THEODORE J. BOUTROUS JR. (SBN 132099)
JEFFREY D. DINTZER (SBN 139056)
MATTHEW C. WICKERSHAM (SBN 241733)
DANA L. CRAIG (SBN 251865)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue, 54th Floor
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
Electronic Mail: jdintzer@gibsondunn.com

Attorneys for Petitioners and Plaintiffs
CHEVRON U.S.A. INC.; KEY ENERGY SERVICES, LLC; ENSIGN UNITED STATES DRILLING (CALIFORNIA) INC.; MAUREEN WRUCK; GAZELLE TRANSPORTATION, LLC; PETER ORRADRE; MARTIN ORRADRE; JAMES ORRADRE; THOMAS ORRADRE; JOHN ORRADRE; STEPHEN MAURICE BOYUM; and SAN ARDO UNION ELEMENTARY SCHOOL DISTRICT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

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

Petitioners and Plaintiffs,

v.

COUNTY OF MONTEREY, et al.,

Respondents and Defendants.

CASE NO. 16-CV-3978 (Consolidated for purposes of Phase 1 with Case Nos. 16-CV-3980, 17-CV-0790, 17-CV-0871, 17-CV-0935, and 17-CV-1012)

CHEVRON PLAINTIFFS' OPENING BRIEF IN SUPPORT OF PHASE 1 PROCEEDINGS

Phase 1 Trial: November 13, 2017
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Dept: 14
Judge: Hon. Thomas W. Wills

Action Filed: December 14, 2016

TODD W. SMITH (SBN 235566)
RAGGHIANTI | FREITAS LLP
1101 5th Avenue, Suite 100
San Rafael, CA 94901
Telephone: (415) 453-9433 ext. 115
Facsimile: (415) 453-8269
Electronic Mail: tsmith@rflawllp.com

Attorneys for Petitioners and Plaintiffs
CHEVRON U.S.A. INC.; KEY ENERGY SERVICES, LLC; ENSIGN UNITED STATES DRILLING (CALIFORNIA) INC.; MAUREEN WRUCK; GAZELLE TRANSPORTATION, LLC; and SAN ARDO UNION ELEMENTARY SCHOOL DISTRICT

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I. INTRODUCTION

At issue in this case is a voter-approved initiative that imposes a series of radical, countywide prohibitions on certain oil production techniques permitted and promoted by state and federal law. Despite masquerading as an "anti-fracking land use" ordinance, Measure Z was contrived to end oil production in the County. But instead of expressly prohibiting production outright, Measure Z bans the use of vital production techniques that are lawfully permitted and comprehensively regulated by state and federal authorities. Because the principal provisions of Measure Z operate in direct conflict with superior authorities that occupy the regulatory field, the entire initiative is preempted and void.

Moreover, the interlocking prohibitions in Measure Z create a series of contradictory outcomes that render the initiative impermissibly vague, contrary to fundamental due process guarantees. Worse still, by effectively ending economic oil production in the County, Measure Z is facially invalid as an unconstitutional taking of private property without just compensation. The sheer number of legal challenges brought by oil operators and royalty owners bears witness to the inevitable and universal impact of Measure Z. The initiative will decimate any economic oil production in the County, rendering valuable property rights worthless. Measure Z should be stricken in its entirety.[1]

II. FACTUAL BACKGROUND

On March 17, 2015, the Monterey County Board of Supervisors rejected a proposed interim urgency ordinance prohibiting well stimulation treatments ("WST") in the County. (AR 1–2; List of Stipulated Facts attached to 5/24/2017 Case Mgmt. Conference Stmt. ("Stip. Facts"), ¶ 1.) Intervenor Protect Monterey County ("PMC") was formed in response to this decision, with the intent to develop an initiative to ban hydraulic fracturing (*i.e.*, "fracking"), and end all oil production in the County. (See PMC Mtn. to Intervene at 4:7–14; Stip. Facts, ¶ 2.) Measure Z constitutes the fruit of their labor: a countywide ballot initiative submitted by PMC to the County Registrar of Voters in February 2016. (AR 118–145; Stip. Facts, ¶ 3.) After certifying the supporting signatures, the Registrar of Voters submitted Measure Z to the Board of Supervisors on June 1, 2016, which voted to place Measure Z on the November ballot. (AR 190, 195; Stip. Facts, ¶¶ 5–7.) County voters approved Measure Z on

[1] The Chevron Plaintiffs join in each of the arguments and briefing submitted by the other Measure Z Plaintiffs in these consolidated proceedings, and incorporate them here by reference.

November 8, 2016. (AR 392; Stip. Facts, ¶ 9.)

Unfortunately, County voters were misled as to the actual effect of Measure Z. During the campaign, Measure Z was heralded by proponents primarily as an "anti-fracking" ordinance, and secondarily as a means to protect underground sources of drinking water. (Pls.' Request for Judicial Notice, filed concurrently ("RJN"), Ex. 5 [PMC Homepage Image] [showing Measure Z signs stating "Ban Fracking" and "Protect Our Water"].) Hydraulic fracturing is not a production technique currently utilized by operators in the County, and current operations provide more than 520 million gallons of purified water per year for beneficial use by the County. (RJN, Ex. 2 [7/21/16 Appraiser Analysis] at COUNTY_0001219; Declaration of Dallas Tubbs, filed concurrently ("Tubbs Decl."), ¶¶ 38, 42–43; Stip. Facts, ¶¶ 27–29.) But Measure Z goes far beyond a ban on (non-existent) hydraulic fracturing, and does not stop at prohibiting (vital, heavily-regulated) underground injection techniques. Instead, Measure Z broadly amends the Monterey County General Plan, local coastal Land Use Plans, and the Fort Ord Master Plan to: (1) prohibit WST, (2) require the "phase-out" of "wastewater" injection and impoundment, and (3) prohibit any drilling of new oil and gas wells. (AR 154–156.)

Measure Z prohibits "[t]he development, construction, installation, or use of any facility, appurtenance, or above-ground equipment, whether temporary or permanent, mobile or fixed, accessory or principal, in support of [WST]." (AR 155.) "Well stimulation treatments" are defined as "any treatment of a well designed to enhance oil and gas production or recovery by increasing the permeability of the formation," explicitly including hydraulic fracturing and acid well stimulation, but excluding "steam flooding, water flooding, or cyclic steaming and . . . routine well maintenance, . . . or routine activities that do not affect the integrity of the well or the formation." (*Ibid*.)

The second part of Measure Z prohibits "[t]he development, construction, installation, or use of any facility, appurtenance, or above-ground equipment, whether temporary or permanent, mobile or fixed, accessory or principal, in support of oil and gas wastewater injection or oil and gas wastewater impoundment." (*Ibid*.) "Oil and gas wastewater" is broadly defined as "wastewater brought to the surface in connection with oil or natural gas production," with no exception for produced water, even when it has been treated. (*Ibid*.)[2] Nonconforming injection and impoundment uses must be

[2] "Produced water" refers to water extracted from an oil-bearing formation during the process of

[Footnote continued on next page]

discontinued within five years of the effective date of Measure Z. (*Ibid*.)[3]

The third part of Measure Z prohibits "[t]he drilling of new oil and gas wells." (AR 156.)[4] "Oil and gas wells" are defined as "wells drilled for the purpose of exploring for, recovering, or aiding in the recovery of, oil and gas." (*Ibid*.) This prohibition precludes the drilling of new wells, as well as the side-tracking of existing wells, a common practice by oil operators to restore a non-productive well. In side-tracking, operators rework a well by drilling out the side of the existing wellbore and completing a new bottom hole. (Tubbs Decl., ¶¶ 47, 51, 52; Stip. Facts, ¶ 21.) Side-track operations are conducted to re-establish production near the original well. (*Ibid*.) The use of side-tracks is often essential to repair damaged wells and to access additional hydrocarbons in close proximity to the bottom of the current well. (Tubbs Decl., ¶ 51; Declaration of James Latham, filed concurrently ("Latham Decl."), ¶ 13.)

A. Federal and State Oversight of Oil and Gas Operations in California.

Under existing law, the Division of Oil, Gas and Geothermal Resources ("DOGGR"), as part of the California Department of Conservation, is obligated to regulate the drilling, operation, maintenance, stimulation, and abandonment of oil and gas wells in the state. (Pub. Resources Code, §§ 3000 et seq.; Stip. Facts, ¶ 30; Declaration of Burton Ellison, filed concurrently ("Ellison Decl."), ¶¶ 3–7.) DOGGR has a dual mandate to promote the development of the state's oil and gas resources, and also to supervise such operations in a manner to prevent, as far as possible, damage to life, health, property and natural resources, including underground waters suitable for irrigation or domestic purposes. (Pub. Resources Code, § 3106, subds. (a) & (b); Stip. Facts, ¶ 31; Ellison Decl., ¶¶ 3–6.) To satisfy this dual

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[Footnote continued from previous page]
extracting oil. (Tubbs Decl., ¶ 27.) In Monterey County, production wells extract ten to twenty times more produced water than oil. (*Id.*, ¶ 32.) As Measure Z specifically defines produced water as "wastewater" without any apparent distinction, this brief uses the two terms interchangeably.

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

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

mandate, the Legislature has enacted as state law that DOGGR shall "encourage the wise development of oil and gas resources" in order "[t]o best meet oil and gas needs in this state[.]" (Pub. Resources Code, § 3106, subd. (d); see also *id*., § 3013 [stating that DOGGR "shall have all powers . . . which may be necessary to carry out the purposes of this division"]; Ellison Decl., ¶¶ 3–6.) In fact, for oilfields like those in Monterey that contain heavy crude (Stip. Facts, ¶ 16), DOGGR has discretion to "approve proposals to drill wells at whatever locations [DOGGR] deems advisable for the purpose of the proper development of such hydrocarbons by the application of pressure, heat or other means for the reduction of oil viscosity, and such wells shall not be classed as public nuisances after approval by the supervisor." (Pub. Resources Code, § 3602.1.)

Pursuant to its statutory mandate, DOGGR has established "the most rigorous regulations in the country for oil and gas exploration, development and production." (See RJN, Ex. 26 [SB 4 EIR] at C.10-24; Ellison Decl., ¶ 7.)[5] Prior to well operations, DOGGR requires operators to file Notices of Intention ("NOI") to Drill, Rework / Redrill or Abandon Wells along with a detailed program, which must be approved by DOGGR. (Cal. Code Regs., tit. 14, § 1722, subd. (d); see, e.g., RJN, Exs. 7–10 [Exemplar permits]; Ellison Decl., ¶ 7.) NOIs expire after one year from submission if work has not commenced, subject to a potential one-year extension for good cause. (*Ibid*.) Operators must submit well history and activity summary reports to DOGGR within 60 days after drilling, completion, suspension, or abandonment, and must comply with detailed reporting requirements. (Pub. Resources Code, §§ 3215, 3226.3, 3227; Cal. Code Regs., tit. 14, §§ 1724, 1724.1; Ellison Decl., ¶¶ 19, 26.) DOGGR also has comprehensive regulations to ensure the safe operation of oil wells. (Cal. Code Regs., tit. 14, §§ 1722–1722.9, 1723, 1723.7, 1775; Ellison Decl., ¶¶ 6–11.) In January 2009, the California legislation known as AB 1960 went into effect, increasing design, inspection, maintenance, operating, and recordkeeping requirements for onshore production facilities.[6] (Pub. Resources Code, § 3270; Cal.

[5] For the oil fields in Monterey County, DOGGR has also established Field Rules that describe subsurface conditions and govern well construction and operation in each reservoir. (RJN, Ex. 25 [San Ardo Field Rules]; Cal. Code Regs., tit. 14, § 1722, subd. (k); Stip. Facts, ¶ 32; Ellison Decl., ¶ 11.) These rules expressly supplement more broadly applicable statutory and regulatory requirements. (*Id*., §§ 1712, 1722, 1723.8.)

[6] "Production facilities" are defined to include "any equipment attendant to oil and gas production or injection operations including, but not limited to, tanks, flowlines, headers, gathering lines, wellheads, heater treaters, pumps, valves, compressors, injection equipment, and pipelines [that are not under the jurisdiction of the U.S. Department of Transportation]." (Pub. Resources Code, § 3010.)

Code Regs., tit. 14, §§ 1773–1773.5, 1774–1774.2, 1777–1777.4; Ellison Decl., ¶ 20.)

DOGGR is also responsible for regulating WST in California. Prior to 2014, DOGGR relied upon existing rules governing well integrity and provisions against fluid migration out of intended zones. (Ellison Decl., ¶ 25; Stip. Facts, ¶¶ 14–15.) Effective January 1, 2014, DOGGR's obligation to regulate the oil and gas industry's use of well stimulation techniques, including hydraulic fracturing, was expanded and codified by Senate Bill 4 ("SB 4"). (Pub. Resources Code, §§ 3160–3161.) As required by SB 4, DOGGR created permanent regulations that went into effect in July 2015 and created a permitting system for the use of any WST in the state. (Cal. Code Regs., tit. 14, §§ 1761, 1780–1789; Stip. Facts, ¶ 33.) The goal of these regulations is to provide the public with information about when and where well stimulation is used, to protect public health and the environment, and to give the oil and gas industry a set of standards to hold it accountable when using those techniques. (Cal. Code Regs., tit. 14, §§ 1761, 1780–1789; Ellison Decl., ¶¶ 25–26.) These are the strongest WST regulations in the nation. (AR 12–16; RJN, Ex. 26 [SB 4 EIR] at C.2-67.)

In California, the U.S. Environmental Protection Agency ("U.S. EPA") has delegated to DOGGR the authority to permit and regulate Class II injection wells under the Underground Injection Control ("UIC") program. (40 C.F.R. § 147.250; Ellison Decl., ¶¶ 14–18.) The UIC program falls under the federal Safe Drinking Water Act ("SDWA"), the purpose of which is to protect "underground sources of drinking water." (40 C.F.R. § 144.1.) The Class II injection category includes wells used to enhance oil recovery through the injection of steam, water, or gas, and wells used to dispose of produced water and certain other fluids that are generated by oil and gas exploration and production operations. (*Id.*, § 144.6; Ellison Decl., ¶ 17.)

DOGGR and the State Water Resources Control Board ("State Water Board") have proposed filing an application with U.S. EPA to expand the limits of an existing aquifer exemption in and around the San Ardo and McCool Ranch Oil Fields. (RJN, Exs. 27 [8/12/16 DOGGR Ltr.], 28 [12/5/16 State Wat. Bd. Ltr.].) DOGGR and the State Water Board have concurred that this expansion meets the criteria for exemption under state and federal law, conducted the public hearing in February, and are completing their review of the public comments before submittal to U.S. EPA for final approval. (*Ibid.*; RJN, Ex. 29 [2/7/17 Ntc. Exemption]; Pub. Resources Code, § 3131; 40 C.F.R. §§ 144.7, 145.32,

146.4.) All UIC projects, including those in the San Ardo and McCool Ranch Oil Fields, are subject to approval by DOGGR. (Cal. Code Regs., tit. 14, § 1724.10.) DOGGR has strict requirements for UIC projects that include stringent testing and equipment requirements, monthly reporting of injection activity and chemical analysis of injection fluids. (*Id.*, §§ 1724.9, 1724.10; Ellison Decl., ¶¶ 16–18.)

B. There Are Significant Benefits to Monterey County from Chevron's Oil Operations.

Chevron conducts oil production operations at the San Ardo Oil Field in Monterey County. (Tubbs Decl., ¶ 4.) Chevron operates pursuant to a 1949 Use Permit issued by the County authorizing the holder to "drill for and/or remove oil, gas, or other hydrocarbon substances." (*Id.*, ¶ 5, Ex. 7.) San Ardo was discovered two years prior in 1947. (*Id.*, ¶ 3.) Since that time, steamflood techniques have been necessary to enhance oil recovery by injecting steam underground to heat and displace the oil. (*Id*., ¶¶ 33–34, 43–44; Latham Decl., ¶ 14.) Production at San Ardo is subject to a natural, exponential decline without the support of additional production and steam injection wells. (*Id*., ¶¶ 43–46, 58–59; Stip. Facts, ¶¶ 20–21; Latham Decl., ¶¶ 13–16.)

San Ardo has recently experienced a production resurgence due to enormous capital investments made by Chevron in enhancing oil recovery by injecting steam, impounding produced water in constructed wetlands following treatment in a new reverse osmosis ("RO") plant, and drilling new production and steam injection wells. (Tubbs Decl., ¶¶ 37–49.) Based in part on these improvements, Chevron has increased total production at San Ardo from roughly 1.1 million barrels of oil equivalent per year in 2006 to over 4 million barrels per year in 2015. (*Id.*, ¶ 48.) Chevron's production relies on a field-wide "steam chest," which heats the heavy oil in San Ardo and allows it to flow to the well. (*Id*., ¶¶ 44–49; Stip. Facts, ¶¶ 16–17.) Over the past decade, Chevron has invested significant resources in expansion and maintenance of the steam chest by injecting steam into existing and new wells, thereby steadily building the amount of steam underground that heats the heavy oil and reduces its viscosity. (*Ibid.*)

Measure Z will have a devastating impact on existing oil operations throughout the County. (Latham Decl., ¶¶ 12–26.) Under the initiative, oil operators are banned from drilling new wells, injecting produced water, or impounding treated water resulting from production. Without these techniques, operators will not be able to conduct the enhanced oil recovery techniques that are necessary

for the feasible recovery of the heavy crude oil to which they hold mineral interests. (See *infra*, § III(C); Latham Decl., ¶¶ 20–26; Tubbs Decl., ¶¶ 33, 42–49, 54–55.) The prohibition on new wells will prevent Chevron from maintaining the steam chest that it has developed for over a decade, thereby rapidly decimating economic production. (Tubbs Decl., ¶¶ 50–60; Latham Decl., ¶¶ 14–18.) In addition, implementation of the injection and impoundment prohibition will necessarily result in the immediate collapse of production at San Ardo. (Tubbs Decl., ¶¶ 54–56; Latham Decl., ¶¶ 20–24.) Under Measure Z, operators will not be able to continue the economic production of oil, thereby eliminating any viable use of their property within the County. (Tubbs Decl., ¶¶ 50–60; Latham Decl., ¶¶ 6, 12–26.)

Moreover, the County collects a significant amount of its budget from tax payments made by owners of oil-producing properties. (AR 362; RJN, Ex. 2 [7/21/16 Appraiser Analysis], Ex. 67 [Top 10 Taxpayers].) Those payments will inexorably decline from the substantial devaluation of oil-producing properties as a result of Measure Z. The local school district in San Ardo relies almost exclusively on these tax revenues. (Declaration of Catherine Reimer, Ed.D, filed concurrently ("Reimer Decl."), ¶ 6.) If allowed to go into effect, Measure Z would deprive the San Ardo school district of this critical revenue source, likely resulting in the closure of the local school to the detriment of an entire community of children in Monterey. (Reimer Decl., ¶¶ 11–12.) Chevron's operation of its reverse osmosis facility at San Ardo also generates about 520 million gallons of purified water per year for beneficial use by the County. (Tubbs Decl., ¶ 38.) All of these benefits will cease based on the enactment of Measure Z. (Tubbs Decl., ¶¶ 50–60.) To avoid these outcomes, the Chevron Plaintiffs filed their Petition for Writ of Mandate and Complaint for Declaratory Relief and Damages on December 14, 2016, immediately after the enactment date for Measure Z.

III. ARGUMENT

A. Measure Z Is Preempted under State and Federal Law.

Voter-approved initiatives, such as Measure Z, are "subject to the same constitutional limitations and rules of construction as are other statutes." (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675.) The California Constitution subordinates Measure Z to state law, and if the initiative operates in "conflict with state law, it is preempted and invalid." (*Cal. Grocers Assn. v. City of L.A.* (2011) 52 Cal.4th 177, 188, citing Cal. Const., art. XI, § 7 [local laws may not be made "in conflict with general

laws"].) Under state preemption principles, "[a] conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law." (*Ibid.*, citations omitted.) Field preemption may be found if either "the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; [or] the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." (*Sherwin-Williams Co. v. City of L.A.* (1993) 4 Cal.4th 893, 898.)

Likewise, the federal Supremacy Clause empowers Congress to preempt state and local law. (*Cal. Grocers*, *supra*, 52 Cal.4th at p. 193, citing U.S. Const., art. VI, cl. 2.) "There are four species of federal preemption: express, conflict, obstacle, and field." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935.) Express preemption occurs when Congress "define[s] explicitly the extent to which its enactments pre-empt state law." (*English v. General Electric Co.* (1990) 496 U.S. 72, 78.) "[C]onflict preemption will be found when simultaneous compliance with both state and federal directives is impossible." (*Viva!*, *supra*, 41 Cal.4th at p. 936.) Preemption also occurs when local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Crosby v. Nat. Foreign Trade Council* (2000) 530 U.S. 363, 373, citation omitted.) And field preemption arises "when it is clear . . . that Congress intended, by legislating comprehensively, to occupy an entire field of regulation." (*Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691, 699.)

Under both state and federal preemption, county initiatives are preempted when they ban activities permitted and promoted by superior legal authority. California law is clear: "[W]here, as here, the state expressly permits operation under a certain set of standards, it implies that the specified standards are exclusive." (*Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1125.) "Local authorities thus are preempted from . . . making impermissible that which the higher authority expressly permits." (*Ibid.*) Federal preemption principles require the same conclusion. Even "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." (*Great Western Shows, Inc. v. County of L.A.* (2002) 27 Cal.4th 853,

868, citing *Blue Circle Cement, Inc. v. Bd. of County Comrs.* (10th Cir. 1994) 27 F.3d 1499.)

1. The Prohibition on Well Stimulation Treatments Is Preempted by State Law.

Measure Z prohibits land use anywhere in the County in support of WST. (AR 155.) This prohibition is in conflict with and preempted by state law that fully occupies the regulatory field by permitting WST throughout California. (*Fiscal v. City & County of S.F.* (2008) 158 Cal.App.4th 895, 914–15.) The Legislature clearly intended to preempt local bans on WST. In addition to DOGGR's general authority to regulate and develop oil and gas production, the Legislature expressly empowered DOGGR to regulate WST, such as the "injection of air, gas, or other fluids into the productive strata" to "explore for and remove all hydrocarbons from any lands in the state[.]" (Pub. Resources Code, § 3106, subds. (a), (b) & (d); Ellison Decl., ¶¶ 24–27.) In fact, the Legislature has directed that DOGGR "***shall*** . . . permit the owners or operators of the wells to utilize all methods and practices known to the oil industry for the purpose of increasing the ultimate recovery of underground hydrocarbons and which, in the opinion of the supervisor, are suitable for this purpose in each proposed case." (*Ibid.*, emphasis added.) Not only has the Legislature empowered DOGGR to regulate WST statewide, it has required DOGGR to permit WST to increase hydrocarbon production. (*Ibid.*; Ellison Decl., ¶¶ 4–6.)

The Legislature's intent to preempt local bans on WST was confirmed by the passage of SB 4 in September 2013. Upon passage, SB 4 directed DOGGR to conduct a statewide Environmental Impact Report ("SB 4 EIR") "to provide the public with detailed information regarding any potential environmental impacts of well stimulation in the state." (*Id.*, § 3161, subd. (b)(3)(A).) The Legislature also specifically directed that WST was authorized "through a permitting process" prepared by DOGGR. (*Id.*, § 3161, subd. (b)(4); Ellison Decl., ¶¶ 25–26.) To supplement this statutory scheme, SB 4 further directed DOGGR to prepare extensive regulations governing WST statewide in consultation with numerous state agencies. (*Id.*, § 3160, subd. (b)(1).) Consistent with this directive, DOGGR spent over a year preparing formal WST regulations, which went into effect on July 1, 2015. (See Cal. Code Regs., tit. 14, §§ 1751–1789.) These regulations establish an extensive regulatory scheme to permit and promote WST. (*Id.*, §§ 1782, 1783.3, 1784, 1785.1, 1786; Ellison Decl., ¶ 26.)

With the implementation of SB 4, there can be no doubt the Legislature intended to preempt local bans on WST, such as the prohibition in Measure Z. Indeed, upon completion of the SB 4 EIR,

DOGGR concluded "the very specific requirements of SB 4 itself are so detailed that they simply leave no room for local governments to add further downhole requirements."[7] (RJN, Ex. 26 [SB 4 EIR] at C.2-45.) This conclusion is bolstered by the legislative history of SB 4; the final Senate Floor Analysis states SB 4 "establishes a comprehensive regulatory program for oil and gas [WST]." (RJN, Ex. 31 [9/12/13 Senate Analysis] at 2; see also RJN, Ex. 26 [SB 4 EIR] at C.2-19 [the "Legislature has recently authorized the increased regulation of an activity that had been occurring lawfully for decades rather than outlawing the practice altogether" despite many calls for an outright ban].) Monterey County even recognized that "[r]egulatory oversight of down-hole operations [specifying hydraulic fracturing] is a regional issue that cannot be adequately addressed locally by individual counties and needs to be handled by the State[.]" (RJN, Ex. 4 [2/13/13 Cnty. Ltr.] at 1.)

California courts have consistently found local prohibitions such as Measure Z in conflict with state statutes and policies like SB 4. In *Fiscal*, the court decided that a local initiative prohibiting residents from selling, distributing, transferring, and manufacturing firearms and ammunition was preempted by a state statute that declared qualifying handguns "may be sold" in California. (*Fiscal*, *supra*, 158 Cal.App.4th at pp. 914–915.) While case law often tolerates local regulations that supplement state statutes, the local regulations must be "not inconsistent with the purpose of the general law." (*Id.* at p. 915.) Even though state handgun laws provide some room for local regulations, the municipal ban on handguns otherwise permitted under state law "swallows the state regulations whole." (*Ibid.*; see also *Water Quality Assn. v. City of Escondido* (1997) 53 Cal.App.4th 755, 765 [finding field preemption where local ordinance banned water softening units permitted under state law]; *Suter*, *supra*, 57 Cal.App.4th at p. 1125 [finding field preemption where local law prohibited method of firearm storage permitted by state law].)

Like the state laws at issue in *Fiscal*, which included provisions applicable to "*all* handguns sold

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[7] While Measure Z purports to affect only the surface uses associated with well stimulation and underground injection, this deceptive language is obviously pretextual and easily dismissed. (AR 154–156.) As shown by Measure Z's findings and related ballot materials, Measure Z is entirely focused on the downhole activities related to well stimulation and injection, not surface land use. (AR 152–154.) Measure Z is not concerned with the location of WST facilities; it aims to prevent all WST from threatening "underground formations" of water. (AR 152.) And Measure Z does not establish new requirements for above-ground injection facilities; it bans all underground injection-related uses to allegedly prevent groundwater contamination. (AR 153.)

in the state," SB 4 and related oil and gas laws comprehensively regulate all WST throughout the State. (*Fiscal*, *supra*, 158 Cal.App.4th at p. 912.) As in *Fiscal*, the local ban on WST operates in the same "regulatory field" as the state laws permitting WST—in fact, Measure Z's definitions of WST are identical to those in SB 4. (See *id.* at p. 914; compare AR 155 with Pub. Resources Code §§ 3152, 3157, 3158.) And just like the local ban in *Fiscal*, "here the state and local acts are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Fiscal*, *supra*, 158 Cal.App.4th at p. 915, citation omitted.) If Measure Z goes into effect, it will invalidate the permitting scheme set up by DOGGR to regulate and promote WST. Such a direct conflict with state law must be preempted. (See, e.g., *Friends of the Eel River v. N. Coast Railroad Authority* (No. S222472, Cal. July 27, 2017) --- P.3d ----, 2017 WL 3185220, at *10 [holding that "at least as to privately owned railroads, state environmental permitting or preclearance regulation that would have the effect of preventing a private railroad from operating pending CEQA compliance would be categorically preempted"].) California long ago adopted a state policy in favor of promoting hydrocarbon recovery through WST. (See Pub. Resources Code, § 3106, subd. (b); see also RJN, Ex. 6 [Brown interview].) By banning WST, Measure Z critically undermines this state policy and is thereby preempted.

2. The Prohibition on Underground Injection is Preempted by Federal and State Law.

The ban on underground injection instituted by Measure Z is preempted by the SDWA and the comprehensive regulatory scheme implemented by DOGGR under state law. Not only does the express language of the SDWA forbid local bans on underground injection, U.S. EPA has approved DOGGR's comprehensive regulatory scheme, which conflicts with and is frustrated by the obstacles presented by Measure Z. (See *Crosby*, *supra*, 530 U.S. at pp. 372–373; RJN, Exs. 73 & 75 [MOA]; Ellison Decl., ¶ 14.)

First, the prohibition on underground injection conflicts with and violates the express terms of the SDWA. The SDWA directs U.S. EPA to oversee underground injection throughout the United States. (42 U.S.C. § 300h, et seq.) But the SDWA also provides that states may obtain primacy in enforcing the UIC program in their jurisdiction, so long as the state has adopted and implemented adequate standards and enforcement measures. (42 U.S.C. § 300h-1.) The SDWA establishes "minimum requirements" for state UIC programs, including that such programs must authorize

underground injection by permit or rule, and not "interfere with or impede" underground injection unless "essential to assure" that underground sources of drinking water will not be endangered. (*Id.*, § 300h, subds. (b)(1), (2).) Measure Z conflicts with the express terms of the SDWA and is preempted.[8] (See *Riegel v. Medtronic, Inc.* (2008) 552 U.S. 312, 330 [holding state law expressly preempted when contrary to federal provision establishing "requirements" for federal regulatory oversight].)

The court in *EQT Production Co. v. Wender* came to a similar conclusion when addressing a local ban on the disposal of "wastewater" in underground injection wells. ((S.D.W.Va. 2016) 191 F.Supp.3d 583, 603.) The *EQT* court found that "the SDWA specifically provides that a state's UIC permitting program, whether run by the state or the EPA, may not prohibit 'the underground injection of wastewater'" brought to the surface in connection with oil and gas operations. (*Id.* at p. 601, citing 42 U.S.C. §§ 300h, subd. (b)(2), 300h-1, subd. (c)(1).) According to the *EQT* court, the local prohibition on disposal of wastewater through underground injection thereby "directly violate[d] this statutory requirement." (*EQT*, *supra*, 191 F.Supp.3d at p. 601.) While a state UIC program does not foreclose all local regulation, by precluding regulators from banning underground injection, the SDWA "surely . . . prevents such local law from ***altogether preventing*** UIC activity." (*Ibid.*, emphasis added.) Like the ordinance at issue in *EQT*, Measure Z expressly violates the SDWA and is void.[9] Measure Z's injection prohibition is almost identical to that in *EQT*. As in *EQT*, Measure Z prohibits the underground

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[8] Measure Z is not "essential to assure" the protection of drinking water supplies. The responsibility for protecting drinking water is entrusted exclusively to the State Water Board, DOGGR and/or U.S. EPA . (42 U.S.C. § 300h, subds. (b)(1), (2).) DOGGR and the State Water Board, the agencies with the specialized technical knowledge and experience, have already stated that underground injection at San Ardo will not endanger drinking water sources, and should continue. (RJN, Exs. 27 [8/12/16 DOGGR Ltr.], 28 [12/5/16 State Wat. Bd. Ltr.], 29 [Public Hrg Ntc.].)

[9] The SDWA has a savings clause stating that "[n]othing in this subchapter shall diminish any authority of a State or political subdivision to adopt or enforce any law or regulation respecting underground injection but no such law or regulation shall relieve any person of any requirement otherwise applicable under this subchapter." (42 U.S.C. § 300h-2, subd. (d).) While somewhat ambiguous, nothing in this language would allow a county to prohibit injection activity that is specifically permitted by the State and specifically contemplated to be the subject of regulation, not prohibition under the SDWA. Where "the state has undertaken to allow UIC wells [pursuant to the authority provided by the SDWA], [that] action operates to diminish the counties' powers to prohibit them." (*EQT*, *supra*, 191 F.Supp.3d at p. 601 [holding that "the superior, overriding power of the state must enable the state to occupy the field to the exclusion of its own subdivisions, lest its superiority be circumscribed"]; see also *Bath Petroleum Storage, Inc. v. Sovas* (N.D.N.Y. 2004) 309 F.Supp.2d 357, 367–368 ["interpret[ing] this savings clause to reinforce that Congress intended that states retain authority respecting underground injection so long as it does not impinge on the UIC program administered by the EPA"].)

injection of "oil and gas wastewater" anywhere in the County, even when such injection has been expressly permitted by DOGGR through the UIC program. (See *EQT*, *supra*, 191 F.Supp.3d at p. 602.) As the *EQT* court explained, "[t]he county cannot unilaterally prohibit conduct that federal and state law both expressly permit." (*Ibid*.)

Second, the underground injection prohibition "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Crosby*, *supra*, 530 U.S. at p. 377.) In 1982, DOGGR was granted primacy by U.S. EPA to implement and enforce the UIC program in California pursuant to the SDWA, and it has done so. (See 40 C.F.R. § 147.250.) "The principal legislative history explains that . . . [Congress] contemplated regulation, not prohibition, because of the importance of avoiding needless interference with energy production and other commercial uses." (*W. Neb. Resources Council v. U.S. EPA* (8th Cir. 1991) 943 F.2d 867, 870.) Because Measure Z prohibits underground injection permitted by the SDWA, it "stands as an obstacle" to congressional intent. (*Capital Cities*, *supra*, 467 U.S. at pp. 698–699, 706 [finding obstacle preemption where state law prohibited out-of-state cable television transmissions that were "permit[ted], indeed encourag[ed]" by federal law]; see also *Crosby*, *supra*, 530 U.S. at pp. 376–378 [finding obstacle preemption where "unyielding application" of state law "penalizes some private action that the Federal Act . . . may allow"]; *Whistler Investments, Inc. v. Depository Trust and Clearing Corp.* (9th Cir. 2008) 539 F.3d 1159, 1166 [finding obstacle preemption for state-law "challenges to the existence or the operation" of federal program intended to "regulate and control a national system" for clearing security transactions].)

This determination is bolstered by federal preemption principles applied by the California Supreme Court. According to the court, "local governments, even if granted regulatory authority, may not wholly exclude activities that are sanctioned or encouraged by state law." (*City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 760.) This proposition is drawn from "several federal decisions under the federal Resource Conservation and Recovery Act (RCRA)." (*Ibid.*) Upon analyzing those decisions, the Court noted that RCRA comprehensively regulates hazardous waste at a federal level, while contemplating supplementary state and local regulations. (*Ibid.*) In such circumstances, "a complete local ban on the processing, recycling, and disposal of industrial waste, imposed without consideration of specific and legitimate local health and

safety concerns," would frustrate the purpose of RCRA and is thereby preempted. (*Id.* at p. 760, citing *Blue Circle Cement*, *supra*, 28 F.3d at pp. 1506–1509.)

The similarities between RCRA and the SDWA are inescapable. Both regulatory regimes establish comprehensive systems to govern certain encouraged activities—*i.e.*, hazardous waste or wastewater management—that could, if regulated improperly, potentially threaten human health and the environment. And both statutes rely on supplementary state and local regulations to fully realize their purpose. The prohibition on underground injection instituted by Measure Z conflicts with the SDWA and its implementing UIC program, just like the local prohibition concerning industrial waste at issue in *Blue Circle Cement* conflicted with RCRA. Measure Z is preempted and void.

Finally, the comprehensive nature of the state UIC program indicates that DOGGR was intended to "be the sole source" of underground injection regulations under both federal and state law. (See *United States v. Locke* (2000) 529 U.S. 89, 116–17; see also *Fiscal*, *supra*, 158 Cal.App.4th at p. 912–914.) The California UIC program administered by DOGGR comprehensively governs the regulation of underground injection in this state, with requirements on permitting, inspection, enforcement, mechanical integrity testing, plugging and abandonment oversight, data management, and public outreach. (See, e.g., Ellison Decl., ¶¶ 16–18; Cal. Code Regs., tit. 14, §§ 1724.6, 1724.9, 1724.10.) In *Locke*, the Court held that Congress intended its Coast Guard regulations to be the only reporting obligations for certain matters covered by a challenged state law. (*Locke*, *supra*, 529 U.S. at pp. 116–117.) The Court noted the federal statute said the Coast Guard "shall" establish reporting regulations, and thus Congress did not intend "reporting obligations to be cumulative," especially obligations that impose "a significant burden." (*Id.* at p. 116.) Here, U.S. EPA and the State specifically agreed on the regulations that will govern underground injection within the state. (40 C.F.R. § 147.250.) Like the federal statute in *Locke*, the SDWA states that upon approval by U.S. EPA , "the State shall have primary enforcement responsibility for underground water sources[.]" (42 U.S.C. § 300h-1, subd. (b)(3).) DOGGR has specifically permitted each injection well that is the subject of Measure Z's prohibition. (Tubbs Decl., ¶¶ 20, 21; Ellison Decl., ¶¶ 14–17.) The County lacks authority to state how long operators are allowed to operate under a state permit. By purporting to implement a "phase-out" period whereby operators must discontinue injection activity specifically permitted by the State,

Measure Z "has enacted a total ban on an activity [that] state law allows." (*Fiscal*, *supra*, 158 Cal.App.4th at pp. 914–915.) Because DOGGR has fully occupied the field of underground injection regulation under both state and federal law, Measure Z is preempted and void.

3. The Prohibition on New Wells Is Preempted by State Law.

The California Legislature has for decades "encourage[d] the wise development of oil and gas resources." (Pub. Resources Code, § 3106, subd. (d); Ellison Decl., ¶¶ 3–5.) To that end, section 3106 "declare[s] as a policy of this state that [an operator] . . . [is] allow[ed] . . . to do what a prudent operator using reasonable diligence would do, having in mind the best interests of the lessor, lessee, and the state in producing and removing hydrocarbons[.]" (Pub. Resources Code, § 3106, subd. (b).) The State has established detailed rules governing oil and gas operations, and DOGGR has promulgated extensive regulations to fulfill its legislative mandate. (*Id.*, §§ 3000–3473; see also Cal. Code Regs., tit. 14, §§ 1681–1998.2; Ellison Decl., ¶¶ 7–21.) "California has the most rigorous regulations in the country for oil and gas exploration, development and production, and their historic and on-going implementation has greatly minimized, and in many cases prevented, the types of environmental impacts that have occurred in other states." (RJN, Ex. 26 [SB 4 EIR] at C.10-24.) The Legislature intended to preempt any local ordinance that arbitrarily prohibits production techniques, including the drilling of new oil wells, used to maintain, enhance and grow oil production, as is done in San Ardo. (See *infra* § III.C.1.)

The California Attorney General came to a similar conclusion in its 1976 opinion concerning the preemptive intent of Public Resources Code section 3106 and Division 3 of the Public Resources Code. (RJN, Ex. 32 [59 Ops.Cal.Atty.Gen. 461], 469, 477 (1976).) Those laws preempt local regulations of oil and gas production so that the state may "conserve, protect and prevent waste of those resources while simultaneously encouraging the ultimate recovery of them." (*Id.* at pp. 462–469.) The Attorney General explained that preemption is needed as "[o]il, gas and geothermal resources are flung far and wide around the state; to leave the simultaneous regulation of their development to various local entities would subject development of the state's fuel resources to the 'checkerboard of regulations[.]'" (*Id.* at p. 477.) While local governments may institute "more stringent, supplemental regulations" based on local land use concerns, those regulations may "not conflict with, interfere with, or frustrate the state's regulation for purposes of conservation and protection of resources." (*Id.* at p. 479.) The Attorney

General concluded any regulation on the "manner" of production short of "a complete prohibition of oil and gas activity"[10] is preempted. (*Id*. at pp. 469, 478.)

By banning certain production techniques—but not expressly banning all oil and gas activity—Measure Z falls squarely within DOGGR's jurisdiction. Measure Z does not isolate new wells to certain parts of the County based on local environmental concerns. (See *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1145 [upholding land use ordinance that "restricted timber harvesting to specified zone districts" against preemption challenge].) In *Big Creek Lumber*, for example, the Court found no preemption where the ordinance "avoids speaking to ***how*** timber operations may be conducted and addresses only ***where*** they may take place." (*Id.* at pp. 1152–1153.) But here, Measure Z says "how" oil production must be conducted throughout the entire County. "[T]otal bans are not viewed in the same manner as added regulations, and justify greater scrutiny." (*Fiscal*, *supra*, 158 Cal.App.4th at p. 915.) Through Measure Z, county voters are not "simply imposing additional restrictions on state law to accommodate local concerns," but instead have enacted a total ban on a production technique regulated by state law for over 56 years. (*Ibid*.) As such, Measure Z is preempted and void in its entirety.

4. The Preempted Portions of Measure Z Cannot Be Severed from the Remainder.

If this Court finds that either prohibition on WST ***or*** underground injection is preempted, Measure Z must be invalidated in its entirety. The official campaign materials in support of Measure Z unquestionably demonstrate both prohibitions were critical to the passage of Measure Z. (AR 364, 387.) "The cases prescribe three criteria for severability: the invalid provision must be grammatically,

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[10] Measure Z is not an outright "complete prohibition of oil and gas activity" in the sense contemplated by the Attorney General. If it were, it is highly unlikely that Measure Z would have passed. (See, e.g., RJN, Ex. 1 [7/12/16 Tr.] at 12:17–15:18 [Measure Z supporters adamantly arguing that Measure Z does not impact existing operations].) Measure Z prohibits specific production techniques permitted by state and federal law. The initiative was presented (albeit deceptively) to the voters as not impacting existing operations at all, in that it "preserves current oil jobs and County tax revenue." (AR 364 [Argument in Favor of Measure Z] [stating that Measure Z "prohibits new wells . . . but allows existing oil wells to be reworked via re-drilling, or horizontal drilling, to extend their productive lives"].) While Measure Z will render infeasible any oil production within the County (see *infra* § II.B), it does so by restricting the manner of operations, rather than prohibiting all oil and gas activity within an area. New wells are used in San Ardo not only to recover new sources of hydrocarbons, but also to maintain the steam chest necessary to operate steamflooding. (See *infra* § II.B & III.C.)

functionally, and volitionally separable." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 821.) If severing the invalidated provision fails any of these criteria, Measure Z must be wholly invalidated; though "[v]olitional severability is the most important factor."[11] (*Acosta v. City of Costa Mesa* (9th Cir. 2012) 694 F.3d 960, 974, 977.) To be volitionally severable, "[t]he remaining portions must constitute an independent operative expression of legislative intent, unaided by the invalidated provisions . . . [and cannot] be inextricably connected to them by policy considerations." (*Barlow v. Davis* (1999) 72 Cal.App.4th 1258, 1265.) "The test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions." (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714–715.) When applying this test, courts "consider legislative history or the voter-guidance materials presented with a proposed statute," as well as the text of the initiative. (*Acosta*, *supra*, 694 F.3d at p. 977.)

a. The Prohibitions on WST or Injection Cannot Be Volitionally Severed.

If either the prohibitions on WST or underground injection are declared void and preempted, it cannot "be said with confidence" that County voters would have approved the initiative with the remaining provisions. (*Gerken*, *supra*, 6 Cal.4th at p. 714.) First, Measure Z acknowledges the initiative arose from the failed effort to convince the Board of Supervisors in 2015 to "adopt a moratorium on fracking and acid well stimulation." (AR 152.) Further, the proponents of Measure Z clearly understood the initiative to principally concern hydraulic fracturing. After "attend[ing] several meetings of the Board of Supervisors related to fracking," intervenor Dr. Laura Solorio wrote to County supervisors about "the REAL AND POTENTIAL health and environmental effects of fracking" on July 12, 2016—the same day the Board of Supervisors considered several items related to certification and analysis of Measure Z. (RJN, Ex. 3.) Further, Measure Z also refers to the fact that a small portion of underground injection in Monterey County has been allowed into aquifers that had not previously been

[11] While Measure Z does contain a severability clause stating that each part of Measure Z "would have been adopted or passed even if [other parts] were declared invalid or unconstitutional" (AR 161), that clause does not dictate whether invalid provisions of Measure Z may be severed by this Court. Instead, "[t]he final determination depends on whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute[.]" (*Calfarm*, *supra*, 48 Cal.3d at p. 821, citation omitted.)

exempted for injection under the federal SDWA.[12] (AR 153.) Once the well stimulation moratorium failed, Measure Z proponents seized on this issue to put their initiative over the top.

The voter guidance materials similarly show that neither section can properly be severed from Measure Z. In the "Argument in Favor of Measure Z," proponents repeatedly emphasize the risks posed by "[f]racking, acidizing, and wastewater injection." (AR 364.) Further, proponents argued "fracking, acidizing, and wastewater injection . . . endanger our aquifers," and claimed fracking and underground injection contribute to cancer, chronic illnesses, and earthquakes. (*Ibid.*) In the "Rebuttal to Argument Against Measure Z," proponents urged "Measure Z stops oil companies from passing the risks of fracking and wastewater injection on to the people of Monterey County." (AR 387.)

If either the WST or injection prohibition is held preempted, "it is by no means clear that the electorate would have approved the measure," thereby requiring invalidation of the whole of Measure Z. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 173.) The situation here is closely analogous to the California Supreme Court decision in *Birkenfeld*. In that case, the Court considered the validity of an initiative amendment to a city charter providing for residential rent control. (*Id.* at p. 135.) The *Birkenfeld* Court held that the initiative placed invalid limitations on the powers of the rent control board to adjust maximum rents. (*Id.* at p. 173.) The Court further concluded that the invalid portions could not be severed from the remainder, thereby requiring invalidation of the entire initiative. (*Id.* at pp. 173–174.) The *Birkenfeld* Court relied on statements in the argument in favor of the initiative that was distributed to voters, which guaranteed restrictions on the rent control board to adjust maximum rents. (*Id.* at p. 173.) Based on these statements, the Court held that "it is by no means clear" that voters would have approved the initiative absent those restrictions. (*Ibid.*) As in *Birkenfeld*, it is not clear that Measure Z would have been approved without the prohibitions on WST and underground injection. And the voter-information materials and legislative history offer a "persuasive reason" that both the

[12] DOGGR subsequently implemented corrective action regulations to bring the UIC program into compliance with the SDWA as directed by U.S. EPA . (RJN, Ex. 30 [1/17/17 Update re: UIC Well Review].) During the UIC program revision, DOGGR conducted an exhaustive statewide review of the UIC wells in the state to ensure that no drinking water sources were endangered. (*Ibid.*) DOGGR has the discretionary authority under this process to determine whether to allow operators to continue underground injection within this state. (RJN, Ex. 33 [*CBD v. DOGGR* Statement of Decision].) And, as discussed above, the State has preliminarily concurred with exempting all relevant portions of the San Ardo aquifers. (RJN, Ex. 28 [12/5/16 State Water Board Concurrence].)

WST and underground injection provisions were so critical to the enactment of Measure Z, that the Measure would not have been enacted if either were absent. (*Calfarm*, *supra*, 48 Cal.3d at p. 822 [severing invalid provision because "no persuasive reason" offered].) Consequently, if either the WST or injection prohibition are invalidated, so must the whole of Measure Z.

b. Voters Would Not Have Separately Approved the Remainder of Measure Z.

If this Court determines the WST ***and*** underground injection prohibitions are preempted, the outcome is even more decisive. In contrast to the attention devoted to WST and underground injection, the voter guidance materials contain scant reference to either the impoundment or new well prohibitions. Neither the "Argument in Favor of Measure Z" nor the "Rebuttal to Argument Against Measure Z" even uses the word "impoundment." (See AR 364, 387.) The only arguable reference to the impoundment prohibition in these materials claims Measure Z encourages the treatment of produced water "for beneficial reuse." (AR 364.) But, as described below, the initiative actually prevents the treatment of produced water through the RO plant,[13] and Measure Z contains no exception for such activity.

In the voter guide, the only specific reference to the merits of the new well prohibition is an attempt to minimize the impact of that prohibition. The "Argument in Favor of Measure Z" notes that "Measure Z is fair and balanced" because it allows most wells in the County to continue operating and "preserves current oil jobs and County tax revenue." (AR 364.) Nowhere do the proponents explain why new wells should be prohibited. Instead, they argue the benefits of WST and underground injection prohibitions would outweigh any negative impact caused by the new well ban.

By relying entirely on the supposed threat caused by well stimulation and injection, proponents have functionally admitted that the remaining provisions alone would not serve "some substantial portion of their purpose." (*Santa Barbara Sch. Dist. v. Super. Ct.* (1975) 13 Cal.3d 315, 331–332 [permitting severance of restriction on local school district discretion to allow elimination of "state commitment to racial balance . . . and thereby to allow local control subject only to constitutional restriction"].) If this Court finds state and federal law preempts the WST and underground injection

[13] Chevron's operations at the San Ardo site do not use excavated sumps, depressions, or other basins in the ground to manage produced water or other wastewater as defined by Measure Z. (RJN, Ex. 20 [4/1/16 Rpt. to Regional Water Bd.] at ES-1.) Thus the impoundment prohibition will only affect the release of purified water from the RO facility.

provisions, the entirety of Measure Z is clearly void.

B. Measure Z Is Impermissibly Vague in Violation of Due Process.

Under the federal and state Constitutions, the County may not deprive persons of life, liberty, or property without due process of law. (U.S. Const., 14th amend., § 1; Cal. Const., art. I, § 7, subd. (a).) "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 574.) "A statute is void for vagueness if persons of common intelligence must guess as to its meaning and differ as to its applications." (*People v. iMERGENT, Inc*. (2009) 170 Cal.App.4th 333, 339, citation omitted.) This principle is essential to due process, which requires "clarity in regulation" and "invalidation of laws that are impermissibly vague." (*FCC v. Fox Television Stations, Inc.* (2012) 567 U.S. 239, 253.) "[T]he void for vagueness doctrine is applicable to cases that involve civil penalties, not just criminal liability." (*Prime Healthcare Servs., Inc. v. Harris* (S.D.Cal. 2016) 216 F.Supp.3d 1096, 1123–24; see also *Morrison v. State Bd. of Educ.* (1969) 1 Cal.3d 214, 231.) Each of the three prohibitions in Measure Z fails to give adequate notice to Chevron of the conduct to be avoided, while subjecting Chevron to potentially arbitrary and discriminatory enforcement.

1. The WST Provision Creates Conflicting Prohibitions and Exceptions.

The well stimulation prohibition appears to sweep all oil and gas operations into its purview while simultaneously offering exceptions to enforcement that could swallow the provision whole. This section broadly prohibits the "use of any facility . . . in support of [WST]," with WST defined as "any treatment of a well designed to enhance oil and gas production or recovery by increasing the permeability of the formation." (AR 155.) Generally speaking, every "treatment" of a well in San Ardo—from routine maintenance to horizontal drilling—is "designed to . . . increas[e] the permeability of the formation." (*Ibid*.) Despite prohibiting treatments to increase permeability in San Ardo, including "hydraulic fracturing" and "acid well stimulation," Measure Z proceeds to permit "steam flooding, water flooding, or cyclic steaming and . . . routine well cleanout work, routine well maintenance, routine removal of formation damage due to drilling, bottom hole pressure surveys, or routine activities that do not affect the integrity of the well or the formation." (*Ibid*.)

Based on this definition, Chevron cannot be reasonably certain what conduct is prohibited. "Hydraulic fracturing" does not occur in Monterey County. (RJN, Ex. 2 [7/21/16 Appraiser Analysis at COUNTY_0001219]; Tubbs Decl., ¶¶ 42–44; Stip. Facts, ¶ 29.) And the only other example in this definition—"acid well stimulation treatment"—directly contradicts the exception for "well maintenance." (AR 155.) How would County officials enforce Measure Z if Chevron uses "one or more acids" for "well maintenance" in compliance with DOGGR guidance? (*Ibid*.; Tubbs Decl., ¶ 53.) Even though this conduct qualifies as "well maintenance," it also may constitute "acid well stimulation treatment" otherwise prohibited by the initiative. Or what if, as regularly occurs, Chevron needs to drill a new well as part of its "routine well maintenance" or "steam flooding"? Does this provision allow a new well for maintenance or steam flooding, or does that fall within the new well prohibition?

2. Measure Z's Definition of Wastewater Is Ambiguous and Circular.

Under the well stimulation provision, Chevron is unquestionably permitted to conduct enhanced oil recovery techniques such as "steam flooding, water flooding, or cyclic steaming." But Chevron is simultaneously prohibited from "us[ing] any facility . . . in support of oil and gas wastewater injection," defined to include any "oil and gas wastewater injection into a well for underground storage or disposal." And while the definition of "oil and gas wastewater" is hopelessly circular—Measure Z uses "wastewater" to define "wastewater"—it explicitly includes all "produced water." When Chevron conducts "steam flooding, water flooding, or cyclic steaming" in San Ardo, it does so with produced water, which is prohibited under Measure Z. And steamflooding would seemingly be prohibited by Measure Z, because steam injection to enhance oil recovery has the practical effect of storing produced water underground for which Chevron would otherwise need to find an alternative means of disposal. (Declaration of Wayman Gore, filed with NARO's Opening Brief, ¶ 5.) Given the ambiguous and circular definition of "wastewater," how are County officials supposed to determine whether underground injection for purposes of enhanced oil recovery also violates Measure Z? The initiative and its supporting materials offer no guidelines for the County.

3. Measure Z Cannot Make Up Its Mind Whether to Prohibit Impoundment.

The San Ardo RO facility impounds produced water in "depressions or basins in the ground" as it releases the purified water into constructed wetlands and recharge basins. (AR 155; Tubbs Decl.,

¶¶ 31, 37, 40, 41, 48.) Without such impoundments, the RO facility would not function; and Measure Z prohibits the "use of any facility . . . in support of . . . oil and gas wastewater impoundment." (AR 157.) By being a facility used in support of impoundments, the RO facility would violate this prohibition. But Measure Z also explicitly cites the "wastewater treatment facility constructed in 2007" (*i.e.*, the RO facility) as a proper method of impoundment. (AR 153.) Neither Chevron nor County officials can be reasonably certain whether impoundment of produced water at the RO facility violates Measure Z.

4. The Prohibition on "Drilling New Oil and Gas Wells" Is Unconstitutionally Vague.

The initiative does not define what wells should be considered "new." For example, Chevron often expands existing wells with horizontal "side-tracking," where new holes are bored into the side of the existing well and creates a new bottom hole that is adjacent to the current well. (Tubbs Decl., ¶¶ 47, 51–52.) Under Measure Z, such activity would appear to be prohibited. Indeed, "oil and gas wells" are broadly defined to include any "wells drilled for the purpose of exploring for, recovering, or aiding in the recovery of, oil and gas." (AR 156.) The expansion of existing wells through "side-tracking" falls squarely within this prohibition. Yet in the "Argument in Favor of Measure Z," proponents asserted Measure Z "allows existing wells to be reworked via re-drilling, or horizontal drilling, to extend their productive lives." (AR 364.) Proponents seem to be at odds with the text of their own initiative. Moreover, while Measure Z "does not affect oil and gas wells drilled prior to the Effective Date and which have not been abandoned," the initiative does not define "abandoned." (AR 156.) County officials are thus empowered to arbitrarily decide whether the prohibition includes wells that have "idled"—an important industry distinction ignored by Measure Z. (Tubbs Decl., ¶¶ 14–17; Ellison Decl., ¶¶ 22–23.) Given these fundamental ambiguities inherent in each part of Measure Z, "it is unclear as to what fact must be proved" to comply with the initiative. (*FCC*, *supra*, 567 U.S. at p. 253.)

5. Measure Z Does Not Define the Enforcement Mechanisms for these Prohibitions.

Assuming Measure Z can overcome the vested rights of oil operators such as Chevron to continue and expand production in San Ardo—an issue to be decided, if necessary, in subsequent phases of these proceedings—the plain language of Measure Z prohibits permitted and zoning-compliant activities. Measure Z provides no guidance as to how the County shall enforce Measure Z. While the County can bring enforcement actions for zoning violations, and seek penalties as either an infraction or

misdemeanor (RJN, Ex. 34 [Monterey County Code, Ch. 21.84.040]), all of the operations prohibited by Measure Z are compliant with the applicable zoning restrictions, and are conducted pursuant to existing permits from the County and State. (See, e.g., RJN, Exs. 7 [1949 Permit], 17 [RO Admin. Permit], 34 [County ordinance]; Tubbs Decl., ¶ 5.) Measure Z is devoid of any guidance or instruction to County officials on how or when to initiate such enforcement actions. If Measure Z is to be enforced at all, its penalty provisions are "so standardless that it authorizes . . . seriously discriminatory enforcement." (*FCC*, *supra*, 567 U.S. at p. 253.)

Measure Z offers no means to navigate these fundamental ambiguities. Instead, Measure Z allows County officials unfettered discretion to determine whether an operator's conduct complies with Measure Z simultaneously as it decides whether to enforce the initiative. As explained by the U.S. Supreme Court, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference." (*Christopher v. SmithKline Beecham Corp.* (2012) 567 U.S. 142, 158–159.) Due process does not tolerate such vagueness, and Measure Z must be rendered void for this reason.

C. Measure Z Violates the Takings Clause of the U.S. and California Constitutions.

The Takings Clause to the U.S. Constitution, and its California counterpart, guarantee that private property shall not be taken without just compensation. (U.S. Const., 5th amend.; Cal. Const., art. I, § 19.) This constitutional protection covers not only physical takings of property, but also regulatory takings. (See *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617 ["[T]here will be instances when government actions do not encroach upon or occupy property yet still affect and limit its use to such an extent that a taking occurs"].) "In facial takings claims, [the court's] inquiry is limited to 'whether the mere enactment of the [regulation] constitutes a taking.'" (*Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency* (9th Cir. 2000) 216 F.3d 764, 773, citation omitted; see also *Hodel v. Va. Surface Mining & Reclamation Assn.* (1981) 452 U.S. 264, 295.) "A person may bring a facial challenge by showing that the subject of [the] particular challenge has the effect of infringing some constitutional or statutory right, but need not necessarily show that he or she has personally

suffered this infringement." (*Vergara v. State* (2016) 246 Cal.App.4th 619, 643, review denied, citations omitted.) Specifically, in a facial challenge, "[the court] look[s] only to the regulation's general scope and dominant features, rather than to the effect of the application of the regulation in specific circumstances." (*Tahoe-Sierra*, *supra*, 216 F.3d at p. 773, citation omitted; see also *Garneau v. City of Seattle* (9th Cir. 1998) 147 F.3d 802, 807.)

A "regulatory taking" occurs when governmental action so restricts the owner's use and enjoyment of the property that it amounts to a "taking" even though there is no planned or formal exercise of the power of eminent domain. (See, e.g., *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13 ["[A] 'regulatory taking' . . . results from the application of zoning laws or regulations which limit development of real property"].) "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (*Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003, 1014.) A land use regulation "goes too far" and constitutes a categorical taking where it "denies an owner economically viable use of his land."[14] (*Id.* at pp. 1015–1016 [finding "categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land"].)

In evaluating takings claims, courts have recognized landowners' right to extract natural resources from a property. In the seminal U.S. Supreme Court case of *Pennsylvania Coal Co. v. Mahon*, the Court found a regulatory taking where a property restriction prohibited coal mining that would "cause the subsidence of, among other things, any structure used as human habitation." ((1922) 260 U.S. 393, 412–413.) Similarly, under California law, a regulation that "affords the respondents no adequate means of protection or substitute for their right to extract oil from the property" constitutes a taking. (*Braly v. Board of Fire Com'rs of City of L.A.* (1958) 157 Cal.App.2d 608, 613–16 [the right to extract oil and gas from a property "is 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," citations omitted].) Finally, Measure Z will result in a complete loss of royalty payments

[14] For purposes of this Phase 1 proceeding, the Chevron Plaintiffs are not pursuing a takings claim under the ad hoc, multifactored test discussed by the United States Supreme Court in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, and by the California Supreme Court in *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761. The Chevron Plaintiffs reserve all rights to pursue a takings claim under this standard in subsequent stages of these proceedings or as part of any administrative proceeding before the County of Monterey.

for the owners of mineral rights within the County, rendering useless their rights in those property interests. (See Declaration of Thomas Orradre, filed concurrently ("Orradre Decl."), ¶¶ 5–6.)

1. New Wells Are Needed To Maintain Current Oil Production in the County.

In seeking passage of Measure Z, its ballot proponents repeatedly made the untrue statement that the prohibition on new wells will not impact existing oil production operations. (See AR 364.) In fact, this prohibition will prevent operators from maintaining their current operations and level of production. (Latham Decl., ¶¶ 6, 13–18; Tubbs Decl., ¶¶ 47, 51–53.) As an initial matter, the prohibition on new wells will cause an immediate exponential decline in oil production throughout Monterey County. (Latham Decl., ¶¶ 6, 13–18; Tubbs Decl., ¶¶ 47, 51–53.) It is a fundamental fact of oil operations that production from individual wells will inevitably and quickly decline as the production of fluid from a well depletes the available oil surrounding that well. (Tubbs Decl., ¶ 52.) As documented through analysis of historical production data, oil production generally declines by 20% per year without the ability to continue drilling new wells. (Tubbs Decl., ¶ 52; Latham Decl., ¶¶ 15–17.)

Given the unique characteristics of the heavy crude oil formations in Monterey County, Measure Z's prohibition on new wells will have an even more devastating impact on ongoing operations. Heavy crude oil is not mobile without the application of enhanced oil recovery techniques, such as steamflooding. (Tubbs Decl., ¶¶ 32–33, 43–44; Latham Decl., ¶¶ 7–11; Stip. Facts, ¶¶ 16–17.) After heating produced water that is extracted from the formation, operators inject steam that lowers the viscosity of the heavy oil, which allows it to migrate to producer wells that can then pump out the oil-bearing produced water. (Tubbs Decl., ¶¶ 43–44; Latham Decl., ¶ 9.) Oilfield operations in Monterey County are entirely dependent on steamflooding and enhanced oil recovery. (Tubbs Decl., ¶¶ 43–49; Latham Decl., ¶ 11.) Steamflooding creates a large "steam chest" within the oil-bearing formations after the investment of significant time and resources. (Tubbs Decl., ¶ 44.) A steam chest represents a large bubble of steam trapped by the cap rock that allows for the extraction of oil with a very high percentage yield. (*Ibid.*) The presence of steam allows for the extraction of a higher percentage of oil than otherwise possible through other means of enhanced oil recovery. (*Ibid.*; see also Latham Decl., ¶¶ 9–11, 14.) A steam chest is critical to the economically feasible production of oil in Monterey County. (Tubbs Decl., ¶¶ 57–59; Latham Decl., ¶¶ 14–15.) But the constant encroachment of water

from the edges of the steam chest can quickly quench the steam and cause the collapse of the steam chest. (Tubbs Decl., ¶ 47; Latham Decl., ¶ 22.)

Chevron must continuously replace or side-track non-productive wells, add infill horizontal wells, and drill new wells at the perimeter of the steam chest in order to avoid the cooling and collapse of the steam chest through the encroachment of native water within the formation. (Tubbs Decl., ¶ 47; Latham Decl., ¶¶ 14, 22.) Without the drilling of new wells, the native water in the formation would provide a constant influx of colder temperature and higher pressure, which can quickly cause the collapse of the steam chest. (Tubbs Decl., ¶ 47; Latham Decl., ¶ 22; Stip. Facts, ¶¶ 19–20.) As Measure Z prevents Chevron from adding or replacing wells that are critical to prevent the encroachment of water into the steam chest, Measure Z's drilling prohibition will result in the collapse of the steam chest within the San Ardo Field. (Tubbs Decl., ¶ 57; Latham Decl., ¶¶ 14, 22.) Once a steam chest has collapsed, it would not be economical to re-establish the existing steam chest in order to resume the current extraction of the remaining oil. (*Ibid.*) Measure Z's drilling prohibition will prevent operators from maintaining their current operations, which will stop all economic production of oil from the San Ardo Field. (Tubbs Decl., ¶¶ 57–59; Latham Decl., ¶¶ 13–18.)

2. Measure Z Makes It Impossible to Use Needed Enhanced Oil Recovery Techniques.

Measure Z requires Chevron to phase out underground injection of water and impoundment operations at San Ardo. Although the steamflood techniques used by Chevron have minimal risk of sub-surface contamination, the plain language of Measure Z prohibits any injection of produced water, even for enhanced oil recovery. (RJN, Ex. 23 [7/31/15 State Ltr. to EPA]; Tubbs Decl., ¶¶ 54–56.) Chevron would not even be allowed to continue operation of its RO plant as this facility requires the release of produced water into an impoundment after treatment, and the disposal of a concentrated brine stream by injection. (Tubbs Decl., ¶¶ 41, 55.) The terms of Measure Z would prohibit both activities from continuing. Once Chevron is prohibited from injecting or impounding produced water, operations will cease shortly thereafter. (*Id.*, ¶¶ 54–56, 60; Stip. Facts, ¶ 23.) There is simply no other economically feasible means to dispose of the large amounts of produced water extracted during production operations.[15] (Tubbs Decl., ¶ 48.)

[15] In fact, the County's own Supervising Appraiser recognized that "[i]f the oil companies were not
[Footnote continued on next page]

Measure Z artificially compresses the time period in which operators are expected to recover their investment into the oilfield at San Ardo, during a period of historically low oil prices. (Latham Decl., ¶¶ 23–25.) While Measure Z assumes that five to fifteen years will provide a reasonable amount of amortization for Chevron to recoup its investment in the San Ardo Field, this provision reflects a fundamental misunderstanding as to the nature of large, heavy crude oil fields such as the San Ardo Field. Unlike billboards or storefront operations, oilfield operations are not simply a large upfront investment that can then be amortized and recouped. (See, e.g., *Nat. Advertising Co. v. County of Monterey* (1970) 1 Cal.3d 875, 879 [finding billboard signs "should await expiration of a reasonable amortization period in order to permit plaintiff to recover their original cost," which was between five and nine years]; see also *People v. Gates* (1974) 41 Cal.App.3d 590, 604 [finding eighteen month amortization period reasonable where appellant made "no investments in any permanent improvements on the subject parcel"].) Instead, Chevron must make continuous, large-scale investments to continue the economic operation of the San Ardo Field. (Tubbs Decl., ¶¶ 55–59; Latham Decl., ¶ 22.) A complicated oilfield operation such as at San Ardo requires significant capital investment and large ongoing operational expenses, under the assumption that operations will continue for at least 50 to 60 more years. (Tubbs Decl., ¶ 56; see also Latham Decl., ¶¶ 23–24.) No oil company would continue to invest capital and resources into an oil field if all operations must cease within fifteen years. Chevron is no different—all planned capital investments into the field will cease once Measure Z is implemented. (Tubbs Decl., ¶ 56; see also Latham Decl., ¶¶ 23–24.) In effect, Measure Z will cause the loss of all economic value upfront, regardless of whether certain provisions are implemented at a later date.[16]

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allowed or banned from drilling new wells and they could not displace the wastewater that was produced from the wells, the oil companies would be effectively 'Shut In' and would most likely end production within a very short time[.]" (RJN, Ex. 2 [7/21/16 Appraiser Analysis] at COUNTY 1220.)

[16] Measure Z violates due process as "it puts a business in an impossible position due to a shortage of relocation sites." (*World Wide Video of Wash., Inc. v. City of Spokane* (9th Cir. 2004) 368 F.3d 1186, 1200; see also *Santa Barbara Patients' Collective Health Co-op. v. City of Santa Barbara* (C.D. Cal. 2012) 911 F.Supp.2d 884, 894 [holding that ordinance precluding relocation put plaintiff in "'an impossible position,' forcing Plaintiff to close its business and lose its permit without due process"].) Unlike billboards or retail stores, oilfield reserves must be extracted where they are located. The oil fields affected by Measure Z cannot be relocated outside of the County. Any "amortization period prescribed by legislation which provides for the eventual discontinuance of nonconforming uses" must be "reasonable and commensurate with the investment involved." (*Nat. Advertising*, *supra*, 1 Cal.3d at

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The County cannot take all economic value from a property based on a meaningless amortization period. (See *People ex rel. Dept. of Transportation v. Diversified Properties Co. III* (1993) 14 Cal.App.4th 429, 443–44 [finding taking where the "City, by way of its development restrictions, [took steps] to 'bank' the subject property for the State—presumably so that the State could, at a later date, condemn the subject property in an undeveloped (and, consequently, less costly) condition"].) Measure Z has the effect of immediately crippling ongoing oil production operations within the County, but purports to allow operators to continue these valueless operations for a few additional years. Regardless of the misleading language in Measure Z, the court must consider the actual effect of the Measure.

3. Measure Z Will Deprive the Oilfields of All Economically Viable Use.

Any implementation of Measure Z will cause an unconstitutional taking of the property rights held by royalty owners and oil operators, and the entire Measure should be invalidated immediately. (*Penn. Coal*, *supra*, 260 U.S. at pp. 414–415 ["To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."].) In California, the mineral estate is the dominant estate, which may not be subject to unreasonable interference by the surface owner. (*Cassinos v. Union Oil Co*. (1993) 14 Cal.App.4th 1770, 1780; *Wall v. Shell Oil Co.* (1962) 209 Cal.App.2d 504, 516–517.) Measure Z has the effect of taking away all value for these mineral rights. (Latham Decl., ¶ 21; Orradre Decl., ¶ 6.) No matter how Measure Z is implemented, it will strip the oil-producing properties of any viable economic use. Where a measure will have the same result regardless of how it is applied by the agency, then the measure is facially invalid. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 [a statute is facially invalid where it will "inevitably pose a present total and fatal conflict with applicable constitutional provisions"].) The regulatory taking effected by Measure Z falls well within the parameters established by *Lucas*.[17]

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p. 879.) Even taking into account Measure Z's maximum fifteen-year phase-out period, this prohibition would substantially reduce the 60-year life expectancy assumed for new wells. (Tubbs Decl., ¶ 56.)

[17] In *Lucas*, the U.S. Supreme Court found that all economically viable uses of the landowner's beachfront property had been eliminated when state law barred the landowner from erecting single-family homes after the landowner purchased the property expressly for that purpose. (*Lucas*, *supra*, 505 U.S. at pp. 1008–1009.) The Court found a taking, despite the fact the owners could continue to use the property to "picnic, swim, camp in a tent, or live on the property in a movable trailer." (See *id.* at p. 1044 (dis. opn. of Blackmun, J.); see also *Monks v. City of Rancho Palos Verdes* (2008) 167

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Chevron's existing operations within the San Ardo Field are zoned for Heavy Industry. (RJN, Ex. 17 [6/29/05 Cnty. Permit] ["parcel is zoned 'HI (Mineral Extraction)' (Heavy Industrial)"].) The only other large-scale operations that exist in the locality are agriculture and grazing, neither of which are permissible uses on land zoned for Heavy Industry. (RJN, Ex. 34 [Monterey County Code, Ch. 21.28].) Without oil operations, the County has precluded all viable, permissible uses for this property. (*Del Monte Dunes at Monterey, Ltd. v. City of Monterey* (9th Cir. 1996) 95 F.3d 1422, 1434, affd. (1999) 526 U.S. 687 ["As the land was zoned for multi-unit residential use, once the jury determined that it was unusable for that purpose, it was entitled to conclude that the City's actions had effected a taking"]; see also *Lucas*, *supra*, 505 U.S. at p. 1016 fn. 7 [noting that an owner's reasonable expectations are shaped by the uses permitted by state law]; *Outdoor Sys., Inc. v. City of Mesa* (9th Cir. 1993) 997 F.2d 604, 616 [holding that "'the existence of permissible uses [generally] determines whether a development restriction denies a property holder the economically viable use of its property'"].) The severe restrictions on the only economically beneficial use of the San Ardo property effect an unconstitutional taking. Unless the County provides just compensation for this taking, Measure Z must be invalidated.

4. Section 6(C) of the Measure Does Not Provide a Safe Harbor from Facial Claims.

While Measure Z establishes an exemption process when its application "effects an unconstitutional taking of property" (AR 160), the Board of Supervisors is specifically prohibited from making these types of determinations, and therefore the exemption process is entirely meaningless; the Board is not competent to make the necessary findings that will permit an exemption under Measure Z. As Measure Z was adopted by initiative, the County is incapable of amending or repealing the scope of the Measure without a vote of the people. (See Cal. Evid. Code, § 9217; see also AR 161.) While Measure Z allows the Board of Supervisors to issue an exemption of any portion of the measure, such exemption is dependent on a determination by the Board that the initiative constitutes an unconstitutional taking of property, and is limited "to the minimum extent necessary to avoid such a

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Cal.App.4th 263, 305 [finding taking where regulations permitted "temporary minor nonresidential structure" but prohibited all other economically beneficial use].)

taking." (AR 160.) Measure Z's exemption provision is fundamentally flawed as the Board of Supervisors is barred from adjudicating these constitutional questions. (*Hensler*, *supra*, 8 Cal.4th 1, 16 ["[A]n administrative agency is not competent to decide whether its own action constitutes a taking"]; *Healing v. Cal. Coastal Com*. (1994) 22 Cal.App.4th 1158, 1178 [holding that the Coastal Commission "is not an adjudicatory body authorized to decide issues of constitutional magnitude"].)

As Measure Z does not allow the Board to consider an exemption on any grounds not based on constitutional law, the exemption process established by Measure Z is futile. (*Hunt v. City of L.A.* (9th Cir. 2011) 638 F.3d 703, 713 ["[C]opying [the Court's] legal standard and pasting it into [an exemption provision] does not offer the City a per se safe harbor from a vagueness challenge"]; *Nat. People's Action v. Blue Island* (N.D.Ill. 1984) 594 F.Supp. 72, 79–80 [finding facial violation where "the exemption in the present ordinance alludes to state and federal law and constitutions, thereby referring to a vast and diverse body of law as guidance for the potential [violator]"].)

Before bringing a facial challenge, the Chevron Plaintiffs are not required to "seek a final decision regarding the application of the regulation to the property at issue before the government entity charged with its implementation[.]" (*Levald, Inc. v. City of Palm Desert* (9th Cir. 1993) 998 F.3d 680, 686.) By definition in a facial taking, the "mere enactment" of Measure Z amounts to a taking, and future administrative exhaustion is unnecessary. (*Tahoe-Sierra*, *supra*, 216 F.3d at p. 773.) As discussed above, any exemption short of a complete revocation of Measure Z would still result in a taking. Given that any application of Measure Z will strip oil-producing properties of all value, it would be a meaningless gesture to require a party to seek an exemption from the Board of Supervisors on facial constitutional issues that, unless found to be fully exempt, will then simply be appealed to the judiciary. In such cases, the parties "need not seek a variance from the ordinance or exhaust administrative remedies . . . [and] may immediately contest the allegedly invalid regulation" in this Court. (*Sinclair Oil Corp. v. County of Santa Barbara* (1996) 96 F.3d 401, 407–08.)

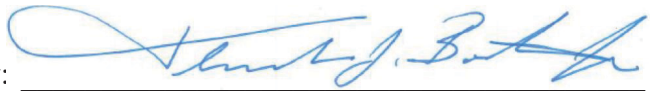
IV. CONCLUSION

For the foregoing reasons, Measure Z is facially and legally invalid and should be struck down.

DATED: August 11, 2017

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 

Theodore J. Boutrous Jr.

Attorneys for Petitioners and Plaintiffs CHEVRON U.S.A. INC.; KEY ENERGY SERVICES, LLC; ENSIGN UNITED STATES DRILLING (CALIFORNIA) INC.; MAUREEN WRUCK; GAZELLE TRANSPORTATION, LLC; PETER ORRADRE; MARTIN ORRADRE; JAMES ORRADRE; THOMAS ORRADRE; JOHN ORRADRE; STEPHEN MAURICE BOYUM; and SAN ARDO UNION ELEMENTARY SCHOOL DISTRICT

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