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CALIFORNIA RESOURCES CORPORATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

CALIFORNIA RESOURCES CORPORATION, a Delaware corporation,

Petitioner and Plaintiff,

v.

COUNTY OF MONTEREY, a general law county; and DOES 1 through 25, inclusive,

Respondents and Defendants.

Lead Case No. 16CV003978

Individual Case No. 17CV000790

Also consolidated for purposes of Phase 1 with 17CV000871, 17CV000935, and 17CV001012

OPENING BRIEF IN SUPPORT OF PHASE 1 CLAIMS

Judge: Hon. Thomas W. Wills, Dept. 14

Amended Petition and Complaint Filed: April 17, 2017

Phase 1 Trial Date: November 13, 2017

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GLOSSARY OF RECORD CITATIONS USED IN THIS BRIEF

Citation	Description
AR	Phase 1 Lodged Certified Administrative Record
RJN Ex. [Number]	Plaintiffs' Joint Request for Judicial Notice (filed by Chevron USA, Inc. ("Chevron"))
CRC RJN Ex. [Number]	Request for Judicial Notice (filed by California Resources Corporation ("CRC"))
Stipulated Facts ¶ [Number]	Stipulated facts filed in Joint Case Management Conference Statement and Status Report (May 24, 2017), Ex. A
Aera Br.	Phase 1 Opening Brief Re Facial Invalidity of Monterey County Measure Z (filed by Aera Energy LLC ("Aera"))
Chevron Br.	Opening Brief in Support of Phase 1 Proceedings (filed by Chevron)
Eagle Br.	Phase One Brief by Eagle Petroleum, LLC ("Eagle")
NARO Br.	Phase 1 Opening Brief of NARO-CA and the Various Affected Mineral Owners
Bridges Decl.	Declaration of Kimberly Bridges (filed by CRC)
Ellison Decl.	Declaration of Burt Ellison (filed by Chevron)
Kemp Decl.	Declaration of Charles G. Kemp (filed by Aera)
Latham Decl.	Declaration of James Latham (filed by Chevron)
McMahan Decl.	Declaration of Justin McMahan (filed by CRC)
Miller Decl.	Declaration of Richard Miller (filed by CRC)
Tubbs Decl.	Declaration of Dallas Tubbs (filed by Chevron)
Smith Decl.	Declaration of Adam Smith (filed by CRC)
Welles Decl.	Declaration of Heather Welles (filed by CRC)
Wilson Decl.	Declaration of Mary Jane Wilson (filed by Eagle)[1]

[1] Unless noted, all emphases to quotations in this brief are added, and internal quotation marks and citations are omitted.

I. Introduction

California Resources Corporation ("CRC") is one of many landowners in Monterey County ("the County") whose property interests are now worthless because of Measure Z. Sold to voters as a "fracking ban," Measure Z, in reality, bans all new exploration, production, and wastewater wells and soon will eliminate all oil and gas operations in the County. The measure therefore wipes out the one economically viable use of CRC's mineral rights, rights protected by the California Constitution for 150 years: producing oil and gas. Because Measure Z's ban on new wells destroys the value of these rights, Measure Z effects a clear taking.

CRC's takings claim is ripe for Phase 1 because Measure Z's mere enactment denies CRC all economically viable use of its property. Indeed, CRC's takings claim is simple, given that it cannot produce oil without drilling new wells—new wells banned by Measure Z. While Measure Z tries to steer takings claims to the Monterey County Board of Supervisors ("the Board") via an exemption process, California law gives *courts* the exclusive authority to resolve such claims. Compounding this problem, Measure Z gives the Board no direction regarding when it should grant exemptions, or what those exemptions should look like. And because the exemption provision requires the Board to assess hundreds, if not thousands, of takings claims through an unwieldy process that will take years to complete, Measure Z doubly denies CRC due process.

As the briefs of CRC's co-plaintiffs demonstrate, Measure Z suffers from many other infirmities—all claims that CRC joins. But the simplest reason to strike down Measure Z now is that it runs afoul of California's single-subject rule, a critical procedural check on voter initiatives designed to prevent proponent overreach and voter confusion. Here that confusion is stark. Measure Z's express purpose was to "ban fracking," and proponents reinforced this message by emblazoning a large red "BAN FRACKING" headline on all campaign materials. In fact, however, fracking is not used in Monterey County, given its geology.

The real (obscured) goal of Measure Z was to shut down all oil and gas production. By banning new wells and wastewater disposal, Measure Z ensures exactly that. Yet the average voter, with little to no understanding of the mechanics of oil and gas operations, would not have foreseen the drastic effects of these bans. To the contrary, proponents assured voters that

Measure Z would not affect current oil and gas operations, and they worked to block the County from issuing a neutral analysis of Measure Z that would have revealed its impact. Voters were thus left to rely on the proponents' lead message: that Measure Z was a fracking ban.

Measure Z was the ultimate bait and switch. The complete bans on new wells and wastewater disposal have nothing to do with fracking. And because Measure Z destroys the value of mineral rights across the County, the County now faces billions of dollars in inverse condemnation claims, and Measure Z will cost the County millions of dollars in lost tax revenue (some $8 million a year in property taxes alone) as well as massive legal fees.

The Court should strike down Measure Z. If, however, it concludes that Measure Z is valid, the Court should grant CRC declaratory relief on its takings claim, ruling that Measure Z cannot apply to CRC's property without the payment of just compensation.

II. Factual Background

Active oil production in Monterey County is limited to its southeast corner, approximately 83 miles southeast of Monterey Bay. Bridges Decl. ¶ 4. The San Ardo and other smaller, nearby fields are located in a sparsely populated area only a few dozen miles from Kern County, where the vast majority of California's oil production occurs. *Id.* Existing Monterey County oil fields consist of saturated sand that is highly permeable, but contains thick, heavy oil that must be heated for efficient production. Stipulated Facts ¶ 16; Miller Decl. ¶¶ 11-12, 15-16, 18.

A. CRC's Property in Monterey County

CRC owns mineral rights in 23 parcels of land in the County, most northeast of San Ardo. Bridges Decl. ¶¶ 30, 31. None contains oil wells, and to produce oil and gas, CRC would need to drill new oil and wastewater injection wells at these sites. McMahan Decl. ¶ 9; Miller Decl. ¶ 28.

CRC also owns numerous oil and gas leases, including land overlying the San Ardo, Paris Valley, and McCool Ranch oil fields. Bridges Decl. ¶¶ 5, 9, 12-30; CRC RJN. The vast majority of these leased parcels contain no oil wells—meaning, again, that CRC would need to drill new wells to produce oil and gas at these sites. McMahan Decl. ¶¶ 2-9; Miller Decl. ¶¶ 18, 28.

Four of CRC's leased parcels contain at least one older nonproducing well, but CRC cannot begin viable production at these sites without drilling new wells. McMahan Decl. ¶¶ 2-8.

B. Background and Provisions of Measure Z

Fracking has become a hot-button issue in California (and across the country).[2] Fracking is a well stimulation treatment typically suited for low-permeability formations, such as diatomite rock—and not the sand formations where oil is produced in Monterey County.[3] In fact, fracking would be harmful in these fields, generally leading to *less* efficient production. Miller Decl. ¶ 17.

In 2013, the California Legislature passed Senate Bill 4, a comprehensive regulatory scheme governing well stimulation treatments, including fracking. Stats. 2013, ch. 313. In 2015, while the State was working to develop implementing regulations for SB 4, the Board considered an interim moratorium on all well stimulation, including fracking. AR 8 (Board Report). County staff noted that "fracking is not likely to occur within Monterey County" and that the County had no "permitted or proposed well stimulation." *Id.* at 7, 9. The Board rejected the moratorium, reasoning that it had no fracking to regulate, and that any ban was likely preempted by SB 4.[4]

In response, a private group formed Protect Monterey County ("PMC") and drafted Measure Z.[5] PMC's campaign in favor of the measure focused on fracking. Proponents created campaign signs, video ads, and other paraphernalia featuring "Yes on Z" and "Protect Monterey County" logos—imploring voters to "BAN FRACKING."[6]

The first substantive part of Measure Z tracks this purpose, prohibiting the development or use of any above-ground equipment "in support of well stimulation treatments." AR 127 (LU-1.21)).

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[2] RJN Ex. 31 (Senate Bill 4 analysis).

[3] Stipulated Facts ¶ 27. The term "well stimulation treatment" (or "WST") generally refers to actions that make the oil- or gas-bearing formation more permeable, by, for instance, creating tiny fractures in the formation rock, as in fracking. *Id.* ¶ 24.

[4] AR 96-99, 105-07, 109 (March 17, 2015 Board meeting transcript).

[5] Stipulated Facts ¶ 2; Intervenors' Case Status Report 4 (May 25, 2017).

[6] RJN Ex. 5.

PMC capitalized on the political potency of fracking or WST—a simple, single practice that is not even used in Monterey County—to try to shut down oil and gas production altogether. It included two additional provisions in Measure Z that, working together, will accomplish that goal. The inevitability of this shutdown is not obvious to the lay voter, but requires knowledge of oil and gas production generally, and Monterey County geology specifically.

The first non-fracking addition to Measure Z is policy LU-1.22. It bans both wastewater injection (the normal process of reinjecting wastewater produced alongside oil and gas back underground) and impoundment (storing such produced water above ground). AR 128-29. Wastewater is an inescapable aspect of oil production, as oil naturally exists comingled with water. 1 Williams & Meyers, *Oil & Gas Law* § 104 (perm ed., rev. vol. 2016). Oil wells in San Ardo extract up to 20 times more water than oil, Kemp Decl., Ex. A at 48, so disposal of produced water through injection is an essential aspect of oil production there, Tubbs Decl. ¶ 42. State and federal law have long allowed operators throughout California to dispose of produced water in this way. Ellison Decl. Given these basic facts, economically viable oil production in the County cannot continue under Measure Z's wastewater ban. Latham Decl. ¶¶ 6(c), 20-21.

The second policy contributing to a shutdown of oil and gas production in the County is LU-1.23, which prohibits "[t]he drilling of new oil and gas wells . . . on all lands within the County's unincorporated area." AR 129. The provision covers all "wells drilled for the purpose of exploring for, recovering, or aiding in the recovery of, oil and gas." *Id.* In addition to the obvious elimination of *future* production by currently nonproducing owners such as CRC, LU-1.23 also impacts existing production by Chevron and the like, because ongoing oil production requires routine drilling of new wells to, for instance, replace wells that have declined in productivity, Stipulated Facts ¶ 20; Tubbs Decl. ¶¶ 48, 52-53, and to perform steam injection, Tubbs Decl. ¶¶ 46, 48. Thus, particularly when combined with the wastewater ban, a ban on new wells will rapidly end all production—a conclusion recognized by the County, the County's Supervising Assessor during the Measure Z campaign, courts, and subject-matter experts.[7]

[7] Multiple experts, including the County's Supervising Assessor and several independent experts retained in this case, all conclude that Measure Z will shut down oil and gas production in Monterey County. RJN Ex. 2 (County Supervising Assessor's opinion), Ex. 43 (Capitol Matrix

Recognizing that Measure Z would have far-reaching effects, opponents tried to sound the alarm, and they supported County Counsel's proposal to order neutral impact reports for the initiative under the Elections Code to help both the County and the public understand the measure's likely ramifications.[8] Initially, the Board agreed to produce impact reports. But once it learned of that plan, PMC began forcefully lobbying the Board to change its mind.[9]

The Board ultimately directed the County Auditor to prepare a fiscal impact statement, but no other reports. This barely slowed PMC, which continued efforts to influence the content of the fiscal statement and other ballot materials to ensure they nowhere stated that Measure Z would impact current oil production.[10] PMC's campaign worked. Despite the Supervising Assessor's conclusion that Measure Z would shut down oil production, no official materials explained that Measure Z's new well and wastewater disposal bans would have this effect. And to the contrary, Measure Z's third paragraph emphasizes that "[t]his Initiative does not prohibit oil and gas operations (other than well stimulation treatments) from using existing oil and gas wells in the County, which number over 1,500 at the time this Initiative was submitted." AR 121 (Measure Z §1(B)). PMC contended in its ballot materials that Measure Z was "fair and balanced" because it allowed existing wells "to continue operating" and "preserves current oil jobs and County tax revenue." AR 364. And PMC argued that any claim of an "Oil 'Shut Down' is a Lie" because "Measure Z allows Monterey County's existing 1,500 oil wells to continue operating." AR 387. A PMC spokesman went further still, saying Measure Z would cause "zero job loss" and "zero loss of taxes" because it was "simply untrue" that Measure Z would shut down oil production.[11]

These claims carried the day, and Measure Z passed. After the election, PMC abandoned its claim that Measure Z does not impact current production. A PMC organizer told the Salinas

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Consulting report); Ellison Decl.; Kemp Decl. Ex. A at 49, 52-54; Latham Decl. ¶ 24; Tubbs Decl. ¶¶ 36-37, 44-51, 54-59; Wilson Decl. ¶ 18. Indeed, the predictable and exponential reduction in production of oil from existing wells is so well understood and indisputable that the County agreed to stipulate to it, Stipulated Facts ¶ 20, and courts have consistently recognized this truism, *e.g.*, *Cassinos v. Union Oil Co.*, 14 Cal. App. 4th 1770, 1781 (1993) ("the production of oil wells predictably and steadily decreases over time").

[8] RJN Ex. 1 at 16:4-17:1; 32:19-33:9 (July 12, 2016 Board meeting transcript).

[9] *E.g.*, AR 220 (June 1, 2016 Board meeting transcript); *see* sources cited *infra* nn.29-37.

[10] *E.g.*, *id.*; RJN Ex. 49 (email from PMC arguing to the County Auditor that "[a]n objective and impartial fiscal impact statement cannot assume a ban on future production").

[11] *Id.* Ex. 53 (video footage of statement).

Californian, "We're ready to transition to renewable energy,"[12] and the Center for Biological Diversity called Measure Z—which it helped draft—part of a "plan to phase out the existing enormous, enormous production" of oil in California.[13] Indeed, PMC has told this Court that to allow current operations to continue would "effectively nullify" Measure Z.[14] And in other fora, PMC has tried to leverage Measure Z into a broad ban on oil and gas production in the County.[15]

III. Measure Z Commits a *Per Se* Taking by Destroying the Economically Beneficial Use of CRC's Mineral Rights.

The California and U.S. Constitutions prohibit governments from taking private property without just compensation. U.S. Const. amend. 5; Cal. Const. art. I, § 19(a). Regulations that deprive property of all economically beneficial use are *per se* unconstitutional takings. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992). As a holder of mineral rights, CRC can use its property only to produce oil and gas and related substances. It cannot use its property to build houses, grow crops, or pursue any other economically viable uses. *E.g.*, *Cassinos v. Union Oil Co.*, 14 Cal. App. 4th 1770, 1782-83 (1993) (describing the limited nature of mineral rights). Measure Z's ban on new wells therefore completely destroys the economically beneficial use of CRC's property rights, producing a textbook taking.

A. By Prohibiting CRC from Drilling Any New Oil or Wastewater Wells, Measure Z Effects a Facial Taking of CRC's Mineral Rights.

1. Legal Framework

The Supreme Court recognizes two broad categories of takings: physical and regulatory. The government physically takes property when it uses its eminent domain power to condemn property or permanently or temporarily occupies it. *Lucas*, 505 U.S. at 1014-15. A regulation can also "take property" when it "goes too far," *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415

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[12] RJN Ex. 54.

[13] RJN Ex. 55.

[14] Reply in Supp. of Mot. for Leave to Intervene at 5, 8, *Chevron U.S.A. Inc. v. Cty. of Monterey* (No. 16CV003978) (Mar. 10, 2017).

[15] *E.g.*, RJN Ex. 36 at 36:5-8, 39:17-18 (July 25, 2017 Board meeting transcript) ("To give corporations at least bypass exemptions for this and other measures, we shouldn't do that. We should have an absolute minimum of exemptions if at all."); ("We did not vote to allow the oil companies to have exemptions to work around the vote."); *see id.* 35:14-16, 40:20-41:1.

(1922), and forces property owners to bear costs that "in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Court has developed several tests for determining when a regulation "goes too far." In two situations, a regulation's impact on property owners is so severe that "case-specific inquiry into the public interest advanced in support of the restraint" is unnecessary, and the regulation is a *per se* taking. *Lucas*, 505 U.S. at 1015. First, any regulation that results in a permanent physical occupation is a *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Second, and of direct relevance to Measure Z, a regulation that deprives a property owner of "all economically beneficial or productive use" of his property is a *per se* taking. *Lucas*, 505 U.S. at 1015. If neither of these categories applies, a property owner can still show that a regulation effects a taking under the multi-factor test laid out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), which considers, *e.g.*, the regulation's economic impact on the property owner and its interference with investment-backed expectations.

Regulations that deprive property owners of all economically beneficial or productive uses of property are particularly egregious. Such a regulation "is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017. In such cases, "it is less realistic to indulge [the Court's] usual assumption that the legislature is simply adjusting the benefits and burdens of economic life." *Id.* Such regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018. For all these reasons, the Court has repeatedly and consistently held that such regulations are *per se* takings. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n, Inc. v. DeBenedictis* (*Keystone*), 480 U.S. 470, 495 (1987); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

When alleging a regulatory taking, property owners may raise either facial or as-applied challenges. A facial taking occurs when the "mere enactment" of a regulation "constitutes a taking." *Hodel*, 452 U.S. at 295. Both federal and California courts recognize facial takings where a regulation denies all economically viable use of real property. *Id.* at 295-96; *Del Oro*

Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 1076 (1995). It is the property owner's burden to produce evidence demonstrating the regulation's effect. *Keystone*, 480 U.S. at 496-97.

As shown below and as will be shown at the Phase 1 trial, Measure Z deprives CRC of all economically beneficial uses of its mineral interests and is thus a facial taking under *Lucas*. If the Court disagrees, CRC reserves the right to assert *Penn Central* or as-applied challenges in later phases of this case.

2. Measure Z Effects a Facial Taking of CRC's Mineral Rights.

CRC owns mineral rights and oil and gas leases in Monterey County. In California, as elsewhere, landowners regularly sever land into surface and mineral estates, and the two are often held by different owners, with the mineral estate being dominant. *E.g.*, *Phillips Petroleum Co. v. Cty. of Lake*, 15 Cal. App. 4th 180, 185 (1993). A mineral owner has "the exclusive right to drill for and produce oil, gas and other hydrocarbons," *Cassinos*, 14 Cal. App. 4th at 1782, while a surface owner holds "[a]ll other rights in the land," *Phillips*, 15 Cal. App. 4th at 185. Oil leases similarly convey rights only to produce oil, gas, and related substances.

The Supreme Court has consistently recognized that the Takings Clause "is addressed to every sort of interest the citizen may possess," including mineral estates and leaseholds. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). Both the Supreme Court and California courts have repeatedly held that regulations that prohibit the use of mineral estates are unconstitutional takings. Indeed, the Supreme Court case that first recognized the concept of regulatory takings involved a ban on mining. In that case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, a coal company that owned only mineral rights challenged a statute banning mining that could cause subsidence. The Court concluded that the act was an unconstitutional taking because it effectively abolished the company's property right. *Id.* at 414.

"For practical purposes, the right to coal consists in the right to mine it. What makes the right to mine coal valuable is that it can be exercised with profit." *Id.* "*To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it*." *Id.* "We are in danger," the Court emphasized, "of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the

desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

In *Keystone*, the Supreme Court upheld a similar law against a takings challenge because the coal company could profitably continue mining. 480 U.S. at 493, 495-96. The Court reaffirmed *Pennsylvania Coal*, noting that the statute there prevented the company from "undertak[ing] profitable . . . mining." *Id.* at 498. Both cases thus stand for the proposition that while a regulation may be beneficial, regulations that wipe out the economic value of mineral rights are *per se* takings and require compensation.

California courts have likewise long held that a complete ban on the right to extract oil is an unconstitutional taking. For instance, in *Braly v. Board of Fire Commissioners*, 157 Cal. App. 2d 608, 610 (1958), the petitioner claimed that the Los Angeles Municipal Code effected a taking of his mineral rights by prohibiting him from drilling any oil wells on his property. Recognizing that the petitioner's exclusive property right to capture oil and gas beneath his land was "'as much entitled to protection as the property itself, and the undue restriction of the use thereof is as much a taking for constitutional purposes as appropriating or destroying it,'" the court concluded that the regulation unconstitutionally denied "adequate means of protection or substitute [through forced pooling from nearby wells] for the[] right to extract oil from their property." *Id.* at 612, 615 (quoting *Bernstein v. Bush*, 29 Cal. 2d 773, 778 (1947)).

CRC's mineral rights present a clean, straightforward application of *Lucas*. CRC leases rights in over 40 parcels without any existing oil and gas wells. Bridges Decl. ¶ 9; McMahan Decl. ¶¶ 2-9. Similarly, CRC owns mineral rights in 23 separate parcels, none of which contain wells. Bridges Decl. ¶¶ 30-31; McMahan Decl. ¶ 9. CRC has leased four additional parcels that contain some infrastructure, but each requires additional wells for any economically viable oil production. McMahan Decl. ¶¶ 2-8. The impact of Measure Z on CRC's property is crystal clear: Because CRC can never drill any exploration, production, or wastewater wells, Measure Z renders its oil and gas rights worthless. *E.g.*, *id.*; Miller Decl. ¶¶ 28-29; Latham Decl. ¶¶ 6(b), 18.

Measure Z therefore has "very nearly the same effect for constitutional purposes as appropriating or destroying" the entirety of CRC's rights in each of its Monterey County properties, committing a *per se* taking. *Pa. Coal Co.*, 260 U.S. at 414; *see also Lucas*, 505 U.S.

at 1017-18. Because CRC will lose the ability to use its property beginning as soon as Measure Z goes into effect—that is, based on its "mere enactment"—it is a facial taking. *Hodel*, 452 U.S. at 295. There is no uncertainty regarding Measure Z's terms: Measure Z strictly bans the wells CRC needs to exercise its rights. All other similarly situated mineral rights owners in Monterey County are in the same position.[16]

B. The Proper Remedy Is a Court Order Declaring That Measure Z Effects a Taking of CRC's Property.

Because Measure Z effects a taking of CRC's property, California law entitles CRC to declaratory relief from this Court as part of this writ of mandate proceeding. *Hensler v. City of Glendale*, 8 Cal. 4th 1, 13-16 (1994). Once the Court grants declaratory relief, the County may then "rescind the ordinance or regulation or . . . exempt [CRC's] property." *Id.* at 13. If the County continues enforcing Measure Z against CRC, CRC would be entitled to just compensation for the permanent loss of its mineral rights. *Id.* In any event, the County is liable for temporary takings once Measure Z takes effect, as "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which [a] taking was effective." *First English Evangelical Lutheran Church v. Los Angeles Cty.*, 482 U.S. 304, 321 (1987).

C. Measure Z's Takings Exemption Impermissibly Purports to Allow the County to Adjudicate and Remedy Takings Claims and Violates Due Process.

Measure Z's drafters undoubtedly knew that the initiative would lead to unconstitutional takings, because they attempt to force mineral owners like CRC into a unusual administrative process to adjudicate these constitutional claims. Measure Z purports to allow the Board to resolve property owners' takings claims through section 6(C): "In the event a property owner contends that application of [Measure Z] effects an unconstitutional taking of property," the

[16] To be clear, Measure Z effects a taking of both CRC's mineral rights (as discussed above) and its vested right (*i.e.*, to fully develop those oil and gas operations, as CRC has been permitted to do by Monterey County, Smith Decl. ¶¶ 6-11; RJN Exs. 57-61). CRC is entitled to immediate declaratory relief as to its vested rights as well, because the legal concept of "amortization," which Measure Z section 6(A) uses in an attempt to artificially limit these rights, is inapplicable to wastewater disposal. Measure Z's purported vested rights exemption is therefore invalid on its face. Chevron Br. 27-28; Aera Br. 29-30; Eagle Br. 28-29; NARO Br. 28-30. If the Court does not address these vested rights in Phase 1, CRC reserves all rights to raise them in later phases.

Board "may grant, upon request of the affected property owner, an exemption . . . if the Board . . . finds, based on substantial evidence" that Measure Z would "constitute an unconstitutional taking of property" and that "the exception will allow additional or continued land uses only to the minimum extent necessary to avoid such a taking." AR 137.

At the outset, it is critical to understand what section 6(C) does, and what it does not do. As Intervenors note in their complaint, section 6(C) is "an administrative procedure to *determine whether an unconstitutional taking has occurred*."[17] Section 6(C) assigns the Board, acting in its administrative capacity, the judicial power to adjudicate takings claims. If the Board decides that Measure Z would effect a taking, it may grant an exemption, but is not required to do so. The exemption, moreover, need comply with only one standard: it must be as narrow as possible to squeak by the constitutional rules protecting private property. Section 6(C) is not a land-use procedure, such as a permit or variance process. The Board applies no substantive policy standard to determine whether and how Measure Z applies to particular property, such as whether construction of a particular well would be compatible with surrounding land uses. Rather, section 6(C) puts the Board in the role of a court, and asks only if a taking has occurred.

This provision—designed to undercut the right of parties like CRC to bring *per se* takings claims in court—is invalid for three main reasons. *First*, takings claims are questions of law that must be resolved by courts. *Second*, section 6(C) is so broad and vague that it exposes CRC and other property owners to arbitrary, discriminatory actions in violation of due process. *Third*, the section subjects property owners to a byzantine process that, too, is a due process violation.

1. Measure Z Usurps the Court's Authority by Requiring Exclusive Administrative Adjudication of Takings Claims.

Measure Z cannot constitutionally transfer the power to decide takings claims from the courts to the Board. As California courts have repeatedly held, the responsibility to decide takings claims lies within the exclusive competence of the courts. Any Measure Z provision to the contrary is invalid. In *Action Apartment Ass'n v. Santa Monica Rent Control Board*, 94 Cal.

[17] Compl. in Intervention ¶ 52, *Aera Energy, LLC v. Cty. of Monterey* (No. 16CV003980) (Apr. 3, 2017).

App. 4th 587 (2001), for example, landlords challenged a provision requiring them to pay certain interest on security deposits as an unconstitutional taking. The court held that the landlords did not need to avail themselves of a process for individual rent adjustments that might have provided an administrative remedy because, among other factors, the landlords' takings challenge presented "a dispositive question within judicial, not administrative, competence." *Id.* at 615.

As the California Supreme Court has explained, "an administrative agency is not competent to decide whether its own action constitutes a taking." *Hensler*, 8 Cal. 4th at 15-16.[18] Instead, property owners are "entitled to a judicial determination of whether the agency action constitutes a taking." *Id.* at 15. Takings claims "are questions for a court of law to decide at an evidentiary trial." *Healing v. Cal. Coastal Comm'n*, 22 Cal. App. 4th 1158, 1174 (1994).

The rule that takings claims are the province of courts, not administrative agencies, makes sense. Takings claims involve applying complex legal doctrine and protecting constitutional rights—tasks uniquely within the competence of the judicial branch. The Board is not equipped to make legal determinations and already faces intense political pressure not to grant exemptions. That is why California and federal law both require that courts review *de novo* any substantive agency fact-finding at issue in takings cases. *See Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289-91 (1920); *Hensler*, 8 Cal. 4th at 16 (when "a taking of property is alleged, the court must accord the owner de novo review of the evidence before the agency . . . and consider any additional evidence admitted at the hearing on the petition for writ of mandate").

If section 6(C) were valid, states could require plaintiffs to address all constitutional questions initially to administrative agencies rather than courts, usurping judicial authority and imposing unnecessary burdens on the exercise of constitutional rights. That is not the law, and the County may not use section 6(C) to avoid adjudicating CRC's ripe takings claim now.

2. Section 6(C) Is Unconstitutionally Vague.

Section 6(C), moreover, fails to provide the guidance necessary to determine whether the Board should grant an exemption or the scope of acceptable exemptions. The only direction it

[18] The Board acts in an administrative capacity when implementing Measure Z. *E.g.*, *Johnston v. Bd. of Supervisors of Marin Cty.*, 31 Cal. 2d 66, 74 (1947), *overruled in part on other grounds by Bailey v. Los Angeles Cty.*, 46 Cal. 2d 132, 139 (1956).

provides the Board and property owners is that the Board "may grant" exemptions "only to the minimum extent necessary to avoid" a taking. This phrasing raises many distinct problems.

First, section 6(C) provides the Board with no guidance whatsoever regarding how to determine whether to grant an exemption. As a result, section 6(C) imposes "dangers of arbitrary and discriminatory application" in violation of due process. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). That danger is stark here. Proponents are urging the Board to grant few exceptions, if any, *supra* n.15—which could easily result in the Board granting a few mineral owners exemptions (to avoid a total ban), while refusing to grant exemptions to others similarly situated, not because Measure Z requires it, but because its vague nature permits such arbitrary and disparate results. *Cf. Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1034-36 (D.C. Cir. 1980) (holding that exemption for "educational" organizations provided that they "present a sufficiently full and fair exposition of the pertinent facts" was unconstitutionally vague because it "lack[ed] the requisite clarity, both in explaining which applicant organizations are subject to the standard and in articulating its substantive requirements").

Second, section 6(C) provides the Board with no comprehensible standard for the scope or form of permissible exemptions. When faced with CRC's claim, for instance, should the Board allow CRC to drill some minimum number of wells to avoid a taking? To produce a minimum amount of oil? To produce oil for a minimum number of years? To achieve a particular return-on-investment threshold? Due process requires that, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. Section 6(C) provides no standard at all.[19]

Third, section 6(C)'s wholesale incorporation of takings law is facially impermissible. Outside the *per se* categories, takings law is complex, requiring "essentially ad hoc, factual inquiries" to determine when a regulation goes "too far." *Penn Central*, 438 U.S. at 124. This unmoored standard virtually ensures arbitrary enforcement and burdens property owners' right to

[19] It does say that the Board should make findings "based on substantial evidence," AR 137, but that is a deferential standard of review used for judicial review of agency decisions, *e.g.*, *W. Chandler Blvd. Neighborhood Ass'n v. City of Los Angeles*, 198 Cal. App. 4th 1506 (2011)—not a burden of proof, much less any guidance on the basic merits questions at hand.

challenge the unconstitutional taking of their mineral rights, as exemptions bounce back and forth between the Board (which is not equipped to hear such claims in any event) and the courts.

Indeed, the U.S. Supreme Court and the Ninth Circuit have both rejected similar attempts to incorporate broad, vague legal standards into statutory obligations. In *Hunt v. City of Los Angeles*, 638 F.3d 703, 713 (9th Cir. 2011), for example, the Ninth Circuit rejected a broad ban on vending that merely "cop[ied] a legal standard" from the governing law and "past[ed] it into" an exemption provision. The court explained that "simply reciting [a] legal standard fails to provide guidance" for substantive application of the general prohibition, particularly because the decision maker was "not a court carefully weighing all of the facts and legal precedent." *Id.* That, of course, is exactly the case here. And *Hunt* builds on *Screws v. United States*, 325 U.S. 91, 96-98 (1945), in which a plurality of the Supreme Court reasoned that a statute penalizing the violation of the due process clause would be unconstitutionally vague—absent a specific intent requirement—because it "incorporate[d] by reference a large body of changing and uncertain law" that provided no concrete guidance for compliance or enforcement.

Fourth, by limiting the Board to its unworkable "minimum extent necessary" standard, Measure Z displays an open hostility to the constitutional protection of private property. In other settings involving the Bill of Rights, similar provisions would raise immediate constitutional concerns. Imagine, for example, if the County banned public speech in a park but permitted individuals to seek exemptions that the Board could grant "to the minimum extent necessary to avoid a violation of the First Amendment." The *Hunt* court struck down Los Angeles's vending ban for precisely this reason, concluding that its "attempt[] to exempt fully protected speech" from the general prohibition through bare recitation of a First Amendment standard was unconstitutionally vague. 638 F.3d at 713. Section 6(C) is similarly unconstitutional.[20]

[20] The County has already both recognized the vagueness of section 6(C) and increased the burden on property owners by requiring them to guess at the provision's meaning. Its draft implementing ordinance requires property owners to request a particular exemption, ensuring arbitrary enforcement and trapping property owners in the no-win position of either identifying a narrow exemption that might be acceptable to the County—and waiving any claim to additional development—or having their application rejected and being forced into court anyway. RJN Ex. 35.

3. Section 6(C) Requires an Unworkable, Unwieldy Process That Cannot Provide Property Owners Meaningful Relief.

Finally, section 6(C) violates due process because it will unnecessarily delay any relief from Measure Z's broadly unconstitutional application. The most analogous case to the section 6(C) process is the rent control adjustment process held unconstitutional by the California Supreme Court in *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129 (1976). There, the court struck down Berkeley's rent control ordinance because (1) the ordinance's general application would inevitably result in takings, and (2) the exception process was overly burdensome. *Id.* at 167, 169, 172. The city had passed a rent control ordinance containing "base rents" that were subject to adjustment only on a unit-by-unit basis upon application to the city's rent control board. *Id.* at 166. As with Measure Z, the process effectively guaranteed that "many or most" property owners would suffer takings because they would never recoup their investments. *Id.* at 169. The ordinance required owners of the city's thousands of rental properties to submit separate petitions to the board, attend individual hearings, and obtain certificates from the city building department that the unit complied with building codes. *Id.* at 170-71. The law, as here, imposed no time limit on the board's decision making. *Id.* at 139. The court held that these features "put the Board in a procedural strait jacket. . . . : [R]egardless of how inequitable" the ordinance's application might be, the board could provide exceptions only "by a procedure that inherently and unnecessarily preclude[d] reasonably prompt action except perhaps for a lucky few." *Id.* at 171-72. The ordinance was thus an "effective[] tak[ing]" on its face. *Id.* at 169.

Like the rent control ordinance in *Birkenfeld*, Measure Z requires hundreds, if not thousands, of property owners to petition the Board individually and participate in costly hearings prior to receiving any exemption, all with no time limit. *See* AR 373 (County Counsel Analysis). Thus, the "magnitude of the job to be done" under section 6(C) is enormous. *Birkenfeld*, 17 Cal. 3d at 169. Monterey County issued nearly 300 mineral rights assessments last year alone, a number that only scratches the surface of the mineral rights taken by Measure Z. Welles Decl. Because these interests have already been monetized, they set a floor for the number of claims the Board will have to address—and it will likely be much higher, given the array of interests held by

mineral estate owners, royalty owners, and lessees.

In addition to the sheer number of claims at issue, section 6(C) requires the Board itself to work through each parcel, determining the precise scope of any unconstitutional taking as to that property (which will require the County to look at each property on its own, even if individual applications are consolidated), and craft an individualized exemption. Such a process will easily "take years." *Carson Mobilehome Park Owners' Ass'n v. City of Carson*, 35 Cal. 3d 184, 192 n.6 (1983). Moreover, unlike the rent control board in *Birkenfeld*, the Board here has a wide range of duties it must fulfill on a regular basis having nothing to do with Measure Z.[21]

Because no subsequent ordinance may alter the terms of an invalid initiative, the Board cannot cure these defects through an implementing ordinance. *See Lesher Commc'ns, Inc. v. City of Walnut Creek*, 52 Cal. 3d 531, 544 (1990) ("The validity of the ordinance under which permits are granted, or pursuant to which development is regulated, may not turn on possible future action by the legislative body or electorate."); *Agric. Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 427 (1976) (administering agencies "may not exercise [their] sublegislative powers to modify, alter or enlarge the provisions of the legislative act which is being administered"). Measure Z is simply fatally flawed.[22]

D. CRC's Takings Claim Is Appropriate for Immediate Review in Any Event.

Even if these infirmities in section 6(C) did not exist, the Court need not defer review of CRC's facial takings claim. CRC's claim is ripe now, and any administrative procedure CRC could exhaust would be both unnecessary and burdensome. The case of *Action Apartment*, which reached plaintiffs' takings claim despite available administrative remedies, illustrates both points.

[21] The *Birkenfeld* rule is in accord with similar case law prohibiting the County from burdening CRC's First Amendment right to petition the courts for redress by imposing costly, delay-filled administrative procedures—in which the County will be providing this Court with, at most, an advisory opinion, subject to no deference, on the legal takings question. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 530-36 (2002).

[22] As noted, *supra* n.20, the County released a draft ordinance to implement section 6—to which a host of parties have objected. RJN Ex. 35. In many ways, the draft ordinance only clarifies the facial problems with Measure Z by, for example, (a) imposing intermediate levels of unnecessary review that only work to ensure further delays, and (b) allowing the general public, without limitation, to participate in each stage of what are essentially adjudicatory proceedings. *Id*. §§ 16.58.050(D)(3), (F), (G); 16.58.090(E). Even if an ordinance could somehow cure the facial invalidity of Measure Z (which it cannot, *see supra*), the draft ordinance offered by the County falls far short of providing any relief.

First, recognizing that the ripeness doctrine is intended to "frame[] [issues] with sufficient definiteness to enable the court to . . . dispos[e] of the controversy," the *Action Apartment* court concluded that the substantive provisions of the regulation requiring landlords to pay interest on security deposits were "sufficiently final . . . to evaluate." 94 Cal. App. 4th at 609-10; *see Palazzolo v. Rhode Island*, 533 U.S. 606, 619-20 (2001) (finding a challenge to "unequivocal" regulations ripe for review). Measure Z is similarly definite: It completely prohibits both the drilling of new wells and wastewater disposal. Section 6(C) introduces no substantive uncertainty regarding how these definitive provisions operate; rather, it addresses only whether they effect a taking. In such settings, where claims rely solely on the language of the regulation rather than the "discretion [agencies] characteristically possess[]" to "soften[] the strictures of . . . general regulations," *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997), courts have repeatedly found cases ripe for review, *e.g.*, *Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 407-08 (9th Cir. 1996); *Brown v. City of Los Angeles*, 102 Cal. App. 4th 155, 168 (2002).

Second, the court emphasized that the purpose of the exhaustion doctrine is to avoid interference with the "subject matter of another tribunal," not impose unnecessarily burdensome and duplicative review. *Action Apartment*, 94 Cal. App. 4th at 610, 614-15. Faced with an administrative process offering individual adjustments, the court declined to require exhaustion for several reasons. The plaintiffs' takings claim was a judicial, not administrative question. *Id.* at 615. The agency was "not likely to resolve the dispute in a manner that makes judicial review unnecessary." *Id.* And because each landlord would have to file a separate administrative petition, each raising the same legal claim, judicial resolution was "singularly economical" compared to "piecemeal review" in the administrative forum. *Id.* All of the same is true here.

* * *

In sum, CRC has established a clear facial taking. Measure Z's flat bans on drilling new oil production and wastewater disposal wells prevent CRC from producing oil and gas from its mineral rights in Monterey County. This renders CRC's rights worthless. The proper remedy for this taking is a judicial declaration that Measure Z would effect a taking if applied to CRC. *See Hensler*, 8 Cal. 4th at 13-14. Although section 6(C) tries to deny CRC this remedy, it is invalid

as a matter of law and immaterial to the ripeness of CRC's claim. The Court should therefore issue an order declaring that (1) the application of Measure Z to CRC without the payment of just compensation is unconstitutional, and (2) section 6(c) is unconstitutional. If the County continues enforcing Measure Z against CRC, CRC will be entitled to damages.

IV. Measure Z Violates the California Constitution's Single-Subject Rule by Pairing Its Highly Advertised Fracking Ban with Unrelated Provisions That Will Eliminate Oil and Gas Production in Monterey County.

The California Constitution protects voter intent through its single-subject rule, which provides that "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Cal. Const. art. II, § 8(d). The aim of this rule is "to avoid confusion of . . . voters" and "to prevent the subversion of the electorate's will." *Senate v. Jones*, 21 Cal. 4th 1142, 1156 (1999). The need for this rule is apparent. "The busy voter does not have the time to devote to the study of long, wordy[] propositions and must rely upon . . . sketchy information" from campaign materials. *Manduley v. Superior Court*, 27 Cal. 4th 537, 585 (2002) (Moreno, J., concurring in judgment). "If improper emphasis is placed upon one feature [of the measure] . . . , the voter may be misled as to the over-all effect of the proposed amendment." *Id.*

Courts have translated this constitutional limitation on the initiative process into a rule that "all of [an initiative's] parts [must be] reasonably germane to each other and to the general purpose or object of the initiative." *Jones*, 21 Cal. 4th at 1157. This analysis first requires the Court to decide "the general purpose or object of the initiative." *Id*. The Court must then determine whether each provision of the initiative is "germane" to the identified purpose, *id.*, taking special care to ensure that voters are not manipulated by one part of the new law "that the proponent views as politically popular," *id.* at 1151, 1160, when the law's actual impacts are disparate and far broader. The Court's inquiry must include a realistic consideration of the average voter's capacity to understand and draw conclusions from available materials. *See Cal. Trial Lawyers Ass'n v. Eu* (*CTLA*), 200 Cal. App. 3d 351, 361 (1988).

Measure Z fails this test. Sold as a fracking ban—and one that would <u>not</u> eliminate ongoing oil and gas operations, or kill jobs or tax revenues—Measure Z accomplishes almost exactly the opposite result. Fracking is not even used in Monterey County; rather, the ban served

as a political hook to capture support. As for existing oil and gas operations in the County, what Measure Z really accomplishes, through obscure means that average voters would not understand, is a shutdown of these multi-billion-dollar interests. Neither Measure Z's text or promotion made any of this plain, and the initiative violates the single-subject rule.

A. Measure Z's Purpose Was to Ban Fracking.

The first step of the single-subject-rule analysis is determining an initiative's purpose. Here, Measure Z's purpose was made plain in many ways, starting with section 1(A), which announces that banning "fracking" is "*[t]he* purpose" of the initiative, AR 121:

> The purpose of this Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative ('Initiative') is to protect Monterey County's water, agricultural lands, air quality, scenic vistas, and quality of life by prohibiting the use of any land within the County's unincorporated area for well stimulation treatments, including, for example, hydraulic fracturing treatments (also known as 'fracking') and well stimulation treatments.

See CTLA, 200 Cal. App. 3d at 360 (relying significantly on initiative's "express purpose").[23]

Of course, no operators frack in Monterey County,[24] but the mere term tends to cause fear, overreaction, and uninformed debate.[25] Measure Z's proponents seized on this fear. Background events can confirm an initiative's purpose, *see Brosnahan v. Brown*, 32 Cal. 3d 236, 248 (1982); *Chem. Specialties*, 227 Cal. App. 3d at 672, and no more so than here, where voters were told that Measure Z originated as a direct response to the County Board's decision to vote down the 2015 fracking ban. In a controversial decision, the Board rejected the ban because no fracking was used in the County, and the State actively regulated fracking under SB 4. AR 96-99, 105-07, 109.

PMC formed and drafted Measure Z in response,[26] stating in Measure Z's second finding that, by rejecting the fracking ban, the Board "failed to enact protections for the county's water, air and land." AR 122 (Measure Z § 1(C)(2)). Dr. Laura Solorio, the named intervenor in these cases and PMC's president, emphasized the need for the County to address "the REAL AND

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[23] *Accord Chem. Specialties Mfrs. Ass'n, Inc. v. Deukmejian*, 227 Cal. App. 3d 663, 671 (1991) (analyzing the initiative's purpose as stated in its preamble); *People v. Kisling*, 199 Cal. App. 4th 687, 694 (2011) (analyzing relationship between initiative's "stated purpose" and its provisions); *Shea Homes Ltd. P'ship v. Cty. of Alameda*, 110 Cal. App. 4th 1246, 1256-57 (2003).

[24] Stipulated Facts ¶ 28; AR 7-9 (Board Report, File No. 15-0228); Wilson Decl. ¶ 40.

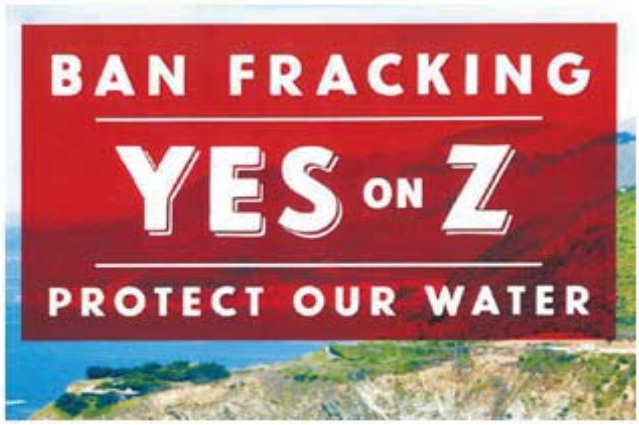
[25] *E.g.*, RJN Ex. 56 (radio interview with Governor Jerry Brown discussing these issues).

[26] Stipulated Facts ¶ 2; Compl. in Intervention ¶ 36, *Aera Energy, LLC v. Cty. of Monterey*, No. 16CV003980 (Apr. 3, 2017).

POTENTIAL health and environmental effects of fracking" the same day the Board held a hearing to address Measure Z. RJN Ex. 3.

An initiative's purpose must be "viewed from a realistic and commonsense perspective," with an average voter in mind. *Jones*, 21 Cal. 4th at 1161. Measure Z's proponents created campaign signs reading, in large, red block letters: "Protect Our Water: Ban Fracking," and "Ban Fracking, Yes on Z, Protect Our Water." RJN Ex. 5.

They featured the same rhetoric and imagery in campaign ads, *id.* Exs. 50, 51:



A singular focus on one provision—here "BAN FRACKING"—in promoting an initiative helps confirm that its "proponent view[ed] [that provision] as [a] politically popular" hook for other, unrelated provisions. *Jones*, 21 Cal. 4th at 1151. A key purpose of the single-subject rule is to police such behavior, as "it [is] extremely unlikely that the average voter . . . or even one more conscientious and sophisticated, would take the time" to dig into all of the details of an initiative, particularly when proponents present a clear, singular message about its purpose and effects. *CTLA*, 200 Cal. App. 3d at 361. The pro-Measure Z message was so prolific that even the *Monterey Herald* published its own editorial in October 2016, that questioned, "why are the

Yes on Z campaign material featuring—in large bold type—BAN FRACKING?" RJN Ex. 52. The editorial noted that it was "perhaps because, on the national stage fracking is a red-flag word these days," and thus urged voters to "look past this obvious attempt to mislead the public." *Id.*

Given this campaign, the average voter likely thought Measure's Z purpose was to ban fracking. We know that some voters *did* think this way. As one voter recently told the Board, "there was a lot of misinformation on the ballot . . . the signs all said 'stop fracking,' there is no fracking, and this . . . should have been clarified, that there is no fracking . . . . That's misinformation."[27]

Although section 1 of Measure Z also mentioned the new well and wastewater bans, it did so divorced from any reasoning or articulation of the purposes to be served by those provisions. AR 121. Section 1 thus suggested to voters that the fracking ban would accomplish the entirety of Measure Z's purpose. Indeed, of the measure's 15 findings that follow (many of which are facially incredible, NARO Br. § V), only two are not focused on fracking. AR 121-27. Throughout Measure Z, the new well and wastewater bans are presented, at most, as secondary or tertiary aims. It is these unrelated bans that are not germane to Measure Z's purpose that render the whole initiative invalid. *See infra* § IV.B. And this result is only bolstered by the fact that Measure Z's proponents affirmatively confused voters about what these additional provisions meant and what their impact would be on the County and its rights holders. *See infra* § IV.C.

B. Measure Z's Bans on New Oil Wells and Wastewater Disposal Are Not Reasonably Germane to Its Stated Purpose of Banning Fracking.

Measure Z's shutdown of existing oil and gas operations—achieved through the ban on new oil wells and ban on wastewater disposal—is not reasonably germane to its highly advertised fracking ban. The reasonably germane standard requires that each provision of an initiative have a logical relationship to the initiative's "stated objective." *CTLA*, 200 Cal. App. 3d at 359. Measure Z's non-fracking bans fail this test.

Neither banning all new conventional oil wells nor banning existing wastewater disposal practices is "logically related to the stated objective" of a fracking ban because neither advances

[27] RJN Ex. 36 at 62:13-63:5 (July 25 Board meeting).

that purpose. *CTLA*, 200 Cal. App. 3d at 359. Each provision, particularly when combined, will not only prohibit any future oil and gas development in Monterey County *altogether*, but will soon shut down all existing production, as found by the County's Supervising Assessor, and as shown above. *See* RJN Ex. 2; sources cited *supra* n.7. Fracking, in stark contrast, is *not* part of current operations, nor is it needed to expand production in existing Monterey County oil fields in which rights holders like CRC have long been making investments. AR 7, 9 (Board Report); Miller Decl. ¶¶ 17, 28; Kemp Decl., Ex. A at 51; Ellison Decl. In fact, fracking would likely have *negative* effects on both new and current operations in Monterey County. Miller Decl. ¶ 17.

Two cases help illustrate why this disconnect violates the single-subject rule. In *CTLA*, the court reasoned that a provision governing insurance-industry campaign contributions violated the single-subject rule because it would not "operate to advance the initiative's announced purpose" of controlling insurance costs. 200 Cal. App. 3d at 359. While both provisions regulated the insurance industry generally, the connection between the campaign finance provision and the measure's stated purpose was "not readily apparent" to voters or to the court. *Id.* Even more analogously, in *Jones*, the Supreme Court held that a provision governing legislative salaries was unrelated to the purported purpose of addressing "legislative self-interest" because, "[a]lthough the text of [the initiative] obscures this point, in reality, under existing law, members of the Legislature do *not* control their own salaries (and thus cannot 'raise their own pay,' as the initiative implies)." 21 Cal. 4th at 1163.

As in *CTLA* and *Jones*, the new well bans in Measure Z do nothing to further its fracking ban—indeed, they are essentially irrelevant to that purpose. *Id.*; *CTLA*, 200 Cal. App. 3d at 359. And as in *Jones*, the true import of these buried provisions was not only unclear, but voters were misled—in *Jones*, the initiative attacked legislators setting their own salaries (a practice that did not occur); here, Measure Z targets nonexistent fracking.

Applying the test the court articulated in *Brosnahan* confirms this same result. 32 Cal. 3d at 247 ("A provision which conduces to the act, or which is auxiliary to and promotive of its main purpose, or has a necessary and natural connection with such purpose is germane within the rule."). Nothing about the new well or wastewater disposal bans "conduces to," that is, helps to

bring about, a prohibition on fracking or WST, or presents a "natural and necessary connection with" banning fracking. *Id*. Had Measure Z included only a fracking ban, existing oil and gas operations could continue without meaningful alteration. *E.g.*, Kemp Decl., Ex. A at 51. Indeed, under the present stay of Measure Z, existing production is occurring, while fracking is not.

For similar reasons, the new well ban and wastewater disposal ban are not "auxiliary to" and do not "promot[e]" Measure Z's fracking ban. *Brosnahan*, 32 Cal. 3d at 247. Neither additional ban "further[s]," "encourage[s]," "offer[s] or provid[es] help, assistance, or support," or "function[s] in a subsidiary capacity," *Webster's Third New International Dictionary* 149, 1815 (1971) (definitions for "promote" and "auxiliary"), as a fracking ban could easily stand on its own without the new well and wastewater bans, given the geology in Monterey County. Miller Decl. ¶¶ 17, 28. These new well and wastewater bans are substantive and distinct, and therefore nothing like the "mere[] administrative details" or "collateral effects" that the California Supreme Court has found permissible under the single-subject rule. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 230 (1978).

That fracking, new well drilling, and wastewater disposal are all parts of the oil industry does not show germaneness. Not only are all three practices regulated very differently by the State and federal governments, Chevron Br. § III.A; Aera Br. § III.A; Eagle Br. § IV, cases like *CTLA* refute such theories. There, the court rejected proponents' argument that "any two provisions, no matter how functionally unrelated, nevertheless comply with the constitution's single-subject requirement so long as they have in common an effect on any aspect of the business of insurance." 200 Cal. App. 3d at 360. That "approach," the court held, "would permit the joining of enactments so disparate as to render the constitutional single-subject limitation nugatory." *Id.* The same is true of Measure Z. Even if some broader purpose could tie different aspects of the measure together, PMC and the County cannot posit a supportable purpose based on the text and campaign in favor of Measure Z that reasonably encompasses its *three* distinct bans. If PMC wished to enact each disparate policy, it could have done so: "Unrelated proposals always may be placed before voters through separate initiative measures," "affording the[m] the choice of approving all, some, or none of the distinct proposals." *Jones*, 21 Cal. 4th at 1158.

Measure Z is also unlike the measure approved in *Brosnahan*, which was a "multifaceted 'reform' measure[] . . . aimed at certain features of the criminal justice system to protect and enhance the rights of crime victims." 32 Cal. 3d at 247. Measure Z was not sold as broad reform of the oil industry (nor could it be, consistent with preemption law), and proponents not only opposed efforts by the County to educate voters about Measure Z's actual effects, they misled voters about its impact on existing production, *e.g.*, AR 364, as shown below.

C. Application of the Single-Subject Rule Is Particularly Appropriate Here Because Voters Were Likely Confused About Measure Z's Content.

The single-subject rule provides a crucial remedy for misleading initiatives that "subver[t] the electorate's will." *Jones*, 21 Cal. 4th at 1156. Cases involving meaningful risk of voter confusion call for strong enforcement of the rule, given that its "purpose [is to] minimiz[e] voter confusion and deception," *id.* at 1160, and given "that in adopting a constitutional amendment limiting initiative measures to one subject, it was the will of the people that the process not be abused," *Chem. Specialties*, 227 Cal. App. 3d at 667. This concern is highly relevant in this case. In addition to baiting the hook for voters with a fracking ban, the proponents' repeated statements that Measure Z would not impact current oil production, jobs, or tax revenue likely confused the voters because, contrary to these assurances, Measure Z will have precisely those effects. This worry is compounded by the fact that, for the average voter without technical experience, these effects are not obvious, and initiative proponents ensured that voters would not learn otherwise.

The risk for deception begins in Measure Z itself. Its third paragraph states that "[t]his Initiative does not prohibit oil and gas operations (other than well stimulation treatments) from using existing oil and gas wells in the County, which number over 1,500." AR 121 (Measure Z §1(B)).[28] This provision implies that Measure Z would not affect current operations, and in its ballot statements, PMC took pains to reassure voters of exactly that conclusion. PMC contended that Measure Z was "fair and balanced" because it allowed existing wells "to continue operating" and "preserves current oil jobs and County tax revenue." AR 364. PMC's rebuttal arguments

[28] This claim is factually incorrect as well: Monterey County does not have even close to 1,500 active wells that could "continue operating." The real number is 779 active wells, and 576 shut-in wells that are idle and not producing. Kemp Decl. Ex. A at 40.

doubled down on this claim, stating that the "Oil 'Shut Down' is a Lie" because "Measure Z allows Monterey County's existing 1,500 oil wells to continue operating." AR 387. PMC even assured voters that Measure Z would cause "zero job loss," "zero loss of taxes," and said that arguments that Measure Z would shut down oil production were "simply untrue." RJN Ex. 53.

By prohibiting all new wells and wastewater disposal, Measure Z itself assures that both current jobs and tax revenue will be lost. *See* sources cited *supra* n.7. However, the average voter with limited knowledge of oil and gas operations cannot be expected to understand these impacts, and the official ballot materials never explained Measure Z's impact on existing production. A full, neutral explanation was particularly important because Measure Z asked voters to regulate subsurface practices in a highly technical industry, with which an average voter would have little, if any, experience. Typical initiatives, on the other hand, ask voters to weigh in on more familiar topics, such as whether to fund medical research. *Cf., e.g.*, *Cal. Family Bioethics Council v. Cal. Inst. for Regenerative Med.*, 147 Cal. App. 4th 1319, 1351 (2007) (voters were "not required to grasp the intricacies" of research to understand measure funded it).

Measure Z's proponents fought hard to stop the County from creating any impact reports, including financial analysis, that would help educate voters about the true effects of Measure Z. The Elections Code allows counties to produce reports about the impacts of initiative measures, which provide "a neutral snapshot position" of the initiative's effects and serve as a key resource for both the public and the county. AR 217-18, 222. The Board's staff recommended impact reports here in part to address Measure Z's effect on current operations. AR 213-14. Yet PMC and its counsel objected to the creation of *any* impact reports or neutral analysis, and engaged in a systematic, behind-the-scenes campaign to ensure that voters would not receive such information.

As revealed by documents obtained through Public Records Act requests, PMC lobbied the Board to oppose the development of any reports,[29] an effort that succeeded when one Supervisor, who had helped PMC secure a campaign treasurer,[30] agreed that the County should not commission reports because they would "increase[] liability for the County when we get

[29] *E.g.*, RJN Ex. 48 (email from PMC to Supervisor Phillips stating that "PMC . . . is concerned that the County's impact analyses could bring into question the Board's *impartiality*").

[30] RJN Ex. 40 (email from PMC to Supervisor Parker).

sued." AR 295. The public asked for this information,[31] Supervisors Phillips "ask[ed] the Auditor to look at the fiscal impact from both sides" to provide "unbiased . . . information . . . for the general public so they can make an informed decision," AR 294, and Supervisor Salinas said "the proponents shouldn't be afraid of" such neutral analysis, AR 303. Yet at PMC's urging, a bare majority of the Board rejected producing any impartial impact reports. AR 306.

PMC's campaign against unbiased analysis only began here, and it threatened to sue the County if it performed any financial analysis.[32] PMC proposed an improper plan for the County to host an official forum for PMC to promote its positions.[33] PMC sought to shut down the Monterey Business Council for inviting Measure Z opponents to speak, arguing that the Council was "conducting a deceptive anti-Initiative campaign to fraudulently induce voter opposition through fear of an oil and gas industry shutdown." RJN Exs. 45-47. PMC told the Board that it "should not undermine its credibility" by ordering neutral, expert reports—which PMC's attorney called "doing the work of the oil industry."[34] And, perhaps most importantly, by lobbying Board members,[35] County Counsel,[36] and the County Auditor,[37] PMC shaped the contents of the official ballot materials to echo its campaign message. (CRC is currently limited to these noticeable documents, which it previews in this brief. If the Court finds this evidence in any way lacking, CRC respectfully renews its requests that the Court allow limited discovery on this claim.)

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[31] *E.g.*, RJN Ex. 44 (email to the Board requesting neutral analysis).

[32] AR 245 (June 1, 2016 Board hearing transcript) (stating that "Protect Monterey County [is] willing to file legal action to stop fiscal impact analysis" if it were done by a staff-selected firm).

[33] AR 261-62, 285 (suggesting that the County could "have both sides create reports" and host an official "public forum" to present them, a process County Counsel noted could be "challenge[d] . . . as an improper way around" the Elections Code).

[34] RJN Ex. 38 (letter from Gary A. Patton to Board of Supervisors stating that the PMC "*objects, in the strongest possible terms*," to developing a fiscal impact statement, calling it "*a bad idea*" and stating that "*[t]he Board should not undermine its credibility with its constituents by doing the work of the oil industry*" by reporting fiscal impacts).

[35] *E.g.*, RJN Ex. 1, at 28:19-29:22 (July 12, 2016 Board meeting transcript) (arguing that the Board would "show bias" if it rejected PMC's ballot question).

[36] RJN Ex. 42 (letter from PMC's attorney arguing that the proposed ballot question "could mislead voters into believing—falsely—that the Initiative prohibits the operation of existing oil and gas wells in the County").

[37] *See* RJN Ex. 39 (email from PMC to County Auditor requesting a meeting with the County Auditor and County Counsel); RJN Ex. 49 (email from PMC to County Auditor attempting to discredit a Monterey County for Energy Independence economic analysis and claiming that "[a]n objective and impartial fiscal impact statement cannot assume a ban on future production").

PMC's campaign proved a success, and it killed all of the usual means of educating voters. For example, rather than providing a meaningful analysis of Measure Z's impact and scope—a key reason that County Counsel recommended impact reports—County Counsel could only tell voters that "[t]he full impact of the measure is uncertain because it is not known to what extent [well stimulation and wastewater injection and impoundment] are either utilized or necessary to the recovery of oil or gas in Monterey County." AR 373. This "analysis" told voters nothing, leaving PMC the clear lane to claim that the impact would be no loss of taxes or jobs. PMC was free to say this because after lobbying County officials, the fiscal impact statement that the Board finally authorized to share with voters omitted any mention of the County Supervising Appraiser's conclusion that Measure Z "would almost certainly eliminate . . . producing oil in this county," likely within "three to six months."[38]

As courts have explained, "significant threat[s] that voters will be misled as to the breadth of the initiative [are] heightened by" incomplete or inadequate official materials. *CTLA*, 200 Cal. App. 3d at 361. In *CTLA*, the challenged provision was absent from the title and summary and "the introductory statement of findings and purpose in the initiative itself." *Id.* Here, although the *text* of the unrelated provisions was included in the title and summary, the *effect* of those provisions was never properly explained. *Cf., e.g.*, *Manduley*, 27 Cal. 4th at 579-80 (concluding voters were "adequately informed" of changes to Three Strikes law because the official summary and impartial analysis "clearly and prominently" explained the effect of proposed revisions).

The best evidence of the bait and switch, however, has come after Measure Z's passage. Now that Measure Z is law, its proponents have abandoned their rhetoric that the measure protects jobs and tax revenue by maintaining existing oil and gas production. Right after the election, a PMC organizer told the press, "We're ready to transition to renewable energy,"[39] and CBD called Measure Z part of a "plan to phase out" existing oil and gas production in California.[40] PMC is not denying those effects either. In fact, it and CBD have advocated for a shutdown of oil production before this Court. In their intervention filings, PMC and CBD argued

[38] RJN Ex. 2 (Supervising Assessor's evaluation of Measure Z).
[39] RJN Ex. 54.
[40] RJN Ex. 55.

that the partial stay of Measure Z, which prohibits all fracking, was not enough—as it "will permit oil producers to continue *current practices* that threaten the County's air, water, and economy."[41] Indeed, they claimed that "*allowing [current] operations to continue . . . would effectively nullify the protections of Measure Z*," *id.*—the exact opposite of what PMC claimed while advocating for Measure Z's passage. *E.g.*, *supra* at 24-26. This new message is also infiltrating Measure Z's supposed exemption process. At a recent Board workshop on implementing Measure Z, its proponents, en masse, told the Board that no exemptions from Measure Z should issue at all.[42] These positions were not the thrust of the campaign, and had they been, voters could have made an informed decision about Measure Z.

But voters never had that chance. When combined, Measure Z's misleading language, the campaign's single-minded focus on fracking, PMC's inaccurate campaign statements, and the lack of neutral analysis explaining Measure Z's scope all likely confused voters and obscured the disconnect between Measure Z's ban on fracking and its actual broader effects. *See Jones*, 21 Cal. 4th at 1163. As a result, even assuming that voters read and understood the materials they were provided, *see Amador*, 22 Cal. 3d at 243-44, they were unlikely to have understood the nature and impact of Measure Z's disparate provisions. As in *CTLA*, "[t]he objectionable nature" of Measure Z is most "apparent when . . . considered in light of one of the primary electoral abuses the single-subject rule is aimed at ameliorating"—*i.e.*, "the single-subject requirement was enacted to minimize the risk of voter confusion and deception." 200 Cal. App. 3d at 360.

If initiative proponents can have it both ways—focusing on narrow, specific purposes perceived to be politically popular when promoting an initiative; falsely denying the broader implications of the initiative; and then advocating for a post-hoc, broader purpose when the measure has passed—then the single-subject rule has no teeth. As the Supreme Court recently held: "In enforcing the command of the single-subject rule in this case, we safeguard the people's precious right of initiative from the very risks of confusion and manipulation that the rule was intended to eliminate." *Jones*, 21 Cal. 4th at 1168. Staying true to this edict dooms Measure Z.

[41] Reply in Supp. of Mot. for Leave to Intervene at 5, 8, *Chevron U.S.A. Inc. v. Cty. of Monterey* (No. 16CV003978) (Mar. 10, 2017).

[42] RJN Ex. 36 (July 25, 2017 Board meeting transcript); *see supra* n.15.

V. Conclusion

Because Measure Z violates the California Constitution's single-subject rule and is fatally flawed for the reasons articulated by the other plaintiffs in these related cases, the Court should invalidate Measure Z in its entirety. If the Court concludes that Measure Z is valid, it should enter a declaratory judgment in CRC's favor, ruling that Measure Z effects a facial taking as to CRC's Monterey County mineral rights—leaving the County to decide whether to enforce the measure, or to pay just compensation.[43]

Dated: August 11, 2017

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[43] CRC respects the Court's desire to manage this litigation by consolidating, for purposes of Phase 1, these six cases challenging Measure Z. In that spirit, rather than brief each individual claim raised in CRC's complaint or by the other parties to these actions, CRC has focused this Opening Brief on its facial takings and single-subject-rule claims.

In accord with the Court's June 26 order, CRC joins in the claims raised by the other plaintiffs, including that Measure Z is preempted on multiple fronts by state and federal law—perhaps Measure Z's other most fatal flaw. CRC reserves all right to address these claims on reply, at the Phase 1 trial, in future proceedings before the Court, and on any appeal, as necessary.