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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA, DOWNTOWN COURTHOUSE

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

Plaintiffs and Petitioners,

vs.

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

Defendants and Respondents.

Case No. 19CV346360

DEFENDANT CITY OF MORGAN HILL'S MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Judge: Hon. Peter Kirwan
Date: July 2, 2020
Time: 9 a.m.
Dept: 19
Action Filed: April 15, 2019

ACCOMPANYING DOCUMENTS: SEPARATE STATEMENT IN OPPOSITION TO SUMMARY JUDGMENT

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I. INTRODUCTION

The preemption analysis in Plaintiffs' Motion for Summary Judgment starts from the wrong place. For one, Morgan Hill is *presumptively entitled* to pass a stricter firearm theft-reporting ordinance. *See Cal. Rifle & Pistol Ass'n v. City of W. Hollywood*, 66 Cal. App. 4th 1302, 1320 (Cal. Ct. App. 1998) ("The relevant question is not whether a statute *grants* the City a power, but whether a statute *deprives* the City of a power already bestowed upon the City by the Constitution."). There is therefore a presumption that the state law requiring gun owners to report lost or stolen firearms within 5 days (Penal Code § 25250 *et seq.*, or "Prop. 63") does not impliedly preempt Morgan Hill's 48-hour reporting requirement (Municipal Code 9.04.030, the "Ordinance") unless it "clearly indicates" an intent to deprive Morgan Hill of its constitutional authority to adopt stronger regulations in this area. *See id.* at 1318; *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 904 (Cal. 1993). And there is no indication, clear or otherwise, that the People of California intended to foreclose such action by Morgan Hill—or by the 17 other cities that already had stronger reporting requirements when voters passed Prop. 63.

Ignoring this outcome determinative presumption, and with little support from preemption law or Prop. 63's text and purpose, Plaintiffs nonetheless contend the Ordinance is preempted because it: 1) duplicates state law; 2) contradicts state law; 3) impliedly enters into an area state law fully occupies; and 4) burdens transient citizens.

They are wrong on all counts. *First*, local ordinances do not duplicate state law unless the ordinance and law proscribe "precisely the same acts," which the Ordinance and Prop. 63 do not. *Second*, local ordinances do not conflict with state law unless they forbid what the state mandates or mandate what the state forbids. Localities may prohibit conduct state law merely authorizes, and may narrow or remove exceptions state law provides—as Morgan Hill has done. *Third*, the existence of a single statutory enactment, like Prop. 63's reporting provisions, is not a reason to find that a state law entirely occupies a regulatory area unless there is a "clear indication" of an intent to preempt, not present here. *Finally*, the California Supreme Court has already rejected Plaintiffs' claim that a "patchwork" of local gun laws unduly burdens transient citizens.

For these reasons, Plaintiffs fail to discharge their burden to show that the Ordinance is

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preempted. Morgan Hill has a constitutional right to regulate firearms to protect its residents' safety and health. The city adopted a stronger local regulation for firearm theft-reporting in response to constituent demand, a legislative record showing that lost and stolen guns pose risks to the Morgan Hill community, and specific discussion of why a 48-hour requirement is better than 5 days. The Court should hold that the Ordinance is consistent with Prop. 63's aims, not preempted by it, and deny Plaintiffs' Motion and grant Morgan Hill's.

II. STATEMENT OF FACTS

Morgan Hill supplied a statement of undisputed facts in its Motion for Summary Judgment. Below is a summary of facts relevant to this Opposition.

A. California Adopted Lost or Stolen Reporting in Prop. 63: "The Safety for All Act of 2016."

On November 8, 2016, California voters approved Proposition 63, entitled "The Safety for All Act of 2016." As part of Prop. 63, Penal Code § 25250, *et seq*., took effect on July 1, 2017. In relevant part, Penal Code § 25250 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."

Prop. 63 also created related Penal Code sections to facilitate implementation by specifying basic information to be reported to law enforcement as well as exceptions and penalties. *E.g.*, Penal Code § 25270 (report should include firearm "make, model, and serial number" and "additional relevant information required by the local law enforcement agency taking the report"); *id.* § 25260 (requiring law enforcement to enter firearm descriptions into preexisting state database); *id.* § 25255 (exemptions from reporting requirement); *id.* § 25275 (penalty for filing a false report).[1]

[1] As discussed below, Plaintiffs now seek to rely on these requirements as proof of a "broad and comprehensive scheme" that supplies "strong evidence that the state intended to occupy the field of the firearm theft-reporting" (Pls.' Mem. ISO MSJ at 16). This is a revealing change in strategy. Plaintiffs did not even mention these additional code sections in their Complaint or in their pre-litigation communications with Morgan Hill. Until their Motion for Summary Judgment, Plaintiffs' preemption claim was premised only on Penal Code § 25250, not on §§ 25255, 25260,

B. Neither Prop. 63 Nor Penal Code § 25250 *et seq.* Contained a Statement of Intent to Preempt Shorter Local Reporting Requirements

When voters adopted Prop. 63, at least 18 cities and towns already had local reporting ordinances, with 17 requiring that lost or stolen guns be reported in less than 5 days.[2] Prop. 63 was silent about these ordinances. The initiative's statements of purpose did not suggest a preference for uniformity or an intent to invalidate stricter local laws as inconsistent with state law. Instead, Prop. 63 announced a general purpose of requiring that all Californians report lost or stolen guns. *See* Prop 63. Sec. 2: Findings and Declarations (cited in Allison Decl. ISO Morgan Hill MSJ, Ex. 8, at p. 164, sec. 2, ¶ 9) ("Californians today are not required to report 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.").

Penal Code § 25250 and the code sections that follow it also contain no statement of an intent to require uniformity or preempt local action. As Plaintiffs acknowledge, one of the statutory provisions gives local police the discretion to require that additional information be reported. Penal Code § 25270 (reports of lost or stolen firearms must include "any additional relevant information required by the local law enforcement agency taking the report").

C. Morgan Hill Adopted a 48-Hour Lost or Stolen Reporting Requirement in 2018 in Response to Local Concerns

On November 28, 2018, responding to demands for gun safety legislation after the high

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25270, and 25275. Now that they have raised these sections in their motion as presenting a preemption issue for the first time, Morgan Hill addresses them in this Opposition memorandum.

[2] 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)).

school shooting in Parkland, Florida, the Morgan Hill City Council approved Local Ordinance 2289, codified at Municipal Code 9.04.030 (the "Ordinance"). The Ordinance requires residents and those whose firearms are lost or stolen in Morgan Hill to report the loss or theft to Morgan Hill Police within 48 hours of when they knew, or reasonably should have known, about their firearm loss or theft.[3] The Ordinance took effect on December 29, 2018.

The legislative record shows that the Morgan Hill City Council focused on local benefits of the Ordinance. Among other considerations, the Council recognized that the firearm reporting legislation was recommended by the Association of Bay Area Governments (of which Morgan Hill is a member) as a "model ordinance[]...for cities and counties to pursue" to help reduce gang-related youth gun violence. (Allison Decl. ISO Morgan Hill MSJ, Ex. 11, Agenda Packet pp. 203, 217–32.) The City Council also recognized specific benefits of a 48-hour reporting timeframe, including that earlier notification aids police, "provides an opportunity for early identification" of stolen guns, and can "reduce the chance of lost or stolen firearms being used in additional crimes." (*See* Pls.' Req. Jud. Ntc. Ex. F, at p. 76 (from adopted City Council Staff Report dated Oct. 24, 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 (Cal. 2001). The parties have filed cross-motions for summary judgment. 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 (Plaintiffs here) bears the burden on both motions. *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).

IV. ARGUMENT

This Court should deny Plaintiffs' Motion for Summary Judgment and grant Morgan

[3] The "reasonably should have known" requirement is a safeguard that ensures gun owners are not unfairly penalized for thefts and losses that are difficult to reasonably discover within 48 hours. For simplicity, however, the "reasonably should have known" caveat has been omitted throughout.

Hill's. The state Constitution gives Morgan Hill broad authority to adopt police ordinances and regulations. *See Birkenfeld v. City of Berkeley*, 130 Cal. Rptr. 465, 473 (Cal. 1976). There is a presumption against preemption of ordinances adopted to advance significant local interests pursuant to these constitutionally guaranteed powers—including firearm-related ordinances like Morgan Hill's. *See, e.g., Calguns Found., Inc. v. Cty. of San Mateo*, 218 Cal. App. 4th 661, 666–67 (Cal. Ct. App. 2013) (citations omitted) ("[t]he party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption"); *see also* Morgan Hill Mem. ISO MSJ at 7–8 (discussing local interests in gun regulations and theft-reporting).

Plaintiffs have not rebutted that presumption because each of their four theories of preemption fail under the applicable law.

A. The Ordinance Does Not Duplicate State Law

Plaintiffs first argue the Ordinance is preempted because it duplicates state law. They claim the enactments are duplicative because it is *possible* to violate "*both* state law *and* local law" on the subject of reporting lost or stolen guns. (Pls.' Mem. ISO MSJ at 13.) For example, someone who never reports a firearm theft or loss would violate both the Ordinance and Prop. 63. (*Id.*)

This is not the correct test. Instead of asking whether it is merely possible to violate both a state statute and local ordinance, courts ask whether a local ordinance prohibits "'precisely the same acts which are ... prohibited'" by statute. *Nordyke v. King*, 27 Cal. 4th 875, 883 (Cal. 2002). Preemption by duplication only arises if a violation of a local law is necessarily a violation of state law, *see id.*, or if the local ordinance is a lesser included offense of the state law. *See Great W. Shows v. Cty. of Los Angeles*, 27 Cal. 4th 853, 866 (Cal. 2002).

For example, in *Nordyke*, plaintiffs challenged an Alameda County ordinance prohibiting guns on county property. They argued that the ordinance duplicated a state law that prohibited carrying firearms without a license since a person who carried an unlicensed gun on county property would violate both measures. *Nordyke*, 27 Cal. 4th at 883. But the Supreme Court found that since the ordinance did not "criminalize precisely the same acts which are prohibited by the statute," they were "not duplicative." *Id*. (citations omitted).

The same is true of Morgan Hill's ordinance. Although the Ordinance and state law both

prohibit some acts, such as failing to report a lost or stolen gun, other acts are punishable under the Ordinance but not state law or vice-versa. For example, a Morgan Hill resident who waits 3 days to report would violate the Ordinance but not state law. A Morgan Hill resident whose gun was stolen in San Jose and who timely reported to Morgan Hill police would violate state law but not the Ordinance. *See* Penal Code § 25250(b) (reports must be made in "jurisdiction in which the theft or loss occurred"). A Morgan Hill resident who lost his gun in San Jose and reported to Morgan Hill police 4 days later would violate *both* local and state law, but for different reasons—just as in *Nordyke*. *Compare* Allison Decl. ISO Morgan Hill MSJ, Ex. 2 (Municipal Code 9.04.030 requires reporting within 48 hours) *with* Penal Code § 25250(b) (requiring report be made in jurisdiction where firearm was stolen).

Courts analyze whether a local and state law prohibit "precisely" the same acts because the doctrine of preemption by duplication is rooted in double jeopardy principles. When a local ordinance exactly duplicates a state criminal law, or criminalizes only a lesser included offense, then a conviction under the ordinance will "operate to bar a prosecution of the same offense under the [state] law." *People v. Orozco*, 266 Cal. App. 2d 507, 511 (Cal. Ct. App. 1968) (citing *In re Sic*, 73 Cal. 142, 148 (Cal. 1887)). If there is no way to enforce the local ordinance without barring a state prosecution, the ordinance is preempted (*see id.*); but if the duplication is not exact, double jeopardy will *not* always attach, and courts will not find preemption. As the Court explained, "we only hold that there is a conflict [based on double jeopardy] where the ordinance and the general law punish precisely the same acts." *In re Sic*, 73 Cal. at 149. "We do not wish to be understood as holding that the sections of the ordinance which make criminal other acts not punishable under the general law are void because the legislature has seen fit to legislate upon the same subject." *Id.*

Plaintiffs' contrary test is unbounded by this principle. Plaintiffs would have courts find duplication if there is any overlapping conduct punishable by a local and state law. But that cannot be right, because it would bar *all* local ordinances that tighten restrictions imposed by the state and in doing so create areas of overlap. Cities are allowed to pass stricter requirements in an area where the state has also legislated. *See In re Iverson*, 199 Cal. 582, 586 (Cal. 1926) (upholding local law setting a lower limit than state law on maximum volume of alcohol pharmacies may

dispense); *Ex parte Hoffman*, 155 Cal. 114, 118 (Cal. 1909) (upholding local law setting a lower limit than state law on maximum percentage milk may be adulterated); *Am. Fin. Servs. Ass'n v. City of Oakland*, 4 Cal. Rptr. 3d 745, 756 (Cal. Ct. App. 2003) (collecting cases), *rev'd on other grounds*, 34 Cal. 4th 1239 (Cal. 2005).[4] And cities may pass stricter *gun laws* than the state, even if some conduct would violate both a local and state enactment. *See, e.g.*, *Great W. Shows*, 27 Cal. 4th at 858 (county ordinance banning gun shows not preempted by state statute regulating gun shows).

Plaintiffs' duplication theory cannot be squared with these cases. The Morgan Hill Ordinance is not duplicative or preempted.

B. The Ordinance Does Not Contradict State Law

The Ordinance also does not contradict state law. Plaintiffs advance another incorrect test here, claiming an ordinance is preempted by contradiction if it "prohibits locally what a state statute authorizes." (Pls.' Mem. ISO MSJ at 13 (citing *Sherwin-Williams*, 4 Cal. 4th at 902).) But ordinances are preempted only if they "prohibit what the statute commands or command what it prohibits," *Sherwin-Williams*, 4 Cal. 4th at 902, not if they prohibit conduct state law only authorizes. *Nordyke*, 27 Cal. 4th at 884. A contradiction arises only if it is impossible to comply with both an ordinance and state law. *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1068 (Cal. 2007) (ordinance preempted if it is "inimical to or cannot be reconciled with state law").

In *Nordyke*, the Supreme Court upheld Alameda County's measure prohibiting firearms on county property, including for gun shows. 27 Cal. 4th at 882. The Court held that the ordinance did not contradict a state law allowing firearms at gun shows in public buildings, explaining that the state law "merely . . . permit[s] local government entities to authorize [gun] shows. It does not *mandate* that local government entities permit such a use." *Id.* at 883–84. One can comply with both laws by not holding a gun show on county property. As in *Nordyke*, and as discussed below, compliance with both the Ordinance and Prop. 63 is possible here too.

[4] As noted in Morgan Hill's summary judgment brief (Mem. ISO MSJ at 11 n.12), the *Hoffman* line of cases was partly overruled on other grounds in *In re Lane*, 58 Cal. 2d 99, 109 (Cal. 1962), but that decision does not foreclose reliance on the principle discussed here. *See Galvan*, 70 Cal. 2d at 865 ("The considerations involved in *Lane* do not apply to the instant case. The statutory pattern governing sexual behavior differs from that governing guns and other weapons.").

1. It Is Reasonably Possible to Comply with the Ordinance and Prop. 63

Ordinances are preempted if they foreclose compliance with state law by "prohibit[ing] what the statute commands or command[ing] what it prohibits." *Sherwin-Williams*, 4 Cal. 4th at 902. Morgan Hill's Ordinance does neither. It requires gun owners to report firearm loss or theft within 48 hours. Prop. 63 allows, but does not require, waiting up to 5 days before reporting. One can thus reasonably comply with both the Ordinance and state law by reporting within 48 hours.

Other provisions of the Ordinance and Prop. 63 relate to each other similarly. For instance, Morgan Hill requires its residents to report a lost or stolen gun to Morgan Hill Police even when the loss occurs outside of Morgan Hill (*see* Allison Decl. ISO Morgan Hill MSJ, Ex. 2)—for instance, in a neighboring county. State law only requires reporting to a law enforcement agency in the jurisdiction where a loss or theft occurred (*see* Penal Code § 25250). However, the state does not prohibit also reporting to one's local police, as Morgan Hill requires, so one could comply with both laws. Another example: Morgan Hill's reporting law has no exceptions for individuals, while the state exempts reporting by some law enforcement officials, U.S. marshals, and others (*see* Penal Code §§ 25250(c), 25255). However, the state does not prohibit these exempt persons from reporting to a local agency that would accept such reports; a person who is exempt under state law could comply with both laws by reporting as Morgan Hill requires.

Plaintiffs try to elide the critical difference between "authorizes" and "requires" by arguing the distinction only applies in cases where it is "'reasonably' possible for run-of-the-mill gun owners passing through the City to comply with both state and local" law. (Pls.' Mem. ISO MSJ at 13–15.) It is true that state and local laws are in harmony where "it is reasonably possible to comply" with both, whereas impossibility of compliance creates a conflict. *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 56 Cal. 4th 729, 743–44 (Cal. 2013). But Plaintiffs offer no support for the idea that compliance with both enactments is impossible; as discussed above, compliance is undoubtedly reasonably possible. Instead, Plaintiffs speculate that "run of the mill gun owners" "passing through the City" are "unlikely to *know* of the City's contradictory law"—but they do not argue owners who know of the law cannot reasonably *comply* with it and state law. (Pls.' MSJ at 14–15 (emphasis added).)

Plaintiffs' point actually helps show why the Ordinance is not preempted. It is reasonably possible for Morgan Hill gun owners to stay apprised of their obligations under state and local law when a firearm is lost or stolen, and it is possible for someone passing through the City who experiences a gun theft or loss (hopefully a rare occurrence) to go to law enforcement to ask about them.[5] But even if this were not the case, learning about applicable local law is, by definition, *reasonably* possible. It is what city residents and responsible travelers are expected to do in a state that presumptively allows for local laws that constrain the behavior of all people in a city—residents and pass-through visitors alike. *See, e.g.*, *Galvan v. Super. Ct. of City & Cty. of San Francisco*, 70 Cal. 2d 851, 865 (Cal. 1969) (overturned on other grounds by statute) (listing lawful local ordinances regulating alcohol consumption, gambling, and loitering that "apply to *anyone* within the geographic confines of the city, and not merely to residents") (emphasis in original).

In fact, in *Nordyke*, the Supreme Court was unpersuaded by the suggestion that it is too challenging for travelers to learn about the gun laws of a city they visit. *See* 27 Cal. 4th at 885 (Brown, J., dissenting) (arguing that the majority's reasoning on preemption would inconvenience travelers because "a person authorized to carry firearms who happened to be traveling across the state would have to consult legal counsel each time he or she crossed a county line or entered a city").[6] The Court should reject that suggestion here too.

2. Plaintiffs' Speed Limit Example is Unsupported

Unable to establish that it is impossible to comply with the Ordinance and Prop. 63, Plaintiffs claim support from a one hundred-year-old Supreme Court case striking down a city's speed limit ordinance. *Ex parte Daniels*, 183 Cal. 636, 641–68 (Cal. 1920) (cited at Pls.' Mem. ISO MSJ at 13–14). But Plaintiffs quote this case out of context. Contrary to Plaintiffs' description, the Court did *not* hold that local governments are unable to impose a lower speed limit

[5] For Morgan Hill residents, the Ordinance facilitates this by requiring local gun dealers to post signs in stores outlining the firearm theft-reporting law and distribute the relevant chapter to customers. *See* Allison Decl. ISO Morgan Hill MSJ, Ex. 1, p.2 (Municipal Code 9.04.020).

[6] This rejected reasoning, expressed in the *Nordyke* dissent and in Plaintiffs' motion, is in tension with the basic principle that "ignorance of a law is no excuse for a violation thereof." *People v. Snyder*, 32 Cal. 3d 590, 592-93 (1982) (internal citation omitted).

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if state law sets a maximum speed limit. *See Daniels*, 183 Cal. at 641–48 ("local legislation fixing a lesser speed limit" than a state law maximum would not contradict state law, but "would be merely an additional regulation"). That case dealt instead with a different issue: a state law that prohibited driving at an "unsafe and unreasonable rate of speed under all the circumstances" as found by a jury, which in any event could not exceed 20 miles per hour in a city. Pasadena then adopted a maximum speed limit of 15 miles per hour in some parts of the city. The Court held that Pasadena's ordinance conflicted with state law, but not, as Plaintiffs represented, because it set a speed limit below the state's, but because of the state's "unsafe and unreasonable" provision:

> "[L]ocal legislation which determines the question of what speed is reasonable and which forecloses that question in a judicial investigation, is in direct conflict with the legislative scheme by which that question is left open for the determination of a jury. **If the legislature had merely fixed the maximum speed limit [of 20 miles per hour], it is clear that local legislation fixing a lesser speed limit [of 15 miles per hour] would not be in conflict therewith, but would be merely an additional regulation.** (Citations omitted.) . . . [However, i]n this case the petitioner had a right to drive on the highway at a speed that was reasonable and proper under all the circumstances, and the fixing of an arbitrary speed limit by the city authorities restricted that right and was, therefore, in conflict with that right."

Daniels, 183 Cal. at 645–47 (emphasis added). The Court was clear that there is no contradiction when the state legislature simply fixes a maximum speed limit without including any type of "reasonable and proper" standard or other indicia of intent to foreclose localities' authority to set a lower limit. *See* 183 Cal. at 645. As discussed above (*supra* pp. 6–7), this is consistent with other case law establishing that cities may pass stricter local laws in areas where the state has also legislated. Here, Morgan Hill is simply setting a lower "speed limit" than state law does, and its Ordinance is not preempted by contradiction under *Daniels*.

C. The Ordinance Does Not Enter into an Area Fully Occupied by State Law

Having failed to show express preemption by duplication or by contradiction, Plaintiffs next argue that Prop. 63 impliedly preempts the Ordinance (Pls.' Mem. ISO MSJ at 15). They aim to prove that, by implication rather than by an express voter or legislative statement, the subject matter of lost or stolen firearm reporting "has been so fully and completely covered by [state] law as to clearly indicate that it has become exclusively a matter of state concern," foreclosing local

action (*id.* at 16).

Plaintiffs' implied preemption claim fails for two reasons: there is no "full and complete" coverage by general law, and there is no other "clear indication" that lost or stolen reporting is an exclusive matter of state concern. In fact, Prop. 63 clearly indicates the opposite.

1. State Law Has Not "Fully and Completely Covered" the Field of Firearm Loss or Theft Reporting

Plaintiffs claim that the Penal Code sections that make up Prop. 63's lost or stolen reporting requirement constitute a "statewide scheme" regulating "all manner of conduct related to reporting firearm theft and loss." Their description of Prop. 63 as creating a dozen new laws (Pls.' Mem. ISO MSJ at 8) is off-base: although the statewide lost or stolen reporting requirement is parceled out into six different code sections, all were adopted via a single legislative enactment, Prop. 63, and occupied half a page of the ballot initiative's text. The code sections Plaintiffs cite cannot be viewed in isolation but must be read alongside Prop. 63's statements of voter intent, which address none of the particular code sections Plaintiffs claim are critical elements establishing an all-encompassing "statewide scheme." *See infra* pp. 14–16 (discussing voter intent); Pls.' Mem. ISO MSJ at 16 (courts must discern intent to preempt not only by looking to "language used" but "whole purpose and scope of the legislative scheme").

But even starting with the statutory text, the Penal Code sections Plaintiffs rely on do not, on their face, occupy an entire regulatory field to the exclusion of ordinances like Morgan Hill's. The code sections are narrow and procedural, rather than covering any sweeping policy matters. Among them are provisions that address guns that were reported lost but subsequently recovered by an owner (Penal Code §25250(b)), how law enforcement should enter lost or stolen firearms into statewide databases (*id.* § 25260), and penalties for false reporting (*id.* § 25275). The Morgan Hill Ordinance does not even address any of these implementation details, nor does the Ordinance change how firearm recovery, database use, or false reporting is handled. Therefore, the Ordinance does not enter into or intrude upon these subjects and cannot be said to frustrate the purpose of these Prop. 63 provisions. It is odd that Plaintiffs focus so heavily on implementing subsections that coexist in harmony with the Morgan Hill Ordinance as evidence of preemptive state action.

Indeed, the weakness of Plaintiffs' theory reflects the fact that the State does not "fully and completely cover" a field simply by passing one or more laws, even lengthy regulations, in a given area. *See, e.g.*, *Galvan*, 70 Cal. 2d at 860 (three state gun registration laws, spanning 16 Penal Code sections, "cannot reasonably be said to show a general scheme for the regulation of the subject of gun registration"); *Nordyke*, 27 Cal. 4th at 884 (state law authorizing gun shows on county property did not preempt county regulation disallowing gun shows). Otherwise, there would be no need for an implied preemption test at all: whenever the state passes one or more laws in a given area or sets a regulatory standard (such as requiring reporting of gun thefts within five days), it would impliedly apply uniformly throughout the state to the exclusion of local legislation.

Instead of equating a single state statute or standard with an impliedly preempted field of regulation, courts approach the implied preemption analysis much more "carefully." *Cal. Rifle & Pistol Ass'n v. City of W. Hollywood*, 66 Cal. App. 4th 1302, 1317 (1998). That is because implied preemption claims "by definition involve situations in which there is no express preemption"—where the legislature has declined to say clearly that it is removing local regulatory powers the Constitution otherwise protects. *See id.* Without an express statement of intent, courts will find implied preemption only if the purpose and scope of a state regulatory scheme "'*clearly* indicate[s]' a legislative intent to preempt," *id.* (emphasis added), such as by making it apparent that local actions are "inconsistent with the purpose of the general law." *Fiscal v. City & Cty. of San Francisco*, 158 Cal. App. 4th 895, 915 (Cal. Ct. App. 2008).

One example of impliedly preemptive state regulatory scheme is the "broad, evolutional statutory regime enacted by the Legislature" to address public and private handgun possession. *See id.* at 911, 909. The Court of Appeal in *Fiscal* described this regime as "a myriad of statewide licensing schemes, exceptions, and exemptions" taking up "almost one hundred pages' of the statute books." *Id.* at 909. The court's analysis of the scheme led it to conclude that the legislature had preempted local handgun possession bans that "completely frustrate" and "obstruct the accomplishment and execution of the full purposes and objectives" of the state's comprehensive scheme of handgun regulations, which contemplates handgun ownership. *Id.* at 911.

Broad as it was, however, the existence of the statutory regime in *Fiscal* was not enough

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itself to support a finding of implied preemption. The key was that the local ordinance at issue—a handgun ban—plainly obstructed and frustrated the legislature's scheme. The *Fiscal* court struck down the handgun ban after finding that the ordinance "swallow[ed] the state regulations whole"—each handgun regulation was rendered null within the city and state-issued concealed carry permits became invalid. *See id.* at 919, 911. The *Fiscal* Court contrasted this impermissible local action with situations where a "local entity has legislated in synergy with state law," *id.* at 915, or "impos[ed] additional restrictions on state law to accommodate local concerns." *Id.*

Unlike in *Fiscal*, here, Plaintiffs fail to show that the legislature has clearly indicated an intent to preempt by adopting a "broad, evolutional statutory regime" on firearm-theft reporting *that will actually be thwarted* by local action requiring reporting in 48 hours. In sharp contrast to the statutes considered to preempt in *Fiscal*, Prop. 63's reporting provisions are not obstructed, frustrated, or rendered null by a local law requiring people to report lost or stolen guns in 48 hours. Under Morgan Hill's Ordinance, and under the 17 preexisting local laws that require reporting in less than five days, the core of the statewide statutory scheme stays in place, but the timeframe for reporting is sped up. These local laws do not "obstruct the accomplishment and execution of [Prop. 63's] full purposes and objectives," *Fiscal*, 158 Cal. App. 4th at 911, but in fact advance and are wholly consistent with the only purpose announced in Prop. 63. That sole purpose—set out unmistakably by voters—is "[t]o require the reporting of lost or stolen firearms to law enforcement." (Allison Decl. ISO Morgan Hill MSJ, Ex. 8 at p. 164, sec. 3, ¶ 6.) Local laws setting a shorter timeframe for reporting are "in synergy" to that purpose; they do not obstruct it.

Plaintiffs point to various Prop. 63 exceptions, which exempt some individuals from having to report lost or stolen firearms, in an attempt to establish a legislative interest the Ordinance undermines. Prop. 63 does exempt the reporting of antique firearm losses and thefts as well as reporting by law enforcement, U.S. marshals, and others (*see* Penal Code §§ 25250(c), 25255), while Morgan Hill's Ordinance does not exclude these (or any other) individuals from the local reporting requirement. But the California Supreme Court has twice rejected the argument that, without more, a state law that provides exceptions preempts a local law that omits those exceptions. *See City of Riverside*, 56 Cal. 4th 729, 759 (statutory exception from a state-law

prohibition is not a mandate that local governments preserve the exception); *Nordyke*, 27 Cal. 4th at 884 ("the fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution"). Although Plaintiffs declare that the Prop. 63 exceptions are "important" (Pls.' Mem. ISO MSJ at 8), the initiative and the statutory text give no indication that these exceptions are in fact so essential that localities cannot impose their own regulations on exempt individuals. Because "a state law does not 'authorize' activities, to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions," *City of Riverside*, 56 Cal. 4th at 758, state-level exemptions cannot, alone, supply a "clear indicator" that Prop. 63 impliedly preempts.

Plaintiffs also point to one of Prop. 63's reporting provisions that specifies that local police can choose what information to collect about a lost or stolen gun. Penal Code § 25270 (reports of a lost or stolen firearm must include "any additional relevant information required by the local law enforcement agency taking the report"). Plaintiffs claim that this shows the State "intend[ed] to address," and accordingly preempt, "local law enforcement concerns." (Pls.' Mem. ISO MSJ at 18.) The opposite is true: § 25270 shows that voters had no problem with local variations in lost or stolen reporting—which indeed, already existed when the statute was adopted in the 17 localities with their own timeframes for theft reporting—and intentionally incorporated local law enforcement discretion into state law. Localities like Morgan Hill that exercise further discretion to tighten state law—under their constitutionally granted, presumptively valid authority—are not acting inconsistently with Prop. 63. Indeed, it is state law itself that envisions a "patchwork" approach where different local police agencies request different information about firearms.

Even if there was more ambiguity in state law, caution is due to avoid finding implied preemption based on anything other than a clear indication of intent to foreclose local regulation. A "clear" indicator is required because, if the Legislature impliedly intended to preempt local regulation, it could easily have simply said it was doing so, as it has done many times before. *See Cal. Rifle & Pistol Ass'n*, 66 Cal. App. 4th at 1317. California's firearm-theft reporting statutes supply no such indicator, and as discussed below, there is no "clear" indication of voter intent in Prop. 63's findings and statements of purpose either.

2. Voter Intent Does not "Clearly Indicate" an Intent to Preempt

Courts look to a legislative scheme's whole purpose and scope when determining whether there is a clear intent to make a field "exclusively a matter of state concern." *Galvan,* 70 Cal. 2d at 859. When California voters enact a state law by ballot initiative, voter intent is considered in place of the Legislature's. *Persky v. Bushey,* 21 Cal. App. 5th 810, 818-19 (Cal. Ct. App. 2018).

Plaintiffs' analysis of voters' intent in passing Prop. 63 is one paragraph long. (Pls.' Mem. ISO MSJ at 18). The analysis boils down to an argument that since voters did not say they were *not* going to preempt local regulation on gun theft-reporting, as they did in other measures contained within Prop. 63, then they were preempting. But an affirmative showing is not the test because state laws are *assumed* not to preempt. Therefore, Plaintiffs must not only show that voters departed from this presumption by barring local legislation, but also that voters' intent is so clear as to not tolerate any local action. *Cal. Rifle & Pistol Ass'n,* 66 Cal. App. 4th at 1320 ("The relevant question is not whether a statute grants the City a power, but whether a statute deprives the City of a power already bestowed upon the City by the Constitution."); *id.* at 1317 (requiring "clear" signal of intent to overcome presumption against preemption, since the Legislature—or here, voters—could have said it was preempting local legislation if that was the intended aim).

Morgan Hill addressed voter intent at pages 3–4, 14, and 17–19 of its Motion for Summary Judgment. Surveying Prop. 63's text, findings, and statement of purpose and intent, there is no indication—clear or otherwise—that voters sought to establish a uniform state reporting requirement to the exclusion of local enactments. Rather, the purpose and findings of Prop. 63 demonstrate that voters intended to combat gun trafficking and facilitate the recovery of lost or stolen firearms by requiring that gun losses and thefts be reported, without expressing a preference for a uniform 5-day timeframe. Prop. 63 notes a clear intention to require "the reporting of lost or stolen firearms to law enforcement," but it does not include any specific time by which reporting should be accomplished (*see* Allison Decl. ISO MSJ Ex. 7), in contrast to timeframes expressly provided elsewhere in Prop. 63 (*see* Morgan Hill Mem. ISO MSJ at 18).

Moreover, and critically, Prop. 63 was enacted against a backdrop of preexisting local firearm theft-reporting laws that went further than state law, yet the ballot initiative was silent

about these local laws. Silence on the existence of so many local ordinances, legitimately adopted as part of cities' and municipalities' police powers, cuts against an implied intent to preempt those ordinances. *See, e.g.*, *Calguns Found., Inc. v. Cty. of San Mateo*, 218 Cal. App. 4th 661, 666–67 (Cal. Ct. App. 2013) (citations omitted) ("it is not to be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication"). To the extent there is any ambiguity about voter intent, as a result of voters' adopting an initiative that included no language either explicitly overruling local theft-reporting ordinances or explicitly leaving them in place, that ambiguity cannot constitute a "clear" indicator of voter intent to preempt.

D. Morgan Hill's Ordinance Does Not Have a Significant Adverse Effect on Transient Citizens.

As a fourth alleged basis for preemption, Plaintiffs argue that the subject of lost or stolen reporting is partly addressed in state law and "is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality" (Pls.' Mem. ISO MSJ at 15, 19). There is no such adverse effect, and any hypothetical adverse effect is not substantial enough to outweigh the benefits to Morgan Hill.

1. The Ordinance's Effect on Transient Citizens is Insubstantial

Though there are many hundreds of local firearms ordinances in California,[7] Plaintiffs point to no firearm ordinance, and Morgan Hill is not aware of any, that has ever been invalidated based on an adverse effect on transient citizens. That is not surprising because courts have repeatedly held that local gun regulations have an insignificant adverse effect on transient citizens. "Laws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens, indeed, far less than other laws that have withstood preemption challenges." *Great W. Shows, Inc.*, 27 Cal. 4th at 867; *see also Suter v. City of Lafayette*, 57 Cal. App. 4th 1109, 1119 (Cal. Ct. App. 1997); *Galvan*, 70 Cal. 2d at 864–65. Furthermore, courts have recognized that, having not preempted broad areas of gun regulation,

[7] *See generally* Giffords Law Center, *Communities on the Move: Local Gun Safety Legislation in California* (Oct. 1, 2018), https://lawcenter.giffords.org/resources/communities-on-the-move-local-gun-safety-legislation-in-california/.

California supports the development of varied local firearm laws. *Suter*, 57 Cal. App. 4th at 1119 (California legislature has "indicate[d] an intent to permit local governments to tailor firearms legislation to the particular needs of their communities").

Contrary to Plaintiffs' contention, courts have not found that local firearm laws burden transient citizens by obligating travelers to learn about gun regulations that differ from state law. In *Nordyke*, for example, the Supreme Court upheld an Alameda County ordinance forbidding firearms on county property, including a county fairground that hosts a gun show, with no exceptions—even though a state law authorized bringing licensed firearms to gun shows held on public land, and exempted retired law enforcement, animal control officers, and correctional officers from firearm licensing restrictions. *See* 27 Cal. 4th 875, 883–84. The Court upheld the local ordinance, despite the fact that transient visitors might need to educate themselves on Alameda County's county building and fairgrounds firearm ban and learn that it applies to normally exempt individuals. *See id.*; *cf. id.* at 885 (Brown, J., dissenting) (noting that majority's reasoning would burden travelers by requiring them to learn local gun laws).

Plaintiffs offer no basis to distinguish *Nordyke* from this case, and their account of the burdens on transient citizens "passing through" Morgan Hill (Pls.' Mem. ISO MSJ at 14–15) such as "while on a hunting trip" or "as part of a move" (*id.* at 20) is even more speculative. Any possible burden the Ordinance could have on travelers would only come into play if (a) a visitor reasonably became aware that their firearm was lost or stolen while passing through Morgan Hill, and (b) such a visitor wished to wait to report the loss or theft to Morgan Hill police until day three, four or five. Since state law would require those passing through Morgan Hill to report firearm losses or thefts to the *Morgan Hill police* (not the police in their hometown), a person in this situation might wish to report right away, before leaving Morgan Hill to continue a move or hunting trip without their firearm. Even if potentially inconvenient, the burden on visitors to report a lost or stolen firearm in Morgan Hill is ultimately imposed by state law, and the obligation to learn about Morgan Hill's 48-hour reporting requirement poses no more of a burden than the local regulations the Court determined Alameda County visitors would need to comply with in *Nordyke*.

Elsewhere in their Motion, Plaintiffs suggest that the sheer number of local reporting laws

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obligates transient citizens to learn all of them. Pls.' Mem. ISO MSJ at 20 (noting that if each county and city in California could "arbitrarily set any number of days to report, a hopeless 'patchwork quilt' of varying reporting requirements will confront visiting gun owners whenever [they] move about the state."). But gun owners need not learn every reporting requirement in this supposedly hopeless patchwork quilt. Local theft-reporting requirements only confront gun owners *whose firearm is lost or stolen* while traveling through a different city or county—quite an abnormal experience, one hopes, that does not occur often. State law already requires traveling gun owners to report to *local* police in the jurisdiction where a theft or loss takes place, and already requires such owners to abide by *local* rules for the information that must be reported. *See* Penal Code § 25270 (requiring reporting of "any additional relevant information required by the local law enforcement agency taking the report"). Given the individualized responsibilities state law already assigns, it is far from unreasonable for cities and counties to ask travelers who lose a deadly weapon or experience a dangerous crime in their borders to comply with any additional local requirements when reporting the lost or stolen gun now endangering the community.[8]

Ultimately, local laws in the area of firearm-theft reporting are no more onerous than any other local law—including the hundreds of local gun regulations already on the books that cities have the broad authority to adopt. *See Galvan*, 70 Cal. 2d at 864 ("That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority."). Nor are local theft-reporting laws more onerous than local regulations on any subject that apply to visitors as well as residents. As the Supreme Court explained in *Galvan*, courts routinely find local ordinances not preempted even though they "apply to *anyone* within the geographic confines of the city, and not merely to residents." 70 Cal. 2d at 865 (emphasis in original). This includes a "Fresno ordinance prohibiting the consumption of

[8] If gun owners are concerned they will be caught unaware by local laws while traveling with a firearm, there are several resources that would allow them to look up this information. Attorneys for Plaintiff California Rifle & Pistol Association market a publication advising California gun owners on applicable federal and state laws and local ordinances, and their obligation to comply with them. Cal. Rifle & Pistol Ass'n, *California Gun Laws* (accessed Jun. 2, 2020), https://crpa.org/california-gun-laws/. Counsel for Morgan Hill, Giffords Law Center, also publishes a free list of localities that have gun ordinances on a number of subjects. *See supra* n.7.

alcoholic beverages on the street" (*id.* (citing *People v. Butler*, 252 Cal. App. 2d Supp. 1053, 1058 (Cal. Super. Ct. 1967))); a Los Angeles ordinance prohibiting assembling at gambling houses (*People v. McGennis*, 244 Cal. App. 2d 527, 532 (Cal. Ct. App. 1966)); and a Los Angeles ordinance making it unlawful to loiter in tunnels (*Gleason v. Mun. Court for Los Angeles Judicial Dist.*, 226 Cal. App. 584, 585 (Cal. Ct. App. 1964)). Such ordinances were not preempted even though they required traveling citizens to learn about local ordinances that differ from state law on alcohol consumption, gambling, and loitering.

2. Any Effect on Transient Citizens Cannot Outweigh the Benefits to Morgan Hill

Since the Ordinance's effects on transient citizens are reasonable and in line with other local laws, Morgan Hill's public safety interests are strong enough to outweigh any burdens. As described in Morgan Hill's summary judgment motion, Morgan Hill sought to achieve a number of local benefits by adopting a 48-hour reporting requirement, including reducing gun crime and youth gun violence. (Morgan Hill Mem. ISO MSJ at 8.) The benefits are further supported by compelling research showing that thefts from legal gun owners is a growing problem and that too many firearms are recovered too slowly—only after they have been used in crime. *Id.* at 1–2. And there is research showing that much gun crime is local crime, confirming that local interventions are well-suited to recover crime guns quickly, before they are used to harm someone. *Id.* at 8.

Plaintiffs attempt to cast doubt on this reasoning by arguing the relevant research is disputed (Pls.' Mem. ISO MSJ at 22 & n.7, 23), but that debate is immaterial. Courts do not ask whether a local law *effectively achieves* a local benefit, which would improperly intrude into a municipality's police powers. *See, e.g.*, *Great W. Shows*, 27 Cal. 4th at 867 (crediting ordinance's legislative findings on the "grave problems" ordinance was intended to address and acknowledging municipality's authority to do its "own calculations of the costs and benefits" of a gun regulation). Morgan Hill is not aware of any court in a firearm preemption case that has engaged in an effectiveness analysis of a local regulation. As the Court of Appeal explained in *Fiscal*: "we need not, and do not, pass judgment on the merits of Prop. H, or engage ourselves in the sociological and cultural debate about whether gun control is an effective means to combat crime." 158 Cal. App. 4th at 902.

Nor do courts in this position demand that a city council justify its policy decisions with a legislative record of studies that would satisfy courtroom evidentiary standards, as Plaintiffs suggest is needed here. (Pls.' Mem. ISO MSJ at 22 & n.7.) That suggestion is off-base because cities and municipalities have constitutionally broad latitude to adopt police regulations. Indeed, courts draw every inference "in favor of the validity of the exercise of the police power," and may look beyond reasons cited by a local legislature and uphold an ordinance as furthering public safety for reasons that "differ from the determination of the legislative body." *See, e.g., Ensign Bickford Realty Corp. v. City Council*, 68 Cal. App. 3d 467, 474 (Cal. Ct. App. 1977) (overruled in part on other grounds by *Hernandez v. City of Hanford*, 41 Cal. 4th 279 (Cal. 2007)).

No preemption precedent suggests the Court should re-weigh Morgan Hill's policy choices and interrogate the strength of the evidence supporting the City's theft-reporting requirement. Instead, the relevant question in this preemption case is whether "the adverse effect of a local ordinance on the transient citizens of the state outweighs the *possible* benefit to the municipality." *Sherwin-Williams Co.*, 4 Cal. 4th at 898 (citations omitted) (emphasis added). Here, since there is no substantial impact on transient citizens and a legislative record that details numerous possible benefits to Morgan Hill, the Ordinance is not preempted on this basis.

V. CONCLUSION

The Constitution safeguards local government authority to use police powers to regulate in the area of firearms, and the California Supreme Court has carefully protected this right by enforcing a robust presumption against the preemption of local gun regulations. Reporting requirements for lost or stolen firearms, including the Morgan Hill Ordinance and the similar laws that exist in 18 other California cities today, enjoy this presumption.

Plaintiffs failed to meet their burden of showing that the presumption should be set aside because the Ordinance duplicates or contradicts state law. They have also failed to articulate, let alone establish, a "clear intent" by Prop. 63 voters to preempt the Ordinance. The relevant evidence and applicable precedents demonstrate that the Ordinance permissibly strengthens a reporting time-frame set by state law, furthering and not undermining the public safety goals of that law. The Court

should deny Plaintiffs' Motion for Summary Judgment and grant summary judgment to Morgan Hill.

Dated: June 11, 2020

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