GORDON, WOLF & CARNEY CHTD

March 28, 2025

Re: Request for an UNFAVORABLE report on SB 883

Dear Members of the Environment and Transportation Committee:

I am attorney in private practice in Baltimore County. My law firm handles consumer protection cases, including cases against trespass towing companies that have engaged in predatory, unfair and/or deceptive practices.

I write at this time to urge the Environment and Transportation Committee to give SB 883 an unfavorable report. While I oppose the bill in its entirety, if passed by the House in its current form, SB 883 would create a Workgroup on an issue that would not only overturn decades of legal precedent, but also significantly disrupt towing operations statewide; and it would do so with a membership that largely excludes consumer advocates and other important stakeholders.

The Proposed Workgroup Bill Will be Looking for a Solution When the Law is Clear and there is no Problem

First, a non-consensual towing lien is not appropriate or necessary in this State. As an advocate with more than ten (10) years of experience handling towing litigation in Maryland, I have not heard private parking lot owners complain of a shortage of towing companies able and willing to tow improperly parked vehicles on their behalf. Nor, during the many times that this issues has been before the General Assembly in past years, have the bills' proponents claimed that there is a "towing issue" in Maryland. Indeed, the non-consensual towing lien that is the subject of the proposed Workgroup is limited to ***post*** towing remedies that, if ultimately enacted, will ***not*** positively impact towing operations statewide (which, generally, run smoothly). Only the towing companies will benefit. However, it will come at the expense of consumers, and carry, as discussed below, a prohibitive price tag for Maryland and Maryland's Counties.

Second, there is no question that non-consensual towing liens are not only illegal in Maryland, but also inherently anti-consumer. Maryland's appeals Courts have consistently held that no possessory lien exists with respect to a towed vehicle at common law. *See T.R. v. Lee*, 55 Md. App. 629 (1983); *Cade, t/a G&G Towing v. Montgomery County*, 83 Md. App. 419, 427 (1990). The Office of the Attorney General ("OAG") also has determined that such liens are illegal. *See* 73 Md. Op. Atty. Gen. 349 (Md.A.G.), 1988 WL 482024. Indeed, as recently as last year, the OAG, in a letter to then-Delegate Sara Love, pointed out the difficulties with legislation proposing the establishment of a non-consensual towing lien. *See* OAG Letter dated April 5, 2024, attached as **Attachment 1**.

The sound public policy behind these and other opinions is that permitting towing companies, especially unscrupulous ones, to exercise a lien, encourages them to tow more vehicles because payment, whether the tow is proper or not, is guaranteed. In short, the

lien essentially takes away the right of all consumers to challenge the tow as unlawful or predatory. At the same time, it also adversely impacts commerce because consumers do not want to return to where they believe their vehicles were improperly towed.

Third, even though Maryland law does not permit non-consensual liens, some towing companies (in Montgomery County and Baltimore City, especially) already ignore the Courts and the General Assembly, and unilaterally (and in my view deceptively) represent to consumers that such a towing lien already exists. *See* **Attachment 2**, Towing Sign.

Fourth, non-consensual towing liens are inherently unconstitutional unless significant and costly due process protections are included. In *Huemmer v. Mayor & City Council of Ocean City*, 632 F.2d 371 (4th Cir. 1980), the Fourth Circuit held that a statute to authorize a lien on a vehicle towed from private property must provide ***both*** notice and a hearing or it is "manifestly defective" from a due process perspective. *Id.* at 372. To include adequate notice and an opportunity for an expedited hearing will come at a substantial cost for all Maryland jurisdictions – Judges, administrators and office space are all required. The fiscal impact will be prohibitive, especially since the Fourth Circuit has held that due process requires that any possessory lien must be supported by a system that can deliver an expedited hearing "***within twenty-four hours after a request***." *De Franks v. Mayor and City Council of Ocean City*, 777 F.2d 185, 187 (4th Cir. 1985). For the State and every Maryland County, the cost will be tremendous.

The Mission of the Workgroup Needs to be Balanced

However, if the bill is passed and Workgroup established, then is it in the interest of the public and Maryland's Counties, generally, that the mission of the Workgroup be amended to reflect that SB 883 is more balanced:

> FOR the purpose of establishing the Post–Towing Procedure Workgroup to consider whether it is necessary, appropriate and in the public interest to establish ~~identify and examine issues relating to the establishment of~~ statutory liens on motor vehicles that are towed or removed from privately owned parking lots under certain circumstances; the costs and resources necessary to satisfy the requirements of due process if such a lien is established; the fiscal impact of on Maryland's Counties; and generally relating to the Post–Towing Procedure Workgroup

In subsection (f), the bill must also provide that:

> The Workgroup is not working under any presumption that a statutory lien is necessary, appropriate or in the public interest.

Membership of the Workgroup Needs to Be Balanced and Fair

Finally, there is no question that the composition of the Workgroup, as currently in SB 883, needs to be adjusted. In this regard, as a matter of equity and fairness, consumer advocates must be included in equal measure to provide balance.

Respectfully,

Richard S. Gordon

CANDACE MCLAREN LANHAM
Chief Deputy Attorney General

CAROLYN A. QUATTROCKI
Deputy Attorney General

LEONARD J. HOWIE III
Deputy Attorney General

CHRISTIAN E. BARRERA
Chief Operating Officer

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

PETER V. BERNS
General Counsel

ANTHONY G. BROWN
Attorney General

SANDRA BENSON BRANTLEY
Counsel to the General Assembly

DAVID W. STAMPER
Deputy Counsel

JEREMY M. MCCOY
Assistant Attorney General

SHAUNEE L. HARRISON
Assistant Attorney General

NATALIE R. BILBROUGH
Assistant Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

Attachment 1

April 5, 2024

The Honorable Sara Love
Maryland General Assembly
210 Lowe House Office Building
6 Bladen Street
Annapolis, Maryland 21401
Via email

RE: Senate Bill 107 – Commercial Law – Statutory Liens – Motor Vehicles Towed or Removed From Parking Lots

Dear Delegate Love:

You have requested advice concerning the constitutionality of a proposed amendment to Senate Bill 107 ("Commercial Law – Statutory Liens – Motor Vehicles Towed or Removed From Parking Lots"). It is my view that the bill, even with the proposed amendment, presents a significant risk of leading to a violation of the Due Process Clause because it does not provide the opportunity for a prompt hearing so that a person can challenge the legality and factual basis of the tow.

Senate Bill 107

Senate Bill 107 establishes "a lien on a motor vehicle if the person tows or removes the motor vehicle from a privately owned parking lot under Title 21, Subtitle 10A of the Transportation Article" for charges incurred for towing, recovery, storage, or notice provided. Proposed Md. Code Ann., Comm. Law, § 16-202(e). You have asked our Office to consider the constitutionality

of the bill, including the proposed amended language shown below, which requires certain signage and conditions the lien on the tow being legal.

> (E) (1) **IF A CLEARLY VISIBLE SIGN IS POSTED AT A PRIVATELY OWNED PARKING LOT THAT EXPLICITLY NOTIFIES PARKERS THAT THEIR VEHICLE WILL BE SUBJECT TO A LIEN IF IT IS LEGALLY TOWED PURSUANT TO STATE AND LOCAL LAW FOR PARKING IMPROPERLY**, A PERSON HAS A **POSSESSORY** LIEN ON A MOTOR VEHICLE IF THE PERSON **LEGALLY** TOWS OR REMOVES THE MOTOR VEHICLE FROM A PRIVATELY OWNED PARKING LOT UNDER TITLE 21, SUBTITLE 10A OF THE TRANSPORTATION ARTICLE, ON BEHALF OF THE PARKING LOT OWNER OR AGENT, FOR ANY **REASONABLE** CHARGE INCURRED FOR ANY:
>
> (I) TOWING;
>
> (II) RECOVERY;
>
> (III) STORAGE; OR
>
> (IV) NOTICE PROVIDED.

Constitutional Analysis

It is my view that the bill, even with the proposed amended language, is at a substantial risk of being found unconstitutional if challenged because it does not provide an opportunity for a prompt post-deprivation hearing so that a person with an interest in the vehicle could test the factual and legal basis for the tow. Deprivation of even a temporary use of a vehicle implicates a constitutionally protected property interest and thus requires certain procedural due process protections. *Stypmann v. City & Cnty. of San Francisco*, 557 F.2d 1338, 1342-43 (9th Cir. 1977). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Numerous federal courts have concluded that state or local laws allowing a vehicle to be towed without providing notice and an opportunity for a hearing within a short amount of time after the tow violate the Due Process Clause of the Fourteenth Amendment. For example, the United States Court of Appeals for the Fourth Circuit affirmed that an Ocean City towing ordinance "was manifestly defective" when vehicle recovery "was absolutely conditioned on payment of towing and storage charges" and "[n]o opportunity was presented for notice and a hearing to establish whether or not the initial removal of the vehicle was rightful or wrongful." *Huemmer v. Mayor & City Council of Ocean City*, 632 F.2d 371, 372 (4th Cir. 1980). The Fourth Circuit later upheld the Ocean City towing ordinance after it added a new "provision requiring written notice to the owner of the vehicle, within one working day of the tow, of his entitlement to a hearing [*within 24 hours of request*] on the question of legality of the seizure." *De Franks v. Mayor & City Council of Ocean City*, 777 F.2d 185, 187 (4th Cir. 1985).

Likewise, the United States Court of Appeals for the Ninth Circuit agreed that provisions of the California Vehicle Code "authorizing removal of privately owned vehicles from streets and highways without prior notice or opportunity for hearing" and another statute "establishing a possessory lien for towage and storage fees without a hearing before or after the lien attaches" were unconstitutional for the same reason. *Stypmann*, 557 F.2d at 1344-45. In reaching its conclusion, the Ninth Circuit court noted that the statute at issue did not provide for the release of the vehicles upon payment of a bond, that "no official participates in any way in assessing the storage charges or enforcing the lien," "[t]he only hearing available under any other state procedure may be long deferred, and the burden of proof is placed upon the owner of the property seized rather than upon those who have seized it." *Id*. at 1343. The court determined that a San Francisco ordinance providing a vehicle owner with a hearing within five days of providing notice was "clearly excessive" and other remedies through a "regular court action" would entail "considerable delay." *Id*. at 1344, 1342, n. 19.

Maryland law already requires persons towing a vehicle to provide notice to certain persons, including the vehicle owner, within a certain amount of time after towing. Md. Code Ann., Transp. § 21-10A-04; *see also* Md. Code. Ann. Comm. Law § 16-203(b) (requiring notice to holders of security interests in the property). But neither the Transportation Article, nor Senate Bill 107, provides a prompt hearing opportunity or notice thereof. However, there are other procedural protections available to a property owner. Section 16-206(a) of the Commercial Law Article stays execution of a lien if the owner "disputes any part of the charge for which the lien is claimed" and "institute[s] appropriate judicial proceedings." Md. Code. Ann. Comm. Law § 16-206(a). And if the owner "disputes any part of the charge for which the lien is claimed, he immediately may repossess his property by filing a corporate bond for double the amount of the charge claimed." *Id*. § 16-206(b). It is possible that a court could find these protections are sufficient, but I think it is more likely they would not. Those provisions require an owner to file an action in court, and a hearing would likely not occur in a quick enough timeframe. Generally, hearings within one to two days of a request have been determined to be constitutional, while hearings after five days or more have been found to be unconstitutional. *See Towers v. City of Chicago*, 979 F. Supp. 708, 715, n.13 (N.D. Ill. 1997), *aff'd*, 173 F.3d 619 (7th Cir. 1999) (collecting cases). In addition, the provision allowing the owner to retake possession after filing a bond is also unlikely to save the statute. *See N. Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) (holding that a garnishment statute was unconstitutional because it allowed a creditor to impound a bank account so that the owner could not use it until litigation of the debt was resolved unless the owner paid a bond). A court would likely conclude, as did the court in *Huemmer*, that the "failure to provide an opportunity to be heard at some meaningful time before the injury occasioned by the taking becomes final" is constitutionally deficient. *Huemmer v. Mayor & City Council of Ocean City*, 474 F. Supp. 704, 711 (D. Md. 1979), *aff'd in part, rev'd in part*, 632 F.2d 371 (4th Cir. 1980).

It is possible that, in a particular scenario, a local law that requires a hearing would apply and could provide adequate procedural due process, but that obviously would not insulate the statute from legal challenge in other scenarios. Accordingly, it is my view that Senate Bill 107

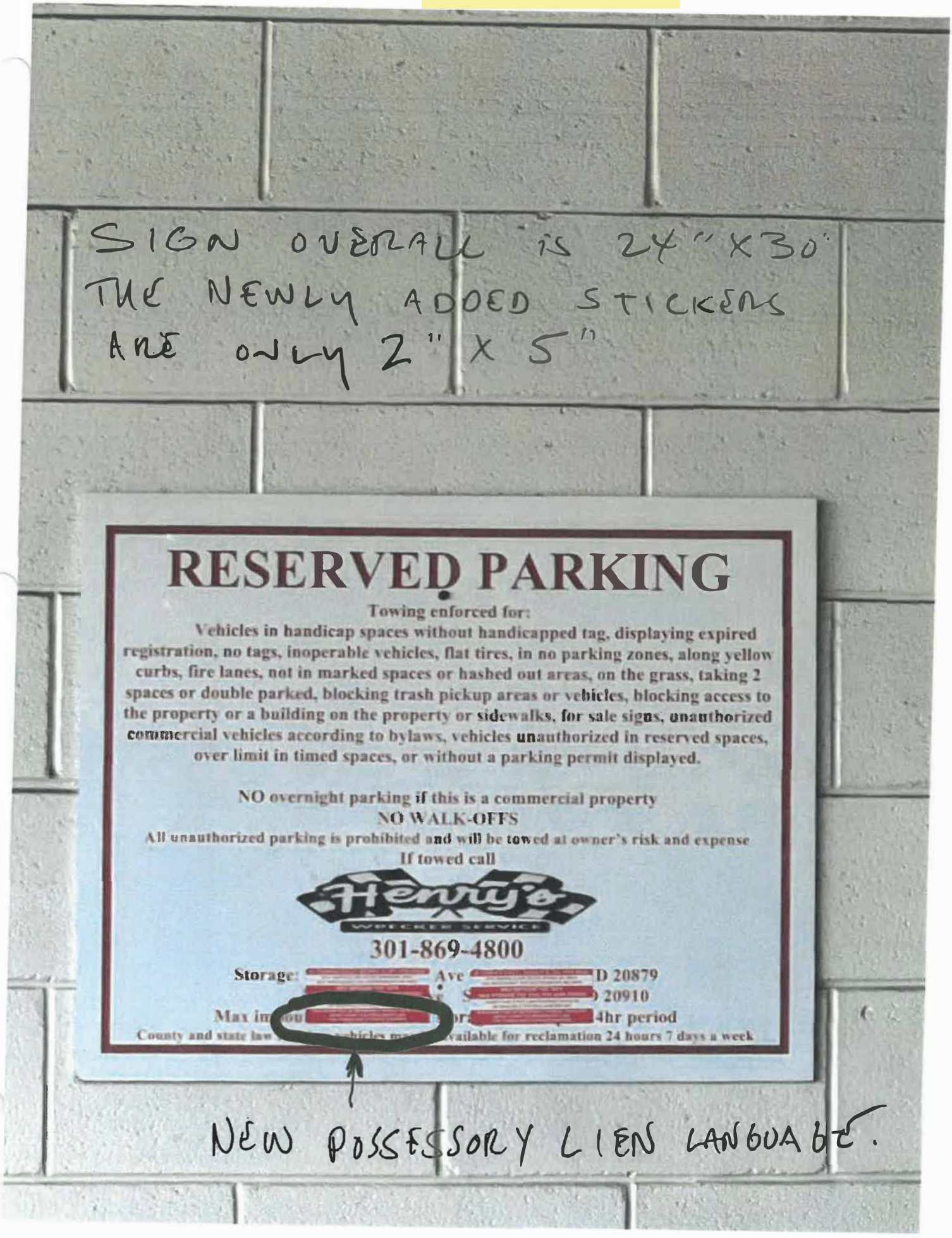
would be at risk of being found to be unconstitutional because the attachment of any lien is not conditioned upon the provision of constitutionally adequate notice and opportunity for a hearing within a short time after any tow.

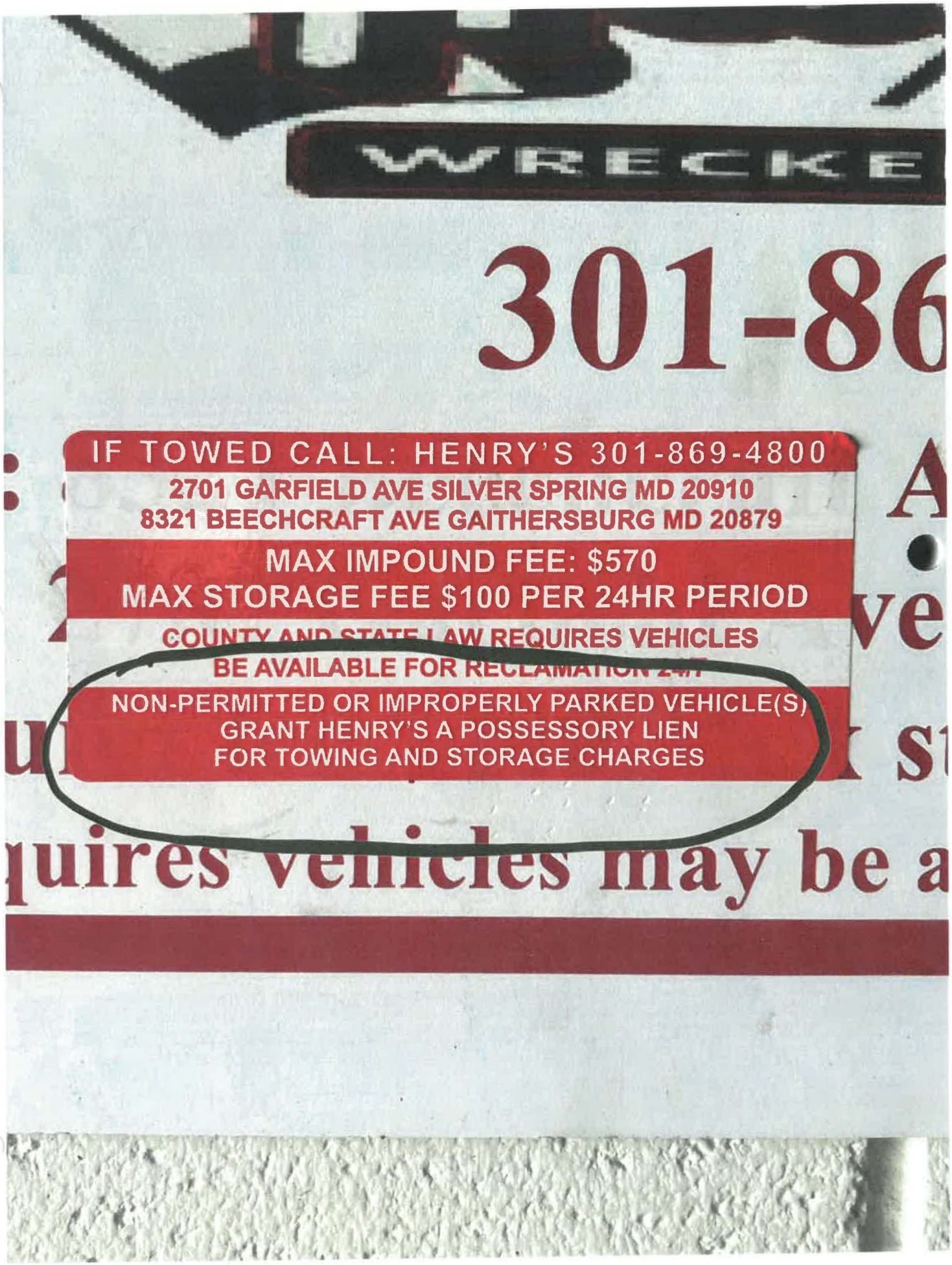
I hope this information is helpful. Please let me know if you have further questions.

Sincerely,

Natalie R. Bilbrough
Assistant Attorney General

Attachment 2




WRECKE
301-86
IF TOWED CALL: HENRY'S 301-869-4800
2701 GARFIELD AVE SILVER SPRING MD 20910
8321 BEECHCRAFT AVE GAITHERSBURG MD 20879
MAX IMPOUND FEE: $570
MAX STORAGE FEE $100 PER 24HR PERIOD
COUNTY AND STATE LAW REQUIRES VEHICLES
BE AVAILABLE FOR RECLAMATION 24/7
NON-PERMITTED OR IMPROPERLY PARKED VEHICLE(S)
GRANT HENRY'S A POSSESSORY LIEN
FOR TOWING AND STORAGE CHARGES
quires vehicles may be a