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CALIFORNIA'S REGULATION OF NON-CONSENSUAL PRIVATE PROPERTY TOWS: WHY SECTION 22658(I) IS FEDERALLY PREEMPTED

Imagine an apartment in a crowded, urban area. It is dark and very late at night. A tenant arrives at home and finds an illegally parked vehicle in her assigned parking space. There are no other available parking spaces. It takes her fifteen minutes of driving around in circles to find the only street parking in the area, blocks away, forcing her to walk to her apartment alone in the dark. When she finally gets home she calls the manager.

In response, the manager calls a tow truck and then heads out to the dark parking lot to wait. It is against the law for her to simply call to have the trespasser towed, nor can she proactively arrange for enforcement of the lot's legally posted rules.¹ Instead, she must be on the scene throughout the tow procedure and provide the tow operator with specific, written authorization every time this occurs.² So the manager waits alone in the dark, recalling the numerous death and bomb threats she has already received as a result of the property's well-known authorization policy. She waits, wondering what type of person she may encounter if the trespasser comes out to try and retrieve his vehicle.³

This is the law promulgated in California Vehicle Code section 22658(I).⁴ The California Legislature insists that this law promotes "safety."⁵ The Legislature claims that having a manager or property

1. See CAL. VEH. CODE § 22658 (West 2004).

2. *Id.* § 22658(I)(1).

3. Opening Brief of the Appellee, Addendum at 62-67, *Tillison v. City of San Diego*, Nos. 03-55939, 03-56188, 2004 WL 546060 (9th Cir. Feb. 6, 2004); Telephone Interview with John Tillison, Owner, West Coast Towing (May 17, 2004) [*hereinafter Tillison Interview IJ*]. Mr. Tillison relayed several stories where property owners and managers were threatened with retribution for authorizing the towing of a specific vehicle. *Id.* One apartment manager at Pacific Gardens in San Diego even received bomb and death threats for giving specific authorization for tows. *Id.* Mr. Tillison asserted that his company was better equipped and more accustomed to deal with these dangers. *Id.* He asserted that most property owners and managers prefer to have his company enforce their parking regulations instead of having to deal with the dangers themselves. *Id.* See Brief of Amicus Curiae North County Apartment Managers Association in Support of Appellee, *Tillison*, 2004 WL 1216520.

4. § 22658(I).

5. § 22658(m)(2).

owner on the scene increases safety because it can lessen confrontations and tow mistakes.⁶ However, California Vehicle Code section 22658(l) is not a safety regulation. It fails to meet the criteria of both the California and the United State Supreme Court as a legitimate safety regulation.⁷ In reality, this law contravenes safety. It does not promote the safety of the tenant who has to walk alone in the dark to her apartment because assigned spaces and parking rules cannot be enforced. It does not protect the safety of the manager who must be on the scene and provide written authorization every time a trespasser ought to be towed. In fact, the only person who is protected is the very person causing the potentially dangerous situation to arise. It is “hard to believe that [the Legislature] would put the safety of the ‘law breaker’ before the safety of [others],”⁸ but this is the result of California Vehicle Code section 22658(l).

Additionally, section 22658(l) prevents tow companies from freely conducting legal business transactions by prohibiting generalized contracts with private property owners to enforce property regulations.⁹ In particular, a state statute that exerts “acute, albeit indirect, economic effects” may unreasonably burden interstate commerce and be subject to federal preemption.¹⁰ The California courts have yet to examine the economic implications of section 22658(l), but a statistical analysis of the towing industry and California’s impact on the United States economy reveals that section 22658(l) may be a regulation with such a burden.¹¹

This Comment will demonstrate that despite the Legislature’s statement of intent to “further the safety of the general public,”¹² California’s prohibition of generalized contracts between tow companies and private property owners fails as a safety regulation and unreasonably burdens interstate commerce. Therefore, California Vehicle Code section 22658(l) is preempted by section 14501(c) of the Federal

6. See *Hearing A.B. 792 Before the Senate Transportation Comm.*, Sen. Reg. Sess. (Cal. July 22, 2003) [hereinafter Senate].

7. See *infra* Part IV.A.

8. Senate, *supra* note 6.

9. Telephone Interview with John Tillison, Owner, West Coast Towing (Feb. 4, 2004) [hereinafter Tillison Interview II].

10. See *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (holding that New York’s surcharges only indirectly affect insurance policy prices and were not intended to be preempted under the Employee Retirement Income Security Act).

11. See *infra* Part IV.B.

12. CAL. VEH. CODE § 22658(m)(2) (West 2004).

Aviation Administration Authorization Act,¹³ which effectively deregulated the towing industry.¹⁴ The resolution of this issue is essential to the freedom of tow truck companies and private property owners to conduct business with one another,¹⁵ and is significant in defining the regulatory role of the state.¹⁶

Part I of this Comment will define the conflicting California and federal laws. Part II will describe the rules that determine preemption analysis. Part III will review the current California cases, their inconsistent interpretations, and cases pending decision. Part IV will assert that the California statute is not a genuine safety regulation and is an unreasonable economic burden. Part V will conclude with predictions regarding pending cases as well as the fate of California's law.

I. THE CONFLICTING LAWS

A. The Federal Aviation Administration Authorization Act Section 14501(c)

The Federal Aviation Administration Authorization Act (FAAA) section 14501(c) provides that a State may not "enact or enforce a law, regulation, or other provision" affecting the "price, route, or service of any motor carrier . . . with respect to the transportation of [private] property."¹⁷ Towing companies and towers qualify as "person[s] providing motor vehicle transportation for compensation,"¹⁸ and fall within the statute's scope.¹⁹

In *City of Columbus v. Ours Garage and Wrecker Service, Inc.*,²⁰ the Supreme Court asserted that the purpose of section 14501(c) was to deregulate the "intrastate transportation of property by the States."²¹ The Court asserted Congress' findings that deregulation is

13. See Federal Aviation Administration Authorization Act of 1994 (FAAA) § 14501(c), 49 U.S.C. 14501(c) (1995)). The FAAA was amended by the Interstate Commerce Commission Termination Act of 1995, which added section 14501. Pub. L. No. 104-88, 109 Stat. 803. See discussion of preemption *infra* Part II. See generally Wayne F. Foster, Annotation, *Validity and Construction of Statute or Ordinance Regulating Vehicle Towing Business*, 97 A.L.R.3d 495 (1980).

14. See 49 U.S.C. § 14501(c) (2000).

15. Tillison Interview II, *supra* note 9.

16. *Id.* See also Tillison Interview I, *supra* note 3.

17. § 14501(c)(1).

18. 49 U.S.C. § 13102(12) (2000).

19. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 430 (2002).

20. *Id.*

21. *Id.* at 440 (quoting FAAA § 601(a)(1), Pub. L. No. 103-305, 108 Stat. 1569 (1994)) (emphasis added). The Court quoted the deregulatory purposes of section 14501(c) in deter-

necessary because “[s]tate economic regulation of motor carrier operations . . . is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.”²² In fact, Congress found that “the State regulatory process should be preempted”²³ regarding “the regulation of *intrastate* transportation of property”²⁴ because such regulation “imposed an unreasonable burden on *interstate* commerce”²⁵ and “impeded the free flow of [business].”²⁶

Although the FAAA deregulates a significant amount of the towing industry, the statute maintains and preserves several areas of state regulation. These areas include regulations concerning safety,²⁷ “the transportation of household goods,”²⁸ the price for non-consensual tows,²⁹ and “uniform cargo liability rules.”³⁰ If a state law falls within one of these preserved realms, it garners exception from preemption under the FAAA.³¹

B. California Vehicle Code Sections 22658(l) and (m)(2)

In contrast to the deregulatory purpose of the FAAA, California Vehicle Code section 22658(l) specifies strict procedures for non-consensual tows from private property,³² which impede businesses from freely making legal contracts.³³ Section 22658(l)(1), enacted in 1991,³⁴ states that if a towing company is to “remove or commence the

mining whether a state’s power to regulate safety over tow-truck operations could be delegated to local municipalities. *Id.* at 428. The court held that the safety exception did extend to the regulatory authority of local municipalities, but left the issue of whether the regulation was safety related open on remand. *Id.* at 442.

22. *Id.* at 440 (quoting H.R. Conf. Rep. No. 103-677, at 87 (1994)).

23. FAAA § 601(a)(2).

24. *Id.* § 601(a)(1)(A) (emphasis added).

25. *Id.*

26. *Id.* § 601(a)(1)(B). Congress found that regulation “impeded the free flow of trade, traffic, and transportation of interstate commerce.” *Id.*

27. 49 U.S.C. § 14501(c)(2)(A).

28. *Id.* § 14501(c)(2)(B).

29. *Id.* § 14501(c)(2)(C).

30. *Id.* § 14501(c)(3)(A).

31. *City of Columbus v. Ours Garage & Wrecker Serv. Inc.*, 536 U.S. 422, 429 (2002).

32. CAL. VEH. CODE § 22658(l) (West 2004).

33. Interview with Todd J. Hilts, Attorney at Law, Law Office of Todd J. Hilts, in San Diego, Cal. (Feb. 12, 2004). Mr. Hilts is counsel for Tillison, d/b/a West Coast Towing, which is currently challenging section 22658(l). *Tillison v. City of San Diego*, Nos. 03-55939, 03-56188, 2004 WL 546060 (9th Cir. Feb. 6, 2004). Mr. Hilts is also counsel for Tillison, d/b/a West Coast Towing, in a case against the State of Washington. *Tillison v. Locke*, DC No. V03-5514 FDB (W.D. Wash. 2004), *appeal docketed*, No. 04-35539 (9th Cir. July 8, 2004).

34. Act of Oct. 14, 1991, S.B. No. 887, § 22658(l)(1), 1991 Cal. Legis. Serv. 1004

removal of a vehicle from private property," the tow operator must "first obtain[] written authorization from the property owner" or agent, who must "be present at the time of removal."³⁵ Furthermore, the "[g]eneral authorization to remove . . . a vehicle . . . shall not be delegated to a towing company."³⁶ Failure to comply with this section imposes liability on the tow company "for four times the amount of the towing and storage charges" plus any additional criminal penalties.³⁷ Thus, this provision prevents tow companies from contracting with private property owners to regularly enforce property rights and regulations.³⁸

On February 20, 2003, eight months after the United States Supreme Court forewarned that towing regulations "*not genuinely responsive to safety concerns*" would be preempted under the FAAA,³⁹ California Vehicle Code section 22658(m)(2) was introduced.⁴⁰ Section 22658(m)(2) states that "[i]t is the intent of the Legislature in the adoption of . . . [22658](l) to further the safety of the general public by ensuring . . . authorization for the removal of a vehicle" from private property.⁴¹ The lead argument in support of the new statute was to "assist the courts in any subsequent litigation" and to "enhance the position and legal standing of the State of California."⁴² In general, section 22658(m)(2) was enacted based on the state's desire to avoid preemption under the FAAA and evidence that section 22658(l) genuinely advanced public safety was non-existent.⁴³

(West).

35. CAL. VEH. CODE § 22658(l)(1).

36. *Id.* Within the Ninth Circuit, only the state of Washington has a similar statute prohibiting generalized contracts for private property tows. WASH. REV. CODE § 46.44.080(2) (2001). This statute is currently being challenged as preempted by the FAAA in the case of *Locke*, DC No. V03-5514 FDB. Contrary to California and Washington, the state of Arizona expressly permits the formation of these contracts to enforce parking regulations on private property. ARIZ. REV. STAT. § 9-499.05 (2001).

37. CAL. VEH. CODE § 22658(l)(3).

38. Interview with Todd J. Hilts, *supra* note 33.

39. *City of Columbus v. Ours Garage & Wrecker Serv. Inc.*, 536 U.S. 424, 442 (2002) (emphasis added).

40. A.B. 792, Assem. Reg. Sess. (Cal. Feb. 20, 2003) [hereinafter Assembly].

41. § 22658(m)(2).

42. Senate, *supra* note 6.

43. *See id.* An early argument in favor of section 22658(m)(2) stated that written authorization for each tow was important because if tow operators were allowed to make such decisions without consulting the property owner, the number of improper tows might increase and lead to violent situations. Assembly, *supra* note 40. *See infra* Part IV.A.

C. The Conflict

FAAA section 14501(c) deregulates the towing industry to alleviate economic burdens while preserving the safety regulatory realm for the states.⁴⁴ In contrast, California Vehicle Code section 22658(l) restricts services on non-consensual private property tows.⁴⁵ This restriction is asserted by the Legislature to properly fall within the state's power to regulate safety.⁴⁶ However, as will be discussed, a proper analysis of section 22658(l) reveals it is not genuinely concerned with safety and it unreasonably burdens commerce, subjecting it to preemption by the FAAA.⁴⁷

II. PREEMPTION ANALYSIS

The laws of the United States “shall be the supreme Law of the Land,”⁴⁸ and if any state law interferes with federal law, the state law must yield.⁴⁹ However, preemption analysis begins with the assumption that “the historic police powers of the States [are] not to be superseded . . . unless that [is] the clear and manifest purpose of Congress.”⁵⁰ Such purpose may be express in the statute or implied.⁵¹ Implied preemption exists where the federal law “thoroughly occupies a legislative field” making it reasonable to infer that “Congress left no room for the States to supplement it.”⁵² Preemption may also be implied where the state law is found to be in actual conflict with the federal law.⁵³ Thus, state law is federally preempted where the statute

44. *Ours Garage*, 536 U.S. at 439-40.

45. § 22658(l); see also Tillison Interview II, *supra* note 9.

46. § 22658(m)(2); see Senate, *supra* note 6.

47. See *infra* Part IV.

48. U.S. CONST. art. VI, cl. 2.

49. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (ruling that New York's granting of a monopoly of ferry rights between New York and New Jersey was invalid because it interfered with the federal interstate commerce power).

50. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (holding that the Federal Cigarette Labeling Act of 1965 and 1969 did not preempt many state law claims but did preempt claims based on a failure to warn where there was reliance on information from advertising) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

51. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1978). Examination of the implied purposes of a federal law requires more than a superficial reading of the statute and includes additional research. *Id.*

52. *Cipollone*, 505 U.S. at 516 (quoting *Rice*, 331 U.S. at 230).

53. *Id.* (quoting *Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204, (1983)); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819) (holding that it is constitutional for the U.S. to create a bank under Congress' broad powers and it is unconstitutional for states to impose taxes on the bank because of their lim-

and Congress' purpose explicitly dictates preemption or where such purpose is fairly implied.

Regarding non-consensual private property tows, the express language of the FAAA, and Congress' purpose, determines the question of preemption. As previously discussed, the express language of FAAA section 14501(c) preempts state laws regulating tow trucks that relate to routes or services⁵⁴ while preserving the states' authority to regulate safety.⁵⁵ The FAAA also provides that the Secretary of Transportation may render a state law unenforceable and preempted if the state law has no safety benefit or where "enforcement of the State law . . . would cause an unreasonable burden on interstate commerce."⁵⁶ In addition, Congress' purpose was that "the State regulatory process should be preempted"⁵⁷ because such regulation "imposed an unreasonable burden on *interstate* commerce"⁵⁸ and "impeded the free flow of [business]."⁵⁹

In *Ours Garage*, the Supreme Court affirmed the express language of the FAAA and Congress' purpose to preempt "States' economic authority over motor carriers of property . . . [but] 'not restrict' the preexisting and traditional state police power over safety."⁶⁰ The Court also warned that a state law "*not genuinely responsive to safety concerns*" would be preempted by the FAAA.⁶¹ Similarly, the Court reinforced the role of the Secretary of Transportation as a safeguard to protect Congress' deregulatory purpose.⁶² The Court stated that the Secretary is authorized to "void any 'State law or regulation' . . . that, in the Secretary's judgment, 'has no safety benefit . . . [or] would cause an unreasonable burden on interstate commerce.'"⁶³

To conclude, the express language of the FAAA, the purposes of Congress, and the Court's affirmation all assert that state regulations

ited authority to impede the federal government).

54. 49 U.S.C. § 14501(c)(1) (2004). Although the price of a private property motor carrier is deregulated under (c)(1), price is one area reserved for regulation by the states in regards to non-consensual towing. *Id.* § 14501(c)(2)(C).

55. *Id.* § 14501(c)(2)(A). In addition to safety, there are three other areas reserved for the states, including transportation of household goods, price for non-consensual tow services, and rules that affect liability. *Id.* §§ 14501(c)(2)(A)-(C), (c)(3)(A).

56. 49 U.S.C. § 31141(c)(4)(C) (2000).

57. FAAA, § 601(a)(2), Pub. L. No. 103-305, 108 Stat. 1569 (1994).

58. *Id.* § 601(a)(1)(A) (emphasis added).

59. *Id.* § 601(a)(1)(B). Congress found that regulation "impeded the free flow of trade, traffic, and transportation of interstate commerce." *Id.*

60. *City of Columbus v. Ours Garage & Wrecker Serv. Inc.*, 536 U.S. 424, 439 (2002).

61. *Id.* at 442 (emphasis added).

62. *Id.* at 441-42; 49 U.S.C. §§ 31141(a), (c)(4).

63. *Ours Garage*, 536 U.S. at 441.

genuinely concerned with safety and not an unreasonable burden on commerce will be saved from preemption. Thus, whether California Vehicle Code section 22658(*l*) is preempted by the FAAA hinges on an analysis of its affect on safety and the economy.

III. THE CALIFORNIA CASES

A. *Tocher v. City of Santa Ana*⁶⁴

The Ninth Circuit Court of Appeals determined in *Tocher* that California Vehicle Code section 22658(*l*) was federally preempted by the FAAA.⁶⁵ *Tocher*, the operator of a tow company in Santa Ana, California, brought suit against the City to enjoin enforcement of several local ordinances and state laws, including California Vehicle Code section 22658(*l*).⁶⁶ The district court ruled in *Tocher*'s favor, concluding that the laws were federally preempted and enjoined their enforcement.⁶⁷ The City appealed to the Ninth Circuit Court of Appeals.⁶⁸ In examining the regulations *de novo*, the court affirmed that section 22658(*l*) was "preempted because [it is] based on consumer protection rather than safety."⁶⁹ Unfortunately, the court did not provide any further explanation or rationale.

B. *People v. Servantes*⁷⁰

In contrast to *Tocher*, the First District Court of Appeal of California drastically departed from the Ninth Circuit's rationale in *Servantes* and held that California Vehicle Code section 22658(*l*) was exempt from federal preemption as a safety regulation.⁷¹ The City Attorney of San Francisco brought suit against *Servantes* seeking "permanent injunction, civil penalties, and disgorgement of profits."⁷² The trial court held "that *Servantes* had committed hundreds of viola-

64. *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 1999) (abrogated in part as to whether the safety regulation exemption extended to municipalities in *Ours Garage*, 536 U.S. at 424).

65. *Id.* at 1051.

66. *Id.* at 1043-44.

67. *Id.* at 1044.

68. *Id.* at 1043.

69. *Id.* at 1051.

70. *People v. Servantes*, 86 Cal. App. 4th 1081 (2001).

71. *Id.* at 1090-92.

72. *Id.* at 1083.

tions,”⁷³ and ordered him to pay \$74,700 in civil penalties, to forfeit \$52,500 in illegal profits as restitution to his victims, and to pay \$87,000 for 174 violates of a preliminary injunction.⁷⁴ In addition, the court “permanently enjoined Servantes from towing vehicles on private property within the State of California.”⁷⁵ Servantes did not dispute many of the charges; instead, his primary defense was that the regulations were preempted by federal law and therefore unenforceable.⁷⁶ The trial court rejected this argument, and the appeals court affirmed on all counts.⁷⁷

More concerned with the desire to impose punishment and less with the law, the Court of Appeals described in detail Servantes’ work ethic as a tow truck operator.⁷⁸ The court described how, within one year of opening his company, Servantes’ permit was revoked and never reinstated, yet he continued to tow vehicles for many years.⁷⁹ The court also described how Servantes regularly overcharged fees, stashed vehicles,⁸⁰ conducted business with false identification, and was cited by the police for operating without a permit or a driver’s license.⁸¹ Given these violations, it is clear that Servantes put the safety of vehicle owners, their property, and the general public at risk.⁸²

In a lengthy opinion reviewing the challenged regulations, the court addressed the violations of California Vehicle Code section 22658(l) only once and stated that “[b]y ensuring that removal occurs only upon proper authorization, the statute obviously serves to protect vehicle owners and the public at large from both towing mistakes and *outright theft of vehicles*.”⁸³ In asserting this view, the court concluded that section 22658(l) “offers far more than economic protection

73. *Id.*

74. *Id.* at 1084.

75. *Id.*

76. *Id.* at 1087.

77. *Id.* at 1087-95.

78. *Id.* at 1085-87.

79. *Id.*

80. “Stashing” vehicles is an illegal process where tow operators tow and “stash” vehicles on public streets nearby, but in a location where the vehicle owner cannot find it. Later the tow truck operator will return to where the vehicle is stashed and tow it to the garage. This process gives the tow truck operator the opportunity to tow more vehicles before owners return. Interview with Todd J. Hilts, Attorney at Law, Law Office of Todd J. Hilts, in San Diego, Cal. (Feb. 16, 2004) [hereinafter Interview with Hilts].

81. *Servantes*, 86 Cal. App. 4th at 1085-86.

82. *Id.* at 1091. The court recounts the testimony of William Griffith who, because of Servantes’ illegal practices, feared for his safety. *Id.*

83. *Id.* at 1090 (emphasis added).

to the consumer” and declined to follow the Ninth Circuit’s determination that the statute was federally preempted.⁸⁴

The court of appeals was clearly upset by both *Servantes*’ actions and the argument that such actions were excusable under federal preemption. In an effort to punish a person who preyed upon vehicle owners, the court asserted that California Vehicle section 22658(l) was safety related and that it was not consumer protectionist.⁸⁵ However, the court offered scant support for this conclusion and ignored the purposes of section 22658(l).⁸⁶ The statute “does not merely require removal ‘upon proper authorization’” to prevent tow mistakes, “[i]t requires specific, written authorization for each and every tow, as well as the physical presence of the owner.”⁸⁷ The court did not explain how such a regulation served public safety.⁸⁸

It should also be noted that the court began its opinion by quoting Justice Harold G. Clarke saying that “[t]he law gives the towing company a great advantage over the owner of the towed car, and creates a great potential for unfair business practices.”⁸⁹ Certainly, this supports the view upheld in *Tocher* that section 22658(l) is not a safety regulation but a consumer protectionist statute.⁹⁰

C. *Tillison v. City of San Diego*⁹¹

Contrary to California Vehicle Code section 22658(l), *Tillison*, owner of West Coast Towing (WCT), maintains several contracts whereby property owners give blanket authorization to remove illegally parked vehicles.⁹² WCT regularly patrols these parking lots, and enforces parking restrictions by performing non-consensual tows without specific authorization.⁹³ On December 21, 2001, while performing such a tow, Gregory Clark, a WCT employee, was stopped by a San Diego Police officer and found to be in violation of section

84. *Id.* The court expressly disagreed with the Ninth Circuit ruling in *Tocher* which declared 22658(l) a consumer protectionist statute. *Tocher*, 219 F.3d 1040.

85. *Servantes*, 86 Cal. App. 4th at 1090.

86. Excerpts of Record, Decision at 7-8, *Tillison v. City of San Diego*, DC No. CV-01-02373-RMB (LSP) (S.D. Cal. 2003), *appeal docketed*, No. 03-55939 (9th Cir. Jan. 19, 2004).

87. *Id.* at 8.

88. *Id.*

89. *Servantes*, 86 Cal. App. 4th at 1083.

90. *Tocher*, 219 F.3d at 1051.

91. *Tillison*, 2004 WL 546060.

92. Excerpts of Record, Decision at 1, *Tillison v. City of San Diego*, DC No. CV-01-02373-RMB (LSP) (S.D. Cal. 2003), *appeal docketed*, No. 03-55939 (9th Cir. Jan. 19, 2004).

93. *Id.*

22658(l).⁹⁴ Clark was ordered to return the towed vehicle but refused.⁹⁵ Upon refusal, Clark was arrested “for violation of California Penal Code section 148 (restricting, delaying, or obstructing a police officer in the performance of his duties),” and “[t]he tow truck was seized as evidence.”⁹⁶ In response, Tillison brought suit for damages and to enjoin further enforcement of section 22658(l) arguing that the statute was preempted by the FAAA.⁹⁷

Applying the Ninth Circuit Court of Appeals’ decision in *Tocher*, the United States District Court for the Southern District of California granted Tillison’s motion for a temporary restraining order to enjoin the City of San Diego from enforcing California Vehicle Code section 22658(l).⁹⁸ After trial and a lengthy analysis of section 22658(l), the court held it was “not a statute that significantly address[ed] public safety concerns” or an “exercise of ‘the safety regulatory authority of a state.’”⁹⁹

The court followed *Tocher*, and found that “[s]ection 22658(l)(1) is an economic regulation” and that if it “protects anyone, it protects trespassers, not the general public.”¹⁰⁰ The court disagreed with *Servantes* that section 22658(l) helps to prevent “outright theft of vehicles”¹⁰¹ and stated that it was “at a loss as to how a written permission requirement makes [this] less likely to occur” as it was “unaware of any thief who ha[d] ever asked for permission, written or otherwise, before stealing a car.”¹⁰²

Therefore, the court found that section 22658(l) was preempted by the FAAA and ordered that the City “be permanently enjoined from enforcing California Vehicle Code section 22658 (l).”¹⁰³ The case is pending appeal to the Ninth Circuit.¹⁰⁴

94. Excerpts of Record, Decision at 2, *Tillison* (No. 03-55939).

95. *Id.*

96. *Id.*

97. *Id.* Tillison also challenged and sought to enjoin enforcement of California Vehicle Code sections 22651.1, 22658(a), (k). *Id.* For the purposes of this Comment, only section 22658(l) is discussed.

98. *Id.*

99. Excerpts of Record, Decision at 12, *Tillison* (No. 03-55939) (quoting 49 U.S.C. § 14501(c)(2)(A)).

100. *Id.*

101. *People v. Servantes*, 86 Cal. App. 4th 1081, 1090 (2001).

102. Excerpts of Record, Decision at 8, n.3, *Tillison* (No. 03-55939).

103. Excerpts of Record, Decision at 12, *Tillison* (No. 03-55939).

104. *Tillison v. City of San Diego*, Nos. 03-55939, 03-56188, 2004 WL 546060 (9th Cir. Feb. 6, 2004) (Oral argument was heard on November 4, 2004). A decision will undoubtedly affect both the resolution of whether federal law preempts section 22658(l) and an identical Washington State statute also currently being challenged. Interview with Todd J. Hiltz, At-

D. Can the Cases be Reconciled?

As illustrated above, California is conflicted as to whether Vehicle Code section 22658(l) is exempt from federal preemption by the FAAA. In summary, “the Ninth Circuit has declared that [s]ection 22658(l)(1) is not a safety regulation without explaining *why not*, and the state appellate court has declared that [s]ection 22658(l)(1) is a safety regulation without explaining *why*.”¹⁰⁵ A simple explanation of the discrepancy between the cases is that the court in *Servantes* was dealing with a criminal defendant and not business owners conducting legitimate business practices as in *Tocher* and *Tillison*. This undoubtedly influenced the *Servantes* court and its decision.

However, it is important to note that these cases were determined prior to the enactment of California Vehicle Code section 22658(m)(2) which asserts the Legislature’s intent of 22658(l) is to promote public safety.¹⁰⁶ It is not clear how this new statute will influence the court. Additionally, only *Tillison* was decided in the wake of *Ours Garage* and the forewarning that a state regulatory law “*not genuinely responsive to safety concerns*” would not be exempt from federal preemption.¹⁰⁷ Perhaps this narrowing of the safety exemption will ultimately lead the court to follow *Tillison* and determine that 22658(l) is not a genuine safety regulation giving it an exempt status from preemption under the FAAA.

Furthermore, the cases have only examined California Vehicle Code section 22658(l) as to its status as a safety regulation. But the preemption issue turns on whether a statute is a safety regulation *or* whether it is an unreasonable economic burden.¹⁰⁸ The analysis of whether section 22658(l) is an economic burden has yet to be addressed by the courts.¹⁰⁹

torney at Law, Law Office of Todd J. Hilts, in San Diego, Cal. (Sept. 28, 2004). See also *Tillison v. Locke*, DC No.V03-5514 FDB (W.D. Wash. 2004), *appeal docketed*, No. 04-35539 (9th Cir. July 8, 2004).

105. Excerpts of Record, Decision at 8, *Tillison* (No. 03-55939).

106. See *Tocher v. City of Santa Ana*, 219 F.3d 1040 (1999); *Servantes*, 86 Cal. App. 4th at 1091; *Tillison*, 2004 WL 546060; Assembly, *supra* note 40.

107. *Ours Garage*, 536 U.S. at 442 (emphasis added).

108. *Id.* at 441; see also 49 U.S.C. § 31141 (a), (c)(4) (2000).

109. See *infra* Part IV.B.

IV. IS IT GENUINELY SAFETY OR IS IT AN UNREASONABLE ECONOMIC BURDEN?

California Vehicle Code section 22658(*l*) restricts services of non-consensual private property tows by demanding specific written authorization and the presence of the property owner.¹¹⁰ In contrast, the FAAA section 14501(c) asserts that state laws are preempted in regards to a tow company's "service, or route," unless it falls within a safety exception.¹¹¹ In addition, the FAAA preempts state regulations that unreasonably burden interstate commerce.¹¹² Thus, the issue of preemption turns on whether California Vehicle Code section 22658(*l*) is genuinely concerned with safety *or* whether it unreasonably burdens interstate commerce.¹¹³

A. California Vehicle Code Section 22658(*l*) is not a Genuine Safety Regulation

California asserts that having one's vehicle unexpectedly and involuntarily towed may put one's safety at risk.¹¹⁴ Consequently, legislation that prevents involuntary tows, helps to expedite the recovery of a vehicle, or decreases tow mistakes promotes safety.¹¹⁵ In addition, as expressed by the Court in *Ours Garage*, a safety regulation must be genuine.¹¹⁶ Under both definitions, however, section 22658(*l*) fails as a safety regulation.

California claims that the "unexpected loss . . . of one's vehicle directly affects the safety and welfare of vehicle operators and owners" because a person may be "stranded hundreds of miles from home with no alternative mode of return travel and with no place to stay until the vehicle can be recovered."¹¹⁷ Therefore, legislation promotes

110. CAL. VEH. CODE § 22658(*l*); Tillison Interview II, *supra* note 9.

111. 49 U.S.C. §§ 14501(c)(2)(A)-(C), (c)(3)(A) (2000); *Ours Garage*, 536 U.S. at 439. In addition to safety, transportation of household goods, price charged for non-consensual tow services, and rules of liability are reserved for states.

112. 49 U.S.C. §§ 31141(a), (c)(4)(C); *see also Ours Garage*, 536 U.S. at 441.

113. *See supra* Part II.

114. *Berry v. Hannigan*, 7 Cal. App. 4th 587, 591 (1992) (quoting *Crane Towing, Inc. v. Gorton*, 570 P.2d 428, 434 (1977)). This rule was reiterated in *People v. Servantes*, 86 Cal. App. 4th 1081, 1091 (2001).

115. *Berry*, 7 Cal. App. 4th at 591.

116. *Ours Garage*, 536 U.S. at 442. The court held that states and local municipalities were exempt from preemption under the FAAA but left the issue of whether the contested regulations were safety related open on remand. *Id.*

117. *Berry*, 7 Cal. App. 4th at 591 (quoting *Crane Towing*, 570 P.2d at 434).

safety if it helps prevent involuntarily tows, expedites recovery,¹¹⁸ or aids in preventing tow mistakes.¹¹⁹ California Vehicle Code section 22658(*l*), however, does not legitimately promote any one of these safety goals.

First, section 22658(*l*) does not help to prevent a vehicle from being involuntarily towed. Prevention occurs when notice is provided to the vehicle owner that her actions may subject her vehicle to the possibility of being towed. Prevention is accomplished by strict compliance to regulations, already in place, that mandate posted signs to warn the vehicle owner of property rules prior to parking.¹²⁰ As section 22658(*l*) stands, by the time an illegally parked vehicle is identified, a tow truck is called, proper written authorization is awarded, and the owner or agent is overseeing the tow, the vehicle owner has long since departed the scene and prevention is not possible. Unless, of course, the assertion is that making the procedure more difficult and time consuming gives the vehicle owner additional time to move the illegally parked vehicle.¹²¹ Although this might contribute to the prevention of involuntary tows, it does so “in the same way that a law mandating that airlines decrease their flight hours might lead to fewer airplane crashes.”¹²² In short, section 22658(*l*) does not aid in preventing involuntary tows. Instead, it provides a vehicle owner more leeway to avoid the consequences of their infraction.

Secondly, the requirements of section 22658(*l*) do not help to expedite recovery of the vehicle after it is lawfully towed. This factor does not apply as it refers to procedures arising after a vehicle has been towed, whereas section 22658(*l*) is implemented prior to a non-consensual tow.¹²³

Finally, section 22658(*l*) is not necessary to help prevent tow mistakes. This argument presumes that tow truck operators and companies cannot comply with the law or wishes of the property owner without an overseer. This is not necessary given provisions that regu-

118. *Id.*

119. *Servantes*, 86 Cal. App. 4th at 1090.

120. CAL. VEH. CODE § 22685(a)(1).

121. Excerpts of Record, Decision at 12, *Tillison v. City of San Diego*, DC No. CV-01-02373-RMB (LSP) (S.D. Cal. 2003), *appeal docketed*, No. 03-55939 (9th Cir. Jan. 19, 2004).

122. *Id.*

123. This argument was raised in conjunction with whether tow companies were required to except credit cards for private property non-consensual tows as payment for towing and storage fees. Statutes that require tow companies to accept credit cards are exempt from federal preemption under the FAAA as a safety regulation. *Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 932 (2003).

late fair business practices¹²⁴ and the availability of substantial damage awards for wrongfully towed vehicle owners.¹²⁵ Moreover, the prevention of tow mistakes can adequately be fostered by generalized contractual relationships between tow companies and private property owners. For example, contractual obligations not to tow when a vehicle displays valid parking permits or meets other requirements to park on the premises can be easily established.¹²⁶ Should the tower fail to adhere to these contractual obligations, he would invariably harm his reputation and lose his business relationships.¹²⁷

In summary, California Vehicle Code section 22658(l) does not prevent involuntary tows or expedite recovery and is not necessary to help avoid tow mistakes. Therefore, the statute fails to meet California's own requirements as a safety regulation for non-consensual private property tows.

In the wake of *Ours Garage*, which emphasized that state regulations not genuinely concerned with safety would be federally preempted,¹²⁸ the California Legislature enacted California Vehicle Code section 22658(m)(2).¹²⁹ This statute states that "the intent of the Legislature in adopting [22658](l) [is] to further the safety of the general public."¹³⁰ Two primary arguments were put forth in support of its enactment.¹³¹ First, it was asserted that requiring written authorization for each tow was important because "allowing tow operators to make such decisions . . . without having to consult with the property owner . . . can increase the chances that the tow will result in improper tows, which can lead to violence."¹³² Second, it was maintained that the provision "will assist the courts in any subsequent litigation on this question."¹³³ Notwithstanding the addition of section 22658(m)(2), section 22658(l) is not magically changed into a safety regulation exempt from federal preemption under the FAAA.

124. CAL. BUS. & PROF. CODE §§ 17200-210 (West 2004).

125. CAL. VEH. CODE §§ 22658(d), (e) (West 2004). Section (d) allows for the vehicle owner to recover "any damage to the vehicle resulting from the intentional or negligent act of any person causing the removal of, or removing, the vehicle." *Id.* Section (e) imposes liability for double the fees on any person causing the removal of a vehicle not in compliance with the numerous California Vehicle Codes. *Id.*

126. See Opening Brief of the Appellee, Addendum at 66-67, *Tillison* (No. 03-55939).

127. See *id.*

128. *Ours Garage*, 536 U.S. at 442.

129. Act of Aug. 11, 2003, A.B. No. 792, § 22658(m)(2), 2003 Cal. Legis. Serv. 212 (West).

130. CAL. VEH. CODE § 22658(m)(2).

131. See Assembly, *supra* note 40 and Senate, *supra* note 6.

132. Assembly, *supra* note 40.

133. Senate, *supra* note 6.

To begin with, having a third party on the scene to authorize the tow does not decrease the likelihood of a violent confrontation.¹³⁴ As asserted in *Tillison*, “[i]f the vehicle owner comes out, it doesn’t matter if there [are] ten people there authorizing the vehicle to be towed. If he wants to be confrontational, he’s going to be confrontational.”¹³⁵ In *Tillison*, the City of San Diego attempted to support the proposition that not having specific authorization on the scene increased the instances of violence and resulted in more frequent calls for police services.¹³⁶ However, the court refuted this claim and, using the City’s own statistics, pointed out that while section 22658(l) was enforced the police were called for service to five local towing locations “7.29 [times] per week.”¹³⁷ After the court issued a Temporary Restraining Order enjoining enforcement of 22658(l), the number of calls dropped to “6.61 calls per week.”¹³⁸ The court stated that the decrease in police calls “suggests that [s]ection 22658(l),” and the presence of witnesses “does not significantly address a public safety concern.”¹³⁹

In fact, the requirement contravenes rather than promotes safety.¹⁴⁰ In opposition to the enactment of section 22658(m)(2) it was argued that the “requirement acts to create dangerous situations . . . all of which are *detrimental* to public safety.”¹⁴¹ The North County Apartment Managers Association asked the committee to consider the situation of a drug dealer’s illegally parked car in a resident’s assigned carport and inquired, “Do you really think it’s necessary for a manager to stand there to sign for the tow? . . . Do you really think this will stop an altercation?”¹⁴² They further complained that they found it “hard to believe that [the Legislature] would put the safety of the ‘law breaker’ before the safety of [others]” by being more concerned with preventing a drug dealer’s illegally parked car from being towed over the property manager’s safety.¹⁴³ The court in *Tillison* contended that

134. See Opening Brief of the Appellee, Addendum at 62-63, *Tillison v. City of San Diego*, Nos. 03-55939, 03-56188, 2004 WL 546060 (9th Cir. Feb. 6, 2004).

135. *Id.*

136. Excerpts of Record, Decision at 8, 10, *Tillison v. City of San Diego*, DC No. CV-01-02373-RMB (LSP) (S.D. Cal. 2003), *appeal docketed*, No. 03-55939 (9th Cir. Jan. 19, 2004).

137. Excerpts of Record, Decision at 10, *Tillison* (No. 03-55939).

138. *Id.*

139. *Id.*

140. See Brief of Amicus Curiae North County Apartment Managers Association in Support of Appellee, *Tillison v. City of San Diego*, No. 03-55939, 2004 WL 1216520 (9th Cir. Feb. 2, 2004).

141. Senate, *supra* note 6 (emphasis added).

142. *Id.*

143. *Id.*

section 22658(l) actually “increases the time it takes to perform the tow . . . increas[ing] the chance that the vehicle operator will return to the scene as the tow is taking place: a recipe for the very confrontation” the statute claims to avoid.¹⁴⁴

Secondly, the Legislature’s purposes for enacting 22658(m)(2) are clearly not safety related. The central argument put forth was that the statute “will assist the courts in any subsequent litigation on this question.”¹⁴⁵ Furthermore, 22658(m)(2) is meant to “enhance the position and legal standing of the State of California.”¹⁴⁶ In short, its purpose is to bolster the state’s ability to regulate tow trucks. Certainly, when Justice Ginsburg warned that “[l]ocal regulation of prices, routes, or services of tow trucks that is *not genuinely responsive to safety concerns* garners no exemption from § 14501(c)(1)’s preemption rule,”¹⁴⁷ she was referring to tactics by the state to cloak regulations like California Vehicle Code section 22658(l) with false assertions of safety like section 22658(m). Thus, even with the enactment of section 22658(m)(2), section 22658(l) is not a genuine safety regulation and is preempted by the FAAA.

In conclusion, California Vehicle Code section 22658(l) fails to meet the state’s own standards and those of *Ours Garage* as a safety regulation. Under this premise alone, section 22658(l) is preempted under the FAAA section 14501(c).

B. California Vehicle Code Section 22658(l) Unreasonably Burdens the Economy

In enacting the FAAA, Congress sought to deregulate the towing industry, finding that “the regulation of *intrastate* transportation of property¹⁴⁸ . . . imposed an unreasonable burden on *interstate* commerce”¹⁴⁹ and “impeded the free flow of [business]”¹⁵⁰ In order to protect Congress’ deregulatory purpose, section 31141 expressly provides that the Secretary of Transportation may render a state law that has

144. Excerpts of Record, Decision at 11, *Tillison* (No. 03-55939).

145. Senate, *supra* note 6. This argument was reiterated throughout senate and assembly meetings. *Id.* Whereas the argument that 22658(l) would prevent violent confrontations was put forth only in the Assembly. Assembly, *supra* note 40.

146. Senate, *supra* note 6.

147. *Ours Garage*, 536 U.S. at 442 (emphasis added).

148. FAAA § 601(a)(1) (emphasis added).

149. *Id.* § 601(a)(1)(A).

150. *Id.* § 601(a)(1)(B). Congress found that regulation “impeded the free flow of trade, traffic, and transportation of interstate commerce.” *Id.*

“no safety benefit . . . [or] would cause an unreasonable burden on interstate commerce” unenforceable and preempted.¹⁵¹ However, regulations with only an indirect effect on motor carrier services do not unreasonably burden interstate commerce and these will be shielded from preemption.¹⁵² On the other hand, it is recognized that where a statute exerts “acute, albeit indirect, economic effects,”¹⁵³ and is found to “frustrate[] the purpose of deregulation by *acutely* interfering with the forces of competition,”¹⁵⁴ it may impose an unreasonable burden and be subject to federal preemption.¹⁵⁵

The California courts have yet to examine the economic implications of California Vehicle Code section 22658(l).¹⁵⁶ However, a statistical analysis of the towing industry and California’s impact on the United States’ economy reveals that California Vehicle Code section 22658(l) may be a regulation with such an acute, indirect effect on interstate commerce.¹⁵⁷

California Vehicle Code section 22658(l) was enacted in 1991.¹⁵⁸ In 1994 the FAAA sought to deregulate the towing industry.¹⁵⁹ However, California Vehicle Code section 22658(l) has been enforced since its enactment to the present day despite deregulation of the industry.¹⁶⁰ Thus, the impact of this statute may be discernable by a sta-

151. 49 U.S.C. §§ 31141(c)(4)(A), (C) (2000). The safeguarding purpose to protect economic deregulation was affirmed by the Court in *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 441 (2002).

152. *Californian’s For Safe and Competitive Dump Truck Transp. v. Mendoca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (holding that the FAAA did not preempt California’s Prevailing Wage Law because it does not frustrate the deregulatory purpose).

153. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995) (holding that New York’s surcharges only indirectly affect insurance policy prices and were not intended to be preempted under the Employee Retirement Income Security Act).

154. *Mendoca*, 152 F.3d at 1189.

155. *Id.*; see also *Blue Cross & Blue Shield*, 514 U.S. at 668.

156. See *supra* Part III D.

157. Of course it is difficult to ascertain how a single statute may affect the economy overall, and there is virtually no guidance from the courts on how to determine whether a statute burdens interstate commerce. However, a generalized statistical analysis may provide a glimpse of how section 22658(l) conflicts with the FAAA’s deregulatory purpose.

158. Act of Oct. 14, 1998, S.B. No. 887, § 22658(l)(1), 1991 Cal. Legis. Serv. 1004 (West).

159. Foster, *supra* note 13; FAAA § 601(a)(2), Pub. L. No. 103-305, 108 Stat. 1569 (1994).

160. Although it is unclear if every city or municipality has continually enforced section 22658(l), it is clear that it was enforced in Santa Ana until 1999 and has remained enforced in San Francisco and San Diego as evidenced by the ongoing case history. See *Tocher v. City of Santa Ana*, 219 F.3d 1040 (1999); *People v. Servantes*, 86 Cal. App. 4th 1081, 1091 (2001); *Tillison v. City of San Diego*, Nos. 03-55939, 03-56188, 2004 WL 546060 (9th Cir. Feb. 6, 2004).

tistical analysis of California's motor vehicle towing industry during the years of the statute's enforcement compared to the industry nationwide.¹⁶¹

There are approximately 60,000 towing companies in the United States and over 85% of their services include passenger vehicles and light trucks,¹⁶² the vehicles most commonly subject to private property non-consensual tows.¹⁶³ According to the 1997 Economic Census, motor vehicle towing accounted for \$2.3 billion in revenues in the United States.¹⁶⁴ In short, towing services make up a large and profitable industry.

California's tow companies and operators have a huge impact on interstate commerce. In 1997, California was the largest economic region contributing 23% to the United States' total revenues for motor vehicle towing services.¹⁶⁵ The second largest contributing state was Texas, which supplied less than 7% of total revenues.¹⁶⁶ Thus, regulations that restrict towing services in California, like section 22658(l), are likely to have an acute, indirect affect on interstate commerce.

161. In 1997, the Census Bureau replaced the Standard Industrial Classification (SIC) system, used since the 1930s, with the North American Industries Classification System (NAICS) to classify statistical information by industry sector. U.S. Census Bureau, Development of NAICS, at <http://www.census.gov/epcd/www/naicsdev.htm> (last visited Mar. 10, 2004). These systems are used as standard classifications by the statistical agencies of the United States. *Id.* Motor Towing Services or "Motor Vehicle Towing" is referenced under the SIC as 7549 and under the NAICS as 488410. U.S. Census Bureau, 1997 Economic Census: NAICS 488410, Motor Vehicle Towing, at <http://www.census.gov/epcd/ec97/industry/E488410.htm#2002> (last visited Mar. 10, 2004) (on file with author)[hereinafter 1997 Economic Census]. "Motor Vehicle Towing" is defined as "establishments primarily engaged in towing light or heavy motor vehicles both local and long distance." U.S. Census Bureau, 488410 Motor Vehicle Towing, at <http://www.census.gov/epcd/ec97/def/488410.txt> (last visited Mar. 10, 2004) (on file with author). Unfortunately, statistics for 1987 (the prior census) and previous years were based solely on the SIC, which do not separately calculate statistics of Motor Vehicle Towing; rather, they report on the higher level industry sector, "Other Automotive Services." See U.S. DEPT. OF COMMERCE, 1987 CENSUS SERVICE INDUSTRIES, GEOGRAPHIC AREA SERIES, CALIFORNIA 10 (1989). Thus, it is impossible to analyze the industry prior to the enactment of California Vehicle Code section 22658(l) without making very large and inaccurate assumptions.

162. Towing Recovery Association of America, Towing and Recovery Industry Overview, at <http://www.towserver.net/about%20traa.htm> (last visited Sept. 22, 2004) (on file with author).

163. Interview with Hiltz, *supra* note 80.

164. 1997 Economic Census, *supra* note 161. Economic data from 1997 is the latest census information available for motor vehicle towing. Economic data for 2002 for Motor Vehicle Towing is expected to be available December 2004. U.S. Census Bureau, 2002 Economic Census, Industry Series Reports, Transportation and Warehousing, at <http://www.census.gov/econ/census02/guide/INDRPT48.HTM> (last visited May 13, 2004) (on file with author).

165. 1997 Economic Census, *supra* note 161.

166. *Id.*

More importantly, in 1992, California contributed \$311 million in revenues from motor vehicle towing services to the United States' economy.¹⁶⁷ This accounted for 24.61% of total United States motor vehicle towing industry revenues.¹⁶⁸ In 1997, California generated \$529 million in industry revenues.¹⁶⁹ However, this contribution made up only 23.07% of total United States motor vehicle towing industry revenues.¹⁷⁰ Simply, California's contribution to the United States economy from 1992 to 1997 *decreased* by 1.54%.¹⁷¹ Had California maintained its prior percentage of contribution and previous rates of growth, it would have contributed \$565 million instead of \$529 million.¹⁷² In other words, regulations imposed in California that should have been deregulated by the FAAA may be responsible for a loss of revenue for interstate commerce of \$36 million in this time period alone.

In summary, while the nation's motor vehicle towing industry has seen steady growth, in California, the nation's number one contributor, has not maintained prior contribution levels. Thus, arguments in opposition to the enactment of California Vehicle Code section 22658(l) may have been correct in declaring that "the requirement . . . frustrates legitimate business goals."¹⁷³ Furthermore, Congress' findings that state regulation "of *intrastate* transportation of property"¹⁷⁴ . . . imposed an unreasonable burden on *interstate* commerce"¹⁷⁵ may have weight in light of the continual enforcement of section 22658(l) and its significant monetary consequences. The express purpose of the FAAA section 14501(c) was to preempt regulations with such an acute, indirect effect. Thus, section 22658(l) should be rendered unenforceable and federally preempted as an unreasonable burden on interstate commerce.

167. U.S. DEPT. OF COMMERCE, 1992 CENSUS OF SERVICE INDUSTRIES, GEOGRAPHIC AREA SERIES, CALIFORNIA 12 (1994).

168. This percentage was determined from the total U.S. revenues in 1992, which was \$1.263 billion. U.S. DEPT. OF COMMERCE, 1992 CENSUS OF SERVICE INDUSTRIES, GEOGRAPHIC AREA SERIES, UNITED STATES 10 (1994).

169. 1997 Economic Census, *supra* note 161.

170. *Id.*

171. This was determined by subtracting the 1997 percent contribution of 23.07% and the 1992 percentage contribution of 24.61%. See U.S. DEPT. OF COMMERCE, *supra* note 167; 1997 Economic Census, *supra* note 161.

172. This was determined by applying the 1992 percentage of 24.61% to the total revenues of the United States of \$2.3 billion. See U.S. DEPT. OF COMMERCE, *supra* note 167; 1997 Economic Census, *supra* note 161.

173. Senate, *supra* note 6.

174. FAAA § 601(a)(1), Pub. L. No. 103-305, 108 Stat.1569 (1994) (emphasis added).

175. *Id.* § 601(a)(1)(A) (emphasis added).

C. California Vehicle Code Section 22658(l) is Preempted by the FAAA

In short, California Vehicle Code section 22658(l) is preempted by FAAA section 14501(c) on two grounds. First, it is not genuinely responsive to safety concerns so it is granted no exception from preemption. Second, it imposes an unreasonable burden on commerce by exerting acute, although indirect, economic effects. Either argument renders California Vehicle Code section 22658(l) federally preempted, but given it is both unrelated to safety *and* an unreasonable economic burden, the statute is unquestionably preempted by the FAAA section 14501(c).

V. CONCLUSION

The FAAA intended to deregulate the towing industry because Congress found that state regulations imposed an unreasonable burden on interstate commerce. Congress did not intend to preempt a state's traditional safety regulation functions, however, a regulation must *genuinely* relate to safety concerns. Moreover, the regulation may not unreasonably burden interstate commerce. California Vehicle Code section 22658(l) fails to meet either of these standards.

Section 22658(l), despite new assertions of the Legislature's intent, does not promote the safety of the general public. In fact, safety is compromised for managers and property owners in exchange for promoting the convenience of a trespasser who ought to be towed for her own illegal actions. The California courts should reaffirm previous findings by the Ninth Circuit Court of Appeals and the District Court for the Southern District of California that section 22658(l) is not a genuine safety regulation. Courts holding otherwise are misguided by their distaste for the towing industry, not the true application or interpretation of the law.

Additionally, section 22658(l) may prove to unreasonably burden interstate commerce. A statistical analysis of California's motor vehicle towing industry shows that the enforcement of section 22658(l) may have an acute effect on interstate commerce. Such regulations frustrate the deregulatory purpose of the FAAA and should be rendered unenforceable.

“The fact that state regulation may affect interstate commerce does not necessarily render it invalid; the United States Supreme Court . . . never intended to cut the states off from legislating . . . [the] safety of their citizens . . . [b]ut a legislative body will not be allowed to abuse its . . . power simply by vague references to safety. . . .”¹⁷⁶ California Vehicle Code section 22658(l) is such a regulation and is preempted under the FAAA.

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176. 16 AM. JUR 2D *Constitutional Law* § 364 (2003); *E.g.*, *Betty-June School, Inc. v. Young*, 201 N.Y.S.2d 692 (1960).

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