**CASE NO. H048745**

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

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

*Plaintiffs and Appellants,*

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.*

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APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
CASE NO. 19-CV-346360
HON. JUDGE PETER H. KIRWAN

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# RESPONDENT'S BRIEF

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**FARELLA BRAUN + MARTEL LLP**
Anthony P. Schoenberg (SBN 203714)
tschoenberg@fbm.com
Kelsey D. Mollura (SBN 337308)
235 Montgomery Street, 17th Floor
San Francisco, California 94104
Telephone: (415) 954-4400
Facsimile: (415) 954-4480

**GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE**
Hannah Shearer (SBN 292710)
hshearer@giffords.org
Esther Sanchez-Gomez (SBN 330408)
esanchezgomez@giffords.org
268 Bush Street #555
San Francisco, CA 94104
Telephone: (415) 433-2062
Facsimile: (415) 433-3357

*Attorneys for Defendants and Respondents CITY OF MORGAN HILL, MORGAN HILL CHIEF OF POLICE DAVID SWING, MORGAN HILL CITY CLERK IRMA TORREZ*

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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: 337308<br>NAME: Kelsey D. Mollura<br>FIRM NAME: Farella Braun + Martel LLP<br>STREET ADDRESS: 235 Montgomery St. Ste. 1700<br>CITY: San Francisco STATE: CA ZIP CODE: 94104<br>TELEPHONE NO.: 415-954-4400 FAX NO.: 415-954-4480<br>E-MAIL ADDRESS: kmollura@fbm.com<br>ATTORNEY FOR (*name*): | SUPERIOR COURT CASE NUMBER: 19-CV-346360 |
| APPELLANT/ PETITIONER: C. Mitchell Kirk; California Rifle & Pistol Assn., Inc.<br>RESPONDENT/ REAL PARTY IN INTEREST: City of Morgan Hill; Morgan Hill Chief of Police David Swing; Morgan Hill City Clerk Irma Torrez; Does --10 | |

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

*(Check one):* [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

**Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.**

1. This form is being submitted on behalf of the following party (*name* ): City of Morgan Hill, et al.

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

| | **Full name of interested entity or person** | **Nature of interest *(Explain):*** |
|---|---|---|
| (1) | | |
| (2) | | |
| (3) | | |
| (4) | | |
| (5) | | |

[ ] Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: November 23, 2021

Kelsey D. Mollura
(TYPE OR PRINT NAME)

Kelsey Mollura
(SIGNATURE OF APPELLANT OR ATTORNEY)

## INTRODUCTION

The mass shooting at a Parkland, Florida high school was a wake-up call for the City of Morgan Hill, as it was for many communities across the nation who have increasingly become aware of their vulnerability to mass shootings and other forms of gun violence. In adopting Municipal Code 9.04.030 (the "Morgan Hill Ordinance" or "Ordinance"), a firearm theft-reporting ordinance aimed at reducing the flow of lost or stolen guns to the criminal market, the Morgan Hill City Council made a reasoned and impactful change for the benefit of public safety and violent crime prevention.

The Morgan Hill Ordinance was informed by the advice of local experts in response to local as well as national concerns, and it is fully consistent with and not preempted by California state law. Appellants' arguments to the contrary fail to acknowledge that Morgan Hill is *presumptively entitled* to pass a stricter firearm theft-reporting ordinance than provided by state law—unless the legislature has "clearly indicated" an intent to foreclose this traditional use of local police powers. (See *Coyne v. City & Cty. of San Francisco* (2017) 9 Cal.App.5th 1215, 1225.) The record in this case contains no indication, clear or otherwise, that the People of California intended to foreclose such action by Morgan Hill—or by the 17 other cities that already had stronger reporting requirements when voters passed the state ballot initiative upon which Appellants base their preemption claim. The Ordinance is therefore not preempted, and this Court should affirm the Superior Court's summary judgment ruling.

## BACKGROUND

Morgan Hill's theft-reporting Ordinance promotes public safety by requiring individuals to report lost or stolen firearms to Morgan Hill Police within 48 hours of the loss or theft.[1] Lost and stolen firearms may not draw the same media attention as a mass

[1] Municipal Code 9.04.030 states that individuals must report within 48 hours of when they knew, or reasonably should have known, about the loss or theft. While important for

shooting that took the lives of fourteen children and three educators, but they are quietly fueling our nation's gun violence epidemic and have contributed to mass shootings as well.[2] The vast majority of Americans agree that background checks should be required for all gun purchases;[3] meanwhile, a gun is stolen from an individual gun owner about once every two minutes.[4] Worse: nationally, up to 40% of all lost or stolen guns go unreported.[5] This means that there are a distressingly large number of guns in the hands of people who likely would be unable to purchase one legally—and law enforcement are hamstrung from addressing this problem when thefts and lost firearms go unreported.

Lax reporting laws have the effect of emboldening straw purchasers and gun traffickers because they can evade responsibility for supplying firearms used in violent

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ensuring that individuals are not unfairly penalized for a firearm loss or theft they did not know about, for simplicity, the caveat of "reasonably should have known" has been omitted throughout.

[2] (Amanda Marcotte, *Many Mass Shootings Involve Stolen Guns: Shouldn't Gun Owners Keep Them Locked Up?*, (April 19, 2018) Salon, https://bit.ly/3HHS80j [as of Nov. 22, 2021] [analyzing Oregon shopping mall shooting perpetrated with a stolen gun: "'The legal gun owner saw the firearm was missing before he went to work' . . . but he did not call police until he learned about the shooting from national news. 'Had he called [the] police before, when he noticed the firearm was gone, it could have prevented the shooting.'"].)

[3] (Giffords Law Center: *New Survey Shows Persuadable Voters Want Urgent Action from Biden Administration and Congress on Gun Safety*, https://giffords.org/wp-content/uploads/2021/01/Everytown-Giffords-Leadership-Memo-F01.24.21.pdf [as of Nov. 18, 2021].)

[4] 380,000 guns are stolen from individual owners per year. (David Hemenway, Deborah Azrael, and Matthew Miller, "Whose Guns are Stolen? The Epidemiology of Gun Theft Victims," Injury Epidemiology 4, no. 1 (2017).) Divided by 365 days, 24 hours, and 60 minutes, approximately one gun is stolen per two minutes.

[5] Of the approximately 380,000 guns stolen from individual owners per year (Hemenway et al., *supra* n.4), less than 240,000 gun thefts are reported to police each year. (Brian Freskos, *Missing Pieces: Gun Theft from Legal Gun Owners is on the Rise, Quietly Fueling Violent Crime*, (Nov. 20, 2017) The Trace, https://bit.ly/2izST1h [as of Nov. 22, 2021].)

crimes by falsely claiming a gun they supplied had previously been lost or stolen.[6] They also throttle law enforcement's efforts to recover guns stolen from legal owners *before* those firearms can be used in a crime. Unfortunately, this is an all-too-common occurrence: 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 *after* being used in a crime.[7]

Informed by these and other public safety concerns associated with stolen guns, at least 18 cities and towns in California have adopted local ordinances requiring the reporting of lost or stolen firearms.[8] California voters then took partial steps to address the problem on a statewide basis with the passage of Proposition 63 ("Prop. 63") on November 8, 2016. As enacted by Prop. 63, Penal Code Section 25250 requires individuals to report the loss or theft of a firearm within five days of the loss or theft.[9] The purpose and intent of this law was: "To keep guns and ammunition out of the hands of convicted felons, the dangerously mentally ill, and other persons who are prohibited by law from

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[6] (See, e.g., Daniel W. Webster et al., "Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws," in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis (Baltimore: The Johns Hopkins University Press, 2013), 118.)

[7] (Freskos, *supra* n.5.)

[8] Oakland (Mun. Code Sec. 9.36.131 – 48 hours), San Francisco (Police Code Sec. 616 – 48 hours), Los Angeles (Mun. Code Sec. 5512 – 48 hours), Campbell (Mun. Code Sec. 8.12.045 – 48 hours), Berkeley (Mun. Code Sec. 13.75.020 – 48 hours), Sacramento (City Code Sec. 9.32.180 – 48 hours), Port Hueneme (Mun. Code Sec. 3914.10 – 48 hours), Simi Valley (Mun. Code Sec. 5-22.12 – 72 hours), West Hollywood (Mun. Code Sec. 9.27.010 – 48 hours), Thousand Oaks (Mun. Code Sec. 5-11.03 – 72 hours), Richmond (Mun. Code. Sec. 11-97.020 – 48 hours), Sunnyvale (Mun. Code Sec. 9.44.030 – 48 hours), Santa Cruz (Mun. Code Sec. 9.3.010 – 5 days), Huntington Park (Mun. Code Sec. 5.17.05 – 48 hours), Maywood (Mun. Code Sec. 4-4.11 – 48 hours), Oxnard (Mun. Code Sec. 7-141.1 – 72 hours), Tiburon (Mun. Code Sec. 32-27 – 48 hours), and Palm Springs (Mun. Code Sec. 11.16.040 – 48 hours (repealed 2018).

[9] Penal Code § 25250 also includes a caveat requiring individuals to report within five days of when they knew or reasonably should have known about the loss or theft. Again, for simplicity's sake, this caveat has been omitted throughout.

possessing firearms and ammunition . . . [; t]o require all stores that sell ammunition to report any lost or stolen ammunition within 48 hours of discovering that it is missing . . . [; and t]o require the reporting of lost or stolen firearms to law enforcement." (Prop. 63, § 3.) The law also created Penal Code Section 25270, which instructs local law enforcement on the *minimum* contents of a lost or stolen firearm report and empowers local law enforcement to set additional requirements for the contents of the report. As noted above, prior to Prop. 63's proposal and passage in 2016, at least 18 cities and towns in California already had firearm theft-reporting ordinances, with 17 requiring that lost or stolen guns be reported in less than 5 days (see *supra* n.8). Prop. 63's text and statutory provisions contained no statement or indication of intent to replace these stronger local regulations with a uniform state standard for firearm theft-reporting.

More than two years after the enactment of Prop. 63, the Morgan Hill City Council adopted Local Ordinance No. 2289. Morgan Hill's Ordinance followed a report issued by the Association of Bay Area Governments ("ABAG")—of which Morgan Hill is a member—regarding concerning levels of gun violence in Morgan Hill's neighbor, San Mateo County. (A.IV 900.) Based in part on that Report, the "ABAG Executive Board approved model ordinances and took action to encourage all member jurisdictions, including the City of Morgan Hill, to adopt the model ordinances." (A.IV 886.) One of the model ordinances addressed lost and stolen firearm reporting in a manner that "both clarifies and expands on the Penal Code requirements" enacted via Prop. 63. (A.IV 886.) In adopting the stronger 48-hour reporting requirement, Morgan Hill sought to "allow[] police to more easily identify stolen weapons during the course of an investigation[,] . . . provide[] an opportunity for early identification[,] and [] reduce the chance of lost or stolen firearms being used in additional crimes." (A.IV 886-87.) The City Council also recognized specific benefits of a 48-hour reporting timeframe as compared to five days, including that earlier notification aids police, "provides an opportunity for early identification" of stolen guns, and can "reduce the chance of lost or stolen firearms being used in additional crimes." (See A.IV at 886-87.) Addressing the grave local public safety concerns associated with lost or stolen firearms of its citizens and neighboring

communities, Morgan Hill adopted the Ordinance on November 28, 2018. This preemption litigation followed about six months later.

## PROCEDURAL BACKGROUND

On April 15, 2019, the California Rifle and Pistol Association ("CRPA")[10] and G. Mitchell Kirk (together "Appellants" or "CRPA") filed this action against the City of Morgan Hill; Morgan Hill Chief of Police David Swing, in his official capacity; and Morgan Hill City Clerk Irma Torrez (together "Respondents" or "Morgan Hill") seeking declaratory and injunctive relief to invalidate the ordinance based on various preemption theories.[11] (A.I 8.) CRPA's complaint argued that the Morgan Hill Ordinance is preempted because: 1) it duplicates state law; 2) it contradicts state law; or 3) it enters into an area fully occupied by state law. Shortly thereafter, the Parties filed cross motions for summary judgment. (A.I 36; A.V 1167.)

The trial court stated that the arguments and evidence it considered in denying CRPA's motion were "virtually identical" to those that apply to Morgan Hill's motion, and thus the court's analysis of the former was simultaneously applicable to both. (A.XI 2758.) To begin its analysis, the trial court recited the general presumption against preemption. (A.XI 2741.)

First, the trial court was persuaded that the Ordinance was neither duplicative nor contradictory to Penal Code Section 25250. (A.XI 2743-48.) Specifically, the trial court explained that the two are not coextensive and therefore cannot be duplicative of one another, because the Ordinance and Section 25250 do not have the same scope or boundaries and they do not criminalize precisely the same acts. (A.XI 2743-45.)

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[10] The CPRA is the California state affiliate of the National Rifle Association ("NRA"). (See, e.g., https://www.nraila.org/campaigns/california/stand-and-fight-california/.)

[11] Appellants also sought a Writ of Mandate/Prohibition. (A.I 14.) Appellants requested dismissal with prejudice of this cause of action, which was entered on July 26, 2019. (A.I 33.)

Second, the trial court determined that the Ordinance is not contradictory to Section 25250 because it is not inimical to the state law—meaning, it does not mandate what state law expressly forbids, or forbid what state law expressly mandates. Further, the trial court determined that it is reasonably possible to comply with both the Ordinance and Section 25250. (A.XI 2745-48.)

Third, in considering theories of implied preemption, the trial found that "the steps that Prop 63 took in pursuit of its objectives were limited and specific" and therefore had not occupied the entire field. (A.XI 2751.) Even in light of the "handful of [additional] code sections . . . that address certain aspects of the reporting of lost or stolen firearms . . . the statutory scheme contemplates local regulation regarding the reporting of lost or stolen firearms . . . [and] it permits more stringent local regulation of that activity." (A.XI 2751-52.) The trial court also refused to find implied preemption even assuming partial coverage because "laws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens[.]" (A.XI 2753-54.)

The trial court's order finding for Morgan Hill and against CRPA was served on the parties on July 31, 2020. (A.XI 2760.) The judgement was filed by the court on January 20, 2021, though the order was signed on December 10, 2020. (A.XI 2787-88.) CRPA noticed the instant appeal on January 12, 2021. (A.XI 2761.)

## STATEMENT OF THE ISSUE

Is a municipal ordinance that requires reporting lost or stolen firearms within 48 hours duplicative of, contradictory to, or impliedly preempted by a state law that requires reporting lost or stolen firearms within five days, where (1) it is reasonably possible to comply with both reporting requirements, and (2) state law contains no clear indicator of intent to preempt stronger local reporting requirements?

## STANDARD OF REVIEW AND LEGAL STANDARD

CRPA appeals the trial court's order granting summary judgment in favor of Morgan Hill and finding that the Morgan Hill Ordinance is not preempted by California Penal Code Section 25250. "The question of whether state law preempts a local ordinance is 'a pure question of law' [the appeals court] review[s] de novo." (*Browne v. Cty. of Tehama* (2013) 213 Cal.App.4th 704, 718 [quoting *City of Watsonville v. State Dept. of Health Servs.* (2005) 133 Cal.App.4th 875, 882].)

Summary judgment shall be granted when "there is no triable issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." (Cal. Civ. Proc. Code § 437c(c); see also *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 843.) Although the moving party generally holds the burden on a summary judgment motion, where, as here, one party claims the Ordinance is preempted by state law, that party—here, CRPA—bears the burden regardless of which party moves for summary judgment. (See, e.g. *First Resort, Inc. v. Herrera* (N.D. Cal. 2015) 80 F.Supp.3d 1043, 1055, aff'd, (9th Cir. 2017) 860 F.3d 1263 [placing burden on the party claiming preemption on cross-motions for summary judgment].)

## ARGUMENT

The trial court properly granted Morgan Hill's Motion for Summary Judgment. Morgan Hill passed the Ordinance pursuant to its broad police powers and the Ordinance does not conflict with state law. It is not preempted. There is not a triable issue.

**First**, as found by the trial court, the Morgan Hill Ordinance does not duplicate Penal Code Section 25250. It does not criminalize "precisely the same acts" as prohibited by the state law, nor can it be considered to be "coextensive" with the state law. They vary temporally: the Ordinance requires gun owners to report a lost or stolen firearm to the Morgan Hill Police within 48 hours, and the state law requires gun owners to report a lost or stolen firearm to the local government within five days. They vary geographically: the Ordinance is specific to firearms lost or stolen in Morgan Hill or stolen from Morgan

Hill residents, and the state law addresses firearms lost or stolen across California. Further, local ordinances that *strengthen* a state law requirement are not considered to be duplicates of the state law.

**Second**, as found by the trial court, the Morgan Hill Ordinance does not contradict Penal Code Section 25250. The Ordinance does not require what Section 25250 forbids, nor does it prohibit what Section 25250 demands. The Morgan Hill Ordinance requires reporting within 48 hours; Section 25250 does not forbid reporting within 48 hours. Section 25250 merely *permits*—does not *demand*—that the reporting period stay open for five days, which, under controlling precedent, means that Section 25250 does not demand that gun owners be allowed more than the Ordinance's 48 hours to report. Further, one can reasonably comply with both the Ordinance and state law by reporting within 48 hours.

**Third**, as found by the trial court, the Morgan Hill Ordinance does not enter an area fully occupied by state law or place a burden on transient citizens without a corresponding benefit to local public safety. Section 25250 does not fully occupy the field of lost and stolen firearm reporting, but rather expressly contemplates further requirements at the local level. Preemption does not follow from state law's partial coverage of the field because Morgan Hill's Ordinance was passed to address special local concerns—which were articulated by the City Council in considering the Ordinance and throughout this litigation—benefitting public safety, and the burden on transient citizens is minimal.

## I. STATE LAW DOES NOT PREEMPT THE MORGAN HILL ORDINANCE BECAUSE THE ORDINANCE DOES NOT DUPLICATE OR CONTRADICT STATE LAW.

The California Constitution allows a county or city to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general [state] laws." (Cal. Const. art. XI, § 7.) "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. [¶] A conflict exists if

the local legislation *duplicates*, *contradicts*, or *enters an area fully occupied* by general law, either expressly or by legislative implication." (*People v. Nguyen* (2014) 222 Cal.App.4th 1168, 1174 [quoting *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067, original italics (internal citations and quotation marks omitted].) As discussed below, the Ordinance is not preempted under the first two theories because it does not duplicate or contradict California state law.

"The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. Cty. of Santa Cruz* (2006) 38 Cal.4th 1139, 1149, as modified Aug. 30, 2006). Further, courts are "particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.'" (*Id.* [quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707].) Firearm regulation is one such field. The Supreme Court has held that firearm regulation is the type of local regulation that warrants an especially strong presumption against preemption. (*Galvan v. Super. Ct.* (1969) 70 Cal.2d 851, 864, superseded by statute on other grounds by *Great Western Shows, Inc. v. Cty. of Los Angeles* (2002) 27 Cal.4th 853. ["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."]; see *Suter v. City of Lafayette*, (1997) 57 Cal.App.4th 1109, 1119 [rather than preempting the "broad field" of firearm regulation, the California legislature has "indicate[d] an intent to permit local governments to tailor firearms legislation to the particular needs of their communities"].) Thus, CRPA face an exceedingly high burden to show that Section 25250 expressly or necessarily preempts the Morgan Hill ordinance.

CRPA cannot meet that burden. As found by the trial court, the Morgan Hill Ordinance is not duplicative of or contradictory to state law. (Nor is it impliedly preempted by state law, as addressed below in the next major section.)

### A. Morgan Hill Municipal Code Section 9.04.030 Is Not Duplicative of California Penal Code Section 25250.

A local ordinance duplicates a state statute where it "criminalize[s] precisely the same acts which are prohibited by the statute." (*Nordyke v. King* (2002) 27 Cal.4th 875, 883 [quoting *Pipoly v. Benson* (1942) 20 Cal.2d 366, 370, quotation marks omitted]; see *Great Western Shows, Inc. v. Cty. of Los Angeles* (2002) 27 Cal.4th 853, 865.) In other words, an ordinance is improperly duplicative of a state statute if it is "coextensive" with state law. (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067.) To be "coextensive" with California Penal Code Section 25250, the Morgan Hill ordinance must "hav[e] the same spatial or temporal scope or boundaries" as Section 25250. (See MERRIAM-WEBSTER, *Coextensive*, https://www.merriam-webster.com/dictionary/coextensive [as of Nov. 16, 2021].)

However defined, the Ordinance is clearly not duplicative of Section 25250. The Morgan Hill Ordinance requires the reporting of a lost or stolen firearm to the Morgan Hill Police within 48 hours of the loss or theft whenever: (1) the person resides in Morgan Hill, or (2) the loss or theft occurs in Morgan Hill. State law requires the reporting of a lost or stolen firearm to local law enforcement in the jurisdiction where the theft occurred within five days of the loss or theft. (See Penal Code § 25250.) Their temporal scope and boundaries clearly differ: where the Ordinance requires the loss to be reported within *48 hours*, state law requires the loss to be reported within *five days*. Their spatial scope and boundaries differ as well: where the Ordinance requires a gun owner whose gun is *stolen in Morgan Hill* or a *Morgan Hill resident gun owner* to report to Morgan Hill Police when loss or theft of a firearm occurs, state law requires reporting in the jurisdiction where the loss or theft occurred. As the Morgan Hill ordinance does not criminalize "precisely the same acts which are prohibited by the statute," (*Nordyke*, *supra*, 27 Cal.4th at p. 883), it is clearly not duplicative of Section 25250. (See also *Great Western Shows*, *supra*, Cal.4th at pp. 865-66 [where state law prohibits the sale of machine guns, assault weapons, and unsafe handguns, and the municipal ordinance more

broadly prohibits the sale of firearms on county property, the municipal ordinance "does not criminalize precisely the same acts which are prohibited by statute" and "therefore [is] not duplicative."] [internal citation and quotation marks omitted].)

Instead, the Ordinance does something that courts have held is distinct from duplication—the Ordinance *increases* the requirements set by state law under Section 25250. As held in *Suter v. City of Lafayette, supra,* 57 Cal.App.4th at p. 1123, an ordinance that "echo[es] the provisions of [a] Penal Code section . . . is not co-extensive with it . . . [where] it *increases* the [] requirements set forth in the Penal Code." (emphasis added). In *Suter*, the court compared state and municipal firearm storage regulations. The state Penal Code regulation required dealers to store firearms using *one* of three methods: (1) in a secure facility, (2) with a trigger guard mechanically secured with a steel rod or cable and anchoring the firearm down to prevent removal, or (3) locked in a safe or vault. (*Id.* at p. 1122.) The second regulation, a municipal regulation, required dealers to employ *two* of the above three methods. The court held that the municipal ordinance did not duplicate the state law because, rather than being coextensive, the municipal ordinance "increases the storage requirements set forth in the Penal Code." (*Id.* at p. 1123.) Likewise, the Morgan Hill Ordinance increases the reporting requirement set forth in Section 25250 by setting a stricter time limit.

The above analysis also precludes CRPA's belated argument (not raised below) that enforcement of both Section 25250 and the Morgan Hill Ordinance would raise double jeopardy concerns. (See Appellants Br. 17.) Even if double jeopardy considerations were applicable, the Morgan Hill ordinance is not a necessarily-included offense of Section 25250. If an offense "cannot be committed without necessarily committing another offense," that 'other' offense is a necessarily included offense. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) Translated to this case, if a gun owner cannot violate Section 25250 without necessarily violating the Morgan Hill ordinance, the Morgan Hill ordinance becomes a lesser included offense of Section 25250. But here, as explained by the trial court, a gun owner *can* violate Section 25250 without necessarily violating the Morgan Hill Ordinance. For example, if a resident loses a gun in another

city but reports it only to Morgan Hill police, the resident violates state law, not the municipal ordinance. Therefore, the double jeopardy concern does not apply. (See also *In re Sic* (1887) 73 Cal. 142, 149 ["we only hold that there is a conflict [based on double jeopardy] where the ordinance and the general law punish precisely the same acts. . . . We do not wish to be understood as holding that the sections of the ordinance which make criminal other acts not punishable under the general law are void because the legislature has seen fit to legislate upon the same subject."].)

Further, if it were a double jeopardy concern for localities to implement stricter regulations than the state, then this Court would be bound to reverse the panoply of caselaw that have held that municipal ordinances may increase state requirements without being held duplicative. California courts "have consistently upheld local regulations in the form of additional reasonable requirements not in conflict with the provisions of the general law." (*Pipoly v. Benson* (1942) 20 Cal.2d 366, 485 [collecting cases]; *Suter, supra,* 57 Cal.App.4th at p. 1128; *Great Western*, *supra*, 27 Cal.4th at. p. 868; see also *Am. Fin. Servs. Ass'n v. City of Oakland* (2003) 4 Cal.Rptr.3d 745, 756 , rev'd on other grounds by (2005) 34 Cal.4th 1239 [The plaintiff's "proposed test for contradiction preemption, that the local ordinance imposes stricter requirements than state regulation of the same conduct, is incompatible with settled case law" upholding stricter local regulation].) For over a century California courts have acknowledged that cities are allowed to pass stricter requirements in an area where the state has also legislated. (E.g., *In re Iverson* (1926) 199 Cal. 582, 586 [upholding local law setting a lower limit than state law on maximum volume of alcohol pharmacies may dispense]; *In re Hoffman* (1909) 155 Cal. 114, 118 [upholding local law setting a lower limit than state law on maximum percentage milk may be adulterated]; *Am. Fin. Servs. Assn.*, *supra*, 4 Cal.Rptr.3d at p. 756 [collecting cases].)[12]

[12] The *Hoffman* line of cases was partly overruled on other grounds in *In re Lane* (1962) 58 Cal.2d 99, 109, but that decision does not foreclose reliance on the principle discussed here—that local governments may pass stricter requirements than state law (absent a conflict or clear indication of intent to preempt). (See *Galvan*, *supra*, 70 Cal.2d at p. 865

The trial court correctly found that the Morgan Hill Ordinance is not duplicative of Section 25250.

### B. Morgan Hill Municipal Code Section 9.04.030 is Not Contradictory to California Penal Code Section 25250.

"An ordinance contradicts state law if it is inimical to state law; i.e., it penalizes conduct that state law expressly authorizes or permits conduct which state law forbids." (*Suter*, *supra*, 57 Cal.App.4th at p. 1124 [citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898; *Bravo Vending v. City of Rancho Mirage*, (1993) 16 Cal.App.4th 383, 396-97.) Where, as here, the Morgan Hill ordinance does not require what Section 25250 forbids, nor does it prohibit what Section 25250 demands, the Morgan Hill ordinance does not contradict Section 25250.

CRPA's general argument that the ordinance contradicts Section 25250 because the state law "implicitly allows" someone to take up to five days to report a theft holds no water. CRPA does not, and cannot, cite support for this imaginary rule, which would effectively bar municipalities from ever creating stricter requirements than state law.[13] The Morgan Hill Ordinance requires reporting within 48 hours; Section 25250 does not forbid reporting within 48 hours. On the other side of the coin, Section 25250 merely *permits*—does not *demand*—that the reporting period stay open for five days. A state law setting a permissive outer limit does not preclude its narrowing by municipalities. For example, in *Great Western*, the California Supreme Court held that a county ordinance that banned gun shows from occurring on county property did not contradict, and was not preempted by, a state statute regulating gun shows. (*Great Western*, *supra*, 27 Cal.4th at

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["The considerations involved in *Lane* do not apply to the instant case. The statutory pattern governing sexual behavior differs from that governing guns and other weapons."].)

[13] Additionally, CRPA's proposition that Section 25250 "implicitly" demands a full five-day window to report counteracts the widely-cited presumption against preemption. (See, e.g., *Calguns Found., Inc. v. Cty. of San Mateo* (2013) 218 Cal.App.4th 661, 666-67 (citations omitted).)

p. 866.) The Court held that, while the language of the state law *contemplated* the sale of guns at gun shows, this did not mean that the state law *mandated* that guns be sold at gun shows. Similarly, while Section 25250 may *contemplate* theft and loss reporting on days three through five, it does not *mandate* waiting more than 48 hours to report.

Nor are CRPA's more specific arguments attempting to find the Ordinance contradictory with Section 25250 persuasive. First, it is indeed reasonably possible for a firearm owner to comply with both California Section 25250 and the Morgan Hill Ordinance; and second, Morgan Hill is under no obligation to show that the Ordinance is justified by local interests, though it has shown such local interests regardless.

### 1. It Is Reasonably Possible for a Regulated Party to Comply with Both Local And State Firearm Theft-Reporting Laws.

An ordinance is not contradictory to state law where it is "reasonably possible" for the regulated party to comply both with the municipal ordinance and state law. California courts have long recognized a municipality's ability to implement stricter requirements than state law, so long as one can reasonably comply with both. (See, e.g., *Am. Fin. Servs. Assn.*, *supra*, 4 Cal.Rptr.3d at p. 756 (collecting cases), *rev'd on other grounds by* (2005) 34 Cal.4th 1239.) Where it is reasonably possible to comply with both a stricter municipal ordinance and a more permissive state law, courts find no contradiction between the two. The *Suter* Court found no preemption where it was "perfectly possible for a firearm dealer to comply with both [the municipal ordinance] and state law." (*Suter*, *supra*, 57 Cal.App.4th at p. 1124; see also *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc*(2013) 56 Cal.4th 729, 743-44 ["no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws."].)

CRPA argues that the Morgan Hill Ordinance is preempted despite its concession that compliance with both laws is possible. (See Appellants Br. 21.) CRPA nevertheless argues that some gun owners, especially traveling ones, might not know about their obligation to comply with both state and local theft-reporting ordinances. This strained

theory ignores the fact that under the relevant case law, a "preemption by contradiction" analysis considers residents' and travelers' *ability* to comply with both state and local law, and does not turn on hypothetical problems with people who lack knowledge of the law. The latter rationale, advanced by CRPA, is unsupported by any caselaw and would improperly expand the universe of municipal ordinances preempted by state law (given that it is always possible a given resident or traveler will not know about local laws).

CRPA's argument rests on a mischaracterization of what the California Supreme Court found to be "reasonably possible" compliance in *City of Riverside*. (See *City of Riverside, supra,* 56 Cal.4th at p. 743.) As CRPA acknowledges, in *City of Riverside* the Supreme Court explained that a local law does not contradict a state law if "it is reasonably possible to comply with both [laws.]" (*Id*., 56 Cal.4th at. at pp. 743-44.) But in conducting this inquiry, the Court did not inquire whether it is reasonably possible for a gun owner, transient or otherwise, to *know* about any local law that may or may not apply to the owner. Instead, the *City of Riverside* Court asked merely whether it is *possible* to comply with both local and state law. With respect to Morgan Hill's theft-reporting ordinance and Prop. 63, the answer to the relevant question from *City of Riverside* is yes—compliance is possible by reporting a lost or stolen firearm to authorities within 48 hours. CRPA's arguments about gun owners' knowledge of the law is beside the point.[14]

[14] Even if this consideration were relevant, Morgan Hill's Ordinance facilitates knowledge of and compliance with the law by requiring local gun dealers to post signs in stores outlining the firearm theft-reporting law and distribute the relevant chapter to customers. (See Morgan Hill Municipal Code 9.04.020.) More broadly, learning about and complying with applicable local law (even outside one's home city) is, by definition, *reasonably* possible, and in fact expected of law-abiding people. (Accord *People v. Snyder* (1982) 32 Cal.3d 590, 592-93, internal citation omitted ["ignorance of a law is no excuse for a violation thereof."].) It is what residents and responsible travelers are expected to do in a state that presumptively allows for local laws that constrain the behavior of all people in a city—residents and pass-through visitors alike.

In a final attempt to rescue the preemption-by-contradiction argument, CRPA cites *Ex parte Daniels* (1920) 183 Cal. 636 ("*Daniels*") as supposedly supporting a contradiction theory based on transient citizens. But *Daniels* does not stand for the broad notion that state law preempts any local requirement that is difficult for pass-through travelers to learn about. (See *Daniels*, *supra*, 183 Cal. at pp. 641-48.) Rather, *Daniels* held that state law preempted a local speed limit because state law affirmatively authorized a "reasonable" speed anywhere in the state, and the court found such a flexible standard preempted a specified 15 mile-per-hour speed limit. The reasoning in *Daniels* most applicable to this case is instead the Court's observation that, "[i]f the Legislature had merely fixed the maximum speed limit, *it is clear that local legislation fixing a lesser speed limit would not be in conflict therewith*, but would be merely an additional regulation." (*Id*., 183 Cal. at p. 645, emphasis added.) Here, the state fixed a maximum time limit to report loss or theft of a firearm—five days—and the Morgan Hill ordinance's requirement that such a loss or theft be reported within 48 hours is not "in conflict therewith," and is "merely an additional regulation." (See *id.*)

### 2. Morgan Hill Need Not Affirmatively Prove a Special Local Interest.

CRPA argues that Morgan Hill must affirmatively show a "special local interest" served by stricter local regulation to prove that the Ordinance is not contradictory to state law. (Appellants Br. 21-23.) But this rule, too, is of CRPA's own invention. CRPA, not Morgan Hill, bears the burden of proving that the ordinance is preempted. (See *Big Creek Lumber Co., supra,* 38 Cal.4th at p. 1149 [no preemption test asks a municipality to substantiate its policy goals in order to defeat a preemption challenge—especially not in the context of a contradiction analysis.].) The legal question of preemption focuses on whether state law forbids local action, not whether local action is necessary or desirable. (*Fiscal v. City & Cty. of San Francisco* (2008) 158 Cal.App.4th 895, 902 [in a firearm preemption challenge, "we need not, and do not, pass judgment on the merits of [local

legislation], or engage ourselves in the sociological and cultural debate about whether gun control is an effective means to combat crime"].)

CRPA attempts to evade this guidance from *Fiscal* by citing *Hoffman* for the supposed rule that "[l]ocal governments are within their power to adopt stricter regulations than state law imposes without violating preemption when it serves some special local interest." (*Ex parte Hoffman* (1909)155 Cal.114, 118, overruled in part by *Ex parte Lane* (1962) 58 Cal.2d 99.) However, this statement merely acknowledges the permissibility of local governments adopting stricter local laws that serve local interests. *Ex parte Hoffman* does not require municipalities to substantiate the strength of their local interests or the necessity of adopting a particular local law in order to defeat a preemption challenge.

Even if such a requirement were supported in the caselaw, California courts have acknowledged that gun regulation inherently affects local interests, and Morgan Hill has provided ample additional evidence of the special local interests its theft-reporting ordinance serves. First, the California Supreme Court has held that firearm regulation is the type of local regulation that warrants an especially strong presumption against preemption—even without "citation of authority" to support the need for local action. (*Galvan, supra,* 70 Cal.2d at p. 864["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."]; see *Suter, supra,* 57 Cal.App.4th at p. 1119 [rather than preempting the "broad field" of firearm regulation, the California legislature has "indicate[d] an intent to permit local governments to tailor firearms legislation to the particular needs of their communities"].) CRPA's concession that the "broad field of gun control, generally, is not a matter of exclusive state concern *for this very reason*"—the reason being that "crimes involving guns vary from one community to the next, and thus the strategies for reducing those crimes must similarly vary"—makes Morgan Hill's argument for it. (Appellants Br. 22, emphasis added.)

Second, while unnecessary to do so, Morgan Hill did present evidence to the trial court that the ordinance implicates localized interests. As acknowledged by the trial

court, Morgan Hill identified several local benefits of the Ordinance when it was passed: the City based its ordinance on a recommendation from a regional government association, the Association of Bay Area Governments; the City found that laws requiring gun owners to report loss or theft help law enforcement detect illegal behavior, charge criminals, protect gun owners from criminal accusations, and aid location and return of lost or stolen firearms; and the City found that notification of lost or stolen weapons within 48 hours aided law enforcement in these efforts. (A.XI 2754-55.)

In sum, the trial court correctly found that the Morgan Hill Ordinance does not contradict state law, and correctly declined to shift the burden to Morgan Hill to establish non-preemption of its ordinance or defend its policy goals.

## II. MORGAN HILL MUNICIPAL CODE SECTION 9.04.030 IS NOT PREEMPTED BY IMPLICATION BECAUSE IT DOES NOT ENTER AN AREA FULLY OCCUPIED BY STATE LAW.

In addition to arguing that Morgan Hill's ordinance duplicates or contradicts state law, CRPA asks this Court to find *implied* preemption on the basis that state law has fully occupied the area of firearm theft-reporting. The Court should reject this argument.

"[W]hen local government regulates in an area over which it traditionally has exercised control . . . California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute." (*Coyne, supra,* 9 Cal.App.5th at p. 1225, citations omitted.) Implied preemption may only be found where there is a *clear indication* of implied intent to preempt the field by fully occupying it. (See *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893; *Cal. Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302.) To determine intent, courts consider three indicia:

> (1) 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;

(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;[15] or

(3) the subject matter has been partially covered by general law, and 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.

(*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898.) In each of these three forms of implied preemption, the Legislature's intent (here, voters' intent) to preempt must be "clear." (E.g., *id*. at 893.)

The party claiming that general state law preempts a local ordinance—including a firearms ordinance—has the burden of rebutting this presumption by demonstrating legislators' "preemptive intent." (*Coyne, supra,* 9 Cal.App.5th at p. 1225; see also *Big Creek Lumber Co., supra,* 38 Cal.4th at p. 1149.) When California voters enact a state law by ballot initiative, voter intent is considered in place of the Legislature's. (See *Persky v. Bushey* (2018) 21 Cal.App.5th 810, 818-19.) Here, CRPA has pointed to no evidence to indicate, let alone "clearly indicate," that the voters who enacted Prop. 63 intended to impliedly occupy the field of lost and stolen firearms reporting and override stronger local laws. Prop. 63 has not occupied the field of firearm theft-reporting in a manner that precludes local regulation on the subject, and moreover, the Morgan Hill Ordinance's purpose and effect are complementary to the general law and protect the safety of locals with a minimal burden on transient citizens.

[15] Appellants failed to address or argue with regard to the second indicia—a paramount state concern that will not tolerate local action—in either their summary judgment motion (A.V 1170) or their opening brief, so Morgan Hill will not address the point here. Should the Court require briefing on this issue, Morgan Hill directs the Court to its summary judgment motion (A.I 60-62) and respectfully requests the opportunity to provide supplemental briefing in this appeal.

### A. There Is No Clear Indication That Reporting of Lost and Stolen Guns Is Exclusively a Matter of State Concern.

Only one general law covers the relevant subject matter. California Penal Code Section 25250 *et seq.*, enacted through Prop. 63, requires reporting lost or stolen firearms within five days of discovering the loss or theft, with exceptions, and establishes minimum procedural requirements for the reporting process. This single, solitary law and implementing code sections—in a field rich with complementary local legislation[16]—does not and cannot fully occupy the field in a manner so as to make lost and stolen firearm reporting exclusively a matter of state concern.

As a general matter, firearms regulation is not a subject matter "of exclusive statewide concern." (*N. Cal. Psychiatric Soc'y v. City of Berkeley* (1986) 178 Cal.App.3d 90, 106.) To the contrary, "[i]t is long since settled in this state that regulation of firearms is a proper police function." (*Galvan, supra,* 70 Cal.2d at p. 866.)[17] The presumption against preemption holds here because local regulation of firearms reporting will not "necessarily be inconsistent with state law." (*N. Cal. Psychiatric Soc'y*, *supra*, 178 Cal.App.3d at p. 106.) Despite CRPA's assertions to the contrary, "the fact that the state has legislated on the same subject does not necessarily exclude[ ] the municipal power." *Id.* In fact, just the opposite is true. (See *Nordyke*, *supra*, 27 Cal.4th at pp. 883-84.)

The Prop. 63 provisions that implement Section 25250's five-day reporting rule do not make the timeline for firearm reporting so comprehensive as to exclude such targeted local regulations, based on special local needs.[18] Requiring local law enforcement to

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[16] (See *supra* n.8 [18 localities had adopted firearm theft-reporting ordinances prior to Prop. 63].)

[17] *Galvan* was later superseded by a narrow state statute expressly preempting the law at issue, but in areas not expressly preempted, the general principle of local authority over firearms regulation still stands. (See discussion at A.I 58-59.)

[18] Appellants rely heavily on what they call a "broad and comprehensive statewide scheme" as evidence of legislative intent to preempt additional local legislation, an argument they raised for the first time at summary judgment. Importantly, only Section

submit reports to the Department of Justice (Penal Code § 25260), for example, and imposing penalties for making a false report (Penal Code § 25275), are complementary to the Ordinance for the same reason they are complementary to Section 25250. Furthermore, this state firearm reporting "scheme"—which the trial court described as limited in scope—*expressly contemplates* additional local regulation with regard to reporting lost and stolen firearms. (A.XI 2752.) Under Section 25270, "[e]very 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.*" (emphasis added). It is illogical to suggest that state law occupies the entire field of firearm reporting legislation and precludes additional "synergistic" local legislation, when the text of the law clearly demonstrates otherwise. (See A.I 61.)

Ultimately, the number of code sections or comprehensiveness of implementing procedures created by Prop. 63 is not a critical consideration when it comes to implied preemption. Fatal to CRPA's implied preemption theory is the fact that the State does not "fully and completely cover" a field simply by passing one or more laws in a given area, even if those laws are developed through lengthy regulations and procedures. (See, e.g., *Galvan*, *supra*, 70 Cal.2d at p. 860 [three state gun registration laws, spanning sixteen Penal Code sections, "cannot reasonably be said to show a general scheme for the regulation of the subject of gun registration"].) Otherwise, there would be no need for an implied preemption test at all: whenever the state passes one or more laws in a given area or sets and implements a regulatory standard (such as requiring reporting of gun thefts within five days), it would impliedly apply uniformly throughout the state to the exclusion of local legislation.

Instead of automatically assuming that any statutory scheme the legislature develops is impliedly preemptive, courts approach the implied preemption analysis much more "carefully." (*Cal. Rifle & Pistol Ass'n*, *supra*, 66 Cal.App.4th at p. 1317.)

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25250 was mentioned in their complaint. (A.I 8.)

Consistent with the presumption against preemption, courts will find implied preemption only if the purpose and scope of a state regulatory scheme "'*clearly* indicate[s]' a *legislative intent to preempt*," *id.* (emphases added), such as by making it apparent that local actions are "inconsistent with the purpose of the general law." (*Fiscal, supra,* 158 Cal.App.4th at p. 915.) A "clear" indicator is required because, if the Legislature intended to preempt local regulation, it could easily have simply said it was doing so, as it has done many times before. (See *Cal. Rifle & Pistol Assn.*, *supra*, 66 Cal.App.4th at p. 1317.)

One example of impliedly preemptive state regulatory scheme is the "broad, evolutional statutory regime enacted by the Legislature" to address public and private handgun possession. (*Fiscal*, *supra*, 158 Cal.App.4th at p. 911.) The Court of Appeal in *Fiscal* described this regime as "a myriad of statewide licensing schemes, exceptions, and exemptions" taking up "almost one hundred pages' of the statute books." (*Id.* at 909.) Broad as it was, however, the existence of the statutory regime in *Fiscal* was not alone itself to support a finding of implied preemption. The key was that the local ordinance at issue—a handgun ban—plainly obstructed and frustrated the purpose of this robust state legislative scheme. The *Fiscal* Court found that the local ordinance "swallow[ed] the state regulations whole"—each handgun regulation was rendered null within the city and state-issued concealed carry permits became invalid. (See *id.* at 911, 915.) The Court contrasted this impermissible local action with permissible situations where a "local entity has legislated in synergy with state law," (*id.* at p. 915), or "impos[ed] *additional* restrictions on state law to accommodate local concerns." (*Id.*, emphasis added.)

In sharp contrast to the statutes considered to preempt in *Fiscal*, the state reporting provisions at issue in this case are not obstructed, frustrated, or rendered null by a local law requiring people to report lost or stolen guns in 48 hours. Under Morgan Hill's Ordinance and other local firearm theft-reporting laws, the core of the statewide statutory scheme stays in place, but the timeframe for reporting is sped up. These local laws do not "obstruct the accomplishment and execution of [Prop. 63's] full purposes and objectives," (*Fiscal*, *supra*, 158 Cal. App. 4th at p. 911) but in fact advance and are

wholly consistent with the only purpose announced in Prop. 63. That sole purpose—set out unmistakably by voters—is "[t]o require the reporting of lost or stolen firearms to law enforcement." (Prop. 63, § 3.) Local laws setting a shorter timeframe for reporting are "in synergy" to that purpose (*Fiscal*, *supra*, 158 Cal.App.4th at p. 909); they do not obstruct it, and so are not impliedly preempted.

A final critical piece of evidence demonstrating that Morgan Hill's Ordinance is not impliedly preempted is the fact that at the time Section 25250 became law, at least eighteen cities and counties were already regulating lost and stolen firearm reporting.[19] The majority of these set the reporting requirement at 48 hours.[20] Prop. 63 was therefore enacted against a backdrop of preexisting local firearm theft-reporting laws that went further than state law, yet the ballot initiative was silent about these local laws. Silence on the existence of so many local ordinances, legitimately adopted as part of cities' and municipalities' police powers, cuts decisively against an implied intent to preempt those ordinances. (See, e.g., *Calguns Found., Inc., supra,* 218 Cal.App.4th at pp. 666-67, citations omitted ["it is not to be presumed that the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication"].) To the extent voter silence about preexisting local theft-reporting ordinances creates any ambiguity about whether voters intended to overrule these or leave them in place, that ambiguity cannot constitute a "clear" indicator of voter intent to preempt, and so precludes a finding of implied preemption.

### B. The Benefits to Morgan Hill Outweigh Any Minimal Impact on Transient Citizens.

As a general matter, courts have held that firearm sale, use, and possession regulations have a minimal adverse effect on transient citizens. (See *Suter, supra,* 57

[19] (*Supra* n.8.)
[20] (*Id.*)

Cal.App.4th at p. 1119; *Galvan*, *supra*, 70 Cal.2d at pp. 864-65; *Great Western*, *supra*, 27 Cal.4th at p. 853.) The generality holds true here: even if state law partially covers firearm theft reporting, the potential benefits to the city outweigh any minimal impact on transient citizens and preclude finding implied preemption.

In its opening brief, CRPA for the first time offers a citation for the proposition that Morgan Hill is obligated to articulate the law's benefits in order to avoid preemption. (Appellants Brief 34-35 [citing *Robins v. Los Angeles Cty.* (1966) 248 Cal.App.2d. 1, 9-10]; A.XI 2755 ["Plaintiffs[/Appellants] do not cite any legal authority, and the Court is aware of none, providing that Defendants[/Respondents] must present evidence showing that the Ordinance effectively, or more effectively than state law, achieved the possible benefits identified by the City."].) But in *Robins* the Court of Appeal merely recited the general rule that, in considering field preemption, courts can engage in 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"—and then found that the local regulation at issue had not been impliedly preempted. (248 Cal.App.2d at p. 9.) Here, local regulation bolsters statewide regulation to more adequately protect public safety in light of explicitly articulated special local needs without even moderately burdening those not local to the City. The Ordinance is not impliedly preempted.

**1. The Possible Benefits Are Large.**

Gun crime is a fundamentally local problem and, unsurprisingly, theft patterns differ across regions[21]—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."[22] Local law enforcement track and investigate firearms that go missing in

[21] (Freskos, *supra*, n.5 [explaining "thieves were more likely to break into homes in areas where gun ownership rates were high"].)

[22] (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.)

their communities and expend resources responding to crimes perpetrated with stolen guns.

California is a geographically large state, with a large distribution of urban and rural residents. When voters considered lost and stolen reporting, they had to take into consideration the full spectrum of Californians. Gun owners who live far from any urban center, who may have to travel long distances to arrive at a police station to make a report, had to be considered when setting the five-day reporting requirement.

Morgan Hill, in contrast, is primarily a suburban residential community, spanning fewer than thirteen miles square miles. It has a major national highway running through it. There is little to no concern that residents will be unable to access their local police department within 48 hours in order to file a report. And Morgan Hill's proximity to some of our state's largest urban centers, including San Jose, San Francisco, and Oakland, makes quick reporting especially crucial.

The legislative record confirms that the Morgan Hill City Council focused on the local benefits of the Ordinance. (A.IV 884-906.) The Council recognized that legislation requiring reporting of lost or stolen guns was recommended by the Association of Bay Area Governments (of which Morgan Hill is a member) as a "model ordinance[ ] . . . for cities and counties to pursue" to help reduce gang-related youth gun violence in neighboring San Mateo County. (*Id.* at 886, 900.) This recommendation, coupled with the fundamentally local nature of many gun crimes, demonstrates Morgan Hill's compelling local interests in reporting measures that prevent lost or stolen guns from entering the criminal market. While it is already well-established that firearms regulation implicates local concerns (see *Galvan*, *supra*, 70 Cal.2d at p. 864), these local interests specific to the Ordinance strengthen the usual presumption against preemption with extra force.

CRPA's attempt to discredit the trial court and Morgan Hill's reliance on a Staff Report identifying local benefits of the Ordinance because that report was originally prepared for a neighboring county misses the mark. (Appellants Br. at 36; A.IV at 884.) While that report may not persuasively support Morgan Hill's special needs as compared to neighboring San Mateo's, it clearly identifies multiple special needs that Morgan Hill

has *as compared to statewide laws*. Neighboring localities unsurprisingly have overlapping and interrelated public safety concerns, and Morgan Hill is entitled to rely on research and recommendations of nearby localities in deciding that statewide regulation does not adequately address local concerns. (Accord, e.g., *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 555 [quoting *Florida Bar v. Went For It, Inc.* (1995) 515 U.S. 618, 628) [the U.S. Supreme Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales. . . ."].) Far from arbitrarily supplementing state law, Morgan Hill has recognized that the timeline for reporting can have a meaningful impact on the City's ability to protect public safety from gun trafficking and violence.

It is not for CRPA or this Court to re-weigh Morgan Hill's policy choices. Courts do not ask whether a local law effectively achieves a local benefit, which would improperly intrude into a municipality's police powers. (See, e.g., *Great Western*, *supra*, 27 Cal.4th at p. 867.) Courts draw every inference "in favor of the validity of the exercise of the police power," and may look beyond reasons cited by a local legislature and uphold an ordinance as furthering public safety for reasons that "differ from the determination of the legislative body." (See, e.g., *Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467, 474, overruled in part on other grounds by *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279.) Instead, the relevant question in this preemption case is whether "the adverse effect of a local ordinance on the transient citizens of the state outweighs the *possible* benefit to the municipality." (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at p. 898, citations omitted, emphasis added.) Morgan Hill has identified numerous "possible" benefits, here and before the trial court, that support its reasoned policy choice. (See A.I 51.)

### 2. Adverse Effects on Transient Citizens Are Minimal or Are Allowed.

Though there are many hundreds of local firearms ordinances in California,[23] Plaintiffs point to no firearm ordinance (and Morgan Hill is aware of none) that has ever been invalidated based on an adverse effect on transient citizens. That is not surprising because courts have repeatedly held that local gun regulations have an insignificant adverse effect on transient citizens. "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." (*Great Western*, *supra*, 27 Cal.4th at p. 867; see also *Suter*, *supra*, 57 Cal.App.4th at p. 1119; *Galvan*, *supra*, 70 Cal.2d at pp. 864-65.) Courts have also rejected CRPA's contention that local firearm laws overly burden transient citizens by obligating travelers to learn about gun regulations that differ from state law. In *Nordyke*, the Supreme Court upheld an Alameda County ordinance forbidding firearms on county property, despite the fact that transient visitors would need to educate themselves on the ban and learn that it applies to individuals normally permitted to carry on government property under state law. (See *Nordyke*, *supra*, 27 Cal.4th at pp. 883-84; cf. *id.* at 885, Brown, J., dissenting [noting that majority's reasoning burdens travelers by requiring them to learn local gun laws].)

Reinforcing the minimal nature of the burden on travelers, the Morgan Hill Ordinance would only affect transient citizens to the extent they (i) were gun owners traveling with their firearm, (ii) lost or had their firearm stolen while in Morgan Hill, and (iii) wished to wait to report the loss or theft for *at least 3 days* (though they would still need to report within 5 days to comply with state law). State law already requires traveling gun owners to report to local police in the jurisdiction where a theft or loss takes place, and already requires such owners to abide by local rules for the information that must be reported. (See Penal Code § 25270 [requiring reporting of "any additional relevant information required by the local law enforcement agency taking the report."].)

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[23] (See generally Giffords Law Center, *Communities on the Move: Local Gun Safety Legislation in California* (Oct. 1, 2018), https://lawcenter.giffords.org/resources/communities-on-the-move-local-gun-safety-legislation-in-california/.)

Thus, for travelers passing through Morgan Hill, the obligation to report directly to Morgan Hill is unaffected. (Penal Code § 25250.) Because of this statewide requirement to report firearm loss or theft locally, transient citizens may even be more likely to report quickly, as they are, by definition, transiting through the City and so have an incentive to report before leaving the jurisdiction.

CRPA's use of the word "victim" to describe affected transient citizens is a troubling emotional appeal in this context. Firearms are exceptionally dangerous; they are portable personal property but have no analogue in terms of their lethality. In light of this, California has created an affirmative obligation to report loss or theft of these weapons, and CRPA seem to take no issue with this obligation. Transient citizens may be victims of a theft, but they are not victims for having to report the theft—this obligation flows directly from the special responsibilities that accompany firearm ownership, as recognized by Section 25250. CRPA's concern for the "labyrinth of time limits," (Appellants Brief at 34) grossly exaggerates the burden on transient citizens. As CRPA acknowledges (*id.* at 21), for travelers, the same report will satisfy obligations under both Section 25250 and the Ordinance. So if a firearm is lost or stolen in Morgan Hill, there is only one relevant time limit: 48 hours.

Ultimately, local laws in the area of firearm-theft reporting are no more onerous than any other local law—including the hundreds of local gun regulations already on the books that cities have the broad authority to adopt. (See *Galvan*, *supra*,70 Cal.2d at p. 864.) As the Supreme Court explained in *Galvan*, courts routinely find local ordinances not preempted even though they "apply to *anyone* within the geographic confines of the city, and not merely to residents." (*Id*. at p. 865, emphasis in original.) This includes a "Fresno ordinance prohibiting the consumption of alcoholic beverages on the street" (*id.* [citing *People v. Butler* (1967) 252 Cal.App.2dSupp. 1053, 1058]); a Los Angeles ordinance prohibiting assembling at gambling houses (*People v. McGennis* (1966) 244 Cal.App.2d 527, 532.); and a Los Angeles ordinance making it unlawful to loiter in tunnels (*Gleason v. Mun. Court for L.A. Jud. Dist.* (1964) 226 Cal.App.2d 584, 585). Such ordinances were not preempted even though they required traveling citizens to learn

about local ordinances that differ from state law on alcohol consumption, gambling, and loitering.

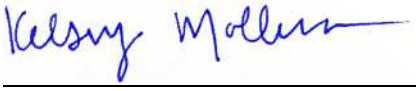
The same is true of Morgan Hill's firearm-theft reporting law. The Ordinance's effect on transient citizens is minimal and does not outweigh the significant potential and actual public safety benefits it provides the citizens of Morgan Hill.

## CONCLUSION

For the reasons discussed above, CRPA fails to overcome the presumption that the challenged Ordinance is not preempted by Prop. 63. The Court should affirm the trial court's decision granting Morgan Hill's Motion for Summary Judgment and denying CRPA's motion for the same.

Dated: November 23, 2021

FARELLA BRAUN + MARTEL LLP

By: 

Kelsey D. Mollura

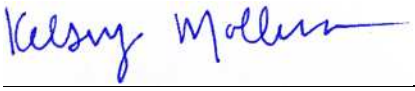
Attorneys for CITY OF MORGAN HILL, MORGAN HILL CHIEF OF POLICE DAVID SWING, MORGAN HILL CITY CLERK IRMA TORREZ

## CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1), I certify that this brief, including footnotes and excluding the items identified in California Rule of Court 8.204(c)(3), contains 10,087 words as counted by the Microsoft Word word-processing program used to generate it.

Executed at San Francisco, California, on November 23, 2021.

FARELLA BRAUN + MARTEL LLP

By: 

Kelsey D. Mollura

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

**PROOF OF SERVICE**

**Kirk v. City of Morgan Hill**
**Court of Appeal Case Number H048745**
**Superior Court Case No. 19CV346360**

**STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery Street, 17th Floor, San Francisco, CA 94104.

On November 24, 2021, I served true copies of the following document(s) described as **RESPONDENT'S BRIEF AND CERTIFICATE OF INTERESTED ENTITIES OR PERSONS** on the interested parties in this action as follows:

C.D. Michel, Esq.
Anna M. Barvir, Esq.
Tiffany D. Cheuvront, Esq.
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Tel: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com
ABarvir@michellawyers.com>

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address smiller@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.

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

Executed on November 24, 2021, at Petaluma, California.

Stephen J. Miller