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

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| G. MITCHELL KIRK; AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,<br><br>PLAINTIFFS AND APPELLANTS,<br><br>V.<br><br>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,<br><br>DEFENDANTS AND RESPONDENTS. | Case No. H048745 |

# APPELLANTS' OPENING BRIEF

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
Konstadinos T. Moros – SBN 306610
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
Email: abarvir@michellawyers.com

*Counsel for Plaintiffs-Appellants*

TO BE FILED IN THE COURT OF APPEAL **APP-008**

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| **COURT OF APPEAL** SIXTH **APPELLATE DISTRICT, DIVISION** | COURT OF APPEAL CASE NUMBER: H048745 |
| ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 268728<br>NAME: Anna M. Barvir<br>FIRM NAME: Michel & Associates, P.C.<br>STREET ADDRESS: 180 East Ocean Blvd., Suite 200<br>CITY: Long Beach STATE: CA ZIP CODE: 90802<br>TELEPHONE NO.: (562) 216-4444 FAX NO.: (562) 216-4445<br>E-MAIL ADDRESS: abarvir@michellawyers.com<br>ATTORNEY FOR (*name*): G. Mitchell Kirk, et al. | SUPERIOR COURT CASE NUMBER: 19CV346360 |
| APPELLANT/ PETITIONER: G. Mitchell Kirk, et al.<br>RESPONDENT/ REAL PARTY IN INTEREST: City of Morgan Hill, et al. | |

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## INTRODUCTION

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

The City has never cited a compelling reason it would need a more restrictive theft-reporting requirement. To the contrary, in the very first line of its motion for summary judgment, the City admitted that what motivated it to adopt the offending ordinance was not some particularized local need for stricter theft reporting, but a bare desire to do *something* in response to the Parkland tragedy. (A.A.I 44.) The legislative history of the City's theft-reporting ordinance includes *no* evidence that its shortened 48-hour reporting requirement will provide any local benefit beyond what state law already provides. Nor did it suggest that its law more effectively serves local interests than state law does. Instead, the City defended its ordinance by pointing to dubious claims that gun violence is a growing epidemic, that firearm theft is on the rise, and that theft-reporting requirements will somehow reduce both. But even assuming each of these broad notions were true, and assuming they justify theft-reporting requirements generally, the City *still* would not have shown that its particular requirement is valid.

Let Appellants be clear. They are not challenging theft-reporting requirements, generally. They are not even challenging California's theft-reporting requirement, specifically. They are only challenging the City's authority to pass its *own* theft-reporting requirement—a

[1] For ease of reference, throughout this brief, Kirk often refers to the reporting of firearms as stolen or lost as "firearm theft reporting" or "theft reporting."

local law at odds with state law that cannot be justified by any special local need. As explained below, the City lacks such authority. For its theft-reporting ordinance duplicates, contradicts, and enters a field implicitly occupied by state law, and is thus preempted. The Court should reverse the trial court's order granting the City's motion for summary judgment and vacate the judgment entered in the City's favor.

## STATEMENT OF THE ISSUE

The doctrine of preemption bars local laws that duplicate, conflict with, or enter a field occupied by state law. State law mandates that gun owners report the theft or loss of their firearms within five days. The city of Morgan Hill recently adopted its own reporting requirement, mandating that gun owners report a firearm theft or loss within just two days. Does the state reporting requirement preempt the City's reporting requirement?

## STATEMENT OF APPEALABILITY

This appeal is from the final judgment of the Superior Court of California, County of Santa Clara, entered after the trial court granted summary judgment in favor of Respondents City of Morgan Hill, Chief of Police David Swing, and City Clerk Irma Torrez (collectively, "the City"). (A.A.XI 2787.) It is expressly authorized by Code of Civil Procedure section 904.1, subdivision (a)(1).

## STATEMENT OF THE FACTS AND CASE

### I. FACTUAL BACKGROUND

In November 2016, California voters enacted Prop 63, creating (among other things) Penal Code section 25250,[2] which reads in relevant part:

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

(Pen. Code, § 25250, subd. (a), double emphasis added.)

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

In short, state law requires that firearm owners report the theft or loss of any firearm in their possession to local law enforcement within five days. (A.A.VI 1206; Pen. Code § 25250, subd. (a).)[3] Failure to do so is a crime punishable by fine for the first two violations and by fine, imprisonment, or both for a third violation. (Pen. Code, § 25265, subds. (a)-(c).)

Prop 63 also created about a dozen other sections and subsections related to firearm theft reporting. (A.A.VI 1206-1208; Pen. Code, §§ 25250, 25255, 25260, 25265, 25270, 25275.) Penal Code section 25270, for instance, lays out what must be part of a section 25250 report to law enforcement. These facts include "the make, model, and serial number of the firearm, if known by the person, and any additional relevant information required by the local law enforcement agency taking the report." (*Id.*, § 25270.) The voter-enacted law provides guidance for those who recover a firearm previously reported lost or stolen. (*Id.*, § 25250, subd. (b) [giving firearm owners five days to notify local law enforcement that they recovered their firearms].) It furthers statewide law enforcement interests by directing "every sheriff or police chief [to] submit a description of each firearm that has been reported lost or stolen directly into the Department of Justice Automated Firearms System ["AFS"]." (*Id.*, § 25260.) And it made it a crime to knowingly make a false report. (*Id.*, § 25275.)

Finally, Prop 63 created several important exceptions to the statewide reporting law. (Pen. Code, § 25250, subd. (c), 25255.) Under section 25250, subdivision (c), for instance, no person may be required to report the theft or loss of any firearm that qualifies as an "antique" under state law. And section 25255 explicitly exempts from section 25250's theft-reporting mandate:

1. Any law enforcement officer or peace officer acting within the scope of their duties who reports the theft or loss to their employing agency;
2. Any United States marshal or member of the United States armed forces or the National Guard engaged in their official duties;
3. Any federally licensed firearms importer, manufacturer, or dealer who reports the theft or loss in compliance with applicable federal law; and

[3] The five-day period begins to run either from the day the theft or loss occurred or from the day the person reasonably should have known it occurred. (Pen. Code, § 25250, subd. (a).)

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

(Pen. Code, § 25255.)

In November 2018, some two years after voters adopted Prop 63, Morgan Hill adopted Ordinance No. 2289, amending section 9.04.030 of the Morgan Hill Municipal Code ("MHMC"). (Morgan Hill Mun. Code, § 9.04.030; A.A.I 9, 21, A.A.VI 1208, 1226-1227, 1279-1280, A.A.VII 1683, 1696.) Drawing from "model laws" championed by the Giffords Law Center to Prevent Gun Violence (formerly the Legal Community Against Violence) and the Association of Bay Area Governments, section 9.04.030 purports to shorten the timeframe for reporting a firearm stolen or lost. (A.A.VI 1216-1217, 1293-1294, 1307-1322, A.A.VIII 1871, 1907, 1952, 2008-2012, 2069-2070.) As amended by the ordinance, MHMC section 9.04.030 reads:

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

(Morgan Hill Mun. Code, § 9.04.030.) The local ordinance thus gives firearm owners only two days to report a firearm theft or loss to the Morgan Hill Police Department whenever the theft or loss occurs in the City or the firearm owner resides there. (Morgan Hill Mun. Code, § 9.04.030; A.A.VI 1208, 1226-1227, 1263-1264, 1266, 1293-1294, A.A.VII 1683, 1696.) Failure to comply with the City's reporting mandate is a misdemeanor punishable by imprisonment in the county jail for up to six months, a fine not to exceed $1,000, or both. (Morgan Hill Mun. Code, §§ 1.24.010, 9.04.070.) Each day a person is in violation is "regarded as a new and separate offense." (*Id.*, §§ 1.24.010, 1.24.030.)

## II. CASE BACKGROUND

### A. Procedural History

While the City was considering adopting the ordinance, Appellant CRPA twice notified lawmakers of its opposition to the law, explaining that state law preempted the City's proposed 48-hour reporting requirement. (A.A.VI 1210, A.A.VII 1724-1731, 1733-

1736.) After the City adopted MHMC section 9.04.030, CRPA again notified the City of its position, requesting that the City voluntarily repeal the law. (A.A.VI 1210, A.A.VII 1684, 1696, 1738-1740.) The City refused to voluntarily repeal its reporting requirement, and the law took effect on December 29, 2018. (A.A.VI 1210-1211, 1227, A.A.VII 1684-1685, 1696-1697, 1716.) The City has enforced the law since that time and has never disavowed its intention to do so. (*Ibid.*)

Because of the City's refusal to appeal MHMC section 9.04.030, Kirk and CRPA sued the City, seeking declaratory and injunctive relief, as well as a writ of mandate, prohibition, or both. (A.A.VII 1682-1693.) The essence of Kirk's lawsuit was that state law, including section 25250, preempts MHMC section 9.04.030. (A.A.VII 1687-1691.) Three months later, the City filed its answer, denying Kirk's claims. (A.A.VII 1695-1706.) Kirk soon dismissed his writ of mandate. (A.A.I 33.)[4] After discovery, the parties brought simultaneous motions for summary judgment on the remaining claims for declaratory and injunctive relief. (A.A.I 36-63, A.A.V 1167-1193.)

**B. The Decision on Appeal**

At issue on appeal is the trial court's order granting the City's motion for summary judgment and denying Kirk's. (A.A.XI 2734-2759.) On summary judgment, Kirk argued that state law preempts MHMC section 9.04.030 for four reasons: (1) MHMC section 9.04.030 *duplicates* section 25250; (2) MHMC section 9.04.030 *contradicts* section 25250; (3) the subject matter has been so fully and completely covered by state law as to clearly indicate that it has become exclusively a matter of state concern; and (4) the subject matter has been partially covered by state law, and the subject is of such a nature that the harm of MHMC section 9.04.030 on transient citizens outweighs the possible benefit to the City. (A.A.VII 1167-1193.) The City disputed each of these claims. (A.A.IX 2099-2125.)

On the question of duplication, the trial court ruled that even though both state law and the local ordinance prohibit losing a firearm and failing to report it, MHMC section 9.04.030 does not duplicate state law because it is not coextensive with it. (A.A.XI 2743-2745.) The local ordinance, the court explained, had stricter time limits on its reporting

[4] The claim for writ of mandate is not at issue on appeal.

requirement, creating sufficient difference between the two laws. (*Ibid.*) The court did not address, even in passing, the double jeopardy issues Kirk raised both in his briefs and during oral argument. (*Ibid.*, A.A.XI 2797.)

Yet despite acknowledging the difference between the length of the reporting periods and giving examples of how the differing requirements could create problems for citizens, the trial court also concluded that MHMC section 9.04.030 did not contradict state law. (A.A.XI 2745-2748.) In short, the trial court held that it was theoretically possible to comply with both state and local law by reporting a lost firearm within 48 hours, so the ordinance is not "inimical" to state law. (A.A.XI 2747.)

Next, the trial court considered whether state law had completely covered the field of firearm theft and loss reporting and concluded that it had not. (A.A.XI 2748-2752.) Even though state law not only established a reporting requirement but also provided a statewide scheme to enforce the law—complete with signage posted in all gun stores and rules local law enforcement must follow—the court held that Morgan Hill's ordinance was not inconsistent with the purpose of the state law because it was "synergistic" with it by also requiring the reporting of lost or stolen firearms. (A.A.XI 2751.) The court also rationalized its decision by stating that state law only addressed limited aspects of theft reporting, and that the Penal Code allows for local police agencies to request additional relevant information upon being informed of lost firearms. (A.A.XI 2752.) The court did not, however, leave any clues as to what could have made the state law more comprehensive so that it would, in the court's opinion, fully occupy the field.

Lastly, the court ruled that any burden on transient citizens does not outweigh the possible benefit to the City. (A.A.XI 2753-2755.) In so ruling, the trial court curiously asserted that Kirk offered no legal authority for the rule that the City must present evidence that the ordinance effectively achieves possible benefits to the City—even though Kirk never advocated for such a rule. (Compare A.A.XI. 2755, with A.A.V 1191 [observing that the City had not shown that state law was not effective or that its requirement was more effective only because the City's purported interests were identical to the state's].) On the other hand, the court did not address Kirk's precedent requiring that the City explain what

special local needs it has that outweigh the need for uniform state regulation. (Compare A.A.XI 2753-2755, with A.A.V 1190 [citing *Robins v. Cnty. of Los Angeles* (1966) 248 Cal.App.2d 1, 10 ("*Robins*") for the rule that courts must balance the needs of local governments to meet the "special needs of their communities" with the need for uniform state regulation].)

In short, the trial court ruled that the MHMC section 9.04.030 is not preempted by state law under any of the theories Kirk raised. The court thus granted the City's motion for summary judgment and denied Kirk's motion. (A.A.XI 2734.) The Court entered final judgment for the City on January 20, 2021, and Kirk's notice of appeal was deemed filed that same day. (A.A.XI 2787.)

## ARGUMENT

### I. STANDARD OF REVIEW

This appeal asks whether state law mandating that gun owners report the theft or loss of their firearms to local law enforcement preempts a local law also mandating that gun owners report the theft or loss of their firearms to local law enforcement. "Whether state law preempts a local ordinance is a pure question of law subject to de novo review" by the Court on appeal. (*Cal. Veterinary Med. Assn. v. City of W. Hollywood* (2007) 152 Cal.App.4th 536, 546, citing *City of Watsonville v. State Dept. of Health Servs.* (2005) 133 Cal.App.4th 875, 882 and *Roble Vista Assocs. v. Bacon* (2002) 97 Cal.App.4th 335, 339.)

### II. THE TRIAL COURT ERRED IN GRANTING THE CITY'S MOTION FOR SUMMARY JUDGMENT, INCORRECTLY HOLDING THAT STATE LAW DOES NOT PREEMPT MHMC SECTION 9.04.030

The California Constitution commands that a county or city must take care not to fall "in conflict with general laws." (Cal. Const., art. XI, § 7.) Courts have long interpreted this as a limitation on local government's ability to interfere with the proper operation of state law through local legislation. (*Agnew v. City of Los Angeles* (1958) 51 Cal.2d 1.) In short, a local law "[i]s invalid if it attempts to impose additional requirements in a field that is preempted by the general law." (*In re Lane* (1962) 58 Cal.2d 99, 102.) In determining whether a local

measure is preempted, the Court asks if it "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 ("*Sherwin-Williams*").) If it does, "it is preempted by such law and is void." (*Candid Enterps., Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 879.)

Meeting any one of these tests is enough on its own to establish preemption. But the City's theft-reporting ordinance defies the constitutional mandate that counties govern subordinate to state law (see *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898; Cal. Const., art. XI, § 7) on all three counts. The Court should thus declare Morgan Hill's law void as preempted and vacate the trial court's judgment.

### A. The City's Theft-reporting Ordinance Duplicates State Law in Its Most Likely Applications

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

MHMC section 9.04.030 requires "any person who owns or possesses a firearm" to report the theft or loss of that firearm to the Morgan Hill Police Department within 48 hours. And it applies to any person who resides in Morgan Hill and, importantly, to any firearm theft or loss of a firearm that *takes place in the City*. (Morgan Hill Mun. Code, § 9.04.030.) This duplicates state law, which also requires gun owners to report firearm theft or loss but gives them five days to make the report. (Pen. Code, § 25250, subd. (a).) MHMC section 9.04.030 thus imposes the "same criminal prohibition that general law impose[s]," (*In re Portnoy*, *supra*, 21 Cal.2d at p. 240), in that both the state law and MHMC section 9.04.030 prohibit a person from failing to report a firearm lost or stolen to local law enforcement. So

if someone who lives in or has their firearm stolen or lost within the City fails to report it, they will have violated *both* state law *and* local law. (See *Baldwin v. Cnty. of Tehama* (1994) 31 Cal.App.4th 166, 179-180.) In its most likely applications then, MHMC section 9.04.030 duplicates section 25250 and is thus preempted.

The trial court, however, concluded that MHMC section 9.04.040 is not duplicative of section 25250 because it is "not coextensive with state law." (A.A.I. 2744, citing *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 897.) While the trial court may be correct that the local ordinance and state law are not *identical*—one penalizes failing to report in two days, the other in five days—the laws are duplicative enough that they raise double jeopardy concerns. Indeed, under relevant precedent, the three-day difference in reporting time simply does not differentiate the two laws enough to alleviate double jeopardy concerns and, by extension, preemption by duplication. For the California Supreme Court has held that "because greater and lesser included offenses constitute the 'same offense' for double jeopardy purposes [citation], 'a conviction of a lesser included offense bars subsequent prosecution of the greater offense.'" (*People v. Seel* (2004) 34 Cal.4th 535, 542 ("*Seel*"), quoting *People v. Bright* (1996) 12 Cal.4th 652, 661.) Similarly, the United States Supreme Court has held that under the traditional *Blockburger* test (or the "same-elements test"), double jeopardy bars:

> "[S]uccessive prosecutions for the same criminal act or transaction under two criminal statutes whenever each statute does not 'requir[e] proof of a fact which the other does not.'" [Citation.] "If application of that test reveals that the offenses have identical statutory elements *or that one is a lesser included offense of the other*, then the inquiry must cease, and the subsequent prosecution is barred."

(*People v. Bivens* (1991) 231 Cal.App.3d 653, 659, quoting *Grady v. Corbin* (1990) 495 U.S. 508, 516 [interpreting test from *Blockburger v. United States* (1932) 284 U.S. 299], italics added.)

Again, in the situation most likely to arise here, a Morgan Hill resident loses a firearm in the city and does not report it at all. Under those circumstances, the City's ordinance criminalizes the very same behavior state law criminalizes—failing to report the loss or theft of a firearm to local law enforcement. Under section 25250, the state must show that the firearm was lost or stolen more than five days ago. To establish a violation of its law, the City need only prove that the firearm was missing for at *least* two days. And, in fact, for each

day that the gun owner remains in violation for failing to report, he has committed "a new and separate offense." (Morgan Hill Mun. Code, §§ 1.24.010, 1.24.030.) So proving that the gun was lost for more than five days necessarily establishes the violation of *both* state law and the lesser included offense for violating city law. So if the gun owner who fails to report is charged with violating the City's ordinance, double jeopardy would attach, *barring the state's prosecution of its own laws*. (*Seel*, *supra*, 34 Cal.4th at p. 542.) This is precisely the sort of local intrusion into state affairs that preemption prohibits. (See *Cohen*, *supra*, 40 Cal.3d at p. 292.)

The trial court hypothesized a few examples of ways the laws might not raise double jeopardy and duplication concerns. (A.A.XI 2744-2745.) It referenced the resident who reports after three days (violating the ordinance but not state law), the resident who loses a gun in another city but reports only to Morgan Hill police (violating state law but not the ordinance), and the resident who loses a gun in another city but reports after four days to Morgan Hill police (violating both state law and the ordinance, but for different reasons). (*Ibid.*) It notably ignored, however, those gun owners who violate both state and local law for precisely the same reasons by failing to report altogether. (Compare A.A.XI 2743-2745, with A.A.V 1181-1182, A.A.IX 2163-2164, A.A.XI 2723-2724.) But one cannot just ignore that application of the law. It is likely the most common violation of theft-reporting mandates. And it illustrates just how the City's ordinance improperly duplicates state law, raising valid double jeopardy concerns that would frustrate the aims of Prop 63 by barring prosecution under section 25250.

For these reasons, the Court should reverse the trial court's ruling and hold that the City's theft-reporting requirement duplicates state law and is thus preempted.

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

Local ordinances that "contradict" state law are preempted and void. (*O'Connell*, *supra*, 41 Cal.4th at pp. 1067-1068.) A local law contradicts state law when it commands what state law prohibits *or prohibits locally what a state statute authorizes*. (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 902.) Such laws are "inimical to or cannot be reconciled with state law," (*O'Connell*, *supra*, 41 Cal.4th at p. 1068), and courts simply strike them as preempted (*Fiscal v. City and Cnty. of San Francisco* (2008) 158 Cal.App.4th 895, 903 ("*Fiscal*")). MHMC section 9.04.030 prohibits Kirk and members of CRPA from doing what state law, at least implicitly, allows them to

do—take up to five days before they must report the theft or loss of their firearms. A patent contradiction with California law, the ordinance is preempted and void.

Below, the City argued (and the court agreed) that local governments are free to narrow what state law permits by creating stricter local requirements and, as such, the City is free to create a shorter theft-reporting period than state law imposes. (A.A.I 54-55, A.A.XI 2746-2748.) But such local action is not always permissible. 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. Second, under *In re Hoffman* (1909) 155 Cal. 114, 118, stricter local regulation is appropriate if it serves a special local interest. Taken together, these precedents make clear that the City's ordinance exceeds the City's limited authority to impose stricter theft-reporting requirements than state law provides.

### 1. It Is Not "Reasonably Possible" to Comply with Both State and Local Law

The test here is not whether, as the City suggested below, it is "impossible" to comply with both the City's ordinance and state law. (A.A.IX 2113.) It is whether it is "*reasonably* possible," (*Riverside, supra,* 56 Cal.4th at p. 743), to comply with both, a phrase that necessarily has a meaning distinct from what is merely "possible." As explained below, it is not *reasonably* possible for transients to know that the City's ordinance differs from statewide law. Thus, it is not "reasonably possible" to comply with both state and local law—you cannot comply with a law of which you are unaware, after all. Claiming otherwise, the City argued below that the first thing someone passing through Morgan Hill will do is drive to a local gun store to ask about regulations. (A.A.IX 2109-2110, 2113.) 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 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. Instead, 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.

In *Ex parte Daniels* (1920) 183 Cal. 636, 641-648, the California Supreme Court held that local legislation purporting to fix a lower maximum speed limit for motor vehicles than what general law fixed was preempted as "contradicting" state law. While later precedent tells us that no "contradictory and inimical conflict" "will be found where it is *reasonably possible* to comply with both the state and local laws," (*Riverside*, *supra*, 56 Cal.4th at p. 743, italics added), *Ex parte Daniels* still has important lessons for us today. Decided in an era before speed limit signs were common, *Ex parte Daniels* recognized that it would not be reasonably possible for someone traveling throughout the state to know the speed limits in each area and to thus comply with the local law. (183 Cal. at p. 645.) In fact, the Court held, "every part of a trip from Siskiyou to San Diego would be controlled by arbitrary speed limits fixed by legislative bodies whose action [the traveler] is presumed to know, *but of which he is much more likely to be totally unaware*." (*Id.* at p. 645, italics added.)

Here, section 25250 gives victims of firearm theft, or those who lose a firearm, up to five days to report to local law enforcement. Put another way, taking up to five days to report the theft or loss of a firearm is authorized by state law. Like the Legislature in *Ex parte Daniels* that adopted a "not unreasonable and unsafe" speed limit for the state's roadways (183 Cal. at p. 645), California voters adopted what they believed to be a reasonable reporting period, (Pen. Code § 25250, subd. (a); A.A.IV 617, A.A.VI 1240-1241, A.A.IX 2178, 2179, 2189, A.A.X 2597-2603.) It is not the City's place to discard that judgment. For, it is *not* "reasonably possible" for citizens passing through Morgan Hill to know that the City's ordinance would differ from the statewide law. Like our forebears of a century ago who would be unaware of lower local speed limits because of the lack of speed limit signs, so too would people passing through Morgan Hill be unaware of shorter local theft-reporting periods. Should they fail to report a theft or loss within five days, they would "unknowingly commit two offenses instead of one—one against the municipality and the other against the state." (*Ex parte Daniels*, *supra*, 183 Cal. at pp. 645-646.) This is the sort of situation that

preemption seeks to avoid.

The Court of Appeal's decision in *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109 ("*Suter*") does not change the outcome. To be sure, the *Suter* court held that a city law increasing firearm storage requirements for dealers did not "contradict" state law because, in complying with the local law, "a dealer automatically complies with state law." (*Id.* at p. 1124.) And so too would compliance with MHMC section 9.04.030 necessarily mean that one has complied with section 25250. (Compare A.A.VI 1206, citing Pen. Code § 25250, with A.A.I 9, 21, A.A.VI 1208, 1226-1227, 1263-1264, 1279-1280, 1293-1294.) But *Suter*'s "contradiction" analysis is distinguishable. Unlike the firearm dealers in *Suter*, it is not "reasonably" possible for run-of-the-mill gun owners passing through the City to comply with *both* state and local theft-reporting laws. (*Riverside*, *supra*, 56 Cal.4th at p. 743.) As explained above, they are unlikely to know of the City's contradictory law. Nor do they have benefit of being sophisticated businesspeople with permanent locations within the City who are charged with a greater knowledge of applicable gun laws.

### 2. The City Cites No Special Local Need Related to Theft Reporting

Local governments are within their power to adopt stricter regulations than state law imposes without violating preemption when it serves some special local interest. (*Hoffman*, *supra*, 155 Cal. at p. 118.) In *Hoffman*, for instance, the Court hypothesized that it would be uncontroversial for a city within an earthquake zone to adopt a law for chimney heights lower than that required by state law. (*Ibid.*) The Court then observed that state law, which operates upon the whole of the state, is often inadequate "to meet the demands of densely populated municipalities; so that it becomes proper and even necessary for municipalities to add to state regulations provisions *adapted to their special requirements*. Such [was] the nature of the legislation [t]here questioned." (*Ibid.*, italics added.)

While Morgan Hill baldly asserted that it has some special local need for a stricter reporting requirement (A.A.I 51, 56), it simply does not have one. (A.A.IX 2186-2187; see also A.A. VI 1260, 1264, 1291-1306, 1483-1494, A.A.VII 1503-1530, 1550, 1573-1598.) The

City 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 local need. (A.A.I 44.) What's more, the City's purported justifications are largely the same general interests in theft reporting that the state law cites. (A.A.IV 617, A.A.IX 2189, A.A.X 2597-2603.) Indeed, the City cited four general purposes for theft reporting, but never mentioned any "significant local interest" in requiring reporting within 48 hours, rather than five days. (A.A.VI 1213-1215, 1217, 1240, A.A.VII 1601, A.A.VIII 1878-1885, 2008-2012, 2081; see also A.A. VI 1260, 1264, 1291-1306, 1483-1494, A.A.VII 1503-1530, 1550, 1573-1598.) And those four purposes are nearly identical to the goals of Prop 63's statewide theft-reporting scheme. (A.A.V 1190-1191.) But the City cites nothing to suggest that Prop 63 does not adequately address those interests or that its ordinance is better suited to serve them—likely because it *cannot*. (A.A.V 1191-1192, A.AVI 1213-1215, 1217, 1240, A.A.VII 1601, A.A.VIII 1878-1885, 2008-2012, 2081, A.A.IX 2160-2162.)

The City's only genuine attempt to show that theft reporting is a matter of local concern relies on a 2011 report about youth violence in San Mateo County, ostensibly to show that crimes involving guns vary from one community to the next, and thus the strategies for reducing those crimes must similarly vary. (A.A.IX 2108.) Concededly, in California, the broad field of gun control, generally, is not a matter of exclusive state concern for this very reason. (See *Suter*, *supra*, 57 Cal.App.4th 1109; but see *Great W. Shows v. Cnty. of Los Angeles* (2002) 27 Cal.4th 867, 866 ("*Great Western*") [recognizing that gun control is not exclusively a state concern, but narrower subsets of that field may be].) But the cited report provides no basis to believe that local governments have some special need for theft reporting that does not apply to communities throughout the state. It merely finds that youth violence in San Mateo County was a costly problem and, without a shred of data that theft reporting would do anything to address that problem, recommends that cities adopt mandatory theft-reporting laws (among other gun control measures). (A.A.VIII 1871.) And it

made that proposal years *before* California voters adopted Prop 63, enacting a comprehensive statewide theft-reporting scheme addressing the same general interests the City has.

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

### C. The City's Theft-reporting Ordinance Enters an Area of Law Fully Occupied by State Law

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

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

(*Ibid.*, citing *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898.)

For the reasons described below, the circumstances make clear the state has impliedly occupied the field of firearm theft reporting, and the City's encroachment on the state's domain in that field violates preemption and is void.

### 1. State Law So Fully and Completely Covers the Field of Firearm Theft Reporting That It Has Become a Matter of Exclusive State Concern

Under the first type of implied field preemption, local power to regulate is lost when "the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern." (*O'Connell*, *supra*, 41 Cal.4th at p. 1068; see also *In re Lane*, *supra*, 58 Cal.2d at p. 102.) In deciding whether the state has "occupied the field" in this way, courts look "not only [to] the abstract legislative intent" and "whether the Legislature has created an extensive regulatory scheme disclosing an implied purpose to exclude all local regulation, but also [to] whether the subject matter at issue is one of exclusive statewide concern." (*N. Cal. Psych. Socy. v. City of Berkeley* (1986) 178 Cal.App.3d 90, 106-107 ("*N. Cal. Psych.*"), citing 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, §§ 445, 452, pp. 3743-3744, 3749-3751.) "In short, if the subject matter is one of general or statewide concern, the Legislature has paramount authority; and if the Legislature has enacted general legislation covering that matter, in whole or in part, *there must be a presumption that the matter has been preempted*." (*Ibid.*, italics added) Through Prop 63, California voters enacted a firearm theft-reporting mandate that "fully and completely" (*O'Connell*, *supra*, 41 Cal.4th at p. 1067) covers the subject of firearm theft reporting through a robust scheme aimed at addressing statewide public safety concerns and regulating all manner of conduct related to reporting firearm theft and loss, making it exclusively a matter of state concern.

To begin, this case cannot be disposed of based simply on the proposition that the Legislature has not preempted the entire field of gun control. (See *Great Western*, *supra*, 27 Cal.4th at pp. 861-864.) The question is *not* whether the state has preempted the broad field of gun control, generally. Surely, it has not. (*Ibid.*) The state has, however, "targeted certain specific areas for preemption," and so local intrusion into *those* areas is preempted and unlawful. (See *id.* at p. 864.) Indeed, even the *Great Western* Court, having found that the Legislature did not intend to occupy the entire field of gun regulation, still considered whether the state intended to occupy the narrower field of gun *show* regulation. (See *id.* at p. 866.) The Court ultimately determined it had not preempted *that* field because "the conduct of business at such [gun] shows [was expressly] subject to 'applicable local laws.' " (*Ibid.*,

citing Pen. Code, §§ 12071, subd. (b)(I)(B), 12071.4, subd. (b)(2), italics added.) Here, the relevant area of general law is firearm theft or loss reporting. And *that* field is "fully and completely" occupied by state law. The City's intrusion into that field is thus impliedly preempted.

One clear indication of the preemptive intent of Prop 63's theft-reporting mandate is that the initiative provides a broad and comprehensive statewide scheme comprised of half a dozen laws regulating all manner of conduct related to firearm theft reporting. (Pen. Code, §§ 25250, 25255, 25260, 25265, 25270, 25275; see *N. Cal. Psych.*, *supra*, 178 Cal.App.3d at p. 106.) Recall, state law mandates that every person must report the theft or loss of their firearm "to a local law enforcement agency in the jurisdiction *in which the theft or loss occurred*." (Pen. Code, § 25250, subd. (a), italics added.) It also dictates that gun owners have up to five days to make the report. (*Ibid.*) Section 25250, subdivision (b), provides guidance for those who recover a firearm previously reported lost or stolen, giving them five days to notify local law enforcement. Section 25270 details what facts must be part of a compliant report, including a description of the lost or stolen firearm. (Pen. Code, § 25270.) Section 25260 directs "every sheriff or police chief [to] submit a description of each firearm that has been reported lost or stolen" into AFS so that other state and local law enforcement agencies have access to the information. Section 25265 lays out the penalty for each violation. And section 25275 makes it a crime to knowingly make a false report.

Also relevant here, Prop 63 created a host of exceptions to the statewide reporting law. (Pen. Code, § 25250, subd. (c), 25255.) Under section 25250, subdivision (c), no person may be required to report the theft or loss of any firearm that qualifies as an "antique" under state law. And section 25255 explicitly exempts four classes of Californians from section 25250's theft-reporting mandate. (Pen. Code, § 25255.) Among those classes are those "whose firearm was lost or stolen prior to July 1, 2017," as well as certain law enforcement officers, peace officers, U.S. marshals, military members, and federally licensed firearm dealers. (Pen. Code, § 25255, subds. (a)-(d).) Through these vital exemptions, state law reveals a respect for federal supremacy and for laws already mandating timely firearm theft reporting, evidencing the state's intent not to burden Californians with multiple reporting

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

Despite the comprehensiveness of the state's regime, the trial court held that state law does not impliedly preempt the City's theft-reporting requirement because Prop 63 did not fully occupy the field. (A.A.XI 2748-2752.) Instead, the trial court described California's statewide theft-reporting requirement as "limited and specific" and the City's ordinance as "synergistic" with it simply because it too "requires the reporting of lost or stolen firearms." (A.A.XI 2751, citing *Fiscal*, *supra*, 158 Cal.App.4th at p. 895.) The trial court's holding must be reversed, however, because (1) state law fully occupies the field, (2) state law does not contemplate additional local legislation, and (3) MHMC section 9.04.030 interferes with Prop 63's "full purpose and objective."

First, though the trial court held that state law is "limited and specific" and "do[es] not exclusively cover the field of reporting lost or stolen firearms because [its] scope is limited," (A.A.XI 2752), the court does not tell us how it arrived at such a surprising finding. And likely for good reason. Prop 63 created a comprehensive and uniform statewide regulatory scheme for the reporting of all lost or stolen firearms, subject to limited and carefully crafted exceptions. It was not "limited" at all. Recall, state law (1) explains the circumstances under which reporting is required; (2) creates a five-day period to make the report; (3) identifies which law enforcement agency one must report to; (4) provides guidance if a previously reported firearm is recovered; (5) mandates signage in gun stores to inform gun owners of their duty to report; (6) carves out important exceptions to the law; (7) directs law enforcement to enter the reports into the statewide AFS database; and (8) establishes penalties for each violation of the law. (Pen. Code, §§ 25250, 25255, 25260, 25265, 25270, 25275.) Kirk cannot imagine what more the state might add to make its law even more exhaustive than it is, and the court certainly identified nothing. It is unclear then what could be enough to make state law comprehensive enough to fully occupy the field of

firearm theft reporting. And frankly, the implication of the trial court's opinion is that there are, in fact, no circumstances under which implied field preemption could be found in this (or any other) case.[5]

Second, rather than explain why California's theft-reporting scheme is not extensive enough to evidence "an implied purpose to exclude all local regulation," (*Cal. Psych. Socy.*, *supra*, 178 Cal.App.3d at p. 106), the court pivots, observing that it is "more significant[]" that state law "contemplate[s] local regulation." (A.A.XI 2752.) While the court is correct that "[t]here can be no implied preemption of an area where state law expressly allows supplementary local *legislation*," (*ibid.*, quoting *Suter*, *supra*, 57 Cal.App.4th at p. 1121, italics added), California's theft-reporting laws include no such authorization. (See Pen. Code, §§ 25250-25275.) At most, state law allows local law enforcement to ask for "additional relevant information" when taking a report. (Pen. Code, § 25270 ["Every person reporting a lost or stolen firearm pursuant to Section 25250 shall report the make, model, and serial number of the firearm, if known by the person, and any additional relevant information required by the local law enforcement agency taking the report."].) But this is a limited allowance to aid local law enforcement in carrying out its administrative duties under the code. It is hardly the express invitation to adopt any manner of local legislation the trial court suggested it is. That much is clear because Prop 63 uses wildly different language to authorize local regulation in the context of two other gun control laws also adopted as part of the measure. (A.A.VI 1244, 1249 [§ 7.2 and § 9].) Both use clear language to express an intent to authorize the adoption of local laws imposing additional or stricter regulations.[6] That the drafters of Prop

[5] Indeed, the opinion implies that state law preempts only when it includes express preemptive language, or the local law is inconsistent with state law. (A.A.XI 2751, quoting *Fiscal*, *supra*, 158 Cal.App.4th at p. 915 ["[C]ourts have found, in the absence of express preemptive language, that a city or county may make additional regulations . . . if not inconsistent with the purpose of the general law."].) But there are already two separate types of preemption dealing with such circumstances—i.e., express preemption and contradiction. They are *not* the same as implied field preemption, and it makes no sense to define implied field preemption in terms of these wholly different types of preemption. To the contrary, doing so would render the entire concept obsolete.

[6] Prop 63, section 7.2, reads: "Nothing in this section shall be construed as preventing a local government from enacting an ordinance imposing additional conditions on licensees with regard to agents or employees." (A.A.VI 1244, § 7.2.) Similarly, Prop 63, section 9, states that "[n]othing in this Act shall preclude or preempt a local ordinance that imposes additional penalties or requirements in regard to the sale or transfer of

63 abandoned similar language in the theft-reporting mandate is good indication that no such authorization was intended.[7] Certainly, if the drafters wanted to authorize local action on theft reporting, they knew how—as several other sections of Prop 63 itself show.

Finally, in rejecting Kirk's implied field preemption argument, the trial court leaned heavily on its finding that the local law is not inconsistent with the state reporting law. (A.A.XI 2751.) But there is no "synergy" exception to implied field preemption. For the very foundation of this breed of preemption is that state law has so completely covered the relevant field that it has become a matter of *exclusive* state concern, so "any local regulation will *necessarily* be inconsistent with the state law." (*Cal. Psych. Socy.*, *supra*, 178 Cal.App.3d at p. 106.) In other words, when state law fully occupies the field as it has here, it preempts *all* attempts at further local regulation, not merely those that are "inconsistent" with it.

In any event, MHMC section 9.04.030 erects substantial barriers to the achievement of Prop 63's objectives that the trial court ignored. It is neither consistent with nor "synergistic" with state law. Instead, it "stands as an obstruction to the accomplishment and execution of the full purposes and objectives of" the supreme state law and is thus preempted. (*Fiscal*, *supra*, 158 Cal.App.4th at p. 911.) Most importantly, the City's law may deter, rather than encourage, theft reporting by those who live in or lose their firearms in Morgan Hill (or any of the growing number of cities adopting their own reporting mandates). Indeed, it is not difficult to imagine a layperson having firearm stolen in Morgan Hill and, believing they have five days to report, missing the City's brief 48-hour reporting deadline. If, between days three and five, the individual learns of the City's unique reporting requirement, they might reasonably fear being charged with a crime making them less likely to report the loss at all.[8]

What's more, under these and similar circumstances, the City's law plainly frustrates

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ammunition." (A.A.VI 1249, § 9.)

[7] See *Bates v. United States* (1997) 522 U.S. 23, 29-30 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *People v. Briceno* (2004) 34 Cal.4th 451, 459 ("In interpreting a voter initiative . . . we apply the same principles that govern statutory construction.").

[8] A.AVIII 1858 [explaining that firearm theft-reporting requirements might have the unintended consequence of discouraging reporting if firearm owners miss the deadline].

the state's ability to prosecute violations of its reporting requirement. Under the Fifth Amendment, for instance, the firearm theft victim cannot be forced to incriminate himself by reporting the theft after day three, essentially turning himself in for violating the City's ordinance. And, under the prohibition against double jeopardy, enforcement of the City's law against any person who fails to report, or waits more than five days to do so, strips the state of its authority to prosecute a violation of section 25250 further frustrating the accomplishment of the state's objectives. (See *supra*, Part II.A.)

Further, MHMC section 9.04.030 does not include a single exception to the City's theft-reporting requirement. It includes no exception for the loss or theft of firearms considered "antiques" under state law directly contradicting section 25250, subdivision (c), which expressly provides that "a person ***shall not be required to report the loss or theft of a firearm that is an antique firearm*** within the meaning of" state law. (Double emphasis added.) It includes no exception for those whose firearms were lost before either law took effect, raising ex post facto concerns that state law expressly avoided via section 25255, subdivision (d). And it includes no exception for any of the classes of persons identified in section 25255 who must already report under state or federal requirements, disrespecting federal supremacy and the state's intent to shield these people from the burden of double (or even triple) reporting duties.

To be sure, "the fact that the state has legislated on the same subject does not *necessarily* exclude[] the municipal power" to regulate. (*N. Cal. Psych.*, *supra*, 178 Cal.App.3d at pp. 106-107, italics added.) If the state has not fully occupied the field, municipalities may impose additional regulations that are not inconsistent with state law, after all. (*Ibid.*) But, as described above, this is not what the City has done here. Far from aligning with the "full purpose and objective," (*Fiscal*, *supra*, 158 Cal.App.4th at p. 911), of Prop 63, MHMC section 9.04.030 impedes the state's objectives by deterring reporting, interfering with the state's ability to prosecute the violation of its own laws, and doing away with measured exemptions created to protect the law from legal challenges and to encourage compliance. It makes no sense that state law would inform firearm owners so fully as to their responsibilities about theft reporting, only to allow local governments to disrupt that scheme by interjecting their

own (more stringent, but far less comprehensive) reporting laws. (*See Fiscal*, *supra*, 158 Cal.App.4th at p. 919 [holding that "the creation of a uniform regulatory scheme is a matter of statewide concern, which should not be disrupted by permitting this type of contradictory local action"], citing *L.B. Police Officers Assn. v. City of Long Beach* (1976) 61 Cal.App.3d 364.)

#### 2. State Law At Least Partially Covers Firearm Theft Reporting, and the Adverse Effects of the City's Conflicting Law Far Outweigh Any Possible Benefit to the City

Countless Californians may travel through the City with firearms while on a hunting trip, as part of a move, or for any number of other reasons. Should their firearm be lost or stolen while they are within the City's limits, they would have to comply with both state law and local law. If they are acquainted with state law or if they have seen the signs required to be posted in all of California's gun stores under section 26835, they may understandably believe they have up to five days to report lost or stolen firearms. Yet the City's ordinance gives them *three fewer days to report*, a fact of which they are unlikely to be aware, exposing them to unjust criminal prosecution for unknowing violations of the law.

Thus, even if the Court finds that state law only partially covers the relevant subject matter, Type 3 implied field preemption—dealing with the adverse effects of local regulation on transient citizens—establishes the People's manifestation of their intent to fully occupy the field. That is, because the potential harms on transient citizens far outweigh any particularized interest the City might conjure, the City's theft-reporting requirement is impliedly preempted. The trial court gave only dismissive consideration to this argument and, as explained below, its ruling would essentially abolish Type 3 field preemption because the test the trial court applied could never be met. This Court should reverse the trial court's decision and declare, once and for all, that this breed of field preemption is not extinct.

##### a. The City's theft-reporting mandate will have adverse effects on transient citizens

When "the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality," (*People v. Gerardo* (1985) 174 Cal.App.3d Supp. 1, 9 ("*Gerardo*"), citing *Hubbard*, *supra*, at p. 128), preemption is established. Under this type of implied preemption, "a *significant* factor in determining if the Legislature

intends to preempt an area of law is the impact that local regulation may have on transient citizens of the state." (*Suter*, *supra*, 57 Cal.App.4th at p. 1119, citing *Hubbard*, *supra*, 62 Cal.2d at p. 128 and *Galvan v. Super. Ct.* (*City & Cnty. of San Francisco*) (1969) 70 Cal.2d 851, 860.) When, as here, a local law threatens to adversely impact citizens moving about the state, imposing criminal penalties for violating local laws they are unlikely to be aware of given contradictory state law, preemption is clear.

If the 58 counties and 482 cities within the state could enact their own theft-reporting ordinances, each arbitrarily setting any number of days to report, a hopeless "patchwork quilt" of varying reporting requirements will confront visiting gun owners whenever they move about the state. (Cf. *Great Western*, *supra*, 27 Ca1.4th at p. 867 [holding that prohibiting sales of arms on county-owned fairgrounds had "very little impact on transient citizens"].) This is exactly the situation Type 3 implied preemption seeks to avoid.

That localities may not uniformly adopt a 48-hour reporting deadline is not mere hypothetical—it is fact. (See e.g., L.A. Mun. Code, § 55.12 [48 hours], Oakland Mun. Code, § 9.36.131 [48 hours], Port Hueneme Mun. Code, § 3914.10 [48 hours], Sacramento Mun. Code, § 9.32.180 [48 hours], S.F. Mun. Code, § 616 [48 hours], Sunnyvale Mun. Code, § 9.44.030 [48 hours], Tiburon Mun. Code, § 32-27 [48 hours], Oxnard Mun. Code, § 7-141.1 [72 hours], Simi Valley Mun. Code, § 5-22.12 [72 hours], Thousand Oaks Mun. Code, § 5-11.02 [72 hours], Santa Cruz Mun. Code, § 9.30.010 [5 days].) The City itself recognized that the city of San Jose expects reporting within 24 hours. (A.A.VI 1212-1213, 1291, 1293-1294, A.A.VII 1503.) While the cities of Oxnard, Simi Valley, and Thousand Oaks require reporting within 72 hours. (Oxnard Mun. Code, § 7-141.1; Simi Valley Mun. Code, § 5-22.12; Thousand Oaks Mun. Code, § 5-11.02.) And the city of Santa Cruz gives victims 5 days to report. (Santa Cruz Mun. Code, § 9.30.010.)[9] Even the gun-control advocates who push

[9] For more proof of just how arbitrary the theft-reporting periods are, one need only look to the varied laws in effect throughout the nation. States that have adopted reporting requirements demanding compliance anywhere from "immediately" to seven days. Only *one* state, Virginia, has seen fit to adopt a 48-hour reporting requirement, suggesting there is no consensus that 48 hours is some "magic number" particularly related to serving the purposes the City cites for its ordinance. (Mass. Gen. Laws, ch. 140, § 129C (requiring gun owners to report theft or loss "forthwith"); Ohio Rev. Code Ann., § 2923.20, subd. (A)(5) (same); D.C. Code Ann., § 7-2502.08, subds. (a), (e) ("immediately"); Haw. Rev. Stat. Ann., § 134-29 (24 hours); N.Y. Pen. Law, § 400.10 (24 hours), R.I. Gen. Laws, § 11-47-48.1 (24 hours); N.J.

"model ordinances" mandating reporting have not uniformly advocated for reporting within 48 hours. (Compare A.A.VII 1631-1632 [supporting the city of Santa Cruz's five-day reporting requirement], with A.A.VIII 1878-1885 [advocating for a 48-hour reporting requirement] and A.A.VIII 2008-2012 [same].) The wildly varying local laws governing theft reporting exposes transient Californians to *criminal prosecution* for unknowing violations of local law and, where they have failed to report within five days, violation of both state *and* local laws for identical conduct. To prevent widespread confusion—and unjust prosecution—state law must control.

That said, the trial court ruled that "laws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens, indeed, far less than other laws that have withstood preemption challenges." (A.A.XI 2753.) The court cited two cases to support this finding—*Great Western* and *Suter*. But both cases involved limitations on firearms *sales* that placed no obligation on transients to know the law and would, in fact, have very little effect on them. *Great Western* concerned a prohibition on the sales of firearms on county-owned fairgrounds, (27 Ca1.4th at p. 867), while *Suter* challenged an ordinance requiring persons seeking to sell, transfer, or lease weapons to obtain local permits in addition to the licenses already required by state and federal law, (57 Cal.App.4th at p. 1116). To be sure, the firearm businesses in *Great Western* and *Suter* might reasonably be expected to know the laws governing firearm sales in the jurisdictions in which they operate. But such laws simply do not impact transient citizens the way that laws directly regulating the behavior of all people, including those just casually passing through town, do. As the court in *Robins* recognized:

> As a general rule it may be said that ordinances affecting the local use of static property [*like firearm businesses*] might reasonably prevail, while ordinances purporting to proscribe social behavior of individuals [*like firearm theft reporting*] should *normally be held invalid if state statutes cover the areas of principal concern with reasonable adequacy*.

(248 Cal.App.2d at p. 10, italics added.)

Here, the City's law does not merely regulate the conduct of sophisticated businesses

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Stat. Ann., § 2C:58-19 (36 hours); Va. Code Ann., § 18.2-287.5 (48 hours); Conn. Gen. Stat., § 53-202g. (72 hours); 720 Ill. Comp. Stat. 5/24-4.1 (72 hours); Md. Code Ann., Pub. Safety, § 5-146 (72 hours); Mich. Comp. Laws, § 28.430 (5 days); Del. Code, tit. 11, § 1461 (7 days).)

seeking to sell firearms within the jurisdiction. It regulates the behavior of every person who simply enters the City with a firearm, imposing an affirmative duty to report to local law enforcement within just two days should they be the victim of firearm theft. (Morgan Hill Mun. Code, § 9.04.030.) This the City requires, even though state law already largely (if not entirely) "cover[s] the area[] of principal concern," (*Robins*, *supra*, 248 Cal.App.2d at p. 10), and the City never once claimed the state law did not do so with "reasonable adequacy." (See A.A.V 1191-1192, A.A.IX 2123-2124, 2172-2173, A.A. XI 2720, 2732 [comparing Kirk's briefs on summary judgment which repeatedly asked the City to cite a local interest not adequately covered by the state law, and the City's refusal to do so in its own briefing].) Under *Robins* then, the City's theft-reporting requirement is the sort of local regulation that "should normally be held invalid." (248 Cal.App.2d at p. 10.) The trial court's decision to reject what is "normal" here cannot be justified.

The trial court also states that the City's ordinance does not interfere with transient citizens any more than local ordinances prohibiting gambling or loitering, both of which have been held to not be preempted. (A.A.XI 2754.) The distinction the trial court missed, however, is that those ordinances *prohibit* certain conduct. The City's ordinance, in contrast, places an affirmative duty on transient citizens to *do* something—report a firearm loss or theft—and to do so much faster than state law (of which they are far more likely to be aware) requires. This distinction is critical. Indeed, the United States Supreme Court has held that even the famous maxim that "ignorance of the law is no excuse" violates due process when the law criminalizes a "wholly passive" failure to act and there is no proof that one would know of their duty to do so. (*Lambert v. California* (1957) 355 U.S. 223, 230.)

What is perhaps most disappointing about the trial court's decision is how dismissive it is of the risk to transient citizens, even though in arguing why there was no duplication earlier in its ruling, the court expressed perfectly why the City's ordinance can be a confusing mess even to *residents* of Morgan Hill, let alone to travelers:

> For example, a resident of the City who waits three days to report a lost or stolen firearm would violate Municipal Code section 9.04.030, but not Penal Code section 25250. Similarly, a resident of the City whose gun was stolen in San Jose and who timely reported the theft to the City's police department would violate Penal Code section 25250, but not Municipal Code section 9.04.030. Additionally, a resident of the City who lost

> his gun in San Jose and reported to the City's police department four days later would violate both Municipal Code section 9.04.030 and Penal Code section 25250, but for different reasons.

(A.A.XI 2744-2745.) Navigating this labyrinth of time limits and reporting requirements would only be worse for the transient citizen, who is unlikely to be aware of the City's shortened reporting deadline. Certainly, it is not hard to imagine someone on a weekend hunting trip who stops in Morgan Hill for the night and has one of their firearms stolen, but the next morning is unsure whether it was actually stolen or whether they just did not bring it along. Upon confirming it was missing after returning from the trip, that individual may report to the Morgan Hill Police Department on the third or fourth day, in compliance with state law but unknowingly in violation of the City's ordinance, effectively turning themselves in for a crime by accident. Or even worse, that individual may discover the City's ordinance before they report and then be too afraid to report at all, sabotaging the aims of the state law.

If this were simply a matter of inconvenience to transient citizens, then perhaps the City's ordinance could survive this third test of implied preemption. (*Gerardo*, *supra*, 174 Cal.App.3d Supp. at p. 9 [finding that a mere inconvenience to transient citizens is not enough to overcome the interests of the locality].) But the stakes here involve *criminal prosecution* for failure to take *affirmative action* within a timeframe that differs from the comprehensive state law on the same topic. In response to Kirk's concerns, the City argued (and the trial court agreed) that there is no harm to transient citizens because they are expected to know the laws of the cities through which they travel. (A.A.XI 2754, A.A.IX 2121-2123.) But under that logic, nothing would ever be a sufficient threat to transient citizens to meet the test for Type 3 implied field preemption. To uphold the trial court's decision, then, would be to essentially declare this type of implied field preemption extinct.

#### b. The City's purported interests cannot justify the adverse effects on transient citizens

The second half of the analysis under Type 3 field preemption focuses on the City's local interests. "The significant issue in determining whether local regulation should be permitted depends upon a 'balancing of two conflicting interests: (1) the needs of local governments to meet the *special needs of their communities*; and (2) the need for uniform state

regulation.' [citation]." (*Robins*, *supra*, 248 Cal.App.at pp. 9-10, italics added.) And again, as a general rule, "ordinances purporting to proscribe social behavior of individuals *should normally be held invalid if state statutes cover the areas of principal concern with reasonable adequacy*." (*Id.* at p. 10, italics added.) The City has never articulated any "special need" justifying its theft-reporting requirement that is not already served by state law, but even if the City had such an interest, the state's interest in uniform theft-reporting regulation far outweighs the City's needs here.

Theft-reporting laws, like section 25250, are said to serve four main purposes:

1. To discourage firearm owners from falsely reporting the theft or loss of their firearm to hide their involvement in illegal activities and to provide a tool for law enforcement to ferret out such behavior. (A.A.VI 1213, 1293.)

2. To help disarm prohibited persons by deterring them from falsely claiming their firearms were stolen or lost. (A.A.VI 1213, 1293.)

3. To protect firearm owners from unwarranted criminal accusations if law enforcement recovers their firearms at a crime scene and to make it easier for law enforcement to locate a stolen or lost firearm and return it to its lawful owner. (A.A.VI 1213, 1293.)

4. To make firearm owners more accountable for their firearms. (A.A.VI 1213, 1293.)

In fact, the point of section 25250, according to its supporters, was to help law enforcement "investigate crimes committed with stolen guns, break up gun trafficking rings, and return guns to their lawful owners." (A.A.VI 1217, 1240; see also A.A.VIII 2081 [citing claims by Prop 63 proponents in the official ballet pamphlet that Prop 63 would "help police shut down gun trafficking rings and locate caches of illegal weapons," "recover stolen guns before they're used in crimes and return them to their lawful owners"].)

Across all three of its briefs during the dueling motions for summary judgment below, the City never once identified any particularized local interest not already served by the state law. Nor did it identify any "special need" that could justify the harm its contradictory theft-reporting law will have on transient Californians. To the contrary, when adopting the ordinance, the City cited largely the very same interests the state law did. (A.A.VI 1213-1215, 1217, 1240, 1260, 1263-1264, 1291-1306, 1483-1494, A.A.VII 1503-1515, 1573-1588, 1601, A.A.VIII 1878-1885, 2008-2012, 2081.) What's more the, the City never once claimed that its interests were not adequately served by the state's uniform theft-reporting scheme. But even if it had, there is no reason to think that the City's law,

shortening the reporting period by three days, is any more likely to serve them. (See A.A.VI 1213-1215, 1260, 1263-1264, 1291-1306, 1483-1494, A.A.VII 1503-1515, 1549-1552, 1573-1588.) The City cited no evidence that it would (*ibid.*), and there is simply is no body of reliable research establishing that it could (A.A.VI 1215, VIII 1859). Because the City cannot identify any particularized local interest that is not reasonably served by the state law, under *Robins*, the need for "uniform state regulation" to both serve the statewide interest in theft reporting and protect transient citizens necessarily outweighs any special interest the City might have. (See 248 Cal.App.2d at pp. 9-10, italics added.) MHMC section 9.04.030 is thus void as impliedly preempted by state law.

Having made these points repeatedly below, Kirk was dismayed that the trial court ruled that the City need not even identify its particularized local interests *at all*. (A.A.XI 2754.) Instead, the court was content that the City had cited the general benefits of such requirements, even though the City made no effort to explain how state law was inadequate to serve them as *Robins* requires. (*Ibid.*) The trial court did cite the City's October 2018 staff report to argue that the City had identified benefits, (A.A.XI 2754-2755), but that report was based on a 2011 report prepared for San Mateo county, (A.A.VIII 1862-1876). So the closest the City ever came to stating its "special needs" was citing a report from another county that predated the 2016 adoption of the statewide theft-reporting requirement which adequately addressed the City's interest in requiring firearm theft reporting. That hardly justifies the City's disruption of the uniform statewide scheme and any attendant harms invited upon the transient citizens of the state.

Regrettably, the trial court disingenuously asserted that Kirk "do[es] not cite any legal authority, and the Court is aware of none, providing that Defendants must present evidence showing that the Ordinance effectively, or more effectively than state law, achieved the possible benefits identified by the City." (A.A.XI 2755.) But Kirk never argued that preemption requires that localities prove their laws will be effective (or more effective than state law) to pass muster. Instead, Kirk simply reiterated the rule, as laid out in *Robins*, that the court must balance the interest of local governments to meet the *special needs of their communities* with the need for uniform state regulation. (*Robins, supra*, 248 Cal.App.at pp. 9-

10.) This balance is decided by considering "[1] whether substantial geographic, economic, ecological or other distinctions are persuasive of the need for local control, and [2] whether local needs have been *adequately recognized and comprehensively dealt with at the state level*." (*Ibid*, italics added.) This requires, at minimum, that the City identify its particularized local needs and show that state law is inadequate to meet them.[10] Kirk only mentioned that the City had not shown that its law was any more effective than state law because the City's interests were practically identical to those already purportedly served by section 25250. (A.A.V 1191.) Because the City's needs are no different from the state's, surely the City's law must meet those interests more effectively—or else *Robins*' guidance that a local law is generally "invalid if state statutes cover the areas of principal concern with reasonable adequacy" would be meaningless. (248 Cal.App.at pp. 10.)

Ultimately, it is unlikely that shortening the theft-reporting period by mere days would have any impact on the City's interests at all. As the City itself essentially admitted when it suggested that "[r]esponsible gun owners will report with or without an ordinance." (A.A.VI 1493; see also A.A.VIII 2084, ¶ 8; 2089, ¶ 10.) Indeed, according to the United States Department of Justice, gun owners reported about 90% of burglaries involving stolen firearms to law enforcement between 2005 and 2010. (A.A.VI 1215, A.A.VIII 1859, 1935.) But only about *1 of every 5* firearms had been recovered between 1 day and *6 months* after reporting. (*Ibid.*) And, although "victimizations involving stolen firearms could have occurred . . . up to six months before the NCVS [National Crime Victimization Study] interview [from which these statistics were drawn], the amount of time that had elapsed *made no significant difference in the percentage of households for which guns had not been recovered* . . .." (A.A.VI 1215-1216, A.A.VIII 1935, italics added.) There is simply no reason to believe that shortening the reporting period from five to two days would make any (let alone a significant) difference in the number of firearms recovered or traced.

So even if state law does not fully cover the field of firearm theft reporting, the

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[10] At least one other case has confirmed the need to prove a "special need" to regulate in the context of local gun regulation of areas already occupied by the state. (See *Fiscal, supra*, 158 Cal.App.4th at p. 919 ["We wish to stress that the goal of any local authority wishing to legislate in the area of gun control should be to accommodate the local interest with the least possible interference with state law."].)

harmful effect on transients far outweighs any interest the City might have in shortening the timeframe for compliance. There is no benefit specific to the City (or local jurisdictions generally) that would justify allowing the City to shorten the reporting period and invite the harms to transient citizens described above. For all these reasons, MHMC section 9.04.030 is implicitly preempted by section 25250. The Court should strike it as void and unenforceable.

## CONCLUSION

For these reasons, Kirk asks this Court to hold that MHMC section 9.04.030 is preempted by Prop 63, reverse the trial court's order granting the City's motion for summary judgment, and vacate the entry of judgment for the City.

Dated: August 25, 2021

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

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

## CERTIFICATE OF WORD COUNT

Under Rule 8.204, subdivision (c)(1), of the California Rules of Court, I certify that the attached Appellants' Opening Brief is 1½-spaced, typed in a proportionally spaced, 13-point font, and the brief contains 11,942 words of text, including footnotes, as counted by the word-count feature of the word-processing program used to prepare the brief.

Dated: August 25, 2021

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

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

## PROOF OF SERVICE

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

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

On August 25, 2021, I served a copy of the foregoing document described as: **APPELLANTS' OPENING BRIEF**, on the following parties, as follows:

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

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

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

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.

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

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

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