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June 1, 2018

VIA FAX & U.S. MAIL
Donald Larkin, City Attorney
City of Morgan Hill
17575 Peak Ave.
Morgan Hill, CA 95037
Fax: 408-779-1592

Re: City Council Consideration of Proposals to Prevent Gun Violence

Dear Mr. Larkin:

We write to you on behalf of our client California Rifle & Pistol Association, Inc. ("CRPA") as well as the hundreds of thousands of their members in California, many residing within the Morgan Hill ("City") area.

It has come to our attention that the City intends to consider several proposed ordinances that seek to impose firearm related restrictions on residents and visitors to the City. These proposals include: (1) A duty to report the theft or loss of a firearm within 48 hours; (2) A mandatory lock storage requirement while in the home; (3) A prohibition on the possession of magazines holding more than 10 rounds; and, (4) A requirement that all firearm retailers obtain a special permit as a condition of obtaining a business license. The City has also proposed certifying staff training for gun retailers, maintaining ammunition sale logs, and prohibiting the sale of "Assault-Style" weapons to persons under the age of 21.

We ask that the City carefully consider the intended objectives of any proposed ordinances, as many of these issues as identified in the May 16, 2018 staff report raise serious constitutional concerns and would fail to meet objectives of reducing gun violence or promoting public safety.

I. REQUIRING INDIVIDUALS TO REPORT THE THEFT OF LOSS OF A FIREARM WITHIN 48 HOURS IS UNENFORCEABLE AND WILL ONLY RESULT IN FEWER REPORTS TO POLICE.

Under the preemption doctrine a local regulation will be struck down if it duplicates state law, conflicts with state law, or enters a field wholly occupied by the state to the exclusion of local regulation, either expressly or by implication.[1] In the present case, the mandatory reporting of the theft or loss of a firearm is already required under state law following the enactment of Proposition 63.[2] This provision subjects gun owners to penalties if a firearm, which is lost or stolen, is not reported to authorities within 5 days of the time he or she knew or reasonably should have known that the firearm was lost or stolen.[3]

With the enactment of Proposition 63, the state has fully and completely occupied the field regarding the reporting of lost or stolen firearms. To pass additional requirements at the local level that is duplicative and otherwise contradictory to state law will be struck down as preempted.

From a policy perspective, mandatory reporting requirements may appear sound, but in practice will only result in fewer firearms being reported. This is because when coupled with the mandatory locked-storage requirements also being considered by the City, reporting a firearm as lost or stolen may expose an individual to additional criminal liability should the person have failed to secure their firearms in accordance with the ordinance. The Fifth Amendment of the United States Constitution, which reads "[n]o person. . . shall be compelled in any criminal case to be a witness against himself," will prevent such individuals from being compelled to report the loss.[4]

As a bedrock of our criminal justice system, the Fifth Amendment prohibits police, prosecutors, and judges from requiring an individual to provide evidence or testimony that could result in potential criminal charges against them (compelled speech). Governor Brown noted these complicated policy issues when he vetoed numerous pieces of legislation prior to the voters passing Proposition 63. In his veto message, Governor Brown wrote that he had vetoed similar measures in 2012 and 2013 stating "I continue to believe that responsible people report the loss or theft of a firearm and irresponsible people do not… it is not likely that this bill would change that." Even Governor Brown's predecessor Governor Schwarzenegger vetoed a similar bill reasoning that it "could result in cases where law-

[1] *Fisacal v. City of San Francisco* (2008) 158 Cal. App. 4th 895, 903-04.
[2] Cal. Penal Code § 25250.
[3] *Id.*
[4] U.S. Const. amend.V.

abiding citizens face criminal penalties simply because they were the victim of a crime, which is particularly troubling."[5]

Given the enforcement difficulties, other jurisdictions considering similar measures have rejected them. Recently, the Sacramento Police Department reviewed identical Oakland, Berkley, and Alameda County reporting requirements, only to discover that not a single investigation, arrest, or conviction had taken place. In San Francisco, when police do try to enforce this portion of the municipal code, the cases are dismissed on constitutional grounds. One District Attorney for the County of San Francisco even stated, "I do not believe [the ordinance] will expand my ability to prosecute crime." This complete lack of the ability to enforce clearly illustrates how such a requirement will not further the objectives of the City.

What's more, law abiding citizens already report firearms lost or stolen. Doing so protects them from becoming a suspect in any potential criminal investigation involving the misuse of the firearm and increases the chances of the firearm being returned. Therefore, the City should be taken steps to encourage the reporting by not imposing penalties on otherwise law-abiding gun owners for failing to do so.

II. MANDATING FIREARMS TO BE STORED IN A LOCKED CONTAINER IN ONE'S HOME RAISES SERIOUS SECOND AND FOURTH AMENDMENT CONCERNS AND IS OTHERWISE PREEMPTED

As a threshold matter, the City cannot enforce the proposed locked storage requirements without running afoul of the Fourth Amendment of the United States Constitution, which provides for "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[6] This prevents the City from inspecting how individuals are storing their firearms in their home or vehicle without first having established probable cause that the person is in violation of the ordinance. Tellingly, although some California cities have similar ordinances in effect, we are unaware of a single instance of enforcement.

In the words of the United States Supreme Court, the "inherent right of self-defense has been central to the Second Amendment right[,]" and "the need for self-defense, family, and property is most acute" in the home.[7] At issue in *Heller* was a District of Columbia ordinance substantially similar to the recommendations of Morgan hill requiring residence to store firearms in a locked container or disable the firearm when not in use. But because of the importance of self-protection in the home, the

[5] A copy of Governor Schwarzenegger's veto letter for SB59 can be viewed online at ftp://leginfo.publicca.gov/pub/05-06/bill/sen/sb_0051-0100/sb_59_vt_20060929.html

[6] U.S. Const. amend IV.

[7] *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

Supreme Court expressly held that "any ban on handgun possession in the home violates the Second Amendment, as does [a] prohibition against rendering any lawful firearm in the home operable for the purposes of immediate self-defense."[8] Given the striking similarity, the proposed recommendation is completely at odds with *Heller* and violates the Second Amendment.

The Ninth Circuit case of *Jackson v. City of San Francisco*, while on point, is not dispositive of this issue. In *Jackson*, the Ninth Circuit only heard an appeal for the denial of a motion for preliminary injunction, not a final decision on the merits of the case. Upon appeal to the Supreme Court, where certiorari was denied, Justice Thomas wrote a scathing opinion noting that "The Court should have granted a writ of certiorari to review this questionable decision and to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights."[9] Because of the *Heller* decision and the fact that *Jackson* was never decided on the merits, it is likely that the should the Supreme Court ever hear a case regarding a mandatory lock storage ordinance, it would hold such an ordinance unconstitutional.

In addition to the Second Amendment concerns, the ordinance also raises serious preemption concerns. As stated above, a local regulation will be struck down if it duplicates state law, conflicts with state law, or enters into a field wholly occupied by the state to the exclusion of local regulations, either expressly or by implication.[10] Dictating the manner in which residents keep their firearms while in the home, and requiring that they keep handguns in a locked storage container or disabled with a trigger lock, runs afoul of the preemption doctrine insofar as it contradicts state law and enters into an area that is fully occupied by state law.

A local law "contradicts state law when it is inimical to or cannot be reconciled with state law.[11] The recommended ordinance is likely contrary to state law to the extent it dictates the manner one must store their firearms in the home. California maintains a comprehensive set of statutes, creating liability for the criminal storage of a firearm whenever a minor or prohibited person may access a firearm and uses that firearm to cause death or bodily injury or carries it to a public place.[12] Liability for such is subject to an equally comprehensive set of exceptions.[13] The proposed ordinance that would mandate locked storage of firearms in the home for residents of Morgan hill would strip from those residents the rights to engage in behavior specifically deemed lawful by the state.

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[8] *Id.* at 635.

[9] See *Heller*, 554 U.S., at 634; *Id.* at 635 (explaining that the Second Amendment "elevates above all other interest the right of the law-abiding, responsible citizens to use arms in defense of hearth and home.").

[10] *Fiscal v. City and County of San Francisco*, 158 Cal. App.4th 895, 903-04 (2008).

[11] *O'Connell v. City of Stockton*, 41 Cal.4th 1061, 1068 (2007).

[12] Cal. Penal Code §§ 25100-25135, 25200-25225.

[13] Cal. Penal Code §§ 25105(a)-(g), 25135(a)(1)-(6), 25205.

Similarly, a recommended ordinance mandating locked storage of firearms is impliedly preempted by state law because it encroaches on an area of law occupied by state law. The storage of firearms is fully and completely regulated by the California Penal Code. In addition to the laws regarding the prevention of access by minors and prohibited persons discussed earlier, California mandates that any firearm sold by a licensed dealer must include a firearm safety device.[14] Additionally, whenever an individual purchases a long gun in California they must sign an affidavit stating ownership of a gun safe or lock box.[15] Such safety devices must meet rigorous safety standards as determined by the California Attorney General so that they "significantly reduce the rate of firearm-related injuries to children 17 years of age and younger."[16]

There are also several firearm storage requirements when one lives with another individual who is prohibited by state or federal law from owning firearms.[17] Because the state's firearm storage scheme is so comprehensive, any local interference with that scheme (except that which was expressly authorized) is preempted. If local governments are permitted to enact further criminal restrictions on the storage of firearms, firearm holders will be confronted by a patchwork quilt of firearm and storage laws each time they enter another jurisdiction, sowing frustration, uncertainty, and the fear of prosecution among California residents as they travel throughout the state.

III. ANY ORDINANCE PROHIBITING THE POSSESSION OF LARGE CAPACITY MAGAZINES IS PREEMPTED AND OTHERWISE AMOUNTS TO AN UNCONSTITUTIONAL TAKING

As noted in the City Council May 16, 2018 report, there are challenges currently underway and pending in the courts regarding the legality of banning the possession of magazines over 10 rounds. One such case, *Duncan v. Becerra*,[18] challenges the state's ban on magazines holding over 10 rounds and is currently working its way through the courts. On June 29, 2017, the court granted a motion for preliminary injunction and stayed enforcement of the state's magazine possession ban for magazines holding more than 10 rounds while the case is litigated. In the preliminary injunction from the court, the Judge noted "The State of California's desire to criminalize simple possession of a firearm magazine able to hold more than 10 rounds is precisely the type of policy choice that the Constitution takes off the table." With the federal injunction in place, it would be completely improper for the City to consider an ordinance in direct conflict with such an injunction.

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[14] Cal. Penal Code § 23650(a).
[15] *See* State of California, Bureau of Firearms From 978 (Re. 01/2013), available at ttps://oag.ca.gov/all/files/agweb/pdfe/firearms/forms/bof_978.pdf
[16] *Id.* at § 23650(a).
[17] *Id.* at § 25135.
[18] *Duncan v. Becerra*, 265 F.Supp.3d 1106 (2017).

What's more, such an ordinance will also be preempted under state law. In 2015 the City of Los Angeles attempted to pass a ban on the possession of magazines that held more than 10 rounds. They were sued by organizations and law enforcement. Eventually under the pressure of constitutional violations and the injunction ruling in *Duncan*, Los Angeles repealed the ordinance.

The Judge in *Duncan* spoke of the "complexity" of the state law and how the state has continued to add layers. [19]Banning the possession of "large capacity magazines" runs afoul of the preemption doctrine insofar as it contradicts state law and enters into an area of law that is fully occupied by state law.

By banning the possession of magazines lawfully acquired, the City's actions would constitute a physical appropriation of property without just compensation, which is *per se* unconstitutional.[20] A regulation that "goes too far"-for example, by depriving a property owner of economically beneficial use or otherwise "interfering with legitimate property interest"-also requires just compensation.[21]

IV. THE PROPOSED FIREARM RETAIL SALE RESTRICTIONS ARE PREEMPTED AND WILL DO NOTHING TO PROMOTE PUBLIC SAFETY

As noted in the City Council's May 16, 2018 report, the City does not currently regulate retail firearm sales. The proposal that the City should regulate retail firearm sales in the City poses serious preemption and Second Amendment issues. The City has proposed the following: (1) Certify that staff members who engage in retail sales are trained to recognize and prevent straw purchases, (2) Maintain an ammunition sales log, which records all ammunition sales made by the retailer, and (3) Prohibit the sale of assault-style firearms to minors under the age of 21, (4)proposals for restricting firearms on City property, and (5) Potential regulations of locations where firearms may be sold. Each of these proposals is likely preempted by state and federal law.

Pursuant to the Gun Control Act (GCA), a federal firearm license (FFL) holder must be a person engaged in the business of selling firearms at wholesale or retail, a person engaged in the business of repairing or making or fitting special barrels, stocks, or trigger mechanisms to firearms, or any person who is a pawnbroker. An FFL must be licensed under the provisions of 18 U.S.C. § 921.

Training to recognize and prevent straw purchases is already provided by the Bureau of Alcohol Firearms, Tobacco, and Explosives. The federal fine for making false statements on a federal firearm record is up to $250,000 dollars and prison for up to 10 years. Additionally, in June of 2014, the U.S. Supreme Court issued a ruling in *Abramski v. U.S.* further emphasizing that an FLL is forbidden from "selling a gun to anyone it knows or has reasonable cause to believe is a forbidden

[19] *Id. Duncan v. Becerra*, Order Granting Preliminary Injunction (June 29, 2017).
[20] *See Horne v. Dep't of Agric.*, -- U.S.--, 135 S. Ct. 2419, 2427 (2015).
[21] *Lingle v. Chevron*, 544 U.S. 528, 537-39 (2005).

buyer."[22] This is clearly an area that is preempted by federal law because the federal government has completely permeated the field.

California Federal Licensed firearm dealers are one of the most heavily regulated businesses in the county. The Penal Code addressed all requirements and inspections by state officials for licensed dealers. California generally prohibits anyone without a firearm license from selling, leasing, or transferring a firearm to another.[23] The California Department of Justice (CADOJ) must approve of any licenses for persons desiring to sell firearms or ammunition in California. The CADOJ conducts background checks on all owners of a business and any employee of the business who must now have a Certificate of Eligibility if they have access to firearms or ammunition.[24] California law also requires a licensee to report any secondhand or pawned firearms to the DOJ on a daily basis.[25] This includes any firearm taken in trade, pawn, accepted for sale on consignment, or accepted for auction.

Several times in the City Council meeting dated March 7, 2018, the terms "assault-style" or "assault weapons" were referred to. Assault Weapons have been banned from sale since the 1990's.[26] *There are no Assault Weapons currently being sold.* California banned the sale even before the federal government in the late 1980s. The term "assault-style" is an undefined media term that is extremely difficult to distinguish for determining which firearms are being singled out and which are not. Any attempt by the City to prohibit "assault-style" firearm would be ambiguous and overly-broad at best.

Limits on those under the age of 21 years would violate numerous federal and state preemption laws. Specifically, the age restriction would violate the California Unruh Civil Rights Act which courts have held applies to age discrimination as well as the listed categories of discrimination within the Act. Just this week the California Senate passed SB 1100 which prohibits the sale of firearms to those persons under 21 years of age who do not possess a valid hunting license. This area of the law is very much still in flux at this point and any action by the City would be premature at this time.

Action from the City to further regulate ammunition sales would also run afoul of state law and would therefore be preempted. Beginning in January 2018 all transactions (sale, transfer, purchase) must occur through a face-to-face transaction.[27] There are no more on-line transactions. While this is being currently challenged in the courts, the finality as to the legal basis for this law has not yet been determined. Additionally, beginning in January 2019 the state will require those purchasing

[22] 134 S.Ct. 2259 (2014).
[23] Cal. Penal Code § 26500.
[24] Cal. Penal Code §§ 26700-27140 26915, 30347.
[25] Business & Professional Code § 21628.2.
[26] See Federal Assault Weapons Ban of 1994.
[27] Cal. Penal Code § 30312 (b).

ammunition to obtain a license from the state, undergo an additional background check, and mandates that licensed ammunition dealers must maintain records on each transaction.[28] The collected information must be submitted to the CADOJ where the CADOJ will maintain an information database. Any person who is prohibited from owning or possessing a firearm is also now prohibited from possessing or owning ammunition.[29] Several years ago the City of Pasadena repealed a similar ordinance because the police found that "The registration information sat unused in a filing cabinet in police headquarters, and police investigators said it would not help them solve crimes because the information would not stand up in court." As you can see, action by the City would not only be preempted by state laws already in place but would also seek to add additional burdens on ammunition dealers that are an unnecessary government action and unconstitutional.

V. CONCLUSION

Our clients understand the need to combat the criminal misuse of firearms and to keep communities safe. The proposed items only seek to target law-abiding citizens, licensed dealers who already report to the state and federal authorities, and residents will be powerless to prevent or minimize the criminal elements that you seek to eliminate in your communities should these provisions be enacted. For the reasons noted herein, we strongly encourage the City Council not to adopt the recommended ordinances noted in the City Council May 16, 2018 report and instead look at how education and community action can better work to serve the safety needs in your community.

Sincerely,

Michel & Associates, P.C.

Tiffany D. Cheuvront

Tiffany D. Cheuvront

Cc: Hon. Steve Tate, Mayor
Hon. Rich Constantine Mayor Pro Tem
Hon. Larry Carr, Council Member
Hon. Rene Spring, Council Member
Hon. Caitlin Robinett Jachimowicz, Council Member

[28] Cal. Penal Code § 30352(a).
[29] Cal. Penal Code § 30305(a)(1).

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