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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

REPLY 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	Plaintiffs' Joint Request for Judicial Notice (filed by Chevron USA, Inc. ("Chevron"))
Suppl. RJN	Supplemental Request for Judicial Notice (filed by Chevron)
CRC RJN	Request for Judicial Notice (filed by California Resources Corporation ("CRC"))
Aera Reply Br.	Reply Brief (filed by Aera Energy LLC ("Aera"))
Chevron Reply Br.	Chevron Plaintiffs' Reply in Support of Opening Brief in Support of Phase 1 Proceedings (filed by Chevron)
County Br.	Opposition Brief for Phase 1 Proceedings (filed by Monterey County ("the County"))
CRC Br.	Opening Brief in Support of Phase 1 Claims (filed by CRC)
PMC Br.	Opposition Brief (Phase 1 Facial Claims) (filed by Protect Monterey County ("PMC") and Dr. Laura Solorio)
Bridges Decl.	Declaration of Kimberly Bridges (filed by CRC)
Johnson Decl.	Declaration of Nathaniel Johnson (filed by Chevron)
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)
Welles Decl.	Declaration of Heather Welles (filed by CRC)
Burzlaff Tr.	Transcript of Deposition of Alan A. Burzlaff, P.E. (filed by Chevron, *see* Suppl. Johnson Decl., Ex. 1)[1]

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

I. Introduction

CRC has presented the Court with a straightforward, quintessential facial takings claim rightly resolved in Phase 1 of this case. CRC is presently a non-operator in Monterey County, and indisputably would need to drill new wells (wells now barred by Measure Z) to pursue any viable economic use of its oil and gas holdings. By banning all new wells in Monterey County, Measure Z destroys CRC's mineral rights, which are useless and valueless without the wells needed to get oil and gas out of the ground. Neither the County, its hired expert, nor PMC has any response to this simple reality—indeed, CRC is barely mentioned (or not mentioned at all) in their briefs and the County's expert report. There is a reason why they scarcely address CRC's claim: they have no response. The County and PMC instead make broad attacks on plaintiffs' takings claims writ large, and refuse to grapple with the plain distinction between the claims of current producers and the claims of non-producing mineral rights holders like CRC. The County makes a passing suggestion that it is speculative whether CRC's holdings have value, but this argument is mistaken. The County has collected *millions of dollars in taxes* from CRC on these very holdings, establishing without any question that they have real, non-speculative value.

The County and PMC also assert—again without any specific analysis of CRC's actual claims—that no takings claims are ripe because all mineral rights holders must first pursue an unprecedented, unwieldy "exemption" process. What the County and PMC never address, however, is that this "exemption" process makes no sense for parties like CRC. CRC needs to drill new wells to use its oil and gas rights. This is undisputed. Measure Z's plain language bans drilling such wells. The "exemption" process has only one function: It instructs the County to decide whether the ban on new wells is an unconstitutional taking of CRC's property. That is a purely legal question that this Court can and must decide in this first phase of this case.

PMC suggests that all of the petitioners in these cases raise as-applied challenges, and it seeks to exclude evidence of CRC's property holdings and how Measure Z renders them without economically valuable use. But PMC's proposed evidentiary bar runs directly against U.S. Supreme Court case law saying that this is exactly how a *Lucas* facial takings claim can and must be presented. The exemption process, moreover, is invalid with respect to all plaintiffs. It asks

an administrative agency to perform a *judicial* function—and worse still uses a process that is devoid of any standards, has no time limits, invites the public to bog down proceedings, and asks a political elected body with no legal expertise to decide politically charged constitutional claims.

Measure Z also violates the single-subject rule. The County and PMC do not even argue that the "fracking ban"—which was the centerpiece of all efforts to get Measure Z enacted—is reasonably germane to its remaining provisions. Rather, they argue that the express purpose identified in Measure Z itself is *not* its actual purpose, and instead propose no fewer than *eight* other purposes (many of which appear nowhere in Measure Z's text), some as vague as "improving quality of life." Tellingly, moreover, while PMC wants the Court to consider the legislative history that led up to Measure Z's passage (including what was happening at the EPA, how DOGGR was doing its job, and how oil spills occurred in other parts of the State), it tells the Court to blind itself to the deceptions that littered the pro-Measure Z "Ban Fracking" campaign. The courts' single-subject case law does not require such a myopic view and instead counsels courts to guard against voter confusion—which was obvious and replete here, as documented by even the local newspaper of record. On this ground, Measure Z can and should be struck down.

II. Measure Z Commits a Facial Taking by Destroying Any Economically Beneficial Use of CRC's Mineral Rights.

A. Measure Z Effects a Clear Facial Taking of CRC's Property.

On its face, Measure Z deprives CRC of all economically beneficial use of its mineral rights, effecting a facial, *per se* taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Despite dozens and dozens of pages of generalized arguments that lump together all of the plaintiffs in these related cases, the County and PMC together provide the Court with only a single paragraph specifically responding to CRC's factually and legally distinct claim, County Br. 38, which does not come remotely close to rebutting that claim.

CRC has proven all three elements of a facial takings claim: (1) it owns constitutionally protected property rights; (2) Measure Z eliminates all economically viable use of that property; and (3) Measure Z's mere enactment, as opposed to some subsequent action by the County, destroys the property's use. In the Supreme Court's words, when a property owner claims a

"mere enactment" effects a taking, "[t]he test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981). The County and PMC's lengthy discussions of amortization, vested rights, and inapposite non-takings cases distract from this substantive claim, which they cannot contest in any real way.

1. CRC Owns Protected Rights. No one disputes that CRC owns constitutionally protected mineral rights. CRC proved such rights in over 60 parcels with no existing oil or wastewater disposal wells, Bridges Decl. ¶¶ 9, 30-31; McMahan Decl. ¶¶ 2-9; CRC RJN, and in four parcels that contain older non-producing infrastructure but require new wells, McMahan Decl. ¶¶ 2-8. The County and its expert do not dispute this evidence. Nor does PMC.[2]

Nor does anyone dispute that CRC's mineral rights receive the same constitutional protection as other real property. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Braly v. Bd. of Fire Comm'rs*, 157 Cal. App. 2d 608, 610 (1958). Although the County suggests that the Supreme Court refused to accept the "narrow definition of the mineral estate for denial of economically viable use" in *Keystone*, County Br. 38, it misreads the case. In *Keystone*, plaintiffs could mine "virtually all of the coal in their mineral estates," but argued they had been deprived of all economically viable use of "specific tons of coal" and their "support estate," which was functionally just part of the mineral estate. 480 U.S. at 496-97, 501. Because Measure Z destroys the "entire bundle of rights" in CRC's mineral rights, Measure Z is a *per se* taking. *Id.*

2. Measure Z Eliminates All Economically Viable Use of CRC's Property. Measure Z's text "categorically prohibit[s]" CRC from drilling the new wells required to exploit its rights—effecting a *per se* taking. *Lucas*, 505 U.S. at 1019. Again, the County and PMC all but concede

[2] While PMC says this evidence is irrelevant, the Supreme Court disagrees. As part of his facial takings claim, "Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the [law] denied him economically beneficial use of his land." *Lucas*, 505 U.S. at 1016 n.6. CRC has submitted exactly the evidence the Supreme Court says is necessary to prove this element of its facial taking claim. *See id.* at 1009 (discussing trial court's necessary factual findings), 1016 n.6; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495-96 (1987); *Hodel*, 452 U.S. at 296; CRC's Responses to Intervenors' Objections *passim* (filed herewith).

this point by failing to address CRC's claim. Unlike the active producers on which the County and PMC focus—who arguably are subject to amortization cushions (infirm as they are, *cf.* Aera Reply Br. 15)—CRC owns mineral rights that do not have wells (or only have out-of-service, non-functional wells) and therefore cannot be accessed *at all* without new wells. CRC proved this with percipient and expert testimony. McMahan Decl. ¶¶ 2-9; Miller Decl. ¶¶ 28-29; Latham Decl. ¶¶ 6(b), 18. No one disputes this. *Cf., e.g.*, PMC Br. 54 (arguing that Measure Z does not bar *existing* operations, but never denying that its new well ban bars CRC from using its mineral rights). In fact, the County's expert *agreed* that both new production and steam wells would be required to expand oil production to undeveloped areas. Burzlaff Tr. 81:8-82:4.

The County suggests that CRC's mineral rights might not be "valuable," County Br. 38, but this objection misses the mark. It is uncontested that, in the last three years alone, the County has collected *nearly $1.5 million* in taxes from CRC on these very holdings. Smith Decl. ¶ 4. CRC presented other uncontested evidence demonstrating the value of its mineral rights, Bridges Decl. ¶¶ 7-8; Miller Decl. ¶¶ 24-26, 30, and the County and PMC do not dispute it either. In any event, the precise amount of Measure Z's economic impact on CRC is not the question under *Lucas.* What matters is that Measure Z destroyed the economically viable use of CRC's property. *See Hodel v. Irving*, 481 U.S. 704, 716-17 (1987) (a regulation "amount[ing] to virtually the abrogation of" mineral rights having "not . . . necessarily *de minimis*" value "cannot be upheld").[3]

3. Measure Z's Enactment Destroys CRC's Property. Because the text of Measure Z—*i.e.*, its "mere enactment," *Hodel*, 452 U.S. at 295—denies CRC the use of its property, this *per se* taking is also a facial taking. *Lucas* itself found a facial *per se* taking in an analogous setting. 505 U.S. at 1016 n.6. Left with no other argument, the County and PMC effectively hang their entire opposition to CRC's claim on the theory that it is not ripe because of a clause in Measure Z calling for the Board of County Supervisors to adjudicate CRC's takings claim in the first instance. But waiting for this ruling from a political body—with no experience or authority to

[3] The County also suggests that CRC might be able to drill "replacement" wells on properties where CRC has old infrastructure, County Br. 35, but this speculation (relevant only to four of the 60+ parcels at issue) is refuted by the County's own expert, Burzlaff Tr. 104:13-24, 119:21-25, and the CRC declarations. This reading of a "replacement" well exception into Measure Z's flat ban on new wells also rewrites the text of Measure Z. Chevron Reply Br. 3-4.

adjudicate takings claims—makes no sense and runs contrary to law. *See Hensler v. City of Glendale*, 8 Cal. 4th 1, 13-16 (1994); *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 94 Cal. App. 4th 587, 615 (2001). As this ripeness argument is the only real response that the County and PMC raise, CRC will address it in some detail below.

B. Measure Z's Takings "Exemption" Is Merely an Effort to Force Property Owners into a Less Favorable Forum and Does Not Require Exhaustion.

Anticipating that Measure Z would unconstitutionally take property, Measure Z includes a clause trying to force property owners to bring their takings claims to the Board of Supervisors rather than to the courts. The County and PMC argue that CRC and other mineral-right holders must use this process before they seek judicial review. In support, they cite rafts of typical land-use cases requiring exhaustion of processes designed to ensure the court knows the conditions the local government will impose on a property owner's building permit or subdivision map before considering constitutional challenges. *E.g.*, PMC Br. 51-52.

These arguments might make sense if Measure Z's takings exemption, in section 6 of the measure, looked anything like the traditional processes used to decide land-use questions (such as whether an area has special environmental importance) discussed in the County and PMC's cited cases. But Measure Z does not call on the Board to consider any such threshold question. Rather, it asks the Board to act as a court and to decide a Fifth Amendment-based takings claim—even though the Board lacks the experience and competence to do so, and even though this Court will need to answer that question *de novo* itself.[4] Section 6 saves no time; it merely doubles the work to be done. PMC, which crafted Measure Z, acknowledged that section 6 imposes the judicial role on the Board, arguing that it establishes "an administrative procedure to *determine whether*

[4] Again, section 6 has two relevant provisions here. Section 6(B) provides that, as a matter of general application, "[t]he provisions of this Initiative shall not apply to the extent, but only to the extent, that they would violate the constitution or laws of the United States or the State of California." AR 137. Section 6(C) then specifically dictates the process for addressing takings claims: "In the event a property owner contends that application of this Initiative effects an unconstitutional taking of property," "the Board of Supervisors may grant . . . an exception." It may do so if the Board finds, "based on substantial evidence," that two conditions are met: (1) "the application of that provision . . . would constitute an unconstitutional taking," and (2) "the exception will allow additional or continued land uses only to the minimum extent necessary to avoid such a taking." *Id.* Both conditions, of course, present pure legal questions (one about liability, and the other about liability and remedies) that turn on substantive takings law.

an unconstitutional taking has occurred." Compl. in Intervention ¶ 52, *Aera Energy, LLC v. Cty. of Monterey* (No. 16CV003980) (Apr. 3, 2017). None of the cases the County and PMC cite involved anything like this forum-selection clause, mandating that a political body act as a court.

It makes no sense and is constitutionally improper to force CRC to take a straightforward legal claim it has already presented to this Court to the Board. The "found[ing] . . . theory" of the exhaustion doctrine is that the issue presented to the court "is within [the agency's] special jurisdiction" and that a judicial decision would thus "interfer[e] with the subject matter of another tribunal." *Action Apartment*, 94 Cal. App. 4th at 610. Constitutional claims are not within the Board's "special jurisdiction," and a judicial decision would not interfere with its authority. To the contrary, section 6(C) interferes with the *courts*' jurisdiction. CRC's claim presents a legal issue ripe for resolution by a court, not by a board of non-judicial elected officials who have no legal expertise and are not equipped to navigate evidentiary issues. *See Hensler*, 8 Cal. 4th at 15.

Forcing legal takings claims into a separate administrative process, moreover, will only discourage non-producing mineral rights holders from exercising their constitutional rights. PMC urges the Court to require each of hundreds of mineral rights owners to bring these claims to the Board first, despite the inevitability of *de novo* judicial review of everything the Board does, *because* PMC assumes property owners will simply abandon their rights when faced with such a burden. PMC Br. 48 n.38. The exhaustion doctrine does not support erecting such bars.

Indeed, cases like *Action Apartment* clearly call for this Court to resolve CRC's takings claim now. There, the court resolved a facial takings claim based on a regulation requiring landlords to pay interest on security deposits. The court laid out all the same arguments relied on by the County and PMC, and declined to require exhaustion for four reasons, each of which applies here. *First*, the substantive provisions of the challenged regulation were "sufficiently final . . . to evaluate." 94 Cal. App. 4th at 609-10. Measure Z is similarly definite: it flatly prohibits drilling new oil production and wastewater disposal wells. *E.g.*, Burzlaff Tr. 104:13-24, 119:21-25. *Second*, the "validity of the challenged regulations [is] a straightforward legal issue," so judicial review is likely necessary regardless of the agency action. *Id.* at 615. *Third*, the landlords' takings claim "present[ed] a dispositive question within judicial, not administrative,

competence." *Id.* *Fourth*, requiring all landlords to pursue individual petitions would be burdensome and unnecessary. *Id.* This blueprint maps cleanly onto CRC's claim.

PMC tries to distinguish *Action Apartment* but misreads the case. It argues the case is irrelevant because section 6 requires individualized analysis, unlike the "blanket" security deposit ordinance. PMC Br. 50 n.40. This argument flips the analysis on its head. *Action Apartment* rested its decision on the ordinance's *substantive* provisions and their facial impact, not on whether the ordinance's administrative exception provisions permitted an individualized analysis. *See* 94 Cal. App. 4th at 609-10, 615. Like there, the Court here can effectively and efficiently resolve the claims of all non-producing mineral rights holders by ruling on CRC's claim now.

C. The Takings Exemption Is Invalid and Presents No Obstacle to CRC's Claim.

Section 6 is also invalid for three separate reasons, any of which would call for resolving CRC's takings claim now: (1) section 6 is unconstitutionally vague, (2) section 6's process denies meaningful relief in violation of CRC's due process rights, and (3) section 6 seeks to have the Board resolve constitutional questions under the unique province of the courts.[5] Neither the County nor PMC seriously disputes the first two arguments, and while the County and PMC try to distinguish the relevant precedents on the final issue, those efforts fail, as shown below.

1. No One Disputes That Section 6(C) Is Unconstitutionally Vague.

Neither the County nor PMC responds to CRC's argument that section 6(C) is unconstitutionally vague. The Court should therefore treat this argument as conceded and rule in CRC's favor. *See Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 288 (2009).

That course is doubly appropriate because CRC is right on the merits, as three separate sources of vagueness doom section 6(C). *First*, rather than requiring the Board to issue an exemption, section 6(C) leaves it up to the Board's discretion and provides the Board with absolutely no guidance as to whether or when it should grant an exemption. As a result, the

[5] The parties appear to agree that the Court should rule on CRC's takings claim if section 6 is invalid. As the Supreme Court has emphasized, an inapplicable exception poses no barrier to a takings claim. *Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001). Although PMC suggests that CRC could pursue existing variance procedures, PMC Br. 6 n.5, 46 n.36, they are facially inconsistent with Measure Z, as the County recognizes, *see* County Br. 36. For one, they do not allow variances for uses "not otherwise expressly authorized by the zone regulation." County Code § 21.72.040. Measure Z expressly *prohibits* the use CRC seeks to make of its property.

Board could choose to exempt larger producers to avoid litigation, but decline to grant exemptions to smaller producers—or vice versa. Such unfettered discretion imposes the precise "dangers of arbitrary and discriminatory application" that the vagueness rule is designed to prevent, particularly because the Board is under political pressure to drastically limit exemptions. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *see also* CRC Br. 13.

Second, section 6(C) provides virtually no guidance on what form an exemption should take. According to section 6(C), an exemption can "allow additional or continued land uses only to the minimum extent necessary to avoid . . . a taking." AR 137. The County might decide to allow some property owners a limited number of wells, some a certain return on investment, while still others, a particular amount of oil. The lack of standards again allows the Board to treat property owners differently, depending on political and other inappropriate considerations.

Third, section 6(C) provides the County and property owners with hopelessly vague guidance on the scope of acceptable exemptions—except that the exemptions must "allow additional or continued land uses only to the minimum extent necessary to avoid such a taking." AR 137. As federal courts have emphasized, initiatives cannot just "copy[] . . . and . . . past[e]" broad legal standards appropriate for judicial resolution of constitutional claims into an exemption provision, then leave it for claimants and the Board to sort through what that standard means. *Hunt v. City of Los Angeles*, 638 F.3d 703, 713 (9th Cir. 2011). This putative standard, moreover, improperly places the burden on property owners to guess at what is "necessary" to avoid a taking. If they suggest too liberal of an exemption, the County can deny it; if they suggest too strict an exemption, they might deprive themselves of constitutionally protected rights.

Underlying all of these problems is section 6(C)'s open hostility to protection of the fundamental constitutional right to private property. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights."); *ABN 51st St. Partners v. City of New York*, 724 F. Supp. 1142, 1147 (S.D.N.Y. 1989) (applying "stringent test" for vagueness because "constitutional property interest is at stake"). Statutes "threaten[ing] to infringe on . . . constitutional rights" are held to a

higher vagueness standard, and on this further independent ground, the County's and PMC's retreat to section 6 should be rejected. *Evangelatos v. Super. Ct.*, 44 Cal. 3d 1188, 1201 (1988).

2. Section 6 Denies Meaningful Relief in Violation of Due Process.

Section 6 also violates due process because it imposes needless delay on property owners. Neither the County nor PMC can distinguish Measure Z from *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129 (1976). As in *Birkenfeld*, Measure Z improperly requires the Board—in addition to its scores of other duties—to process hundreds of claims and develop individualized exemptions, which is "a procedure that inherently and unnecessarily precludes reasonably prompt action except perhaps for a lucky few." *Id.* at 171-72.[6]

3. Binding Precedent Bars the Board from Adjudicating Takings Claims.

Finally, despite several different attempts, the County and PMC fail to distinguish the multiple decisions holding that takings claims raise "dispositive question[s] within judicial, not administrative, competence." *Action Apartment*, 94 Cal. App. 4th at 615. This rule is grounded in the fundamental competencies of administrative agencies as opposed to courts. Although the Board can issue permits or pass zoning ordinances, that expertise is "of no assistance" in adjudicating constitutional claims. *Id.* The videos of Board meetings submitted in this case are enough to show that this body is nothing like a court and is not equipped to act like one. *E.g.*, Johnson Decl. ¶¶ 1, 16, 39-40 (providing hyperlinks). As the California Supreme Court has emphasized, "an administrative agency is not competent to decide whether its own action constitutes a taking," as section 6 of Measure Z requires it to do. *Hensler*, 8 Cal. 4th at 15-16; *Healing v. Cal. Coastal Comm'n*, 22 Cal. App. 4th 1158, 1174 (1994). The County's and PMC's arguments to the contrary misread these cases and fail to account for the existence and meaning of section 6(C)—which establishes a process different in kind from any of the cases they cite.

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[6] PMC says it is "rank speculation" that so many claims will be filed, PMC Br. 48 n.3, but CRC provided the Court with the specific number of existing County mineral assessments affected—a number the County never disputes. *See* CRC Br. 15; Welles Decl.; *see also* Suppl. RJN. The *Birkenfeld* court considered similar evidence approximating the number of landlords who would need to pursue the administrative process at issue there. 17 Cal. 3d at 169-70.

The County declines to defend this aspect of Measure Z, instead promising it will develop an ordinance that "will be extensive and will provide due process protections." County Br. 36. But its draft suffers from many infirmities, *e.g.*, CRC Br. 16, and cannot cure Measure Z's flaws.

PMC first argues that the unambiguous rule that courts must decide takings claims does not apply here because the relevant cases did not consider an ordinance with the same terms as Measure Z. PMC Br. 48. PMC, however, never accounts for the holding in *Action Apartment* that takings claims present a "question within judicial, not administrative, competence." 94 Cal. App. 4th at 615. It then misreads two other cases, *Healing* and *Hensler*.

Healing involved a dispute over whether a property owner was entitled to submit new, additional evidence relevant to his takings claim, or whether the court could consider only the existing administrative record from the underlying agency permitting process. 22 Cal. App. 4th at 1169. The court agreed that new evidence was admissible because "it has become clear that *administrative proceedings are not the proper forum for consideration of the takings issues* relevant to an inverse condemnation claim and that, therefore, a petition for writ of administrative mandate does not provide a satisfactory substitute for an evidentiary trial of those issues." *Id.* at 1177. The court thus directly considered whether an administrative agency could adjudicate a takings claim, and concluded that it could not.

PMC attempts to distinguish the California Supreme Court's subsequent decision in *Hensler*, which expressly agreed with *Healing*'s conclusion that agencies like the Board are not competent to adjudicate takings claims, on the same ground. And again, PMC fails to appreciate that the court evaluated the proper forum for takings cases, coming to a conclusion directly opposed to the forum selection clause in section 6(C). In *Hensler*, the court held that a property owner could not bring a claim seeking only compensation for an alleged taking without also challenging the substantive application of the ordinance alleged to effect that taking. 8 Cal. 4th at 8, 11-12. In the critical passage for this case, the court reasoned that because "*an administrative agency is not competent to decide whether its own action constitutes a taking*," those claims would not be before the agency. *Id.* at 16. The court concluded that the property owner could fairly litigate takings in a mandate proceeding only if the agency hearing "permit[ted] full litigation of the *facts* relevant to the takings issue, and *any additional issues* are litigated before the court." *Id.* at 14-16. Here, Measure Z offers a procedure designed to answer the one question that should *not* be before the County—whether Measure Z effects a taking.

The County and PMC also argue that *San Mateo County Coastal Landowners' Ass'n v. County of San Mateo*, 38 Cal. App. 4th 523 (1995), "recognized the validity" of provisions "nearly identical" to section 6(B). County Br. 36 n.19. But *San Mateo* concerned a classic land-use ripeness issue, involving nothing like section 6(C).[7] *San Mateo* was a facial challenge to a standard land-use ordinance that allowed the county to impose open space or other easements as a condition for certain subdivision map and plan approvals. 38 Cal. App. 4th at 545. The ordinance included language like that in section 6(B) to limit the county's discretion to require easements as part of its typical plan approval processes. The court rejected the facial challenge, reasoning that the qualification gave the county "sufficient flexibility" to use its existing land-use procedures "to avoid potentially unconstitutional application of easement requirements" by declining to impose any conditions *before* a taking could occur. *Id.* at 547.[8]

Measure Z, however, is quite different. Its flat ban on new wells and wastewater disposal is the taking, not some later act by the Board. And Measure Z uses section 6(C)—a clause not present in *San Mateo*—to steer legal claims that these bans are unconstitutional away from the courts and to a political body. The ordinance in *San Mateo* allowed the county to avoid takings by its actions. Measure Z effects the takings itself, and section 6(C) is simply a forum selection clause, mandating that the Board decide whether Measure Z constitutes a taking—a question that the Board is decidedly "not competent" to resolve. *Hensler*, 8 Cal. 4th at 15-16.

This Court should declare that Measure Z is a facial taking of CRC's and other non-operators' mineral rights. If the County wants to then invoke section 6(B) to exempt CRC from Measure Z, rather than pay it just compensation, that is section 6's only proper function here.

III. Measure Z Violates the California Constitution's Single-Subject Rule.

The County and PMC do not dispute (a) that Measure Z was sold to voters as a fracking ban, as shown by the massive "BAN FRACKING" logo on all its campaign materials; (b) that

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[7] While making this flawed argument, PMC accuses CRC of misleading the Court. PMC Br. 47. PMC's persistent *ad hominem* attacks violate the rules of civility and need to cease.

[8] The same was true in the primary authority relied on by the *San Mateo* court, *Tahoe-Sierra Preservation Council v. State Water Resources Control Board*, 210 Cal. App. 3d 1421, 1442 (1989), in which the court declined to consider a facial challenge to a land-use plan because it was unclear how an existing administrative process would ultimately classify the plaintiffs' land.

when urging Measure Z's passage, PMC consistently denied that Measure Z would curtail current oil production; or (c) now that Measure Z has passed, PMC argued it should be used to stop that same production. Nor do the County and PMC dispute that if the Court considers CRC's evidence—including an editorial by the County's newspaper of record calling Measure Z "an obvious attempt to mislead the public"—it could easily find that voters were likely confused or deceived. The County and PMC further do not dispute that if Measure Z's purpose *was* to enact a fracking ban—as the "purpose" section of Measure Z says it was—Measure Z must fall.

Instead, they brush all of this aside and propose at least eight *different* broader potential purposes, punting to the Court to draft some new purpose to save Measure Z. PMC also argues that the Court should ignore what their own campaign told voters about the initiative while at the same time considering a pile of *other* evidence supposedly supporting their narrative of Measure Z's genesis—a narrative that omits their own message about the initiative they drafted. *E.g.*, PMC Br. 4, 7. Both the law and the conflicting positions of the County and PMC demonstrate that the textual definition of Measure Z's purpose, a definition reinforced by the initiative campaign, is the *terra firma* on which the Court should rest its single-subject-rule analysis.

A. All Parts of Measure Z Are Not Reasonably Germane to Any Textually Supported, Adequately Specific Purpose.

Litigants defending an initiative can usually identify a "sole objective" provided in the measure's text. *E.g.*, *Chem. Specialties Mfrs. Ass'n v. Deukmejian*, 227 Cal. App. 3d 663, 670 (1991). But to avoid Measure Z's stated purpose of banning fracking, the County and PMC throw the Court nearly a dozen different purposes to see if one sticks. The County—six months after CRC filed the complaint raising this claim—still cannot identify a single purpose. Rather, it proposes five distinct purposes, each one ignoring some aspect of Measure Z's purpose statement: "environmental protection"; "protect[ion of] the County's water, environment and other resources"; "protect[ion of] Monterey County's water, agricultural lands, air quality, scenic vistas and quality of life"; "protecting resources"; and "protecting County resources by restricting certain land uses in support of oil and gas extraction." County Br. 5, 41, 43-45. Given more than a day to review the County's brief, PMC disagrees with the County's offerings, but cannot choose

one purpose either. First, it concedes that Measure Z has "*three* clearly-expressed objectives," and prohibits "*three* specific land use activities." PMC Br. 4, 14. Then it backpedals, attempting to collapse these separate objectives by arguing that the purpose is to "reduc[e] the local land use" impacts or "protect[ ] public health and environment" from oil and gas generally. *Id.* at 13, 15.[9]

By contrast, CRC properly relies on the text of the initiative. No one disputes that Measure Z section 1(A), entitled "Purpose," states that "*[t]he* purpose of" Measure Z is to protect various resources by banning fracking. AR 121; CRC Br. 19. Neither does anyone dispute that California courts have looked to the "express purpose" to identify the purpose of an initiative for single-subject purposes, *see, e.g.*, *Senate v. Jones*, 21 Cal. 4th 1142, 1159 (1999); *Cal. Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351, 360 (1988); CRC Br. 19, and the County and PMC cite no case where the stated purpose is disregarded.[10]

Identifying an initiative's purpose with sufficient clarity and specificity is the critical first step in a single-subject rule analysis, and the primary disputed point the Court must resolve here. "[T]he rule obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.'" *Brosnahan v. Brown*, 32 Cal. 3d 236, 253 (1982). Using excessively broad proposed purposes such as "quality of life" or "protecting resources" renders the purpose inquiry essentially meaningless. AR 121; County Br. 43, 44. The same critique the Supreme Court had concerning the purpose "fiscal affairs" applies to these purposes as well: "The number and scope of topics germane to 'fiscal affairs' in this sense is virtually unlimited. If petitioners' position were accepted, . . . [t]his would effectively read the single subject rule out of the Constitution." *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1100-01 (1987); *see Chem. Specialties*, 227 Cal. App. 3d at 670 (rejecting "public disclosure" and

[9] PMC points out that the measure's "purpose" section identified the disposal ban and the new well ban in two separate sentences beginning "[t]he Initiative also prohibits," and suggests this "also" language means the three bans are part of one single purpose. PMC Br. 16. This argument only works if the word "also" is redefined. In any dictionary, "also" is defined as "in addition," not "of a part with." *E.g.*, *Webster's Third International Dictionary* 62 (1971 ed.). At best, this section establishes, as PMC admits elsewhere, that Measure Z had at least three subjects.

[10] The County characterizes *Shea Homes Limited Partnership v. County of Alameda*, 110 Cal. App. 4th 1246 (2003), as a case where the purpose could be identified by generally reading "the first two pages of the initiative." County Br. 43. To the contrary, in *Shea*, the court relied on a *stated* purpose in the initiative, and looked to the other pages to determine if its effects were reasonably germane to the explicit, stated purpose. 110 Cal. App. 4th at 1256-57.

"truth in advertising" purposes as overly broad). Thus, the County's attempt to lift positive general goals—including protecting "water, agricultural lands, air quality, [and] scenic vistas"—from the express purpose of the measure fails precisely because it omits the text stating that the measure protects these goals "*by prohibiting the use of any land within the County's unincorporated area for well stimulation treatments*, including [fracking]." AR 121.

The County and PMC rely heavily on *Shea* and *San Mateo*, but each is distinguishable because the *actions* of the initiatives in those cases related to their *stated purposes*. *Shea* hewed closely to the "objective" that was "clearly stated": "preserving and enhancing *specifically defined* open space and agricultural lands within the County." 110 Cal. App. 4th at 1259. So understood, landfill limits were "complementary mechanisms" to achieve this single goal identified in the text. *Id.* at 1257. Similarly, in *San Mateo*, the court analyzed the text of the initiative's policies, and concluded they were "directed at the single general purpose expressed" by the measure: "protection of coastal resources" through modification of a single existing land-use plan. 38 Cal. App. 4th at 554. Thus, policies affecting drilling just off the coast already contained in that plan were germane.

Effectuating a fracking ban is "[t]he purpose" identified in Measure Z. The County and PMC have not and cannot explain how a new well ban or wastewater injection prohibitions further or relate to that purpose. Nor can or do they deny that "fracking"—which is not used in Monterey County—is a political hot-button that PMC seized on to get Measure Z enacted.

B. Vacating Measure Z Would Advance the Purpose of the Single-Subject Rule.

The County and PMC never dispute that, on the merits, the evidence shows that voters were likely confused by PMC's marketing of Measure Z as (a) a fracking ban that (b) would not affect current production. This unrebutted evidence shows that invalidating Measure Z would serve "the principal purpose" of the single-subject rule: "to avoid confusion of either voters or petition signers and to prevent the subversion of the electorate's will." *Jones*, 21 Cal. 4th at 1156. The County does not object to consideration of this evidence. As it notes, *see* County Br. 45-46, in *Brosnahan*, the Supreme Court considered evidence of "publicity," of "[n]ewspaper, radio and television editorials," and of "public debate involving candidates, letters to the editor, etc." 32

Cal. 3d at 252. Nor does the County dispute that voters were confused or deceived. It simply argues the Court should not "assume" that Measure Z's complexity led to confusion or deception. County Br. 45. But CRC does not urge the Court to assume anything. Rather, it should look to the wall of evidence showing likely confusion, including testimony from the County's own expert, who agreed that Measure Z will impact production. Burzlaff Tr. 140:22-141:13.

PMC disagrees with CRC, the County, and the Supreme Court, arguing that the campaign is irrelevant to voters' understanding of the measure, citing no authority other than *Brosnahan* and *Chemical Specialties*. PMC Br. 15. But *Brosnahan* clearly *did* look at campaign evidence, as the County notes. And while no party presented such evidence in *Chemical Specialties*, the court found "the history of the measure" relevant. 227 Cal. App. 3d at 672. PMC thus makes no real case for ignoring the Measure Z campaign. To the contrary, it only reinforces the campaign's relevance by submitting its own asserted evidence of campaign funding, *e.g.*, PMC RJN Ex. F, and the campaign's history, *e.g.*, PMC Br. 4—a one-sided story that conveniently stops right before its many misleading statements and efforts to stop the County from educating voters about the impact of Measure Z, *e.g.*, CRC Br. at 3-6, 19-21, 24-28.[11]

As noted by the local newspaper of record, the Measure Z campaign was "an obvious attempt" to mislead voters. RJN Ex. 52. The Court should not ignore this simple reality. Rather, it should honor the single-subject rule's express purpose: to avoid voter confusion.

IV. Conclusion

The Court should invalidate Measure Z in its entirety for the many reasons identified by the petitioners, which CRC joins. If the Court upholds Measure Z, it should enter a declaratory judgment in CRC's favor, ruling that Measure Z effects a facial taking of CRC's mineral rights.

Dated: October 17, 2017

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[11] PMC contests its motivation for suppressing such information, PMC Br. 16, but not the facts that (a) Measure Z was marketed (in its text and campaign materials) as a "fracking ban," even though fracking does not occur in Monterey County; or (b) that despite assuring voters that Measure Z would not shut down existing operations, once Measure Z passed, PMC argued to this very Court that no stay should issue, so operations could be shut down. *E.g.*, CRC Br. 27-28.