

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

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

PLAINTIFFS AND APPELLANTS,

V.

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. H048745

**APPELLANTS' MOTION FOR RELIEF FROM DEFAULT
AND TO REINSTATE APPEAL**

Superior Court of California, County of Santa Clara
Case No. 19CV346360
Honorable Peter H. Kirwan, Judge

C. D. Michel – SBN 144258
Anna M. Barvir – SBN 268728
Tiffany D. Chevront – SBN 317144
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Counsel for Plaintiffs-Appellants

INTRODUCTION

Likely because of court delays owing to the COVID pandemic and related orders, this appeal has been bogged down in procedural quirks since before it began—when Appellants, out of an abundance of caution, had to file their notice of appeal before final judgment had been entered (but nearly six months after summary judgment was granted). Now, Appellants have had their appeal involuntarily dismissed for failure to correct perceived defaults regarding the requirements that Appellants designate a record for the clerk's transcript, pay a \$100 deposit for the preparation of the clerk's transcript, and designate the proceedings for a reporter's transcript.

But, as explained below, Appellants were never actually in default of their responsibilities regarding either the clerk's transcript or the reporter's transcript. In fact, they filed the required Notice Designating Record on Appeal on January 22, 2021—within the 10-day window to comply with the record designation requirement. It was merely the trial court's delay in updating the docket to enter the filing that led to a perceived default regarding the reporter's transcript. And it was the trial court's confusion regarding Appellant's election to proceed with an appendix that led to a perceived default regarding the clerk's transcript.

Further, because Appellants elected to use an appendix in lieu of the clerk's transcript, a fact the trial court has failed to recognize, Appellants believe that they were not required to submit a \$100 deposit for the preparation of a clerk's transcript. So, as to this requirement too, it seems Appellants were never in default. To the extent Appellants' counsel was reasonably mistaken and the \$100 clerk's transcript fee was required, however, the declarations filed with this motion reveal that good cause exists to reinstate this appeal.

Appellants thus respectfully ask this Court to grant this motion for relief from default and reinstate the appeal.

STATEMENT OF FACTS

On July 30, 2020, the superior court granted Respondents' motion for summary judgment as to all claims but did not dismiss the claims immediately or enter a final judgment. After some back and forth with the parties, a final judgment was signed by the trial judge on December 10, 2020, and the clerk entered judgment on January 20, 2021. Because Appellants, out of an abundance of caution and to preserve their rights to appeal, had already filed a notice of appeal (Notice of Appeal (Jan. 12, 2021), this appeal was deemed filed on January 20, 2021 (Order (Feb. 17, 2021)).

On January 22, 2021, Appellants electronically filed the required Notice Designating Record on Appeal. (Palmerin Decl., ¶ 2 & Ex. 1.) In that notice, Appellants notified the court and the parties of their intention to proceed with an appendix in lieu of the clerk's transcript. (*Id.*, ¶ 2 & Ex. 1, p. 1; Barvir Decl., ¶ 2.) They also elected to proceed with a reporter's transcript of all the oral proceedings under rule 8.130, attaching a copy the certified reporter's transcript under rule 8.130(b)(3)(C). (Palmerin Decl., ¶ 2 & Ex. 1, p. 2; Barvir Decl., ¶ 2.)

On January 29, 2021, the superior court mailed Appellants a Notice of Default, indicating that they had failed to designate the record for a clerk's transcript, pay a \$100 deposit for the clerk's transcript, or designate the oral proceedings for a reporter's transcript. (Palmerin Decl., ¶ 3; Barvir Decl., ¶ 3) In other words, it seemed the trial court had either not received or not processed Appellants' Notice Designating Record on Appeal.

On February 2, 2021, Appellants called and left a voicemail for the trial court, seeking clarification regarding what was missing from their

designation of the record and what could be done to correct it. (Palmerin Decl., ¶ 4; Barvir Decl., ¶ 4) Hearing no response from the trial court, Appellants sent the trial court a letter via overnight mail on February 3rd, attaching a copy of the Notice Designating Record on Appeal with the electronic filing receipt. (Palmerin Decl., ¶ 5 & Ex. 2; Barvir Decl., ¶ 5.) From February 8, 2021, to February 12, 2021, hearing no response from the trial court, Appellants sent three more emails and left one more voicemail. (Palmerin Decl., ¶¶ 7-10 & Exs. 4-6.)

There was no response until February 16, 2021, when the trial court replied that it had processed the Notice Designating Record on Appeal. (Palmerin Decl., ¶¶ 7-11 & Ex. 7; Barvir Decl., ¶¶ 6-7) That day, the trial court also sent Appellants a conformed copy of the Notice Designating Record on Appeal, showing a file stamp dated January 22, 2021. (Palmerin Decl., ¶ 12 & Ex. 1.) Appellants' counsel thus believed they had satisfied the requirements of the Default Notice previously received. (Barvir Decl., ¶ 7.)

On February 18, 2021, the trial court apparently mailed a Notice of Appellants' Non-Compliance, stating that Appellants had not filed a timely notice designating the record for a clerk's transcript or paid the \$100 deposit for the clerk's transcript. (Palmerin Decl., ¶ 13 & Ex. 8.) Appellants had not received this document before February 24, 2021, when they accessed the civil docket directly and retrieved it. (*Id.*, ¶ 13.)

On February 22, 2021, the trial court apparently filed a Clerk's Certificate of Compliance, stating that Appellants had cured default regarding designation of the record, but failed to cure regarding the clerk's transcript deposit. (*Id.*, ¶ 14 & Ex. 9.) Appellants had not received this document before February 24, 2021, when they accessed the civil docket directly and retrieved it. (*Id.*, ¶ 14.)

On February 24, 2021, this Court received notice from the trial court regarding Appellants' perceived failure to designate the record for or pay a \$100 deposit toward the clerk's transcript (which Appellants expressly elected not to use in this case). The Court thus summarily dismissed this appeal. (Order (Feb. 24, 2021).)

Appellants then immediately reached out to the trial court to address the court's misunderstanding regarding their Notice Designating Record on Appeal in hopes that the trial court could notify this Court of the error. (Palmerin Decl., ¶ 15 & Ex. 10.) Hearing nothing from the trial court in response, Appellants filed this motion for relief from default and to reinstate their appeal. (*Id.*, ¶ 16.)

ARGUMENT

For good cause, the Court may relieve a party from default and reinstate an appeal dismissed for failure to comply with procedural requirements regarding the record on appeal. (Cal. Rules Ct., rules 8.100(d)(3), 8.140(b)(1).) Here, the trial court failed to correctly process Appellants' timely Notice Designating Record on Appeal, and Appellants were deemed in default of the requirement to procure the record in this matter. The default, however, was in no way the fault of the party, and good cause exists to relieve Appellants of their default and reinstate this appeal.

Indeed, Appellants were extremely diligent in their attempts to procure the record for appeal. As required by California Rules of Court, rule 8.121, they filed their Notice Designating Record on Appeal in the Superior Court of Santa Clara County on January 22, 2021—that is, within 10 days of filing the Notice of Appeal and, in fact, just *two days* after the appeal was considered by this Court to have been filed in this case. (Palmerin Decl., ¶ 2 & Ex. 1. See also Order (Feb. 17, 2021) ["On the court's own motion, the appeal is deemed

filed as of the date of the January 20, 2021 judgment.”)]. In their Notice Designating Record on Appeal, Appellants indicated their intention to use an *appendix in lieu of the clerk’s transcript* under rule 8.124 and a reporter’s transcript of all the oral proceedings under rule 8.130. (Palmerin Decl., ¶ 2 & Ex. 1, pp. 1-2; Barvir Decl., ¶ 2.) They also attached a copy the certified reporter’s transcript under rule 8.130(b)(3)(C). (Palmerin Decl., ¶ 2 & Ex. 1, p. 2; Barvir Decl., ¶ 2.)

Even so, on February 1, 2021, Appellants received a Notice of Default from the trial court, indicating that they had failed to timely designate the record for a clerk’s transcript, pay a \$100 deposit for the clerk’s transcript, or designate the oral proceedings for a reporter’s transcript. (Palmerin Decl., ¶ 3; Barvir Decl., ¶ 3.) It was then that Appellants realized that the trial court had either not processed or not understood Appellants’ designation of the record. (Barvir Decl., ¶ 4.) So Appellants promptly called the superior court and left a voicemail to begin correcting the problem. (*Id.*, ¶ 4; Palmerin Decl., ¶ 4.) Hearing no response from the trial court, Appellants then drafted a letter to the trial court, attaching the Notice Designating Record on Appeal, and sent the documents via overnight mail on February 3, 2021. (Palmerin Decl., ¶ 5 & Ex. 2; Barvir Decl., ¶ 5.) Appellants received confirmation of receipt of the letter the next day. (Palmerin Decl., ¶ 6 & Ex. 3.)

Again, hearing no response from the trial court, Appellants followed up with an email on February 8, 2021, seeking clarification of the Notice of Default and informing the court that they had, in fact, filed the required designation of record. (Palmerin Decl., ¶ 7 & Ex. 4.) Hearing no response from the trial court in response to either communication, Appellants called and emailed the court again on February 9, 10, and 12. (*Id.*, ¶¶ 8-10 & Exs. 5-6.)

On February 16, 2021, trial court replied, informing Appellants that their designation had been processed. (Palmerin Decl., ¶ 11; Barvir Decl., ¶ 6.) That day, the trial court also sent Appellants a conformed copy of the Notice Designating Record on Appeal. (Palmerin Decl., ¶ 12 & Ex. 1; Barvir Decl., ¶ 7.) The document was file-stamped with the actual date of filing—January 22, 2021. (Palmerin Decl., Ex. 1.) As such, Appellants believed that the mailing was confirmation the trial court had received the designation and they had satisfied the requirements of the Default Notice. (Barvir Decl., ¶ 7.)

Appellants were thus quite surprised to learn, on February 24, 2021, that the trial court—which just days earlier confirmed that it had the Notice Designating Record on Appeal in hand—had notified the Court of Appeal that Appellants had not attempted to procure the record. (Barvir Decl., ¶ 8.) They immediately contacted the trial court by email again for clarification. (*Ibid.*; Palmerin Decl., ¶ 15 & Ex. 10.)

Hearing nothing from the trial court, Appellants pulled the civil case docket and learned, for the first time, that the trial court mailed a Notice of Appellants’ Non-Compliance on February 18, (wrongly) stating that Appellants had not filed a timely notice designating the record for a clerk’s transcript or paid the \$100 clerk’s transcript deposit. (Palmerin Decl., ¶ 13 & Ex. 8.) Appellants also learned, for the first time, that the trial court mailed a Clerk’s Certificate of Compliance on February 22, stating that Appellants had cured default regarding designation, but failed to cure regarding the “\$100.00 deposit for Court Transcripts.” (*Id.*, ¶ 14 & Ex. 9 [also indicating that record preparation would proceed notwithstanding the missing fee].)

But again, Appellants clearly elected to proceed with an appendix, *not* a clerk’s transcript, as is their right under California Rules of Court, rule 8.124. (Palmerin Decl., ¶ 2 & Exs. 1, 8, p. 1; Barvir Decl., ¶ 2.) And they did

so on January 22, 2021—within the 10-day window for filing a designation and *before* they were notified of the perceived default. (Palmerin Decl., ¶¶ 2, 12 & Exs, 1, 8.) Appellants fail to see how they are in non-compliance for failure to designate a record or pay a deposit for a clerk’s transcript that they have elected not to use.

But to the extent Appellants must still pay a \$100 deposit for a clerk’s transcript, Appellants’ counsel made a reasonable mistake in thinking no such deposit was required when the parties were preparing their own appendices and bearing the full cost of that preparation. (Barvir Decl., ¶ 9. See Code Civ. Proc., § 473 [“The court may, upon any terms as may be just, relieve a party or his or her legal representative from a . . . dismissal . . . other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.”].)

In Appellants’ counsel’s many years of taking appeals in California, she had never been required to pay this deposit when electing to use an appendix in lieu of a clerk’s transcript. (Barvir Decl., ¶ 9.) And the Fourth Appellate District expressly explains in its publication, *The California Court of Appeal: Step By Step*, that the \$100 deposit for the clerk’s transcript “need not be included if you, as appellant, plan to prepare an appendix under CRC rule 8.124.” (Cal. Ct. App., 4th App. Dist., *The California Court of Appeal: Step By Step* (revd. Feb. 2019) p. 2-2 <<https://www.courts.ca.gov/documents/4dca-Self-Help-Manual-Combined.pdf>>.) Appellants’ counsel deeply regrets her error if this district does not follow the same rule.

Ultimately, this mistake could have been corrected had the trial court responded to Appellants’ letter, calls, or emails to clarify what, if anything, was missing from their timely filed designation of the record. (See Palmerin Decl., ¶¶ 4-5, 7-10; Barvir Decl., ¶ 6.) Indeed, Appellants took swift action to

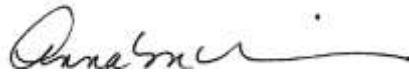
correct all parts of their alleged default by February 4, 2021—11 days before the deadline to cure. (Barvir Decl., ¶¶ 5, 10.) If something was still incorrect, there was plenty of time to fix it. Appellants just needed to be notified. At the end of the day, if the deposit is required, Appellants are ready and able to pay it. (*Id.*, ¶ 10.) Good cause thus exists to reinstate this appeal. (See Cal. Rules Ct., rule 8.100(d)(3).)

CONCLUSION

For the foregoing reasons, the Court should grant this motion, relieve Appellants of their default, and reinstate this appeal.

Dated: February 24, 2021

MICHEL & ASSOCIATES, P.C.



Anna M. Barvir
Attorney for Plaintiffs-Appellants

PROOF OF SERVICE

Case Name: *Kirk, et al. v. City of Morgan Hill, et al.*
Court of Appeal Case No.: H048745
Superior Court Case No.: 19CV346360

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, Long Beach, California 90802.

On February 24, 2021, I served a copy of the foregoing document described as: **MOTION FOR RELIEF FROM DEFAULT AND TO REINSTATE APPEAL**, on the following parties, as follows:

Anthony P. Schoenberg
tschoenberg@fbm.com
James Allison
jallison@fbm.com
Farella Braun + Martel, LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104

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

Attorneys for Defendants and Respondents City of Morgan Hill, et al.

The parties were served as follows: I served a true and correct copy by electronic transmission through TrueFiling. Said transmission was reported and completed without error.

Superior Court of California
County of Santa Clara
191 N. First Street
San Jose, CA 95113

The party was served as follows: by mail. I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

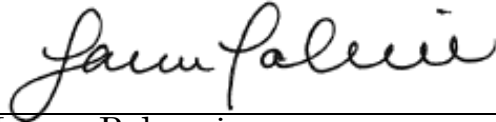
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 24, 2021, at Long Beach, California.

A handwritten signature in cursive script, appearing to read "Laura Palmerin", written in black ink.

Laura Palmerin
Declarant

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

G. MITCHELL KIRK; AND
CALIFORNIA RIFLE & PISTOL
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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. H048745

**DECLARATION OF LAURA PALMERIN IN SUPPORT OF
APPELLANTS' MOTION FOR RELIEF FROM DEFAULT AND TO
REINSTATE APPEAL**

Superior Court of California, County of Santa Clara
Case No. 19CV346360
Honorable Peter H. Kirwan, Judge

C. D. Michel – SBN 144258
Anna M. Barvir – SBN 268728
Tiffany D. Cheuvront – SBN 317144
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180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
Email: abarvir@michellawyers.com

Counsel for Plaintiffs-Appellants

DECLARATION OF LAURA PALMERIN

I, Laura Palmerin, hereby declare as follows:

1. I am a paralegal at the law firm, Michel & Associates, P.C., Counsel of record for Plaintiffs G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated, in the above-entitled matter. I make this declaration in support of Appellants' Motion for Relief from Default and to Reinstate Appeal. I have personal knowledge of the facts set forth herein and if called as a witness, I could and would competently testify hereto.

2. On January 22, 2021, I electronically filed Appellants' Notice Designating Record on Appeal via One Legal. In that notice, Appellants notified the court and the parties of their intention to proceed with an appendix in lieu of the clerk's transcript. They also elected to proceed with a reporter's transcript of all the oral proceedings under rule 8.130, attaching a copy the certified reporter's transcript under rule 8.130(b)(3)(C). A true and correct copy of the Notice Designating Record on Appeal is attached here as **Exhibit 1**.

3. On January 29, 2021, the Superior Court of California, County of Santa Clara (hereafter "trial court") mailed Appellants a Notice of Default, indicating that they had failed to designate the record for a clerk's transcript, pay a \$100 deposit for the clerk's transcript, or designate the oral proceedings for a reporter's transcript. Our office did not receive the Notice of Default until February 1, 2021. That day, I checked the trial court's docket and noticed that our electronically submitted Appellants' Notice Designating Record on Appeal was not on the docket.

4. On February 2, 2021, I called the trial court to inquire as to whether they had received our electronically submitted designation of the

record, and if so, what could be done to correct it. The trial court did not answer the phone; therefore, I left a voicemail.

5. On February 3, 2021, having not received a response from the trial court, I sent the court a letter via overnight mail, attaching the filed Notice Designating Record on Appeal with the electronic filing receipt. A true and correct copy of the letter is attached here as **Exhibit 2**.

6. On February 4, 2021, I received confirmation of delivery of the letter to the trial court. A true and correct copy of the confirmation of delivery receipt is attached here as **Exhibit 3**.

7. On February 8, 2021, I sent an email to the trial court to follow up on the status of our Notice Designating Record on Appeal. I received no response. A true and correct copy of my email is attached here as **Exhibit 4**.

8. On February 9, 2021, I sent another email to the trial court to follow up on the status of our Notice Designating Record on Appeal. I received no response. A true and correct copy of my email is attached here as **Exhibit 5**.

9. On February 10, 2021, I called the trial court and left another voicemail to follow up on the status of our Notice Designating Record on Appeal. I received no response.

10. On February 12, 2021, I sent a third email to the trial court to follow up on the status of our Notice Designating Record on Appeal. A true and correct copy of my email is attached here as **Exhibit 6**.

11. On February 16, 2021, the trial court replied to my email indicating that the Notice Designating Record on Appeal had been processed. A true and correct copy of their email is attached here as **Exhibit 7**.

12. That same day, I received a conformed copy of the Notice Designating Record on Appeal, showing a file-stamp date of January 22, 2021. See **Exhibit 1**.

13. On February 18, 2021, the trial court apparently mailed a Notice of Appellants' Non-Compliance, stating that Appellants had not filed a timely notice designating the record for a clerk's transcript or paid the \$100 deposit for the clerk's transcript. However, Appellants had not received this document before February 24, 2021, when I accessed the civil docket directly and retrieved it. A true and correct copy of the Notice of Appellants' Non-Compliance is attached here as **Exhibit 8**.

14. On February 22, 2021, the trial court apparently filed a Clerk's Certificate of Compliance, stating that Appellants had cured default regarding designation of the record, but failed to cure regarding the clerk's transcript deposit. Appellants had not received this document before February 24, 2021, when I accessed the civil docket directly and retrieved it. A true and correct copy of the conformed Clerk's Certificate of Compliance is attached here as **Exhibit 9**.

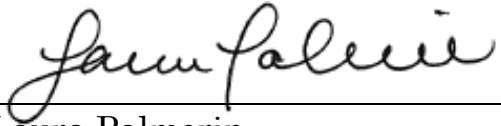
15. On February 24, 2021, I received this Court's order dismissing the appeal for failure to procure the record on appeal. I then immediately sent an email to the trial court to address the court's misunderstanding regarding their Notice Designating Record on Appeal in hopes that the trial court could notify this Court of the error. A true and correct copy of my email is attached here as **Exhibit 10**.

16. As of the time of this filing, I have not received a response from the trial court.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 24, 2021 at Long Beach, California.



Laura Palmerin
Declarant

EXHIBIT 1

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.

CASE NAME: G. Mitchell Kirk, et al. v. City of Morgan Hill, et al.	SUPERIOR COURT CASE NUMBER: 19-CV-346360
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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
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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
--------------------------------	----------------

(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)
----------------	-------------	-------------------

(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 *ARS* Reporting
Services, LLC

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

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PROCEEDINGS - JULY 30, 2020

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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1
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
28

PROCEEDINGS - JULY 30, 2020

EXHIBIT 2

SENIOR PARTNER
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February 3, 2021

VIA OVERNIGHT DELIVERY

Superior Court of California
County of Santa Clara
Appeals Division
191 N. First Street
San Jose, CA 95113

Re: ***Kirk, et al. v. City of Morgan Hill, et al.***
Superior Court Case No.: 19CV346360
Court of Appeals Case No.: H048745

Dear Clerk of the Court:

I write on behalf of our clients, Plaintiffs-Appellants G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated, in the above-referenced matter. We have received a Default Notice (a copy is enclosed here as **Exhibit A**) regarding the failure to file a Notice Designating the Record on Appeal. However, we filed the Appellants' Notice Designating the Record on Appeal by electronic means through One Legal on January 22, 2021 (a copy is enclosed here as **Exhibit B**). The e-filing receipt confirming the submission of our Notice Designating the Record on Appeal is enclosed here as **Exhibit C**. The Court's filing transaction number is 5692988.

Please do not hesitate to contact us if you need any further information or if any further action is required from us.

Sincerely,
Michel & Associates, P.C.

A handwritten signature in black ink, appearing to read "Laura Palmerin", is written over the typed name. The signature is fluid and cursive.

Laura Palmerin

Encl.

EXHIBIT A

<p align="center">IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA</p> <p>STREET ADDRESS: 191 N. First Street San Jose California 95113</p> <p>MAILING ADDRESS: 191 North First Street</p> <p>CITY AND ZIP CODE: San José, California 95113</p> <p>BRANCH NAME: Appeals Division</p>	<p align="center"><i>FOR COURT USE ONLY</i></p> <p>Filed January 29, 2021 Clerk of the Court Superior Court of CA County of Santa Clara 19CV346360 By: clucero</p>
<p>PLAINTIFF: G. MITCHELL KIRK; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED</p> <p>DEFENDANT: CITY OF MORGAN HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING; MORGAN HILL CITY CLERK IRMA TORREZ</p>	<p>CASE NUMBER : 19CV346360 DCA NUMBER H048745</p>
<p align="center">APPELLANT'S DEFAULT NOTICE</p>	

Appellant G. Mitchell Kirk, you are hereby notified as follows:

You have failed to perform the duties required to procure the record on appeal for the following reason(s) as defined in rules 8.100 and/or 8.140, California Rules of Court. You have 15 days from the date of mailing of this notification to comply. Failure to comply may result in the dismissal of your appeal.

- ☒ CRC 8.100 The \$100 fee has not been deposited 8.100(b)(2).
- ☒ CRC 8.130 Notice designating reporter's transcript or notice of intent to proceed without reporter's transcript not timely filed.
- ☐ CRC 8.130 Notice designating reporter's transcript is unclear. A notice designating reporter's transcript must specify the date of each proceeding to be included in the transcript.
- ☐ CRC 8.130 Deposit or Fee Waiver for reporter's transcript not timely deposited/ filed.
- ☒ CRC 8.122 Notice designating record for clerk's transcript not timely filed.
- ☐ CRC 8.122 Notice designating clerk's transcript is unclear. A notice designating a clerk's transcript, must identify each designated document by its title and filing date, or if the filing date is not available, the date it was signed. Exhibits must be specified by exhibit number or letter.
- ☐ CRC 8.122 Fees for preparation of clerk's transcript not timely deposited 8.122(c)(3).
- ☐ CRC 8.137 Incomplete Designation: Proposed Settled Statement has not been filed.

Signed: 1/29/2021 03:42 PM

San José, California on January 29, 2021

Clerk, by *Connie Lucero*, Deputy
Connie Lucero

cc: Court of Appeal, Sixth Appellate District, 333 W. Santa Clara St., Ste 1060, San José, CA 95113
Anna Marie Barvir 180 E Ocean Blvd Ste 200 Long Beach CA 90802

EXHIBIT B

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

SUPERIOR COURT CASE NUMBER:
19-CV-3463602. 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
(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)
(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-346360

5. 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)

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

C. MITCHELL KIRK, et al.,)
)
Plaintiff,) No.: 19CV346360
vs.)
)
CITY OF MORGAN HILL, et al.,)
)
Defendants.)

**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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City of Morgan Hill: By: HANNAH SHEARER,
Attorney at Law
415.433.2062

and

FARELLA BRAUN & MARTEL, LLP
By: JAMES A. ALLISON,
Attorney at Law
By: RODERICK M. THOMPSON,
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and

CITY OF MORGAN HILL
CITY ATTORNEY
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Attorney at Law
408.778.3490
donald.larkin@morganhill.ca.gov

PROCEEDINGS - JULY 30, 2020

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

PROCEEDINGS - JULY 30, 2020

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

PROCEEDINGS - JULY 30, 2020

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

PROCEEDINGS - JULY 30, 2020

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

PROCEEDINGS - JULY 30, 2020

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

PROCEEDINGS - JULY 30, 2020

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

PROCEEDINGS - JULY 30, 2020

1
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
28

PROCEEDINGS - JULY 30, 2020

EXHIBIT C

Laura Palmerin

From: noreply@onelegal.com
Sent: Friday, January 22, 2021 11:00 AM
To: Laura Palmerin
Subject: eFiling & eServe confirmation for G. MITCHELL KIRK vs. CITY of MORGAN HILL, et al.

eFiling Under Court Clerk Review / eServe Complete

Order # 15777306
Submitted 1/22/2021 10:59 AM PT by Haydee Villegas
Case G. MITCHELL KIRK vs. CITY of MORGAN HILL, et al.
#19CV346360
Court Superior Court of California, Santa Clara County
(Santa Clara - First Street)
Client billing 2305
Court transaction # 5692988

Documents

- Appellants' Notice Designating Record on Appeal (A...

What happens next?

The court has received your filing. You will receive an email immediately upon completion of the court clerk's review. Although court processing times vary, the court filing date for accepted filings will reflect the date this order was submitted.

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The One Legal Team

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Confirmation #: 24724080

Case Title: G. MITCHELL KIRK vs. CITY of MORGAN HILL, et al.

Thank you for choosing One Legal. If you have any questions about this order, please email us at support@onelegal.com.

CASE INFORMATION

Court Name:	Santa Clara County, Superior Court of California
Court Branch:	Santa Clara - First Street
Case Title:	G. MITCHELL KIRK vs. CITY of MORGAN HILL, et al.
Case Category:	Civil - Unlimited
Case Type:	Writ of Mandate
Case #:	19CV346360

ORDER DETAILS

Order Type:	eFiling-eService
Filing order #:	15777306
Date/Time Submitted:	1/22/2021 10:59 AM PT
Client Billing Code:	2305
Contact Name:	Laura Palmerin
Attorney Name:	Anna Barvir
Email Notification:	Contact

DOCUMENTS

Document Type	Document Title	Pages Uploaded
Appellants Notice Designating Record on Appeal (APP-003)	Appellants' Notice Designating Record on Appeal (APP-003)	23

eSERVICE RECIPIENTS

Name	Email
Roderick Thompson	rthompson@fbm.com
James Allison	jallison@fbm.com
Hannah Shearer	hshearer@giffords.org
Hannah Friedman	hfriedman@giffords.org
Anthony Schoenberg	tschoenberg@fbm.com

EXHIBIT 3

From: TrackingUpdates@fedex.com
To: [Laura Palmerin](#)
Subject: FedEx Shipment 772815568404: Your package has been delivered
Date: Thursday, February 04, 2021 9:49:28 AM

FedEx



Hi. Your package was
delivered Thu, 02/04/2021 at
9:15am.



Delivered to 191 N 1ST ST A, SAN JOSE, CA 95113
Received by G.HUDGENS

OBTAIN PROOF OF DELIVERY

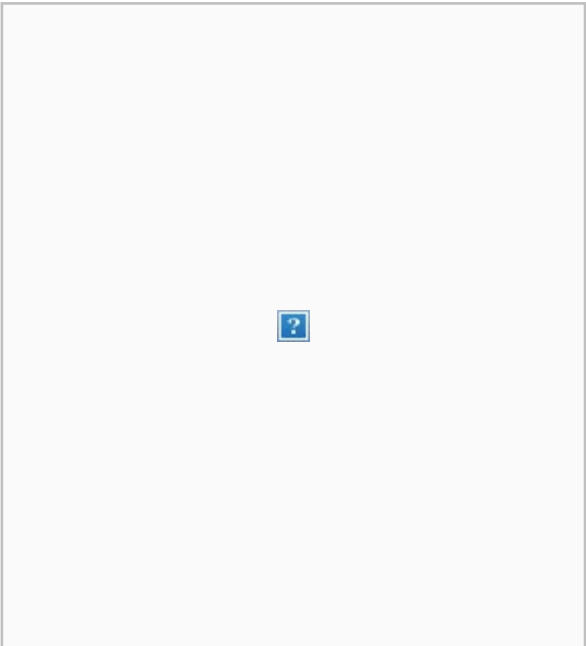
TRACKING NUMBER [772815568404](#)

FROM Michel & Associates, P.C.
180 E. Ocean Blvd., Suite 200
Long Beach, CA, US, 90802

TO Superior Court, Cnty of Santa Clara
Clerk, Appeals Division
191 N. First Street
SAN JOSE, CA, US, 95113

REFERENCE 2486

SHIPPER REFERENCE	2486
SHIP DATE	Wed 2/03/2021 05:17 PM
DELIVERED TO	Guard/Security Station
PACKAGING TYPE	FedEx Envelope
ORIGIN	Long Beach, CA, US, 90802
DESTINATION	SAN JOSE, CA, US, 95113
SPECIAL HANDLING	Deliver Weekday
NUMBER OF PIECES	1
SERVICE TYPE	FedEx Standard Overnight



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EXHIBIT 4

From: [Laura Palmerin](#)
To: ssweb@scscourt.org
Bcc: [NRA 2305 CRPA v Morgan Hill preemption theft reporting E Mail](#)
Subject: Kirk v. City of Morgan Hill, Case No.: 19CV346360 [MA-Interwoven.FID78693]
Date: Monday, February 08, 2021 5:57:34 PM
Attachments: [Appellants' Ntc Designating Record on Appeal.pdf](#)
[2147288 2021-01-29 Default Ntc re Ntc Designating Record on Appeal.PDF](#)
[2147603 2021-02-03 Letter to Court re Default Ntc re Ntc Designating Record on Appeal.PDF](#)
[image001.png](#)


Dear Clerk of the Court,

Our office represents Plaintiffs G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated in the above-referenced case. We would like to follow up regarding our Appellants' Notice Designating the Record on Appeal. We e-filed the document on January 22, 2021, copy attached here. However, on January 29, 2021, we received a Notice of Default for not filing a Notice Designating the Record on Appeal, also attached here.

We sent a letter to the Court regarding this matter on February 3, 2021 via overnight delivery.

Please let us know if you need anything else from us to resolve this matter.

Best regards,

<p>Laura Palmerin Legal Secretary/Paralegal</p>  <p>MICHEL & ASSOCIATES, P.C. Attorneys at Law Environmental - Land Use - Firearms - Employment Law Civil Litigation - Criminal Defense</p>	<p>Direct: (562) 216-4473 Main: (562) 216-4444 Fax: (562) 216-4445 Email: lpalmerin@michellawyers.com Web: www.michellawyers.com 180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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EXHIBIT 5

From: [Laura Palmerin](#)
To: sscivilinfo@scscourt.org
Cc: ssweb@scscourt.org
Bcc: [NRA 2305 CRPA v Morgan Hill preemption theft reporting E Mail](#)
Subject: Kirk v. City of Morgan Hill, Case No.: 19CV346360 [MA-Interwoven.FID78693]
Date: Tuesday, February 09, 2021 8:55:16 AM
Attachments: [Appellants' Ntc Designating Record on Appeal.pdf](#)
[2147288 2021-01-29 Default Ntc re Ntc Designating Record on Appeal.PDF](#)
[2147603 2021-02-03 Letter to Court re Default Ntc re Ntc Designating Record on Appeal.PDF](#)
[image001.png](#)


Dear Clerk of the Court,

Our office represents Plaintiffs G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated in the above-referenced case. We would like to follow up regarding our Appellants' Notice Designating the Record on Appeal. We e-filed the document on January 22, 2021, copy attached here. However, on January 29, 2021, we received a Notice of Default for not filing a Notice Designating the Record on Appeal, also attached here.

We sent a letter to the Court regarding this matter on February 3, 2021 via overnight delivery.

Please let us know if you need anything else from us to resolve this matter.

Best regards,

<p>Laura Palmerin Legal Secretary/Paralegal</p>  <p>MICHEL & ASSOCIATES, P.C. Attorneys at Law Environmental - Land Use - Firearms - Employment Law Civil Litigation - Criminal Defense</p>	<p>Direct: (562) 216-4473 Main: (562) 216-4444 Fax: (562) 216-4445 Email: lpalmerin@michellawyers.com Web: www.michellawyers.com 180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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EXHIBIT 6

From: [Laura Palmerin](#)
To: sscivilinfo@scscourt.org; ssweb@scscourt.org
Bcc: [NRA 2305 CRPA v Morgan Hill preemption theft reporting E Mail](#)
Subject: FW: Kirk v. City of Morgan Hill, Case No.: 19CV346360 [MA-Interwoven.FID78693]
Date: Friday, February 12, 2021 10:28:39 AM
Attachments: [2147603 2021-02-03 Letter to Court re Default Ntc re Ntc Designating Record on Appeal.PDF](#)
[image001.png](#)
Importance: High

Dear Clerk of the Court,

I would like to follow up on my email below. We sent the attached correspondence to the Appeals Division on February 3, 2021 via overnight delivery. Please confirm that the Appeals Division has received it and will issue a conformed copy of our e-filed Notice Designating the Record on Appeal, court transaction number 5692988. I have called several times the past two weeks and left two voicemails but I still have not heard back.

Best regards,

<p>Laura Palmerin Legal Secretary/Paralegal</p>  <p>MICHEL & ASSOCIATES, P.C. Attorneys at Law</p> <p>Environmental - Land Use - Firearms - Employment Law Civil Litigation - Criminal Defense</p>	<p>Direct: (562) 216-4473 Main: (562) 216-4444 Fax: (562) 216-4445 Email: lpalmerin@michellawyers.com Web: www.michellawyers.com 180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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From: Laura Palmerin
Sent: Tuesday, February 09, 2021 8:55 AM
To: sscivilinfo@scscourt.org
Cc: ssweb@scscourt.org
Subject: Kirk v. City of Morgan Hill, Case No.: 19CV346360 [MA-Interwoven.FID78693]

Dear Clerk of the Court,

Our office represents Plaintiffs G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated in the above-referenced case. We would like to follow up regarding our Appellants' Notice Designating the Record on Appeal. We e-filed the document on January 22, 2021, copy attached here. However, on January 29, 2021, we received a Notice of Default for not filing a Notice Designating the Record on Appeal, also attached here.

We sent a letter to the Court regarding this matter on February 3, 2021 via overnight delivery.

Please let us know if you need anything else from us to resolve this matter.

Best regards,

Laura Palmerin
Legal Secretary/Paralegal



Direct: (562) 216-4473
Main: (562) 216-4444
Fax: (562) 216-4445
Email:
lpalmerin@michellawyers.com
Web:
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EXHIBIT 7

From: [SSCivil Info](#)
To: [Laura Palmerin](#)
Subject: Re: Kirk v. City of Morgan Hill, Case No.: 19CV346360 [MA-Interwoven.FID78693]
Date: Tuesday, February 16, 2021 10:13:42 AM
Attachments: [image001.png](#)

I has been processed.


From: Laura Palmerin <lpalmerin@michellawyers.com>
Sent: Friday, February 12, 2021 10:28 AM
To: SSCivil Info <sscivilinfo@scscourt.org>; SSWeb <ssweb@scscourt.org>
Subject: FW: Kirk v. City of Morgan Hill, Case No.: 19CV346360 [MA-Interwoven.FID78693]

[EXTERNAL EMAIL] DO NOT CLICK links or attachments unless you recognize the sender.

Dear Clerk of the Court,

I would like to follow up on my email below. We sent the attached correspondence to the Appeals Division on February 3, 2021 via overnight delivery. Please confirm that the Appeals Division has received it and will issue a conformed copy of our e-filed Notice Designating the Record on Appeal, court transaction number 5692988. I have called several times the past two weeks and left two voicemails but I still have not heard back.

Best regards,

<p>Laura Palmerin Legal Secretary/Paralegal</p>  <p>MICHEL & ASSOCIATES, P.C. Attorneys at Law</p> <p>Environmental - Land Use - Firearms - Employment Law Civil Litigation - Criminal Defense</p>	<p>Direct: (562) 216-4473 Main: (562) 216-4444 Fax: (562) 216-4445 Email: lpalmerin@michellawyers.com Web: www.michellawyers.com 180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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From: Laura Palmerin
Sent: Tuesday, February 09, 2021 8:55 AM
To: sscivilinfo@scscourt.org
Cc: ssweb@scscourt.org
Subject: Kirk v. City of Morgan Hill, Case No.: 19CV346360 [MA-Interwoven.FID78693]

Dear Clerk of the Court,


Our office represents Plaintiffs G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated in the above-referenced case. We would like to follow up regarding our Appellants' Notice

Designating the Record on Appeal. We e-filed the document on January 22, 2021, copy attached here. However, on January 29, 2021, we received a Notice of Default for not filing a Notice Designating the Record on Appeal, also attached here.

We sent a letter to the Court regarding this matter on February 3, 2021 via overnight delivery.

Please let us know if you need anything else from us to resolve this matter.

Best regards,

<p>Laura Palmerin Legal Secretary/Paralegal</p>  <p>MICHEL & ASSOCIATES, P.C. Attorneys at Law Environmental - Land Use - Firearms - Employment Law Civil Litigation - Criminal Defense</p>	<p>Direct: (562) 216-4473 Main: (562) 216-4444 Fax: (562) 216-4445 Email: lpalmerin@michellawyers.com Web: www.michellawyers.com 180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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EXHIBIT 8

<p align="center">IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA</p> <p>STREET ADDRESS: 191 N. First Street San Jose California 95113 MAILING ADDRESS: 191 North First Street CITY AND ZIP CODE: San José, California 95113 BRANCH NAME: Appeals Division</p>	<p align="center"><i>FOR COURT USE ONLY</i></p> <p>Filed February 18, 2021 Clerk of the Court Superior Court of CA County of Santa Clara 19CV346360 By: clucero</p>
<p>PLAINTIFF: G. MITCHELL KIRK; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED DEFENDANT: CITY OF MORGAN HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING; MORGAN HILL CITY CLERK IRMA TORREZ</p>	
<p align="center">NOTICE OF APPELLANT'S NON-COMPLIANCE</p>	<p>CASE NUMBER: 19CV346360</p>

Notice is hereby given that pursuant to CRC 8.100 and/or CRC 8.140, the Appellant was notified of a failure to comply in the above-entitled action and has not responded with the appropriate action within the mandated time. The Appellant has failed to comply for the reason(s) indicated below.

- ☒ CRC 8.100 \$100 deposit for clerk's transcript not paid.
- ☐ CRC 8.130 Notice designating reporter's transcript or notice of intent to proceed without reporter's transcript not timely filed.
- ☐ CRC 8.130 Notice designating reporter's transcript is unclear. A notice designating reporter's transcript must specify the date of each proceeding to be included in the transcript.
- ☐ CRC 8.130 Deposit for reporter's transcript not timely deposited.
- ☒ CRC 8.122 Notice designating record for clerk's transcript not timely filed.
- ☐ CRC 8.122 Notice designating clerk's transcript is unclear. A notice designating a clerk's transcript must identify each designated document by its title and filing date, or if the filing date is not available, the date it was signed.
- ☐ CRC 8.122 Fees for preparation of clerk's transcript not timely deposited.

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party of this cause and that a true copy of this document was mailed first class postage, fully pre-paid, in a sealed envelope addressed as shown below and the document was mailed at San Jose, California, on February 18, 2021.

Clerk of the Court

Signed: 2/18/2021 10:45 AM

Clerk, by Connie Lucero, Deputy
Connie Lucero

cc: Court of Appeal, Sixth Appellate District, 333 W. Santa Clara St. Ste. 1060, San Jose, CA 95113
Anna Marie Barvir 180 E Ocean Blvd Ste 200 Long Beach CA 90802

EXHIBIT 9

<p align="center">IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA</p> <p>STREET ADDRESS: 191 N. First Street San Jose California 95113</p> <p>MAILING ADDRESS: 191 North First Street</p> <p>CITY AND ZIP CODE: San José, California 95113</p> <p>BRANCH NAME: Appeals Division</p>	<p align="center"><small>FOR COURT USE ONLY</small></p> <p align="center">Filed</p> <p align="center">February 22, 2021</p> <p align="center">Clerk of the Court</p> <p align="center">Superior Court of CA</p> <p align="center">County of Santa Clara</p> <p align="center">19CV346360</p> <p align="center">By: clucero</p>
<p>PLAINTIFF: G. MITCHELL KIRK; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED</p> <p>DEFENDANT: CITY OF MORGAN HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING; MORGAN HILL CITY CLERK IRMA TORREZ</p>	
<p align="center">CLERK'S CERTIFICATE OF COMPLIANCE</p>	<p>CASE NUMBER: 19CV346360</p> <p>DCA NUMBER: H048745</p>

The Appellant was notified of a failure to comply on **January 29, 2021** and has now cured the default. Appellant cured default regarding Designation only. Non-compliance was sent 2/18/2021 regarding \$100.00 deposit for Court Transcripts.

Record preparation will now proceed.

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party of this cause and that a true copy of this document was mailed first class postage, fully pre-paid, in a sealed envelope addressed as shown below and the document was mailed at San Jose, California, on February 22, 2021.

Clerk of the Court

Signed: 2/22/2021 10:13 AM

Clerk, by Connie Lucero, Deputy
Connie Lucero

cc: **Court of Appeal, Sixth Appellate District, 333 W. Santa Clara St. Ste. 1060, San Jose, CA 95113**
Anna Marie Barvir 180 E Ocean Blvd Ste 200 Long Beach CA 90802

EXHIBIT 10


From: [Laura Palmerin](#)
To: sccappeals@scscourt.org; sscivilinfo@scscourt.org
Cc: [Anna M. Barvir](#)
Bcc: [Interwoven E Mail](#)
Subject: Kirk v. City of Morgan Hill, Superior Court Case No.: 19CV346360, Court of Appeal Case No.: H048745 [MA-Interwoven.FID88378]
Date: Wednesday, February 24, 2021 10:51:42 AM
Attachments: [2021-02-24 Order Dismissing Appeal.pdf](#)
[2148733_2021-01-22 Appellants Ntc Designating Record on Appeal.PDF](#)
[image001.png](#)
Importance: High

Hello Clerk of the Court,

We have received a notice from the Court of Appeal indicating that our appeal has been dismissed due to failure to procure the record, notice attached here. We did, however, file the Notice Designating the Record on Appeal within the time limits allowed, conformed copy attached. Although the Notice Designating the Record on Appeal was timely filed and stamped as filed on 1/22/21, the Superior Court did not get us the conformed copy until 2/16/21. And before getting us the conformed copy, we received a Default Notice regarding failure to procure the record (issued on 1/29/21, after we electronically filed the Notice Designating the Record on Appeal but before getting our conformed copy back). In response to that Default Notice, we sent a letter with filed copy of the Notice Designating Record on Appeal via overnight mail to the Superior Court, confirmation of receipt which was received by our office the next day (2/4/21) .

There appears to be some delay on the part of the Superior Court and as such, our appeal was incorrectly dismissed. Please advise, if you will contact the Court of Appeal to clarify the situation to have our appeal reinstated. If we do not hear back by the end of today, we will be filing a motion for relief from default and to reinstate our appeal.

Best regards,

<p>Laura Palmerin Legal Secretary/Paralegal</p>  <p>MICHEL & ASSOCIATES, P.C. Attorneys at Law Environmental - Land Use - Firearms - Employment Law Civil Litigation - Criminal Defense</p>	<p>Direct: (562) 216-4473 Main: (562) 216-4444 Fax: (562) 216-4445 Email: lpalmerin@michellawyers.com Web: www.michellawyers.com 180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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This e-mail is confidential and is legally privileged. If you have received it in error, you are on notice of its status. Please notify us immediately by reply e-mail and then delete this message from your system. Please do not copy it or use it for any purposes, or disclose its contents to any other person. To do so could violate state and Federal privacy laws. Thank you for your cooperation. Please contact Michel & Associates, PC at (562) 216-4444 if you need assistance.

PROOF OF SERVICE

Case Name: *Kirk, et al. v. City of Morgan Hill, et al.*
Court of Appeal Case No.: H048745
Superior Court Case No.: 19CV346360

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, Long Beach, California 90802.

On February 24, 2021, I served a copy of the foregoing document described as: **DECLARATION OF LAURA PALMERIN IN SUPPORT OF APPELLANTS' MOTION FOR RELIEF FROM DEFAULT AND TO REINSTATE APPEAL**, on the following parties, as follows:

Anthony P. Schoenberg
tschoenberg@fbm.com
James Allison
jallison@fbm.com
Farella Braun + Martel, LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104

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

Attorneys for Defendants and Respondents City of Morgan Hill, et al.

The parties were served as follows: I served a true and correct copy by electronic transmission through TrueFiling. Said transmission was reported and completed without error.

Superior Court of California
County of Santa Clara
191 N. First Street
San Jose, CA 95113

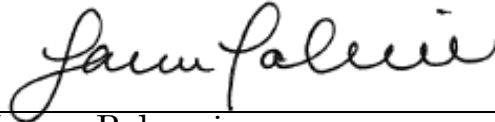
The party was served as follows: by mail. I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 24, 2021, at Long Beach, California.

A handwritten signature in cursive script, appearing to read "Laura Palmerin", written in black ink.

Laura Palmerin
Declarant

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE SIXTH APPELLATE DISTRICT

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

PLAINTIFFS AND APPELLANTS,

V.

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. H048745

**DECLARATION OF ANNA M. BARVIR IN SUPPORT OF
APPELLANTS' MOTION FOR RELIEF FROM DEFAULT AND TO
REINSTATE APPEAL**

Superior Court of California, County of Santa Clara
Case No. 19CV346360
Honorable Peter H. Kirwan, Judge

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
Email: abarvir@michellawyers.com

Counsel for Plaintiffs-Appellants

DECLARATION OF ANNA M. BARVIR

I, Anna M. Barvir, declare as follows:

1. I am an attorney licensed to practice before all courts in the state of California. The law firm where I am employed, Michel and Associates, P.C., is council of record for Plaintiffs G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated, in the above-entitled matter. I make this declaration in support of Appellants' Motion for Relief from Default and to Reinstate Appeal. I have personal knowledge of the facts set forth herein and if called as a witness, I could and would competently testify hereto.

2. On or about January 22, 2021, I completed the required Appellants' Notice Designating Record on Appeal, electing to use an appendix in lieu of a clerk's transcript as a record of the documents filed in the trial court. I also elected to use a reporter's transcript of all relevant oral proceedings and attached a certified copy of the reporter's transcript at issue. I then directed my paralegal, Ms. Laura Palmerin, to electronically file the Notice.

3. On or about February 1, 2021, I received a Notice of Default from the Santa Clara Superior Court dated January 29, 2021, indicating that Appellants had not designated a record for the clerk's transcript, had not paid the \$100 deposit for the clerk's transcript, and had not designated the oral proceedings for the reporter's transcript.

4. Realizing then that the trial court had either not received or not processed our Notice Designating Record on Appeal, I directed Ms. Palmerin to reach out to the trial court to discuss how to cure the perceived default since Appellants had, in fact, already filed the required Notice.

5. On or about February 3, 2021, I directed Ms. Palmerin to send a letter, as well as copies of Appellants' Notice Designating Record on appeal

and the electronic filing receipt, via overnight mail to the trial court. I directed her to send the letter some 11 days before the deadline to cure in hopes that, if Appellants' Notice Designating Record on Appeal was still defective, there would be time for the trial court to notify me so that I could correct any outstanding deficiencies.

6. After sending the letter via overnight mail, I kept in regular email contact with Ms. Palmerin for updates on whether the trial court had accepted our filing or had otherwise contacted us regarding the perceived default. Though she had repeatedly reached out the trial court via email and telephone, Ms. Palmerin informed me that there had been no response.

7. On February 16, 2021, I finally received the conformed copy of Appellants' Notice Designating Record on Appeal with the file-stamp date of January 22, 2021. Having received this document and no other communication from the trial court, I believed that the trial court had finally received and processed our timely filed designation of the record and no further action was necessary.

8. So, when I received this Court's February 24, 2021 order dismissing the appeal for Appellants' failure to designate the record for or pay a \$100 deposit toward the clerk's transcript, I was quite surprised. I immediately directed Ms. Palmerin to contact the Court of Appeal and the trial court and to pull the civil case docket to figure out what could have been missing. Ms. Palmerin later sent me copies of the trial court's February 18 and February 22 notices regarding the failure to cure the perceived defect regarding the designation of the clerk's transcript and the \$100 deposit.

9. Because I had elected to proceed with an appendix in lieu of the clerk's transcript and based on my 10 years of experience litigating appeals in California, I reasonably believed that Appellants were not required to submit

\$100 deposit for a clerk's transcript. Indeed, I do not remember a single instance of an appeal where the deposit was required when I elected to proceed with an appendix.

10. What's more, I had directed Ms. Palmerin to call and email the trial court many times before the deadline to cure default in order to clarify whether Appellants' designation of the record was still defective and, if so, what needed to be done to cure it. Appellants are willing and able to pay the \$100 clerk's transcript deposit if it is required, and they would have done so had they been notified of continued deficiency.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 24, 2021 at Stanton, California.



Anna M. Barvir
Declarant

PROOF OF SERVICE

Case Name: *Kirk, et al. v. City of Morgan Hill, et al.*
Court of Appeal Case No.: H048745
Superior Court Case No.: 19CV346360

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Anthony P. Schoenberg
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Executed on February 24, 2021, at Long Beach, California.

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Laura Palmerin
Declarant