C. D. Michel – SBN 144258
Anna M. Barvir – SBN 268728
Tiffany D. Cheuvront – SBN 317144
**MICHEL & ASSOCIATES, P.C.**
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
Facsimile: 562-216-4445
cmichel@michellawyers.com

Attorneys for Plaintiffs/Petitioners
G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated

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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE 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

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Date: July 2, 2020
Time: 9:00 a.m.
Judge: Judge Peter Kirwan
Dept.: 19

[Filed concurrently with Response to Defendants' Separate Statement of Undisputed Facts and Additional Undisputed Material Facts; Request for Judicial Notice; Declaration of Anna M. Barvir; Evidentiary Objections; and Proposed Order for Evidentiary Objections]

Action filed: April 15, 2019

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## INTRODUCTION

Plaintiffs G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated, allege that Defendant City of Morgan Hill adopted an ordinance that state law preempts. The challenged ordinance requires victims of firearm theft who live in, and those whose firearms are lost or stolen within, the City to report the theft or loss to the Morgan Hill Police Department within *48 hours*. But under Proposition 63, which California voters enacted in 2016, gun owners must *also* report the theft or loss of a firearm to local law enforcement, but they are given *five days* to do so. In short, the City's ordinance criminalizes conduct that the voters of the state have found permissible. And it undermines the state's broad effort to create consistent and rational statewide compliance with its comprehensive theft-reporting requirements.[1]

The City cites no compelling reason it would need a more restrictive theft-reporting requirement. To the contrary, in the very first line of its motion for summary judgment, the City admits that what motivated it to adopt the offending ordinance was not some particularized local need for stricter theft reporting, but a bare desire to do *something* in response to the Parkland tragedy. The legislative history of the City's theft-reporting ordinance includes *no* evidence that a 48-hour theft-reporting requirement is more likely to serve the City's purported interests than the statewide five-day requirement. And even now, with the parties filing dueling dispositive motions, the City *still* has no evidence that a shortened period will provide any local benefit beyond what state law already provides. Instead, the City defends its ordinance by pointing to dubious claims that gun violence is a growing epidemic, that firearm theft is on the rise,[2] and that theft-reporting requirements will somehow reduce both. But even assuming each of these broad notions were true, and assuming they justify theft-reporting requirements generally, the City *still* would not have shown that its particular requirement is valid.

Let Plaintiffs be clear. They are not challenging theft-reporting requirements, generally. They are not even challenging California's theft-reporting requirement, specifically. They are only

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[1] For ease of reference, Plaintiffs often refer to the reporting of firearms as stolen or lost as "firearm theft reporting" or "theft reporting."

[2] See Pls.' Evid. Objs. Supp. Oppn. Defs.' Mot. Summ. J., filed simultaneously herewith.

challenging the City's authority to pass its own theft-reporting requirement—a local law at odds with state law that cannot be justified by any special local need. As Plaintiffs will show, the City lacks such authority. For its theft-reporting ordinance duplicates, contradicts, and enters a field implicitly occupied by state law, and is preempted. The Court should grant Plaintiffs' Motion for Summary Judgment, deny the City's, and enter an order enjoining enforcement of the City's law.

## STATEMENT OF FACTS

In November 2016, California voters enacted Prop 63, creating (among other things) Penal Code section 25250,[3] which reads in relevant part:

> 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.

(Pls.' Resp. Defs.' Sep. State. Undisp. Mat. Facts & Additional Undisp. Mat. Facts ("RUMF") No. 10, citing Pen. Code, § 25250, subd. (a).) In short, state law requires that firearm owners report firearm theft or loss to local law enforcement within five days. (Pls. RUMF No. 10.) Failure to do so is a crime punishable by fine for the first two violations and by fine, imprisonment, or both for a third violation. (RUMF No. 25, quoting Pen. Code, § 25265, subds. (a)-(c).)

Prop 63 also created about a dozen other sections and subsections related to firearm theft reporting. (RUMF Nos. 16-25, 67.) Penal Code section 25270, for instance, lays out what must be part of a section 25250 report, including "the make, model, and serial number of the firearm, if known by the person, and any additional relevant information required by the local law enforcement agency taking the report." (RUMF No. 16, citing Pen. Code, § 25270.) The law also provides guidance for those who recover a firearm previously reported lost or stolen. (RUMF No. 17, citing Pen. Code, § 25250, subd. (b) [giving firearm owners five days to notify local law enforcement that they recovered their firearms].) It furthers statewide law enforcement interests by directing "every sheriff or police chief [to] submit a description of each firearm that has been reported lost or stolen directly into the Department of Justice Automated Firearms System [AFS]."

[3] Unless otherwise noted, all statutory references are to the California Penal Code.

(RUMF No. 21, citing Pen. Code, § 25260.) It made it a crime to knowingly make a false report. (RUMF No. 22, citing Pen. Code, § 25275.) And it created a requirement that firearm retailers notify consumers of the statewide five-day theft-reporting requirement on a visible sign printed in block letters. (RUMF No. 67, citing Pen. Code, § 26835.)

Finally, Prop 63 created several exceptions to the statewide reporting law. (RUMF No. 18, citing Pen. Code, §§ 25250, subd. (c), 25255.) Under section 25250, subdivision (c), for instance, no person must report the theft or loss of any firearm that qualifies as an "antique" under state law. (RUMF No. 19.) And section 25255 explicitly exempts:

1. Any law enforcement officer or peace officer acting within the scope of their duties who reports the theft or loss to their employing agency;

2. Any United States marshal or member of the United States armed forces or the National Guard engaged in their official duties;

3. Any federally licensed firearms importer, manufacturer, or dealer who reports the theft or loss in compliance with applicable federal law; and

4. Any person whose firearm was stolen or lost before July 1, 2017.

(RUMF No. 20, citing Pen. Code, § 25255.)

Interestingly, even though voter approval of Prop 63 created this comprehensive scheme regulating firearm theft reporting, the official ballot language for Prop 63 did not include a single reference to it:

> Requires background check and Department of Justice authorization to purchase ammunition. Prohibits possession of large-capacity ammunition magazines. Establishes procedures for enforcing laws prohibiting firearm possession by specified persons. Requires Department of Justice's participation in federal National Instant Criminal Background Check System. Fiscal Impact: Increased state and local court and law enforcement costs, potentially in the tens of millions of dollars annually, related to a new court process for removing firearms from prohibited persons after they are convicted.

(RUMF No. 65, citing Pls.' Req. Jud. Ntc. Supp. Oppn. Defs.' Mot. Summ. J. ("Pls.' Req. Jud. Ntc.") Exs. UU-VV.)

In late November 2018, some two years later after voters adopted Prop 63, the City adopted Ordinance No. 2289, amending section 9.04.030 of the Morgan Hill Municipal Code. (RUMF Nos. 11-12.) Drawing from "model laws" championed by the Giffords Law Center to Prevent Gun

Violence (formerly the Legal Community Against Violence) and the Association of Bay Area Governments, section 9.04.030 shortens the time for reporting a firearm stolen or lost. (RUMF Nos. 59-62.) MHMC section 9.04.030 reads:

> 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 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 Hill.

(RUMF No. 13, citing Morgan Hill Mun. Code, § 9.04.030.) The local law thus gives firearm owners only two days to report a firearm theft or loss to the MHPD whenever the theft or loss occurs in the City or the firearm owner resides there. (RUMF No. 13.) Failure to comply with the City's reporting mandate is crime punishable by confiscation or fine or, potentially, both. (RUMF No. 26, citing Morgan Hill Mun. Code, §§ 1.19.060, 9.04.060.) Unlike the Penal Code, the MHMC has no exceptions to its theft-reporting mandate.

While the City was considering adopting the ordinance, Plaintiff CRPA twice notified lawmakers of its opposition to the law, explaining that state law preempted the City's proposed 48-hour reporting requirement. (RUMF No. 27.) After the City adopted MHMC section 9.04.030, Plaintiff CRPA again notified the City of its position, requesting that the City voluntarily repeal the law. (RUMF No. 28.)[4] The City refused, the law took effect in December 2018, and the City has enforced the law since that time. (RUMF No. 29.)

## ARGUMENT

### I. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only if the moving party can show there is no triable issue of material fact and it is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) On summary judgment, courts view the evidence in the light most favorable to the nonmoving party, resolving any evidentiary doubts in their favor. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499;

[4] Plaintiff CRPA also wrote to the city of Palm Springs, notifying local lawmakers that Prop 63 preempted its similar attempt to shorten the time that firearm-theft victims have to report their property stolen. (RUMF No. 30.) After receiving CRPA's analysis (and just months after adopting the law), Palm Springs voluntarily repealed its 48-hour reporting requirement. (RUMF No. 30.) The City acknowledged the repeal but did not address the reasons for it. (Defs.' MSJ, p. 4.)

*Yanowitz v. L'Oreal USA*, *Inc*. (2005) 36 Cal.4th 1028, 1037.)

## II. THERE IS NO EVIDENCE THAT VOTERS INTENDED FOR THE STATEWIDE THEFT-REPORTING LAW TO NOT PREEMPT FURTHER LOCAL REGULATION

Throughout its motion, the City repeatedly refers to the "intent of the voters" in passing Prop 63 by referencing the initiative's "Findings and Declarations" and "Purpose and Intent" sections. (Defs.' MSJ, pp. 2-3, 6, 16-17.) But this extrinsic evidence of subjective voter intent is inappropriate here. As the City correctly notes, "when California voters enact a state law by ballot initiative, voter intent is considered in place of the Legislature's." (Defs.' MSJ, p. 14, citing *Persky v. Bushey* (2018) 21 Cal.App.5th 810, 818-819.) Like a legislature then, evidence of the voters' subjective intent is secondary to the operation and effect of their enactment. (*S.F. Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 476.) Indeed, "[t]he motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." (*County of Los Angeles v. Superior Court (Burroughs)* (1975) 13 Cal.3d 721, 726, citing *Soon Hing v. Crowley* (1885) 113 U.S. 703, 710-711.) As will be shown, the "natural and reasonable effect" of Prop 63's comprehensive theft-reporting scheme preempts further local regulation, so resort to extrinsic evidence of subjective voter intent is unnecessary and improper.

But even if one were to try to discern a purported "intent of the voters" by looking beyond the effect of their enactment, one would quickly realize that the task is much harder than examining legislative history. Legislatures are made up of relatively few people, their proceedings are recorded, and the people who comprise them are not laypeople, but lawmakers. In contrast, when millions of voters take the place of the legislature, there is no reliable legislative history to refer to. The City points to various sections of Prop 63's full text and its voter guide. (Defs.' MSJ, pp. 3-4.) But it cites no evidence about how many of the millions of people who voted on Prop 63 read the full text of the initiative or even the voter guide's excerpts. The text of Prop 63 was over *15 pages*, including complicated "legalese," unlikely to have been read by most laypeople. (See Pls.' Req. Jud. Ntc. Ex. C.) As the Center for Civic Design explained in 2014, there is:

> [S]trong evidence from many sources that voters feel that preparing for an

> election can be an overwhelming task. The number of pages is one of the factors that figures into the "20-second test." If recipients get a large document in the mail, they're less likely to even flip through it, regardless of how compelling the cover might be.

(RUMF No. 66.)

The City thus has no way to know whether voters even read what their "intent" was, let alone that they expressed it through their vote. The only reliable extrinsic evidence of the voters' intent is the language on the ballot itself. But the ballot did not even reference theft reporting, focusing instead on other aspects of Prop 63. (RUMF No. 65.) A voter who reasonably chose not to wade through the "legalese" of Prop 63's full text would have had no idea that firearm theft reporting was even a part of the measure. So, beyond the scope of the enactment itself, there is really no way to determine voter intent about theft reporting, generally, or preemption, specifically.

The only people the City can definitively argue read all of Prop 63 were those who drafted it. And *they* saw fit to include not one, *but two*, statutes expressly sanctioning further regulation, including local action, in other parts of the very same initiative measure. (Pls.' Req. Jud. Ntc. Ex. C, at pp. 23, 26.)[5] That they did not include similar language in the theft-reporting mandate is good indication that no authorization of further local regulation was intended. (See *Bates v. United States* (1997) 522 U.S. 23, 29-30 ["[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."]; *People v. Briceno* (2004) 34 Cal.4th 451, 459 ["In interpreting a voter initiative . . . we apply the same principles that govern statutory construction."].) Certainly, if the drafters wanted to authorize local action on theft reporting, they knew how, as several other sections of Prop 63 itself demonstrate.

The City makes a final argument about voter intent, relying again on Prop 63's "Purpose and Intent" section, which makes reference to Prop 63's requirement that ammunition retailers report ammunition theft or loss within 48 hours. (Defs.' MSJ, p. 18.) Noting that the section quotes the length of the reporting period for these retailers, but is silent as to the length of the reporting

[5] For more evidence of the drafters' intent about which types of state laws left room for local restriction under Prop 63, see section 9, which reads: "Nothing in this Act shall preclude or preempt a local ordinance that imposes additional penalties or requirements in regard to the sale or transfer of ammunition." (Pls.' Req. Jud. Ntc. Ex. C, at p. 31.)

period for common gun owners, the City claims the

> discrepancy . . . demonstrates that the purpose of the 48-hour stolen ammunition reporting requirement for *sellers* may be to remove localities' ability to mandate a shorter reporting requirement for ammunition sellers. But because there is no corresponding statement that five days is the only appropriate time for individuals to report lost or stolen firearms,[6] Prop 63 indicates an intent to allow further local regulation in this area.

(Defs.' MSJ, p. 18.) The City is making a stunning argument that elevates improper extrinsic evidence of voter intent in the "Purpose and Intent" section *above the law the voters actually enacted*. Given the absurd weight the City lends to what amounts to a preamble, it is understandable that it overlooks that Prop 63 voters did, in fact, specify the "appropriate time for individuals to report lost or stolen firearms." (Defs.' MSJ, p. 18.) *That time is five days*. (Pen Code, § 25250.) And of course, it is the reasonable effect of the enactment that counts, not the (likely unknowable) subjective intent behind it. (*S.F. Apartment Assn.*, *supra*, 3 Cal.App.5th at p. 476.) That the "Purpose and Intent" did not itself cite the actual length of the reporting period is irrelevant.

Additionally, the City's wholly speculative argument about why the drafters specified that ammunition reports be made within 48 hours in the preamble should be dismissed offhand. Even before Prop 63, state law required retailers to report firearm loss "within 48 hours of discovery." (Pen. Code, § 26885, subd. (b).) The *only* change Prop 63 made to that section was to add ammunition loss to the list of reportable events. (*Ibid.* See also Pls.' Req. Jud. Ntc. Ex. C, at p. 26.) It is thus more likely the "purpose and intent" of Prop 63 (as regards retailer reporting) was to add ammunition, *not* to impact how long retailers have to report or to make any broad-sweeping statement about the preemptive effect of section 26885 or any other law, for that matter.

## III. THE CITY HAS NO SPECIAL INTEREST IN ITS THEFT-REPORTING PERIOD

The City argues that there is a strong presumption against preemption "when considering a local regulation that covers an area of significant local interest differing from one locality to another." (Defs.' MSJ, p. 7, citing *Big Creek Lumber Co. v. City of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.) It goes further, claiming that "the reporting of lost or stolen firearms in particular

[6] The "Purpose and Intent" section does not say that the "*only* appropriate time" for retailers to report ammunition loss is 48 hours either. (Pls.' Req. Jud. Ntc. Ex. C, at p. 22.)

implicates particularly localized interests," and that preemption would leave them "unable to address acute public health issues." (Defs.' MSJ, pp. 8, 13.) Yet the City has *never* identified what particularized interest, "acute public health issue," or other need it has to shorten the reporting period. To the contrary, the very first line of the City's motion reveals that the City passed the ordinance as a response to "its citizens' desire to take action on gun violence in light of the Parkland mass shooting," and not any local need related to theft reporting. (Defs.' MSJ, p. 1.) A tragedy that occurred across the country is not a particularly local interest, especially when no theft-reporting law, *regardless of the length of the reporting period*, would have prevented that crime.[7]

Further, in adopting MHMC section 9.40.030, the City cited four general purposes for theft-reporting ordinances, but never mentioned any "significant local interest" in requiring reporting within 48 hours, as opposed to five days (or any other reporting period). (Pls. RUMF Nos. 44-54. See also Pls.' Req. Jud. Ntc. Ex. D, at pp. 42, 46-46, Ex. F, at pp. 73-88, 265-289, Ex. H, at pp. 308-309, Ex. J, pp. 347-362.) The City's goals for MHMC section 9.04.030 were purportedly:

1. To discourage firearm owners from falsely reporting the theft or loss of a firearm to hide their involvement in illegal activities and to provide a tool for law enforcement to ferret out such behavior. (RUMF No. 45.)

2. To help disarm prohibited persons by deterring them from falsely claiming their firearms were stolen or lost. (RUMF No. 46.)

3. To protect firearm owners from unwarranted accusations if law enforcement recovers their firearm at a crime scene and to make it easier to return a lost or stolen firearm to its lawful owner. (RUMF No. 47.)

4. To make firearm owners more accountable for their firearms. (RUMF No. 48.)

The City has cited no evidence that its 48-hour theft-reporting requirement would be more likely to serve these interests than the statewide five-day requirement (RUMF No. 49), which itself seeks to serve the very same purposes (RUMF Nos. 63-64). Even if state law cannot serve these purposes, there is no reason to think that the City's law, shortening the reporting period by just three days, is any more likely to. The City cited no evidence that it would (RUMF Nos. 49-54), and there is no body of reliable research establishing that it could (RUMF No. 55).

[7] See Jansen, *Florida Shooting Suspect Bought Gun Legally, Authorities Say*, USA Today (Feb. 15, 2018) <https://www.usatoday.com/story/news/2018/02/15/florida-shooting-suspect-bought-gun-legally-authorities-say/340606002/> [as of June 4, 2020].

In fact, it is unlikely that shortening the reporting period by mere days would have any impact on the City's interests at all. As the City itself admitted when considering the ordinance, "[r]esponsible gun owners will report with or without an ordinance." (Pls.' Req. Jud. Ntc. Ex. F, at p. 275.) Indeed, according to the U.S. Department of Justice, gun owners reported about 90% of burglaries involving stolen firearms to law enforcement between 2005 and 2010. (RUMF No. 57.) But only about *1 of every 5* firearms had been recovered between 1 day and *6 months* after reporting. (RUMF No. 57.) And, although "victimizations involving stolen firearms could have occurred . . . up to six months before the [National Crime Victimization Study] interview [from which these statistics were drawn], the amount of time that had elapsed *made no significant difference in the percentage of households for which guns had not been recovered* . . .." (RUMF No. 58, italics added.)

What's more, the City's purported interest in deterring false reporting (RUMF Nos. 45-46), is no doubt served *better* by state law, which expressly criminalizes that behavior. (RUMF No. 22 [citing Prop 63, which also created section 25275, making it a crime to falsely report a firearm lost or stolen].) MHMC section 9.04.030 does not address the issue at all.

For all these reasons, it is hard to see how the City could claim its law addresses some local concern that state law does not already seek to address. And the City cites no evidence that it's specific theft-reporting ordinance—limiting the reporting period to 48 hours—serves those interests any better than state law.

## IV. STATE LAW PREEMPTS THE CITY'S THEFT-REPORTING ORDINANCE

The California Constitution commands that a county or city must take care not to fall "in conflict with general laws." (Cal. Const., art. XI, § 7.) Courts have long interpreted this as a limitation on local governments' ability to interfere with the proper operation of state law through local legislation. (*Agnew v. City of Los Angeles* (1958) 51 Cal.2d 1.) In short, a local law "[i]s invalid if it attempts to impose additional requirements in a field that is preempted by the general law." (*In re Lane* (1962) 58 Cal.2d 99, 102.) In determining whether a local measure is preempted, courts ask if it "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4

Cal.4th 893, 897 ("*Sherwin-Williams*").) If it does, "it is preempted by such law and is void." (*Candid Enterps., Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 879.)

Meeting any one of these tests is enough to establish preemption. But the City's theft-reporting ordinance defies the constitutional mandate that counties govern subordinate to state law (see *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898; Cal. Const., art. XI, § 7) at least thrice over because it duplicates state law, contradicts it, *and* enters a field that state law has fully occupied.

**A. The City's Theft-reporting Ordinance Duplicates State Law**

A local law *duplicates* state law "when it is 'coextensive' with state law." (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067 ("*O'Connell*"), quoting *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 897.) That is, "where local legislation purport[s] to impose the same criminal prohibition that general law impose[s]," the local law duplicates state law and is void as preempted. (*In re Portnoy* (1942) 21 Cal.2d 237, 240.) "The reason that a conflict [with the 'general laws' under article XI, section 7 of the state Constitution] is said to exist where an ordinance duplicates state law is that a conviction under the ordinance will operate to bar prosecution under state law for the same offense." (*Cohen v. Bd. of Supervisors* (1985) 40 Cal.3d 277, 292.) This frustrates the enforcement of supreme state criminal law.

MHMC section 9.04.030 requires "any person who owns or possess a firearm" to report the theft or loss of that firearm to the MHPD within 48 hours. (RUMF No. 13.) The law applies to any person who resides in the City and any theft or loss that takes place in the City. This duplicates state law, which also requires gun owners to report firearm theft or loss but gives them five days to make the report. (Pen. Code, § 25250, subd. (a).) MHMC section 9.04.030 thus imposes the "same criminal prohibition that general law impose[s]" (*In re Portnoy*, *supra*, 21 Cal.2d at p. 240) in that both state law and local law criminalize the failure to report a firearm lost or stolen. So, if a City resident or visitor has their firearm stolen and fails to report it, they will have violated *both* state law *and* local law. (See *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 179-180.)

The City's reliance on *Nordyke v. King* (2002) 27 Cal.4th 875 ("*Nordyke*") misses the mark. There, Alameda County banned possession of firearms at gun shows held at its fairgrounds, presenting the California Supreme Court with a narrow issue of first impression: "Does state law

regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property?" (*Id.* at p. 880.) Answering that question, the Court relied heavily on the county's statutorily recognized authority to regulate commercial activities on its own property, holding that under state law

> [A] county is given *substantial authority to manage its property*, including the most fundamental decision as to how the property will be used, and that nothing in the gun show statutes evince an intent to override that authority. The gun show statutes do not mandate that counties use their property for such shows. . .. In sum, whether or not the [o]rdinance is partially preempted, Alameda County has the authority to prohibit the operation of gun shows held on its property and, at least to that extent, may ban possession of guns on its property.

(*Id.* at pp. 882-885, italics added.) In short, *Nordyke* stands for little more than the proposition that state gun-show laws—*which expressly contemplate further local regulation*—do not preclude local governments from banning the possession of firearms *at gun shows held on county-owned property*. Though the Court did observe that "possessing a gun on county property is not identical to the crime of possessing an unlicensed firearm that is concealable or loaded, nor is it a lesser included offense, and therefore someone may lawfully be convicted of both offenses" (*Nordyke*, *supra*, 27 Cal.4th at p. 883), the case is distinguishable. For the City's ordinance *does* criminalize the same behavior state law criminalizes—failing to report the loss or theft of a firearm to local law enforcement. This is precisely the sort of local intrusion into state affairs that preemption prohibits.

**B. The City's Theft-reporting Ordinance Contradicts State Law**

Local ordinances that "contradict" state law are preempted and void. (*O'Connell*, *supra*, 41 Cal.4th at pp. 1067-1068.) A local law contradicts state law when it commands what state law prohibits *or prohibits what a state law authorizes.* (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 902.) Such laws are "inimical to or cannot be reconciled with state law," (*O'Connell*, *supra*, 41 Cal.4th at p. 1068), and courts should strike them as preempted. (*Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 903 ("*Fiscal*").) MHMC section 9.04.030 prohibits Plaintiff Kirk and members of Plaintiff CRPA from doing what state law, at least implicitly, allows them to do—take up to five days before they must report the theft or loss of their firearms. A patent contradiction with California law, the ordinance is preempted and void.

Arguing that local governments are free to narrow what state law permits by creating stricter local requirements, the City points out that "Prop 63 *allows* a gun owner to wait up to five days before reporting a loss or theft; it does not *require* an individual to wait that long." (Defs.' MSJ, p. 10.) But even if the City's ordinance merely narrowed what state law allows, such local action is not *always* permissible. For the reasons explained below, it is *not* permissible here.

In *Ex parte Daniels* (1920) 183 Cal. 636, 641-648, the California Supreme Court held that local legislation purporting to fix a lower maximum speed limit for motor vehicles than what general law fixed was preempted as "contradicting" state law. While later precedent tells us that no "contradictory and inimical conflict" "will be found where it is *reasonably possible* to comply with both the state and local laws," (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729, 743 ("*Riverside*"), italics added), *Ex parte Daniels* still has important lessons for us today. Decided in an era before speed limit signs were common, *Ex parte Daniels* recognized that it would not be reasonably possible for someone traveling throughout the state to know the speed limits in each area. Indeed, the Court held, if localities had a right to reduce the statewide speed limits at their discretion, "every part of a trip from Siskiyou to San Diego would be controlled by arbitrary speed limits fixed by legislative bodies whose action [the traveler] is presumed to know, but of which he is much more likely to be totally unaware." (*Id*. at p. 645.) The Legislature, however, had "authorized the citizens of the state to travel upon the highways . . . at a speed which is not unreasonable and unsafe." (*Ibid.*) It was not the prerogative of the localities to second-guess the state's measured judgment.

Here, section 25250 gives victims of firearm theft, or those who lose a firearm, up to five days to report to local law enforcement. Put another way, taking up to five days to report the theft or loss of a firearm is authorized by state law. Like the Legislature in *Ex parte Daniels* that adopted a "not unreasonable and unsafe" speed limit for the state's roadways (183 Cal. at p. 645), California voters adopted what they believed to be a "not unreasonable and unsafe" reporting period (RUMF Nos. 10, 15, 63-64; Pls.' Req. Jud. Ntc. Ex. C, at pp. 22-23). It is not the City's place to discard that judgment. For, it is *not* "reasonably possible" for citizens passing through Morgan Hill to know that the City's ordinance would differ from the statewide law. Like our forebears of a century ago who

would be unaware of lower local speed limits, so too would people passing through Morgan Hill (or one of the many other cities with similar laws) be unaware of shorter local theft-reporting periods.[8] Should they fail to report a theft or loss within five days, they would "unknowingly commit two offenses instead of one—one against the municipality and the other against the state." (*Ex parte Daniels*, *supra*, 183 Cal. at pp. 645-646.) This is the sort of situation that preemption seeks to avoid.

Even *In re Hoffman* (1909) 155 Cal. 114, a case the City leans heavily on for support (Defs.' MSJ, p. 11), makes clear that cities are not always free to adopt stricter requirements than state law mandates. There, the California Supreme Court concededly did hold that Los Angeles could adopt a regulation requiring that all milk sold in the city contain a higher percentage of milkfat than mandated by state law without violating preemption. (*Hoffman*, *supra*, 155 Cal. at p. 118.) But there are two important reasons *Hoffman* is inapt.

First, *Hoffman* notes that stricter local regulation is appropriate when, as the challenged ordinance did in that case, it serves some special local interest. (*Hoffman*, *supra*, 155 Cal. at p. 118.) For instance, the Court hypothesized that it would be uncontroversial for a city *within an earthquake zone* to adopt a law for chimney heights lower than that required by state law. (*Ibid.*) The Court then held that state law, which operates upon the whole of the state, is often inadequate "to meet the demands of densely populated municipalities; so that it becomes proper and even necessary for municipalities to add to state regulations provisions *adapted to their special requirements*. *Such is the nature of the legislation here questioned*." (*Ibid.*, italics added.) While Morgan Hill baldly asserts that it has some special local need for a stricter reporting requirement (Defs.' MSJ, pp. 8, 13), it simply does not have one. (Pls. RUMF Nos. 49-54. See also Pls.' Req. Jud. Ntc. Ex. D, at pp. 42, 46-46, Ex. F, at pp. 73-88, 265-289, Ex. H, at pp. 308-309, Ex. J, pp. 347-362.) To the contrary, the City's purported justifications are largely the same general interests

[8] The City references the Prop 63 requirement that firearm dealers post the theft-reporting law (among others) to argue against contradiction preemption because dealers in Morgan Hill also must post the City's local gun laws. (Defs.' MSJ, p. 12.) But Plaintiffs hardly see how presenting consumers with seemingly contradictory sets of laws at the point of sale would create anything but more confusion. What's more, a person who has never visited a gun shop in the City would have *no* reason to know the contradictory local law was posted there. Such signage is *not* like speed limit signs which are, today, ubiquitous.

in theft reporting that the state law cites. (RUMF Nos. 63-64.) And the City does not even try to establish how its shortened reporting period would serve those general interests better than the statewide law. (Pls. RUMF Nos. 49-54, 55.)

Second, unlike Morgan Hill's theft-reporting requirement which applies to run-of-the-mill firearm owners just passing through the City, the local ordinance at issue in *Hoffman* operated upon fixed businesses that sought to sell their products in the city. The distinction is important because, as the court recognized in *Robins v. County of Los Angeles* (1966) 248 Cal.App.2d 1, 10 ("*Robins*"), "ordinances affecting the local use of static property might reasonably prevail, while ordinances purporting to proscribe social behavior of individuals should normally be held invalid if state statutes cover the areas of principal concern with reasonable adequacy."

The same vital distinction is present in other cases the City relies on, including *Great Western Shows v. County of Los Angeles v. County of Los Angeles* (2002) 27 Cal.4th 853 ("*Great Western*"), *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109 ("*Suter*"), and *CRPA v. City of West Hollywood* (1998) 66 Cal.App.4th 1302 ("*CRPA*"). Unlike the milk retailers in *Hoffman*, the gun-show promoters and retailers doing business at the county fairgrounds in *Great Western*, and the firearm retailers in *Suter* and *CRPA*, it is not "reasonably possible" for gun owners passing through the City to comply with *both* state and local theft-reporting laws. (*Riverside*, *supra*, 56 Cal.4that p. 743.) As explained above, they are unlikely to know of the City's contradictory law. And they do not have benefit of being sophisticated businesspeople with static locations within the City who are reasonably charged with a greater knowledge of the laws applicable to their businesses. In short, unlike the City's ordinance, none of the laws at issue in the cases the City cites pose a threat of unjust enforcement against laypeople passing through the locality.

Ultimately, California voters have seen fit to give firearm owners up to five days to report the theft or loss of a firearm. The City cannot undermine their measured judgment by prohibiting conduct that state law allows—especially without some special local need. So even if the Court holds that there is no "duplication," the City's ordinance contradicts state law and is preempted.

**C. The City's Theft-reporting Ordinance Is Implicitly Preempted by State Law**

"Local government[s] may not enact additional requirements in regard to a subject matter

which has been fully occupied by general state law." (*In re Hubbard* (1964) 62 Cal.2d 119, 125 ("*Hubbard*"), overruled on another point by *Bishop v. City of San Jose* (1969) 1 Cal.3d 56.) Indeed, "where the Legislature has manifested an intention, *expressly or by implication*, wholly to occupy the field . . . municipal power [to regulate in that area] is lost." (*Fiscal*, *supra*, 158 Cal.App.4th at p. 904, quoting *O'Connell*, *supra*, 41 Cal.4th at p. 1067, italics added.) When, as here, the state has not expressly stated its intent to preempt local regulation, "courts look to whether it has impliedly done so." (*O'Connell*, *supra*, 41 Cal.4th at p. 1068.) The state impliedly preempts a field when:

> (1) [T]he subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

(*Ibid.*, citing *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898.) As explained below, it is clear the state intended to occupy the field of mandatory firearm theft reporting. The City's attempt to encroach on the state's domain in that field violates preemption and is void.

**1. The City's Theft-reporting Ordinance Improperly Intrudes Upon a Field that State Law Has Fully Occupied**

"Whenever the Legislature has seen fit to adopt a general scheme for the regulation of a particular subject, the entire control over whatever phases of the subject are covered by state legislation ceases as far as local legislation is concerned." (*In re Lane*, *supra*, 58 Cal.2d at p. 102.) As for "the *implied* occupation of an area of law by the Legislature's full and complete coverage of it," the California Supreme Court has held that courts glean the state's intent by looking both at the language used *and* the entire scope of the legislative scheme. (*Am. Fin. Servs. Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1253, italics original.) Moreover, where "the state expressly permits operation under a certain set of standards, it implies that the specified standards are exclusive," prohibiting local authorities from imposing stricter standards. (*Suter*, *supra*, 57 Cal.App.4th at 1125, citing *Water Quality Assn. v. Cty. of Santa Barbara* (1996) 44 Cal. App.4th 732, 741-742 [local law regulating water softeners preempted by state law imposing less strict

requirements].) Here, state theft-reporting laws "fully and completely" cover the subject of firearm theft reporting, making it exclusively a matter of state concern.

Clear indication of the preemptive intent of Prop 63's theft-reporting sections is that the initiative did not simply establish a basic reporting requirement for lost and stolen firearms. Rather, it created a robust statewide scheme aimed at addressing both state and local concerns and regulating all manner of conduct related to reporting firearm theft and loss. (RUMF Nos. 10, 16-22, 67; Pen. Code, §§ 25250, subds. (b)-(c), 25255, 25260, 25265, 25270, 27275, 26835.) This broad and comprehensive scheme is strong evidence that the state intended to occupy the field of the firearm theft reporting, foreclosing local action.

Recall, aside from Penal Code section 25250, subdivision (a), Prop 63 also created about a dozen other sections and subsections related to firearm theft reporting. (RUMF Nos. 16-22, 67.) Penal Code section 25270, for instance, details what facts must be part of a section 25250 report to law enforcement. (RUMF No. 16.) Section 25250, subdivision (b), provides guidance for those who recover a firearm previously reported lost or stolen, giving them five days to notify local law enforcement. (RUMF No. 17.) Section 25260 directs "every sheriff or police chief [to] submit a description of each firearm that has been reported lost or stolen" into AFS. (RUMF No. 21.) And section 25275 makes it a crime to make a false report. (RUMF No. 22.)

Perhaps even more importantly, Prop 63 created a whole host of exceptions to the statewide reporting law. (Pls. RUMF No. 18, citing Pen. Code, § 25250, subd. (c), 25255.) Under Penal Code section 25250, subdivision (c), no person must report the theft or loss of any firearm that qualifies as an "antique" under state law. And, as discussed, section 25255 explicitly exempts four classes of Californians from section 25250's theft-reporting mandate. (RUMF No. 20, citing Pen. Code, § 25255.) Among those classes are various sorts of law enforcement officers, peace officers, U.S. marshals, and military members, as well as federally licensed firearm dealers. (RUMF No. 20, citing Pen. Code, § 25255.) As to these individuals and businesses, section 25255 reveals a respect for federal and state requirements, including those that already require timely firearm theft reporting. (RUMF No. 20, citing Pen. Code, § 25255, subd. (a) [exempting law enforcement and peace officers who must report to their employing agency]; *id.* § 25255, subd. (b) [exempting U.S.

marshals, military members, and National Guard members while engaged in their official duties]; *id.* § 25255, subd. (c) [exempting federally licensed firearm dealers who, under 18 U.S.C. § 923(g)(6), must report to the Attorney General and local authorities].)

MHMC section 9.04.030 makes *no* attempt to account for the comprehensive nature of the state reporting requirements or their important exemptions. (Morgan Hill Mun. Code, § 9.04.030.) Instead, it presumably requires that, even if you fall within one of these many exceptions, if you live in or have your firearm stolen in the City, you must still report the incident to local police and you must act within just two days—something you are extremely unlikely to know. (RUMF No. 13; Morgan Hill Mun. Code, § 9.04.030.) It makes no sense that state law would inform firearm owners so fully as to their rights and responsibilities regarding theft reporting, only to allow local governments to disrupt that scheme by interjecting their own (more stringent, but far less comprehensive) reporting laws. (*See Fiscal*, *supra*, 158 Cal.App.4th at p. 919 [holding that "the creation of a uniform regulatory scheme is a matter of statewide concern, which should not be disrupted by permitting this type of contradictory local action"].)

What's more, the fact that section 25250 reports are to be made to local law enforcement (RUMF No. 10) reflects the statute's intent to address the same local law enforcement concerns the City cited when passing MHMC section 9.04.030 (see RUMF Nos. 44-48). At the same time, the related requirement that local law enforcement enter all theft and loss reports into AFS so that other law enforcement agencies have access to the information reveals the broader, statewide law enforcement concerns the law is meant to serve. (See RUMF No. 21; Pen. Code, § 25260.)

Ignoring all of this, the City argues that "there is nothing to indicate, let alone 'clearly indicate,' that the Legislature impliedly intended to occupy the field of lost and stolen firearms reporting, thereby preempting the ordinance." (Defs.' MSJ, p. 15.) The City cites again to *CRPA*, this time quoting the court's reasoning that " 'the very existence of three code sections discussed above, each of which specifically preempts a narrowly limited field of firearms regulation, is a rather clear indicator of legislative intent to leave areas not specifically covered within local control.' " (Defs.' MSJ, p. 16, quoting *CRPA*, *supra*, 66 Cal.App.4th at p. 1318.) But Prop 63 itself expressly allowed for local regulation in *three other areas of the initiative.* (Pls.' Req. Jud. Ntc. Ex.

C, at pp. 23, 26, 31.) So by *CRPA*'s very reasoning, the fact that Prop 63 itself expressly allows for local action in other fields of firearm regulation, *but not as to theft reporting*, reveals an implicit intent to preempt the field of firearm theft reporting. (See *People v. Guzman* (2005) 35 Cal.4th 577, 588 [discussing *expressio unius est exclusio alterius*, the principle of statutory construction that "the expression of one thing . . . ordinarily implies the exclusion of other things"]; see also *Bates v. United States*, *supra*, 522 U.S. at pp. 29-30; *People v. Briceno*, *supra*, 34 Cal.4th at p. 459.)

In short, the field of firearm theft reporting is "fully and completely" regulated by state law. State law in that field does *not* contemplate further municipal regulation. So the City's theft-reporting law is impliedly preempted.

**2. The City's Theft-reporting Ordinance Enters a Field at Least Partially Covered by State Law and Its Adverse Effects on Transient Citizens Far Outweigh Any Possible Benefit to the City**

Even if the Court holds that state law only partially covers the relevant subject matter, Type 3 implied preemption—the adverse effect of local regulation on transient citizens—establishes the People's manifestation of their intent to fully occupy the field. Indeed, because the adverse effect of the challenged ordinance on transient citizens *far* outweighs any particularized interest the City might possibly conjure, Type 3 implied field preemption is clearly established.

Under this breed of implied preemption, "a significant factor in determining if the Legislature intends to preempt an area of law is the impact that local regulation may have on transient citizens of the state." (*Suter*, *supra*, 57 Cal.App.4th at p. 1119, citing *Hubbard*, *supra*, 62 Cal.2d at p. 128 and *Galvan v. Superior Court* (*City & County of San Francisco*) (1969) 70 Cal.2d 851, 860.) When, as here, a local law threatens to adversely impact citizens moving about the state, imposing criminal penalties for violating local laws they are unlikely to know of, preemption is clear.

Countless Californians may travel through the City with firearms while on a hunting trip, as part of a move, or for any number of other reasons. Should their firearm be stolen or lost while they are within the City's limits, they would have to comply with both state law and local law. Yet the City's challenged ordinance gives them three fewer days to report the theft or loss, a fact of which they are unlikely to be aware. If the 58 counties and 482 cities within the state could enact their own

theft-reporting ordinances, each arbitrarily setting any number of days to report, a hopeless "patchwork quilt" of varying reporting requirements will confront gun owners whenever they move about the state. (Cf. *Great Western*, *supra*, 27 Ca1.4th at p. 867 [holding that prohibiting sales of arms on county-owned fairgrounds had "very little impact on transient citizens"].) This is exactly the situation Type 3 implied preemption seeks to avoid.

That a "patchwork quilt" of reporting deadlines might appear is not a mere hypothetical—it is already fact. (Defs.' MSJ, p. 4; RUMF Nos. 31-42.) While many localities have adopted 48-hour rules (RUMF Nos. 32-38), others have chosen to require reporting within 72 hours (RUMF Nos. 39-41). And one city, like the state, gives victims 5 days to report. (RUMF No. 42.)[9] The City itself acknowledges that its ordinance can require duplicative reporting, citing an example of a Morgan Hill resident who loses their firearm outside the City. (Defs.' MSJ, p. 11.) That person would have to report the theft to MHPD within 48 hours under local law. (RUMF No. 13.) Then, under state law, they'd have to report the theft in a duplicate report within five days to the police in the jurisdiction where the theft actually occurred. (RUMF No. 10.) Unless, of course, the theft occurred in a city with its own unique reporting period, in which case the theft victim would need to make a duplicate report within some other window. The wildly varying local laws governing theft reporting expose transient Californians to *criminal prosecution* for unknowing violations of local law and, where they have failed to report within five days, violation of both state *and* local laws for identical conduct. To prevent widespread confusion—and unjust prosecution—state law must control.

This is especially so because the City cites no local interest that state law does not already serve. "The significant issue in determining whether local regulation should be permitted depends upon a 'balancing of two conflicting interests: (1) the needs of local governments to meet the

[9] For more proof of just how arbitrary theft-reporting periods are, one need only look to the varied laws in effect throughout the nation. States that have adopted reporting requirements demand compliance anywhere from "immediately" to seven days. Only *one* state, Virginia, has seen fit to adopt a 48-hour reporting requirement, suggesting there is no consensus that 48 hours is some "magic number" related to serving the purposes the City cites. (Mass. Gen. Laws, ch. 140, § 129C (requiring gun owners to report theft or loss "forthwith"); Ohio Rev. Code Ann., § 2923.20, subd. (A)(5) (same); D.C. Code Ann., § 7-2502.08, subds. (a), (e) ("immediately"); Haw. Rev. Stat. Ann., § 134-29 (24 hours); N.Y. Pen. Law, § 400.10 (24 hours), R.I. Gen. Laws, § 11-47-48.1 (24 hours); N.J. Stat. Ann., § 2C:58-19 (36 hours); Va. Code Ann., § 18.2-287.5 (48 hours); Conn. Gen. Stat., § 53-202g. (72 hours); 720 Ill. Comp. Stat. 5/24-4.1 (72 hours); Md. Code Ann., Pub. Safety, § 5-146 (72 hours); Mich. Comp. Laws, § 28.430 (5 days); Del. Code, tit. 11, § 1461 (7 days).)

*special needs of their communities*; and (2) the need for uniform state regulation.' [citation]." (*Robins*, *supra*, 248 Cal.App.2d at pp. 9-10, italics added.) And again, "ordinances purporting to proscribe social behavior of individuals should normally be held invalid if state statutes cover the areas of principal concern with reasonable adequacy." (*Id.* at p. 10.) But the City has identified no "special need" not already purportedly served by state law. (See Section III, *supra*, at pp. 10-12.) Nor does it even try to establish how its shortened reporting period would serve those general interests better than the statewide law. (*Ibid.* See also RUMF Nos 49-54.) Instead, it claims, without support, that shortening the period more effectively serves the very same purpose that Prop 63 serves. (Defs.' MSJ, p. 17.) This is not enough.

To conclude, even if state law does not fully cover the field of firearm theft reporting, the harmful effect on transients far outweighs any interest the City might have in shortening the time for compliance. MHMC section 9.04.030 is thus implicitly preempted by state law.

## CONCLUSION

For the reasons discussed above, the Court should deny Defendants' Motion for Summary Judgment, grant Plaintiffs', and enter an order enjoining enforcement of MHMC section 9.04.030.

Dated: June 11, 2020

**MICHEL & ASSOCIATES, P.C.**

*s/ Anna M. Barvir*
Anna M. Barvir
Attorneys for Plaintiffs

**PROOF OF SERVICE**
**STATE OF CALIFORNIA**
**COUNTY OF SANTA CLARA**

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On June 11, 2020, I served the foregoing document(s) described as

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

on the interested parties in this action by placing

[ ] the original
[X] a true and correct copy

thereof by the following means, addressed as follows:

Roderick M. Thompson
rthompson@fbm.com
James Allison
jallison@fbm.com
Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
*Attorneys for Defendants/Respondents*

Hannah Shearer
hshearer@giffords.org
Hannah Friedman
hfriedman@giffords.org
Giffords Law Center to Prevent Gun Violence
268 Bush Street #555
San Francisco, CA 94104

_X_ (BY ELECTRONIC TRANSMISSION) As follows: I served a true and correct copy by electronic transmission via One Legal. Said transmission was reported and completed without error.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 11, 2020, at Long Beach, California.

*s/ Tiffany M. Harber*
Tiffany M. Harber