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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

CHEVRON U.S.A. INC, et al. Petitioners and Plaintiffs, v. COUNTY OF MONTEREY, a municipal corporation; and DOES 1 through 25, inclusive, Respondents and Defendants, PROTECT MONTEREY COUNTY, a nonprofit organization, and DR. LAURA SOLORIO, MD. Respondents in Intervention.	Case No. 16CV003978 [Consolidated with Case Nos. 16CV003980, 17CV000790, 17CV000871, 17CV000935, 17CV001012] **INTERVENORS' OPPOSITION BRIEF (PHASE I FACIAL CLAIMS)** Date: November 13, 2017 Time: 9:00 am Dept: 14, Judge Wills Action Filed: December 14, 2016

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Regulations

Other Authorities

I. INTRODUCTION

Measure Z is an exercise of the people's constitutional right of initiative. It invokes traditional police powers that the California Constitution grants to political subdivisions like Monterey County – and ultimately the voters – to protect public health and the environment. A century of case law acknowledges that local governments may exercise these powers restrict or prohibit land use activities by oil and gas producers. The California oil and gas laws and relevant state officials agree that local governments retain these powers. Furthermore, Measure Z itself includes constitutional safeguards allowing affected property owners to seek exceptions from the County pursuant to an administrative process. In this Phase 1 proceeding, Petitioners' facial challenges cannot overcome the "strong presumption" that Measure Z is valid.

Petitioners' challenges on the grounds that Measure Z violates the California Constitution's "single-subject" rule and is too vague for oil interests to understand are belied by the plain language of the initiative and the ballot materials accompanying it. Measure Z's three land use policies (related to well stimulation treatments, wastewater injection/surface disposal, and new wells) are clear on their face and are reasonably related to the common theme or purpose of protecting the County's citizens from the harmful environmental impacts caused by oil and gas production.

Petitioners' claims of preemption by state and federal law are similarly meritless. Those laws only regulate technical aspects of "downhole" or subsurface operations, not the land use activities that Measure Z addresses. As such, they do not implicitly occupy the field, as Petitioners suggest, or in any way conflict with Measure Z's provisions. Moreover, Petitioners ignore explicit savings (non-preemption) clauses in those statutes – clear expressions of legislative intent that neither federal nor state law supplants inherent local police power to protect the community from risky land uses. They also conveniently sidestep a long history of California decisions which consistently hold that local authorities have the right to control local activities in the oil and gas industry.

Petitioners' taking arguments fare no better. To avoid any uncompensated taking, Measure Z provides property owners and operators with a right to seek an exemption from its application upon a showing that implementation would otherwise effect a taking. In a case directly on point, the California

Court of Appeal held that such a provision alone precludes any facial taking claim. The same result is required here. Petitioners' fact-based arguments may be brought only after the County has an opportunity to address them; they have no place in a facial takings analysis. At a minimum, these as-applied" arguments are premature and not yet ripe because Petitioners have not sought an exemption or a determination of vested rights from the County.

Lastly, Petitioners' scattershot of other facial claims (no legitimate government purpose, overbreadth, no local authority to prohibit or amortize a lawful business, etc.) are legally untenable and/or simply wrong. Protecting air, water, and land are, of course, legitimate reasons for the voters' exercise of a county's police powers, and Measure Z's land use provisions are rationally related to this purpose. And basic black letter law confirms that local governments are allowed to amend their zoning codes to address emerging threats to public health or to slowly phase out old, nonconforming land uses.

It is against the backdrop of these legal leaps that Petitioners mask their as-applied challenges in this facial phase of the case. The true facts are that, unlike other California cities and counties, the County of Monterey historically has allowed oil production in the San Ardo, Lynch Canyon, and other oil fields without meaningful local oversight. Operators in these fields rely on decades-old general use permits that contain no monitoring, reporting, inspection or other conditions, and which purport to obviate the need for local approval or permits for new wells, new production activities, or other new uses that can dramatically expand the footprint of oil production and its risks to the community. In essence, these oil fields operate out of the public eye, with a degree of impunity from local oversight and control that no other business in Monterey County enjoys.

Nor have state or federal agencies filled this void. The Division of Oil, Gas, and Geothermal Resources ("DOGGR") within the California Department of Conservation has technical requirements for downhole activities such as well casings and spacing, but has no land use authority and does not assert control over new well development.[1] Moreover, although DOGGR nominally operates

[1] Before drilling a new well, oil field operators need only file with DOGGR a "Notice of Intention to Drill New Well," a form that identifies the technical construction specifications for proposed wells. The proposed well is deemed approved within ten days unless DOGGR responds otherwise. Cal. Pub. Res. Code § 3203. The purpose of these notices is to ensure that operators comply with technical drilling standards, not to evaluate the wisdom of expanded operations or their impacts on the surrounding community.

California's Underground Injection Control ("UIC") program, it has failed to carry out its statutory obligations, as a 2011 audit by the U.S. Environmental Protection Agency revealed. That audit showed that DOGGR was routinely allowing the discharge of oil and gas wastes into potential sources of drinking water, including in Monterey County.[2] Ironically, DOGGR has responded by proposing to exempt these potential sources of drinking water from the UIC program altogether, and EPA is unlikely to object.[3]

Faced with the possibility of expanding and increasingly risky oil operations, concerned citizens took the matter into their own hands by qualifying Measure Z for the ballot. Despite the efforts of well-funded oil interests, who spent millions of dollars to defeat the initiative, a strong majority of Monterey County's voters rejected the oil industry's arguments and approved Measure Z. In these lawsuits, oil interests reprise the same hyperbole that failed to sway voters during the campaign, in an attempt to convince the Court to override the will of the people. But where, as here, a voter initiative is supported by constitutional grants of authority, statutory savings clauses, a century of legal precedent, and strong presumptions favoring its validity, courts must not usurp the democratic process. Accordingly, the Court should reject Petitioners' facial challenges and grant judgment for Respondents.

II. FACTUAL BACKGROUND

Monterey County has significant oil operations, but historically has lacked meaningful land use and zoning regulations applicable to those operations. For instance, while many California localities require individual permits for each new well, oil facilities in unincorporated Monterey County have typically operated under antiquated, open-ended use permits, which purported allow them to expand their activities or drill new wells without environmental review or further local approval or oversight. The absence of local oversight became an even more pressing concern as some oil producers began experimenting with the use of hydraulic fracturing ("fracking") and the additional of acid ("acidizing")

2 See Intervenors' Request for Judicial Notice ("RJN") Exh. A (DOGGR letter to EPA Region IX dated May 15, 2015, Attachments C and D, listing wells in violation of Safe Drinking Water Act).

3 RJN Exh. B (DOGGR notice of intention to approve exemption); Exh. C (DOGGR chart of EPA approvals).

to stimulate oil production in Monterey shale oil deposits.[4] After years of growing concern, residents petitioned Monterey County in 2014 to address the community and environmental risks posed by oil field expansion and new high intensity oil extraction activities.

Recognizing the need for greater local supervision, the Monterey Planning Commission recommended that the County adopt a temporary moratorium on the use of fracking and acidizing to stimulate oil and gas well production, and require discretionary use permits for any well stimulation activities. E.g., AR 006-08. The Monterey Planning Department drafted language for a potential ordinance to implement these recommendations, but the County Board of Supervisors failed to enact any legislative changes. AR 117. While the County delayed, oil company operations continued apace, resulting in at least 14 spills from 2014 to 2016. RJN Exh D. To make matters worse, the public simultaneously learned that DOGGR stood by while operators of thousands of wells across the state injected toxic-laden wastewater into aquifers that were supposed to be protected under the federal Safe Drinking Water Act. RJN, Exh. E. Scores of these illegal injection wells were in Monterey County, threatening serious degradation to the area's groundwater. RJN Exh. A.

Unsatisfied by the County's inaction in the face of its own Planning Commission's recommendation, over 16,000 residents signed a petition to place Measure Z on the ballot. AR 118-45. Given the intervening revelations about the significant deficiencies in DOGGR's UIC program, the initiative expanded on the Planning Department's draft ordinance to include provisions that address wastewater injection and impoundment. Under California Election Code section 9118(b), the Board of Supervisors voted to place the initiative on the November 2016 ballot rather than adopt the measure itself. AR 314, 318-19, 327-28.

Measure Z was carefully crafted to comply with existing law and to carry out three clearly-expressed objectives. Descriptively titled "Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative," Measure Z stated its "purpose" clearly:

[4] For example, as the County explained in an analysis of a 2015 application by Trio Petroleum for a conditional use permit, Venoco, Inc. used fracking and acidizing in 2008 on two wells on the same property in 2008. RJN Exh. G (explaining that DOGGR records indicate that Venoco performed hydraulic fracturing and acidizing on both wells).

> To protect Monterey County's water, agricultural lands, air quality, scenic vistas, and quality of life by [1] prohibiting the use of any land within the County's unincorporated area for well stimulation treatments, including, for example, hydraulic fracturing treatments (also known as "fracking") and acid well stimulation treatments. The Initiative also [2] prohibits and phases out land uses in support of oil and gas wastewater (which the Initiative defines) disposal using injection wells or disposal ponds in the County's unincorporated area. The Initiative also [3] prohibits drilling new oil and gas wells in the County's unincorporated area.

AR 121. Measure Z's stated "effects" track these same three goals. AR 121. To support these land use changes, Measure Z includes fifteen detailed "findings" regarding the absence of effective local regulations governing oil and gas operations within unincorporated areas of the County and the need for more stringent measures to protect the health, safety, welfare, and quality of life of residents of the County. AR 121-27.

The operative provisions of Measure Z are equally clear and precise. Measure Z simultaneously amends the Monterey County General Plan, the Monterey County Local Coastal Program, and the Fort Ord Master Plan to include the three land use prohibitions. ***First***, "[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 well stimulation treatments is prohibited on all lands within the County's unincorporated area"; the term "well stimulation treatments" is defined to include fracking and acidizing, but not steam processes. AR 127-28 (LU-1.21). ***Second***, "[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 is prohibited on all lands within the County's unincorporated area," with a reasonable amortization or "phase-out" period of at least five years for all non-conforming uses, and the opportunity for existing operators to obtain a longer amortization period (up to ten additional years) on a case-by-case basis upon a showing to the Planning Commission. AR 128-29 (LU-1.22). ***Third***, "[t]he drilling of new oil and gas wells is prohibited on all lands within the County's unincorporated area," but this prohibition "does not affect oil and gas wells drilled prior to the Effective Date and which have not been abandoned." AR 129 (LU-1.23).

In these ways, Measure Z exercises only the County's traditional police powers and land use authority for the purpose of promoting public welfare and protecting human communities and the

environment. The initiative does so by (1) anticipating and prohibiting in advance the commencement of certain dangerous oil and gas well stimulation treatments (which Petitioners claim are not currently used in the County but which DOGGR records show has recently been performed in Monterey), (2) phasing out, over a reasonable amortization period, the risky land use practice of disposing oil and gas wastes through underground injection and surface impoundments, and (3) preventing the expansion of existing oil and gas extraction operations through a ban on construction of new wells, while allowing continued extraction from existing wells consistent with the natural life and inevitable decline of all oil fields.

To ensure Measure Z preserves existing property rights, section 6 provides that nothing in the initiative "shall apply to prohibit any person or entity from exercising a vested right, obtained pursuant to State law" and that the initiative's provisions 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. Measure Z effectuates these safeguards by expressly authorizing the grant of "an exception to application of any provision of this Initiative if the Board of Supervisors 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 137.[5]

Measure Z's provisions and goals were clearly stated in the official voter pamphlet, which provided full information to County voters. The County Counsel's Impartial Analysis explained Measure Z's three prohibitions, as well as the section 6 exemption provision, in clear, concise, objective language. The County Auditor's Fiscal Impact Statement discussed the potential financial costs and benefits of the initiative. AR 362-63. The voter pamphlet included arguments for and against Measure Z and rebuttals thereto. AR 364-72, 375-91. The arguments in favor of Measure Z explained that the initiative would prohibit fracking and acidizing, phase-out wastewater injection, and prohibit new wells but allow the reworking and horizontal drilling of the County's existing 1,500 oil wells. AR cite. The

[5] Although Measure Z did not articulate a specific process for either granting an exception or determining vested rights, Monterey County's existing zoning ordinance has provisions for both granting variances to local zoning restrictions and for determining vested rights. Monterey County Code, § 21.64.240 (vested rights) and §21.72 (variances).

arguments against Measure Z claimed, as Petitioners do here, that Measure Z was a "deceptive, deeply flawed initiative" that "will lead to the shutdown of oil production" and "will have devastating consequences for crucial county programs like education, police, and fire protection." AR cite. Echoing these same arguments, the oil industry waged a year-long, $5.6 million multimedia advertising campaign against Measure Z. RJN Exh. F. Despite this industry effort, Measure Z passed on November 8, 2016 with a strong majority of the vote. AR 399.[6]

On December 13, 2016, the Board certified the results of the initiative at a public hearing, and the new law was set to take effect in ten days. AR 392-394, 399. But the day after certification, two of the Petitioners filed lawsuits against the County and, before Intervenors could join the case, the Court stayed implementation of Measure Z's key provisions pursuant to stipulation of the parties. Nearly a year after Measure Z passed by a sizable margin, voters are still waiting for Measure Z's protections to be put in place, even as Petitioners go about planning expansion of their current operations.[7]

III. BACKGROUND LEGAL PRINCIPLES

As an enactment of the people through the initiative process, Measure Z exemplifies "one of the most precious rights of our democratic process." Cal. Cannabis Coalition v. City of Upland, 3 Cal. 5th 924, 930 (2017). Indeed, the constitutional initiative power is so fundamental that the California Supreme Court has described it "not as a right granted the people, but as a power reserved by them." Id., at 934. Thus, the California Supreme Court recently reaffirmed that courts possess a "'solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise.'" Briggs v. Brown, 3 Cal. 5th 808, 827 (2017) (quoting Legislature v. Eu, 54 Cal. 3d 492, 501 (1997)): see also Cal. Cannabis Coal., 3 Cal. 5th 924, 401 P.3d 49, 55 ("courts have consistently declared it their duty to 'jealously guard' and liberally construe the right so that it 'be not improperly annulled'") (quotations omitted).

[6] Notably, Plaintiffs did not pursue any kind of pre-election challenge to the adequacy of the voter pamphlet information or arguments or to the facial validity of Measure Z. Cal. Elec. Code § 9190; Senate of State of Cal. v. Jones, 21 Cal. 4th 1142, 1155 (1999) (affirming availability of such pre-election challenges).

[7] See Declaration of Dallas Tubbs at ¶ 51 (stating that "Chevron intends to drill or sidetrack 56 new wells in 2017 and 2018. The expected life span of these new wells is 60 years.").

The subject matter of Measure Z itself likewise flows from the constitution, which vests expansive police powers in political subdivisions like Monterey County. Under the California Constitution's Article XI Section 7, local cities and counties have "broad and flexible" police powers to make and enforce ordinances and regulations that promote and protect the lives, health, morals, comfort, and general welfare of the people. Cal. Const. Art. XI, sec. 7; Richeson v. Helal, 158 Cal. App. 4th 268, 277 (2007) (noting that local police powers are as broad as those of the state itself). "A county may use its police powers to do 'whatever will promote the peace, comfort, convenience, and prosperity' of [its] citizens . . . , [and these powers] should 'not be lightly limited.'" San Diego County Veterinary Med. Ass'n v. County of San Diego, 116 Cal. App. 4th 1129, 1135 (2004) (quoting Waste Resource Technologies v. Dep't of Public Health, 23 Cal. App. 4th 299, 310 (1994)); see also Cotta v. City & County of San Francisco, 157 Cal. App. 4th 1550, 1557 (2007) ("The police power extends to legislative objectives in furtherance of public peace, safety, morals, health and welfare."). Moreover, a county's constitutionally-derived powers are "capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race," including through the adoption and amendment, from time to time, of a "comprehensive zoning plan." Richeson, 158 Cal. App. 4th at 277.

These principles apply with special force to judicial review of voter initiatives. The purpose of the initiative power is to allow voters "to propose and adopt provisions 'that their elected public officials had refused or declined to adopt.'" Cal. Cannabis Coal. v. City of Upland, 3 Cal. 5th 924, 401 P.3d 49, 55. Thus, as the California Supreme Court has recently reaffirmed, courts have a "solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise." Briggs v. Brown, 3 Cal. 5th 808, 400 P.3d 29 (2017). Indeed, "the people's power to propose and adopt initiatives is at least as broad as the legislative power wielded by the Legislature and local governments," and "[w]hen voters exercise the initiative power, they do so subject to precious few limits on that power." Cal. Cannabis Coal. v. City of Upland, 3 Cal. 5th 924, 401 P.3d 49, 56.

In the zoning realm, a county "has broad authority, under its general police power, to regulate the development and use of real property within its jurisdiction to promote the public welfare." California

Bldg. Indus. Ass'n v. City of San Jose, 61 Cal. 4th 435, 455 (2015), cert. denied, 136 S. Ct. 928 (2016). A "city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state," and the Legislature has made it clear that "counties and cities may exercise the maximum degree of control over local zoning matters." Big Creek Lumber Co. v. County of Santa Cruz, 38 Cal. 4th 1139, 1151–52 (2006) (quoting DeVita v. County of Napa, 9 Cal. 4th 763, 782 (1994)). "The variety and range of permissible land use regulations are extensive and familiar, including, for example, restrictions on the types of activities for which such property may be used . . . As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible." California Bldg. Indus. Ass'n, 61 Cal. 4th at 455. Moreover, "zoning legislation may validly provide for the eventual discontinuance of nonconforming uses within a prescribed reasonable amortization period." Nat'l Advert. Co. v. County of Monterey, 1 Cal. 3d 875, 877–78 (1970).

Consistent with this expansive authority, California courts have long recognized that local governments may use their traditional zoning authority to prohibit oil and gas activity. More than 60 years ago, the California Supreme Court upheld the validity of a local ban on new oil production wells, explaining that "[t]here can be no question of the inherent right of the city to control or prohibit such production, provided it is done reasonably and not arbitrarily." Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 558 (1953) (citing Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931)); see also California Attorney General's Opinion, 59 Ops. Cal. Atty. Gen. 461, 466 (1976) ("[I]t is our opinion that cities and counties have the power to prohibit [oil and gas] operations."). Today, the courts continue to acknowledge that the "[e]nactment of a city ordinance prohibiting exploration for and production of oil, unless arbitrary, is a valid exercise of the municipal police power." Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach, 86 Cal. App. 4th 534, 555 (2001) (upholding validity of local ballot initiative, passed by 56 percent of voters, to stop all oil production within city limits).

IV. STANDARD OF REVIEW

Under this Court's Order, this first phase of the case relates exclusively to the "facial validity" of Measure Z. "Facial challenges to statutes and ordinances are disfavored." Bldg. Indus. Ass'n of the

Bay Area v. City of San Ramon, 4 Cal. App. 5th 62, 90 (2016), review denied (Dec. 21, 2016), cert. denied, 137 S. Ct. 2189 (2017). Because facial challenges "often rest on speculation, they may lead to interpreting statutes prematurely, on the basis of a barebones record," and they "conflict with the fundamental principle of judicial restraint that courts should not decide questions of constitutional law unless it is necessary to do so, nor should they formulate rules broader than required by the facts before them." Id. Accordingly, courts "start from 'the strong presumption that the ordinance is constitutionally valid,'" id. (quoting Allen v. City of Sacramento, 234 Cal. App. 4th 41, 54 (2015)), and must "resolve all doubts in favor of the validity of the ordinance." Id. (quoting City of San Diego v. Boggess, 216 Cal. App. 4th 1494, 1503 (2013)). Petitioners bear the burden of demonstrating that an ordinance is unconstitutional in all or most instances, and unless the constitutional conflict is "clear and unmistakable," a reviewing court must uphold the ordinance. Id. An initiative must be upheld even if its validity is "fairly debatable." Briggs, 3 Cal. 5th at 828.

As the Court recognized in controlling the scope of evidence for this first phase, "[a] facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of" any individual Petitioner. Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 1084 (1995). "To support a determination of facial unconstitutionality, . . . petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." Arcadia Unified Sch. Dist. v. State Dep't of Educ., 2 Cal. 4th 251, 267 (1992) (quoting Pacific Legal Foundation v. Brown, 29 Cal. 3d 168, 180-181 (1981); Dillon v. Mun. Court for Monterey-Carmel Judicial Dist., 4 Cal. 3d 860, 865-66 (1971) (facial challenge does not require resolution of factual disputes because "[s]uch a challenge is directed solely to the language of the enactment and not to its application in the particular case").

On a facial challenge, the only evidence that may be considered beyond the initiative itself is official ballot material and relevant state and federal law. While the Court may ultimately be concerned with the effects of such laws on individual Monterey County wells and the value of properties

surrounding them is some later proceedings, Measure Z's alleged interference with any specific well is irrelevant for purposes of this facial challenge. See NJD, Ltd. v. City of San Dimas, 110 Cal. App. 4th 1428, 1448 (2003) (finding "'a facial challenge presents no 'concrete controversy' as to the application of the statute to the property at issue'" and since all plaintiff's proffered evidence related to statute's impact on development of plaintiff's property, such evidence was irrelevant to facial challenge) (quoting Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 494-95 (1987)); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 773 (9th Cir. 2000) (finding in facial regulatory taking challenge, court only reviews regulation's "general scope and dominant features" and not "the effect of the application of the regulation in specific circumstances"); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981) (explaining that "'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances"). Because, as the Court repeatedly clarified, Phase I is limited to facial invalidity claims,[8] expert declarations and evidence addressing Measure Z's purported impacts on specific properties is not admissible.

"In interpreting a voter initiative . . . , [courts] apply the same principles that govern statutory construction." People v. Rizo, 22 Cal. 4th 681, 685 (2000). Thus, they "'turn first to the language of the [initiative], giving the words their ordinary meaning.'" Id. (quoting People v. Birkett, 21 Cal. 4th 226, 232 (1999)); see also Cal. Cannabis Coal., 3 Cal. 5th 924, 401 P.3d 49, 55 (relevant text of the initiative "is typically the best and most reliable indicator of purpose"); Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 321 (2011) (when interpreting voter initiatives, "'we begin with the text'"). "'Absent ambiguity, [courts] presume that the voters intend the meaning apparent on the face of an initiative measure . . . and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." Professional Engineers in California Gov't v. Kempton, 40 Cal. 4th 1016,

[8] Reporter's Transcript [6/17/17] at 9:13-14 ("Phase 1 is to determine the constitutionality of [Measure Z] on its face and the preemption issues. We do not get into as-applied arguments. I do not need to know the particulars of anyone's operation."); at 37 ("[I]t is not going to take on the shape of an as-applied [takings claim] to each particular plaintiff."); Reporter's Transcript [3/17/17] at 45:23-46:9 ("I don't think discovery on the validity and preemption issues is necessary at this point. My intent would be to sever off the interpretation and validity arguments from the balance of the case, bifurcate that, get that resolved first. And I don't think there would be any discovery in the traditional sense between parties necessary prior to that.").

1037 (2007) (quoting Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 543, 277 (1990)). Moreover, like any other statutory provision, an initiative's language must be construed in the context of the measure as a whole and its overall scheme. People v. Rizo, 22 Cal. 4th at 685. Accordingly, "[w]here there is ambiguity in the language of the measure, '[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure.'" Professional Engineers, 40 Cal. 4th at 1037 (quoting Legislature v. Deukmejian, 34 Cal.3d 658, 673, fn. 14 (1983)).

Ordinarily, courts "should assume that the voters who approved a constitutional amendment '. . . have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the election and which they must be assumed to have duly considered . . . .'" Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 243–44 (1978) (quoting Wright v. Jordan, 192 Cal. 704, 713 (1923)). Moreover, initiatives "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.' If the validity of the measure is 'fairly debatable,' it must be sustained." Briggs v. Brown, 3 Cal. 5th 808, 400 P.3d 29, 37 (quoting Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 814-15 (1989); internal citations omitted). In construing constitutional and statutory provisions in the initiative context, courts apply their independent judgment. Cal. Cannabis Coal., 3 Cal. 5th 924, 401 P.3d 49, 55.

V. ARGUMENT

A. Measure Z Is a Clear, Coherent, and Legally Adequate Expression of the Electorate's Right to Control Local Land Use Activities.

Faced with public health concerns and environmental risks from intensifying oil production in southern Monterey County and a Board of Supervisors that refused to act, voters exercised their constitutional right to adopt a carefully-crafted zoning initiative that prohibits dangerous new oil activities, phases out harmful disposal practices, and halts future expansion. Unhappy with the outcome of the democratic process, Petitioners invoke a hodge-podge of theories – single-subject rule, general plan consistency, void for vagueness, valid public purpose, – to support their request that this Court

override the will of the voters. Each of these arguments lacks merit and should be summarily rejected.[9]

1. Measure Z Easily Complies with the Constitution's Lenient "Single-Subject Rule."

Petitioner California Resources Corporation ("CRC") nominally argues that Measure Z violates the California Constitution's so-called "single-subject" rule, but this is a sham argument. The measure's three land use policies are obviously related to the initiative's stated purpose of reducing the local land use and environmental impacts of oil and gas production activities in Monterey County. CRC's real complaint is not with the plain text of Measure Z, which is the proper focus of the single-subject rule, but with the campaign run by grassroots supporters, which CRC claims misled and confused voters. CRC OB at 19-21, 24-28. However, courts may not second-guess voter thinking, review the wisdom of a political campaign, or substitute their judgment for the will of the people. Each of Measure Z's land use restrictions was clear on the face of the initiative and in the written arguments, pro and con, included in the voter pamphlet. The oil industry made all of the same arguments they do here in their own multi-million dollar anti-Measure Z campaign – the voters simply rejected them.

To satisfy California's exceedingly deferential single-subject requirement, an initiative's various provisions need only be "reasonably related to a common theme or purpose." Manduley v. Superior Court, 27 Cal. 4th 537, 575 (2002). Relation to a common theme, purpose, or subject, is sufficient; the provisions need not relate individually to one another. Californians for an Open Primary v. McPherson, 38 Cal. 4th 735, 764, fn. 29 (2006); Raven v. Deukmejian, 52 Cal. 3d 336, 349 (1990).

Moreover, the Supreme Court has long construed the single-subject rule "in an accommodating and lenient manner so as not to unduly restrict the . . . people's right to package provisions in a single . . . initiative." McPherson, 38 Cal. 4th at 764. The rule "should not be interpreted in an unduly narrow or restrictive fashion that would preclude the use of the initiative process to accomplish comprehensive, broad-based reform in a particular area of public concern." Senate of the State of Cal. v. Jones, 21 Cal. 4th 1142, 1157 (1999). Courts entertaining single-subject challenges must resolve all reasonable doubts in favor of the exercise of the right of initiative. San Mateo County Coastal Landowners' Ass'n v.

[9] Other arguments, including several in the NARO brief, fail to articulate a coherent legal theory and do not warrant the Court's attention or serious consideration. See NARO OB at §§ 2, 3, 5, 6.

County of San Mateo, 38 Cal. App. 4th 523, 553 (1995). Accordingly, courts rarely overturn voter initiatives on this basis. See Jones, 21 Cal. 4th at 1158.[10]

Measure Z's Three Land Use Policies Are Reasonably Related to Reducing Public Health and Environmental Impacts. Measure Z restricts or prohibits three specific land use activities that all clearly relate to oil and gas production – well stimulation treatment, wastewater injection/surface disposal, and new wells. On this basis alone, the initiative readily satisfies the single-subject rule. Indeed, courts have routinely upheld initiatives with broader and more diverse land use policies. For example, in Shea Homes Limited Partnership v. County of Alameda, 110 Cal. App. 4th 1246, 1256 (2003), the court upheld an initiative measure whose "overarching purpose" was "to preserve and enhance agriculture and agricultural lands, and to protect the natural qualities, the wildlife habitats, the watersheds and the beautiful open spaces of Alameda County from excessive, badly located and harmful development." The measure variously redrew the County's urban growth boundary, altered the land use designations outside of that boundary, and altered the County's solid waste management and planning practices. Id. at 1255. All of these provisions were reasonably related to the measure's protective land use goals. Id. at 1256.

Similarly, in San Mateo County Coastal Landowners' Ass'n, the court upheld a voter initiative that prohibited construction of (1) all onshore oil and gas facilities, and (2) pipelines for offshore drilling. 38 Cal. App. 4th at 553-54. The two components were reasonably germane to the measure's purpose of "planning and regulation of development in the coastal zone in order to protect coastal resources, including agricultural lands, ecologically significant habitats and scenic values." Id.; see also Cal. Gillnetters Ass'n v. Dep't of Fish & Game, 39 Cal. App. 4th 1145, 1162 (1995) (initiative banned the practice of using gillnets for commercial fishing operations and also created new marine ecological preserves, for the purpose of conserving marine resources). These cases make it clear that initiatives do not violate the single-subject rule simply because they are designed to curtail various public health and environmental impacts stemming from a particular land use or type of development.

[10] In the nearly two decades since the Supreme Court decided Jones, there have been no appellate decisions invalidating an initiative on single-subject grounds, despite many such challenges.

The cases cited by CRC, in contrast, are not analogous. CRC OB at 22-23. The initiative in Jones, for instance, proposed three changes to state legislator compensation, including salary caps, per diem allowance limits, and salary penalties. All were "reasonably germane to the subject of state officer compensation." 21 Cal. 4th at 1160-61. Unsurprisingly, however, the court concluded that a fourth provision that transferred legislative redistricting power to the Supreme Court had nothing to do with state officer compensation.[11] Id. These facts bear no resemblance to Measure Z.

CRC's Claim that Voters Were Misled Is Both Wrong and a Red Herring. CRC does not seriously dispute that Measure Z's three restrictions relate to a common theme, purpose, or subject – protecting public health and the environment from oil and gas activities. Rather, CRC uses photographs of non-ballot activities and statements made during the election campaign to argue that voters were duped into believing that Measure Z addressed only the activity of hydraulic fracturing. CRC OB at 19-21, 24-28 (citing lawn signs, newspaper editorials, and other campaign material). Statements made by proponents and opponents during a campaign, however, have no bearing on whether an initiative violates the single-subject rule; the only legitimate question before the Court is whether all of the measure's provisions are reasonably related to a common goal – a question answered by evaluating the language of the initiative itself.[12]

Petitioners also make much of the fact that the County declined to commission and pay for an optional pre-election report on Measure Z pursuant to Elections Code section 9111.[13] They claim that "PMC and its counsel objected to the creation of any impact reports or neutral analysis." CRC OB at

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[11] Similarly, the 67-section initiative in Cal. Trial Lawyers Ass'n v. Eu, 200 Cal. App. 3d 351, 360 (1988), contained a laundry list of code amendments directed at reigning in rising liability insurance premiums, save for a lone far-reaching campaign finance provision consisting of two paragraphs "near the middle of a 120 page document" that bore "no connection to what preced[ed] or follow[ed]."

[12] While courts occasionally consider official ballot materials contained in the voter pamphlet to resolve facial challenges, CRC tellingly invokes no case in which a court has considered other campaign materials. CRC contends that courts may consider "[b]ackground events," citing Brosnahan v. Brown, 32 Cal. 3d 236 (1982), and Chem. Specialties Mfrs. Ass'n v. Deukmejian, 227 Cal. App. 3d 663 (1991). CRC OB at 19. But in Brosnahan, the court was considering background facts described in the official ballot argument in favor of the measure, 32 Cal. 3d at 248. And in Chem. Specialties, the court simply noted without citation that provisions of a statewide ballot measure had each previously been part of failed legislation. Intervenors do not further burden the Court by submitting such materials themselves.

[13] These reports are typically used to conduct "abbreviated environmental review" of an initiative. Friends of Sierra Madre v. City of Sierra Madre, 25 Cal. 4th 165, 191 (2001).

25-27; see also NARO OB at 15. This is demonstrably false. At the public hearing on the matter, PMC members voiced legitimate concerns that staff's proposal to use an outside consulting firm with deep ties to the oil and gas industry to prepare the 9111 report threatened the report's credibility and neutrality. AR 243-45, 261-62, 281. When PMC members brought this to the Board's attention, the Board agreed and ultimately decided not to commission and pay for this non-required report. AR 310-11. In any event, the Board's decision has utterly no bearing on the legal question of whether Measure Z's land use provisions are reasonably related to a common purpose.

CRC's argument that the plain language of Measure Z misled voters is equally specious. It essentially asks the Court to rewrite and artificially narrow the initiative's "purpose," then strike down provisions that do not conform to it. CRC OB at 19. CRC introduces this argument by selectively quoting only the first of three sentences that together comprise Measure Z's statement of purpose. Id. But as noted above, Measure Z's "purpose" section clearly articulates all three aspects of the initiative:

> **Purpose:** The purpose of this *Protect Our Water: Ban Fracking and Limit Risky Oil Operations Initiative* ("Initiative") is to protect Monterey County's water, agricultural lands, air quality, scenic vistas, and quality of life by prohibiting the use of any land within the County's unincorporated area for well stimulation treatments, including, for example, hydraulic fracturing treatments (also known as "fracking") and acid well stimulation treatments. The Initiative also prohibits and phases out land uses in support of oil and gas wastewater (which the Initiative defines) disposal using injection wells or disposal ponds in the County's unincorporated areas. The Initiative also prohibits drilling new oil and gas wells in the County's unincorporated areas.

AR 121. Likewise, the immediately following section, titled "Effect," discloses and explains in even greater detail each of the measure's three land use policies. AR 121. Indeed, the very title of the ballot measure near the top of the first page alerts voters to the fact that Measure Z does more than simply ban fracking. AR 121 ("Ban Fracking and Limit Risky Oil Operations"). Thus, on its very first page, Measure Z discloses three separate times to voters the initiative's three restrictions on oil and gas activities. See Shea Homes Limited, 110 Cal. App. 4th at 1257 (noting with approval that voters who did not read beyond page two of the initiative could discern all of its policies).

In addition to the initiative's text, all of the official voter materials required by the Elections Code carefully disclosed each of Measure Z's three land use policies. First and foremost, the question that appeared on the ballot next to the words "yes" and "no" describes and numbers each policy. AR

322. The County's ballot title and summary of Measure Z, AR 147, and the impartial analysis, AR 343, similarly described all three prongs. Though it was not required to, the official ballot argument in favor of Measure Z also disclosed all three of Measure Z's policies, stating that the initiative "bans fracking, acidizing and wastewater injection" and "prohibits new wells." AR 364. As is customary, the bulk of the short ballot argument emphasizes the beneficial effects to Monterey County residents of adopting these policies. Id. The ballot title and summary, impartial analysis, and ballot arguments are the "official matter" included in the pamphlet provided to voters. Cal. Elec. Code § 9162.[14]

In sum, the single-subject rule is not a device to allow initiative opponents to re-wage an unsuccessful political campaign. Legislature v. Eu, 54 Cal. 3d 492, 514 (1991) (single-subject rule does not concern whether an initiative's various provisions are sensible or combine effectively to achieve their stated purpose); Manduley, 27 Cal. 4th at 579-80 ("Petitioners' claim of voter confusion is refuted by the materials in the ballot pamphlet presented to the voters . . . . We must assume the voters duly considered and comprehended these materials."). Accordingly, the Court should reject CRC's claim.

2. Measure Z Does Not Create Facial Inconsistencies in the County's General Plan.

Next in the grab bag of arguments is the claim by the National Association of Royalty Owners ("NARO") Petitioners that Measure Z is invalid because it creates inconsistencies in the County's General Plan in violation of California Government Code section 65300.5. NARO OB at 13. This contention fundamentally misapprehends the role of a general plan and amounts to nothing more than a policy argument against Measure Z. The initiative's three land use policies are fully consistent with one another and with the other policies in the Monterey County General Plan.

A general plan is the "constitution" for development and land use in a county, consisting of a "statement of development policies . . . setting forth objectives, principles, standards, and plan proposals." DeVita v. County of Napa, 9 Cal. 4th 763, 773 (1995). Government Code section 65300.5 expresses the Legislature's intent that a general plan "comprise an integrated internally consistent and

[14] To the extent that CRC or other Petitioners believed that this official ballot material was inadequate, incomplete, biased, or misleading, they were required to seek a pre-election writ of mandate to strike or amend the offending material. Id. § 9190 (establishing procedures and a 10-day limitation period for challenging the contents of the official voter materials) and § 9106 (making writ of mandate available to amend ballot title or summary). Despite spending millions of dollar in an anti-Measure Z campaign that raised these same arguments, none of Petitioners pursued a pre-election challenge.

compatible statement of policies for the adopting agency." As the Sixth District Court of Appeal has explained, however, a general plan's myriad polices "reflect a range of competing interests," and so must be weighed and balanced against one another in light of the plan's overall purposes. Pfeiffer v. City of Sunnyvale City Council, 200 Cal. App. 4th 1552, 1563 (2011). The County has "broad discretion to weigh and balance competing interests in formulating development policies, and a court cannot review the wisdom of those decisions under the guise of reviewing a general plan's internal consistency and correlation." San Francisco Tomorrow v. City and County of San Francisco, 229 Cal. App. 4th 498, 513 (2014). Rather, this court must determine whether the general plan policies are inconsistent on their face. Hernandez v. City of Encinitas, 28 Cal. App. 4th 1048, 1071 (1994) (finding no violation of § 65300.5). Moreover, courts presume that a general plan and any initiative measures amending it are valid, and challengers bear the burden of demonstrating otherwise. Garat v. City of Riverside, 2 Cal. App. 4th 259, 292 (1991) (disapproved on other grounds in Morehart v. County of Santa Barbara, 7 Cal. 4th 725, 743, fn. 11 (1994)).

Internal Consistency of Measure Z's Provisions. Measure Z's three land use polices are fully consistent with one another. In order to gin up a purported internal conflict, NARO claims that when the policies are read together, they simultaneously require and prohibit certain activities. NARO sums up this argument as follows: "In short LU-1.21 and LU-1.23 say that the oil and gas industry can continue to operate its existing wells, but LU-1.22 says it cannot" and "LU-1.21 says the oil and gas industry can continue to water flood but LU-1.22 says it cannot." NARO OB at 15-16.

This claim relies on a misrepresentation of what Measure Z's policies actually do.[15] On their face, LU-1.21, LU-1.22, and LU-1.23 do not require, promote, or even expressly allow any land use activities. Rather, they impose limitations on certain land uses. All three policies begin with the phrase "Prohibited Land Uses:" and then include a description of the proscribed land use, with clarifying definitions. AR 127-29. The fact that a certain land use activity may be prohibited under one policy but

[15] Notably, NARO fails to cite the actual language of LU-1.21, LU-1.22, or LU-1.23, relying instead on industry employees' personal interpretations of these policies. See NARO OB at 15-16 (citing Gore and Tubb declarations).

is not also prohibited under the others does not give rise to any "inconsistency." Petitioners cite no authority holding that it does.

Instead, Petitioners rely exclusively on Concerned Citizens of Calaveras County v. Calaveras County Board of Supervisors, 166 Cal. App. 3d 90, 94 (1985), which involved a challenge to Calaveras County's adoption of a new general plan. Provisions in the general plan's circulation element and its land use element were inconsistent because, on their face, they drew opposing conclusions about whether the county's existing roads would be able to accommodate projected increases in traffic. Id. at 98. These conclusions "flatly contradict[ed]" each other. Id. Here, even if the Court accepts NARO's erroneous claim that LU-1.22 prohibits water flooding and operating existing wells, there is no contradiction simply because LU-1.21 and LU-1.23 do not also prohibit water flooding or operating existing wells. Measure Z thus fully complies with Government Code section 65300.5.

Measure Z's Consistency with Other General Plan Provisions. NARO also proffers a plethora of alleged inconsistencies between Measure Z and other policies in the Monterey County General Plan that express support for various economic development opportunities. NARO OB at 16-23 (alleging inconsistency with 13 separate policies). NARO makes no effort, however, to demonstrate that these policies actually or directly conflict with LU-1.21, LU-1.22, or LU-1.23 on their face. Instead, NARO speculates darkly that Measure Z will "threaten adequate and sustainable water supplies and public services" (id. at 17) and "create significant economic problems causing a marked decline in Monterey County's economy for the next two decades." Id. at 20.

NARO's speculation about the alleged negative environmental or economic effects of Measure Z amounts to nothing more than an expression of disagreement with the voters of Monterey County. That lawful and legitimate restrictions on certain land use activities may have impacts on economic activity is self-evident and provides no grounds for a violation of Government Code section 65300.5. Zoning restrictions necessarily reflect a community's choice to prefer some land uses and economic activities over others. While general plans virtually always include statements endorsing economic growth and sustainability, such generalized policy statements do not conflict with a plan's more specific restrictions on particular land uses that the community elects not to accommodate. Otherwise, any restriction on any

land use would conflict with general policy notions of economic growth and thus always violate the consistency requirement. As the court aptly explained in Concerned Citizens of Calaveras County, "the adoption of a general plan is a legislative act; the wisdom or merits of a plan are not proper subjects of judicial scrutiny." 166 Cal. App. 3d at 95. Thus, Petitioners' arguments about the purported policy implications of Measure Z simply do not support a claim for violation of Government Code section 65300.5.[16]

3. Measure Z Is Not Unconstitutionally Vague on Its Face.

In a different twist on the same theme, the Chevron and Trio Petroleum Petitioners claim that Measure Z is impermissibly vague in violation of basic due process requirements. Chevron OB at 29-32; Trio Petroleum OB at 14-17. Spinning out a string of hypotheticals, Petitioners argue that each of the three land use provisions in Measure Z is so ambiguous and uncertain as to deprive them of adequate notice on how to conduct their operations. As explained below, these argument have no merit whatsoever, as Measure Z employs clear and plain terms that are readily understandable. The Court should, therefore, reject Petitioners' attempt to inject uncertainty into the clear and simple language of Measure Z.

A challenger's burden on a "void for vagueness" claim is exceptionally high. See United States v. Salerno, 481 U.S. 739, 745 (1987) (explaining that "the challenger must establish that no set of circumstances exists under which the Act would be valid"); People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1117 (1997) (challenge must show initiative is "impermissibly vague in all of its applications").[17] A statute is not void for vagueness or uncertainty if its language can be given any reasonable and practical construction. People v. iMergent, Inc., 170 Cal. App. 4th 333, 340 (2009) (cited in Chevron OB at 29). And even insufficiently clear legislation may later be "made more precise by judicial

[16] Moreover, the appropriate remedy for inconsistency under Government Code section 65300.5 is a writ of mandate requiring the agency to take action to render the general plan internally consistent. Woodward Park Homeowners Assn., Inc. v. City of Fresno, 150 Cal. App. 4th 683, 732 (2007). Thus, if this Court were to determine that Measure Z's new restrictions are inconsistent with some existing provision of the Monterey County General Plan, it should not invalidate the initiative, but direct the Board of Supervisors to take the necessary steps to amend the other provisions to ensure they are consistent with Measure Z.

[17] The analysis of vagueness claims is the same under the due process clauses of the U.S. and California Constitutions. See generally People v. Heitzman, 9 Cal. 4th 189, 199 (1994).

construction and application . . . in conformity with the legislative objective." Mission Springs Water Dist. v. Verjil, 218 Cal. App. 4th 892, 915 (2013) (upholding voter initiatives against vagueness challenge). Moreover, courts have expressed doubt as to whether vagueness review even applies outside of the limited contexts of criminal law and First Amendment cases: "[Where] initiatives are not penal and do not restrict speech, vagueness review is at its lowest ebb, assuming it applies at all." Id.

Petitioners fail entirely to meet their burden with respect to any of Measure Z's three operative provisions – in large part because the initiative was drafted to use clear, plain terms and, where terms or phrases have specialized meaning, to carefully define these terms with reference to existing definitions under state law. Furthermore, a local legislative body may enact ordinances to clarify, implement, and interpret an initiative in order to harmonize it with existing law. Creighton v. City of Santa Monica, 160 Cal. App. 3d 1011, 1021 (1984). Measure Z expressly authorizes the Monterey County Board of Supervisors to adopt any ordinances, guidelines, rules, or regulations it believes necessary to implement the initiative (AR 139 (Measure Z Section 7.H) and to make any necessary amendments to the County's general plan and other zoning ordinances to ensure their consistency with Measure Z. AR 138-39 (Measure Z's Section 7.F). Thus, to the extent that Petitioners are truly uncertain as to any particular provision of Measure Z, they may seek guidance or clarification from the County, which has authority to implement ordinances, regulations or guidelines. Any facial challenge is thus premature. In any event, Measure Z is not unconstitutionally vague in any of the ways that Petitioners specifically suggest:

LU-1.21's Prohibition and Definitions. First, Petitioners claim that provision LU-1.21, which prohibits land uses in support of well stimulation treatments, is impermissibly vague because it prohibits some types of treatments (hydraulic fracturing and acid well stimulation treatments) while allowing others (steam and water flooding, cyclic steaming, routine maintenance and repair work, and other routine activities that do not affect the integrity of a well or formation), and Petitioners are unable to discern what activity is permitted from what is prohibited. Chevron OB at 29-30; Trio Petroleum OB at 15. These arguments are not only disingenuous, but also affirmatively misleading in their failure to disclose to the Court that each operative term is carefully defined by Measure Z. Indeed, precisely to avoid the "confusion" now feigned by Petitioners, Measure Z's drafters defined the key terms "well

stimulation treatments," "acid well stimulation treatments," and "hydraulic fracturing" to exactly mirror the definition of those terms in the state law under which Petitioners operate every single day. Compare AR 127-29 (LU-1.21(2)) with Cal. Pub. Res. Code §§ 3153, 3157, 3158. As Measure Z itself explains: "This Initiative amends Monterey County's land use plans, including the Monterey County General Plan, to prohibit the use of any land within the County's unincorporated area for hydraulic fracturing treatments, acid well stimulation treatments, and other types of well stimulation treatments, and tracks state law – SB 4 (Pavley 2013) – in defining those terms." AR 121 (Section 1.B). If California's core oil and gas law is not void for vagueness, neither is Measure Z's well stimulation treatment prohibition that tracks that law.

LU-1.22's Prohibition on Wastewater Disposal through Injection and Impoundment. Next, Petitioners argue that Measure Z's prohibition on oil and gas wastewater disposal is ambiguous because certain of Petitioners' production activities have "the practical effect of storing produced water underground." Chevron OB at 30; Trio Petroleum at 15-16. This argument is another example of Petitioners ginning up "ambiguity" to undermine what is Measure Z's clearly expressed purpose – to phase out and prohibit "land uses in support of oil and gas wastewater (which the Initiative defines) disposal using injection wells or disposal ponds." AR 121. Provision LU-1.22 prohibits land uses "in support of oil and gas wastewater injection or oil and gas wastewater impoundment," defining the terms (1) "oil and gas wastewater injection" to mean the injection of oil and gas wastewater into a well for underground storage or disposal and (2) "oil and gas wastewater impoundment" to mean "the storage or disposal of oil and gas wastewater in depressions or basins in the ground, whether manmade or natural, lined or unlined, including percolation ponds and evaporation ponds." The plain intent of Measure Z's language is to prohibit operators from ultimately disposing their waste – that is, spent material that is no longer of use in the production process – into underground aquifers or surface impoundments. Nothing in Measure Z suggests that oil field operators cannot recycle produced water as part of their ongoing cyclic steam or steam flooding production process. Until water is no longer used in the production process, it is, by definition, not waste or wastewater and thus not subject to Measure Z. If Petitioners

have real concerns about this issue, as opposed to feigned concerns designed to create a constitutional argument, their first recourse is to seek the County's interpretative guidance.

Even more far-fetched is Petitioners' contrived uncertainty over whether "purified water" from reverse osmosis treatment facilities may be released into constructed wetlands and recharge basins under a permit issued by the Regional Water Quality Control Board. Chevron OB at 30-31. Again, nothing in Measure Z suggests that produced water which is treated by a reverse osmosis process and sufficiently "purified" to be discharged to retention basins for recharge of the Salinas River, under the supervision of the Regional Water Board, would fall with the ban on wastewater disposal. Such "purified" water is no longer waste of the kind that Measure Z voters intended to prevent from being disposed in surface ponds. See AR 123-24 (Measure Z's Finding 5 approving of the use of oil and gas wastewater treatment in the County). Consistent with the "void for vagueness" legal precedent, the Court can and should interpret Measure Z in a way that does not create the absurd "ambiguities" that Petitioners posit.

LU-1.23's Prohibition on Drilling New Wells. Perhaps most ridiculous of all is Petitioners' purported confusion over the phrase "new oil and gas wells." Chevron OB at 31; Trio Petroleum OB at 15. Provision LU-1.23 covers new wells, but explicitly "does not affect oil and gas wells drilled prior to the Effective Date and which have not been abandoned." AR 129. Petitioners claim that this language "appears" to prohibit horizontal "side-tracking" of existing wells, "where new holes are bored into the side of an existing well and [sic] creates a new bottom hole that is adjacent to the existing well." Chevron OB at 31; Trio Petroleum OB at 15. But Measure Z could hardly be clearer; it prohibits only the "drilling of new oil and gas wells" and expressly "does not affect" existing wells that have not been abandoned. Reworking existing wells does not, therefore, implicate the new well ban. And although the term "abandoned" is not expressly defined in Measure Z, the well abandonment process is clearly defined by, and reasonably interpreted consistent with, the same state oil and gas code provisions that the initiative tracks. See, e.g., Cal. Pub. Res. Code §§ 3206.1, 3208 (designating when a well has been abandoned). Petitioners attempt to strip the plain text of the measure of context in order to create confusion where none actually exists. Cf. Younger v. Smith, 30 Cal. App. 3d 138, 166 (1973) ("The question of vagueness cannot be viewed in a vacuum."). As Petitioners themselves admit, Measure Z

proponents have always maintained that the initiative, consistent with its plain text, allows the reworking of existing wells, through re-drilling or horizontal drilling, to extend their productive lives. Chevron OB at 31 (quoting ballot proponents' argument). Nobody but operators looking for an excuse to overturn the will of the voters claims otherwise.

The Absence of Special Enforcement Provisions. Finally, Petitioners fault Measure Z because it does not "define the enforcement mechanisms" for its policies. Chevron OB at 31-32. There is no requirement that a general plan amendment create new or separate enforcement provisions. Petitioners acknowledge that the County already has the means for enforcing its land use laws and regulations. Id. And courts have long recognized that administrative bodies enjoy broad discretion to adjudicate land use matters. See, e.g., Echevarrieta v. City of Rancho Palos Verdes, 86 Cal. App. 4th 472, 483 (2001) ("A substantial amount of vagueness is permitted in California zoning ordinances in order to permit delegation of broad discretionary power to administrative bodies.") (internal brackets and quotation marks omitted). Nothing more is required of Measure Z, and the Court should reject Petitioners' vagueness arguments.

B. State and Federal Laws Do Not Preempt Measure Z's Land Use Restrictions.

Petitioners' preemption arguments confusingly zig-zag from state to federal law and back with respect to each of Measure Z's three operative provisions: (1) well stimulation treatment (fracking and acidizing), (2) wastewater disposal, and (3) new wells. But none of them addresses the fact that the relevant state and federal laws both include express non-preemption, or savings, clauses. And none mentions, let alone successfully circumvents, long-standing judicial precedent reaffirming a local government's ability to regulate or prohibit oil and gas production activities. Indeed, Petitioners cannot overcome the strong disfavor for state law preemption of local land use regulations, and they make no showing of a clear legislative intent to override the will of the voters or the County's traditional zoning authority. To the contrary, all evidence leads to the conclusion that neither state nor federal law preemptions Measure Z.

For clarity's sake, Intervenors collect Petitioners' sprawling preemption arguments into two buckets and address them sequentially: (1) well stimulation and new well bans are not preempted by the

California Public Resources Code**,** and (2) wastewater disposal requirements are not preempted by the federal Safe Drinking Water Act ("SDWA"), as implemented DOGGR.

1. The General "Presumption Against Preemption" Applies with Particular Force to the Local Land Use Initiative at Issue Here.

"The inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed." City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 56 Cal. 4th 729, 738 (2013) (state laws exempting medical marijuana from more general drug laws do not preempt local zoning ordinance prohibiting medical marijuana dispensaries within city limits). In fact, "when local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute." Big Creek Lumber Co., 38 Cal. 4th at 1149 (state law intended to create comprehensive system for regulating logging statewide did not preempt local ordinance prohibiting logging in specified areas and limiting helicopter logging). This "presumption against preemption" for local land use measures accords with the general principle that the Legislature does not intend to override existing law except by express declaration or by necessary implication. Id. "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." Id.

Local legislation is preempted only if it "conflicts with" state law. Inland Empire, 56 Cal. 4th at 743. "A conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" Id. (quoting Sherwin–Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897 (1993) (state law defining lawful transfer and possession of aerosol paint and requiring sellers to post vandalism warnings did not preempt local ordinance regulating display of aerosol paint by retailers). Local legislation is "duplicative" of general law when "it is coextensive therewith." Id. It "contradicts" general law when "it is inimical thereto" in the sense that "it is impossible simultaneously to comply with both." Id. at 743, 754-55. "Finally, local legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area, or when it has impliedly done so in light of one of the

following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality.'" Id. at 743 (emphasis added; citations in original omitted).

As discussed below, Measure Z does not conflict with any state or federal regulation, and California has not expressly or impliedly indicated any intent to preempt the activities governed by Measure Z. To the contrary, state and federal law set minimum standards for protecting communities and the environment from the risks posed by oil and gas operations while explicitly recognizing the primacy of local land use authority to enact more protective measures. Through the ballot box, the people of Monterey County have properly exercised their retained legal authority to prohibit certain local land uses which support high-risk fossil fuel extraction activities, and they have decided that oil and gas operations in the County should no longer continue expanding through the construction of new well infrastructure.

2. California's Oil and Gas Laws Do Not Preempt Measure Z's Land Use Restrictions on the Drilling of New Wells and Surface Activities that Support Fracking.

Under the state preemption doctrine, Measure Z poses no conflict with state laws because its well provisions (prohibiting both new wells and certain defined well treatments) do not contradict or impliedly enter the state's limited field of oil and gas regulation of downhole activities.[18] Functioning wholly outside of, and apart from, the state-specified technical standards for downhole activities, Measure Z's restrictions on land use activities related to oil and gas production are in no way preempted.

a. A Century of Legal Authority Refutes Petitioners' Preemption Claims and Evidences Clear Legislative Intent Not to Preempt Local Zoning Restrictions or Prohibitions on Oil and Gas Production Activities.

Measure Z joins a long list of court-sanctioned local zoning laws that restrict, ban, or eventually

[18] This section largely answers Chevron, Aera, and Eagle's state preemption arguments, because the other Petitioners' arguments are largely duplicative (Trio), more limited (NARO), or nonexistent (CRC).

terminate, oil and gas operations. Dating back to at least 1925, courts have recognized the local right to regulate oil and gas operations through zoning. Beginning with Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211 (1925), the California Supreme Court considered an emergency city ordinance that prohibited a landowner from "erecting derricks, installing machinery, and drilling oil wells" within a business and residence district. Id. at 214. The Huntington Beach ordinance effectively blocked the landowner from executing a lease for the development of proven oil land, amidst nearby lands with producing wells. Id. at 215. Nonetheless, the Supreme Court concluded that the city "has the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing." Id. at 217.

A few years later, the Ninth Circuit came to the same conclusion in Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931), when it upheld the validity of a zoning ordinance that prohibited oil well drilling operations on roughly 300 acres of land leased to an oil company. The court confirmed that "there can be no question of the inherent right of the city to control or prohibit such prohibition." Id. at 532. The court upheld the reasonableness of the city ordinance even though the city had flip-flopped, first amending the ordinance to permit oil drilling operations and then repealing the amendment to forbid the same, and meanwhile the land had been leased for drilling purposes with a considerable sum of money spent on preliminary work. The court explained, a "mere change of policy or of legislation, however unfortunate the result may be to appellants, does not justify the courts in declaring void an ordinance exercising legitimate police power." Id. at 534.

The California Supreme Court expanded on this principle when it upheld the validity of a Los Angeles city law that – exactly like Measure Z – rezoned an area with existing producing wells in a way that allowed their continued operation, but prohibited specific new uses, including the drilling of new wells and the deepening of existing wells; as here, oil interests argued that these new restrictions would eventually terminate oil production. Beverly Oil v. City of Los Angeles, 40 Cal. 2d 552 (1953). The Supreme Court squarely addressed – and rejected – any conflict with state law. It did so after first recognizing that, pursuant to Public Resources Code section 3400, the state has a "primary and supreme interest" in oil deposits, which must be produced, if at all, where the resource exists. Id. at 558.

Nevertheless, the high court concluded that local zoning ordinances prohibiting oil production are valid because:

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community.

Id. at 557 (quoting Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding a City of Los Angeles zoning ordinance that retroactively required the removal of a brickmaking industry (internal citations omitted)). The Supreme Court concluded that it is "well settled that the enactment of an ordinance which limits the owner's property interest in oil bearing lands located within the city is not of itself an unreasonable means of accomplishing a legitimate objective within the police power of the city." Id. at 558.

A few years later, the California appellate court reviewed this case law and restated: "There is no question that the county has the right to regulate the drilling and operation of oil wells within its limits and to prohibit their drilling and operation within particular districts if reasonably necessary for the protection of the public health, safety and general welfare." Friel v. Los Angeles Cty., 172 Cal. App. 2d 142, 157 (1959) (upholding a county zoning ordinance prohibiting oil well drilling in parts of the county[19]). And as recently as 2001, an appellate court reaffirmed that "[e]nactment of a city ordinance prohibiting exploration for and production of oil, unless arbitrary, is a valid exercise of the municipal police power." Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 555 (2001) (upholding 1994 reinstatement of 1932 ban on oil and gas operations following an interim period where drilling was allowed and developer secured leasing and permits to produce oil).

The California Legislature made this inherent and unquestioned right an express one when it added a chapter on unit operations to the state's oil and gas laws in 1971 with the following:

[19] There, the ordinance allowed the county to grant an exception if the "exception would not be materially detrimental to the public welfare nor to the property of other persons located in the vicinity." Id., 172 Cal. App. 2d at 147. The court found that the landowners "neglected to ask for an exception or variance as to parcel three, thus they have made no pretense of exhausting their administrative remedies before seeking any judicial relief as to that particular parcel." Id. at 158. As discussed below, Measure Z has a similar available exception that Petitioners have not yet exhausted.

> This chapter shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection.

Cal. Pub. Res. Code § 3690. The Legislature likely made express this assumed right with respect to newly-authorized unit operations, in particular, because unit operators may drain from a pool of oil and gas resources that cross city or county lines. Even there, the Legislature preserved a county's right to regulate the development of lands within its own jurisdiction. Indeed, this expansive non-preemption clause expressly leaves room for a county to enact a law that regulates the "conduct and location of oil production activities," including zoning. Measure Z does just that. In a glaring omission, not one of the Petitioners mentions this non-preemption clause, which directly governs operations on unitized fields like those at issue.[20]

After the California Legislature weighed in, the California Attorney General examined the foregoing case law, reviewed the state laws and regulations through a preemption lens, and applied its guidance to specific local laws. The resulting 1976 Opinion is one of the seminal resources on whether California laws constrain local zoning in the oil and gas context. Though much cited by Petitioners to support their position, the opinion plainly concludes that local zoning laws are generally not preempted by state laws, and local zoning bans on oil and gas operations are never preempted by state law. 59 Ops. Cal. Atty. Gen. 461 (1976).

To arrive at this conclusion, the Opinion explains that state laws do not occupy the field of oil and gas operations, but only a discrete field of the technical, specified aspects of downhole oil and gas activities. The preempted subject matter is "confined to down-hole or subsurface operations" and only where the prescribed methods, materials, procedures, and equipment for subsurface well operations are so specified by the Supervisor that they leave no room for local regulation. Id. at 462; see also City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 56 Cal. 4th 729, 757 (2013) (a state law, in specifying regulated activities, must be "so thorough and detailed" to imply intent to preclude

[20] See Unit Agreement, submitted by Aera with the Declaration of William Anderson, at ¶ 17, Ex. H (parties agreed to unitization of San Ardo field in August 1965, and Supervisor approved the unit agreement pursuant to Cal. Pub. Res. Code § 3301 in February 1966).

local regulation). Petitioners rely on a single, short section of the Opinion that says just that. Id. at 478 (finding state preemption where the statutory scheme "specifies a particular method, material or procedure" in connection to underground aspects of oil and gas activities but concluding that even there, a complete prohibition of oil and gas activities would be valid).

Petitioners ignore the remaining discussion that identifies the limited examples of specific, technical downhole activities that would be off-limits to local regulation: casing strength, underground plugging of wells, and downhole-installed blowout equipment. Id. at 480-82, 487. The Opinion goes on to find that there is room for local regulation of other state-regulated activities, including: approval of drilling, activities subject to a unit agreement, well spacing restrictions, surface cleanup,[21] and the "surface aspects of well abandonment, including regulation concerning pumps, tanks, and oil field surface installations and equipment, [that] do leave room for more stringent local controls than those set up by the state if no direct conflict is otherwise created." Id. at 481-82.

And undoubtedly, there is room for a county to exercise its traditional zoning powers. The Opinion provides an expansive list of non-preempted categories of local concern, including land use, environmental protection, aesthetics, public safety, and fire and noise prevention. Id. at 479. So long as a local law does not conflict with the technical aspects of downhole activities specified by state law, local zoning powers are unconstrained by preemption; that is, "the power of cities and counties to regulate oil and gas and geothermal well operations is complete." Id. at 466. Conflicts only arise where a local regulation contradicts or relaxes a state requirement. The Opinion provides an example: a local law that allows wells 60 feet from a public street would conflict with state law that imposes a minimum 100-foot setback, but a more stringent local requirement, such as a 300-foot setback, would be permissible. Id. at 484-85.

The Attorney General Opinion is particularly instructive with respect to Measure Z's prohibitions on drilling new wells. As to a local prohibition on drilling new wells or deepening existing wells, the opinion is crystal clear: no preemption. Id. at 466 ("it is our opinion that cities and counties have the power to prohibit such operations"); 480 (even though approvals to drill are preempted by the

[21] Over the last five years, Aera and Chevron's operations have resulted in at least 14 oil spills. See RJN, Exh D.

state, a local prohibition of drilling would pose no conflict); 491-92 (a Napa Valley county ordinance establishing a local permitting process poses no conflict "since the county may prohibit operations in all areas or selected parts of its territory"). And perhaps most apt, in analyzing a Beverly Hills ordinance – with the same terms as Measure Z – that allowed existing wells to continue in operation but prohibited the drilling of new wells and the deepening of existing wells, the Opinion concludes that these prohibitions pose no preemption conflict even though the ordinance "deals with subsurface operations." Id. at 483.[22] A local ordinance may even impose non-conflicting conditions on state-approved drilling that restricts the manner or conduct of operations. Id. at 480.

b. Neither the Public Resources Code nor DOGGR Implementing Regulations Undermine Monterey County's Ability to Restrict or Prohibit on Land Uses and Surface Activities Related to Oil and Gas Production.

Applying these principles here, Monterey County can decide whether, where, and even (to a limited extent) how to allow oil and gas operations. Indeed, since the advent of oil and gas operations in Monterey County in the 1940s, Petitioners' oil and gas development, like all land uses, has been subject to Monterey County's zoning authority. In a recent exercise of this authority, the voters enacted Measure Z, an initiative carefully crafted to fall perfectly in line with well-settled precedent recognizing local governments' power to regulate oil and gas operations. As the above discussion demonstrates, starting in the 1920s, several cities (Huntington Beach, Los Angeles, Hermosa Beach, Beverly Hills) and counties (Napa Valley, Los Angeles) with oil resources have developed local prohibitions or permitting procedures governing oil and gas operations within their jurisdictions. And many counties, such as neighboring Kern and San Luis Obispo, have their own extensive oil and gas regulations.[23]

Against this century-long backdrop establishing the ability of cities and counties to exercise their traditional local zoning powers to regulate or prohibit oil and gas land use activities, Petitioners unconvincingly argue that the California Legislature intended otherwise. Petitioners attempt to read this

[22] In a desperate attempt to manufacture a preemption conflict, Petitioners try to rewrite Measure Z, claiming it regulates the manner or method of operations, and thus poses an impermissible conflict with state law rather than a permissible prohibition on certain land use activities. But, of course, Measure Z is very clear, imposing full prohibitions on the drilling of new wells and on surface structures and uses that support fracking or acidizing. These prohibitions do not affect the manner or method of operations and pose no conflict with state law.

[23] See, e.g., Kern County Zoning Code §.19.98 ("Oil and Gas Production").

implied legislative intent into the constellation of state laws, implementing regulations, and field rules concerning the technical aspects of oil production. But these authorities do not articulate a departure from the longstanding rule that a county can limit, and even prohibit, land uses related to oil and gas activities without impermissibly entering the limited field of state laws that define technical standards for downhole activities. See Big Creek Lumber Co. v. County of Santa Cruz, 38 Cal. 4th 1139, 1149-50 (2006) (explaining that the presumption against preemption derives from an understanding that the Legislature does not intend "to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication").

Petitioners proffer a misreading of Public Resources Code section 3106 to support a legislative intent to maximize oil and gas development free from local zoning restrictions. But section 3106 evinces no such preemptive intent behind the state's oil and gas laws. Rather, as part of California's overall oil and gas conservation law, dating back to 1939, section 3106 establishes the state's supervision of downhole operations (e.g., the physical drilling, operation, maintenance, and abandonment of wells, tanks, pipelines, and other facilities attendant to oil and gas production) so as to prevent damage to life, health, property, and natural resources. Cal. Pub. Res. Code § 3106(a). It allows the use of suitable methods to recover oil and gas resources and requires that a lease, subject to other express lease provisions, allow an operator to remove all oil and gas resources. Id. § 3106(b). It concludes with the purpose: "to encourage the wise development of oil and gas resources." Id. § 3106(d). This section, particularly when read as a whole, hardly conveys an intent to preempt local land use powers.

Indeed, given the long history of case law, legislative amendments, and Attorney General opinions concluding that California's oil and gas conservation law does not preempt local land use regulations or prohibitions, the Court should presume that the Legislature does not intend a different result. E.g., People v. Scott, 58 Cal. 4th 1415, 1424 (2014) ("It is a settled principle of statutory construction that the Legislature 'is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof'. . . . Courts may assume, under such circumstances, that the Legislature intended to maintain a consistent body of rules and to adopt the

meaning of statutory terms already construed.") (citations omitted); People v. Leahy, 8 Cal. 4th 587, 604 (1994) (because the Legislature has had ample opportunity to amend the [statutory code] provisions to abrogate or modify" the provision in response to numerous judicial interpretations, its failure to do so "may be presumed to signify legislative acquiescence"). In short, the Court cannot reasonably read the language of Public Resources Code section 3106 to find an implied legislative intent to comprehensively and fully occupy the field of oil and gas regulation and preempt local lands use law.[24]

Nor do other provisions in the Public Resources Code, the DOGGR regulations, or the San Ardo field rules,[25] individually or collectively, preempt zoning restrictions. Together, these provisions cover a limited set of detailed, technical downhole activities. See Cal. Pub. Res. Code §§ 3000-3690, 3780-3787, 14 Cal. Code Regs. §§ 1710-1883 (detailing permitting, abandonment, well casing, well spacing, and unit operations). Far from specifying standards for suitable sites or ensuring compatibility with neighboring uses, these state requirements are silent as to where oil and gas development can occur, apart from street setbacks. The limitation of state supervision to ensuring that wells are properly constructed and operated so as not to endanger workers, cross-contaminate aquifers, or affect neighboring operations is consistent with California's overall regulatory scheme, whereby local governments traditionally control the location of particular land uses. See Big Creek Lumber Co, 38 Cal. at 1149 (local regulation of land use is presumed to be not preempted by state statute "absent a clear

[24] Unwittingly perhaps, Petitioner Aera imports language from Section 3700 that separately governs geothermal – not oil and gas – resources to suggest that the state has a preempting interest in the maximum recovery of oil and gas. Aera OB at 11 (mixing up purpose statements from section 3106 and 3700) and 19 (relying on geothermal provision to establish state primacy over oil and gas); see Cal. Pub. Res. Code § 3700 (finding that California has a direct and primary interest in the development of geothermal resources, and directing that geothermal resources be developed to safeguard life, health, property, and the public welfare, and to encourage maximum economic recovery). Section 3700 may reflect the state's prioritization of renewable energy development, but it certainly does not establish state primacy over oil and gas resources. Unlike section 3700, section 3106's stated purpose is to encourage the "wise development" – not the maximum economic recovery – of oil and gas resources. Measure Z, like other local oil and gas land use ordinances, is intended to ensure the wise and environmentally protective activities. And regardless of their distinct purposes, neither statutory provision gives rise to a preemptive effect on local land use restrictions. Indeed, section 3700's "direct and primary interest" language is similar to, although less expansive than, section 3400's "primary and supreme interest" language, which Beverly Oil held did not preempt a local land use prohibition. 40 Cal. 2d at 558.

[25] The field rules comprise one page that suggests minimal DOGGR oversight over the San Ardo field based on the longstanding operations. Plaintiffs' RJN, Exh. 25. The few rules include: (1) cement, thermally stable, casing, and (2) minimum 6" diverter vent line. Measure Z is clearly outside the narrow scope of these technical rules.

indication of preemptive intent from the Legislature."). Not one of the state laws and regulations cited by Petitioners indicate any – much less clear – preemptive intent. To the contrary, the best indicator of legislative intent is found in section 3690, which expressly preserved a county's regulatory power over the conduct and location of oil and gas operations on unitized lands. Cal. Pub. Res. Code § 3690.

c. The Legislature's Most Recent Pronouncement, in the form of Senate Bill 4, Confirms that the State Legislature Does Not Intend to Preempt Local Land Use Authority over Oil and Gas Activities, as DOGGR Itself Recognizes.

Having identified no language in the longstanding oil and gas conservation laws that evidences a legislation intent to preempt a local ban on new wells, Petitioners turn to Senate Bill 4 ("S.B. 4"), adopted by the California Legislature to address public concerns over DOGGR's failure to effectively regulate hydraulic fracturing under its general oil and gas conservation authority. 2013 Cal. Legis. Serv. Ch. 313 (S.B. 4) (codified as Cal. Pub. Res. Code §§ 3150-3161). Petitioners argue that S.B. 4 preempts Measure Z's prohibition on certain well stimulation treatments (fracking and acidizing), even as they argue that no such well stimulation activities occur in Monterey County and that "oil producers do not intend to use hydraulic fracturing at the San Ardo Field in the future." Aera OB at 8; see also CRC OB at 4; Chevron OB at 11; Eagle Petroleum OB at 3-4 (explaining its current and planned steam flooding operations). Indeed, Petitioners state that "[b]ecause the producing formations in Monterey County [sic] generally comprised of sand that has good natural permeability, 'fracking' would serve no purpose." Eagle Petroleum OB at 6, fn.2 (citing Declaration of Mary Jane Wilson at ¶ 32).[26] Thus, as a threshold matter, Petitioners have no standing to obtain relief from the Court on this issue.[27]

[26] As noted above, in addition to the kind of oil sand deposit that Petitioners exploit, portions of Monterey County are underlain by shale oil deposits in what is known as the Monterey Formation. See, e.g., https://www.usgs.gov/news/usgs-estimates-21-million-barrels-oil-and-27-billion-cubic-feet-gas-monterey-formation-san. Fracking and acidizing treatments may be used to prolong the extractive life of such shale oil deposits, which is precisely why residents included these activities in Measure Z.

[27] This is true whether Petitioners' claims sound in traditional mandamus under California Code of Civil Procedure section 1085 or are styled as declaratory relief actions under section 1060. See, e.g., Carsten v. Psychology Examining Com., 27 Cal. 3d 793, 797 (1980) (to pursue a writ challenging governmental action, petitioner must be "beneficially interested" – "generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large" – and since petitioner challenging actions of California's Psychology Examining Committee was "neither seeking a psychology license, nor in danger of losing any license she possesses under the rule adopted by the board, she is not a beneficially interested person within the meaning of the statute"); Chorn v. Workers' Comp. Appeals Bd., 245 Cal. App. 4th 1370, 1382 (2016) (quoting League of California Cities, 241 Cal.

Nevertheless, to the extent that the Court decides to address the question of whether Measure Z's fracking and acidizing prohibitions are facially preempted, S.B. 4 does nothing to alter the foregoing preemption analysis. In adopting S.B. 4, the Legislature was concerned that "[i]nsufficient information is available to fully assess the science of the practice of hydraulic fracturing and other well stimulation treatment technologies in California, including environmental, occupational, and public health hazards and risks" and declaring that "[p]roviding transparency and accountability to the public regarding well stimulation treatments, including, but not limited to, hydraulic fracturing, associated emissions to the environment, and the handling, processing, and disposal of well stimulation and related wastes, including from hydraulic fracturing, is of paramount concern." 2013 Cal. Legis. Serv. Ch. 313, sec. 1(b), (c). To respond to these concerns, the Legislature directed the California Natural Resources Agency to prepare or commission an independent scientific study of the hazards and risks associated with well stimulation treatments and directing DOGGR to prepare an Environmental Impact Report ("EIR")[28] and to develop implementing regulations. Cal. Pub. Res. Code §§ 3160-61. The resulting regulations provide technical requirements for testing, monitoring, and disclosure. See 14 Cal. Code Regs. §§ 1782-1789. Petitioners cite to the EIR where DOGGR describes the new regulations as "so detailed that they simply leave no room for local governments to add further downhole requirements." See Chevron at 19. This characterization simply underscores that DOGGR's oversight under S.B. 4, just as it historically has been, is focused on downhole requirements, and Intervenors do not dispute that a local government cannot layer conflicting downhole requirements on top of these state requirements. The voters, in passing Measure Z, expressed no intent to enter this highly technical field occupied by the

App. 4th 976, 985 (2015): "Writ relief is not available if the petitioner gains no direct benefit from the writ's issuance, or suffers no direct detriment from its denial."); Otay Land Co. v. Royal Indem. Co., 169 Cal. App. 4th 556, 563 (2008) ("The fundamental basis of [section 1060] declaratory relief is the existence of an actual, present controversy over a proper subject" and "under California rules, an actual controversy that is currently active is required for such relief to be issued, and both standing and ripeness are appropriate criteria in that determination").

[28] Hydraulic fracturing has many above-ground impacts. See Exh. J (EIR Ch. 10.16-15, listing surface impact, including: visual intrusions to scenic resources; decreased air quality due to dust or odors; hazards and hazardous materials could result in environmental contamination or introduce public; health issues to surrounding land uses; increased noise audible to surrounding land uses; vibrations that could be felt by surrounding land uses; risk of upset issues and resultant effects on public safety; and increased traffic as a result of construction-related activities that may limit, restrict, or delay access to surrounding land uses).

state. Measure Z simply prohibits fracking altogether.

This Court need not look far to find that the legislative intent behind these newer state provisions is a non-preemptive one. DOGGR itself explained that the fracking regulations "do not purport to limit local land use authority." See RJN Exh. K (DOGGR Well Stimulation Regs Response to Comments, Dec. 14, 2014, p. 53.). Most telling, the California Legislature itself included section 3160(n), which states: "This article does not relieve the division or any other agency from complying with any other provision of existing laws, regulations, and orders." Cal. Pub. Res. Code § 3160(n). As explained by Senator Fran Pavley, the author of S.B.4, this bill maintains the status quo and is "not intended to preempt … local government's authority over land use …" RJN Exh. L. Thus, on its face, S.B. 4 plainly does not signal a shift away from the long-standing recognition that local governments can exercise their zoning authority to regulate or prohibit surface oil and gas activities. Given this established interpretation of state law, had the Legislature intended for S.B. 4 to preempt local zoning powers with respect to fracking activities, it could and presumably would have done so; its failure to do so is telling. People v. Garcia, 39 Cal. 4th 1070, 1088 (2006) (holding that "because the Legislature amended the [relevant] statutes after this court's decision [interpreting the law], we assume that the Legislature was aware of the court's construction" and could have amended the statute "had it wanted to invalidate [it]").

None of the cases cited by Petitioners support a conclusion that state law preempts Measure Z. Just as Petitioners collectively ignore the express non-preemption provision (Pub. Res. Code section 3690) that applies to their unitized operations, they also collectively omit any mention of the long line of California cases that uphold local zoning laws affecting oil and gas activities and uses against claims of state preemption. This omission is particularly startling in light of the Attorney General's comprehensive examination of precisely those cases as controlling the preemption inquiry in the oil and gas context. Instead, Petitioners reach to other contexts, like the state-occupied field of handgun sales[29]

[29] Fiscal v. City and County of San Francisco, 158 Cal. App. 4th 895 (2008) (irrelevant because reviewing state-occupied field of firearms regulation, and city not exercising zoning authority); Suter v. City of Lafayette, 57 Cal. App. 4th 1109 (1997) (reviewing the state-occupied field of firearms regulation, but finding city not preempted from exercising local zoning powers in limiting firearm dealerships to particular commercial zones); Great Western Shows, Inc. v. County of Los Angeles, 27

and irrelevant cases in other states,[30] to argue that Measure Z conflicts with California oil and gas laws. These cases shed no meaningful light on the contours of field preemption with respect to this state's oil and gas laws.

Relying on these irrelevant cases, Petitioners suggest that it would be impossible to abide by Measure Z's prohibitions on drilling new wells and well stimulation treatments, on the one hand, and state laws governing particular technical aspects of downhole activity, on the other hand. But there is no conflict or impossibility, and Petitioners can abide by both laws because they are compatible. Under Measure Z, Petitioners can continue operating at existing wells using existing techniques pursuant to the terms of existing permits and leases without violating any state laws. Even if Measure Z did compel immediate or eventual closure, Petitioners can wind down their operations while still complying with state laws. See City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 56 Cal. 4th 729, 743 (2013) (an impossibility conflict arises only where a local ordinance "prohibits what the state enactment demands"). The state laws do not demand that the county allow oil and gas activity to continue within its borders. As the Attorney General Opinion concluded, the mere existence of a state permitting process for an activity does not extinguish the right of a county to restrict or ban that activity. 59 Ops. Cal. Atty. Gen. at 481-82.

The only relevant case cited by Petitioners, Big Creek Lumber Co, v, County of Santa Cruz, 38

Cal. 4th 853 (2002) (reviewing state-occupied field of firearms regulation, but finding that state occupies only discrete aspects and not guns shows, and county not preempted from exercising local zoning powers in prohibiting gun sales at gun shows within the county in part because state laws did not compel counties to allow their property to be used for gun shows where guns were sold); Water Quality Association v. County of Santa Barbara, 44 Cal. App. 4th 732 (1996), Water Quality Association v. City of Escondido, 53 Cal. App. 4th 755 (1997) (both irrelevant because reviewing state-occupied field specifying standards for water softening, and local government not exercising zoning authority); L.I.F.E. Committee v City of Lodi, 213 Cal. App. 3d 1139 (1989) (irrelevant because reviewing state-occupied field of annexation); Friends of Eel River v. N. Coast R.R. Auth., 3 Cal. 5th 677 (2017) (irrelevant because addressing federal preemptive effect of Interstate Commerce Commission Termination Act).

[30] These out-of-state cases demonstrate that the preemption analysis is state-specific. Each state has different preemption doctrines, oil and gas laws, home rules, and county powers. See State ex rel. Morrison v. Beck Energy Corp., 143 Ohio St. 3d 271 (2015) (preemption finding turned on Ohio's oil and gas code and home rule); City of Longmont v. Colorado Oil & Gas Ass'n., 369 P.3d 573 (Colo. Sup. Ct. 2016) and City of Fort Collins v. Colorado Oil, 369 P.3d 586 (Colo. Sup. Ct. 2016) (preemption finding turned on Colorado's oil and gas code and home rule). But see Robinson Twp., Washington Cty. v. Commonwealth, 83 A.3d 901 (2013) (Pennsylvania legislature cannot preempt local environmental legislation affecting oil and gas operations); Wallach v. Town of Dryden, 16 N.E.3d 1188 (N.Y. 2014) (New York's oil and gas laws do not preempt zoning ordinances that restrict or prohibit certain land uses within town boundaries).

Cal. 4th 1139 (2006), fully supports a finding of no preemption. There, the California Supreme Court considered an ordinance that banned timber harvesting in certain areas of the county. The Supreme Court concluded that the ordinance was not preempted by California's statewide forestry laws even though they contained an express preemption provision precluding local governments from regulating the "conduct" of timber harvesting. Chevron unsuccessfully tries to distinguish this case and turn it to Petitioners' advantage by arguing that Measure Z's total prohibition on new wells regulates "conduct" – that is, "how" oil operations may be conducted – whereas the partial ban in Big Creek merely regulated "where" such operations may be located. Chevron OB at 25. Indeed, Chevron claims that "[b]y banning certain production techniques – but not expressly banning all oil and gas activity – Measure Z falls squarely within DOGGR's jurisdiction." Id. By this statement, Chevron suggests that a ban of all oil production in the County would survive preemption scrutiny, while a prohibition on expanding current operations fails the preemption test. The Court should give no credence to such contorted logic. By its clear and plain language, Measure Z does not regulate how wells are to be drilled or operated; in attempting to curtail continuous expansion and to slowly wind down what are now essentially non-conforming land uses, Measure Z simply prohibits new wells and surface structures or activities that support new well stimulation treatments. Those restrictions do not run afoul of Big Creek or clash in any way with DOGGR's technical regulations.

In sum, Measure Z is a valid exercise of Monterey County's right to restrict oil and gas land use activities and related structures under its local zoning authority, notwithstanding DOGGR's detailed, technical regulation of existing and continuing downhole operations. The California courts, Legislature, and Attorney General have all endorsed a local government's ability to do precisely what the voters did here

3. The Safe Drinking Water Act and California's UIC Program Do Not Preempt Measure Z's Land Use Restriction on Wastewater Disposal.

Petitioners turn to the Safe Drinking Water Act to avoid Measure Z's wastewater disposal phase-out provision,[31] but this requirement is not preempted by federal law, either. Inexplicably, Petitioners

[31] Petitioners erroneously contend that Measure Z stops the treatment and reinjection of all produced water, including reinjection for steamflood purposes or purification and return to the Salinas River

argue field preemption, even though Congress expressly stated in the broadest possible terms that SDWA does not fully occupy the field of underground injections:

> Nothing 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(d). Remarkably, Petitioners utterly fail to address this express – and controlling – non-preemption clause, sometimes called a "savings" clause because it retains and protects the ability of states and local governments to exercise their traditional powers. The only Petitioner who even mentions this clause, Chevron, buries it in a footnote. See Chevron OB at 21. The controlling, non-preemption clause resides at the end of SDWA's relevant section on underground injections of waste, where Congress expressly left room for more stringent local laws like Measure Z

Consistent with this express non-preemption clause, SDWA's purpose and structure reflect Congress' intent to establish minimum national standards that leave room for more stringent local regulation. Part C of the Act envisions a federal-state system "to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h. The statute directs the U.S. Environmental Protection Agency ("EPA") to promulgate regulations establishing minimum requirements for state underground injection control ("UIC") programs. Id. As California has done, a state may apply for and receive approval ("primacy") to implement its own UIC program if it meets the minimum requirements established by the EPA's regulations. Id. § 300h-1. If a state fails to adopt an approved a UIC program, then the EPA administers the program. Id. § 300h-1(c). A so-called "endangerment finding" rests on minimum, national standards for drinking water. Id. § 300h(d)(2) (endangerment where injection results in noncompliance with any national primary drinking water regulation).[32] To avoid any confusion,

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watershed pursuant to state permit. As explained above, however, Measure Z's injection provision only prohibits the injection of wastewater for underground storage or disposal purposes.

[32] The fact that DOGGR has been issuing wastewater injection permits pursuant to an aquifer exemption based on a non-endangerment finding does not change the preemption analysis. DOGGR agrees. See RJN, Exh L (DOGGR Letter to James Eggleston, Feb. 8, 2017). Neither the approval of an aquifer exemption nor the Division's issuance of permits will excuse operators from complying with Measure Z, or otherwise undermine in any way Monterey County's enforcement of Measure Z. In fact, the Division's permits state that operators must comply with other federal, state and local laws."). If anything, the aquifer exemption makes plain that there is room for more stringent, local regulations.

Congress then included the broad non-preemption clause, which explicitly allows Monterey County to more stringently protect its aquifers. 42 U.S.C. § 300h-2(d).[33]

The court in Bath Petroleum Storage, Inc. v. Sovas, 309 F. Supp. 2d 357 (N.D.N.Y 2004) came to the same conclusion when it found no preemption where New York required additional state permits for underground injections on top of those required by the EPA-administered UIC program. The court first tracked the statutory framework and determined that, even though SDWA occupies the field of underground injection, "there is room for state regulation over areas in which the SDWA and its UIC program do not enter." Id. at 367. The court read the non-preemption clause to simply "reinforce that Congress intended that states [and their subdivisions] retain authority respecting underground injection so long as it does not impinge on the UIC program." Id. at 367-68 (referencing the non-preemption clause in the Clean Water Act where, although Congress intended to dominate the field of pollution regulation, the non-preemption clause negated the inference that Congress left no room for the state). SDWA is clearly silent on local zoning concerns and appropriately leaves that field to Monterey County. Accordingly, Monterey County retains its zoning authority to determine whether, and where, wastewater disposal may occur without impinging on the California-administered UIC program.

Petitioners claim that even if SDWA leaves room for local regulation, Measure Z directly conflicts with the federal law, based on a misreading that turns the statute on its head. The premise of this argument is that underground injections cannot be banned under a UIC program – that is, SDWA sets both a floor and a ceiling on state regulations – and so they cannot be banned by a county. To support this no-prohibition argument, Petitioners rely on subsection 300h(b), which lays out minimum requirements for state UIC programs. The relevant provision states that regulations for state UIC programs "may not prescribe requirements which interfere with or impede the underground injection" of brine or produced water "unless such requirements are essential to assure that underground sources of

[33] The SDWA savings clause is not at all exceptional. When exercising its Commerce Clause authority to adopt sweeping interstate regulatory statutes, especially as in the realm of environmental protection, Congress frequently employs this same "cooperative federalism" approach, whereby it sets minimal federal standards and expressly authorizes states and local governments to adopt more protective measures as they choose, consistent with their reserved powers under the Tenth Amendment. See, e.g., 33 U.S.C. § 1370 (Clean Water Act); 42 U.S.C. § 7416 (Clean Air Act); 42 U.S.C. § 6929 (Resource Conservation and Recovery Act).

drinking water will not be endangered by such injection." 42 U.S.C. § 300h(b)(2)(A). Stated differently, if needed to protect underground sources of drinking water, a UIC program may impose requirements that interfere or impede underground injections. To effectuate the clear intent of Congress that the UIC program sets minimum, but not maximum, standards, this provision must logically be read to allow the prohibition of injections that endanger an underground aquifer. This plain meaning is supported by the final provision of the same subsection: "Nothing in this section shall be construed to alter or affect the duty to assure that underground sources of drinking water will not be endangered by any underground injection." 42 U.S.C. § 300h(b)(3)(C).

A fundamental error in Petitioners' proffered interpretation of this subsection is that they do not actually read the whole subsection. They skip the key language, "unless such requirements are essential," in order to say that a UIC program cannot prohibit injections. See, e.g., Aera OB at 18 (omitting "unless" clause and relying on EQT Production Company v. Wender, 191 F. Supp. 3d 583, 601 (S.D.W.Va. 2016) (discussing subsection 300h(b)(2) and omitting same)). In rejecting precisely this contorted argument, the Tenth Circuit explained the wording of the statute: "If a requirement 'is essential to assure that underground sources of drinking water will not be endangered,' then it is of no import whether underground injections are impeded. Indeed, the clear overriding concern of Congress was that of 'assuring the safety of present and potential sources of drinking water.'" Philips Petroleum Co. v. U.S. E.P.A., 803 F.2d 545, 560 (10th Cir. 1986); see also id. at 547-48 (stating that under this subsection 300h(b), "[n]o injection is to be allowed that may endanger drinking water sources.").

To bolster the no-prohibition argument, Petitioners pluck language from another court's review of the legislative history. Western Nebraska Resources Council v. U.S. E.P.A., 943 F.2d 867 (8th Cir. 1991). Quoted in full,

> The principal legislative history explains that the statute was primarily aimed at controlling underground injections of waste; although Congress also intended that injection mining activities be covered, it contemplated regulation, not prohibition, because of the importance of avoiding needless interference with energy production and other commercial uses.

Id. at 870 (referencing H.R. Rep. No. 1185, 93d Cong., 2nd Sess. 1 (1974)). There, the Eighth Circuit was not considering whether EPA could prohibit injections, but whether the SDWA compels EPA to

prohibit injections even where an aquifer is so contaminated with radium that it would never become a future source of drinking water. Moreover, the court's account of the legislative history does not indicate that Congress intended to allow underground injections free from regulatory interference. The Tenth Circuit has rejected this interpretation of the SDWA's legislative history. See Arco Oil & Gas Co. v. E.P.A., 14 F.3d 1431, 1435 (10th Cir. 1993) (concluding that "Congress' concern about undue interference with oil and gas production is secondary and expressly subject to the primary goal of ensuring clean water").

Surprisingly, Petitioners also argue that Measure Z stands as an obstacle to the accomplishment of the SDWA's purpose, but Measure Z could not be more aligned with the statutory purpose to ensure clean water. Petitioners[34] fail to includes the most relevant purpose language from Western Nebraska: "the statute was primarily aimed at controlling underground injections of waste." 943 F.3d at 870. In comparing the SDWA to the Resource Conservation and Recovery Act ("RCRA"), which includes a similar savings clause, Eagle Petroleum and Chevron nonsensically suggest that the SDWA's purpose is to encourage, rather than control, underground injections. See Eagle Petroleum OB at 20-21; Chevron OB at 22-23. In yet another variant of the no-prohibition argument, Petitioners argue that, as in RCRA context where a city cannot avoid its obligations to treat hazardous waste, so too in the SDWA context, a city cannot avoid its obligations to treat contaminated wastewater. But this analogy fails. While the purpose of RCRA is to establish standards for facilities that treat, store, and dispose hazardous wastes in order to ensure that hazardous waste handlers are properly trained and certified and that hazardous waste are properly tracked from "cradle to grave," the purpose of the Safe Drinking Water Act is to protect the nation's drinking water and potential drinking sources from contamination. That is, RCRA regulates hazardous wastes while the SDWA regulates drinking water.

Even if a UIC program could not impose requirements that interfere with or impede underground injections – which it can – nothing in SDWA stops a state or county from restricting wastewater disposal outside of the UIC program. See e.g. Bath Petroleum Storage, 309 F.Supp. 2d at 367-68 (finding no federal preemption where New York required state permits for underground injections already permitted

[34] See, e.g., Eagle Petroleum OB at 17; Chevron OB at 22 (using ellipses to omit the primary purpose).

by EPA-administered UIC program). Congress expressly provided for just that. A county may "adopt or enforce any law or regulation respecting underground injection." 42 U.S.C. § 300h-2(d). This standard clause disclaims any intent to fully occupy the field and thus does not limit the regulatory tools available to a local government. SDWA expressly leaves room for a county to use other, more stringent regulatory tools, like Measure Z's phase-out of wastewater disposal.

While the district court in EQT Production Company erred in failing to read to the end of subdivision 300h(b)(2), the remainder of the court's reasoning does not support a preemption finding here. There, the court held that a local ban on the storage of wastewater in UIC wells was preempted by West Virginia's UIC program. That program operates pursuant to a set of state laws and regulations that – unlike California's UIC program – grant the director of the state agency "full charge of the oil and gas matters" in the state. 191 F. Supp. 3d at 603 (citing a long list of West Virginia's state laws that grant the state agency "plenary power" over oil and gas activities).

In another significant contrast, the EQT Production Company ruling was based in large part on the very limited powers afforded to counties in West Virginia. 191 F. Supp. 3d at 594-95. In enacting the local ban, the county invoked its "plenary power to eliminate hazards to public health," a power that a county in West Virginia does not have. Id. at 595. In West Virginia, counties are far more constrained than in California; their powers are explicitly limited by the state constitution to only those powers that are expressly delegated by the state legislature, or necessary by implication. Id. (listing delegated powers that are confined to matters like: construct and maintain county transportation facilities and regulate safety and quality of building construction). By contrast in California, our constitution expressly grants counties broad police powers, powers that have been repeatedly held to empower counties to control land uses. In DOGGR's own words, "the Division's permits [for new drills, well stimulation treatments, or storage/disposal injection operations] state that operators must comply with other federal, state and local laws." RJN, Exh. M (DOGGR fact sheet). Given SDWA's express reservation of local authority to regulate underground injections, along with California's long recognition of a county's constitutionally-based, broad police powers to control land uses, Measure Z's wastewater provision poses no conflict with this federal law or its implementation in California.

4. Each of Measure Z's Three Separate Land Use Policies Is Severable Because the Policies Independently Serve the Initiative's Purpose and Voters Intended for Them Each to Take Effect.

Petitioners hope to transform any minor victory into a total subversion of the voters' will by arguing that the Measure Z is not severable. But Measure Z expressly states that "If any . . . portion of this Initiative is held to be invalid or unconstitutional by a final judgment of a court of competent jurisdiction, such decision shall not affect the validity of remaining portions of this Initiative." AR 139-40. The presence of such a severability clause "normally calls for sustaining any valid portion of a statute," and although not conclusive, creates a presumption that all valid provisions should take effect. Gerken v. Fair Political Practices Com., 6 Cal. 4th 707, 721 (1993) (Baxter, J., concurring); Santa Barbara School Dist. v. Superior Court of Santa Barbara County, 13 Cal. 3d 315, 331 (1975).

Provisions that can be grammatically, functionally, and volitionally separated from the remainder of an initiative are severable. Gerken, 6 Cal. 4th at 721. A provision is grammatically severable where it can be removed without affecting the wording of any other provisions (Rental Housing Assn. of Northern Alameda County v. City of Oakland, 171 Cal. App. 4th 741, 770) (2009)), and functionally severable if it is "capable of independent application." McMahan v. City and County of San Francisco, 127 Cal. App. 4th 1368, 1378 (2005). Each of Measure Z's three land use provisions is self-contained, operates independently of the other two, and supplies its own definitions. See AR 127-29. If necessary, any policy could be cleanly excised without adding to or amending or altering the remaining policies. Each is clearly grammatically and functionally severable.

The three policies are also volitionally severable because voters were aware of each, and would prefer "to achieve at least some substantial portion of their purpose" even if they cannot accomplish the whole. See Borikas v. Alameda Unified School Dist., 214 Cal. App. 4th 135, 167 (2013); see also Gerken, 6 Cal. 4th at 715. Measure Z could not be clearer on this point, stating, "The voters hereby declare that this Initiative, and each . . . portion thereof would have been adopted or passed even if one or more . . . portions were declared invalid or unconstitutional." AR 140. As described above, the ballot materials clearly apprised voters of Measure Z's three land use policies, each of which serves the measure's purpose. Id. (citing AR 322, 147, 343, 364).

Yet Petitioners absurdly claim that "proponents have functionally admitted that the remaining provisions alone would not serve 'some substantial portion of their purpose.'" Chevron OB at 28. This is nonsense. Excising any of Measure Z's policies would diminish, but not eliminate, the initiative's ability to carry out the voters' environmentally protective land use goals. Chevron's heavy reliance on Birkenfeld v. Berkeley, 17 Cal. 3d 129, 174 (1976) (Chevron OB at 27) is inapt. There, an initiative's invalid limitations on the powers of a board that it created could not be severed because removing them while leaving the remainder in place would have enlarged the board's powers beyond the voters' contemplation. Id. at 173-74. By contrast, severing any of Measure Z's three land use policies would narrow the measure's reach. See California Gillnetters Ass'n, 39 Cal.App.4th at 1159 (initiative volitionally severable where remainder could still accomplish the measure's purpose of protecting and conserving marine resources); see also Borikas, 214 Cal. App. 4th at 167. The court should decline Petitioners' invitation to ignore Measure Z's severability clause and "wholly defeat voter expectations," Borikas, 214 Cal. App. 4th at 167.[35]

C. Petitioners' Constitutional Taking Claims Are Either Meritless or Premature.

1. Given the Administrative Flexibility Built into Measure Z, Petitioners Do Not and Cannot Assert a Viable Facial Taking Claim.

Several Petitioners contend that the mere passage of Measure Z effects a "facial taking" of their property rights without just compensation. They argue that under Lucas v. So. Carolina Coastal Council, 505 U.S. 1003, 1014 (1992), Measure Z on its face "goes too far" in regulating their land use activities. Chevron OB at 33; Aera OB at 22; CRC OB at 6; Eagle Petroleum OB at 25. But "[a] claim that a regulation is facially invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining parties." Tahoe-Sierra Pres. Council v. State Water Res. Control Bd., 210 Cal. App. 3d 1421, 1441 (1989). In other words, courts may entertain a facial taking claim only when the law or regulation, by its own terms, "will not permit those who administer it to avoid confiscatory results in its application to the complaining parties." Fisher v. City of Berkeley, 37 Cal. 3d 644, 679 (1984), aff'd., 475 U.S. 260 (1986) (noting the limited

[35] Individual sub-parts of each policy are also severable. Intervenors reserve the right to seek supplemental briefing on severability prior to a determination that the initiative is invalid in its entirety.

scope of the court's facial taking because the constitutionality of a regulation depends ultimately on how it is applied). For that reason, a "facial" taking claim is not cognizable if "[t]he county has the flexibility to avoid potentially unconstitutional application of easement requirements, should these requirements 'go too far' as specifically applied to a particular parcel of property." San Mateo County Coastal Landowners' Assn. v. County of San Mateo, 38 Cal. App. 4th 523, 547 (1995).

Measure Z was crafted with precisely this concern in mind. Section 6 provides: "The 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 AR 137. Measure Z effectuates this outcome by providing that potentially aggrieved property owners may request an exception from any of the initiative's provisions and the Board of Supervisors may grant such an exception upon a showing that application of the provision would constitute an unconstitutional taking. Id.[36] Thus, if implemented in accordance with applicable constitutional law, Measure Z will always avoid an impermissible taking. Presumably, this is precisely why the Court's scheduling and trial phasing order segmented "facial" from "as applied" claims.

In any event, the inclusion of such administrative flexibility in Measure Z means that Petitioners simply cannot make out a cognizable "facial" taking claim. Indeed, the court in San Mateo County Coastal Landowners' Ass'n held that an identical provision in the initiative at issue there – "The provisions of this ordinance shall not be applicable 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" – precluded any "facial" taking challenge. 38 Cal. App. 4th at 547; see also Home Builders Ass'n of N. California v. City of Napa, 89 Cal. App. 4th 897, 199 (2001) (rejecting facial validity challenge because "[w]hen an ordinance contains provisions that allow for administrative relief, we must presume the implementing authorities will exercise their authority in conformity with the Constitution"). The same result

[36] As the Court is aware, pursuant to Measure Z's legislative authorization for necessary implementing ordinances, guidelines, rules, or regulations (AR 139 section 7.H), the County is developing an administrative process to handle any such requests, and the Court has temporarily stayed enforcement of Measure Z's provisions, ensuring that there is no interim "taking" of Petitioners' property interests. But like virtually every California local land use law, the Monterey County Zoning Ordinance already has a time-tested "variance" process. See Monterey County Code, § 21.72. Nothing precludes any Petitioner, in the meantime, from seeking a variance from Measure Z's provisions based on grounds of unconstitutional taking.

necessarily applies here.

2. Petitioners' Attempts to Discredit Section 6 Are Unavailing.

Ignoring the Court's phasing order for these cases, as well as the overwhelming legal authority indicating that their "facial" taking claims are meritless, Petitioners simply bulldoze ahead, larding their papers with detailed information on how Measure Z allegedly will impact their various operations. Once again here, Petitioners neglect to inform the Court of the directly applicable ruling in San Mateo County Landowners' Ass'n,[37] which held that voter initiative language identical to the language of Measure Z's section 6 both (1) precluded any "facial" taking claim and (2) required exhaustion of county administrative processes before any "as applied" taking claim ripens. 38 Cal. App. 4th at 546-50. Despite this controlling precedent to the contrary, Petitioners suggest that section 6 itself is flawed and unlawful because it "puts the Board [of Supervisors] in the role of a court" and gives the Board "the judicial power to adjudicate taking claims." CRC OB at 11; also Chevron OB at 38. This assertion is as ridiculous as it is wrong.

Section 6 merely ensures that, where the application of Measure Z's provisions to any particular property owner or operator may result in an uncompensated taking, the County has the ability and an opportunity to consider granting an exception. Local governments do this all the time. A county's decision to grant a variance or exemption from otherwise applicable local land use requirements is not a "judicial" determination, nor does it somehow usurp or displace the courts' role. If the County declines to grant an exception under section 6, a disappointed property owner or operator may then challenge that result in court. Nothing in Measure Z suggests otherwise. Such a process is the very definition of administrative remedy exhaustion, giving the local agency a chance to consider relevant facts and make an initial land use decision that may well avoid the need for judicial review.

The grab bag of inapposite cases cited by Petitioners, and the selective excerpts from them, do not support a different conclusion. For instance, the relevant question in Healing v. California Coastal

[37] Petitioners' failure to disclose this directly adverse California appellate decision in their papers is, at best, questionable. See, e.g., ABA Model Rule of Professional Conduct 3.3 ("A lawyer shall not knowingly . . . (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client."); Gonzalez-Servin v. Ford Motor Co., 662 F.3d 931 (7th Cir. 2011) ("The ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless.").

Com., 22 Cal. App. 4th 1158, 1178 (1994), was whether a challenger's inverse condemnation claim for denial of a permit should be determined through a court trial or on a petition for administrative mandamus, not whether the Coastal Commission could adjudicate taking claims, as CRC vaguely suggest. CRC OB at 12. Hensler v. City of Glendale, 8 Cal. 4th 1 (1994), like Healing, dealt with the same evidentiary question of whether the record for an inverse condemnation action is limited to the information before the agency at the time of its decision or whether supplemental information can be admitted at trial; in fact, the California Supreme Court reiterated in Hensler that exhaustion of administrative remedies is a prerequisite to judicial review. Hollin says insert quote here from P. 17 "the owner must pursue any available administrative permit process before seeking compensation or challenging the statute or regulation." In Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1983), a facial challenge claiming that mere passage of a rent control ordinance immediately reduced plaintiff's property value was dismissed on statute of limitations grounds, and the Ninth Circuit, once again, affirmed that any "as applied" claim was unripe because plaintiff had not pursued state remedies. Likewise, Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 406-07 (9th Cir. 1996), affirmed that a federal taking claim "premised upon the denial of a property's economically viable use" is not ripe until the landowner submits "to local decision-makers at least one meaningful application for a development project and a variance." In citing misleading snippets from each of these and similar cases, Petitioners attempt to confuse and elide the legally distinct concepts of "facial" and "as applied" taking claims.

Distilled to its essence, Petitioners' attack on section 6 amounts to a conclusory argument that the County is, *a priori*, incapable of handling the number and complexity of exemption applications that will inevitably be pursued. CRC OB at 15-16.[38] Courts, however, do not assume that state and local agencies are incompetent to decide such matters. To the contrary, the Supreme Court has explained that:

> [T]his Court consistently has indicated that among the factors of particular significance in the

[38] CRC's suggestion that the County will need to process hundreds of exemption claims is nothing but rank speculation. Lawyerly rhetoric in support of a facial claim the initiative is taking "all economically beneficial or productive use" of property is not the same as a property owner presenting a coherent, tailored, and factually-supported request for consideration of an exception as applied to its particular circumstances. It remains to be seen how many Petitioners will ultimately pursue this route, as opposed to blithely joining a lawsuit to facially invalidate the will of the electorate in its entirety.

> inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985) (citations omitted); see also Sierra Club v. San Joaquin Local Agency Formation Com., 21 Cal. 4th 489, 501(1999) ("There are several reasons for the exhaustion of remedies doctrine. The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief. Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. It can serve as a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the court may review.") (internal quotes and citations omitted).[39]

In short, Measure Z was carefully drafted to avoid any facial taking by allowing property owners and operators to seek exemptions from its provisions, consistent with a vast body of constitutional taking jurisprudence. The California courts have upheld the validity of exactly the same language that Measure Z adopted. Petitioners simply pretend that this applicable precedent does not exist and try to skip over the available exhaustion step by massaging their "as applied" taking claims into "facial" challenges. The Court should not be fooled by this attempted sleight-of-hand. All Petitioners, whether they are property owners, mineral owners, lessees, or current operators, have the right to pursue an exception from the County on the grounds that legitimate local land use regulations, adopted by the will of the

[39] CRC's reliance on Birkenfeld v. City of Berkeley, 17 Cal. 3d 129 (1976), does not counsel a different result. That case concerned the question of whether the rent adjustment process under a local rent control ordinance was sufficiently designed to avoid confiscatory results in its application. As the California Supreme Court subsequently explained, the Berkeley ordinance at issue in Birkenfeld did not survive facial scrutiny because it put the rent control board "in a procedural strait jacket." Carson Mobilehome Park Owners' Ass'n v. City of Carson, 35 Cal. 3d 184, 192 (1983) (holding that a similar facial challenge to the Carson rent control ordinance was not proper because the Carson ordinance did not include the same cumbersome restrictions). Here, the availability of section 6 exceptions ensures that the Monterey County Board of Supervisors has no such strait jacket.

voters, would cause an uncompensated taking in their particular, individualized circumstances. Judicial review is available after they pursue that relief, but not before.[40]

3. Petitioners' Arguments Are Really Just Disguised "As Applied" Taking Claims for Which Any Judicial Adjudication Is Wholly Premature.

While ostensibly asserting "facial" challenges to the Measure Z, Petitioners collectively submit mountains of documentary evidence and declaration testimony to support what are effectively "as applied" taking claims that are not ripe for judicial review. Because the Court has properly precluded these claims from Phase I, Petitioners' various documentary and testimonial submissions regarding economic impacts to their individual property interests or operations should not be admitted into evidence or considered in deciding the question of Measure Z's "facial" validity. See [Objections document?] If Petitioners eventually exhaust their individual claims of economic harm through the exception or variance route authorized by Measure Z and remain unhappy with the result, they may then pursue judicial review of their "as applied" taking claims. Until that time, however, any consideration of those individual claims and supporting evidence is premature, as the Court has already recognized.

Petitioners' expansive, fact-based taking arguments in their various briefs are not only inconsistent with the Court's prior order, but also incompatible with long-standing taking jurisprudence.

[40] Contrary to CRC's contentions, mineral rights holders are in no different or special position vis-à-vis Measure Z than other property owners, lessees, or operators; the section 6 exemption applies equally to all property interests and requires administrative exhaustion of a meaningful variance application to the County before any taking claim becomes ripe for judicial review. Relying on a combination Lucas and Action Apartment Ass'n v. Santa Monica Rent Control Bd., 94 Cal. App. 4th 587 (2001), CRC argues that even if section 6 is constitutionally sound, it does not avoid a "facial" taking claim for mineral interest holders because Measure Z constitutes a *per se* categorical taking of all economic value of those interests. This argument is self-evidently wrong. Just like every other property owner or lessee, a mineral holder may request and, if appropriate, receive an exception, depending on whether the application of the Measure Z's restrictions will effect a taking of all economic value. But this analysis is still an individualized one, properly considered first by the County. See, e.g., Murr v. Wisconsin, 137 U.S. 1933 (2017) (holding that two contiguous parcels be evaluated as a single parcel or denominator for purposes of taking analysis). In contrast, Action Apartment challenged a local blanket regulation requiring landlords to provide 3 percent interest on all tenant security deposits. The court concluded that the constitutionality of a fixed interest rate on all security deposits was "a single, discrete" question "not related to whether landlords are making a fair return on their property" that presented "a straightforward legal issue that needs little in the way of factual development" and could not be resolved by the rent control board's individual rent adjustment process (which applied only to rent increase requests and was not to security deposit rules) Id. at 615 (noting elsewhere that "the requirement of exhaustion is a jurisdictional prerequisite, not a matter of judicial discretion"). On its facts, therefore, Action Apartment plainly has no purchase here.

"To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute . . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." Arcadia Unified Sch. Dist. v. State Dep't of Educ., 2 Cal. 4th 251, 267, 825 P.2d 438 (1992) (quoting Pacific Legal Found. v. Brown, 29 Cal.3d 168, 180-81 (1981)). Put differently, "[i]n determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449–50 (2008) (quoting United States v. Raines, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined")).[41] For this reason, "[a] facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 1084 (1995); see also Rental Housing Ass'n of N. Alameda County v. City of Oakland, 171 Cal. App. 4th 741, 752 (2009) (in facial challenge, court "will consider only the text of the measure and not whether it may be invalid as applied in certain circumstances").

In the Fifth Amendment context in particular, the courts are especially clear that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson County, 473 U.S. at 186. Thus, a plaintiff must seek a variance from the relevant regulatory or land use agency before his or her claim becomes ripe for judicial adjudication. Id. (taking claim unripe where plaintiff failed to seek variance which commission had authority to grant); Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 297 (1981) (taking claim not ripe because "[t]here is no indication in the record that

[41] As the courts frequently explain, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." Sanchez v. City of Modesto, 145 Cal. App. 4th 660, 678 (2006) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). Here, of course, Petitioners cannot establish that Measure Z would constitute a taking under all circumstances.

appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance . . . or a waiver"). This remedy exhaustion requirement is critical because "[e]xercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" Washington State Grange, 552 U.S. at 450 (quoting Raines, 362 U.S. at 22); see also City of San Ramon, 4 Cal. App. 5th at 90 (explaining that "facial challenges conflict with the fundamental principle of judicial restraint that courts should not decide questions of constitutional law unless it is necessary to do so, nor should they formulate rules broader than required by the facts before them").

Only last month, a California appellate court strongly reaffirmed these time-tested principles when it held that a property owner's taking claim was premature because the owner had not sought a coastal development permit before closing a public access route on its property. Surfrider Found. v. Martins Beach 1, 14 Cal. App. 5th 238 (2017). The owner argued that the mere requirement that it seek a coastal development permit for the closure under the California Coastal Act constituted an uncompensated taking of its property rights. Relying on a long line of U.S. Supreme Court cases, the California court explained that requiring the owner to first obtain a final permit decision from the Coastal Commission "informs the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property . . . or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." 14 Cal.App.5th at 256 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001)). Such matters, the Surfrider court explained, "cannot be resolved in definitive terms until a court knows 'the extent of permitted development' on the land in question." Id. Accordingly, the court declined to issue what it called an "'advisory opinion' regarding the constitutionality of a hypothetical decision on a CDP application regarding closure of Martins Beach before the County or Coastal Commission is given an opportunity to render a decision." Id. at 258.

This robust administrative exhaustion requirement is particularly important in the voter initiative context, where "facial challenges threaten to short circuit the democratic process by preventing laws

embodying the will of the people from being implemented in a manner consistent with the Constitution." Washington State Grange, 552 U.S. at 451. In evaluating such a voter initiative, therefore, courts "properly show substantial deference to the legislative judgment made by the voters." Hermosa Beach Stop Oil Coalition, 86 Cal.App.4th at 565 (emphasis added) (upholding a "complete ban on oil drilling and exploration [as] necessary and reasonable").

The implication of the foregoing well-established judicial precedent, at both the federal and state level, is clear: The "as applied" taking claims that Petitioners assert in their opening briefs – by which they hope to overturn the will of Monterey County voters – are patently premature and speculative. As the Surfrider court explained, it may well be that some or all of Petitioners' Measure Z exception requests, if and when they assert them, will be granted because the County believes that denial would violate Petitioners' demonstrated property rights. 14 Cal. App. 5th at 258. But because "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes," MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986), this Court should find that Petitioners cannot go forward at this time on their taking claims. See Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 504 (9th Cir. 1990) (where challenger has filed no meaningful application with agency for variance or other relief, courts should not "guess what possible proposals appellants might have filed with the [agency], and how the [agency] might have responded to these imaginary applications").

If Petitioners do eventually exhaust their "as applied" claims at the County and subsequently seek judicial review, they carry a heavy burden to show that Measure Z "goes too far," either because it deprives them of all economic value (Lucas, 505 U.S. at 1012-13) or because application of the fact-specific, three-part balancing test demonstrates a regulatory taking. See Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (courts must consider the economic impact of the regulation on the owner, the degree to which the regulation interferes with the owner's investment-backed expectations, and the character of the government action); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002) ("[I]n the regulatory taking context, we require a more fact specific inquiry.") Even with the full development of the facts at the administrative level, Petitioners are

unlikely to meet this burden. For instance, Petitioners' assert that Measure Z spells the "end oil and gas production in the County," thereby effecting a taking. Aera OB at 7. But Petitioners' own description of their operations demonstrates that this statement is pure hyperbole. As explained above, Measure Z allows continued operation of existing wells, reworking of those wells (including sidetracking), and continued operation of the steaming and flooding activities on which the industry now relies. Similarly, the long phase-out of wastewater disposal will not be the death knell of production at the San Ardo field; Chevron concedes that it is already recycling a significant portion of its wastewater for recharge to the Salinas River, Tubbs Decl. at 15, and other operators recycle wastewater for additional steam injection. Eagle Petroleum OB at 4. Because all of these processes are permissible under Measure Z, the initiative will not end oil operations in the County.

Likewise, it is not at all clear that the many "paper" rights held by various Petitioners (NARO, CRC, etc.) have any significant value. Many of those who hold mineral rights or lessees, either as part of a larger bundle of property interests or severed from surface rights, have declined for decades to commence exploration or otherwise use or develop those interests, likely because their value is economically marginal and declining as the old Monterey oil fields are tapped out and wind down. See Aera OB at 24 and supporting declarations (admitting that San Ardo field is in long-term natural decline). That long-dormant paper rights holders are now concerned with their ability to commence risky new activities, like fracking or acidizing, to pursue oil that is not available using conventional means is hardly a viable basis for an investment-backed expectations claim. The value of such interests may well be negligible or offset by the increased value of the surface land. See Murr v. Wisconsin, 137 U.S. 1933, 1948 (2017) (considering value of property as a whole, including increased value as a result of the regulation itself). In any event, these fact-based questions are best distilled and framed for judicial review by the County exception process.

D. Measure Z Lawfully Phases Out Nonconforming Uses and Protects Vested Rights.

Petitioners' attacks on Measure Z's amortization provisions are premature and do nothing to establish that the initiative facially violates due process. Local governments may terminate a previously lawful land use immediately, except where a landowner possesses a "vested right" to continue operating.

Hermosa Beach Stop Oil Coalition, 86 Cal.App.4th at 552. Property owners claiming a vested right must demonstrate that they have: (1) acquired all discretionary permits necessary for the prohibited activity, and (2) completed substantial work in good faith reliance on those permits prior to the effective date of the ordinance. Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal. 3d 785, 791 (1976); Hermosa Beach Stop Oil Coalition, 86 Cal. App. 4th at 552-53 (no vested right to drill for oil without having first obtained state and local permits). Vested rights need not be allowed to continue indefinitely; they may be terminated pursuant to a regulation's reasonable phase-out or "amortization" period. Metromedia, Inc. v. San Diego, 26 Cal. 3d 848, 882 (1980).[42]

In keeping with this long-established body of law, Measure Z contains ample protections for property owners who can demonstrate that they have obtained a vested right to conduct activities otherwise prohibited by the initiative. First, the measure expressly provides that "[n]othing in this Initiative shall apply to prohibit any person or entity from exercising a vested right, obtained pursuant to State law, as of the Effective Date of this Initiative." See AR 137 (Section 6(A)). Second, Policy LU-1.22 independently provides an automatic 5-year phase-out period (extendable to 15 years) during which applicants with vested rights are excused from complying with the prohibition on wastewater disposal. AR 128.

The County has a preexisting administrative procedure by which applicants may seek a determination that they hold a vested right. See Monterey County Code of Ordinances, § 21.64.240. Applying for and receiving a vested right determination is a necessary prerequisite to challenge the adequacy of any associated phase-out period, yet only one Petitioner, CRC, even bothers to claim in its briefing – obliquely, in a footnote – that it possesses a vested right to conduct activities prohibited by Measure Z. CRC OB at 10, fn. 16. Nonetheless Petitioner Chevron launches headlong into a convoluted financial, technical, and economic argument as to why the measure's amortization provisions are "unreasonable" as applied to them. See Chevron OB at 36-37. As with Petitioners' as-applied

[42] Petitioner NARO's argument that regulations may not prohibit existing land uses unless they are a nuisance, NARO OB at 9-10, is frivolous. The two cases Petitioners cite, San Diego Tuberculosis Ass'n v. E. San Diego, 186 Cal. 252 (1921), and Jones v. Los Angeles, 211 Cal. 304 (1930), predate roughly eighty years of relevant case law on vested rights and discontinuing nonconforming uses, including the cases cited in this subsection. The argument does not warrant consideration by this Court.

takings claims, these claims are unripe for adjudication. Petitioners may bring them, if at all, only after they have sought and received a vested right determination from the County.

Petitioners alternatively argue that "the concept of amortization cannot be applied to and is invalid as to oil fields." Aera OB at 27-30 (initial caps omitted); see also CRC OB at 10, fn. 16; Eagle Petroleum OB at 30 (suggesting that amortization is limited to billboard ordinances). No authority supports this bald claim. On the contrary, courts have approved the use of phase out periods in a wide variety contexts. See, e.g., Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121 (1954) (cement mixing plant); People v. Gates, 41 Cal. App. 3d 590, 603 (1974) (wrecking yard); Castner v. City of Oakland, 129 Cal. App. 3d 94, 96-97 (1982) (adult bookstore); Elysium Inst. v. County of L.A. 232 Cal. App. 3d 408 (1991) (nudist camp). Petitioners cite no case even remotely hinting that amortization is categorically unlawful for oil and gas related land uses.[43]

E. Measure Z Does Not Otherwise Violate Due Process.

Petitioner NARO also raises two final, poorly worded arguments that might be charitably be considered substantive due process challenges. Both are entirely without merit.

First, NARO argues that Measure Z has "no valid public purpose," disputing the factual bases for each of the measure's fifteen findings. NARO OB at 23-29.[44] NARO neglects to describe the well-settled standard of review for a substantive due process claim that does not implicate a fundamental right: the challenged legislation need only be reasonably related to a legitimate governmental interest. See, e.g., Birkenfeld, 17 Cal. 3d at 159. For the purpose of rational basis inquiry, an initiative's purpose is "liberally construed," and challengers bear the burden of demonstrating a due process violation. Yoshioka v. Superior Court, 58 Cal. App. 4th 972, 983, fn. 2 (1997) (upholding voter initiative).

Measure Z clearly serves a legitimate governmental interest. The measure was enacted "to protect Monterey County's water, agricultural lands, air quality, scenic vistas, and quality of life." AR

[43] Hanson Bros. Enters. v. Bd. of Supervisors, 12 Cal. 4th 533, 553 (1996), a mining case cited in NARO OB at 29, is not to the contrary. The ordinance did not include an amortization period and the plurality opinion expressly acknowledged that amortization may be used to lawfully discontinue vested nonconforming uses. Id. at 552.

[44] Because Petitioners cite no legal authority to support this claim, they have waived it. See City of Merced v. American Motorists Ins. Co., 126 Cal. App. 4th 1316, 1327-28 (2005).

121. Measure Z's 15 robust findings explain in detail the many ways in which the initiative's land use polices advance its purpose, and more than satisfy the minimum showing necessary to survive rational basis review. AR 121-27 (Measure Z's findings). For example, they describe the risk of water pollution, soil contamination, and seismic activity posed by the oil and gas development activities Measure Z prohibits. AR 123-25 (Findings number 5 and 8). They also express the voters' desire to protect Monterey County's critical agriculture and tourism industries from the risks posed by these activities. AR 122-25 (Findings number 4, 7, and 10). Neighboring counties have adopted similar justifications for placing land use restrictions on oil and gas development. See, e.g., RJN Exh. N (San Luis Obispo County Zoning Ordinance § 22.34.010 (citing the county's "limited water supply for agricultural and domestic uses" and stating that it "must be fully protected from pollution by petroleum operations.").

Although Petitioners expend several pages pointlessly disputing Measure Z's findings (NARO OB 24-29), the exercise does nothing to strengthen their claim. Legislation violates due process only if the underlying facts supporting its adoption "could not reasonably be conceived to be true." See Stubblefield Construction Co. v. City of San Bernardino, 32 Cal. App. 4th 687, 711 (1995) (upholding zoning amendment that prohibited a property owner from building a development project). NARO's disagreement with the voters' conclusions does not warrant invalidating this duly-adopted initiative.

Second, NARO argues that Measure Z "is broader than necessary to solve the perceived problem." NARO OB at 10. But as the United States Supreme Court has explained, "we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." United States v. Salerno, 481 U.S. 739, 745 (1987); see also Sanchez v. City of Modesto, 145 Cal. App. 4th 660, 679 (2006). Petitioners' authorities do not support their baseless argument. People v. Goodspeed, 85 Cal. App. 2d 821, 823-26 (1948), concerned a vagueness challenge to a criminal statute and did not address overbreadth. Dolan v. City of Tigard, 512 U.S. 374, 377, 385 (1994) addressed special permit conditions in Fifth Amendment takings cases. And, to the extent that Bernstein v. Bush, 29 Cal. 2d 773, 778 (1947), could conceivably be read to support NARO's claim, the case has long been superseded by more recent opinions recognizing the constitutional validity of ordinances broader than Measure Z. See,

e.g., Hermosa Beach Stop Oil Coalition, 86 Cal. App. 4th 534; Bayless v. Limber 26 Cal. App. 3d 463, 470 (1972); Beverly Oil Co., 40 Cal. 2d at 557-558. Measure Z is not unconstitutionally broad.

VI. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court find that there is no merit to Petitioners' contentions and that Measure Z is facially valid, and enter final judgment in favor of the County.

Respectfully submitted,

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