determined that section 3106 supports the trial court's preemption finding because it "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." (Opn. at p. 9, original emphasis.) Section 3106 thus "plainly lodges the authority to permit 'all methods and practices' firmly in *the State's hands*," and does not reserve any authority to local entities to limit the State's authority as to these "methods and practices." (*Ibid.*, original emphasis.) Since Measure Z prohibits all wastewater injection and bans new well drilling, section 3106 preempts it. (Opn. at pp. 7, 9.)

In response to Intervenors' contention that the police power of local entities to regulate oil and gas drilling rebuts any preemption claim, the Court of Appeal held the mere fact that some local regulation is within the police power does not resolve whether a particular local regulation is preempted by a particular state law. If a local regulation conflicts with a state law, the local regulation exceeds the local entity's power under article XI, section 7 of the California Constitution. (Opn. at p. 14.)

The Court of Appeal rejected Intervenors' argument that Measure Z controls only "where and whether" oil drilling occurs such that it is a "land use" regulation beyond State control. (Opn. at pp. 15–16.) Rather, Measure Z regulates "*what* and *how* any oil drilling operations could proceed," and bans oil and gas drilling "activities that section 3106 not only promotes and encourages, but also explicitly places the authority to permit in the hands of the State. Consequently, Measure Z conflicts with section 3106." (*Ibid.,* original emphasis.)

Finally, the Court of Appeal denied Intervenor's contention that conflict preemption does not apply because section 3106 supposedly does not "demand" what Measure Z "forbids." (Opn. at p. 17.) The Court distinguished each of the cases cited by Intervenors, (*id.* at pp. 17–20), and concluded that "Measure Z forbids the State from permitting certain methods and practices,

while section 3106 encourages those methods and practices and mandates that the State be the entity deciding whether to permit those methods and practices." (*Id.* at p. 19.)

Because it upheld the superior court's judgment on grounds of state law preemption, the Court of Appeal did not consider whether Measure Z is preempted by federal law or constitutes a taking of Plaintiffs' property. (*Id.* at p. 20.) Further, since the Court of Appeal concluded Measure Z "conflicts" with section 3106, it did not consider whether the State preempted the "field" of oil and gas regulation. (*Id.* at p. 7, fn. 8.) The Court also explained that its "narrow decision" should not "be construed to cast any doubt on the validity of local regulations requiring permits for oil drilling operations or restricting oil drilling operations to particular zoning districts. This case involves no such regulations." (*Id.* at pp. 2, 19, fn. 17.)

ARGUMENT

I. Intervenors Have Not Identified Any Conflicts Among the Court of Appeal or Unsettled, Important Questions of Law

Intervenors argue the Opinion is a "radical reinterpretation" of section 3106 that is inconsistent with precedent. (Pet. at p. 24.) To the contrary, the Opinion is a straightforward application of statutory and decisional law. The Opinion does not grapple with a new area of law, does not resolve

a conflict in the lower courts, and does not present a novel interpretation of any authority. What is unique here is the scope of the regulations that would be implemented by Measure Z. Measure Z is a sweeping regulation of technical oil and gas production techniques that are both expressly encouraged by the State and thoroughly regulated by the State's Division of Oil, Gas, and Geothermal Resources ("DOGGR").[2] The thorough and well-reasoned Opinion analyzes the plain language of section 3106 and finds that Measure Z conflicts with state law.

A. Measure Z Conflicts With the Plain Terms of Section 3106

The starting point for preemption analysis is to "examine the statute and the ordinance, each on its own terms," and then to "measure the latter against the former." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) Here, the Opinion relies on the plain language of both section 3106 and the provisions of Measure Z as the basis for its finding that the former preempts the latter.

As the Opinion correctly recognizes, section 3106 declares the fundamental policy of the state concerning oil and gas

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[2] DOGGR has since been renamed as the Geologic Energy Management Division. Plaintiffs continue to use the name DOGGR so as to remain consistent with the usage in the decisions of the Court of Appeal and the superior court.

production and mandates that DOGGR enforce it. Section 3106 mandates that, "[t]o best meet the oil and gas needs in this state," DOGGR "shall administer" the laws "so as to encourage the wise development of oil and gas resources." (§ 3106, subd. (d), emphasis added; see Opn. at p. 9.) Section 3106 mandates that DOGGR "shall" act to protect against the "loss of oil, gas, or reservoir energy," to protect underground and surface water sources, and to prevent harm to "life, health, property, and natural resources." (§ 3106, subd. (a).) Section 3106 further declares that DOGGR "shall 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).)

Section 3106 also codifies a mandatory policy respecting the subsurface techniques of wastewater injection. Section 3106 decrees: "To further the elimination of waste by increasing the recovery of underground hydrocarbons, it is hereby declared *as a* policy *of this state*" to allow an operator "to do what a prudent operator using reasonable diligence would do . . . in producing and removing hydrocarbons," 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." (§ 3106, subd. (b), emphasis added.)

By contrast, Measure Z would flatly ban throughout Monterey County what section 3106 declares is a policy of the state to permit (where otherwise appropriate). Specifically, Measure Z would ban two "methods and practices" that increase the recovery of oil and gas: the drilling of new wells and wastewater injection.

The Court of Appeal correctly concluded that Measure Z conflicts with section 3106 because it would "ban activities that section 3106 not only promotes and encourages, but also explicitly places the authority to permit in the hands of the State." (Opn. at p. 16.) Measure Z conflicts with section 3106 regarding whether the State or Monterey County controls oil and gas "methods and practices," so the "the local ordinance must yield to the supreme state law." (Opn. at p. 18.)

There is nothing "unsettled" about the facial conflict between the plain language of section 3106 and Measure Z. Much less does it evince a conflict among the courts of appeal. Rather, Measure Z is simply preempted under article XI, section 7 of the California Constitution. (*Id.* at p. 14.)

B. The Opinion Is Consistent with Existing Law

Intervenors assert that the Opinion conflicts with (1) caselaw regarding localities' police power, (2) two Public

Resources Code sections, and (3) a 1976 Attorney General Opinion. (Pet. at pp. 25–32.) The Court of Appeal carefully considered and correctly rejected each of Intervenors' claims. Accordingly, Intervenors do not identify any unsettled important questions of law or split of opinion among the courts of appeal.

1. The Opinion Is Consistent with Local Police Power and Zoning Authority

Intervenors argue that the Opinion's decision on the preemption of Measure Z undermines a series of local police power cases, but this argument relies on a misstatement of these cases' holdings. There is no conflict between these cases and the Opinion because none of the cases Intervenors cite concludes that localities may prohibit oil and gas operations under a relevant *preemption analysis*. In fact, only one of the cases considers preemption at all. As the Court of Appeal explained, a series of cases Intervenors relied upon, including *Pacific Palisades Assoc. v. City of Huntington Beach* (1925) 196 Cal. 211, *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, and *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal.App.4th 534, never "even considered whether an otherwise valid local regulation was preempted by state law." (Opn. at pp. 13–15.) Because these cases do not consider preemption, they do not stand for the proposition that the local police power trumps the preemptive effect of a conflicting state statute. (*Id.* at p. 15,

quoting *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 ["[I]t is axiomatic that cases are not authority for propositions not considered."].)

Second, none of Intervenors' cases addresses section 3106. As discussed in the Opinion, *Pacific Palisades* predated the enactment of the Public Resources Code, and *Beverly Oil* predated the 1961 addition of the critical preemptive language that now appears in section 3106, subdivision (b). (Opn. at pp. 14–15.) While *Hermosa Beach* post-dated the addition of the current language to section 3106, subdivision (b), the court in that case did not consider whether the local regulation was preempted, as noted above. (*Ibid.*) And in the only case to consider a preemption argument, *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, the preemption argument was limited to specific state laws concerning tidelands over which the State, in that case, had expressly granted the local entity full authority. The Supreme Court found that the state tidelands laws had vested discretion in the City to determine where oil drilling should take place on the tidelands. (Opn. at pp. 14–15.)

Finally, the Court of Appeal considered and rejected this argument because a locality's power to regulate does not resolve the unrelated issue of preemption. As the Court explained, "The mere fact that *some* local regulation of oil and gas drilling is within a local entity's police power does not resolve the question

of whether a particular local regulation is *preempted* by a particular state law. If a local regulation conflicts with a state law, the local regulation exceeds the local entity's power." (Opn. at p. 14, original italics.) The Opinion was careful to differentiate between a local government's authority to enact certain restrictions in the first place through a police power, such as the authority to restrict oil drilling to certain zoning districts, and the constitutional prohibition on local regulations that conflict with state law, which applies regardless of whether the locality had the authority to pass the law in the first place. (Opn. at 2, 19 and fn. 16)

2. The Opinion Properly Rejected Intervenors' Reliance on Sections 3012 and 3690

Intervenors cite two statutory provisions, sections 3012 and 3690, to argue that the Legislature intended to permit local regulation of the activities at issue. Intervenors' contentions fail.

First, section 3012 states: "The provisions of this division apply to any land or well situated within the boundaries of an incorporated city in which the drilling of oil wells is now or may hereafter be prohibited, until all wells therein have been abandoned as provided in this chapter." (§ 3012.) The Court of

Appeal concluded that while section 3012 allows a city[3] to ban oil operations entirely, it nonetheless mandates that the State continue to exercise authority over existing wells, and thus does not support Intervenors' argument that the State has ceded its authority over oil drilling "methods and practices." (Opn. at p. 11.) Further, the Opinion notes that the preemptive language in section 3106, subdivision (b), was adopted after the adoption of section 3012. (*Ibid.*)

Next, section 3690 provides: "*This chapter [(chapter 3.5)]* shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection." (§ 3690, emphasis added.) By its terms, section 3690 is limited to chapter 3.5, which concerns "unit operations" and consists of sections 3630 through 3690. The Court of Appeal properly concluded that section 3690 is inapplicable here because section 3690 is limited to chapter 3.5, and section 3106 is not contained within chapter 3.5. (Opn. at 12.)

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[3] Section 3012 applies by its terms only to "an incorporated city," which the County of Monterey is not.

3. The Opinion Is Consistent with the 1976 Attorney General Opinion

Contradicting their claim that the Court of Appeal "radically reinterpreted" section 3106, Intervenors acknowledge that no prior reported decision has considered the preemptive effect of section 3106. (Pet. at p. 29.) Intervenors speculate the lack of prior decisions "likely reflects" the influence of a 1976 Attorney General Opinion (the "AG Opinion"), which they contend "clearly demonstrates" Measure Z is a valid exercise of the County's power. (*Ibid.*) To the contrary, while the Court of Appeal found "no need to rely" on the AG Opinion, it explained why the AG Opinion is consistent with its ruling. (Opn. at p. 16, fn. 14.)

As stated by the Court of Appeal, the AG Opinion opined that "certain phases of oil and gas activities are of statewide rather than local concern and that any local regulation in conflict with those phases would therefore be ineffective; in our view, *the state has so fully occupied these certain phases that there is no room left for local regulation*." (*Ibid.*, quoting AG Opinion, 59 Ops.Cal.Atty.Gen. at p. 477 (emphasis added).) The AG Opinion also found that conflicting local regulations over these oil and gas activities would be particularly problematic where oil and gas deposits extended under the boundary of multiple localities, and that state preemption applied to any activities the State oil and

gas supervisor had approved. (*Id.*, citing AG Opinion, 59 Ops.Cal.Atty.Gen. at pp. 477 and 478.)

Here, drilling wells and wastewater injection are precisely the type of oil and gas activities that are subject to State supervision and approval, and therefore shielded from local regulation according to the AG Opinion. (See also Ops.Cal.Atty.Gen. at pp. 461–462 ["where the state regulation approves of or specifies plans of operation, methods, materials, procedures, or equipment to be used by the well operator or where activities are to be carried out under the direction of the Supervisor, there is no room for local regulation."].)

Further, Intervenors concede that the AG Opinion found that the State had preempted local regulation of "certain phases" of oil and gas development referred to as "subsurface" phases. (Pet. at pp. 29–30.) The Court of Appeal declined to address whether Measure Z regulates "subsurface" activities because it "is unnecessary to our analysis." (Opn. at p. 16, fn. 14.) The superior court, however, properly rejected Intervenors' attempt to characterize Measure Z as a "land use" regulation that affected only surface, as opposed to subsurface, activities. (31:AA.7570.)

In the superior court, Intervenors argued Measure Z does not limit subsurface wastewater injection and impoundment, but simply prohibits surface equipment and activities in support of the same. (*Ibid.*) The superior court found this argument "is

clearly a pretextual attempt to do indirectly what it cannot do directly," and that there is no "meaningful distinction between wastewater injection and impoundment on the one hand, and surface equipment and activities in support of wastewater injection and impoundment on the other." (*Ibid.*) Intervenors also conceded at trial that Measure Z does not merely regulate surface land uses, and that Intervenors' attempted distinction between surface and subsurface activities is "artificial" since subsurface activity "is accompanied inherently by surface activities" and surface land uses. (*Ibid.*)

C. Intervenors Overstate Any Impact of the Opinion on Local Governments

Intervenors' premise that local governments will be subject to "profound" uncertainty and litigation risk from the Opinion (Pet. at 32) is belied by the fact that Monterey County, the defendant in this litigation, elected to abandon its appeal and is not a part of these proceedings. The County apparently did not consider the impacts that Intervenors allege will befall cities and counties significant enough to pursue an appeal of the superior court's order.

Intervenors assert the Opinion disturbs the "balance of power" between state and local government by upending local regulation of oil and gas "land uses," *i.e.*, the local ability to determine "whether and where" wells may be drilled. (Pet. at pp.

32–33.) The Court of Appeal rejected this argument because Measure Z does not identify any locations where oil drilling may or may not occur. (Opn. at p. 15.) Rather, it would bar any new wells and wastewater injection anywhere in Monterey County, even if these new facilities would be located on the same land as an existing oil and gas operation. (*Ibid.*) Thus, Measure Z does "not regulate 'where and whether' oil drilling would occur . . . but rather *what* and *how* any oil drilling operations could proceed." (*Id.* at pp. 15–16, original italics.) Under Measure Z, "[o]perations could proceed only if they involved no new wells and no wastewater injection, which are operational methods and practices." (*Id.* at p. 16.)

Local governments have always been required to avoid passing laws that conflict with state law, including state oil and gas regulations, even if those local laws are done under the auspice of land use regulation. (E.g., Cal. Const., art. XI, § 7.) The AG Opinion cited by Intervenors, which was authored in 1976, states expressly that local governments may not regulate oil and gas production activities regulated by the State. (AG Opinion, 59 Ops.Cal.Atty.Gen. at pp. 461–462.) Intervenors' feigned concern that the Opinion will preclude localities from exercising zoning authority is refuted by the text of the Opinion, which states specifically that the ruling does not "cast any doubt on the validity of local regulations requiring permits for oil

drilling operations or restricting oil drilling operations to particular zoning districts." (Opn. at p. 19, fn. 16.) No such regulations are addressed by section 3106, Measure Z, or the Opinion. (*Ibid.*)

II. Review Is Unnecessary to Ensure Uniformity of Decision Because the Opinion Faithfully Applies this Court's Preemption Precedent

Intervenors argue uniformity of decision is threatened because the Opinion is inconsistent with other caselaw finding preemption based on a "contradictory and inimical" conflict between state and local law. (Pet. at 34.) But the Court of Appeal explained in detail the consistency of the Opinion with established preemption law, and thoroughly analyzed the Supreme Court cases that Intervenors cite here. (Opn. at pp. 16–20.)

The Court of Appeal concluded that Measure Z would "ban activities that section 3106 not only promotes and encourages, *but also explicitly places the authority to permit in the hands of the State*." (Opn. at p. 16, emphasis added.) Measure Z "conflicts" with and is preempted by section 3106, as it is not possible for the statute's mandate that the State permit, where appropriate, these oil and gas activities if the local ordinance bars them altogether. (*Ibid.*; see also *id.* at p. 18.) Measure Z conflicts with the state statute's express encouragement of these specific

activities. As the Court of Appeal explained, "[T]he two laws conflict with respect to who controls the use of these methods and practices," and therefore "the local ordinance must yield to the supreme state law." (*Id.* at p. 18.) The Opinion relies on existing preemption jurisprudence to make the straightforward finding that Measure Z, which prohibits specific oil production techniques, is contrary and inimical to state law that encourages and mandates that the State permit those techniques.

Intervenors first try to distinguish the Opinion on the grounds that a state statute's "encouragement" of an activity is supposedly insufficient to demonstrate preemptive intent. (Petition at pp. 34–35, citing *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal.5th 1107; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139; and *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729.) But Intervenors misread the cases they cite. As the Court of Appeal found, none of the preemption cases that Intervenors claim are inconsistent with the Opinion addresses a circumstance, as here, where the local law directly prohibits what a state law not only encourages, but mandates the State have the authority to permit.

In *T-Mobile,* this Court considered whether a local ordinance requiring telephone service companies to obtain permits to install and maintain lines and equipment in rights-of-

way, including conformance with aesthetic guidelines, was preempted by a state law allowing construction of lines and equipment along public roads if the construction does not "disturb or give inconvenience" to "the public's use of the road." (*T-Mobile, supra,* 6 Cal.5th at pp. 1114, 1117, 1118.) There, the state statute made no mention of the subject matter addressed by the local ordinance (aesthetics), so there was no conflict. (*Id.* at p. 1121; Opn. at 18.) Here, by contrast, section 3106 specifically addresses drilling of wells and wastewater injection, encourages both, and mandates that the State permit these "methods and practices" where appropriate. (Opn. at p. 18.)

In *Big Creek*, the Supreme Court considered whether two county zoning ordinances relating to the permissible locations for timber operations were preempted by state forestry statutes. The state law at issue contained an express preemption clause that was limited to "'the *conduct* of timber operations,'" and the "general forestry law . . . expressly recognize[d] local zoning authority." (Opn. at p. 18, quoting *Big Creek, supra*, 38 Cal.4th at pp. 1151, 1157, emphasis added.) The local zoning ordinance was not expressly preempted because it did not involve the "conduct" of timber operations. (*Id.*) Nor was it impliedly preempted, because by expressly preempting local regulation of the "conduct" of timber operations, the state statute implicitly

permitted local regulation of other aspects of timber operations. (*Big Creek, supra*, 38 Cal.4th at 1157.)

The Court of Appeal held Intervenors' reliance on *Big Creek* is misplaced because section 3106, unlike the state forestry laws in *Big Creek*:

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

(Opn. at p. 19.)

In *City of Riverside,* this Court considered whether a state medical marijuana statute preempted a local ban on facilities that distribute medical marijuana. The Court found the local laws were not preempted because the "sole effect of the [state] statute's substantive terms is to exempt specified medical

marijuana activities from enumerated state criminal and nuisance statutes," and the state statute's "provisions do not mandate that local jurisdictions permit such activities." (*City of Riverside, supra*, 56 Cal.4th at pp. 760–761.) Since the state law did not authorize or intend to promote medical marijuana facilities, it did not preempt the local ban. Here, section 3106 encourages the development of oil and gas resources and requires that the State have authority to permit the "methods and practices" of oil and gas production.

Next, Intervenors criticize the Court of Appeal's conclusion that Measure Z would "forbid" the State from permitting oil wells or wastewater injection in Monterey County. (Pet. at p. 36.) Intervenors assert that because the State is not mentioned in Measure Z, the State cannot be forbidden by Measure Z from doing anything. (*Ibid.*) But Intervenors do not and cannot explain how a local ban on oil and gas methods and practices would not forbid the State from permitting those methods and practices within Monterey County.

Intervenors also state that section 3106 does not "*require* the state to approve any particular method or practice." (*Id.* at p. 36, original emphasis.) This is true but misses the point. While section 3106 does not mandate State approval of any particular method or practice, it does, as the Court of Appeal explained,

"mandate[] that the State be the entity deciding whether to permit those methods and practices." (Opn. at p. 19.)

Lastly, Intervenors suggest the Court of Appeal may have relied on "obstacle preemption," which, Intervenors argue, has not been embraced by this Court. (Pet. at pp. 38–40.) But the Opinion never mentions obstacle preemption. Instead, the Opinion explains at length that Measure Z "conflicts" with, and thus is contradictory and inimical to, section 3106. (Opn. at pp. 6–10, 13–19.) The Court of Appeal also detailed why the Opinion is consistent with this Court's precedent on contradictory and inimical preemption, as discussed above, and expressly disclaimed consideration of "field" preemption. (Opn. at p. 7, fn. 8.) The basis for the Opinion's preemption finding, and its consistency with existing law, therefore is clear.

Intervenors' "obstacle preemption" theory is based on the Court of Appeal's citation, on the last page of its preemption analysis, to *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 868. The Court of Appeal cited *Great Western* in the context of dispelling the contention that local zoning authority of oil and gas operations cannot coexist with the preemption of a local ban on all new wells and wastewater injection. (Opn. at pp. 19–20, quoting *Great Western, supra*, 27 Cal.4th at p. 868 ["[W]hen a statute or statutory scheme seeks to promote certain activity and, at the same time, permits more

stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose."]) Thus, the Court of Appeal determined Measure Z is preempted by section 3106 while stating the Opinion does not "cast any doubt on the validity" of local zoning authority. (Opn. at p. 19, fn. 16.) The Opinion does not depart from the existing preemption jurisprudence.

CONCLUSION

The Petition fails to establish any substantial grounds for review by this Court, presenting no unsettled important questions of law or identifying conflicting authority. Instead, Intervenors seek merely to reargue the Court of Appeal's well-reasoned decision. Accordingly, the Petition should be denied.

DATED: December 9, 2021 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

In accordance with Rule 8.504, subd. (d)(1), of the California Rules of Court, the text of the foregoing Joint Answer to Petition for Review consists of 5,840 words, including footnotes but excluding the cover, tables, signature block, and this certificate, according to the word count generated by the computer program used to produce this brief.

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PROOF OF SERVICE

I, Dione Garlick, declare:

I am employed in the County of Los Angeles, State of California. My business address is Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, 54th Floor, Los Angeles, California 90071. I am over the age of eighteen years and not a party to the action in which this service is made.

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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S271869**
Lower Court Case Number: **H045791**

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

12/9/2021

Date

/s/Dione Garlick

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