

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,

Case No. H048745

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.

**APPELLANTS' APPENDIX
VOLUME XI OF XI
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Superior Court of California, County of Santa Clara
Case No. 19CV346360
Honorable Judge Peter H. Kirwan

C. D. Michel – SBN 144258
Anna M. Barvir – SBN 268728
Tiffany D. Cheuvront – SBN 317144
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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA
DOWNTOWN COURTHOUSE**

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

Plaintiffs and Petitioners,

vs.

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

Defendants and Respondents

Case No: 19CV346360

**PLAINTIFFS' EVIDENTIARY
OBJECTIONS IN SUPPORT OF
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

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

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

Action filed: April 15, 2019

Plaintiffs G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated hereby submit the following evidentiary objections in support of their Opposition to Defendants' Motion for Summary Judgment.

Material Objected To	Grounds for Objection
Objection No. 1: Declaration of James Allison in Support of Defendants' Motion for Summary Judgment, Exhibit 4 (David Hemenway, Deborah Azrael, and Matthew Miller, "Whose Guns are Stolen? The Epidemiology of Gun Theft Victims," Injury Epidemiology 4, no. 1 (2017).)	No Citation to Separate Statement/Not Contained in Separate Statement Setting out facts and citing supporting evidence in the memorandum of points and authorities is insufficient. All material facts must be set forth in the separate statement of undisputed facts and not simply buried in a mound of paperwork. (<i>Mills v. Forestex Co.</i> (2003) 108 Cal.App.4th 625, 640-641.) Indeed, it is the "Golden Rule" of summary judgment: If the facts are not set forth in the separate statement, they do not exist. (<i>United Cmty. Church v. Garcin</i> (1991) 231 Cal.App.3d 327, 337, rejected by S.D. <i>Watercrafts, Inc. v. Wells Fargo Bank, N.A.</i> (2002) 102 Cal.App.4th 308.) The separate statement serves a due process purpose, informing the opposing party of the evidence that must be disputed in order to defeat the motion for summary judgment. The City's failure to include Exhibit 4 (and the "facts" it gleans from Exhibit 4) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City's separate statement of undisputed facts).
Objection No. 2: Declaration of James Allison in Support of Defendants' Motion for Summary Judgment, Exhibit 5 (Brian Freskos, <i>Missing Pieces: Gun Theft from Legal Gun Owners is on the Rise, Quietly Fueling Violent Crime</i> , The Trace, November 20, 2017, https://bit.ly/2izST1h)	No Citation to Separate Statement/Not Contained in Separate Statement Setting out facts and citing supporting evidence in the memorandum of points and authorities is insufficient. All material facts must be set forth in the separate statement of undisputed facts and not simply buried in a mound of paperwork. (<i>Mills v. Forestex Co.</i>

(2003) 108 Cal.App.4th 625, 640-641.)
Indeed, it is the “Golden Rule” of summary judgment: If the facts are not set forth in the separate statement, they do not exist. (*United Cmty. Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, rejected by *S.D. Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308.)

The separate statement serves a due process purpose, informing the opposing party of the evidence that must be disputed in order to defeat the motion for summary judgment. The City’s failure to include Exhibit 5 (and the “facts” it gleans from Exhibit 5) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City’s separate statement of undisputed facts).

Unduly Prejudicial (Evid. Code, § 352)

Exhibit 5 is an article published by The Trace, a biased news and blog site funded by Everytown for Gun Safety,¹ a nonprofit advocacy organization that advocates for gun control.² Exhibit 5 contains some research The Trace claims is “conducted by The Trace and more than a dozen NBC TV stations” (Ex. 5, pg. 1),³ but it then reveals it is relying on numbers reported by the National Crime Information Center (NCIC), a database maintained by the FBI.

An NCIC spokesman is quoted in the article as stating that the increase could be partially attributable to a growing number of law enforcement agencies reporting firearm theft as opposed to an actual increase in firearm theft (Ex. 5, pg. 1), which means the basis of the claim The Trace (and the City) are making that firearm thefts are on the rise could very

¹ “Donor and Financial Transparency”, The Trace <<https://www.thetrace.org/donor-financial-transparency/>> (as of June 5, 2020).

² “We Are Everytown for Gun Safety”. Everytown for Gun Safety <<https://everytown.org/who-we-are/>> (as of June 5, 2020).

³ Defendants did not bates-number the exhibit pages submitted, so all references are to the page number labeled on the original article printout.

	<p>well be false, and Exhibit 5 would thus be misleading and unduly prejudicial.</p> <p>Inadmissible Speculation and Conclusions (Evid. Code, §§ 400, 403, 410)</p> <p>Exhibit 5 relies on data from the NCIC showing an increase in reported firearm thefts, but the Exhibit baselessly attributes the basis for that increase to an increase in actual thefts, and not simply an increase in reporting by law enforcement. This is inadmissible speculation.</p>
<p>Objection No. 3:</p> <p>Defendants’ Memorandum of Points and Authorities in Support of their Motion for Summary Judgment, pg. 1, lines 10-12 & fn. 2:</p> <p>“Guns are stolen from an individual owner roughly once every two minutes, but nationally up to 40% of guns that are lost or stolen go unreported.”²</p> <p>² David Hemenway, Deborah Azrael, and Matthew Miller, “Whose Guns are Stolen? The Epidemiology of Gun Theft Victims,” <i>Injury Epidemiology</i> 4, no. 1 (2017); Brian Freskos, “Missing Pieces: Gun Theft from Legal Gun Owners is on the Rise, Quietly Fueling Violent Crime, <i>The Trace</i>, November 20, 2017, https://bit.ly/2izST1h. The latter report used public records requests to compile national data on guns reported lost or stolen to law enforcement.”</p>	<p>No Citation to Separate Statement/Not Contained in Separate Statement</p> <p>Setting out facts and citing supporting evidence in the memorandum of points and authorities is insufficient. All material facts must be set forth in the separate statement of undisputed facts and not simply buried in a mound of paperwork. (<i>Mills v. Forestex Co.</i> (2003) 108 Cal.App.4th 625, 640-641.) Indeed, it is the “Golden Rule” of summary judgment: If the facts are not set forth in the separate statement, they do not exist. (<i>United Cmty. Church v. Garcin</i> (1991) 231 Cal.App.3d 327, 337, rejected by <i>S.D. Watercrafts, Inc. v. Wells Fargo Bank, N.A.</i> (2002) 102 Cal.App.4th 308.)</p> <p>The separate statement serves a due process purpose, informing the opposing party of the evidence that must be disputed in order to defeat the motion for summary judgment. The City’s failure to include Exhibit 5 (and the “facts” it gleans from Exhibit 5) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City’s separate statement of undisputed facts).</p> <p>Lacks Foundation (Evid. Code, § 403)</p> <p>Because these statements rely on Exhibits 4 and 5, and because those exhibits are inadmissible for the reasons presented in Objection Nos. 1 and 2 above, the statements</p>

	lack foundation and should be stricken.
Objection No. 4:	
Defendants' Memorandum of Points and Authorities in Support of their Motion for Summary Judgment, pg. 1, lines 14-16 & fn. 4:	No Citation to Separate Statement/Not Contained in Separate Statement
"Lax reporting requirements also thwart law enforcement's ability to investigate actual thefts from legal owners—which have increased significantly in recent years..." ⁴	Setting out facts and citing supporting evidence in the memorandum of points and authorities is insufficient. All material facts must be set forth in the separate statement of undisputed facts and not simply buried in a mound of paperwork. (<i>Mills v. Forestex Co.</i> (2003) 108 Cal.App.4th 625, 640-641.) Indeed, it is the "Golden Rule" of summary judgment: If the facts are not set forth in the separate statement, they do not exist. (<i>United Cmty. Church v. Garcin</i> (1991) 231 Cal.App.3d 327, 337, rejected by <i>S.D. Watercrafts, Inc. v. Wells Fargo Bank, N.A.</i> (2002) 102 Cal.App.4th 308.)
⁴ Freskos, <i>supra</i> , n.2."	The separate statement serves a due process purpose, informing the opposing party of the evidence that must be disputed in order to defeat the motion for summary judgment. The City's failure to include Exhibit 5 (and the "facts" it gleans from Exhibit 5) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City's separate statement of undisputed facts).
	Lacks Foundation (Evid. Code, § 403)
	Because this statement relies on Exhibit 5, and because Exhibit 5 is inadmissible for the reasons presented in Objection No. 2, the statement lacks foundation and should be stricken.
	Unduly Prejudicial (Evid. Code, § 352)
	The City's statement here relies on Exhibit 5, an article published by The Trace, a biased news and blog site funded by Everytown for Gun Safety, ⁴ a nonprofit advocacy

⁴ "Donor and Financial Transparency," The Trace <<https://www.thetrace.org/donor->

	<p>organization that advocates for gun control.⁵ Exhibit 5 contains some research The Trace claims is “conducted by The Trace and more than a dozen NBC TV stations” (Ex. 5, pg. 1),⁶ but it then reveals it is relying on numbers reported by the National Crime Information Center (NCIC), a database maintained by the FBI.</p> <p>An NCIC spokesman is quoted in the article as stating that the increase could be partially attributable to a growing number of law enforcement agencies reporting firearm theft as opposed to an actual increase in firearm theft (Ex. 5, pg. 1), which means the claim the City is making here--that firearm thefts “have increased significantly in recent years”--could very well be false, and would thus be misleading and unduly prejudicial.</p> <p>Inadmissible Speculation and Conclusions (Evid. Code, §§ 400, 403, 410)</p> <p>The City’s statement here relies on Exhibit 5, which in turn relies on data from the NCIC showing an increase in reported firearm thefts, but the Exhibit baselessly attributes the basis for that increase to an increase in actual thefts, and not simply an increase in reporting by law enforcement. This is inadmissible speculation.</p>
<p>Objection No. 5:</p> <p>Defendants’ Memorandum of Points and Authorities in Support of Motion for Summary Judgment, pg. 1, lines 17-18, pg. 2, line 1 & fn. 5, which read:</p> <p>The consequences of escalating firearm thefts are devastating: an analysis of tens of thousands of stolen guns recovered by police from 2010 to 2016 found that the majority of weapons were recovered only <i>after</i> being used in a crime (and not before).⁵</p>	<p>No Citation to Separate Statement/Not Contained in Separate Statement</p> <p>Setting out facts and citing supporting evidence in the memorandum of points and authorities is insufficient. All material facts must be set forth in the separate statement of undisputed facts and not simply buried in a mound of paperwork. (<i>Mills v. Forestex Co.</i> (2003) 108 Cal.App.4th 625, 640-641.) Indeed, it is the “Golden Rule” of summary judgment: If the facts are not set forth in the separate statement, they do not exist. (<i>United Cmty. Church v. Garcin</i> (1991) 231 Cal.App.3d 327, 337, rejected by S.D.</p>

[financial-transparency/](#)> (as of June 5, 2020).

⁵ “We Are Everytown for Gun Safety”. Everytown for Gun Safety
<<https://everytown.org/who-we-are/>> (as of June 5, 2020).

⁶ Defendants did not bates-number the exhibits submitted, so all references are to the page numbers found on the original article printout.

5 Freskos, *supra*, n.2.”

Watercrafts, Inc. v. Wells Fargo Bank, N.A.
(2002) 102 Cal.App.4th 308.)

The separate statement serves a due process purpose, informing the opposing party of the evidence that must be disputed in order to defeat the motion for summary judgment. The City’s failure to include Exhibit 5 (and the “facts” it gleans from Exhibit 5) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City’s separate statement of undisputed facts).

Lacks Foundation (Evid. Code, § 403)

Because this statement relies on Exhibit 5, and because Exhibit 5 is inadmissible for the reasons presented in Objection No. 2, the statement lacks foundation and should be stricken.

Unduly Prejudicial (Evid. Code, § 352)

The City’s statement here relies on Exhibit 5, an article published by The Trace, a biased news and blog site funded by Everytown for Gun Safety,⁷ a nonprofit advocacy organization that advocates for gun control.⁸ Exhibit 5 contains some research The Trace claims is “conducted by The Trace and more than a dozen NBC TV stations” (Ex. 5, pg. 1),⁹ but it then reveals it is relying on numbers reported by the National Crime Information Center (NCIC), a database maintained by the FBI.

An NCIC spokesman is quoted in the article as stating that the increase could be partially attributable to a growing number of law enforcement agencies reporting firearm theft as opposed to an actual increase in firearm

⁷ “Donor and Financial Transparency,” The Trace <<https://www.thetrace.org/donor-financial-transparency/>> (as of June 5, 2020).

⁸ “We Are Everytown for Gun Safety”. Everytown for Gun Safety <<https://everytown.org/who-we-are/>> (as of June 5, 2020).

⁹ Defendants did not bates-number the exhibits submitted, so all references are to the page numbers found on the original article printout.

	<p>theft (Ex. 5, pg. 1), which means the claim the City is making here--that firearm thefts are “escalating”--could very well be false, and would thus be misleading and unduly prejudicial.</p> <p>Inadmissible Speculation and Conclusions (Evid. Code, §§ 400, 403, 410)</p> <p>The City’s statement here relies on Exhibit 5, which in turn relies on data from the NCIC showing an increase in reported firearm thefts, but the Exhibit baselessly attributes the basis for that increase to an increase in actual thefts, and not simply an increase in reporting by law enforcement. This is inadmissible speculation.</p>
<p>Objection No. 6:</p> <p>Defendants’ Memorandum of Points and Authorities in Support of Motion for Summary Judgment, pg. 8, line 8 & fn. 9, which states in pertinent part:</p> <p>“Theft patterns differ across regions.”⁹</p> <p>⁹ See Freskos, supra n.2 (explaining ‘thieves were more likely to break into homes in areas where gun ownership rates were high’).”</p>	<p>No Citation to Separate Statement/Not Contained in Separate Statement</p> <p>Setting out facts and citing supporting evidence in the memorandum of points and authorities is insufficient. All material facts must be set forth in the separate statement of undisputed facts and not simply buried in a mound of paperwork. (<i>Mills v. Forestex Co.</i> (2003) 108 Cal.App.4th 625, 640-641.) Indeed, it is the “Golden Rule” of summary judgment: If the facts are not set forth in the separate statement, they do not exist. (<i>United Cmty. Church v. Garcin</i> (1991) 231 Cal.App.3d 327, 337, rejected by <i>S.D. Watercrafts, Inc. v. Wells Fargo Bank, N.A.</i> (2002) 102 Cal.App.4th 308.)</p> <p>The separate statement serves a due process purpose, informing the opposing party of the evidence that must be disputed in order to defeat the motion for summary judgment. The City’s failure to include Exhibit 5 (and the “facts” it gleans from Exhibit 5) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City’s separate statement of undisputed facts).</p>

	<p>Lacks Foundation (Evid. Code, § 403)</p> <p>Because these statements rely on Exhibit 5, and because Exhibit 5 is inadmissible for the reasons presented in Objection No. 2, the statements lack foundation and should be stricken.</p>
<p>Objection No. 7:</p> <p>Declaration of James Allison in Support of Defendants’ Motion for Summary Judgment, Exhibit 6 (Daniel W. Webster et al., “Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws,” in <i>Reducing Gun Violence in America: Informing Policy with Evidence and Analysis</i> (Baltimore: The Johns Hopkins University Press, 2013), 118.)</p>	<p>No Citation to Separate Statement/Not Contained in Separate Statement</p> <p>Setting out facts and citing supporting evidence in the memorandum of points and authorities is insufficient. All material facts must be set forth in the separate statement of undisputed facts and not simply buried in a mound of paperwork. (<i>Mills v. Forestex Co.</i> (2003) 108 Cal.App.4th 625, 640-641.) Indeed, it is the “Golden Rule” of summary judgment: If the facts are not set forth in the separate statement, they do not exist. (<i>United Cmty. Church v. Garcin</i> (1991) 231 Cal.App.3d 327, 337, rejected by <i>S.D. Watercrafts, Inc. v. Wells Fargo Bank, N.A.</i> (2002) 102 Cal.App.4th 308.)</p> <p>The separate statement serves a due process purpose, informing the opposing party of the evidence that must be disputed in order to defeat the motion for summary judgment. The City’s failure to include Exhibit 6 (and the “facts” it gleans from Exhibit 6) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City’s separate statement of undisputed facts).</p>
<p>Objection No. 8:</p> <p>Defendants’ Memorandum of Points and Authorities in Support of their Motion for Summary Judgment, pg. 1, lines 12-14 & fn.3, which read:</p> <p>“Lax reporting requirements embolden straw purchasers and gun traffickers, who can evade responsibility for supplying firearms used in</p>	<p>No Citation to Separate Statement/Not Contained in Separate Statement</p> <p>Setting out facts and citing supporting evidence in the memorandum of points and authorities is insufficient. All material facts must be set forth in the separate statement of undisputed facts and not simply buried in a mound of paperwork. (<i>Mills v. Forestex Co.</i></p>

1 violent crimes by falsely claiming a gun they
2 supplied had previously been lost or stolen.³

3 ³ See, e.g., Daniel W. Webster et al.,
4 “Preventing the Diversion of Guns to
5 Criminals Through Effective Firearm Sales
6 Laws,” in *Reducing Gun Violence in America:
7 Informing Policy with Evidence and Analysis*
8 (Baltimore: The Johns Hopkins University
9 Press, 2013), 118.”

(2003) 108 Cal.App.4th 625, 640-641.)
Indeed, it is the “Golden Rule” of summary
judgment: If the facts are not set forth in the
separate statement, they do not exist. (*United*
Cnty. Church v. Garcin (1991) 231
Cal.App.3d 327, 337, rejected by *S.D.*
Watercrafts, Inc. v. Wells Fargo Bank, N.A.
(2002) 102 Cal.App.4th 308.)

The separate statement serves a due process
purpose, informing the opposing party of the
evidence that must be disputed in order to
defeat the motion for summary judgment. The
City’s failure to include Exhibit 6 (and the
“facts” it gleans from Exhibit 6) in its separate
statement prejudices Plaintiffs. For they are
not properly put on notice of the facts and
evidence the City relies on to support its
motion, and they cannot dispute the truth or
accuracy of the facts and evidence in the
manner prescribed by the rules governing
summary judgment (i.e., through a response to
the City’s separate statement of undisputed
facts).

Lacks Foundation (Evid. Code, § 403)

Because this statement relies on Exhibit 6, and
because Exhibit 6 is inadmissible for the
reasons presented in Objection No. 7, the
statement lacks foundation and should be
stricken.

Objection No. 9:

18 Declaration of James Allison in Support of
19 Defendants’ Motion for Summary Judgment,
20 Exhibit 12 (Douglas J. Wiebe et al.,
21 “Homicide and Geographic Access to Gun
22 Dealers in the United States,” BMC Public
23 Health 9:199 (2009): 2, 7, [http://www.biomed](http://www.biomedcentral.com/1471-2458/9/199)
24 [central.com/1471-2458/9/199](http://www.biomedcentral.com/1471-2458/9/199))

No Citation to Separate Statement/Not Contained in Separate Statement

Setting out facts and citing supporting
evidence in the memorandum of points and
authorities is insufficient. All material facts
must be set forth in the separate statement of
undisputed facts and not simply buried in a
mound of paperwork. (*Mills v. Forestex Co.*
(2003) 108 Cal.App.4th 625, 640-641.)
Indeed, it is the “Golden Rule” of summary
judgment: If the facts are not set forth in the
separate statement, they do not exist. (*United*
Cnty. Church v. Garcin (1991) 231
Cal.App.3d 327, 337, rejected by *S.D.*
Watercrafts, Inc. v. Wells Fargo Bank, N.A.
(2002) 102 Cal.App.4th 308.)

The separate statement serves a due process
purpose, informing the opposing party of the

	evidence that must be disputed in order to defeat the motion for summary judgment. The City's failure to include Exhibit 12 (and the "facts" it gleans from Exhibit 12) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City's separate statement of undisputed facts).
<p>Objection No. 10:</p> <p>Defendants' Memorandum of Points and Authorities in Support of their Motion for Summary Judgment, pg. 8, lines 8-11, & fn. 10, which state in pertinent part:</p> <p>"[W]hich makes sense given that so much gun crime is <i>local</i> crime — studies show that 'almost one-third (32.2%) of traced crime guns are recovered by police within 10 miles of the [firearms dealer] where they were first purchased.'¹⁰</p> <p>¹⁰ Douglas J. Wiebe et al., "Homicide and Geographic Access to Gun Dealers in the United States," BMC Public Health 9:199 (2009): 2, 7, http://www.biomedcentral.com/1471-2458/9/199."</p>	<p>No Citation to Separate Statement/Not Contained in Separate Statement</p> <p>Setting out facts and citing supporting evidence in the memorandum of points and authorities is insufficient. All material facts must be set forth in the separate statement of undisputed facts and not simply buried in a mound of paperwork. (<i>Mills v. Forestex Co.</i> (2003) 108 Cal.App.4th 625, 640-641.) Indeed, it is the "Golden Rule" of summary judgment: If the facts are not set forth in the separate statement, they do not exist. (<i>United Cmty. Church v. Garcin</i> (1991) 231 Cal.App.3d 327, 337, rejected by <i>S.D. Watercrafts, Inc. v. Wells Fargo Bank, N.A.</i> (2002) 102 Cal.App.4th 308.)</p> <p>The separate statement serves a due process purpose, informing the opposing party of the evidence that must be disputed in order to defeat the motion for summary judgment. The City's failure to include Exhibit 12 (and the "facts" it gleans from Exhibit 12) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City's separate statement of undisputed facts).</p> <p>Lacks Foundation (Evid. Code, § 403)</p> <p>Because this statement relies on Exhibit 12, and because Exhibit 12 is inadmissible for the reasons presented in Objection No. 9, the</p>

1		statement lacks foundation and should be stricken.
2		
3	Objection No. 11:	No Citation to Separate Statement/Not Contained in Separate Statement
4	Declaration of James Allison in Support of	Setting out facts and citing supporting
5	Defendants' Motion for Summary Judgment,	evidence in the memorandum of points and
6	Exhibit 13 (Jennifer L. Pomeranz & Mark	authorities is insufficient. All material facts
7	Pertschuk, <i>State Preemption: A Significant</i>	must be set forth in the separate statement of
8	<i>and Quiet Threat to Public Health in the</i>	undisputed facts and not simply buried in a
9	<i>United States</i> , 107 Am. J. Public Health 900,	mound of paperwork. (<i>Mills v. Forestex Co.</i>
10	900 (2017).)	(2003) 108 Cal.App.4th 625, 640-641.)
11		Indeed, it is the "Golden Rule" of summary
12		judgment: If the facts are not set forth in the
13		separate statement, they do not exist. (<i>United</i>
14		<i>Cnty. Church v. Garcin</i> (1991) 231
15		Cal.App.3d 327, 337, rejected by <i>S.D.</i>
16		<i>Watercrafts, Inc. v. Wells Fargo Bank, N.A.</i>
17		(2002) 102 Cal.App.4th 308.)
18		The separate statement serves a due process
19		purpose, informing the opposing party of the
20		evidence that must be disputed in order to
21		defeat the motion for summary judgment. The
22		City's failure to include Exhibit 13 (and the
23		"facts" it gleans from Exhibit 13) in its
24		separate statement prejudices Plaintiffs. For
25		they are not properly put on notice of the facts
26		and evidence the City relies on to support its
27		motion, and they cannot dispute the truth or
28		accuracy of the facts and evidence in the
		manner prescribed by the rules governing
		summary judgment (i.e., through a response to
		the City's separate statement of undisputed
		facts).
	Objection No. 12:	No Citation to Separate Statement/Not Contained in Separate Statement
	Defendants' Memorandum of Points and	Setting out facts and citing supporting
	Authorities in Support of their Motion for	evidence in the memorandum of points and
	Summary Judgment, pg. 13, fn. 13, which	authorities is insufficient. All material facts
	states:	must be set forth in the separate statement of
		undisputed facts and not simply buried in a
		mound of paperwork. (<i>Mills v. Forestex Co.</i>
		(2003) 108 Cal.App.4th 625, 640-641.)
		Indeed, it is the "Golden Rule" of summary
		judgment: If the facts are not set forth in the
		separate statement, they do not exist. (<i>United</i>
		<i>Cnty. Church v. Garcin</i> (1991) 231
	"In contrast to California's narrow preemption	
	of defined areas of gun regulation, forty-three	
	states preempt all, or substantially all, aspects	
	of firearms regulation. <i>See Jennifer L.</i>	
	<i>Pomeranz & Mark Pertschuk, State</i>	
	<i>Preemption: A Significant and Quiet Threat to</i>	
	<i>Public Health in the United States</i> , 107 AM. J.	

PUBLIC HEALTH 900, 900 (2017). These states’ preemption statutes are an instructive comparison, as many of them—modeled after legislation promoted by the gun industry, *see id.*—express a boilerplate preference for uniform gun laws throughout the state. *See, e.g.,* Ala. Code § 13A-11-61.3 (“The purpose of this section is to establish within the Legislature complete control over regulation and policy pertaining to firearms, ammunition, and firearm accessories in order to ensure that such regulation and policy is applied uniformly throughout this state”); Idaho Code Ann. § 18-3302J(1) (announcing “legislature’s intent to wholly occupy the field of firearms regulation within this state”); Utah Code § 76-10-500 (firearm preemption law declaring “the need to provide uniform laws throughout the state”). With good reason, this is not the path California has chosen. *See, e.g., Pomeranz at 900 (industry-backed preemption laws tie municipalities’ hands, leaving them “unable to address acute public health issues” best solved at the local level).*”

(underlining added for clarity)

Cal.App.3d 327, 337, rejected by *S.D. Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308.)

The separate statement serves a due process purpose, informing the opposing party of the evidence that must be disputed in order to defeat the motion for summary judgment. The City’s failure to include Exhibit 13 (and the “facts” it gleans from Exhibit 13) in its separate statement prejudices Plaintiffs. For they are not properly put on notice of the facts and evidence the City relies on to support its motion, and they cannot dispute the truth or accuracy of the facts and evidence in the manner prescribed by the rules governing summary judgment (i.e., through a response to the City’s separate statement of undisputed facts).

Lacks Foundation (Evid. Code, § 403)

Because these statements rely on Exhibit 13, and because Exhibit 13 is inadmissible for the reasons presented in Objection No. 11, the statements lack foundation and should be stricken.

Relevance (Evid. Code, § 210)

The City’s statements, relying on Exhibit 13, that California has chosen not to preempt all aspects of firearm regulation are irrelevant strawmen. This case is not about preemption of all aspects of firearm regulation. Rather, this case is about whether California has preempted the City’s authority to adopt a very specific type of firearm regulation, i.e., a theft or loss reporting requirement at odds with state laws regarding theft or loss reporting.

What’s more, much of what the City relies on in Exhibit 13 addresses the way *other* states have opted to preempt all manner of firearm regulation. That is wholly irrelevant to the legal analysis of preemption in *California*.

Dated: June 11, 2020

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir

Anna M. Barvir

Attorneys for Plaintiffs

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

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

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

**PLAINTIFFS' EVIDENTIARY OBJECTIONS IN SUPPORT OF OPPOSITION
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

on the interested parties in this action by placing

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

thereof by the following means, addressed as follows:

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

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

Executed on June 11, 2020, at Long Beach, California.

s/ Tiffany M. Harbor
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13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SANTA CLARA, DOWNTOWN COURTHOUSE

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

18 Plaintiffs and Petitioners,

19 vs.

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

23 Defendants and Respondents.
24
25
26
27
28

Case No. 19CV346360

**DEFENDANT CITY OF MORGAN
HILL'S REPLY MEMORANDUM OF
POINTS & AUTHORITIES IN SUPPORT
OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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

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16	§ 9.04.030	
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19	§ 2520	
20	§ 16520	
21	§ 25270	

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I. INTRODUCTION

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

There is no burden on Morgan Hill to corroborate the local interests motivating its 48-hour firearm-theft reporting Ordinance. Morgan Hill would prevail even if Plaintiffs showed the Ordinance is not supported by undisputed evidence (which they have not). Plaintiffs have the burden of showing that *state law* preempts the Ordinance. It is part of *Plaintiffs’* burden to overcome the presumption that the Ordinance is within Morgan Hill’s constitutional authority. *Calguns Found., Inc. v. Cty. of San Mateo*, 218 Cal. App. 4th 661, 666–67 (Cal. Ct. App. 2013). It is also Plaintiffs’ burden to show that the Ordinance duplicates, contradicts, or enters a field implicitly occupied by state law. *See, e.g. First Resort, Inc. v. Herrera*, 80 F. Supp. 3d 1043, 1055 (N.D. Cal. 2015), *aff’d*, 860 F.3d 1263 (9th Cir. 2017). And it is Plaintiffs’ burden to show that Proposition 63 voters *clearly* intended to preempt local firearms regulations. *See Sherwin-Williams*, 4 Cal. 4th at 904. Plaintiffs had to present evidence of Proposition 63 voters’ intent. *Persky v. Bushey*, 21 Cal. App. 5th 810, 818-19 (Cal. Ct. App. 2018); *Coyne v. City & Cty. of San Francisco*, 9 Cal. App. 5th 1215, 1225 (Cal. Ct. App. 2017). Pointing, as Plaintiffs do, to an *absence* of “evidence about how many of the millions of people who voted on Prop. 63” interpreted the initiative, or that voters’ “subjective intent” is “likely unknowable,” is a concession that they have failed to discharge that burden. (Pls.’ Opp’n., pp. 11, 13.)

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

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

3 **II. STATEMENT OF FACTS**

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

6 "Every person shall report the loss or theft of a firearm he or she owns or possesses to a
7 local law enforcement agency in the jurisdiction in which the theft or loss occurred within
8 five days of the time he or she knew or reasonably should have known that the firearm had
been stolen or lost."

9 When Prop. 63 was passed, at least 18 California municipalities had already enacted their
10 own local requirements governing lost or stolen firearms reporting. (Defs.' Mot. Summ. J. at p. 4
11 n. 8.) On November 28, 2018, Morgan Hill joined those municipalities when it enacted Ordinance
12 No. 2289, which took effect on December 29, 2018 as amended Municipal Code Section 9.04.030
13 ("Duty to Report Theft or Loss of Firearms"). Section 9.04.030 states,
14

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

19 **III. LEGAL STANDARD**

20 The court should grant summary judgment when "the moving party is entitled to a
21 judgment as a matter of law." Cal. Civ. Proc. Code § 437c(c); *see also Aguilar v. Atl. Richfield*
22 *Co.*, 25 Cal. 4th 826, 843 (Cal. 2001). The parties have filed cross-motions for summary
23 judgment. Where, as here, one party claims the ordinance is preempted by state law, that party
24 (Plaintiffs here) bears the burden on both summary judgment motions. *See, e.g. First Resort*, , 80-
25 F. Supp. 3d at 1055, *aff'd*, 860 F.3d 1263 (9th Cir. 2017).
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IV. ARGUMENT

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

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

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

Document received by the CA 6th District Court of Appeal.

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

3 Plaintiffs suggest that Morgan Hill must present “legislative history” supporting the
4 enhanced effectiveness of its 48-hour firearm-theft reporting Ordinance, over Prop. 63’s five-day
5 requirement, to avoid a finding of preemption. (*See, e.g.,* Pls.’ Opp’n., p. 7.) Again, this
6 misapprehends the law. The legal question of preemption focuses on whether *state law* forbids
7 local action, not whether local action is necessary or desirable. *Fiscal v. City & Cty. of San*
8 *Francisco*, 158 Cal. App. 4th 895, 902 (Cal. Ct. App. 2008) (“we need not, and do not, pass
9 judgment on the merits of Prop. H, or engage ourselves in the sociological and cultural debate
10 about whether gun control is an effective means to combat crime”).

11 To be sure, Morgan Hill could readily justify its policy choice if necessary, and cited
12 studies in its Motion for Summary Judgment that support its particularized interest in
13 strengthening firearm-theft reporting requirements. (*See* Defs.’ Mot. Summ. J., p. 8.) The
14 legislative record also shows that the City Council considered specific benefits of adopting a 48-
15 hour theft-reporting requirement, and elected to model the Ordinance after a local measure
16 adopted years ago in Sunnyvale, which had successfully required firearm theft-reporting within 48
17 hours.¹ But no preemption test asks a municipality to substantiate its policy goals in order to
18 defeat a preemption challenge.² Instead, the basic question is whether a state law has disturbed the
19 status quo by depriving municipalities of their broad, preexisting authority to pass the police-
20 power regulations of their choosing. *See Cal. Rifle & Pistol Assn.*, 66 Cal. App. 4th at 1320 (“The
21 relevant question is not whether a statute *grants* the City a power, but whether a statute *deprives*
22 the City of a power already bestowed upon the City by the Constitution.”).

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

26 ¹ *See* Plaintiffs’ Req. Jud. Ntc. ISO Motion for Summary Judgment Ex. F, p. 75-76 (packet pp.
27 203-04) (from adopted City Council Staff Report dated Oct. 24, 2018); *id.* Ex. F, p. 277 (packet p.
28 405) (from City Council presentation in agenda packet dated Oct. 24, 2018).

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

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

8 **C. Plaintiffs Fail to Overcome the Presumption Against Preemption**

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

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

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

25 Plaintiffs also argue, in error, that the Court cannot look to *Nordyke v. King* to inform its
26 duplication analysis here. 27 Cal. 4th at 883. (Pls.’ Opp’n., p. 16). A straightforward application of
27 that case shows that Morgan Hill’s Ordinance does not precisely duplicate Prop. 63. Yet Plaintiffs
28 attempt to distinguish *Nordyke* by focusing on the “authority” of the acting locality, as well as

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

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

12 Plaintiffs fail to carry their burden of showing that the Ordinance contradicts Prop. 63.
13 They argue that the Ordinance contradicts state law because it prohibits “what state law, at least
14 implicitly, allows.” (Pls.’ Opp’n., p. 17). They do not cite any case law for this standard, and
15 contrary to Plaintiffs’ claim, the inquiry for preemption by contradiction is whether the local law
16 “directly requires what [a state] statute forbids or prohibits what the state enactment demands.”
17 *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 56 Cal. 4th 729, 743-
18 44 (Cal. 2013). Plaintiffs fail to name any conduct that the Ordinance *requires* but Prop. 63
19 *forbids*; not have they named conduct Prop. 63 *demand*s but the Ordinance *prohibits*.

20 Instead, Plaintiffs continue to rely on an outdated 1920 decision issued before signs for
21 motorized speed limits were commonplace. (Pls.’ Opp’n., p. 18). *Ex parte Daniels*, 183 Cal. 636,
22 641-648 (1920). They point to this case to argue that the Ordinance contradicts Prop. 63 because it
23 is not “reasonably possible” for gun owners passing through Morgan Hill to learn, in the event of
24 losing a firearm, about the local Ordinance. (Pls.’ Opp’n., p. 18). *Daniels* does not stand for the
25 broad notion that state law preempts any local requirement that is difficult for pass-through
26 travelers to learn about. *Daniels*, 183 Cal. at 641–48 (“local legislation fixing a lesser speed limit”
27 than a state law maximum would *not* contradict state law, but “would be merely an additional
28 regulation”). *Daniels* found that state law preempted a local speed limit because state law

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1 authorized a reasonable speed anywhere in the state. The Court found such a flexible standard
2 preempted a specified 15 mile-per-hour speed limit. *See* Defs.’ Opp’n. Pls.’ Mot. Summ. J., pp.
3 14-16, 22-24.

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

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

15 Plaintiffs fail to show that California law fully occupies the area of lost and stolen firearm
16 reporting laws. Plaintiffs concede that Prop. 63 lacks express preemption language. (Pls.’ Opp’n.,
17 p. 21). Therefore Plaintiffs must provide signs that “clearly indicate” voters’ intent for Prop. 63 to
18 fully occupy the field of firearm regulation or theft-reporting. *See Sherwin-Williams Co. v. City of*
19 *Los Angeles*, 4 Cal. 4th 893 (Cal. 1993); *California Rifle & Pistol Assn.*, 66 Cal. App. 4th at 1302.
20 A “clear” indicator is required because, if the Legislature impliedly intended to preempt local
21 regulation, it could easily have simply said it was doing so, as it has done many times before. *See*
22 *id* at 1317.

23 Plaintiffs fail to point to any such “clear” indicator, relying on the mere fact that state law
24 has set a 5-day timeframe for reporting lost or stolen firearms as evidence of preemption. *E.g.*,
25 Pls.’ Opp’n., p. 23 (“Prop 63 voters did, in fact, specify the ‘appropriate time for individuals to
26 report lost or stolen firearms’ . . . *That time is five days.*”). But California does not “fully and
27 completely cover” a field simply by passing one standard in a given area. *See Daniels*, 183 Cal. at
28 641–48 (“local legislation fixing a lesser speed limit” than a state law maximum “would be merely

1 an additional regulation”). Otherwise, there would be no need for an implied preemption test: any
2 state regulatory standard would impliedly apply throughout the state and exclude local legislation.
3 But municipalities are presumptively allowed to set their own standards. *See Cal. Rifle & Pistol*
4 *Assn.*, 66 Cal. App. 4th at 1317 (implied preemption claims “courts will find implied preemption
5 only if the purpose and scope of a state regulatory scheme “clearly indicate[s]’ a legislative intent
6 to preempt”).

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

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

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

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

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

19 As Morgan Hill explained in prior memoranda, not only have Plaintiffs failed to show that
20 voters impliedly intended to preempt local firearm theft-reporting requirements, Prop. 63 actually
21 shows the opposite. The evidence of intent shows that voters did *not* intend to preempt local
22 regulation, nor did they intend to impliedly overturn the 18 local laws already on the books that
23 imposed a shorter local time-frame for firearm theft-reporting. (*See* Defs.’ Mot. Summ. J. pp. 17-
24 19; Defs.’ Opp’n. Pls.’ Mot. Summ. J., pp. 14-16). Local measures like the Morgan Hill Ordinance
25 do not “obstruct the accomplishment and execution of [Prop. 63’s] full purposes and objectives.”
26 *Fiscal*, 158 Cal. App. 4th at 911. Instead, these measures advance and are consistent with Prop.
27 63’s purpose “[t]o require the reporting of lost or stolen firearms to law enforcement,” (Allison
28 Decl. ISO Morgan Hill MSJ, Ex. 8 at p. 164, sec. 3, ¶ 6), and are therefore not preempted.

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

3 Plaintiffs have not provided any reason to disturb the conclusion that “[l]aws designed to
4 control the sale, use or possession of firearms in a particular community have very little impact on
5 transient citizens, indeed, far less than other laws that have withstood preemption challenges.”
6 *Great W. Shows*, 27 Cal. 4th at 867.³

7 **D. Plaintiffs’ Evidentiary Objections are Immaterial**

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

17 Morgan Hill therefore opposes Plaintiffs objections on grounds that any disputes Plaintiffs
18 wish to raise to the studies’ credibility are immaterial to whether the Ordinance is preempted.
19 Objections to immaterial evidence are improper. *Reid v. Google, Inc.*, 50 Cal. 4th 512, 532 (Cal.
20 2010) (parties should “raise only meritorious objections to items of evidence that are legitimately
21 in dispute *and pertinent* to the disposition of the summary judgment motion”) (emphasis added).

22 **V. CONCLUSION**

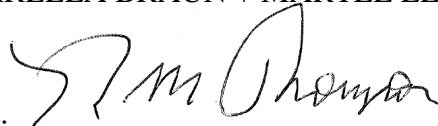
23 Plaintiffs fail to overcome the presumption that the challenged Ordinance is not preempted
24 by Prop. 63. The Court should deny Plaintiffs’ Motion for Summary Judgment and grant summary
25 judgment to Morgan Hill.

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

1 Dated: June 23, 2020

FARELLA BRAUN + MARTEL LLP

2
3 By:



4 Roderick M. Thompson

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

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Case #19CV346360
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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA
DOWNTOWN COURTHOUSE**

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

Plaintiffs and Petitioners,

vs.

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

Defendants and Respondents

Case No: 19CV346360

**REPLY TO DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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

Action filed: April 15, 2019

1 **I. THE CITY’S ORDINANCE IMPROPERLY DUPLICATES STATE LAW, RAISING SERIOUS**
2 **DOUBLE JEOPARDY CONCERNS**

3 Courts do not strike down local laws that duplicate state law just because they are interested
4 in cleaning up the state and local code systems to ensure they are free of redundancy. Were that the
5 goal, perhaps the City could get away with passing ordinances that differ ever so slightly from state
6 law as to not be complete copies, as it did with its theft-reporting ordinance. But courts have long
7 barred duplicative local laws for a much more important reason: they raise critical double jeopardy
8 concerns. As the California Supreme Court has held, “[t]he reason that a conflict . . . is said to exist
9 where an ordinance duplicates state law is that a conviction under the ordinance will operate to bar
10 prosecution under state law for the same offense.” (*Cohen v. Bd. of Supervisors* (1985) 40 Cal.3d
11 277, 292.) So even if an ordinance were intended to cover some purported shortcoming in state law,
12 it is still preempted when it “denounces as criminal precisely the same acts which are attempted to
13 be prohibited by the code.” (*In re Sic* (1887) 73 Cal. 142, 146.)

14 The City tries to justify its redundant ordinance by insisting that because the City’s reporting
15 period is shorter, the behavior prohibited is distinct from what state law prohibits. (Defs.’ Oppn.,
16 pp. 11-12.) It is not. While the City is correct that local ordinances may, sometimes, tighten
17 restrictions imposed by state law (Defs.’ Oppn., p. 12-13), in this case both state and local law
18 prohibit the same action—losing a firearm and failing to report it. The City’s ordinance merely
19 tightens the reporting window by three days. Even if the Court finds that such is a significant
20 enough distinction, double jeopardy concerns are no doubt implicated whenever someone reports a
21 firearm lost or stolen on the sixth day or later or fails to report it altogether. For, in those situations,
22 the failure to report offends *both* state and local law. When an ordinance prohibits the same acts
23 forbidden by state law, the ordinance is “void to the extent that it duplicates the state enactment.”
24 (*People v. Commons* (1944) 64 Cal.App.2d Supp. 925, 929.) At absolute minimum, the City’s law
25 is preempted as to any cases in which the state can assert its jurisdiction; otherwise, there would be
26 a conflict. (*Fiscal v. City & Cty. of S.F.* (2008) 158 Cal.App.4th 895, 913, fn. 7 (“*Fiscal*”).)

27 The City’s reliance on *Nordyke v. King* (2002) 27 Cal.4th 875 (“*Nordyke*”) misses the mark.
28 There, Alameda County banned possession of firearms at gun shows at its fairgrounds, presenting

1 the California Supreme Court with a narrow issue: “Does state law regulating the possession of
2 firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county
3 property?” (*Id.* at p. 880.) Answering that question, the Court relied on the county’s broad statutory
4 authority to regulate commercial activities on its own property, holding that under state law

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

10 (*Id.* at pp. 882-885, italics added.) In short, *Nordyke* stands for little more than the proposition that
11 state gun-show laws—which expressly contemplate further local regulation—do not preclude local
12 governments from banning the possession of firearms *at gun shows held on county-owned property*.
13 The Court observed that “possessing a gun on county property is not identical to the crime of
14 possessing an unlicensed firearm that is concealable or loaded, nor is it a lesser included offense,
15 and therefore someone may lawfully be convicted of both offenses” (*Nordyke, supra*, 27 Cal.4th at
16 p. 883), so the case is distinguishable as the state and local authorities restricted very distinct
17 violations. Here, the City’s ordinance *does* criminalize the same behavior state law criminalizes—
18 failing to report the loss or theft of a firearm to local law enforcement. This is precisely the sort of
19 local intrusion into state affairs that preemption prohibits.

20 **II. THE CITY’S ORDINANCE CONTRADICTS STATE LAW, AND THE CITY IS NOT FREE TO**
21 **ADOPT A STRICTER THEFT-REPORTING REQUIREMENT**

22 As Plaintiffs have shown, the City’s theft-reporting law contradicts state law because it
23 prohibits Plaintiff Kirk and members of Plaintiff CRPA from doing what state law allows them to
24 do—i.e., take up to five days before they must report the theft or loss of their firearms. (Pls.’ Mot,
25 p. 13; Pls.’ Oppn., p. 17.) In response, the City characterizes its theft-reporting law as being like a
26 lower local speed limit that, under *Ex Parte Daniels* (1920) 183 Cal. 636,¹ would not be preempted.

27 ¹ The City argues that Plaintiffs misrepresent *Daniels* to support a rule that localities may not
28 fix speed limits lower than those set by state law without violating contradiction preemption.
(Defs.’ Oppn., pp.15-16.) But Plaintiffs are not arguing that the City may never adopt a stricter

(Defs.’ Oppn., pp. 15-16.) The argument is much like the City’s argument in its motion for summary judgment that local governments are free to narrow that which state law permits by creating stricter local requirements. (Defs.’ MSJ, pp. 11-12.) But as explained in Plaintiffs’ opposition, such local action is not always permissible. (Pls.’ Oppn., pp. 18-20.) In short, controlling precedent tells us two things. First, under *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729, 743 (“*Riverside*”), stricter local regulation is preempted when it is not “reasonably possible” to comply with both state and local law. (Pls.’ MSJ, pp. 13-14; Pls.’ Oppn., pp. 18-19, 20.) And second, under *In re Hoffman* (1909) 155 Cal. 114, 118, stricter local regulation is appropriate if it serves a special local interest. (Pls.’ Oppn., p. 19-20.)

Taken together, these precedents make clear that the City’s ordinance simply does not fit within the City’s limited authority to impose stricter requirements than state law provides.

A. It Is Not “Reasonably Possible” to Comply with Both State and Local Law

The test here is not whether, as the City suggests, it is “impossible” to comply with both the City’s ordinance and state law. (Defs.’ Oppn., p. 15.) It is whether it is “*reasonably possible*” (*Riverside, supra*, 56 Cal.4th 729, 743) to comply with both, a phrase that necessarily has a meaning distinct from what is merely “possible.” Plaintiffs have shown that it is not *reasonably possible* for transients to know the City’s ordinance differs from statewide law, and thus it is not *reasonably possible* to comply with both laws—you cannot comply with a law of which you are unaware, after all. (Pls.’ MSJ, pp. 13-14; Pls.’ Oppn., pp. 18-20.) Claiming otherwise, the City presumes that the first thing someone passing through Morgan Hill will do is drive to a local gun store to ask about regulations. (Defs.’ Oppn., pp. 11-12, n. 5.) This may seem “reasonable” from the pages of a legal brief divorced from the reality of how even the most responsible people behave, but it is in fact neither reasonable nor realistic.

Even if someone who experiences firearm theft might understand that falling victim to that crime carries some duty to report, the existence of and compliance with statewide theft-reporting regulation, like a lower speed limit. Rather, Plaintiffs use *Daniels* to illustrate a point about the reasonableness of compliance with a local law that transient citizens are unlikely to know of, given statewide law setting a different standard. (Pls.’ MSJ, p. 14; Pls.’ Oppn., p. 19.) That is, in situations where it is unreasonable to expect that transients would know of stricter local restrictions, like *Daniels*, it is not *reasonably possible* to comply with both state and local law.

requirements, of which both residents and transients are more likely to be aware, make it unlikely that victims would think to check whether some local law imposes a *different* reporting duty on them. Indeed, they are likely to have a false sense that they *have* complied with their reporting duty because they are informed by what they reasonably believe to be the supreme state law.

Even so, claiming there is no harm, the City leans on the common law presumption that “ignorance of a law is no excuse.” (Defs.’ Oppn., n. 6.) But to the extent that maxim does not violate due process as applied to the City’s ordinance,² it reveals precisely why the ordinance is preempted. It does not derive from preemption doctrine as a shield to allegations that a local law contradicts state law, it is a criminal law presumption that tells us that one cannot escape liability simply because they were ignorant of the law. Because “ignorance of the law” is no defense, the City’s theft-reporting mandate exposes individuals to unjust criminal prosecution for violating a law that they were reasonably unaware even existed.

Turning again to *Nordyke*, the City suggests it is reasonable to expect travelers to take affirmative steps to learn the local laws of every city they visit. (Defs.’ Oppn., p. 15.) But to accept the City’s position would essentially invalidate the third test for implied preemption. Certainly, if the fact that travelers could technically learn the local laws of all the cities they pass through were enough to overcome the threat that a “patchwork quilt” of local laws poses, there would never be reason to find preemption due to the effect on transient citizens. But that test is not only well-settled, it applies *because* transients are unlikely to know the laws in the cities they pass through.

B. The City Cites No Special Local Need Related to Theft-reporting

The City has never identified what special local need cities have related to theft reporting. To the contrary, the City’s briefing reveals that the City passed the ordinance as a response to “its citizens’ desire to take action on gun violence in light of the Parkland mass shooting,” and not any

² The U.S. Supreme Court has held that the presumption offends due process when the law criminalizes a “wholly passive” failure to register and there is no proof that one would know of their duty to do so. (*Lambert v. California* (1957) 355 U.S. 223, 230.) There, a woman convicted of forgery was unaware of a local ordinance requiring that she register as a felon if in Los Angeles for more than five days. (*Id.* at p. 226.) The Court recognized that her failure to register was a “wholly passive act . . . unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.” (*Id.* at p. 228.) The Court thus held that “actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction . . . can stand.” (*Id.* at p. 229.)

1 local need. (Defs.’ MSJ, p. 1.) What’s more, in adopting its ordinance, the City cited four general
 2 purposes for theft-reporting, but never mentioned any “significant local interest” in requiring
 3 reporting within 48 hours, rather than five days. (SUMF Nos. 47-52. See also Pls.’ Req. Jud. Ntc.
 4 Ex. D, at pp. 42, 46-46, Ex. F, at pp. 73-88, 265-289, Ex. H, at pp. 308-309, Ex. J, pp. 347-362.)
 5 And those four purposes are nearly identical to the goals of Prop 63’s statewide theft-reporting
 6 scheme. (Pls.’ MSJ, pp. 21-22.) But the City cites nothing to suggest that Prop 63 does not
 7 adequately address those interests or that its ordinance is better suited to serve them—likely
 8 because it *cannot*. (Pls.’ MSJ, pp. 22-23; Pls.’ Oppn., pp. 13-15; SUMF Nos. 47-52.)

9 The City’s only genuine attempt to show that theft reporting is a matter of local concern
 10 relies on a 2011 report about youth violence in San Mateo County, ostensibly to show that crimes
 11 involving guns vary from one community to the next, and thus the strategies for reducing those
 12 crimes must similarly vary. (Defs.’ Oppn., p. 10.) Concededly, in California, the broad field of gun
 13 control, generally, is not a matter of exclusive state concern for this very reason. (See *Suter v. City*
 14 *of Lafayette* (1997) 57 Cal.App.4th 1109. But see *Great W. Shows v. Cty. of L.A.* (2002) 27 Cal.4th
 15 867, 866 [recognizing that gun control is not exclusively a state concern, but narrower subsets of
 16 that field may be].) But the cited report provides no basis to believe that local governments have
 17 some special need for theft reporting that does not apply to communities throughout the state. It
 18 merely finds that youth violence in San Mateo County was a costly problem and, without a shred of
 19 data that theft-reporting would do anything to address that problem, recommends that cities adopt
 20 mandatory theft reporting laws (among other gun control measures). (Barvir Decl., Ex. MM, at p.
 21 192.) And it made that proposal years *before* California voters adopted Prop 63, enacting a
 22 comprehensive statewide theft-reporting scheme addressing the same general interests the City has.

23 **III. THE CITY’S ORDINANCE INTRUDES UPON A FIELD FULLY OCCUPIED BY STATE LAW**

24 **A. Prop 63 Created a Comprehensive Statewide Scheme, “Clearly Indicating”** 25 **Voter Intent to Preempt Local Regulation**

26 Through Prop 63, California voters enacted a firearm theft-reporting mandate that “fully and
 27 completely” (*O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067) covers the subject of
 28 theft reporting through a robust statewide scheme aimed at addressing both state and local concerns

1 and regulating all manner of conduct related to reporting firearm theft and loss (Pls. MSJ, pp. 16-
 2 17, discussing SUMF Nos. 12-18), making it exclusively a matter of state concern. And to be
 3 abundantly clear, it is this effect of the voters' enactment that matters, not the say-nothing
 4 preambles of Prop 63 the City would prefer to focus on. When "voters enact a state law by ballot
 5 initiative, voter intent is considered in place of the Legislature's." (Defs.' MSJ, p. 14, citing *Persky*
 6 *v. Bushey* (2018) 21 Cal.App.5th 810, 818-819.) Like a legislature then, evidence of the voters'
 7 subjective intent is secondary to the operation and effect of their enactment. (*S.F. Apartment Assn.*
 8 *v. City & Cty. of S.F.* (2016) 3 Cal.App.5th 463, 476.) Indeed, "[t]he motives of the legislators . . .
 9 will always be presumed to be to accomplish that which follows as the natural and reasonable effect
 10 of their enactments." (*Cty. of L.A. v. Superior Court (Burroughs)* (1975) 13 Cal.3d 721, 726.) The
 11 "natural and reasonable effect" of Prop 63's comprehensive, statewide scheme is to fully occupy the
 12 field of theft reporting, preempting local regulation. So resort to extrinsic evidence of subjective
 13 voter intent is unnecessary and improper.³

14 In response to Plaintiffs' argument that, on its face, state law regarding theft reporting is
 15 comprehensive and thus fully occupies the field, the City suggests that, under *Fiscal*, Plaintiffs must
 16 show that the preempting state law represents a "broad, evolutionary statutory scheme." (Defs.'
 17 Oppn., pp. 18-19) But just because that was the sort of state law at issue in *Fiscal*, does not limit the
 18 application of Type 1 implied field preemption to such instances. And the City cites nothing to
 19 support its suggestion that a single state-law enactment (rather than an "evolutional" statutory
 20 scheme) cannot fully occupy the field. As long as the enactment "fully and completely" covers the
 21 subject matter such that it has become a matter of exclusive state concern, it preempts.

22 Attacking Plaintiffs' reference to section 25250's myriad exemptions, the City again
 23 mischaracterizes Plaintiffs' argument, claiming that "the California Supreme Court has twice

24 ³ The City misunderstands Plaintiffs' argument as regards "voter intent," suggesting that
 25 they claim only that the drafters' failure to expressly authorize local action regarding theft reporting
 26 implies an intent to preempt. (Defs.' Oppn., p. 21.) While it is significant that Prop 63's drafters
 27 saw fit to include *three express references* to local regulation in other sections of the measure—but
 28 did not as to theft-reporting—that is not the extent of Plaintiffs' argument. To reiterate, it is the
 "natural and reasonable effect" of the enactment which is presumed to establish the lawmakers'
 intent. (*Burroughs, supra*, 13 Cal.3d at p. 726.) And the statewide scheme, which is comprehensive
 by design and effect, clearly evinces the voters' intent to occupy the field. For a full analysis of
 voter intent, see Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, pp. 11-13.

1 rejected the argument that, *without more*, a state law that provides exceptions preempts a local law
 2 that omits those exceptions.” (Defs. Oppn., pp. 19-20, citing *Nordyke, supra*, 27 Cal.4th at p. 884;⁴
 3 *Riverside, supra*, 56 Cal.4th at p. 759, italics added.)⁵ But Plaintiffs do not argue otherwise. Rather,
 4 Plaintiffs examine the various exemptions as just a part of a broader, fully comprehensive scheme
 5 regulating the entire field of firearm theft reporting. The exceptions do not stand “alone.” For that
 6 reason, the City’s reliance on *Riverside* and *Nordyke* is inapt. In *Riverside*, the California Supreme
 7 Court held that the Compassionate Use Act and the Medical Marijuana Program did not preempt a
 8 local *zoning* laws barring the operation of medical marijuana dispensaries within city limits. (56
 9 Cal.4th at p. 762. The Court reasoned:

10 *The CUA and the MMP create no all-encompassing scheme for the control*
 11 *and regulation of marijuana for medicinal use.* These statutes, both carefully
 12 worded, *do no more* than exempt certain conduct by certain persons from
 certain state criminal and nuisance laws against the possession, cultivation,
 transportation, distribution, manufacture, and storage of marijuana.

13 (*Riverside, supra*, 56 Cal.4th at p. 757, italics added.) The *Nordyke* Court’s holding was similarly
 14 narrow because the law at issue merely created an exception to state laws barring firearm
 15 possession in government buildings, nothing more. (*Ibid.*) Unlike both cases, Prop 63 *does* establish
 16 an all-encompassing statewide scheme. (Pls.’ Mot., pp. 16-17, citing Pls.’ SUMF Nos. 10-18.)
 17 While it may be true that state-level exceptions “without more” may not establish preemption of
 18 local laws, there is indisputably “more” here. There is a comprehensive statewide scheme that fully
 19 addresses firearm theft reporting, fully occupying the field and preempting local action.

20 **B. The City’s Law Frustrates the Statewide Theft-reporting Scheme**

21 Assuming (without conceding) that Plaintiffs must prove the City’s law “stands as an
 22 obstruction to the accomplishment and execution of the full purposes and objectives of the” state
 23 scheme (*Fiscal, supra*, 158 Cal.App.4th at p. 911), the City’s law does just that. While the City

24
 25 ⁴ The City also City misrepresents the conclusions the *Nordyke* Court reached. The Court
 26 stated that it was possible that the ordinance at issue was partially preempted as to those exceptions,
 though it declined to rule on that issue. (*Nordyke, supra*, 27 Cal.4th at p. 884.) While it is clear to
 Plaintiffs that MHMC section 9.40.030 is fully preempted, at best, the City’s argument makes the
 point that their ordinance is only *partially* preempted.

27 ⁵ The City also suggests that Plaintiffs must prove the exceptions are “so essential that
 28 localities cannot impose their own regulations on exempt individuals.” (Defs.’ Oppn., p. 20.) The
 City cites nothing for this “rule,” and it is not the test cited in *Riverside*.

1 pretends that its ordinance harmoniously coexists with state law simply because it is technically
2 possible to comply with both laws, the City’s ordinance erect substantial barriers to the
3 achievement of Prop 63’s “purposes and objectives” that the City ignores. (Defs.’ Oppn., pp. 14-
4 15.) For instance, the City’s law may *deter* theft-reporting by those who live in or lose their
5 firearms in Morgan Hill. Indeed, it is not difficult to imagine a layperson losing a firearm in the
6 City and, thinking they have five days to report the loss, missing the City’s brief 48-hour reporting
7 deadline. If, between days three and five, the individual learns of the City’s unique reporting
8 requirement, they would reasonably fear being charged with a crime and might be less likely to
9 report the loss at all.⁶ Worse yet, under these circumstances, the City’s law would likely prevent
10 state prosecution for failure to report because, under the Fifth Amendment, the firearm theft victim
11 cannot be forced to incriminate himself by reporting the theft after day three and essentially turning
12 himself in for violating the City’s ordinance. Similarly, enforcement of the City’s law against any
13 person who fails to report or waits more than five days strips the state of its authority to prosecute a
14 violation of section 25250. In short, the City argues that its ordinance is in harmony with state law.
15 But by impeding the state’s objectives by deterring reporting after day two and interfering with the
16 state’s ability to prosecute the violation of its laws, the ordinance is painfully out of tune.

17 **IV. THE CITY’S ORDINANCE INTRUDES UPON A FIELD THAT PARTIALLY OCCUPIED BY STATE**
18 **LAW, AND ITS ADVERSE EFFECTS ON TRANSIENT CITIZENS FAR OUTWEIGH ANY**
19 **POSSIBLE BENEFIT TO THE CITY**

20 Countless Californians may travel through the City with firearms while on a hunting trip, as
21 part of a move, or for any number of other reasons. Should their firearm be lost or stolen while they
22 are within the City’s limits, they would have to comply with both state law and local law. Yet the
23 City’s ordinance gives them three fewer days to report, a fact of which they are unlikely to be
24 aware, exposing them to unjust criminal prosecution for unknowing violations of the law. (See
25 *supra* Part II.A.) If local governments are free to deviate from state law, enacting their own theft-
26 reporting ordinances at will, each arbitrarily setting any number of days to report, a “patchwork
27 quilt” of varying reporting mandates will confront gun owners whenever they move about the state.

28 ⁶ See Barvir Decl., Ex. LL, p. 179 [explaining that firearm theft-reporting requirements might have the unintended consequence of discouraging reporting if firearm owners miss the deadline].)

1 Citing an example of a Morgan Hill resident who loses their firearm outside the City, the
 2 City itself provides a good example of the threat facing City residents as they move about the state.
 3 (Defs.’ MSJ, p. 11.) That person would have to report the theft to MHPD within 48 hours under
 4 local law. (SUMF No. 22.) Then, under state law, they’d have to report the theft in a duplicate
 5 report within five days to the police in the city where the theft occurred. (SUMF No. 13.) Unless, of
 6 course, it occurred in a city with its own reporting period, in which case the victim would need to
 7 make a duplicate report within some other window. The wildly varying local laws governing theft
 8 reporting expose transient Californians to *criminal prosecution* for unknowing violations of local
 9 law and, where they have failed to report within five days, violation of both state *and* local laws for
 10 identical conduct. This is just the sort of harm to transients that preemption seeks to avoid.

11 In response to Plaintiffs’ concerns, the City once more argues that there is no harm to
 12 transient citizens because they are expected to know the laws of the cities through which they
 13 travel. (Defs.’ Oppn., pp. 24-25.) But again, if this were all that was necessary to defeat a claim of
 14 undue burden on transients, it is not clear that there would ever be a threat sufficient to overcome a
 15 city’s vague assertion of its “interests.” (See *supra* Part II.A., p. 5.) The third test for preemption
 16 may as well not exist. What’s more, the City’s reliance on *Galvan v. Superior Court* (1969) 70
 17 Cal.2d 851 (“*Galvan*”) to make its point is unhelpful. For the City ignores that the ordinance at
 18 issue specifically *protected* transient citizens from undue burden. The *Galvan* Court held:

19 We find that the San Francisco gun law places no undue burden on transient
 20 citizens. *Indeed, the ordinance was drafted to prevent such a burden.* The
 21 law, applicable to firearms possessed by persons in San Francisco, provides
 for a seven-day exemption, and thus excludes those transients who might
 otherwise be burdened.

22 (*Id.* at p. 864, italics added.) Here, the City did not bother to include any such exemption for
 23 transient citizens. To the contrary, it went out of its way to ensure the law did apply to them. And,
 24 as discussed below, the burden that places on these Californians is all the more intolerable because
 25 the City cites no local interest that state law does not already serve.

26 Under Type 3 implied preemption, “[t]he significant issue in determining whether local
 27 regulation should be permitted depends upon a ‘balancing of two conflicting interests: (1) the needs
 28 of local governments to meet the special needs of their communities; and (2) the need for uniform

1 state regulation.’ [citation].” (*Robins v. Cnty. of L.A.* (1966) 248 Cal.App.2d 1, 9-10 (“*Robins*”).)
2 Plaintiffs have repeatedly pointed out that the City never asserts a single local interest related to
3 theft reporting that state law does not already address. (Pls.’ MSJ, pp. 21-23; Pls.’ Oppn., pp. 13-
4 15.) Rather than address Plaintiffs’ criticism, the City pivots, claiming that it need not engage in an
5 “effectiveness analysis.” (Defs.’ Oppn., pp. 25-26.) But Plaintiffs do not argue that preemption
6 generally requires that localities prove their laws will be effective to pass muster. But, under
7 controlling precedent, it is significant that the City cannot show that its 48-hour reporting
8 requirement is likely to serve any interest not already served by the state’s five-day requirement.

9 Again, under *Robins*, the City must show some particular local interest related to theft
10 reporting and that state law does not address that interest with “reasonable adequacy.” (Pls.’ MSJ,
11 p. 21.) This is because this type of preemption considers “[1] whether substantial geographic,
12 economic, ecological or other distinctions are persuasive of the need for local control, and [2]
13 whether local needs have been adequately recognized and comprehensively dealt with at the state
14 level.” (*Robins, supra*, 248 Cal.App.2d at p. 10.) The City fails on both counts. First, before the
15 Court can even consider whether state theft-reporting law “adequately recognize[s] and
16 comprehensively deal[s] with” (*ibid.*) the City’s special needs, the City must disclose what those
17 needs are. But the City refuses to identify any interest sensitive to differing local circumstances.
18 (See *supra* Part II.B.) Instead, it makes sweeping generalizations about the need for theft reporting
19 based on increasing firearm theft and crimes involving guns throughout the country. (Defs.’ Oppn.,
20 pp. 25-26.) Second, because there is no reliable evidence that a shortened reporting period would
21 provide any benefit to the City beyond what state law provides (SUMF No. 53), the adverse effects
22 on transients outweighs any possible benefit to the City. The ordinance is preempted.

23 **V. CONCLUSION**

24 For these reasons, the Court should grant Plaintiffs’ Motion for Summary Judgment, deny
25 the City’s, and enter an order enjoining enforcement of MHMC section 9.04.030.

26 Dated: June 25, 2020

MICHEL & ASSOCIATES, P.C.

s/ Anna M. Barvir

Anna M. Barvir

Attorney for Plaintiffs

PROOF OF SERVICE
STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

On June 25, 2020, I served the foregoing document(s) described as

**REPLY TO DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

on the interested parties in this action by placing

☐ the original
☒ a true and correct copy

thereof by the following means, addressed as follows:

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

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

Executed on June 25, 2020, at Long Beach, California.

s/ Laura Palmerin
Laura Palmerin

FILED
JUL 30 2020

Clerk of the Court
Superior Court of CA County of Santa Clara
BY [Signature] DEPUTY
S. Hernandez

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

*Order Issued
on Submitted Matter*

G. MITCHELL KIRK, et al.,

Plaintiffs,

vs.

CITY OF MORGAN HILL, et al.,

Defendants,

Case No. 19-CV-346360

ORDER RE: MOTIONS FOR
SUMMARY JUDGMENT

The following matters came on for hearing before the Honorable Peter H. Kirwan on July 30, 2020, at 9:00 a.m. in Department 19: (1) the motion by plaintiffs G. Mitchell Kirk ("Kirk") and California Rifle Pistol Association, Incorporated ("CRPA") (collectively, "Plaintiffs") for summary judgment of the complaint; and (2) the motion by defendants City of Morgan Hill (the "City"), Morgan Hill Chief of Police David Swing, and Morgan Hill City Clerk Irma Torrez (collectively, "Defendants") for summary judgment of the complaint. The matters having been submitted, the Court finds and orders as follows:

Factual and Procedural Background

This is an action for declaratory, injunctive, and writ relief. According to the allegations of the complaint, California voters enacted Proposition 63 (“Prop 63”) on November 8, 2016. (Complaint, ¶ 4.) Prop 63 was an omnibus gun-control initiative that included a mandatory reporting requirement for all victims of firearm theft within the state, Penal Code section 25250. (*Ibid.*) That statute requires victims of firearm theft within the state to report to a local law enforcement agency that a firearm has been stolen within five days of the theft or within five days after the victim reasonably becomes aware of the theft. (*Ibid.*)

The City adopted Ordinance No. 2289 (the “Ordinance”) on October 24, 2018, to amend section 9.04.030 of the Morgan Hill Municipal Code (“Municipal Code”). (Complaint, ¶ 1.) The Ordinance has been in full force and effect since its enactment, and Defendants have enforced and are currently enforcing Municipal Code section 9.04.030. (*Id.* at ¶ 11.) The intended effect of the Ordinance was to require persons to report the theft of their firearms to local law enforcement. (*Id.* at ¶ 2.) Under the new law, victims of firearm theft in the City—whether residents or visitors—must report to the City’s Police Department that a firearm has been stolen within 48 hours of the theft or within 48 hours after the victim reasonably becomes aware of the theft. (*Ibid.*)

As amended by the Ordinance, Municipal Code section 9.04.030 now reads as follows:

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

(Complaint, ¶ 3.) The language in Municipal Code section 9.04.030 mirrors the language in other theft reporting ordinances adopted by other California cities. (*Id.* at ¶ 3, fn. 1.)

1 Kirk is a resident of the City and a firearm owner. (Complaint, ¶ 13.) In the event Kirk
2 is a victim of firearm theft, he is subject to the requirements of the Ordinance. (*Ibid.*) Kirk has,
3 within the past year, paid sales taxes and property taxes while a resident of the City, with
4 portions of the proceeds of those taxes transferred to the City for funding general law
5 enforcement activities of its police department, including training its officers on the enforcement
6 of the Ordinance. (*Ibid.*)

7 CRPA is a nonprofit membership organization incorporated under the laws of California
8 that works to preserve and expand constitutional and statutory rights of gun ownership, including
9 the right to self-defense and the right to keep and bear arms. (Complaint, ¶ 14.) Many of
10 CRPA's members reside in the City or the surrounding county, conduct business in the City, visit
11 or travel through the City, or are otherwise subject to the Municipal Code. (*Ibid.*) CRPA
12 represents its members both in their general interest as citizens and in their particular interest in
13 the right to lawfully own and possess firearms. (*Ibid.*)

14 Plaintiffs claim that declaratory and writ relief is warranted because an actual controversy
15 has arisen and now exists between them and Defendants over the validity of the Ordinance, and
16 there is no adequate remedy in the ordinary course of law. (Complaint, ¶¶ 10 & 22.) Plaintiffs
17 allege that “[b]y passing Prop 63 and enacting [Penal Code] section 25250, voters caused state
18 law to occupy the whole of the field of firearm-theft-reporting, such that a local ordinance that
19 purports to prescribe reporting requirements for firearm theft, like the Ordinance, is preempted.”
20 (*Id.* at ¶ 5.) Plaintiffs further allege that the Ordinance is preempted because it conflicts with the
21 less onerous reporting requirement set forth in Penal Code section 25250. (*Id.* at ¶ 6.) “Because
22 those preempted portions of the Ordinance continue to remain in effect, and because there is a
23 danger that firearm-theft victims who reside in or who are victimized in the City may be subject
24 to prosecution for conduct that Penal Code section 25250 deems lawful, Plaintiffs[] seek judicial
25 relief declaring the Ordinance, codified at Municipal Code 9.04.030, to be void as preempted by
26 state law.” (*Id.* at ¶¶ 8 & 12.) Specifically, Plaintiffs ask the Court to declare that “the
27 Ordinance is preempted by state law because: (1) it duplicates state law that obligates victims of
28 firearms theft to report such theft to a law enforcement agency; (2) it contradicts state law that

1 sets for[th] the maximum time period by which such theft must be reported; or (3) it enters into
2 areas fully occupied by the state.” (*Id.* at ¶ 24.) Plaintiffs urge that a judicial declaration is
3 necessary and appropriate at this time so that they may ascertain their rights and duties without
4 first subjecting themselves to criminal liability by violating the Ordinance. (*Id.* at ¶ 12.)
5 Plaintiffs further contend that Defendants’ ongoing enforcement of an invalid law constitutes a
6 waste of taxpayer funds and an undue burden on them. (*Ibid.*) Plaintiffs also seek a permanent
7 injunction “forbidding Defendants, their agents, employees, representatives, and all those acting
8 in concert with them from enforcing the Ordinance, and further requiring Defendants to remove
9 corresponding Municipal Code [section] 9.04.030 from the ... Municipal Code.” (*Id.* at ¶ 28.)

10 Based on the foregoing allegations, Plaintiffs filed a complaint for declaratory and
11 injunctive relief and petition for writ of mandate and/or prohibition against Defendants on April
12 15, 2019. Defendants filed an answer on July 19, 2019. Dismissal of Plaintiffs’ second cause of
13 action for a writ of mandate and/or prohibition was entered as requested on July 26, 2019. Thus,
14 the first cause of action for declaratory and injunctive relief is the only claim that remains at
15 issue.

16 Thereafter, Plaintiffs and Defendants filed cross-motions for summary judgment of the
17 complaint. The parties then filed oppositions and replies in connection with the pending
18 motions. The motions were originally set for hearing on July 2, 2020, but the Court continued
19 the hearing to July 30, 2020.

20 Discussion

21 I. Plaintiffs’ Motion for Summary Judgment

22 Pursuant to Code of Civil Procedure section 437c, Plaintiffs move for summary judgment
23 of the complaint on the ground that Municipal Code section 9.04.030 is preempted by Penal
24 Code section 25250.

25 A. Plaintiffs’ Request for Judicial Notice

26 Plaintiffs ask the Court to take judicial notice of: chapters from the Municipal Code; the
27 Ballot Pamphlet for Prop 63; excerpts from the Morgan Hill City Council Agenda Packets;
28

1 minutes from Morgan Hill City Council Meetings; excerpts from a Santa Cruz City Council
2 Agenda Packet; and municipal code provisions enacted in other municipalities in California.

3 Defendants do not oppose Plaintiffs' request for judicial notice.

4 The Court may properly take judicial notice of the foregoing materials as "[r]egulations
5 and legislative enactments issued by or under the authority of the United States or any public
6 entity in the United States" and "[o]fficial acts of the legislative, executive, and judicial
7 departments of the United States and any state of the United States." (Evid. Code, § 452, subds.
8 (b) & (c); see *Otay Land Co., LLC v. U.E. Limited, L.P.* (2017) 15 Cal.App.5th 806, 826, fn. 9
9 [taking judicial notice of documents comprising the legislative history of a statute]; see also *St.*
10 *John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 967, fn. 5 (*St.*
11 *John's*) [taking judicial notice of a ballot pamphlet text and arguments in favor of a proposition];
12 *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1027 [courts may take
13 judicial notice of local ordinances and the official resolutions, reports, and other official acts of a
14 city], disapproved on other grounds in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th
15 1193, 1202-1203; *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th
16 172, 178, fn. 3 [taking judicial notice of city council agenda].)

17 Accordingly, Plaintiffs' request for judicial notice is GRANTED.

18 **B. Legal Standard**

19 "A motion for summary judgment shall be granted when 'all the papers submitted show
20 that there is no triable issue as to any material fact and that the moving party is entitled to a
21 judgment as a matter of law.' ([Code Civ. Proc.,] § 437c, subd. (c).) Where a plaintiff moves for
22 summary judgment, the plaintiff bears the initial burden of showing that there is no defense to a
23 cause of action by proving each element of the cause of action entitling the plaintiff to judgment.
24 (Code Civ. Proc., § 437, subd. (p)(1); see *Paramount Petroleum Corporation v. Super.*
25 *Ct.* (2014) 227 Cal.App.4th 226, 241.) If the plaintiff makes such a showing, the burden then
26 shifts to the defendant to show that a triable issue of one or more material facts exists as to a
27 cause of action or a defense thereto. (*Ibid.*)

1 For purposes of establishing their respective burdens, the parties involved in a motion for
2 summary judgment must present admissible evidence, which is to say the motion is evidentiary
3 in nature and cannot be based solely upon the allegations in a complaint. (*Saporta v.*
4 *Barbagelata* (1963) 220 Cal.App.2d 463 (*Saporta*).) In ruling on the motion, however, a court
5 cannot weigh the evidence presented or deny summary judgment on the ground any particular
6 evidence lacks credibility. (*Melrich Builders v. Super. Ct.* (1984) 160 Cal.App.3d 931, 935
7 (*Melrich*); *Lerner v. Super. Ct.* (1977) 70 Cal.App.3d 656, 660 (*Lerner*).) As summary
8 judgment “is a drastic remedy eliminating trial,” the court must liberally construe evidence in
9 support of the party opposing summary judgment and resolve all doubts concerning the evidence
10 in favor of that party. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389 (*Dore*);
11 see also *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717-718 (*Hepp*).)

12 **C. State Law Preemption In General and As Applied to Gun Control**

13 “ ‘ “Under article XI, section 7 of the California Constitution, ‘[a] county or city may
14 make and enforce within its limits all local, police, sanitary, and other ordinances and regulations
15 not in conflict with general [state] laws.’ [¶] ‘If otherwise valid local legislation conflicts
16 with state law, it is preempted by such law and is void.’ [Citations.] [¶] ‘A conflict exists if
17 the local legislation “ ‘duplicates, contradicts, or enters an area fully occupied by general law,
18 either expressly or by legislative implication.’ ” ’ [Citations.]” [Citations.]’ [Citation.]” (*People*
19 *v. Nguyen* (2014) 222 Cal.App.4th 1168, 1174 (*Nguyen*).)

20 “Local legislation is ‘duplicative’ of general law when it is coextensive therewith.”
21 (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 (*Sherwin-Williams*).)
22 The term “coextensive” means having the same scope or boundaries, or corresponding exactly in
23 extent. (See Lexico Online Dict. <https://www.lexico.com/en/definition/coextensive> [as of July
24 27, 2020]; see also Merriam-Webster Dict. <https://www.merriam->
25 [webster.com/dictionary/coextensive](https://www.merriam-webster.com/dictionary/coextensive) [as of July 27, 2020]; *Nordyke v. King* (2002) 27 Cal.4th
26 875, 883 (*Nordyke*) [stating that a local ordinance duplicates state law if it criminalizes precisely
27 the same acts as the state law]; *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27
28 Cal.4th 853, 865 (*Great Western*) [same].) Local legislation is not duplicative of state law if the

1 local legislation increases the requirements set forth in the state law. (See e.g., *Suter v. City of*
2 *Lafayette* (1997) 57 Cal.App.4th 1109, 1123 (*Suter*) [“An ordinance duplicates state law if it is
3 coextensive with state law. [Citation.] Section 8–609, although echoing the provisions of Penal
4 Code section 12071, is not co-extensive with it. Rather, it increases the storage requirements set
5 forth in the Penal Code.”].)

6 “[L]ocal legislation is ‘contradictory’ to general law when it is inimical thereto.”
7 (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898.) “ ‘[A] local ordinance is not impliedly
8 preempted by conflict with state law unless it “mandate[s] what state law expressly forbids, [or]
9 forbid[s] what state law expressly mandates.” [Citation.] That is because, when a local
10 ordinance “does not prohibit what the statute commands or command what it prohibits,” the
11 ordinance is not “inimical to” the statute. [Citation.]’ [Citation.]” (*Browne v. County of*
12 *Tehama* (2013) 213 Cal.App.4th 704, 721 (*Browne*); *Great Western, supra*, 27 Cal.4th at p. 866.)
13 Where it is possible to comply with both the local legislation and the state law, the local
14 legislation does not contradict state law. (See e.g., *Suter, supra*, 57 Cal.App.4th at p. 1124.)

15 “[L]ocal legislation enters an area that is ‘fully occupied’ by general law when the
16 Legislature has expressly manifested its intent to ‘fully occupy’ the area [citation], or when it has
17 impliedly done so in light of one of the following indicia of intent: ‘(1) the subject matter has
18 been so fully and completely covered by general law as to clearly indicate that it has become
19 exclusively a matter of state concern; (2) the subject matter has been partially covered by general
20 law couched in such terms as to indicate clearly that a paramount state concern will not tolerate
21 further or additional local action; or (3) the subject matter has been partially covered by general
22 law, and the subject is of such a nature that the adverse effect of a local ordinance on the
23 transient citizens of the state outweighs the possible benefit to the’ locality [citations].”
24 (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898.)

25 “ ‘ “Whether state law preempts a local ordinance is a question of law” [Citation.]’
26 [Citation.]” (*Nguyen, supra*, 222 Cal.App.4th at p. 1177; *Browne, supra*, 213 Cal.App.4th at p.
27 718.) “ ‘The party claiming that general state law preempts a local ordinance has the burden of
28 demonstrating preemption.’ [Citation.]” (*Nguyen, supra*, 222 Cal.App.4th at p. 1177.)

1 “ ‘[W]hen local government regulates in an area over which it traditionally has exercised
2 control, ..., California courts will presume, absent a clear indication of preemptive intent from the
3 Legislature, that such regulation is *not* preempted by state statute. [Citation.]’ [Citations.] ‘The
4 presumption against preemption accords with [the] more general understanding that “it is not to
5 be presumed that the legislature in the enactment of statutes intends to overthrow long-
6 established principles of law unless such intention is made clearly to appear either by express
7 declaration or by necessary implication.” [Citations.]’ [Citation.]” (*In re Jennifer S.* (2009) 179
8 Cal.App.4th 64, 69; *Browne, supra*, 213 Cal.App.4th. at p. 719.) In addition, courts “ ‘have been
9 particularly “reluctant to infer legislative intent to preempt a field covered by municipal
10 regulation when there is a significant local interest to be served that may differ from one locality
11 to another.” ’ [Citation.] ‘ “The common thread of the cases is that if there is a significant local
12 interest to be served which may differ from one locality to another then the presumption favors
13 the validity of the local ordinance against an attack of state preemption.” ’ [Citation.]” (*City of*
14 *Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 744
15 (*City of Riverside*).)

16 “A review of the gun law preemption cases indicates that the Legislature has preempted
17 discrete areas of gun regulation rather than the entire field of gun control.” (*Great Western,*
18 *supra*, 27 Cal.4th at p. 861.) In response to cases determining that various local laws were not
19 preempted by state law, the Legislature’s response has been measured and limited, extending
20 state preemption into narrow areas in which legislative interest had been aroused, but at the same
21 time carefully refraining from enacting a blanket preemption of all local firearms regulation. (*Id.*
22 at pp. 861-863; *Suter, supra*, 57 Cal.App.4th at pp. 1119-1120.) For example, in response to
23 *Galvan v. Superior Court* (1969) 70 Cal.2d 851 (*Galvan*), the Legislature adopted Government
24 Code section 9619, the predecessor to current Government Code section 53071, which made
25 clear an “intent ‘to occupy the whole field of registration or licensing of ... firearms.’ ” (*Id.* at p.
26 862.) Similarly, in response to *Olsen v. McGillicuddy* (1971) 15 Cal.App.3d 897, the Legislature
27 enacted Government Code section 53071.5, which expressly occupies the field of the
28 manufacture, possession, or sale of imitation firearms. (*Id.* at p. 863.) “In sum, a review of case

1 law and the corresponding development of gun control statutes in response to that law
2 demonstrates that the Legislature has chosen not to broadly preempt local control of firearms but
3 has targeted certain specific areas for preemption.” (*Id.* at p. 864; *Suter, supra*, 57 Cal.App.4th
4 at p. 1119 [“That state law tends to concentrate on specific areas, leaving unregulated other
5 substantial areas relating to the control of firearms, indicates an intent to permit local
6 governments to tailor firearms legislation to the particular needs of their communities.”].)

7 With this framework in mind, the Court turns to California law regulating the reporting of
8 lost or stolen firearms to determine whether and to what extent the Legislature has preempted
9 this area of the law.

10 **D. Analysis**

11 Plaintiffs contend Penal Code section 25250 preempts Municipal Code section 9.04.030
12 because: (1) Municipal Code section 9.04.030 duplicates Penal Code section 25250; (2)
13 Municipal Code section 9.04.030 contradicts Penal Code section 25250; (3) the subject matter
14 has been so fully and completely covered by state law as to clearly indicate that it has become
15 exclusively a matter of state concern; and (4) the subject matter has been partially covered by
16 state law, and the subject is of such a nature that the adverse effect of Municipal Code section
17 9.04.030 on the transient citizens of the state outweighs the possible benefit to the City.

18 In opposition, Defendants assert Municipal Code section 9.04.030 is not preempted by
19 Penal Code section 25250 because: (1) Municipal Code section 9.04.030 does not duplicate
20 Penal Code section 25250; (2) Municipal Code section 9.04.030 does not contradict Penal Code
21 section 25250; (3) the subject matter has not been so fully and completely covered by state law
22 as to clearly indicate that it has become exclusively a matter of state concern; and (4) although
23 the subject matter has been partially covered by state law, and the subject is of such a nature that
24 the adverse effect of Municipal Code section 9.04.030 on the transient citizens of the state does
25 not outweigh the possible benefit to the City.

1 **1. Municipal Code Section 9.04.030 is Not Duplicative of Penal Code**
2 **Section 25250**

3 Plaintiffs argue Municipal Code section 9.04.030 duplicates Penal Code section 25250
4 because they both prohibit a person from failing to report a lost or stolen firearm to local law
5 enforcement. Plaintiffs state that Municipal Code section 9.04.030 requires any person who
6 owns or possesses firearm to report the theft or loss of that firearm to the Morgan Hill Police
7 Department within 48 hours, and applies to any resident of the City or any theft or loss of a
8 firearm that occurs in the City. Plaintiffs assert this duplicates Penal Code section 25250, which
9 also requires gun owners to report firearm theft or loss, but gives them five days to make the
10 report. Plaintiffs contend Municipal Code section 9.04.030 is duplicative of Penal Code section
11 25250 because a person will violate both local law and state law if the person lives in or has their
12 firearm stolen or lost within the City and fails to report it.

13 Conversely, Defendants argue Municipal Code section 9.04.030 is not duplicative of
14 Penal Code section 25250 merely because it is possible to violate both local law and state law by
15 failing to report a lost or stolen firearm. Defendants contend that instead of asking whether it is
16 merely possible to violate both state law and local law, courts ask whether the local law prohibits
17 precisely the same acts that are prohibited by state law. Defendants assert that although
18 Municipal Code section 9.04.030 and Penal Code section 25250 prohibit some of the same acts,
19 Municipal Code section 9.40.030 imposes stricter reporting requirements than Penal Code
20 section 25250 and some acts are punishable under Municipal Code section 9.04.030 but not
21 Penal Code section 25250 or vice-versa.

22 Penal Code section 25250 states:

23 (a) Commencing July 1, 2017, every person shall report the loss or theft of
24 a firearm he or she owns or possesses to a local law enforcement agency in
25 the jurisdiction in which the theft or loss occurred within five days of the
26 time he or she knew or reasonably should have known that the firearm had
27 been stolen or lost.

1 (b) Every person who has reported a firearm lost or stolen under
2 subdivision (a) shall notify the local law enforcement agency in the
3 jurisdiction in which the theft or loss occurred within five days if the
4 firearm is subsequently recovered by the person.

5 (c) Notwithstanding subdivision (a), a person shall not be required to
6 report the loss or theft of a firearm that is an antique firearm within the
7 meaning of subdivision (c) of Section 16170.

8 Municipal Code section 9.04.030 provides:

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

15 As Defendants persuasively argue, Municipal Code section 9.04.030 is not duplicative of
16 Penal Code section 25250 because the local law is not coextensive with the state law. (See
17 *Sherwin-Williams, supra*, 4 Cal.4th at p. 897 [“Local legislation is ‘duplicative’ of general law
18 when it is coextensive therewith.”].) Municipal Code section 9.04.030 does not have the same
19 scope or boundaries as Penal Code section 25250 and it does not criminalize precisely the same
20 acts. (See Lexico Online Dict. <https://www.lexico.com/en/definition/coextensive> [as of July 27,
21 2020]; see also Merriam-Webster Dict. [https://www.merriam-
22 webster.com/dictionary/coextensive](https://www.merriam-webster.com/dictionary/coextensive) [as of July 27, 2020]; *Nordyke, supra*, 27 Cal.4th at p. 883
23 [stating that a local ordinance duplicates state law if it criminalizes precisely the same acts as the
24 state law]; *Great Western, supra*, 27 Cal.4th at p. 865 [same].) For example, a resident of the
25 City who waits three days to report a lost or stolen firearm would violate Municipal Code section
26 9.04.030, but not Penal Code section 25250. Similarly, a resident of the City whose gun was
27 stolen in San Jose and who timely reported the theft to the City’s police department would
28 violate Penal Code section 25250, but not Municipal Code section 9.04.030. Additionally, a

1 resident of the City who lost his gun in San Jose and reported to the City's police department
2 four days later would violate both Municipal Code section 9.04.030 and Penal Code section
3 25250, but for different reasons. Municipal Code section 9.04.030 is not duplicative of Penal
4 Code section 25250 because it imposes different and stricter reporting requirements than state
5 law (i.e., Municipal Code section 9.04.030 requires lost or stolen firearms to be reported within
6 48 hours while Penal Code section 25250 requires lost or stolen firearms be reported within 5
7 days). (See *Suter, supra*, 57 Cal.App.4th at p. 1123 ["An ordinance duplicates state law if it is
8 coextensive with state law. [Citation.] Section 8–609, although echoing the provisions of Penal
9 Code section 12071, is not co-extensive with it. Rather, it increases the storage requirements set
10 forth in the Penal Code."]; see also *Great Western, supra*, 27 Cal.4th at pp. 865-866 [although a
11 local ordinance prohibiting the sale of firearms or ammunition on county property overlapped in
12 some respects with state statutes prohibiting the sale of certain dangerous firearms, the local
13 ordinance was not duplicative of the state statutes because the crimes were not identical].)

14 **2. Municipal Code Section 9.04.030 is Not Contradictory to Penal Code**
15 **Section 25250**

16 Plaintiffs argue Municipal Code section 9.04.030 contradicts Penal Code section 25250
17 because Municipal Code section 9.04.030 prohibits them from doing what Penal Code section
18 25250, at least implicitly, allows them to do—take up to five days to report a lost or stolen
19 firearm to a local law enforcement agency in the jurisdiction in which the theft or loss occurred.
20 Plaintiffs contend taking up to five days to report a theft or loss of a firearm is authorized by
21 state law and it is not reasonably possible for citizens passing through the City to know that the
22 Ordinance differs from state law. Plaintiffs cite the case of *Ex parte Daniels* (1920) 183 Cal. 636
23 (*Daniels*) to support is position.

24 In opposition, Defendants assert Plaintiffs advance an incorrect test as Plaintiffs claim an
25 ordinance is preempted by contradiction if it prohibits locally what state statute authorizes.
26 Defendants contend the correct test is that an ordinance is preempted by contradiction only if it
27 prohibits what the state statute commands or commands what it the state statute prohibits.
28 Defendants argue Municipal Code section 9.04.030 does not contradict Penal Code section

1 25250 because Municipal Code section 9.04.030 does not prohibit what Penal Code section
2 25250 mandates or mandate what Penal Code section 25250 prohibits. Defendants point out that
3 Municipal Code section 9.04.030 requires gun owners to report firearm loss or theft within 48
4 hours and Penal Code section 25250 allows, but does not require, waiting up to 5 days before
5 reporting the loss or theft of a firearm. Defendants conclude a person can thus reasonably
6 comply with both the Ordinance and state law by reporting the loss or theft of a firearm to the
7 City's police department within 48 hours.

8 As Defendants persuasively argue, Municipal Code section 9.04.030 is not contradictory
9 to Penal Code section 25250 because it is not inimical to Penal Code section 25250. (*Sherwin-*
10 *Williams, supra*, 4 Cal.4th at p. 898 ["[L]ocal legislation is 'contradictory' to general law when it
11 is inimical thereto."].) A local ordinance is only inimical to a state statute if it mandates what
12 state law expressly forbids, or forbids with state law expressly mandates. (See *Browne, supra*,
13 213 Cal.App.4th at p. 721 [" '[A] local ordinance is not impliedly preempted by conflict with
14 state law unless it "mandate[s] what state law expressly forbids, [or] forbid[s] what state law
15 expressly mandates." [Citation.] That is because, when a local ordinance "does not prohibit
16 what the statute commands or command what it prohibits," the ordinance is not "inimical to" the
17 statute. [Citation.] [Citation.]"]; see also *Great Western, supra*, 27 Cal.4th at p. 866 [same];
18 *Sherwin- Williams, supra*, Cal.4th at p. 902 [same].) Here, Municipal Code section 9.04.030
19 requires a person who owns or possesses a firearm to report the theft or loss of the firearm to the
20 City's police department within 48 hours of the time he or she knew or reasonably should have
21 known that the firearm had been stolen or lost, whenever the person resides in the City or the
22 theft or loss of the firearm occurs in the City. The conduct mandated by Municipal Code section
23 9.04.030 is not prohibited by Penal Code section 25250, which allows a person to report a lost or
24 stolen firearm to a local law enforcement agency within five days from the time a person knew
25 or reasonably should have known that the firearm had been stolen or lost. Moreover, Municipal
26 Code section 9.04.030 does not prohibit conduct that Penal Code section 25250 expressly
27 mandates. Penal Code section 25250 merely permits reporting of lost or stolen firearms up to
28 five days from the time a person knew or reasonably should have known that the firearm had

1 been stolen or lost; the statute does not expressly mandate that persons wait up to five days
2 before reporting a lost or stolen firearm.

3 Furthermore, Municipal Code section 9.04.030 is not inimical to Penal Code section
4 25250 because it is reasonably possible to comply with both Municipal Code section 9.04.030
5 and Penal Code section 25250. (See *Suter, supra*, 57 Cal.App.4th at p. 1124 [providing that
6 where it is possible to comply with both the local legislation and the state law, the local
7 legislation does not contradict state law]; see also *City of Riverside, supra*, 56 Cal.4th at pp. 743
8 & 754-755 “[N]o inimical conflict will be found where it is reasonably possible to comply with
9 both the state and local laws.”]; *Great Western, supra*, 27 Cal.4th at p. 866 [ordinance banning
10 sale of firearms or ammunition on county property was not “inimical” to state statutes
11 contemplating lawful existence of gun shows; ordinance did not require what state law forbade
12 or prohibit what state law demanded].) For example, a gun owner who resides in the City and
13 learns that his firearm has been stolen in the City can comply with both Municipal Code section
14 9.04.030 and Penal Code section 25250 by reporting the theft of the firearm to the City’s police
15 department within 48 hours.

16 Lastly, *Daniels* does not undermine the foregoing analysis. In *Daniels*, the court opined
17 that if the Legislature “had merely fixed the maximum speed limit, it is clear that local
18 legislation fixing a lesser speed limit would not be in conflict therewith, but would be merely an
19 additional regulation.” (*Daniels, supra*, 183 Cal. at p. 645.) Instead, the Legislature made it
20 unlawful to travel at an unreasonable or unsafe speed. (*Id.* at p. 643.) The court determined that
21 a city ordinance fixing a speed limit of 15 miles per hour was a declaration of the local
22 legislative body to the effect that to exceed the limit would be unreasonable, and thereby
23 foreclosed the question of the reasonableness of the speed and substituted the judgment of the
24 local legislative body for the judgment of a jury. (*Id.* at pp. 644 & 647-648.) The court stated:

25 It is evident that the two plans are in direct conflict and that the conflict is a very
26 material one. Under the state law a motor vehicle driver, provided he keeps
27 within the limits expressly fixed by law, is only confronted with the problem of
28 keeping his vehicle at a speed which reasonable men would conclude to be a

1 reasonable speed. While, on the other hand, he is confronted with an arbitrary
2 rule fixed by a local legislative body, so that he would be wholly within his rights
3 in traveling at a speed of 14.9 miles, and violating a criminal law if traveling at a
4 speed of 15.1 miles, whereas, in fact, it might be much more reasonable to travel
5 at a speed of 15.1 miles sometimes on that particular highway than to travel at a
6 slower rate of speed at other times when the traffic was more congested.

7 (*Id.* at p. 644.) For these reasons, the court held that the local ordinance was in direct conflict
8 with the state law. (*Id.* at pp. 647-648.)

9 The state law at issue in this case, Penal Code section 25250, is readily distinguishable
10 from the state law at issue in *Daniels* and much more akin to the hypothetical state law
11 mentioned in *Daniels*, which merely fixed a maximum speed limit. (See *Daniels, supra*, 183
12 Cal. at p. 645 [if the Legislature “had merely fixed the maximum speed limit, it is clear that local
13 legislation fixing a lesser speed limit would not be in conflict therewith, but would be merely an
14 additional regulation”].) Consequently, *Daniels* does not compel a different outcome in this
15 case.

16 **3. Municipal Code Section 9.04.030 Does Not Enter an Area Fully**
17 **Occupied by State Law**

18 **a. The Subject Matter Has Not Been so Fully and Completely**
19 **Covered by State Law as to Clearly Indicate That It Has**
20 **Become Exclusively a Matter of State Concern**

21 Plaintiffs argue Municipal Code section 9.04.030 enters an area fully occupied by state
22 law because the subject matter has been so fully and completely covered by state law as to
23 clearly indicate that it has become exclusively a matter of state concern. Plaintiffs contend state
24 law not only establishes a basic reporting requirement for stolen and lost firearms (i.e., Penal
25 Code, 25250, subdivision (a)), but provides a statewide scheme aimed at addressing both state
26 and local concerns and regulating all manner of conduct related to reporting firearm theft and
27 loss (i.e., Penal Code sections 25250, subdivisions (b)-(c), 25255, 25260, 25265, 25270, and
28 27275). Plaintiffs point out that Penal Code section 25270 details what facts must be part of a

1 report to law enforcement; Penal Code section 25250, subdivision (b) addresses the recovery of
2 lost or stolen firearms, giving a person who owns or possesses a recovered firearm five days to
3 notify local law enforcement of its recovery; Penal Code section 25260 directs every sheriff or
4 police chief to submit description of each firearm that has been reported lost or stolen to the
5 Department of Justice Automated Firearms System; and Penal Code section 25275 makes it
6 crime to knowingly make false report. Plaintiffs further highlight that Penal Code sections
7 25250, subdivision (c) and 25255 contain several exceptions to the reporting requirement,
8 exempting persons such as law enforcement officers and military members. Plaintiffs assert that
9 it makes no sense that state law would inform firearm owners so fully as to their rights and
10 responsibilities regarding theft-reporting, only for local governments to disrupt that scheme by
11 interjecting their own contradictory reporting requirements. Finally, Plaintiffs note that other
12 provisions in the Penal Code (i.e., Prop 63, Section 9, Penal Code section 26915, subdivisions
13 (d) and (f), and Penal Code section 25275, subdivision (b)) expressly sanction additional local
14 gun regulation and conclude that the absence of such language in the reporting provisions
15 demonstrates that no further local regulation was intended.

16 Conversely, Defendants argue the subject matter has not been so fully and completely
17 covered by state law as to clearly indicate that it has become exclusively a matter of state
18 concern. Defendants assert that Prop 63 did not establish a statewide scheme regulating all
19 manner of conduct related to reporting lost or stolen firearms, but merely adopted six narrow and
20 procedural code sections addressing only some circumstances related to reporting lost or stolen
21 firearms. Defendants note that courts have previously determined that state gun regulations
22 spanning multiple Penal Code sections could not reasonably be said to show a comprehensive
23 scheme for the regulation of the particular subject to the exclusion of local regulation.
24 Defendants contend Prop 63's reporting provisions are not obstructed, frustrated, or rendered
25 null by local law requiring people to report lost or stolen guns in 48 hours; rather, Municipal
26 Code section 9.04.030 is in synergy with the purpose of Prop 63. Defendants further assert that
27 the exceptions to the state law reporting requirement do not create a clear indication of
28 preemptive intent because a statutory exception from a state law does not mandate that local

1 governments preserve the exception. Finally, Defendants urge that Prop 63 contemplates local
2 regulation of reporting of lost or stolen firearms because Penal Code section 25270 states that a
3 report must include any additional relevant information required by the local law enforcement
4 agency taking the report. Defendants conclude that Penal Code section 25270 shows voters had
5 no problem with local variations in lost or stolen firearms reporting—which already existed
6 when the statute was adopted in the 17 localities with their own timeframes for theft reporting—
7 and intentionally incorporated local law enforcement discretion into state law.

8 Here, the subject matter of Municipal Code section 9.04.030 is the reporting of lost or
9 stolen firearms. (See *Sherwin-Williams, supra*, 4 Cal.4th at p. 904 [“The first potential indicium
10 of implied preemptive intent focuses on whether the subject matter of the ordinance has been so
11 covered by the statute as to clearly indicate that the field has become exclusively a matter of state
12 concern. [¶] At the outset, the subject matter of the ordinance must be specified”].)

13 It appears that Prop 63 does not exclusively cover the field of reporting lost or stolen
14 firearms such that the matter is exclusively a matter of state concern and there is no room for
15 supplementary or complementary local legislation. (See *Nguyen, supra*, 222 Cal.App.4th at p.
16 1174 [“ ‘If the subject matter or field of the legislation has been fully occupied by the state, there
17 is no room for supplementary or complementary local legislation [Citations.]’ ”].)

18 As is relevant here, the “Findings and Declarations” section for Prop 63 states:

19 [] Under current law, stores that sell ammunition are not required to report to law
20 enforcement when ammunition is lost or stolen. Stores should have to report lost
21 or stolen ammunition within 48 hours of discovering that it is missing so law
22 enforcement can work to prevent that ammunition from being illegally trafficked
23 into the hands of dangerous individuals.

24 [] Californians today are not required to report lost or stolen guns to law
25 enforcement. This makes it difficult for law enforcement to investigate crimes
26 committed with stolen guns, break up gun trafficking rings, and return guns to
27 their lawful owners. We should require gun owners to report their lost or stolen
28 guns to law enforcement.

1 (Ds. RJN, Ex. A.)

2 Similarly, the “Purpose and Intent” section for Prop 63 provides:

3 [] To keep guns and ammunition out of the hands of convicted felons, the
4 dangerously mentally ill, and other persons who are prohibited by law from
5 possessing firearms and ammunition.

6 [¶]

7 [] To require all stores that sell ammunition to report any lost or stolen
8 ammunition within 48 hours of discovering that it is missing.

9 [¶]

10 [] To require the reporting of lost or stolen firearms to law enforcement.

11 (Ds. RJN, Ex. A.)

12 The Voter Guide for Prop 63 contained arguments for the initiative, stating that initiative
13 would “[r]equire people to notify law enforcement if their guns are lost or stolen, before the
14 weapons end up in the wrong hands,” “help police shut down gun trafficking rings and locate
15 caches of illegal weapons,” and “help police recover stolen guns before they’re used in crimes
16 and return them to their lawful owners.”

17 (Ds. RJN, Ex. B.)

18 Municipal Code section 9.04.030 is not inconsistent with the purpose of Prop 63, but
19 synergistic as it also requires the reporting of lost or stolen firearms. (See *Fiscal v. City and*
20 *County of San Francisco* (2008) 158 Cal.App.4th 895 [“[C]ourts have found, in the absence of
21 express preemptive language, that a city or county may make additional regulations, different
22 from those established by the state, if not inconsistent with the purpose of the general law.”]; see
23 also *Great Western, supra*, 27 Cal.4th at p. 868 [“when a statute or statutory scheme seeks to
24 promote a certain activity and, at the same time, permits more stringent local regulation of that
25 activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the
26 statute’s purpose.”].)

27 Moreover, the steps that Prop 63 took in pursuit of its objectives were limited and
28 specific. Prop 63 contains a handful of code sections—Penal Code sections 25250, 25255,

1 25260, 25265, 25270, and 25275—that address certain aspects of the reporting of lost or stolen
2 firearms. Specifically, these provisions address the reporting of lost or stolen firearms,
3 exceptions to the reporting requirements, the submission of a description of lost or stolen
4 firearms, violations and penalties, information required when reporting a lost or stolen firearm,
5 and violations and penalties for making a false report. These statutes do not exclusively cover
6 the field of reporting lost or stolen firearms because their scope is limited. More significantly,
7 the provisions regarding the reporting of lost or stolen firearms contemplate local regulation.
8 (See *Suter, supra*, 57 Cal.App.4th at p. 1121 [“There can be no implied preemption of an area
9 where state law expressly allows supplementary local legislation.”].) Specifically, Penal Code
10 section 25270 states “[e]very person reporting a lost or stolen firearm pursuant to Section 25250
11 shall report the make, model, and serial number of the firearm, if known by the person, *and any*
12 *additional relevant information required by the local law enforcement agency taking the report.*”
13 Thus, the statutory scheme contemplates local regulation regarding the reporting of lost or stolen
14 firearms. Although the statutory scheme seeks to promote a certain activity (i.e., the reporting of
15 lost or stolen firearms), at the same time it permits more stringent local regulation of that
16 activity.

17 Case law demonstrates that rather than intending to deprive municipalities of their police
18 power to regulate guns, the Legislature has been cautious about depriving local municipalities of
19 aspects of their constitutional police power to deal with local conditions. (*California Rifle &*
20 *Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1318.) “The general fact
21 that state legislation concentrates on specific areas, and leaves related areas untouched (as has
22 been done here), shows a legislative intent to permit local governments to continue to apply their
23 police power according to the particular needs of their communities in areas not specifically
24 preempted.” (*Ibid.*) The fact that Prop 63 only addresses some aspects of reporting lost or stolen
25 firearms, and acknowledges the existence of local regulations regarding the reporting of lost or
26 stolen, is a rather clear indicator that the field has not been fully occupied by the state such that
27 there is no room for supplementary or complementary local legislation.

1 b. **Although the Subject Matter is Partially Covered by State**
2 **Law, the Subject is of Such a Nature that the Adverse Effect of**
3 **Municipal Code Section 9.04.030 on Transient Citizens Does**
4 **Not Outweigh the Possible Benefit to the City**

5 Plaintiffs argue Municipal Code section 9.04.030 enters an area fully occupied by state
6 law because the subject matter has been partially covered by state law, and the subject is of such
7 a nature that the adverse effect of Municipal Code section 9.04.030 on the transient citizens of
8 the state outweighs the possible benefit to the City. Plaintiffs contend Municipal Code section
9 9.04.030 has an adverse effect on transient citizens because it imposes “criminal penalties for
10 violating local laws they are unlikely to be aware of given contradictory state law.” Plaintiffs
11 assert transient citizens could face a “patchwork quilt” of varying reporting requirements that
12 confront gun owners as they move about the state. Plaintiffs also contend that the burden is not
13 outweighed by the possible benefit to the City because “[t]he City has identified no
14 particularized local interest not already purportedly served by state law” and it has not “identified
15 any ‘special need’ that could justify the harmful effects its contradictory theft-reporting law will
16 have on transient Californians.”

17 In opposition, Defendants argue there is no case law providing that local firearm laws
18 burden transient citizens because citizens are obligated to learn about gun regulations that differ
19 from state law. Defendants point out that courts have repeatedly held that local gun regulations
20 have an insignificant adverse effect on transient citizens, far less than other laws that have
21 withstood preemption challenges. Defendants also contend that Plaintiffs use the wrong test by
22 claiming Defendants must present evidence showing that the Ordinance more effectively
23 achieves a local purpose than state law. Defendants point out that the City sought to achieve a
24 number of benefits by adopting Municipal Code section 9.04.030. Defendants assert that those
25 possible benefits are not outweighed by the minimal impact on transient citizens.

26 As Defendants persuasively argue, laws designed to control the sale, use or possession of
27 firearms in a particular community have very little impact on transient citizens, indeed, far less
28 than other laws that have withstood preemption challenges. (*Great Western, supra*, 27 Cal.4th at

1 p. 867; *Suter, supra*, 57 Cal.App.4th at p. 1119.) Notably, Plaintiffs do not identify any case law,
2 and the Court is aware of none, providing that an obligation to learn about local laws that differ
3 from state law constitutes an adverse effect on transient citizens. (See *Schaeffer Land Trust v.*
4 *San Jose City Council* (1989) 215 Cal.App.3d 612, 619, fn. 2 (*Schaeffer*) “[A] point which is
5 merely suggested by a party’s counsel, with no supporting argument or authority, is deemed to
6 be without foundation and requires no discussion.”].) In any event, Municipal Code section
7 9.04.030 does not interfere with transient citizens any more than local ordinances prohibiting the
8 consumption of alcoholic beverages on the street, prohibiting gambling, or prohibiting
9 loitering—all of which were found not preempted by state law, and all of which apply to anyone
10 within the geographic confines of the city, not merely to residents. (See *Galvan, supra*, 70
11 Cal.2d at p. 865, superseded by statute as stated in *Great Western, supra*, 27 Cal.4th 853; see
12 also *In re Jennifer S.* (2009) 179 Cal.App.4th 64, 70-71 & 74 [opining that appellant’s argument
13 “that a transient person under the age of 21 who does not reside in Del Norte County could
14 potentially be adversely affected by the Ordinance ‘by drinking one alcoholic beverage and
15 stepping outside of a private home though such an act would not be punishable elsewhere in the
16 state’ ” lacked merit and failed to show that the potential adverse effects on transient citizens
17 outweighed the possible benefits to the county].)

18 Moreover, the fact that problems with firearms are likely to require different treatment in
19 different localities requires no elaborate citation of authority. (*Galvan, supra*, 70 Cal.2d at p.
20 864, superseded by statute as stated in *Great Western, supra*, 27 Cal.4th 853; *Great Western,*
21 *supra*, 27 Cal.4th at p. 867; *Suter, supra*, 57 Cal.App.4th at p. 1119.) The City identified several
22 possible benefits when it passed the Ordinance. (Allison Dec., Ex. 11, Morgan Hill City Council
23 Staff Report, Meeting Date October 24, 2018.) The City highlighted that its ongoing priorities
24 include enhancing public safety and supporting youth, seniors, and the entire community. (*Ibid.*)
25 The City found that laws requiring guns owners to report the loss or theft of a firearm serve
26 several purposes, such as helping law enforcement detect illegal behavior and charge criminals
27 who engage in it, protecting gun owners from criminal accusations when guns are recovered at a
28 crime scene, and making it easier for law enforcement to locate a lost or stolen firearm and return

1 it to its lawful owner. (*Ibid.*) The City also determined that the danger lost or stolen firearms
2 posed to public safety required a heightened level of accountability on the part of individuals
3 who choose to own firearms. (*Ibid.*) After acknowledging state law regarding the reporting of
4 lost and stolen firearms, the City noted that it had multiple local law enforcement agencies and it
5 was important to clarify that the appropriate local law enforcement agency to report lost or stolen
6 firearms to was the City's police department. (*Ibid.*) Finally, the City found that earlier
7 notification of lost or stolen firearms (i.e., within 48 hours instead of 5 days) allowed police to
8 more easily identify stolen weapons during the course of an investigation, provided an
9 opportunity for early identification, and may reduce the chance of lost or stolen firearms being
10 used in additional crimes. (*Ibid.*)

11 Plaintiffs do not cite any legal authority, and the Court is aware of none, providing that
12 Defendants must present evidence showing that the Ordinance effectively, or more effectively
13 than state law, achieved the possible benefits identified by the City. (See *Schaeffer, supra*, 215
14 Cal.App.3d at p. 619, fn. 2 [“[A] point which is merely suggested by a party's counsel, with no
15 supporting argument or authority, is deemed to be without foundation and requires no
16 discussion.”].) Instead, Plaintiffs were required to show that the adverse effect of the Ordinance
17 on the transient citizens of the state outweighs the possible benefit to the City. (See *Nguyen,*
18 *supra*, 222 Cal.App.4th at p. 1177 [“ ‘The party claiming that general state law preempts a local
19 ordinance has the burden of demonstrating preemption.’ [Citation.]”]; see also *Sherwin-*
20 *Williams, supra*, 4 Cal.4th at p. 898 [local legislation enters an area that is fully occupied by
21 general law when the subject matter has been partially covered by general law, and the subject is
22 of such a nature that the adverse effect of a local ordinance on the transient citizens of the state
23 outweighs the possible benefit to the locality].) Plaintiffs failed to meet their burden because the
24 possible benefits to the City are not outweighed by the minimal impact Municipal Code section
25 9.04.030 imposes on transient citizens.

26 **E. Conclusion**

27 Accordingly, Plaintiffs' motion for summary judgment is DENIED.
28

1 **II. Defendants' Motion for Summary Judgment**

2 Pursuant to Code of Civil Procedure section 437c, Defendants move for summary
3 judgment of the complaint on the ground that Municipal Code section 9.04.030 is not preempted
4 by Penal Code section 25250.

5 **A. Defendants' Request for Judicial Notice**

6 In connection with their moving papers, Defendants ask the Court to take judicial notice
7 of Prop 63 and the Voter Guide that accompanied Prop 63.

8 Plaintiffs do not oppose Defendants' request for judicial notice.

9 The Court may properly take judicial notice of the foregoing materials as “[r]egulations
10 and legislative enactments issued by or under the authority of the United States or any public
11 entity in the United States” and “[o]fficial acts of the legislative, executive, and judicial
12 departments of the United States and any state of the United States.” (Evid. Code, § 452, subs.
13 (b) & (c); see *St. John's*, *supra*, 50 Cal.4th at p. 967, fn. 5 [taking judicial notice of a ballot
14 pamphlet text and arguments in favor of a proposition]; see also *Nguyen*, *supra*, 222 Cal.App.4th
15 at p. 1175 [“The Legislature’s ‘ ‘intent with regard to occupying the field to the exclusion of
16 all local regulation is not to be measured alone by the language used but by the whole purpose
17 and scope of the legislative scheme.” [Citations.]’ [Citation.]”]; *Hogoboom v. Superior*
18 *Court* (1996) 51 Cal.App.4th 653, 659 [“In evaluating whether preemption has occurred, an
19 appellate court is not confined in ascertaining legislative intent to solely examining the language
20 used in the relevant statutes.”]; *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th
21 893, 905 [providing that courts may look to intrinsic and extrinsic materials to determine
22 whether an implied intent to preempt exists]; *Persky v. Bushey* (2018) 21 Cal.App.5th 810, 818
23 [“[E]xtrinsic evidence of the voters’ intent may include ... the ballot arguments for and against
24 the initiative.”]; *In re Ogea* (2004) 121 Cal.App.4th 974, 986, fn. 5 [taking judicial notice of
25 official voter information guide pertaining to a proposition].)

26 Accordingly, Defendants' request for judicial notice is GRANTED.
27
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1 **B. Plaintiffs' Request for Judicial Notice**

2 In connection with their opposition, Plaintiffs submit the same request for judicial notice
3 that they submitted in connection with their motion for summary judgment.

4 Defendants do not oppose Plaintiffs' request for judicial notice.

5 For the reasons explained above, Plaintiffs' request for judicial notice is GRANTED.

6 **C. Plaintiffs' Evidentiary Objections**

7 In connection with their opposition, Plaintiffs submit evidentiary objections to articles
8 attached to the declaration of James Allison, which are offered by Defendants in support of their
9 motion for summary judgment. Plaintiffs also submit objections to statements made by
10 Defendants in their memorandum of points and authorities.

11 The Court declines to rule on Plaintiffs' objections because they are not material to the
12 disposition of the motion. (See Code Civ. Proc., § 437c, subd. (q) ["In granting or denying a
13 motion for summary judgment ..., the court need rule only on those objections to evidence that it
14 deems material to its disposition of the motion."].)

15 **D. Legal Standard**

16 "Summary judgment is properly granted when no triable issue of material fact exists and
17 the moving party is entitled to judgment as a matter of law. A defendant moving for summary
18 judgment bears the initial burden of showing that a cause of action has no merit by showing that
19 one or more of its elements cannot be established or that there is a complete defense. Once the
20 defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of
21 one or more material facts exists as to that cause of action or a defense thereto.' 'There is a
22 triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to
23 find the underlying fact in favor of the party opposing the motion in accordance with the
24 applicable standard of proof.' " (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267,
25 1272, internal citations omitted.)

26 A trial court may grant summary adjudication on a cause of action for declaratory relief
27 when only legal issues are presented for its determination. (*City of Torrance v. Castner* (1975)
28 46 Cal.App.3d 76, 83, fn. 3.) "When seeking summary judgment on a claim for declaratory

1 relief, the defendant must show that the plaintiff is not entitled to a declaration in its favor by
2 establishing ‘(1) the sought-after declaration is legally incorrect; (2) [the] undisputed facts do not
3 support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is
4 appropriate for declaratory relief.’ [Citation.] If this is accomplished, the burden shifts to the
5 plaintiff to prove, by producing evidence of specific facts creating a triable issue of material fact
6 as to the cause of action or the defense.” (*Cates v. California Gambling Control Com.* (2007)
7 154 Cal.App.4th 1302, 1307-1308.) “When summary judgment is appropriate, the court should
8 decree only that plaintiffs are not entitled to the declarations in their favor.” (*Gafcon, Inc. v.*
9 *Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.)

10 For purposes of establishing their respective burdens, the parties involved in a motion for
11 summary judgment must present admissible evidence. (*Saporta, supra*, 220 Cal.App.2d at p.
12 468.) Additionally, in ruling on the motion, a court cannot weigh said evidence or deny
13 summary judgment on the ground that any particular evidence lacks credibility. (See *Melovich,*
14 *supra*, 160 Cal.App.3d at p. 935; see also *Lerner, supra*, 70 Cal.App.3d at p. 660.) As summary
15 judgment “is a drastic remedy eliminating trial,” the court must liberally construe evidence in
16 support of the party opposing summary judgment and resolve all doubts concerning the evidence
17 in favor of that party. (See *Dore, supra*, 39 Cal.4th at p. 389; see also *Hepp, supra*, 86
18 Cal.App.3d at pp. 717-718.)

19 **E. Analysis**

20 The arguments and evidence presented by the parties in connection with the instant
21 motion are virtually identical to the arguments and evidence that the presented in connection
22 with Plaintiffs’ motion for summary judgment. For the same reasons articulated above, the
23 undisputed material facts demonstrate that the declaration sought by Plaintiffs—that Municipal
24 Code section 9.04.030 is preempted by Penal Code section 25250—is legally incorrect.
25 Consequently, Defendants are entitled to summary judgment of the complaint.
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July 30, 2020

Peter H. Kravitz

Peter H. Kirwan
Judge of the Superior Court



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**
DOWNTOWN COURTHOUSE
191 NORTH FIRST STREET
SAN JOSÉ, CALIFORNIA 95113
CIVIL DIVISION

**Anna Marie Barvir
180 E Ocean Blvd Ste 200
Long Beach CA 90802**

RE: **G. MITCHELL KIRK vs. CITY of MORGAN HILL, et al.**
Case Number: **19CV346360**

PROOF OF SERVICE

Order Re: Motions for Summary Judgment was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408) 882-2700, or use the Court's TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on July 31, 2020. CLERK OF THE COURT, by Shantel Hernandez, Deputy.

cc: James Allison FARELLA BRAUN & MARTEL LLP 235 Montgomery Street 17th Floor San Francisco CA 94104

Document received by the CA 6th District Court of Appeal.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 268728 NAME: Anna M. Barvir FIRM NAME: Michel & Associates, P.C. STREET ADDRESS: 180 East Ocean Blvd., Suite 200 CITY: Long Beach STATE: CA ZIP CODE: 90802 TELEPHONE NO.: (562) 216-4444 FAX NO.: (562) 216-4445 E-MAIL ADDRESS: abarvir@michellawyers.com ATTORNEY FOR (name): G. Mitchell Kirk, et al.		Electronically Filed by Superior Court of CA, County of Santa Clara, on 1/12/2021 9:21 AM Reviewed By: A. Rodriguez Case #19CV346360 Envelope: 5621425
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.		
<input checked="" type="checkbox"/> NOTICE OF APPEAL <input type="checkbox"/> CROSS-APPEAL (UNLIMITED CIVIL CASE)		CASE NUMBER: 19-CV-346360

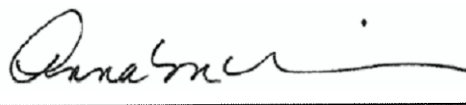
Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal. A copy of this form must also be served on the other party or parties to this appeal. You may use an applicable Judicial Council form (such as APP-009 or APP-009E) for the proof of service. When this document has been completed and a copy served, the original may then be filed with the court with proof of service.

1. NOTICE IS HEREBY GIVEN that (name): G. Mitchell Kirk and California Rifle & Pistol Association, Incorporated
appeals from the following judgment or order in this case, which was entered on (date): July 30, 2020
- ☐ Judgment after jury trial
☐ Judgment after court trial
☐ Default judgment
☐ Judgment after an order granting a summary judgment motion
☐ Judgment of dismissal under Code of Civil Procedure, §§ 581d, 583.250, 583.360, or 583.430
☐ Judgment of dismissal after an order sustaining a demurrer
☐ An order after judgment under Code of Civil Procedure, § 904.1(a)(2)
☐ An order or judgment under Code of Civil Procedure, § 904.1(a)(3)–(13)
☒ Other (describe and specify code section that authorizes this appeal):
 Order Granting a Summary Judgment Motion (please see attached Declaration of Anna M. Barvir for further explanation)
2. For cross-appeals only:
- a. Date notice of appeal was filed in original appeal:
- b. Date superior court clerk mailed notice of original appeal:
- c. Court of Appeal case number (if known):

Date: January 12, 2021

Anna M. Barvir

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY)

PROOF OF SERVICE
STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

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

On January 12, 2021, I served the foregoing document(s) described as

NOTICE OF APPEAL

on the interested parties in this action by placing

☐ the original
☒ a true and correct copy

thereof by the following means, addressed 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

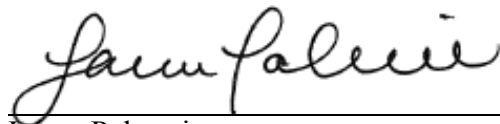
Hannah Shearer
hshearer@giffords.org
Giffords Law Center to Prevent Gun Violence
268 Bush Street #555
San Francisco, CA 94104

Attorneys for Defendants/Respondents

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

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

Executed on January 12, 2021, at Long Beach, California.



Laura Palmerin

Electronically Filed
by Superior Court of CA,
County of Santa Clara,
on 1/12/2021 9:21 AM
Reviewed By: A. Rodriguez
Case #19CV346360
Envelope: 5621425

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

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

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

DOWNTOWN COURTHOUSE

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

Plaintiffs and Petitioners,

vs.

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

Defendants and Respondents.

Case No: 19CV346360

[Assigned to the Honorable Peter H. Kirwan;
Department 19]

**DECLARATION OF ANNA M. BARVIR RE:
NOTICE APPEAL**

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1 Mr. James Allison, attorney of record for the Defendants, informing him of the missing signature
2 line and requesting that Defendants file another proposed judgment for the court's consideration
3 and signature. (Exhibit B.)

4 8. The City filed a revised Proposed Judgment on November 24, 2020. (See revised
5 Proposed Judgment filed on Nov. 24, 2020, attached hereto as **Exhibit C.**)

6 9. On December 29, 2020, having still received nothing indicating that the court had
7 adopted Defendants' Proposed Judgment or otherwise entered judgment in this matter, I directed
8 Ms. Palmerin to once again send an email to the Civil Department Court Clerk requesting an
9 update on the status on the revised Proposed Judgment. (Exhibit B.) We still have not received a
10 response.

11 10. Out of an abundance of caution and to prevent missing any deadline for the filing of
12 an appeal that might have been triggered even though the court has not yet entered a final
13 judgment in this matter, we are now filing a Notice of Appeal.

14
15 I declare under penalty of perjury under the laws of the State of California that the
16 foregoing is true and correct. Executed on January 11, 2021, at Stanton, California.

17
18 

19 Anna M. Barvir
20 Declarant
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EXHIBIT A

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 203714 NAME: Anthony P. Schoenberg FIRM NAME: Farella Braun + Martel, LLP STREET ADDRESS: 235 Montgomery Street, 17 th Floor CITY: San Francisco STATE: CA ZIP CODE: 94104 TELEPHONE NO.: 415-954-4400 FAX NO.: 415-954-4480 E-MAIL ADDRESS: tschoenberg@fbm.com CITY OF MORGAN HILL, MORGAN HILL CHIEF OF POLICE ATTORNEY FOR (name): DAVID SWING, MORGAN HILL CITY CLERK IRMA TORREZ		FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara STREET ADDRESS: 161 N. First Street MAILING ADDRESS: CITY AND ZIP CODE: San Jose, CA 95113 BRANCH NAME:		
PLAINTIFF/PETITIONER: G. MITCHELL KIRK; and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED CITY OF MORGAN HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; DEFENDANT/RESPONDENT: MORGAN HILL CITY CLERK IRMA TORREZ OTHER:		CASE NUMBER: 19CV346360 JUDICIAL OFFICER:
PROPOSED ORDER (COVER SHEET)		DEPT:

NOTE: This cover sheet is to be used to electronically file and submit to the court a proposed order. The proposed order sent electronically to the court must be in PDF format and must be attached to this cover sheet. In addition, a version of the proposed order in an editable word-processing format must be sent to the court at the same time as this cover sheet and the attached proposed order in PDF format are filed.

- Name of the party submitting the proposed order:
CITY OF MORGAN HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; MORGAN HILL CITY CLERK IRMA TORREZ
- Title of the proposed order:
[Proposed] Judgment
- The proceeding to which the proposed order relates is:
Motion for Summary Judgment
 - Description of proceeding: Summary Judgment Hearing
 - Date and time: July 30, 2020, 9:00 a.m.
 - Place: Department 6, Santa Clara Superior Court
- The proposed order was served on the other parties in the case.
Yes

Anthony P. Schoenberg
(TYPE OR PRINT NAME)

► 
(SIGNATURE OF PARTY OR ATTORNEY)

CASE NAME:
Kirk v. City of Morgan Hill

CASE NUMBER:
19CV346360

**PROOF OF ELECTRONIC SERVICE
PROPOSED ORDER**

1. I am at least 18 years old and **not a party to this action.**

a. My residence or business address is (*specify*):
235 Montgomery Street, 17th Floor, San Francisco, CA 94104

b. My electronic service address is (*specify*):
pwoodfin@fbm.com

2. I electronically served the *Proposed Order (Cover Sheet)* with a proposed order in PDF format attached, and a proposed order in an editable word-processing format as follows:

a. On (*name of person served*) (*If the person served is an attorney, the party or parties represented should also be stated.*):
C.D. Michel, Esq.
Anna M. Barvir, Esq.
Tiffany D. Cheuvront, Esq.
MICHEL & ASSOCIATES, P.C.
180 Est Ocean Blvd., Suite 200
Long Beach, CA 90802
Tel: (562) 216-4444
Fax: (562) 216-4445

b. To (*electronic service address of person served*):
cmichel@michellawyers.com
tcheuvront@michellawyers.com
abarvir@michellawyers.com

c. On (*date*):
August 25, 2020

☐ Electronic service of the *Proposed Order (Cover Sheet)* with the attached proposed order in PDF format and service of the proposed order in an editable word-processing format on additional persons are described in an attachment.

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

Date:
August 25, 2020

Pam Woodfin

(TYPE OR PRINT NAME OF DECLARANT)

▶ Pam Woodfin

(SIGNATURE OF DECLARANT)



1 Anthony P. Schoenberg (State Bar No. 203714)
tschoenberg@fbm.com

2 James Allison (State Bar No. 319204)
jallison@fbm.com

3 Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
4 San Francisco, California 94104
Telephone: (415) 954-4400
5 Facsimile: (415) 954-4480

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

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

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SANTA CLARA, DOWNTOWN COURTHOUSE
14

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

17 Plaintiffs and Petitioners,

18 vs.

19 CITY OF MORGAN HILL; MORGAN HILL
20 CHIEF OF POLICE DAVID SWING, in his
official capacity; MORGAN HILL CITY
21 CLERK IRMA TORREZ, in her official
capacity; and DOES 1-10,,
22

23 Defendants and Respondents.

Case No. 19CV346360

PROPOSED JUDGMENT

Action Filed: April 15, 2019

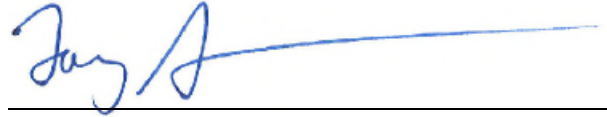
24 The Court hereby enters judgment in favor of Defendants, CITY OF MORGAN HILL;
25 MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; MORGAN HILL
26 CITY CLERK IRMA TORREZ, in her official capacity sued herein as CITY OF MORGAN
27 HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; MORGAN
28 HILL CITY CLERK IRMA TORREZ, in her official capacity, and against Plaintiff G.

1 MITCHELL KIRK; and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,
2 pursuant to the attached Order granting Defendants' Motion for Summary Judgment, signed by the
3 Court on July 30, 2020.

4 Dated: August 24, 2020

FARELLA BRAUN + MARTEL LLP

5
6 By:



Anthony Schoenberg

7
8 Attorneys for CITY OF MORGAN HILL, MORGAN
9 HILL CHIEF OF POLICE DAVID SWING, MORGAN
10 HILL CITY CLERK IRMA TORREZ
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Document received by the CA 6th District Court of Appeal.

1 Roderick M. Thompson (State Bar No. 96192)
rthompson@fbm.com
2 Anthony P. Schoenberg (State Bar No. 203714)
tschoenberg@fbm.com
3 James Allison (State Bar No. 319204)
jallison@fbm.com
4 Farella Braun + Martel LLP
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7 Hannah Shearer (State Bar No. 292710)
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268 Bush Street #555
9 San Francisco, CA 94104
Telephone: (415) 433-2062
10 Facsimile: (415) 433-3357

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

13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SANTA CLARA, DOWNTOWN COURTHOUSE

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

18 Plaintiffs and Petitioners,

19 vs.
20

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

23 Defendants and Respondents.
24

Case No. 19CV346360

PROOF OF SERVICE

Action Filed: April 15, 2019

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STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

On August 25, 2020, I served true copies of the following document(s) described as

NOTICE OF APPEARANCE;

on the interested parties in this action as follows:

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address pwoodfin@fbm.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Executed on August 25, 2020, at San Francisco, California.

Document received by the CA 6th District Court of Appeal.

EXHIBIT B

Laura Palmerin

From: Laura Palmerin
Sent: Wednesday, October 14, 2020 10:36 AM
To: ssweb@scscourt.org
Subject: Kirk v. City of Morgan Hill, Case No. 19CV346360 [MA-Interwoven.FID78693]
Attachments: 2132695_2020-08-25 Proposed Judgment.PDF


Follow Up Flag: Follow up
Flag Status: Completed

Hello,

Attorneys for Plaintiffs in the above-referenced matter would like to follow up on the attached Proposed Judgment filed on August 25, 2020 by Defendants. Please let us know if a Judgment will be issued by the Court or if anything else is required from us to get the Judgment issued.

Please feel free to contact me if you have any questions or concerns.

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</p> <p>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.

Document received by the CA 6th District Court of Appeal.

Laura Palmerin

From: SSCivil Info <sscivilinfo@scscourt.org>
Sent: Monday, October 26, 2020 12:57 PM
To: Laura Palmerin
Subject: Re: Kirk v. City of Morgan Hill, Case No. 19CV346360 [MA-Interwoven.FID78693]

Good Afternoon,

The Proposed Judgment does not have a signature line for the Judge. We will be notifying the submitting party to resubmit their order.

clerk

Document received by the CA 6th District Court of Appeal.

Laura Palmerin

From: SSWeb <ssweb@scscourt.org>
Sent: Friday, November 20, 2020 11:58 AM
To: Laura Palmerin
Subject: FW: Kirk v. City of Morgan Hill, Case No. 19CV346360 [MA-Interwoven.FID78693]

We apologize for the delay in response to your email due to shortage of staffing.

It appears there is no signature line on the proposed judgment for the judge to sign.

Civil Clerk - ar

Document received by the CA 6th District Court of Appeal.

Laura Palmerin

From: Laura Palmerin
Sent: Friday, November 20, 2020 5:31 PM
To: tschoenberg@fbm.com; James Allison
Cc: Anna M. Barvir
Subject: Kirk v. City of Morgan Hill, Case No. 19CV346360 [MA-Interwoven.FID78693]
Attachments: 2132695_2020-08-25 Proposed Judgment.PDF; Court's 10-26-20 Email Response.pdf; Court's 11-20-20 Email Response.pdf


Hello Counsel,

Since we had not heard back from the Court regarding your filed Proposed Judgment (attached here) we reached out to the Clerk on October 14, 2020. The Clerk replied to our email on October 26, 2020 stating that the Proposed Judgment did not have a signature line for the Judge to sign off and that they would be informing the filing party of this, their email response attached here. Today we got another response from the Court stating the same (but did not say they would let the filing party know), email attached here.

So we just wanted to let you know to see if you could please file a revised Proposed Judgment with a signature line for the Judge to sign.

Please feel free to contact our office if you have any questions or concerns.

Best regards,

<p>Laura Palmerin Legal Secretary/Paralegal</p> 	<p>Direct: (562) 216-4473 Main: (562) 216-4444 Fax: (562) 216-4445 Email: lpalmerin@michellawyers.com Web: www.michellawyers.com</p> <p>180 E. Ocean Blvd. Suite 200 Long Beach, CA 90802</p>
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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.

ease notify us immediately by reply e-mail

Document received by the CA 6th District Court of Appeal.

Laura Palmerin


From: Laura Palmerin
Sent: Tuesday, December 29, 2020 12:18 PM
To: sscivilinfo@scscourt.org
Subject: Kirk v. City of Morgan Hill, Case No.: 19CV346360 [MA-Interwoven.FID78693]
Attachments: 2142083_2020-11-24 Revised Proposed Judgment.PDF

Hello,

We would like to follow up regarding a Proposed Judgment that was filed on November 24, 2020, attached here. Please let us know when we could expect to receive the signed Judgment.

Please feel free to contact us if there are any issues with processing the document.

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</p> <p>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.

Document received by the CA 6th District Court of Appeal.

EXHIBIT C

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 203714 NAME: Anthony P. Schoenberg FIRM NAME: Farella Braun + Martel, LLP STREET ADDRESS: 235 Montgomery Street, 17 th Floor CITY: San Francisco STATE: CA ZIP CODE: 94104 TELEPHONE NO.: 415-954-4400 FAX NO.: 415-954-4480 E-MAIL ADDRESS: tschoenberg@fbm.com CITY OF MORGAN HILL, MORGAN HILL CHIEF OF POLICE ATTORNEY FOR (name): DAVID SWING, MORGAN HILL CITY CLERK IRMA TORREZ		FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara STREET ADDRESS: 161 N. First Street MAILING ADDRESS: CITY AND ZIP CODE: San Jose, CA 95113 BRANCH NAME:		
PLAINTIFF/PETITIONER: G. MITCHELL KIRK; and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED CITY OF MORGAN HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; DEFENDANT/RESPONDENT: MORGAN HILL CITY CLERK IRMA TORREZ OTHER:		CASE NUMBER: 19CV346360 JUDICIAL OFFICER:
PROPOSED ORDER (COVER SHEET)		DEPT:

NOTE: This cover sheet is to be used to electronically file and submit to the court a proposed order. The proposed order sent electronically to the court must be in PDF format and must be attached to this cover sheet. In addition, a version of the proposed order in an editable word-processing format must be sent to the court at the same time as this cover sheet and the attached proposed order in PDF format are filed.

- Name of the party submitting the proposed order:
CITY OF MORGAN HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; MORGAN HILL CITY CLERK IRMA TORREZ
- Title of the proposed order:
[Proposed] Judgment
- The proceeding to which the proposed order relates is:
Motion for Summary Judgment
 - Description of proceeding: Summary Judgment Hearing
 - Date and time: July 30, 2020, 9:00 a.m.
 - Place: Department 6, Santa Clara Superior Court
- The proposed order was served on the other parties in the case.
Yes

Anthony P. Schoenberg

(TYPE OR PRINT NAME)



(SIGNATURE OF PARTY OR ATTORNEY)

1 Anthony P. Schoenberg (State Bar No. 203714)
tschoenberg@fbm.com

2 James Allison (State Bar No. 319204)
jallison@fbm.com

3 Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
4 San Francisco, California 94104
Telephone: (415) 954-4400
5 Facsimile: (415) 954-4480

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

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

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SANTA CLARA, DOWNTOWN COURTHOUSE

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

17 Plaintiffs and Petitioners,

18 vs.

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

22 Defendants and Respondents.
23

Case No. 19CV346360

PROPOSED JUDGMENT

Action Filed: April 15, 2019

24 The Court hereby enters judgment in favor of Defendants, CITY OF MORGAN HILL;
25 MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; MORGAN HILL
26 CITY CLERK IRMA TORREZ, in her official capacity sued herein as CITY OF MORGAN
27 HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; MORGAN
28 HILL CITY CLERK IRMA TORREZ, in her official capacity, and against Plaintiff G.

1 MITCHELL KIRK; and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,
2 pursuant to the Order granting Defendants' Motion for Summary Judgment, signed by the Court
3 on July 30, 2020.

4 Dated:
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6

7 _____
8 Peter H. Kirwan
9 Judge of the Superior Court
10 County of Santa Clara
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Document received by the CA 6th District Court of Appeal.

CASE NAME:
Kirk v. City of Morgan Hill

CASE NUMBER:
19CV346360

**PROOF OF ELECTRONIC SERVICE
PROPOSED ORDER**

1. I am at least 18 years old and **not a party to this action.**

a. My residence or business address is (*specify*):
235 Montgomery Street, 17th Floor, San Francisco, CA 94104

b. My electronic service address is (*specify*):
abrown@fbm.com

2. I electronically served the *Proposed Order (Cover Sheet)* with a proposed order in PDF format attached, and a proposed order in an editable word-processing format as follows:

a. On (*name of person served*) (*If the person served is an attorney, the party or parties represented should also be stated.*):
C.D. Michel, Esq.
Anna M. Barvir, Esq.
Tiffany D. Cheuvront, Esq.
MICHEL & ASSOCIATES, P.C.
180 Est Ocean Blvd., Suite 200
Long Beach, CA 90802
Tel: (562) 216-4444 / Fax: (562) 216-4445

b. To (*electronic service address of person served*):
cmichel@michellawyers.com; tcheuvront@michellawyers.com; abarvir@michellawyers.com

c. On (*date*):
11-24-2020

☐ Electronic service of the *Proposed Order (Cover Sheet)* with the attached proposed order in PDF format and service of the proposed order in an editable word-processing format on additional persons are described in an attachment.

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

Date:
11-24-2020

Alison Brown
(TYPE OR PRINT NAME OF DECLARANT)

► 
(SIGNATURE OF DECLARANT)

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

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

On January 12, 2021, I served the foregoing document(s) described as

DECLARATION OF ANNA M. BARVIR RE: APPEAL

on the interested parties in this action by placing

☐ the original
☒ a true and correct copy

thereof by the following means, addressed 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

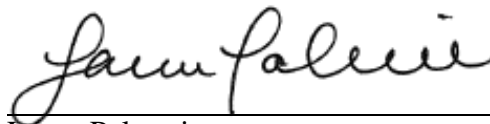
Hannah Shearer
hshearer@giffords.org
Giffords Law Center to Prevent Gun Violence
268 Bush Street #555
San Francisco, CA 94104

Attorneys for Defendants/Respondents

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

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

Executed on January 12, 2021, at Long Beach, California.



Laura Palmerin

<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 14, 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 align="center">CLERK'S NOTICE OF APPEAL</p>	<p>CASE NUMBER: 19CV346360</p>

YOU ARE HEREBY NOTIFIED, pursuant to California Rules of Court, that Notice of Appeal herein was filed on **January 12, 2020**

Date: 1/14/2021

Clerk of the Court

Signed: 1/14/2021 11:33 AM

Clerk, by Connie Lucero, Deputy
Connie Lucero

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 1/14/2021

Clerk of the Court


Signed: 1/14/2021 11:33 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
James Allison FARELLA BRAUN & MARTEL LLP 235 Montgomery Street 17th Floor San Francisco CA 94104

FILED

JAN 20 2021

Clerk of the Court
Superior Court of CA County of Santa Clara
BY  DEPUTY
RYAN NGUYEN

1 Anthony P. Schoenberg (State Bar No. 203714)
tschoenberg@fbm.com

2 James Allison (State Bar No. 319204)
jallison@fbm.com

3 Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
4 San Francisco, California 94104
Telephone: (415) 954-4400
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hshearer@giffords.org
7 Giffords Law Center to Prevent Gun Violence
268 Bush Street #555
8 San Francisco, CA 94104
Telephone: (415) 433-2062
9 Facsimile: (415) 433-3357

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

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SANTA CLARA, DOWNTOWN COURTHOUSE

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

17 Plaintiffs and Petitioners,

18 vs.

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

22 Defendants and Respondents.
23

Case No. 19CV346360

~~PROPOSED~~ JUDGMENT

Action Filed: April 15, 2019

24 The Court hereby enters judgment in favor of Defendants, CITY OF MORGAN HILL;
25 MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; MORGAN HILL
26 CITY CLERK IRMA TORREZ, in her official capacity sued herein as CITY OF MORGAN
27 HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING, in his official capacity; MORGAN
28 HILL CITY CLERK IRMA TORREZ, in her official capacity, and against Plaintiff G.

1 MITCHELL KIRK; and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,
2 pursuant to the Order granting Defendants' Motion for Summary Judgment, signed by the Court
3 on July 30, 2020.

4 Dated:

5 12/10/2020

6 

7 Peter H. Kirwan
8 Judge of the Superior Court
9 County of Santa Clara
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CASE NAME: Kirk v. City of Morgan Hill	CASE NUMBER: 19CV346360
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**PROOF OF ELECTRONIC SERVICE
PROPOSED ORDER**

1. I am at least 18 years old and **not a party to this action.**

a. My residence or business address is (*specify*):
235 Montgomery Street, 17th Floor, San Francisco, CA 94104

b. My electronic service address is (*specify*):
abrown@fbm.com

2. I electronically served the *Proposed Order (Cover Sheet)* with a proposed order in PDF format attached, and a proposed order in an editable word-processing format as follows:

a. On (*name of person served*) (*If the person served is an attorney, the party or parties represented should also be stated.*):
C.D. Michel, Esq.
Anna M. Barvir, Esq.
Tiffany D. Cheuvront, Esq.
MICHEL & ASSOCIATES, P.C.
180 Est Ocean Blvd., Suite 200
Long Beach, CA 90802
Tel: (562) 216-4444 / Fax: (562) 216-4445

b. To (*electronic service address of person served*):
cmichel@michellawyers.com; tcheuvront@michellawyers.com; abarvir@michellawyers.com

c. On (*date*):
11-24-2020

☐ Electronic service of the *Proposed Order (Cover Sheet)* with the attached proposed order in PDF format and service of the proposed order in an editable word-processing format on additional persons are described in an attachment.

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

Date:
11-24-2020

Alison Brown
(TYPE OR PRINT NAME OF DECLARANT)

► 
(SIGNATURE OF DECLARANT)

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
------------------------------------	---------------

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).)

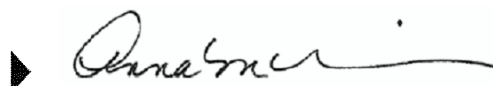
7. a. The proceedings designated in 5b or 6 ☒ include ☐ do not include all of the testimony in the superior court.

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
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P R O C E E D I N G S

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

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

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

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

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

JUDGE KIRWAN: Do I have Hannah Shearer?

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

JUDGE KIRWAN: James Allison?

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

JUDGE KIRWAN: Roderick Thompson?

MR. THOMPSON: Also representing the defendants.

JUDGE KIRWAN: Okay, and then finally Anna Barvir.

MS. BARVIR: Yes, Your Honor. Anna Barvir

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1 representing Plaintiffs.

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

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

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

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

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

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

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

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

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

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

15 MS. BARVIR: Sorry.

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

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

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

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

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

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

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

24 MS. BARVIR: Thank you.

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

28 At that point the state cannot then demand

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

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

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

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

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

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

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

3 And this leads me to third and final issue.

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

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

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

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

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

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

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

15 Is that responsive to the Court's question?

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

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

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

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

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1 Los Angeles puts forth.

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

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

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

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

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

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

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

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

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

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

28 This law, on the other hand, regulates the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 city or town and regulates their conduct.

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

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

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

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

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

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

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

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1 scheme.

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

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

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

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

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

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

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

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

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

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

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

25 Thank you.

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

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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

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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 August 25, 2021, I served a copy of the foregoing document(s) described as:
APPELLANTS' APPENDIX, VOLUME XI OF XI, as follows:

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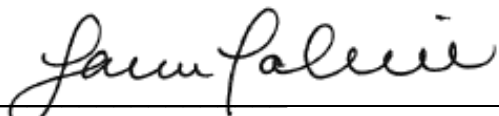
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Attorneys for Defendants and Respondents City of Morgan Hill, et al.

These 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.

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

Executed on August 25, 2021, at Long Beach, California.



Laura Palmerin
Declarant

Document received by the CA 6th District Court of Appeal.