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13

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
15 COUNTY OF SANTA CLARA, DOWNTOWN COURTHOUSE  
16

17 G. MITCHELL KIRK; and CALIFORNIA  
RIFLE & PISTOL ASSOCIATION,  
INCORPORATED,

18 Plaintiffs and Petitioners,  
19

20 vs.

21 CITY OF MORGAN HILL; MORGAN HILL  
CHIEF OF POLICE DAVID SWING, in his  
22 official capacity; MORGAN HILL CITY  
CLERK IRMA TORREZ, in her official  
23 capacity; and DOES 1-10,,  
24

25 Defendants and Respondents.  
26  
27  
28

Case No. 19CV346360

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

Judge: Hon. Peter Kirwan

Date: July 2, 2020

Time: 9 a.m.

Dept: 19

Action Filed: April 15, 2019

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1 I. INTRODUCTION

2 On November 28, 2018, responding to its citizens' desire to take action on gun violence in  
3 light of the Parkland mass shooting tragedy, the Morgan Hill City Council adopted Local  
4 Ordinance 2289, codified at Municipal Code 9.04.030 ("Morgan Hill Ordinance" or "Ordinance").  
5 The Ordinance promotes public safety by requiring individuals to report the loss or theft of  
6 firearms to Morgan Hill Police within 48 hours of the loss or theft.<sup>1</sup> The Ordinance also requires  
7 gun dealers within Morgan Hill to post signage in stores outlining these requirements and to  
8 distribute the relevant chapter to customers who purchase firearms.

9 Though mass shootings like Parkland receive disproportionate media attention, lost or  
10 stolen firearms have fueled a quieter epidemic of gun violence. Guns are stolen from an  
11 individual owner roughly once every two minutes, but nationally up to 40% of guns that are lost or  
12 stolen go unreported.<sup>2</sup> Lax reporting requirements embolden straw purchasers and gun traffickers,  
13 who can evade responsibility for supplying firearms used in violent crimes by falsely claiming a  
14 gun they supplied had previously been lost or stolen.<sup>3</sup> Lax reporting requirements also thwart law  
15 enforcement's ability to investigate actual thefts from legal owners—which have increased  
16 significantly in recent years<sup>4</sup>—and recover stolen firearms before they are used to harm someone.  
17 The consequences of escalating firearm thefts are devastating: an analysis of tens of thousands of  
18 stolen guns recovered by police from 2010 to 2016 found that the majority of weapons were  
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20 \_\_\_\_\_  
21 <sup>1</sup> Municipal Code 9.04.030 states that individuals must report within 48 hours of when they knew,  
22 or reasonably should have known, about the loss or theft. While important for ensuring that  
23 individuals are not unfairly penalized for a firearm loss or theft they did not know about, for  
24 simplicity, the caveat of "reasonably should have known" has been omitted throughout.

25 <sup>2</sup> David Hemenway, Deborah Azrael, and Matthew Miller, "Whose Guns are Stolen? The  
26 Epidemiology of Gun Theft Victims," *Injury Epidemiology* 4, no. 1 (2017); Brian Freskos,  
27 "Missing Pieces: Gun Theft from Legal Gun Owners is on the Rise, Quietly Fueling Violent  
28 Crime, The Trace, November 20, 2017, <https://bit.ly/2izST1h>. The latter report used public  
records requests to compile national data on guns reported lost or stolen to law enforcement.

<sup>3</sup> See, e.g., Daniel W. Webster et al., "Preventing the Diversion of Guns to Criminals Through  
Effective Firearm Sales Laws," in *Reducing Gun Violence in America: Informing Policy with  
Evidence and Analysis* (Baltimore: The Johns Hopkins University Press, 2013), 118.

<sup>4</sup> Freskos, *supra* n.2.

1 recovered only *after* being used in a crime (and not before).<sup>5</sup>

2 Informed by these and other public safety concerns associated with lost or stolen firearms,  
3 Morgan Hill's Ordinance passed by a vote of 4 to 1. On April 15, 2019, the California Rifle and  
4 Pistol Association (CRPA) and G. Mitchell Kirk (together "Plaintiffs") filed this action seeking  
5 declaratory and injunctive relief to invalidate the ordinance.<sup>6</sup> Plaintiffs challenge the Ordinance as  
6 preempted by state law, specifically Penal Code Section 25250, which was enacted when  
7 California voters passed Proposition 63 on November 8, 2016 ("Prop. 63"). Penal Code Section  
8 25250 requires individuals to report the loss or theft of a firearm within five days of the loss or  
9 theft.<sup>7</sup> Plaintiffs argue that the Morgan Hill Ordinance is preempted by this state law because: 1) it  
10 duplicates state law; 2) it contradicts state law; or 3) it enters into an area fully occupied by state  
11 law. Plaintiffs are mistaken.

12 Just as when a city adopts stricter speed limits to better protect its citizens, Morgan Hill's  
13 Ordinance does not duplicate state law. The two laws are not identical and do not criminalize  
14 precisely the same acts. Nor does the Ordinance contradict state law; reporting within 48 hours  
15 complies with both requirements simultaneously. Lastly, state law does not fully occupy the area  
16 of timely reporting requirements for a lost or stolen gun. In adopting Prop. 63, voters did not  
17 indicate any intent to foreclose local regulation, and indeed, local ordinances requiring faster  
18 reporting of a firearm theft or loss already existed when the initiative was passed. Simply put, the  
19 Ordinance goes further than state law in promoting public safety by requiring that law  
20 enforcement be notified of a lost or stolen firearm within two days instead of five. It is not  
21 preempted by state law.

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25 <sup>5</sup> Freskos, *supra* n.2.

26 <sup>6</sup> Plaintiffs also included a cause of action for Writ of Mandate and/or Prohibition but  
subsequently agreed to dismiss this cause of action.

27 <sup>7</sup> Penal Code § 25250 also includes a caveat requiring individuals to report within five days of  
28 when they knew, or reasonably should have known, about the loss or theft. Again, for simplicity's  
sake this caveat has been omitted throughout.



1 **II. STATEMENT OF UNDISPUTED FACTS**

2 **A. Prop. 63: “The Safety for All Act of 2016.”**

3 On November 8, 2016, California Voters enacted Proposition 63 (“Prop. 63”) entitled “The  
4 Safety for All Act of 2016.”

5 **B. Prop 63. Section 2 Findings and Declarations**

6 Prop 63. Section 2: Findings and Declarations sets out fourteen findings made by the  
7 “people of the State of California,” including:

8 “8. Under current law, stores that sell ammunition are not required to report to law  
9 enforcement when ammunition is lost or stolen. Stores should have to report lost or stolen  
10 ammunition within 48 hours of discovering that it is missing so law enforcement can work  
11 to prevent that ammunition from being illegally trafficked into the hands of dangerous  
12 individuals.”

13 “9. Californians today are not required to report lost or stolen guns to law enforcement.  
14 This makes it difficult for law enforcement to investigate crimes committed with stolen  
15 guns, break up gun trafficking rings, and return guns to their lawful owners. We should  
16 require gun owners to report their lost or stolen guns to law enforcement.”

17 **C. Prop 63. Section 3 Purpose and Intent**

18 Prop 63. Section 3: Purpose and Intent is comprised of nine paragraphs that together set  
19 out the purpose and intent of the people of the State of California in enacting The Safety for All  
20 Act of 2016. This section states, in relevant part:

21 “2. To keep guns and ammunition out of the hands of convicted felons, the dangerously  
22 mentally ill, and other persons who are prohibited by law from possessing firearms and  
23 ammunition.”

24 “4. To require all stores that sell ammunition to report any lost or stolen ammunition  
25 within 48 hours of discovering that it is missing.”

26 “6. To require the reporting of lost or stolen firearms to law enforcement.”

27 **D. Penal Code Section 25250.**

28 Following Prop. 63’s passage, Penal Code § 25250 took effect on July 1, 2017. Penal  
Code § 25250, in relevant part, states:

“Commencing July 1, 2017, every person shall report the loss or theft of a firearm he or  
she owns or possesses to a local law enforcement agency in the jurisdiction in which the  
theft or loss occurred within five days of the time he or she knew or reasonably should  
have known that the firearm had been stolen or lost”

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**E. Prop. 63 Voter Guide: For and Against.**

A Voter Guide For Prop. 63 summarized the proposed law and included arguments For and Against the initiative. The “Pro” argument stated, in part, the initiative: “will . . . [r]equire people to notify law enforcement if their guns are lost or stolen, before the weapons end up in the wrong hands.”

The “Pro” Rebuttal stated, in part: “Prop. 63 also requires reporting lost and stolen firearms, to help police shut down gun trafficking rings and locate caches of illegal weapons. Prop. 63 will help police recover stolen guns before they’re used in crimes and return them to their lawful owners.”

**F. Local Regulation Governing Lost or Stolen Reporting Requirements.**

When Prop. 63 was passed, local regulation governing lost or stolen reporting requirements already existed in at least 18 California cities and towns.<sup>8</sup>

**G. Morgan Hill City Local Ordinance No. 2289.**

More than two years after the enactment of Prop. 63, on November 28, 2018, Morgan Hill City Council adopted Local Ordinance No. 2289.

**H. Local Ordinance No. 2289 amended Municipal Code Section 9.04.030.**

Municipal Code Section 9.04.030 now reads:

**“9.04.030. Duty to report theft or loss of firearms.**

Any person who owns or possesses a firearm (as defined in Penal Code Section 16520 or as amended) shall report the theft or loss of the firearm to the Morgan Hill Police Department within forty-eight (48) hours of the time he or she knew or reasonably should have known that the firearm had been stolen or lost, whenever: (1) the person resides in the City of Morgan Hill; or (2) the theft or loss of the firearm occurs in the City of Morgan

<sup>8</sup> Oakland (Mun. Code Sec. 9.36.131 – 48 hours), San Francisco (Police Code Sec. 616 – 48 hours), Los Angeles (Mun. Code Sec. 5512 – 48 hours), Campbell (Mun. Code Sec. 8.12.045 – 48 hours), Berkeley (Mun. Code Sec. 13.75.020 – 48 hours), Sacramento (City Code Sec. 9.32.180 – 48 hours), Port Hueneme (Mun. Code Sec. 3914.10 – 48 hours), Simi Valley (Mun. Code Sec. 5-22.12 – 72 hours), West Hollywood (Mun. Code Sec. 9.27.010 – 48 hours), Thousand Oaks (Mun. Code Sec. 5-11.03 – 72 hours), Richmond (Mun. Code. Sec. 11-97.020 – 48 hours), Sunnyvale (Mun. Code Sec. 9.44.030 – 48 hours), Santa Cruz (Mun. Code Sec. 9.3.010 – 5 days), Huntington Park (Mun. Code Sec. 5.17.05 – 48 hours), Maywood (Mun. Code Sec. 4-4.11 – 48 hours), Oxnard (Mun. Code Sec. 7-141.1 – 72 hours), Tiburon (Mun. Code Sec. 32-27 – 48 hours), and Palm Springs (Mun. Code Sec. 11.16.040 – 48 hours (repealed 2018)).

Hill.”

**I. Municipal Code 9.04.030 took effect on December 29, 2018.**

**III. LEGAL STANDARD**

Summary judgment shall be granted when “there is no triable issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” Cal. Civ. Proc. Code § 437c(c); *see also Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 843 (2001). The purpose of summary judgment is “to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” *Id.* at 843. When a defendant seeks summary judgment, the defendant need not negate the plaintiff’s claims, but must only show that the “plaintiff cannot establish at least one element of the cause of action.” *Id.* at 853-54. A defendant may meet this burden by showing that an issue is foreclosed as a matter of law or by showing that the plaintiff “does not possess, and cannot reasonably obtain, needed evidence.” *Id.* at 854.

Although the moving party generally holds the burden on a summary judgment motion, where, as here, one party claims the Ordinance is preempted by state law, that party bears the burden regardless of which party moves for summary judgment. *See, e.g. First Resort, Inc. v. Herrera*, 80 F. Supp. 3d 1043, 1055 (N.D. Cal. 2015), *aff’d*, 860 F.3d 1263 (9th Cir. 2017) (placing burden on the party claiming preemption on cross-motions for summary judgment).

**IV. ARGUMENT**

Morgan Hill’s Motion for Summary Judgment should be granted. Morgan Hill passed Local Ordinance 2289 pursuant to its broad police powers and the Ordinance does not conflict with state law. It is not preempted. There is not a triable issue.

**First**, the California Constitution grants local authorities broad power to pass and enforce local regulations, which includes firearms regulation. Indeed, the question is not whether the state legislature has granted Morgan Hill the authority to pass gun regulations, but whether it has specifically taken such authority away. There can be no genuine dispute that the state has not acted to prevent local regulation of lost or stolen reporting requirements.

**Second**, when local governments regulate pursuant to the authority vested by the

1 California Constitution, those regulations are presumed valid absent a clear indication of  
2 preemptive intent by the state legislature. Plaintiff bears the burden of showing this “clear  
3 indication of preemptive intent.” Furthermore, California courts are reticent to find preemption  
4 when local governments regulate in areas of considerable local concern such as firearms. Plaintiff  
5 cannot show a “clear indication of preemptive intent” as the undisputed facts demonstrate the  
6 exact opposite.

7 **Third**, Morgan Hill’s Ordinance is not preempted by state law because it does not conflict  
8 with state law. Absent express preemptive language, which is not present here, California courts  
9 look to whether the Ordinance conflicts with state law by either duplicating or contradicting state  
10 law. Morgan Hill’s Ordinance does neither.

11 **Fourth**, the relevant indicia of legislative intent confirm that neither the state legislature  
12 nor Prop. 63 voters intended to preempt local regulation of lost or stolen firearms reporting  
13 requirements. To begin with, the state legislature has declined, on many occasions, to preempt  
14 gun regulation beyond three discrete areas not implicated here. Instead local governments are left  
15 to exercise their authority in this area given the immense local interests at stake. The legislature’s  
16 actions demonstrate an affirmative intent not to impliedly preempt those areas not expressly  
17 preempted, including lost or stolen reporting requirements. Additionally, the Purpose and  
18 Findings of Prop. 63 demonstrate that voters intended to establish a baseline reporting time  
19 requirement to help facilitate the recovery of lost or stolen firearms. At the time of passage, that  
20 baseline in Prop 63 had already been, and would continue to be, reinforced and supplemented by  
21 many local ordinances that establish stricter reporting requirements.

22 In sum, Morgan Hill’s Ordinance was passed pursuant to Morgan Hill’s constitutionally-  
23 bestowed authority; the Ordinance neither duplicates nor contradicts state law; the state legislature  
24 has intentionally cabined its preemption to only three types of gun regulation, none of which  
25 include lost and stolen reporting; and other relevant evidence indicates the voters did not intend to  
26 preempt local regulations. Morgan Hill’s Ordinance is not preempted as a matter of law.

1           **A.       The California Constitution Grants Municipalities Broad Power to Make and**  
2           **Enforce Regulations.**

3           Under Article XI, section 7 of the California Constitution, a “city may make and enforce  
4 within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with  
5 general laws.” (Cal. Const., art. XI, § 7.) As a California municipality, Morgan Hill enjoys broad  
6 police powers. A municipality’s police powers are as broad as the police powers exercisable by  
7 the State Legislature itself. *See Birkenfeld v. City of Berkeley*, 130 Cal. Rptr. 465, 550 (1976).

8           The right to regulate firearms – including reporting the loss or theft of a firearm – falls  
9 squarely within this broad authority. *See California Rifle & Pistol Assn. v. City of W. Hollywood*,  
10 66 Cal. App. 4th 1302, 1310 (1998) (“Our starting point in this case, therefore, is that the City also  
11 has the constitutional power to regulate in the area of firearms control.”).

12           **B.       Plaintiffs Bear the Burden of Rebutting the Presumption Against Preemption**  
13           **Because Morgan Hill Regulated Pursuant to its Police Powers.**

14           The Morgan Hill City Council enacted the Ordinance regulating the reporting of lost or  
15 stolen firearms as part of its traditional police powers. “[W]hen local government regulates in an  
16 area over which it traditionally has exercised control ... California courts will presume, absent a  
17 clear indication of preemptive intent from the Legislature, that such regulation is not preempted by  
18 state statute.” *Coyne v. City & Cty. of San Francisco*, 9 Cal. App. 5th 1215, 1225 (Ct. App. 2017)  
19 (citations omitted). The party claiming that general state law preempts a local ordinance—  
20 including a firearms ordinance—has the burden of rebutting this presumption by demonstrating  
21 legislators’ “preemptive intent.” *Id.*; *see also Big Creek Lumber Co. v. Cty. of Santa Cruz*, 38 Cal.  
22 4th 1139, 1149 (2006); *Calguns Found., Inc. v. Cty. of San Mateo*, 218 Cal. App. 4th 661, 666–67  
23 (2013) (citations omitted) (“[t]he presumption against preemption accords with our more general  
24 understanding that it is not to be presumed that the Legislature in the enactment of statutes intends  
25 to overthrow long-established principles of law unless such intention is made clearly to appear  
26 either by express declaration or by necessary implication”).

27           Courts are particularly reluctant to depart from the presumption against preemption when  
28 considering a local regulation that covers an area of significant local interest differing from one  
locality to another. *Big Creek Lumber*, 38 Cal. 4th at 1149. The California Supreme Court has

1 held, that the regulation of firearms covers just such an area. *See, e.g. Galvan v. Super. Ct. of City*  
2 *& Cty. of San Francisco*, 70 Cal. 2d 851, 864 (1969) (overturned by statute) (“That problems with  
3 firearms are likely to require different treatment in San Francisco County than in Mono County  
4 should require no elaborate citation of authority.”).

5 Within the general category of firearms regulation, the reporting of lost or stolen firearms  
6 in particular implicates particularly localized interests. Local law enforcement track and  
7 investigate firearms that go missing in their communities and who must expend resources  
8 responding to crimes perpetrated with stolen guns. Theft patterns differ across regions,<sup>9</sup> which  
9 makes sense given that so much gun crime is *local* crime — studies show that “almost one-third  
10 (32.2%) of traced crime guns are recovered by police within 10 miles of the [firearms dealer]  
11 where they were first purchased.”<sup>10</sup> Furthermore, the legislative record confirms that the Morgan  
12 Hill City Council focused on the local benefits of the Ordinance. (*See* Allison Decl. Ex. 11). The  
13 Council recognized that legislation requiring reporting of lost or stolen guns was recommended by  
14 the Association of Bay Area Governments (of which Morgan Hill is a member) as a “model  
15 ordinance[...for cities and counties to pursue” to help reduce gang-related youth gun violence in  
16 neighboring San Mateo County. *Id.* at 203, 217. This recommendation, coupled with the fact that  
17 many gun crimes occur close to home, demonstrates Morgan Hill’s compelling local interests in  
18 reporting measures that prevent lost or stolen guns from entering the criminal market. While it is  
19 already well-established that firearms regulation implicates local concerns, *see Galvan*, 70 Cal. 2d  
20 at 864, these local interests specific to the Ordinance strengthen the usual presumption against  
21 preemption with extra force.

22 For these reasons, Morgan Hill’s Ordinance enjoys a strong presumption against  
23 preemption. The Ordinance is within Morgan Hill’s traditional police powers and covers an area  
24 of significant local interest that differs from one locality to another. As discussed in Section C.3,  
25 *infra*, the undisputed facts compel applying the presumption here. The Ordinance is neither

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26 <sup>9</sup> *See* Freskos, *supra* n.2 (explaining “thieves were more likely to break into homes in areas where  
27 gun ownership rates were high”)

28 <sup>10</sup> *Douglas J. Wiebe et al.*, “Homicide and Geographic Access to Gun Dealers in the United  
States,” *BMC Public Health* 9:199 (2009): 2, 7, <http://www.biomedcentral.com/1471-2458/9/199>.

1 expressly nor impliedly preempted by state law, let alone is it “made clearly to appear” that such  
2 preemption was intended.

3 **C. The Ordinance Is Not Preempted By State Law as It Does Not Conflict With**  
4 **State Law.**

5 An otherwise valid local ordinance is preempted by state law if it conflicts with state law.  
6 *Great W. Shows, Inc. v. Cty. of Los Angeles*, 27 Cal. 4th 853, 860 (2002). A conflict arises if the  
7 local law: 1) duplicates state law; 2) contradicts state law; or 3) enters an area fully occupied by  
8 general law, either expressly or by implication. *Id.* The Ordinance does not conflict with state law  
9 under any of the three categories outlined above.

10 **1. The Ordinance Does Not Duplicate State Law Because It Differs From**  
11 **State Law.**

12 The first way a local ordinance can conflict with state law is if it duplicates state law. A  
13 local ordinance duplicates a state statute where it “criminalize[s] precisely the same acts which are  
14 prohibited by the statute.” *See Nordyke v. King*, 27 Cal. 4th 875, 883 (2002) (citations omitted).

15 In *Nordyke v. King*, the California Supreme Court found that an Alameda County  
16 prohibition on possessing a firearm on county property was not duplicative of state law which  
17 prohibited carrying a loaded firearm, and a concealable firearm, without a license. *Id.* Even  
18 though an individual carrying a loaded, concealable firearm on county property would be in  
19 violation of both the state statutes and the local ordinance, the Court found that the ordinance did  
20 not “criminalize precisely the same acts which are prohibited by the statute and is therefore not  
21 duplicative.” *Id.* (citations omitted).

22 The Ordinance does not criminalize precisely the same acts as state law and thus does not  
23 duplicate state law. The Ordinance requires the reporting of a lost or stolen firearm to the Morgan  
24 Hill Police within 48 hours of the loss or theft whenever: (1) the person resides in Morgan Hill; or  
25 (2) the loss or theft occurs in Morgan Hill. (*See Allison Decl. Ex. 2*). State law requires the  
26 reporting of a lost or stolen firearm to local law enforcement in the jurisdiction where the theft  
27 occurred within five days of the loss or theft. *See Cal. Pen. Code § 25250*. Where the Ordinance  
28 requires the report within 48 hours, state law requires the report within five days. Where the

1 Ordinance requires the report to Morgan Hill Police when the loss or theft occurs to a Morgan Hill  
2 resident, state law requires reporting in the jurisdiction where the loss or theft occurred. In light of  
3 these distinctions, the Ordinance does not duplicate state law.

4 While the Ordinance and state law both prohibit some acts (i.e. waiting until day six to  
5 report the loss or theft), there are other acts that would be punishable under the Ordinance but not  
6 state law or vice-versa. For example, a Morgan Hill resident who had their gun stolen in San  
7 Francisco and who only timely reported to San Francisco law enforcement would be in violation  
8 of the Ordinance but not state law. Alternatively, a Morgan Hill resident who had their gun stolen  
9 in San Francisco and who only timely reported to the Morgan Hill Police would be in violation of  
10 state law but not the Ordinance. Just as the Alameda County ordinance in *Nordyke* did not  
11 criminalize precisely the same acts as state law, the Morgan Hill Ordinance does not criminalize  
12 precisely the same acts as state law. *See Nordyke*, 27 Cal. 4th at 883. The Ordinance is not  
13 duplicative of state law.

14 **2. The Ordinance Does Not Contradict State Law Because One Can**  
15 **Reasonably Abide By Both State Law and The Ordinance.**

16 The second way local legislation can be preempted for conflicting with state law is if it  
17 contradicts state law. A local ordinance is contradictory to state law when the local “ordinance  
18 directly requires what [a state] statute forbids or prohibits what the state enactment demands.”  
19 *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 56 Cal. 4th 729, 743-  
20 44 (2013). An ordinance is only contradictory to state law if it is “inimical to or *cannot be*  
21 *reconciled with*” state law. *O’Connell v. City of Stockton*, 41 Cal. 4th 1061, 1068 (2007)  
22 (emphasis added). As the California Supreme Court has explained, “no inimical conflict will be  
23 found where it is reasonably possible to comply with both the state and local laws.” *City of*  
24 *Riverside*, 56 Cal. 4th at 743-44.

25 Here, the Ordinance requires a gun owner to report the loss or theft of a firearm within 48  
26 hours. Prop. 63 allows a gun owner to wait up to five days before reporting a loss or theft; it does  
27 not require an individual to wait that long. One can reasonably comply with both the Ordinance  
28



1 and state law by reporting a loss or theft within 48 hours.<sup>11</sup> Put another way, “[t]he Ordinance  
2 does not mandate what state law expressly forbids, nor does it forbid what state law expressly  
3 mandates.” *Great W. Shows*, 27 Cal. 4th at 866.

4                                **i.        Morgan Hill Can Narrow the Options Available Under State**  
5                                **Law and Still Not Contradict it.**

6                The Ordinance tightens the window during which one must report the loss or theft of a  
7 firearm, but does not prevent compliance with both state and local law and thus does not  
8 contradict state law. For over a century, California courts have recognized a municipality’s ability  
9 to implement stricter requirements than state law, so long as one can reasonably comply with both.  
10 *See, e.g. Am. Fin. Servs. Assn. v. City of Oakland*, 4 Cal. Rptr. 3d 745, 756 (Ct. App. 2003)  
11 (collecting cases), rev’d on other grounds by, 34 Cal. 4th 1239, 104 P.3d 813 (2005).

12                In 1909 in *Ex Parte Hoffman*, the California Supreme Court found that a Los Angeles  
13 ordinance prohibiting the sale of milk that had been further diluted beyond the state law standards  
14 was not preempted and did not contradict state law. The Court considered the question of whether  
15 a local jurisdiction may pass more stringent requirements, based on local needs, than the state-  
16 imposed law. In concluding it may, the Court stated, “[t]he correctness of the principle may not be  
17 doubted. If the state should pass a law declaring it unlawful to erect a chimney of a height  
18 exceeding 150 feet, would any one (sic) seriously contend that a city of the state within the  
19 earthquake zone might not, by ordinance, in the clear exercise of the police power, for the benefit  
20 of its citizens, still further restrict the height of chimneys?” *Ex parte Hoffman*, 155 Cal. 114, 118,  
21 99 P. 517, 519 (1909), overruled in part by *Ex parte Lane*, 58 Cal. 2d 99, 372 P.2d 897 (1962).<sup>12</sup>

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23  
24 <sup>11</sup> Moreover, in circumstances where a Morgan Hill resident’s firearm is stolen outside of Morgan  
25 Hill, a person can easily comply with both laws by reporting to Morgan Hill police within 48  
hours and making a separate report within 5 days in the jurisdiction where the loss or theft  
occurred.

26 <sup>12</sup> The *Hoffman* holding has been questioned insofar as it stood for the unmitigated permission for  
27 local regulation in an area **fully occupied** by state law, however that is not the situation with  
Morgan Hill’s Ordinance. *See Ex parte Lane*, 58 Cal. 2d 99, 105 (1962) (stating that *Hoffman*,  
28 among others, is overruled insofar as it stands for the proposition that a locality may impose  
stricter requirements than state law mandates **when the state has already fully occupied the**

1 This precedent allowing for stricter local requirements than state law applies to gun  
2 regulations. In *Great Western Shows, Inc. v. County of Los Angeles*, the California Supreme Court  
3 held that a county ordinance banning gun shows on county property did not contradict, and was  
4 not preempted by, a state statute regulating gun shows. *Great W. Shows*, 27 Cal. 4th 853. The  
5 Court held that since the state law merely permitted gun shows rather than mandating them, the  
6 county’s gun show ban did not contradict state law. Similarly, state law in this case merely  
7 permits reporting of a lost or stolen firearm during days three, four, or five following the loss or  
8 theft. It does not mandate waiting more than 48 hours to report. The Ordinance does not  
9 contradict state law.

10 **ii. Dealers Within Morgan Hill Can Reasonably Comply with State**  
11 **Law and the Local Ordinance.**

12 Gun dealers, in addition to individual gun owners, are also reasonably capable of  
13 complying with both state law and the Ordinance. Prop. 63 requires gun dealers in California to  
14 post signage in their establishment stating that lost or stolen firearms must be reported within five  
15 days to local law enforcement. Similarly, the Ordinance requires gun dealers within Morgan Hill  
16 to post the relevant Municipal Code chapter within their establishment and to deliver a copy of the  
17 relevant chapter to anyone who purchases a firearm from them. (*See Allison Decl. Ex. 3*). As  
18 noted *supra*, state law and the Ordinance are not contradictory – one can reasonably comply with  
19 both. So too can dealers comply with the posting requirements of each; neither requirement  
20 prohibits posting additional information, and posting both required notices will ensure gun  
21 purchasers in Morgan Hill are fully informed about how to comply with both state and local  
22 reporting laws. For these reasons and those discussed above, the Ordinance is not preempted by  
23 state law by reason of contradiction.

24 **3. The Ordinance Is Not Preempted Because State Law Does Not**  
25 **Expressly or Impliedly Occupy the Entire Field of Lost or Stolen**  
26 **Reporting Requirements.**

27 The last possible avenue of “conflict” preemption requires a showing that state law

28 **field.)** (emphasis added). Since, as discussed in Section X, *infra*, state law does not fully occupy  
the field of firearm regulation, the Ordinance is not preempted and *Hoffman’s* reasoning applies.

1 expressly preempts the Ordinance or impliedly occupies the entire field of lost or stolen reporting  
2 requirements. Neither is true here.

3 **i. State Law Does Not Expressly Preempt the Ordinance.**

4 Neither Prop. 63, nor Penal Code § 25250, includes express preemption language  
5 regarding the reporting of lost or stolen firearms. Plaintiffs do not contend otherwise.  
6 Plaintiffs also do not, and cannot, contend that state law includes express preemption language  
7 regarding firearms regulation generally. In fact, the opposite is true. Recognizing the significant  
8 local interests at stake, the California Legislature has declined to generally preempt the regulation  
9 of firearms and instead has chosen only to preempt local gun regulations in three discrete  
10 categories: (1) the licensing or registration of commercially manufactured firearms (Cal. Gov’t  
11 Code § 53071); (2) licensing or permitting with respect to concealable firearms (*id.* § 25605(b));  
12 and (3) regulation of imitation firearms (*id.* § 53071.5). There is no comparable legislative  
13 declaration of intent to preempt lost or stolen firearms reporting requirements.<sup>13</sup>

14 Regulations requiring the reporting of lost or stolen firearms within a given timeframe are  
15 not reasonably, or even remotely, analogous to the categories of licensing and registration laws the  
16 Legislature has expressly preempted. Unlike licensing and registration regulations, Morgan Hill’s  
17 Ordinance applies only after an owner has been *dispossessed* of their firearm; the ordinance is  
18 designed to aid local law enforcement in investigating crimes, not regulate guns while in the  
19 possession of lawful owners. Accordingly, Morgan Hill’s Ordinance does not enter into a field of

20 \_\_\_\_\_  
21 <sup>13</sup> In contrast to California’s narrow preemption of defined areas of gun regulation, forty-three  
22 states preempt all, or substantially all, aspects of firearms regulation. *See* Jennifer L. Pomeranz &  
23 Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United*  
24 *States*, 107 AM. J. PUBLIC HEALTH 900, 900 (2017). These states’ preemption statutes are an  
25 instructive comparison, as many of them—modeled after legislation promoted by the gun industry,  
26 *see id.*—express a boilerplate preference for uniform gun laws throughout the state. *See, e.g.,* Ala.  
27 Code § 13A-11-61.3 (“The purpose of this section is to establish within the Legislature complete  
28 control over regulation and policy pertaining to firearms, ammunition, and firearm accessories in  
order to ensure that such regulation and policy is applied uniformly throughout this state”); Idaho  
Code Ann. § 18-3302J(1) (announcing “legislature’s intent to wholly occupy the field of firearms  
regulation within this state”); Utah Code § 76-10-500 (firearm preemption law declaring “the need  
to provide uniform laws throughout the state”). With good reason, this is not the path California  
has chosen. *See, e.g.,* Pomeranz at 900 (industry-backed preemption laws tie municipalities’  
hands, leaving them “unable to address acute public health issues” best solved at the local level).

1 regulation which the state has expressly reserved for itself.

2 Furthermore, California courts have confirmed that the Legislature’s specific intent to  
3 preempt within these three discrete areas shows an intent not to preempt gun regulation generally.  
4 *See California Rifle & Pistol Assn.*, 66 Cal. App. 4th at 1311 (“The statutes, the judicial rulings  
5 interpreting the statutes, and the legislative responses to the judicial rulings demonstrate that the  
6 Legislature has carefully avoided a blanket preemption in the field of firearms regulation”); *see*  
7 *also Olsen v. McGillicuddy*, 15 Cal. App. 3d 897 (1971) (applying same reasoning and  
8 determining legislature has intentionally avoided blanket preemption in firearms regulation).  
9 Since the Ordinance is not related to any expressly preempted areas, and the Legislature’s  
10 considered, limited action shows an intent to not preempt firearms regulation generally, the  
11 Ordinance does not enter into an area expressly preempted by state law.

12 **ii. State Law Does Not Impliedly Preempt the Ordinance.**

13 Absent express language of preemption, state law only preempts the Ordinance if relevant  
14 indicia “clearly indicate” an *implied* intent to preempt by occupying the field. *See Sherwin-*  
15 *Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893 (1993); *California Rifle & Pistol Assn.*, 66 Cal.  
16 App. 4th at 1302. Courts consider three indicia of intent to impliedly occupy a field: (1) the  
17 subject matter has been so fully and completely covered by general law as to clearly indicate that  
18 it has become exclusively a matter of state concern; (2) the subject matter has been partially  
19 covered by general law couched in such terms as to indicate clearly that a paramount state concern  
20 will not tolerate further or additional local action; or (3) the subject matter has been partially  
21 covered by general law, and the subject is of such a nature that the adverse effect of a local  
22 ordinance on the transient citizens of the state outweighs the possible benefit to the locality.  
23 *Sherwin-Williams*, 4 Cal. 4th at 898. Courts look to the legislative scheme’s whole purpose and  
24 scope when determining such intent. *Galvan*, 70 Cal. 2d at 859. When California voters enact a  
25 state law by ballot initiative, voter intent is considered in place of the Legislature’s. *See Persky v.*  
26 *Bushey*, 21 Cal. App. 5th 810, 818-19 (2018).

27 In each of these three forms of implied preemption, the Legislature’s intent (here voters’  
28 intent) to preempt must be “clear.” *E.g.*, *Sherwin-Williams*, 4 Cal. 4th at 893. That is because

1 determining if the Legislature impliedly intended to preempt local regulation begs the question of  
2 why it did not simply say it was doing so, as it has done many times before. *California Rifle &*  
3 *Pistol Assn.*, 66 Cal. App. 4th at 1317. As discussed in Section C.3.i, supra, the Legislature has  
4 avoided preempting gun regulation generally. A finding of implied preemption absent a “clear”  
5 indication of intent to preempt would disregard the Legislature’s intentional avoidance of express  
6 preemption. *See id.* at 1318 (“To rule that the Legislature implicitly intended to preempt,  
7 notwithstanding the clear record that the Legislature has expressly avoided preemption by the  
8 careful wording of its enactments, would be to disregard the Legislature's own pronouncements.”).

9 Here, there is nothing to indicate, let alone “clearly indicate,” that the Legislature impliedly  
10 intended to occupy the field of lost and stolen firearms reporting, thereby preempting the  
11 Ordinance. Plaintiffs cannot meet their burden of proving implied legislative intent; to the  
12 contrary, the precedents and undisputed facts discussed below establish that the Legislature has  
13 *not* impliedly occupied this field of regulation.

14 **a. First, Lost or Stolen Firearms Reporting Is Not So Fully**  
15 **and Completely Covered By General Law As To Clearly**  
16 **Indicate It is Exclusively a Matter of State Concern.**

17 The only state law that covers the reporting of lost or stolen firearms by individual firearms  
18 owners is Penal Code § 25250, enacted through Prop. 63. Penal Code § 25250 requires, with  
19 some exceptions, reporting lost or stolen firearms within five days of a loss or theft. This one law  
20 does not “fully and completely” cover the area such that it has become “exclusively a matter of  
21 state concern.” This is particularly so given that Prop. 63 was enacted against a backdrop of  
22 preexisting local lost or stolen reporting laws that went further than state law. *See infra* at p.17.

23 In *Galvan v. Superior Court*, the California Supreme Court considered whether state law  
24 preempted a local ordinance requiring gun registration (this decision predated, and indeed  
25 motivated, the California legislature’s express preemption of certain local gun registration laws).  
26 *Galvan*, 70 Cal. 2d 851 (overturned by statute). In noting only three state laws at that time relating  
27 to the registration of guns, the Court said “[t]hese statutes cannot reasonably be said to show a  
28 general scheme for the regulation of the subject of gun registration, and there is no basis for a  
conclusion that these statutes show a legislative intent to make the subject of gun registration

1 immune from local regulation.” *Galvan*, 70 Cal. 2d at 860. Until the legislature expressly  
2 identified local firearm registration laws as preempted, the California Supreme Court was  
3 unwilling to interpret three isolated state registration laws as overriding localities’ presumptive  
4 authority to regulate in this area.

5 In *California Rifle & Pistol Assn. v. City of W. Hollywood*, the court considered whether a  
6 West Hollywood ordinance banning the sale of certain firearms was preempted by state law. 66  
7 Cal. App. 4th at 1318. In discussing the first indicia of intent for implied preemption, the court  
8 found that the Legislature’s express preemption in three areas of gun regulation —none of which  
9 covered firearms sales —indicated that the Legislature did not intend to impliedly preempt  
10 firearms sales. The court stated “[t]he very existence of the three code sections discussed above,  
11 each of which specifically preempts a narrowly limited field of firearms regulation, is a rather  
12 clear indicator of legislative intent to leave areas not specifically covered within local control.  
13 Thus state law does not ‘clearly indicate’ that the Legislature has intended a preemption here; in  
14 fact, it clearly indicates the opposite.” *California Rifle & Pistol Assn.*, 66 Cal. App. 4th at 1318.

15 The *California Rifle & Pistol Assn* court’s reasoning applies equally well to Morgan Hill’s  
16 Ordinance. Reporting lost or stolen firearms does not fall within an area expressly preempted, and  
17 the Legislature’s inaction indicates no implied preemption, especially in light of its measured  
18 approach to express preemption. *See id.* at 1318. The one state law related to individuals reporting  
19 lost or stolen firearms falls far short of establishing lost or stolen firearms reporting as “so fully  
20 and completely covered by general law as to clearly indicate that it has become exclusively a  
21 matter of state concern.” *See Galvan*, 70 Cal. 2d at 860; *Sherwin-Williams*, 4 Cal. 4th at 898.

22 Plaintiffs may contend that Prop. 63’s signage requirement indicates an intent for state  
23 law to regulate to the exclusion of local ordinances since Prop. 63 requires gun dealers to post the  
24 state law requirements in the establishment. This ignores that Courts look to the whole scheme  
25 and purpose when determining legislative intent. *Galvan*, 70 Cal. 2d at 859. The purpose of Prop.  
26 63, as laid out in the “Purpose and Intent” Section of the initiative, is “[t]o keep guns and  
27 ammunition out of the hands of convicted felons, the dangerously mentally ill, and other who are  
28 prohibited by law from possessing firearms and ammunition.” And “[t]o require the reporting of

1 lost or stolen firearms to law enforcement.” The signage requirement, when considered in context  
2 of the purpose of the statute, does not indicate an intent to fully occupy the field.

3 Taken as a whole, the relevant indicia of intent do not indicate a legislative intent to  
4 preempt. Rather, as the *California Rifle & Pistol Assn* court put it, state law does not “clearly  
5 indicate” that the Legislature intended a preemption of the Ordinance, “in fact, it clearly indicates  
6 the opposite.” 66 Cal. App. 4th at 1318.

7 **b. Second, State Law Governing Lost or Stolen Firearms Is**  
8 **Not Couched in Such Terms as To Indicate Clearly That**  
9 **a Paramount State Concern Will Not Tolerate Further or**  
10 **Additional Local Action.**

11 The second way that state law could preempt the Ordinance by implication is if “there has  
12 been partial coverage of the field by general law couched in such terms as to indicate that there is  
13 a paramount state concern which will not tolerate further or additional local requirements.”  
14 *Galvan*, 70 Cal. 2d at 863 (citation omitted). However, far from clearly indicating an intolerance  
15 for local action, Prop. 63 — the only state law relevant to the reporting of lost or stolen firearms  
16 — left existing local ordinances untouched. Prior to the enactment of Prop. 63, seventeen  
17 localities in California required reporting of lost or stolen firearms sooner than 5 days after the  
18 loss or theft was reasonably discovered. (*See* Allison Decl. Ex. 10). In imposing a state-law  
19 maximum period for reporting firearm loss or theft, Prop. 63 was completely silent about these  
20 more stringent local ordinances or the need for a five-day standard in particular. This cannot be  
21 interpreted as an intolerance for local ordinances on the reporting of firearm loss or theft.

22 The ballot measure’s text also indicates there is no “paramount state concern” such that  
23 additional local action cannot be tolerated. The Purpose section of Prop. 63 states, in part, that it  
24 is intended “[t]o keep guns and ammunition out of the hands of convicted felons, the dangerously  
25 mentally ill, and other persons who are prohibited by law from possessing firearms and  
26 ammunition.” Shortening the reporting timeframe for lost or stolen firearms only furthers this  
27 purpose. *See Fiscal v. City & Cty. of San Francisco*, 158 Cal. App. 4th 895, 915 (2008) (“[C]ourts  
28 have found, in the absence of express preemptive language, that a city or county may make  
additional regulations, different from those established by the state, if not inconsistent with the

1 purpose of the general law.”).

2 Reinforcing this conclusion, Prop. 63 also notes a clear intention to require “the reporting  
3 of lost or stolen firearms to law enforcement,” but it does not include any specific timeframe by  
4 which reporting should be accomplished. (*See* Allison Decl. Ex. 7). This is in contrast to  
5 timeframes expressly provided elsewhere in Prop. 63. Specifically:

- 6 • A separate provision of Prop. 63 requires licensed ammunition *sellers* (not  
7 individuals) to report lost or stolen ammunition. The statement of purpose provides  
8 that the initiative intends to require sellers to “report any lost or stolen ammunition  
**within 48 hours** of discovering it is missing.” *Id.*
- 9 • By contrast, there is no such time frame provided in the description of the purpose  
10 for individual reporting or lost or stolen firearms, which only states that the purpose  
11 is “to require the reporting of lost or stolen firearms to law enforcement.” *Id.*
- 12 • Similarly, Prop. 63 Section 2 outlines the findings of the people of California.  
13 With respect to seller reporting, Section 8 states, “...Stores should have to report  
14 lost or stolen ammunition **within 48 hours** of discovering that it is missing...” *Id.*
- 15 • But as to individuals, Section 9 states, “Californians today are not required to report  
16 lost or stolen guns to law enforcement. This makes it difficult for law enforcement  
to investigate crimes committed with stolen guns, break up gun trafficking rings,  
and return guns to their lawful owners. **We should require gun owners to report  
their lost or stolen guns to law enforcement.**” *Id.*

17 The discrepancy between these two provisions demonstrates that the purpose of the 48-  
18 hour stolen ammunition reporting requirement for *sellers* may be to remove localities’ ability to  
19 mandate a shorter reporting requirement for ammunition sellers. But because there is no  
20 corresponding statement that 5 days is the only appropriate timeframe for individuals to report lost  
21 or stolen firearms, Prop. 63 indicates an intent to allow further local regulation in this area. While  
22 it is an omission rather than an affirmative statement to this effect, an affirmative showing is not  
23 the test. State legislative enactments are *assumed* not to preempt. Therefore, Plaintiffs must not  
24 only show that the voters departed from this presumption by barring local legislation, but also that  
25 the voters’ intent is *so* clear as to not tolerate *any* local action. *See California Rifle & Pistol Assn.*,  
26 66 Cal. App. 4th at 1320 (“The relevant question is not whether a statute grants the City a power,  
27 but whether a statute deprives the City of a power already bestowed upon the City by the  
28 Constitution.”). By failing to mention a 5-day reporting requirement, in particular, anywhere in its



1 express statement of purpose or voter findings (in contrast to other timeframes that were expressly  
2 mentioned), Prop. 63 does not support such an interpretation.

3 As a final factor weighing against a finding of implied preemption on the basis of a  
4 “paramount state interest,” courts have routinely recognized that gun regulation is a matter of *local*  
5 concern. In *Great Western Shows, Inc. v. County of Los Angeles*, the Court held that “we are  
6 reluctant to find such a paramount state concern, and therefore implied preemption, when there is  
7 a significant local interest to be served that may differ from one locality to another. It is true today  
8 as it was more than 30 years ago when we stated it in *Galvan*, “[t]hat problems with firearms are  
9 likely to require different treatment in San Francisco County than in Mono County.” 27 Cal. 4th  
10 at 866–67 (citations omitted). These local interests are even more pronounced in the unique  
11 context of ordinances regulating the loss or theft of firearms. As discussed *supra* at p.8, gun crime  
12 is local crime, and it is *local* law enforcement who are tasked with investigating lost or stolen  
13 firearms and responding to crimes committed with these weapons. Prop. 63’s Purpose and  
14 Findings, coupled with the differing interests of local municipalities, lead to one conclusion:  
15 Morgan Hill’s Ordinance is not preempted by implication.

16 **c. Third, Morgan Hill’s Ordinance Does Not Have a**  
17 **Significant Adverse Effect on Transient Citizens.**

18 The last reason a court might find an ordinance impliedly preempted is if it substantially  
19 burdens transient citizens. Morgan Hill is unaware of any firearm ordinance being invalidated on  
20 this basis, and courts have held that gun sale, use, and possession regulations have a minimal  
21 adverse effect on transient citizens. See *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109, 1119  
22 (1997); *Galvan*, 70 Cal. 2d at 864–865; *Great W. Shows*, 27 Cal. 4th 853. Morgan Hill’s  
23 Ordinance would only come into play for transient citizens if their gun was lost or stolen within  
24 Morgan Hill *and* they wished to wait to report it until day three, four, or five. Even then, the  
25 effect is minimal. See *Great W. Shows*, 27 Cal. 4th at 867 (“As for the third test, we agree with  
26 previous cases that “[l]aws designed to control the sale, use or possession of firearms in a  
27 particular community have very little impact on transient citizens, indeed, far less than other laws  
28 that have withstood preemption challenges.”) (Citations omitted).

1 The Ordinance, by its express language, only applies when a gun is lost by, or stolen from,  
2 a resident of Morgan Hill or when the loss or theft occurs in Morgan Hill. (Allison Decl. Ex. 2).  
3 Penal Code § 25250 requires an individual to report a loss or theft to local law enforcement. Pen.  
4 Code § 25250. Since non-residents of Morgan Hill must only report under the Ordinance when  
5 the loss or theft occurs in Morgan Hill, and state law already requires reporting to “local law  
6 enforcement” which would be Morgan Hill Police, the adverse effect on transient citizens is  
7 limited to the restricted timeframe during which an individual must report – namely 48 hours  
8 instead of five days. The final indicia of intent weighs in favor of finding no preemption.

9 **V. CONCLUSION**


10 Like all California municipalities, Morgan Hill enjoys a Constitutional right to regulate  
11 within its police powers for the health and safety of its citizens. The city has chosen to do so in  
12 the area of lost or stolen firearm reporting, motivated by a recent and dangerous increase in gun  
13 thefts nationwide, coupled with documented evidence that stolen guns fuel gun trafficking, straw  
14 purchasing, and gun crimes close to home.

15 Gun regulations generally, and reporting requirements for lost or stolen firearms  
16 specifically, fall squarely within Morgan Hill’s police powers and, absent a clear legislative intent  
17 to preempt, will not be disturbed by state law. Far from a “clear intent to preempt,” the relevant  
18 evidence and accompanying case law demonstrates the legislature, in this instance the voters,  
19 affirmatively intended not to preempt existing lost or stolen reporting ordinances, leaving Morgan  
20 Hill free to regulate as it sees fit. Morgan Hill’s Motion for Summary Judgment should be  
21 granted.

22 Dated: April 30, 2020

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23  
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