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17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 AMERICAN TRUCKING  
ASSOCIATIONS, INC. )

20 Plaintiff, )

21 vs. )

22 THE CITY OF LOS ANGELES, THE  
HARBOR DEPARTMENT OF THE  
23 CITY OF LOS ANGELES, THE  
BOARD OF HARBOR  
24 COMMISSIONERS OF THE CITY  
OF LOS ANGELES, THE CITY OF  
25 LONG BEACH, THE HARBOR  
DEPARTMENT OF THE CITY OF  
26 LONG BEACH, and THE BOARD  
OF HARBOR COMMISSIONERS  
27 OF THE CITY OF LONG BEACH, )

28 Defendants. )

Case No. CV 08-04920 CAS (CTx)

**PLAINTIFF'S STATEMENT OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

**Hon. Christina A. Snyder**

**Date: January 11, 2010**

**Time: 10:00 a.m.**

**Place: Courtroom 5**

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1 Pursuant to Federal Rule of Civil Procedure 56 and Local Rules 56-1, 56-3,  
2 and 56-4, Plaintiff American Trucking Associations, Inc. (“ATA”) submits this  
3 Statement of Points and Authorities in Support of its Motion for Summary  
4 Judgment against the Los Angeles Defendants (“the Port” or “POLA” or  
5 “Defendants”).<sup>1</sup>

### 6 **INTRODUCTION AND SUMMARY OF ARGUMENT**

7 This Court is no longer analyzing this case on a blank slate. There have  
8 already been three Court decisions already regarding this dispute: one from the  
9 Ninth Circuit and two more from this Court. In the last of those opinions, this  
10 Court issued a preliminary injunction barring POLA from implementing many of  
11 the provisions in its Concession agreements. ATA continues to support, as it  
12 always has, enforcement of the federal and California motor carrier safety  
13 regulatory scheme, the Transportation Worker Identification Credential (“TWIC”)  
14 program, and POLA’s use of a drayage truck registry. With respect to provisions  
15 in POLA’s Concession agreements relating to these issues, ATA is challenging  
16 only the Port’s attempt (via its Concession agreements) to use a possible violation  
17 of those requirements as a basis to revoke entirely a motor carrier’s authority to  
18 provide drayage services at the Port. Notably, the Port of Long Beach has agreed  
19 to settle this case by implementing a Registration and Agreement that ATA  
20 supports. This demonstrates the ability of a port next to POLA to address concerns  
21 identified by POLA in this litigation without using a Concession agreement at all.

22 But one aspect of the case has not changed: despite months of discovery, no  
23 material facts have arisen that should alter the holdings of this Court and the Ninth  
24 Circuit that federal law preempts certain provisions of POLA’s Concession  
25 agreements. As a result, the three exemptions from preemption that POLA has

26  
27 <sup>1</sup> This memorandum of law refers to the Statement of Uncontroverted Facts  
28 and Conclusions of Law as the “SOUF.” For any exhibits marked confidential that  
are mentioned in this memorandum or included with the SOUF, confidentiality has  
been waived by the producing party for those pages that are quoted or referenced.

1 raised continue to have no support in the law, and do not involve any disputed  
2 material facts. Given the recent close of discovery, it is now appropriate for this  
3 Court to further narrow this case by issuing final rulings with respect to these  
4 exceptions to preemption claimed by POLA:

- 5 • **Sovereign Tidelands Exception.** Nothing can change the fact that the  
6 federal government continues to maintain the power to ensure that tidelands  
7 remain free to interstate commerce. This Court’s preliminary ruling  
8 rejecting the application of this exception to POLA should be made  
9 permanent.
- 10 • **Market Participant Exception.** Nothing has changed the fact that POLA  
11 cannot qualify as a market participant exempt from federal preemption,  
12 given that the Port simply does not participate in the market for drayage  
13 services. The Ninth Circuit affirmed this Court’s holdings on these issues,  
14 and nothing warrants a different holding now.
- 15 • **Motor Vehicle Safety Exception.** Nothing can change the fact that POLA  
16 has no evidence indicating that the provisions of its Concession agreements  
17 most troubling to ATA’s members—the independent owner-operator  
18 (“IOO”) phase-out, the off-street parking restriction, and the financial  
19 information, maintenance, and placard requirements—are not “genuinely  
20 responsive” to motor vehicle safety. That was the preliminary assessment of  
21 this Court as well as the Ninth Circuit, and POLA was not able to identify  
22 any data or analysis during discovery demonstrating that these three  
23 provisions are “genuinely responsive” to motor vehicle safety. Accordingly,  
24 this Court’s preliminary injunction regarding these provisions also should be  
25 made permanent.

26 In addition to final rulings on the applicability of these exceptions,  
27 resolution of two legal issues at this stage also would narrow the case. First,  
28 POLA’s Concession agreements violate federal law for the separate reason that

1 POLA cannot use them to prohibit motor carriers from participating in interstate  
2 commerce. Because only federal agencies have the power to sanction motor  
3 carriers in this manner, resolution of this issue alone should end this case. Second,  
4 if any portion of the case were to remain, it would streamline further proceedings  
5 to clarify that “motor vehicle safety” in this statutory context does not include port  
6 security, homeland security, terrorism, crime, public safety, or public health.

7 For these reasons, ATA respectfully requests that this Court grant summary  
8 judgment in its favor on all claims.

### 9 **LEGAL STANDARD**

10 Summary judgment is appropriate if “the pleadings, the discovery and  
11 disclosure materials on file, and any affidavits show that there is no genuine issue  
12 as to any material fact and that the movant is entitled to judgment as a matter of  
13 law.” Fed. R. Civ. P. 56(c)(2). To show a genuine fact dispute, it is not sufficient  
14 to “simply show that there is some metaphysical doubt as to the material facts.”  
15 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587,  
16 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citation omitted). Rather, the opposing  
17 party must “set out specific facts showing a genuine issue for trial” and cannot  
18 “rely merely on allegations or denials in its own pleadings.” Fed. R. Civ. P.  
19 56(e)(2). Further, “the mere existence of *some* alleged factual dispute between the  
20 parties will not defeat an otherwise properly supported motion for summary  
21 judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248,  
22 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (emphases in original). The non-moving  
23 party cannot merely claim it will later discredit the moving party’s evidence at trial  
24 and hope it can somehow develop evidence to support that claim. *Id.* at 256-57.

### 25 **FACTUAL SUMMARY**

26 This Court is familiar with the basic facts of this case, from the three  
27 previous decisions in this case: *Am. Trucking Ass’ns, Inc. v. City of L.A.*, 577  
28 F. Supp. 2d 1110 (C.D. Ca. 2008); *Am. Trucking Ass’ns, Inc. v. City of L.A.*,

1 559 F.3d 1046 (9th Cir. 2009); and *Am. Trucking Ass'ns, Inc. v. City of L.A.*,  
2 No. CV 08-4920 CAS (CTx), 2009 WL 1160212 (C.D. Ca. Apr. 28, 2009).  
3 Specific material facts are detailed in the accompanying Statement of  
4 Uncontroverted Facts, and in the legal arguments that follow.

### 5 ARGUMENT

#### 6 **I. There is no material fact dispute regarding the preliminary issues of** 7 **associational standing or the application of 49 U.S.C. § 14501(c)(1).**

##### 8 **A. ATA has associational standing.**

9 “[A]n association has standing to bring suit on behalf of its members when:  
10 (a) its members would otherwise have standing to sue in their own right; (b) the  
11 interests it seeks to protect are germane to the organization’s purpose; and (c)  
12 neither the claim asserted nor the relief requested requires the participation of  
13 individual members in the lawsuit.” *Hunt v. Wash. State Apple Adver. Comm’n*,  
14 432 U. S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977); *see also National*  
15 *Ass’n for Advancement of Colored People v. Ameriquest Mortg. Co.*, 635 F. Supp.  
16 2d 1096, 1101-02 (C.D. Cal. 2009). Here, undisputable facts establish ATA’s  
17 standing to sue on behalf of its membership.

18 First, ATA’s members would have standing to sue POLA on their own  
19 behalf. ATA’s members provide drayage services at POLA. SOUF at ¶ 4. POLA  
20 concedes that the Concession agreements affect those members’ rates, routes, or  
21 services, by admitting, for instance, that the Concession agreements will increase  
22 the costs of drayage services. SOUF at ¶ 30. Second, protecting the interests of its  
23 members is integral to the purpose of the ATA and its Intermodal Motor Carriers  
24 Conference. SOUF at ¶ 6. Finally, neither the claim asserted nor the relief  
25 requested requires the participation of individual members in the lawsuit, because  
26 ATA seeks only injunctive relief. *See Warth v. Seldin*, 422 U.S. 490, 515, 955  
27 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (holding that injunctive relief will “inure to  
28

1 the benefit of those members of the association actually injured”). Accordingly,  
 2 ATA has associational standing.

3 **B. Section 14501(c)(1) preempts the Concession agreements.**

4 The Supremacy Clause of the United States Constitution states in relevant  
 5 part that, “[t]his Constitution, and the Laws of the United States which shall be  
 6 made in Pursuance thereof . . . shall be the supreme Law of the Land.” U.S.  
 7 Const., art. VI, cl. 2. Section 14501(c)(1) of Title 49 of the U.S. Code states that  
 8 “a State [or a] political subdivision of a State . . . may not enact or enforce a law,  
 9 regulation, or other provision having the force and effect of law related to a price,  
 10 route, or service of any motor carrier.”

11 As the Ninth Circuit held in the preliminary injunction phase of this  
 12 litigation, “[t]hat the Concession agreements relate to prices, routes or services of  
 13 motor carriers can hardly be doubted.”). *Am. Trucking Ass’ns v.*, 559 F.3d at 1046,  
 14 1053. Since that holding, POLA has produced no facts that change this  
 15 conclusion. Because the Concession agreements that ATA challenges in this  
 16 litigation affect a “price, route, or service of any motor carrier,” they are preempted  
 17 by federal law.

18 **1. The Concession agreements have a “connection with or  
 19 reference to” prices, routes, or services of motor carriers.**

20 To establish preemption under Section 14501(c)(1), the Supreme Court  
 21 requires in part that a regulation must have a “connection or reference to” motor  
 22 carrier prices, routes, or services. *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S.  
 23 364, 128 S. Ct. 989, 995, 998, 169 L. Ed. 2d 933 (2008). Under *Rowe*, this Court  
 24 found, and the Ninth Circuit affirmed, that Section 14501(c)(1) likely preempts the  
 25 Concession agreements. *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1117, *aff’d in*  
 26 *part*, *Am. Trucking Ass’ns*, 559 F.3d at 1053. The Concession agreements, on their  
 27 face, satisfy this requirement because they regulate almost every facet of a motor  
 28 carrier’s operations. The provisions “establish requirements for motor carriers’

1 hiring decisions, truck routes, parking restrictions, truck maintenance, truck safety,  
2 operations regulations, driver health insurance, driver credentials, compliance tags,  
3 security, placards posted on trucks, technology, and financial capability.” *Id.*

4 The factual record further supports this conclusion. First, POLA requires  
5 that a motor carrier sign a Concession agreement before the motor carrier can  
6 provide drayage services. SOUF at ¶ 24. This requirement directly relates to the  
7 services of motor carriers. Further, the various provisions of the Concession  
8 agreement relate to the manner in which drayage services can be provided. SOUF  
9 at ¶¶ 25-27, 29. Second, that same requirement relates to the routes of a motor  
10 carrier because no motor carrier can even transport containers between POLA and  
11 customer locations without first signing a Concession agreement. SOUF at ¶ 24.  
12 Third, POLA admits that the Concession agreements increase drayage costs in an  
13 amount that inherently will affect, and thus “relate to,” prices for drayage services.  
14 For example, a report from the Boston Consulting Group commissioned by POLA  
15 states that the employee driver provision of the Concession agreement will add a  
16 minimum of \$500 million annually to the cost of drayage services. SOUF at ¶ 30.

17 **2. The Concession agreements have a “significant” impact that**  
18 **is not “too tenuous, remote, or peripheral.”**

19 The Supreme Court also requires that the impact of the law or regulation  
20 must be “significant” and not “too tenuous, remote, or peripheral.” *Rowe*,  
21 \_\_\_ U.S. at \_\_\_, 128 S. Ct. at 995, 998. The significant and direct impact of the  
22 Concession plans on motor carriers is beyond dispute. This Court held that the  
23 Concession agreements “directly regulate” motor carriers, “at least to the extent  
24 they wish to access the Ports.” *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1117.  
25 Indeed, noncompliance with the Concession agreements would have a direct and  
26 significant effect on motor carriers “because they would be banned from the Ports,  
27 and therefore could not provide drayage services to clients there.” *Id.*  
28 Accordingly, this Court held that “the effect of the concession agreements on

1 ‘price, route, or service,’ would likely be sufficiently non-tenuous and direct to  
2 warrant preemption.” *Id.* (citing *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1047  
3 (9th Cir. 2000)). No material facts have been introduced by POLA to change this  
4 conclusion.

5 **II. The sovereign tidelands exception to preemption does not apply here.**

6 POLA alleges in this litigation that the Port sits on sovereign tidelands, and  
7 on that basis claims that the preemptive force of Section 14501(c)(1) does not  
8 apply to the Concession agreements. However, as this Court held during the  
9 preliminary injunction phase of the litigation, and as the Ninth Circuit affirmed, the  
10 sovereign tidelands doctrine does not apply here. POLA has introduced no  
11 material facts in this litigation that could conceivably change this Court’s  
12 conclusion on sovereign tidelands.

13 POLA sits adjacent to and on the filled tidelands of San Pedro Bay. But this  
14 fact does not provide POLA refuge from preemption in its theory of sovereign  
15 tidelands. As this Court has already recognized, a state’s power over beds of  
16 navigable waters, e.g., tidelands, “remains subject to only one limitation: *the*  
17 *paramount power of the United States to ensure that such waters remain free to*  
18 *interstate and foreign commerce.”* *Montana v. United States*, 450 U.S. 544, 551,  
19 101 S. Ct. 1245, 67 L. Ed. 493 (1981) (emphasis added). Based on that Supreme  
20 Court decision, this Court found that POLA’s control over its tidelands “is not  
21 absolute . . . . Congress’s power to regulate interstate commerce over navigable  
22 waterways supersedes the state’s plenary control.” *Am. Trucking Ass’ns*, 577 F.  
23 Supp. 2d at 1119. Further, binding Ninth Circuit precedent directly contradicts the  
24 Port’s theory where, as this Court observed, the Commerce Clause “preempted  
25 regulations by a state regarding leasing of sovereign tidelands.” *Id.* (citing *Western*  
26 *Oil & Gas v. Cory*, 726 F.2d 1340, 1343 (9th Cir. 1984)).

27 For all these reasons, this Court held as a matter of law, and the Ninth  
28 Circuit affirmed, “that the fact that the Ports sit on sovereign tidelands does not

1 exempt them from preemption under the” Federal Aviation Administration  
2 Authorization Act, or “FAAAA”. *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1119,  
3 *aff’d in part*, 559 F.3d at 1053. The Ninth Circuit “agree[d] with the district court  
4 that it is likely that ATA will prevail” over the tidelands theory and “commend[ed]  
5 the district court’s cogent explanation.” *Am. Trucking Ass’ns*, 559 F.3d at 1053.  
6 Because there are no additional facts relevant to POLA’s theory, this Court should  
7 grant ATA’s motion for summary judgment on this issue.

### 8 **III. The market participant exception to preemption does not apply here.**

9 At the preliminary injunction phase of this litigation, this Court already  
10 considered and rejected POLA’s arguments that it should qualify for an exemption  
11 from preemption, on the grounds that it allegedly acts as a participant in some  
12 relevant market. *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1119-1123. POLA has  
13 no legitimate claim to an exemption under the market participant doctrine, this  
14 Court held, because POLA has not pursued “purely proprietary interests.” *Id.* at  
15 1119. That is, POLA’s actions do not qualify as proprietary under the tests for  
16 either “efficient procurement” or for “narrow scope.” *Id.* at 1119-1123. On  
17 appeal, the Ninth Circuit praised this Court’s discussion and holding regarding the  
18 market participant doctrine, going so far as to “commend the district court’s cogent  
19 explanation.” *Am. Trucking Ass’ns*, 559 F.3d at 1053. Since this Court issued its  
20 earlier holding, POLA has introduced nothing that can lead this Court to arrive at a  
21 different conclusion. Indeed, POLA’s Deputy Executive Director, Mr. John  
22 Holmes, testified at his deposition as a corporate representative that he knows of  
23 no additional documents or facts that support POLA’s contention that they are a  
24 market participant. SOUF at ¶ 32.

#### 25 **A. POLA’s Concession agreements do not constitute proprietary** 26 **state action.**

27 Whether POLA meets the market participant exception to preemption, this  
28 Court previously noted, hinges on whether “state action is proprietary, rather than

1 regulatory.” *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1119. To determine whether  
2 the state’s action is proprietary, this Court considers whether the challenged action  
3 “essentially reflects the governmental entity’s own interest in its efficient  
4 procurement of needed goods and services.” *Id.* (internal punctuation omitted)  
5 (quoting *Engine Mfrs. v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1041  
6 (9th Cir. 2007)). As an alternative to this “efficient procurement” test, this Court  
7 can also apply the “narrow scope” test. This test considers whether the challenged  
8 program has such a “narrow scope” that it defeats “an inference that its primary  
9 goal was to encourage a general policy.” *Id.* (quoting *Engine Mfrs.*, 498 F.3d at  
10 1041). No new material fact disputes have arisen to change this Court’s previous  
11 conclusions that POLA’s actions fail both tests, and so are not proprietary.

12 **B. The Concession agreements do not satisfy the test for efficient**  
13 **procurement.**

14 This Court has already rejected Defendants’ attempt to assert that POLA’s  
15 actions are proprietary under the efficient procurement test. This Court went so far  
16 as to hold flatly that the “defendants are not participants in the relevant market,”  
17 *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1120, because the Defendants “and motor  
18 carriers do not contract directly for the provision of motor carrier services.” *Id.* at  
19 1121. Rather, the Concession agreements are “akin to a licensing scheme,  
20 whereby [POLA] license[s] the motor carriers to do business at [POLA], provided  
21 that they follow certain regulations.” *Id.* POLA has not introduced anything new  
22 to create a material fact dispute.

23 Whether the Defendants qualify for the efficient procurement doctrine can  
24 be stated as “whether the law at issue enables the city or state entity to procure  
25 goods or services in order to operate as a business.” *Am. Trucking Ass’ns*,  
26 577 F. Supp. 2d at 1121 (internal citation omitted). That, in turn, “depends on the  
27 definition of ‘the market.’” *Id.* at 1120. And “it is noteworthy that the [Supreme]  
28 Court has stated that for purposes of the market participation doctrine, the ‘market’

1 should be ‘relatively narrowly defined.’” *Id.* (quoting *South-Central Timber*  
2 *Develop., Inc. v. Wunnicke*, 467 U.S. 82, 98, 1045 S. Ct. 2237, 81 L. Ed. 2d 71  
3 (1984)). Given these legal standards from this Court and from the Supreme Court,  
4 the Defendants’ Concession agreements cannot qualify as efficient procurement of  
5 a market.

6 As this Court previously noted, the facts of *Florida Transp. Serv., Inc. v.*  
7 *Miami-Dade County*, 543 F. Supp. 2d 1315, 1327 (S.D. Fla. 2008), are extremely  
8 similar to this case. There, as this Court noted, plaintiffs challenged limits that the  
9 Port of Miami sought to impose on the number of permits given to stevedores who  
10 worked at the port. *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1123. That court held  
11 that the market participation doctrine had no application because the Port of Miami  
12 was “not a ‘participant’ in the stevedore market.” *Florida Transp. Serv.*, 543 F.  
13 Supp. 2d at 1332. That is, that port “did not offer stevedore services or hire  
14 stevedores.” *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1123. Just as the Port of  
15 Miami there did not offer stevedore services, there is no material dispute that the  
16 Port of Los Angeles here does not offer drayage services.

17 The evidence that has been produced during discovery serves only to  
18 reinforce this Court’s previous holding on this issue. According to ATA’s expert,  
19 Mr. Stephen Nieman, “[i]n port drayage transactions there are two participants—  
20 the motor carrier (or LMC) and its ‘customer’. The customer is the beneficial  
21 cargo owner that has title to the cargo when it is in transit.” SOUF at ¶ 34. “Ports  
22 do not participate as buyers or sellers of port drayage services.” *Id.* The  
23 Concession agreements themselves recognize this fact. Section I.(c) of the  
24 agreement states that “the Port has not secured drayage service contracts between  
25 Concessionaire and any customers.”

26 The market for port *drayage* services is distinct and separate from the  
27 market for port services generally. Port services include “1) wharfage and dockage  
28 for ocean carriers that call at a port and 2) land and capital improvements on the

1 land for marine terminal operators that lease land and/or equipment.” *Id.* at ¶ 37.  
2 It is undisputed that “LMCs do not offer port services.” *Id.* at ¶ 38. POLA has  
3 introduced nothing to dispute the separate nature of the markets. Indeed, POLA’s  
4 expert, Mr. Charles Towsley, testified in his deposition that he never defined the  
5 scope of any market in his expert report. *Id.* at ¶ 33. And POLA has in effect  
6 admitted that it does not participate in the market for drayage services. According  
7 to POLA’s Executive Director Geraldine Knatz, speaking as POLA’s corporate  
8 representative, POLA does not engage in marketing to attract motor carriers to the  
9 Port. *Id.* at ¶ 31. Rather, POLA directs its marketing efforts toward steamship  
10 lines and cargo holders. *Id.*

11 All of these undisputed facts buttress this Court’s earlier conclusion that  
12 “defendants are not participants in the relevant market” here. *Am. Trucking Ass’ns*,  
13 577 F. Supp. 2d at 1120.

14 **C. The Concession agreements do not satisfy the test for narrow**  
15 **scope.**

16 In its prior decision, this Court correctly made short work of the narrow  
17 scope test. According to the Court, the test analyzes whether the challenged action  
18 is so narrow that it “defeat[s] an inference that its primary goal was to encourage a  
19 general policy . . . .” *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1123 (quoting  
20 *Engine Mfrs.*, 498 F.3d at 1041). The test, this Court emphasized, “protects narrow  
21 spending decisions . . . that lack the effect of broader social regulation.” *Id.* Given  
22 the test’s stringent criteria, this Court noted that “the test was designed to protect  
23 ‘narrow spending decisions,’ which the concession agreements almost certainly are  
24 not.” *Id.* This Court continued that, rather than being narrow, the Concession  
25 agreements “contain numerous provisions regulating different aspects of the motor  
26 carriers’ services, and apply to all motor carriers wishing to access the Port[.]” *Id.*  
27 *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1123. The Ninth Circuit also noted the  
28 broad scope of POLA’s efforts, describing Defendants’ program as “an extensive

1 attempt to reshape and control the economies of the drayage industry in one of the  
2 largest ports in the nation.” *Am. Trucking Ass’ns*, 599 F.3d at 1055.

3 POLA has not changed this fundamentally broad scope of the Concession  
4 agreements. The Concession agreements still seek to regulate virtually every  
5 aspect of draying containers at POLA. They require truck drivers to work as  
6 employees for large trucking businesses, set mandatory criteria regarding what  
7 sorts of financial capacity those companies must have, what sorts of records they  
8 must keep, and what sort of placards the trucks must display. The Concession  
9 agreements even determine where the drayage trucks can park. This Court already  
10 rejected POLA’s claim of “narrow” scope, holding that these “numerous  
11 provisions” regulate many “different aspects of the motor carriers’ services” and  
12 “apply to all motor carriers wishing to access” POLA. *Am. Trucking Ass’ns*, 577  
13 F. Supp. 2d at 1123. Further, Defendants have conceded that the Concession  
14 agreements seek to advance the general policy of trying to clean up the air quality  
15 of the Port and the area surrounding it. According to POLA’s Mr. Holmes,  
16 “POLA’s most visible and widely publicized goal for the CTP has always been to  
17 reduce air pollution coming from the drayage trucks at the Ports.” SOUF at ¶ 40.  
18 Mr. Holmes has confirmed more recently that the concession “[p]rogram is a key  
19 feature of POLA’s Clean Air Action Plan.” SOUF at ¶ 41. And the Mayor’s  
20 Deputy Chief of Staff, Mr. Daniel Grunfeld, similarly confirmed that “[t]he CTP  
21 and concession features form an integral part of Mayor Villaraigosa’s Clean Air  
22 Action Plan.” *Id.* Or, again in the words of Mr. Holmes, the Concession  
23 agreements form part of a “*comprehensive* scheme” that POLA seeks to  
24 implement (emphasis added). SOUF at ¶ 42.

25 In other words, the Concession agreements, which are broad in and of  
26 themselves, advance a still wider goal of cleaning up the Port’s air quality. This is  
27 the very sort of “broader social regulation” that this Court has already held cannot  
28 meet the narrow scope test necessary to qualify for the market participant doctrine.

1 *Am. Trucking Ass'ns*, 577 F. Supp. 2d at 1119-20. The July 2009 declaration of  
 2 Mr. Holmes and the August 2009 declaration of Mr. Grunfeld, both obtained  
 3 during the discovery phase of this litigation, further reinforce this Court's holding  
 4 that the Concession agreements are far from narrow, and so cannot meet the  
 5 requirements for even the alternate test for the market participation exception from  
 6 preemption.

7 **IV. Motor vehicle safety does not include general public safety, port safety,  
 8 or security.**

9 There is another similarly narrow, and similarly inapplicable, exception to  
 10 preemption at 49 U.S.C. § 14501(c)(2)(A). That section provides in relevant part  
 11 that the preemption provision “shall not restrict the safety regulatory authority of a  
 12 State with respect to motor vehicles.” *Id.* Other concerns—such as general public  
 13 safety, port safety, or security—do not meet this definition.<sup>2</sup>

14 **A. Section 14501 covers only state actions genuinely responsive to  
 15 motor vehicle safety.**

16 In interpreting the motor vehicle safety exception, the Ninth Circuit has  
 17 stated that any regulation must be “genuinely responsive to safety concerns. *See*  
 18 *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 145-47 (2d Cir.  
 19 2006).” *Am. Trucking Ass'ns*, 559 F.3d at 1053. *See also City of Columbus v.*  
 20 *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 442, 122 S. Ct. 2226,

21 \_\_\_\_\_  
 22 <sup>2</sup> To be clear, ATA does not challenge the obligation of motor carriers to  
 23 comply with the underlying laws and regulations relating to motor vehicle safety  
 24 and homeland security that the Concession agreements duplicate, or the ability of  
 25 the Port and Marine Terminal Operators to enforce these obligations upon drayage  
 26 trucks and drivers. ATA has never challenged the legitimacy of TWIC, the  
 27 drayage truck registry, the radio frequency technology tags, the clean truck tariff,  
 28 or the progressive truck ban, among others. But ATA's support for those policies,  
 if they were to be enforced through tariffs or regulations, is not at issue in this  
 litigation. ATA in this litigation is challenging the Port's attempt to use the  
 Concession agreements as an enforcement mechanism, with respect to these and  
 other Concession agreement provisions, so as to deny drayage motor carriers their  
 right in interstate commerce to serve the Port—a power reserved to the federal  
 government.

1 153 L. Ed. 2d 430 (2002). As the Ninth Circuit held, there is “no bright line test  
2 for what is related to vehicle safety.” *Am. Trucking Ass’ns*, 559 F.3d at 1054. But  
3 it is also true that motor vehicle safety remains the touchstone. Otherwise, as the  
4 Ninth Circuit cautioned, “if too broad a scope were given to the concept of motor  
5 vehicle safety, the exception would swallow the preemption section itself or, at the  
6 very least, cut a very wide swath through it.” *Id.*

7 One category that the Ninth Circuit offered in this regard concerns  
8 government actions related to “general public health concerns.” *Id.* For example,  
9 “control of cigarette usage” would “not bring the regulation within the ambit of the  
10 motor vehicle safety exception.” *Id.* But other categories of actions are also so far  
11 removed from motor vehicle safety that, if allowed under Section 14501(c)(2)(A),  
12 they would, as a matter of law, “swallow the preemption section itself.”

13 **B. Motor vehicle safety does not include general public safety, port**  
14 **safety, or security.**

15 Just as general public health falls far outside of the line, so does general  
16 public safety. The statute itself makes this clear, by explicitly allowing the  
17 statutory provision to cover only a certain sort of “safety regulatory authority”—  
18 namely, one responsive to “motor vehicles.” 49 U.S.C. § 14501(c)(2)(A).  
19 Whatever general public safety might mean, it is by definition broader than the  
20 more narrow category of safety relating to motor vehicles delineated by the statute.

21 Using the same reasoning, any rationale related to *port* safety, as distinct  
22 from *motor vehicle* safety, also falls outside of the limits of Section  
23 14501(c)(2)(A), as a matter of law. As the Supreme Court has written, statutes  
24 mean what they say. “[C]ourts must presume that a legislature says in a statute  
25 what it means and means in a statute what it says there. When the words of a  
26 statute are unambiguous, then, this first canon is also the last: judicial inquiry is  
27 complete.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146,  
28

1 117 L. Ed. 2d 391 (1992) (internal citations and punctuation omitted). Thus, port  
2 safety and motor vehicle safety cannot mean the same thing.

3 Similarly, safety, in this context, cannot mean the same thing as security.  
4 Congress made a point of limiting the exception to “the *safety* regulatory authority  
5 of a State.” Section 14501(c)(2)(A) (emphasis added). According to the Ninth  
6 Circuit, statutory interpretation must proceed “consistent with the context of the  
7 statute.” *United States v. TRW Rifle 7.62x51mm Caliber, One Model 14 Serial*  
8 *593006*, 447 F.3d 686, 690 (9th Cir. 2006). The *TRW Rifle* decision favorably  
9 cites to *United States v. Turkette*, 452 U.S. 576, 581, 101 S. Ct. 2524, 69 L. Ed. 2d  
10 246 (1981). There, the Supreme Court calls for interpreting statutes in light of  
11 “language and structure” that Congress used. *Id.* As the Ninth Circuit has held,  
12 congressional intent “is the ultimate touchstone of preemption analysis.” *Tocher*,  
13 219 F.3d at 1045.

14 Here, the context, language, and structure indicate that Congress did not  
15 intend “safety” to mean the same thing as “security.” For the Department of  
16 Transportation, Congress has defined “motor vehicle safety” as government action  
17 that “protects the public against unreasonable risk of accidents . . . and against  
18 unreasonable risk of death or injury in an accident.” 49 U.S.C. § 30102(a)(8). By  
19 contrast, port security measures required by federal regulation are undertaken to  
20 avert risks of intentional harm, pursuant to a facility owner or operator’s approved  
21 security plan under 46 U.S.C. § 70103(c)(3)(C)(ii).

22 This dichotomy between motor vehicle safety and port security was  
23 confirmed by the United States as *amicus curiae* on behalf of itself, the  
24 Department of Transportation, and the Federal Motor Carrier Safety  
25 Administration (“FMCSA”).<sup>3</sup> The United States argued that under *Rowe* the  
26 Section 14501(c)(2)(A) exemptions must be limited to their actual scope. Thus,

27  
28 <sup>3</sup> See *amicus* brief at 13 & n.15. A copy of the *amicus* brief is submitted with  
this motion by way of the Declaration of Christopher C. McNatt, Jr.

1 “the regulatory authority of a state with respect to motor vehicles” would not  
2 extend to regulation directed at broader concerns such as port security, any more  
3 than it could extend to “public health” in *Rowe*, even when motor vehicles were  
4 involved. The express federal regulatory framework governing port security  
5 renders unnecessary and improper any attempt to stretch the safety exception to  
6 achieve valid security objectives.

7 Finally, Congress also could not have meant motor vehicle safety to cover  
8 security, such as protection against a terrorist act or cargo crime, because such an  
9 interpretation would completely ignore the qualifier “with respect to motor  
10 vehicles” in the provision at issue. If Congress wanted to use this provision to  
11 allow states to protect against cargo theft or smuggling, Congress certainly would  
12 have said so. For example, in establishing the requirement for the TWIC,  
13 Congress did refer to “port cargo crimes, smuggling, and terrorist actions,” with no  
14 mention of motor vehicle safety. Maritime Transportation Security Act of 2002,  
15 Pub. L. No. 107-295, § 101(11) (Nov. 25, 2002), 116 Stat. 2066.

16 Thus, as a matter of law, wherever the outer limit of “motor vehicle safety”  
17 lies, it stops far short of general safety, port safety, or security.

18 **V. The motor vehicle safety exception to preemption does not apply to**  
19 **provisions that are not “genuinely responsive” to motor vehicle safety.**

20 As is discussed above, the Ninth Circuit held previously in this case that  
21 Section 14501(c)(2)(A) covers only government actions that are “genuinely  
22 responsive” to motor vehicle safety concerns. *Am. Trucking Ass’ns*, 559 F.3d at  
23 1053. To be “genuinely responsive,” a governmental action must have more than a  
24 “reasonable” connection to motor vehicle safety concerns. *Loyal Tire*, 445 F.3d at  
25 145. As the Ninth Circuit held, courts are not “required to take the regulator at its  
26 word; we need to go further with the analysis.” *Id.* at 1054. Simply put, a measure  
27 can have *some* relationship to motor vehicle safety without being “genuinely  
28 responsive” to a motor vehicle safety concern. *Loyal Tire*, 445 F.3d at 145-47.

1 With respect to the five Concession agreement provisions at issue in this  
2 motion—the independent owner operator phase-out, the off-street parking  
3 restrictions, and the financial information, maintenance, and placard  
4 requirements—ATA motor vehicle safety expert Ms. Annette Sandberg (former  
5 Administrator of the FMCSA, Deputy Administrator of the National Highway  
6 Traffic Safety Administration, and Chief of the Washington State Patrol) concludes  
7 there is no evidence that any of these provisions of POLA’s Concession agreement  
8 is “genuinely responsive” to motor vehicle safety. SOUF at ¶¶ 53-54, 56. If any of  
9 them was responsive, “a motor vehicle safety expert . . . would expect to see a  
10 well-defined problem, supported by sound data and then with appropriate analysis  
11 conducted to identify countermeasures or initiatives to address the problem.”  
12 SOUF at ¶ 62. POLA does not—and cannot—identify any such data or analysis to  
13 establish that these provisions are “genuinely responsive” to motor vehicle safety.

14 The absence of any data or analysis demonstrating that POLA’s Concession  
15 agreement is “genuinely responsive” to motor vehicle safety is corroborated by  
16 POLA’s own executives. For example, POLA’s deputy director Mr. Holmes stated  
17 during his deposition that he has never seen any report of accidents occurring at the  
18 Port, and has never seen a report concerning safety at the Port with respect to  
19 drayage trucks. SOUF at ¶ 57. Mr. Holmes further testified that POLA did not  
20 perform or obtain any analysis to determine whether federal and state law  
21 requirements concerning commercial truck maintenance were sufficient to address  
22 safety concerns relating to drayage trucks. SOUF at ¶ 58. He continued that, as  
23 POLA’s corporate representative, he is not aware of any studies commissioned by  
24 POLA about motor vehicle safety concerns that were factors in developing the  
25 Concession program. SOUF at ¶ 59. Tellingly, Mr. Holmes did not even know  
26 what the Haddon matrix is, despite the fact motor vehicle safety experts use it to  
27 determine whether initiatives are “genuinely responsive” to motor vehicle safety.  
28 SOUF at ¶¶ 48-50.

1 POLA’s executive director testified in a similar vein. According to Ms.  
2 Knatz, POLA did not base its decision to require employee drivers on any studies  
3 or data about accidents or incidents involving owner operator drivers or about  
4 truck inspections. SOUF at ¶ 60. Rather than using data-driven analyses, Ms.  
5 Knatz testified POLA’s research on motor vehicle safety apparently boiled down to  
6 generic personal observations such as the following: “If you spend any time around  
7 the Port you get an idea of the indication of the trucks that commute on the 710  
8 freeway, and there is always tacked on tire treads flipping back at you.” SOUF at ¶  
9 61.

10 In short, POLA cannot identify any data or analysis demonstrating that these  
11 provisions of its Concession agreement—the phase-out of independent owner  
12 operators, the off-street parking restrictions, and the financial information,  
13 maintenance, and placard requirements—are “genuinely responsive” to motor  
14 vehicle safety. Accordingly, these provisions cannot qualify for the Section  
15 14501(c)(2)(A) exception from preemption, and POLA should be permanently  
16 enjoined from imposing or enforcing them.

17 **A. The IOO phase-out provision must be enjoined because it is not**  
18 **“genuinely responsive” to motor vehicle safety.**

19 In its March 2009 Opinion, the Ninth Circuit held that the POLA  
20 requirement for a transition to employee-only drayage drivers is “highly likely to  
21 be shown to be preempted.” *Am. Trucking Ass’ns*, 559 F.3d at 1056. This was so  
22 because, “far from regulating motor vehicle safety, requiring concession motor  
23 carriers to use only their own employees for truck drayage at the Port will  
24 contribute to the administrative efficiency and reduce the cost of the Clean Truck  
25 Program.” *Id.* (internal citations omitted). In particular, the court rejected POLA’s  
26 claimed safety justifications, concluding, “[w]e see little safety-related merit in  
27 those threadpaper arguments, which denigrate small businesses and insist that  
28 individuals should work for large employers or not at all.” *Id.* at 1055-56.

1           There are no facts in dispute that can overcome this preliminary assessment.  
2 The Harbor Board record makes clear that the purpose and intent for the IOO  
3 phase-out was not “genuinely safety.” Rather, the intent behind the “phasing out  
4 of thousands of independent contractors (many or most of them small businessmen  
5 who own their own trucks),” *id.* at 1055, was for reasons of convenience and  
6 efficiency, not safety: “Another fundamental requirement [of the Clean Trucks  
7 Program] is a truck driving work force that is obligated to come to work when they  
8 are needed and do what they are told by their LMC. . . . Drivers with employee  
9 status and employee benefits will be far more likely to work when needed and to  
10 work in the manner best suited to the Port’s needs.” SOUF at ¶ 43. Thus, “[t]he  
11 issue of control is the heart of an employer-employee relationship. Our need to  
12 impose the employee mandate is thus rooted in the basic difference between an  
13 independent contractor and an employee—the issue of control.” *Id.*

14           In fact, federal law already has addressed the issue of “control” that so vexed  
15 the Harbor Board: An independent contractor is deemed to be an “employee”  
16 “when operating a commercial motor vehicle” for the purposes of motor vehicle  
17 safety requirements. 49 U.S.C. § 31132(2). Thus, any LMCs providing drayage  
18 services at POLA are required to comply with the same state and federal safety  
19 regulations whether their drivers are IOOs or employees. Additionally, as  
20 discussed above, POLA undertook no data-driven analyses whatsoever. According  
21 to ATA’s expert, Ms. Sandberg, POLA revealed no “data or analysis provided by  
22 the Port of Los Angeles indicating that this provision was to address commercial  
23 motor vehicle safety,” nor was the provision “responsive to improving motor  
24 vehicle safety.” SOUF at ¶ 53.

25           Thus, POLA’s IOO phase-out cannot fall within the Section 14501(c)(2)(A)  
26 exemption as a matter of law and uncontested fact.  
27  
28

1           **B. The requirement of off-street parking is not “genuinely**  
2           **responsive” to motor vehicle safety.**

3           With regard to the requirement in Concession agreement Section III(f) to use  
4 off-street parking *outside* of the Port, the Ninth Circuit stated that how the Port  
5 “can set out to regulate compliance with parking and truck routes which are not on  
6 Port property is a bit of a mystery,” *Am. Trucking Ass’ns*, 559 F.3d at 1057. POLA  
7 has offered no new material facts on this issue.

8           The Ninth Circuit noted that the Port of Los Angeles “bans trucks from  
9 parking legally on streets where other trucks are free to park. Thus, any potential  
10 safety rationale for restricting on-street parking is seriously undermined.” *Am.*  
11 *Trucking Ass’ns*, 559 F.3d at 1056-57. There is no genuine issue that this  
12 prohibition is unrelated to motor vehicle safety within the Port. The Harbor Board  
13 conceded the justification for the parking ban was not safety: “The Port needs to  
14 maintain political support and goodwill from the people living in surrounding  
15 communities . . . . The Board therefore finds it necessary and desirable . . . to  
16 require that Concessionaires provide parking facilities which are adequate to allow  
17 parking for its Drayage Trucks when not in service.” SOUF at ¶ 44. In her expert  
18 report, Ms. Sandberg concluded there was no data or analysis indicating that the  
19 requirement was genuinely responsive to motor vehicle safety. Therefore, the off-  
20 street parking prohibition does not fall within Section 14501(c)(2)(A), and is  
21 preempted.

22           **C. The Harbor Board’s maintenance plan requirement is not**  
23           **“genuinely responsive” to motor vehicle safety.**

24           The Concession’s “Maintenance Plan” requirement, Section III(g), is  
25 “genuinely responsive” to environmental, not safety concerns. Concession  
26 agreement section III(h)—which ATA is not challenging in this motion—*already*  
27 (through duplication of the existing federal and state requirements) requires that  
28 “Concessionaire shall ensure that all Permitted Trucks are in compliance with all

1 applicable regulatory safety standards,” including federal motor carrier safety  
2 regulations and California safety regulations. “This includes . . . vehicle  
3 maintenance, vehicle inspection . . . ,” as well as compliance with those programs’  
4 recordkeeping requirements.

5 As the Ninth Circuit concluded, “the Concession agreements sought to  
6 ameliorate . . . adverse environmental effects . . . by mandating vehicle  
7 maintenance requirements.” 559 F.3d at 1055. The additional terms of III(g) are  
8 directed at these environmental effects, plus maintaining POLA’s anticipated  
9 investment in subsidized clean trucks. Section III(g) expressly refers, for example,  
10 to the maintenance of “retrofit” equipment used to bring pre-2007 trucks into  
11 compliance with clean-diesel entry requirements.

12 As the Harbor Board noted in its March 20, 2008, Order 6522 approving the  
13 Concession Plan, Fifth Whereas, ¶¶ b, t:

14 Inadequate truck maintenance currently contributes to significant  
15 amounts of unnecessary emissions of air pollutants from drayage trucks  
16 while in operation on Port property. The proper maintenance of truck air  
17 pollution control equipment will continue to be necessary to achieving the  
18 Port’s clean air goals even after actions that the Port will take to replace  
19 older drayage trucks with newer, cleaner trucks and to retrofit trucks with  
20 emissions control devices . . . .

21 The Board also intends to protect the value of the Port’s investments in  
22 Clean Trucks and in retrofit equipment, and finds that it can better protect  
23 such investments by (i) imposing maintenance and record-keeping  
24 requirements directly upon Concession motor carriers. SOUF at ¶ 58.

25 In short, the maintenance plan requirement of Section III(g) fulfills the Harbor  
26 Board’s environment/investment protection mandate. Importantly, however, there  
27 is no data or analysis indicating this provision is “genuinely responsive” to motor  
28

1 vehicle safety. SOUF at ¶ 55. Therefore, this provision does not fall within the  
2 motor vehicle safety exemption.

3 **D. The financial information requirement is not “genuinely**  
4 **responsive” to motor vehicle safety.**

5 The Ninth Circuit found that “it is not likely that the financial disclosure  
6 requirements in both Ports’ agreements could be justified under any conceivable  
7 safety rationale.” *Am. Trucking Ass’ns*, 559 F.3d at 1056. POLA has produced no  
8 contestable facts that refute this finding. In her expert report, Ms. Sandberg noted  
9 that POLA produced no data or analyses relevant to a link between this  
10 requirement and motor vehicle safety. SOUF at ¶ 56. Indeed, POLA’s has not  
11 produced anything to challenge this conclusion. There is no study that POLA can  
12 point to as support for the allegation that less profitability by an independent owner  
13 operator somehow contributes to deficiencies in motor vehicle safety. This  
14 requirement is all the more arbitrary because Section III(n) explicitly allows  
15 POLA’s executive director to herself decide whether a motor carrier meets this  
16 provision. There is no published standard for her to follow, or for a motor carrier  
17 to meet. Thus, this provision is arbitrary and capricious, as well as not genuinely  
18 responsive to motor vehicle safety concerns.

19 **E. The provision requiring additional placards is not “genuinely**  
20 **responsive” to motor vehicle safety.**

21 Finally, POLA’s requirement III(l), which requires off-port display of  
22 placards, is preempted. First, the provision is preempted by 49 U.S.C. § 14506(a).  
23 That law contains no safety exception. It provides, “[n]o . . . political subdivision  
24 of a State . . . may enact or enforce any law, rule, regulation standard, or other  
25 provision having the force and effect of law that requires a motor carrier . . . to  
26 display any form of identification on or in a commercial motor vehicle . . . other  
27 than forms of identification required by the Secretary of Transportation . . . .” It is  
28 uncontested that POLA’s Concession agreement requires the display of placards.

1 Section 14506(a) prohibits that requirement, with no relevant exceptions. Second,  
2 the placards requirement is not genuinely responsive to motor vehicle safety.  
3 Rather, POLA instituted this provision in order to maintain good relations with  
4 members of its community. SOUF at ¶ 28. Therefore, this Court should preempt  
5 Requirement III(1) of POLA's Concession agreements.

6 **VI. POLA has no authority to suspend motor carriers from interstate**  
7 **operations.**

8 POLA claims power under Concession agreement Schedule 4, Section 4.4,  
9 to revoke a drayage carrier's Concession for any breach of the agreement. Such  
10 power would enable POLA to suspend the motor carrier from providing port  
11 drayage services in interstate commerce. However, the Supreme Court and  
12 Congress have banned states from issuing precisely such a suspension.

13 In *Castle v. Hayes Freight Lines*, 348 U.S. 61, 62, 65, 255 S. Ct. 191,  
14 992 L. Ed. 68 (1954), the U.S. Supreme Court affirmed a decision of the Illinois  
15 Supreme Court, which held that a state cannot suspend a motor carrier's interstate  
16 operating authority as a means of enforcing that state's safety laws against a  
17 "repeated violator." According to the Supreme Court, even if motor carriers  
18 operating in interstate commerce "persistently and repeatedly violate the [safety]  
19 laws of a state," it is the responsibility of *federal* regulators to "protect the state's  
20 interest." *Id.* at 65 (emphasis added). Congress incorporated *Castle's* conclusion  
21 into the Motor Carrier Safety Act of 1984 by retaining federal control over  
22 carriers' safety fitness to engage in interstate commerce.<sup>4</sup> That Act created the  
23 framework for interstate motor carrier safety fitness regulations in effect today.<sup>5</sup>

24  
25 <sup>4</sup> Pub. L. No. 98-554, Title II, § 215, 98 Stat. 2829, 2844.

26 <sup>5</sup> The Act's provisions were codified in their current statutory form as 49  
27 U.S.C. Chapter 311, Commercial Motor Vehicle Safety and Subchapter III, Safety  
28 Regulation, by Pub. L. No. 103-272, § 1(e), 108 Stat. 745, 983-1013, (July 5,  
1994) (codifying § 215 as 49 U.S.C. § 31144 (federal control over motor carrier  
safety fitness)).

1 The California Legislature recognized that only the federal government can  
 2 suspend a motor carrier from interstate commerce. It passed the Motor Carrier  
 3 Safety Improvement Act of 1996 to define, and to take advantage of, the regulatory  
 4 power left to California by the Section 14501(c)(2) exemptions. The California  
 5 statute reads: “It is the intention of the Legislature by this enactment to exercise  
 6 *the power over motor carriers of property authorized by [the 1994 FAAAA].*” 1996  
 7 Statutes, ch. 1042 § 1.5 (emphasis added). With respect to a motor carrier that has  
 8 engaged in a “consistent failure” to comply with safety requirements, this  
 9 California statute authorizes state agencies merely to “*recommend* to the Federal  
 10 Motor Carrier Safety Administration that appropriate administrative action be  
 11 taken against the carrier . . . .” Cal. Veh. Code § 34505.6(a), as modified by  
 12 ch. 1042 § 51 (emphasis added). Thus, California acknowledges the sole federal  
 13 ability to suspend interstate motor carriers.<sup>6</sup>

14 In 2005, Congress found that *Castle*’s separate interstate and intrastate  
 15 suspensions under Section 31144 could be inefficient. It thus allowed a state’s  
 16 intrastate safety suspension recommendation to have a binding effect on the  
 17 FMCSA’s interstate safety determinations—but only in limited circumstances.<sup>7</sup>  
 18 Moreover, unlike other sections in the subchapter, “State,” for purposes of Section  
 19 31144 specifically *excludes* “a political subdivision of a State” from its scope. *See*  
 20 Section 31132(8). Thus, California is expressly precluded from delegating to Los  
 21 Angeles the ability to recommend a suspension that would bind the FMCSA.<sup>8</sup>

22  
 23 <sup>6</sup> *See* 49 C.F.R. § 385.13(d)(1) (“If a proposed ‘unsatisfactory’ safety rating  
 24 becomes final, the FMCSA will issue an order placing out of service the motor  
 25 carrier’s operations in commerce. The out-of-service order shall apply both to the  
 26 motor carrier’s operations in interstate commerce and to its operations affecting  
 27 interstate commerce.”).

28 <sup>7</sup> Pub. L. No. 109-59, § 4114(c) (2005), 119 Stat. 1144, 1725-26, *amending* 49  
 U.S.C. § 31144(d).

<sup>8</sup> This delegation restriction is not surprising; a state’s power to make binding  
 fitness recommendations to the FMCSA hinges on state receipt of Section 31102  
 safety grant funds. *See Ours Garage*: “[a] saving provision is hardly comparable  
 to exercises of congressional spending authority that, as a condition for receipt of

