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11 UNITED STATES DISTRICT COURT
12 FOR THE EASTERN DISTRICT OF CALIFORNIA

13 CALIFORNIA DUMP TRUCK OWNERS
14 ASSOCIATION,

15 Plaintiff,

16 v.

17 MARY D. NICHOLS, Chairperson of the
18 California Air Resources Board; and JAMES
19 GOLDSTENE, Executive Officer of the
20 California Air Resources Board,

21 Defendants,

22 NATURAL RESOURCES DEFENSE
23 COUNCIL, INC.,

24 Defendant-Intervenor.
25
26
27
28

Case No. 2:11-CV-00384-MCE-GGH

NATURAL RESOURCES DEFENSE
COUNCIL'S MEMORANDUM IN
OPPOSITION TO PLAINTIFF
CALIFORNIA DUMP TRUCK OWNERS
ASSOCIATION'S MOTION FOR
PRELIMINARY INJUNCTION

Date: December 15, 2011
Time: 2:00 p.m.
Judge: Hon. Morrison C. England, Jr.
Courtroom: 7

TABLE OF CONTENTS

1

2 I. INTRODUCTION 1

3 II. STATEMENT OF FACTS 2

4 A. Diesel Exhaust From Trucks Threatens Air Quality And Poses A Significant

5 Public Health Threat 2

6 B. The Truck and Bus Rule 3

7 III. STANDARD OF REVIEW 5

8 IV. CDTOA IS NOT LIKELY TO SUCCEED ON THE MERITS 5

9 A. The FAAA Did Not Repeal California’s Authority Under The Clean Air

10 Act to Adopt The Truck And Bus Rule 6

11 1. Congress Expressly Reserved California’s Authority To Adopt The

12 Rule Under The Clean Air Act 6

13 2. Congress Intended to Preempt “Economic Regulation” When It

14 Adopted The FAAA, Not Repeal Provisions In The Clean Air Act..... 8

15 B. The Truck and Bus Rule Does Not Significantly Affect Motor Carrier

16 Prices, Routes Or Services 11

17 1. The Rule Will Not Significantly Affect Prices 12

18 2. The Rule Will Not Significantly Affect Routes..... 13

19 3. The Rule Will Not Significantly Affect Services 14

20 4. CDTOA’s Cases Do Not Demonstrate That It Is Likely To Succeed 16

21 V. AN ANALYSIS OF HARM, BALANCE OF THE EQUITIES, AND THE

22 PUBLIC INTEREST STRONGLY WEIGH AGAINST ISSUING AN

23 INJUNCTION 17

24 A. CDTOA Fails To Demonstrate A Likelihood Of Irreparable Harm..... 17

25 B. An Injunction Would Substantially Injure the State And The Public

26 Interest..... 19

27 VI. CONCLUSION..... 20

28

TABLE OF AUTHORITIES

FEDERAL CASES

Abdu-Brisson v. Delta Airlines, Inc.,
 128 F.3d 77 (2nd Cir. 1997)..... 11, 13

Air Transport Ass’n of Am. v. City and County of San Francisco,
 992 F. Supp. 1149 (N.D. Cal. 1998) 15

Allway Taxi Inc. v. City of New York,
 340 F. Supp. 1120 (S.D.N.Y.), *aff’d*, 468 F.2d 624 (2nd Cir. 1972)7

Am. Trucking Ass’ns v. City of Los Angeles,
 559 F.3d 1046 (9th Cir. 2009) 16

Am. Trucking Ass’ns v. City of Los Angeles,
 No. 10–56465, 2011 WL 4436256 (9th Cir. Sept. 26, 2011)5, 11, 15, 16

Am. Trucking Ass’ns v. City of Los Angeles,
 No. CV 08-4920, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010), *rev’d in part*, 2011 WL
 4436256..... 16

Amoco Prod. Co. v. Vill. of Gambell,
 480 U.S. 531, 107 S. Ct. 1396 (1987).....20

Ass’n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.,
 622 F.3d 1094 (9th Cir. 2010) 10

Californians for Safe & Competitive Dump Truck Transp. v. Mendonca,
 152 F.3d 1184 (9th Cir. 1998)passim

Californians for Safe & Competitive Dump Truck Transp. v. Mendonca,
 957 F. Supp. 1121 (N.D. Cal. 1997) 13

Cardenas v. McLane FoodServices,
 Case No. SACV 10–473, 2011 WL 2714430 (C.D. Cal. July 8, 2011)..... 14

Dilts v. Penske Logistics,
 Case No. 08–CV–318, 2011 WL 4975520 (S.D. Cal. Oct. 19, 2011) 16, 17

1 *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*,
 2 498 F.3d 1031 (9th Cir. 2007)7
 3 *Exxon Mobil Corp. v. United States Env’tl. Prot. Agency*,
 4 217 F.3d 1246 (9th Cir. 2000)6
 5 *Fitz-Gerald v. SkyWest Airlines*,
 6 155 Cal. App. 4th 411 (2007) 15
 7 *Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm’n*,
 8 634 F.3d 206 (2nd Cir. 2011)..... 11
 9 *Huron Portland Cement Co. v. City of Detroit*,
 10 362 U.S. 440, 80 S. Ct. 813 (1960).....6
 11 *J.E.M. Ag Supply v. Pioneer Hi-Bred Int’l*,
 12 534 U.S. 124, 122 S. Ct. 593 (2001).....8
 13 *Medtronic, Inc. v. Lohr*,
 14 518 U.S. 470, 116 S. Ct. 2240 (1996).....5
 15 *Morales v. Trans World Airlines, Inc.*,
 16 504 U.S. 374, 112 S. Ct. 2031 (1992)..... 10, 12
 17 *Morton v. Mancari*,
 18 417 U.S. 535, 94 S. Ct. 2474 (1974).....8
 19 *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*,
 20 762 F.2d 1374 (9th Cir. 1985) 19
 21 *Omya, Inc. v. Vermont*,
 22 33 Fed. Appx. 581 (2nd Cir. 2002)..... 10, 11
 23 *Omya, Inc. v. Vermont*,
 24 80 F.Supp.2d 211 (D.Vt. 2000)..... 10
 25 *Rowe v. New Hampshire Motor Transport Ass’n*,
 26 552 U.S. 364, 128 S. Ct. 989 (2008)..... passim
 27 *Winter v. Natural Res. Def. Council*,
 28 555 U.S. 7, 129 S. Ct. 365 (2008).....5, 19

1 **FEDERAL STATUTES**

2 42 U.S.C. § 7401(a)(3).....6

3 42 U.S.C. § 7401(b)(1)6

4 42 U.S.C. § 7409.....6

5 42 U.S.C. § 7410.....6

6 42 U.S.C. § 7416.....7, 8, 11

7 42 U.S.C. § 7509(b)(1)7

8 42 U.S.C. § 7521.....8

9 42 U.S.C. § 7543.....11

10 42 U.S.C. § 7543(a)7

11 42 U.S.C. § 7543(b)7

12 42 U.S.C. § 7543(d)7, 8, 10

13 42 U.S.C. § 7550(3)6

14 42 U.S.C. § 7550(5)6

15 49 U.S.C. § 14501(c)(1).....1, 5, 8, 9

16 49 U.S.C. § 41713(b)(1)9

17

18 **STATE REGULATIONS**

19 13 Cal. Code. Reg. § 20251

20

21 **FEDERAL REGISTER**

22 76 Fed. Reg. 40652 (July 11, 2011).....7, 11

23

24 **OTHER AUTHORITIES**

25 Fed. R. Evid. 201(b).....9

26 H.R. Conf. Rep. No. 103-6778, 9

27

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1 **I. INTRODUCTION**

2 Plaintiff California Dump Truck Owners Association’s (“CDTOA”) argues that
3 California’s Truck and Bus Rule¹ is preempted by the Federal Aviation Administration
4 Authorization Act, 49 U.S.C. § 14501(c)(1), (“FAAA”), and has moved for a preliminary
5 injunction. The Truck and Bus Rule will clean up the largest mobile source of air pollution in the
6 state by modernizing aging diesel vehicles. This case is about whether Congress intended to take
7 away California’s authority to adopt the rule when it enacted the FAAA. Congress did not, and
8 CDTOA’s motion should be denied.

9 First, CDTOA cannot show that it is likely to succeed on the merits. The FAAA was
10 enacted to enhance competition in the motor carrier industry, and to level the playing field between
11 the trucking industry and deregulated air carrier industry. California adopted the rule pursuant to
12 authority expressly reserved to states under the federal Clean Air Act, and to achieve federal air
13 quality standards. CDTOA’s claim asks this court to find that Congress implicitly repealed
14 provisions in the Clean Air Act that authorize states to reduce air pollution from motor vehicles.
15 However, implicit repeals are strongly disfavored and CDTOA has not provided any evidence, let
16 alone the “overwhelming evidence” necessary, to demonstrate that such a repeal occurred.
17 Further, even if CDTOA could show that Congress intended to limit state authority to regulate air
18 pollution from motor carriers, it has not provided any admissible evidence that the rule has more
19 than a tenuous, remote, or peripheral effect on prices, routes, or services.

20 Second, CDTOA greatly exaggerates the harm its members may incur pending resolution
21 of CDTOA’s preemption claim, and in any event, CDTOA’s alleged injuries are outweighed by the
22 harm Defendants and the public would suffer if the rule is enjoined. For these reasons, and the

23
24 ¹ The “Truck and Bus Rule” refers to the “Regulation to Reduce Emissions of Diesel Particulate
25 Matter, Oxides of Nitrogen and Other Criteria Pollutants, from In-Use Heavy-Duty Diesel-
26 Fueled Vehicles,” 13 Cal. Code. Reg. § 2025. CARB adopted amendments to the rule in
27 September 2011, which are expected to become effective on December 14, 2011. The amended
28 rule is attached to the Decl. of M. Lin Perrella in Support of NRDCs Opp. to CDTOA’s Mot. for
Prelim. Inj. (“Lin Perrella Decl.”) as Exhibit A. CDTOA’s challenge is to the amended rule. *See*
CDTOA Request for Judicial Notice, Ex. B (CARB Final Statement of Reasons for the amended
rule); Pl. Mot. at 2 (describing the rule as beginning on January 1, 2012, which is the first
compliance date for the amended rule).

1 reasons set forth in Defendants' opposition papers, which NRDC joins in full, CDTOA's motion
2 should be denied.

3 **II. STATEMENT OF FACTS**

4 **A. Diesel Exhaust From Trucks Threatens Air Quality And Poses A Significant**
5 **Public Health Threat**

6 In 2010, diesel trucks and buses were the largest source of air pollution in the state,
7 accounting for over 30% of statewide emissions of oxides of nitrogen ("NOx") and about 40% of
8 diesel particulate matter ("PM") emissions from all mobile source emissions, including cars. Lin
9 Perrella Decl., Ex. C at 19. Diesel PM contributes to ambient concentrations of fine particulate
10 matter ("PM 2.5"), which is "associated with premature mortality, aggravation of respiratory and
11 cardiovascular disease, asthma exacerbation, chronic and acute bronchitis and reductions in lung
12 function." *Id.*, Ex. B at 9. In 1998, the California Air Resources Board ("CARB") identified
13 diesel PM as a toxic air contaminant, and concluded that diesel PM is by far, the largest
14 contributor of known ambient air toxics cancer risk in California. *Id.*, Ex. C at 24.

15 Approximately 63,000 to 80,000 premature deaths occur each year in the U.S that are related to
16 exposure to PM2.5. *Id.* Approximately 9,200 of these deaths occur annually in California. *Id.*
17 Reducing emissions to meet federal air quality standards would result in 2,700 fewer premature
18 deaths annually. *Id.*

19 NOx emissions lead to formation of ozone and PM2.5. *Id.*, Ex. B at 10. Exposure to
20 ozone can result in "reduced lung function, increased respiratory symptoms, increased airway
21 hyperreactivity, and increased airway inflammation. Exposure to ozone is also associated with
22 premature death, hospitalization for cardiopulmonary causes, emergency room visits for asthma,
23 and restrictions in activity." *Id.*

24 The United States Environmental Protection Agency ("EPA") has established federal
25 clean air standards for PM 2.5 and ozone. *Id.*, Ex. C at 21. Regions in California, including the
26 San Joaquin Valley Air Basin ("SJVAB")² and South Coast Air Basin ("SCAB")³, violate EPA's

27
28 ² The SJVAB includes eight counties: San Joaquin, Stanislaus, Merced, Madera, Fresno, Kings,
Tulare, and portions of Kern County. http://www.valleyair.org/General_info/aboutdist.htm.

1 “PM 2.5” and “8-hour ozone” standards, which must be attained by 2014 and 2023, respectively.
2 *Id.*, Ex. C at 21-22. In order to meet the PM2.5 standard in these two regions, NOx emissions
3 will need to be reduced by approximately 50%. To achieve the 8-hour ozone standard, such
4 emissions will need to be reduced between 75 to 88%. *Id.*, Ex. C at 22. CARB views the Truck
5 and Bus Rule as a “key strategy” towards meeting these standards. *Id.*

6 **B. The Truck And Bus Rule**

7 CARB adopted the rule in December 2008, and approved amendments to the rule in
8 September 2011 in response to the recession. *Id.*, Ex. C at 9, Ex. D. The amendments relaxed the
9 rule’s environmental mandates, and reduced compliance costs by 50% over the first five years of
10 the rule and by approximately 60% over the life of the regulation. *Id.*, Ex C at 6. CARB has
11 transmitted the amendments to the Office of Administrative Law (“OAL”), and OAL is expected
12 to approve the amendments by December 14, 2011. All references herein to the Truck and Bus
13 Rule or the “rule” refer to the amended rule.

14 The rule will reduce emissions from aging diesel trucks and buses that operate in California
15 by requiring exhaust and vehicle retrofits and accelerated vehicle turnover. The end result is that
16 cleaner, less polluting vehicles will operate on California’s roadways. By 2020, nearly every truck
17 operating in California will have a PM filter, *Id.*, Ex. C at 45, and by 2023, all trucks operating in
18 California will meet 2010 model year emissions standards. *Id.*, Ex. C at 5. The rule applies to
19 nearly one million diesel trucks and buses, and to a number of industry sectors, including,
20 construction, for-hire transportation, manufacturing, retail and wholesale trade, vehicle leasing and
21 rental, bus lines, and agriculture. *Id.*, Ex. B at 1, Ex. C at 1.

22 With respect to “heavier trucks,”⁴ the rule starts to phase-in beginning January 2012, and
23 provides fleets with two primary ways to comply: adhere to a compliance schedule by engine
24 model year or utilize a “phase-in option.” *Id.*, Ex. A at §§ 2025(g)(1), 2025(i). The rule also
25

26 ³ The SCAB includes Orange County and portions of Los Angeles, Riverside and San Bernardino
27 counties. This area is home to over 16.8 million people—about half the population of the entire
28 state, and is one of the smoggiest regions in the nation. <http://www.aqmd.gov/aqmd/index.html>.

⁴ “Heavier trucks” are those with a gross vehicle weight rating greater than 26,000 pounds.
CDTOA members’ trucks fall into the “heavier truck” category.

1 provides a number of exemptions and “credits” that can be utilized to ease compliance. These
 2 compliance paths are summarized below.

3 Under the “Engine Model Year” schedule, the deadline for installation of PM filters and
 4 engine replacements depends on the model year of the truck. *Id.*, Ex. A at § 2025(g)(1), Ex. E.
 5 For example, 1996-1999 trucks are required, starting January 2012, to have a PM filter.

Engine Model Year Schedule for Heavier Trucks	
Engine Year	Requirement from January 1, 2012
Pre-1994	No requirements until 2015, then 2010 engine
1994-1995	No requirements until 2016, then 2010 engine
1996-1999	PM filter from 2012 to 2020, then 2010 engine
2000-2004	PM filter from 2013 to 2021, then 2010 engine
2005-2006	PM filter from 2014 to 2022, then 2010 engine
2007-2009	No requirements until 2023, then 2010 engine
2010	Meets final requirements

6 These same trucks must then be
 7 upgraded 8 years later with a vehicle
 8 meeting 2010 emissions standards.
 9 Trucks with a 1995 model year
 10 engine have no requirements until
 11 2016. By 2023, trucks and buses

12 must meet 2010 emissions standards with few exceptions.

13 Alternatively, fleets can utilize a “phase-in” option whereby the fleet decides which
 14 vehicles to retrofit or replace, regardless of engine model year. *Id.*, Ex. A at § 2025(i), Ex. E.
 15 Fleets utilizing this option would need to ensure that a certain percentage of their trucks have PM
 16 filters by each year shown in the table below. For example, by January 2012, a fleet would need to
 17 have PM filters on 30% of its trucks. This option counts 2007 model year and newer engines
 18 originally equipped with PM filters toward compliance and would reduce the overall number of

Phase-In Option for Heavier Trucks	
Compliance Date	Vehicles w/PM Filters
Jan. 1, 2012	30%
Jan. 1, 2013	60%
Jan. 1, 2014	90%
Jan. 1, 2015	90%
Jan. 1, 2016	100%

19 retrofit PM filters needed. *Id.*, Ex. E. Beginning January 1, 2020,
 20 all trucks would need to meet “Engine Model Year” requirements
 21 for heavier trucks. *Id.*, Ex. A at § 2025(i)(1).

22 The rule also provides a number of credits or exemptions.
 23 For example, owners of small fleets (3 vehicles or less),
 24 construction trucks that travel 20,000 or less miles per year, fleets
 25 than have downsized since 2006, and vehicles that operate in less polluted areas of the state can
 26 extend the time they have to comply with the rule. *Id.*, Ex. A at §§ 2025(h), (j)(1), (p)(1), (p)(2).

27 CARB estimates that the rule will cost approximately \$1.5 billion during the first five years
 28 of the rule, and \$2.2 billion over the life of the rule. *Id.*, Ex. C at 56. Costs per industry sector or

1 vehicle owner vary greatly and depend on, for example, the replacement cycle for individual
2 vehicles. *Id.* A number of funding programs are available to help truck owners comply with the
3 rule. *Id.*, Ex. C at 64.

4 The rule will substantially improve air quality. The rule and a related regulation for
5 “drayage trucks” will reduce statewide PM emissions from trucks and buses by 50% from baseline
6 levels in 2014. *Id.*, Ex. C at 45. Statewide NOx emissions will be reduced by 36% in 2023. *Id.*,
7 Ex. C at 46. The rule will prevent approximately 3,500 premature deaths statewide, and is critical
8 to California meeting federal air quality standards. *Id.*, Ex. C at 6, 22.

9 **III. STANDARD OF REVIEW**

10 A “plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
11 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
12 balance of equities tips in his favor, *and* that an injunction is in the public interest.” *Winter v.*
13 *Natural Resources Defense Council*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008) (emphasis added). The
14 plaintiff must establish *all* four of these points for an injunction to issue. *Id.*

15 **IV. CDTOA IS NOT LIKELY TO SUCCEED ON THE MERITS**

16 The FAAA precludes a state from “enact[ing] or enforce[ing] a law, regulation, or other
17 provision having the force and effect of law related to a price, route, or service of any motor carrier
18 . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). The term “price”
19 refers to “rates.” *American Trucking Associations v. City of Los Angeles* (“ATA v. LA”), No. 10–
20 56465, 2011 WL 4436256, at *7 (9th Cir. Sept. 26, 2011). “[R]outes refers to courses of travel . . .
21 [and] service refers to such things as the frequency and scheduling of transportation, and to the
22 selection of markets to or from which transportation is provided.” *Id.* CDTOA alleges that the
23 FAAA preempts section 2025(g) of the rule, and requests that this court “enjoin the enforcement of
24 the regulation until it can rule on whether the regulation is preempted . . .” Pl. Mot. at 10.

25 Two independent bases exist for finding that Congress did not intend to preempt the Truck
26 and Bus Rule. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240 (1996)
27 (congressional intent is the “ultimate touchstone” in every pre-emption case). First, the rule is
28 expressly authorized by the federal Clean Air Act, and there is no evidence that Congress intended

1 to repeal that authority when it adopted the FAAA. Second, even if the rule falls within the sphere
2 of regulations the FAAA was intended to preempt, CDTOA has not shown that the rule
3 “significantly” affects prices, routes or services. *Rowe v. New Hampshire Motor Transport Ass’n*,
4 552 U.S. 364, 370-71, 128 S. Ct. 989 (2008).⁵ Each of these points is discussed in turn below.

5 **A. The FAAA Did Not Repeal California’s Authority Under the Clean Air Act To**
6 **Adopt The Truck And Bus Rule**

7 **1. Congress Expressly Reserved California’s Authority To Adopt The**
8 **Rule Under The Clean Air Act**

9 California adopted the Truck and Bus Rule to implement the federal Clean Air Act. The
10 rule was enacted pursuant to federal authority that expressly reserves the power of states to adopt
11 “operational” restrictions for “in-use”⁶ motor vehicles, and to comply with federal mandates to
12 achieve clean air standards—the deadlines of which are fast approaching. This litigation presents a
13 case of first impression concerning the intersection of California’s authority to regulate air
14 pollution under the Clean Air Act and the regulation of motor carriers under the FAAA.

15 The Clean Air Act serves to “protect and enhance the quality of the Nation’s air resources
16 so as to promote the public health and welfare and the productive capacity of its population.” 42
17 U.S.C. § 7401(b)(1). Under that act, Congress created a federal-state partnership to combat air
18 pollution, in which the federal government sets standards for how clean the air must be, and state
19 and local governments devise and carry out “State Implementation Plans” to meet these standards.
20 *See* 42 U.S.C. §§ 7409, 7410. As a result, the Clean Air Act places the “primary responsibility”
21 for achieving clean air in the hands of state and local governments. *See id.* § 7401(a)(3); *Exxon*
22 *Mobil Corp. v. US EPA*, 217 F.3d 1246, 1250 (9th Cir. 2000); *Engine Mfrs. Ass’n v. S. Coast Air*

23 ⁵ In cases like the present—where an exercise of a state’s police power is challenged—it is
24 presumed that the state law is not preempted unless Congress’ intent to do so is “clear and
25 manifest”. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d
26 1184, 1186 (9th Cir. 1998); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442, 80
27 S. Ct. 813 (1960) (state efforts to reduce air pollution “fall[] within the exercise of even the most
28 traditional concept of what is compendiously known as the police power.”).

⁶ “In-use” motor vehicles are distinguishable from “new” motor vehicles. “New motor vehicles”
are vehicles “the equitable or legal title to which has never been transferred to an ultimate
purchaser.” 42 U.S.C. § 7550(3). The “ultimate purchaser” is “the first person who in good faith
purchases such new motor vehicle or new engine for purposes other than resale.” *Id.* at § 7550(5).

1 *Quality Mgmt. Dist.*, 498 F.3d 1031, 1042 (9th Cir. 2007) (“[t]he overriding purpose of the Clean
2 Air Act is to force the states to do *their* job in regulating air pollution effectively so as to achieve
3 baseline air quality standards”) (emphasis in original).

4 If a state fails to meet federal air quality standards, it is exposed to stiff penalties, including
5 the withholding of federal highway funds. *See, e.g.*, 42 U.S.C. § 7509(b)(1). Currently, the
6 SJVAB and SCAB do not meet federal air quality standards. Lin Perrella Decl., Ex C at 21-22.
7 California is relying on the rule to attain those standards and avoid potential sanctions. *Id.* CARB
8 included the rule within its State Implementation Plan, and EPA is poised to approve it. Approval
9 and Promulgation of Implementation Plans, 76 Fed. Reg. 40652 (proposed July 11, 2011) (to be
10 codified at 40 C.F.R. pt. 52) (EPA statement that “we know of no obstacle under Federal or State
11 law in CARB’s ability to implement the regulation[]”).

12 Congress expressly reserved state authority to adopt regulations like the Truck and Bus
13 Rule under two sections of the Clean Air Act. First, under section 7416, Congress generally
14 reserved *all* State rights to control and regulate air pollution except those rights specifically
15 preempted by the Clean Air Act. 42 U.S.C. § 7416. With respect to motor vehicles, the Clean Air
16 Act preempts states, absent a waiver from EPA, from adopting emissions standards relating to the
17 control of emissions from *new* motor vehicles, including trucks. *Id.* at 7543(a), (b). The Truck
18 and Bus Rule does not establish emissions standards for new vehicles. 76 Fed. Reg. at 40658
19 (concluding that the Truck and Bus Rule is not preempted under the Clean Air Act).⁷ CDTOA
20 does not allege that the rule is preempted by the Clean Air Act.

21 Second, under section 7543(d) of the Clean Air Act, Congress expressly stated that
22 “[n]othing in this part shall preclude or deny to any State or political subdivision thereof the right
23 otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed
24 motor vehicles.” The Truck and Bus Rule is an exercise of authority expressly reserved to
25 California under section 7543(d). There are no limitations on this authority. And in fact, only
26

27 ⁷ The Truck and Bus Rule is not preempted by the Clean Air Act because the rule establishes
28 emissions standards for “in-use” trucks (as opposed to new vehicles) and the burden for retrofits
does not fall on original equipment manufacturers. 76 Fed. Reg. at 40658 (citing *Allway Taxi
Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff’d*, 468 F.2d 624 (2nd Cir. 1972).

1 states have authority to adopt operational restrictions for “in use” motor vehicles; Congress did not
2 provide that authority to EPA, or any other federal agency. *See* 42 U.S.C. § 7521 (providing EPA
3 only with authority to promulgate “emissions standards” for “new” motor vehicles).

4 The Clean Air Act demonstrates that Congress knows how to preempt state air pollution
5 regulations for trucks when it wants to. It also shows that with respect to regulations for “in use”
6 vehicles, Congress expressly preserved state authority. CDTOA fails to acknowledge that the
7 FAAA was adopted against this regulatory backdrop.

8 **2. Congress Intended To Preempt “Economic Regulation” When It**
9 **Adopted The FAAA, Not Repeal Provisions In The Clean Air Act**

10 Given the authority reserved to states in sections 7416 and 7543(d) of the Clean Air Act,
11 CDTOA’s preemption claim only survives if Congress repealed that authority when it adopted the
12 FAAA. The FAAA, however, does not *expressly* repeal provisions within the Clean Air Act, and
13 CDTOA cannot show that any such repeal was *implicit*.

14 Implied repeals are strongly disfavored and exist only where two federal statutes are
15 “irreconcilable.” *Morton v. Mancari*, 417 U.S. 535, 549-50, 94 S. Ct. 2474 (1974). Not
16 surprisingly, therefore, the Supreme Court requires “overwhelming evidence” that Congress
17 intended to effectuate an implied repeal, and such intent must be “clear and manifest.” *Id.* at 551;
18 *J.E.M. Ag Supply v. Pioneer Hi-Bred Int’l*, 534 U.S. 124, 137, 122 S. Ct. 593 (2001). This
19 “stringent” standard is rarely satisfied, *J.E.M. Ag Supply*, 534 U.S. at 142, and exists because
20 “courts are not at liberty to pick and choose among congressional enactments.” *Morton*, 417 U.S.
21 at 551. Here, the evidence overwhelmingly demonstrates that Congress intended California to
22 adopt the rule.

23 First, the purpose of section 14501(c)(1) of the FAAA was to prevent a patchwork of state
24 economic regulation that hindered efficient ground transportation, and placed motor carriers at a
25 competitive disadvantage with air-based shippers, who had been deregulated years prior.
26 *Mendonca*, 152 F.3d at 1187. Congress characterized the type of state actions preempted under the
27 FAAA as “economic regulations,” which included “entry controls, tariff filing and price
28 regulation, and [regulation of] the types of commodities carried.” H.R. Conf. Rep. No. 103-677, at

1 86-88.⁸ The conferees criticized state regulations that required companies that wanted to change
2 their prices to go through costly and lengthy proceedings in every state in which they operated. *Id.*
3 at 87. They also highlighted the inefficiency created when rates for intrastate shipments exceeded
4 rates for comparable distances across state lines—resulting in companies inefficiently shipping
5 goods across state lines and back to the state of origin to avoid the higher rates for purely in-state
6 shipments. *Id.* at 87-88. Neither the FAAA itself nor its legislative history mentions the Clean Air
7 Act or suggests that Congress intended to repeal state authority to regulate air pollution.

8 Second, the Clean Air Act places primary responsibility for reducing air pollution in the
9 hands of state and local governments. *Supra* at 6-7. To find that the FAAA implicitly repealed
10 provisions of the Clean Air Act, would strip California of its authority to clean up the largest single
11 source of mobile source emissions in the state, and notwithstanding federal mandates to do so. It
12 would also mean that large sources of air pollution will go *completely* unregulated. *Supra* at 7-8
13 (only states have authority to adopt operational restrictions for motor vehicles; Congress did not
14 provide that authority to EPA or any other federal agency). There is no evidence that Congress
15 gave motor carriers a “free pass” to pollute. Congress’ longstanding recognition of the critical role
16 states play in reducing air pollution indicates that it did not take away—and especially *implicitly*
17 take away—the very tools states have to achieve clean air.

18 Third, the federal government’s support for the Truck and Bus Rule within the Clean Air
19 Act and EPA’s recent proposed approval of the rule distinguishes this case from instances where
20 state laws were deemed preempted under the FAAA and ADA.⁹ For example, in *Rowe*, the
21 Supreme Court held that a state statute that required delivery of tobacco products within the state
22 to be made with a “recipient-verification service” that confirmed that the purchaser was of legal
23 age was preempted under the FAAA. 552 U.S. at 368, 372-73. There was no indication in that
24 case, however, that the state statute was expressly authorized by federal law. *Id.* at 377-78
25 (concurring) (stating that “no comprehensive federal law currently exists to prevent tobacco sellers
26

27 ⁸ This court may take judicial notice of the FAAA’s legislative history. Fed. R. Evid. 201(b).

28 ⁹ FAAA, section 14501(c) mirrors the ADA’s preemption provision, 49 U.S.C. § 41713(b)(1). Courts rely on ADA cases to interpret section 14501(c). *See e.g., Rowe*, 552 U.S. at 370.

1 from exploiting the underage market,” and that there exists a “large regulatory gap” created by
2 FAAA preemption and the absence of Congressional efforts to effectively thwart youth access to
3 tobacco through purchases over the internet). Similarly, while the Supreme Court in *Morales v.*
4 *Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031 (1992) held that state guidelines
5 governing the content and format of advertising for airfares was preempted by the ADA, both the
6 Department of Transportation and Federal Trade Commission had objected to those guidelines “on
7 pre-emption and policy grounds.” *Id.* at 379. The point is that while *Rowe* and *Morales* may be
8 interpreted to broadly preempt state laws under the FAAA, the applicability of those cases to the
9 present facts are limited at best. Here, unlike in *Rowe* and *Morales*, the federal interest in
10 upholding the state action is “clear and manifest.”¹⁰

11 Fourth, the only court that has considered the validity of a state environmental law against
12 a FAAA preemption claim upheld the state law. In *Omya, Inc. v. Vermont*, 33 Fed. Appx. 581
13 (2nd Cir. 2002), the plaintiff owned a quarry in Vermont and transported ore from its quarry to its
14 processing plant using Route 7, a major federal highway. *Omya*, 80 F.Supp.2d 211, 214 (D.Vt.
15 2000). Plaintiff contended that it needed to make up to 170 daily truck trips on Route 7 to meet its
16 processing capacity and anticipated customer demand. 80 F.Supp.2d at 214. The legal question in
17 *Omya* was whether an order issued by the Vermont Environmental Board (“Act 250”), which
18 restricted the number of truck trips plaintiff could make on Route 7 to 115 per day was preempted
19 by the FAAA. *Id.*; 33 Fed. Appx. at 583-84. The Second Circuit held that it was not and affirmed
20 the district court’s order granting Vermont’s motion to dismiss:

21 Section 14501 . . . aims to preempt state economic regulation. Act 250 does not
22 speak directly to prices, routes, or services of motor carriers, and is a land use

23
24 ¹⁰ Because of the authority expressly reserved states in section 7543(d) of the Clean Air Act, and
25 EPA’s proposal to approve the rule, this case is distinguishable from *Ass’n of American R.R.s v. S.*
26 *Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010). In that case, the railroads argued
27 that air district regulations that reduced locomotive and rail yard emissions were preempted by the
28 Interstate Commerce Commission Termination Act of 1995 (“ICCTA”). *Id.* at 1096. The air
district argued that the Clean Air Act reserved local authority to enact the challenged regulations
and the court needed to “harmonize” ICCTA with the Clean Air Act. *Id.* at 1097-98. The court
held that until the regulations were included in CARB’s State Implementation Plan and approved
by EPA, it did not have two federal statutes to harmonize. *Id.* at 1098.

1 statute intended to protect Vermont’s environmental resources with an eye
 2 towards . . . preserving lands, when possible, that have special values to the
 3 public. . . The permit restriction imposed on plaintiff seeks to achieve non-
 4 economic goals that bear no relationship to the regulation of competition. We
 5 cannot conclude that it was the clear and manifest purpose of Congress . . . in
 6 enacting Section 14501 to preempt a non-economic regulation with the limited
 7 impact on “route” that the permit restriction imposes.

8 *Id.* at 584 (internal citations and quotations omitted); *see also Abdu-Brisson v. Delta Airlines, Inc.*,
 9 128 F.3d 77, 84 (2nd Cir. 1997) (“generally applicable tax, environmental, [and] blue sky laws . . .
 10 as a general matter are not preempted under the ADA.”); *Goodspeed Airport LLC v. East Haddam*
 11 *Inland Wetlands & Watercourses Comm’n*, 634 F.3d 206, 210 (2nd Cir. 2011) (ADA does not
 12 preempt state environmental laws).

13 Like the state order in *Omya*, the rule does not speak directly to motor carrier prices, routes
 14 or services. It reduces air pollution from trucks and achieves non-economic goals that bear no
 15 relationship to the regulation of competition. *See Omya*, 33 Fed. Appx. at 584. Further, the case
 16 against preemption here is even better than it was in *Omya* given that, as discussed above, the
 17 federal government has expressed its support for the rule in the Clean Air Act, 42 U.S.C. §§ 7416,
 18 7543, and as part of California’s State Implementation Plan, 76 Fed. Reg. 40652.

19 **B. The Truck and Bus Rule Does Not Significantly Affect Motor Carrier Prices,
 20 Routes Or Services**

21 Even if CDTOA establishes that the rule falls within the scope of laws Congress intended
 22 to preempt when it adopted the FAAA, CDTOA’s legal burden would not end there. CDTOA
 23 must show that the effect of the rule on motor carrier prices, routes or services is “significant.”
 24 *Rowe*, 552 U.S. at 371. State laws that have a “tenuous, remote, or peripheral” effect are not
 25 preempted. *Id.* Because the rule does not directly regulate or reference motor carriers prices,
 26 routes or services, the only question is whether the rule “binds” motor carriers to a particular price,
 27 route or service. *ATA v. LA*, 2011 WL 4436256 at *7. CDTOA has not provided any admissible¹¹
 28 evidence that it does.

¹¹ Defendants and NRDC have separately filed evidentiary objections to CDTOA’s declarations.

1 **1. The Rule Will Not Significantly Affect Prices**

2 In *Morales*, the Supreme Court considered whether state guidelines that governed
3 advertising for airfares were preempted by the ADA. 504 U.S. at 383. Because the guidelines
4 contained literal references to “fares” and “airfares,” the Court had little difficulty in holding that
5 the state rules related to “rates.” *Id.* at 388-89. The Court’s opinion added, however, that because
6 of the economics of the airline industry, which effectively require airlines to price discriminate
7 between “consumers whose volume of purchases is relatively insensitive to price (primarily
8 business travelers) and consumers whose demand is very price sensitive indeed (primarily pleasure
9 travelers),” there was economic confirmation that the rules would affect rates:

10 [In order to price-discriminate], the airlines must be able to place substantial
11 restrictions on the availability of the lower priced seats (so as to sell as many seats
12 as possible at the higher rate), and must be able to advertise the lower fares. The
13 [rules] severely burden their ability to do both at the same time [and hence affect
the airlines’ rates].

14 *Id.* at 389. The Court added that although “[s]ome state actions may affect [airline fares] in too
15 tenuous, remote, or peripheral a manner to have pre-emptive effect,” the effect was clear in
16 *Morales*. *Id.* at 390 (internal quotations omitted).

17 The Truck and Bus Rule does not contain any literal references to motor carrier rates, so
18 the first basis on which *Morales* found an effect on rates is absent here. As to the second basis for
19 the *Morales* holding, CDTOA does not point to any comparable economic principle, applicable in
20 special fashion to the dump truck industry, requiring the conclusion that the rule necessarily affects
21 motor carrier prices. CDTOA’s preemption claim rests largely on its contention that the rule will
22 increase motor carrier *costs* and therefore will affect its members’ prices. Pl. Mot. at 9, 13. The
23 Ninth Circuit, however, rejected this argument in *Mendonca*, 152 F.3d 1184.

24 There, the court addressed whether a state prevailing wage law impermissibly affected
25 prices, routes, or services under section 14501(c). *Id.* at 1187, 1189. The plaintiff contended that
26 such an effect existed because it based its prices on, among other things, labor costs and prevailing
27 wage requirements, and that that the state law increased labor costs by 75%, which in turn
28

1 increased prices by 25%. *Id.* at 1189; *Mendonca*, 957 F. Supp. 1121, 1127 (N.D. Cal. 1997). The
2 Ninth Circuit held that the state law was not preempted:

3 While [the wage law] in a certain sense is “related to” [plaintiff’s] prices, routes,
4 and services, we hold that the effect is no more than indirect, remote, and tenuous
5 . . . We do not believe that [the wage law] frustrates the purpose of deregulation
6 by *acutely* interfering with the forces of competition . . . Nor can it be said . . . that
7 [the law] falls into the “field of laws” regulating prices, routes, or services.

8 *Mendonca*, 152 F.3d at 1189; *see also Abdu-Brisson*, 128 F.3d at 84-85 (rejecting contention that
9 an increase in costs necessarily led to an increase in prices).

10 CDTOA is not likely to establish that the rule has more than a tenuous, remote, or
11 peripheral effect on prices, or that it “binds” motor carriers to certain prices. CDTOA has not
12 provided any expert testimony on the effect of the rule on the dump truck industry. CDTOA
13 doesn’t even know how its members set their prices, routes, or services, and refused to disclose the
14 factors that influence those decisions during discovery. Lin Perrella Decl., Ex. F at Interrogatories
15 31, 36-38. While Messers Kern, Santoro, Parigini and Wipf generally state that the rule will
16 require them to raise their prices, they never specify by how much, and in any event, *Mendonca*
17 instructs that simply showing a price increase is not enough to establish preemption. Kern Decl. at
18 ¶5; Santoro Decl. at ¶5; Parigini Decl. at ¶5; Wipf Decl. at ¶5; *Mendonca*, 152 F.3d at 1189.
19 Further, Mr. Brown’s hearsay testimony¹² and Messers Recupido and McClernon’s “back of the
20 envelope” calculations concerning the amount they will increase their prices do not distinguish this
21 case from *Mendonca* either. Recupido at ¶13; McClernon at ¶11.¹³ CDTOA simply will not
22 succeed on its “priced-based” claim.

23 **2. The Rule Will Not Significantly Affect Routes**

24 CDTOA contends that the rule significantly affects routes because retrofit technology
25 mandated by the rule causes engine breakdowns and decreases fuel efficiency, resulting in motor

26 ¹² Mr. Brown is the CDTOA’s Executive Director. He does not own or operate a trucking
27 company or have economic expertise. His testimony is based on conversations with his members.

28 ¹³ CDTOA refers to CARB studies to support its claim. Pl. Mot. at 15. However, CARB did not
calculate costs for CDTOA’s members, let alone, report that the rule significantly affects motor
carrier prices, routes or services.

1 carriers choosing different routes. Pl. Mot. at 14. CDTOA relies on declarations from Mr. Brown
2 and Mr. Pocock to support its claim. *Id.* However, Mr. Brown’s declaration is based on “stories”
3 shared by CDTOA members at “meetings, through blogs[,] and publications” about the use of
4 retrofit technology, Brown Decl. at ¶9, and is inadmissible hearsay. While Mr. Pocock’s
5 declaration attempts to substantiate Mr. Brown’s based on personal experience, Pocock Decl. at
6 ¶¶5-6, Mr. Pocock’s testimony is based on his experience with the retrofit device on *one* truck. *Id.*
7 Further, Mr. Pocock isn’t even a motor carrier; he’s a salesman. *Id.* at ¶1. Consequently, his
8 testimony is, at best, anecdotal.

9 Even if CDTOA could overcome the evidentiary problems presented by Messers Brown
10 and Pocock’s declarations, that does not mean that the Truck and Bus Rule is necessarily
11 preempted. In *Cardenas v. McLane FoodServices*, Case No. SACV 10–473, 2011 WL 2714430
12 (C.D. Cal. July 8, 2011), the court considered whether California meal and rest break laws were
13 preempted by the FAAA. While the court acknowledged that such laws might require McLane
14 FoodService (“MFI”) to change its routes, it declined to hold that the state laws were preempted as
15 a matter of law:

16 [T]o comply with California break laws, MFI may choose to adjust its routes, or
17 slightly modify its services . . . But just because [a motor carrier] may make
18 changes to its routes does not necessarily mean that California’s break laws have
19 more than an “indirect, remote, or tenuous effect” on these decisions. The Court
has concerns that MFI’s evidence stretches plausibility—and the FAAAA—to
suggest that nearly every state law would be preempted.

20 *Id.* at *8. CDTOA’s preemption claim attempts to take this court down the same slippery slope
21 that the district court correctly refused to take in *Cardenas* and should be rejected.

22 3. The Rule Will Not Significantly Affect Services

23 As discussed above, the Supreme Court in *Rowe* held that a Maine statute that required
24 delivery of tobacco products within the state be made with a “recipient-verification service” was
25 preempted by the FAAA. 552 U.S. at 371. The Court reasoned:

26 [T]he law will require carriers to offer a system of services that the market does
27 not now provide (and which the carriers would prefer not to offer). And even
28 were that not so, the law would freeze into place services that carriers might
prefer to discontinue in the future. The Maine law thereby produces the very

1 effect that the federal [trucking deregulation regime] sought to avoid, namely, a
2 State’s direct substitution of its own governmental commands for “competitive
3 market forces” in determining (to a significant degree) the services that motor
4 carriers will provide.

5 *Id.* at 372 (internal quotations and citations omitted). Here, unlike the preempted statute in *Rowe*,
6 the Truck and Bus Rule does not require motor carriers to provide a new service.

7 However, CDTOA argues that the rule is still preempted because it reduces its members’
8 levels of service. Pl. Mot. 14. But even if a reduction in service qualifies as basis for a FAAA
9 preemption claim,¹⁴ CDTOA has not provided sufficient evidence to succeed on such a claim.
10 CDTOA relies on general allegations of reduced service levels; none of CDTOA’s declarants
11 actually say how much their service levels will decline in response to the rule, and none of them
12 say they will cease doing business in the state because of the rule. *See e.g.*, Kern Decl. at ¶6,
13 Parigini Decl. at ¶5, Wipf Decl. at ¶5, Santoro Decl. at ¶5.¹⁵ While Mr. Recupido says he sold all
14 but one of his trucks, CDTOA admits that he did so based on a number of factors other than the
15 rule. Recupido at ¶5; Lin Perrella Decl., Ex. G at Request for Admission 7. And while CDTOA
16 may argue that Mr. McClernon abandoned his motor carrier license in response to the rule, he
17 apparently did so based on a misunderstanding of the rule’s requirements. *See infra* at 18.
18 Accordingly, CDTOA fails to show that the rule significantly affects its members’ services in more
19 than a tenuous way.

21 ¹⁴ In *Fitz-Gerald v. SkyWest Airlines*, 155 Cal. App. 4th 411, 423 n. 7 (2007), the court
22 determined that actions to enforce state wage, and meal and rest breaks laws were not preempted
23 by the ADA despite allegations that such laws might “result in higher fares, fewer routes, and
24 less service.” (emphasis added). The court stated that the connection between the state laws and
25 ADA preemption was too tenuous for preemption to apply, and “[i]f the rule was otherwise, ‘any
26 string of contingencies is sufficient to establish a connection with price, route or service, [and]
27 there will be no end to ADA preemption’.” *Id.* at 423 (quoting *Air Transport Ass’n of America*
28 *v. City and County of San Francisco*, 992 F. Supp. 1149, 1183 (N.D. Cal. 1998)).

¹⁵ The Ninth Circuit acknowledges that there might be some state actions that impose costs that
are so high that they compel motor carriers to change their prices, routes, or services, and rise to
the level of a preempted substantive mandate. *ATA*, 2011 WL 4436256 at *8. CDTOA has not
however, provided admissible evidence demonstrating such costs. *See infra* at 17; *see also*
NRDC Evidentiary Objections to Plaintiff’s Declarations.

1 **4. CDTOA’s Cases Do Not Demonstrate That It Is Likely To Succeed**

2 Neither *ATA v. LA*, 559 F.3d 1046 (9th Cir. 2009), nor *Dilts v. Penske Logistics*, Case No.
3 08–CV–318, 2011 WL 4975520 (S.D. Cal. Oct. 19, 2011), provide a basis for granting CDTOA’s
4 motion. *See* Pl. Mot. at 15, 16. First and foremost, unlike the situation here, neither case involved
5 a challenge to a state law that was expressly authorized by Congress. *See supra* at 6-8. Both cases
6 are distinguishable on this basis alone.

7 Further, CDTOA mischaracterizes what was litigated in *ATA*. Pl. Mot. at 15. The Ninth
8 Circuit in *ATA* did *not* consider whether the ports’ ban on older trucks was preempted by the
9 FAAA; plaintiff *ATA* never challenged that portion of the ports’ “Clean Trucks Program.” *ATA*,
10 559 F.3d at 1048-49 (Clean Trucks Program consists of three parts: a concession agreement, fee,
11 and ban on older trucks; *ATA* challenged the concession agreement). CDTOA also omits that two
12 years after the Ninth Circuit reversed the district court’s denial of *ATA*’s preliminary injunction
13 motion, and after a full trial, the Ninth Circuit largely reversed its preliminary assessment that
14 certain provisions within the Port of Los Angeles’ concession agreement were likely preempted.
15 *ATA v. LA*, 2011 WL 4436256 at *13-19. In fact, of the five provisions *ATA* challenged at trial,
16 the Ninth Circuit held that only the provision requiring motor carriers to use “employee” drivers to
17 haul port cargo was preempted by the FAAA. *Id.* at *17-18. And, in rendering that decision, the
18 court did not examine whether the provision significantly affected prices, routes, or services, but
19 rather whether it was saved from preemption by the market participant doctrine.¹⁶ *Id.*

20 CDTOA also mischaracterizes the holding in *Dilts*. There, the district court held that meal
21 and rest break laws (“M & RB laws”) were preempted by the FAAA. 2011 WL 4975520 at *8-9.
22 Contrary to CDTOA’s assertions, however, the court did not base its decision on increased motor
23 carrier costs attributable to the M &RB laws. Instead, the court stated that, “[j]ust as in *Rowe*, an
24

25 _____
26 ¹⁶ At trial, *ATA* provided significantly more evidence detailing the effect of the employee
27 provision on its prices, routes and services than CDTOA does here. Based on economic reports
28 and the port’s own documents, the district court found that the employee provision would
increase motor carrier costs by 167%, and that the concession agreement as a whole would raise
carrier prices by 80%. *ATA*, No. CV 08-4920, 2010 WL 3386436, at *10, 19 (C.D. Cal. Aug. 26,
2010), *rev’d in part*, 2011 WL 4436256.

1 emphasis on the additional imposition of costs upon carriers is ‘off the mark.’ . . . It is more
2 importantly the imposition of substantive standards upon a motor carrier’s routes and services, as
3 in *Morales* and *Rowe*, that implicates preemption here.” *Id.* at *9 (quoting *Rowe*, 552 U.S. at 373).
4 Indeed, in distinguishing its holding from the Ninth Circuit’s decision in *Mendonca*, which upheld
5 state wage laws against a FAAA preemption claim, the court in *Dilts* stated:

6 A wage law, which essentially increases the price of labor, impacts a motor carrier's
7 prices, routes, or services in a tenuous way . . . If the cost of labor goes up, then
8 prices, routes, and services are more expensive. In the instant case, however, the
9 impact is not derived from the increased cost of labor and is not tenuous. Rather,
10 the impact is derived from the imposition of substantive restrictions upon the breaks
11 taken by motor carrier drivers and drivers’ helpers, which binds the motor carriers
12 to a set of routes, services, schedules, origins, and destinations that it otherwise
would not be bound to. . . The M & RB laws at issue here are significantly more
connected to the routes and services of a motor carrier than laws that merely impact
the cost of labor.

13 *Id.* at *11-12. The Truck and Bus Rule is analogous to the wage laws in *Mendonca*; not the M &
14 RB laws in *Dilts*. CDTOA’s preemption claim derives from increased costs; not a substantive
15 mandate akin to the M & RB laws, which expressly required motor carriers to stop working.¹⁷

16 **V. AN ANALYSIS OF HARM, BALANCE OF THE EQUITIES, AND THE PUBLIC**
17 **INTEREST STRONGLY WEIGH AGAINST ISSUING AN INJUNCTION**

18 **A. CDTOA Fails To Demonstrate A Likelihood Of Irreparable Harm**

19 CDTOA asserts that it will suffer irreparable injury absent an injunction because its
20 members will need to make substantial capital investments to comply with the rule (or go out of
21 business), and these investments cannot be “undone” if the rule is later invalidated. Pl. Mot. at
22 17.¹⁸ CDTOA’s allegations of harm suffer from a number of flaws.

23 First, CDTOA greatly exaggerates any harm it will suffer absent an injunction. The basis
24 for CDTOA’s motion is that the rule’s first set of compliance deadlines commences January 1,
25 2012, and absent an injunction, CDTOA members will allegedly incur significant costs before
26

27 ¹⁷ Similarly, CDTOA’s “route-based” claim is not derived from a substantive mandate to cease
working but rather an alleged result of using retrofit devices.

28 ¹⁸ Although CDTOA does not cite to any evidence in support of its irreparable injury claim, *see*
Pl. Mot. at 17, we presume it is relying on the declarations submitted with its motion.

1 then. *Id.* CDTOA provides a number of declarations that attempt to attest to this harm. A close
2 examination of each declaration and the specific requirements of the rule, however, reveal that
3 CDTOA fundamentally misunderstands what is required of motor carriers next month.

4 As outlined in CARB's declaration of Tony Brasil,¹⁹ who was a principal author of the
5 Truck and Bus Rule, Messers Recupido, McClernon and Wipf will *not* incur *any* compliance costs
6 in 2012. Brasil Decl. at ¶¶37-45. This is because the rule includes credits and exemptions
7 available to these motor carriers that are specifically designed to ease compliance costs, including
8 credits for small fleets, downsizing, and operating in less polluted areas of the state. *See id.*; Lin
9 Perrella Decl., Ex. A at §§ 2025(h), (j)(1) and (p)(1). Messers Recupido, McClernon and Wipf
10 overstate the impact of the rule on their businesses by failing to account for these compliance
11 options. As a result, CDTOA cannot rely on their declarations as evidence of imminent and
12 irreparable harm.

13 Messers Kern, Parigini and Santoro also allege that they face imminent compliance costs
14 before January 2012. Kern Decl. at ¶¶2-4; Parigini Decl. at ¶¶2-5; Santoro Decl. at ¶¶2-3.
15 However, their one-page declarations fail to provide the information necessary to substantiate their
16 alleged harm or to determine whether they too can take advantage of credits relieving them of
17 compliance costs before 2012. *See* Brasil Decl. at ¶¶43-45. Moreover, even if they cannot utilize
18 any credits or exemptions, the only requirement under the rule that must be complied with in 2012
19 is for fleets to install filters on trucks with 1996 to 1999 model year engines, or, alternatively that
20 fleets install filters on 30% of their vehicles. Lin Perrella Decl., Ex. A at §§ 2025(g), (i). There is
21 no requirement that trucks be upgraded to meet 2010 emissions standards next year, nor is there
22 any requirement that motor carriers bring their entire fleet into compliance by January. *See id.* at §
23 2025(g) (replacements not required any earlier than 2015); *id.* at § 2015(i) (phase-in option).
24 Finally, Mr. Brown's testimony as to his members' harm is inadmissible hearsay and cannot be
25 relied upon to support CDTOA's claim. Simply put, the record is devoid of reliable evidence
26 demonstrating that CDTOA is likely to suffer irreparable harm absent an injunction.

27
28 ¹⁹ Mr. Brasil's declaration is submitted by Defendants Nichols and Goldstene in support of their
opposition to CDTOA's preliminary injunction motion.

1 Second, there is no evidence that the investments CDTOA members make to comply with
2 the rule would be a total loss if the rule is invalidated. *See* Pl. Mot. at 17. If the rule is invalidated,
3 CDTOA members could sell their upgraded trucks in exchange for cheaper, older models. Or, they
4 could reap the benefits of having accelerated the *inevitable* turnover of their fleets.

5 Third, CDTOA’s claim that its members will lose business absent an injunction is
6 speculative. For instance, Mr. Santoro states that his customers will not pay the higher prices he is
7 forced to charge in order to deflect the costs of his new trucks. Santoro Decl. at ¶5. But CDTOA
8 fails to provide a single declaration from any of Mr. Santoro’s clients stating that they will not pay
9 higher prices. Moreover, Mr. Santoro’s loss of business allegations, as detailed above, may be
10 based on inaccurate projections of the financial impact of the rule, rendering his allegations—and
11 any similar allegations made by CDTOA’s other declarants—inadmissible.

12 Fourth, CDTOA initiated this case in February 2011—over nine months ago. It did not
13 seek an injunction at that time. Instead, it waited until the eve of the effective date of the rule
14 before seeking preliminary relief. The timing of CDTOA’s motion “implies a lack of urgency
15 and irreparable harm” and is a factor this court may consider in weighing the propriety of relief.
16 *Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

17 Consequently, CDTOA has not established a likelihood of irreparable harm. *Winter*, 555
18 U.S. at 22 (injunctive relief cannot be based on the mere “possibility” of irreparable harm).

19 **B. An Injunction Would Substantially Injure the State And The Public Interest**

20 CDTOA asks that the *entire* Truck and Bus Rule be enjoined. Pl. Mot. at 10, 20.²⁰ The
21 harm that would occur to the state and public if an injunction issued is outlined above. *See supra*
22 at 2-5 (discussing the public health impacts of truck pollution, benefits of the rule, and potential
23 sanctions to the state if clean air standards are not met). The Defendants’ declarations submitted in
24 connection with its opposition papers also delineate the harm that would incur absent timely
25 implementation of the rule. The Supreme Court has stated that, “[e]nvironmental injury, by its
26

27 ²⁰ The rule applies to many businesses other than the dump truck industry, some of which are
28 also motor carriers, and some that are not. Because CDTOA has not alleged that the rule is
invalid as to anyone other than *its* motor carrier members, under no circumstances should the
entire rule be enjoined even if CDTOA’s motion is granted.

1 nature, can seldom be adequately remedied by money damages and is often permanent or at least
2 of long duration, *i.e.*, irreparable.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545, 107
3 S. Ct. 1396 (1987).

4 In an effort to minimize the harm to the state and public if an injunction issued, CDTOA
5 argues that the duration of the injunction may only last for several weeks or months, and that
6 absent an injunction, consumers would suffer from increased construction costs and market
7 instability. Pl. Mot at 18. Neither argument has merit. For starters, any alleged harm to
8 consumers is speculative, unsupported by a single piece of evidence, and undermined by
9 CDTOA’s declarations that exaggerate the financial impact the rule has on its members pending
10 resolution of CDTOA’s claim.

11 Further, CDTOA incorrectly assumes that this case will be resolved on summary judgment.
12 While that could happen, it might not. This court could issue a preliminary injunction but then
13 decline to grant CDTOA’s summary judgment motion on the basis that factual questions remain
14 that should be decided at trial. Pursuant to this Court’s Pretrial Scheduling Order, the trial date in
15 this case is set for June 3, 2013. Because CDTOA seeks an injunction “until [the court] can rule
16 on whether the regulation is preempted by federal law,” Pl. Mot at 10, it could be over a year
17 before a decision on the merits is rendered. As detailed above, the 2014 deadline for achieving the
18 federal PM2.5 air quality standard is fast approaching, and regions in California will be unable to
19 obtain that standard if the rule is enjoined—rendering the state vulnerable to sanctions. Moreover,
20 absent the rule, communities affected by truck and bus pollution will continue to endure the public
21 health consequences associated with exposure to toxic diesel exhaust. The harm from such
22 exposure cannot be compensated by monetary damages. On this record, the balance of hardships
23 is overwhelmingly against CDTOA.

24 **VI. CONCLUSION**

25 For all of the reasons stated herein, CDTOA’s motion for preliminary injunction should be
26 denied.

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