Roderick M. Thompson (State Bar No. 96192)
rthompson@fbm.com
James Allison (State Bar No. 319204)
jallison@fbm.com
Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, California 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

Hannah Shearer (State Bar No. 292710)
hshearer@giffords.org
Hannah Friedman (State Bar No. 324771)
hfriedman@giffords.org
Giffords Law Center to Prevent Gun Violence
268 Bush Street #555
San Francisco, CA 94104
Telephone: (415) 433-2062
Facsimile: (415) 433-3357

Attorneys for CITY OF MORGAN HILL, MORGAN HILL CHIEF OF POLICE DAVID SWING, MORGAN HILL CITY CLERK IRMA TORREZ

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 REPLY MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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

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235 Montgomery Street, 17th Floor
San Francisco, California 94104
(415) 954-4400

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235 Montgomery Street, 17th Floor
San Francisco, California 94104
(415) 954-4400

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235 Montgomery Street, 17th Floor
San Francisco, California 94104
(415) 954-4400

I. INTRODUCTION

Plaintiffs continue to confuse the legal question in this case. Their challenge requires Plaintiffs to show that California law preempts Morgan Hill's 48-hour firearm-theft reporting requirement ("the Ordinance"). But Plaintiffs focus instead on the immaterial claim that Morgan Hill "cites no compelling reason" for adopting the Ordinance (Pls.' Opp'n., p. 7). Such a claim is wholly irrelevant in a preemption case, where Morgan Hill does not need to prove it had an undisputed "compelling reason" for adopting its law. To the contrary, Morgan Hill enjoys a presumption that the Ordinance constitutes a valid exercise of broad police powers granted by the California Constitution. (Cal. Const., art. XI, § 7); *California Rifle & Pistol Assn. v. City of W. Hollywood*, 66 Cal. App. 4th 1302, 1310 (Cal. Ct. App. 1998) ("[o]ur starting point in this case" is that cities have "the constitutional power to regulate in the area of firearms control").

There is no burden on Morgan Hill to corroborate the local interests motivating its 48-hour firearm-theft reporting Ordinance. Morgan Hill would prevail even if Plaintiffs showed the Ordinance is not supported by undisputed evidence (which they have not). Plaintiffs have the burden of showing that *state law* preempts the Ordinance. It is part of *Plaintiffs'* burden to overcome the presumption that the Ordinance is within Morgan Hill's constitutional authority. *Calguns Found., Inc. v. Cty. of San Mateo*, 218 Cal. App. 4th 661, 666–67 (Cal. Ct. App. 2013). It is also Plaintiffs' burden to show that the Ordinance duplicates, contradicts, or enters a field implicitly occupied by state law. *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). And it is Plaintiffs' burden to show that Proposition 63 voters *clearly* intended to preempt local firearms regulations. *See Sherwin-Williams*, 4 Cal. 4th at 904. Plaintiffs had to present evidence of Proposition 63 voters' intent. *Persky v. Bushey*, 21 Cal. App. 5th 810, 818-19 (Cal. Ct. App. 2018); *Coyne v. City & Cty. of San Francisco*, 9 Cal. App. 5th 1215, 1225 (Cal. Ct. App. 2017). Pointing, as Plaintiffs do, to an *absence* of "evidence about how many of the millions of people who voted on Prop. 63" interpreted the initiative, or that voters' "subjective intent" is "likely unknowable," is a concession that they have failed to discharge that burden. (Pls.' Opp'n., pp. 11, 13.)

Because Plaintiffs have failed to carry their burden on each test for preemption, their

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235 Montgomery Street, 17th Floor
San Francisco, California 94104
(415) 954-4400

preemption challenge fails, and Morgan Hill is entitled to summary judgment. The Court should hold the Ordinance is not preempted, deny Plaintiffs' Motion, and grant Morgan Hill's Motion.

II. STATEMENT OF FACTS

On November 8, 2016, California Voters enacted Proposition 63 ("Prop. 63"), which took effect as Penal Code § 2520 on July 1, 2017. Section 2520 states,

> "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."

When Prop. 63 was passed, at least 18 California municipalities had already enacted their own local requirements governing lost or stolen firearms reporting. (Defs.' Mot. Summ. J. at p. 4 n. 8.) On November 28, 2018, Morgan Hill joined those municipalities when it enacted Ordinance No. 2289, which took effect on December 29, 2018 as amended Municipal Code Section 9.04.030 ("Duty to Report Theft or Loss of Firearms"). Section 9.04.030 states,

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

III. LEGAL STANDARD

The court should grant summary judgment when "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. Where, as here, one party claims the ordinance is preempted by state law, that party (Plaintiffs here) bears the burden on both summary judgment motions. *See, e.g. First Resort, ,* 80 F. Supp. 3d at1055, *aff'd*, 860 F.3d 1263 (9th Cir. 2017).

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235 Montgomery Street, 17th Floor
San Francisco, California 94104
(415) 954-4400

IV. ARGUMENT

A. There is a Presumption Against Preemption, Which Plaintiffs Do Not Dispute

Plaintiffs must overcome the presumption that Morgan Hill's Ordinance was not preempted and is a valid exercise of Morgan Hill's police powers. Plaintiffs do not dispute this presumption, nor do they dispute that it is their burden to overcome it. Instead, they question Morgan Hill's argument that the presumption against preemption should be especially strong for local firearm regulations like the Ordinance. (Pls.' Opp'n., p. 13). Plaintiffs are mistaken. The presumption against preemption is stronger when the challenged law is the *type* of regulation that benefits from localized policies. It is a categorical question to be resolved as a matter of law, rather than a policy-specific inquiry that hinges on the evidence supporting a given local enactment. Firearms laws are a *category* of laws that courts have held benefit from localized responses. *See Suter v. City of Lafayette*, 57 Cal. App. 4th 1109, 1119 (Cal. Ct. App. 1997) (legislature has "indicate[d] an intent to permit local governments to tailor firearms legislation to the particular needs of their communities"). Indeed, the Supreme Court has not only held that firearm regulation is the type of local regulation that warrants an especially strong presumption against preemption—it has stated that this concept requires no formal evidentiary support. "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." *Galvan v. Super. Ct. of City & Cty. of San Francisco*, 70 Cal. 2d 851, 864 (Cal. 1969) (overturned by statute on other grounds))

Plaintiffs ignore the Court's statement in *Galvan*. Instead, Plaintiffs frame the presumption as something Morgan Hill only enjoys if it makes a fact-based showing of its strong interests in adopting the ordinance, or satisfies a cousin of constitutional scrutiny. This proposed test is unsupported by law. And for good reason: it would interfere with local police powers—and turn preemption on its head—by requiring cities to present evidentiary justifications for laws before they can enjoy the presumption against preemption. The Supreme Court has squarely rejected this idea. *See, e.g., Great W. Shows, Inc. v. Cty. of Los Angeles*, 27 Cal. 4th 853, 867 (Cal. 2002) (municipalities have authority to do their "own calculations of the costs and benefits" of a firearm regulation).

B. No Preemption Test Requires Morgan Hill to Present Undisputed Evidence of the Effectiveness of a Local Police-Power Regulation

Plaintiffs suggest that Morgan Hill must present "legislative history" supporting the enhanced effectiveness of its 48-hour firearm-theft reporting Ordinance, over Prop. 63's five-day requirement, to avoid a finding of preemption. (*See, e.g.*, Pls.' Opp'n., p. 7.) Again, this misapprehends the law. The legal question of preemption focuses on whether *state law* forbids local action, not whether local action is necessary or desirable. *Fiscal v. City & Cty. of San Francisco*, 158 Cal. App. 4th 895, 902 (Cal. Ct. App. 2008) ("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").

To be sure, Morgan Hill could readily justify its policy choice if necessary, and cited studies in its Motion for Summary Judgment that support its particularized interest in strengthening firearm-theft reporting requirements. (*See* Defs.' Mot. Summ. J., p. 8.) The legislative record also shows that the City Council considered specific benefits of adopting a 48-hour theft-reporting requirement, and elected to model the Ordinance after a local measure adopted years ago in Sunnyvale, which had successfully required firearm theft-reporting within 48 hours.[1] But no preemption test asks a municipality to substantiate its policy goals in order to defeat a preemption challenge.[2] Instead, the basic question is whether a state law has disturbed the status quo by depriving municipalities of their broad, preexisting authority to pass the police-power regulations of their choosing. *See Cal. Rifle & Pistol Assn.,*, 66 Cal. App. 4th at1320 ("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.").

It is therefore of no moment that Morgan Hill chose to require firearm-theft reporting within 48 hours while other jurisdictions found a longer timeframe sufficient to accomplish their policy goals. Municipalities presumptively have the discretion to make such choices, and what

[1] *See* Plaintiffs' Req. Jud. Ntc. ISO Motion for Summary Judgment Ex. F, p. 75-76 (packet pp. 203-04) (from adopted City Council Staff Report dated Oct. 24, 2018); *id*. Ex. F, p. 277 (packet p. 405) (from City Council presentation in agenda packet dated Oct. 24, 2018).

[2] For this reason, Plaintiffs' evidentiary objections are immaterial to the resolution of the motions for summary judgment. Morgan Hill addresses those objections at page 10, *infra*.

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matters is whether *state law* precludes localities from making the discretionary regulatory choices the Constitution normally authorizes. *See Cal. Rifle & Pistol Assn.*, 66 Cal. App. 4th at 1310. The fact that 18 municipalities in California passed local reporting requirements that differ from one another is not evidence of "arbitrary" policymaking or a "hopeless patchwork quilt" of requirements. (Pls.' Opp'n., p. 24-25.) Instead, it manifests what the Supreme Court has already held: localities have different gun safety needs, and enjoy presumptive authority to adopt different policy responses. *See Galvan*, 70 Cal. 2d at 864.

C. Plaintiffs Fail to Overcome the Presumption Against Preemption

Plaintiffs have not met their burden of proving that the Ordinance duplicates or contradicts Prop. 63 or that it enters an area fully occupied by state law. There is no evidence of clear voter intent, express or implied, for Prop. 63 to preempt local reporting requirements for lost and stolen firearms. Nor have they shown an adverse effect on transient citizens that outweighs the potential benefits of the Ordinance. The Court should find the Ordinance non-preempted.

i. Plaintiffs Fail to Show That the Ordinance Duplicates State Law

Plaintiffs fail to carry their burden of showing that the Ordinance duplicates Prop. 63. The Ordinance duplicates state law if it "criminalizes *precisely* the same acts which are prohibited by the [state law]." *See Nordyke v. King*, 27 Cal. 4th 875, 883 (Cal. 2002) (citations omitted) (emphasis added). Plaintiffs cannot show that the Ordinance prohibits precisely the same acts as Prop. 63. As discussed in Defendants' Motion for Summary Judgment, pp. 9-10, there are some acts that the Ordinance prohibits but Prop. 63 does not, and vice-versa. The laws require reporting within different timeframes, and in some cases, to different agencies. Plaintiffs argue that the Ordinance duplicates state law because both laws "criminalize the failure to report a firearm lost or stolen." (Pls.' Opp'n., p. 16). This paints with too broad a brush, ignoring the material differences between the laws showing that "precisely" the same acts are *not* criminalized.

Plaintiffs also argue, in error, that the Court cannot look to *Nordyke v. King* to inform its duplication analysis here. 27 Cal. 4th at883. (Pls.' Opp'n., p. 16). A straightforward application of that case shows that Morgan Hill's Ordinance does not precisely duplicate Prop. 63. Yet Plaintiffs attempt to distinguish *Nordyke* by focusing on the "authority" of the acting locality, as well as

peripheral factual distinctions, none of which implicates the City's reference to the case, and none of which gets Plaintiffs any closer to showing precise duplication between the Ordinance and Prop. 63. (Pls.' Opp'n., p. 17). They further attempt to distinguish *Nordyke* by raising the conclusory argument that in contrast to the laws in *Nordyke*, "the City's ordinance *does* criminalize the same behavior state law criminalizes." (Pls.' Opp'n., p. 17). But that was also true, in part, in *Nordyke*, where a person carrying an unlicensed firearm on county property would violate both the state and local laws at issue. *See* 27 Cal. 4th at 883. Plaintiffs' argument boils down to the claim that the Ordinance duplicates state law because it duplicates state law. This is insufficient.

ii. Plaintiffs Fail to Show That the Ordinance Contradicts State Law

Plaintiffs fail to carry their burden of showing that the Ordinance contradicts Prop. 63. They argue that the Ordinance contradicts state law because it prohibits "what state law, at least implicitly, allows." (Pls.' Opp'n., p. 17). They do not cite any case law for this standard, and contrary to Plaintiffs' claim, the inquiry for preemption by contradiction is whether the local law "directly requires what [a state] statute forbids or prohibits what the state enactment demands." *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 56 Cal. 4th 729, 743-44 (Cal. 2013). Plaintiffs fail to name any conduct that the Ordinance *requires* but Prop. 63 *forbids*; not have they named conduct Prop. 63 *demands* but the Ordinance *prohibits*.

Instead, Plaintiffs continue to rely on an outdated 1920 decision issued before signs for motorized speed limits were commonplace. (Pls.' Opp'n., p. 18). *Ex parte Daniels*,183 Cal. 636, 641-648 (1920). They point to this case to argue that the Ordinance contradicts Prop. 63 because it is not "reasonably possible" for gun owners passing through Morgan Hill to learn, in the event of losing a firearm, about the local Ordinance. (Pls.' Opp'n., p. 18). *Daniels* does not stand for the broad notion that state law preempts any local requirement that is difficult for pass-through travelers to learn about. *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"). *Daniels* found that state law preempted a local speed limit because state law

authorized a reasonable speed anywhere in the state. The Court found such a flexible standard preempted a specified 15 mile-per-hour speed limit. *See* Defs.' Opp'n. Pls.' Mot. Summ. J., pp. 14-16, 22-24.

Further, Plaintiffs misuse the phrase "reasonably possible." As Plaintiffs acknowledge, the Supreme Court explained that a local law does not contradict a state law if "it is reasonably possible to comply with both [laws.]" *City of Riverside*, 56 Cal. 4th at 743-44. (Pls.' Opp'n., p. 18). Courts ask if it is "reasonably possible" for gun owners to *comply* with local and state law, not if it is "reasonably possible" for a transient gun owner to know about any local law that may or may not apply to the owner. Plaintiffs offer no evidence that it is not reasonably possible to comply with the Ordinance and Prop. 63. Reporting a lost or stolen gun within 48 hours is reasonably possible, and enables compliance with both laws; therefore, plaintiffs have failed to show that the Ordinance contradicts Prop. 63.

iii. Plaintiffs Fail to Show That the Ordinance Enters into an Area Fully Occupied by State Law

Plaintiffs fail to show that California law fully occupies the area of lost and stolen firearms reporting laws. Plaintiffs concede that Prop. 63 lacks express preemption language. (Pls.' Opp'n., p. 21). Therefore Plaintiffs must provide signs that "clearly indicate" voters' intent for Prop. 63 to fully occupy the field of firearm regulation or theft-reporting. *See Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893 (Cal. 1993); *California Rifle & Pistol Assn.*, 66 Cal. App. 4th at 1302. 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 id* at 1317.

Plaintiffs fail to point to any such "clear" indicator, relying on the mere fact that state law has set a 5-day timeframe for reporting lost or stolen firearms as evidence of preemption. *E.g.*, Pls.' Opp'n., p. 23 ("Prop 63 voters did, in fact, specify the 'appropriate time for individuals to report lost or stolen firearms' . . . *That time is five days*."). But California does not "fully and completely cover" a field simply by passing one standard in a given area. *See Daniels*, 183 Cal. at 641–48 ("local legislation fixing a lesser speed limit" than a state law maximum "would be merely

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235 Montgomery Street, 17th Floor
San Francisco, California 94104
(415) 954-4400

an additional regulation"). Otherwise, there would be no need for an implied preemption test: any state regulatory standard would impliedly apply throughout the state and exclude local legislation. But municipalities are presumptively allowed to set their own standards. *See Cal. Rifle & Pistol Assn.*, 66 Cal. App. 4th at1317 (implied preemption claims "courts will find implied preemption only if the purpose and scope of a state regulatory scheme "'clearly indicate[s]' a legislative intent to preempt").

Rather than pointing to any other "clear indicator" of intent to preempt, Plaintiffs try to discredit Morgan Hill's evidence of Prop. 63 voters' intent. (Pls.' Opp'n., p. 11-13). But it is the *Plaintiffs'* burden to prove an intent to preempt. Plaintiffs attempt to sidestep their burden by arguing that there is "really no way to determine voter intent" except from the "scope of the enactment." (Pls.' Opp'n., p. 12). They argue illogically the "Purpose and Intent" section of the Prop. 63 ballot initiative is not relevant, and that voters cannot be presumed to have actually read the text of an initiative they vote to adopt. (*Id.* pp. 11-12).

First, these arguments are inconsistent with decisions from the California Supreme Court, which consistently looks to the "Purpose and Intent" sections of ballot initiatives as relevant indicia of voter intent (thereby presuming voters have read and adopted these sections). *See*, e.g., *Robert L. v. Super. Crt.*, 30 Cal. 4th 894, 905 (Cal. 2003); *Kwikset Corp. v. Super. Crt.*, 51 Cal. 4th 310, 322 (Cal. 2011) (referring to a statement of intent of California voters in section one of a ballot initiative as the "text of" the initiative). The "Purpose and Intent" Section of the initiative confirms that Prop. 63's aim is "[t]o keep guns and ammunition out of the hands of convicted felons, the dangerously mentally ill, and other who are prohibited by law from possessing firearms and ammunition," and "[t]o require the reporting of lost or stolen firearms to law enforcement." The Supreme Court has also squarely rejected the notion that it is *drafters'* and not *voters'* intent that is relevant. *Robert L.*, 30 Cal. 4th at 905 ("to the extent the Court of Appeal, in ascertaining the voters' intent, relied on evidence of the drafters' intent that was not presented to the voters, we decline to follow it."). Plaintiffs argue that, nonetheless, the evidence Morgan Hill relies on from Prop. 63 is "extrinsic evidence." (Pls.' Opp'n., pp. 11-12). Even if this were true—which would require ignoring the California Supreme Court's reference to such evidence as

the "text" of a ballot initiative—extrinsic evidence is an appropriate factor in determining implied voter intent. *People v. Mentch*, 45 Cal. 4th 274, 282 (Cal. 2008).

Second, the "scope of the enactment" fails to show an affirmative intent to preempt. Contrary to Plaintiffs' claims, Prop. 63 is not comprehensive; the subsections Plaintiffs cite as evidence of a "statewide scheme" are narrow and procedural, and one subsection actually gives local police departments discretion to impose differing theft-reporting requirements. (*See* Pls.' Opp'n., pp. 17-18; Penal Code § 25270). Plaintiffs also point to Prop. 63's handful of express approvals for local regulation in other areas as evidence of an intent to preempt in the area of lost and stolen firearms reporting. (Pls.' Opp'n., p. 12).

This type of reasoning—inference based on a statutory omission—is insufficient. The presumption *against* implied preemption requires clear indicia of intent to preempt. Plaintiffs cannot invert the presumption by trying to prove affirmative intent by mere omission. Plaintiffs' arguments that Prop. 63 voter intent is inherently *ambiguous* is a concession that they cannot prove "clear" voter intent to preempt local firearm theft-reporting requirements. *See* Pls.' Opp'n., p. 11 ("when millions of voters take the place of the legislature, there is no reliable legislative history to refer to"); *id.* p. 12 ("[t]he City . . . has no way to know whether voters even read what their 'intent' was, let alone that they expressed it through their vote," and "the ballot did not even reference theft reporting").

As Morgan Hill explained in prior memoranda, not only have Plaintiffs failed to show that voters impliedly intended to preempt local firearm theft-reporting requirements, Prop. 63 actually shows the opposite. The evidence of intent shows that voters did *not* intend to preempt local regulation, nor did they intend to impliedly overturn the 18 local laws already on the books that imposed a shorter local time-frame for firearm theft-reporting. (*See* Defs.' Mot. Summ. J. pp. 17-19; Defs.' Opp'n. Pls.' Mot. Summ. J., pp. 14-16). Local measures like the Morgan Hill Ordinance do not "obstruct the accomplishment and execution of [Prop. 63's] full purposes and objectives." *Fiscal*, 158 Cal. App. 4th at 911. Instead, these measures advance and are consistent with Prop. 63's purpose "[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), and are therefore not preempted.

iv. Plaintiffs Fail to Show an Adverse Effect on Transient Citizens that Outweighs the Potential Benefits of the Ordinance to Morgan Hill

Plaintiffs have not provided any reason to disturb the conclusion that "[l]aws 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*, 27 Cal. 4th at 867.[3]

D. Plaintiffs' Evidentiary Objections are Immaterial

Plaintiffs object to empirical studies Morgan Hill cited, arguing that Morgan Hill's separate statement of undisputed facts should have included these studies so Plaintiffs could dispute them. (*E.g.*, Pls. Evidentiary Objections, p. 1.) But these studies do not need to be undisputed for Morgan Hill to prevail. Morgan Hill referenced the studies to provide context as to why it chose to regulate gun theft-reporting, a permissible policy choice courts do not second-guess in preemption cases. *Great W. Shows*, 27 Cal. 4th at 867 (acknowledging municipal authority to do "own calculations of the costs and benefits" of a gun regulation); *see also, e.g.*, *Ensign Bickford Realty Corp. v. City Council*, 68 Cal. App. 3d 467, 474 (Cal. Ct. App. 1977) (courts draw every inference "in favor of the validity of [local] exercise of the police power").

Morgan Hill therefore opposes Plaintiffs objections on grounds that any disputes Plaintiffs wish to raise to the studies' credibility are immaterial to whether the Ordinance is preempted. Objections to immaterial evidence are improper. *Reid v. Google, Inc.*, 50 Cal. 4th 512, 532 (Cal. 2010) (parties should "raise only meritorious objections to items of evidence that are legitimately in dispute *and pertinent* to the disposition of the summary judgment motion") (emphasis added).

V. CONCLUSION

Plaintiffs fail to overcome the presumption that the challenged Ordinance is not preempted by Prop. 63. The Court should deny Plaintiffs' Motion for Summary Judgment and grant summary judgment to Morgan Hill.

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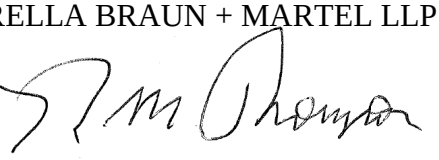
[3] Plaintiffs appear to have recycled their argument on this form of implied preemption, word for word, from their Memorandum in Support of Plaintiffs' Motion for Summary Judgment. The City already explained why these arguments are without merit in its Opposition to Plaintiffs' Motion for Summary Judgment. (Defs.' Opp'n. Pls.' Mot. Summ. J., pp. 16-22).

Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, California 94104
(415) 954-4400

Dated: June 23, 2020

FARELLA BRAUN + MARTEL LLP

By: 

Roderick M. Thompson

Attorneys for CITY OF MORGAN HILL, MORGAN HILL CHIEF OF POLICE DAVID SWING, MORGAN HILL CITY CLERK IRMA TORREZ

Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, California 94104
(415) 954-4400