

No. 08-56503

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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AMERICAN TRUCKING ASSOCIATIONS, INC.

*Plaintiff-Appellant*

v.

THE CITY OF LOS ANGELES, THE HARBOR DEPARTMENT OF THE CITY  
OF LOS ANGELES, THE BOARD OF HARBOR COMMISSIONERS OF THE  
CITY OF LOS ANGELES, THE CITY OF LONG BEACH, THE HARBOR  
DEPARTMENT OF THE CITY OF LONG BEACH, and THE BOARD OF  
HARBOR COMMISSIONERS OF THE CITY OF LONG BEACH,

*Defendants-Appellees.*

NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, AND  
COALITION FOR CLEAN AIR, INC.,

*Intervenors-Appellees.*

On Appeal from the United States District Court  
For the Central District of California The Honorable Christina A. Snyder,  
District Judge Case No. CV 08-04920 CAS (CTx)

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BRIEF OF *AMICUS CURIAE*  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE  
IN SUPPORT OF APPELLANT  
AMERICAN TRUCKING ASSOCIATIONS, INC.

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Karyn A. Booth  
Eric N. Heyer  
Jennifer M. Gartlan  
THOMPSON HINE LLP  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036  
(202) 331-8800  
*Counsel for The National  
Industrial Transportation League*

October 20, 2008

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The National Industrial Transportation League (the “NITL”) discloses that it is the oldest and largest organization in the United States representing the transportation policy interests of shippers who place freight of all kinds onto all modes of transportation. The NITL is a non-profit corporation under the laws of the District of Columbia. It does not have parent companies and no publicly held companies have any ownership interest in the NITL.

THOMPSON HINE LLP

By: s/ Karyn A. Booth  
Karyn A. Booth  
[karyn.booth@thompsonhine.com](mailto:karyn.booth@thompsonhine.com)  
Eric N. Heyer  
[eric.heyer@thompsonhine.com](mailto:eric.heyer@thompsonhine.com)  
Jennifer M. Gartlan  
[jennifer.gartlan@thompsonhine.com](mailto:jennifer.gartlan@thompsonhine.com)  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036  
(202) 331-8800 - Phone  
(202) 331-8330 - Fax

*Counsel for The National  
Industrial Transportation League*

Dated: October 20, 2008

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*Amicus curiae* The National Industrial Transportation League (“NITL”) submits this brief in support of the Appellant, the American Trucking Associations, Inc. (“ATA”), and hereby seeks reversal of the District Court’s denial of a preliminary injunction. The NITL was granted authority to participate as an *amicus curiae* pursuant to this Court’s Order dated on September 24, 2008.

### **NITL STATEMENT OF INTEREST**

NITL is a national association that represents approximately 700 member companies that tender goods to carriers for transportation in interstate and international commerce, or that arrange or perform transportation services. The NITL’s membership includes large multinational and national corporations as well as small and medium-sized companies. The majority of NITL’s members are companies that own or control the goods being transported and delivered, i.e. shippers and receivers. NITL’s shipper members span a multitude of industries, such as retail, automotive, petroleum, chemicals, paper, computer, and electronics, among others, and use all modes of transportation for the shipment of raw materials and finished products. Many NITL members are importers and exporters that depend on our nation’s seaports, including Los Angeles and Long Beach (the “Ports”), for the efficient and timely shipment of their goods.

Since its founding in 1907, NITL has advocated government policies that promote competitive, efficient, and safe transportation systems both within the United States and around the world. NITL has been a strong proponent of port security measures established to protect the homeland in the aftermath of September 11, 2001, and also supports a clean environment. NITL strongly supports the clean air objectives associated with the Ports' Clean Truck Program, including the plan to retire older trucks and replace them with newer, cleaner vehicles. However, NITL strongly opposes the Ports' Concession Agreements at issue in this proceeding, since they would unlawfully regulate the "prices, routes, and services" of trucking companies and substantially interfere with international maritime commerce to the detriment of NITL's members.

As one of the leading trade associations for the freight transportation industry whose members are the primary users of the Ports of Los Angeles and Long Beach, NITL can provide a unique and informed perspective on the issues presented in this appeal.

## **INTRODUCTION**

### **I. Competitive And Efficient Trucking Services At The Ports Are Critical To U.S. Importers And Exporters**

In today's global economy, NITL members depend upon competitive and efficient transportation services to effectively compete with foreign businesses and to meet the demands of American consumers. Timely and efficient cargo

deliveries are required to get U.S. goods to market, run assembly plants, and stock retail store shelves. This is particularly critical for many companies that operate “Just-In-Time”<sup>1</sup> supply chain management systems: “In its simplest terms, supply chain management (SCM) lets an organization get the right goods and services to the place they’re needed at the right time, in the proper quantity and at an acceptable cost.”<sup>2</sup>

The ports of Los Angeles and Long Beach together serve as our nation’s primary gateway for international cargo, handling in excess of 40 percent of all containerized cargo, including nearly 16 million containers. See Steinke Decl. ¶¶ 1, 3, ER at 457. As our nation’s largest and busiest seaport complex, it is critical that the Ports’ operations allow for a seamless flow of cargo transported in international commerce. Drayage carriers play an essential role in the efficient transport of international shipments at Los Angeles and Long Beach, since they deliver and pick up the cargo that is transported on vessels moving to and from the United States.

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<sup>1</sup> Just-In-Time “is a method of inventory control that brings material into the production process, warehouse or to the customer just in time to be used, which reduces the need to store excessive levels of material in the warehouse.” Martin Murray, Just in Time (JIT), <http://logistics.about.com/od/supplychainglossery/g/JustInTime.htm?p=1> (accessed Oct. 20, 2008).

<sup>2</sup> Russell Kay, Supply Chain Management, Computerworld, <http://www.computerworld.com/softwaretopics/erp/story/0,10801,66625,00.html> (Dec. 17, 2001).

## II. Drayage Services At The Ports Are A Fundamental Component Of International Maritime Commerce

Today, international shipments moving through the ports are often handled under “multimodal” arrangements involving “an integrated system of through-transportation of goods over land and water.”<sup>3</sup> Such arrangements enhance efficiencies because an international cargo movement involving multiple modes of transportation are handled under a single contract of carriage: “The significance of multimodalism is the explosive proliferation of international point-of-origin to point-of-destination multimodal shipments arranged by a single carrier under one set of documents.”<sup>4</sup> Indeed, “through transportation” movements are expressly governed by the federal regulatory regime governing international maritime commerce.<sup>5</sup>

Port drayage services are a fundamental component of international multimodal shipments. In such arrangements, cargo owners typically contract with the ocean carrier or a logistics services provider who provides a single rate for the entire “door-to-door” (as opposed to “port-to-port”) service. The contracting

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<sup>3</sup> Richard W. Palmer and Frank P. Degiulio, *Admiralty Law Institute Symposium: Terminal Operations and Multimodalism: Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 Tul. L. Rev. 281, 283 (1989).

<sup>4</sup> *Id.* at 284.

<sup>5</sup> “Through Transportation” is defined under federal law as “continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and foreign point or port.” 46 U.S.C. § 40102(25).

carrier is then responsible to hire other carriers needed to complete the transportation, including drayage operators that deliver and pick up cargo moving to and from the ports. Thus, by contracting for a “through” transportation service, the cargo owner gains efficiencies by avoiding multiple contracts with multiple carriers involved in the international shipment.

NITL is concerned that the Ports’ concession plans unduly burden international maritime commerce by unlawfully regulating the prices, routes, and services of the trucking companies operating at the ports. The regulations imposed by the ports will fundamentally restructure trucking operations at a significant cost, Whalen Decl. ¶ 43, ER at 835 (noting cost estimate exceeding \$1.1 billion for Port of Los Angeles concession plan), reducing the efficiency gains secured under multimodal shipping arrangements. Moreover, the concession plans operate as artificial barriers to entry at our nation’s busiest seaports and are expected to result in “reduced competition within the port drayage sector” and substantially higher drayage rates.<sup>6</sup> Under the Los Angeles concession plan, which would prohibit non-employee drivers from serving the port,<sup>7</sup> the ports’ own economic consultant has

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<sup>6</sup> John E. Husing, et al., San Pedro Bay Ports Clean Air Action Plan: Economic Analysis, Proposed Clean Truck Program, at 79 (Sept. 7, 2007), *available at* <http://www.cleanairactinplan.org/civica/filebank/blobdload.asp?BlobID=2260>.

<sup>7</sup> A phase-in schedule applies to the prohibition on independent owner-operators. See Los Angeles Concession Agreement § 3(d), ER at 545-46.

predicted price increases to cargo owners of **80 percent**.<sup>8</sup> Such dramatic increases in drayage costs can reasonably be expected to result in higher international through transportation prices overall, undermining the competitiveness of U.S. companies and jeopardizing U.S. jobs and the domestic economy.

### **SUMMARY OF ARGUMENT**

The District Court erred in broadly construing the motor vehicle safety exception of the FAAA Act, 49 U.S.C. § 14501(c)(2), to encompass port security. The Court's holding ignores the plain meaning of the statute and Congress's intent to limit the safety exception to motor vehicle *operations* and not matters only tangentially-related thereto.

The Court's overly broad interpretation of the safety exception conflicts with applicable Supreme Court precedent which requires precisely the opposite—a narrow construction of the saving clause to prohibit reregulation of trucking services by Los Angeles and Long Beach, as well as ports across the nation. Such a narrow interpretation is especially warranted here, since Appellees seek to regulate trucking companies in a manner that fundamentally interferes with the federal regulatory systems designed to enhance our nation's international and interstate commerce by imposing artificial barriers to entry and reducing competition among drayage operators.

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<sup>8</sup> See supra note 6, at 75.

Reversal of the District Court is also required because an examination of the Appellees' legislative intent demonstrates that motor vehicle "safety" was not the *bona fide* purpose underlying the concession plans, but rather an incidental, derivative benefit.

The concession plans are preempted under the doctrine of field preemption. The Ports' schemes to regulate the economics of drayage services interferes fundamentally with the federal regime regulating international maritime commerce that has existed under various formulations for more than 90 years. Based on the manifest federal interest in the field of maritime commerce, there is no presumption that the ports' regulations are a valid exercise of their State police powers. See United States v. Locke, 529 U.S. 89, 108 (2000).

The concession plans imposed by the Ports unduly burden efficient "through" multimodal international transportation arrangements, in which drayage carriers participate. They also conflict with the pro-competitive and nondiscriminatory policies of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (Oct. 14, 1998), as well as the federal objective to harmonize international shipping practices. See 49 U.S.C. § 40101.

NITL adopts and incorporates herein the Statement of the Case included in the ATA's Brief.

## ARGUMENT

### **I. The District Court Erred In Broadly Interpreting The FAAA Act's Motor Vehicle Safety Exception To Encompass Port Security Regulations**

In its Order, the District Court explicitly found that “the effect of the Concession agreements on ‘price, route, or service,’ would likely be sufficiently non-tenuous and direct to warrant preemption.” District Court Sept. 9, 2008 Order (“Order”) at 7, ER at 7. The Court, however, then erroneously determined that “the safety regulations at issue are not purely related to ‘the safety of *operation* of motor carriers of property,’ but rather address broader concerns more tangentially related to the operation of motor carriers . . . such as the security of the Ports.” Order at 19, ER at 19. Moreover, the Court concluded that the “case law examining the safety exception does not indicate that regulations have to have been passed for the exclusive purpose of promoting safety” and concluded that the concession plans were sufficiently related to “promoting safety” to fall within the saving clause created by 49 U.S.C. § 14501(c)(2)(A). *Id.* at 20-21, ER at 20-21.

#### **A. The District Court's Interpretation Judicially Rewrites The Safety Exception To Grant The States Authority Not Intended By Congress**

A close examination of the motor vehicle safety exception's text and legislative history illuminates the District Court's misreading of the term “safety regulatory authority . . . *with respect to motor vehicles*” to improperly encompass port security and permit the ports to regulate the economics of trucking in a

manner that far exceeds the scope of permissible State action reasonably anticipated by Congress. 49 U.S.C. § 14501(c)(2)(A)(emphasis added).

When undertaking statutory interpretation, the Court is obligated to carry out the intent and policy of Congress. San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004). In so doing, it must first examine the plain text of the statute and then, if necessary, resort to the statute’s legislative history. Id.; see also Carvajal v. United States, 521 F.3d 1242, 1246 (9th Cir. 2008). The Court must avoid stretching statutory language to cover a situation not contemplated by Congress. Biehl v. Comm’r of Internal Revenue, 351 F.3d 982, 987 (9th Cir. 2003). In the preemption context especially, the Supreme Court “declin[e] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.” Locke, 529 U.S. at 106-07 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 385 (1992)).

**1. The plain language of the safety exception requires a reading limited only to operational safety**

Here, the plain language of the statute reflects Congress’s intent that the saving clause apply only to State regulation of motor vehicle *operational* safety. The text refers to “the safety regulatory authority of a State *with respect to motor vehicles.*” 49 U.S.C. § 14501(c)(2)(A) (emphasis added). At least one federal appeals court has interpreted the saving clause as limited only to the regulation of motor vehicles and their operation because an expansive reading of the clause to

refer to “the states’ authority over safety issues generally . . . does not square with the plain language” of the statute. See United Parcel Serv., Inc. v. Flores-Galarza, 385 F.3d 9, 13-14 (1st Cir. 2004) (rejecting the Commonwealth of Puerto Rico’s argument that the safety exception “is not limited to motor vehicle safety or the prevention of motor vehicle accidents” to preempt a regulatory scheme that required, *inter alia*, carriers to keep documents and records required by the Commonwealth, pay license fees, submit copies of corporate officers’ criminal records, and post bonds). The overly expansive interpretation of the term “safety” adopted by the District Court not only reads the words “with respect to motor vehicles” out of the plain language of the statute, but also artificially inserts the expansive concept of port security—a subject not mentioned or contemplated by the limiting language of the statute’s text.

**2. The legislative history of the safety exception requires a reading limited only to operational safety**

An examination of the safety exception’s legislative history also demonstrates that the exception is limited only to motor carrier operational safety and does not concern matters such as port security designed to protect against weapons of mass destruction.

The first draft of the safety exception that evolved into what is now § 14501(c)(2)(A) was originally passed by the Senate as part of the attempt to preempt state regulation of “intermodal all-cargo air carrier[s].” See Federal

Aviation Administration Authorization Act of 1994, H.R. 2739 (engrossed amendment as agreed to by Senate on June 16, 1994), 103rd Cong. § 211 (1994).<sup>9</sup> Significantly, the draft safety exception’s text, as it existed following passage by the Senate, contained no reference to “motor vehicles” or any other object of the States’ safety regulatory authority.<sup>10</sup> Rather, the clause provided only that the general preemption rule “shall not restrict safety regulatory authority.” Id.

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<sup>9</sup> A modified version of H.R. 2739 was introduced in the Senate by amendment, 140 Cong. Rec. S6650-51 (June 9, 1994), and passed by the Senate in lieu of S. 1491, 140 Cong. Rec. S7097 (June 16, 1994). The original House version of H.R. 2739 did not contain a similar preemption provision. See H.R. 2739 (engrossed as passed by House on October 13, 1993). It is worth noting that while the general rule of preemption was modeled on Section 4 of the Airline Deregulation Act, Pub. L. No. 95-504, 1978 U.S.C.C.A.N. (92 Stat.) 1705, 1707-08, the Airline Deregulation Act did not contain a safety saving clause comparable to the clause at issue here.

<sup>10</sup> The draft preemption clause prior to referral of H.R. 2739 to the Conference Committee provided, in relevant part, as follows:

(4)(A) Except as provided in subparagraph (B), no State or political subdivision thereof, no interstate agency of two or more States, and no other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any intermodal air carrier . . . .

. . . .  
(B) Subparagraph (A)—

(i) does not apply to the transportation of household goods as defined in section 10102(11) of title 49, United States Code;

(ii) ***shall not restrict safety regulatory authority***; and

(iii) does not apply to the regulation of vehicle size and weight.

However, following passage of the bill by the Senate and prior to the meetings of the Conference Committee, the House Subcommittee on Surface Transportation held a hearing on July 20, 1994, to specifically address the preemption issues posed by the draft § 211. The comments made by members of the Subcommittee and federal regulators during this hearing demonstrate that the safety exception was widely understood to refer only to state operational safety regulations.<sup>11</sup>

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For purposes of clause (ii), the authority to regulate rates, routes, or services shall not be construed as safety regulatory authority, and the authority permitted under the Hazardous Materials Transportation Act (49 App. U.S.C. 1801 et seq.) to regulate routing shall not be affected.

H.R. 2739 (engrossed amendment as agreed to by Senate on July 16, 1994), § 211(b) (emphasis added).

<sup>11</sup> See, e.g., Legislation to Preempt State Motor Carrier Regulations Pertaining to Rates, Routes, and Services: Hearing Before the House Subcomm. on Surface Transportation of the Comm. on Public Works and Transportation, 103rd Cong. (July 20, 1994) at 11 (statement of Rep. Eddie Bernice Johnson that “We in Congress have long recognized that *highway safety* is an issue of national concern, and I support the States’ rights to continue to regulate safety . . . .”) (emphasis added), 17-18 (prepared statement of Rep. J. Dennis Hastert that “I do not in any way propose to deregulate motor carrier safety regulations” and citing as examples the Motor Carrier Safety Assistance Program and “safety regulations like insurance requirements, driver qualifications, vehicle safety, random drug testing, and commercial driver license requirements”); see also id. at 26, 36, 40 (exchanges between Subcommittee Chairman Rep. Nick J. Rahall II, Rep. Greg Laughlin, and Frank E. Kruesi, Assistant Secretary for Transportation Policy, Department of Transportation) (emphasis added):

By Rep. Rahall:

Finally, the final version of the safety exception that emerged from the Conference Committee included the addition of the new clause “with respect to

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Q. [ . . . ] How do you suppose the States would be able to ensure that safety requirements are met if the Congress preempts these laws relating to rates, routes, and services?

By Mr. Kruesi:

A. Mr. Chairman, this Committee has worked very well in developing the Motor Carrier Safety Assistance Program . . . , which allows the U.S. Department of Transportation to fund inspections and inspectors at the State level.

Most of these inspections are conducted by State Motor Vehicle Inspections and police officers, and these are what keep unsafe trucks off the road and detect them, much more so than regulatory efforts. It is quite clear to us from the studies that we have seen.

Again, it is not the economic regulation, but rather the law enforcement efforts of the States and localities with the direction from the Federal Government, that results in reductions in fatalities and a safer, although still not sufficiently safe, trucking industry.”

. . .

Q. Wouldn't the States still have to have some type of filing requirement for fitness certificates, some type of new permits for such safety reasons?

A. It would certainly be entitled to do so. This is not an effort to in any way reduce or impede the State's ability to regulate safety for trucks.

. . .

By Rep. Laughlin:

Q. So, in your opinion, this bill in no way will impact the State's *ability to enforce safety operations, safety inspections of the trucking industry*?

A. That is correct, Congressman.

motor vehicles,” to reflect Congress’s desire to limit the safety exception to only those State regulations that reference or concern the *operations* of motor carriers.

In construing the safety exception to encompass port security, the District Court improperly stretched the term “safety” to cover a whole range of non-operational-safety situations not contemplated by Congress. As the Supreme Court has warned, “a statute is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.” Nat’l Broiler Marketing Ass’n v. United States, 436 U.S. 816, 827 (1978). The District Court cannot be permitted to substitute its own, post-9/11 understanding of the term “safety regulatory authority . . . with respect to motor vehicles” for that of the 103rd Congress.

**B. The Safety Exception Must Be Narrowly Construed**

The District Court’s interpretation equating the terms “safety regulatory authority . . . with respect to motor vehicles” to “port security regulatory authority” also contradicts the recent Supreme Court decision of Rowe v. New Hampshire Motor Transport Association, 552 U.S. \_\_\_, 128 S. Ct. 989, 169 L. Ed. 933 (2008) (“Rowe”). In Rowe, the Court found a Maine statute regulating delivery service procedures for tobacco products preempted by § 14501(c)(1). Id. at 995-96. In addressing Maine’s argument that it retained the right to regulate

public health as part of its reserved police powers, the Court emphasized the narrowness of the FAAA’s saving clauses:

Maine’s inability to find significant support for some kind of “public health” exception is not surprising. “Public health” does not define itself . . . . To accept Maine’s justification in respect to a rule regulating services would legitimate rules regulating routes or rates for similar public health reasons. And to allow Maine directly to regulate carrier services would permit other States to do the same. Given . . . the variety of potential adverse public health effects, the many different kinds of regulatory rules potentially available, and the difficulty of finding a legal criterion for separating permissible from impermissible public-health-oriented regulations, Congress is unlikely to have intended an implicit general “public health” exception . . . .

Id. at 997.

Like Maine’s improper attempt to formulate out of whole cloth a “public health” exception, there is no support in the statute, its legislative history, or any applicable case precedent for the proposition that “port security” measures fall within the narrow confines of the safety exception. Just as the Supreme Court warned in Rowe, recognizing some sort of “port security” component to the narrow safety exception would allow every port in the United States to justify rules regulating routes, rates, and services for similar “security” reasons. The resulting patchwork of potentially contradictory State regulations is exactly what Congress sought to avoid when it enacted the FAAA Act with the goal of leaving service-

determining decisions “to the competitive marketplace.” *Id.* at 996. Thus, the Court must find that the Ports’ concession plans fail to survive preemption.

While the Supreme Court’s decision in City of Columbus v. Ours Garage and Wrecker Serv., Inc., 536 U.S. 424 (2002), observes that the inclusion of the safety exception “does not *invariably* call for the narrowest possible construction of the exception” because the preemption rule and the safety exception “do not *necessarily* conflict,” *Id.* at 440 (emphases added), a narrow interpretation of the safety exception is entirely appropriate here because the District Court has already found that the general rule preempting state regulation of “rates, routes, and services” applies in this case. McCauley v. Makah Indian Tribe, 128 F.2d 867, 869-70 (9th Cir. 1942) (holding that saving exceptions to statutory provisions should be strictly construed); Order at 5-8, ER at 5-8.

Even though the District Court recognized that “[t]here does not appear to be any case law addressing the question of whether security concerns analogous to the concerns identified by the Ports fall within the safety exception,” it attempted to glide over that issue by merely noting that “[s]ome of the cases involving towing have, however, indicated that the safety exception does cover regulations that address safety concerns beyond pure motor vehicle operation safety.” Order at 18-19, ER at 18-19. Tillison v. San Diego, 406 F.3d 1126 (9th Cir. 2005), and similar cases are distinguishable, however, because tow truck operations are inherently

local in nature, present no real threat to the orderly flow of interstate or international commerce, and are explicitly addressed in part in the statute. See 49 U.S.C. § 14501(c)(2)(C) (permitting state regulation of prices for unconsented or unauthorized tows). Indeed, one similar and widely-quoted towing case explicitly noted that the challenged state regulations “impose so peripheral and incidental an economic burden that no detailed analysis is necessary to conclude that they fall within the § 14501(c)(2)(A) exemptions.” Ace Auto Body & Towing Ltd. v. City of New York, 171 F.3d 765, 769 (2d Cir. 1999).

Here, however, the challenged concession plans clearly impose a heavy burden on interstate and international commerce, and thus the “competitive marketplace.” The District Court implicitly recognized this burden when it found the plans fall within the scope of § 14501(c)(1)’s general rule of preemption. Order at 7, ER at 7 (“Failure to comply with the concession agreements would seemingly have a direct effect on what services the motor carriers could provide, because they would be banned from the Ports, and therefore could not provide drayage services to clients there.”) Indeed, the provision banning independent owner operators from the Port of Los Angeles is exactly the type of barrier to market entry that Congress attempted to prohibit through § 14501(c)(1). See H.R. Conf. Rep. No. 103-677 at 86-87, 1994 U.S.C.C.A.N. at 1758-59 (“Currently, 41 jurisdictions regulate, in varying degrees, intrastate prices, routes, and services of

motor carriers. . . . Typical forms of regulation include *entry controls* . . . . Strict entry controls often serve to protect carriers, while restricting new applicants from directly competing for any given route and type of trucking business."); see also Automobile Club of New York v. Dykstra, 520 F.3d 210, 216-17 (2d Cir. 2008) (finding preempted by § 14501(c)(1) a New York City licensing scheme making it unlawful to engage in towing without having first obtained a license because the scheme was not "genuinely responsive to safety concerns").

Thus, because Rowe requires a limited reading of the safety exception and because—unlike Tillison and related towing cases—the regulations at issue here have a profound impact on the flow of interstate and international commerce, the Court should strictly construe the motor vehicle safety exception and hold the concession plans preempted by the FAAA Act. To hold otherwise would allow the motor vehicle safety exception to swallow the general preemption rule.

### **C. The Concession Plans Are Not “Genuinely Responsive” To Motor Vehicle Safety**

As the Supreme Court has noted in addressing the safety exception, “[l]ocal regulation of prices, routes, or services . . . that is not genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)’s preemption rule.” Ours Garage, 536 U.S. at 442. This Court has restated this point by asserting that “the focus of the safety exception to preemption must be on the legislative intent and whether the legislature was acting out of safety concerns.” Tillison, 406 F.3d

at 1129. As the Tillison Court notes, the crux of the inquiry is the legislative body's *bona fide* subjective intent—"whether the purpose and intent of the body passing the law at issue . . . was *truly* safety." Id.

The party attempting to invoke a saving clause bears the burden of proving that safety was not a mere pretext for a regulatory scheme with some other guiding motivation. See NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 711 (2001). Congress was clear in its intent that the safety exception not be used "as a guise for continued economic regulation":

The conferees do not intend the regulatory authority which the States may continue to exercise (partially identified in section 41713(b) . . . ) to be used as a guise for continued economic regulation as it relates to prices, routes or service. There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and service, may instead attempt to regulate intrastate trucking markets through [*sic*] its unaffected authority to regulate matters such as safety . . . . The conferees do not intend for States to attempt to de facto regulate prices, routes, or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

H.R. Conf. Rep. No. 103-677 at 84, 1994 U.S.C.C.A.N. at 1756.

The Second Circuit, in addressing legislative intent under the safety exception, has noted the "slippery slope" of "relatedness" to safety: "Little imagination is necessary to imagine that a regulation could be reasonably related to safety without being genuinely responsive to safety concerns." Loyal Tire & Auto

Center, Inc. v. Town of Woodbury, 445 F.3d 136, 145 (2d Cir. 2006). Thus, in examining the “genuinely responsive” standard, the Second Circuit formulated the following two-step test: “First, a court ‘must consider any specific expressions of legislative intent in the statute itself as well as the legislative history.’ Then, it must assess those ‘purported safety justifications . . . in light of the existing record evidence.’” Automobile Club of New York, 520 F.3d at 215 (quoting Loyal Tire, 445 F.3d at 145, and holding tow truck regulation intended to remedy problem of "chasing" disabled vehicles federally preempted under two-step test because safety exception inapplicable).

Here, applying the two-step test formulated by the Second Circuit, Appellees cannot show that safety was more than a pretextual justification for the concession plans at issue.

**1. The primary intent of the concessions plans is to ameliorate environmental externalities**

As the ATA notes in its brief, the concession agreements contain only four provisions that may even be reasonably construed as “relating” to safety: (1) the requirement that the concessionaire be a licensed motor carrier and comply with federal and state safety standards; (2) the requirement that only trucks entered into the Drayage Trucks Registry be used; (3) the requirement that records be kept of driver enrollment in the federal TWIC program and compliance with the TWIC program; and (4) the requirement that trucks comply with all applicable federal,

state, local, and Port security regulations. Appellant's Br. at 11-12. With the exception of the Drayage Trucks Registry, other federal and State laws provide a stand-alone basis for all of these purported "safety" requirements. Moreover, the Ports' motivation for a Drayage Truck Registry was not primarily safety, but rather to "verify that a truck entering the gate meets the applicable model year standard" so as to contain the adverse environmental impact of using older trucks. Kanter Decl. ¶¶ 17-19, ER at 433-44.

"It is not always a sufficient answer to a claim of preemption to say that state rules supplement, or even mirror, federal requirements." Locke, 529 U.S. at 115. Yet, with respect to three of the four "safety-related" provisions of the Ports' concession plans, that is exactly what the Ports attempt to do here. Holmes Decl. ¶ 28, ER at 291 ("Simply stated, POLA wants to ensure that LMC's are obeying existing laws and following reasonable, prudent practices while they are operating trucks on POLA property.").

As the Locke Court observed, merely reiterating already-existing federal requirements is a thin reed on which to place the weight of a comprehensive economic regulatory scheme like the concession programs here. Thus, because none of the *bona fide* "safety-related" measures in the Ports' concession plans impose any requirements that do not already exist under other federal or State

laws, the requirements of the concession plans themselves demonstrate that the plans are not “genuinely responsive” to safety concerns.

**2. The record demonstrates that promoting safety is not the ports’ true motivation**

Finally, an examination of the record also demonstrates that safety and port security are not the Ports’ true motivations. On August 22, 2008, the City of Los Angeles filed with the District Court an *Ex Parte* Notice of Tariff Amendment wherein it described tariff amendments made on August 21, 2008. ER at 150-154. Notably, the Port significantly relaxed two of the supposedly crucial “safety” and port security measures: the Port established a Day Pass system wherein access is granted to infrequent motor carrier users in exchange for a \$100 fee and shortened the advance registration requirement for the Drayage Truck Registry from 31 days to any time prior to entry. *Id.* at ¶¶ 2-3, ER at 152. As these modifications to the Port of Los Angeles’s tariff demonstrate, the supposedly crucial port security measures implemented by the concession plan are actually nothing more than incidental benefits of an economic regulatory scheme. Indeed, based on the Ports’ tariff amendment, it appears that access to relatively unknown truckers can be granted simply in exchange for paying a \$100 fee. Thus, as the above analysis demonstrates, while several of the concession plans’ provisions may be broadly categorized as “safety-related,” the plans as a whole are far from “genuinely responsive” to any legitimate motor vehicle safety concerns the Ports may have.

## II. The Ports' Concession Plans are Preempted Because They Interfere With Long-Standing Federal Regulation of International Maritime Commerce

The Ports' Concession Plans are also unlawful because they significantly interfere with international maritime commerce, a field which has historically been subject to federal regulation. The Supreme Court has recognized that our nation's maritime trade involves "a federal interest [that] has been manifest since the beginning of our republic and is now well established." Locke, 529 U.S. at 99; see also Ray v. Atlantic Richfield Co., 435 U.S. 151, 163-68 (1977). When a State law encroaches in the area of international maritime commerce, there is no assumption that the State action is a valid exercise of the State's police powers in light of the long-standing federal regulation of the field. Locke, 529 U.S. at 108 (noting that "an 'assumption' of nonpreemption is *not* triggered when the State regulates in an area where there has been a history of significant federal presence" (emphasis added)).

In such a case, the Court must determine whether the State regulation contradicts the federal regime and would undermine uniformity:

The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity in regulation for maritime commerce.

Id.; see also Pacific Merchant Shipping Ass'n v. Cackette, 2007 U.S. Dist. Lexis 67165 (E.D. Cal. Aug. 7, 2007), aff'd, Pacific Merchant Shipping Ass'n v. Goldstene, 517 F.3d 1108 (9th Cir. 2008) (holding there was no presumption that state regulation of air emissions for ocean-going vessels involved valid police powers due to the history of significant federal presence in the maritime field).

Historic federal regulation of maritime commerce is not limited to vessel navigation or operational issues. The federal government has regulated international maritime cargo movements for more than 90 years. Congress initiated regulation in this area with passage of the Shipping Act of 1916, which regulated common carriers by water operating in U.S. foreign commerce and “other persons” involved in the business of “forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.”<sup>12</sup> Years later, Congress reformed that federal regime with passage of the Shipping Act of 1984 in order to afford common carriers greater flexibility to respond to changing market conditions. Pub. L. No. 98-237, 98 Stat. 67 (Mar. 20, 1984). While the 1916 Act governed international shipments transported only between ports of the United States and a foreign country, the 1984 Act expanded the law’s scope to include “through transportation” shipments in which an

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<sup>12</sup> The Shipping Act of 1916, 39 Stat. 728 (Sept. 7, 1916); see also Richard W. Palmer and Frank P. Deguilo, supra note 3, at 316.

international shipment involving ocean and land transportation is governed by a single contract of carriage. See id. at § 3(26) (defining “through transportation”).

The Shipping Act of 1984 was amended in 1998 by the Ocean Shipping Reform Act (“OSRA”), Pub. L. No. 105-258, 112 Stat. 1902, with the intent of enhancing further competitive and efficient intermodal transportation services at our nation’s seaports.<sup>13</sup> 46 U.S.C. § 40101. OSRA also maintained federal jurisdiction over “through” intermodal shipments. See 46 U.S.C. § 40102(25).

A primary objective of the regime established by OSRA is to promote uniformity in international maritime commerce: “The purposes of this Act are— . . . (2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, in so far as possible, in harmony with, and responsive to, international shipping practices.” 46 U.S.C. § 40101(2). Congress also intended that the reforms of OSRA would promote a “nondiscriminatory regulatory process” and “the growth and development of United States exports through competitive and efficient ocean transportation . . . .” 46 U.S.C. § 40101(1), (4).

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<sup>13</sup> OSRA regulates maritime commercial activity including, *inter alia*, service contracts between shippers and carriers (46 U.S.C. § 40502), tariff publication of transportation prices (46 U.S.C. § 40501), and prohibited shipping practices (46 U.S.C. § 41101).

Accordingly, since 1916, there has been a consistent and significant federal presence in the regulation of international maritime cargo movements that establishes a *manifest federal interest in the field*. As such, this Court cannot assume that the Ports' concession plans represent a valid exercise of their traditional police powers. Locke, 529 U.S. at 108.

The concession plans also directly contradict the pro-competitive, efficiency enhancing, and nondiscriminatory policies of OSRA. Both Ports' plans unduly burden drayage operators by regulating their hiring decisions, truck routes, parking, operations, driver health insurance, driver credentials, compliance tags, security, truck placards, technology, and financial capability. Whalen Dec. ¶ 19, ER at 824. The Los Angeles plan would also permit only employee drivers (and not independent subcontractors) access to the ports. Whalen Dec. ¶ 20, ER at 825. This denial of entry to an entire class of trucking firms is wholly discriminatory and will reduce competition among available carriers. Husing, supra note 6, at 79. By restricting access to the Ports and burdening the remaining carriers with substantial regulations affecting "prices, routes, and services," Order at 7, ER at 7, the concession plans will substantially frustrate the objectives of the existing federal regulatory regime.

Furthermore, if the concession plans are upheld, it is reasonable to expect that other ports across the nation will develop their own schemes to regulate

trucking companies (and possibly other port operators, e.g. terminals and stevedores), thus creating a patchwork of inconsistent state regulations which would further undermine uniformity in international shipping practices contrary to OSRA. See 46 U.S.C. § 40101(2). Accordingly, this Court must find that the concession plans are preempted by the historical federal occupation of the field. See Locke, 529 U.S. at 108-10 (recognizing the importance of uniform national rules in the design of tankers); Ray, 435 U.S. at 163-68 (finding enforcement of state requirements would frustrate congressional intent to establish a uniform federal regime for the design of oil tankers).<sup>14</sup>

### **CONCLUSION**

For the foregoing reasons, this Court should reverse the ruling of the District Court denying ATA's motion for a preliminary injunction and rule that the FAAA Act's motor vehicle safety exception does not encompass port security, and that the

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<sup>14</sup> Notwithstanding the substantial interference with the existing federal regulatory regime, ATA's complaint before the District Court did not include any claim arising under the Shipping Act of 1984, as amended by OSRA, which may require a determination by the U.S. Federal Maritime Commission, the regulatory agency that administers the Shipping Act. ATA Complaint, ER at 930, et seq. Thus, this Court has the authority to rule on the issue of field preemption without having to determine whether any violation of the Shipping Act may have occurred as a result of the Ports' Clean Truck Program. Indeed, this Court should so rule in order to avoid unnecessary delays in the resolution of the critical issues presented in this appeal and the District Court proceeding.

Ports' concession plans are preempted by the manifest federal presence in the field of international maritime commerce.

Respectfully submitted,

THOMPSON HINE LLP

By: s/ Karyn A. Booth  
Karyn A. Booth  
[karyn.booth@thompsonhine.com](mailto:karyn.booth@thompsonhine.com)  
Eric N. Heyer  
[eric.heyer@thompsonhine.com](mailto:eric.heyer@thompsonhine.com)  
Jennifer M. Gartlan  
[jennifer.gartlan@thompsonhine.com](mailto:jennifer.gartlan@thompsonhine.com)  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036  
(202) 331-8800 - Phone  
(202) 331-8330 - Fax

*Counsel for The National  
Industrial Transportation League*

Dated: October 20, 2008

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 08-56503**

I hereby certify that pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit rule 32-1, the attached opening brief is proportionally spaced, has a type face of 14 points or more and contains 6,522 words.

THOMPSON HINE LLP

By: s/ Karyn A. Booth  
Karyn A. Booth  
[karyn.booth@thompsonhine.com](mailto:karyn.booth@thompsonhine.com)  
Eric N. Heyer  
[eric.heyer@thompsonhine.com](mailto:eric.heyer@thompsonhine.com)  
Jennifer M. Gartlan  
[jennifer.gartlan@thompsonhine.com](mailto:jennifer.gartlan@thompsonhine.com)  
1920 N Street, N.W., Suite 800  
Washington, D.C. 20036  
(202) 331-8800 - Phone  
(202) 331-8330 - Fax

*Counsel for The National  
Industrial Transportation League*

Dated: October 20, 2008

## PROOF OF SERVICE

I, hereby certify that on October 20, 2008 I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. Upon their written consent I have e-mailed the forgoing to the following non-CM/ECF participants (some listed persons may also be CM/ECF participants):

*Counsel for Plaintiff-Appellant American Trucking Associations, Inc.:*

Christopher C. McNatt, Jr.  
SCOPELITIS, GARVIN, LIGHT,  
HANSON & FEARY LLP  
2 North Lake Avenue, Suite 460  
Pasadena, California 91101  
Telephone: (626) 795-4700  
Facsimile: (626) 795-4790  
[cmcnatt@scopelitis.com](mailto:cmcnatt@scopelitis.com)

W. Stephen Cannon  
Seth D. Greenstein  
CONSTANTINE CANNON LLP  
1627 Eye Street, N.W., Suite 1000  
Washington, D.C. 20006  
Telephone: (202) 204-3500  
Facsimile: (202) 204-3501  
[scannon@constantinecannon.com](mailto:scannon@constantinecannon.com)  
[sgreenstein@constantinecannon.com](mailto:sgreenstein@constantinecannon.com)

Robert Digges  
Chief Counsel, ATA Litigation Center  
AMERICAN TRUCKING  
ASSOCIATIONS, INC.  
950 North Glebe Road  
Arlington, Virginia 22203  
Telephone: (703) 838-1889  
Facsimile: (703) 838-1705  
[rdigges@trucking.org](mailto:rdigges@trucking.org)

*Counsel for Defendants-Respondents the City of Los Angeles,  
the Harbor Department of the City of Los Angeles, and the Board of Harbor  
Commissioners of the City of Los Angeles:*

Steven S. Rosenthal  
Alan K. Palmer  
Douglas A. Tucker  
Tiffany R. Moseley  
KAYE SCHOLER LLP  
The McPherson Building  
901 Fifteenth Street, N.W.  
Washington, D.C. 20005-2327  
[srosenthal@kayescholer.com](mailto:srosenthal@kayescholer.com)  
[apalmer@kayescholer.com](mailto:apalmer@kayescholer.com)  
[dtucker@kayescholer.com](mailto:dtucker@kayescholer.com)  
[tmoseley@kayescholer.com](mailto:tmoseley@kayescholer.com)

Thomas A. Russell  
General Counsel  
Joy M. Crose  
Assistant General Counsel  
Simon M. Kann  
Deputy City Attorney  
LOS ANGELES CITY  
ATTORNEY'S OFFICE  
425 South Palos Verdes Street  
San Pedro, California 90731  
[trussell@portla.org](mailto:trussell@portla.org)  
[jcrose@portla.org](mailto:jcrose@portla.org)  
[skann@portla.org](mailto:skann@portla.org)

Anton Arbasser  
Bryant Delgadillo  
KAYE SCHOLER LLP  
1999 Avenue of the Stars, Suite 1700  
Los Angeles, CA 90067  
[aarbisser@kayescholer.com](mailto:aarbisser@kayescholer.com)  
[bdelgadillo@kayescholer.com](mailto:bdelgadillo@kayescholer.com)

*Counsel for Defendants-Respondents the City of Long Beach,  
the Harbor Department of the City of Long Beach, and the Board of Harbor  
Commissioners of the City of Long Beach:*

C. Jonathon Benner  
Mark E. Nagle  
TROUTMAN SANDERS LLP  
401 9th Street, N.W.  
Suite 1000  
Washington, D.C. 20004-2134  
[jonathon.benner@troutmansanders.com](mailto:jonathon.benner@troutmansanders.com)  
[mark.nagle@troutmansanders.com](mailto:mark.nagle@troutmansanders.com)

Robert Shannon  
City Attorney  
Dominic Holzhaus  
Principal Deputy  
CITY OF LONG BEACH  
Long Beach City Hall  
333 West Ocean Boulevard  
Eleventh Floor  
Long Beach, California 90802  
[robert\\_shannon@longbeach.gov](mailto:robert_shannon@longbeach.gov)  
[dominic\\_holzhaus@longbeach.gov](mailto:dominic_holzhaus@longbeach.gov)

Paul L. Gale  
ROSS, DIXON & BELL LLP  
5 Park Plaza, Suite 1200  
Irvine, California 92614-8529  
[pgale@rdbl.com](mailto:pgale@rdbl.com)

*Counsel for Intervenors-Respondents National Resource Defense Council, Inc.,  
Sierra Club, and Coalition for Clean Air:*

David Pettit  
Melissa Lin Perrella  
Adriano Martinez  
NATURAL RESOURCES DEFENSE  
COUNCIL, INC.  
1314 Second Street  
Santa Monica, California 90401  
[dpettit@nrdc.org](mailto:dpettit@nrdc.org)  
[mlinperrella@nrdc.org](mailto:mlinperrella@nrdc.org)  
[amartinez@nrdc.org](mailto:amartinez@nrdc.org)

*Counsel for Amicus Curiae National Retail Federation:*

Jeffery S. Davidson  
Brent Caslin  
William Grignon  
KIRKLAND & ELLIS LLP  
777 South Figueroa Street, Floor 37  
Los Angeles, California 90017-5800  
[jdavidson@kirkland.com](mailto:jdavidson@kirkland.com)  
[bcaslin@kirkland.com](mailto:bcaslin@kirkland.com)  
[wgrignon@kirkland.com](mailto:wgrignon@kirkland.com)

Jeffrey Bossert Clark  
KIRKLAND & ELLIS LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005-5793  
[jclark@kirkland.com](mailto:jclark@kirkland.com)

s/ Karyn A. Booth  
Karyn A. Booth