

1 and the question is relatively close. If no appeal is filed by the City, the Injunction shall
2 become effective January 15, 2011.¹

3 **I. LEGAL STANDARD**

4 Summary judgment is properly entered “if the pleadings, the discovery and disclosure
5 materials on file, and any affidavits show that there is no genuine issue as to any material fact
6 and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); see
7 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477
8 U.S. 242, 256 (1986). The movant bears the “burden of showing the absence of a genuine
9 issue as to any material fact, and for these purposes the material it lodged must be viewed in
10 the light most favorable to the opposing party.” Adickes v. S.H. Kress & Co., 398 U.S. 144,
11 157 (1970). The movant is not required to produce evidence negating the non-movant’s
12 claims. Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 885 (1990) (“[T]he purpose of Rule 56
13 is to enable a party who believes there is no genuine dispute as to a specific fact essential to
14 the other side’s case to demand at least one sworn averment of that fact before the lengthy
15 process of litigation continues”). If the movant carries its burden, the burden shifts to the
16 nonmoving party to establish facts beyond the pleadings showing that there remains a triable
17 issue of disputed material fact so that summary judgment is not appropriate. Celotex, 477
18 U.S. at 324; Adickes, 398 U.S. at 157.

19 To successfully rebut a properly supported summary judgment motion, the
20 non-moving party must (1) point to some facts in the record that demonstrate a genuine issue
21 of material fact and (2) show that, with all reasonable inferences made in its favor, a jury
22 could reasonably find for it. Reese v. Jefferson School Dist. No. 14J, 208 F.3d 736, 738 (9th
23 Cir. 2000). The non-moving party must “go beyond the pleadings and by her own affidavits,
24 or by ‘the depositions, answers to interrogatories, and admissions on file,’ designate ‘specific
25 facts showing that there is a genuine issue for trial.’” Celotex, 477 U.S. at 324 (quoting Fed.
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27 ¹ The City’s Motion for Summary Judgment is GRANTED as to CTTA’s dormant Commerce
28 Clause and Fourth Amendment claims. Having disposed of the federal issues in this case, the Court declines to exercise supplemental jurisdiction over the remaining novel questions of state law and remands this matter to state court.

1 R. Civ. P. 56(e)). The opposing party may not rest on conclusory allegations or mere
2 assertions. Rather, it must present significant probative evidence of specific facts raising a
3 material issue that “can be resolved only by a finder of fact because [the issue] may
4 reasonably be resolved in favor of either party.” Anderson, 477 U.S. at 249-50, 256.

5 Here, the parties apparently agree that the factual record does not require further
6 development for this Court to rule on summary judgment, at least as to the federal claims.

7 **II. DISCUSSION**

8 The Permit System requires tow drivers and tow firms to obtain a permit, at some
9 cost, to operate in the City. San Francisco Police Code §§ 3000, 3051. Permits are provided
10 to drivers and firms that meet certain requirements relating, among other things, to (1)
11 insurance; (2) facilities and equipment; (3) background (i.e. lack of criminal behavior); and
12 (4) acceptance of credit card payments. San Francisco Police Code § 3054. Tow firms with
13 permits are required to display them prominently and have at least 50 copies of a brochure,
14 available in multiple languages, explaining relevant California law. San Francisco Police
15 Code § 3055.2(c). Permits may be revoked for failing to comply with the regulations or for
16 failing to pay required fees.

17 In deciding the federal issues in this case it is helpful to keep in mind three groups of
18 tow drivers and tow firms ostensibly affected by the Permit System: (1) those “passing
19 through” the City;² (2) those engaged in consensual tows in the City; and (3) those engaged
20 in non-consensual tows in the City. Consensual towing involves an agreement between the
21 car owner and the tow truck driver. Non-consensual towing involves towing, often from
22 private lots, improperly or “illegally” parked cars. In non-consensual tows the car owner
23 typically does not know that his car has been towed until he comes to retrieve it and it is not
24 there.

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² The City asserts that it does not enforce the permit requirement on those merely passing through the City, but on its face the Permit System applies to all tow truck drivers operating in the City. San Francisco Police Code § 3000.

1 **A. Federal Preemption**

2 **1. The Federal Aviation Administration Authorization Act**

3 CTTA argues that the Permit System is preempted by federal law. The starting point
4 for CTTA’s argument is the Federal Aviation Administration Authorization Act of 1994
5 (“FAAAA”). That Act provides, in part, that “[e]xcept as provided in paragraphs (2) and (3),
6 a State [or] political subdivision of a State . . . may not enact or enforce a law, regulation, or
7 other provision having the force and effect of law related to a price, route, or service of any
8 motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1).
9 The parties agree that the Permit System is “related to” “price, route, or service” and that,
10 accordingly, the preemption provision is applicable.

11 However, the FAAAA also contains exceptions to preemption for States (or political
12 subdivisions of a State) to enact certain regulations. Regulations not preempted include
13 those relating to:

- 14 • the exercise of a State’s “safety regulatory authority . . . with respect to motor
15 vehicles.” 49 U.S.C. § 14501(c)(2)(A).
- 16 • the “price” of non-consensual tow operations. *Id.* § 14501(c)(2)(c).
- 17 • ensuring “minimum amounts of financial responsibility relating to insurance
18 requirements” *Id.* § 14501(c)(2)(a).

19 The Supreme Court has said with respect to the “safety regulatory authority” exception that
20 “[l]ocal regulation of prices, routes, or services of tow trucks that is not genuinely responsive
21 to safety concerns garners no exemption from § 14501(c)(1)’s preemption rule.” *City of*
22 *Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002) (emphasis
23 added).

24 The question of federal preemption turns on whether the Permit System falls within
25 one or more of the delineated exceptions to preemption. *Id.*

26 **2. The Permit System is Not Preempted As Applied to Non-Consensual**
27 **Towing**

28 The Permit System is not preempted as applied to non-consensual towing because it
falls within all three preemption exceptions. Keeping tabs on drivers and firms engaged in

1 non-consensual towing via a permit system makes it easier for the City to ensure that
2 insurance requirements are being met and reasonable fees are being charged. Further, and
3 more importantly given the extent of regulation, the provisions relating directly or indirectly
4 to fees and insurance dovetail with the broader safety-related purposes of the Permit System
5 – keeping tabs on drivers and firms engaged in the inherently dangerous business of non-
6 consensual towing and weeding out at the front end those most likely to misbehave.

7 The Court will thus turn its attention to an explanation of why the Permit System is
8 genuinely responsive to safety concerns as applied to the practice of non-consensual towing.

9 * * *

10 Determining whether a City has properly regulated pursuant to its general “safety
11 regulatory authority” requires a court to assess whether the challenged law is “genuinely
12 responsive to safety concerns[.]” That analysis requires a two-step approach. First, “a court
13 must consider any specific expressions of legislative intent in the statute itself as well as the
14 legislative history.” Automobile Club of New York, Inc. v. Dykstra, 520 F.3d 210, 215 (2d
15 Cir. 2008). Second, “it must assess those ‘purported safety justifications’ . . . in light of the
16 existing record evidence.” Id.

17 **a. Legislative Intent and Effect**

18 The Permit System includes legislative “findings” reflecting the legislation’s purpose.
19 San Francisco Police Code § 3055.2. Those findings identify a safety concern with non-
20 consensual tows. For example, the findings provide, among other things, that (1) “there is a
21 significant risk to the safety of residents and visitors when illegal towing from private
22 property occurs at night”; (2) “there is a risk to public health and safety when the vehicles of
23 senior citizens and persons with disabilities are illegally towed from private property”; (3)
24 “there are no accessible resources for people to research their rights and responsibilities with
25 respect to private property tows”; and (4) “requiring tow car firms to provide information on
26 the legal rights of vehicle owners at the time they reclaim their vehicle would be an effective
27 way of informing vehicle owners of their rights under California law when their vehicle is
28 towed from private property.” Id. §§ ii, iii, vi, vii. The findings suggest that the Board of

1 Supervisors was concerned broadly with safety issues associated with non-consensual towing
2 and in particular with “illegal” towing from private property at night. Id. §§ i, ii.

3 In addition to the foregoing, the California Legislature has determined that local
4 permit systems serve safety objectives, especially in the context of non-consensual towing.

5 [T]he safety and welfare of the general public is prompted
6 by permitting local authorities to regulate tow truck
7 service companies and operators by requiring licensure,
8 insurance, and proper training in the safe operation of
9 towing equipment, thereby ensuring against towing
mistakes that may lead to violent confrontation, stranding
motorists in dangerous situations, impeding the expedited
vehicle recovery, and wasting state and local law
enforcement’s limited resources.

10 Cal. Veh. Code § 21100(g)(2). The bill’s author noted some of the problems in the tow
11 industry related in particular to non-consensual tows from private property. Statement of
12 Assembly-member Jackie Goldberg, Request for Judicial Notice, Ex. E.

13 **b. Assessment of Purported Safety Justifications in Light of**
14 **Record Evidence**

15 In addition to the foregoing reflections of the Permit System’s purpose, the City
16 submitted the Declaration of Sergeant William Coggan. He provided evidence concerning
17 the Permit System’s operation and effect. Coggan Decl. (Dkt. 12). Among other things,
18 Sergeant Coggan states that the Permit System (1) allows the Police Department to “screen
19 company owners and their employees to ensure they have not previously engaged in
20 dangerous and/or criminal conduct” that could create safety problems; id. ¶ 8; (2) helps the
21 police assist drivers left stranded as a result of non-consensual tows and enables better
22 assessment of allegations of wrongdoing (including allegations related to excessive fees) by
23 tow drivers and tow firms, id. ¶¶ 10, 12; (3) enables the City to make sure proper trucks and
24 equipment are being used and provides for safety inspections, id. ¶ 13, see also San Francisco
25 Police Code § 3059; and (4) allows the City to revoke permits, thereby encouraging good
26 behavior. Id. ¶¶ 21-23.

27 * * *

28 The available legislative history and evidence of the Permit System’s functioning
suggest that the Permit System is genuinely responsive to safety concerns and thus is not

1 preempted insofar as it applies to non-consensual towing. Although there might be methods
2 other than the Permit System that the City could use to combat the dangers associated with
3 non-consensual towing – more aggressive prosecution of any driver or firm that over-charges
4 or otherwise acts improperly – the preemption test asks merely whether the method the City
5 has chosen is “genuinely responsive” to safety concerns. In the Court’s view, it is.³

6 **3. The Permit System is Preempted as Applied to Pass Through and**
7 **Consensual Tows**

8 The foregoing analysis is different in two ways with respect to firms and drivers (1)
9 merely passing through the City⁴ or (2) engaged only in consensual towing. First, the “price”
10 exception does not apply to consensual or pass through tows. Second, because the legislative
11 findings show that the Permit System was not enacted with consensual or pass through tows
12 in mind, it is not genuinely responsive to safety concerns as applied to that conduct. Indeed,
13 allowing a city to require a permit of this nature for consensual towing, in the absence of any
14 indication that the public body was actually concerned about safety in that context, would
15 result in the safety exception swallowing the preemption rule.

16 The Court recognizes that the Permit System contains some general safety provisions
17 related to the actual act of towing as well as provisions regarding insurance. For example,
18 the Permit System provides for safety inspections of tow trucks and provides that permits
19 will not be issued if the applicant lacks “the requisite tow car equipment or facilities
20 reasonably necessary to operate a tow car business in such a manner as to adequately protect
21 vehicles of the public that are towed or stored from damage or theft.” San Francisco Police

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23 ³ CTTA argues that the Permit System ought to be preempted, even in the context of non-
24 consensual tows, to the extent it applies to non-consensual towing from public property or towing during
25 the day. That argument is rejected. It is true that the available legislative findings show that the Board
26 of Supervisors was primarily motivated by a concern about non-consensual tows from private property
at night. However, many of the same public safety issues are present when non-consensual tows are
made from public property and/or occur during the day. The overarching public safety concern
articulated by the Board of Supervisors related to non-consensual towing, and the Court declines to draw
a line between private and public tows or day versus night.

27 ⁴ As mentioned, the City asserts that it does not apply the Permit System to pass through drivers
28 and that, accordingly, CTTA lacks standing to challenge the Permit System’s application to that class
of activity. It is undisputed, however, that CTTA has standing as a general matter to challenge the
City’s Permit System as preempted under federal law.

1 Code § 3054, 3059.⁵ But these provisions do not save the Permit System from preemption as
2 applied to consensual and pass through towing. This is because there are no legislative
3 findings that general towing safety motivated the Board of Supervisors to create the Permit
4 System. Further, if a city can apply a fairly extensive (and costly) permit system to all
5 towing activity by merely including within that system one or two provisions related to
6 general safety, the preemption analysis becomes a meaningless exercise.⁶

7 The Court’s conclusion on this issue stems from its understanding of the analysis it is
8 required to undertake to determine whether a regulation is genuinely responsive to safety
9 concerns. If the test were merely whether the regulation is related to safety in some way, the
10 Court might reach a different a result. But the test, as the Court understands it, requires the
11 Court to review legislative expressions of intent and then determine whether the regulation
12 fairly serves to address the identified safety concerns. See Tillison v. City of San Diego, 406
13 F.3d 1126, 1129 (9th Cir. 2005) (“[T]he Supreme Court tells us that our focus in a
14 preemption case like this one is whether the purpose and intent of the body passing the law at
15 issue was truly safety.”; “The focus of the safety exception to preemption must be on the
16 legislative intent and whether the legislature was acting out of safety concerns.”).

17 To reiterate, the legislative findings reveal a concern about safety in the context of
18 non-consensual tows, and the Permit System helps the City address those concerns. But the
19 Court cannot go so far as to say that the purpose and intent of the Board of Supervisors in
20 applying the Permit System to firms and drivers engaged only in consensual towing was

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22 ⁵ The Permit System also contains provisions related to minimum levels of insurance. San
23 Francisco Police Code § 3058.

24 ⁶ This is not to say, of course, that the City cannot exercise its safety regulatory authority in the
25 context of consensual tows. Indeed, the Board of Supervisors is invited to do so if it is unhappy with
26 the outcome of this case. But there must be some indication that the Board has identified a safety
27 concern in the context of consensual tows, and the regulations adopted to meet the identified safety
28 concern (perhaps including a permit requirement) must be genuinely responsive to the safety concern.

27 As it stands now, not only are there no legislative findings regarding safety concerns in the
28 consensual towing business, but the Permit System contains provisions ostensibly applicable to all tow
firms – price for non-consensual tows, requirements for removal of vehicles from private property,
requirements for brochures regarding the rights of someone seeking to recover a vehicle – that are not
genuinely responsive to any apparent safety concern with consensual towing.

1 “truly related to safety” or that in applying the Permit System to such firms and drivers the
2 Board of Supervisors “was acting out of safety concerns.”

3 Accordingly, the Permit System is preempted insofar as it applies to drivers and firms
4 engaged exclusively in consensual or pass through towing.

5 4. The Jurisprudence in this Area Supports this Result

6 The foregoing analysis is supported by a review of the caselaw.

7 For example, CTTA relies heavily on Dykstra, 520 F.3d at 215. Dykstra involved a
8 challenge to New York City’s licensing and registration system for tow firms in which,
9 among other things, applicants had to pay fees, submit drivers to background checks, and
10 provide proof of adequate insurance. Id. at 212. The Second Circuit held that the system
11 was preempted by the FAAAA because it was not genuinely responsive to safety concerns.
12 It reached that conclusion after conducting the two-step preemption analysis described
13 above. First, it noted that the licensing system was enacted in large part to prevent
14 “chasing,” a practice in which tow truck operators monitor police radios and race to the scene
15 of accidents. Id. at 215. The Court noted that:

16 [T]he City may have been motivated by a desire to reduce chasing . . .
17 but it did not explain why increased enforcement [of the prohibition of
18 that activity] was insufficient. Instead of enforcing existing law, the
19 City chose to impose its Scheme on all tow trucks that happened to be
20 within its limits, regardless of whether they were chasing. The
legislative history is silent on how those trucks not engaged in chasing,
or those merely driving through New York City threaten public safety
and how the expanded definition of ‘towing’ is genuinely responsive
to those concerns.

21 Id. at 216. Second, the court determined that the record did not show any link between the
22 licensing provision and a reduction in chasing. Id. Moreover, “[e]ven assuming that the
23 Scheme has been effective in reducing chasing for accidents within New York City, the City
24 has not articulated a reason why the Scheme must be enforced against all tow trucks anywhere
25 within the City to reduce chasing, or how that broad enforcement is genuinely responsive to
26 safety concerns.” See also Northway Towing, Inc. v. City of Pasadena, Tex., 94 F. Supp. 2d
27 801, 803 (S.D. Tex. 2000) (finding local ordinances requiring permits and storage of vehicles
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1 is preempted to the extent it applies to drivers and/or firms engaged in consensual tows or
2 tows passing through the City.⁷ The City remains free to apply its Permit System to drivers
3 and firms engaged in non-consensual towing in the City.⁸ This Order is STAYED pending
4 appeal. If no appeal is taken by the City, this Order will go into effect on January 15, 2011.

5 **B. Seizure of Tow Trucks – CTTA’s Fourth Amendment Argument**

6 The City apparently has a practice of seizing the tow trucks of repeat offenders of the
7 Permit System. CTTA challenges this practice as extra-statutory (the ordinances do not
8 expressly provide for seizure) and unreasonable under the Fourth Amendment. This argument
9 is rejected because questions about the reasonableness of police action are best resolved on
10 their individual facts and not in a declaratory judgment action.

11 The only case CTTA cites in support of its argument is Automobile Club of New York,
12 Inc. v. Dykstra, 423 F. Supp. 2d 279, 287 (S.D.N.Y. 2006). That case held that seizure of tow
13 trucks in New York City was improper when based only on the failure to obtain a required
14 license. Implicit in that holding was a prior determination that the New York City ordinances
15 at issue were themselves invalid. Here, at least as applied to drivers and companies engaged
16 in non-consensual tows, the Permit System is valid. Thus, there is no reason for a blanket
17 prohibition against seizure of tow trucks following multiple offenses.

18 Accordingly, the City’s Motion for Summary Judgment is GRANTED as to CTTA’s
19 Fourth Amendment claim.

20 **C. The Dormant Commerce Clause**

21 CTTA argues that the Permit System violates the dormant commerce clause. The
22 dormant commerce clause is violated by local regulation if it “unjustifiably discriminate[s] on
23 [its] face against out-of-state entities” or “impose[s] burdens on interstate trade that are clearly
24 excessive in relation to the putative local benefits.” Am. Trucking Ass’n v. Michigan Pub.

25 ⁷ To avoid any uncertainty, tows passing through the City are tows that originate and conclude
26 outside the City. If a non-consensual tow originates or concludes in the City, that driver and any tow
27 firm he is associated with are still subject to the Permit System.

28 ⁸ The City can continue to apply the Permit System to drivers and firms engaged in both
consensual and non-consensual towing. The Permit System is preempted only to the extent it is applied
to drivers and firms engaged exclusively in consensual towing.

1 Serv. Comm’n, 545 U.S. 429, 433 (2005) (internal quotations omitted). Because the Permit
2 System does not discriminate against out-of-state entities, the question here is whether it
3 “impose[s] burdens on interstate trade that are clearly excessive in relation to the putative
4 local benefits.” Id. (emphasis added).

5 Because the City does not apply the Permit System to tow trucks merely passing
6 through the City (and, as a result of this ruling, cannot do so) the Permit System does not run
7 afoul of the dormant Commerce Clause. The fact that tow firms and/or drivers conducting
8 non-consensual towing in San Francisco may have increased costs as a result of the Permit
9 System does not show a “significant practical burden on interstate trade” where the costs are
10 relatively modest and serve to effectuate an important public safety program. Id. at 434.⁹

11 Accordingly, the City’s Motion for Summary Judgment is GRANTED as to CTTA’s
12 dormant Commerce Clause claim.

13 **D. The Court Declines to Exercise Jurisdiction over the State Law Claims**

14 CTTA has moved for summary judgment as to two state law claims: preemption and
15 tax code violations. A threshold question with respect to these claims is whether this Court
16 ought to reach them at all. The City argues that this Court should not do so because the state
17 preemption and tax claims are not inextricably related to the federal claims and involve “novel
18 or complex issue[s] of State law[.]” See 28 U.S.C. § 1367(c). The Court agrees.

19 This Court’s decision on the cross motions for summary judgment ends the federal
20 aspect of this case. “[I]n the usual case in which all federal-law claims are eliminated before
21 trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the
22 remaining state law claims.” Acri v. Varian Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997)
23 (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)); Dargis v. Sheahan,
24 526 F.3d 981, 991 (7th Cir. 2008) (affirming district court’s decision not to exercise
25 supplemental jurisdiction over pendant state law claims even though plaintiff was awarded

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27 ⁹ CTTA cites only one case in support of its dormant commerce clause argument: Dykstra, 423
28 F. Supp. 2d at 282. That court focused on New York City’s permit system as applied to passers through
and consensual tows in and out of the City headed for other states. San Francisco does not apply its
Permit System to passers through, and, as discussed, can no longer apply it to firms or drivers engaged
only in the business of consensual towing in the City.

1 judgment on one of his federal claims because “we see no reason that a district court must
2 entertain [] state law claims, on which no other judicial resources have been expended, simply
3 because it disposed of a federal . . . claim in [plaintiff’s] favor.”).

4 Moreover, the state law claims raise issues that have not been addressed by the state
5 courts and concern important questions of state statutory construction. Those matters are
6 better left to the state courts in the first instance.

7 **III. CONCLUSION**

8 San Francisco’s Permit System is preempted under federal law to the extent described
9 above. Thus, both the City’s and CTTA’s motions for summary judgment are granted in part
10 and denied in part on the federal preemption issue. The City’s motion for summary judgment
11 is granted as to CTTA’s Fourth Amendment and dormant Commerce Clause claims. Having
12 resolved the federal claims, the Court declines to exercise supplemental jurisdiction over the
13 novel questions of state law that CTTA also raises and remands this matter back to state court.
14 This Court’s INJUNCTION against enforcement of the Permit System as to pass through and
15 consensual towing is STAYED pending appeal. If no appeal is taken by the City, the
16 INJUNCTION goes into effect January 15, 2011.

17 **IT IS SO ORDERED.**

20 Dated: December 7, 2010

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21 CHARLES R. BREYER
22 UNITED STATES DISTRICT JUDGE
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