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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
REPLY TO DEFENDANTS'
OPPOSITION TO PLAINTIFF'S
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, Plaintiff American Trucking
2 Associations, Inc. (“ATA”) submits this Statement Of Points And Authorities In
3 Reply To Defendants’ Opposition To Plaintiff’s Motion For Summary Judgment,
4 filed by the Los Angeles Defendants (“the Port” or “POLA” or “Defendants”).¹

5 **ARGUMENT**²

6 **I. The preliminary injunction holdings of this Court and the Ninth Circuit**
7 **are binding precedent and the law of this case.**

8 POLA seeks, wrongly, to discount the holdings of this Court and the Ninth
9 Circuit from the preliminary injunction phase of this litigation. None of the
10 holdings that ATA relies on has been reversed. Moreover, POLA has failed in the
11 current phase of the litigation to introduce any new material facts different from
12 those that it relied before. In fact, it is striking that POLA has repeated in its
13 summary judgment filings many of the same factual arguments, virtually word for
14 word, that this Court and the Ninth Circuit have already rejected. Absent any new
15 material facts, there are no reasons to diverge from the holdings that this Court and
16 the Ninth Circuit have already issued.

17 Similarly, POLA has provided no new legal basis to disturb the Ninth
18 Circuit’s conclusions of law. Thus, the Ninth Circuit holds, “[a]ny of our
19 conclusions on pure issues of law . . . are binding.” *Ranchers Cattlemen Action*
20 *Legal Fund United Stockgrowers of America v. U.S. Dep’t of Agric.*, 499 F.3d
21 1108, 1114 (9th Cir. 2007) (adopting and quoting the reasoning of a leading federal

22 ¹ This Memorandum of Law refers to Plaintiff’s initial Statement of
23 Uncontroverted Facts and Conclusions of Law as the “PSOUF,” to Plaintiff’s
24 Supplemental Statement of Uncontroverted Facts and Conclusions of Law as the
25 “SPSOUF,” to the Plaintiff’s Statement of Genuine Issues as the “PSGI,” and to
26 Defendant’s Statement of Genuine Issues filed on December 24 as the “DSGI.”
This Memorandum also refers to POLA’s December 24 Opposition to ATA’s
Motion for Summary Judgment as “POLA Op.,” and refers to ATA’s December 7
Motion for Summary Judgment as “ATA Mot.”

27 ² Because POLA concedes that ATA has standing to bring this litigation,
28 POLA Op. at 1, and also that POLA will not claim that it deserves an exemption
from preemption due to the sovereign tidelands doctrine, *id.* at 7, ATA does not
address those arguments in this Memorandum.

1 practice treatise, which states that “[a] fully considered appellate ruling on an issue
2 of law made on a preliminary injunction appeal . . . become[s] the law of the case
3 for further proceedings in the trial court on remand and in any subsequent
4 appeal”).³ Here, because POLA repeats the same legal arguments considered and
5 rejected on appeal, the Ninth Circuit’s conclusions of law are binding as the law of
6 the case.⁴

7 **II. ATA merits summary judgment that POLA’s Concession agreement**
8 **relates to the prices, routes, or services of motor carriers.**

9 POLA seeks to contest what the Ninth Circuit and this Court already have
10 decided: its Concession agreement relates to motor carrier prices, routes, or
11 services. *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th
12 Cir. 2009) (“That the Concession agreements relate to prices, routes or services of
13 motor carriers can hardly be doubted.”); *see also Am. Trucking Ass’ns v. City of*
14 *Los Angeles*, 577 F. Supp. 2d 1110, 1117 (C.D. Cal. 2008). POLA’s Opposition
15 does not contain any new material facts as to whether the Concession plan relates
16 to motor carrier prices, routes, or services. Rule 56 makes clear that a nonmoving
17 party must “set out specific facts showing a genuine issue for trial.” Fed. R. Civ.
18 P. 56(e)(2). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548,
19 91 L. Ed. 2d 265 (1986) (“the burden on the moving party may be discharged by
20 ‘showing’—that is, pointing out to the district court—that there is an absence of
21 evidence to support the nonmoving party’s case.”). Accordingly, as ATA has
22 demonstrated previously, and as summarized below, ATA is entitled to summary

23 ³ Quoting 18 Charles Alan Wright & Arthur R. Miller, *FED. PRACTICE &*
24 *PROC.*, § 4478.5 (2002) (brackets and ellipses in *Ranchers Cattlemen* case).

25 ⁴ As a general point, ATA notes here that throughout POLA’s Opposition and
26 its own Motion for Summary Judgment, the Port has relied on declarations and
27 other materials that do not come from the Board of Harbor Commissioners
28 (“BHC”). In an accompanying motion, ATA moves this Court to prohibit POLA
from relying on any such materials, on the basis that doing so violates this Court’s
Order of December 21, 2009. While that motion details ATA’s position, this
Memorandum points out some concrete instances in which POLA relies on such
prohibited materials.

1 judgment on this element of its claim.⁵

2 **A. Congressional intent requires broad construction of**
3 **49 U.S.C. § 14501(c)(1)'s preemptive force.**

4 POLA begins its Opposition by attempting to narrow the scope of
5 preemption under Section 14501. But “[c]ongressional intent . . . is the ultimate
6 touchstone of preemption analysis.” *Engine Mfrs. Ass’n v. S. Coast Air Quality*
7 *Mgmt. Dist.*, 493 F.3d 1031, 1040 (9th Cir. 2007) (quoting *Tocher v. City of Santa*
8 *Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000)). Contrary to POLA’s assertions,
9 congressional intent compels a broad construction of the Act’s preemptive scope.
10 Regarding Section 14501(c)(1), the Supreme Court has described “Congress’
11 overarching goal as helping assure transportation rates, routes, and services that
12 reflect ‘maximum reliance on competitive market forces.’” *Rowe v. N.H. Motor*
13 *Transp. Ass’n*, 552 U.S. 364, 128 S. Ct. 989, 995, 169 L. Ed. 2d 933 (2008)
14 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378, 112 S. Ct.
15 2031, 119 L. Ed. 2d 157 (1992)). There, the Supreme Court held that a
16 “patchwork” of state regulations governing the “essential details” of motor carriage
17 would violate Congress’ intent, and that the “state regulatory patchwork is
18 inconsistent with Congress’ major legislative effort to leave such decisions where
19 federally unregulated, to the competitive marketplace.” *Rowe*, 128 S. Ct. at 996.⁶

20
21 ⁵ POLA’s attempt to create a fact issue misconstrues the test for Section
22 14501(c) preemption. POLA Op. at 4, n.1. POLA concedes that the Boston
23 Consulting Group predicted that drayage costs will rise because of the Concession
24 plan. *Id.* While POLA argues that drayage costs represent a “small portion of the
25 overall cost to ship a *container*,” *id.* (emphasis added), that fact (if true) is
26 completely immaterial because Section 14501(c) concerns itself with the impact of
27 cost increases on *motor carrier prices, routes, or services*. Moreover, another
28 POLA consultant, Beacon Economics, estimated that drayage rates would increase
“between 20 and 25 percent.” SPSOUF Add. Fact ¶ 2. So, POLA has introduced
no facts to contest the impact of its Concession plan on motor carrier prices.

⁶ *See Botz v. Omni Air Int’l*, 286 F.3d 488, 493-94 (8th Cir. 2002) (“Although
Congress could easily have selected more restrictive terminology to describe the
type of . . . enactment the [Airline Deregulation Act] pre-empts, the provision as
written is without language that would produce a more limited pre-emptive
effect”).

1 Here, POLA’s Concession plan creates precisely such a regulatory patchwork for
2 drayage services, even between the two adjacent San Pedro Bay ports. *See e.g.*,
3 PSOUF ¶¶ 25-27; *see also Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1117 (the
4 Concession plan “establish[es] requirements for motor carriers’ hiring decisions,
5 truck routes, parking restrictions, truck maintenance, truck safety, operations
6 regulations, driver health insurance, driver credentials, compliance tags, security,
7 placards posted on trucks, technology, and financial capability”).

8 Contrary to *Rowe*’s findings of broad congressional intent, POLA asserts
9 that *Morales* held that preemption would only be found where (1) a challenged
10 regulation contains “literal references” to motor carrier prices or (2) a plaintiff
11 pleads some sort of “economic principle” to prove that a challenged agreement
12 affects motor carrier prices. POLA Op. at 2-3. But *Morales* never held that those
13 findings are the *exclusive* indicia of preemption. In fact, *Morales* refused to draw
14 any “line” regarding how or when a regulation relates to prices, routes, or services.
15 504 U.S. at 390. Instead, the Court held that regulations having a “connection
16 with, or reference to” to “rates, routes, or services are pre-empted.” *Id.* at 384
17 (internal quotation marks omitted); *Rowe*, 128 S. Ct. at 995 (same). Indeed,
18 *Morales* found preemption where state regulations simply prescribed specific
19 airline advertising guidelines. 504 U.S. at 389-90. Unquestionably, provisions
20 such as POLA’s employee driver mandate, which completely alters the current
21 business model for motor carriers providing drayage services, represents far more
22 than a “borderline” intrusion on motor carriage. *Id.* at 390.

23 **B. The Concession plan is directly related to motor carrier prices,**
24 **routes, or services.**

25 **1. The Concession plan is related to motor carrier prices.**

26 POLA erroneously claims that *Californians for Safe and Competitive Dump*
27 *Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998) “forecloses” the
28 possibility that the Concession plan relates to motor carrier prices. POLA Op. at 3-

1 4. *Mendonca* held that California’s Prevailing Wage Law was not preempted
2 under the Federal Aviation Administration Authorization Act (“FAAAA”) because
3 rules setting out the terms for government procurement do not “acutely” affect
4 competition, even if they affect the cost of the services being procured. 152 F.3d
5 at 1189. But subsequent Supreme Court and Ninth Circuit decisions have
6 significantly diminished *Mendonca*’s discussion of when costs are “related to”
7 prices. Contrary to *Mendonca*, *Rowe*, as discussed above, emphasized that the
8 “related to” test sets a low hurdle to preemption. Moreover, *Mendonca* was
9 decided two years before *Tocher*, which held that rules that exclusively govern
10 procurement escape FAAAA preemption under the “market participant” doctrine,
11 without any need to conduct a “related to” analysis. *See Tocher*, 219 F.3d at 1048-
12 49. Unlike *Mendonca*, the issues here are not related to government procurement.

13 Recent precedent also contradicts POLA’s theory. In *Blackwell v. Skywest*
14 *Airlines, Inc.*, No. 06cv0307 DMS (AJB), 2008 WL 5103195, at *18 (S.D. Cal.
15 Dec 3, 2008), the court preempted state wage and hour laws as applied to air
16 carriers, on the basis that increased labor costs resulted in price increases sufficient
17 to reduce demand and thus the number of flights flown. As a result, the court held
18 that the claims related to carrier prices. *Id.* Here, POLA Executive Director
19 Geraldine Knatz admits POLA’s Concession plan will do just that, by increasing
20 costs enough to reduce the number of containers drayed at POLA. *See* SPSOUF
21 ¶ 22. Accordingly, the Concession plan relates to motor carrier prices.

22 **2. The Concession plan is related to motor carrier services.**

23 *Rowe* also undermines POLA’s argument regarding motor carrier services.
24 POLA Op. at 4-5. First, *Rowe* affirmed the preemption of a regulatory scheme
25 directed toward shippers that only *indirectly* affected motor carrier services. 128
26 S. Ct. at 996. In contrast, the Concession plan *directly* regulates the “essential
27 details” of drayage services at POLA. *See, e.g.*, PSOUF ¶¶ 25-27; *see also Am.*
28 *Trucking Ass’ns*, 577 F. Supp. 2d at 1117 (listing Concession requirements).

1 Second, as POLA concedes in its Opposition, *Rowe* concludes that a regulation
2 substituting a government’s own commands for “competitive market forces”
3 affects trucking “services” in a “significant” way. POLA Op. at 5 (quoting *Rowe*,
4 128 S. Ct. at 995). Here, POLA’s employee provisions are “a rather blatant
5 attempt to decide who can use whom for drayage services, and . . . a palpable
6 interference with prices and services.” *Am Trucking Ass’ns*, 559 F.3d at 1056. See
7 PSOUF ¶ 25. Accordingly, the Concession plan will produce “the very effect that
8 the federal law sought to avoid,” and falls within the preemption provision of
9 Section 14501. *Rowe*, 128 S. Ct. at 995.

10 **3. The Concession plan is related to motor carrier routes.**

11 POLA claims that, under its “special analysis,” its Concession plan does not
12 relate to motor carrier routes because cases finding preemption are restricted to
13 “broad-scale state regulation.” POLA Op. at 5-6. POLA thereby effectively
14 concedes that it cannot survive summary judgment under Section 14501, which
15 reflects express congressional intent to limit the ability of governmental
16 transportation terminal proprietors to interfere with deregulation.⁷ Nevertheless, it
17 is undeniable that the Concession requirements directly affect the routes for which
18 motor carriers could provide drayage services. Drayage trucks of any motor carrier
19 failing to sign the Concession agreement cannot serve POLA at all and, indeed,
20 cannot even drop off an empty container at POLB and continue across to pick up a
21 full container load at POLA.⁸ Moreover, POLA misstates the law when it argues

22 ⁷ “In reducing federal economic regulation . . . Congress obviously did not
23 intend to leave a vacuum to be filled by the Balkanizing forces of state and local
24 regulation. . . . Although [the ADA] allows local authorities to operate airports as
25 proprietors, this grant is not unlimited and is subject to curbing if it transgresses
26 into the general field reserved for federal interest.”). *New England Legal Found. v.*
Mass. Port Auth., 883 F.2d 157, 171, 173 (1st Cir. 1989) (upholding ADA
preemption of a Logan Airport landing fee formula). *Rowe* held that Congress
intended to incorporate 1978 Airline Deregulation Act precedents into the
interpretation of the FAAAA, 128 S. Ct. at 994-95.

27 ⁸ See, e.g., *Automobile Club of N.Y., Inc. v. Dykstra*, 520 F.3d 210 (2nd Cir.
28 2008) (upholding preemption of New York City licensing scheme as applied to
tow truck operators licensed in other jurisdictions coming into the city); *Am.*

1 that the “regulation” of truck deliveries to a hypothetical state capitol building
2 could be foreclosed. To the contrary, the second clause of Section 14501(c)(2)(A)
3 contemplates that governments may control physical truck routings based on
4 vehicle size or hazardous cargo. Nor does the FAAAA foreclose security
5 checkpoints or inspections. However, that does not mean that POLA’s Concession
6 plan, which would deny motor carriers the ability to provide drayage services to
7 ocean carriers serving POLA, is permissible.

8 **III. ATA merits summary judgment regarding the “narrow scope” prong of**
9 **the market participant exemption.**

10 ATA’s opening brief demonstrates its entitlement to summary judgment
11 under the “narrow scope” prong against POLA’s market participant defense.⁹

12 Notably, POLA’s Opposition *admitted* the key facts on which ATA relies, and
13 submitted no new material facts. The facts POLA suggests are new and material

14 *Airlines v. Dep’t of Transp.*, 202 F.3d 788, 806 (5th Cir. 2000) (upholding
15 preemption of actions by City of Dallas as proprietor of Love Field to restrict
16 services authorized by federal law to land at Love Field as a means of controlling
17 competition between Love Field and Dallas-Forth Worth International Airport).

18 ⁹ATA’s opening December 7 brief and its December 24 Opposition detail the
19 reasons that ATA merits summary judgment on the efficient procurement prong of
20 market participant test. Because POLA introduced no new material facts or legal
21 arguments, POLA Op. at 8, ATA relies on the reasoning in its own two prior
22 briefs. One point that merits a fuller response is the Port’s back-door attempt to
23 exclude the report of ATA expert Stephen Nieman, POLA Op. at 8 n.2. First, Mr.
24 Nieman, a business consultant who has been involved in the trucking industry for
25 decades, has now submitted a declaration swearing to his report. Second, Mr.
26 Nieman’s report was timely filed as a rebuttal to the report of POLA expert
27 Charles A. Towsley. Mr. Towsley’s report repeatedly tries to offer support to
28 POLA’s market participant arguments. *See* SPSOUF ¶ 34. Mr. Nieman’s report
appropriately rebuts such opinions. Given that POLA’s own Motion relies on Mr.
Towsley’s report, POLA Mot. 7, 10, POLA has no basis to claim that Mr.
Nieman’s report fails to rebut Mr. Towsley’s report. Finally, POLA seeks to
exclude Mr. Nieman’s report, pursuant to *Daubert v. Merrell Dow Pharm.*, 509
U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), on the basis that Mr. Nieman
is not a trained economist. However, POLA cites no law stating that an expert
report concerning the market participant doctrine must be by an economist. It is
especially disingenuous for POLA to make this claim, given that POLA’s Mr.
Towsley specifically denies expertise in economics, drayage trucking services,
market definition, or financial analysis. *See* SPSOUF ¶ 34. Thus, there is no basis
to exclude Mr. Nieman’s report.

1 are identical to those it submitted during the preliminary injunction proceedings.
2 This Court and the Ninth Circuit at that time rejected the materiality of POLA’s
3 facts, and this Court should do the same now. Along the same lines, POLA merely
4 rehashes the same legal arguments that this Court and the Ninth Circuit already
5 rejected. Accordingly, those earlier legal rulings are binding, and this Court should
6 reaffirm its holding rejecting POLA’s narrow scope arguments.

7 **A. POLA concedes facts showing the Concession plan’s broad scope,**
8 **and creates no material fact disputes.**

9 **1. POLA does not controvert the critical facts.**

10 ATA’s opening brief relies on a handful of material facts with regard to the
11 narrow scope doctrine. ATA Mot. at 11-13. POLA does not controvert the
12 substance of any of these facts. Specifically, POLA agrees with ATA regarding
13 the following: drayage truck drivers must work as employees for trucking
14 businesses (DSGI ¶ 25); they cannot park on streets (DSGI ¶ 26); they must
15 display specific placards (DSGI ¶ 27); and the companies that drayage truck
16 drivers work for must maintain specific records and meet certain financial-capacity
17 requirements (DSGI ¶¶ 21, 29). POLA also does not controvert that two of
18 Defendants’ employees (John Holmes and Daniel Grunfeld) admit that the
19 Concession plan is itself part of a broader Clean Air Action Plan. DSGI ¶¶ 40, 41.
20 POLA does not controvert that Mr. Holmes admitted that the Concession plan
21 forms part of an even more “comprehensive scheme” that POLA seeks to
22 implement. DSGI ¶ 42.¹⁰ Indeed, POLA admits that drayage carriers at POLA
23 serve an extremely large segment of national economy—\$240 billion in cargo in
24 2007. DSGI ¶ 13.

25
26 ¹⁰ POLA’s suggestion that ATA took Mr. Holmes’ concededly accurate
27 quotation out of context has no merit. DSGI ¶ 41. The full quotation simply
28 makes explicit that the Clean Trucks Program is the “comprehensive scheme” to
which Mr. Holmes referred. Irrefutably—as Mr. Holmes’ own choice of words
makes clear—the Clean Trucks Program itself is not narrow in scope.

1 **2. POLA has introduced no new or material facts regarding**
2 **the narrow scope test.**

3 Because it cannot controvert these critical facts, POLA instead seeks to
4 muddy the waters with non-material facts. POLA relies on a new declaration from
5 its executive director, Ms. Knatz, for three propositions: (1) that the Concession
6 plan affects drayage service trucks but not other work; (2) that the Concession plan
7 affects only “trust” lands; and (3) that the Concession plan affects only the Port’s
8 “business purposes.” POLA Op. at 10, 11; DSGI Add. Fact ¶¶ 3, 4. None of these
9 assertions controverts the critical facts, discussed above, that POLA has already
10 conceded.¹¹

11 To begin, these three facts are not new. POLA’s factual recitation here was
12 identical in almost every word to its briefs to this Court, and to the Ninth Circuit, at
13 the preliminary injunction phase of this litigation.¹² These facts are as non-
14 material now as then, and fail to save POLA under the “narrow scope” test.

15 These three facts also are either uncontroverted, immaterial, or both. ATA
16 does not controvert that the Concession plan applies to drayage services (although
17 the Concession plan may apply to segments of the stevedoring, rail transportation,
18 and marine terminal operations that POLA lists, depending on where and how a
19 particular shipment is drayed). But, as discussed above, drayage carriers at POLA
20 serve an extremely large segment of national economy—\$240 billion in a year.
21 Under no circumstances is POLA’s drayage services market “narrow.”

22 POLA’s second assertion, that the Concession plan affects only “trust land
23 granted by the State,” POLA Op. at 10, is puzzling. POLA has withdrawn its

24
25 ¹¹ Additionally, for the reasons set forth in ATA’s accompanying evidentiary
26 motion, this Court’s Order of December 21, 2009 prohibits POLA from relying on
27 materials that were not produced by the BHC. Therefore, POLA cannot rely here
28 on a declaration from Ms. Knatz.

¹² Compare POLA Op. at 10 with Opposition to Plaintiff’s Motion For
Preliminary Injunction (Aug. 20, 2008) at 29 and with Opening Brief for Appellees
(Nov. 26, 2008) at 66-67.

1 “sovereign tidelands” argument. POLA Op. at 7. POLA makes no attempt to
2 explain how the “trust land” fact might be relevant absent the withdrawn argument.
3 If POLA means to argue that the Concession plan applies to only this specific port,
4 which is owned by a government, that fact is undisputed, but irrelevant since the
5 market participant doctrine applies only to government entities. Further, there can
6 be no debate that the Concession plan reaches beyond the physical boundaries of
7 the Port. The employee-mandate, the prohibition of on-street parking, the placard
8 requirement, and the financial capability requirements all apply to drayage truck
9 drivers and their companies even when the drivers leave the Port, and even when
10 the drayage company has its offices outside the Port and, indeed, outside of the
11 state. *See* DSGI ¶¶ 21, 25-27, 29.

12 POLA’s third alleged factual assertion, that the Concession plan is related to
13 the Port’s “business purposes,” is not a *factual* assertion at all. Rather, this quote
14 from Ms. Knatz is nothing more than impermissible lay opinion speaking to an
15 ultimate *legal* issue for the Court. Further, even if this were a fact, it would not
16 satisfy the narrow scope test; POLA’s Concession plan constitutes broad regulation
17 regardless of POLA’s purpose for enacting it. Therefore, POLA has not
18 introduced any material fact disputes.

19 **B. This Court’s preliminary injunction opinion correctly states the**
20 **Ninth Circuit’s law regarding the narrow scope prong.**

21 The remaining question regarding the narrow scope test is whether the
22 uncontroverted facts that ATA relies on merit summary judgment as a matter of
23 law. Despite POLA’s recycled arguments to the contrary, the law that this Court
24 and the Ninth Circuit applied at the preliminary injunction phase is correct, and
25 warrants summary judgment to ATA on the market participant doctrine.

26 As this Court correctly stated, the narrow scope test is meant to “defeat an
27 inference that [a government program’s] primary goal was to encourage a general
28 policy.” *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1123 (quoting *Engine Mfrs.*, 498

1 F.3d at 1041). The test only “protects narrow spending decisions . . . that lack the
2 effect of broader social regulation.” *Id.* This Court and the Ninth Circuit
3 concluded that the narrow scope test does not apply because (1) the Concession
4 plan is not a narrow spending decision, (2) the program is not in any case narrow,
5 and (3) the plan does seek to implement a broad social regulation. *Id.*; *Am.*
6 *Trucking Ass’ns*, 559 F.3d at 1055. This Court should reject POLA’s baseless
7 invitation to ignore the law, and should reaffirm its previous holding.

8 **1. This Court must consider whether the Concession plan**
9 **constitutes a narrow spending decision.**

10 First, POLA asserts that this Court, when applying the narrow scope test,
11 should not ask whether the Concession plan protects narrow *spending* decisions.
12 POLA Op. at 9. According to POLA, the Fifth Circuit did not impose such a
13 requirement, and so the Ninth Circuit and this Court should not impose the
14 requirement either. *Id.* (citing to *Cardinal Towing & Auto Repair, Inc. v. City of*
15 *Bedford*, 180 F.3d 686 (5th Cir. 1999)).¹³

16 This argument has multiple flaws. First, the Ninth Circuit has already
17 decided in two separate cases that a key question regarding whether a government
18 entity qualifies for the narrow scope prong of the market participant doctrine is
19 whether or not the government makes a mere narrow spending decision. *See*
20 *Engine Mfrs.*, 498 F.3d at 1041; *Chamber of Commerce v. Lockyer*, 463 F.3d 1076,
21 1084 (9th Cir. 2006) (*en banc* opinion), *rev’d on other grounds sub nom. Chamber*
22 *of Commerce v. Brown*, ___ U.S. ___, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008).

23
24 ¹³ If this Court were to apply the Fifth Circuit’s *Cardinal Towing* case, POLA
25 would need to satisfy *both* the efficient procurement *and* the narrow scope test.
26 180 F.3d at 693 (stating that “the key . . . is to focus on *two* questions. . . . Since the
27 answer to *both* questions here is affirmative” the action challenged there falls
28 under the market protection doctrine) (emphasis added). In any case, *Cardinal*
Towing’s facts concern nonconsensual tows on behalf of a city, and are inapposite
to the facts here. It is uncontroverted that POLA enters into no contract for
drayage services with the motor carriers. *See* DSGI ¶ 35.

1 Second, the Ninth Circuit already rejected POLA’s argument and affirmed
2 this Court’s application of the narrow spending requirement at the preliminary
3 injunction phase of this litigation. *Am. Trucking Ass’ns*, 559 F.3d at 1053; *see*
4 Opening Br. for Appellees at 65-66. The Ninth Circuit’s holding on this question
5 is a pure issue of law, and does not depend on any fact. Therefore, it is the binding
6 law of this case. *See Ranchers Cattlemen*, 499 F.3d at 1114.

7 **2. POLA’s Concession plan is not narrow.**

8 Even if this Court were to disregard the narrow spending requirement,
9 POLA still would not satisfy the narrow scope test. As this Court held, the
10 Concessions “contain numerous provisions regulating different aspects of the
11 motor carriers’ services, and apply to all motor carriers wishing to access the
12 Ports.” *Am. Trucking Ass’ns*, 577 F. Supp. 2d at 1123. Further, the Ninth Circuit
13 described the Concession plan as “an extensive attempt to reshape and control the
14 economics of the drayage industry in one of the largest ports in the nation.” *Am.*
15 *Trucking Ass’ns*, 559 F.3d at 1055.

16 Rather than accept this conclusion, POLA (again) merely repeats legal
17 arguments that it already made to the Ninth Circuit—and lost. *Compare* POLA
18 Op. at 10 *with* Opening Brief for Appellees at 67 (citing *Petrey v. City of Toledo*,
19 246 F.3d 548, 558-59 (6th Cir. 2001) and *Hotel Employes & Rest. Employees v.*
20 *Sage Hospitality Res., LLC*, 390 F.3d 206, 217-18 (3d Cir. 2004)). As POLA has
21 introduced no new material facts on this issue, this Court should reaffirm its
22 previous conclusion.

23 An examination of *Petrey* and *Sage* further demonstrates why they are
24 simply not applicable to the case here. *Petrey*, another nonconsensual towing
25 services case, exempted that municipality’s towing program from preemption
26 because it involved a direct business relationship between the city and the towers.
27 246 F.3d at 558 (*See, e.g.*, noting federal law “does not prevent Toledo from
28 choosing the towers with which *it* will do business”; “*its* towing work”; “*its* police

1 towing”; “vehicles *it* needs to have towed” (emphasis added).) Further, *Petrey*
2 applied only to towing services ordered by the police, and would not have reached
3 the same result if the city had attempted “to regulate the towing industry as a
4 whole, or to advance some general societal goal” *Id.* at 558-559. By contrast,
5 POLA does not contract at all for drayage services, and applied the Concession
6 program to the entire drayage industry serving the Port in order to advance its
7 broad societal goal of cleaning up the air around the Port.

8 *Sage* is equally inapplicable. That case involved a city’s attempt to impose
9 union rules on a developer as a condition for accepting millions of dollars in
10 incentives. 390 F.3d at 208. Here, POLA seeks to impose the Concession
11 agreement on all licensed motor carriers (“LMCs”) that serve the Port, including
12 the majority of clean trucks that take no incentives or other funds from POLA.
13 PSGI Add. Fact ¶ 18.¹⁴ Therefore, this Court and the Ninth Circuit were correct in
14 holding that the Concession plan is too broad to qualify for the narrow scope test,
15 and this Court should now reaffirm its prior holding.

16 **IV. Section 14501(c)’s safety exception excludes port security.**

17 POLA fails to counter the finding of the Ninth Circuit that any safety
18 rationale for the Concession plan is a mere “threadpaper” argument. *Am. Trucking*
19 *Ass’ns*, 559 F.3d at 1056. To avoid this result, POLA hopes to stretch the Section
20 14501(c)(2) motor vehicle safety exception to encompass homeland security
21 concerns, so long as they involve drayage trucks. Contrary to POLA’s position,
22 because the narrowest construction of Section 14501(c)(2) is “resistible” does not
23 mean that the motor vehicle safety exception broadly extends to anything having to
24

25 ¹⁴ ATA also objects to POLA’s request that this Court grant summary
26 judgment in POLA’s favor on the narrow scope test. POLA Op. at 11 n.5. POLA
27 had the opportunity to move for summary judgment on this topic, and it decided
28 not to. It is improper for POLA, in an opposition brief, to effectively move this
Court on an issue that POLA abandoned, whether or not this Court has the actual
authority to do so. In any case, for the reasons described above, ATA merits
summary judgment in its favor on the narrow scope issue.

1 do with motor vehicles.¹⁵ As the Ninth Circuit held, “when Congress adopted the
2 FAAA Act, it intended to broadly preempt state laws that were ‘related to a price,
3 route or service’ of a motor carrier.” *Am. Trucking Ass’ns*, 559 F.3d at 1053. Both
4 the preemption *and* the exception cannot be interpreted broadly, lest the exception
5 “swallow the preemption section itself or, at the very least, cut a very wide swath
6 through it.” *Id.* at 1054. Thus, congressional intent to preempt state re-regulation
7 of the trucking industry should be interpreted more broadly than the narrower
8 motor vehicle safety exception.

9 The cases relied upon by POLA arise in the inapposite context of
10 nonconsensual tow truck operation. Nonconsensual towing occurs solely by virtue
11 of municipal parking laws and ordinances, and so falls within traditional local
12 safety regulatory authority. That authority was expressly preserved by Congress
13 when adopting the motor vehicle safety exception. “It is the expressed intent of
14 § 14501(c)(2)(A) that the preemption rule of § 14501(c)(1) ‘not restrict’ the
15 existing ‘safety regulatory authority of a State.’” *City of Columbus v. Ours Garage*
16 *& Wrecker Serv., Inc.*, 536 U.S. 424, 438, 122 S. Ct. 2226, 153 L. Ed. 2d 430
17 (2002) (emphasis in original). Yet, even that towing authority is neither as broad
18 nor unbridled as POLA suggests. A court must look past the regulators’ proffered
19 “safety” rationales to determine whether the provisions are genuinely responsive to
20 safety concerns, instead of merely having a “reasonable relation” to safety. *See*
21 *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 145-47 (2d Cir.
22 2006) (prohibiting requirement to maintain tow yard within one mile of police
23 station as intended to exclude out-of-town businesses, despite articulated safety

24
25 ¹⁵ *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424,
26 440, 122 S. Ct. 2226, 153 L. Ed. 2d 430 (2002). While POLA accuses ATA of
27 misinterpreting Section 14501(c)(2) as a “motor vehicle safety” exception, this
28 phrase expressing the plain meaning of the provision was used by the Supreme
Court, *see Rowe*, 128 S. Ct. at 997 (Section 14501(c) “explicitly lists a set of
exceptions (governing motor vehicle safety, certain local route controls, and the
like)”) and throughout the Ninth Circuit’s opinion in *Am. Trucking Ass’ns*.

1 rationale). Further, the court must segregate and invalidate provisions whose
2 purpose and intent is not truly safety. *See Am. Trucking Ass'ns*, 559 F.3d at 1055,
3 *citing Tocher*, 219 F.3d at 1050. Moreover, the regulations in the cases cited by
4 POLA (POLA Op. at 13-14, 17), provided narrow solutions to specific targeted
5 problems. In no case did a regulator succeed in attempts to re-shape the towing
6 industry (as POLA tries to do here to the drayage industry) or dramatically increase
7 the costs of towing services, based solely on vague notions related to safety. *Am.*
8 *Trucking Ass'ns*, 559 F.3d at 1056.

9 POLA fails to justify how the motor vehicle safety exception could
10 encompass port security. The word “security” does not appear in
11 Section 14501(c)(2)(A). Motor vehicle safety and security are addressed under
12 wholly separate bodies of federal law. As POLA concedes, its arguments rely on
13 regulation of port security under the aegis of separate maritime security statutes in
14 Titles 33 and 46 of the U.S. Code. POLA Op. at 15. By contrast, motor carrier
15 safety laws are separately addressed in Title 49. Notably, while maritime security
16 laws in Title 46 were amended substantially during the past decade to address
17 potential threats from terrorism, including securing of access to port facilities by
18 drayage trucks,¹⁶ Congress made no change to the FAAAA and Section 14501(c).¹⁷
19 Thus, as the United States stated in its brief *amicus curiae* to the Ninth Circuit,
20 because Congress explicitly has addressed port security in a different statutory

21
22 ¹⁶ *See* 46 U.S.C. § 70103(c)(3)(C)(ii) (requiring a port operator to submit
23 security plans to the Coast Guard and the Secretary of Homeland Security);
24 46 U.S.C. § 70105 (establishing the Transportation Worker Identification
25 Credential program).

26 ¹⁷ In a gratuitous and overreaching attempt to smear the trucking industry,
27 POLA cites fears arising from two acts of domestic terrorism from the 1990's.
28 POLA Op. at 16 n.10. What POLA neglects to tell the Court is that the Ryder
trucks used in both incidents were Class 7 or smaller trucks which are (a) not
container trucks used for drayage, (b) rental vehicles not under the control of a
licensed motor carrier, and (c) not covered by, and specifically exempted from,
POLA's Tariff and Concession program. *See* POLA Tariff No. 4, definition of
“Drayage Truck”; *see also* Truck Exemption Guidelines at 5,
www.arb.ca.gov/msprog/onroad/porttruck/truckexemptionguidelines.pdf.

1 context, and chose not to amend Section 14501(c)(2)(A), it would be improper to
2 expand the existing scope of the motor vehicle safety exception by implication to
3 include port security.¹⁸

4 Accordingly, Concession plan provisions that concern port security—
5 whether duplicative, multipurpose, or otherwise—are not within the traditional
6 “safety regulatory authority of a State with respect to motor vehicles,” and cannot
7 be “genuinely responsive” to motor vehicle safety. These provisions therefore fall
8 outside the exemption.

9 **V. POLA has raised no genuine issue to counter ATA’s showing that the**
10 **Concession agreement provisions are not genuinely responsive to safety.**

11 ATA’s Motion demonstrates why each of five provisions of the Concession
12 agreement could not, as a matter of law, be deemed genuinely responsive to motor
13 vehicle safety concerns. In its opposition, POLA repeats the same bare arguments,
14 without any factual support. POLA has submitted nothing to change the Ninth
15 Circuit’s view that these regulatory provisions, based on economic, administrative,
16 and environmental concerns, should be preempted. POLA’s arguments concerning
17 the safety exception do not dispute ATA’s central point: while POLA
18 commissioned multiple consultant reports concerning the economic and
19 environmental issues to be addressed by its Concession plan, POLA performed no
20 study or analysis of any motor vehicle safety issues. If the Board of Harbor
21 Commissioner’s (“BHC’s”) mere incantations of the word “safety” could be
22 sufficient, then both the preemption requirement and the motor vehicle safety
23 exception would be drained of all meaning.

24 POLA’s suggestion that ATA did not address “the conclusions of POLA’s
25 two experts on safety,” POLA Op. at 16, serves only to prove ATA’s point. An
26 expert’s “conclusions” are not *facts*, and only a genuine dispute as to material facts

27
28 ¹⁸ Brief for the United States to the Ninth Circuit in *Am. Trucking Ass’ns as*
Amicus Curiae, at 13 (Oct. 20, 2008).

1 can preclude issuance of summary judgment. A non-moving party cannot defeat a
2 motion for summary judgment where its “expert[‘s] opinion and the inferences
3 [that party] seeks to draw from it are not of sufficient quantum or quality to create
4 genuine issues of material fact.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d
5 1216, 1222 (9th Cir. 1995). “[I]n the context of a motion for summary judgment,
6 an expert must back up his opinion with specific facts.” *Guidroz-Brault v.*
7 *Missouri Pac. R. Co.*, (9th Cir. 2001) 254 F.3d 825, 830-31 (multiple experts’
8 opinions excluded where they were “not sufficiently founded on facts”); *Major*
9 *League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 311(2nd Cir.
10 2008). “A party opposing summary judgment does not show the existence of a
11 genuine issue of fact to be tried merely by making assertions that are conclusory”
12 *Major League*, 542 F.3d at 310-11 (citation omitted); *Evers v. General Motors*
13 *Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) (citing *United States v. Various Slot*
14 *Machines on Guam*, 658 F.2d 697, 700-701 (9th Cir. 1981) for the proposition that
15 in summary judgment “an affidavit must set forth specific facts in order to have
16 any probative value”). In short, “an expert’s report is not a talisman against
17 summary judgment.” *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2nd Cir. 1997).

18 Tellingly, *none of POLA’s fact or expert witnesses offered any data or*
19 *analysis to support their opinions on motor vehicle safety*, nor did they dispute the
20 expert testimony of Ms. Sandberg (the former head of the Federal Motor Carrier
21 Safety Administration) that such data and analysis are necessary to determine if an
22 initiative is genuinely responsive to motor vehicle safety. SPSOUF Add. Fact ¶¶ 6,
23 7. Without, first, data to quantify any purported safety issues and, second, analysis
24 to assess the potential effectiveness of proposed solutions, POLA cannot credibly
25 argue that the Concession plan was adopted as a genuine response to safety
26 concerns.¹⁹

27
28 ¹⁹ Moreover, Mr. Brown testified at his deposition that he was appearing not as
an expert in motor vehicle safety, but as “an expert in maritime security in

1 **A. POLA’s ban on independent owner operators is preempted.**

2 After extensively reviewing and citing the history of the BHC’s adoption of the
3 Concession program, the Ninth Circuit observed that POLA’s ban on the use of
4 independent owner-operated trucks (“IOOs”) was motivated by POLA’s desire to
5 reshape the economics of the drayage industry, and to save the administrative costs
6 of dealing with numerous individual truckers rather than fewer LMCs. *Am.*
7 *Trucking Ass’ns*, 559 F.3d at 1055-1056. POLA’s witnesses concede that POLA
8 obtained no studies or analyses relating to motor vehicle safety concerns at the
9 Port, and that POLA’s adoption of the IOO ban was not based on the safety record
10 of IOOs at the Port. SPSOUF Add. Fact ¶¶ 11, 12, 13, 14. Thus, POLA has
11 provided no material facts to alter this Court’s prior finding that this provision is
12 not genuinely responsive to safety and should be preempted.²⁰

13 Grasping to find a relation between the IOO ban and safety, POLA suggests
14 that “higher driver incomes” from the IOO ban would necessarily lead to better
15 truck repair. Precisely such regulation has been rejected by the courts. *Baltimore*
16 *Shippers & Receivers Ass’n v. Pub. Utilities Comm’n of California*, 268 F. Supp.
17 836, 843 (N.D. Cal. 1967) (three-judge court), *aff’d* 389 U.S. 583, 88 S. Ct. 694,
18 19 L. Ed. 2d 783 (1968) rejected California’s claim that it “has a legitimate interest
19 in maintaining minimum rates and regulation to see that sufficient marginal profit
20 is made to allow the motor carriers to maintain their equipment in a safe
21 manner” Rather: “[A]ssuming arguendo that such a showing [of “destructive
22 competition” among federally deregulated carriers leading to unsafe equipment]
23 had been made, the interest the State asserts is one of economic protection for
24 common carriers and does not come within the health, safety and welfare, or police

25 general.” SPSOUF 42 n. 1. He also testified that his familiarity with truck safety
26 issues was “[o]nly general from the perspective of initial police training,” *id.*, and
27 that “I do not know the federal regulatory scheme” with respect to motor carrier
28 responsibility for independent owner-operators with whom they contract. *Id.*

²⁰ Indeed, POLB did not believe an IOO ban was needed to achieve safety, in
its current Registration and Agreement or in its original Concession agreement.

1 power interests which have been recognized to have validity.” *Id.*²¹ POLA cannot
2 have such a power, since under Section 14501(c)(2)(A), it only can exercise the
3 “safety regulatory authority” of its parent state.

4 The few BHC references to safety offer only rhetoric with no factual
5 foundation. POLA submits no back-up for its claimed relationship between
6 “higher driver incomes” and safety, or why drivers who more regularly perform
7 drayage services at POLA would be better or safer drivers. As to the former, BHC
8 offers no safety rationale to compel the many IOOs, and LMCs that rely heavily on
9 IOOs, with outstanding maintenance records that provide drayage service at POLA
10 to incur dramatic changes to their business models and millions of dollars in costs
11 by changing to employee-only drivers.²² As to the latter, BHC establishes no actual
12 correlation between safety and the frequency of performing drayage services.
13 Indeed, Mr. Holmes, who wrote the statement of reasons adopted by the BHC
14 when passing the Concession program, concedes that POLA has no basis to believe
15 such a correlation exists. SPSOUF Add. Fact ¶¶ 8, 13, 14. Such bare assumptions
16 demonstrate precisely why study and analysis are prerequisites to a *genuine*
17 response to safety concerns.

18 Further, without factual studies and analysis, POLA had no basis to find that
19 the IOO ban actually could achieve a pro-safety result. POLA had no study
20 showing lack of funds as a root cause why some companies did not follow existing
21 federal and state maintenance requirements, and no basis to disprove the opposite,
22 equally rational, assumption that the “higher driver incomes” would leave LMCs
23 less profit to fund maintenance and, thus, would prove harmful to safety.

24 Additionally, POLA had no basis to believe that the IOO ban would result in
25 greater control over employees than IOOs. Though POLA seeks to rely on Mr.

26
27 ²¹ Notably, the statutes at issue there remain part of federal motor carrier law.
28 *See* 49 U.S.C. §§ 13506(b)(1), 13531, and 13903(a)(2).

²² SPSOUF Add. Fact ¶¶ 10, 11, 12.

1 Holmes for this dubious proposition, at his deposition Mr. Holmes demonstrated
2 only a “general” understanding of the level of responsibility and control LMCs
3 must exercise over IOOs. SPSOUF Add. Fact ¶ 8. Mr. Holmes, Ms. Knatz, David
4 Freeman, and the BHC did not understand that under federal motor vehicle safety
5 law LMCs already *are* responsible for IOOs to the same extent as employees.
6 Under 49 U.S.C. Section 31132(2), an “‘employee’ means an operator of a
7 commercial motor vehicle (*including an independent contractor when operating a*
8 *commercial motor vehicle*), . . . who— (A) *directly affects commercial motor*
9 *vehicle safety* in the course of employment” (Emphasis added.) *See also* 49
10 U.S.C. § 31310(i); 49 C.F.R. Parts 385 and 386. Finally, Mr. Jeffrey Brown cites
11 no studies or facts to support his incorrect assertion that IOOs are more likely than
12 employees to accept unsafe working conditions. POLA Op. 18-19. Thus, for
13 purposes of the Section 14501(c)(2) exemption, an IOO is no different from an
14 “employee” for the purposes of motor vehicle safety requirements.

15 The real problem, as POLA admits, was that POLA considered dealing with
16 a large number of firms an “impossible job” and caused POLA “discomfort.”
17 POLA Op. at 18. In other words, POLA believed it needed more resources to
18 accommodate a larger number of LMCs. Congress prohibited such economic and
19 administrative efficiency-based measures under Section 14501(c). *Am. Trucking*
20 *Ass’ns*, 559 F.3d at 1053, 1056, 1059; H.R. Conf. Rep. No. 103-667, at 84 (1994),
21 *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756 (safety exception cannot be used “as a
22 guise for continued economic regulation”).

23 **B. POLA’s ban of on-street parking is preempted.**

24 POLA’s contention that “there is no reason” prohibiting it from regulating
25 off Port parking (POLA Op. at 19) fails to answer the “mystery” identified by the
26 Ninth Circuit: how the Port has “the safety regulatory authority” required by
27 Section 14501(c)(2) to control parking, off of Port property, of any truck that might
28 provide drayage service. *Am. Trucking Ass’ns*, 559 F.3d at 1056-57. California

1 delegated to its municipalities the power to regulate parking and traffic only on
2 streets subject to their control.²³ The Harbor Board’s rulemaking authority is
3 limited to the “Harbor District,” not Los Angeles as a whole. Los Angeles City
4 Charter, section 652(a). POLA has no more authority to control off-Port parking
5 than it has to set truck speed limits on Los Angeles streets. Because, as a matter of
6 law, the Harbor Board lacks the authority to impose traffic regulations outside the
7 Harbor District, summary judgment should be granted to ATA on this provision.²⁴

8 **C. The maintenance provision is preempted.**

9 POLA admits that its maintenance requirement is meant to impose
10 obligations on LMCs to follow manufacturer recommendations, not federal and
11 state law safety requirements. POLA Op. at 21. Notably, however, POLA fails to
12 identify any of those manufacturer requirements that actually relates to motor
13 vehicle safety (as opposed to emissions control); and, as with each of the other
14 provisions of the Concession contracts, POLA adopted the provision without any
15 study or analysis showing that the provision provided genuine safety benefits.
16 Absent such a factual showing, there is no genuine dispute that the BHC was
17 motivated solely by concerns with ensuring ongoing emissions control and
18 maximizing the longevity of the Ports’ investment in clean trucks. SPSOUF Add.
19 Fact ¶¶ 24, 25, 26.

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23 ²³ California law grants “[l]ocal authorities” the ability to control traffic on
roads “under their jurisdiction.” Calif. Veh. Code § 21101(c).

24 ²⁴ POLB’s Concession agreement permitted on-street parking, consistent with
25 city ordinances. SPSOUF Add. Fact ¶¶ 21, 22, 23. Even if POLA somehow had
26 authority to regulate parking outside the Port, any “safety-related justifications for
27 the rule either wither under scrutiny as a matter of logic or lack basis in fact.”
Loyal Tire, 445 F.3d at 148. Here, the BHC adopted the ban to “maintain political
28 support and goodwill from the . . . surrounding communities,” not any safety-
related reason. Harbor Board Resolution 6522, sixth Whereas clause, ¶¶ (e)-(g).

1 **D. Submission of financial information is not “genuinely responsive”**
2 **to safety concerns.**

3 POLA has submitted no facts to refute the Ninth Circuit view that “it is not
4 likely that the financial disclosure requirements in both Ports’ agreements could be
5 justified under any conceivable safety rationale.” *Am. Trucking Ass’ns*, 559 F.3d
6 at 1056. No studies or analyses support any safety reasons behind the provision.
7 SPSOUF Add. Fact ¶¶ 30, 31. The financial requirements section was not part of
8 the Concession program as adopted by the BHC in March or May 2008. Rather, it
9 was belatedly added at the direction of the Harbor Board as a means of protecting
10 its investments in clean trucks, “to make sure that someone is not judgment proof .
11 . . .” SPSOUF Add. Fact ¶¶ 30, 31. *See Am. Trucking Ass’ns*, 559 F.3d at 1056
12 (“the Port felt that its insistence on that particular employment structure
13 [employee-drivers] would ensure that the Ports’ ‘investments’ in retrofitted trucks
14 ‘will be better protected’”). Thus, provision II(n) is thus not “genuinely
15 responsive” to motor vehicle safety concerns.

16 **E. POLA’s placards provision is preempted.**

17 POLA notably abandons its previous limitation of this provision to the use
18 of placards solely while on Port property, and concedes that it was intended to be
19 used by “community members.” POLA Op. at 22; *compare Am. Trucking Ass’ns*
20 *v. Los Angeles*, No. CV 08-4920 CAS (CTx), 2009 WL 1160212 at *5 (C.D. Cal.
21 Apr. 28, 2009) (“The Los Angeles defendants, however, argue that in fact, there is
22 no off-port display requirement in the Concession agreement”). POLA does not
23 dispute that there is no need for any placard while the truck is on Port property,
24 inasmuch as any truck found to violate a traffic or safety regulation can easily be
25 stopped at a marine terminal operator gate. Indeed, the facts reveal the pretextual
26 nature of this supposed restriction. Mr. Holmes could not cite a single instance in
27 which the placard resulted in a report originating on POLA property, rather than on
28 public roads. SPSOUF Add. Fact ¶¶ 34, 35, 36. Thus, POLA’s placard restriction

1 seeks to impose obligations outside its safety regulatory authority, and is
2 preempted.

3 **VI. ATA is entitled to summary judgment enjoining enforcement of**
4 **Schedule 4, Section 4.4.**

5 In its Opposition, POLA acknowledges that under both federal and
6 California law, only the Federal Motor Carrier Safety Administration (“FMCSA”)
7 can suspend or revoke a motor carrier’s interstate authority for violations of safety
8 laws and regulations. POLA Op. at 23-24 and n.18. POLA’s attempts to avoid
9 preemption have no merit.²⁵

10 First, POLA claims that revocation of a Concession pursuant to Schedule 4,
11 Section 4.4 for safety violations would not suspend a motor carrier’s right to
12 provide interstate port drayage services within Los Angeles, because a suspended
13 carrier’s drayage trucks would not be placed “out-of-service.” Rather, according to
14 POLA, the affected trucks instead would be forbidden to enter marine terminals at
15 POLA, and this “would have no effect on the carriers’ operations outside of Port
16 property.” POLA Op. at 23-24; DSGI ¶ 23. POLA’s argument is mere semantics.
17 First, being unable to serve POLA, which is the busiest container port in the United
18 States, would dramatically curtail carriers’ ability to conduct business. Further,
19 POLA’s Concession plan arrogates to itself the power to place motor carriers out
20 of service with regard to POLA. That is enough. As the Supreme Court has stated,
21 “it would be odd if a state could take *action amounting to* a suspension or
22 revocation” of a carrier’s interstate authority for safety violations, which is the
23 “equivalent of a *partial suspension* of its federally granted certificate.” *Castle v.*
24 *Hayes Freight Lines*, 348 U.S. 61, 64, 75 S. Ct. 191, 192, 99 L. Ed. 68 (1954)
25 (emphasis added). POLA’s approach would allow states and municipalities to

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27 ²⁵ Oddly, POLA claims that ATA did not raise the safety suspension
28 preemption point in its Complaint. POLA Op. at 23 n.16. While this is true, ATA
had no obligation to raise the issue there, given that it responds to an affirmative
defense that POLA itself raised in its Answer.

1 wreak havoc with national services. Such potential Balkanization of interstate
2 services is precisely why Congress required that interstate authority can be revoked
3 only by the FMCSA.

4 POLA’s claim to the power to exclude motor carriers as an extension of its
5 proprietary power to refuse to do business with a company that “breaches” its
6 agreements with the Port, has two logical flaws. POLA Op. at 24. First, this
7 statement starts from a false premise: POLA has *no* discretionary proprietary right
8 to exclude in this manner. As the Ninth Circuit held with respect to airlines’
9 ability to serve municipal airports under the Airline Deregulation Act, “[t]he ADA
10 allows air carriers to make their own decisions about where to fly.” *Air Transp.*
11 *Ass’n v. City and County of San Francisco*, 266 F.3d 1064, 1074, 1075 (9th Cir.
12 2001). Further, as this Court has recognized, an express purpose of Section 4.4’s
13 suspension/revocation power over interstate drayage rights is to serve as a “unique
14 enforcement mechanism” for violations of, *inter alia*, federal, state, and local
15 safety rules. *Am. Trucking Ass’ns*, 2009 WL 1160212 at *5. This purpose and
16 effect falls squarely within the scope of the FMCSA’s exclusive jurisdiction.²⁶
17 Second, it is a tautology. The issue in this case is whether POLA has the power to
18 regulate by compelling LMCs to enter into agreements. POLA cannot justify
19 provisions within a regulatory “agreement” on the need to remedy “breaches” of
20 such an agreement that it cannot, as a matter of federal preemption under the
21 Supremacy Clause, promulgate in the first place.

22 Finally, POLA wrongly continues to claim that the provisions of the Motor
23 Carrier Act of 1935 somehow have disappeared, or that the system of federal

24 ²⁶ POLA’s citation to ATA’s settlement with POLB is misplaced. That
25 settlement requires POLB automatically to give Port access to all drayage carriers
26 signing a Registration and Agreement and registering their trucks and drivers with
27 the Drayage Truck Registry. Suspension could occur only on grounds of
28 knowingly supplying false information for the Drayage Truck Registry or on the
 suspension of a carrier’s federal or state authority. In other cases, POLB may
 recommend to the relevant agency suspension or revocation of a carrier’s federal
 or state operating authority. SPSOUF Add. Fact ¶ 39.

1 regulation of motor carrier safety fitness established by the Motor Carrier Safety
2 Act of 1984 (incorporating *Castle*'s federal suspension exclusivity) is no longer in
3 effect. POLA Op. at 25. While the 1935 Act's section numbers in Title 49 of the
4 U.S. Code have evolved, the 1935 Act (as supplemented by the 1984 Safety Act)
5 remains the *current* source of the FMCSA's regulatory powers. "This final rule is
6 based on the authority of the Motor Carrier Safety Act of 1984 . . . and the Motor
7 Carrier Act of 1935" FMCSA, Requirements for Intermodal Equipment
8 Providers and for Motor Carriers and Drivers Operating Intermodal Equipment, 73
9 Fed. Reg. 76,974 (Dec. 17, 2008).²⁷

10 Moreover, Congress made clear in enacting Section 14501(c)(2)(A) that it
11 intended no change in the limitations federal motor carrier law imposed on state
12 safety regulation. "The conferees emphasize that nothing in these new subsections
13 contains a new grant of Federal authority to a State to regulate commerce and
14 nothing in these sections amends other Federal statutes that govern the ability of
15 States to impose safety requirements." H.R. Conf. Rep. No. 103-677, at 84. Thus,
16 the Motor Carrier Act and Motor Carrier Safety Act are federal motor carrier laws
17 whose scope and authority Congress intended to leave intact in enacting the
18 FAAAA's safety exemption.

19 CONCLUSION

20 For the foregoing reasons, ATA respectfully requests that this Court grant
21 summary judgment to ATA, or, in the alternative, partial summary.

22 Dated: January 5, 2010

Respectfully submitted,

23 By: /s/ Christopher C. McNatt, Jr.
24 Christopher C. McNatt, Jr.
25 Attorney for Plaintiff
26 American Trucking Associations, Inc.

27 ²⁷ The 1984 Act was codified and reenacted less than two months before the
28 August 1994 passage of the FAAAA. Pub. L. No. 103-272 § 1(e), 108 Stat. 745,
983-1013 (July 5, 1994).