Preemption's Climate Action Gap: How *Chevron U.S.A. Inc. v. County of Monterey* Perpetuates Big Oil Capture in California

Lilia Alameida

CONTENTS

Preemption's Climate Action Gap: How *Chevron U.S.A. Inc. v. County of Monterey* Perpetuates Big Oil Capture in California

Lilia Alameida[*]

The oil and gas industry has argued that the use of unconventional extraction methods, such as fracking, is one way to reduce emissions, combat climate change, and bolster national security through energy independence. While fracking increases extraction output, modern research suggests that fracking increases the risk of earthquakes, water contamination, and disastrous spills. These risks deserve special attention in California, which is particularly susceptible to water scarcity and increased seismic activity.

In light of these concerns, the California state legislature enacted multiple amendments to the mandate of the California Geologic Energy Management Division (CalGEM), including the ambitious goal of reaching net-zero emissions by 2045. However, according to recent data, CalGEM's enforcement efforts have not advanced emissions targets—unless California triples its greenhouse gas reduction rate, it will fail to reach net-zero by 2045.

This Note identifies the pervasive influence of regulatory, legislative, and executive capture by Big Oil as a primary obstacle to California's climate progress and argues that the California Supreme Court's holding in Chevron U.S.A. Inc. v. County of Monterey *will only perpetuate Big Oil capture. Big Oil wields its influence by lobbying for favorable agency oversight and through campaign donations granted in exchange for industry-friendly votes. Consequently, Big Oil capture has produced a climate action gap, forcing locals to take action in the absence of judicial or genuine legislative intervention.* Chevron*'s reasoning frustrates California's climate progress as it effectively ratifies CalGEM's extraction-heavy focus, rendering CalGEM's concurrent environmental directive superfluous. Ultimately,* Chevron *degrades political accountability and the countervailing force of citizen plaintiffs, exacerbating the climate action gap by vitiating an important check on state power and discouraging local innovation.*

---

* Lilia Alameida is a third-year law student at Chapman University Dale E. Fowler School of Law. She extends her heartfelt gratitude to Professor Lan Cao for her invaluable guidance during the writing process and her unwavering support and encouragement over the past three years. She would also like to thank her Papa for his unyielding devotion to his grandchildren and for inspiring her to pursue a career in law. To her friends, she thanks them for the precious memories and for making law school enjoyable. She thanks her partner for his steadfast love and support and for always encouraging her to be better and do better. Finally, to her parents: she cannot thank them enough for their unconditional love, as well as their commitment to her education—all that she is, or hopes to be, she owes to them.

I. INTRODUCTION

We are in a new environmental era. According to a 2017 U.S. Climate Science Special Report, by the twenty-second century, the global temperature will rise by five to ten degrees Fahrenheit should the yearly emissions rate continue to increase as it has since 2000.[1] Since the turn of the twentieth century, hydraulic fracturing (fracking) has generated controversy due to its negative externalities such as methane leaks, air pollution, water contamination, and increased seismic activity.[2] The oil and gas industry has argued that the use of unconventional extraction methods such as fracking is one way to reduce emissions, combat climate change, and bolster national security through energy independence.[3] Environmental advocates have criticized this position as a mere "half-truth" because methane—the greenhouse gas most commonly associated with fracking—is a super pollutant eighty-six times more powerful than carbon dioxide at warming the climate over a twenty-year period.[4]

In 2000, fracking accounted for just two percent of U.S. oil production, but by 2015, fracking produced fifty percent of the country's oil supply and more than half of its natural gas.[5] The recent expansion of fracking is primarily due to rapid economic and population growth, which has increased demand for oil and gas.[6] The traditional drilling approach involves purely vertical drilling, which makes it difficult to maximize extraction when a

---

1 *See* Rebecca Lindsey & Luann Dahlman, *Climate Change: Global Temperature*, CLIMATE.GOV (Jan. 18, 2024), https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature [https://perma.cc/94Z3-ERS5].

2 For a further description, see *infra* Section II.B.

3 For a further description, see *infra* Section II.A; *see also* Thomas W. Merrill, *Four Questions About Fracking*, 63 CASE W. RSRV. L. REV. 971, 991 (2013) (explaining that "[t]he most important contributor" to America's declining carbon dioxide levels is "the big shift in power generation from coal to natural gas" because "[p]ower plants that run on natural gas emit about 50 percent of the greenhouse gasses emitted by plants generated by coal").

4 *See* Ava Tomasula y García, *How Fracking's Methane Leaks Aggravate Climate Change*, AIDA (Feb. 14, 2019), https://aida-americas.org/en/blog/how-fracking-s-methane-leaks-aggravate-climate-change [https://perma.cc/9WJE-3HZ9].

5 *See* Matt Egan, *Oil Milestone: Fracking Fuels Half of U.S. Output*, CNN BUSINESS (Mar. 24, 2016, 12:40 PM), http://money.cnn.com/2016/03/24/investing/fracking-shale-oil-boom/ [https://perma.cc/XGL3-XWA8]; *see also* Marcelo Prince & Carlos A. Tovar, *How Much U.S. Oil and Gas Comes from Fracking?*, WALL ST. J., https://www.wsj.com/articles/how-much-u-s-oil-and-gas-comes-from-fracking-1427915636 [https://perma.cc/NHB7-R8KZ] (Apr. 1, 2015, 6:53 PM).

6 *See Fracking Chemicals and Fluids Market Size, Share & Trends Analysis Report*, GRAND VIEW RSCH., https://www.grandviewresearch.com/industry-analysis/fracking-chemicals-fluid-market [https://perma.cc/GZK4-RT5P] (last visited Nov. 19, 2024).

reserve extends horizontally.[7] This deficiency, along with the decreasing availability of conventional, vertically-accessible reserves, propelled the expansion of non-traditional, well-stimulation treatment methods (WSTs) like fracking.[8]

Fracking is a technique used to increase the yield of unconventional oil, defined as natural gas or oil trapped in tight, impermeable rock formations such as shale.[9] "In shale formations, organic matter in the soil generates gas molecules that absorb onto the matrix of the rock. Over time, tectonic and hydraulic stresses fracture the rock, and natural gas (e.g., methane) migrates to fill the fractures or pockets."[10] The fracking process involves blasting large amounts of fracking fluid (or frac fluid) into the well's pipe-casings at pressures high enough to crack the rock and propel the fossil fuels to the surface for extraction.[11] The frac fluid used in this process requires copious amounts of essential resources, such as water, and the method as a whole runs the risk of causing earthquakes, water contamination, and disastrous spills.[12] When such risks manifest, oil and gas companies often find shelter in the warm embrace of

---

7 *See* ETHAN N. ELKIND & TED LAMM, LEGAL GROUNDS: LAW AND POLICY OPTIONS TO FACILITATE A PHASE-OUT OF FOSSIL FUEL PRODUCTION IN CALIFORNIA 16, 28 (2020). Under the traditional production approach, the developer uses a drill string (a steel column with a drill bit and pipe that delivers fluids) to drill the well to 5,000 feet for crude oil and 6,500 feet for natural gas. *See id.* at 4. A mixture of water, clay, and chemicals maintains the pressure while drilling, after which a steel pipe well casing with cement is inserted into the well to seal it and provide structural support. *See id.* The well casing is then perforated to allow the hydrocarbons to rise to the wellhead. *See id.* A series of valves (sometimes referred to as a "Christmas tree") or a pump jack (appearing like a horse head going up and down) is placed at the surface to control pressure and pump fluids to the surface if there's insufficient reservoir pressure. *See id.* Well operators are permitted to employ underground injections to enhance oil recovery, maintain pressure, prevent land caving, and dispose of wastewater. *See id.*

8 *See* Melissa Denchak, *Fracking 101*, NRDC (Apr. 19, 2019), https://www.nrdc.org/stories/fracking-101 [https://perma.cc/ZU8K-SHAX]. Non-traditional methods, such as WSTs, include fracking, acid injection, and explosives. *See* ELKIND & LAMM, *supra* note 7, at 4. Fracking involves injecting additional water, chemicals, and other materials into the ground to produce hydrocarbons trapped in rock formations that are hard to access by drilling alone. *See id.* The oil's viscosity is reduced by converting significant amounts of water into steam and injecting it into the ground, making it easier to produce. *See id.* Despite the fact that the injection technique generates nearly 50% more emissions than traditional methods, more than 40% of California's oil production is produced by way of well stimulation injection treatments because it requires substantial energy consumption in order to heat the water into steam and refine the heavy oil it produces. *See id.*

9 *See* Denchak, *supra* note 8.

10 Robinson Twp. v. Commonwealth, 83 A.3d 901, 914 (Pa. 2013).

11 *See* Denchak, *supra* note 8.

12 *See infra* Section II.B.

the United States' market-driven legal scheme, utilizing confidential business information laws to withhold disclosure of the hundreds of chemical additives in their frac fluid.[13]

While some states take a proactive, cautionary approach to fracking and permit local restrictions or prohibit the method altogether, others practice a reactive, development-first approach and respond to risks by amending regulations.[14] Despite California's proclaimed status as the "global leader on climate change," the state's fracking regulations have largely followed the reactive, development-first approach, giving rise to tensions between environmental health and degradation on one hand and state overreach and local governance on the other.[15] In California, the emergence of these tensions stems from (1) the proliferation of "non-traditional" oil and gas WSTs, such as fracking; (2) the state's strong interest in fracking arising from its status as the nation's seventh-largest oil producer; (3) an outdated state statutory scheme that inhibits environmentally conscious action at the local level; and (4) the pervasive influence of "Big Oil"[16] capture.

In 1915, the California state legislature created the California Geologic Energy Management Division (CalGEM) for the purpose of "ensur[ing] the safe development and recovery of energy resources."[17] Division 3 of California's Public Resources Code, which this Note will refer to as the California Oil and Gas Act (COGA), was enacted in 1939 and codified CalGEM's responsibilities and powers, establishing a state regulatory framework for the oil and gas industry.[18] The COGA grants local

---

13 *But see* CAL. HEALTH & SAFETY CODE §§ 38532–38533 (West 2024). California's SB 4 includes (arguably) one of the toughest disclosure provisions in the nation and will be discussed more in the following sections of this Note. *See infra* discussion Section III.C.

14 *See* David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 434–35 (2013).

15 *Getting Started with Climate Resilience*, CAL. GOVERNOR'S OFF. OF LAND USE & CLIMATE INNOVATION, https://opr.ca.gov/climate [https://perma.cc/GR4R-ZA3S] (last visited Nov. 19, 2024).

16 *See generally* Naomi Oreskes & Jeff Nesbit, *How 'Big Oil' Works the System and Keeps Winning*, YALE CLIMATE CONNECTIONS (Dec. 10, 2021), https://yaleclimateconnections.org/2021/12/how-big-oil-works-the-system-and-keeps-winning/ [https://perma.cc/TC4N-5Y3N] (providing a brief history of major oil companies and their continued dominance in the energy sector despite the growing calls to stop climate change).

17 *Oil and Gas*, CAL. DEP'T OF CONSERVATION, https://www.conservation.ca.gov/calgem/Pages/Oil-and-Gas.aspx [https://perma.cc/TLZ5-PFZ7] (last visited Nov. 19, 2024).

18 *See id.*; *see also* CAL. PUB. RES. CODE §§ 3000–3473 (West 2024).

governments the authority to regulate the *location* of gas and oil operations, reserving to the State, through CalGEM, the concurrent authority to promulgate technical standards and to permit operations and extraction *methods*.[19]

The evolution of CalGEM's mandate generally reflects a shift from prioritizing recovery to incorporating environmental considerations and local concerns.[20] For most of the twenty-first century, CalGEM has operated under a dual mandate of maximizing recovery and preventing harm to public health and the environment, although the agency has unduly prioritized extraction to the detriment of environmentalism.[21]

CalGEM's disregard for its environmental mandate directly contradicts California's legislative history, which clearly indicates that CalGEM must give adequate consideration to public health and environmental concerns.[22] In 2013, the California legislature enacted Senate Bill 4 (SB 4) to "enhance environmental protection around WST/fracking" and respond to the increasingly prevalent use of fracking, the lack of scientific data on the practice, and growing public concern regarding government and industry transparency and accountability.[23] Among other provisions, SB 4 requires companies to disclose the chemical composition of their frac fluid on a public website and establishes a separate set of regulatory and permitting requirements for oil production by way of WSTs and fracking.[24]

---

19 *See* Application for Leave to File Amici Curiae Brief in Support of Appellants; Proposed Brief of League of Cal. Cities & Cal. State Ass'n of Cntys. at 30, Chevron U.S.A., Inc. v. County of Monterey, 532 P.3d 1120 (Cal. 2023) (No. H045791).

20 *See infra* Section III.B.

21 *See* PUB. RES. § 3106.

22 *See id.* § 3002 (showing that AB 1057 amended "Division" to refer to the California Geologic Energy Management Division in the California Department of Conservation); *see also id.* § 3108.5 (explaining that the new purposes of the laws include "protecting public health and safety and environmental quality . . . in a manner that meets the energy needs of the state"); CAL. HEALTH & SAFETY CODE § 38562.2(C)(1) (West 2024).

23 *See* ELKIND & LAMM, *supra* note 7, at 17.

24 *See infra* Section III.C; *see also* ELKIND & LAMM, *supra* note 7, at 16 (noting that the WST injection method generates nearly fifty percent more emissions than traditional methods); Janet Wilson, *Are California Oil Companies Complying with the Law? Even Regulators Often Don't Know.*, PROPUBLICA (Mar. 22, 2021, 6:00 AM), https://www.propublica.org/article/are-california-oil-companies-complying-with-the-law-even-regulators-often-dont-know [https://perma.cc/3G3P-WUYV] (explaining that SB 4 has done little to slow WST approvals despite being advertised as one of the most stringent disclosure laws in the nation). CalGEM has struggled to establish a centralized public database, resulting in a waste of tens of millions of taxpayer dollars while Texas was able to establish a centralized database at a budget of $105,000. *Id.* CalGEM failed to

Enacted in 2013, Sections 3160(n) and 3161(b)(3)(C) (WST Sections) permit local entities to conduct their own environmental review of an oil well operator's use of WST methods. The enactment of the WST sections suggests that the legislature identified the expansion of local oil and gas regulatory authority as a means of enabling efficient responses to localized environmental issues.[25]

Other ancillary state acts further support this interpretation of the WST Sections. In November 2019, following multiple high-profile spill events, the California Department of Conservation (CalGEM's parent agency) announced a temporary moratorium on approvals of new high-pressure steam injection wells in addition to a WST and fracking permit review and public health regulatory review. Assembly Bill 1057 (AB 1057), enacted in 2020, clarified that CalGEM is responsible for "protecting public health and safety and environmental quality."[26] In 2021, Governor Gavin Newsom issued an executive order directing CalGEM to "initiate regulatory action" and phase out the issuance of new hydrofracking permits by January 2024.[27] Most notably, California has adopted an ambitious goal of net-zero emissions by 2045.[28]

Despite the increasing flux of pro-environmental policy, CalGEM continues to prioritize recovery by consistently misinterpreting its mandate as "offer[ing] minimal authority to deny permits based on environmental considerations."[29] In 2020,

---

accomplish the same after five years, multiple authorizations for budget requests, and a total estimated project budget of nearly $80 million. *Id.*

25 *See* PUB. RES. §§ 3160(n), 3161(b)(3)(C); *infra* Section III.C.

26 *See* PUB. RES. § 3011.

27 *See Governor Newsom Takes Action to Phase Out Oil Extraction in California*, GOVERNOR GAVIN NEWSOM (Apr. 23, 2021) [hereinafter Newsom Press Release], https://www.gov.ca.gov/2021/04/23/governor-newsom-takes-action-to-phase-out-oil-extraction-in-california/ [https://perma.cc/X9NP-59D3]; *see also* Wilson, *supra* note 24.

28 *See* CAL. HEALTH & SAFETY CODE § 38562.2(c) (West 2024). The provision declares:

> It is the policy of the state to do both of the following: (1) Achieve net zero greenhouse gas emissions as soon as possible, but no later than 2045, and to achieve and maintain net negative greenhouse gas emissions thereafter. This goal is in addition to, and does not replace or supersede, the statewide greenhouse gas emissions reduction targets in Section 38566. (2) Ensure that by 2045, statewide anthropogenic greenhouse gas emissions are reduced to at least 85 percent below the statewide greenhouse gas emissions limit established pursuant to Section 38550.

Id.

29 *See* ELKIND & LAMM, *supra* note 7, at 24; *see also* PUB. RES. § 3106(b) (noting that COGA's WST Sections do not completely foreclose permit denials based on environmental

CalGEM's staff mostly consisted of engineers and geologists engaged in technical assessments of drilling applications, and its planning materials neither credited issues of public health and environmental protection nor "identif[ied] a need for environmental scientists, air or water quality experts, or climate change experts."[30] Since AB 1057 did not clarify exactly *how much* weight CalGEM was expected to give to extraction versus environmentalism, it ultimately failed to correct the agency's disregard for its environmental directive.[31]

Research suggests that the doctrine of regulatory capture may explain why CalGEM has continued to disproportionately focus on extraction to the detriment of environmentalism, even in light of the environmental amendments to its mandate.[32] Regulatory capture occurs when "organized groups successfully act to vindicate their interests through government policy at the expense of the public interest."[33] In California, Big Oil wields its influence through common mechanisms such as lobbying and campaign donations in exchange for favorable agency oversight or votes opposing environmental policies that would restrict oil and gas development.[34]

Over the past decade, multiple CalGEM supervisors have been terminated due to impermissible personal investments in oil and gas companies, and the agency has consistently failed to enforce noncompliance measures against violators.[35] As a result of CalGEM's susceptibility to capture, the agency's "cooperative enforcement" may be toeing the line of collusion.[36] According to recent data, CalGEM's enforcement efforts have not advanced emissions targets—unless California *triples* its greenhouse gas reduction rate, the state will fail to reach net zero by 2030.[37] Big Oil lobbying efforts have also successfully captured the

considerations, although it requires that supervision of oil operations focus on "increasing the ultimate recovery of underground hydrocarbons").

30 ELKIND & LAMM, *supra* note 7, at 15.

31 *See id.*

32 *See* PUB. RES. § 3106.

33 Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1343 (2013).

34 *See id.* at 1343–44.

35 *See infra* Section VI.C.

36 *See infra* Section VI.C.

37 *See* Alejandro Lazo, *California Isn't on Track to Meet Its Change Mandates - and a New Analysis Says It's Not Even Close*, CALMATTERS (Mar. 14, 2024), https://calmatters.org/environment/climate-change/2024/03/california-climate-change-mandate-analysis/ [https://perma.cc/V8CC-DJWY].

legislature, inducing state policymakers to contradict the wishes of their constituents by blocking environmental bills that the industry believes will decrease production.[38] Today, state legislators on both sides of the aisle continue to receive tens of thousands of dollars in campaign donations from oil and gas special interest groups.[39]

The analysis set forth in this Note suggests that, by degrading agency and legislative oversight, Big Oil capture has produced a climate action gap, forcing locals to take action to remedy or prevent environmental harm in the absence of legislative or judicial intervention.[40] One way environmental advocacy groups and local governments have urged courts to "check" agency and legislative action or inaction is by refraining from preempting local oil and gas ordinances.[41]

In *Chevron U.S.A. Inc. v. County of Monterey*, the California Supreme Court missed a valuable opportunity to curb the pervasive effects of Big Oil capture and draw a stark comparison of California's governing oil and gas regulatory scheme with the state legislature's explicit policy of transitioning away from fossil fuels and achieving carbon neutrality by 2045.[42] In *Chevron*, oil and gas companies brought an action to preempt a Monterey County ordinance called "Measure Z," a voter's initiative comprised of three provisions which, if enacted, would prohibit: (1) wastewater injection (LU-1.22), (2) land uses in support of drilling new wells (LU-1.23), and (3) land uses in support of fracking (LU-1.21).[43]

The *Chevron* court preempted Measure Z's prohibitions on wastewater injection and drilling on the premise that they contradicted COGA by impermissibly attempting to regulate methods.[44] The court did so despite the fact that local authority over zoning and land use issues *such as drilling* has been well settled for decades: "Nearly a century ago . . . the California

---

38 *See infra* Section VI.D.

39 *See supra* Part I.

40 *See* ELKIND & LAMM, *supra* note 7, at 24; *see also* CAL. PUB. RES. CODE § 3106(b) (West 2024).

41 *See infra* Sections VI.A, VI.D.

42 *See* Chevron U.S.A. Inc. v. County of Monterey (*Chevron II*), 532 P.3d 1120, 1125–26 (Cal. 2023); *see also* CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024); Sherwin-Williams Co. v. City of Los Angeles, 844 P.2d 534, 537 (Cal. 1993) (holding that a clear indication of preemptive intent must be established to displace inherent local authority).

43 *See Chevron II*, 532 P.3d at 1125–26; *see also infra* Section V.B.

44 *See id.* at 1127.

Supreme Court acknowledged that local regulation of 'the [location] of oil wells' was properly within the local entity's police power."[45] Thus, to justify preempting LU-1.23, Measure Z's drilling prohibition, the *Chevron* court characterized the ban as an impermissible attempt to regulate production methods, blatantly disregarding Section 3690 of COGA, which expressly recognizes a local government's right to "enact and enforce laws . . . [that] regulat[e] the conduct and location of oil production activities."[46] Although Measure Z's ban on fracking was not at issue due to a lack of standing, COGA's legislative evolution, the broader regulatory authority granted to local governments by the WST Sections, and California's ambitious climate policy of net-zero by 2045 suggests that California courts should exercise extreme restraint before preempting local ordinances that regulate fracking.[47]

In the context of Big Oil capture, the consequences stemming from *Chevron* can hardly be understated. In holding that courts may give the recovery authority controlling weight, *Chevron* renders CalGEM's environmental mandate superfluous, thus perpetuating Big Oil capture by allowing CalGEM to continue to engage in lenient enforcement and ignore environmental factors when deciding whether to issue a permit.[48] Instead of addressing California's muddled, contradictory regulatory scheme, *Chevron* creates greater confusion regarding the scope of state versus local regulatory authority, thereby encouraging environmentally adverse Big Oil litigation and degrading preemption's primary benefit of uniformity.[49]

At the very least, *Chevron* exacerbates state-local tensions and discourages local innovation by discrediting the countervailing force of citizen plaintiffs in favor of preemption.[50] For California's Big Oil-captured policymakers, *Chevron* will serve as a convenient shield against political accountability.[51] By confining local

---

45 Chevron U.S.A., Inc. v. County of Monterey (*Chevron I*), 285 Cal. Rptr. 3d 247, 256–57 (Cal. Ct. App. 2021), *aff'd*, 532 P.3d 1120 (Cal. 2023).

46 *See Chevron II*, 532 P.3d at 1126–27, 1126 n.6; *see also* CAL. PUB. RES. CODE §§ 3690, 3160(n), 3161(b)(3)(C) (West 2024); City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 300 P.3d 494, 496 (Cal. 2013) ("[P]reemption by state law is not lightly presumed.").

47 *See infra* Section V.C.iii.

48 *See infra* Part VII.

49 *See infra* Section V.C.iii.

50 *See infra* Part VII.

51 *See infra* Part VI.

environmentalists to grassroots-level activism and leaving them without any enforcement authority that is genuinely incentivized to prioritize environmental considerations, *Chevron* enables lawmakers to continue parading purely performative legislation.

Part II of this Note examines the process of fracking and its rapid proliferation in the United States in the latter half of the twentieth century. Part II also compares the benefits and risks associated with fracking, including its environmental and socioeconomic impacts, and recounts the ongoing public debate regarding the method's overall utility.

Part III examines California's current oil and gas regulatory scheme and climate policy. It describes the legislative evolution of CalGEM's mandate and notes that it has been amended so as to signal that CalGEM must reorient its extraction-heavy focus to regulate oil and gas development in the interest of public health and environmentalism. It further explains that, contrary to CalGEM's partiality toward Big Oil, an environment-first interpretation is more consistent with California's twenty-first century climate policy, most notably the state's desire to phase out fracking in favor of clean energy.[52]

Part IV addresses preemption: the issue that most often arises when local governments enact environmentally focused ordinances that prohibit or restrict certain extraction activities in an effort to fill the climate action gap produced by capture.[53] Part IV provides a general background on the preemption doctrine, as well as a more focused background on preemption in California.[54] It offers a brief introduction to the concept of charter cities and notes that both the legislature and the courts have historically deferred to local judgment with respect to municipal affairs.[55] Lastly, Part IV compares the risks and benefits associated with preemption.[56]

Part V examines the reasoning behind *Chevron*'s holding and considers whether it contradicts legislative intent and California's common-law preemption doctrine.[57] Part V then analyzes the preemption of oil and gas ordinances in Pennsylvania and Colorado, explaining that both states have generally lagged behind California in recognizing local regulatory

52 *See infra* Part III.
53 *See infra* Part IV.
54 *See infra* Sections IV.A–B.
55 *See infra* Section IV.A.
56 *See infra* Section IV.C.
57 *See infra* Part V.

authority, even over pure zoning issues.[58] It notes that, unlike California, neither Pennsylvania nor Colorado has a climate policy that requires such a significant reduction in fossil fuel production.[59] It further explains that, until the twenty-first century, Pennsylvania and Colorado's regulatory schemes precluded consideration of environmental risks. Part V then examines a preemption case in each respective state and the legislative evolution of their regulatory mandates, contrasting these findings with *Chevron* to highlight the irrationality of the California Supreme Court's holding. Part V concludes that *Chevron*'s logic has multiple holes, resulting, in part, from the court's failure to adequately consider the evolution of CalGEM's mandate and the legislature's intent to grant local governments at least partial regulatory authority over WST methods.[60] Finally, Part V explains why *Chevron* may mark the emergence of "hyper preemption" in California, and notes how routine preemption of local environmental ordinances will widen the climate action gap.[61]

Part VI applies the analysis developed in Parts I through V to the Doctrine of Capture to explain why *Chevron* should have been decided differently.[62] It reveals that agency capture has produced a lack of agency oversight and enforcement, and it observes that legislative and executive capture has precluded corrective action at the state level.[63] This Note concludes by suggesting that, unless the California Supreme Court corrects course, *Chevron* will perpetuate Big Oil capture and exacerbate the climate action gap by degrading political accountability and the "countervailing force of citizen plaintiffs," thereby discouraging local innovation.[64]

II. FRACKING

The twenty-first century has been marked by the expansion of fracking. California has a significant interest in permitting fracking operations. Spread over areas of southern and central California, the Monterey Shale oil play "compris[es] two-thirds of

58 *See infra* Section V.C.
59 *See infra* Section V.C.
60 *See infra* Section V.C.
61 *See infra* Section V.C.
62 *See infra* Part VI.
63 *See infra* Part VI.
64 *See infra* Part VI.

the United States's total estimated shale oil reserves and cover[s] 1,750 square miles."[65]

A. Benefits

The primary benefit of fracking is economic. Citizens are most likely to recognize these benefits at the gas pump. The explanation is one of simple economics: supply and demand. Fracking reduces consumer costs by increasing the domestic oil and gas supply.[66] For the federal government, fracking strengthens national security by fostering energy independence.[67] By bolstering the domestic oil and gas supply, the United States can reduce reliance on foreign resources, especially in regards to oil-rich countries that may be hostile toward American policies, such as Saudi Arabia.[68]

B. Consequences

i. Environmental Impacts

Since fracking increases access to previously inaccessible reserves, it also enables well operators to "increasingly encroach upon densely populated urban and suburban areas."[69] In the 2000s, contaminated water and gas leak incidents linked to fracking led to public uproar.[70] In the 2010 film *Gasland*, American citizens recounted how the exposure to methane and other toxic chemicals in their water supply was so extreme that they could light their tap water on fire.[71] A study by the Food and Water Watch noted that "[a]cross the country – from Wyoming to

---

65 Norimitsu Onishi, *Vast Oil Reserve May Now Be Within Reach, and Battle Heats Up*, N.Y. TIMES (Feb. 3, 2013), https://www.nytimes.com/2013/02/04/us/vast-oil-reserve-may-now-be-within-reach-and-battle-heats-up.html [https://perma.cc/VH4U-AQ8M].

66 *See* Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145, 158–59 (2013).

67 *See* Phillip M. Bender, *California Creates New Regulatory Regime for "Fracking,"* ABA SECTION ENV'T, ENERGY & RES.: TRENDS, Nov.–Dec. 2013, at 13–14, 17.

68 *See* Merrill & Schizer, *supra* note 66, at 161–63; *see also Oil and Petroleum Products Explained: Oil Imports and Exports*, U.S. ENERGY. INFO. ADMIN., https://www.eia.gov/energyexplained/oil-and-petroleum-products/imports-and-exports.php [https://perma.cc/69MQ-9YLG] (last visited Dec. 14, 2024).

69 Jade Wolansky, *Quiet Suffocation: California Oil and Gas Production near Communities of Color Is a Public Health Crisis*, 52 U. PAC. L. REV. 387, 389 n.9 (2021).

70 *See* Rachel A. Kitze, *Moving Past Preemption: Enhancing the Power of Local Governments over Hydraulic Fracturing*, 98 MINN. L. REV. 385, 389 (2013).

71 *See id.*

Texas to Pennsylvania – fracking has polluted essential drinking water sources," with some residents forced to truck in water.[72]

In 2016, the U.S. Environmental Protection Agency finally acknowledged that fracking contaminates water, correcting an earlier report that found "no evidence that fracking systematically contaminates water."[73] The EPA report conceded:

> [There is] evidence that fracking has contributed to drinking water contamination in *all* stages of the process: acquiring water to be used for fracking, mixing the water with chemical additives to make fracking fluids, injecting the chemical fluids underground, collecting the wastewater that flows out of fracking wells after injections, and storing the used wastewater.[74]

In 2015, the EPA estimated that approximately 100 to 3,700 fracking fluid spills occur every year.[75]

Since fracking significantly contributes to atmospheric methane, natural gas leaks also present a risk to public health and emissions goals.[76] Although fracking proponents argue the method is less harmful than coal mining, methane leaks from oil and gas extraction make fracking's environmental impact worse than that of coal.[77] This is because methane is "a superpollutant 87 times more powerful than CO2 at warming the climate over a 20-year period."[78] Thus, once the methane leakage rate exceeds 2.4%, any climate benefits that fracking achieves are effectively negated.[79]

---

72 Romain Coetmellec, *9 Ways Fracking Is the Worst – Climate Change Is Top of the List*, FOOD & WATER WATCH, https://www.foodandwaterwatch.org/2021/10/15/9-ways-fracking-is-the-worst-climate-change-is-top-of-the-list/ [https://perma.cc/AN3C-7W3V] (Mar. 31, 2023) (explaining that the pollutant produced by natural gas, methane, traps eighty-six times more heat than carbon dioxide, so although fracking proponents argue the method marks an improvement from reliance on coal, methane leaks from oil and gas extraction likely make the environmental impact of fracking much worse than coal).

73 Coral Davenport, *Reversing Course, E.P.A. Says Fracking Can Contaminate Drinking Water*, N.Y. TIMES (Dec. 13, 2016), https://www.nytimes.com/2016/12/13/us/reversing-course-epa-says-fracking-can-contaminate-drinking-water.html [https://perma.cc/LA36-VFTZ].

74 *Id.* (emphasis added).

75 *See California's Fracking Fluids*, EWG (Aug. 12, 2015), https://www.ewg.org/research/californias-fracking-fluids [https://perma.cc/JXK3-CBZX].

76 *See* Nick Stockton, *Fracking's Problems Go Deeper than Water Pollution*, WIRED (June 18, 2015, 1:28 PM), http://www.wired.com/2015/06/frackings-problems-go-deeper-water-pollution/ [https://perma.cc/Q6P4-WM4E].

77 *See* JOHN FLEMING, KILLER CRUDE: HOW CALIFORNIA PRODUCES SOME OF THE DIRTIEST, MOST DANGEROUS OIL IN THE WORLD 15 (2021), https://www.biologicaldiversity.org/programs/climate_law_institute/pdfs/June-2021-Killer-Crude-Rpt.pdf [https://perma.cc/N383-UWDU].

78 *Id.*

79 *See id.*

Although oil companies estimate leakage to be minimal, independent studies indicate individual leaks often greatly exceed these estimates.[80] Similarly, local research indicates that fossil fuel production in California produces greater environmental harm than coal production.[81] For example, in 2019, San Joaquin Valley recorded a methane leakage rate of 4.8%, far exceeding the 2.4% threshold.[82] A 2015 blow-out of natural gas storage in Aliso Canyon, California, emitted over 109,000 metric tons of methane over a four-month period.[83] The Aliso Viejo leak "effectively doubled the methane emissions of the entire Los Angeles metropolitan area, creating enough pollution to match the annual output of nearly 600,000 cars," or the methane emissions of a medium-sized European Union country.[84] CalGEM's response was criticized as "too little, too late," as it took nearly four months to plug the leak.[85] The delay prolonged the displacement of thousands of residents, who were forced to evacuate due to methane-exposure symptoms such as nausea and headaches.[86] In hindsight, the leak offered credence to concerns regarding the obsolescence and weaknesses of state regulations, and it reignited claims of failed agency oversight by CalGEM.

The potential for groundwater contamination by fracking is especially alarming in the context of California's persistent and severe drought conditions, which have put a strain on the state's

---

80 *See* Benjamin L. McCready, Note, *Like It or Not, You're Fracked: Why State Preemption of Municipal Bans Are Unjustified in the Fracking Context*, 9 DREXEL L. REV. ONLINE 61, 69–70 (2016).

81 *See id.*

82 *See* FLEMING, *supra* note 77, at 16.

83 *See Methane Progress in California*, ENV'T DEF. FUND, https://www.edf.org/climate/methane-progress-california [https://perma.cc/RW83-LY93] (June 3, 2019) (estimating the impact of the methane leaked during the Oct. 23, 2015 through Feb. 11, 2016 Aliso Viejo incident as equivalent to: 9,156,000 metric tons of carbon dioxide released; 1,030,268,900 gallons of gas burned; or 21,545,930 U.S. dollars of natural gas waste); *see also* Sarah Zhang, *California Has a Huge Gas Leak, and Crews Can't Stop It Yet*, WIRED (Dec. 15, 2015, 7:00 AM), http://www.wired.com/2015/12/massive-gas-leak-california/ [https://perma.cc/B7C2-B72N] (discussing a two-month methane leak from a natural gas storage site that has since been fixed).

84 Oliver Milman, *LA Gas Leak: Worst in US History Spewed as Much Pollution as 600,000 Cars*, THE GUARDIAN (Feb. 26, 2016, 12:23 PM), https://www.theguardian.com/environment/2016/feb/26/los-angeles-aliso-canyon-gas-leak-methane-largest-us-history [https://perma.cc/BX5L-5XHU]; *see also Methane Progress in California*, *supra* note 83.

85 *See* Zhang, *supra* note 83.

86 *See id.*

groundwater resources.[87] Importantly, "[g]roundwater is a vital resource in California and accounts for almost 60 percent of [the] State's water supply in drought years."[88] Although California boasts one of the most comprehensive frac fluid disclosure laws in the United States, a study by the Environmental Working Group determined that disclosures continue to reveal that fracking fluids generally contain a myriad of harmful chemicals known to cause cancer, reproductive harm, hormone disruption, and harm to aquatic life, among other consequences.[89]

Increased seismic activity represents another primary danger associated with fracking.[90] To dispose of flowback fluid—frac fluid that returns to the surface after the shale is fractured—operators usually inject it back into an underground formation.[91] The use of underground injection has increased the prevalence of earthquakes in states such as Ohio, Oklahoma, and Arkansas due to the high pressure required to inject the fluid back into the ground.[92] Underground injection also increases the risk of rupture, as was the case in 2006, when injection at illegal pressure limits and a lack of agency oversight led to a major rupture in downtown Los Angeles, forcing over one hundred low-income tenants to evacuate after crude oil waste filled the basement of their apartment building.[93]

---

87 See *Track California Water Conditions*, CALIFORNIA WATER WATCH, https://cww.water.ca.gov/ [https://perma.cc/LMU3-JZX7] (last visited Dec. 14, 2024), for continuing updates on California's water conditions.

88 *See* Kitze, *supra* note 70, at 390 (noting that fracking has particularly significant environmental consequences in the southwestern states, where water scarcity is an issue, because each well uses around five million gallons of water drawn from groundwater sources).

89 *See California's Fracking Fluids*, *supra* note 75. The Environmental Working Group analysis determined that, per mandatory disclosures by California drillers, fracking fluids typically contain chemicals that can be hazardous to human health:

> [These include] 15 listed under California's Proposition 65 as known causes of cancer or reproductive harm . . . 25 likely to contain impurities of Proposition 65-listed chemicals . . . 5 that the European Union has associated with an increased risk of cancer . . . 6 associated with reproductive harm . . . 3 linked to clear evidence of hormone disruption . . . 12 listed under the federal Clean Air Act as Hazardous Air Pollutants known to cause cancer or other harm . . . [and] 93 associated with harm to aquatic life.

See id.

90 *See* Spence, *supra* note 14, at 488.

91 *See* Duke Off. of News & Commc'ns, *New Tracers Can Identify Fracking Fluids in the Environment*, DUKE NICHOLAS SCH. OF THE ENV'T (Oct. 19, 2014), https://nicholas.duke.edu/news/new-tracers-can-identify-fracking-fluids-environment [https://perma.cc/6MQG-U6EL] ("Deep-well injection is the preferable disposal method, but injecting large volumes of wastewater into deep wells can cause earthquakes in sensitive areas.").

92 *See id.*; Spence, *supra* note 14, at 488–89.

93 *See* Wilson, *supra* note 24.

ii. Socioeconomic Impacts

Most scholarship has focused on fracking's environmental rather than socioeconomic impacts.[94] Socioeconomic impacts attempt to show how an activity changes a community's social dynamic and economic status.[95] Fracking can "fundamentally change the character of an area for the duration of fracking activities."[96] This is known as the "boomtown" effect, whereby a state or city experiences "population 'booms' due to a sudden influx of oil and gas workers."[97] During a boom, primarily adult males relocate to these cities to make a quick profit.[98] Often, this leads to overcrowding, tensions between longtime residents and newcomers, and increases in the local crime rate, the cost of living, and social dislocation.[99]

Municipalities have generally attempted to exercise regulatory authority over fracking operations by analogizing them to "nuisances from which they are allowed to protect their citizens."[100] Generally, the construction of fracking facilities requires substantial amounts of activity, including increased truck and heavy machinery traffic.[101] This, in turn, increases noise and air pollution.[102] The aesthetic of the surrounding area also undergoes significant changes following the construction of on-site storage facilities built to capture flowback water.[103]

III. LEGAL BACKGROUND

A. Oil and Gas Regulation

Generally, states retain the authority to regulate oil and gas extraction activities that occur within their boundaries.[104] State and local laws still apply on federal lands and are rarely preempted by federal law.[105] In the event that state law applies

94 *See* Joel Minor, *Local Government Fracking Regulations: A Colorado Case Study*, 33 STAN. ENV'T L.J. 59, 59–60 (2013).

95 *See id.* at 71.

96 Spence, *supra* note 14, at 444.

97 *See* Minor, *supra* note 94, at 72.

98 *See id.* at 79.

99 *See id.* at 79–81, 85–87.

100 *See* James K. Pickle, Note, *Fracking Preemption Litigation*, 6 WASH. & LEE J. ENERGY, CLIMATE, & ENV'T 295, 298 (2014).

101 *See* Spence, *supra* note 14, at 444.

102 *See id.*

103 *See id.*

104 *See* Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61924, 61926 (Dec. 29, 2017) (to be codified at 43 C.F.R. pt. 3160).

105 *Id.*

stricter regulation requirements than federal law, extraction activities that occur on federal lands must meet the state's stricter standard.[106] Across the United States, local governments have taken action to regulate fracking.[107]

B. The California Oil & Gas Act: CalGEM's Contradictory Mandate

In California, CalGEM, an agency within California's Department of Conservation, retains primary responsibility for overseeing state oil and gas operations.[108] Subdivision (b) of the COGA was added in 1961 and requires the state supervisor to, inter alia, oversee "the drilling, operation, maintenance, and abandonment of wells."[109] Essentially, subdivision (b) designates the state supervisor—not local government—responsible for ensuring well owners or operators are permitted to "utilize all methods and practices known to the oil industry *for the purpose of increasing the ultimate recovery of underground hydrocarbons*."[110]

In recognition of the adverse environmental and health impacts produced by oil drilling operations, the California legislature amended subdivision (a) in 1970, expanding the supervisor's role beyond mere maximization of resource extraction so as to encompass "*prevent[ion], as far as possible, [of] damage to life, health, property, and natural resources*."[111] Two years later, the legislature added subdivision (d) to promote the

---

106 *See id.*; *see also* ROBERT L. BRADLEY JR., OIL, GAS, AND GOVERNMENT: THE U.S. EXPERIENCE 133 (1996).

107 *See e.g.*, Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *14 (Colo. Dist. Ct. July 24, 2014) (finding the city's fracking ban was invalid as it was preempted by the Colorado Oil and Gas Conservation Act); Norse Energy Corp. v. Town of Dryden, 964 N.Y.S.2d 714, 724 (N.Y. App. Div. 2013) (stating that the Oil, Gas, and Solution Mining Law "does not preempt, either expressly or impliedly, a municipality's power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders"); State *ex rel.* Morrison v. Beck Energy Corp., 989 N.E.2d 85, 99 (Ohio Ct. App. 2013), *aff'd*, 37 N.E.3d 138 (Ohio 2015) (holding that certain drilling ordinances were in direct conflict with and preempted by state law); Robinson Twp. v. Commonwealth, 83 A.3d 901, 913 (Pa. 2013), *aff'd in part*, *rev'd in part on other grounds*, 147 A.3d 536 (Pa. 2016) (finding that a statute restricting municipalities right to restrict fracking unconstitutional under the Environmental Rights Amendment); Ne. Nat. Energy, LLC v. City of Morgantown, No. 11-C-411, slip op. 6285, at *9 (Cir. Ct. Monongalia Cnty. Aug. 12, 2011) (concluding "that the State's interest in oil and gas development and production" justifies the West Virginia Department of Environmental Protection exclusively controlling this area of the law).

108 *See e.g.*, CAL. PUB. RES. CODE § 3106 (West 2024).

109 *Id.* § 3106(b).

110 *Id.* (emphasis added).

111 *Id.* § 3106(a) (emphasis added).

responsible development of oil and gas resources, for instance, by addressing environmental problems created by drilling and extraction operations.[112] In practice, these amendments have produced contradictory and competing interests: (1) to administer the state's regulations to enhance oil and gas recovery and ensure an adequate state supply of oil and gas (*extraction prong*) and (2) to protect the environment from the harmful consequences of extraction activities (*environmental prong*). The confusion generated by these competing interests has rendered courts more likely to preempt local oil and gas initiatives that prioritize environmentalism over extraction.[113]

C. Senate Bill 4: The WST Sections

The California legislature attempted to address public concern regarding the environmentally risky use of fracking by enacting SB 4, which required CalGEM to create and implement an enhanced permitting and disclosure process for fracking.[114] SB 4 also required disclosure of all chemicals used in the fracking process.[115] Included in SB 4 are two sections of note: Sections

---

112 *See id.* § 3106(d).

113 *See* Justin Hedemark, *Taming the West: Senate Bill 4 and California's Struggle to Regulate Fracking*, 8 GOLDEN GATE U. ENV'T L.J. 119, 128 (2015) (asserting that [CalGEM's] responsibility to maximize hydrocarbon recovery and allow fracking while also protecting "life, health, property, and natural resources" creates seemingly contradictory and competing interests) (quoting PUB. RES. § 3106(a)).

114 *See* PUB. RES. §§ 3160(b)(1)(A), 3160(g), 3160(j). Under SB 4's permitting process, a well owner and operator must apply for a permit with CalGEM prior to commencing WSTs. *See id.* § 3160(d)(1). The permit must include the well number, when stimulation will occur, a water management plan, a list of chemicals used in the stimulation process, the size and direction of the fractures, a groundwater monitoring plan, and an estimated amount of produced waste. *See id.* § 3160(d)(1)(A)–(G). Prior to applying, the well operator is expected to assist CalGEM in completing an Environmental Impact Report and notifying neighbors located near the site of the pending permit. *See id.* § 3160(d)(6)(A).

115 *See id.* §§ 3160(b)(1)(A), 3160(g). The disclosure requirements outlined in SB 4 were intended to grant the public a means of discerning potential WSTs or fracking-related toxic exposure, and further to require CalGEM to post a "full disclosure of the composition and disposition of well stimulation fluids, including, but not limited to, hydraulic fracturing fluids, acid well stimulation fluids, and flowback fluids" on a public website within sixty days of the well's last stimulation treatment. *See id.* § 3160(j)(2). While disclosure is still subject to certain trade secret protections, SB 4 presumes that the identities of chemicals used in frac fluid are unprotected. *See id.* § 3160(j)(1). In California, trade secrets are governed by Section 1060 of the California Evidence Code, the Uniform Trade Secrets Act, and the California Public Records Act. *See id.* § 3160(j)(4)(D). California Public Resources Code Section 3160(j) applies only to frac fluid suppliers and requires disclosure of chemical constituents to CalGEM, even if the supplier claims a trade secret. *See id.* § 3160(j)(3). If the trade secret is invalid, CalGEM must release the information to the public. *See id.* § 3160(j)(7). Then the company may only avoid disclosure by instituting a suit for trade secret status within 60 days and obtaining a court order. *See id.* § 3160(j)(8). If CalGEM is satisfied with the trade secret claim, the agency is

3160 and 3161 (WST Sections).[116] These provisions expanded the scope of local authority by granting local lead agencies shared regulatory authority over WSTs, allowing local agencies to conduct their own environmental assessment of a well operator's use of WST independent of any environmental review conducted by CalGEM.[117]

Local governments have advocated for greater regulations because they believe the legislature is too accommodating to the oil and gas industry to the detriment of environmental and health protections. According to The Citizen Action Network, an environmental organization that initiated the petition process to garner support for a Butte County fracking ban, "the basic position [is] that [local entities] can't rely on federal and state people" or the "la[x] . . . language in SB4."[118] Although scientific studies required by SB 4 proved that stricter regulations are needed to mitigate the negative environmental and public health impacts produced by fracking, local governments have only been successful in advocating for broader authority over the location of extraction, *not* the methods of extraction.[119] Successful advocacy has been limited to extraction location due to the competing interests underlying California's regulatory scheme—*extraction versus environment*.

D. California's Twenty-First Century Climate Policy: Net-Zero by 2045

CalGEM's "Big Oil-friendly" interpretation of the COGA and the ensuing routine preemption of local environmental ordinances directly contradicts California's climate policy—specifically, the state's explicit policy of net-zero emissions by 2045.[120] According to the California Energy Commission, "California is leading the nation toward a 100 percent clean energy future and addressing

---

not required to disclose it. *See id.* § 3160(j)(9)(A). Members of the public may then request disclosure directly from CalGEM, which must thereafter notify the company of their obligation to substantiate their trade secret status in court. *See id.*

116 *See id.* §§ 3160, 3161.

117 *See id.* § 3161(b)(3)(C) ("This paragraph does *not* prohibit a local lead agency from conducting its own EIR.") (emphasis added).

118 *Butte County, California, Fracking Ban Initiative, Measure E (June 2016)*, BALLOTPEDIA, https://ballotpedia.org/Butte_County,_California,_Fracking_Ban_Initiative,_Measure_E_(June_2016) [https://perma.cc/KJK2-UWL4] (last visited Nov. 19, 2024).

119 *See* Wolansky, *supra* note 69, at 390–92.

120 *See Chevron I*, 285 Cal. Rptr. 3d at 252–53; *see also* CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024).

climate change for all."[121] On its face, this statement is true. Compared to other states, "California has been a national leader in regulatory policymaking on issues ranging from forestry management, scenic land protection, air pollution, and coastal zone management to energy efficiency and global climate change."[122] In 1947, California assisted other states and the federal government in research and enforcement efforts pertaining to air quality after becoming the first state to enact an air pollution control statute.[123]

As legislative history supports, in 1972, the California legislature's *purpose* in adding to the text of subdivision (d) was to strengthen CalGEM's role in handling environmental issues.[124] In 2019, the legislature clarified that, under the COGA, CalGEM bears the affirmative duty of "protecting public health and safety and environmental quality."[125] Two years later, Governor Newsom directed CalGEM to "initiate regulatory action" to phase out the issuance of new hydrofracking permits by January 2024.[126] More recently, California Health and Safety Code Section 38562.2(c)(1), enacted in 2023, designates CalGEM as one of the primary agencies responsible for helping California "[a]chieve net zero greenhouse gas emissions as soon as possible, but no later than 2045."[127]

---

121 *Renewable Energy*, CAL. ENERGY COMM'N, https://www.energy.ca.gov/programs-and-topics/topics/renewable-energy [https://perma.cc/9TKK-Y4JA] (last visited Nov. 19, 2024).

122 DAVID VOGEL, CALIFORNIA GREENIN': HOW THE GOLDEN STATE BECAME AN ENVIRONMENTAL LEADER 4 (2018).

123 *See id.* at 4–5.

124 *Chevron I*, 285 Cal. Rptr. 3d at 255 (alteration in original) (quoting Cal. Res. Agency, Enrolled Bill Report, S.B. 1022, 1972 Reg. Sess. (Cal. 1972)); *see also California Announces New Oil and Gas Initiatives*, CAL. DEP'T OF CONSERVATION (Nov. 19, 2019), https://www.conservation.ca.gov/index/Pages/News/California-Establishes-Moratorium-on-High-Pressure-Extraction.aspx [https://perma.cc/85D5-FQES].

125 CAL. PUB. RES. CODE § 3011 (West 2024).

126 Newsom Press Release, *supra* note 27.

127 CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024); *see also Governor Newsom Calls Out Big Oil on Continued Push for Drilling in Neighborhoods*, GOVERNOR GAVIN NEWSOM (Feb. 3, 2023), https://www.gov.ca.gov/2023/02/03/governor-newsom-calls-out-big-oil-on-continued-push-for-drilling-in-neighborhoods/ [https://perma.cc/6YJM-99GC]; *see also* Exec. Order B-55-18 to Achieve Carbon Neutrality (Sept. 10, 2018), https://www.ca.gov/archive/gov39/wp-content/uploads/2018/09/9.10.18-Executive-Order.pdf (discussing California's goal of achieving carbon neutrality by no later than 2045). *But see* CAL. CODE REGS. tit. 14, § 1765.11 (West 2024) ("On [February 3, 2023], the Secretary of State certified that a referendum against Senate Bill 1137 (Gonzalez, Chapter 365, Statutes of 2022) qualified for the November 2024 ballot. Senate Bill 1137 is, therefore, stayed until and unless a majority of voters approve Senate Bill 1137 in the November 2024 general election.").

IV. PREEMPTION

Generally, preemption is one of the biggest obstacles to enacting a local, pro-environmental ordinance that restricts certain oil and gas production activities.[128] Although California's climate policy suggests that preemption should not extend to local ordinances that restrict environmentally risky oil and gas activities, this has not been the case. Instead, California courts have preempted such ordinances, effectively permitting CalGEM to continue ignoring the environmental prong of its mandate.[129] This is alarming in light of the fact that Big Oil continues to exert substantial influence over industry-related regulations.[130] California courts have implicitly ratified CalGEM's misinterpretation of its mandate, giving legislators little to no incentive to forgo the benefits of being on the "good side" of Big Oil. Consequently, California is left to operate under a weak regulatory framework marked by little to no oversight of the environmental factors associated with extraction. This Section (IV) provides an overview of the preemption doctrine to contextualize the argument set forth in Section V, which concludes that routine preemption of local environmental oil and gas ordinances have left locals without any regulatory authority that is *actually* incentivized to consider the environmental impacts of oil and gas production.

A. Levels of Authority

i. Federal

---

128 *See, e.g.*, Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *14 (Colo. Dist. Ct. July 24, 2014) (preempting Longmont's ban on fracking and the storage and disposal of fracking waste under Colorado's Oil and Gas Conservation Act); Range Res.–Appalachia, LLC v. Salem Twp., 964 A.2d 869, 877 (Pa. 2009) (preempting a local ordinance that attempted to regulate surface and land development attendant to oil and gas drilling because it overlapped with state regulations by setting the *methods* of extraction (i.e., permitting procedures) and imposing bonding requirements).

129 *See, e.g.*, Warren E&P, Inc. v. City of Los Angeles, No. 23STCP00060, at *1, *11–15 (Cal. Super. Ct. Sept. 6, 2024) (preempting a City of Los Angeles ordinance prohibiting new drilling, finding that the home rule doctrine did "not save [it] from such preemption").

130 *See* Dan Bacher, *Elk Grove News – Big Oil Pumped $25.4 Million into Lobbying California Officials in 2023*, CONSUMER WATCHDOG (Feb. 26, 2024), https://consumerwatchdog.org/in-the-news/elk-grove-news-big-oil-pumped-25-4-million-into-lobbying-california-officials-in-2023/ [https://perma.cc/KXA3-H2U9] (explaining that in California, Big Oil has exerted its influence and "captured" oil and gas regulations through mechanisms such as, inter alia, lobbying, campaign spending, and the placement of regulatory shills).

Although this Note does not discuss federal preemptive authority, it is important to note that the federal government certainly retains regulatory authority over oil and gas development. The Commerce Clause grants Congress the power to regulate interstate commerce, and the U.S. Supreme Court has broadly interpreted this regulatory authority to include *any* activity that substantially affects interstate commerce.[131] Oil and gas production is an economic activity that substantially affects interstate commerce and is rarely, if ever, conducted purely intrastate, so the federal government retains regulatory authority.[132]

ii. State

Under the Tenth Amendment of the U.S. Constitution, all "powers not delegated to the [federal government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[133] With respect to the exercise of state power over local governments, a state's authority is sometimes further restricted by state constitutions.[134]

iii. Local Authority & California's "Charter Cities"

Article XI, Section 7 of the California Constitution provides 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."[135]

Furthermore, under Article XI, Section 5, subdivision (a), a charter city such as Monterey County "gain[s] exemption, *with respect to its municipal affairs*, from the 'conflict with general laws' restrictions of Article XI, Section 7."[136] Charter cities are considered "supreme and beyond the reach of legislative

131 *See* United States v. Lopez, 514 U.S. 549, 558–64 (1995) (explaining that Congress can regulate an activity under the Commerce Clause if it "substantially affects" interstate commerce); *see also* United States v. Morrison, 529 U.S. 598, 611 (2000) (requiring activities that are regulated under the Commerce Clause to be "some sort of economic endeavor") (citing *Lopez*, 514 U.S. at 559–60).

132 *See* Spence, *supra* note 14, at 436.

133 U.S. CONST. amend. X.

134 *See* Richard Briffault, *Preemption: The Continuing Challenge*, 36 J. LAND USE & ENV'T L. 251, 255 (2021) (discussing Pennsylvania's environmental protection article, which required the invalidation of a state ban on local fracking restrictions).

135 CAL. CONST. art. XI, § 7.

136 Sherwin-Williams Co. v. City of Los Angeles, 844 P.2d 534, 536 n.1 (Cal. 1993) (alteration in original) (quoting Bishop v. City of San Jose, 460 P.2d 137, 140 (Cal. 1969) (en banc)).

enactment" with respect to municipal affairs.[137] The concept of charter cities is more than a century old and reflects "the principle that the municipality itself knew better what it wanted and needed than the state at large."[138]

Grants of municipal charters represent the earlier version of recent "home-rule" statutes, which presume a local government is authorized to act unless such act is explicitly prohibited by state law or charter. The primary benefit of home rule is that it enables localities to adequately address issues that state-level actors consider to be of secondary importance. In practice, it serves a vital role in ensuring local governments are not silenced due to their lack of political bargaining power.

In *California Federal Savings & Loan Ass'n v. City of Los Angeles*, the California Supreme Court established a guide for determining the scope of home-rule authority. First, the local provision at issue must regulate a "municipal affair."[139] In a preceding case, *Ex parte Braun*, the California Supreme Court held that levying taxes to support local expenditures is an example of a municipal affair.[140] Although *Braun* gave rise to confusion regarding the meaning of "municipal affairs,"[141] California courts have routinely noted that this confusion is largely unavoidable, as "the constitutional concept of municipal affairs is not a fixed or static quantity," but rather is assessed based on the specific facts and circumstances of the case.[142] In fact, this confusion may be a *necessary* ingredient of the home-rule doctrine, which has become "a means of adjusting the political relationship between state and local governments in discrete areas of conflict."[143] By granting municipal charters, state governments have, in effect, acknowledged that the state-local power balance is in constant flux and that, in certain areas, the state should make every effort to defer to the judgment of local governments.

---

137 Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles, 812 P.2d 916, 922 (Cal. 1991) (quoting *Ex parte* Braun, 74 P. 780, 786 (Cal. 1903)).

138 State Bldg. & Constr. Trades Council v. City of Vista, 279 P.3d 1022, 1027 (Cal. 2012) (quoting Fragley v. Phelan, 58 P. 923, 925 (Cal. 1899)).

139 *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 917.

140 *Ex parte* Braun, 74 P. 780, 783 (Cal. 1903).

141 *See Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 922.

142 Pac. Tel. & Tel. Co. v. City of San Francisco, 336 P.2d 514, 517 (Cal. 1959).

143 *State Bldg. & Constr. Trades Council*, 279 P.3d at 1028 (quoting *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 926).

Second, the court "must satisfy itself that the case presents an actual conflict between [local and state law]."[144] This is resolved by asking whether the state law addresses a matter of "statewide concern."[145] Whether a matter is one of statewide concern turns "on the meaning and scope of the state law in question and the relevant state constitutional provisions."[146]

Third and finally, the court must resolve whether the law is "'reasonably related to . . . resolution' of that concern and 'narrowly tailored' to avoid unnecessary interference in local governance."[147] In other words, home rule charter cities must still defer to applicable general state laws, even where such laws contradict their charters, if the subject matter of the law is one of statewide concern rather than a purely local concern.[148]

While courts give "great weight to the factual record that the Legislature has compiled" and the factual findings of the trial court, these factors are not controlling, and "[t]he decision . . . is ultimately a legal one."[149] Thus, the judiciary often plays a central role in either upholding or preempting local initiatives. Charter cities have experienced the most success by persuading courts to uphold local provisions that address *purely* local matters, such as public works contracts funded exclusively by city revenues,[150] or the supply of water by a city to its inhabitants.[151] However, other charter cities have been permitted to regulate *even* in areas where state involvement is well settled,

---

144 *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 925.

145 *Id.*

146 *State Bldg. & Constr. Trades Council*, 279 P.3d at 1028; *see also* CAL. CONST. art. 11, § 11; Abbott v. City of Los Angeles, 349 P.2d 974, 979 (Cal. 1960).

147 *State Bldg. & Constr. Trades Council*, 279 P.3d at 1027 (citation omitted) (first quoting *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 925; and then quoting *id.* at 930); *see also* Fiscal v. City of San Francisco, 70 Cal. Rptr. 3d 324, 341 (Cal. Ct. App. 2008) (explaining that a charter city can escape a finding of state preemption by demonstrating its local ordinance relates to a purely municipal affair under the home rule doctrine).

148 *See* Bishop v. City of San Jose, 460 P.2d 137, 140 (Cal. 1969).

> As is made clear in the leading case of Pipoly v. Benson, . . . local governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality.

Id.

149 *State Bldg. & Constr. Trades Council*, 279 P.3d at 1028.

150 *See id.* at 1026–27 (holding that public works contracts funded exclusively by city revenues constitute municipal affairs over which a charter city has paramount power under Article XI, Section 5 of the California Constitution).

151 *See* City of Pasadena v. Charleville, 10 P.2d 745, 746–47 (Cal. 1932) (holding that the supply of water by a city to its inhabitants is understood to be a municipal affair).

as in *Beverley Oil Co. v. City of Los Angeles*, where the California Supreme Court acknowledged charter cities' "unquestioned right to regulate the business of operating oil wells within [their] city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing."[152]

B. General Preemption Doctrines

In *Sherwin-Williams Co. v. City of Los Angeles*, the California Supreme Court listed three general ways in which preemption arises in the state-local context: "if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'"[153] "Local legislation is 'duplicative' of general law when it is coextensive therewith."[154] A local law is "'contradictory' to general law when it is inimical thereto."[155] "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."[156] To determine whether state legislation has expressly or impliedly occupied a given area, the court asks whether:

> (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 municipality.[157]

Should the court find preemption by conflict or by intent to occupy the field, the issue is resolved by examining whether state law, as opposed to local law, predominates in the area of

---

152 Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865, 868 (Cal. 1953) (quoting Pac. Palisades Ass'n v. City of Huntington Beach, 237 P. 538, 539–40 (Cal. 1925)).

153 Sherwin-Williams Co. v. City of Los Angeles, 844 P.2d 534, 536 (Cal. 1993) (quoting Candid Enters., Inc. v. Grossmont Union High Sch. Dist., 705 P.2d 876, 885 (Cal. 1985) (citation omitted)).

154 *Id.* at 537; *see also In re* Portnoy, 131 P.2d 1, 2 (Cal. 1942) (identifying "duplication" where local legislation is intended to enforce the same criminal prohibition as general law).

155 *Sherwin-Williams Co.*, 844 P.2d at 537; *see also Ex parte* Daniels, 192 P. 442, 445–47 (Cal. 1920) (identifying a "contradiction" where local legislation attempts to set a lower maximum speed limit for automobiles than the one established by general law).

156 *Sherwin-Williams Co.*, 844 P.2d at 537 (citations omitted).

157 *In re* Hubbard, 396 P.2d 809, 815 (Cal. 1964) (en banc).

legislation.[158] Typically, the resolution of an implied preemption issue involves the question of whether the state law sets a floor, allowing local governments to add more stringent regulations, or whether it sets a ceiling, prohibiting any further restrictions at the local level.[159] Oil and gas regulations typically set a regulatory ceiling rather than a floor in order "to provide a stable environment for industry to operate," meaning preemption is more likely to occur when the local ordinance establishes stricter standards than those set by the state.[160] However, because local zoning authority is well settled in California and is generally considered a municipal affair, a substantial gray area exists where the local law is both stricter than the state's *and* an exercise of zoning authority.

C. Costs Versus Benefits of Preemption

The primary benefit of preemption is uniformity in the implementation of state policies.[161] The preemption of local regulations that are inconsistent with state goals promotes uniformity by providing industries with a predictable regulatory framework.[162] In regard to fracking, states feel they are better positioned to regulate the activity because they possess greater knowledge of their state's geology and energy needs.[163] Irrespective of this benefit, California's courts have sought to protect local police power by "presum[ing], absent a clear indication of preemptive intent from the Legislature," that preemption does *not* apply to common exercises of local power, such as the enactment of land-use ordinances.[164]

---

158 *Sherwin-Williams Co.*, 844 P.2d at 536.

159 *See* Briffault, *supra* note 134, at 258; *see also* Graco, Inc. v. City of Minneapolis, 937 N.W.2d 756, 761 (Minn. 2020) (holding that a local ordinance which set a higher minimum wage than the state's was not impliedly preempted by conflict as the state law merely set a floor, and therefore "the [two] provisions [were] not irreconcilable"—compliance with the local ordinance did not leave local employers with no other option but to violate the state law); *cf.* City of Corvallis v. Pi Kappa Phi, 428 P.3d 905, 912 (Or. Ct. App. 2018) (explaining that state law set a ceiling by imposing a knowing prerequisite for liability, thus preempting stricter local law that created a strict liability offense).

160 Kitze, *supra* note 70, at 394; *see also* Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENV'T L. REV. 237, 242 (2000).

161 Weiland, *supra* note 160, at 242–43.

162 *Id.*

163 Pickle, *supra* note 100, at 298; *see also* Jason Schumacher & Jennifer Morrissey, *The Legal Landscape of "Fracking": The Oil and Gas Industry's Game-Changing Technique Is Its Biggest Hurdle*, 17 TEX. REV. L. & POL. 239, 260 (2013).

164 Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 840 (Cal. 2006) (Moreno, J., dissenting).

Generally, state-local preemption has the potential to produce a myriad of negative consequences. First, preemption often overlooks local attempts to address a real and urgent problem, as well as the unique knowledge that supports such attempts. Proponents of greater local control argue that when a state grants municipal charters or home rule authority, such authority encompasses the power to adopt local fracking ordinances because "fracking is an issue of local concern [due to] its potential negative effects on local communities."[165] By preempting local ordinances without addressing underlying local concerns regarding fracking's environmental impact, courts leave locals disillusioned and with little to no political capital, further stymieing California's climate progress.

Second, preemption devalues the wisdom of federalism and threatens California's status as a global leader in climate and clean energy.[166] Under the United States' federalist system of government, states retain the capacity to influence policy at the national level.[167] As stated by Justice Louis Brandeis: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[168] California's "ability to remain the most important source of environmental policy innovation in the United States over so many decades and across such a diverse range of policy areas is a significant accomplishment."[169] Scholarship suggests that California's recent climate policy "could form the latest chapter of the 'California effect'—a phenomenon that occurs when laws and regulations passed by California ripple outward, spreading to other states

---

165 Pickle, *supra* note 100, at 300; *see also* Jesse J. Richardson, Jr., *Local Regulation of Hydraulic Fracturing*, 117 W. VA. L. REV. 593, 598–99 (2014). The Richardson article offers a list of the local impacts of fracking that give municipalities cause for concern, including "'noise, light and other visual impacts,' road damage, blasting, dust and traffic," as well as odors, "potential groundwater contamination, methane emissions, habitat fragmentation, and 'degradation of environmentally sensitive areas.'" *Id.* (citation omitted). Socioeconomic concerns include "compatibility of the activity to nearby property uses, the impact of the activity on property values in the area, 'adequate off-site infrastructure, services [such as police and fire protection], affordable housing, and . . . the [general] health and safety of the community.'" *Id.* at 598 (alterations in original) (citation omitted).

166 VOGEL, *supra* note 122, at 7.

167 *See id.*

168 New State Ice Co. v. Liebmann, 285 U.S. 262, 281 (1932) (Brandeis, J., dissenting).

169 VOGEL, *supra* note 122, at 6.

and beyond."[170] Preemption directly contradicts the California effect by discouraging innovative experimentation at the local level, thereby eliminating potential creative solutions to environmental issues.[171]

Third, preemption increases the strain on state administrative and judicial resources by generating a considerable amount of litigation. Beyond California, courts in West Virginia, Pennsylvania, New York, Ohio, and Colorado have been consistently asked to determine whether state regulations preempt local fracking ordinances.[172]

V. PREEMPTION'S CLIMATE ACTION GAP: *CHEVRON U.S.A. INC. V. COUNTY OF MONTEREY*

A. Preemption of Local Oil & Gas Regulations in California: The COGA & WST Sections

The COGA & the WST Sections establish California's oil and gas regulatory scheme.[173] Under the COGA's division of authority, local governments have authority to regulate the *location* of oil and gas operations, while the state retains concurrent authority to regulate the *methods* of oil and gas operations.[174] The California Supreme Court reaffirmed this standard in *Chevron U.S.A. Inc. v. County of Monterey*, holding that the COGA grants the state the authority to regulate the "manner" of oil and gas production *to the exclusion of* municipal regulations.[175]

In *Chevron*, the California Supreme Court considered whether the COGA preempted "Measure Z," a Monterey County ballot initiative enacted to address the environmental effects of

---

170 MATTHEW H. AHRENS, ALLAN T. MARKS & ALLISON SLOTO, THE CALIFORNIA EFFECT: VISIONARY CLIMATE DISCLOSURE LAWS WILL HAVE FAR-REACHING IMPACT 1 (2023), https://www.milbank.com/a/web/tu9QCEzJJUaeBGAvsByF4K/8nwQAL/environmental-client-alert-october-2023-ca-climate-discourse-lawsx2.pdf [https://perma.cc/F7BP-YNMB].

171 *See* Kitze, *supra* note 70, at 395.

> Communities often lead the country on environmental issues when they are able to experiment with approaches to land use and the protection of natural resources. Even more broadly, local governments have carefully guarded their right to determine what kind of communities they will live in and how their land is used. Preemption inhibits the ability of local communities to create and fulfill their own unique visions of how they will live.

Id.

172 *See supra* notes 128–129 and accompanying text.

173 *See* CAL. PUB. RES. CODE § 3106(a) (West 2024).

174 *See id.*

175 *Chevron II*, 532 P.3d at 1123.

oil and gas production.[176] Ultimately, the *Chevron* court found that Measure Z's prohibitions on land uses in support of wastewater injection and the drilling of new wells were preempted by state law, but it failed to consider whether the prohibition on fracking was preempted due to a lack of standing.[177]

i. Justiciability: Standing & Ripeness

The concept of justiciability stems from the common law principle that courts should only decide *actual* controversies.[178] Essential to a determination of justiciability are the closely related doctrines of standing and ripeness.[179] Ripeness refers to the adequacy of the factual record and asks whether the court has enough information to "permit an intelligent and useful decision."[180] An unripe case is one in which the parties seek a judicial determination of a question of law despite the lack of an actual dispute or controversy.[181] In deciding whether a claim is ripe, courts evaluate both (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration."[182] In the context of a request for declaratory or injunctive relief, standing and ripeness overlap, requiring a petitioner to show a "very significant possibility of future harm."[183] Past injury is insufficient.[184] However, California's

176 For more information on Measure Z, see *Measure Z*, PROTECT MONTEREY CNTY., https://protectmontereycounty.org/measure-z/ [https://perma.cc/8EAF-E2K8] (last visited Oct. 31, 2024).

177 *Chevron II*, 532 P.3d at 1123.

178 *See, e.g.*, Wilson & Wilson v. City Council of Redwood City, 120 Cal. Rptr. 3d 665, 677 (Cal. Ct. App. 2011); Ass'n of Irritated Residents v. Dep't of Conservation, 218 Cal. Rptr. 3d 517, 532 (Cal. Ct. App. 2017); Parkford Owners for a Better Cmty. v. County of Placer, 268 Cal. Rptr. 3d 653, 659 (Cal. Ct. App. 2020).

179 *See Parkford Owners for a Better Cmty.*, 268 Cal. Rptr. 3d at 659.

180 *Id.*; *see also* Cmtys. for a Better Env't v. State Energy Res. Conservation & Dev. Comm'n, 277 Cal. Rptr. 3d 486, 493–94 (Cal. Ct. App. 2017) ("[T]he ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.") (quoting Pac. Legal Found. v. Cal. Coastal Comm'n, 655 P.2d 306, 314 (Cal. 1982) (en banc)).

181 *Cmtys. for a Better Env't*, 227 Cal. Rptr. 3d at 492.

182 Johnson v. Cal. Dep't of Health Care Servs., No. 22STCP00750, 2023 Cal. Super. LEXIS 20926, at *17 (Cal. Super. Ct. Apr. 4, 2023) (quoting Los Altos El Granada Invs. v. City of Capitola, 43 Cal. Rptr. 3d 434, 449 (Cal. Ct. App. 2006)).

183 Coral Constr., Inc. v. City of San Francisco, 10 Cal. Rptr. 3d 65, 73–74 (Cal. Ct. App. 2004). For more information on when an injunction may be granted by California courts, see CAL. CIV. PROC. CODE § 526 (West 2024).

184 *See* CIV. PROC. § 526.

standing requirements vary widely from statute to statute.[185] For example, California courts are imbued with discretion to waive the requirement that a plaintiff demonstrate a potential future injury where the claim is brought in the public interest.[186]

B. *Chevron U.S.A. Inc. v. County of Monterey*

In 2016, 73,877 Monterey County voters endorsed Measure Z.[187] The initiative faced tough opposition, in part due to the significant position Monterey County holds in California's oil industry, ranking fourth statewide in oil production.[188] Despite Big Oil's efforts to oppose Measure Z, local residents resonated with the grassroots campaign "Protect Monterey County" and its mission of "defend[ing] the right of all communities to protect their water, health and future."[189] Measure Z is comprised of three Monterey County ordinances: LU-1.21, LU-1.22, and LU-1.23.[190] When enforced, LU-1.21 would forbid the use of land "in support of well stimulation treatments" throughout Monterey County's unincorporated areas.[191] LU-1.22 would prohibit unincorporated land use "in support of oil and gas wastewater injection or oil and gas wastewater impoundment."[192] Finally, LU-1.23 would ban land uses that facilitate the drilling of new oil and gas wells in those same unincorporated areas of the county.[193] Identical provisions would also amend Monterey County's local

185 *See* CIV. PROC. § 367 ("Every action must be prosecuted in the name of the real party in interest, *except as otherwise provided by statute*.") (emphasis added).

186 *See, e.g.*, Hernandez v. Atl. Fin. Co., 164 Cal. Rptr. 279, 284 (Cal. Ct. App. 1980) (allowing a suit for an injunction *on behalf of the general public* under Section 17204 of the California Business Professions Code because "the statute . . . expressly authoriz[ed] the institution of action by any person on behalf of the general public").

187 *See Monterey County, California, Ban on Oil and Gas Drilling, Measure Z (November 2016)*, BALLOTPEDIA, https://ballotpedia.org/Monterey_County,_California,_Ban_on_Oil_and_Gas_Drilling,_Measure_Z_(November_2016) [https://perma.cc/UL4T-D53J] (last visited Nov. 1, 2024).

188 *See* Paul Rogers, *Fracking Ban: Environmentalists Declare Victory on Monterey Measure Z*, THE MERCURY NEWS (Nov. 9, 2016, 1:18 AM), https://www.mercurynews.com/2016/11/09/fracking-ban-environmentalists-declare-victory-on-monterey-measure-z/ [https://perma.cc/E5ZS-W4JS].

189 PROTECT MONTEREY CNTY., https://protectmontereycounty.org [https://perma.cc/CME2-QLRK] (last visited Oct. 31, 2024).

190 *See Chevron II*, 532 P.3d at 1122–23.

191 *Chevron I*, 285 Cal. Rptr. 3d at 250.

192 *Id.*

193 *Id.*

coastal program and its plan to revitalize the former Fort Ord military base.[194]

In *Chevron U.S.A. Inc. v. County of Monterey*, mineral rights holders Chevron U.S.A. Inc., Aera Energy LLC, California Resources Corporation, Trio Petroleum, and the National Association of Royalty Owners-California, Inc. brought an action for declaratory and injunctive relief, alleging that Measure Z was preempted by the COGA.[195] The California Supreme Court ultimately held that the COGA preempted ordinances LU-1.22 and LU-1.23, reasoning that said ordinances contradicted the COGA. The Court explained that because LU-1.22 prohibits the use of certain production techniques, it contradicts CalGEM's mandate, which requires the agency to "supervise oil operation[s] in a way that permits well operators to 'utilize *all* methods and practices' the supervisor has approved."[196] The *Chevron* court then compared the dispute over Measure Z to *Big Creek Lumber Co. v. County of Santa Cruz*, where the Court addressed a local ordinance that restricted timber harvesting and operations to certain zone districts and parcels.[197] The *Big Creek* court held that the local timber ordinance was not preempted because it only regulated *where* timber operations occurred in the locality—not *how* they were conducted in the state. The *Chevron* court reasoned that, unlike the *Big Creek* timber ordinance, Measure Z "usurped [CalGEM's] statutorily granted authority" to decide what methods are suitable in each proposed case.[198]

As to LU-1.23, the Court held that although the ordinance "appears to regulate *where* oil production can take place, i.e., nowhere in the County," its language was overbroad in that it encompassed oil production methods that "require[] the drilling of new wells—such as wastewater and steam injection wells—in order to continue extracting oil from existing oil fields."[199] The Court presumed that LU-1.23 was actually a covert attempt to ban methods of oil production merely because the ordinance described "the drilling of new oil wells as 'Risky Oil Operations.'"[200]

---

194 *Id.*; *see also Fort Ord Property Development*, CITY OF MONTEREY, https://monterey.gov/city_hall/community_development/planning/planning_projects/fort_ord_property_development.php [https://perma.cc/YEK9-3S98] (last visited Dec. 15, 2024).

195 *Chevron II*, 532 P.3d at 1122 & n.1.

196 *Id.* at 1125 (quoting CAL. PUB. RES. CODE § 3106(b) (West 2024)).

197 Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 835–36 (Cal. 2006).

198 *Chevron II*, 532 P.3d at 1126 (quoting PUB. RES. § 3106(b)).

199 *Id.* at 1127.

200 *Id.* (alterations in original).

The Court declined to rule on the legality of LU-1.21's fracking ban due to a lack of standing, as no plaintiff was using nor proposing to use WSTs in Monterey County.[201] Regardless, the California Court of Appeal's opinion discusses SB 4's WST Sections.[202] Ultimately, the California Supreme Court refused to draw any connection between Measure Z's fracking prohibition and the WST Sections, holding that, at most, the WST Sections "*may* reflect a legislative intent to carve out [WSTs] as an area of shared regulatory authority."[203] In affirming the appellate court's judgment, the California Supreme Court explained that, under the COGA, the State's oil and gas supervisor retains the authority to determine permissible *methods* of oil and gas drilling.[204] In effect, *Chevron* ratifies CalGEM's extraction-heavy focus, rendering the agency's concurrent environmental directive superfluous by implying that CalGEM lacks the authority to deny or limit permits based on environmental considerations.

C. Is California *Really* Leading on Climate?

This Section compares the evolution of the oil and gas regulatory scheme and the prevalence of state-local preemption in California with that of Pennsylvania and Colorado to highlight the irrationality of the *Chevron* holding. Unlike lawmakers in Pennsylvania and Colorado, California's legislature has not expressed an intent to wholly supersede local regulatory authority over oil and gas activity. Instead, California has attempted to take heed of and respond to local concerns by expanding local authority over setback requirements and incorporating environmental directives into CalGEM's legislative mandate.[205] Although WST and fracking activity has increased significantly nationwide over the past two decades, it is generally less prevalent in California, where fracked wells have produced only twenty percent of the state's oil and gas production.[206] Additionally, California has adopted a comprehensive framework of climate policies underscoring its clear intent to transition from

---

201 *See id.* at 1123.

202 *Chevron I*, 285 Cal. Rptr. 3d at 256 (first quoting PUB. RES. § 3160(n); and then citing PUB. RES. § 3161(b)(3)(C)); *see also id.* at 250 n.3 (stating that Chevron conceded at the outset of the Phase 1 trial that it was not using well stimulation techniques or hydraulic fracturing but argued that "the possibility that Chevron might in the future use well stimulation or may need to or may decide to [was] enough for standing").

203 *Chevron II*, 532 P.3d at 1126 n.6 (emphasis added).

204 *See id.* at 1125–26.

205 *See supra* Sections III.B–C.

206 *See* ELKIND & LAMM, *supra* note 7, at 4.

fossil fuels to renewable energy.[207] This framework clearly indicates that, in interpreting the COGA, courts must give weight to CalGEM's environmental directive. When taken together, the above factors suggest that, contrary to *Chevron*, local ordinances restricting fracking should be upheld as consistent with the evolution of CalGEM's mandate and California's twenty-first century climate policy, and as a necessary method of citizen enforcement.

i. Pennsylvania

Pennsylvania has experienced a recent expansion of fracking, with 7% of the state's labor income and 9% of the total gross domestic product coming from oil and gas activities.[208] Pennsylvania's Oil and Gas Act (PA Act) is similar in substance to the COGA in that it outlines the division of state-local regulatory authority and prohibits local ordinances restricting state development of oil and gas.[209] However, unlike the COGA, the PA Act was written so as to expressly preempt nearly *all* local oil and gas regulations, with the critical provision providing that "*all* local ordinances and enactments purporting to regulate oil and gas well operations are hereby superseded."[210] The PA Act also precluded local authority over the location of wells.[211]

In 2009, the Pennsylvania Supreme Court issued two decisions interpreting the PA Act before it was eventually repealed in 2012.[212] The Court outlined a method versus location distinction, holding that local governments retain authority over the location of wells while the state holds regulatory power over the methods utilized to operate the well.[213] Three years later, the

---

207 *See* CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024).

208 *See New Analysis: Pennsylvania's Abundant Natural Gas and Oil Resources Provide over $75 Billion in Economic, Trade & Job Benefits*, AM. PETROLEUM INST. (May 16, 2023), https://www.api.org/news-policy-and-issues/news/2023/05/16/api-pwc-pa-2023 [https://perma.cc/Z6VC-2A5C].

209 58 PA. CONS. STAT. § 3304 (2012).

210 Oil and Gas Act, Pub. L. No. 223, § 601, 2 Pa. Laws 1140, 1180–81 (1984) (emphasis added) (current version at 58 PA. CONS. STAT. § 3302, *invalidated by* Pa. Gen. Energy Co., LLC v. Grant Twp., 139 F. Supp. 3d 706, 717 (W.D. Pa. 2015).

211 *See id.* § 205, at 1149–50 (current version at 58 PA. CONS. STAT. § 3215, *invalidated by* Robinson Twp. v. Commonwealth, 83 A.3d 901, 1000 (Pa. 2013).

212 *See* Act of Feb. 14, 2012, Pub. L. No. 13, § 3504(3), 1 Pa. Laws 87, 177; *see also* Huntley & Huntley, Inc. v. Borough Council, 964 A.2d 855, 863–64 (Pa. 2009); Range Res. Appalachia, LLC v. Salem Twp., 964 A.2d 869, 877 (Pa. 2009).

213 *See Huntley*, 964 A.2d at 863–64.

> [T]he closely-contested question centers on whether the *location* of a well in a particular zoning district constitutes a feature of a natural gas well operation

Pennsylvania legislature enacted Act 13, thereby enabling the state to expand the use of unconventional extraction methods in order to develop the Marcellus Shale Play, a shale formation estimated to contain up to ten percent of North America's natural gas deposits.[214] Shortly thereafter, Robinson Township, along with six other municipalities, two residents and elected local officials, a nonprofit environmental group, and a physician, filed a fourteen-count petition alleging that Act 13 violated Pennsylvania's Environmental Rights Amendment (ERA) codified in Article I, Section 27 of the Pennsylvania Constitution.[215] Ultimately, the Supreme Court of Pennsylvania held that Act 13's expansion violated "the commonwealth's duties as trustee of the public natural resources" under the ERA.[216]

The approach taken by the *Robinson Township* plaintiffs may prove useful for California's environmentalists. Besides California's aggressive climate policy, the state also has a public trust doctrine establishing citizens' rights to healthy natural resources, similar to Pennsylvania laws.[217] In *National Audubon*

> that is regulated by the Oil and Gas Act. On this topic, although Huntley develops that the Act places some restrictions on the siting of wells - most notably, setback requirements designed to prevent damage to existing water wells, buildings and bodies of water, as well as measures intended to protect attributes of Pennsylvania's landscape such as parks, forests, game lands, scenic rivers, natural landmarks, and historical and archeological sites, it does not automatically follow that the placement of a natural gas well at a certain location is a feature of its operation.

Id. (emphasis added) (citations omitted); *see also Range Res. Appalachia*, 694 A.2d at 877 (preempting a local ordinance that attempted to regulate surface and land development attendant to oil and gas drilling because it overlapped with state regulations by setting the *methods* of extraction, such as permitting procedures and imposed bonding requirements).

> [T]he Pennsylvania Supreme Court adopted a "how versus where" distinction . . . [in which] local governments retain limited control over the location of gas wells within their communities, but are preempted from regulating any aspect of the wells' operation, even if the operations affect the community's health, safety and welfare.

Kitze, *supra* note 70, at 399.

214 *See Robinson*, 83 A.3d at 915; *see also* John C. Dernbach, James R. May & Kenneth T. Krist, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS U. L. REV. 1169, 1169 (2015).

215 *See Robinson*, 83 A.3d at 913–14 (explaining the ERA provides that the people of Pennsylvania "have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment," and charges the state government, as trustee of these resources, with corresponding conservation and maintenance responsibilities) (citation omitted).

216 *Id.* at 984–85.

217 *See* Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 84–85 (2010).

Society v. Superior Court, the California Supreme Court invoked the public trust doctrine to protect California's water resources.[218] The Court explained that the public trust "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands."[219] Since fracking is a water-intensive activity that involves the risk of water contamination "in all stages of the process," there is a real argument that the public trust doctrine should apply to uphold fracking ordinances that limit the fracking industry's water rights in order to remedy harm done to public trust waters.[220]

ii. Colorado

Colorado's oil and gas production statistics are similar to California's, with oil and gas reform emerging in 2018 in connection with the state's democratic transition.[221] However, unlike California, the economic benefits of oil and gas development are much more salient in Colorado.[222] For example, in 2021, the oil and gas industry provided 12% of Colorado's labor income, compared to only 5% of California's, and contributed 11% of Colorado's total gross domestic product, but only 6% of California's.[223] The Colorado Oil and Natural Gas Act of 1951 (CO Act) set forth a uniform framework for the development of a statewide oil and gas industry.[224] Among other things, it gave the Colorado Oil and Gas Commission (COGCC) authority to "make

---

218 *See* Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 732 (Cal. 1983).

219 *Id.* at 724.

220 Davenport, *supra* note 73 (stating an EPA report "found evidence that fracking has contributed to drinking water contamination in all stages of the process," from acquisition, preparation, underground injection, wastewater collection, and all the way through post-operation storage); *see* Kundis Craig, *supra* note 217 (explaining that environmentalists might invoke the public trust doctrine in response to excessive water extraction that impacts navigable waters or other fracking activities that risk polluting surface water or groundwater).

221 *See* ELKIND & LAMM, *supra* note 7, at 19; Tara K. Righetti, Hannah J. Wiseman & James W. Coleman, *The New Oil and Gas Governance*, 130 YALE L.J.F. 51, 65 (2020).

222 *New Analysis: California's Abundant Natural Gas and Oil Resources Provide over $217 Billion in Economic, Trade & Job Benefits* [hereinafter *California Analysis*], AM. PETROLEUM INST. (May 16, 2023), https://www.api.org/news-policy-and-issues/news/2023/05/16/api-pwc-ca-2023 [https://perma.cc/DT2G-YF82]; *New Analysis: Colorado's Abundant Natural Gas and Oil Resources Provide Over $48 Billion in Economic, Trade & Job Benefits* [hereinafter *Colorado Analysis*], AM. PETROLEUM INST. (May 16, 2023) https://www.api.org/news-policy-and-issues/news/2023/05/16/api-pwc-co-2023 [https://perma.cc/L92W-PSW8].

223 *California Analysis*, *supra* note 222; *Colorado Analysis*, *supra* note 222.

224 *See* Oil and Gas Conservation Act, ch. 230, 1951 Colo. Sess. Laws 651 (codified at COLO REV. STAT. § 34-60-101 (2024)).

and enforce rules, regulations, and orders pursuant to" the CO Act.[225] Similar to the PA Act, the CO Act provided for heavy state regulation up until the mid-1990s, when population growth led to an increase in land use and encroachment issues that largely stemmed from oil and gas development.[226]

Until recently, the Colorado Supreme Court has been unreceptive to environmentalists.[227] In *Colorado Oil and Gas Ass'n v. City of Longmont*, the Court struck down a municipal charter provision that banned fracking and the storage and disposal of fracking waste, holding it was preempted by the CO Act.[228] In *Martinez v. Colorado Oil & Gas Commission*, plaintiffs, a group of youth activists, brought a suit to determine whether the COGCC, in accordance with the CO Act, properly declined to engage in rulemaking to consider a proposed rule.[229] Among other things, the rule would have prohibited the COGCC from issuing drilling permits "unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change."[230] For support, the plaintiffs cited the Colorado General Assembly's declaration calling for responsible and balanced oil and gas development, carried out "*in a manner consistent with* . . . protection of the environment."[231]

---

225 COLO. REV. STAT. § 34-60-105(1)(a).

226 *See* Ralph A. Cantafio, *The Changing Landscape of Land Use Law and Regulations Impacting the Colorado Oil and Gas Industry: From the Colorado Oil and Gas Conservation Act of 1951 to Senate Bill 181 of 2019*, 6 TEX. A&M J. PROP. L. 31, 33 (2020) (explaining that at the time the CO Act was passed, Colorado's population was 1,325,089, but by 2015, it had grown to 5,456,571).

227 *See, e.g.*, City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 577 (Colo. 2016); City of Fort Collins v. Colo. Oil & Gas Ass'n, 369 P.3d 586, 589 (Colo. 2016).

228 *See* Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *14 (Colo. Dist. Ct. July 24, 2014); *see also* Voss v. Lundvall Bros., 830 P.2d 1061, 1067 (Colo. 1992) (explaining that Colorado courts consider four factors when faced with a preemption question: "whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation").

229 *See* Colo. Oil & Gas Conservation Comm'n v. Martinez, 433 P.3d 22, 24–25 (Colo. 2019).

230 *Id.* at 25.

231 *Id.* at 26; *see* COLO. REV. STAT. §§ 34-60-102(1)(a)(I), 34-60-105(1) (2024); *see also id.* § 34-60-106(2)(a) (providing that COGCC has broad authority to "make and enforce rules, regulations, and orders" and "to do whatever may reasonably be necessary" to carry

The COGCC refused to consider the proposed rule, claiming a lack of statutory authority under the CO Act to "readjust" the balance of its mandate and "conditio[n] new oil and gas drilling on a finding of no cumulative adverse impacts."[232] In response, the *Martinez* plaintiffs argued that the COGCC's interpretation rendered the phrase "in a manner consistent with . . . protection of the environment" superfluous.[233] The Denver District Court upheld the COGCC's decision, but a divided Court of Appeals reversed, holding that the COGCC erred in interpreting its mandate as requiring a balancing between development and environmental considerations. Rather, the court held that the COGCC was responsible for fostering balanced development in the public interest by developing *subject to* the protection of the environment.[234] In other words, the court determined the phrase "in a manner consistent with" denoted "*more* than a mere balancing."[235]

In support of its holding, the court cited "the evolution of the General Assembly's regulation of the oil and gas industry in Colorado and its numerous alterations to the language of the Act," which originally "contained no qualifying language" regarding environmental protections.[236] The court reasoned that these alterations "reflect[ed] the General Assembly's general movement away from unfettered oil and gas production and the incorporation of public health, safety, and welfare as a check on that development."[237] The Supreme Court of Colorado thereafter reversed, holding that the COGCC did not have the authority to

---

out the provisions of the CO Act, and is thereby authorized to regulate "the drilling, producing, and plugging of wells and all other operations for the production of oil and gas").

232 *Colo. Oil & Gas Conservation Comm'n*, 433 P.3d at 25.

> It is declared to be in the public interest and the commission is directed to . . . [r]egulate the development and production of the natural resources of oil and gas in the state of Colorado in a manner that protects public health, safety, and welfare, including protection of the environment and wildlife resources.

COLO. REV. STAT. § 34-60-102(1)(a)(I).

233 *Colo. Oil & Gas Conservation Comm'n*, 433 P.3d at 26.

234 Martinez v. Colo. Oil & Gas Conservation Comm'n, 434 P.3d 689, 693 (Colo. App. 2017).

235 *Id.* (emphasis added).

236 *Id.* at 694–95. Until 1994, the CO Act read: "It is hereby declared to be in the public interest to foster, encourage, and promote the development, production, and utilization of the natural resources of oil and gas in the state of Colorado." *Id.* at 695 (quoting Oil and Gas Conservation Act, ch. 208, sec. 10, § 100-6-22, 1955 Colo. Sess. Laws 648, 657). The language, "in a manner consistent with protection of public health, safety, and welfare," was added in 1994. *Id.* (citation omitted). In 2007, the CO Act was completed with the addition of an amendment stating: "It is declared to be in the public interest to foster . . . responsible, balanced [resource] development." *Id.* (citation omitted).

237 *Martinez*, 434 P.3d at 695.

condition development on a finding of no adverse environmental impacts and could only consider such impacts *after* taking into consideration cost-effectiveness and technical feasibility.[238]

Although this judicial assist saw Colorado-based Big Oil companies gain yet another win, the glory was short-lived. Colorado's 2018 elections resulted in a huge win for Democrats, who swiftly moved to restructure the COGCC's regulatory mandate after gaining control of both houses.[239] On April 3, 2019, the General Assembly passed SB 19-181, Protect Public Welfare Oil and Gas Operations ("SB 181").[240] Although SB 181 made many changes to the state's regulatory scheme, "the most pivotal change was the legislature's placement of the regulation of the surface impacts of oil and gas exploration firmly in the control of local communities, as coequals with the state."[241] This directly undermined Colorado Supreme Court precedent, which routinely interpreted state law as setting the ceiling, rather than the floor, for local regulation.[242] In effect, it signaled a departure from state preemption of local control "in a major producing state [which] might portend a broader shift toward local governance" in the oil and gas field.[243] Most notably, SB 181's amendment of the COGCC's mission "from fostering the development of oil and gas to regulating it" marked a direct rejection of the commission's disproportionate focus on development.[244]

iii. California

a. Local Authority Over Zoning & Land Use Issues Is Well Settled in California

Compared to Pennsylvania and Colorado, local authority over zoning and land use issues in California has been well settled for decades: "Nearly a century ago, the California Supreme Court . . . acknowledged that local regulation of 'the business of operating oil wells' was properly within the local entity's police power."[245] Conversely, it took the Pennsylvania legislature until 2012 to repeal certain express preemption

238 *See Colo. Oil & Gas Conservation Comm'n*, 433 P.3d at 25.

239 *See* Daniel E. Kramer, *Springtime for Home Rule over Oil and Gas*, 48 COLO. LAW. 36, 36 (2019).

240 *Id.*

241 *Id.*

242 *See id.*

243 Righetti, Wiseman & Coleman, *supra* note 221, at 65.

244 Kramer, *supra* note 239, at 39.

245 *Chevron I*, 285 Cal. Rptr. 3d at 256–57 (citation omitted).

provisions.[246] Colorado experienced similar stagnation until 2019, when a state democratic shift produced environmentally focused regulatory amendments that are arguably more progressive and innovative than California's.[247] This is surprising in light of the scholarly consensus as of 2017, which posits that "California's legal structure concerning home-rule authority and fracking regulation suggests that local fracking bans stand a better chance of surviving a preemption challenge in California than they d[o] in Colorado."[248]

b. Strict Adherence to the Contemporaneous Administrative Construction Doctrine Produces Absurd Results

The *Chevron* court found that the contemporaneous administrative construction weighs in favor of preemption and, therefore, that the WST Sections do not *necessarily* expand local authority to encompass regulatory power over certain production methods. The contemporaneous construction doctrine provides that "a court or agency decision or practice interpreting an ambiguous statute may be considered a contemporaneous construction."[249] Although the *Chevron* court avoided ruling on the status of Monterey's fracking ordinance, the state's well-settled recognition of local zoning authority and the doctrine of stare decisis suggest that California courts should avoid rigid adherence to the contemporaneous administrative construction doctrine.

Previously, in *Big Creek Lumber*, the California Supreme Court listed factors courts should consider when determining the scope of local authority under a state statute, including legislative history, contemporaneous administrative construction, and public policy.[250] Like in *Big Creek Lumber*, the legislative history of the COGA "expressly preserves and plainly contemplates the exercise of local

246 *See* 58 PA. CONS. STAT. § 601.205 (2012).

247 *See* Kramer, *supra* note 239, at 36–37.

248 William C. Mumby, *Trust in Local Government: How States' Legal Obligations to Protect Water Resources Can Support Local Efforts to Restrict Fracking*, 44 ECOLOGY L.Q. 195, 221 (2017).

249 Small Bus. in Telecomms. v. Fed. Commc'ns Comm'n, 251 F.3d 1015, 1022 n.9 (D.C. Cir. 2001).

250 Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 829 (Cal. 2006) (listing the relevant factors for analysis as the "ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part").

authority."[251] Furthermore, the addition of the WST Sections and its language permitting local lead agencies to conduct their own fracking-related environmental impact review lends credence to the local concern that states generally "lack information regarding the localized impacts of fracking operations."[252] By giving disproportionate weight to the contemporaneous administrative construction doctrine, the *Chevron* court effectively ratifies CalGEM's disregard of its environmental mandate. Consequently, *Chevron* widens the climate action gap by directly contradicting legislative intent to reorient CalGEM's focus so as to encompass greater environmental considerations.

c. *Chevron*'s Preemption of Measure Z's Drilling Ban Creates Greater Confusion

By mischaracterizing Measure Z's drilling ban as an improper regulation of a "method" or "manner" of extraction in order to simultaneously justify preemption and avoid undermining local zoning authority, *Chevron* creates greater confusion regarding the method versus location distinction and negates the primary benefit of preemption: uniformity.[253] It is likely the court itself recognized this fallacy, as footnote nine potentially concedes that Measure Z could be fairly categorized as a "land use ordinance," which would warrant a presumption against preemption.[254] Nevertheless, the *Chevron* court doubled down: "Regardless of whether Measure Z qualifies as a 'land use ordinance,' . . . any presumption that might apply is amply rebutted by the fact that the measure clearly contradicts" the state's authority to regulate extraction methods in the interest of maximizing recovery. [255] As a result, the *Chevron* opinion fails to provide any clarification regarding how courts should interpret land use ordinances that also address fracking. While fracking proponents would argue that Measure Z's fracking ban is distinct from the drilling prohibition in that it references WST methods rather than just drilling, it can just as easily be understood as a "prohibition[] on oil production based on zoning laws."[256]

---

251 *Id.*; *see also* CAL. PUB. RES. CODE § 3690 (West 2024) ("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.").

252 Elena Pacheco, *It's a Fracking Conundrum: Environmental Justice and the Battle to Regulate Hydraulic Fracturing*, 42 ECOLOGY L.Q. 373, 377 (2015).

253 *See Chevron II*, 532 P.3d at 1127.

254 *See id.* at 1129 n.9.

255 *Id.*

256 *See id.* at 1127.

d. The 1976 AG Opinion Does *Not* Support Preemption of Measure Z's Drilling Ban

Prior to *Chevron*, the California Supreme Court did not address the preemptive effect of the COGA and instead relied on a 1976 opinion by the California Attorney General (AG Opinion) that affirmed local prohibitory power is not preempted under the COGA so long as it does not address the "manner" of extraction.[257] Until the *Chevron* opinion, the AG Opinion's interpretation of the COGA had "stood the test of time," and its clear and comprehensive guidance regarding the balance between state and local authority likely explained the lack of judicial opinions interpreting the COGA.[258] Among other things, the AG Opinion concluded that the state retains authority over "technical aspects of exploration and production," whereas local governments may exercise authority with respect to "land use, environmental protection, aesthetics, public safety, and fire and noise prevention."[259] For example, a law assigning permitting authority to the state would not preempt "a valid prohibition of drilling . . . by a county or city in all or part of its territory."[260] Thus, at the very least, an application of the AG Opinion suggests that Measure Z's drilling prohibition should *not* have been preempted.

The uncertainty created by *Chevron*'s conclusion that Measure Z's drilling prohibition impermissibly attempts to regulate production "methods" also increases the "unwarranted litigation risk for local governments" and "threatens to convert [the COGA] into a cudgel the oil industry can use to threaten cities and counties over virtually any local oil and gas zoning regulation—even regulations that would *permit* the drilling of new oil and gas wells as a conditional use."[261] Like the *Martinez* plaintiffs, who argued that the COGGC's interpretation of its mandate rendered its environmental directives superfluous, California environmentalists have warned that CalGEM's interpretation "creates a danger of placing profits over environmental protection."[262]

---

257 *See* 59 Op. Cal. Att'y Gen. 461 (1976), 1976 Cal. AG LEXIS 82.

258 *See* Petition for Review at 32, *Chevron II*, 532 P.3d 1120 (No. 16-CV-3978), https://www.biologicaldiversity.org/programs/climate_law_institute/pdfs/21-11-19-PMC-Solorio-Petition-for-Review.pdf [https://perma.cc/2LGB-KS5V].

259 *Id.* at 30, 32.

260 *Id.* at 30–31 (alteration in original).

261 *Id.* at 33–34.

262 Hedemark, *supra* note 113, at 128.

e. *Chevron* Fails to Meet California's Heightened, Stringent Standard for Preemption

When considered in light of the COGA's Section 3012, which allows local prohibitions on "the drilling of oil wells," and the AG Opinion, *Chevron*'s conclusion that Measure Z impermissibly attempts to regulate production "methods" defies the court's own heightened, stringent standard for preemption.[263] The California Supreme Court has repeatedly held that "absent a *clear* indication of preemptive intent from the Legislature," traditional exercises of local land use authority are presumed to survive preemption.[264] In the court's own words, preemption is only implicated where the state law is "so overshadowing that it obliterates all vestiges of local power as to a subject where municipalities have traditionally enjoyed a broad measure of autonomy."[265]

f. *Chevron* Contradicts Legislative Intent to Expand Shared Regulatory Authority

Unlike Pennsylvania and Colorado pre-SB 181, the California legislature has never evinced a clear intent to establish exclusive state regulatory authority over oil and gas activities. In fact, there is greater legislative support for the opposite conclusion. The evolution of CalGEM's mandate, like the COGCC's, reflects a shift from prioritizing recovery to incorporating environmental considerations.[266] Legislative history confirms that California has never enacted a law similar to Pennsylvania's Act 13 that establishes or "require[s] . . . local governments [to] allow oil and gas development as of right throughout their communities."[267] As of the *Chevron* decision, the legislature has not enacted any subsequent amendments restricting CalGEM's environmental directives or prioritizing the expansion of WSTs such as fracking.[268] To the contrary, California has taken action to *preserve and strengthen* local authority, as

263 *See Chevron II*, 532 P.3d at 1127; CAL. PUB. RES. CODE § 3012 (West 2024); Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 830 (Cal. 2006).

264 *Big Creek Lumber Co.*, 136 P.3d at 827 (emphasis added); *see also* City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 300 P.3d 494, 499 (Cal. 2013).

265 *Big Creek Lumber Co.*, 136 P.3d at 830 (citation omitted).

266 *See Chevron I*, 285 Cal. Rptr. 3d at 254–55.

267 Richardson, *supra* note 165, at 617; *see also* 58 PA. CONS. STAT. § 3304(b)(5) (2024), *invalidated by* Robinson Twp. v. Commonwealth, 83 A.3d 901, 977–82 (Pa. 2013).

268 *See Chevron II*, 532 P.3d at 1125.

evidenced by SB 4's savings clause, which provides that CalGEM must still comply with existing local laws and regulations.[269]

Moreover, *Chevron*'s conclusion that the legislature intended for Section 3012 to preclude local authority over the "conduct . . . of oil production activities" is illogical when the time of enactment and the statutory language of each provision is considered.[270] In 1961, the California legislature added Section 3012 for the purpose of acknowledging that cities may prohibit "the drilling of oil wells."[271] Section 3690, added in 1971, provides:

> 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.[272]

Notably, Section 3690, enacted ten years after Section 3012, uses the language "*existing* right of cities and counties."[273] Thus, the legislature clearly considered cities and counties to have regulatory authority over oil and gas operations as early as 1961.[274] Despite having access to such a sizable legislative record, unlike the Colorado Court of Appeals, the *Chevron* court gave it little to no weight in its ultimate decision to ratify CalGEM's extraction-friendly focus.[275]

D. How *Chevron* Exacerbates the Climate Action Gap

> *"Local governments' most basic responsibility is to safeguard community health and safety. But they can't fight pollution or climate change if they don't have the full range of tools to address oil and gas projects in their own backyards."*
>
> — Stephen Jenkins[276]

Giving the "recovery authority controlling weight" would be a nonissue were it not for California's explicit goal of achieving

---

269 *See* CAL. PUB. RES. CODE § 3160(n) (West 2024).

270 *Chevron II*, 532 P.3d at 1126 n.6.

271 *See* PUB. RES. § 3012.

272 *Id.* § 3690 (emphasis added).

273 *Id.* (emphasis added).

274 *See id.* § 3012.

275 *See Chevron II*, 532 P.3d at 1129.

276 Stephen Jenkins, *New California Bill Aims to Restore Local Governments' Ability to Limit or Ban Certain Oil and Gas Extractions*, JD SUPRA (Apr. 4, 2024), https://www.jdsupra.com/legalnews/new-california-bill-aims-to-restore-6489341/ [https://perma.cc/N9JD-9AD3].

net-zero by 2045 and the embarrassingly low levels of progress achieved thus far. Such lackluster progress has left local governments disillusioned and with no other option but to adopt a grassroots approach to environmentalism.[277] The longer this trend continues, the greater the likelihood of the emergence of "hyper preemption," a form of preemption involving "intentional, extensive, and sometimes punitive state efforts to block local action across a wide range of domains."[278] Hyper preemption often consists of "state laws displacing local regulation of a subject without putting state regulation in its place."[279]

Chevron is indicative of hyper preemption because it effectively leaves Californians without any regulatory authority that is incentivized to genuinely prioritize environmental considerations. Although the state has designated CalGEM responsible for promulgating regulations that both maximize extraction *and* comport with the state's environmental objectives, the agency has disproportionately focused on maximization to the detriment of environmentalism. By preempting local oil and gas ordinances, courts allow the legislature to shirk the concerns underlying local initiatives while simultaneously stripping local governments of the power to close the climate action gap. Thus, instead of addressing environmental issues, preemption widens the action gap by precluding local environmentally conscious regulation and "replacing" it with a "sham" environmental directive that, in practice, lacks substance.[280]

Given that the rise of hyper preemption is largely shaped by Republican policies and the polarized, partisan state of modern American politics, its emergence in California—a "blue state" that often touts its liberal policies as one of the main driving factors of its economic success—would be politically

---

277 *See, e.g.*, Samantha Maldonado, Bruce Ritchie & Debra Kahn, *Plastic Bags Have Lobbyists. They're Winning.*, POLITICO (Jan. 20, 2020, 8:11 AM), https://www.politico.com/news/2020/01/20/plastic-bags-have-lobbyists-winning-100587 [https://perma.cc/Y3NB-EMTK] (explaining how California environmentalists used local grassroots momentum to win a referendum upholding a plastic bag ban in 2016, overcoming a $5.5 million campaign by the bag alliance in the process).

278 Briffault, *supra* note 134, at 251 (listing this "wide range of domains" as including firearms regulation, the treatment of immigrants, workplace equity, environmental protection, anti-discrimination laws, and more).

279 *Id.* at 260 (stating that hyper preemption often consists of state laws displacing local regulation of a subject without putting state regulation in its place).

280 *See id.*

embarrassing.[281] At the local level, it would likely increase distaste for the state government. At the national level, strict preemption of local fracking ordinances would degrade the climate policies that qualify California as a climate and clean energy leader: policies such as the nation's first economy-wide greenhouse gas limit, or the state's commitment to terminating "the issuance of new hydraulic fracturing permits by 2024."[282] On a global scale, the consequences can hardly be understated.

VI. CAPTURE BY BIG OIL

A. Routine State-Local Preemption Perpetuates Capture & Exacerbates the Climate Action Gap

Despite California's aggressive climate policy and purported "divorce" from Big Oil, Pennsylvania and Colorado—states with (apparently) less stringent environmental policies and greater oil and gas interests than California—have been more receptive to local environmental fracking initiatives.[283] This Note suggests that this discrepancy may be due to the pervasive effect of capture, which has directly undermined California's "innovative" climate policies. In California, Big Oil has exerted its influence and "captured" oil and gas regulations in eight different ways:

> (1) lobbying; (2) campaign spending; (3) serving on and putting shills on regulatory panels; (4) creating Astroturf groups; (5) working in collaboration with media; (6) sponsoring awards ceremonies and dinners, including those for legislators and journalists; (7) contributing to nonprofit organizations; and (8) creating alliances with labor unions, mainly construction trades.[284]

---

281 *See id.*; *see also, e.g.*, ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES – AND THE NATION 238–42 (2019) (describing how state legislatures have preempted progressive, local legislation); Maldonado, *supra* note 277; Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018) ("[T]he preponderance of new preemption actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to . . . relatively progressive city regulations.").

282 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024); *see also* Cal. Exec. Order No. N-79-20 (Sept. 23, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-Climate.pdf [https://perma.cc/4Y2W-D4YT].

283 Sabrina Valle, *California and Big Oil Are Splitting After Century-Long Affair*, REUTERS (Jan. 29, 2024, 3:36 PM), https://www.reuters.com/sustainability/climate-energy/california-big-oil-are-splitting-after-century-long-affair-2024-01-29 [https://perma.cc/K3Z6-ZBDV]; *see supra* Section V.C.

284 Bacher, *supra* note 130.

As a result, *Chevron*'s holding bears larger, unforeseen consequences. By suggesting that courts may give greater weight to CalGEM's recovery mandate, *Chevron* perpetuates capture by (1) ratifying CalGEM's extraction-heavy focus, (2) generating unnecessary confusion regarding the scope of local land use authority, and (3) degrading California's well-settled, heightened preemption standard.[285] Consequently, *Chevron* will likely encourage environmentally adverse Big Oil litigation, thereby exacerbating state-local tensions and generating additional obstructions to the achievement of California's climate targets.[286]

B. Regulatory Capture

> *"California's regulatory record on oil and gas does not justify claims that it has the toughest environmental regulations in the world."*
>
> — John Fleming[287]

Regulatory capture occurs when "organized groups successfully act to vindicate their interests through government policy at the expense of the public interest."[288] Policies that contradict "the public interest are those that would be difficult to defend to an informed and neutral observer on the grounds of social welfare, efficiency, distributional equity, or the fulfillment of moral duties."[289] Generally, organized interest groups exert influence through mechanisms such as campaign contributions in exchange for friendly agency oversight (or, in many cases, a lack thereof).[290]

C. Agency Capture

> *"No program of environmental regulation is better than its enforcement system."*
>
> — Peter Seth Menell & Richard B. Stewart[291]

---

285 *See supra* Section V.C.iii.

286 *See* ELKIND & LAMM, *supra* note 7, at 32–33.

287 Fleming, *supra* note 77, at 14.

288 Livermore & Revesz, *supra* note 33, at 1343; *see also* DANIEL CARPENTER & DAVID MOSS, *Introduction to* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 13 (2014) (defining capture as "the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself").

289 Livermore & Revesz, *supra* note 33, at 1343.

290 *See id.*

291 PETER SETH MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY 531 (1994).

Agency capture is an offshoot of regulatory capture whereby "regulators within the bureaucracy" are influenced to adopt policies in favor of special interests to the detriment of the public interest.[292] One example of an environmental anti-capture measure is the citizen suit provision, which allows citizens to bring suit against violators of environmental statutes independent of the regulatory agency.[293] Congress first addressed the issue of agency capture in the early 1970s.[294] In response to criticism that regulatory agencies were particularly susceptible to capture by special interests, Congress imposed additional controls on environmental agencies to "reduce administrative discretion and expand public participation."[295]

Scholarship suggests that agency bias towards overregulation manifests from a conglomeration of agency behavior related to self-aggrandizement, risk aversion, and a steadfast commitment to the mandate.[296] The self-aggrandizement theory argues that agency officials adopt an economic mindset and aim to increase their "salary, prerequisites of the office, public reputation, power, patronage, [and the] output of the bureau" by maximizing their agency's performance.[297]

The self-aggrandizement theory is clearly present in California, where Big Oil has been successful at placing shills on regulatory panels.[298] While CalGEM officials often go on to work for the oil and gas industry, many have been terminated due to conflicts of interest and the inability to view their agency position as anything more than a protracted, private-sector job interview.[299] For example, in 2019, Governor Newsom fired former Oil & Gas Supervisor Ken Harris in light of a watchdog report that revealed Harris "had personal investments in a dozen

---

292 *Id.*; *see also* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENV'T L.J. 81, 82 (2002) ("Many commentators have come to believe that the adversarial interest group politics of pollution regulation create massive transaction costs and that those costs should encourage agencies and interest groups to adopt cooperative approaches to problem-solving.").

293 *See* Zinn, *supra* note 292, at 84.

294 *See id.* at 83.

295 *Id.*

296 Livermore & Revesz, *supra* note 33, at 1351.

297 *Id.* at 1351 (alteration in original) (noting, however, that a *concrete* link between agency budgets and regulatory overzealousness has not been established).

298 *See* discussion *infra* notes 300–301.

299 *See* Fleming, *supra* note 77, at 14.

of the world's top petroleum companies."[300] In 2023, Udak-Joe Ntuk resigned from his position as California's Oil & Gas Supervisor "against the backdrop of a 745% uptick in new oil drilling permits issued in the fourth quarter of 2022."[301] According to consumer advocate Liza Tucker, "CalGEM had gone rogue in permitting oil and gas wells."[302] Although Ntuk claimed CalGEM's main priority is protecting the environment and public health, the agency's budget requests stated it lacked the resources needed to "prosecute enforcement actions in a timely manner" and "adequately protect the health and safety of the citizens of the state."[303] Kobi Naseck, Coalition Coordinator of Voices in Solidarity Against Oil in Neighborhoods, has petitioned Governor Newsom "to appoint a leader who will enable CalGEM to do what Supervisor Ntuk could not: . . . *actually* do its job of regulating oil and gas."[304] Interestingly, Naseck invoked the term "capture" when expressing suspicion as to whether CalGEM's "new leader will be another Big Oil-captured official or someone who is actually up to the task."[305]

Agencies may subscribe to the "precautionary principle" and engage in risk-averse behavior, especially in light of scientific uncertainty, or conversely, they may use such uncertainty to ignore risks rather than regulate them.[306] To avoid being replaced, agency officials may seek to curb regulatory costs by shying away from proactive practices meant to prevent

---

300 Ann Alexander, *Governor Newsom Starts to Lead California Out of Its Oily Mire*, NRDC (Sept. 20, 2019), https://www.nrdc.org/bio/ann-alexander/gov-newsom-starts-lead-california-out-its-oily-mire [https://perma.cc/GZ8N-4GY7].

301 Dan Bacher, *Breaking: Top California Oil Regulator Resigns After a 745% Uptick in New Oil Drilling Permits*, CONSUMER WATCHDOG (Jan. 19, 2023), https://consumerwatchdog.org/in-the-news/breaking-top-california-oil-regulator-resigns-after-a-745-uptick-in-new-oil-drilling-permits/ [https://perma.cc/76LC-ZFPQ].

302 *Id.*

303 Wilson, *supra* note 24 (explaining that in 2019 and 2020, CalGEM issued only 35 out of 87, and 19 out of 138, respectively, of the orders requested by staff, although the agency itself declined to provide the final count).

304 Bacher, *supra* note 301 (emphasis added).

305 *Id.*

306 *See* Cass R. Sunstein, *The Paralyzing Principle*, REGULATION, Winter 2002–2003, at 32, 32; *cf.* Thomas O. McGarity, *Our Science Is Sound Science and Their Science Is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 934 (2004); Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS. 63, 64–67 (2003).

regulatory failures.[307] They may also attempt to reduce agency expenditures by practicing "cooperative enforcement," negotiating and compromising with violators rather than punishing noncompliance by administrative or judicial action.[308] The primary danger of cooperative enforcement is the significant risk that cooperation will turn into collusion: "that agencies will be *too* nice, letting bad actors get away with prolonged and significant violations of the law."[309]

In California, agency capture has rendered CalGEM predisposed to ignore risks rather than regulate them. A 2022 audit of CalGEM's injection and WST programs revealed that the agency approved dozens of injection projects under "dummy" files in order to avoid regulatory review.[310] Despite environmental disasters such as the Aliso Viejo Canyon leak, CalGEM continues to refrain from bringing noncompliance actions in response to illegal pollution, instead choosing to engage in cooperative enforcement.[311] For example, in response to a 2019 oil investigator's concern that Nasco Petroleum was injecting water at pressure levels that exceeded the legal limit, thus increasing the risk of rupture and water contamination, CalGEM did not order Nasco to cease operations or suspend permit approvals. Instead, the agency stated it had "taken less stringent measures," choosing to "proactively engage with operators at risk of non-compliance"—a clear indication of cooperative enforcement.[312]

Even in light of legislation such as SB 1137, which established a 3,200-foot setback requirement for new wells, the number of rework permits issued has increased by seventy-six percent.[313] Although local zoning authority has been established in California for over a century, "[m]ore than half of these permits were for wells located within 3,200 feet of homes, schools,

---

307 *See* Livermore & Revesz, *supra* note 33, at 1352 ("Costs are often immediate and felt by an identifiable and concentrated group, whereas the benefits of regulating often address latent, long-term risks experienced by a diffuse population.").

308 *See* Zinn, *supra* note 292, at 83.

309 *Id.*

310 *See* OFF. OF STATE AUDITS & EVALUATIONS, DEP'T OF FIN., REP. NO. 20-3480-030, CALIFORNIA DEPARTMENT OF CONSERVATION, UNDERGROUND INJECTION CONTROL AND WELL STIMULATION TREATMENT PROGRAMS, PERFORMANCE AUDIT 24 (2020).

311 *See* Wilson, *supra* note 24.

312 *See id.*

313 For updates on CalGEM's permitting review, see Kyle Ferrar, *CalGEM Permit Review Q1 2023: Well Rework Permits Increase by 76% in California*, FRACTRACKER ALLIANCE (Apr. 14, 2023), https://www.fractracker.org/2023/04/calgem-permit-review-q1-2023/ [https://perma.cc/M56Q-8PPU].

healthcare facilities, or other sensitive receptors."[314] Although CalGEM has severely decreased the issuance of new drilling permits, any environmental or public health benefits have been effectively reduced by the dramatic increase in rework permits.[315]

Data suggests that Governor Newsom's characterization of CalGEM's enforcement efforts as "very aggressive" is a mere half-truth.[316] From 2018 to 2020, less than twenty percent of CalGEM enforcement orders were actually implemented, and in 2020, CalGEM collected zero dollars in fines from the $191,669 it issued in civil penalties.[317] From 2015 to 2020, CalGEM received a generous budget of nearly $80 million to establish a centralized public enforcement database, yet it failed to do so despite the fact that Texas was able to accomplish the same with a budget of only $105,000.[318]

In response to watchdog reports, some legislators have called for an oversight hearing and are considering legislation "to tighten CalGEM's enforcement" and increase transparency.[319] State Senator Henry Stern has echoed these concerns, stating that "[i]f [CalGEM] is either unable or unwilling to do the job, then the Legislature is going to have to force them to do it."[320] As stated by an organizer for the Central California Environmental Justice Network, "CalGEM issuing hundreds of permits to negligent oil companies so they can continue drilling in our communities just months after they released an emergency rule to block neighborhood drilling is exactly why [local frontline communities] don't trust them."[321] In essence, by prioritizing extraction rather than environmental considerations, CalGEM continues to frustrate state-local tensions and exacerbate the climate action gap, forcing local citizens to either take up environmental causes themselves or hold out for genuine legislative or judicial intervention.

---

314 *Id.*

315 *See id.*

316 *See* Wilson, *supra* note 24.

317 *Id.*

318 *Id.*

319 *Id.*

320 *Id.*

321 Dan Bacher, *Climate Activists Protest Approval of Hundreds of Neighborhood Oil Drilling Permits in California*, CONSUMER WATCHDOG (Mar. 17, 2023), https://consumerwatchdog.org/in-the-news/the-daily-kos-climate-activists-protest-approval-of-hundreds-of-neighborhood-oil-drilling-permits-in-california/ [https://perma.cc/D8US-8N69].

D. Legislative & Executive Capture

While recent legislation clearly shifts CalGEM's mandate to prioritize public health and the environment, state policymakers have fallen prey to the influence of capture, leaving California's climate policy toothless in the absence of judicial correction. In 2023, two-thirds of the bills opposed by Big Oil were extinguished in light of an alliance with the building trades union.[322] Although environmentally friendly laws such as AB 1057 suggest that the California legislature has not been subject to capture by Big Oil, the state has struggled to make any real environmental progress.[323] In 2022, the environmental group EnviroVoters gave California a "D" rating—its lowest-ever score since annual scorecards were first released in 1973.[324]

Environmental advocacy groups believe California lags in regulatory oversight because the oil industry "remains a 'huge force' in California politics."[325] From 2018 to 2022, special interest groups tied to the Western States Petroleum Association and Chevron, among other companies, spent $72 million on lobbying efforts.[326] In 2023, Chevron was the top-spending lobbyist.[327]

According to EnviroVoters, 52% of California legislators—100% of Republicans and 38% percent of Democrats—receive contributions from oil companies.[328] For instance, Democrat Rudy Salas, who represents oil-rich Kern County, has received more than $343,000 in campaign donations from the oil and gas industry over the past

322 Ryan Sabalow & Jeremia Kimelman, *How Big Oil Wins in Green California*, CALMATTERS (Dec. 19, 2023), https://calmatters.org/politics/2023/12/california-big-oil/ [https://perma.cc/9L62-C93S].

323 *See* CAL. PUB. RES. CODE §§ 3002, 3011 (West 2024); CAL. HEALTH & SAFETY CODE § 38562.2(C)(1) (West 2024).

324 Liza Gross, *California's Climate Reputation Tarnished by Inaction and Oil Money*, INSIDE CLIMATE NEWS (Mar. 16, 2022), https://insideclimatenews.org/news/16032022/california-climate-inaction-oil-money [https://perma.cc/NFL2-R9U9].

325 Matt Vasilogambros, *California Just Can't Quit Big Oil*, STATELINE (May 8, 2023, 5:00 AM), https://stateline.org/2023/05/08/california-just-cant-quit-big-oil/ [https://perma.cc/3APA-3VP2].

326 Lindsey Holden, Ari Plachta & Phillip Reese, *Oil Spends Millions at California Capitol. Did It Weaken Newsom Crusade Against High Gas Prices?*, THE SACRAMENTO BEE, https://www.sacbee.com/news/politics-government/capitol-alert/article273734515.html [https://perma.cc/WV4Q-NY9X] (Mar. 30, 2023).

327 Bacher, *supra* note 130.

328 CAL. ENV'T VOTERS, 2023 CALIFORNIA ENVIRONMENTAL SCORECARD 2 (2023).

decade.[329] In support of Big Oil, Republican State Senator Shannon Grove has characterized environmental policies that restrict oil development as "just another attack on the oil industry."[330] This lobbying money likely precluded the enactment of environmental legislation to establish setback requirements, ban fracking, and prohibit offshore drilling in state waters.[331] Although California considers itself to be a climate leader, it is now one of the *only* major oil-producing states with no setback requirements.[332]

Recent legislative activity suggests that *Chevron*'s result and reasoning are incorrect. On May 22, 2024, the California legislature enacted AB 3233 as a direct response to the confusion generated by *Chevron* and as a means of "giv[ing] more power back to the local governments."[333] AB 3233 clarifies that a local government can "prohibit oil and gas operations in its jurisdiction" and "limit or . . . ban specific types of extraction methods or operations."[334] It also requires CalGEM to "reduce harm from oil and gas activities."[335] Most notably, it explicitly provides that CalGEM's *primary* purpose is to preserve

---

329 *See* Laurel Rosenhall, *Oil Industry Spends Millions to Boost California Democrats*, CALMATTERS, https://calmatters.org/politics/2018/11/california-democrats-big-oil-money/ [https://perma.cc/L3WM-3CBR] (June 23, 2020).

330 Matt Vasilogambros, *Even California Struggles with Quitting Big Oil*, GOVERNING (May 11, 2023), https://www.governing.com/climate/even-california-struggles-with-quitting-big-oil [https://perma.cc/PQ9A-LBH4].

331 *See* Vasilogambros, *supra* note 325.

332 *See* CAL. CODE REGS. tit. 14, § 1765.11 (West 2024) (noting that a referendum against SB 1137 qualified for the November 2024 ballot, and as a result, SB 1137 was stayed "until and unless a majority of voters approve" SB 1137 at that time); Julie Cart, *Controversial Measure Overturning Oil Well Restrictions Won't Be on California Ballot*, CALMATTERS, https://calmatters.org/environment/2024/06/oil-ballot-california/ [https://perma.cc/7YDF-23UE] (Sept. 25, 2024) ("The oil industry's decision [to withdraw its ballot measure challenging SB 1137] will mean that the state rules protecting homes and schools near oil and gas wells will go into effect. The companies instead will fight them in court."); *see also* COLO. COMMON CAUSE, DRILLING AND DOLLARS: THE COLORADO OIL AND GAS INDUSTRY'S STREAM OF POLITICAL INFLUENCE 2–3 (2020), https://www.commoncause.org/colorado/wp-content/uploads/sites/6/2020/06/Common-Cause-Report_5.pdf [https://perma.cc/C9D5-7S49] (analyzing Colorado as an exemplar of a successful regulatory redesign, noting that the legislature successfully passed SB 181 to expand local regulatory authority to encompass at least some say over production methods in spite of the fact that Big Oil spent over $4 million on lobbying efforts between 2015 and 2019 and outnumbered committee members in favor of the bill by six-to-one at the hearing).

333 Jenkins, *supra* note 276.

334 *Id.*

335 *Id.*

"California's air, water, environment, and natural resources, and advancing the state's climate goals."[336]

California environmentalists looking to hold their state legislators accountable must also recognize the risk of executive capture. Although Governor Newsom has levied multiple attacks on Big Oil, even going so far as to institute litigation under claims of deception, cover-up, and environmental damage, he has not, as promised, "brought Big Oil to their knees."[337] Despite accusing his fellow Democrats of becoming "wholly-owned subsidiaries of the fossil fuel industry," Governor Newsom signed a measly seven of the twenty-one bills opposed by Big Oil in 2023.[338] Although Governor Newsom has vowed to hold Big Oil responsible for clean-up costs, in 2023, CalGEM spent "more than $34 million in taxpayer money to clean up 171 oil wells in Santa Barbara's Cat Canyon alone."[339] Moreover, AB 1057's widely acclaimed setback requirements may not even take effect, and companion bill AB 1440—which was passed by both houses and would have directed CalGEM to consider damage prevention before approving the use of certain production methods—was vetoed by none other than Governor Newsom himself.[340] In the wake of capture's pervasive effects, *Chevron* will further reduce political accountability by suggesting that California courts will refuse to act as a "check" on the legislature.

VII. CONCLUSION

By suggesting that courts are predisposed to defer to state authority, *Chevron* degrades political accountability and the "countervailing force of citizen plaintiffs," exacerbating the climate action gap by vitiating an important check on state power.[341] Generally, "the Legislature hold[s] the bar high when they know there's an alternative floating around out there."[342] Rather than holding California's Big Oil-captured policymakers accountable for their purported policies and positions, *Chevron* serves as a

336 *Id.*

337 Brandon Dawson, *Opinion: If Gavin Newsom Really Wanted to Go After Big Oil, Here's What He Would Do*, L.A. TIMES (Apr. 7, 2023, 3:30 AM), https://www.latimes.com/opinion/story/2023-04-07/gavin-newsom-oil-gas-wells-price-gouging-climate [https://perma.cc/6EZ7-MBEW].

338 Sabalow & Kimelman, *supra* note 322.

339 Dawson, *supra* note 337.

340 *See* ELKIND & LAMM, *supra* note 7.

341 *See* Zinn, *supra* note 292, at 84.

342 Maldonado, Ritchie & Kahn, *supra* note 277.

convenient shield against political accountability, enabling legislators to continue parading purely performative legislation.

Historically, courts have avoided entertaining citizen suits that implicate regulatory agencies "either because they view citizen plaintiffs as presumptively intermeddlers, or because they are unwilling to scrutinize the quasi-political judgments inherent in agency enforcement."[343] *Chevron* goes one step further, as the court's refusal to scrutinize CalGEM's misinterpretation of its mandate implicitly ratifies CalGEM's disproportionate focus on extraction. Consequently, *Chevron* widens the climate action gap by eliminating the judiciary as a sympathetic forum, effectively confining environmentalists to grassroots-level activism.[344]

"The risk of capture in enforcement shows that courts' uncritical deference to agency enforcement is misplaced."[345] By allowing CalGEM to maintain that the COGA precludes any authority to deny permits based on environmental considerations, *Chevron* creates an echo chamber and increases the risk of agency capture. In essence, *Chevron* renders the environmental provision of the COGA practically meaningless.[346] Consequently, Big Oil will interpret *Chevron* as a clear signal that California courts would rather preempt local oil and gas ordinances that restrict development instead of scrutinizing misguided agency action, even where such action contradicts the state's broader scheme of climate and energy law.

---

343 Zinn, *supra* note 292, at 85.

344 *See, e.g.*, Pacheco, *supra* note 252, at 373. Because local environmentalism and opposition to fracking stand in stark contrast to the state's embrace of Big Oil and prioritization of output maximization, this has led both groups to "tur[n] to the courts to answer the question: Who gets to regulate fracking?" *Id.* Preemption decides the question in favor of the state, thereby resulting in the waste of activist resources, preclusion of environmental solutions, and discouragement of future good-faith efforts. *See id.*

345 Zinn, *supra* note 292, at 174.

346 *See* CAL. PUB. RES. CODE §§ 3106(a), 3011(a) (West 2024).