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

18 AMERICAN TRUCKING)
19 ASSOCIATIONS, INC.)
20 Plaintiff,)
21 vs.)
22 THE CITY OF LOS ANGELES, et)
23 al.,)
24 Defendants.)

Case No. CV 08-04920 CAS (CTx)

**REPLY OF ATA IN SUPPORT OF
MOTION ON REMAND FOR
PRELIMINARY INJUNCTION**

HEARING:
Date: April 27, 2009
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Hon. Christina A. Snyder

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INTRODUCTION

1
2 In its opening brief on remand, the American Trucking Associations
3 (“ATA”) demonstrated why, under the Ninth Circuit opinion,¹ the Concession
4 Agreements of the Port of Los Angeles and the Port of Long Beach should be
5 preempted in their entirety. Specifically, ATA showed why federal law preempts
6 the Ports from exercising discretionary decisionmaking as to which licensed motor
7 carriers (“LMCs”) could obtain a Concession Agreement, thus requiring an
8 injunction against the Concession scheme. Moreover, ATA demonstrated that the
9 opinion of the Ninth Circuit requires this Court to enjoin as preempted virtually all
10 individual elements of the Concession Agreements, which were not genuinely
11 responsive to concerns of motor vehicle safety but, instead, merely served the
12 economic ends and administrative convenience of the Ports. Op. **7-9. In that
13 regard, ATA detailed, paragraph by paragraph, why each remaining provision of
14 the Agreements served no purpose genuinely responsive to motor vehicle safety;
15 but, even if some provisions could meet the 49 U.S.C. § 14501(c)(1) exemption,
16 why they were too few and far too disparate to survive a severability analysis.

17 The Ports, not surprisingly, disagree with each of ATA’s conclusions as to
18 preemption. They repeat before this Court many of the same “administrative
19 efficiency” arguments rejected by the Ninth Circuit; and Long Beach even
20 persistently defends the provisions essentially struck down by the Ninth Circuit.
21 Where ATA showed that a history of Supreme Court law (which the United States
22 Department of Transportation agrees remains good law binding on all courts)
23 deprived the Ports of any authority to promulgate the Concession Agreements, the
24 Ports respond only by claiming that precedent too old to remain relevant. Where
25 the Ninth Circuit saw no record evidence that the Concession elements genuinely
26 respond to motor vehicle safety, the Ports, again, try to shoehorn Port safety into
27

28

¹ *American Trucking Associations v. Port of Los Angeles*, No. 08-56503, 2009
WL 723993 (9th Cir. Mar. 20, 2009) (“Op.”).

1 the narrow scope of § 14501(c)(2). The Ports now submit a supplemental
2 declaration from Mr. Holmes and cite new references, in an effort to rewrite
3 history. But, history cannot so easily be changed; and the history of the
4 Concession Agreements shows little or no concern for motor vehicle safety, but
5 “an exhaustive attempt to reshape and control the economics of the drayage
6 industry” for the Ports’ convenience: a few large carriers under the Port’s
7 contractual thumb. Op. **3, 8.

8 As the Ninth Circuit held, such provisions do not genuinely respond to
9 motor vehicle safety, and are preempted. Because these provisions constitute the
10 Concessions *in toto*, the entire Concession Agreements must be enjoined.

11 **I. THE PORTS LACK AUTHORITY TO USE DISCRETIONARY**
12 **CONCESSION MECHANISMS TO RE-REGULATE LICENSED**
13 **MOTOR CARRIERS SERVING THE PORTS.**

14 The express language of 49 U.S.C. § 14501(c)(2)(A) requires this Court to
15 determine whether the Ports’ use of their Concession mechanisms fall within the
16 “regulatory authority of a State” as a predicate to determining whether they also
17 operate with respect to motor vehicle safety. If applicable to the Concession
18 mechanisms, the line of cases beginning with *Castle v. Hayes Freight Lines*, 348
19 U.S. 61, 75 S. Ct. 191, 99 L. Ed. 68 (1954), would be dispositive of this issue.
20 Those cases hold that states have no power to determine which motor carriers may
21 engage in interstate commerce. Further, states may not exclude an interstate motor
22 carrier from the state’s roads as an enforcement mechanism for violations of safety
23 standards by a carrier’s trucks. If a state, such as California, has no such power,
24 then it may not delegate that non-existing power to its political subdivisions. And,
25 absent that authority, it is irrelevant whether the Concession provisions are or are
26 not genuinely responsive to motor vehicle safety; they fall outside the exception.

27 The Ports do not dispute these conclusions. Rather they contend that those
28 cases are inapplicable to the Concession mechanism. Los Angeles Opposition

1 (“LA Opp.”) 12 n.4; Long Beach Opposition (“LB Opp.”) 5 n.2. In so doing, they
2 draw comfort from this Court’s prior observation that those cases occurred 40
3 years ago in different factual circumstances. *Am. Trucking Ass’ns v. City of Los*
4 *Angeles*, 577 F. Supp. 2d 1110, 1125 (C.D. Cal. 2008).

5 As the Ninth Circuit held, however, the Ports may not use the Concession
6 mechanism to control which motor carriers may compete in the Ports, so as to
7 reshape the Ports’ drayage industry to a fewer, larger motor carriers. Op. **3, 8.
8 ATA therefore respectfully requests that this Court revisit *Castle*’s continuing
9 applicability, and its consequent impact on this case. Such reconsideration is
10 particularly appropriate in light of the brief *amicus curiae* of the United States to
11 the Ninth Circuit, which concurs with ATA’s arguments on this issue. Declaration
12 on Remand of Christopher C. McNatt (“McNatt Dec.”), Attachment 2 (“United
13 States Br.”).

14 **A. This Court Should Respect the Continuing Validity Of the *Castle***
15 **Line Of Cases, and Hold the Ports Lack Authority to Impose**
16 **Concession Agreements.**

17 Throughout this proceeding, the Ports have asked this Court to rely on the
18 Department of Transportation (“DoT”) and its Federal Motor Carrier Safety
19 Administration (“FMCSA”) as the expert agencies charged by Congress under 49
20 U.S.C. § 31141 with determining whether local regulations claimed to fall within
21 the motor vehicle safety exemption should be preempted.² Those agencies have
22 spoken. In its brief, expressly filed on behalf of itself, DoT, and FMCSA, the
23 United States argues that under the federal motor carrier law, the Ports simply do
24 not have the authority to exercise a veto power over motor carriers’ interstate
25 operating rights, including the power to suspend or revoke interstate operating
26

27
28 ² Long Beach requests that this Court suspend this proceeding and defer to the
primary jurisdiction of FMCSA. ATA separately addresses this issue *infra* at VI.

1 authority to enforce otherwise valid safety regulations, citing *Castle*. United States
2 Br. 9-10.

3 The Ports implicitly argue that this Court should ignore their views.³
4 However, the Ports put forward no new arguments to rebut the conclusion of the
5 United States and its expert safety agencies. They simply repeat the contention
6 that the precedents are not applicable to determinations under the motor vehicle
7 safety exception. Consequently, ATA will set out in the next section, the evidence
8 of Congressional intent and statutory language that underscores the correctness of
9 expert agencies' conclusions on this matter.

10 **B. The Congressional and California Legislative Record**
11 **Demonstrates That States Do Not Have the Regulatory Authority**
12 **to Control Motor Carriers' Interstate Operating Authority.**

13 As the Ninth Circuit has observed, "Congressional intent ... is the ultimate
14 touchstone of preemption analysis." *Tocher v. City of Santa Ana*, 219 F.3d 1040,
15 1045 (9th Cir. 2000), *cert. denied*, 531 U.S. 1146, 121 S.Ct. 1085, 148 L.Ed.2d 960
16 (2001), *abrogated on other grounds by City of Columbus v. Ours Garage &*
17 *Wrecker Serv.*, 536 U.S. 424, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002) (citations
18 and internal quotes omitted). In enacting the Federal Aviation Administration
19 Authorization Act ("FAAA Act"), Congress made clear that by limiting the motor
20 vehicle safety exception to the existing "regulatory authority of a state," it intended
21 no diminution whatever in limitations that federal motor carrier law imposed on
22 state safety regulation. "The conferees emphasize that nothing in these new
23 subsections contains a new grant of Federal authority to a State to regulate
24 commerce and nothing in these sections amends other Federal statutes that govern

25
26 ³ Remarkably, Long Beach takes the position that the Ninth Circuit's Opinion
27 somehow forecloses this Court's obligation to inquiry into California's safety
28 regulatory authority over interstate motor carriers, even though the Opinion did not
even mention, never mind discuss, this issue. LB Opp. 3-4. Rather, the Court left it
to this Court to perform a preemption analysis of individual Concession Agreement
provisions and then decide whether to enjoin the Concession Agreements as a
whole, or just in part.

1 the ability of States to impose safety requirements.” H.R. Rep. No. 103-677 at 84
2 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1715, 1756.⁴

3 When the FAAA Act was enacted in August 23, 1994, “other federal
4 statutes” that governed states’ authority under the safety exemption still included
5 the Interstate Commerce Commission-administered system of public convenience
6 and necessity-based route-by-route grants of operating authority that had been the
7 subject of *Castle*. Three days later, on August 26, 1994, the Trucking Industry
8 Regulatory Reform Act of 1994, Public Law 103-311, Title II, was enacted. That
9 Act streamlined the ICC’s interstate motor carrier entry regulation by removing the
10 need for route-specific public interest findings. But, importantly, it did not in
11 anyway redefine the scope of “interstate commerce.” Rather, it granted motor
12 carriers blanket interstate operating authority by meeting safety and insurance
13 requirements.⁵ This change was based on express recognition that safety was no
14 justification for continuing existing price and entry restrictions.⁶

15 By adopting the FAAA Act in tandem with the Trucking Industry
16 Regulatory Reform Act’s interstate entry liberalization,⁷ Congress could not have
17 intended that California or the Ports would be able to thwart its deregulatory plan
18 through an expansive interpretation of the motor vehicle safety exception. “There

19
20 ⁴ See *Ours Garage*, 536 U.S. at 438, (“It is the expressed intent of
21 § 14501(c)(2)(A) that the preemption rule of § 14501(c)(1) ‘not restrict’ the
22 *existing* ‘safety regulatory authority of a State’” with respect to motor vehicles”)
23 (emphasis in original).

24 The only entry requirements were compliance with safety regulations, a DoT
25 safety fitness finding, and compliance with minimum insurance requirements.
26 Public Law 103-311 § 207; 108 Stat. 1678.

27 ⁶ “In the past, economic regulation often served as a proxy for safety
28 regulation. The theory was that regulation and protection from competition would
29 assure safe operations and equipment. However, we have learned that regulation
30 for regulation’s sake can divert resources away from safety and toward red tape.”
31 140 *Cong. Rec.* S11320, S11323 (1994) (statement of Sen. Exon).

32 The Trucking Industry Regulatory Reform Act “is part of a major effort by
33 this Congress to reduce economic regulation in the trucking industry, to increase
34 reliance on competition ... and to reduce the size and role of the Government
35 bureaucracy. The Congress took the [previous] step last Monday with the passage
36 of the Aviation Conference Report when it preempted State regulation of prices,
37 routes, and services of motor carriers....” 140 *Cong. Rec.* H8435, H8440 (1994)
38 (statement of Rep. Mineta).

1 can be no doubt that when Congress adopted the FAAA Act ... Congress intended
2 to avoid the spectacle of state and local laws reregulating what Congress had
3 sought to deregulate.” Op. *5 n.6.

4 Finally, in December 1995, Congress consolidated motor carrier entry and
5 safety authority in the DoT,⁸ which responsibilities currently are exercised by the
6 FMCSA under 49 U.S.C. Chapter 139. In so doing, Congress made clear that
7 existing judicial interpretations affecting motor carriers’ rights continued in effect
8 with respect to authorities transferred to DoT.⁹

9 Significantly, the California Legislature confirmed this legislative record in
10 its Motor Carrier Safety Improvement Act of 1996. The Act proclaimed that, “It is
11 the intention of the Legislature by this enactment to exercise *the power* over motor
12 carriers of property authorized by P.L. 103-305.” 1996 Statutes, ch. 1042 § 1.5
13 (emphasis added).¹⁰ Notably, there was no indication whatever that California had
14 re-gained the power to control the entry or services of motor carriers engaged in
15 interstate commerce for safety purposes. Quite to the contrary, the legislature
16 recognized that “the power” of the state with respect to motor vehicle safety
17 extended only to making recommendations to the appropriate federal agency when
18 an interstate carrier has a track record of poor safety compliance. Thus, under Cal.

19
20 ⁸ The Interstate Commerce Commission Termination Act, Public Law 104-88
21 (“ICCTA”), “eliminate[d] and then reenacts a revised Motor Carrier Act.” H. Rep.
22 No. 104-311, at 84 (1995) *as reprinted in* 1995 U.S.C.C.A.N. 793 (1995).

23 ⁹ Legal determinations of the ICC and the courts expressly continue in force
24 with respect to provisions and functions reenacted and/or transferred by the ICCTA
25 to the jurisdiction of the DoT. *See* note to 49 U.S.C. § 701. For example, the
26 holding of *Railroad Transfer Serv. v. City of Chicago*, 386 U.S. 351, 358-60, 87 S.
27 Ct. 1095, 1099-1100, 18 L. Ed. 2d 143 (1967) (preempting Chicago from
28 exercising “veto power” over railroads’ choice of transfer motor carriers) was
based in significant part on the “terminal zone” provision of then 49 U.S.C.
§ 302(c)(2), which was recodified by the ICCTA as 49 U.S.C. § 13503(b).

¹⁰ Statutory changes include transfer of authority over motor carriers of
property from the P.U.C. to the Department of Motor Vehicles and creation of a
today’s streamlined Motor Carrier of Property Permit system, § 53, based on
compliance with safety and minimum insurance requirements. In so doing, the Act
recognized independent owner-operators as a category of motor carriers entitled to
motor carrier permits in their own right (new Cal. Veh. Code § 34624).

1 Veh. Code § 34505.6(a), as modified by ch. 1042 § 51, if the California Highway
 2 Patrol (“CHP”) determines that a motor carrier of property has, for example,
 3 engaged in a “consistent failure” to appropriately maintain its vehicles “so as to
 4 justify a suspension or revocation of the motor carrier’s motor carrier permit” (§
 5 34505.6(a)), then “for interstate operators, the department shall *recommend* to the
 6 Federal Motor Carrier Safety Administration¹¹ that appropriate administrative
 7 action be taken against the carrier...” (Emphasis added).¹²

8 **C. The Concession Agreements Are Preempted Regardless of**
 9 **Whether a Less Restrictive Alternative Could Have Been Chosen.**

10 Los Angeles additionally argues that use of the Concession Agreements as a
 11 means of enforcing the Agreements’ claimed safety-related provisions saves the
 12 Concessions from preemption even if there are other means of accomplishing the
 13 Ports safety objectives, because the safety exemption does not impose a least-
 14 restrictive-means test. LA Opp. 4, *citing Galactic Towing, Inc. v. City of Miami*
 15 *Beach*, 274 F. Supp. 2d 1315 (S.D. Fla. 2002), *aff’d* 341 F.3d 1149 (11th Cir.
 16 2003). See LB Opp. 6 (“POLB’s choice to employ this administrative mechanism
 17 [concession agreements] to meet its objectives cannot be challenged now by ATA
 18 on the grounds that ATA prefers other mechanisms.”). A “least-restrictive” means
 19 test has no applicability to the legal issue of whether a proposed remedy is within
 20 the “regulatory authority of a state.” If it is not within that authority—as is the
 21 case with the Concession mechanism—it is preempted, regardless of whether the
 22
 23

24 ¹¹ 2000 Statutes ch. 860 § 9 changed the relevant federal agency from the
 25 Federal Highway Administration to the Federal Motor Carrier Safety
 26 Administration.

27 ¹² Prior to 1996, the Vehicle Code had directed the CHP to make a federal
 28 agency referral to ensure that “appropriate administrative action be taken against
 the carrier’s Interstate Commerce Commission operating authority.” West’s Ann.
 Cal. Vehicle Code § 34505.6, Historical and Statutory Notes. California’s
 Legislature thus recognized that the same need for deference to the federal interest
 survived the transfer of federal motor carrier licensing from the ICC to DoT and
 survived the streamlining of federal motor carrier operating authorities.

1 chosen mechanism for addressing a safety issue is the most-restrictive or the least-
2 restrictive means available.¹³

3 **D. The Ports' Harbor Tariffs are Regulations, not Contracts.**

4 The Ports claim that, by noting that the Ports may rely on their Harbor
5 Tariffs as an enforcement tool, ATA has conceded that the Ports may enter into
6 "contractual" relationships with motor carriers as a predicate for entering onto Port
7 property. LB Opp. 4-5, LA Opp. 12 n.5 (citing cases treating tariffs as contracts).
8 Given that the trucking industry had to file tariffs for decades prior to enactment of
9 the deregulatory statutes discussed above, ATA recognizes that tariffs filed *by*
10 *private carriers* generally have the status of unilateral contracts between the carrier
11 and its customers, and may be enforced by the usual contractual remedies.

12 In sharp contrast, the Ports' Harbor Tariffs are regulations of their respective
13 cities. They are adopted by government agencies—the Defendant Boards of
14 Harbor Commissioners of each Port—and in the case of Los Angeles, must be
15 confirmed by City Council Ordinance signed by the Mayor. More particularly,
16 unlike ordinary contracts, they can be enforced by penal sanction. Indeed, Los
17 Angeles recently adopted Los Angeles Ordinance 180340, confirming permanent
18 revisions the Harbor Tariff's penal provisions, Tariff No. 4, item 220(b), allowing
19 each tariff violation (or day of a continuing violation) to be punished by a fine of
20 \$1000, imprisonment for no more than 6 months, or both.

21 **II. PORT SECURITY IS NOT MOTOR VEHICLE SAFETY.**

22 Congress enacted the FAAA Act and the motor vehicle safety exception in
23 1994 well before the dawn of the "age of terrorism" *See* LA Opp. 3-4.
24 Nevertheless, the Ports would have this Court bootstrap port security onto the
25 motor vehicle safety exemption to save an otherwise-preempted Concession
26

27 ¹³ Los Angeles also argues that "multi-purpose provisions like the concession
28 contracts" should escape judicial preemption so long as some of its purposes are
safety-related. LA Opp. 5. However, the Ninth Circuit held that this proposition
"is not the law." Op. *7.

1 program. However, port security has never been considered part of motor vehicle
2 safety, and the Ports cite no case, statute, or regulation that so holds. The word
3 “security” does not appear in § 14501(c)(2)(A), and only the most strained reading
4 of motor vehicle safety would include port security. The DoT holds the view both
5 that port security concerns are not encompassed within motor vehicle safety
6 concerns, *and* that port security falls outside the scope of the § 14501(c)(2)(A)
7 exception. United States Br. 13 n.5.

8 Tangential connections cannot satisfy the “genuinely responsive” standard
9 set out by the Supreme Court in *Ours Garage* to qualify for the motor vehicle
10 safety exception. Otherwise, the motor safety vehicle exception would render
11 FAAA Act preemption largely meaningless and frustrate Congressional intent.
12 Further, port security does not depend on the existence of the Concession
13 Agreements, and this Court should not allow the Ports to unlawfully shift for
14 efficiency’s sake their responsibility for enforcing federal security programs to the
15 motor carrier. Accordingly, this Court should not allow the Ports to salvage their
16 Concession Programs by clinging to arguments already called into serious question
17 by the Ninth Circuit. *See Op. *5* (“We are satisfied that it is likely no exception
18 applies.”). As the Supreme Court recognized, the motor vehicle exception is not a
19 catchall category for state regulators to exploit. *See Rowe v. N.H. Motor Transp.*
20 *Ass’n*, 128 S. Ct. 989, 997, 169 L. Ed. 2d 933 (2008).

21 **A. The Ports’ Overly Broad Interpretation of the Motor Vehicle**
22 **Safety Exception Would Swallow FAAA Act Preemption Entirely.**

23 The Ninth Circuit held that “if too broad a scope were given to the concept
24 of motor vehicle safety, the exception would swallow the preemption section itself
25 or, at the very least, cut a very wide swath through it.” *Op. *6*. The Ports continue
26 to ignore this precedent. Despite the Ninth Circuit’s warning, they again argue that
27 the motor vehicle safety exception should be interpreted “broadly.” LA Opp. 3
28

1 (citing to *Ours Garage*, 536 U.S. at 440; *Tillison v. Gregoire*, 424 F.3d 1093, 1103
2 (9th Cir. 2005)).

3 The Ports' proposed expansion of "motor vehicle safety" fails for three
4 reasons. First, even if "the narrowest possible construction" is "surely resistible,"
5 the opposite extreme is not necessarily true.¹⁴ See *Ours Garage*, 536 at 440.
6 Indeed, the Supreme Court in *Ours Garage* did not expand (or even address) the
7 substantive scope of the motor vehicle safety exception, and nothing in the opinion
8 suggests that § 14501(c)(2)(A) could somehow subsume economic re-ordering of
9 the drayage industry or state enforcement of federal transportation security laws.
10 See 536 U.S. at 442. Second, the Supreme Court has limited the scope of the
11 exception against attempts to address generalized public concerns. See *Rowe*, 128
12 S. Ct. at 996-97 (holding that "public health" was not exempted). Third, the Ninth
13 Circuit, in this very case, questioned whether any Concession provision, as well as
14 the entire Concession mechanism itself, could be saved from preemption. See Op.
15 *5.

16 To be exempt from preemption under the FAAA Act by the motor vehicle
17 safety exception, the regulation in question must be "genuinely responsive to
18 safety concerns." *Ours Garage*, 536 U.S. at 442; Op. *6. And to survive scrutiny,
19 the regulation must address "a field which the States have traditionally occupied."
20 *Ours Garage*, 536 U.S. at 438. That is not the case here. Congress has made port
21 security subject to comprehensive federal regulation, including securing of access
22 to port facilities by drayage trucks. See 46 U.S.C. § 70103(c)(3)(C)(ii) (requiring a
23 port operator to submit security plans to the Coast Guard and the Secretary of
24 Homeland Security for controlling access to secure areas, including access by
25

26 ¹⁴ The Ports' quotation from *Ours Garage* omits a crucial phrase. LA Opp. 3.
27 The quote, in its entirety, states, "A congressional decision to enact both a general
28 policy that furthers a particular goal and a specific exception that might tend
against that goal *does not invariably call for the narrowest possible construction of
the exception. Such a construction is surely resistible here . . .*" *Ours Garage*, 536
U.S. at 440 (emphasis added).

1 drayage trucks); 46 U.S.C. § 70105 (establishing the Transportation Worker
2 Identification Credential (“TWIC”) program). Accordingly, the provisions of the
3 Concession Agreements that concern port security – whether duplicative,
4 multipurpose, or otherwise – are not “genuinely responsive” to motor vehicle
5 safety and are therefore preempted.

6 The Ports suggest that *Tillison v. Gregoire* “comfortably” assures that port
7 security lies within ambit of the motor vehicle safety exception. LA Opp. 3-4.
8 Any such comfort is illusory. The Ninth Circuit’s holding that the intent behind a
9 narrow towing statute (a regulatory field traditionally occupied by the states) was
10 “truly safety” in *Tillison* in no way sanctions the comprehensive economic and
11 environmental regulatory scheme created by the Concession Agreements. To the
12 contrary, in its recent opinion, the Ninth Circuit all but struck down the Ports’
13 economic, environmental, and administrative efficiency justifications for the
14 Concession Programs. *See* Op. *7-9; *see also* Op. *5 (“We are satisfied that it is
15 likely no exception applies.”). The Ninth Circuit further found that “even if some
16 kind of general public health concerns are (or may be) involved in a statute or
17 regulation — for example control of cigarette usage — that alone does not bring
18 the regulation within the ambit of the motor vehicle safety exception.” Op. *6
19 (citing *Rowe*, 128 S. Ct. at 996-97). To hold otherwise would allow a narrow
20 motor vehicle safety exception to nullify the broad preemptions of § 14501(c)(1),
21 and thus defeat Congressional intent to deregulate interstate motor carriage.¹⁵

22
23 ¹⁵ The Ports also cite to a Second Circuit case in which the court found that a
24 regulation that limited the number of trips through a town fell under the motor
25 vehicle safety exception. *See* LB Opp. 10-11; *Oyma, Inc. v. State of Vermont*, 33
26 Fed. Appx. 581, 584 (2d Cir. 2002). This decision is inapposite to this case for
27 three reasons. First, it was decided before *Rowe*, and its holding likely would not
28 survive. Second, unlike the Concession Agreements, the regulation at issue in
Oyma did not completely bar entry, but only limited the number of trips over a
certain route. Third, the Second Circuit found that the regulation at issue did “not
speak directly to prices, routes, or services of motor carriers.” *Id.* This Court and
the Ninth Circuit both found that Concession Agreements do directly regulate
prices, routes, or services of motor carriers. *See Am. Trucking Ass’ns v. City of
Los Angeles*, 577 F. Supp. 2d at 1116-18; Op. *5 (“That the Concession

1 **B. The Ports' Security Goals Do Not Require the Concession**
 2 **Agreements.**

3 The Holmes Declaration spends little time addressing motor vehicle safety
 4 concerns, but instead focuses almost exclusively on security and environmental
 5 matters – topics clearly outside the motor vehicle safety exception. For example,
 6 when Mr. Holmes attempts to justify the Concession Agreements, he instead refers
 7 to security concerns of the Ports. *See, e.g.*, Holmes Decl. ¶¶ 8-16, 21-26 (“access
 8 control and accountability are the corner stones of any effective physical security
 9 program. [. . .] It is the concession agreement structure that gives POLA the
 10 ability . . . to address the drayage security issues.”). Although Mr. Holmes
 11 tangentially mentions “safety,” more often than not he refers to port safety. The
 12 focus of his discussion remains security and the environment.¹⁶ *See, e.g., id.*
 13 ¶ 7(b), (g) (addressing environmental and safety concerns when discussing
 14 requirements to use only permitted trucks and LMC entering Drayage Truck
 15 Registry (“DTR”) information; referring to “safety” when addressing TWIC
 16 requirement).

17 This is not surprising, given that the motor vehicle safety justification was,
 18 at best, a late afterthought by the Ports. The August 20, 2008, Declaration of
 19 Mr. Holmes stresses the Agreements' goals to improve the environment and alter
 20 the economics of the drayage industry; and, after Los Angeles decided to move
 21 ahead with these steps, to also address “the threat to security.” Dkt. No. 57 at 9
 22 ¶ 30. Mr. Holmes's initial declaration contains at most a passing reference to
 23 motor vehicle safety. Even those elements of the Agreements that the Ports now
 24 claim reflect their concern for “safety” in fact find their roots elsewhere. For
 25 example, as late as October 15, 2008, Mr. Holmes approved memoranda describing

26
 27 _____
 28 agreements relate to prices, routes or services of motor carriers can hardly be
 doubted.”).

¹⁶ When Mr. Holmes's second declaration does address safety concerns, he
 relies on conclusory statements without evidentiary support. *See, e.g., id.* 8 (“it
 goes without saying that a well maintained truck is a safe truck.”).

1 the purposes of the DTR and the radio frequency identification device (“RFID”)
2 tags as necessary to enable marine terminal operators “to enforce the progressive
3 ban of dirty trucks and collect the [Clean Truck Fee]” – with no mention of safety
4 at all.¹⁷

5 Accordingly, the lack of genuine safety concern as expressed by Mr. Holmes
6 reinforces that port security has little to do with motor vehicle safety, and
7 undermines the Ports’ *post hoc* rationalizations for the Concession Agreements.

8 **C. Federal Law Makes Port Security the Responsibility of the**
9 **Facility Operator, TSA, and the Driver, Not the Motor Carrier.**

10 The Supreme Court in *Rowe* condemned Maine’s effort “to enlist the motor
11 carrier operators as allies in its enforcement efforts” if the result would affect
12 “essential details” of trucking services. 128 S. Ct. at 996-98. The Ports seek to do
13 exactly that by requiring motor carriers to ensure TWIC enrollment and
14 compliance by their drivers, to ensure compliance with the RFID requirement by
15 its drivers, and ensure compliance with various security laws. LA Concession
16 Agreement III(i), (j), (k), (m); LB Concession Agreement III(j), (k), (l), (m).
17 Federal and state laws delegate certain safety obligations to motor carriers, but
18 federal regulations also impose certain obligations solely on the Ports; *e.g.*,
19 according to federal security regulations, “[t]he facility owner or operator must
20 ensure the implementation of security measures to . . . [c]ontrol access to the
21 facility.” 33 C.F.R. § 105.255; (emphasis added). The Concession Agreements
22 effectively seek to transform federally-licensed motor carriers into the Ports’
23 enforcement agents. This is not to suggest that motor carriers would not fully
24 cooperate with and satisfy such obligations, such as entering all appropriate
25 information in the DTR, without Concession plans to assist the Ports’ security
26 goals. But inasmuch as the Concession mechanisms directly affects prices, routes

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28 ¹⁷ Memorandum to LA Harbor Board, Subject: Order Amending Los Angeles
Harbor Tariff No. 4, November 15, 2008 at 2 (available at
http://www.portoflosangeles.org/Board/2008/October/102308_item9.pdf).

1 or services of motor carriers, and do not genuinely respond to motor vehicle safety,
2 they are preempted.

3 **III. THE PORTS CAN TIE TOGETHER DATA ON DRIVERS, MOTOR**
4 **CARRIERS, TRUCKS, AND CARGO WITHOUT CONCESSION**
5 **AGREEMENTS.**

6 In his Declaration, Mr. Holmes contends that without Concession
7 Agreements, the Ports could do little “to reliably and quickly connect a driver to a
8 specific truck, LMC, or manifest,” and “would be left without any means of
9 enforcing the environmental and security portions of the CTP.” *See, e.g.,* Holmes,
10 Dec. ¶¶ 20-21. However, as the Ninth Circuit observed, even without the
11 Concession Agreements, the Ports would still have at their disposal, the DTR
12 program, the TWIC, Port Check and PierPASS. Op. *12. These are embodied in
13 federal and state law, and Port tariffs enforced by fine or incarceration. Moreover,
14 Mr. Holmes glosses over the fact the Ports explicitly have delegated many of these
15 responsibilities explicitly to Marine Terminal Operators (“MTOs”), which the
16 Ports selected and empowered to perform the very operations that the Ports claim
17 they would be “without means” to do themselves. As shown more fully below, the
18 Ports and MTOs have more than enough in their arsenal to address any legitimate
19 motor vehicle safety-related concerns – without Concession Agreements.

20 1. The definition of “Drayage Truck Registry” comprehensively
21 requires: vehicle identification (the unique Vehicle Identification Number and
22 License Tag), truck and engine make and model (as well as any emissions control
23 retrofits), truck owner information, and dispatching licensed motor carrier
24 information.¹⁸ Supplemental information elements could be added.¹⁹

25
26
27
28 ¹⁸ LA Tariff No 4, § 20, item 2000; LB Tariff No. 4, § 10, item 1000.
¹⁹ LA Tariff item 2025 and LB Tariff Item 1025 require the motor carrier
making the DTR entries to submit verifiable documentation of entered information.

1 2. Information as to cargo manifests is to be supplied by cargo owners to
2 PortCheck, LLC, the collaboration between the Ports and the MTOs.²⁰ PortCheck
3 then consolidates that information concerning the cargo with DTR data. McNatt
4 Dec. Attachments 6, 7. Thus, even without Concessions, the Ports through its
5 PortCheck venture have an available database for use safety and security forensic
6 analyses.

7 3. The Ports' Tariffs (LA item 2005, LB item 1005) place an obligation
8 on the MTOs to have in place a means of accessing DTR information to determine
9 the eligibility of a truck to access the Ports. One permitted method, which has
10 been implemented by the MTOs, are RFID tags to be placed on trucks entering the
11 Ports. Thus, the MTOs currently use the PortCheck RFIDs to access the DTR
12 information the Ports have forwarded to PortCheck's data system.

13 4. The federal TWIC program imposes on the Ports or their MTOs the
14 obligation to ensure that unescorted Port access is granted only to those with a
15 TWIC, and to validate the identity of the card holder and the TWIC credential
16 itself. 33 C.F.R. § 105.255. The TWIC actually presented at the gate can be
17 checked against the DTR entry for the TWIC number of the driver supposedly
18 driving the truck.

19 Thus, contrary to the implications of Mr. Holmes's declaration, the Ports
20 already have more than adequate tools to control access to the Ports. The
21 combination of the DTR, RFID, PortCheck, and TWIC provides all necessary
22 information to the Ports. The DTR stores detailed identifying information about
23 each truck. The RFID tag transmits information that can be matched to the DTR.
24 PortCheck registers drayage truck entry onto port property, and tracks shipments of
25 cargo. The TWIC identifies the driver of the truck. And, of course, no driver is
26 permitted entry onto the Port without documentation manifesting authorization to

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28 ²⁰ See Port Fee Services Agreement, effective February 13, 2009 (available at http://www2.fmc.gov/agreement_lib/201199-000.pdf) Section 1.4 requires the MTOs to enforce the Ports' access restrictions.

1 pick up or deliver specific cargo registered with PortCheck. All of the components
2 are now up and running.²¹ None of these programs will be affected by the issuance
3 of a preliminary injunction against the Concession Agreement as a whole. *See Op.*
4 **3* (recognizing that ATA does not oppose the DTR or the expedited
5 implementation of the TWIC program). Preliminarily enjoining the Concession
6 Agreements would have no practical effect on the Ports' entry enforcement efforts.

7 **IV. THE CONCESSION AGREEMENTS THEMSELVES, AND THEIR**
8 **INDIVIDUAL PROVISIONS, UNLAWFULLY INTERFERE WITH**
9 **THE ABILITY OF MOTOR CARRIERS TO SERVE THE PORTS**
10 **AND ARE PREEMPTED.**

11 The Ninth Circuit addressed five key provisions of the Port's respective
12 plans, and found them likely to be preempted. ATA showed in its opening brief,
13 and the Ports in their respective oppositions concede, that nearly all remaining
14 obligations of the Agreements already exist under other federal and state laws and
15 regulations applicable to trucks, drivers, and, in some cases, to LMCs, and so
16 cannot be genuinely responsive to motor vehicle safety concerns.

17 The Ports mischaracterize ATA's arguments, as if ATA merely opposed
18 redundancy. That is simply not the case. What the Ports fail to refute is that
19 obvious unconstitutional consequences arise from the requirement of a Concession
20 Agreement. Via these Agreements, the Ports arrogate the power to bestow or deny
21 concessionaire status to any LMC, and to impose more draconian remedies than
22

23
24 ²¹ See www.portcheck.org (electronic gate access started February 18, 2009);
25 Press Release, U.S. Coast Guard, New Transportation Worker Identification Card
26 Adds Extra Layer Of Security To Three U.S. Ports (April 14, 2009) (announcing
27 successful TWIC implementation at the Ports),
28 <http://uscglosangeles.com/go/doc/834/267193/>. That is why the Ports can catch
any attempt to move RFID devices from truck to truck (so as to evade the
environmental truck model-year phase-out prohibitions). *See Holmes Dec.* ¶ 11.
Specifically, the MTOs would have the DTR information (truck model, license
plate, and VIN) that would enable them to detect a discrepancy between the
vehicle to which the RFID was assigned and the one actually approaching a gate,
and call Port Police.

1 those provided under federal law.²² The Ports thereby could prevent entry by all
2 trucks and drivers of a nonconcessionaire LMC – regardless of whether under
3 federal law that LMC would be fully entitled to service the Port in interstate
4 commerce, and whether its trucks and drivers otherwise meet the Ports’
5 requirements. These barriers unlawfully re-regulate the trucking industry, and
6 potentially strip LMCs of their federally-guaranteed rights under to operate in
7 interstate commerce.²³

8 To avoid preemption on remand it is the Ports’ burden, as proponents of the
9 § 14501(c)(2) safety exception, to establish why forcing each and every element of
10 the Concession Agreements upon an LMC through their applications and
11 enforcement mechanisms genuinely responds to motor vehicle safety. As shown
12 below, the Ports have failed to meet this burden, as to both those specific
13 provisions of the Concession Agreements addressed by the Ninth Circuit and all
14 remaining elements.

15 **A. Long Beach Fails to Demonstrate that the Provisions Addressed**
16 **by the Ninth Circuit “Genuinely Respond” to Motor Vehicle**
17 **Safety.**

18 The Ninth Circuit found that the Ports’ primary concern at least with respect
19 to five specific Agreement provisions “was increasing efficiency and regulating the
20 drayage market.” Op. *8. In their oppositions, the Ports of Los Angeles and Long
21 Beach take different approaches. Los Angeles concedes that the provisions
22 criticized by the Ninth Circuit, including its unique independent owner-operator

23
24 ²² Notably, the Ports do not address ATA’s arguments that federal law
25 preempts their exercise of discretionary approval or rejection over applicants, the
26 right to terminate, or the imposition of a five-year term, with respect to any LMC
27 that meets federal and state requirements for operation in interstate commerce.
28 ATA Memorandum of Points and Authorities on Remand for Preliminary
Injunction (April 3, 2009) (“ATA Br.”) at 13-14.

²³ Inasmuch as the lack of a Concession Agreement by itself bars an LMC’s
trucks and drivers from entering the Ports, the Long Beach Defendants’ stubborn
insistence that the concession provisions do not affect “routes, rates, or services”
has no merit.

1 ban, cannot meet the § 14501(c)(2) exemption. Long Beach attempts to pull a
2 rabbit from a hat by disputing the Ninth Circuit’s findings. As shown below, Long
3 Beach’s thin arguments cannot do the trick.

4 Preferences in driver hiring [LB subsection (e)]. The Ninth Circuit held,
5 “the job posting and experienced-drivers-first requirement in both Ports’
6 Concession agreements have little or nothing to do with vehicle safety,” and are
7 likely to be preempted as “a palpable interference with prices and services.” Op.
8 *9. Long Beach offers no evidence to prop up its exclusionary preferences, and no
9 proof that qualified drivers with less experience cannot operate safely at the Ports.

10 Parking and truck route restrictions [LB subsection (f)]. Long Beach
11 tellingly fails to solve the Ninth Circuit’s “mystery” as to how either Port has
12 authority to regulate parking and truck routes beyond Port property. Op. *9.

13 Driver Health Insurance [LB subsection (i)]. The Ninth Circuit noted this
14 provision “has no discernable safety purpose.” Op. *9. Long Beach again
15 responds with assumptions and aphorisms (*i.e.*, “healthy drivers are safer”), but no
16 evidence that its intent in adopting the insurance provisions (which, for example,
17 include family coverage) was genuinely responsive to motor vehicle safety, rather
18 than the broader public health objectives of the type preempted in *Rowe*.

19 Financial capability [LB subsection (o)]. The Ninth Circuit understood this
20 provision to reflect the Ports’ purpose to “reshape and control the economics of the
21 drayage industry” and “denigrate small businesses.” Op. *7-8. Long Beach’s
22 attempt to find “some link” between resources and safety performance does not
23 constitute a “genuine response” to safety. LB Br. Opp. 18. The fact that a
24 federally-commissioned report cited by Long Beach showing some link between
25 profitability and safety, but no conclusions regarding drayage carriers, is irrelevant.
26 Congress has preempted the states from imposing economic tests as a pre-
27 condition to a motor carrier’s provision of interstate service. The fact that the
28 FMCSA requires the filing of certain financial reports simply demonstrates that

1 any concerns in this regard are being addressed by the FMCSA. As the Ninth
2 Circuit observed, the Ports made no effort to justify financial disclosure
3 requirements under “any conceivable safety rationale,” and it is not likely they can
4 do so. Op. *9.

5 **B. The Remaining Concession Elements are Not “Genuinely**
6 **Responsive” to Motor Vehicle Safety, or Merely Duplicate**
7 **Existing Rules.**

8 The remaining provisions of the Concession Agreements fall into two basic
9 categories: Those ATA does not contest in substance (although ATA does oppose
10 their implementation via an unconstitutional Concession Agreement); and those
11 not genuinely responsive to concerns of motor vehicle safety and/or already are
12 imposed by law or regulation.

13 1. Provisions not challenged except as part of the Concession
14 Agreement. The Ports note correctly that ATA does not contest the ability of the
15 Ports to impose the Clean Truck Tariff, the DTR mechanism, or the use of RFID
16 tags. However, the Ports wrongly assume ATA agrees such provisions could be
17 imposed via the federally-preempted Concession mechanism. To the contrary, as
18 the Ninth Circuit understood, ATA does not contest the Ports’ power to enact these
19 provisions by another, constitutional, means, such as by existing Port tariffs. Op.
20 *12. As set forth above, however, the discretionary powers asserted by the Ports
21 under the Concession Agreement are preempted.

22 2. Provisions not genuinely responsive to motor vehicle safety and/or
23 already required by law.

24 For this second category of provisions, the touchstone is not, as the Ports
25 suggest, that the Ports may burden the LMCs with completely redundant
26 requirements relating to safety. As acknowledged by the Ninth Circuit, each
27 provision must be “genuinely responsive” to motor vehicle safety concerns. Mere
28 redundancy cannot not be “genuinely” responsive because there is no demonstrable

1 need for any further regulation. Thus, the challenge that the Ports must overcome
2 is to show some defined and genuine need to impose additional requirements and
3 penalties on LMCs that serves a purpose genuinely responsive to motor vehicle
4 safety. This they cannot do.

5 Driver control [LB subsection (d), LA subsection (c)]. Long Beach agrees
6 with ATA that, in the absence of any Agreement, LMCs are responsible for
7 performance and compliance of their drivers. But the Ports demonstrate no need,
8 as a matter of motor vehicle safety, to contractually impose greater liability and
9 additional sanctions on the LMCs. Los Angeles argues that the provision is tied to
10 Port security. However, the specific cited example concerned circumvention of the
11 progressive truck ban, not any element relating to safety. *See* Holmes Dec. ¶ 11
12 (describing use of the DTR to “identify specific trucks that were trying to evade
13 the requirements of the CTP”). To the extent any safety concern may be
14 implicated, any attempt to circumvent the DTR, TWIC, or RFID requirements can
15 be detected and enforced while the driver and truck are on Port property, without
16 imposing additional obligations on an LMC. As the Ninth Circuit found, the
17 provisions for driver control may promote the Ports’ goals of administrative
18 efficiency, but have “little safety-related merit.” Op. *8.

19 Submission of Maintenance Plans [LB and LA subsections (g)]. The Ports
20 concede that federal law already imposes duties of proper maintenance and
21 inspection upon motor carriers with respect to all vehicles subject to its control.
22 *See* ATA Br. 8 & n.9; LB Opp. 15. While Long Beach claims that a duplicative
23 requirement does not burden an LMC, “burden” is not the issue. Neither Long
24 Beach nor Los Angeles demonstrates why imposing additional obligations and
25 sanctions on an LMC over and above existing federal requirements is justified by
26 safety, rather than pollution control. *See* Holmes Dec. ¶ 17(e) (“truck maintenance
27 is important to ensure the environmental goals of the CTP... .”)
28

1 Compliance with existing federal and state truck safety and operations
2 regulations [LB and LA subsections (h)]. The Ports concede that this requirement
3 merely duplicates existing safety requirements. LB Opp. 16; LA Opp. 9. The
4 Ports already have sufficient tariff and regulatory powers to require and enforce
5 compliance with safety and operational regulations while trucks and drivers are on
6 Port property or as a condition of entry thereto. Imposing redundant obligations by
7 Concession Agreements thus can serve only one of two goals: enhancing the
8 Ports' administrative convenience, or providing a contractual vehicle to tack on
9 other, non-safety related provisions. See Op. *8 (e.g., avoiding “the
10 administrative cost of maintaining up-to-date records’ for tens of thousands of
11 independent contractors”). Neither of these goals relates to motor vehicle safety.

12 Driver credentials [LB subsection (j), LA subsection (i)]. Both Ports agree
13 this provision merely duplicates the federal TWIC requirement (effective April 14,
14 2009) and DTR requirements that can be enforced by Port tariffs. There is no
15 safety-related need to impose these obligations on LMCs. Op. *3, 12. Los
16 Angeles admits as much, by justifying these requirements on “Port safety,”
17 terrorism, and drug trafficking – concerns that do not genuinely respond to motor
18 vehicle safety under §14501(c)(2).

19 Security searches, laws and regulations [LB subsection (l), LA subsection
20 (k)]. The Ports do not contest that these provisions merely duplicate requirements
21 of the USA Patriot Act of 2001, the Maritime Transportation Security Act of 2002,
22 and other federal, state, and municipal laws and regulations cited in those
23 provisions. But neither Port demonstrates any genuine motor vehicle safety need
24 for the Ports to include those obligations in a Concession Agreement.

25 Provisions requiring additional placards are preempted [LB subsection (m),
26 LA subsection (l)]. The Ports do not contest that any requirement for off-port
27 display of placards is preempted by 49 U.S.C. § 14506(a), which has no safety
28 exception. See ATA Br. 9 & n.11. Thus, Long Beach's argument that the

1 requirement is not burdensome is irrelevant. Conversely, the Ports' contention that
2 this provision can be achieved by requiring a "How's My Driving" placard solely
3 while the truck is on Port property is as impractical as it is nonsensical. What
4 genuine safety purpose is served by a placard, while the truck and driver are
5 physically on Port property, and have been tracked according to RFID tag, DTR
6 entries, and TWIC data? In any event, Port safety clearly is not the intended
7 purpose of the provisions, given the Ports' admitted desire to enlist the assistance
8 of "the public" – an entity not permitted on Port property. LB Opp. 17; LA Opp.
9 11.

10 **V. THE CONCESSION AGREEMENTS SHOULD BE ENJOINED IN**
11 **TOTO.**

12 The Ninth Circuit found that "it may not be practicable to leave the
13 remaining portions [of the Concession Agreements] standing." Op. *12 (citing
14 *United States v. Manning*, 527 F.3d 828, 840 (9th Cir. 2008)). Once the preempted
15 and duplicative provisions have been removed from the Concession Agreements,
16 no substantive elements remain. Nevertheless, the Ports argue that the provisions
17 explicitly identified by the Ninth Circuit can be severed without invalidating the
18 Concession Agreements as a whole. LA Opp. 12-17. To reach their conclusion,
19 the Ports make three mistaken assumptions.

20 First, the Ports apparently assume they need not distinguish the Ninth
21 Circuit's citation to the *Manning* case. In *Manning*, the Ninth Circuit, despite the
22 existence of a savings clause, refused "to examine and rewrite" the remaining
23 elements of a state statute that, despite the federal preemption of radiological waste
24 regulation, attempted to control mixed waste "as a whole" with specific provisions
25 "concerning the radioactive component." 527 F.3d at 840 (describing the statute
26 as a "complex regulatory web" intersecting with "multiple state and federal
27 statutes"). This Court faces the same situation here. The Agreements represent a
28

1 “complex regulatory web” of economic, environmental, and security provisions.²⁴
2 Accordingly, this Court should not “unscramble the egg” and enjoin the
3 Concession Agreements as a whole. *See id.*

4 Second, the Ports assume that only the provisions identified by the Ninth
5 Circuit will be found preempted. LA Opp. 12. However, quite to the contrary, the
6 Ninth Circuit held “that *many* of the provisions of the Concession agreements will
7 be preempted and should be subject to the strictures of a preliminary injunction.”
8 Op. *12 (emphasis added); *see also* Op. *9 (“[I]t is likely that many of those
9 provisions are preempted.”). The Ninth Circuit obviously contemplates, and
10 appears to expect, that additional provisions of the Concession Agreements will be
11 adjudged preempted.

12 Third, the Ports assume that a presumption of constitutionality applies to the
13 Concession Agreements. LA Opp. 13-14. This flies in the face of the Ninth
14 Circuit’s opinion, which repeatedly describes the Concession Agreements as
15 “likely unconstitutional.” Op. *10.

16 Finally, for these same reasons, the Court should disregard POLA’s
17 suggestion that no injunction can issue under *Winter v. Nat’l Resources Def.*
18 *Council*, 129 S.Ct. 365, 172 L.Ed. 2d 263 (2008) once all unconstitutional
19 elements are stricken. POLA ignores two facts. First, elements only will be
20 “stricken” from the plans at this stage by the entry of a preliminary injunction
21 against the Concessions. Second, the Ninth Circuit remanded this case “for the
22 issuance of an appropriate preliminary injunction.” Op. *13. Thus, under the law
23 of this case, this Court must enjoin all aspects of the Plans found to be preempted
24 under § 14501(c)(1). Because these pervasive unconstitutional elements are not
25 severable, the Concession Agreements should be enjoined in their entirety.

26
27
28 ²⁴ Significantly, the Ports continue to insist, in the very section where they argue
for severability, that the Concession Agreements, “as a whole,” are “important” to
the their “security and environmental” objectives. LA Opp. 16.

1 Moreover, contrary to POLB's suggestion, the Ninth Circuit has determined that
2 "there is a likelihood of irreparable damages in this case." Op. *12.

3 **VI. THIS PROCEEDING NEED NOT BE REFERRED TO THE FMCSA.**

4 In a final effort to stave off an injunction, Long Beach argues that the Court
5 should refer this proceeding to the Secretary of Transportation pursuant to 49
6 U.S.C. § 31141 for a primary jurisdiction determination by the FMCSA as to
7 whether the Concession Agreements (or elements thereof) should be preempted.
8 LB Opp. 7-10; *see* LA Opp. 5. This is a truly remarkable argument, since, as Long
9 Beach well knows, the General Counsel of the FMCSA was of counsel to the
10 United States with respect to its *amicus curiae* brief filed with the Court of
11 Appeals in this proceeding. In that Brief, the United States definitively stated that
12 the § 31141 process supplements, but does not substitute for, § 14501(c)(1); and,
13 moreover, Congress did not intend to expend FMCSA administrative resources to
14 make repeated case-by-case preemption determinations. United States Br. 18.

15 Given the Ports' claim that this Court should show deference to the DoT as
16 the "expert agency" responsible for administering the safety exception, it is
17 stunning that they do not address the United States' key arguments to the Court of
18 Appeals: that the authority of a state with respect to motor vehicle safety does not
19 extend to exercising a "veto power" over a motor carriers right to engage in
20 interstate commerce, including as a means of enforcing motor vehicle safety rules;
21 that "port security" does not fall within the scope of motor vehicle safety; and that
22 numerous other Concession elements do not fall within the motor vehicle safety
23 exemption. *Id.*, United States Br. 9-10, 13 & n. 5, 18-22.

24 **VII. NRDC'S CLAIM THAT AN INJUNCTION COULD UNDERCUT THE**
25 **PORTS' ENVIRONMENTAL OBJECTIVES IS BOTH**
26 **IRRELEVANT AND INCORRECT.**

27 In their Brief, the "Environmental Intervenors" argue that if the Concession
28 Agreements are enjoined, then the elements of all Ports environmental programs—

1 which ATA does not oppose—will nevertheless fall like “dominoes.” NRDC Br.
 2 2. This is so, according to NRDC, because the Ports conditioned the award of
 3 certain financial assistance for truck replacement on the recipient’s status as a
 4 Concessionaire. However, there is no need for the Ports to link financial aid to a
 5 Concession, rather than independent contractual arrangements with aid recipients.
 6 Further, contrary to the Intervenor’s fears, the Ports have taken steps to provide
 7 self-help enforcement so that trucks receiving assistance do not “disappear to the
 8 San Joaquin Valley or Las Vegas.” NRDC Br. 1.²⁵ Thus, even were the
 9 intervenors’ concerns relevant to the motor vehicle safety issues the Ninth Circuit
 10 remanded to this Court for entry of a preliminary injunction, they readily can be
 11 addressed without a Concession Agreement.

12 CONCLUSION

13 Wherefore, Plaintiff American Trucking Associations requests this Court
 14 enter a preliminary injunction against the Concession Agreements of the Port of
 15 Los Angeles and the Port of Long Beach, respectively, in their entirety.

16 Respectfully submitted,

17 Dated: April 17, 2009

SCOPELITIS, GARVIN, LIGHT,
 HANSON & FEARY, LLP

18 By: /S/ Christopher C. McNatt, Jr.
 19 Christopher C. McNatt, Jr.
 20 Attorneys for Plaintiff
 American Trucking Associations, Inc.

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 27 ²⁵ See Memorandum (approved by John Holmes) to Harbor Board, Subject:
 28 Approval of a Cost Sharing Agreement with Webtech Wireless, Inc. (available at
http://www.portoflosangeles.org/Board/2008/November/112008_item3.pdf),
 November 7, 2008, at 2, ¶ 7.