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

G. MITCHELL KIRK; AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, PLAINTIFFS AND APPELLANTS, V. CITY OF MORGAN HILL; MORGAN HILL CHIEF OF POLICE DAVID SWING, IN HIS OFFICIAL CAPACITY; MORGAN HILL CITY CLERK IRMA TORREZ, IN HER OFFICIAL CAPACITY; AND DOES 1-10, DEFENDANTS AND RESPONDENTS.	Case No. H048745

APPELLANTS' REPLY BRIEF

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

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INTRODUCTION

Relying largely on the argument that it is within its authority to enact laws imposing stricter requirements than state law imposes and resisting Appellants' repeated pleas to identify *any* special community need related to its firearm theft-reporting mandate, the City fails at each turn to address Appellants' core arguments for why state law must preempt Morgan Hill Municipal Code (MHMC) section 9.04.030.

First, it fails to address the fundamental reason its theft-reporting mandate duplicates state law requiring the same. That is, it ignores "inevitable conflict of jurisdiction" and the double jeopardy concerns that arise when a local punishes the same act that state law does. Instead, the City would have this Court focus the small differences between its law and the state's. Those differences, however, do not save the City's ordinance from improperly duplicating state law because, in a not insignificant number of cases, enforcement and prosecution under the City's law would bar enforcement of the state's supreme law.

Second, the City fails to appreciate that its attempt to shorten the amount of time one has to report the theft or loss of a firearm *inevitably* conflicts with state law. And it provides no satisfying response to Appellants' oft-repeated concern that enforcement of the City's theft-reporting ordinance obstructs the "accomplishment and execution of the full purposes and objectives of" the supreme state law, (*Fiscal v. City & Cnty. of San Francisco* (2008) 158 Cal.App.4th 895, 911 ("*Fiscal*")), making it "inimical" to state law and thus preempted as contradicting state law. Instead, the City pivots, claiming that it is "possible" to comply with both its law and the state law, so there is no conflict. But this requires a level of notice of the law that many, especially transient citizens, are unlikely to have. What's more, even if it is "possible" to comply with the law, this argument ignores the more fundamental concern that the City's law is "inimical" to state law because it could obstruct the state's power to enforce its laws.

Third, Appellants argue that state law is so comprehensive that it fully occupies the field of firearm-theft reporting and so preempts local regulation in the field. Neither the City's brief nor the trial court's opinion below explain how Prop 63 could have been any more comprehensive. The best they can muster is a claim that if the state had meant to

preempt local law in this field, it "could easily have simply said it was doing so, as it has done many times before." The argument borders on the frivolous. For if the state must expressly state its intention to preempt, *then there would be no implied field preemption at all.* Further, Prop 63 did exactly as the City suggests in two other gun control provisions unrelated to the theft-reporting law, revealing a strong implied intent *not* to allow local meddling in the field of theft-reporting.

But even if state law does not fully occupy the field to the exclusion of local regulation, it at least partially occupies the field. And the risk of harm to transient citizens outweighs any special benefit the City might dream up (but to this point has not). Indeed, the ordinance uniquely burdens transient citizens because it involves an affirmative duty to act, unlike all the laws the City has cited which involve *prohibitions* on behavior. In response, the City, like the lower court, argues simply that there is no threat to transient citizens because they could just learn the law before they enter Morgan Hill. The argument, if affirmed, would essentially swallow the test. If transient citizens are presumed to know every local law of every jurisdiction they pass through, then it becomes hard to imagine when *any* law could sufficiently adversely affect transient citizens so that this type of implied field preemption would apply.

For these reasons and those analyzed in Appellants' Opening Brief, this Court should reverse.

ARGUMENT

I. THE CITY'S THEFT-REPORTING ORDINANCE IS PREEMPTED BECAUSE IT DUPLICATES STATE LAW; THE TRIVIAL DIFFERENCES THE CITY IDENTIFIES DO NOT DEFEAT THE INEVITABLE CONFLICT OF JURISDICTION THE CITY'S LAW CREATES

Given its focus on trivial differences between MHMC section 9.04.030 and Penal Code section 25250, (Resps.' Br. ("R.B."), pp. 18-21), the City seems to believe that duplication preemption functions as little more than a sort of legal "cleaning crew"—wiping away redundant ordinances that are identical to state law, so they no longer clog up the local code books. Taken alone without context, one might think that duplication preemption serves just that purpose. Certainly, a local law that differs in no way from state law would be duplicative and thus preempted. But if duplication preemption serves *only* to strike identical

local laws, then even the smallest differences would be enough to save otherwise duplicative laws. This cannot be the test. For if it were, duplication preemption would quickly become meaningless as local governments scramble to tweak their duplicative laws ever so slightly to evade this breed of preemption.

But, as Appellants' Opening Brief explains, courts have long recognized that duplication preemption serves a far more important purpose—to bar duplicative local laws that raise double jeopardy concerns and thus threaten the ability of the state to enforce its own (supreme) laws. (Appellants' Opening Br. ("A.O.B.") at pp. 17-18, citing *People v. Seel* (2004) 34 Cal.4th 535, 542.)[1] Indeed, "[t]he invalidity arises, not from a conflict of language, but from the *inevitable conflict of jurisdiction* which would result from dual regulations covering the same ground." (*Pipoly v. Benson* (1942) 20 Cal.2d 366, 370 ("*Pipoly*"), italics added; see also *Abbott v. Los Angeles* (1960) 53 Cal.2d 674, 682 ("*Abbott*").) Put another way, "[t]he 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.) So even if an ordinance were intended to cover some purported shortcoming in state law, it is still preempted when it "denounces as criminal precisely the same acts which are attempted to be prohibited by the code." (*In re Sic* (1887) 73 Cal. 142, 146.) In its most likely applications, that is just what MHNC section 9.04.030 does.

Even so, the City makes two basic arguments about why duplication preemption does not apply—what it terms the "temporal" and "spatial" scope arguments. (R.B. at p. 18.) As to the latter, the City argues that "where the Ordinance requires a firearm owner whose firearm 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." (*Ibid.*)[2] The City must thus acknowledge then

[1] Respondents claim that Appellants did not raise the double jeopardy argument below. (R.B. at p. 19.) That is verifiably false. Appellants argued the point both in their lower court briefing *and* expressly at oral argument. (A.A.XI 2723-2724, 2797-2799.) Respondents' counsel even responded to Appellants' double jeopardy arguments at the hearing on the parties' cross-motions for summary judgment. (A.A.XI 2806-2807.)

[2] Not that Morgan Hill would have any authority to require them to report to any

that two laws requiring residents and non-residents to report a firearm lost or stolen in Morgan Hill to Morgan Hill authorities regulates, "spatially," the very same conduct. So too, in the likely most common scenario to which the ordinance would apply, MHMC section 09.04.030 punishes the Morgan Hill resident who loses their firearm in the City but fails to report it at all. If the City prosecuted that resident under its reporting mandate, double jeopardy would plainly prevent the state from doing the same.

The City also makes much of the "temporal" difference between MHMC section 9.04.030 and Penal Code section 25250, arguing that the three-day difference in reporting time between the two saves its ordinance. The argument can be dispensed with in much the same way the City's "spatial" argument can be. Because duplication preemption is more concerned with whether the local law regulates the same conduct as state law and less with any minute differences the local government might add. And, again, in the most likely of scenarios, MHMC section 9.04.030, even with its "temporal" difference, regulates the very same conduct state law regulates. State law thus preempts the City's ordinance.

Still, the City fights this result, leaning heavily on a series of cases in which California courts upheld local laws that, while very similar to their state-law counterparts, included additional requirements supplementing state law regulation. (R.B. at p. 20, citing *Am. Fin. Servs. Assn. v. City of Oakland* (2003) 111 Cal.App.4th 1435 ("*Am. Fin. Servs.*"); *Great W. Shows v. Cnty. of Los Angeles* (2002) 27 Cal.4th 853 ("*Great Western*"); *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109 ("*Suter*"); *Pipoly v. Benson* (1942) 20 Cal.2d 366 ("*Pipoly*"); *In re Iverson* (1926) 199 Cal. 582 ("*Iverson*"); *In re Hoffman* (1909) 155 Cal. 114 ("*Hoffman*").) Most of the cases the City cites, however, deal with laws regulating sophisticated businesses, not individuals. (*Am. Fin. Servs.*, *supra*, 111 Cal.App.4th at p. 1441 [restricting sub-prime consumer loans secured by Oakland real property]; *Great Western*, *supra*, 27 Cal.4th at p. 865 [banning gun shows on county property];[3]*Suter*, *supra*, 57 Cal.App.4th at p. 1123 [imposing firearm storage

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other police department outside city limits anyway. Interestingly, this fact illustrates well why these "spatial" differences between state and local law cannot be enough to save otherwise duplicative local laws. Because no local jurisdiction has the authority to regulate conduct outside its borders, *most* local laws differ "spatially" from state law. Under the City's logic, then, duplication preemption would have little or no practical application.

[3] Even if *Great Western* were not distinguishable because the local law regulated

requirements on firearms retailers beyond what state law required]; *Iverson*, *supra*, 199 Cal. at p. 586 [restricting the amount of alcohol pharmacies could dispense]; *Hoffman*, *supra*, 155 Cal. at p. 118 [limiting the maximum percentage milk may be adulterated].) And not one involved a law placing an affirmative duty on laypeople to act. The laws at issue were instead aimed at prohibiting some conduct. These distinctions are critical because, as Appellants will establish, the standard applied to laws regulating the behavior of individuals differs greatly from that applied to prohibitory enactments and laws regulating businesses.

In fact, only one of the City's cited authorities, *Pipoly v. Benson*, dealt with a local law regulating the conduct of laypeople. (R.B. at p. 20, citing *Pipoly*, *supra*, 20 Cal.2d at p. 485 [sic].) And that case *struck* the local traffic law at issue. (*Pipoly*, *supra*, at pp. 372, 375.) To be sure, the *Pipoly* Court acknowledged the well-established rule that the City relies on here—that "local regulations in the form of additional reasonable requirements not in conflict with the provisions of the general law" are permissible. (*Id.* at p. 370.) But the *Pipoly* Court *also* recognized the equally well-established exception to that rule:

> This general rule permitting the adoption of additional local regulations supplementary to the state statutes is subject to an exception, however, which is important in the present case. Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute.[4] *Thus, it has been held from an early date that an ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute.*

(*Id.* at p. 370, italics added.) That exception, *Pipoly* observed, has been applied not just to cases in which the state and local laws are identical (and thus clearly occupying the very same field), but also to cases in which it is less clear that the legislature intended to preempt local

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business instead of individual conduct, it does not provide much support for the City's duplication argument. Because, there, the court noted the *substantial* differences between the relevant state and county laws, the former prohibiting the sale of certain firearms generally, and the latter prohibiting sales of any firearms specifically on county-owned property. (*Great Western*, *supra*, 27 Cal.4th at p. 865.) More importantly, the relevant state law in *Great Western* expressly contemplated further local regulation of the industry. (*Id.* at p. 865.)

[4] Appellants establish in their Opening Brief, (see A.O.B. at pp. 23-28), and again below, (see Part III, *infra*), that state law has indeed "fully occupied" the field of firearm theft- and loss-reporting. This reference to "implied field preemption" is made here in Appellants' discussion of "duplication preemption," however, because the *Pipoly* Court (like many courts addressing state-law preemption at the time) did not so clearly delineate between the various implied preemption analyses.

regulation. (*Ibid.*)

But even if the general rule (and not the exception) controls here, *Pipoly* suggests that the City's theft-reporting ordinance cannot be saved simply because, in other cases, local laws imposing additional requirements supplemental to state law have been upheld. That is because the general rule requires that local laws not be in "conflict" with state law. (*Pipoly*, *supra*, 20 Cal.2d at p. 370.) The City contends that its theft-reporting ordinance does not "conflict" with the state's similar requirement because it is "possible" to comply with both. (R.B. at p. 22.) And perhaps under a dictionary definition of "conflict," the City might be right. For purposes of preemption, however, the courts have long recognized a much broader definition of the term. Again,

> The invalidity arises, not from a conflict of language, but from *the inevitable conflict of jurisdiction* which would result from dual regulations covering the same ground. *Only by such a broad definition of 'conflict' is it possible to confine local legislation to its proper field of supplementary regulation.*

(*Pipoly*, *supra*, 20 Cal.2d at p. 370, italics added; see also *Abbott*, *supra*, 53 Cal.2d at p. 682 ["[T]he term 'conflict' as used in section 11 of article XI has been held not to be limited to a mere conflict in language, but applies equally to a conflict of jurisdiction."]; *San Francisco v. Boss* (1948) 83 Cal.App.2d 445, 452.) As explained above, MHMC section 9.04.030 creates an "inevitable conflict of jurisdiction" with state law when no report is made within in five days, likely the most common scenario. Again, that is because prosecution by the City for this violation of its ordinance would bar the subsequent prosecution by the state for the violation of Penal Code section 25250.

The City's brief also refers to several cases "collected" by the *Pipoly* Court. (R.B. at p. 20, citing *Pipoly*, *supra*, 20 Cal.2d at p. 370 [cited by the City as 20 Cal. 2d 366, *485*, which appears to be a mistaken citation to the pin cite page in the Pacific Reporter], citing *In re Sic*, *supra*, 73 Cal. at p. 144 and *In re Application of Mingo* (1923) 190 Cal. 769, 771.) These cases support Appellants' position for the same reason *Pipoly* does. *In re Sic* examined the differences between a state law that prohibited operating an opium den and a local ordinance that prohibited "two or more persons to assemble, be, or remain in any room or place for the purpose of smoking opium or inhaling the fumes thereof." (*In re Sic*, *supra*, 73 Cal. at p.

144.) The ordinance and the state law in that case plainly had more differences between them than the state and local firearm theft-reporting requirements here. Yet after examining both, the California Supreme Court observed:

> Perhaps it would be enough to say that the offense charged in the complaint, of which respondent was convicted, may be, for aught that appears, the same as that prohibited in the code. *The section plainly covers the same ground as the Penal Code. It was probably intended to cover some supposed defects in the Penal Code, still it denounces as criminal precisely the same acts which are attempted to be prohibited by the code.* It is admitted that no ordinance is valid which conflicts with the general laws of this state.

(*Id.* at p. 146, italics added.) There, as here, the local ordinance was likely intended to cover some perceived defect in state law, but the California Supreme Court struck it down as duplicative despite its differences. (*Ibid.*) And again, the duplication analysis there turned on the double jeopardy concerns that necessarily arise when a local law punishes the same act that state law does. As the Court held, "an ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law…. If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the general law." (*Id.* at p. 148.)

In re Application of Mingo, the second case cited in *Pipoly*, similarly supports Appellants' position. There, the California Supreme Court analyzed the differences in punishment imposed by Prohibition-era state and local laws restricting the possession of alcohol. Once again, the Court struck the local enactment, emphasizing that the duplication arose not just in barring precisely the same acts, but in punishing the same act. (*In re Application of Mingo* (1923) 190 Cal. 769, 771 ["A county ordinance punishing exactly the same act denounced by a state law is in conflict therewith and therefore, to that extent, void."].)

Finally, the cases the City relies on are distinguishable in at least one other critical respect. Not one of the City's authorities evaluated a law imposing an affirmative duty on laypeople to act. Instead, except for just one case regulating the conduct of firearm businesses, all of the City's authorities involve prohibitory enactments. (See *Am. Fin. Servs.*, *supra*, 111 Cal.App.4th at p. 1441 [restricting sub-prime consumer loans secured by Oakland real property]; *Great Western*, *supra*, 27 Cal.4th at p. 865 [banning *gun show businesses* on county

property];[5] *Pipoly*, *supra*, 20 Cal.2d at pp. 483-484 [banning jaywalking]; *Iverson*, *supra*, 199 Cal. at p. 586 [restricting the amount of alcohol *pharmacies* could dispense]; *Hoffman*, *supra*, 155 Cal. at p. 118 [limiting the maximum percentage milk may be adulterated]; *In re Application of Mingo*, *supra*, 190 Cal. at p. 771 [restricting possession of alcohol]; *In re Sic*, *supra*, 73 Cal. at p. 144 [prohibiting opium dens]; but see *Suter*, *supra*, 57 Cal.App.4th at p. 1123 [imposing stricter firearm storage requirements on *firearms retailers*].) Referring to the "general rule" "permitting the adoption of additional local regulations supplementary to the state statutes," (*Pipoly*, *supra*, 20 Cal.2d at p. 370), the City skims over the language seemingly limiting the rule's application to "prohibitory enactments," of the sort upheld in nearly all of the City's cited authorities. To wit:

> The applicable rule in these situations where state control is dominant has been stated as follows: "Where the legislature has assumed *to regulate a given course of conduct by prohibitory enactments*, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law[6] as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable."

(*Ibid.*, quoting *Mann v. Scott* (1919) 180 Cal. 550, 556, italics & underline added.) The limitation makes sense, especially as applied to laws regulating the conduct of individuals. For the commission of certain acts inherently alerts us to the potential criminality of our deeds in ways that "wholly passive" failures to act do not. (See *Lambert v. California* (1957) 355 U.S. 223, 230 ("*Lambert*").)

On the other hand, when faced with challenges to laws that impose affirmative duties on laypeople, courts do not hesitate to curtail the local government's authority to impose stricter requirements. (See, e.g., *Abbott*, *supra*, 53 Cal.2d at pp. 685-689 [striking city law

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[5] Even if *Great Western* is not distinguishable because the local law regulated business instead of individual conduct, it does not provide much support for the City's duplication argument. Because, there, the court noted the *substantial* differences between the relevant state and county laws, the former prohibiting the sale of certain firearms generally, and the latter prohibiting sales of any firearms specifically on county-owned property. (*Great Western*, *supra*, 27 Cal.4th at p. 865.)

[6] The requirement that a locality's "new and additional regulations" must "aid" and "further" the purpose of state law is yet another important limitation on the general rule. Appellants have discussed, at length, the many ways the City's theft-reporting mandate actively *obstructs*, rather than furthers, the statewide theft-reporting requirement. (A.O.B. at pp. 16-21; see also Part II, *infra*.)

requiring felons to register with the city within 5 days, while state law required only those convicted of certain sex crimes to register and gave them 60 days to do so]; *Eastlick v. Los Angeles* (1947) 29 Cal.2d 661, 666.) For instance, in *Eastlick v. Los Angeles*, the California Supreme Court invalidated a municipal charter provision requiring that any demand for municipal liability "specif[y] each separate item of damage, with the date and amount thereof," (*id.* at pp. 664-665), while state law required only that "a verified claim for damages" "specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received," (*id.* at p. 664). Like the City here, Los Angeles defended its itemization requirement, arguing that it "is merely supplementary to the general law—an additional, not a contrary requirement—and therefore is valid." (*Id.* at p. 666.) Los Angeles likened its requirement to laws upheld in cases like *In re Iverson*, *supra*, 199 Cal. 582 (cited by the City here), *In re Simmons* (1926) 199 Cal. 590, and *Natural Milk Producers Assn. v. San Francisco* (1942) 20 Cal.2d 101. (*Eastlick*, *supra*, 29 Cal.2d at p. 664.) Even so, the *Eastlick* Court expressly distinguished those cases because they "concerned *local prohibitory enactments* adopted, in the municipality's exercise of the police power, in a field where the applicable state law contained language *expressly indicating that the Legislature did not intend its regulations to be exclusive*." (*Ibid.*) Such laws are nothing like the theft-reporting mandate here, which requires victims of firearm theft[7] to take affirmative action in a field where the relevant state law makes no express (or even implied) indication that local regulation is permissible.

Taking all of these cases together, a fundamental truth becomes readily apparent: California courts have long given less leeway to local ordinances that impose affirmative duties to act and directly regulate the conduct of *individuals*, than they give to prohibitory enactments aimed at business entities. That is why the City's series of cited cases uniformly upheld similar (but not identical) local ordinances affecting businesses against preemption

[7] The City scoffs at Appellants referring to law-abiding citizens who have been victimized by the crime of theft as "victims," calling it a "troubling emotional appeal." (R.B. at p. 36.) The claim highlights the City's thinly veiled contempt for gun owners, suggesting that they lose the benefit of being considered victims because they own guns and so must be complicit in crimes that they had no part in.

arguments, but also uniformly struck down those ordinances affecting individuals despite some differences with state law. This also squares with double jeopardy applying to individuals, and not to entities. (*Shore v. Gurnett* (2004) 122 Cal.App.4th 166, 171 ["Federal courts have consistently interpreted this provision to apply solely to multiple efforts by the government to prosecute or punish an *individual*."], italics added.) While regulations on business may need to be identical (or extremely close to it) to be voided, such regulations do not implicate the double jeopardy concerns which are paramount to the duplication analysis. This critical distinction is why Morgan Hill's ordinance must be struck down. Even if current jurisprudence does not *directly* acknowledge the distinction, this Court should formally adopt what California's caselaw has strongly implied for over a century.

The City may be able to dream up scenarios where someone violates just state law or just its ordinance. But in the most likely situation that these issues would arise under—a Morgan Hill resident losing a firearm and failing to report it at all—there will be an "inevitable conflict of jurisdiction" with the state. (*Pipoly*, *supra*, 20 Cal.2d at p. 370.) In that situation, the "temporal" and "spatial" differences the City harps on are meaningless, and double jeopardy is implicated. If all that is necessary to overcome duplication is for cities to change the copied state law just enough that it might be *possible* to violate one but not the other, then the duplication test of preemption is indeed just a municipal code cleaning crew.

II. THE CITY'S THEFT-REPORTING ORDINANCE CONTRADICTS STATE LAW IN THE STRICTEST SENSE OF THE WORD

Appellants have always maintained that the City's theft-reporting ordinance contradicts state law because it requires Appellants to report the theft or loss of their firearm within 48 hours when the state expressly gives them five days to do so. (A.O.B. at pp. 19-20; A.A.V 1182-1184; A.A. IX 2164-2167; A.A. XI 2724-2727.) In other words, Morgan Hill criminalizes conduct that state law implicitly makes lawful—that is, to take up to five days before they must report the theft or loss of their firearms. (A.O.B. at pp. 19-20.) The City argues that contradiction preemption could not possibly bar local laws from criminalizing conduct that state law implicitly allows, claiming that Appellants' "imaginary rule" would bar municipalities from ever creating stricter requirements than state law. (R.B. at p. 21.) The

City cites nothing in support of its claim. And for good reason. It is wrong.

To begin with, Appellants are not advocating for some "rule" that would preempt local regulation whenever state law implicitly "allows" some behavior simply by not criminalizing it. That said, when the state requires some affirmative act and dictates how much time one has to complete that act, a local law that shortens that deadline *inherently* conflicts with the state's regulatory scheme. Indeed, as the California Supreme Court observed in *Abbott*, such a law conflicts with state law "*in the conventional and strictest sense of the word 'conflict.*' " (53 Cal.2d at p. 688, italics added.) There, the Court struck a "criminal registration" ordinance that required certain criminal offenders to register with the city "within five days of taking up residence." (*Ibid.*) State law, however, then required "registration of certain sex offenders in the city or county of their residence, within *60 days* of taking up such residence." (*Ibid.*, citing Pen. Code, § 290, italics added.) The Court naturally recognized the direct and undeniable conflict this created. (*Ibid.*) Here too, the City's reporting mandate, requiring those whose firearms are lost or stolen to report the loss to law enforcement within *48 hours*, when state law requires the same within *five days*, "conflict[s] with one or more state laws in the conventional and strictest sense of the word 'conflict.' " (*Ibid.*)

Second, we know that contradiction preemption arises when local laws are "inimical to or cannot be reconciled with state law" (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068.) "Inimical" means that something "tends to obstruct or harm," (see Oxford Languages, *Inimical*, https://rb.gy/8jtwmk [as of Feb. 4, 2022]), and the City's theft-reporting mandate both obstructs and harms the statewide theft-reporting mandate. Indeed, as Appellants argued in their opening brief, MHMC section 9.04.030 "stands as an obstruction to the accomplishment and execution of the full purposes and objectives of" the supreme state law. (*Fiscal*, *supra*, 158 Cal.App.4th at p. 911.) For it may have the unintended effects of deterring firearm theft-reporting altogether and obstructing the state's ability to prosecute violations of its own theft-reporting mandate. (A.O.B. at pp. 16-18 [discussing how the double jeopardy and Fifth Amendment implications of the City's law may bar the state from enforcing section 25250]; see also Part I, *supra* [discussing double jeopardy].)

In short, the City's ordinance is inimical to Penal Code section 25250 because it could obstruct the state's ability to enforce its own laws. This is nothing like the example the City cites in *Great Western*, (R.B. at pp. 21-22, citing *Great Western*, *supra*, 27 Cal.4th at p. 873), where the California Supreme Court upheld a local law banning the sale of firearms on county-owned property with no real effect on the enforcement and effect of state laws regulating gun show businesses generally. What's more, as Appellants pointed out in their opening brief, the *Great Western* Court held that the field of gun show regulation had not been preempted because "the conduct of business at such shows [was expressly] subject to 'applicable local laws.' " (*Ibid.*, citing Pen. Code, §§ 12071, subd. (b)(I)(B), 12071.4, subd. (b)(2).)

Even so, the City insists that its law must be upheld because it is "perfectly possible" to comply with both MHMC section 9.04.030 and Penal Code section 25250. (R.B. at pp. 22-24, citing *Suter*, *supra*, 57 Cal.App.4th at p. 1124 and *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 Cal.4th 729, 743-744 ("*City of Riverside*")). Once again, the City's authorities target the regulation of *businesses*, not individuals. The cases that *do* regulate individual behavior cited by the City elsewhere all involve enactments *prohibiting* some conduct, not laws creating an affirmative duty to act. (See R.B. at p. 36, citing *People v. Butler* (1967) 252 Cal.App.2d Supp. 1053, 1058 ("*Butler*") [ordinance prohibiting the consumption of alcohol on the street], *People v. McGennis* (1966) 244 Cal.App.2d 527, 532 ("*McGennis*") [ordinance banning assembling at gambling houses], and *Gleason v. Mun. Ct. for L.A. Jud. Dist.* (1964) 226 Cal.App.2d 584, 585 [ordinance banning loitering in tunnels].) Indeed, in all the City's briefing, both in the lower court and now on appeal, the City has never cited a case upholding a local law placing an affirmative duty to act on laypeople that differs from the duties imposed by similar state laws.

In any event, the applicable test for contradiction is whether it is "reasonably possible," (*City of Riverside*, *supra*, 56 Cal.4th at p. 743), to comply with both state and local law, a phrase that necessarily has a meaning distinct from what is merely "possible." The City's ordinance imposes an *affirmative duty* on firearm owners to act. And, as explained above, that duty inherently conflicts with the duties imposed by the nearly identical state law.

This is relevant to whether it is "reasonably possible" for transient citizens to comply. The City attempts to differentiate the *ability* to comply with the ordinance from the knowledge of its existence, calling such knowledge "beside the point." (R.B. at p. 23.) But it is very much *not* beside the point when the ordinance imposes an affirmative duty on the individual.

Indeed, the United States Supreme Court has held that the maxim that "ignorance of the law is no excuse" offends due process when the law criminalizes a "wholly passive" failure to register and there is no proof that one would know of their duty to do so. (*Lambert*, *supra*, 355 U.S. at p. 230.)[8] There, a woman convicted of forgery was unaware of a local ordinance requiring that she register as a felon if present in Los Angeles for more than five days. (*Id.* at p. 226.) The Court recognized that her failure to register was a "wholly passive act . . . unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." (*Id.* at p. 228.) The Court thus held that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction . . . can stand." (*Id.* at p. 229.) The City's ordinance easily runs into this same issue—especially when it comes to transient citizens.

To be sure, a Morgan Hill resident might be informed about the City's theft-reporting mandate if they follow the local government on social media or visit a Morgan Hill gun store. A transient passing through the town would not be. The City can hardly be serious when it suggests that a traveler has nothing to worry about because they can learn of the ordinance by simply visiting a Morgan Hill firearm retailer. (R.B. at p. 23, n. 14.) That is simply not what the average person is likely to do. 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 make it unlikely that victims would think to check whether some local law imposes a *different* duty on them.

[8] *Lambert* was a federal due process challenge to the same "criminal registration" ordinance invalidated eight years later by the state court in *Abbott v. Los Angeles*. (*Abbott*, *supra*, 53 Cal.3d at p. 680 ["The ordinance here under attack has been before the United States Supreme Court in the case of *Lambert* v. *California* [citation]. That court refused to pass upon the constitutionality of the statute *per se*, but held that the application thereof, in that case, was violative of the due process clause of the Fourteenth Amendment."].)

Indeed, they are likely to have a false sense that they have complied with their reporting duty because they are informed by what they reasonably believe to be the supreme state law.

What's more, to accept the City's position would essentially invalidate the third test for implied field preemption. (See Part II.B., *infra*.) Certainly, if the fact that travelers could technically learn the local laws of all the cities they pass through were enough to overcome the threat that a "patchwork quilt" of local laws poses, the effect on transient citizens would never be grounds for finding a law preempted. But that test is not only well settled, it applies precisely *because* transients are unlikely to know the laws of the cities they pass through.

In sum, the City's ordinance is inimical to the aims of Prop 63 and the statewide firearm theft- and loss-reporting requirements it created. It thus contradicts state law.

III. THE CITY'S THEFT-REPORTING ORDINANCE ENTERS A FIELD SO FULLY OCCUPIED BY STATE LAW THAT IT BORDERS ON EXPRESS PREEMPTION; EVEN IF STATE LAW WERE NOT SO CLEAR, THE ADVERSE EFFECTS ON TRANSIENT CITIZENS UNDERSCORES THE NEED FOR STATEWIDE UNIFORMITY IN THE FIELD

"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.) When, as here, the state has not expressly stated its intent to fully occupy the field, "courts look to whether it has impliedly done so." (*O'Connell*, *supra*, 41 Cal.4th at p. 1068.) As relevant here, the state has impliedly occupied the field when:

> [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; [or]
>
> . . . .
>
> [T]he 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 v. City of Los Angeles* (1993) 4 Cal.4th 893, 898.) That said, "[w]hen there is a doubt as to whether an attempted regulation relates to a municipal or to a state matter, or if it be the mixed concern of both, the doubt must be resolved in favor of

the legislative authority of the state." (*Abbott*, *supra*, 53 Cal.2d at p. 681, citing *Ex parte Daniels* (1920) 183 Cal. 636, 639-640 and *Lossman v. City of Stockton* (1935) 6 Cal.App.2d 324, 328.)

Appellants' Opening Brief explains just how the state has impliedly occupied the field of firearm theft-reporting (A.O.B. at pp. 23-38.) But Appellants will briefly address the City's rebuttals in turn.

A. Both the Context of Prop 63 and Its Comprehensiveness Reveal the State's Clear Intention to Fully Occupy the Field of Firearm Theft- and Loss-Reporting; It Has Become a Matter of Exclusive State Concern

Concededly, Prop 63 and Penal Code section 25250 do not expressly preempt local regulation—but only just barely. Indeed, the context and comprehensiveness of Prop 63 (and the statewide reporting mandate it created) so clearly operate to the exclusion of local regulation, that calling it "implied" is almost a misnomer. Recall that Prop 63 *expressly* authorized local regulation in two other gun control laws it added to the Penal Code along with section 25250. Indeed, 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.) And 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 ammunition." (A.A.VI 1249, § 9.) The drafters of Prop 63 thus clearly knew how to craft statutory language preventing state law from preempting further local regulation. Yet they chose not to include any such language in the state theft-reporting scheme. The clear implication is that they never intended to leave room for local regulation in the field of firearm theft- and loss-reporting. It is preempted.

The City has no answer to this point except to say that "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." (R.B. at p. 30.) But so what? If field preemption required the legislature, or in this case the People, to *expressly* state an intention to preempt local regulation, there would be no *implied* field preemption analysis at all. And again, Prop 63 *did* expressly allow for local regulation in other sections, but it *did not* include similar language for theft-reporting. Given how much work goes into drafting propositions, that cannot have been an accident. It may

not be express preemption, but it is as strong an implication as Appellants can imagine. It no doubt "clearly indicate[s]" a legislative intent to preempt (*Cal. Rifle & Pistol Assn. v. City of W. Hollywood* (1998) 66 Cal.App.4th 1302, 1317.)

The pre-existence of other local theft-reporting laws throughout the state, which the City mistakenly believes is a point in its favor, (R.B. at p. 31), further supports Appellants' point. Given that the drafters of Prop 63 and the voters that enacted it knew of these local theft-reporting laws, it hardly makes sense for them to have omitted express language authorizing local regulation to protect those laws. After all, they included such language elsewhere in the proposition—twice. The likeliest explanation is that it was an intentional omission made to dispense with the "patchwork quilt" of local regulations in favor of a uniform statewide standard. The City would have this Court believe that the omission is meaningless, but that goes against typical principles of statutory construction. (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 voter initiatives . . . we apply the same principles that govern statutory construction"].) If Prop 63 aimed to allow local regulation in all its sections, then it would have had no need to include specific allowance for local action in the two places it did.

The context of Prop 63 thus speaks for itself. But if this Court is not persuaded that the context so strongly implies preemption, the comprehensiveness of Prop 63 as to theft-reporting should remove any doubt. Frankly, Appellants fail to see what more the People could have possibly added to make Prop 63 more comprehensive. It dictates where and by when gun owners must report a lost or stolen firearm. (Pen. Code, § 25250, subd. (a).) It provides guidance for those who recover a firearm reported as lost or stolen. (Pen. Code, § 25250, subd. (b).) It details what facts must be part of a compliant report to police. (Pen. Code, § 25270.)[9] It directs police chiefs to submit descriptions of each reported firearm into

[9] The City implies in a footnote that Appellants may not rely on these various Penal Code sections as evidence of the voters' intention to preempt because the complaint named only section 25250 (the section directly requiring reporting). (R.B. at pp. 28-29, n.18.) But

the statewide Automated Firearms System. (Pen. Code, § 25260.) It lays out penalties for each violation. (Pen. Code, § 25265.) And it makes it a crime to knowingly file a false report. (Pen. Code, § 25275.) What's more, Prop 63 created a whole host of exceptions to the statewide reporting law. (A.O.B. at p. 25, citing Pen. Code, §§ 25250, subd. (c), 25255.)

The City's brief, like the trial court's ruling, lacks a satisfying answer for what more Prop 63 could have possibly added to be more comprehensive than it already is. It makes just one argument in that regard, noting that Penal Code section 25250 allows local police to ask for additional relevant information when receiving a report of a lost or stolen firearm. (R.B. at p. 29.) But giving police limited flexibility to ask more questions when taking a report is not at all like allowing for local laws that change theft-reporting requirements altogether. Further, if local governments were free to pass any theft-reporting requirement they saw fit, there would be no reason for Prop 63 to include an express grant of limited authority to law enforcement to take down further relevant information. In any event, the City's ordinance does not change what is reported to police. It adjusts the time limit to make such reports.

The City, also like the trial court, claims its law is "synergistic" with state law. (R.B. at

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Appellants' claim is that the reporting requirement of section 25250 preempts the City's reporting requirement. The other sections cited implement and give context to that section. No matter what the complaint says, section 25250 is inseparable from the implementing sections adopted together with section 25250 via Prop 63 to create the "broad and comprehensive" scheme Appellants identify.

In any event, the City's claim is misleading, at best. Appellants' complaint referenced "the plain language" of all of Prop 63—which includes not just Penal Code section 25250, but also sections 25255, 25260, 25265, 25270, and 25275. (See, e.g., A.A I 10 ["*By passing Prop 63 and enacting section 25250*, voters caused state law to occupy the whole of the field of firearm-theft-reporting, such that a local ordinance that purports to prescribe reporting requirements for firearm theft, like the Ordinance, is preempted."], italics added; A.A. I 14 ["Based on the plain language and legislative history of *Prop 63 and Penal Code section 2525*0, the Ordinance, as codified in the Morgan Hill Municipal Code, conflicts with and is preempted by state law"], italics added.)

The City also complains that Appellants did not raise the argument that the "broad and comprehensive statewide scheme" was evidence of legislative intent to preempt until summary judgment. (R.B. at p. 28, n. 18.) But appellants are unsure when they would have raised the theory at any time prior. There was no other substantive motion practice in which Appellants would have had a chance to lay out the details of their legal theories. And a complaint need not lay out every legal theory or argument that supports the plaintiff's claim. (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1022.)

p. 31; A.A.XI 2751.) Appellants' Opening Brief deals at length with how the law is not only *not* "synergistic" with state law, but how it frustrates the state law's goals and impedes the state's ability to prosecute its laws. (A.O.B. at pp. 16-21; see also Part I, *supra*.) Moreover, it is hard to see how the two laws can be "synergistic" when the City's ordinance fails to take the simple step of importing Prop 63's exceptions. For example, someone who lost an antique firearm is expressly exempt from Prop 63's reporting requirement, but Morgan Hill honors no such exception—nor does it recognize exceptions for law enforcement, U.S. marshals, and others. (Pen. Code, §§ 25250, subd. (c), 25255.) This omission should be fatal to the City's ordinance. Indeed, the *Abbott* Court noted that the city's attempt to apply its "criminal registration" ordinance to some sex offenders exempt from the statewide registration law placed the local ordinance "in direct conflict with state law." (53 Cal.2d at p. 686.)

But more than these differences, the argument that the City made below, which the trial court adopted, would effectively erase this type of preemption. (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"].) While a local law being "synergistic" might be a factor to consider, such "synergy" cannot the deciding question. If it were, and a local law is only implicitly preempted when it obstructs the purposes of state law, (R.B. at p. 30), then this test of preemption would be unnecessary. There are already two separate types of preemption dealing with such circumstances (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 different types of preemption. To the contrary, doing so would render the entire concept obsolete.

B. If the City's Theft-reporting Ordinance Is Not Preempted Due to Its Adverse Effect on Transient Citizens, This Test for Preemption Likely Has No Application at All

1. Appellants Must Respond to the City's Repeated Misrepresentations of the Record

Once might be chance. (See p. 5, n. 1, *supra*, citing R.B. at p. 19 [addressing the City's representation that Appellants did not raise a double jeopardy argument below].) Twice is perhaps a coincidence. (See p. 18, n. 9, *supra*, citing R.B. at pp. 28-29, n. 18 [responding to

the City's claim that the complaint was limited to Penal Code section 25250].) But three times is a pattern. Appellants will soon turn back to a discussion of why the City's ordinance is preempted based on its disparate impact on transient citizens. Before doing so, however, Appellants must address the City's clear misrepresentation that "[i]n 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." (R.B. at p. 32.) This being the *third* time the City has made verifiably false claims about the record on appeal, Appellants feel compelled to respond in more detail than they otherwise would.

Here are some examples from the record showing that this issue was thoroughly argued—with citation to authority—below:

1. In Appellants' motion for summary judgment, they argued in a subsection titled "The City's Purported Interests," that " '[t]he 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.'… The City has identified no particularized local interest not already purportedly served by state law." (A.A. V 1190, citing *Robins v. Cnty. of L.A.* (1966) 248 Cal.App.2d 1, 9-10 ("*Robins*"), italics added.)

2. In Appellants' opposition to the City's motion for summary judgment, they wrote:

> This is especially so because the City cites no local interest that state law does not already serve. "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.2d at pp. 9-10, italics added.) And again, "**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.) But the City has identified no "special need" not already purportedly served by state law.

(A.A. IX 2172-2173, citing *Robins*, *supra*, 248 Cal.App.2d at pp. 9-10, italics & bold added.)

3. In Appellants' reply to the City's opposition to their motion for summary judgment, they argued that the City had not "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. XI 2726-2727.) Appellants also pointed out that

> [U]nder *Robins*, the City must show some particular local interest related to theft reporting and that state law does not address that interest with "reasonable adequacy." [Citation to record omitted.] This is because this type of preemption considers "[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."

(A.A. XI 2732, quoting *Robins*, *supra*, 248 Cal.App.2d at p. 10.)

4. At oral argument, Appellants argued that "Plaintiffs ask the Court to balance, quote from *Robins*, '(1), the needs of local government to meet the special needs of their community; and (2), the need for uniform state regulation.'… It tells us it's not enough that the City might proffer some possible or even likely benefit from theft reporting; it must show that Morgan Hill has some special need that its law serves… Both the City and Court's tentative suggest[] that Plaintiffs are arguing that the City must show that its law serves its local interests better than state law does. That's not what Plaintiffs are arguing. Rather, they argue that the City must state a special local need particular to its community." (A.A. XI 2802-2803.)

5. In its opinion, the lower court seemed to avoid referencing *Robins* directly, but it did recognize that "Plaintiffs also contend that the burden is not outweighed by the possible benefit to the City because '[t]he City has identified no particularized local interest not already purportedly served by state law' and it has not 'identified any "special need" that could justify the harmful effects its contradictory theft-reporting law will have on transient Californians.' " (A.A. XI 2753.) Of course, that language comes directly from *Robins*.

In short, Appellants *did* offer a citation—and they offered it repeatedly and uniformly—for their argument that the City must (at least) articulate a "special need" that is not being addressed with "reasonable adequacy" at the state level. (*Robins*, *supra*, 248 Cal.App.2d at p. 10.) They did so in all three briefs they submitted in the lower court, and they repeated it in oral argument.

2. The City's Ordinance Exemplifies a Local Law that So Heavily Burdens Transient Citizens That It Must Be Preempted

Appellants concede that local governments may, subject to the limitations discussed above, adopt stricter regulations than state law imposes without violating preemption when it serves some special local interest. (*Hoffman*, *supra*, 155 Cal. at p. 118.) To be sure, courts are "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." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707.) But the City refuses to name *any* local need particular to its community (or communities like it). To the contrary, the four purposes that theft-reporting purportedly serves, according to the City, are nearly identical to the goals of Prop 63's statewide scheme. (A.A.V 1190-1191.) The City cites nothing to suggest Prop 63 does not adequately address those interests. (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).

Instead, the City argues that precedent "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." (R.B. at p. 25.) While it is amusing that the City recoils at the notion of substantiating the effectiveness of its ordinance, Appellants do not argue that such is the City's burden. Nor do they argue, as the City claims they do, that the City must prove that its law serves its local interests *better* than state law does. (R.B. at p. 24.)[10] Rather, in cases like this one where state law and local law "proscribe social behavior of individuals" and serve the very same purposes, the City must show that the competing state law does not "cover the areas of principal concern with *reasonable adequacy*." (A.A. IX 2172-2173, citing *Robins*, *supra*, 248 Cal.App.2d at pp. 9-10 [holding that "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"].)

[10] One could be forgiven for mistakenly believing this was Appellants' claim. For in their opposition to the City's motion for summary judgment, they wrote: "Nor does it even try to establish *how* its shortened reporting period would serve those general interests better than the statewide law." (A.A. IX 2173, italics added.) But this was not Appellants' attempt to claim such was the test under *Robins*. Rather, they were merely responding to the City's unsubstantiated claim that shortening the reporting period would more effectively serve its interests. (A.A. IX 2173, citing A.A. I 60.)

At a minimum, however, the City must *identify* what special local need its shortened theft-reporting period serves. This is because, as Appellants have explained, "[t]he 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.) In short, the importance of the community's "special need," presumably so long as it is believable within reason, must be balanced against the need for uniform state regulation. That balance cannot be struck if the City refuses to even identify what special need it has. So while the City may not need prove its ordinance adequately serves a significant local interest, it does need to *identify* the local interest its law *aims* to serve. On this simple test, the City has failed.

Indeed, throughout this litigation, the most the City has ever provided to support its interest is a 2011 report about youth violence in San Mateo County, advocating for laws requiring the reporting of lost or stolen firearms. (A.A.VIII 1862-1876.) It is this report that the City again exclusively relies on in its opposition. (R.B. at p. 26, 33-34; A.A.IX 2108.) Perhaps that report may have been enough in 2011—before the voters adopted Prop 63—but now there is a statewide theft-reporting mandate that serves the very same goals the City seeks to address. Yet the City has identified no special community need not already served by state law with "reasonable adequacy." (*Robins*, *supra*, 248 Cal.App.2d at pp. 9-10 .) This is likely because there is no evidence that shortened reporting periods would provide any further benefit. (A.A.VI 1215, VIII 1859.)

While it may be true that "problems with firearms are likely to require different treatment in San Francisco County," (R.B. at p. 25, citing *Galvan v. Super. Ct. of S.F.* (1969) 70 Cal.2d 851, 864 ("*Galvan*")), the City has never identified any problem that would set the City apart from the rest of the state on the issue of firearm theft, loss, and reporting. It is this narrower question that the City must answer. For if it were enough to point generally to "problems with firearms" on the grounds that such issues require specialized local treatment, no gun law could be preempted. We know that is not right because *Fiscal* overturned a San Francisco ordinance banning handguns as preempted: "[I]t can be readily 'infer[red]' " that

the state "intended to occupy the field of residential handgun possession to the exclusion of local governmental entities." (*Fiscal*, *supra*, 158 Cal.App.4th at p. 909.) So in some narrower fields, it is clear that the state has established that "problems with firearms" are a matter of statewide concern.

The City also protests that 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.' " (R.B. at p. 34, citing *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898, citations omitted, italics added.) But this is a distinction without a difference. Whether the correct test requires the City to identify the "special needs of [its] community," as in *Robins*, or to identify a "possible benefit to the municipality," as in *Sherwin-Williams*, the City must identify what problem it has that might benefit from a shorter reporting time than Prop 63 already provided. Again, the City has never done so.

Instead, the City argues that Morgan Hill is a small suburban residential community, so residents should have no trouble accessing their police station quickly, while Prop 63 had to consider gun owners who live far from any urban center. (R.B. at p. 33.) But this type of preemption balancing concerns the impact on *transient* citizens, not the residents of Morgan Hill. While residents too could easily be impacted, perhaps the City is correct that they are likely to know about the ordinance. *Transient citizens are not*. It is really not difficult to imagine a traveler losing a firearm while in Morgan Hill and realizing it only upon returning home to a town that is hours away, requiring that they make the trip *back* to Morgan Hill to make a report. Such a citizen would understandably believe they have five days to do so and not immediately drive back within 48 hours. Even if the ordinance were acceptable as to residents of Morgan Hill, which it is not for the reasons discussed above, its burden on transient citizens is much too high.

Indeed, unlike the unidentified problems that the City claims a shortened reporting period is necessary to solve, the threat to transient citizens of being charged with unknowingly violating the City's ordinance is very real. It makes *criminal* the failure to comply with an *affirmative duty to act* that conflicts with (or at least changes) the duty imposed by state law. In contrast, every case the City cites that upheld a local law in the face of arguments that

they unduly burdened transients involves *prohibitions* on behavior. (R.B. at pp. 35-36, citing *Nordyke v. King* (2002) 27 Cal.4th 875 ("*Nordyke*") [banning firearms possession on county property]; *Butler*, *supra*, 252 Cal.App.2d Supp. at p. 1058 [prohibiting alcohol consumption on the street]; *McGennis*, *supra*, 244 Cal.App.2d at p. 532 [prohibiting assembling at gambling houses]; *Gleason*, *supra*, 226 Cal.App.2d at p. 585 [prohibiting loitering in tunnels].) Appellants have explained repeatedly why this distinction matters. (See Parts I & II, *supra*.)

But as for transients, specifically, the distinction is particularly important. For most of the cases the City cites involve laws banning the very sorts of conduct—like loitering, gambling, and public alcohol consumption—restricted in *most* places.[11] While the particulars of those bans might differ from one jurisdiction to the next, these are "circumstances that should alert the doer to the consequences of his deed." (*Lambert*, *supra*, 355 U.S. at p. 228.) In contrast, the City's ordinance purports to shorten the time one has to affirmatively do the very same thing required by a state law that transient citizens are more likely to know of. And, for those classes of people exempt from reporting under state law, they likely have no idea that they would be obligated to report at all. It is no answer to say that "ignorance of the law is no excuse." For if transient citizens are simply expected to know all the local laws of every jurisdiction they pass through as the City and the lower court assume, (A.A.XI 2754, A.A.IX 2121-2123), then it's not really clear why this preemption test even exists. No local law would ever be able to violate it. This point was raised in the opening brief, but the City did not respond to it.

Nor is it persuasive that no firearm ordinance has yet been struck down based on its harm on transient citizens. (R.B. at p. 35.) Because again, none of these ordinances placed an affirmative duty on transient citizens. The one case that came close was *Galvan*, which

[11] The only exception is *Nordyke*, *supra*, 27 Cal.4th 875. But the law in *Nordyke* banned possession of firearms on county property, (*Id.* at pp. 880-881), where readily visible signs are likely to inform all who visit that firearms are prohibited. What's more, *Nordyke* was brought by a gun show promoter because the ban would effectively shutter its events. At such events, however, the event promoter and paid security are tasked with ensuring that all vendors and visitors comply with all relevant federal, state, and local laws. There really was no credible threat that anyone, including transients entering the county to attend the event, would not know the local law. Even if they were unaware, they would merely be turned away at the gate.

involved a registration requirement for all firearms possessed within the city of San Francisco. (*Galvan*, *supra*, 70 Cal.2d at p. 851.) But the California Supreme Court expressly held that the "San Francisco gun law places no undue burden on transient citizens. *Indeed, the ordinance was drafted to prevent such a burden*. The law, applicable to firearms possessed by persons in San Francisco, provides for a seven-day exemption, and thus excludes those transients who might otherwise be burdened." (*Id.* at p. 864, italics added.) Had that provision not existed, and the registration requirement applied to transient citizens the moment they stepped into San Francisco while in possession of a firearm, the *Galvan* opinion implies it would have been struck down on those grounds. (*Ibid.*)

That is the situation here. Even if this Court is not persuaded by the three other preemption arguments Appellants have raised, it should still strike the City's ordinance because state law at least partially occupies the field of firearm theft- and loss-reporting, and the City's ordinance adversely affects transient citizens.

CONCLUSION

For these reasons, as well as those discussed in their opening brief, Appellants ask this Court to hold that MHMC section 9.04.030 is preempted by state law, reverse the trial court's order granting the City's motion for summary judgment, and vacate the entry of judgment for the City.

Dated: February 14, 2022

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CERTIFICATE OF WORD COUNT

Under Rule 8.204, subdivision (c)(1), of the California Rules of Court, I certify that the attached Appellants' Reply Brief is 1½-spaced, typed in a proportionally spaced, 13-point font, and the brief contains 10,532 words of text, including footnotes, as counted by the word-count feature of the word-processing program used to prepare the brief.

Dated: February 14, 2022

MICHEL & ASSOCIATES, P.C.

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PROOF OF SERVICE

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

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

On February 14, 2022, I served a copy of the foregoing document described as: **APPELLANTS' REPLY BRIEF**, on the following parties, as follows:

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

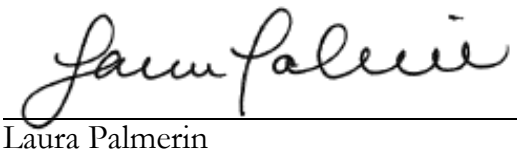
These parties were served as follows: I served a true and correct copy by electronic transmission through TrueFiling. Said transmission was reported and completed without error.

Superior Court of California
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 February 14, 2022, at Long Beach, California.



Laura Palmerin
Declarant