LEGAL TOOLS FOR ACHIEVING LOW TRAFFIC ZONES

by Amy E. Turner

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SUMMARY

Cities around the world are looking to reduce greenhouse gas and other emissions from vehicles through the use of low emission zones and congestion pricing. These strategies have been employed to great success abroad, including in central London, where both congestion pricing and fees and restrictions on higher-emitting vehicles are in effect. In the U.S. law context, these policy approaches give rise to significant legal issues that have not been well-explored. This Article proposes that these policy approaches be called "Low Traffic Zones" (LTZs), and surveys those legal considerations. The areas of law explored are: (1) potential for preemption of LTZ policies by U.S. federal laws; (2) U.S. constitutional considerations; (3) federal tolling authority; (4) state enabling laws; (5) laws to protect individual privacy and data security; and (6) other claims that may be raised in litigation. It concludes by outlining guidance U.S. lawmakers and policymakers may take into account in drafting LTZ policies to comport with U.S. and state law.

An increasing number of U.S. cities are seeking to limit the flow of vehicular traffic in designated areas as a means to reduce greenhouse gas (GHG) emissions from cars and trucks and help achieve their municipal climate goals. The creation of these "low traffic zones" (LTZs) can take a number of different forms, including, most prominently, (1) bans on one or more categories of vehicles and (2) fees or tolls that may be charged to all vehicles equally or made applicable to only certain classes of vehicles.[1]

These two policy categories—bans and fees—are often written about separately, but they are merely two traffic-demand management tools that can be employed to create LTZs, which are defined here as *bounded, geographic areas in which reductions in vehicular traffic are achieved or attempted through legal and policy approaches*, including but not limited to congestion pricing, low emission zones, and street closures. In addition to GHG emission reductions, the reduction of vehicle traffic in cities can produce other important benefits—such as reducing tailpipe pollution that can have severe negative public health impacts, mitigating traffic congestion, and improving public safety—but these LTZ policy innovations raise a number of difficult legal issues in the U.S. law context.

This Article identifies those critical legal questions, provides a comprehensive overview of the state of play, and offers a range of approaches for lawyers and policymakers to reach answers appropriate to their own local contexts. The United States has a complex patchwork of federal, state, and local laws, and LTZ policies that have found success abroad will need tailoring to comport with U.S. laws. Part I briefly describes LTZ policy tools and their use in the United States to date. Part II then explores U.S. federal law issues associated with LTZs, including preemption of state and local LTZ laws and policies by federal statutes, constitutional considerations such as the dormant Commerce Clause, and federal law authority to set and collect tolls in connection with a congestion pricing program.

Part III discusses municipal authority to implement LTZ policies and set tolls vis-à-vis applicable state law. In Part IV, I review legal considerations relating to privacy and protection of automobile users' data. Part V contains a short review of other legal areas in which litigation challenging LTZs may arise. Part VI reviews considerations for lawmakers and policymakers as they craft LTZ policies to minimize risk of legal scrutiny. Part VII concludes.

LTZ policies must be developed carefully in collaboration with those expert in traffic and emissions modeling. The impacts of congestion pricing policies on traffic, GHG emissions, and vehicle miles traveled (VMT) are complex and vary by location and circumstances. The vast majority

1. While both bans and fees can help achieve the goal of reducing traffic and vehicle emissions, the policies have different strengths: bans offer a city more control over traffic, while a fee or a toll can help raise funds for city needs, including further emissions-reducing investments like public transportation, bike- and pedestrian-friendly infrastructure, and electric vehicle charging. *See* Peter Plastrik & John Cleveland, Game Changers: Bold Actions by Cities to Accelerate Progress Toward Carbon Neutrality (Michael Shank & Johanna Partin eds., 2018), *available at* http://carbonneutralcities.org/wp-content/uploads/2018/09/CNCA-Game-Changers-Report-2018.pdf.

of road closures and congestion pricing programs that have been implemented in the United States over the past two decades have not been aimed at reducing GHG emissions, but rather at traffic calming, reducing congestion and travel times, and developing public space amenities. Depending on unique local factors, these policies may reduce VMT (and the emissions associated with them), or may merely shift trips to different routes or times of day.[2] Further, as Trip Pollard notes in *Legal Pathways to Deep Decarbonization in the United States*, if congestion pricing or other "revenues are used to build new or expanded roads, the net result could be to increase VMT."[3]

This Article highlights the legal considerations associated with LTZ policies, leaving the policy, science, economic, engineering, and urban planning questions to experts in each of those areas. It is generally accepted that if the goal of a congestion pricing strategy is to reduce VMT or GHG emissions, and that if a congestion pricing strategy is to be progressive and equitable rather than regressive, the fee or toll should be paired with improvements to public transit or to bike and pedestrian infrastructure.[4]

I. The Range of LTZ Policies

The most well-known LTZs may be London's low emission zone (LEZ) and ultra low emission zone (ULEZ). London began congestion pricing in 2003 and has since expanded the reach of its LEZ and ULEZ in geographic scope and coverage—as of 2019, the LEZ and ULEZ each include an extra charge for vehicles that do not meet applicable emission standards.[5] While the London model has not been replicated in the United States, several U.S. cities have implemented or are poised to enact some form of LTZ strategy, including both bans and fees. Because of the unique complexities of U.S. federal, state, and local law, it is infeasible to "copy and paste" London's LEZ and ULEZ program into U.S. cities. However, many elements of LTZ policy are in use in the United States, and the lessons from those uses can help inform LTZ policies that comport with and take advantage of U.S. law.

U.S. cities have for years closed commercial areas to traffic, often to improve bicyclist and pedestrian safety, to improve the flow of public transportation, or simply as a retail amenity, rather than as an overt means of reducing GHG pollution. Four blocks of Burlington, Vermont's Church Street, known as the Church Street Marketplace, have been closed to vehicular traffic since 1981.[6] More recently, cities like Los Angeles[7] and New York[8] have paved over several street crossings to create "pedestrian plazas" that "calm traffic and increase safety for people who walk, bike, and take transit"[9] and "transform underused streets into vibrant, social public spaces."[10] A one-block Jersey City, New Jersey, pedestrian plaza was laid down in green paint in 2015; it has since been expanded to two blocks and the city's mayor proposes to make the plaza permanent.[11] Boston[12] and Waltham,[13] Massachusetts, are exploring or piloting street closures. In October 2019, the 14th Street Busway opened in Manhattan with priority bus and bicycle lanes and a prohibition on nearly all uses of private (including for-hire) vehicles.[14] Most recently, in January 2020, a two-mile stretch of Market Street in San Francisco was closed to most private vehicles.[15]

The use of a fee to limit congestion—commonly known as congestion pricing—has also been used widely along arterial toll roads and on bridges throughout the United States since at least the 1990s.[16] More recently, cities have begun exploring *cordon pricing*, a form of congestion pricing in which vehicles are charged a toll upon crossing the boundary into a designated geographical zone (often a central business district or CBD). In 2019, New York State authorized a cordon pricing regime that will require all vehicles entering the CBD of New York City (defined as Manhattan below 60th Street, other than two local highways) to pay a toll beginning in 2021 or sometime thereafter. While many have touted the New York City congestion pricing program as a first, New York City is not the first U.S. jurisdiction to implement congestion pricing; it is merely the first to enact a cordon pricing regime.

2. Trip Pollard, *Transforming Transportation Demand*, *in* Legal Pathways to Deep Decarbonization in the United States 339 (Michael B. Gerrard & John C. Dernbach eds., Envtl. L. Inst. 2019).
3. *Id.* at 338.
4. *See*, *e.g.*, Stuart Cohen & Alan Hoffman, Pricing Roads, Advancing Equity (2019), *available at* http://www.transformca.org/sites/default/files/Pricing_Roads_Advancing_Equity_Combined_FINAL_190314.pdf; Regional Plan Association, Congestion Pricing in NYC: Getting It Right (2019), *available at* http://library.rpa.org/pdf/RPA-CongestionPricingNYC_GettingItRight.pdf.
5. Mayor of London, *The Mayor's Ultra Low Emission Zone for London*, https://www.london.gov.uk/what-we-do/environment/pollution-and-air-quality/mayors-ultra-low-emission-zone-london (last visited Feb. 14, 2020).
6. Church Street Marketplace, *About Us*, https://www.churchstmarketplace.com/about (last visited Feb. 14, 2020).
7. Los Angeles Department of Transportation Livable Streets, *Our Projects*, https://ladotlivablestreets.org/projects (last visited Feb. 14, 2020).
8. New York City Department of Transportation, *NYC Plaza Program*, https://www1.nyc.gov/html/dot/html/pedestrians/nyc-plaza-program.shtml (last visited Feb. 14, 2020).
9. Los Angeles Department of Transportation Livable Streets, *People St*, https://ladotlivablestreets.org/programs/people-st (last visited Feb. 14, 2020).
10. New York City Department of Transportation, *supra* note 8.
11. City of Jersey City, *Newark Avenue Pedestrian Mall*, https://www.jerseycitynj.gov/community/transportation/pedestrianmall (last visited Feb. 14, 2020).
12. *Birch Street Plaza in Roslindale to Be Permanently Installed*, City of Boston Mayor's Off., Sept. 30, 2019, https://www.boston.gov/news/birch-street-plaza-roslindale-be-permanently-installed.
13. Jenna Fisher, *Waltham to Pilot Pedestrian Plaza on Moody Street*, Patch, Sept. 4, 2019, https://patch.com/massachusetts/waltham/waltham-pilot-pedestrian-plaza-moody-street.
14. City of New York, *14th Street Select Bus Service With Transit & Truck Priority Pilot Project*, https://www1.nyc.gov/html/brt/html/routes/14th-street.shtml (last visited Feb. 14, 2020).
15. Dana Hull & Laura Bliss, *After New York, San Francisco Bans Cars on Iconic Market Street*, Bloomberg, Jan. 29, 2020, https://www.bloomberg.com/news/articles/2020-01-29/after-new-york-san-francisco-bans-cars-on-iconic-market-street.
16. Orange County, California, opened four variably priced toll lanes on State Route 91 in 1995, San Diego opened a dynamically priced high-occupancy toll lane on Interstate 15 in 1998, and in Lee County, Florida, two bridge tolls were discounted 50% for off-peak use beginning in 1998. *See* U.S. Department of Transportation Federal Highway Administration, *Congestion Pricing: Examples Around the U.S.*, https://ops.fhwa.dot.gov/congestion-pricing/resources/examples_us.htm (last modified Oct. 8, 2019).

In addition to cordon pricing, congestion pricing tools include *variably priced lanes* (charging dynamic or variable tolls—set to rise with congestion—to use separated road lanes like express toll lanes or high-occupancy toll (HOT) lanes), *variable tolls* (charging dynamic or variable toll rates on all lanes of a road), and *areawide charges* (per-mile charges within a cordoned area).[17] Another pricing overlay is *fleet* or *vehicle class pricing*, in which a fee is placed on specific types of vehicles, such as commercial or for-hire vehicles, within a cordoned zone.[18]

In addition to its cordon pricing program for all vehicles set to go into effect in 2021 or thereafter, New York City implemented a fleet pricing program for for-hire vehicles traveling through a set geographic zone in 2019,[19] and a Chicago fleet charge on for-hire vehicles in the downtown area went into effect in January 2020.[20] Other cities, including Los Angeles,[21] have studied or are considering cordon pricing schemes as well, and the use of congestion pricing more generally continues to be used throughout the country. The pricing of parking spaces has also long been used as a congestion mitigation strategy, including in areas of Los Angeles, New York City, San Francisco, and Washington, D.C.[22]

II. Federal Law Limitations and Opportunities

Local law, as a subset of state law, interacts with and is limited by federal law, including statutes, the U.S. Constitution, and federal agency policy and regulations. This part will first discuss the potential for preemption of local LTZ policies under three federal statutes. It will then address constitutional considerations, such as the dormant Commerce Clause, that can impact LTZ programs. Finally, this part will review state and local authority—both opportunities and restrictions—under federal law to set and collect tolls in connection with a congestion pricing program.

17. Cambridge Systematics, Inc., Tolling and Congestion Pricing Research and Policy Support: Congestion Pricing White Paper 2 (2017), *available at* https://www.oregon.gov/ODOT/KOM/Tolling-White-Paper.pdf.
18. Nelson Nygaard, Seattle Congestion Pricing Study Phase I: Impacts and Benefits White Paper 12 (2019), *available at* https://www.seattle.gov/Documents/Departments/SDOT/About/ImpactsandBenefitsAnalysisWhitePaper_20190518.pdf. Variable pricing for parking can also be considered a type of congestion pricing. A for-hire vehicle ride fee could—depending on state and municipal enabling laws—be a way to implement a form of congestion pricing without implementing tolls.
19. N.Y. Comp. Codes R. & Regs. tit. 20, pt. 700 (2019).
20. Chicago, Ill., Ordinance O2019-8527 (Nov. 26, 2019).
21. Matt Tinoco & Blanca Barragan, *Congestion Pricing in Los Angeles, Explained*, Curbed L.A., Sept. 27, 2019, https://la.curbed.com/2017/10/13/16467386/congestion-pricing-los-angeles-explained; Damien Newton, *Santa Monica, Westside Political Leaders Disagree on "Go Zone" Congestion Pricing Proposal*, Streetsblog LA, Mar. 28, 2019, https://la.streetsblog.org/2019/03/28/santa-monica-westside-political-leaders-disagree-on-go-zone-congestion-pricing-proposal/. *See also* Federal Highway Administration, U.S. Department of Transportation, Report on the Value Pricing Pilot Program Through April 2016, at 5-6 [hereinafter Report on VPPP], *available at* https://ops.fhwa.dot.gov/congestionpricing/value_pricing/pubs_reports/rpttocongress/pdf/vppp16rpt.pdf.
22. U.S. Department of Transportation Federal Highway Administration, *Congestion Pricing—Value Pricing Pilot Program Funding*, https://ops.fhwa.dot.gov/congestionpricing/value_pricing/projects/funding.htm (last modified Oct. 8, 2019).

A. Preemption

The Constitution establishes the supremacy of federal over state law.[23] As municipalities are merely political subdivisions of the states in which they are located,[24] federal law can also preempt local law. Depending on how LTZ laws are written, three federal statutes in particular have the potential to preempt state or local laws attempting to establish LTZs: the Clean Air Act (CAA),[25] the Energy Policy and Conservation Act (EPCA), and the Federal Aviation Administration Authorization Act (FAAAA).

Preemption under CAA §209(a), which pertains to "standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines," and EPCA §32919(a), which pertains to "fuel economy standards or average fuel economy standards," are closely related. In practice, an LTZ law or policy may run afoul of either. For analytic purposes, however, it is important to treat each provision on its own terms.

1. The CAA

Section 209(a) of the CAA states that "no state or political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."[26] However, states, and if authorized by state law, municipalities, may still "control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."[27]

The U.S. Supreme Court weighed in on CAA preemption in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District* (*Engine Manufacturers Ass'n I*).[28] In that case, the South Coast Air Quality Management District, which has oversight of air pollution controls in greater Los Angeles, had implemented rules prohibiting public and private fleet operators from purchasing vehicles that do not meet specified emission requirements. The question before the Court was whether the rules could avoid preemption under CAA §209(a) because they related to the purchase, rather than the sale, of vehicles. The Court held that they could not: "A command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular emission characteristics is as much an 'attempt to enforce' a 'standard' as a command, accompanied by sanctions, that a certain percentage of a manufacturer's sales volume must consist of such vehicles."[29]

In contrast, but still relying on *Engine Manufacturers Ass'n I*, the U.S. Court of Appeals for the Fifth Circuit later held that a Dallas ordinance that differentiated between taxi vehicle engine technologies amounted only

23. U.S. Const. art. VI, cl.2; Gibbons v. Ogden, 22 U.S. 1 (1824).
24. City of Trenton v. New Jersey, 262 U.S. 182, 185-86 (1923).
25. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
26. CAA §209, 42 U.S.C. §7543(a).
27. CAA §209(d), 42 U.S.C. §7543(d).
28. 541 U.S. 246, 255, 34 ELR 20028 (2004).
29. *Id.*

to an incentive, not a mandate, and therefore it was not preempted by the CAA. In that case, *Association of Taxicab Operators USA v. City of Dallas* (*Association of Taxicab Operators II*),[30] a local association of taxi operators brought suit against the city to challenge an ordinance that allowed taxi vehicles with compressed natural gas (CNG) engines to cut to the head of the passenger pickup line at the municipally owned airport. Adopting language from *Engine Manufacturers Ass'n I*,[31] the Fifth Circuit notes that the Dallas ordinance is not a "command, accompanied by sanctions," but rather "an incentive to encourage cab drivers to transition to CNG technology."[32] In sum, the Dallas ordinance "alters the 'shopping decisions' for traditional cab drivers in determining where in the City to operate . . . [but it does not] effectively compel[ ] a particular course of action."[33]

Despite the broad preemptive effects of the CAA, both statutory and common law have laid out parameters within which cities are potentially able to act to create a zone that limits vehicle pollution. For example, CAA §209(d) states that, despite preemption language, "nothing in this part shall preclude or deny to any State or political subdivision thereof the right to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." As the district court further explained in an earlier procedural stage of *Association of Taxicab Operators II* (later affirmed by the Fifth Circuit, herein referred to as *Association of Taxicab Operators I*), "the longstanding scheme of motor vehicle emissions control has always permitted the states to adopt in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles—that are expressly intended to control emissions."[34]

In addition, cities have significant latitude when acting as direct market participants (i.e., using their own property or procuring goods or services with their own funds). The "market participant exception" of the Commerce Clause of the Constitution, which shields actions by states acting as market participants from dormant Commerce Clause violations, has been extended to the statutory law context, including the CAA. After the Supreme Court remanded the South Coast Air Quality Management District's rules in *Engine Manufacturers Ass'n I*, the U.S. Court of Appeals for the Ninth Circuit applied the market participant doctrine to the CAA, noting that "[a]ctions taken by a state or its subdivision as a market participant are generally protected from federal preemption."[35]

2. EPCA

Section 509(a) of the EPCA states that "a State or political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter."[36] The U.S. Court of Appeals for the Second Circuit explored the contours of preemption under EPCA §509(a) in *Metropolitan Taxicab Board of Trade v. City of New York* (*Metropolitan Taxicab II*).[37] There, New York City had passed a law that would establish pricing differentials in the maximum lease amount taxicab owners could charge to taxicab operators based on whether or not a taxicab was a hybrid or "clean diesel" vehicle. The Second Circuit upheld a preliminary injunction, finding the law was likely preempted by the EPCA because it amounted to a "*de facto* mandate [for the taxicab owners] to purchase hybrid vehicles."[38] Although the terms "fuel efficiency" and "fuel economy" did not appear in the law, the court explained that the pricing rules "expressly rely on a distinction between hybrid and non-hybrid vehicles . . . the equivalency of the term 'hybrid' with 'greater fuel efficiency' . . . is self-evident."[39]

The Fifth Circuit later borrowed from this EPCA jurisprudence in considering the CAA question in *Association of Taxicab Operators II*. Contrasting the Dallas ordinance in that case to the facts of *Metropolitan Taxicab II*, the court noted that the New York City law was "so coercive as to indirectly mandate that cab owners purchase hybrids, 'constitut[ing] an offer which can not, in practical effect, be refused.'"[40] In addition, the court noted that the New York City taxi law applied in the entire city, while the Dallas ordinance applied only at the city-owned airport.[41]

The *Metropolitan Taxicab II* decision squares with two earlier federal district court cases that also held that the EPCA preempted state and local mandates requiring fuel economy or hybrid engines. In the first case, the court enjoined New York City's first effort to green the taxi fleet, which set a minimum mile-per-gallon standard for new taxis, as likely preempted by the EPCA.[42] In the second, *Ophir v. City of Boston*, the court held a rule requiring "[e]very vehicle put into service as a taxi . . . shall be a new Clean Taxi vehicle or must have been purchased before August 29, 2008," to be preempted by the EPCA.[43] "Clean Taxi" vehicles were those on a list that included "only new hybrid-powered vehicles."[44]

This is not to say that all programs targeting taxis are preempted by the EPCA. In *Green Alliance Taxi Cab Ass'n,*

30. 720 F.3d 534, 43 ELR 20137 (5th Cir. 2013).
31. *Engine Manufacturers Ass'n I*, 541 U.S. at 255.
32. *Association of Taxicab Operators II*, 720 F.3d at 539 (quoting *Engine Manufacturers. Ass'n I*, 541 U.S. at 255).
33. *Id.* at 542.
34. Ass'n of Taxicab Operators, USA v. City of Dallas, 866 F. Supp. 2d 595, 599 (N.D. Tex. 2012) (*Association of Taxicab Operators I*) (quoting Engine Mfrs. Ass'n v. Envtl. Prot. Agency, 88 F.3d 1075, 1094, 26 ELR 21477 (D.C. Cir. 1996)).
35. Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1040, 37 ELR 20210 (9th Cir. 2007) (*Engine Mannufacturers. Ass'n II*).
36. EPCA §509(a), 49 U.S.C. §32919(a).
37. 615 F.3d 152, 40 ELR 20193 (2d Cir. 2010), *cert. denied*, 562 U.S. 1264 (2011).
38. *Id.* at 156.
39. *Id.* at 157.
40. Association of Taxicab Operators II, 720 F.3d 534, 541, 43 ELR 20137 (5th Cir. 2013).
41. *Id.* at 535.
42. Metropolitan Taxicab Bd. of Trade v. City of New York, No. 08 Civ. 7837 (PAC), 2008 WL 4866021 (S.D.N.Y. Oct. 31, 2008) (*Metropolitan Taxicab I*).
43. 647 F. Supp. 2d 86, 88 (D. Mass. 2009).
44. *Id.*

Inc. v. King County,[45] the court found a "voluntary incentive program" ("small in scope, involving the issuance of a mere 50 taxicab licenses") to be not preempted by the EPCA. Under the Seattle program at issue in that case, participating taxi licensees had to "agree to utilize hybrid electric vehicles 'with a minimum rating of 40 miles per gallon in the city.'"[46] The court, relying on *Metropolitan Taxicab II*, noted that the Seattle rule did not require a "taxicab owner to do anything—they can choose to enter the program and follow the fuel efficiency rule or refrain from entering the program and not be bound by the rule. Plaintiffs have other means of obtaining taxi licenses, namely purchasing or otherwise transferring them on the open market."[47] Additionally, municipalities may rely on a statutory market participant exception to the EPCA for "automobiles obtained for its own use."[48]

3. The FAAAA

The FAAAA preempts any "State [or local] law, regulation, or other provision having the force or effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."[49] In effect, this means that cities are limited in the types of direct restrictions they can impose on freight carriers. Thus, the FAAAA may also preempt local rules relating to LTZs, particularly where any rules, standards, or restrictions would apply to the trucking industry. However, legal requirements relating to size or weight of vehicles or highway route controls are explicitly carved out of the FAAAA.[50]

In *American Trucking Ass'ns, Inc. v. City of Los Angeles*,[51] the Port of Los Angeles (a division of the city) had introduced a concession agreement for all trucking companies doing business in the port that required each truck to post a placard with a phone number for reporting concerns and for each trucking company to have submitted an off-street parking plan for its trucks. These requirements were enforced by a condition—punishable by a fine and up to six months in prison—that terminal operators not allow noncompliant trucks into the port. The Supreme Court held that the concession agreement terms were preempted by FAAAA §14501(c)(1) because they related to the "price, route, or service of" motor carriers. The Court further held that the concession agreement could not be considered "contract-based participation in a market,"[52] because the concession agreement "functions as part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment. That counts as action 'having the force and effect of law' if anything does."[53] Other case law looking at FAAAA preemption has less factual similarity to LTZ policies, but still the law is well established that the FAAAA preempts many state and local requirements relating to the "price, route, or service of any motor carrier."[54]

As noted above, the FAAAA has a significant carve-out: the law "shall not restrict . . . the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo."[55] This means that municipalities may, subject to their state-delegated authority, set truck routes, tolls, or other traffic restrictions based on weight without inviting FAAAA preemption. This may give municipalities some flexibility to limit emissions from large trucks in an LTZ area, provided any requirements comply with these federal statutes. Municipalities may also generally rely on the market participant exception to the FAAAA's applicability.[56]

B. Constitutional Concerns

In addition to preemption by federal statutes, LTZs can be impacted by certain U.S. constitutional provisions, such as the dormant Commerce Clause and, to a lesser extent, the rights to travel and to equal protection.

1. Dormant Commerce Clause

The Constitution grants to the federal government the authority to "regulate commerce . . . among the several states."[57] Courts have long interpreted this power to include a "negative" or "dormant" aspect, prohibiting states and local governments from enacting laws and policies that discriminate against interstate commerce with "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[58] An LTZ policy that discriminates against interstate commerce rather than "regulat[ing] evenhandedly with only 'incidental' effects on interstate commerce,[59] will be considered 'virtually per se invalid.'"[60]

45. No. C08-1048RAJ, 2010 WL 2643369 (W.D. Wash. June 29, 2010).
46. *Id.* at *2 (quoting Seattle Rule LIC 8-3 §6.4.4 (2007)).
47. *Id.* at *5.
48. EPCA §509(c), 49 U.S.C. §32919(c). See also *Metropolitan Taxicab I*, No. 08 Civ. 7837 (PAC), 2008 WL 4866021, at *7, 11-12 (S.D.N.Y. Oct. 31, 2008), in which the market participant exception did not apply to the regulation at issue.
49. FAAAA §601, 49 U.S.C. §14501(c)(1).
50. 49 U.S.C. §14501(c)(2)(A).
51. 569 U.S. 641, 43 ELR 20128 (2013).
52. *Id.* at 649.
53. *Id.* at 650-51.
54. Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008). But see *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013), rejecting a claim that the FAAAA preempted a state law because "for purposes of FAAAA preemption, it is not sufficient that a state law relates to the 'price, route, or service' of a motor carrier in any capacity; the law must also concern a motor carrier's 'transportation of property'" (internal citations omitted).
55. 49 U.S.C. §14501(c)(2)(A).
56. Tocher v. City of Santa Ana, 219 F.3d 1040, 1049 (9th Cir. 2000) (market participant exception did apply to a part of the city's towing scheme). *But see* City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424 (2002).
57. U.S. Const. art. I, §8, cl. 3.
58. Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1998)).
59. Or. Waste Sys., Inc. v. Department of Envtl. Quality of Or., 511 U.S. 93, 99, 24 ELR 20674 (1994); *see also* City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 8 ELR 20540 (1978).
60. *Or. Waste Sys., Inc.* at 99. In order to overcome this presumption of invalidity, the state or municipal government will need to overcome strict scrutiny to show that (1) the law is not related to economic protectionism and (2) there are no nondiscriminatory alternatives available. *Wyoming v. Oklahoma*, 502 U.S. at 454; Maine v. Taylor, 477 U.S. 131, 138 (1986).

However, local laws will be sustained where they have "effects on interstate commerce [that] are only incidental," and where the "statute regulates even-handedly . . . [and] unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[61] (This is referred to as the "*Pike* balancing test.") LTZ laws and policies may have at least an incidental effect on interstate commerce, as they will likely impact the transportation of goods and services that flow across state lines (even if an LTZ itself is located wholly within one state). But LTZ laws and policies can generally be structured so as to not facially discriminate against interstate commerce and to satisfy the *Pike* test by advancing local goals relating to traffic reduction, health and safety, and even the reduction of air emissions.

Cities may also avoid dormant Commerce Clause restrictions where they are acting as market participants as opposed to market regulators. Recognizing that there is "no indication of a constitutional plan to limit the ability of the States [or municipalities] themselves to operate freely in the free market,"[62] the market participant exception allows municipalities to use their own property and purchasing power in ways that affect interstate commerce.[63]

The dormant Commerce Clause takes on somewhat increased significance where tolls, congestion pricing, or some other form of road pricing is used, though congestion pricing is still unlikely to—and can be structured not to—violate the dormant Commerce Clause. Given the relative rarity of congestion pricing, particularly outside the Federal Highway Administration (FHwA) tolling programs, the case law relating to road tolls more generally is applicable here. Generally, cases alleging dormant Commerce Clause violations arise where different toll amounts are charged based on state or municipal residency or where toll discounts are offered to users of a particular toll transponder program.

In *Cohen v. Rhode Island*, for example, the U.S. District Court for the District of Rhode Island held that a program discounting bridge tolls for in-state residents did not violate the dormant Commerce Clause, because plaintiff "failed to identify a specific in-state commercial interest that is favored by the Newport Bridge toll discount at the expense of particular out-of-state competitors, so it cannot demonstrate that the discount discriminates against interstate commerce,"[64] and that it further was "based on a fair approximation of the use of the [bridge] facilities [and was] not excessive in relation to the benefits conferred."[65] A toll discount for residents of Staten Island and the Rockaways in New York City was likewise held not to violate the dormant Commerce Clause.[66] Federal courts have also held that providing a toll discount for users of a certain toll transponder service, such as Fast Lane or E-ZPass, does not violate the dormant Commerce Clause.[67] Each of these cases relied on the rule set in two Supreme Court cases opining on the constitutionality of fees for out-of-state airport users, which apply a three-pronged version of the *Pike* test: "a levy [for out-of-state residents] is reasonable . . . if it (1) is based on some fair approximation of the use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce."[68]

While basic tolls, and even dynamic road prices that vary based on congestion, are unlikely to be viewed as violating the dormant Commerce Clause, it is somewhat less clear whether a claim alleging that differential tolls specifically targeting commercial truck companies (i.e., economic interests) violates the dormant Commerce Clause would be successful.[69] It also remains to be seen how a congestion toll, which could be untethered to any "fair approximation of the use of the facilities,"[70] might be treated under this line of case law. (A toll need not be tied to the exact cost to use the facility; "so long as the toll is based on some fair approximation of use or privilege for use . . . it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users."[71] Though no legal authority tests this proposition, a congestion toll could seemingly be viewed as tied to this fair approximation of use if it internalizes the externalities associated with vehicle use.)

2. Other Constitutional Issues

Petitioners in these cases also allege violations of the constitutional protection to the right to travel, which is not explicit in the Constitution but has long been protected by the courts as "a fundamental right protected by the Privileges and Immunities Clause,"[72] and of the right to equal protection.

Turning first to the right to travel, "state law implicates the right to travel when it actually deters such travel . . . when impeding travel is the primary objective . . . or when

61. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). See also *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 346, 37 ELR 20097 (2007), which applied the *Pike* test.
62. Reeves, Inc. v. Stake, 447 U.S. 429, 447 (1980).
63. *See, e.g.*, White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 208 (1983) ("when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause").
64. Cohen v. Rhode Island Turnpike & Bridge Auth., 775 F. Supp. 2d 439, 447 (D.R.I. 2011).
65. *Id.* at 450.
66. Janes v. Triborough Bridge & Tunnel Auth., 977 F. Supp. 2d 320 (S.D.N.Y. 2013).
67. Yerger v. Mass. Turnpike Auth., 395 Fed. Appx. 878, 885 (3d Cir. 2010); Angus Partners LLC v. Walder, 52 F. Supp. 3d 546 (S.D.N.Y. 2014).
68. Northwest Airlines, Inc. v. County of Kent, Mich., 510 U.S. 355, 369 (1994); Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707, 716-17 (1972) (case was later superseded by statute).
69. Robert S. Kirk, Cong. Research Serv., R44910, Tolling U.S. Highways and Bridges 14-16 (2017), *available at* https://www.ibtta.org/sites/default/files/documents/2017/CRS%20Interstate%20tolls_2017-08-04.pdf.
70. *Northwest Airlines*, 510 U.S. at 369.
71. *Evansville-Vanderburgh Airport*, 405 U.S. at 716-17, *quoted in Northwest Airlines*, 510 U.S. at 362-63; Cohen v. Rhode Island Turnpike & Bridge Auth., 775 F. Supp. 2d 439, 445 (D.R.I. 2011). Note also that the market participant exception generally does not apply to setting and collecting tolls. *Cohen*, 775 F. Supp. 2d at 445; Selevan v. New York Thruway Auth., 584 F.3d 82, 103 (2d Cir. 2009). *But see* Endsley v. Chicago, 230 F.3d 276, 284-86 (7th Cir. 2000).
72. *Cohen*, 775 F. Supp. 2d at 451 (citing Saenz v. Roe, 526 U.S. 489, 501 (1999)).

it uses any classification which serves to penalize the exercise of that right."[73] Moreover, "the Supreme Court has 'always carefully distinguished between bona fide residence requirements, which seek to differentiate between residents and nonresidents, and residence requirements . . . which treat established residents differently based on the time they migrated into the State.'"[74] Differential toll rates based on residency are clearly the former; the Supreme Court underscores the point by noting that "any person is free to move to a State and to establish residence there."[75] These cases generally dispose of the equal protection claims easily, as they are derivative of the allegations that the tolls violate the right to travel: "The Equal Protection claim stands on the same 'right to travel' footing as the Privileges and Immunities claim and fails for the same reasons."[76]

Cities and states have long been able to enact tolls on traffic, pedestrian zones, in-use restrictions on vehicles, and other legal tools that can advance LTZ objectives without violating the dormant Commerce Clause or running afoul of other constitutional provisions. They should be able to similarly develop and implement LTZ laws and policies, including pricing policies, consistent with constitutional requirements.

C. *Authority to Set Tolls and Implement Congestion Pricing Under Federal Law*

While federal law places limitations on LTZ pricing policies, the FHwA can be very supportive of pricing policies designed to mitigate congestion. Nearly all of the active congestion pricing projects in the United States have been developed with the support of the FHwA, which began piloting congestion pricing strategies in the 1990s. These federal projects, which are situated in major metropolitan areas such as Miami,[77] San Diego,[78] and suburban Virginia,[79] are generally variably priced express lanes on major arterial highways that have higher tolls during periods of higher traffic congestion. Any project that seeks to place tolls on federal-aid highways (roads eligible for FHwA funding, "other than local road[s] or rural minor collector[s]")[80] will need to comply with U.S.C. Title 23 (Highways). A key question, therefore, is whether a proposed LTZ pricing project falls on or encompasses all or part of any "federal-aid highway."

The FHwA authorizes congestion pricing through several different programs and statutory provisions. Most significantly, the Value Pricing Pilot Project (VPPP) allows states and municipalities to study, pilot, or implement congestion pricing, congestion management, or road pricing strategies, offering federal tolling authority outside the more limited provisions of 23 U.S.C. §§129 and 166, the two main statutory provisions permitting tolls on federal-aid highways. A wide variety of road pricing strategies are VPPP-eligible, including cordon pricing,[81] the pricing of parking,[82] and areawide charges.[83] While 2012 was the last year in which funding was authorized to support individual VPPP projects, the VPPP continues to offer states and municipalities the opportunity to obtain federal authorization to implement tolling for road pricing projects; it also provides technical assistance and advice in connection with such projects.[84] Up to 15 states and municipalities may participate in the VPPP at a time—slots rotate as a city or state steps away. As of November 18, 2019, five VPPP slots were open.[85]

FHwA approval of congestion pricing projects, whether under the VPPP or otherwise, is not guaranteed to come easily. As of February 2020, the FHwA had not issued its approval for the New York City congestion pricing program (which includes some federal-aid highways),[86] nor had the U.S. Department of Transportation provided any guidance as to whether a full environmental impact statement would be required under the National Environmental Policy Act (NEPA)[87] or whether a shorter-form environmental assessment would suffice.[88] New York State Gov. Andrew Cuomo[89] and New York City Mayor Bill de Blasio[90] separately suggested that the delay in federal approval was political; FHwA officials countered that the state agency had failed to submit all required documen-

73. *Id.* (quoting Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986)). "[M]inor burdens impacting interstate travel, such as toll roads, do not constitute a violation of that right." Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999).
74. *Cohen*, 775 F. Supp. 2d at 451 (quoting *Soto-Lopez*, 476 U.S. at 903).
75. Martinez v. Bynum, 461 U.S. 321, 328-29 (1983); *see also Cohen*, 775 F. Supp. 2d at 451. See further discussion in Kirk, *supra* note 69.
76. *Cohen*, 775 F. Supp. 2d at 452.
77. Florida Department of Transportation, *95 Express*, https://95express.com/ (last visited Feb. 14, 2020).
78. FasTrak, *San Diego Region*, https://511sd.com/fastrak511sd/I-15ExpLanes (last visited Feb. 14, 2020).
79. Transurban, *Express Lanes*, https://www.expresslanes.com/ (last visited Feb. 14, 2020).
80. 23 U.S.C. §101(a)(6) defines a "Federal-aid highway" as "a public highway eligible for assistance under this chapter other than a highway functionally classified as a local road or rural minor collector." "Highway" is a broad term that includes roads, streets, parkways, rights-of-way, bridges, tunnels, and more. *Id.* §101(a)(11). Federal-aid highways comprise approximately one-quarter of public roads in the United States. Cong. Research Serv., R44332, Federal-Aid Highway Program (FAHP): In Brief 2 (2019), *available at* https://fas.org/sgp/crs/misc/R44332.pdf.
81. Report on VPPP, *supra* note 21, at 5-6.
82. *See* U.S. Department of Transportation FHwA, *Congestion Pricing—Parking Pricing*, https://ops.fhwa.dot.gov/congestionpricing/strategies/not_involving_tolls/parking_pricing.htm (last modified Oct. 8, 2019).
83. *See* U.S. Department of Transportation FHwA, *Congestion Pricing—Zone-Based Pricing*, https://ops.fhwa.dot.gov/congestionpricing/strategies/involving_tolls/zone_based.htm (last modified Oct. 8, 2019).
84. Telephone Conversation with Angela Fogle, Staff, FHwA Office of Operations (Nov. 18, 2019).
85. *Id.*
86. Christina Goldbaum & Winnie Hu, *Could the Trump Administration Block Congestion Pricing in New York?*, N.Y. Times, Feb. 25, 2020, https://www.nytimes.com/2020/02/25/nyregion/-trump-congestion-pricing-nyc.html.
87. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.
88. Dana Rubenstein, *Why Congestion Pricing Might Be Delayed*, Politico, Feb. 18, 2020, https://www.politico.com/states/new-york/city-hall/story/2020/02/14/why-congestion-pricing-might-be-delayed-1261628.
89. Nolan Hicks & David Meyer, *Cuomo Says Trump is Holding Manhattan Congestion Pricing Fees "Hostage,"* N.Y. Post, Feb. 20, 2020, https://nypost.com/2020/02/20/cuomo-says-trump-is-holding-manhattan-congestion-pricing-fees-hostage/.
90. Matt Hickman, *Is Trump Holding Up NYC Congestion Pricing and Second Avenue Subway Funding?*, The Architect's Newspaper, Feb. 25, 2020, https://archpaper.com/2020/02/trump-blocking-nyc-congestion-pricing-and-second-avenue-subway-funding/.

tation (a charge the agency denied).[91] The delay puts the program's anticipated January 2021 start date in doubt.[92]

In addition to the VPPP, grants under 23 U.S.C. §133, a surface transportation block grant program, can be used for "projects and strategies designed to support congestion pricing, including electronic toll collection and travel demand management strategies and programs,"[93] and funds allocated under 23 U.S.C. §149, a congestion mitigation and air quality improvement program, can be used for congestion mitigation projects and programs in areas designated nonattainment areas for ozone, carbon monoxide, or particulate matter under §107(d) of the CAA.[94] There are significant additional requirements and considerations for each of §§133 and 149, and, in all cases, the state has the authority to choose which projects receive any available federal funding,[95] so municipalities will need to work closely with states to pursue any of these options.[96]

Outside of these special authorizing programs, tolling on federal-aid highways is generally allowed under 23 U.S.C. §129 only upon their construction or reconstruction.[97] Interstate highways are further restricted in that any lanes for which new tolling or pricing is implemented must add capacity to the road; there may be no reduction in free lane capacity.[98] In addition to these general parameters, the following Title 23 requirements will need to be considered in crafting LTZ policies:

- Highway operators may rely on 23 U.S.C. §166 to convert high-occupancy vehicle (HOV) lanes, which restrict access to vehicles with two or more passengers, into HOT lanes, which allow vehicles carrying only the driver to enter the lane in exchange for a fee, which may be variably priced.[99] Section 166 also allows states to permit certain federally identified alternative fuel vehicles to use HOV and HOT lanes without meeting the occupancy requirement or paying a toll.[100] Buses may be permitted to use these lanes, potentially expanding and speeding up public transit services, so long as all intercity buses are permitted to use the lanes on the same terms and for the same toll amounts.[101]
- Toll revenues on roads under the FHwA's jurisdiction must first be used for costs directly attributable to the tolled facility, such as debt service and a reasonable return on investment for any private road financers, operation and maintenance costs for the road, and contractual costs owed under any public-private partnership agreement.[102] Only upon certification by the relevant public authority that the highway is adequately maintained may tolling revenues be used for purposes authorized elsewhere in Title 23.[103]
- The applicable public authority must submit annual audit reports demonstrating adequate maintenance of the highway; failure to comply with this audit requirement can result in suspension of authority to collect tolls.[104]
- The state in which the project sits must have a law permitting tolling.[105]

Subject to meeting these and other Title 23 requirements, there is no prohibition in §129 or §166 on variable or congestion pricing.[106] While public authorities are not required to enter into any written agreement with the FHwA in establishing a tolling or congestion pricing program under §129 or §166, given the audit requirements and potential consequences, the FHwA suggests that tolling authorities may wish to enter into a memorandum of understanding with the FHwA and provides suggested terms.[107]

III. State Law

State law may also serve as an independent restraint on cities looking to create LTZs. In most jurisdictions, municipalities have the authority to regulate or pass laws to control traffic, though such authority is delegated pursuant to state- or even municipality-specific laws. Authority to regulate in order to control traffic may be delegated in a state constitution, via a municipal home rule statute, or by another enabling law. Congestion pricing requires separate legal authority from a state—the authority to set and col-

91. Goldbaum & Hu, *supra* note 86.
92. Rubenstein, *supra* note 88.
93. 23 U.S.C. §133(b)(12).
94. For states that do not have and have never had a nonattainment area, there is some flexibility for projects under this section to be in areas that are not nonattainment areas. *Id.* §149.
95. *Id.* §145(a).
96. The FHwA also supported four U.S. cities implementing congestion pricing programs (also on arterial roads) under its former Urban Partnership Agreement Program. While this program is no longer active, resources from those cities' experiences are available at U.S. Department of Transportation FHwA, *Congestion Pricing—Urban Partnership Agreements*, https://ops.fhwa.dot.gov/congestionpricing/urb_partner_agree.htm (last modified Oct. 8, 2019).
97. 23 U.S.C. §129. See also 23 U.S.C. §301, which prohibits tolls on federal-aid highways other than as authorized by §129.
98. 23 U.S.C. §129. The Interstate System Reconstruction and Rehabilitation Pilot Program (ISRRPP) offers a slight reprieve to this limitation. Authorized under §1216(b) of the Transportation Equity Act for the 21st Century, the ISRRPP can authorize up to three interstate highways to implement tolling programs without maintaining the free lane capacity. As of November 18, 2019, all three slots were open. Telephone Conversation with Angela Fogle, *supra* note 84.
99. 23 U.S.C. §166.
100. *Id.* §166(b)(5).
101. *Id.* §166(b)(4)(C)(iii).
102. *Id.* §129(a)(3)(A).
103. These purposes may include public transportation assets such as bus infrastructure, HOV lanes, parking, and electric vehicle charging (23 U.S.C. §142(a)(1)); carpool and vanpool projects (23 U.S.C. §146(a)); and "pedestrian walkways and bicycle transportation facilities" (23 U.S.C. §217(a)). Each of these uses is subject to the approval of the FHwA and significant other requirements.
104. 23 U.S.C. §129(c).
105. *Id.* §129(a)(8).
106. The FHwA does not provide requirements with respect to setting toll rates, other than that intercity buses must pay the same rates for HOV lane access as public transportation buses and that public authorities must consult with applicable metropolitan planning organizations in connection with HOV facilities. Robert S. Kirk, Cong. Research Serv., R43575, Tolling U.S. Highways 11 (2016) (referencing 23 U.S.C. §§166(b)(3)(C) and (g)), *available at* https://fas.org/sgp/crs/misc/R43575.pdf.
107. U.S. Department of Transportation FHwA, *Tolling Memorandum of Understanding Sample Template*, https://www.fhwa.dot.gov/ipd/tolling_and_pricing/tolling_pricing/sample_mou_template.aspx (last visited Feb. 14, 2020).

lect tolls. This part will discuss generally the ways in which municipalities are authorized to enact laws or policies to control traffic and the limits of that authorization.

A. Interplay With State Law—Varies by State

Municipalities often have broad powers to regulate street traffic consistent with state law. In particular, "elimination of congestion and hazards to life and property and the safety and convenience of the traveling public constitute a vital part of the police power of municipalities."[108] States have delegated this authority in different ways.[109] For LTZ strategies that do not involve a toll or fee, municipal authority to close roads to vehicular traffic as a part of the delegated authority to regulate traffic is relatively well established.

An Idaho court determined that the city of Pocatello acted within its authority in opening up a street only to bicycle and pedestrian traffic.[110] In Connecticut, a court found the city of Hartford's closure to vehicle traffic of a one-block stretch of road in the downtown area during certain hours of the day to be "intended both to improve the city's economic well-being and to ensure the safety of persons patronizing downtown business establishments . . . represent[ing] a legitimate use of the city's police power to advance economic, aesthetic and safety-related goals."[111] Some cities will also be able to set size and weight restrictions (which can serve as an imperfect proxy for emissions) for local roads.[112] Cities often may also regulate parking and use of curb space on city streets, as in California, where California Vehicle Code §22507(a) allows local authorities to "prohibit or restrict the stopping, parking, or standing of vehicles."[113]

This is not to say that municipal attempts to close roads are always met with court approval. In very general terms, courts charged with reviewing municipal traffic regulations look to see if traffic regulations are reasonable and applied uniformly. In Ohio, for example, a traffic regulation (as an exercise of police power) "is valid if it bears a real and substantial relationship to the public health, safety, morals, or general welfare, and if it is not unreasonable or arbitrary."[114] A city generally may not treat its own residents significantly more favorably than nonresident drivers, as with a program that "exempted" residents from restrictions,[115] but differential toll rates based on residency are generally permissible. Ordinances will often be held invalid if there is no alternate route available to the vehicles that have been blocked by a closure to vehicle traffic or some other traffic-limiting regulation.[116] Specific state laws and fact patterns may yield additional restrictions; for example, a California court held that Santa Barbara was not preempted by state law from restricting parking, but that the city had not complied with state law in providing sufficient notice of a parking restriction.[117] The process followed by a city in closing a road could also be found to run afoul of the state enabling law.[118]

B. Authority to Implement Tolls

State law may be more limiting where a city wishes to create an LTZ that requires drivers to pay a tax, toll, or fee (i.e., congestion pricing). For LTZ or congestion pricing projects that are not placed on federal-aid highways, state law controls a municipality's ability to implement and collect tolls.[119] Legislation varies from state to state. Common elements of many state road tolling laws include, among others, clarifications on the delegated police power, "constraints on the use of [tolling revenue] funds," and "relationships with other entities."[120]

For example, Oregon state law generally allows cities and counties to collect tolls on roads that they manage.[121] However, the use of revenues from such tolls is limited to "construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside areas in" Oregon.[122] In New York State, by contrast, the Vehicle and Traffic Law reserves toll-setting authority for the state[123]; New York City, in enacting its cordon pricing scheme, had to go through the state legislature to pass enabling legislation. The state and local responsibilities for implementing New York's congestion pricing program are further delineated by a memorandum of understanding between the state-controlled Triborough Bridge and Tunnel Authority, which has most of the authority, and the New York City Department of Trans-

108. 7A McQuillin Municipal Corporations §24:633 (3d ed. 2019).
109. For example, municipalities in Missouri have "the authority to exercise . . . police power in making 'additional rules of the road or traffic regulations to meet their needs and traffic conditions' as long as the ordinance's provisions are consistent with and do not conflict with state law." Ballard v. City of Creve Coeur, 419 S.W.3d 109, 119 (Mo. Ct. Apps. 2013). With respect to New York City, the New York State Vehicle and Traffic Law supersedes conflicting local requirements. N.Y. Veh. & Traf. Law §1640 (2008). A state may have concurrent jurisdiction with respect to traffic laws. City of Cedar Rapids v. State, 478 N.W.2d 602, 605 (Iowa 1991). In Ohio, "a city's authority to regulate traffic comes from the Constitution." Cleveland v. Martinez, 126 Ohio Misc. 2d 36, 39 (Cleveland Mun. Ct. 2003).
110. Christensen v. City of Pocatello, 142 Idaho 132, 139 (Idaho 2005).
111. Cohen v. City of Hartford, 244 Conn. 206, 219 (Conn. 1998).
112. *See* Corona Ready Mix, Inc. v. State Dep't of Motor Vehicles Traffic Violations Appeals Bd., 226 A.D.2d 630 (N.Y. App. Div. 1996); State ex rel. Dean v. City Court of City of Tucson, 123 Ariz. 189, 192 (Ariz. Ct. App. 1979).
113. Homes on Wheels v. City of Santa Barbara, 119 Cal. App. 4th 1173, 1178 (Cal. Ct. App. 2004).
114. *Martinez*, 126 Ohio Misc. 2d at 39.
115. City of Lafayette v. County of Contra Costa, 91 Cal. App. 3d 749 (Cal. Ct. App. 1979). *See also* People of the State of New York v. Grant, 306 N.Y. 258 (N.Y. 1954).
116. *See*, *e.g.*, Wellswood Columbia, LLC v. Town of Hebron, 295 Conn. 802, 818-19 (Conn. Super. Ct. 2010) (town's closure of a road that was the only means of access to a planned subdivision found "inconsistent with the statutes governing the review of subdivision applications"); *but see* McCammon v. City of Redwood City, 149 Cal. App. 2d 421 (Cal. Dist. Ct. App. 1957) (upholding weight restriction on trucks over three tons that effectively required large trucks to use a different, longer route to a quarry).
117. *Homes on Wheels*, 119 Cal. App. 4th at 1175.
118. *See* Zack's, Inc. v. City of Sausalito, 165 Cal. App. 4th 1163, 1183-84 (Cal. Ct. App. 2008).
119. 23 U.S.C. §§129(a)(8), 166(c)(1).
120. U.S. Department of Transportation FHwA, *Office of Highway Policy Information—Toll Facilities in the United States*, https://www.fhwa.dot.gov/policyinformation/tollpage/2015/history.cfm (last modified Apr. 11, 2018).
121. Or. Rev. Stat. §383.004(2) (2007).
122. Or. Const. art. IX, §3a.
123. N.Y. Veh. & Traf. Law §1630 (2019).

portation.[124] Washington State takes a different approach, with state law authorizing the creation of "transportation benefit districts" that have the authority "to charge vehicles tolls within the boundaries of the district" so long as such tolls are approved by "a majority of the votes in the district voting on a proposition at a general or special election."[125] The Seattle Transportation Benefit District was established under this authorizing law in 2010.[126]

The restriction in Oregon (and other states, such as North Carolina[127] and Washington[128]) on use of tolling revenues is important. A range of policymakers recommend that congestion pricing policies be paired with investments in transit, bicycle, and pedestrian improvements, which can help further reduce vehicle emissions and mitigate equity concerns stemming from increased commuting costs for low- and middle-income communities.[129] Ideally, these could be funded by the revenues from congestion tolling. In jurisdictions where use of tolling revenues is restricted, policymakers should seek other ways to fund these types of improvements, and should, if possible, avoid using such funding to increase vehicle capacity on the tolled or other roads, which could lead to an increase in VMT.[130] There's a credible argument that bicycle, pedestrian, and busway improvements could fall within the permissible scope of "highways, roads, streets and roadside areas."

IV. Privacy

LTZs can give rise to significant privacy concerns where they monitor vehicles via camera or collect payment through some form of in-car technology, as many congestion pricing programs do. There are three broad, potentially complementary ways in which privacy and data security are implicated in monitoring vehicles in connection with LTZ boundaries and collecting payments for congestion pricing systems: (1) Cameras are often used to monitor both tolled arterial roads and the boundaries of cordon zones, and to identify by license plate vehicles that do not have an on-board payment mechanism (a system known as automatic license plate readers or ALPRs). Such license plate information might, subject to applicable law, be stored in databases and shared with other parties.[131] (2) On-board payment mechanisms must have some way to track when the vehicle crosses the cordon or toll point, and, for areawide charges, must be able to track the mileage of the vehicle within the zone. (3) A municipality may also collect data from for-hire vehicle companies to "improve assessment of impacts on VMT, GHG emissions, and transit, to adopt policies . . . that lower subsidies for driving and send price signals that better reflect the cost of driving to help reduce emissions."[132] Data privacy is a rapidly evolving area, as experts and policymakers are continually assessing new risks and responses.[133]

A. ALPRs

A patchwork of state laws governs traffic cameras. States with few or no toll roads may not have considered whether to allow toll enforcement cameras. Moreover, several states have enacted laws that govern the data collected by ALPRs.[134] Such laws restrict who may access ALPR data and for what purpose, and specify the maximum amount of time such data may be stored before it is required to be destroyed. Privacy advocates and others have raised concerns that ALPR cameras can be used to track the movements of individuals, and that records from these cameras have "been used and criticized for their use in tracking immigrants, welfare recipients, Muslims, as well as used in divorce courts."[135] The American Civil Liberties Union and its state counterparts, in particular, have sought to highlight these concerns.[136]

In *Neal v. Fairfax County Police Department*, the Virginia Supreme Court held that "the pictures and data associated with each license plate number constitute 'personal information' as defined by" Virginia state law.[137] The court

124. *See* Michael B. Gerrard & Edward McTiernan, *New York's New Congestion Pricing Law*, N.Y. L.J., May 8, 2019, https://www.law.com/newyorklawjournal/2019/05/08/new-yorks-new-congestion-pricing-law/.
125. Seattle Department of Transportation, Seattle Congestion Pricing Study: Phase I Summary Report 27 (2019) (referencing Wash. Rev. Code §36.73.020 (2010)), *available at* https://www.seattle.gov/Documents/Departments/SDOT/About/SeattleCongestionPricingStudy_SummaryReport_20190520.pdf.
126. Seattle, Wash., Ordinance 123397 (Sept. 20, 2010).
127. N.C. Gen. Stat. §136-89.188 (2018).
128. Wash. Rev. Code §47.56.830(3) (2008).
129. *See, e.g.*, Cohen & Hoffman, *supra* note 4.
130. Pollard, *supra* note 2.
131. Robin Chase, *The Technology That Could Transform Congestion Pricing*, CityLab, May 8, 2019, https://www.citylab.com/perspective/2019/05/congestion-pricing-technology-apps-road-tolls-data-privacy/589006/.
132. Pollard, *supra* note 2, at 341.
133. *See, e.g.*, Lauren Feiner, *A Federal Privacy Law Is Starting to Crystallize, but Democrats and Republicans Can't Agree on How to Do It*, CNBC, Dec. 4, 2019, https://www.cnbc.com/2019/12/04/a-federal-privacy-law-is-starting-to-crystallize-senators-remain-divided-over-details.html; Allison Grande, *Wash. Could Be Next to Enact Consumer Data Privacy Law*, Law360, Jan. 13, 2020, https://www.law360.com/articles/1233674/wash-could-be-next-to-enact-consumer-data-privacy-law.
134. *See, e.g.*, Ark. Code §§12-12-1801 to -1808 (2013); Cal. Veh. Code §2413 (2011) and Cal. Civ. Code §§1798.29 (2020), 1798.90.5 (2016); Colo. Rev. Stat. §24-72-113 (2014); Fla. Stat. §316.0777 (2019); Ga. Code §35-1-22 (2018); Me. Rev. Stat. Ann. tit. 29-A, §2117-A(2) (2019); Md. Code Ann., Pub. Safety §3-509 (2019); Minn. Stat. §§13.82, 13.824, 626.8472 (2015); Mont. Code Ann. §§46-5-117 to -119 (2017); Neb. Rev. Stat. §§60-3201 to -3209 (2018); N.H. Rev. Stat. Ann. §§261.75-b (2016), 236.130 (2014); N.C. Gen. Stat. §§20-183.30 to .32 (2015); Tenn. Code §55-10-302 (2014); Utah Code Ann. §§41-6a-2001 to -2005 (2018); Vt. Stat. Ann. tit. 23, §§1607, 1608 (2018). Aggregated by *Automated License Plate Readers: State Statutes*, Nat'l Conf. St. Legislatures, Mar. 15, 2019, http://www.ncsl.org/research/telecommunications-and-information-technology/state-statutes-regulating-the-use-of-automated-license-plate-readers-alpr-or-alpr-data.aspx.
135. Chase, *supra* note 131 (citing Tanvi Misra, *When Transit Agencies Spy on Riders*, CityLab, Sept. 18, 2018, https://www.citylab.com/equity/2018/09/when-your-transit-agency-is-found-tracking-you/570292/); Sidney Fussell, *California Officials Admit to Using License Plate Readers to Monitor Welfare Recipients*, Gizmodo, Aug. 13, 2018, https://gizmodo.com/california-officials-admit-to-using-license-plate-reade-1828313821; Paul Lewis, *CCTV Aimed at Muslim Areas in Birmingham to Be Dismantled*, Guardian, Oct. 25, 2010, https://www.theguardian.com/uk/2010/oct/25/birmingham-cctv-muslim-areas-surveillance; Chris Newmarker, *E-ZPass Records Out Cheaters in Divorce Court*, NBCNews.com, Aug. 10, 2017, http://www.nbcnews.com/id/20216302/ns/technology_and_science-tech_and_gadgets/t/e-zpass-records-out-cheaters-divorce-court/#.XdapuVdKiUk.
136. *See* American Civil Liberties Union, *Automatic License Plate Readers Search Results Page*, https://www.aclu.org/search/%20?f%5b0%5d=field_issues%3A106&f%5b1%5d=type%3Ablog (last visited Feb. 14, 2020).
137. 295 Va. 334, 346 (Va. 2018).

remanded *Neal* to the trial court, which determined that the police department's "passive use" practices with respect to ALPR data was in violation of Virginia's Government Data Collection and Dissemination Practices Act.[138] In another case—one related to disclosure of information rather than permissibility of using ALPR data—a New York court ruled that ALPR data relating to a person or license plate should not be disclosed to a third party, because while one "read" of a license plate did not implicate a person's privacy interests, the "accumulated data [of many reads] can create a non-contextual 'mosaic' which is essentially a high-resolution image of an individual, defined by his or her vehicle's randomly recorded movements and locations."[139]

In addition to laws relating to ALPR data specifically, more general state data privacy laws may limit how long and for what purpose private data can be kept, used, or shared. Among the most comprehensive state data privacy laws is California's Consumer Privacy Act, which went into effect in January 2020 and which specifies a variety of protections for the handling of private data.[140] Other states are following suit with data privacy protections as well; the particulars vary from state to state and practitioners should pay careful attention to state data privacy requirements as they become law. Any retention of license plate data relating to toll or congestion fee enforcement will need to comply with these laws.

Privacy considerations around on-board payment mechanisms are relatively more settled, though they can present risk. Toll-monitoring transponders, such as those used in systems such as E-ZPass (eastern and midwestern United States), I-PASS (Illinois), SunPass (Florida), and NTTA (Texas) have long been accepted as appropriate for efficient and cost-effective road tolling systems. As the FHwA noted:

> Tolling agencies have devised a method to protect the public's privacy by linking the transponder and the driver's personal information with a generic, internal account number that does not reveal the driver's identity and is not disclosed to other organizations. Also, a motorist can open an anonymous account if he or she so chooses.[141]

Still, cities will need to make sure that contractors can handle compliance with state privacy laws and can protect themselves from breach.

B. Areawide Charges

While best practices around these basic transponders are well established, systems to measure areawide charges (which are per-mile fees within a cordon zone) require more user information and therefore could give rise to additional privacy concerns, particularly where they use global positioning satellite (GPS) tracking in real time.[142] In addition to state requirements, federal funding programs for piloting road user charges require the applicable technologies to protect user privacy.[143] Some have proposed employing private companies to manage such data via a transponder or smartphone application, allowing the mileage and payment data to be transmitted in encrypted format without sharing where the car has been.

Washington State recently piloted a road user charge system; a task force studying the pilot made recommendations to protect user privacy including offering a range of mileage reporting options, from those that required no GPS data (which were more protective of privacy but billed drivers for miles driven outside of the state) and those that relied on GPS trackers (which were less protective of privacy but more convenient and did not bill users for miles driven out of state).[144] These approaches to location and payment privacy could be used for cordon or areawide charges as well. Other recommendations to come out of Washington's pilot program were for Washington to update its list of statutory exemptions to its public records disclosure law[145] so that mileage data is considered private information,[146] and the adoption of a model privacy policy for road usage charging.[147]

California,[148] Colorado,[149] and Oregon[150] also piloted road user charges as a replacement for gasoline taxes, and similarly grappled with the tension between ease of mileage reporting and user privacy.[151] (As in Washington, these

138. Va. Code §§2.2-3800 et seq. (2018).

139. Gannett Co., Inc. v. County of Monroe, 47 Misc. 3d 898, 905 (N.Y. Sup. Ct. 2015). There is also significant case law relating to whether, and in what circumstances, use of ALPR data may constitute a Fourth Amendment search under the Constitution and pertaining to other questions about the use of such data. This line of inquiry is omitted here, as it does not directly relate to developing LTZ or congestion pricing policies.

140. A.B. 375, 2017-2018 Leg. (Cal. 2018).

141. FHwA, U.S. Department of Transportation, Congestion Pricing: A Primer 9 (2006), *available at* https://ops.fhwa.dot.gov/publications/congestionpricing/congestionpricing.pdf.

142. *See, e.g.*, Benjamin K. Orr & Alice M. Rivlin, Brookings, Road-Use Pricing: How Would You Like to Spend Less Time in Traffic? (2009), *available at* https://www.brookings.edu/wp-content/uploads/2012/04/0625_transportation_rivlin.pdf.

143. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, §6020(d)(1)(B), 129 Stat. 1582 (2015).

144. Washington State Road Usage Charge Steering Committee, Steering Committee Report for the WA RUC Pilot Project 22 (2019), *available at* https://waroadusagecharge.org/wp-content/uploads/2019/10/WA-RUC_Final-Report.pdf.

145. Wash. Rev. Code §42.56.010(3) (2017).

146. Washington State Road Usage Charge Steering Committee, *supra* note 144, at 125-26.

147. *Id.* at 126-27 and app. A-6, at 33, *available at* https://waroadusagecharge.org/wp-content/uploads/2019/11/WA-RUC-SC-Report-Appendices2019_10_COMPILED.pdf.

148. California State Transportation Agency & Caltrans, California Road Charge Pilot Program: Summary Report (2017) (authorized by Cal. S.B. 1077), *available at* https://dot.ca.gov/-/media/dot-media/district-12/documents/summary-a11y.pdf.

149. Colorado Department of Transportation, Colorado Road Usage Program Final Report (2017) (No. CDOT-2017-11), *available at* https://www.codot.gov/programs/ruc/programs/ruc/documents/rucpp-final-report.

150. Oregon Department of Transportation, Oregon's Road Usage Charge: The OReGO Program Final Report (2017) (authorized by Or. H.B. 2017), *available at* https://www.oregon.gov/ODOT/Programs/RUF/IP-Road%20Usage%20Evaluation%20Book%20WEB_4-26.pdf.

151. *Road Use Charges (RUC): News From the States*, Nat'l Conf. St. Legislatures, Apr. 24, 2018, http://www.ncsl.org/research/transportation/road-use-charges.aspx.

pilots assessed the use of road user charging to replace gasoline taxes, but the privacy considerations are the same as they would be for an areawide charge or other mileage-based fee or toll.) In particular, the Colorado study noted, after review of several other road pricing pilots and studies, that

> one effective way to address privacy concerns is to allow users to select the mileage reporting option they are most comfortable with. Those with significant privacy concerns can select a low-technology mileage reporting option such as odometer reporting, while those that are more comfortable with technology can select the GPS enabled mileage option.[152]

With any approach, municipalities should pay close attention to legal requirements relating to user data and its management, regardless of whether the data are handled by a private or governmental entity. A breach of data security could give rise to significant legal claims even where such requirements are closely followed.

C. *For-Hire Vehicle Data*

Municipalities ask for-hire vehicle companies (also referred to as transportation network companies or TNCs) to provide trip data for a variety of reasons, including so the municipality can better assess TNC activity in a cordon zone (this last form of data is relevant where cities have implemented or are considering implementing fleet pricing for for-hire vehicles within a cordon zone, as New York City and Chicago have done). In collecting any type of personal or user data from TNCs, cities should take care to comply with federal, state, and local data security requirements. Moreover, even where data collection policies have been appropriately crafted, for-hire vehicle companies may claim that they are not required to turn over such data or may file suit against the municipality in an attempt to prevent disclosure of the information.[153] Whether a municipality succeeds on the merits of such a suit would depend on applicable facts and law, but municipalities may wish to consider the risks of this type of litigation with for-hire vehicle companies in developing data disclosure policies.

V. The Litigation Grab Bag

Of course, a city's authority to regulate traffic does not preclude potential litigation aimed at preventing implementation of changes to traffic patterns. Affected neighbors or others may look for legal hooks upon which to challenge proposed changes to on-street traffic. Several of the cases discussed herein began as complaints by residents or drivers concerned about impacts to their ability to drive or about increased or decreased traffic near their homes or businesses.[154] In many of these cases, the law allowing municipalities to set traffic patterns is fairly well settled, but cities and towns looking to close roads or limit traffic should be sure to craft their policies to avoid federal preemption and comply with state enabling laws in order to minimize the burden of fending off any legal attacks. Other legal issues that may arise in litigation include:

- **Takings**. There are an extensive number of cases considering the question of whether road closures constitute compensable takings; a discussion of that case law and survey of the outcomes are beyond the scope of this Article, but cities should take care to avoid any such result.

- **Environmental review statutes**. Block associations and residents surrounding 14th Street in Manhattan joined together to challenge the 14th Street Busway, which prohibits most uses of private cars in favor of priority bus lanes. These neighboring block associations and residents alleged that the review process required by state and local environmental review statutes had been insufficient (while the case remains open, no court has determined this to be the case).[155] Implementation of the busway, which had been scheduled to open in July 2019, was enjoined by the courts twice before finally going into effect.

- **Fleet pricing (i.e., a surcharge on taxi and other for-hire vehicle rides)**. A group of taxicab owners, operators, and fleet managers brought suit against New York State and the New York City Taxi & Limousine Commission in connection with a surcharge on for-hire vehicle rides in much of Manhattan, alleging violations of substantive due process under both the U.S. and New York State Constitutions and the Equal Protection Clause of the U.S. Constitution, among other allegations.[156] The court rejected petitioners' claims.[157] A one-month stay during the pending litigation cost the state an estimated $1 million per day, money that would have gone to fund public transit.[158]

152. Colorado Department of Transportation, *supra* note 149, at 18.

153. *See*, *e.g.*, City & County of San Francisco v. Uber Techs., Inc., 36 Cal. App. 5th 66, 76 (Cal. Ct. App. 2019); Lyft, Inc. v. City of Seattle, 190 Wash. 2d 769 (Wash. 2018); Rasier, LLC v. New Orleans, 222 So. 3d 806, 813 (La. Ct. App. 2017); City of Columbus v. Lyft, Inc., 22 N.E.3d 304 (Franklin County Mun. Ct. 2014); Carniol v. N.Y. City Taxi & Limousine Comm'n, 42 Misc. 3d 199, 209 (N.Y. Sup. Ct. 2013).

154. *See*, *e.g.*, Christensen v. City of Pocatello, 142 Idaho 132 (Idaho 2005).

155. Council of Chelsea Block Ass'ns v. City of N.Y. Dep't of Transp., No. 156153/19 (N.Y. Sup. Ct. June 20, 2019); 14th St. Coalition v. City of N.Y. Dep't of Transp., No. 159030/18 (N.Y. Sup. Ct. Sept. 28, 2018).

156. Memorandum of Law in Further Support of Order to Show Cause Seeking Preliminary Injunction, Taxifleet Mgmt. LLC v. State, No. 161920/18 (N.Y. Sup. Ct. Jan. 16, 2019).

157. Decision/Judgment at 10, Taxifleet Mgmt. LLC v. State, No. 161920/18 (N.Y. Sup. Ct. June 25, 2019).

158. Respondent State of N.Y.'s Memorandum of Law in Opposition to Petitioner's Motion for Preliminary Injunction and in Support of the State's Cross-Motion to Dismiss the Verified Petition at 2, Taxifleet Mgmt. LLC v. State, No. 161920/18 (N.Y. Sup. Ct.).

VI. Considerations in Crafting LTZ Laws and Policies

In crafting LTZ policies, cities will need to consider federal preemption and comportment with federal and state law, as well as the particular privacy concerns inherent to LTZ and congestion pricing programs. LTZ laws and policies that take into account the legal issues identified above are those that:

- Do not set any form of "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines," or "fuel economy standards or average fuel economy standards for automobiles" to avoid preemption under CAA §209(a) or EPCA §32919(a), respectively. Note that reference to low emissions automobile technologies, such as hybrids or electric vehicles, may be considered proxies for fuel economy standards, per *Metropolitan Taxicab II*. In this respect, bans or fees on *all* vehicle traffic, or all vehicle traffic other than public transport and/or commercial deliveries, may be less likely to be preempted than those that ban or set a toll for only some traffic based on emissions or fuel economy, or a proxy thereof.
    - Where referencing emissions or fuel economy standards, or distinguishing between internal combustion engine and low emissions vehicle technologies, provide incentives for using low emissions technology rather than mandating their use. Note that incentives should not be "so coercive as to indirectly [constitute a] mandate."[159] Incentives might include access to priority lanes, parking, charging, or loading zones.
    - In the congestion or road pricing context, the courts have not yet weighed in on toll, fee, or pricing differentials set according to emissions or fuel economy standards. It is therefore not clear what, if any, pricing differential would be considered by a court to be an incentive as opposed to a *de facto* mandate.
- Set in-use restrictions for vehicles, which are permitted by CAA §209(d) and which can have a variety of benefits, including limiting traffic or speeding up slow-moving traffic, improving public safety, and limiting emissions. Such in-use restrictions might include the "carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles" identified in *Association of Taxicab Operators II*, as well as parking, stopping, and standing rules and use of curbside space. In particular, 23 U.S.C. §166 provides explicitly for certain alternative fuel vehicles to be granted access to HOV lanes on federal-aid highways.[160]
- Avoid regulating the "price, route, or service of any motor carrier" in a way that would invite preemption concerns under the FAAAA. Size or weight restrictions on vehicles (which can serve as an imperfect proxy for vehicle emissions) and programs setting truck routes are generally not preempted by the FAAAA.[161]
- Consider carefully the contours of the dormant Commerce Clause. Laws or policies that are discriminatory or that favor drivers from one state over another will invite state law and Commerce Clause scrutiny, though cities retain some authority to enact laws aimed at improving safety or reducing congestion, even if they have some impact on interstate commerce.
- Emphasize the local benefits that are appropriate exercises of the municipal police power, which include traffic reduction, public health and safety, and aesthetic and economic concerns, rather than the GHG emission reductions attributable to vehicles. Naming LTZs or LTZ policies with reference to these benefits may also be helpful, though not controlling, in avoiding federal scrutiny. (Examples include "low traffic zone," "congestion zone," "pedestrian zone," "busway," or other phrasing that emphasizes benefits to the flow of traffic or pedestrian and bicyclist safety.)
- Leverage the city's role as a market participant, which acts as an exception to both the Commerce Clause and preemption under federal statutes. A city is permitted to favor low emissions technology where it is procuring goods or services for itself.
- Where assessing a congestion price or other toll or fee, are appropriately authorized by applicable federal and state tolling laws. Federal law places significant restrictions on tolling on federal-aid highways, but the FHwA and the federal VPPP may also offer useful assistance and latitude for LTZ pricing strategies. State enabling laws vary and may require municipalities to work with the state-level government in enacting a congestion pricing regime. Close attention should also be paid to the allowable uses of tolling revenues.

159. Association of Taxicab Operators II, 720 F.3d 534, 541, 43 ELR 20137 (5th Cir. 2013).

160. 23 U.S.C. §166(b)(5)(A).

161. 49 U.S.C. §14501(a)(2).

- Are protective of individual privacy to the extent required by federal, state, and local law and exercise due care with respect to vehicle and payment data (including any data handled by private contractors). Where vehicle operators are required to make payments, as in congestion pricing programs, offering options that require varying amounts of user information can allow motorists to choose the option that meets their level of privacy concern.

- Where these recommendations are infeasible, pricing parking, offering incentives like vehicle charging, and greening the city's own municipal fleet can be useful policy tools to reduce vehicle emissions.

- Otherwise comport with individual state law and municipal enabling statutes to minimize the risk of additional litigation.

VII. Conclusion

Local governments have significant tools available to them in crafting LTZ policies. While some approaches implemented abroad are not feasible in the U.S. legal context, and while appropriate strategies will vary from place to place in the United States for a variety of reasons, including legal ones, cities wield considerable authority to control traffic within their borders, subject to state law. Moreover, working with states and the federal government, municipalities can use pricing strategies—on all vehicles, on for-hire vehicles, or on parking—to reduce traffic congestion. Federal preemption is a significant concern, particularly where fuel economy or fuel efficiency, emissions control standards, or vehicle emissions technology are implicated, but it does not stand in the way of crafting LTZ policy that does not run afoul of these standards or structures them as true incentives.

LTZs can provide a range of benefits to a city or local area. The policy focus here is on GHG emission reductions, but as in much of climate policy, the co-benefits are numerous. It is in the pursuit of these ancillary benefits—traffic and congestion mitigation; protection of health and safety; improved local air quality; development of pedestrian, bike, and commercial amenities—that municipalities can exercise significant police powers. LTZ strategies involving road closures, limits on traffic, road and congestion pricing, and other policies can address a range of these benefits, including (under the guidance of an expert in GHG emissions modeling) GHG emissions. Cities are increasingly looking for options to mitigate traffic or eliminate it altogether in certain geographic areas. With careful drafting to accommodate federal and state considerations, LTZ strategies can help accomplish these goals, and in so doing can help cities make significant progress in achieving their carbon mitigation targets.