

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: Anna M. Barvir FIRM NAME: Michel & Associates, P.C. STREET ADDRESS: 180 East Ocean Blvd., Suite 200 CITY: Long Beach TELEPHONE NO.: (562) 216-4444 E-MAIL ADDRESS: abarvir@michellawyers.com ATTORNEY FOR (name): G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated		STATE BAR NUMBER: 268728 STATE: CA ZIP CODE: 90802 FAX NO.: (562) 216-4445	Electronically Filed <small>FOR COURT USE ONLY</small> by Superior Court of CA, County of Santa Clara, on 1/22/2021 10:59 AM Reviewed By: A. Rodriguez Case #19CV346360 Envelope: 5692988
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA STREET ADDRESS: 161 North First Street MAILING ADDRESS: 161 North First Street CITY AND ZIP CODE: San Jose 95113 BRANCH NAME: Old Courthouse			
PLAINTIFF/PETITIONER: G. Mitchell Kirk, et al. DEFENDANT/RESPONDENT: City of Morgan Hill, et al. OTHER PARENT/PARTY:			
APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)		SUPERIOR COURT CASE NUMBER: 19-CV-346360	
RE: Appeal filed on (date): 1/12/2021		COURT OF APPEAL CASE NUMBER (if known): H048745	
Notice: Please read <i>Information on Appeal Procedures for Unlimited Civil Cases</i> (form APP-001-INFO) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.			

1. RECORD OF THE DOCUMENTS FILED IN THE SUPERIOR COURT

I choose to use the following method of providing the Court of Appeal with a record of the documents filed in the superior court (check a, b, c, or d, and fill in any required information):

- a. ☐ A clerk's transcript under rule 8.122. (You must check (1) or (2) and fill out the clerk's transcript section (item 4) on pages 2 and 3 of this form.)
- (1) ☐ I will pay the superior court clerk for this transcript myself when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the Court of Appeal.
- (2) ☐ I request that the clerk's transcript be provided to me at no cost because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record (check (a) or (b)):
- (a) ☐ An order granting a waiver of court fees and costs under rules 3.50–3.58; or
- (b) ☐ An application for a waiver of court fees and costs under rules 3.50–3.58. (Use *Request to Waive Court Fees* (form FW-001) to prepare and file this application.)
- b. ☒ An appendix under rule 8.124.
- c. ☐ The original superior court file under rule 8.128. (NOTE: *Local rules in the Court of Appeal, First, Third, and Fourth Appellate Districts, permit parties to stipulate (agree) to use the original superior court file instead of a clerk's transcript; you may select this option if your appeal is in one of these districts and all the parties have stipulated to use the original superior court file instead of a clerk's transcript in this case. Attach a copy of this stipulation.*)
- d. ☐ An agreed statement under rule 8.134. (You must complete item 2b(2) below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.134(a).)

2. RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT

I choose to proceed (you must check a or b below):

- a. ☐ WITHOUT a record of the oral proceedings (what was said at the hearing or trial) in the superior court. I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in deciding whether an error was made in the superior court proceedings.

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2. b. ☒ WITH the following record of the oral proceedings in the superior court (you must check (1), (2), or (3) below):
- (1) ☒ A reporter's transcript under rule 8.130. (You must fill out the reporter's transcript section (item 5) on pages 3 and 4 of this form.) I have (check all that apply):
- (a) ☐ Deposited with the superior court clerk the approximate cost of preparing the transcript by including the deposit with this notice as provided in rule 8.130(b)(1).
- (b) ☐ Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(c)(1).
- (c) ☐ Attached the reporter's written waiver of a deposit under rule 8.130(b)(3)(A) for (check either (i) or (ii)):
- (i) ☐ all of the designated proceedings.
- (ii) ☐ part of the designated proceedings.
- (d) ☒ Attached a certified transcript under rule 8.130(b)(3)(C).
- (2) ☐ An agreed statement. (Check and complete either (a) or (b) below.)
- (a) ☐ I have attached an agreed statement to this notice.
- (b) ☐ All the parties have stipulated (agreed) in writing to try to agree on a statement. (You must attach a copy of this stipulation to this notice.) I understand that, within 40 days after I file the notice of appeal, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.
- (3) ☐ A settled statement under rule 8.137. (You must check (a), (b), or (c) below, and fill out the settled statement section (item 6) on page 4.)
- (a) ☐ The oral proceedings in the superior court were not reported by a court reporter.
- (b) ☐ The oral proceedings in the superior court were reported by a court reporter, but I have an order waiving fees and costs.
- (c) ☐ I am asking to use a settled statement for reasons other than those listed in (a) or (b). (You must serve and file the motion required under rule 8.137(b) at the same time that you file this form. You may use form APP-025 to prepare the motion.)

3. RECORD OF AN ADMINISTRATIVE PROCEEDING TO BE TRANSMITTED TO THE COURT OF APPEAL

- ☐ I request that the clerk transmit to the Court of Appeal under rule 8.123 the record of the following administrative proceeding that was admitted into evidence, refused, or lodged in the superior court (give the title and date or dates of the administrative proceeding):

Title of Administrative Proceeding	Date or Dates
------------------------------------	---------------

4. NOTICE DESIGNATING CLERK'S TRANSCRIPT

(You must complete this section if you checked item 1a above indicating that you choose to use a clerk's transcript as the record of the documents filed in the superior court.)

- a. **Required documents.** The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed, or if that is not available, the date the document was signed.

Document Title and Description	Date of Filing
(1) Notice of appeal	
(2) Notice designating record on appeal (this document)	
(3) Judgment or order appealed from	
(4) Notice of entry of judgment (if any)	
(5) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order (if any)	
(6) Ruling on one or more of the items listed in (5)	
(7) Register of actions or docket (if any)	

CASE NAME: G. Mitchell Kirk, et al. v. City of Morgan Hill, et al.

SUPERIOR COURT CASE NUMBER:
19-CV-346360**4. NOTICE DESIGNATING CLERK'S TRANSCRIPT**

- b. **Additional documents.** (If you want any documents from the superior court proceeding in addition to the items listed in 4a. above to be included in the clerk's transcript, you must identify those documents here.)

☐ I request that the clerk include in the transcript the following documents that were filed in the superior court proceeding. (You must identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)

Document Title and Description	Date of Filing
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(8)

(9)

(10)

(11)

☐ See additional pages. (Check here if you need more space to list additional documents. List these documents on a separate page or pages labeled "Attachment 4b," and start with number (12).)

- c. **Exhibits to be included in clerk's transcript**

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the superior court. (For each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit. Indicate whether or not the court admitted the exhibit into evidence. If the superior court has returned a designated exhibit to a party, the party in possession of the exhibit must deliver it to the superior court clerk within 10 days after service of this notice designating the record. (Rule 8.122(a)(3).))

Exhibit Number	Description	Admitted (Yes/No)
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(1)

(2)

(3)

(4)

☐ See additional pages. (Check here if you need more space to list additional exhibits. List these exhibits on a separate page or pages labeled "Attachment 4c," and start with number (5).)

5. NOTICE DESIGNATING REPORTER'S TRANSCRIPT

You must complete both a and b in this section if you checked item 2b(1) above indicating that you choose to use a reporter's transcript as the record of the oral proceedings in the superior court. Please remember that you must pay for the cost of preparing the reporter's transcript.

- a. **Format of the reporter's transcript**

I request that the reporters provide (check one):

(1) ☒ My copy of the reporter's transcript in electronic format.

(2) ☐ My copy of the reporter's transcript in paper format.

(3) ☐ My copy of the reporter's transcript in electronic format and a second copy in paper format.

(Code Civ. Proc., § 271.)

CASE NAME: G. Mitchell Kirk, et al. v. City of Morgan Hill, et al.

SUPERIOR COURT CASE NUMBER:
19-CV-3463605. b. **Proceedings**

I request that the following proceedings in the superior court be included in the reporter's transcript. (You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings (for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions), the name of the court reporter who recorded the proceedings (if known), and whether a certified transcript of the designated proceeding was previously prepared.)

Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1) 7/30/2020	19	Partial	Motion for Summary Judgment Hrg	Katherine Chok	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
(2)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(3)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(4)					<input type="checkbox"/> Yes <input type="checkbox"/> No

☐ See additional pages. (Check here if you need more space to list additional proceedings. List these exhibits on a separate page or pages labeled "Attachment 5b," and start with number (5).)

6. **NOTICE DESIGNATING PROCEEDINGS TO BE INCLUDED IN SETTLED STATEMENT**

(You must complete this section if you checked item 2b(3) above indicating you choose to use a settled statement.) I request that the following proceedings in the superior court be included in the settled statement. (You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings (for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions), the name of the court reporter who recorded the proceedings (if known), and whether a certified transcript of the designated proceeding was previously prepared.)

Date	Department	Full/Partial Day	Description	Reporter's Name	Prev. prepared?
(1)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(2)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(3)					<input type="checkbox"/> Yes <input type="checkbox"/> No
(4)					<input type="checkbox"/> Yes <input type="checkbox"/> No

☐ See additional pages. (Check here if you need more space to list additional proceedings. List these proceedings on a separate page or pages labeled "Attachment 6," and start with number (5).)

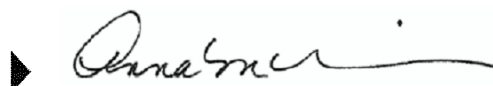
7. a. The proceedings designated in 5b or 6 ☒ include ☐ do not include all of the testimony in the superior court.

b. If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal. (Rule 8.130(a)(2) and rule 8.137(d)(1) provide that your appeal will be limited to these points unless the Court of Appeal permits otherwise.) Points are set forth: ☐ Below ☐ On a separate page labeled "Attachment 7."

Date: January 22, 2021

Anna M. Barvir

(TYPE OR PRINT NAME)



(SIGNATURE OF APPELLANT OR ATTORNEY)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
BEFORE HONORABLE PETER KIRWAN, JUDGE
DEPARTMENT 19

C. MITCHELL KIRK, et al.,)

Plaintiff,)

vs.)

CITY OF MORGAN HILL, et al.,)

Defendants.)

No.: 19CV346360

**CERTIFIED
TRANSCRIPT**

REPORTER'S TRANSCRIPT OF PROCEEDINGS
THURSDAY, JULY 30, 2020
TELEPHONIC (COURTCALL) MOTION
9:00 A.M.

Official Advantage Reporting Services
Reporter Pro Tem: By: Katherine Chok, CSR 9209
katherine@arsdepos.com

Advantage  Reporting
Services, LLC

1083 Lincoln Avenue, San Jose, California 95125, Telephone (408) 920-0222, Fax (408) 920-0188

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P R O C E E D I N G S

JUDGE KIRWAN: All right. Good morning everyone. We will go on the record in the matter of Kirk versus City of Morgan Hill. And I do have my CourtCall list here, so I will go through the names on my CourtCall list and if you are on the line, please confirm you're on the line and indicate for the record that, who you are representing.

We do have a court reporter. Ms. Chok, can you hear us -- or me okay?

THE REPORTER: Good morning, Your Honor. This is Katherine. I can hear you just fine, thank you.

JUDGE KIRWAN: Do I have Donald Larkin on the line?

MR. LARKIN: Yes, Your Honor. Don Larkin, City Attorney for the City of Morgan Hill.

JUDGE KIRWAN: Do I have Hannah Shearer?

MS. SHEARER: Yes, Your Honor. Hannah Shearer, representing City of Morgan Hill as well.

JUDGE KIRWAN: James Allison?

MR. ALLISON: Yes, Your Honor, also representing City of Morgan Hill.

JUDGE KIRWAN: Roderick Thompson?

MR. THOMPSON: Also representing the defendants.

JUDGE KIRWAN: Okay, and then finally Anna Barvir.

MS. BARVIR: Yes, Your Honor. Anna Barvir

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1 representing Plaintiffs.

2 JUDGE KIRWAN: All right. Is there anyone
3 else on the line this morning whose name I didn't
4 already call?

5 All right. So two matters before the Court
6 this morning, there are motions for summary judgment
7 brought by both Plaintiffs G. Mitchell Kirk and the
8 California Rifle & Pistol Association; and then a second
9 motion for summary judgment brought by the Defendant
10 City of Morgan Hill, Morgan Hill Chief of Police and
11 Morgan Hill City Clerk.

12 The Court did issue its tentative yesterday in
13 the afternoon and presumably everybody has had a chance
14 to review that. I was advised later in the afternoon
15 that Plaintiffs notified the Court that they intended to
16 challenge the tentative ruling.

17 So Miss Barvir, I will turn it over to you
18 first if you want to address the Court relative to the
19 tentative.

20 MS. BARVIR: Thank you, Your Honor. This is
21 Anna Barvir for Plaintiffs Kirk and CRPA. I just want
22 to take a few minutes to address three points in light
23 of the Court's thoughtful tentative issued yesterday.

24 First, I'd like to address whether the City's
25 48-hour theft-reporting law is preempted because of
26 duplication of state law, and the implications of the
27 Court's ruling in light of concerns over double jeopardy
28 and self-incrimination.

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1 As to the first issue, whether the City's
2 theft-reporting law duplicates state law and is thus
3 preempted by it. With respect, Plaintiff contends the
4 answer must be yes.

5 And that's because case law is clear that
6 duplication preemption does not merely exist when a
7 local law is identical to state law -- though, of
8 course, those are the most clear-cut situations -- but
9 whenever two laws criminalize the same conduct.

10 As the Court of Appeals recognized in Baldwin
11 at 179 --

12 THE REPORTER: Excuse me, I'm so sorry to
13 interrupt, but Ms. Barvir I really need you to slow down
14 a bit. Apologies.

15 MS. BARVIR: Sorry.

16 -- Preemption is concerned not simply with
17 cleaning up duplicative laws, but with preventing the
18 frustration of a statewide criminal scheme that
19 necessarily follows when local laws present issues of
20 double jeopardy.

21 Because the City adopted a law that varies
22 from state law by slight degrees, there are concededly
23 situations -- like the hypotheticals the Court
24 identified in its tentative yesterday -- whereby a
25 person who has lost or stolen a firearm might violate
26 the City law but not state law, and vice versa in those
27 hypotheticals. It might be said that the laws can exist
28 in harmony.

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1 But whenever someone fails to report the theft
2 or loss to any law enforcement agency at any time, the
3 City law criminalizes exactly the same conduct the state
4 does; that is, a failure to report the theft of or loss
5 of a firearm. There may be details that make the City's
6 law differ from state law, some details that might make
7 the way it reported a little different, but at the end
8 of the day, the laws criminalize the same conduct.

9 So if the City prosecutes the gun owner for
10 failure to report under its criminal law, a double
11 jeopardy bars the state from then prosecuting the gun
12 owner, thereby frustrating the operation of state
13 criminal law and the voters' intention under Prop 63
14 that people statewide report the loss or theft of their
15 firearms.

16 What's more, city law also frustrates the
17 statewide scheme whenever a person unknowingly misses
18 the City's 48-hour deadline in reliance on state law
19 giving them five days to report.

20 That person might then fear reporting at all,
21 even if they are still within --

22 JUDGE KIRWAN: Miss Barvir, I am going to ask
23 you to slow down a little bit.

24 MS. BARVIR: Thank you.

25 Even if they are still within that five-day
26 window, because to do so would force them to admit to
27 law enforcement that they have violated criminal law.

28 At that point the state cannot then demand

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1 that a gun owner report, because to do so would entail
2 self-incrimination in violation of the U.S.
3 Constitution. The State is left with no reporting and
4 no way to prosecute, thereby frustrating the goal of
5 Prop 63 voters.

6 Second, I'd like to address the Court's
7 findings regarding whether state law fully occupies the
8 field of firearm theft-reporting and thus impliedly
9 preempts local law on the subject.

10 The tentative ruling seems to characterize the
11 state law as uncomprehensive, leaving room for further
12 local regulation. But I think the question arises:
13 What more could the California law possibly address to
14 make it comprehensive enough to fully occupy the field?

15 Frankly, it seems like nothing would suffice.
16 For if this law is not comprehensive, Plaintiff's
17 struggle to see what would be, as there is little if
18 anything else for state law to cover in the absence of
19 reporting.

20 What's more, on top of all of the very
21 detailed state law requires with respect to reporting
22 all of the requirements, it also doesn't explicitly
23 allow for the regulation as other parts of the same --
24 of the same composition Proposition 63 expressly did.

25 What must be added to Prop 63 for it to be
26 deemed comprehensive enough to fully occupy by the
27 field? Does the law have to declare itself to be so?
28 And if it does, are we really just left with express

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1 preemption? These are the issues this case specifically
2 requires us to really consider.

3 And this leads me to third and final issue.

4 JUDGE KIRWAN: Quick question about the second
5 argument. And this is set forth in the tentative, but
6 the Penal Code Section 25250 -- I'm sorry, 25270,
7 basically includes language that says they are inviting
8 any additional relevant information required by local
9 law enforcement agency taken to report. And I think the
10 tentative states that that contemplates local regulation
11 regarding the returning of firearms.

12 There is no preemptive language there. In
13 fact, to the contrary, there is language that invites
14 local agencies to require any additional information or
15 requirements.

16 So I guess my question to you is: How do you
17 address that issue in the context of your argument that
18 clearly states' statute covers the entire field of the
19 subject?

20 MS. BARVIR: Thank you for your question, Your
21 Honor.

22 Respectfully, Plaintiffs disagree that that
23 suggests that there is some introduction by state law to
24 contemplate additional restrictions or regulation. Of
25 course a law enforcement agency gets to decide the
26 contents of the way it writes up its police reports,
27 that is just true. We expect that, the way a police
28 report would look is going to be a matter of what the

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1 local law enforcement agency writes up. But what we're
2 looking at here is not just a few questions extra added
3 to a police report, but a frustration of entire
4 statewide penal scheme.

5 The issue is more about the voters and the
6 state wanting theft reporting and loss reporting to
7 happen and encouraging it to happen. But issues what we
8 were talking about earlier, self-incrimination and
9 double-jeopardy concern, that would then frustrate a
10 broader criminal scheme of encouraging, enforcing and
11 prosecuting violations of law that require theft
12 reporting, not just a few extra details the police might
13 need to track down if they say a firearm has been
14 misplaced.

15 Is that responsive to the Court's question?

16 JUDGE KIRWAN: If you want to transition on to
17 your third point.

18 MS. BARVIR: Thank you, Your Honor. I
19 appreciate the opportunity to answer any question the
20 Court has.

21 So the third point is about implied preemption
22 as it relates to transient citizens. And I only want to
23 address two points on the tentative.

24 One, the tentative wants to put forth a test
25 requiring that Plaintiffs show the adverse effect of the
26 ordinance on transients must outweigh the, quote,
27 possible benefit to the City. Respectfully, Plaintiffs'
28 position is that is not the test that Robins v City of

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1 Los Angeles puts forth.

2 Instead, Plaintiffs ask the Court to balance,
3 quote from Robins, "(1), the needs of local government
4 to meet the special needs of their community; and (2),
5 the need for uniform state regulation."

6 To help the Court out, that's 248 Cal. App.
7 2nd at pages 9 to 10 under Robins.

8 It tells us it's not enough that the City
9 might proffer some possible or even likely benefit from
10 theft reporting; it must show that Morgan Hill has some
11 special need that its law serves. It has never
12 attempted to put forth such a showing. Instead, the
13 City lists the same exact interests Prop 63 lists:
14 interests in public safety that all cities share.

15 Which leads me to my second point, the
16 characterization of Plaintiffs' argument regarding the
17 City's burden under Robins. Both the City and Court's
18 tentative suggests that Plaintiffs are arguing that the
19 City must show that its law serves its local interests
20 better than state law does. That's not what Plaintiffs
21 are arguing. Rather, they argue that the City must
22 state a special local need particular to its community.

23 And failing that, because theft-reporting
24 regulates the social behavior of individuals as they
25 move throughout the state, instead of the local use of
26 static property, and because the state and local laws
27 serve identical goals, under Robins the Court should
28 consider not whether the City's law is serving those

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1 interests better, but whether Prop 63 serves those
2 interests with reasonable adequacy. If it does, the
3 Court should hold the City's law invalid.

4 The City cites nothing suggesting that
5 California's five-day reporting requirement inadequately
6 serves its interests. And Plaintiffs have shown that
7 there is no evidence that it does not.

8 I'd like to say a few brief words about the
9 effect of differing reporting periods on transient
10 citizens. The tentative, I think rightfully focused on
11 what those might look like. The tentative holds that
12 the City's reporting mandate does not harm transients,
13 or at least that it does not harm them more than other
14 laws that have been upheld. But the cases the Court
15 relies on, respectfully, are distinguishable.

16 First, the City's law is not like the law at
17 issue in the firearms cases the City and the tentative
18 cite. Those cases, Great Western, Suter and the like,
19 deal with the operation of firearm-related businesses
20 within cities. And places like gun shows on
21 county-owned land where to the extent they apply to
22 everyday gun owners, the laws they must follow are
23 posted conspicuously for all to see before they enter
24 the event.

25 Of course, these laws are unlikely to harm
26 individuals as they move about the state, because they
27 regulate the local use of static properties.

28 This law, on the other hand, regulates the

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1 social behavior of individuals and should be invalidated
2 under Robins if state law serves the local interest
3 with, quote, reasonable adequacy.

4 Second, the City's law is not like laws
5 prohibiting public drinking, gambling and loitering, all
6 of which are criminal prohibitions that people are
7 generally expected to understand are prohibited in most
8 places. Theft-reporting is not a criminal prohibition;
9 it confers affirmative duties to act and to do so within
10 a very short window.

11 Transient citizens, in reasonable reliance on
12 a well-known state law adopted by the people in their
13 jurisdiction believe they may wait until five days to
14 meet their obligation. When they do so, they
15 unknowingly admit to violating a local criminal law they
16 knew nothing about, exposing them to criminal penalties
17 for violating a gun law. That is a burden on
18 transients, not as the tentative suggests, a burden to
19 learn the laws in the city they might travel through.

20 I think Plaintiffs are ultimately worried that
21 the order seems to suggest that no firearm law would
22 harm transients in such a way that would satisfy this
23 test for implied preemption. If that is true, it is in
24 conflict with the Galvan case which recognized that a
25 local firearm law would have hurt transients in such a
26 way if not for an express exemption that was meant to
27 protect against application of the law to those moving
28 about the state.

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1 Unless the Court has any other questions, that
2 is what Plaintiff would like the Court to put on the
3 record, and ask the Court to review its tentative and
4 find that the City's law is preempted by state law and
5 strike it.

6 JUDGE KIRWAN: Thank you, Miss Barvir.
7 Appreciate the arguments.

8 I'll turn it over to the City. And I'm not
9 sure who wants to address the comments made by the
10 Petitioner on behalf of the City?

11 MS. SHEARER: Good morning, Your Honor. This
12 is Hannah Shearer on behalf of Morgan Hill. I can
13 respond to Miss Barvir's comments and any other
14 questions the Court might have for us.

15 I'll use the same order that Miss Barvir did
16 and first address preemption by duplication and the
17 double-jeopardy concern.

18 Miss Barvir proposed where if there is any
19 overlap between a local ordinance and the state law, the
20 Court should find preemption. They found double
21 jeopardy can't be squared in Resnick, which held if
22 there is, in fact, overlap, if interest or sections of
23 local ordinance that makes it not punishable by state
24 law because there is still local enforcing; that's
25 exactly what is happening here in Morgan Hill.
26 Ordinance is waged at people who wait more than two days
27 to report. So there is an area not covered by state law
28 at all.

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1 Her reasoning that Miss Barvir suggest the
2 Court adopt would also be in conflict with a number of
3 other preemption cases involving firearm loss including
4 Great Western shows where there was a state law that
5 prohibited sales of certain firearms and a local law
6 preventing the sale of all firearms on county property.

7 So there would certainly be some violation of
8 both the local and state enactment. And yet the Court
9 did not find the entire ordinance was preempted by
10 duplication.

11 So there are numerous examples in the cases
12 cited in our brief and the Court's tentative ruling of a
13 stronger local law that does have some area of overlap
14 with state and local law, and those ordinances shouldn't
15 be deemed invalid on the basis of duplication.

16 Courts regularly distinguish by imposing
17 additional requirements. And that's all that is
18 happening here. It certainly doesn't rise to the level
19 of preemption by duplication.

20 Turning next to the assertion that the field
21 is fully occupied, Proposition 63 voters here were
22 setting a floor for the reporting of firearm thefts and
23 losses.

24 There is no indication in the ballot
25 initiative that they were setting ceilings that left no
26 room for local regulation. That is the simple question
27 here for this type of preemption. It's whether there is
28 any clear indication by voters that they intended to

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1 foreclose the presumptive local authority to adopt a
2 stronger law.

3 Here there is no such indication that five
4 days was meant to be a ceiling rather than a floor.

5 I think that that resolves Plaintiffs'
6 concerns with obligation of the field.

7 Miss Barvir also referenced the Robins case.
8 I think she was talking about that in the context of
9 burden on transient citizens. That case wasn't
10 addressing that type of preemption, as far as I can
11 tell. It seems part of the appeal was looking at the
12 legislative intent and found there was no legislative
13 intent of the regulation in that case.

14 The Court went on to look at one other factor
15 they might have considered when setting a uniform state
16 standard and disallowing local, and found none of the
17 factors supported a preemption in that case.

18 The Robins test cannot (inaudible) where the
19 Court should decide certain matters at the state or
20 local levels. I don't think the Robins case is doing
21 that or that can be squared with the clear preemption
22 test the Court has announced.

23 Finally, with respect to transient citizens,
24 the Supreme Court has already held that firearms don't
25 burden transient citizens, and given other laws that
26 impact travel, like speed limits aimed at travel and
27 laws when it is registered sex offender and distinguish
28 that from laws that apply to visitors or residents of a

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1 city or town and regulates their conduct.

2 Local governments are allowed to pass laws
3 that regulate their citizens, even if those affect
4 visitors.

5 Plaintiffs have cited no authority this type
6 of preemption to regulate individual conduct is
7 constraining, and I don't think any of the gun law
8 preemption cases support that either, even though those
9 dealt with regulation of businesses, there is no
10 suggestion that cities like Morgan Hill are limited in
11 terms of regulating their firearm policies.

12 Unless the Court has further questions, we'll
13 rest on our briefs.

14 JUDGE KIRWAN: Miss Barvir, since you're here
15 to contest the tentative, I'll give you --

16 MS. BARVIR: I just want to hit on -- quickly
17 respond a little bit to the duplication points that my
18 opposing counsel has brought up.

19 They are talking Plaintiff arguing if there is
20 any overlap, then the Court should find duplication and
21 strike the law.

22 And in this case what we see is a law where
23 it's likely that many instances of the application of
24 this law are going to entail the exact same contact.
25 It's going to entail the double jeopardy concern for, I
26 think, a large majority probably of the violations of
27 these laws, and you still have to consider what that is
28 going to do, I think, in terms of frustrating the state

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1 scheme.

2 With regard to the comments about Great
3 Western, that simply isn't on point here, because that
4 case dealt with regulatory matters with regard to these
5 firearm businesses. So double jeopardy is not going to
6 attach to the issue. What happened at Great Western is
7 not going to apply.

8 With regard to what the voters intent was with
9 regard to implied preemption, it seems that the City is
10 basically asking that the voters tell us what explicitly
11 they meant for preemption to exists.

12 If the Court looks back to Plaintiff argument
13 in opposition to the City's motion for summary judgment,
14 I think it makes clear that what we need to do -- all
15 that Plaintiffs needed to do here with regard to proving
16 what the voters intent was, was to look at the text
17 there.

18 We don't -- we don't need to be going into
19 this external evidence of things that we don't even know
20 anyone even saw.

21 What you see is a very detailed scheme here,
22 throughout Prop 63, where voters were clear in their
23 intention. They knew how to do that. But you start to
24 see that is what the voters wanted, was the scheme that
25 Plaintiffs are talking about here.

26 On top of that, the -- lost my train of
27 thought, sorry -- is the necessary implications of what
28 the law must be, right. That is also part of this path

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1 to determine whether or not preemption is appropriate.
2 And, again, where you have a situation where allowing
3 local laws to tinker with the statewide scheme, change
4 the number of days and stuff, what we have here is a
5 problem where the statewide scheme gets frustrated by
6 due process and self-incrimination concerns, and the
7 necessary implication is that state law must control.

8 Finally, it seems to me that the City, and I
9 think the Court's tentative suggests that there is no
10 firearm law that would harm transients in a way that
11 would satisfy the preemption. But I don't think that is
12 what the Supreme Court espoused. There was a passing
13 remark that generally that is true, but that is a
14 presumption, and the presumption can be overcome. And
15 this is a case that impacts transients in such a way
16 that it should be preempted by state law.

17 JUDGE KIRWAN: I appreciate the arguments from
18 both sides.

19 I'm going to submit this matter, give it some
20 final thought before I get my final order out. And I
21 should have my order out in the next couple of days.

22 So I appreciate the arguments and the
23 briefing. Interesting issue. And I'll get my order out
24 shortly, okay.

25 Thank you.

26 (Time noted: 9:31 a.m.)
27
28

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2
3 I, KATHERINE CHOK, C.S.R. #9209, a Certified
4 Shorthand Reporter for the State of California, and
5 acting in my capacity as an Official Pro Tem,
6 do hereby certify:

7 That the foregoing telephonic hearing was
8 taken down by me in shorthand to the best of my ability
9 given the audio challenges of CourtCall hearings, at the
10 time and place therein named, and thereafter reduced to
11 computerized transcription under my direction and
12 supervision;

13 That the foregoing pages comprise a full,
14 true and correct transcript of my shorthand notes so
15 taken.

16 I further certify that I am not
17 interested in the outcome of this action.

18 Witness my hand this 19th day
19 of August, 2020.

20
21 

22 KATHERINE CHOK,
23 CSR #9209
24 STATE OF CALIFORNIA
25
26
27
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