Case No. H045791

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CHEVRON U.S.A., INC., ET AL.
Plaintiffs and Cross-Appellants,

vs.

COUNTY OF MONTEREY, ET AL.
Defendants and Cross-Respondents;

PROTECT MONTEREY COUNTY and DR. LAURA SOLORIO
Intervenors, Appellants, and Cross-Respondents.

Appeal From a Judgment Entered in Favor of Plaintiffs
Monterey County Superior Court
Case No. 16-CV-3978 and consolidated cases
Honorable Thomas W. Wills, Judge

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS; PROPOSED BRIEF OF LEAGUE OF CALIFORNIA CITIES & CALIFORNIA STATE ASSOCIATION OF COUNTIES

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

TO THE HONORABLE PRESIDING JUSTICE:

Proposed amici curiae League of California Cities and California State Association of Counties make this application to file the accompanying brief in this case pursuant to California Rules of Court, Rule 8.200, subd. (c).[1]

The League of California Cities (the "League") is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

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[1] UCLA Law student Divya Rao contributed to the research supporting this brief. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, and no one other than amici, and their counsel of record, made any monetary contribution intended to fund the preparation or submission of the brief.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The Court's decision in this matter will significantly impact amici's interests, and the interests of cities and counties generally, because the novel legal theories raised by Respondents have the potential to limit inappropriately the enactment of ordinances, general plan amendments, and voter initiatives authorized under local government police powers.

As amici represent hundreds of cities and counties throughout the state, amici are uniquely situated to offer context for the Court and provide insight into the practical ramifications of the trial court's reasoning.

Because amici will be affected by this Court's decision and may assist the Court through their unique perspectives, amici

respectfully request the permission of the Honorable Presiding Justice to file this brief.

Dated: August 9, 2019

By: /s/ Sean B. Hecht

Sean B. Hecht
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AMICI CURIAE BRIEF

I. Introduction

The issues in this appeal implicate core decision-making powers critical to local governments throughout California. Amici urge this court to reject Respondents' position—a novel analysis that, if adopted, would unduly limit the core police power authority of cities and counties to protect public health and safety through general plan provisions and other traditionally-employed land use controls. Respondents' theory here would call into question local governments' longstanding authority to regulate where oil and gas drilling can take place within their jurisdictions, and would invite other intrusions into core police powers of cities and counties. While Respondents characterize their arguments as a straightforward application of legal principles, their proposal would radically alter the balance of authority between local and state governments, a balance that has resulted in a diverse set of local approaches to fossil fuel exploration and extraction.

California cities and counties possess broad authority to regulate and govern land uses for the general welfare under their police powers. Here, the people of Monterey County enacted an initiative, Measure Z, that changed the Monterey County General Plan (the "General Plan") to limit or forbid certain land uses supporting oil and gas drilling. This action falls squarely within

the inherent power of local governments, and the initiative's approach squares with the reach of local government authority recognized in the California and federal Constitutions, in case law over the past century, and implicit in the state's statutory provisions governing oil and gas drilling.

Respondents allege that Measure Z's routine deployment of local government police powers is unlawful. The Superior Court agreed, finding both that state and federal laws preempted the initiative, and that the initiative, on its face, effected an uncompensated taking of property. This reasoning, along with Respondents' arguments on appeal, represents a significant departure from the traditional understanding of local government and seriously undermines the authority that cities and counties have always possessed to use land use ordinances, general plan provisions, and voter initiatives to protect the general welfare of California residents, and more specifically to determine where and under what conditions oil and gas drilling can or cannot take place.

The trial court's reasoning is incorrect as a matter of law. Measure Z carries with it a strong presumption of validity against arguments that state or federal law impliedly preempts it, and nothing Respondents have argued displaces that presumption. Moreover, Measure Z, which includes a savings clause ensuring it will not effect an uncompensated taking of

property, does not effect such a taking. The trial court's conclusions thus are contrary to well-settled law.

Amici represent cities and counties in California whose decision-making authority will be jeopardized if the Court of Appeal adopts Respondents' arguments. The Court should decline Respondents' invitation to unsettle the law. The trial court's decision not only ignores the broad authority of cities and counties to govern land use, but also ignores the radical impact its decision will have on the broad range of local government approaches to regulating where and under what conditions oil and gas drilling may occur. For these reasons, amici urge the Court of Appeal to reverse the trial court's decision and to ensure future courts have guidance to properly apply the law on these important issues.

II. State Law Does Not Preempt Measure Z.

A. California Cities and Counties Possess Broad Police Power Authority to Regulate and Govern Land Use and Other Activities to Promote the General Welfare.

The County's authority to regulate activities, including oil drilling, through land use controls stems from Article XI, section 7 of the California Constitution, which states plainly that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) Cities and

counties derive broad power reserved by the states "to protect the order, safety, health, morals, and general welfare of society." (*In re Rameriz* (1924) 193 Cal. 633, 649-50.) The police power of a county or city within its territorial jurisdiction is "as broad as the police power exercisable by the Legislature itself." (*Candid Enters., Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal. 3d 878, 885; see also *Miller v. Bd. of Public Works of City of Los Angeles* (1925) 195 Cal. 477, 484 [describing municipal police power as an "indispensable prerogative of sovereignty and one that is not to be lightly limited"].) The police power is "elastic" and "capable of expansion to meet existing conditions of modern life," rather than a "circumscribed prerogative." (*Miller*, *supra*, 195 Cal. at p. 484-85.)

The "general power of governing" reserved in the police power is broad, allowing states and local governments to "perform many of the vital functions of modern government." (See *Nat'l Fed'n of Indep. Bus. v. Sebelius* (2012) 567 U.S. 519, 535-36.) This is particularly true in the land use context, where cities and counties have authority to regulate extensively for the public welfare. (*Cal. Building Indus. Ass'n v. City of San Jose* (2015) 61 Cal. 4th 435, 455.)

A fundamental application of the police power is the authority of states and localities to implement zoning and other land use controls. (See, e.g., *Fonseca v. City of Gilroy* (2007) 148

Cal. App. 4th 1174, 1181; see also *Berman v. Parker* (1954) 348 U.S. 26, 32-33.) The exercise of police power in the land use context is owed substantial deference and is presumed constitutional, "with every intendment in [its] favor." (*Cal. Building Indus. Ass'n*, *supra*, 61 Cal. 4th at p. 455 [quoting *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 604-05].)

The police power authorizes cities and counties not only to limit land uses, but also to condition and regulate them. For example, this year, in *T-Mobile West LLC v. City and County of San Francisco* (2019) 6 Cal. 5th 1107, the California Supreme Court considered the validity of a San Francisco City and County ordinance that utilized local government police power to regulate construction of telephone lines, based on local aesthetic concerns. (*Id.* at p. 1114-15.) The board of supervisors enacted that ordinance to further the general welfare of the City and County, and specifically to maintain the aesthetic beauty of San Francisco. (*Id.* at p. 1114.) The Court reaffirmed that the local police power includes the authority to establish conditions for land uses, including land uses such as telephone lines that service infrastructure outside the land use framework, even where state laws regulate in the same subject area. (*Id.* at p. 1116.)

The police power also extends far beyond the context of land use control. For example, in *Sherwin-Williams Co. v. City of Los Angeles*, the Supreme Court upheld, as a valid use of the police power, a local ordinance generally requiring "retailers of aerosol paint and broad-tipped marker pens to display such items out of the public's reach." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893, 901.) The history of the use of police power to protect health, safety, and welfare is even older than its deployment to control land uses; as the Ninth Circuit recognized almost ninety years ago:

> [T]he right of the appellee city to pass the ordinance in question need not be confined to the more recently developed phase of police power involved in zoning ordinances which undertake in a measure to direct the future growth of the city, but may also be predicated upon the power of the city to protect its inhabitants from fire hazard and from noxious gases; that is to say, the power exercised by the city authorities in enacting the ordinance may be based upon that branch of the police power which deals with the public safety. It cannot be doubted under the authorities that, if there is a menace to the health and property of its citizens from the proposed drilling operations, under the police power as long established and exercised the ordinance would be a valid exercise of such police power.

(*Marblehead Land Co. v. City of Los Angeles* (9th Cir. 1931) 47 F.2d 528, 531 [citations omitted.])

California has a long history not only of local government police power-based land use controls, but also of associated local

regulations specifically governing oil well development. These regulations are based both on land use authority and on general authority to protect the public safety and welfare. For example, in 1953, in *Beverly Oil Co. v. City of Los Angeles*, the California Supreme Court—citing a line of even earlier cases—concluded that it was deemed to be well settled, before 1953, 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." (*Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal. 2d 552, 558.) The court in *Beverly Oil* affirmed the legal reach of the city's power—exercised via an ordinance that "expressly provide[d] that no new well for the production of hydrocarbon substances … shall be drilled nor shall existing wells be deepened" (*id.* at p. 555)—as encompassing the ability to regulate oil and gas development activities. (*Id.* at p. 558-59; see also *Marblehead Land*, *supra*, 47 F.2d at p. 531-34 [upholding a zoning ordinance prohibiting oil drilling on plaintiff's property as a valid exercise of police power].)

B. California Jurisdictions Have Used Their Police Power to Promulgate Land Use Controls Regulating Oil and Gas Development in Myriad Ways.

The voters of Monterey County enacted Measure Z with the purpose to "protect Monterey County's water, agricultural lands,

air quality, scenic vistas, and quality of life." (Administrative Record ("AR")[1]121.) Voters were concerned that oil and gas extraction's impacts have been unduly harming those values and resources in the County. (AR[1]121-123.) The voters unquestionably intended Measure Z to protect public health and welfare, through General Plan amendments that prohibit or limit particular land uses found to be inconsistent with the voters' vision of public welfare within the County. Measure Z's approach to this issue is by no means the only approach that local governments have taken to regulate oil and gas, but it is well within the range of approaches taken in California.

Measure Z amended the County's General Plan, adding Policies LU-1.22 and LU-1.23 to the General Plan's Land Use Element. A general plan is "the local government's long-term blueprint for the community's vision of future growth";[2] every local government has a general plan, pursuant to state law. Among other provisions, Measure Z included General Plan amendments prohibiting land uses in support of oil and gas wastewater injection and disposal (with a phase-out period to amortize the value of existing uses), and prohibiting land uses in support of new well-drilling after the measure's effective date, on

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[2] California Governor's Office of Planning and Research, *General Plan Guidelines* <http://opr.ca.gov/planning/general-plan/> (as of August 9, 2019).

unincorporated lands within the County. (AR[1]129.) Measure Z supported its General Plan amendments with extensive findings articulating the health, welfare, and safety benefits of the new amendments and the consistency of the amendments with the voters' vision for the County's future. (AR[1]121-27.)

While *Beverly Oil* addressed a ban on oil drilling and well-deepening in an area smaller than an entire city or county, Measure Z is not the first general plan provision to broadly prohibit a range of oil drilling-related land uses throughout the entirety of a local government's land use jurisdiction. For example, the City of Hermosa Beach enacted a ban on oil drilling operations decades ago. (See *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach* (2001) 86 Cal. App. 4th 534, 540 [noting that in 1932 the City of Hermosa Beach "enacted a ban on all oil and gas operations within the City, declaring such activity to be both unlawful and a public nuisance"] [citing Hermosa Beach Mun. Code § 21-10].) Similarly, the Board of Supervisors of Santa Cruz County enacted, in 2014, general plan amendments prohibiting

> development, construction, installation, or use of any facility necessary for or intended to support oil or gas exploration or development from any surface location within the unincorporated area of the County of Santa Cruz, whether the subsurface portion(s) of such facility is within or outside the unincorporated area of the County of Santa Cruz, and prohibit development, construction, installation or use of any

> facility necessary for or intended to support oil or gas exploration or development from surface locations outside the unincorporated area of the County of Santa Cruz which may begin, pass through or terminate below the surface of land located within the unincorporated area of the County of Santa Cruz. This prohibition applies to facilities directly involved in oil and gas exploration, production, and refinement such as wells, pipelines and pumps.

(1994 General Plan and Local Coastal Program for the County of Santa Cruz, California, section 5.18.4 [as amended by Res. No. 142-2014];[3] see also San Benito Measure J (2014)[4] [amending the general plan to "prohibit[] the use of any land within the County's unincorporated area for fracking, acid fracking, acid matrix stimulation, steam injection and other types of oil and gas development with advanced well stimulation technologies" and further "prohibit[] the new use of land for any Petroleum Operations in unincorporated areas designated for residential use"].)

By contrast, but under the same legal authority, other local jurisdictions have developed detailed local standards and procedures for local permitting of oil and gas production. In some jurisdictions, these permitting systems have facilitated a

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[3] Available at <http://www.sccoplanning.com/Portals/2/County/userfiles/106/GP_Chapter%205_Open%20Space_Conservation.pdf>, at p. 5-63.

[4] Available at <http://sbcvote.us/pdf/forms/registrar/2014NovElection/Measure_J_Web-Post.pdf>, at p. 28.

significant amount of oil and gas development. These procedures rely on local government police power to limit not only oil drilling activities, but also the use of land within the jurisdiction to support particular production techniques in the course of those activities. So, for example, Kern County, in its Zoning Ordinance, has "provide[d] development standards for all future oil and gas exploration, extraction, operations, and production activities in the unincorporated Kern County" that require a conditional use permit for some activities. (See Kern Cty. Planning & Nat. Res. Dep't, *Kern County Oil and Gas Permitting* <https://kernplanning.com/planning/kern-county-oil-gas-permitting-3/> [as of August 9, 2019].) In particular, such a permit is required in some parts of Kern County in order to lawfully drill a well for underground injection as part of oil drilling operations, or to install oil drilling-related infrastructure at all. (See Kern County Zoning Ordinance, chapter 19.98, section 050 [requiring that "no well for use as an injection well and no well for the exploration for or development or production of oil, gas, or other hydrocarbon substances may be drilled, and no related accessory equipment, structure, facility or use may be installed" without an approved conditional use permit, in various parts of the county].)[5]

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[5] Available at <https://psbweb.co.kern.ca.us/planning/pdfs/KCZONov2017.pdf>, at p. 500-01.

Many other cities and counties regulate oil drilling operations through permitting or other similar processes regulating the drilling of wells and related structural installations, and many confine those operations to certain zones or districts. For example, the City of Los Angeles has not only developed a process for permitting of wells that limits the number and location of wells (L.A. Mun. Code § 13.01), but also has long-established zoning requirements that limit the possible locations of new wells to certain areas of the city. (See *Beverly Oil*, *supra*, 40 Cal. 2d at p. 554-55.) And, as evidenced by *Marblehead Land*, the police power underpinning of local regulation of oil operations has not historically been limited to land use authority and has been relied upon to regulate other aspects of oil operations as well. (See *Marblehead Land*, *supra*, 47 F.2d at 532-33.)

C. Measure Z Is Entitled to a Strong Presumption Against Preemption.

As Appellants have demonstrated (Appellants' Reply Brief ("ARB") at p. 23-26), a local ordinance or policy relying on the police power to control land uses, such as Measure Z, is presumed valid against a preemption claim. The "inherent local police power includes broad authority to determine . . . 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.* (2013) 56 Cal. 4th

729, 738.) Local government "traditionally has exercised control" over both land-use controls under the police power and general lawmaking and policymaking to protect public health, safety, and welfare. (*T-Mobile*, *supra*, 6 Cal. 5th at p. 1116 [quoting *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal. 4th 1139, 1149]; see also, e.g., *Cal. Grocers Ass'n v. City of Los Angeles* (2011) 52 Cal. 4th 177, 197-98 [noting that presumption against implied preemption is "particularly heavy" where subject matter is "traditionally regulated by . . . local governments under their police powers"].)

D. Respondents' Novel Theory That Measure Z Is Preempted Because It Improperly Intrudes on the Field of "Subsurface Operations" Fails as a Matter of Law.

Against the long historical background of local regulation of oil drilling through land use controls and other regulatory tools, ranging from permitting requirements to prohibitions, Respondents nonetheless argue both that the entire field of "subsurface operations" is preempted, and that this field is so broad as to include Measure Z. But Measure Z, in all relevant respects, has the same relationship to "subsurface operations" as numerous other land use control ordinances and policies that local governments have enacted and enforced for the past century.

Respondents contend flatly that both underground wastewater injection and well-drilling, broadly understood, are subsurface production techniques, and thus that there is no room for local regulation in either field. Respondents argue that limiting facilities used for well drilling or underground injection constitutes "regulating the methods and operations of oil and gas production"—a type of regulation that, they assert, lies categorically outside the legitimate scope of local control and solely within the authority of the Division of Oil, Gas and Geothermal Resources ("DOGGR"), California's oil regulatory agency. Those contentions reveal that Respondents seek a sweeping interpretation of the scope of field preemption here. This Court should not take Respondents up on their invitation to so dramatically alter longstanding precedent.

In Respondent Chevron's view, both "underground wastewater injection" and "drilling wells" constitute "subsurface production techniques," and because the state has fully occupied that field, there is no possible room for local regulation within those broad fields. Chevron claims that

> DOGGR's regulatory scheme is so thorough that it has fully occupied the field of regulating subsurface activity related to oil and gas production. Measure Z's ban on two subsurface production techniques (underground wastewater injection and the drilling of wells) is thus preempted.

(Chevron's Respondent's Brief ("Chevron RB") at p. 41.) Chevron repeats this claim more than once in the brief, leaving no room for doubt about its extensive scope. Elsewhere in its brief, Chevron goes on to say:

> [B]y prohibiting certain subsurface production activities, such as drilling new wells or underground injection, Measure Z facially regulates specific subsurface production techniques. This type of regulation clearly enters the subsurface regulatory field exclusively delegated to DOGGR. . . . In so doing, Measure Z "impinges on an area fully occupied or exclusively covered by state law" and is preempted.

(Chevron RB at p. 63 [citations omitted.])

Aera uses similarly sweeping language, arguing that because the Legislature has vested DOGGR with "complete authority" to ensure that operators "utilize all methods and practices" (Aera Energy's Respondent's Brief ("Aera RB") at p. 37), any and all local government attempts to regulate "wastewater impoundment and reinjection" and "the drilling of new wells" within the scope of police power land use regulation is necessarily pretextual:

> Measure Z purports to be a set of land use regulations addressing above-ground "land uses" involved in wastewater impoundment and reinjection, and drilling new wells. (1-AR-127-129.) Yet, upon examination, the "land use" regulations do not actually regulate land uses. . . . There are no "land uses" implicated by wastewater impoundment and reinjection that are not already subject to

> DOGGR regulation in the context of oil and gas extraction. There are no "land uses" implicated by the drilling of new wells that are not already subject to DOGGR regulation in the context of oil and gas extraction. Instead of implementing any actual land use policy, Measure Z merely uses the "land use" pretext to get after its real goal: impermissibly regulating the methods and operations of oil and gas production, a matter of paramount state concern.

(Aera RB at p. 45-46.)

Chevron's sweeping assertions—assertions that are necessary to the logic of its argument—potentially implicate a wide range of local government controls and regulations concerning oil and gas drilling, including the types of local government land use policies described above that require discretionary approval of a conditional use permit as a condition of drilling a new well. If "underground injection and drilling new wells" are types of "subsurface production techniques," and state law preempts any local regulation that "facially regulates" such "techniques," the legal authority of local governments even to condition drilling of underground injection wells and other new wells on discretionary local permit decisions, or even local zoning limiting the locations of such activities, may be called into question. Similarly, Aera asserts that local permitting of wastewater impoundment and reinjection, and of the drilling of new wells, both cannot be properly characterized as regulation of "land uses," and also are entirely "already subject to DOGGR

regulation in the context of oil and gas extraction" and thus preempted. This analysis would likely mandate that a wide variety of local zoning laws, general plan policies, and other regulations be preempted.

Thus, under Respondents' theory, even jurisdictions that have implemented longstanding policies that allow or encourage oil and gas development, subject to local land-use regulations such as requirements to obtain conditional use permits, could find their laws and policies at risk of preemption challenges. But *Beverly Oil*, not even discussed by Respondents in this context, makes clear these ordinances are not preempted. The Supreme Court in *Beverly Oil* concluded, as the basis of its entire analysis, that it was "well settled" that an ordinance that "expressly provide[d] that no new well for the production of hydrocarbon substances . . . shall be drilled nor shall existing wells be deepened" was within the power of a local government to enact. (*Beverly Oil*, *supra*, 40 Cal. 2d at p. 555, 558.) If *Beverly Oil* means anything, it means that local governments retain ample authority to regulate the location of oil wells and related infrastructure, including by conditioning them through a discretionary permitting process, or by prohibiting certain "subsurface production techniques" entirely in areas within their jurisdiction. And because local governments retain that authority, the field preemption argument here must fail.

Assuming for the sake of argument there is some field of "subsurface production" that is preempted by state law, Measure Z, by its terms, falls no closer to the line than the types of regulations used by other local governments throughout the state—regulations expressly authorized under *Beverly Oil*. Indeed, the use of local authority here is so well-settled that in cases where other preemption arguments—arguments not applicable here—have been made in similar contexts, the core authority to ban oil drilling has not even been challenged by litigants, and indeed has been reaffirmed by courts as the starting point for analysis. (See *Hermosa Beach Stop Oil Coal.*, *supra*, 86 Cal. App. 4th at p. 555–56 [finding a total ban on oil drilling within city limits to be "presumptively a justifiable exercise of the City's police power" and noting that "none of the parties disputes the validity of reinstituting the total ban on oil drilling within Hermosa Beach"]; *Higgins v. City of Santa Monica* (1964) 62 Cal. 2d 24, 28 [holding that an ordinance prohibiting all oil drilling on granted submerged lands "amounts to a determination that the city does not desire to subject the public to the inconvenience, noisome effects, and potential dangers that may accompany and follow the exploration for, and production of, oil" and finding it both a valid exercise of the police power, and not preempted, in the face of a legal challenge based on the terms of the grant and the laws generally governing state-granted

tidelands].)[6] *Beverly Oil* settled the core question at issue here decades ago; local governments have utilized and relied on their police power authority to regulate drilling locations extensively, and this Court should not take the opportunity to revisit that settled law.

E. Measure Z Is Neither "Inimical" to State Law, Nor Does It Frustrate the Legislative Purpose of State Law.

Respondents argue that Measure Z is preempted because it "frustrates the purpose" of state law by prohibiting "activities permitted and promoted by state law." (Chevron RB at p. 29-34.) Respondents misstate the applicable legal standard, and come to

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[6] As conceded by Respondent Chevron (Chevron RB at p. 53), Public Resources Code section 3012 acknowledges that cities possess the authority to "prohibit the drilling of oil wells in certain locations within their jurisdictions"—an acknowledgment that, while understating dramatically the scope of local authority, is still manifestly at odds with their assertion of field preemption here. (Pub. Res. Code § 3012.) As Appellants point out, while section 3012 acknowledges cities' broad authority to prohibit oil drilling completely, this authority derives from the general police power—a proposition that has been confirmed on multiple occasions by California courts, including this Court in *Beverly Oil*, *Hermosa Beach Stop Oil Coalition*, and *Higgins*. And while Respondents have asserted that this principle somehow applies only to "incorporated cities," they have not provided any support for that assertion. And they cannot provide such support, since the authority derives from constitutional local government police power, and not from section 3012, as they mistakenly suggest it does.

the wrong conclusion. In fact, in the absence of field preemption, California courts have found implied preemption only where a local ordinance or other regulation "contradicts," or is "inimical to," state law. (ARB at p. 28-29.) Here, there is no question that Measure Z neither contradicts nor is inimical to state law governing oil and gas exploration and production. And a finding that it is inimical, or that it is preempted because it frustrates the purpose of state law, would call into question other ordinances and policies relying on police power authority to regulate oil and gas extraction.

Just four months ago, the Supreme Court in *T-Mobile* set forth, in plain terms, the manner in which California courts must analyze a claim of implied preemption:

> "[L]ocal legislation that conflicts with state law is void." (*City of Riverside*, *supra*, 56 Cal. 4th at p. 743, citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893, 897.) A conflict exists when the local legislation " ' " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' " (*Sherwin-Williams*, at p. 897.) Local legislation duplicates general law if both enactments are coextensive. (*Ibid.*, citing *In re Portnoy* (1942) 21 Cal. 2d 237, 240.) Local legislation is contradictory when it is inimical to general law. (*Sherwin-Williams*, at p. 898, citing *Ex parte Daniels* (1920) 183 Cal. 636, 641-48.)

(*T-Mobile*, *supra*, 6 Cal. 5th at p. 1116.) This teaching from the Supreme Court follows a long line of cases reaffirming this

principle, and restating it in various terms. In *Big Creek Lumber*, for example, the Court noted:

> We previously have explained that a local ordinance is not impliedly preempted by conflict with state law unless it "mandate[s] what state law expressly forbids, [or] forbid[s] what state law expressly mandates." (*Great Western Shows, Inc. v. County of Los Angeles* [2002] 27 Cal. 4th [853,] 866.) That is because, when a local ordinance "does not prohibit what the statute commands or command what it prohibits," the ordinance is not "inimical to" the statute. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893, 902.)

(*Big Creek Lumber*, *supra*, 38 Cal. 4th at p. 1161.) The state statute at issue in *Big Creek Lumber*, unlike any California law addressing oil and gas production, expressly preempted state regulation by stating that, with limited exceptions, "individual counties shall not otherwise regulate the conduct of timber operations, as defined by this chapter, or require the issuance of any permit or license for those operations." (Pub. Res. Code § 4516.5(d).) Moreover, that statute included a policy "to achieve the maximum sustained production of high-quality timber products." (*Big Creek Lumber*, *supra*, 38 Cal. 4th at 1147 [citing *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1226; Pub. Res. Code § 4513].) The local ordinances in that case included a "zone district ordinance" that amended the county's zoning laws "to restrict timber harvesting operations to areas zoned for timber production, mineral extraction industrial, or

parks, recreation and open space." (*Big Creek Lumber*, *supra*, 38 Cal. 4th at 1146.) The Court held that

> the zone district ordinance does not mandate what general forestry law forbids or forbid what general forestry law mandates. While the forestry laws generally encourage "maximum sustained production of high-quality timber products . . . while giving consideration to" competing values (§ 4513), they do not require that every harvestable tree be cut.

(*Id.* at 1161.) In the end, the Court found no preemption because the ordinances were not inimical to state law, even in light of both the express preemption provision and the general policy in favor of maximum timber harvest.

Here, it is beyond question that Measure Z is not inimical to state law. Like the ordinances in *Big Creek Lumber*, it prohibits nothing that state law commands, and commands nothing that state law prohibits. Like the ordinances in that case, Measure Z directly limits the location, and not the conduct, of an extractive industry—even though the practical effect of limiting the location may nonetheless create some limitation on the conduct. Thus, the ordinances in *Big Creek Lumber* are indistinguishable from Measure Z for the purposes of preemption analysis. Because it is so clear that this is so, Respondents attempt to reframe the legal standard for preemption, using case law that is inapposite, to suggest a local ordinance or policy may be preempted by implication if a court finds it frustrates the

purpose of a state law, even where it does not contradict state law. As Appellants argue persuasively in their Reply Brief, that is not a viable theory of preemption under California law. (*See* ARB at p. 30-32.)

Moreover, even if frustration of the purpose of a state statutory scheme could give rise to a viable preemption claim, *Big Creek Lumber* makes clear that such a claim could not apply to Measure Z. In that case, the statute at issue contained a clear statement of state policy "to create and maintain an effective and comprehensive system of regulation and use of all timberlands so as to ensure . . . [t]he goal of maximum sustained production of high-quality timber products is achieved" in light of consideration of other values. (Pub. Res. Code § 4513.) Yet the Court upheld local ordinances that in practice sharply and broadly limited the locations where timber could be harvested. (See *Big Creek Lumber*, *supra*, 38 Cal. 4th at p. 1150-62.) To the extent that there may be a state policy in favor of oil extraction based on the language in Public Resources Code section 3106(b)—a position that is tenuous in light of the explicit policy in section 3106(a) to "prevent, as far as possible," damage to human health and the environment from oil extraction (Pub. Res. Code § 3106(a))—such a policy promoting oil extraction is certainly not greater than the policy at issue in *Big Creek Lumber*.

In summary, this Court should recognize that Measure Z is not contradictory or inimical to state law, and that it does not frustrate legislative purpose in any event. A holding to the contrary would be sharply at odds with precedent.

F. A Ban on an Activity or Land Use Within the Entire Jurisdiction of a Local Government Is No Different an Exercise of Police Power than a Ban in a Smaller Region.

In various places in their briefs, Respondents argue, or assume, that a total geographic ban on new oil well or injection well drilling within a county's unincorporated areas should be analyzed differently from a ban that is smaller in geographic scope. This argument has no support in California law.

One version of this argument appears in Respondents' contention that Measure Z is preempted because it "frustrates the purpose" of the state's statutory scheme. The essence of this claim is that even if a county can lawfully limit drilling, it cannot ban it completely, because of state policy favoring oil drilling. But as discussed above, and as articulated persuasively in Appellants' Reply Brief, there simply is no state analog to federal "obstacle preemption"—the only preemption analysis that would make a "frustration of purpose" claim relevant. (See ARB at p. 30-32.) Instead, preemption analysis under California law rests on the analysis set forth in *T-Mobile* and *Big Creek Lumber*, and not other unrelated inquiries under theories not endorsed by the

California Supreme Court. And as discussed above and at length in Appellants' Reply Brief, even if this analysis applies under California law, it does not apply to Measure Z. (*Id.* at 32-33; see also *id.* at 33-50 [analyzing why Measure Z is not impliedly preempted as falling within a field fully occupied by state law].)

Another version of this argument appears in Respondents' contention that Measure Z's focus on land use is "pretextual." It is not. General plans, zoning ordinances, and other land use regulations contain a wide range of measures that may impact operations as well as land uses; that does not render their land-use focus pretextual. And, of course, the police power extends far beyond land use controls anyway, as acknowledged by cases going back a century. (See *Marblehead Land*, *supra*, 47 F.2d at p. 531-32.)

But more fundamentally, there is no other reason a total ban on a particular land use or activity within a jurisdiction would be treated, for preemption analysis purposes, differently from a local ordinance or general plan provision that limits a land use or activity but stops short of a total ban. The cases in which California appellate courts have considered whether local governments' total bans on land uses or activities are preempted by state law short of field preemption—both in the context of oil drilling and otherwise—have analyzed the question in traditional police power terms, have not distinguished between total bans

and more limited land use controls, and generally have resulted in upholding those bans against preemption challenges. (See, e.g., *City of Dublin v. County of Alameda* (1993) 14 Cal. App. 4th 264 [finding countywide initiative prohibiting operation of waste incinerators throughout entire county was a lawful exercise of the police power, and not preempted]; *City of Riverside*, *supra*, 56 Cal. 4th at p. 744-63 [rejecting the argument that a countywide ordinance designating marijuana dispensaries as a prohibited use and a public nuisance was preempted by a state statutory scheme enabling the possession and cultivation of marijuana for authorized medicinal purposes]; *Hermosa Beach Stop Oil Coal.*, *supra*, 86 Cal. App. 4th at p. 555-56, [calling a total ban on oil drilling within the jurisdiction "presumptively a justifiable exercise of the City's police power" and noting that "none of the parties disputes the validity of reinstituting the total ban on oil drilling within Hermosa Beach, save only for the question whether that ban can be applied to the Macpherson project"].)[7]

III. The Federal Safe Drinking Water Act Does Not Preempt Measure Z.

[7] Appellants' Reply Brief discusses at length why the case law cited by Respondents in support of their theory to the contrary is inapposite; Amici will not repeat those arguments here. (See ARB at p. 39-43.)

In their Reply Brief, Appellants persuasively and comprehensively explain why the federal Safe Drinking Water Act does not preempt Measure Z. (See ARB at p. 50-69.) Amici agree, and further note that California courts have consistently limited federal obstacle preemption to a narrow range of cases where application of state or local law truly frustrates Congress's purpose. This is especially true where the claim implicates state and local police power in a field traditionally not regulated by the federal government, as confirmed by a long line of California Supreme Court cases. (See, e.g., *People v. Rinehart* (2016) 1 Cal. 5th 652 [finding that federal mining law did not preempt a statewide moratorium on suction dredging]; *Quesada v. Herb Thyme Farms, Inc.* (2015) 62 Cal. 4th 298, 316 [finding that the federal Organic Foods Act did not preempt the application of California's consumer remedies and unfair competition laws to allegedly false or misleading food labels because "permitting state consumer fraud actions would advance, not impair, the[] goals" of federal law]; *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal. 4th 929 [finding a state law banning the importation or sale of kangaroo products was preempted neither by federal policies under the Endangered Species Act nor by foreign policy interests]; see also *Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra* (9th Cir. 2017) 870 F.3d 1140 [the Ninth Circuit holding that California's

statute banning the sale of products made from force-fed birds was not preempted by federal law regulating poultry products].) This body of opinions makes clear that courts must apply a strong presumption that Congress did not intend to impliedly preempt state or local law, and recognizes the strength and primacy of regulation under general state police powers, as context for examination of federal statutory text and intent.

Not only are these ordinances and general plan provisions valid as a matter of law against preemption challenges regardless of the extent of their regulatory reach, but also, the practical ramifications of a holding that any such ordinance or general plan provision is invalid are significant. As noted above in the context of claims of state law preemption, a preemption finding here would be especially likely to chill state and local land use control laws and policies addressing oil and gas drilling, including some ordinances and policies governing injection wells with a far more modest reach than Measure Z. (*See, e.g.*, Kern County Zoning Ordinance, chapter 19.98, section 050 [requiring that "no well for use as an injection well and no well for the exploration for or development or production of oil, gas, or other hydrocarbon substances may be drilled, and no related accessory equipment, structure, facility or use may be installed" without an approved conditional use permit, in various parts of the County].)

IV. Measure Z Does Not Effect a Facially Unlawful Taking of Property Without Just Compensation.

The trial court was incorrect to find that Respondents maintained a valid facial takings claim, and incorrect to conclude that Measure Z's provisions explicitly requiring the County to implement the policy in a way that will avoid unconstitutional takings were inadequate to ensure the constitutional validity of the measure. A local law or policy that facially provides a mandate to avoid an unconstitutional taking simply cannot effect a facially unconstitutional taking, except—possibly—in extraordinarily rare circumstances not present here, as argued in detail by Appellants. (See ARB at p. 70-74.) Here, where there is a specific procedure designed to implement that mandate, it is especially clear.

Section 6(B) of Measure Z mandates that the County Board of Supervisors "shall not apply" Measure Z in situations where its application would violate California or federal law, including the Constitution. (AR[1]137.) Moreover, Section 6(C) of Measure Z provides a specific process by which aggrieved parties claiming an unconstitutional taking may request an exception to any of the initiative's provisions in cases where the County 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." (*Ibid.*) These provisions require the County to avoid unconstitutional applications of the law, and thus the general plan provisions are necessarily facially valid against any takings claims.

As noted by Appellants, the Court of Appeal found that a substantively identical provision to Section 6(B) in San Mateo was adequate to survive a facial takings claim, compelling the same result here. (See *San Mateo Cty. Coastal Landowners' Ass'n v. County of San Mateo* (1995) 38 Cal. App. 4th 523, 547 [finding no facial taking where the county's adopted measure expressly stated that "'[t]he 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'"].) Moreover, the language of Section 6(C) echoes similar provisions in local government land use ordinances and policies throughout the state. Not only are these provisions adequate to avoid a facial taking, but a determination otherwise would call into question multiple local laws and policies in multiple contexts, raising the specter of facial takings claims overwhelming local governments in contexts where there has been no reason to expect such claims to be valid.

If there is any doubt, courts in other cases have construed similar provisions and have found—as they must—that ordinances or policies that provide an opportunity for a local

government to avoid an unconstitutional taking are facially valid. (See, e.g., *Home Builders Ass'n of N. Cal. v. City of Napa* (2001) 90 Cal. App. 4th 188, 194 [holding that case-by-case waiver application process insulated a land-use ordinance from a facial takings claim].) In *Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal. App. 5th 244, the Court of Appeal relied on the "express statutory directive to not apply the Coastal Act in a way that would infringe constitutional rights," as well as local government land use policy echoing that directive, to conclude the takings claim was not yet ripe:

> Section 30010 provides: "The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the [C]ommission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. . . .
>
> Similarly, policy 5.9.5 of the City's ALUP articulates the following general policy regarding new development: "Ensure the private and public interest in protecting and preserving private property rights under the state and federal Constitutions, the Coastal Act, and local ordinances, such that regulations are not overreaching and no private owner is denied reasonable use of his, her or its property. In accordance with Public Resources Code Section 30010, this Policy is not intended to increase or decrease the rights of any property owner under

> the Constitution of the State of California or of the United States."
>
> Invalidating the policies on BBC's facial challenges before they are applied would deprive the City and Commission the opportunity to apply them in a way that will not result in unconstitutional takings without just compensation, as required by section 30010 and policy 5.9.5.

(*Id.* at 271-72 [alteration in original].)

Section 6(C) of Measure Z, which articulates a specific process for avoiding takings claims in the context of the initiative's application to specific cases, is even more direct and more protective of property owners than the far more general Coastal Act and local land-use law provisions at issue in *Beach & Bluff Conservancy*, which articulated no such process. Here, as in *Beach & Bluff Conservancy*, a finding that Measure Z effects a facial taking would deprive the County of the opportunity to avoid application that would result in an unconstitutional taking without just compensation, despite the fact that Section 6(C) of Measure Z requires such an opportunity. Nor does Measure Z's exception process—again, similar to processes already being applied by many jurisdictions in the context of a host of similar local ordinances and policies—fall short of constitutional requirements, as Appellants persuasively argue. (ARB at p. 74-84.)

CRC also contends that the provision of Section 6(C) that would grant exceptions to the General Plan policy "only to the

minimum extent necessary to avoid . . . a taking" violates constitutional due process protections. (CRC's Respondent's Brief ("CRC RB") at p. 45.) This is plainly wrong. As noted by Appellants, not only is there nothing inappropriate or unlawful about ensuring that a government action does not result in a taking through a narrowly-drawn exception, but also, provisions of this type are common and serve an important purpose. (See, e.g., Vacaville General Plan Policy LU-P5.7(a)(ii) [amendment of Urban Growth Boundary to accommodate landowner available to "allow additional land uses only to the minimum extent necessary to avoid such a taking of the landowner's property"]; City of Healdsburg General Plan LU-2(c)(ii) [same].) Moreover, processes by which elected bodies can grant variances based on similar provisions are also commonplace. (See, e.g., City of Pismo Beach General Plan Policy LU-R-2 [city council approval of development in special planning area, waiving ordinary requirements, requires a finding that "[t]he waiver of standards and/or conditions, or a redesignation of land use as a result of a finding of an unconstitutional taking, allows a waiver, amended use, additional use, or redesignation only to the minimum extent necessary to avoid a taking of a landowner's property"].) The fact that those bodies have discretion in the variance process does not render them arbitrary; rather, that discretion is the essence of such a variance or exception process, and a legal challenge to

purported abuse of that discretion is available when the process is applied to a particular case.

As Appellants persuasively note, "minimum extent necessary" language furthers a core use of the police power—regulating conduct and use of property based on a legitimate governmental interest in protecting public health, welfare, or safety—and ensures that such use of police power respects constitutional protection of property rights. (ARB at p. 82-83.) Constitutional due process requires no more than a rational basis for this type of use of police power. (See, e.g., *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 395 [a zoning ordinance is unconstitutional only if the ordinance's "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"]; *City of Eastlake v. Forest City Enters., Inc.* (1976) 426 U.S. 668, 676 [citing *Village of Euclid* and reaffirming that a zoning restriction is unconstitutional "[i]f the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power"]; *Consol. Rock Prods. Co. v. City of Los Angeles* (1962) 57 Cal. 2d 515, 523 [the California Supreme Court explaining that "whenever we have found that reasonable minds might differ as to the necessity or propriety of particular regulations or classifications, we have bowed to the legislative determination and sustained the regulation."].)

And as Appellants have further noted, the trial court's decision presumes that the Board would act unconstitutionally in exercising its discretion under Section 6(C), which is clear legal error given the required countervailing presumption that the administrative procedure is adequate to address constitutional concerns. (CRC RB at p. 49; Appellants' Appendix[31]7584; *Home Builders Ass'n of N. Cal.*, *supra*, 90 Cal. App. 4th at p. 199 ["When an ordinance contains provisions that allow for administrative relief, [courts] must presume the implementing authorities will exercise their authority in conformity with the Constitution."]; Evid. Code § 664 [courts must presume official duties are lawfully performed].)

A finding that this provision, and the accompanying procedure, violates due process protections may call into question numerous variance and exception provisions in similar contexts—and may even invite challenges to a host of other unrelated exercises of police power that are subject to variance and exception procedures.

More broadly, a holding that an ordinance such as Measure Z—with its specific, articulated procedure for ensuring avoidance of takings—plainly falls within a range of valid state and local police power-based land use controls on which local governments and state agencies rely.

V. Conclusion

The trial court's decision undermines California cities' and counties' broad and well-established authority to govern land use for the general welfare under its police powers in the context of regulation of fossil fuel extraction. If the Court of Appeal does not strongly reject both the preemption and takings claims here, cities and counties will face substantial and unprecedented burdens on their ability to protect health and safety under their police powers. For all the foregoing reasons, amici urge the Court of Appeal to reverse the trial court's decision and provide guidance to the lower courts on these important issues.

Dated: August 9, 2019

By: /s/ Sean B. Hecht

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CERTIFICATE OF COMPLIANCE

(California Rules of Court 8.204(c)(1))

I hereby certify, pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of a*mici curiae* League of California Cities and California State Association of Counties contains 8,294 words, not including tables of contents and authorities, the signature block, and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: August 9, 2019

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PROOF OF SERVICE

CHEVRON U.S.A., INC., ET AL,. Plaintiffs and Cross-Appellants, vs. COUNTY OF MONTEREY, ET AL. Defendants and Cross-Respondents; PROTECT MONTEREY COUNTY and DR. LAURA SOLORIO, Intervenors, Appellants, and Cross-Respondents.

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to the within action; my business address is 405 Hilgard Avenue, Los Angeles, California 90095. On August 9, 2019, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS; PROPOSED BRIEF OF LEAGUE OF CALIFORNIA CITIES & CALIFORNIA ASSOCIATION OF COUNTIES

on the parties in this action as follows:

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Executed on August 9, 2019, at Los Angeles, California.

/s/ Sean B. Hecht

Sean B. Hecht

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