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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11

12 CALIFORNIA DUMP TRUCK OWNERS  
13 ASSOCIATION

14 Plaintiff,

15 vs.

16 MARY D. NICHOLS, Chairperson of the  
California Air Resources Board; JAMES  
17 GOLDSTENE, Executive Officer of the  
California Air Resources Board; and DOES 1-  
18 50

19 Defendants.  
20  
21

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

**REPLY TO OPPOSITION TO MOTION  
FOR PRELIMINARY INJUNCTION**

(Fed.R.Civ.P. 65)

Date: December 15, 2011  
Time: 2:00 p.m.  
Courtroom.: 7

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## INTRODUCTION

By this reply, Plaintiff CDTOA responds to the opposition of defendants Nichols and Goldstene (Dkt # 38), as well as the opposition of defendant-intervenor Natural Resources Defense Council (“NRDC”) (Dkt # 37.) Because many of the arguments are duplicative, they will be addressed jointly as appropriate. The arguments and supporting documentation filed with the opposition pleadings demonstrate that plaintiff’s motion for a preliminary injunction should be granted. Defendants admit that the regulation will increase the costs of operation for CDTOA members. Dkt. #37 at 1:13-15. They also admit that some members will have increased costs on January 1, 2012, but argue that most will not. *Id.* at 1:23-24. While defendants assert that there are a number of compliance options available to delay the impact of the rule, they implicitly acknowledge that all of them impact the prices, routes, or services of motor carriers.

## ARGUMENT

### **I. THE PRESUMPTION AGAINST PREEMPTION IS REBUTTED**

Defendants’ argument begins with the assertion that there is a presumption against preemption that is applicable in this case. Dkt # 38 at 6:3-10. However, 49 U.S.C. § 14501(c)(1) contains an express provision, specifically stating that states “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier” of property. No presumption is required in this case, because Congress made its intent quite clear: preemption is the rule. Unless there is a specific statutory exception to the rule of preemption, no presumptions need be indulged; the state law is simply invalid under the Supremacy Clause of the United States Constitution.

### **II. THE REGULATION RELATES TO THE PRICES, ROUTES AND SERVICES OF MOTOR CARRIERS**

Defendants admit that the regulation will cost affected fleets “about \$1.5 billion” during the first five years of compliance. Declaration of Tony Brasil in Support of Defendants Mary

1 Nichols and James Goldstene’s Opposition to Motion for Preliminary Injunction (“Brasil  
2 Decl.”), at 5:11-12. Over the life of the regulation, the costs will be “about \$2.2 billion.” *Id.* at  
3 5:13-14. These costs will have to be absorbed by the affected fleets, including CDTOA  
4 members. However due to the nationwide recession which has hit the construction trucking  
5 industry especially hard, the already slim profit margins are now virtually nonexistent, such that  
6 CDTOA members are struggling to stay afloat. Declaration of Lee Brown (hereafter “Brown  
7 Dec.”) ¶ 3. What would be an oppressively expensive regulation in any economic environment  
8 is especially oppressive today, because CDTOA members have no financial cushion. They will  
9 have to raise prices in order to defray the costs of compliance, and many will simply go out of  
10 business. Brown Dec. ¶ 12. Numerous motor carriers who have been in business for decades  
11 have already determined that the costs of compliance will require them to raise their prices and  
12 lay off employees. Declaration of Jed Kern (hereafter “Kern Dec.”) ¶ 5; Declaration of Ernie  
13 Wipf (hereafter “Wipf Dec.”) ¶¶ 4-6; Declaration of Mike Parigini (hereafter “Parigini Dec.”) ¶  
14 5; Declaration of Tom Santoro (hereafter “Santoro Dec.”) ¶ 5.

15 Defendants argue that the regulation does not directly speak to prices, routes or services,  
16 and moreover that customers of CDTOA members would likely be ignorant of the age and  
17 equipment specifications of the trucks used by CDTOA members. Dkt. #38 at 6:24-28. These  
18 arguments are irrelevant because in determining whether a law is “related to” the price, route or  
19 service of a motor carrier, the focus is on the “effect” of the state law, not its precise terms. It is  
20 for this reason that the United State Supreme Court has determined that “preemption may occur  
21 even if a state law's *effect* on rates, routes or services is only indirect.” *Rowe v. New Hampshire*  
22 *Motor Transport Association*, 552 U.S. 364, 370-371 (2008), emphasis added. It does not matter  
23 that the regulation does not directly or expressly specify restrictions on prices, routes or services.  
24 It is enough if the state law will “have a significant impact related to Congress' deregulatory and  
25 pre-emption-related objectives.” *Ibid.*

26 Not content with the language from the Supreme Court, defendants rely on language from  
27 a recent Ninth Circuit case, *American Trucking Assoc., Inc. v. City of Los Angeles*, No. 10–  
28 56465, 2011 WL 4436256, at \*7 (9th Cir. Oct. 31, 2011). That case noted that in cases where  
the effect of a law on prices, routes or services is indirect, the proper inquiry is whether the

1 provision, directly or indirectly, “binds the ... carrier to a particular price, route or service and  
2 thereby interferes with competitive market forces within the ... industry.” Defendants seize upon  
3 the word “binds” and argue that the rule does not require any particular price, route, or service.  
4 Dkt #38 at 7:5-15. But that is precisely what the regulation does, albeit indirectly. Rather than  
5 prescribe a price that motor carriers must charge, the regulation prescribes the particular type of  
6 vehicle (or engine) that they must use. By specifying the precise type of instrumentality that  
7 motor carriers must use in conducting their business, the regulation necessarily binds them to a  
8 particular price, i.e. a price that will allow for the motor carrier to profitably purchase and  
9 operate the specified instrumentality. It must be remembered that CDTOA members’ primary  
10 source of livelihood is their diesel powered tractor and truck body or trailer. Brown Dec ¶ 7.  
11 The transportation of construction material, and the cost to do so, is almost entirely dependent on  
12 the costs of the truck required to be used. By requiring substantial capital investment in the  
13 primary instrumentality of their business, the regulation necessarily compels CDTOA members  
14 to raise their prices to cover the costs of compliance, or go out of business.

15         Interestingly, the very Ninth Circuit decision relied upon by defendants makes the point  
16 that costs from a state law could be so high that a business would be compelled to change its  
17 prices, routes, or services. *American Trucking Assoc., Inc. v. City of Los Angeles, supra*, 2011  
18 WL 4436256, at \*8. The question in this case is whether the rule rises to that level. It is true that  
19 minor and incidental costs may be deemed too tenuous or remote for preemption to apply.  
20 *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992). However, in this case, the  
21 costs are substantial, running into the billions of dollars, such that many CDTOA members have  
22 already determined they will have to raise their prices or go out of business.

23         Another interesting aspect of the Ninth Circuit decision relied upon by defendants is that  
24 it contemplates an inquiry into whether the impact on prices routes or services “interferes with  
25 competitive market forces within the ... industry.” *American Trucking Assoc., Inc. v. City of Los*  
26 *Angeles, supra*, 2011 WL 4436256, at \*7. It does not take an economics degree to understand  
27 that when significant capital investment costs are imposed on an industry, there will be winners  
28 and losers. Some will be able to scrape together the necessary financing to come into  
compliance, while others will not. Those who do not will either go out of business or be forced

1 out by the costly fines for noncompliance. The result will be less competition for those that  
2 manage to survive. Simple rules of supply and demand dictate that the winners will be more able  
3 to raise their prices because there will be less competition. But this is *precisely the opposite*  
4 result intended by Congress. Congress' purpose in preempting state regulation of the  
5 transportation industry was to create "maximum reliance on competitive market forces" to ensure  
6 lower prices and better service. *Morales v. Trans World Airlines, Inc., supra*, 504 U.S. at 378.  
7 Because the costs of compliance are so significant, the effect of the regulation is to directly  
8 manipulate the market and interfere with the normal competitive forces that would otherwise  
9 cause prices to reflect the equilibrium between supply and demand. Thus, under the very  
10 authority relied upon by the defendants, it is apparent that the regulation has the type of effect on  
11 prices, routes and services that Congress sought to preempt. Congress expressly wanted to  
12 "ensure that the States would not undo federal deregulation with regulation of their own." *Ibid.*

13 Defendants also rely upon *Californians for Safe and Competitive Dump Truck*  
14 *Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998). Dkt #38 at 7:16-22. But even that  
15 case acknowledged that the Supreme Court's jurisprudence in this area has wrestled with where  
16 to draw the line in determining when an effect on prices, routes or services was too remote. *Id.*  
17 at 1188. In fact, in *Mendonca* the court cites the Supreme Court's earlier recognition of the fact  
18 that that a state law might produce "acute, albeit indirect, economic effects ... that such a state  
19 law might indeed be preempted...." *Id.*, citing *New York State Conference of Blue Cross & Blue*  
20 *Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995).

21 The impact on prices, routes and services is also demonstrated by the various compliance  
22 options offered by the regulation. As summarized by Mr. Brasil, for 2012 fleets must either  
23 1) install filters on trucks with 1996 to 1999 model-year engines, or, 2) install filters on 30% of  
24 their vehicles. Brasil Dec. at 9:4-8. Alternatively, a fleet could choose to operate 30% fewer  
25 trucks to delay the compliance deadline. *Id.* at 9:15. Or, a fleet could "designate their 1996 to  
26 1999 model-year engines as low use (i.e., operate less than 1,000 miles per year in California)"  
27 in order to delay compliance. *Id.* at 9:16-18.

28 It should be obvious that all of these options impact prices, routes or services. Installing  
filters comes with a significant cost. It can range from \$18,000 per truck (Recupido Dec. ¶ 11) to

1 \$44,372 per truck (McClernon Dec. ¶ 5) despite the fact that the trucks themselves are only  
2 worth approximately \$8,000. Recupido Dec. ¶ 6. Operating 30% fewer trucks will necessarily  
3 result in a reduction in the level of service that can be provided, as some work will not be able to  
4 be performed as quickly. Designating trucks as low use and limiting their mileage to less than  
5 1,000 per year almost by definition restricts the routes that these trucks can use, as they will  
6 necessarily be limited only to jobs very near their home base. NRDC argues that “CDTOA’s  
7 preemption claim derives from increased costs; not a substantive mandate akin to the M & RB  
8 laws, which expressly required motor carriers to stop working.” Dkt #37 at 17:14-15. However,  
9 this argument proves too much. Requiring motor carriers to operate 30% fewer trucks means  
10 that 30% of their workers “stop working.” This case is directly analogous to the situation in  
11 *Dilts v. Penske*, case # 08-CIV-318 JLS (BLM), \_\_\_ F.Supp.2d \_\_\_, 2011 WL 4975520 (S.D.  
12 Cal. 2011).

### 13 14 **III. THE SAFETY EXCEPTION TO PREEMPTION IS INAPPLICABLE**

15 Defendants argue that even if the regulation does relate to prices, routes or services, it is  
16 saved by the exception to preemption in 49 U.S.C. § 14501. Dkt # 38 at 9:5. Specifically, the  
17 safety exception provides that the preemption provision  
18

19 shall not restrict the safety regulatory authority of a State with respect to motor  
20 vehicles, the authority of a State to impose highway route controls or limitations  
21 based on the size or weight of the motor vehicle or the hazardous nature of the  
22 cargo, or the authority of a State to regulate motor carriers with regard to  
23 minimum amounts of financial responsibility relating to insurance requirements  
24 and self-insurance authorization.

25 This “safety” exception permits states to enact laws that are truly aimed at ensuring the safety of  
26 motor vehicles. However, the exception is to be construed narrowly, not broadly. The United  
27 States Supreme Court has declared that “Local regulation of prices, routes, or services of [motor  
28 carriers] that is not genuinely responsive to safety concerns garners no exemption from §  
14501(c)(1)'s preemption rule. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536  
U.S. 424, 429 (2002). All CDTOA members who transport construction material are motor  
carriers of property (see Cal. Rev. & Tax. Code § 7232, subd. (d)) and therefore any regulations

1 on the construction trucking industry must be limited to the safety exception or they will be  
2 deemed invalid under the preemption doctrine. Accordingly, the only state regulation of motor  
3 carriers that is permissible is regulation that is “genuinely responsive to safety concerns.”

4 The Supreme Court has already determined that public health is *not* an exception to  
5 preemption, holding that public health is different than public safety. *Rowe v. New Hampshire*  
6 *Motor Transport Association, supra*, 552 U.S. 364 at 374. In *Rowe*, the issue was whether the  
7 state could regulate tobacco shipments by requiring shippers to utilize only carriers with a  
8 specific recipient-verification service to ensure that only persons with a Maine tobacco license  
9 received tobacco, and by imputing upon persons knowledge that a package contains tobacco  
10 under specific circumstances. *Id.* at 369. The purpose of the law was to prevent minors from  
11 obtaining cigarettes, but the Court determined that notwithstanding that laudable goal, the  
12 method chosen by Maine ran afoul of federal law. *Id.* at 373-374. The decision in *Rowe*  
13 completely forecloses any notion that the public health concerns arising out of pollution fall  
14 within the safety exception to the FAAAA.

15 To begin with, the Supreme Court in *Rowe* made clear that the safety exception to the  
16 FAAAA was limited to “motor vehicle safety” and not safety in general. *Id.* at 373. On this  
17 point, the court noted that “[m]any products create “public health” risks of differing kind and  
18 degree.” *Id.* at 375. By expressly refusing to find that the health risks associated with tobacco  
19 smoke could be deemed to fall within the exception for “*motor vehicle safety*” the Court has  
20 already rejected an expansive interpretation of the exception to preemption. The public health  
21 risks from tobacco smoke is analogous in kind to the risks associated with diesel pollution, and  
22 while public health may be a laudable goal, Congress has already determined that you cannot  
23 regulate public health by regulating motor carriers.

24 In the opposition by NRDC, more than a page is dedicated at the outset to describing  
25 diesel exhaust as a “public health threat.” Dkt. # 37 at 2:4-3:5. Assuming without conceding  
26 that NRDC is correct in these assertions, they simply illustrate why this case does not fall within  
27 the safety exception: public health is not public safety.

28 Two additional aspects of the decision in *Rowe* are significant. First, the court reiterated  
its prior decisions that found that “state laws whose ‘effect’ is ‘forbidden’ under federal law are

1 those with a ‘*significant* impact’ on carrier rates, routes, or services.” *Id.* at 375, emphasis in  
2 original. This is important because it underscores the fact that the focus is on the degree of the  
3 impact, not whether there is an express reference to prices, routes or services in the state law.  
4 Interestingly, the NRDC opposition brief acknowledges that this is the relevant inquiry. Dkt #  
5 37 at 6:2-3. Second, the court distinguished between laws of general applicability and those that  
6 are specific to the motor carrier industry. Thus, a law that prohibits members of the public  
7 (including truck drivers) from smoking in public places would not have a direct effect on truck  
8 drivers. *Id.* at 375. In contrast, this case presents a regulation that is not one of general  
9 applicability, but rather is aimed directly and exclusively at motor carriers, and the single most  
10 important tool they use to do their job.

11 It is therefore apparent that while the regulation was intended to address the public health  
12 effects of regulation, that purpose is not “genuinely responsive to motor vehicle safety  
13 concerns.” Accordingly, defendants’ reliance on the safety exception to escape preemption  
14 should be rejected.

#### 15 16 **IV. THE EFFECT OF THE REGULATION IS IMMEDIATE AND SEVERE**

17  
18 Defendants argue that the only immediate impact is that only those trucks with model  
19 year 1996 to 1999 engines are required to retrofit these engines with filters by January 1, 2012.  
20 Dkt # 38 at 14:15-16; see also Dkt #37 at 18:17-20. They argue that “most of the dump truck  
21 operators who make up the Association’s membership” will likely be able to delay compliance  
22 beyond 2012. *Id.* at 14:22-23. Without conceding the accuracy of these assertions, it is enough  
23 to point out that even if “most” of CDTOA’s members can delay compliance, “some” cannot.  
24 And as to those who cannot, the costs of installing filters are undeniable (and undisputed), and in  
25 many cases exceed the value of the trucks. This is precisely the type of significant cost that the  
26 Supreme Court has indicated is preempted.

27 And even if the number of businesses immediately impacted is only a subset of  
28 CDTOA’s membership, as to those members, the damage will be irreversible. They will either  
install expensive filters that may later be deemed to be preempted, or they will go out of  
business. Defendants grossly understate the severity of the harm. Those members who do have

1 to purchase and install filters will have to invest between \$18,000 and \$40,000 dollars on trucks  
2 worth less than \$10,000. And most importantly, that investment only buys a few additional years  
3 of use until the trucks have to be replaced in 2020. CDTOA owners drive their trucks for  
4 decades. Their business model simply does not allow for them to invest tens of thousands of  
5 dollars to retrofit their trucks, and then entirely replace them again only a few years later. Many  
6 members will not be able to afford the retrofits. Those who actually have access to capital may  
7 decide that the lesser of two economic evils is to simply purchase a replacement truck for 2012  
8 so as to avoid having to invest additional capital later. The point is simply that the compliance  
9 options are all variations on the same theme: if you are a motor carrier of property with a  
10 business model based on using your truck at relatively low cost for many years to come, you  
11 have to invest tens of thousands of dollars into your fleet over the next few years. This will  
12 inevitably impact the prices, routes and services in a significant manner.

13 NRDC's response to this is that CDTOA members could actually benefit from the rule,  
14 by purchasing new trucks so that they would have "accelerated the *inevitable* turnover of their  
15 fleets." Dkt # 37 at 19:3-4. This statement betrays a complete lack of understanding of how  
16 small business works, and reveals no understanding of the time value of money. Under NRDC's  
17 view, it makes no difference whether a business is forced to purchase a new truck tomorrow or in  
18 20 years. In reality, that makes all the difference in the world, because a business owner that is  
19 free from having to make significant capital investments can develop and grow the business, hire  
20 more employees, and generally enhance the productive capacity of the population. Over time, as  
21 the business grows, truck replacements can be phased in in an economically viable manner,  
22 rather than forced to occur on an unrealistically short timeframe that does not match business  
23 models that have been operating for decades.

24 Defendants also make much of the fact that grants and loans are available. Specifically,  
25 they argue that their programs have "helped leverage \$57 million in loans to purchase over 900  
26 cleaner trucks and nearly 350 filter retrofits, and the Board expects to leverage \$98 million more  
27 over the next two years." Negrete Dec. at 8:14-17, 9:4-5.) Moreover, the "Carl Moyer program  
28 has spent \$15.5 million on heavy-duty truck replacements and \$9 million on retrofits. (Rowland  
Dec. at 6:15-18, 7:1-4. However, these figures are a pittance when compared to the fact that the

1 rule will cost industry “about \$1.5 billion” during the first five years of compliance. Brasil Dec.  
2 at 5:11-12. And they overlook the fact that the loans are not free; there are still financing costs  
3 associated with these programs, such that the costs will not be eliminated. Moreover, the  
4 declarants offered in support of the opposition acknowledge that they cannot even say with any  
5 certainty whether any of the financial assistance provided to date has been for CDTOA members.  
6 Negrete Dec. at 9:23-25.

7 Even the attempt to analyze the specific fleets of the declarants provided by CDTOA falls  
8 flat. While it may be true that some of the declarants who chose to sell their trucks because the  
9 cost of compliance was too high may be able to delay compliance, the defendants do not dispute  
10 the majority of the declarations. As to Declarant Wipf, defendants argue that “his fleet  
11 predominantly operates in the NOx Exempt Areas” and that only three . . . of the 28 trucks in his  
12 fleet have 1996 to 1999 model-year engines.” Brasil Dec. at 11:13-15. Thus, they argue, Mr.  
13 Wipf “can avoid compliance costs for these trucks in 2012 by ensuring that the three dump  
14 trucks remain in the NOx Exempt Areas.” *Id.* at 11:16-17. In other words, as long as Mr. Wipf  
15 adjusts the routes on these three trucks, he can delay compliance. The explanation on its face  
16 demonstrates that it must be preempted.

17 As to the other declarants, Mr. Brasil does not have sufficient information to determine  
18 compliance obligations, but does not dispute that Mr. Kern’s statement that he will have to either  
19 retire trucks (thus reducing his level of service) or install filters, thus causing him to raise prices.  
20 Kern Dec. ¶¶ 5-6. Nor does he dispute the assertions of Mr Parigini or Santoro with respect to  
21 their business judgment that the rule will cause them to raise their prices.

22 Having failed to rebut the allegations in the various declarations, and having failed to  
23 show that any CDTOA members are eligible or have received grants or loans, the defendants are  
24 thus forced to implicitly admit that “some” CDTOA members will have to bear the high cost of  
25 compliance on January 1, 2012.

1 **V. THE PUBLIC INTEREST WEIGHS IN FAVOR OF GRANTING THE**  
2 **PRELIMINARY INJUNCTION**  
3

4 Faced with the implicit admission that some CDTOA members will suffer immediate and  
5 severe consequences, the defendants posit that the public has an interest in clean air. Dkt #38 at  
6 15:21-28. But the analysis of preemption does not consider any countervailing public interest in  
7 the benefits of the state regulation in question. The Supreme Court made this clear in *Rowe*  
8 when it rejected a similar argument:  
9

10 Maine's primary arguments focus upon the *reason why* it has enacted the  
11 provisions in question. [¶] Despite the importance of the public health objective,  
12 we cannot agree with Maine that the federal law creates an exception on that  
13 basis, exempting state laws that it would otherwise pre-empt.

14 *Rowe v. New Hampshire Motor Transport Association, supra*, 552 U.S. 364 at 373, emphasis in  
15 original. Notwithstanding the noble purpose of a state law, absent an exception, it will be  
16 preempted.

17 To the extent defendants offer the public interest in clean air as part of the balancing of  
18 the equities analysis applicable to preliminary injunctions, their calculus is problematic at best,  
19 and they have failed to show their work. They have presented no analysis as to whether the  
20 billions of dollars that they admit the regulation will cost is outweighed by the positive effects of  
21 the rule. Even assuming the regulation will have achieved all of the goals set for it by  
22 defendants, they offer no evidence whatsoever as to whether those goals will be offset by the  
23 substantial drag on the economy that will be created by imposing billions of dollars of regulatory  
24 costs on business. If jobs are destroyed, and people cannot get work to buy food, is that  
25 outweighed by the fact that the regulation will, over time, arguably make the air in some parts of  
26 the state incrementally cleaner? These kinds of policy questions may be debated, but Congress  
27 has already struck the balance: deregulation of motor carriers is of such importance that states  
28 cannot interfere with it.

1           Moreover, the defendants admit (perhaps inadvertently) that the harm to the public by  
2 delaying implementation of the rule will not be very great. They acknowledge that the recession  
3 has resulted in fewer trucks on the road, and thus has reduced pollution levels:

4           Our forecasts strongly suggest that emissions will also be lower in 2014 than  
5 previously expected. . . The reduced emissions effectively provided the Board  
6 with a cushion in its efforts to achieve attainment in the South Coast and San  
7 Joaquin Valley Air Basins.

8 Brasil Dec. at 4:12-20. In addition to the “cushion” that is now available, the defendants go to  
9 great lengths to show that “most” CDTOA members will not have to comply on January 1, 2012.  
10 If that is true, then defendants must acknowledge that delaying the rule for only a small portion  
11 of the industry will not have a significant impact on the overall impact of the rule, assuming it is  
12 ultimately upheld.

13  
14 **VI. THE URGENCY WAS NOT CREATED BY CDTOA**

15  
16           Defendants argue that CDTOA is somehow to blame for bringing this motion on the eve  
17 of the effective date of the rule. However, the final amendments to the rule did not come out  
18 until September 16, 2011, as the defendants’ own declarant admits. Brasil Dec. at 5:23-25. Up  
19 to that point in time, CDTOA and other industry groups were lobbying for changes that would  
20 mitigate their concerns. While some amendments were adopted, it was not until the amendments  
21 were approved by the Board and submitted to the Office of Administrative Law that CDTOA  
22 knew with certainty that its members would be impacted on January 1, 2012. It was only then  
23 that the extraordinary remedy of an injunction became the last resort for businesses seeking to  
24 avoid bankruptcy.

25  
26 **VII. THE PREEMPTION PROVISIONS OF THE FAAAA DO NOT CONFLICT WITH**  
27 **THE CLEAN AIR ACT**  
28

1 The primary argument of the NRDC opposition brief is little more than a straw man.  
2 NRDC begins by asserting that “CDTOA’s claim asks this court to find that Congress implicitly  
3 repealed provisions in the Clean Air Act” and that implied repeals are strongly disfavored. Dkt  
4 #37 at 1:13-14. The NRDC brief then goes on to detail Congress’ intent in enacting the Clean  
5 Air Act, pointing out that

6 The Clean Air Act serves to “protect and enhance the quality of the Nation’s air  
7 resources so as to promote the public health and welfare and the productive  
8 capacity of its population.” 42 U.S.C. § 7401(b)(1).

9 Dkt #37 at 6:14-16.1 NRDC argues that the Clean Air Act gives state and local government  
10 primary responsibility for establishing clean air standards. *Id.* at 6:19-20.

11 Ultimately, NRDC identifies two portions of the Clean Air Act as cornerstones to their  
12 implied repeal argument: 42 U.S.C. §§ 7416 and 7543(d). Each will be discussed in some  
13 detail, *infra*. First, however, it is necessary to understand the law regarding implied repeal.  
14 NRDC is correct that repeal by implication is strongly disfavored:

15 The conclusion that two statutes conflict, however, is one that courts must not  
16 reach lightly. If any interpretation permits both statutes to stand, the court must  
17 adopt that interpretation, “absent a clearly expressed congressional intention to  
18 the contrary.”

19 *Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers*, 619 F.3d 1289, 1299  
20 (11th Cir. 2010). Before finding that a statute has been impliedly repealed, courts must first  
21 “assiduously attempt” to try to construe two statutes in harmony before concluding that one  
22 impliedly repeals the other. *Ibid.* The Supreme Court has affirmed that repeal by implication  
23 “will not be recognized, insofar as two statutes are capable of coexistence. . . .” *Astoria Federal*  
24 *Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991). And the Ninth Circuit has spoken  
25 strongly on the subject as well:

26 Furthermore, “courts are not at liberty to pick and choose among congressional  
27 enactments, and when two statutes are capable of co-existence, it is the duty of the  
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<sup>1</sup> The fact that NRDC acknowledges that the regulation at issue in this case was enacted pursuant to the Clean Air Act, and that the Clean Air Act is aimed at protecting public health further undercuts any claim that the safety exception to preemption applies in this case.

1 courts, absent a clearly expressed congressional intention to the contrary, to  
2 regard each as effective.”

3 *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 103 (9th Cir. 1981). Thus, it is the duty of  
4 this Court to first determine whether the Clean Air Act and the FAAAA are even in conflict. If  
5 they can coexist, this Court must choose that interpretation over one that creates a conflict.

6 As to the FAAAA, Congress’ intent is clear. Congress expressly amended the law in  
7 1994 to ensure that motor carriers would enjoy the same “broad preemption interpretation”  
8 enjoyed by the airline industry via the earlier Airline Deregulation Act. *Rowe v. New Hampshire*  
9 *Motor Transport Association*, *supra*, 552 U.S. 364 at 370. The “clear purpose” of the law was to  
10 preemption of States' economic authority over motor carriers of property, subject only to the  
11 safety exception. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, *supra*, 536 U.S. at  
12 439.

13 As to the Clean Air Act, whose provisions predate the 1994 amendments at issue in the  
14 present case, the intent of Congress is also clear, as it is expressly set forth in 42 U.S.C. § 7401,  
15 aptly entitled “Congressional findings and declaration of purpose.” After finding that air  
16 pollution is “brought about by urbanization, industrial development, and the increasing use of  
17 motor vehicles,” 42 U.S.C. § 7401(a)(2), Congress declared its purpose: “to protect and enhance  
18 the quality of the Nation's air resources so as to promote the public health and welfare and the  
19 productive capacity of its population.” 42 U.S.C. § 7401(b)(1). These provisions are interesting  
20 for several reasons. First, they make clear that air pollution has a number of sources, including  
21 urbanization, industrial development, and motor vehicles. Second, they identify a dual purpose:  
22 promoting clean air and also promoting “the productive capacity” of the population.

23 With the purposes of the two statutory schemes in mind, it is apparent that there is no  
24 conflict at all. Nothing in the FAAAA impliedly repeals the Clean Air Act. States are still free  
25 to exercise their responsibility under the Clean Air Act to promote clean air. They can address  
26 the pollution caused by urbanization, by such means as regulating land use and development.  
27 They can address the pollution caused by industrial development, by such means as limiting the  
28 types of pollutants factories emit from their smokestacks. They can even regulate the vast  
majority of motor vehicles. However they cannot regulate one small subset: motor carriers of  
property. In other words, states are free to promote clean air in virtually any manner they

1 choose, except in a manner that would constitute economic regulation of motor carriers. And  
2 given Congress' deregulatory intent in passing the FAAAA, it coexists quite nicely with the  
3 Clean Air Act's goal of promoting the "productive capacity of its population." This is not a case  
4 where this Court must struggle to harmonize these two statutory schemes. Quite the contrary,  
5 they are complementary. Congress has struck a balance: promote clean air, but don't do so in a  
6 matter that unduly fetters the economic and productive capacity of motor carriers.

7       Because the FAAAA and the Clean Air Act are not in conflict, the entirety of NRDC's  
8 argument about implied repeal should be rejected. It is based on a false premise. Rather than  
9 finding an implied repeal, this Court is duty bound instead to harmonize the two statutes, and  
10 Congress has already done most of the work in that regard. 42 U.S.C. § 7416, relied upon by  
11 NRDC, simply stands for the proposition that "nothing in this chapter" shall prohibit a state from  
12 adopting and enforcing standards for air pollution. It is silent as to whether Congress might, in a  
13 subsequent enactment in a completely different chapter, ensure that states do not engage in  
14 economic regulation. Similarly, 42 U.S.C. § 7453(d) provides that "[n]othing in this part shall  
15 preclude or deny to any State or political subdivision thereof the right otherwise to control,  
16 regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."  
17 Emphasis added. Again, Congress expressly reserved the power to adjust the law in a different  
18 part of the code. The Clean Air Act provisions, enacted in the 1970s, do not purport to prohibit  
19 Congress from ever again acting in any area to which air pollution might conceivably relate.  
20 This Court need not hinge its decision on the fact that the FAAAA is enacted later in time,  
21 although if there was a true conflict that would be a reasonable basis upon which to decide this  
22 case. Rather, this case can be decided on the simple fact that nothing in the Clean Air Act stands  
23 for the proposition that Congress cannot later tweak other areas of the law (like economic  
24 regulation of motor carriers). Congress did exactly that, and the two statutes can coexist.

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**CONCLUSION**

For the foregoing reasons, plaintiff CDTOA respectfully requests this Court issue a preliminary injunction enjoining the enforcement of the Truck and Bus Regulation, codified at 13 CCR § 2025.

THE LAW OFFICES OF BROOKS ELLISON

Dated: December 8, 2011

/s/ Patrick J. Whalen

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