IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

WHEELABRATOR BALTIMORE, L.P., ET AL.	*	
Plaintiffs,	*	
V.	*	
	*	**CIVIL NO. 1:19-cv-01264-GLR**
MAYOR AND CITY COUNCIL OF BALTIMORE,	*	
Defendant.	*	

****

MEMORANDUM OF LAW IN SUPPORT OF THE MAYOR AND CITY COUNCIL OF BALTIMORE'S MOTION TO DISMISS

Defendant, the Mayor and City Council of Baltimore (the "City"), by its undersigned counsel and pursuant to Federal Rule of Civil Procedure 12(b)(1), respectfully submits this memorandum of law in support of its Motion to Dismiss Plaintiffs' Complaint.

_____/s/_____
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I. Introduction

The Baltimore Clean Air Act ("BCAA"), was passed unanimously by the Baltimore City Council and signed into law by Mayor Catherine Pugh on March 7, 2019. BALTIMORE CITY, MD. HEALTH CODE § 8-110, *et seq*. The ordinance was enacted to protect the public health and welfare of Baltimore citizens by limiting the emission of harmful pollutants from commercial solid waste incinerators in Baltimore City. More specifically, the BCAA sets forth emission limits on nitrogen oxides, sulphur dioxide, and other pollutants that are more stringent than the limits established by state and federal law. In passing the ordinance the City acted consistently with the Environmental Protection Agency's stated public policy goal of reducing emissions of these substances, which are widely recognized as harmful pollutants. Compl. at ¶ 57.

Plaintiffs' Complaint alleges, *inter alia*, that the BCAA must be overturned because it is both irrational and preempted by state and federal law. Both of these claims lack legal foundation. The federal Clean Air Act ("CAA"), which dictates standards for the pollutants regulated by the BCAA, explicitly recognizes that "air pollution control at its source **is the primary responsibility of States and local governments** . . . ." 42 U.S.C. § 7401(a)(3)(emphasis added). The only restriction on local action in the CAA is that a "State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation" in the CAA. 42 U.S.C. § 7416. As such, it is well established that the CAA "does not prevent states or local governments from enacting standards **more stringent** than those contained in the federal laws and regulations." *Rhode Island Cogeneration Assocs. v. City of E. Providence*, 728 F. Supp. 828, 833 n.11(D.R.I. 1990)(emphasis added).

State law similarly recognizes local authority to pass more stringent air pollution regulations. Md. Code Ann., Envir. § 2-104 states that "this title does not limit the power of a political subdivision to adopt ordinances, rules, or regulations that set emission standards or ambient air quality standards." Like the CAA, the only limitation established under § 2-104 is that a local government may not "set[] an emission standard or ambient air quality standard **less stringent** than the standards set by the Department under this title." Md. Code Ann., Envir. § 2-104. The original version of § 2-104 explicitly recognized that any law passed by a locality that meets at least the minimum requirements of state law "shall be deemed consistent" with state law. 1963 Md. Laws Ch. 806 (May 6, 1963)(enacting Md. Code, Art. 43, § 701, recodified without substantive change as Md. Code Ann., Envir. § 2-104).

These established legal principles comport with good governance and common sense. A large city such as Baltimore, with a dense urban population living in close proximity to pollutant-emitting trash incinerators, must have the ability to protect its citizens by passing more stringent air-pollution regulations than those established by state and federal law. Indeed, Maryland courts have recognized that the regulation of land use, particularly as it relates to harmful emissions and public health, is where municipal authority is at its strongest. *Md. Reclamation Assocs., Inc. v. Harford Cty.*, 414 Md. 1, 40, 994 A.2d 842, 865 (2010). In short, Baltimore City has broad and clear authority to enact ordinances regulating pollutants more stringently than state and federal law, and acted in accordance with that authority in passing the BCAA. For these reasons and those articulated *infra*, the City asks that this Court dismiss Plaintiffs' Complaint in its entirety and with prejudice.

II. Standard of Review

A complaint must be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570. Under the plausibility standard, a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Id* at 555. Thus, in considering the Motion to Dismiss, this Court can "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). Well-plead factual allegations contained in the Complaint are assumed to be true "even if [they are] doubtful in fact," but ***legal conclusions are not entitled to judicial deference***. *See Twombly*, 550 U.S. at 570 (stating that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'" (citations omitted)). Even though Rule 8(a)(2) requires only a short and plain statement showing entitlement to relief, "it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S. Ct. at 1950.

To survive a Rule 12(b)(6) motion, the legal framework of the Complaint must be supported by factual allegations that "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The Supreme Court has explained that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. The plausibility standard requires that the pleader show more than a sheer possibility of success. *Twombly*, 550 U.S. at 556. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1937. Thus, this Court must "draw on its judicial experience and common sense" to determine whether the pleader has stated a plausible claim for relief. *Id.*

III. Argument

A. The Baltimore Clean Air Act is Expressly Authorized by State and Federal Law

In Maryland, State law may preempt local law in one of three ways: (1) express preemption, (2) implied preemption, or (3) preemption by conflict. *County Council of Prince George's Cty. v. Chaney Enterprises Ltd. P'ship*, 454 Md. 514, 540–41, 165 A.3d 379, 395 (2017); *Md. Reclamation Assocs.*, 414 Md. at 36, 994 A.2d at 863. "Express preemption occurs when the General Assembly prohibits local legislation in a field by specific language in a statute." *Montgomery Cty. v. Complete Lawn Care, Inc.*, 240 Md. App. 664, 685–86, 207 A.3d 695, 708 (2019), *quoting Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 512 n. 6, 850 A.2d 1169 (2004). Implied preemption occurs when a local law "deals with an area in which the State Legislature has acted with such force that an intent by the State to occupy the entire field must be implied." *Chaney,* 454 Md. at 541, 165 A.3d at 395*,* (quoting *Talbot Cty. v. Skipper*, 329 Md. 481, 488, 620 A.2d 880, 883 (1993)).

Conflict preemption occurs when a local law prohibits an activity which is intended to be permitted by state law or permits an activity which is intended to be prohibited by state law. *See Chaney*, 454 Md. at 541 n.19, 165 A.3d 379 (internal citations and quotations omitted for clarity). In *Montgomery County*, the Court of Special Appeals noted that:

> although the circuit court found conflict preemption in part based on its determination that the County ordinance would frustrate the State's purpose of seeking uniform pesticide regulations, the Court of Appeals "has not recognized frustration of purpose-type conflict preemption." . . . Indeed, the Court of Appeals has emphasized that it has "rejected the application" of "federal 'frustration of purpose' preemption to a local... ordinance" because "our appellate courts ha[ve] never applied it to resolve a conflict between state and local law."

Montgomery Cty, 240 Md. App. at 688, 207 A.3d at 709 (citations omitted).

Plaintiffs' Count I alleges that the BCAA is preempted by the CAA. Counts II-IV allege preemption by State clean air laws: Count II via conflict preemption, Count III through implied preemption, and Count IV by way of express preemption. Count V alleges implied preemption as a result of State solid waste laws.

The federal CAA, Maryland Environment Code, Title 2, and Maryland solid waste laws do not preempt Baltimore City's right to exercise its police powers in the regulation of air pollution. Indeed, these statutes and associated jurisprudence expressly preserve the right of political subdivisions such as Baltimore City to adopt ordinances, rules, or regulations that establish emission standards or ambient air quality standards that are more stringent than State and federal law.

1. The Clean Air Act Expressly Recognizes State and Local Authority to Pass More Stringent Emission Standards

"[T]he philosophy of the [Clean Air] Act is not to displace but to encourage state, local and interstate action to abate air pollution." *United States v. Bishop Processing Co.*, 287 F. Supp. 624, 636 (D. Md. 1968). In enacting the CAA, Congress found "that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source **is the primary responsibility of States and local governments** . . . ." 42 U.S.C. § 7401(a)(3)(emphasis added). "A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and **local governmental actions**, consistent with the provisions of this chapter, for pollution prevention." 42 U.S.C. § 7401(c). "The term 'air pollution control agency' means [a] city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than

the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency." 42 U.S.C. § 7602(b)(3).

In *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989), the Province of Ontario, Canada and others filed suit challenging the City of Detroit's proposed solid waste incinerator. The district court granted summary judgment for the defendants, but the Court of Appeals reversed and vacated, holding, *inter alia*, that the CAA did not displace state law which was as strict or stricter than emission limitations established in the CAA:

> [I]t is clear that the district court erred in holding that the Clean Air Act preempted any action under MEPA [the Michigan Environmental Protection Act] regarding pollution standards. As the Supreme Court noted in *Washington v. General Motors Corp.*, 406 U.S. 109, 92 S.Ct. 1396, 31 L.Ed.2d 727 (1972):
>
> > Air pollution is, of course, one of the most notorious types of public nuisance in modern experience. Congress has not, however, found a uniform, nationwide solution to all aspects of this problem and, indeed, has declared "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." To be sure, Congress has largely pre-empted the field with regard to "emissions from new motor vehicles," and motor vehicle fuels and fuel additives. It has also pre-empted the field so far as emissions from airplanes are concerned. So far as factories, incinerators, and other stationary devices are implicated, the States have broad control....
>
> *Id*. at 114 . . . . As noted above, the CAA displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute.

Her Majesty The Queen, 874 F.2d at 342. Most significant, for the purpose of this action, the CAA expressly provides that:

> nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission

> standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is **less stringent** than the standard or limitation under such plan or section.

42 U.S.C. § 7416 (emphasis added).

Federal cases construing the CAA, and 42 U.S.C. § 7416 in particular, make clear that the federal act does not preempt States and political subdivisions from enacting more stringent air pollution standards. *See Union Elec. Co. v. E.P.A.*, 515 F.2d 206, 213, n.23 (8th Cir. 1975), *aff'd*, 427 U.S. 246, 96 S. Ct. 2518, 49 L. Ed. 2d 474 (1976); *Oakland Cty. Res. Recovery Auth. v. City of Madison Heights*, 5 F.3d 166, 169 (6th Cir. 1993); *Rhode Island Cogeneration Assocs.*, 728 F. Supp. 828. As the court held in *Rhode Island Cogeneration*:

> The federal statute itself and case law have made abundantly clear that the federal Clean Air Act, 42 U.S.C. § 7401 *et seq*., does not prevent states or local governments from enacting standards more stringent than those contained in the federal laws and regulations. *See e.g.*, 42 U.S.C. § 7416; *Union Electric Co. v. Environmental Protection Agency*, 515 F.2d 206 (8th Cir.1975), *aff'd* 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). However, the congressional finding that state and local governments should have primary responsibility for controlling air pollution (42 U.S.C. § 7401(a)), is not a grant of power to local governments. Local governments are subordinate to the states; any grants of authority must come from the state legislatures, not from Congress. Thus, this Court does not need to examine the federal law for the purposes of this decision, and will concentrate on Rhode Island's laws and regulations governing air pollution. If the state has preempted East Providence's Ordinance, its validity cannot be saved by a grant of authority from Congress.

Rhode Island Cogeneration, 728 F. Supp. at 833 n.11. So, although the CAA does not empower Baltimore City to regulate air pollution, neither does it prohibit the City from doing so. The question is whether Maryland law grants Baltimore City authority to regulate air pollution, or prohibits it from doing so.

2. Maryland Law Expressly Authorizes Local Regulation of Emissions

The Maryland General Assembly has expressly authorized political subdivisions such as Baltimore City to enact air pollution laws more stringent than state laws:

> § 2-104. Power of political subdivisions[1]
>
> (a)(1) Except as provided in this section, this title does not limit the power of a political subdivision to adopt ordinances, rules, or regulations that set emission standards or ambient air quality standards.
>
> (2) A political subdivision may not adopt any ordinance, rule, or regulation that sets an emission standard or ambient air quality standard less stringent than the standards set by the Department under this title.
>
> (b) The governing body of any political subdivision may ask the Department to adopt rules and regulations that set more restrictive emission standards or ambient air quality standards in that political subdivision.

Md. Code Ann., Envir. § 2-104. The original version of § 2-104(a), adopted in 1963, made clear that more stringent local air pollution standards were permitted and would be "deemed consistent" with State law:

> Any ordinances or regulations of any governmental body of a municipality or county or local board of health which are not inconsistent with this subtitle or with any rule or regulation which shall be promulgated pursuant thereto, shall not be superseded by it, and nothing in this subtitle or in any rule or regulation promulgated pursuant thereto shall preclude the right of any governing body of a municipality or county or local board of health to adopt ordinances or regulations which are not inconsistent with this subtitle or with any rule or regulation promulgated pursuant thereto. Any ordinances or regulations of a municipality or county or local board of health which comply with at least the minimum applicable requirements set forth in any rule or regulation promulgated pursuant to this subtitle **shall be deemed consistent** with this subtitle or with any such rule or regulation.

[1] " 'Political subdivision' means a county or municipal corporation of this State." Md. Code Ann., Envir. § 2-101.

1963 Md. Laws Ch. 806 (May 6, 1963)(enacting Md. Code, Art. 43, § 701, recodified without substantive change as Md. Code Ann., Envir. § 2-104)(emphasis added). In short, the CAA and Maryland Environment Code, Title 2 expressly permit local air pollution regulation such as the BCAA.

Plaintiffs argue that the BCAA is preempted because it is stricter than State and federal law – too strict according to Plaintiffs – but that strictness is precisely why the BCAA is **not** preempted by federal or State law. In the instant case, the State legislation on the subject of air pollution expressly provides that local laws on the same subject are not superseded and shall be deemed consistent with the State law, so long as the local law is **more stringent** than State law.

The BCAA is also consistent with recent Maryland jurisprudence affirming municipal authority to regulate solid waste for the benefit of the health and welfare of local citizenry. In *Md. Reclamation Assocs., Inc. v. Harford County*, the Maryland Court of Appeals considered a Harford County regulation subjecting rubble landfills to a variety of restrictions, primarily regarding proximity to residential developments, historical landmarks, and other features. 414 Md. 1, 994 A.2d 842 (2010). Plaintiff, the owner of a landfill subject to the regulations, sought a variance from these restrictions, which was denied, and then turned to the courts to challenge the regulations on a variety of grounds, including preemption. The rubble landfill at issue was—as with the incinerators at issue here—part of the County's solid waste management plan and subject to state permitting. *Id*. The court rejected plaintiff's preemption claim and affirmed the county's power over local land use decisions, holding that the county acted "for classic zoning considerations: the impact of the use on neighboring properties due to emissions from the site," among other factors. *Md. Reclamation Assocs.*, 414 Md. at 40, 994 A.2d at 865.

Md. Reclamation Assocs. also distinguished and limited the Maryland Court of Special Appeals' decision in *Mayor & City Council of Baltimore v. New Pulaski Co. P'ship*, 112 Md. App. 218, 684 A.2d 888 (1996). *Pulaski* considered a Baltimore City ordinance which expressly prohibited "the construction, reconstruction, replacement, and expansion of incinerators within Baltimore City." *New Pulaski*, 112 Md. App. at 222, 684 A.2d at 890. The *Pulaski* court determined that the state statutory scheme regulating solid waste management "preempt[s] by implication the City's enactment of the Moratorium banning solid waste incinerators." *New Pulaski*, 112 Md. App. at 227, 684 A.2d at 893. *New Pulaski* did not consider regulation of emissions, however, and only applies to an express and complete ban on incinerators.[2] Indeed, the Court of Appeals made clear in *Md. Reclamation Assocs.* that *New Pulaski's* application was narrow, holding that "the regulation at issue here is less restrictive than a categorical ban and thus, ***New Pulaski's* reasoning does not apply**." *Md. Reclamation Assocs.*, 414 Md. at 44, 994 A.2d at 868 (emphasis added).

As *Md. Reclamation Assocs.* makes clear, nothing in the State's solid waste management scheme preempts the express statutory right of political subdivisions to regulate air pollution more stringently than State and federal law. In 2016 and 2017, the Maryland Department of the Environment issued Refuse Disposal Permits to Wheelabrator and Curtis Bay pursuant to Maryland Environment Code, Title 9. *See* Compl. Exhibits G & H. The Maryland Solid Waste Laws clearly did not preempt Maryland's regulation of air pollution, however, because the Maryland Department of the Environment also required Wheelabrator and Curtis Bay to secure Part 70 Operating Permits pursuant to the CAA and Maryland Environment Code, Title 2. *See*

[2] This partial and limited form of preemption has been recognized and applied frequently in Maryland jurisprudence. *Holmes v. Maryland Reclamation Assocs., Inc.*, 90 Md. App. 120, 154, 600 A.2d 864, 880 (1992)("Even if state law did not suggest the legislature's general purpose to reserve entirely this regulatory power to the expertise of state agencies, state legislation may partially preempt the field.")(citing cases).

Compl. Exhibits B & D. The Maryland Solid Waste Laws do not occupy the field of air pollution regulation. Rather, air pollution and solid waste pose different problems, and the State has separate regulatory schemes for addressing them. As set forth above, for air pollution, Maryland has expressly decided to exercise authority concurrently with Baltimore City.

In a more recent case addressing concurrent State and local environmental regulation, the Court of Special Appeals held that a Montgomery County ordinance was not preempted by State or federal laws regulating the use of certain pesticides. *See Montgomery County*, 240 Md. App. 664, 207 A.3d 695. As with the CAA, it was well-established that the applicable federal law permitted such local legislation. *See Montgomery County*, 240 Md. App. at 669, 207 A.3d at 698 (citing *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991)). The federal law was less expansive than the CAA on this issue, providing that a "State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." *See* 7 U.S.C.A. § 136v. The Court of Special Appeals upheld Montgomery County's right to enact pesticide regulations concurrently with State law, because "the State has not prohibited local governments from regulating pesticides in the manner addressed by the County. Accordingly, we conclude that the citizens of Montgomery County are not powerless to restrict the use of certain toxins that have long been recognized as 'economic poisons' and which pose risks to the public health and environment." *Montgomery Cty.*, 240 Md. App. at 709, 207 A.3d at 722.

The citizens of Baltimore, represented by the Mayor and City Council, are similarly not powerless to impose more stringent air pollution standards on incinerators located with the City of Baltimore. Maryland Courts have explicitly recognized localities' authority to legislate in the interest of the health of their citizens by limiting public exposure to harmful pollutants.

Montgomery Cty., 240 Md. App. at 709, 207 A.3d at 722; *Md. Reclamation Assocs.*, 414 Md. at 40, 994 A.2d at 865. Indeed, the City's power to regulate is **stronger** here than in *Montgomery County, New Pulaski*, and *Maryland Reclamation Assocs.*, because the City is acting pursuant to express state legislation authorizing more stringent local regulation of air pollution.

3. The City May Regulate Emissions under its Police Power

Even if Environment Code § 2-104 did not empower Baltimore City to regulate air pollution, the State's grant of police power to Baltimore City gives it full authority to do so. Indeed, Baltimore exercised its police power to prohibit air pollution six decades before the State or federal government entered the field. Baltimore City's police powers are derived from Articles 11 and 11A of the Maryland Constitution. *See* Md. Const. Art. 11, §§ 2, 8, 9, Art. 11-A.

> [T]he City of Baltimore is recognized by the Constitution of 1867, as it was also by the Constitutions of 1851 and 1864, as a separate political entity similar in character to the several counties, and that it is liable like the counties to the control of the Legislature, except in so far as may be forbidden by the Constitution. . . . Therefore the Legislature, by virtue of Article 11, Section 9, of the Constitution, possesses the same power over the Charter of the City of Baltimore . . . as it has over the Charter of any other city or town in the State.

Pressman v. D'Alesandro, 211 Md. 50, 57, 125 A.2d 35, 38 (1956).

> The Home Rule Amendment was submitted to the voters of the State by Chapter 416 of the Acts of 1914, and was ratified at the general election in November, 1915. This Amendment provides that after the adoption of a Charter, the Mayor and City Council of Baltimore shall have full power to enact local laws, including the power to repeal or amend local laws enacted by the General Assembly, upon all matters covered by the express powers granted. Md. Constitution, art. 11A, sec. 3.
>
> In pursuance of that Amendment, the Charter of Baltimore City was adopted in 1918.

Pressman, 211 Md. at 56, 125 A.2d at 38. Article II of the Baltimore City Charter enumerates the following powers, among others:

The Mayor and City Council of Baltimore shall have full power and authority to exercise all of the powers heretofore or hereafter granted to it by the Constitution of Maryland or by any Public General or Public Local Laws of the State of Maryland; and in particular, without limitation upon the foregoing, shall have power by ordinance, or such other method as may be provided for in its Charter, subject to the provisions of said Constitution and Public General Laws:
. . . .
§ (11) Health and nuisances.
(a) In general.
To provide for the preservation of the health of all persons within the City; to prevent the introduction of contagious diseases within the City, and within three miles of the same upon land, and within fifteen miles thereof upon the navigable waters leading thereto; and to prevent and remove nuisances.
. . . .

§ (17) Licenses.
To license, tax and regulate all businesses . . . .
. . . .

§ (27) Police power.
To have and exercise within the limits of Baltimore City all the power commonly known as the Police Power to the same extent as the State has or could exercise that power within the limits of Baltimore City; provided, however, that no ordinance of the City or act of any municipal officer, other than an act of the Mayor pursuant to Article IV of this Charter, shall conflict, impede, obstruct, hinder or interfere with the powers of the Police Commissioner.
. . . .

§ (47) General welfare.
To pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated in this Charter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City and to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations.

§ (48) Fines and penalties.
To provide civil and criminal fines and penalties for the violation of any ordinance, rule or regulations established by the City under or in the execution of any power granted by this Article II; provided that no fine or penalty shall exceed $1000.00 and no imprisonment shall be for a longer period than 12 months.

§ (49) Constitutional and other powers.
The voters of Baltimore City shall have and are hereby expressly granted the power to make such changes in Sections 1 to 6, inclusive, of Article XI of the

> Constitution of the State of Maryland, as they may deem best; such power shall be exercised only by the adoption or amendment of a charter as provided in Article XI-A of said Constitution; provided, that nothing contained in this subsection (49) shall be construed to authorize the exercise of any powers in excess of those conferred by the Legislature upon said City, as set forth in Article XI-A of said Constitution; and expressly provided, further, that nothing herein contained shall give to the City or to the inhabitants thereof the right to initiate any legislation, laws or ordinances relating to the classification and taxation of real and personal property within the limits of said City.
>
> The powers heretofore or hereafter granted to the City not included in Article II of its Charter shall, nevertheless, be exercisable by said City. Nothing contained in this subsection (49) shall be construed to take away or limit any power vested in the City, under the laws existing prior to June 1, 1945.

Balt. City Charter, Art. II, §§ 11, 17, 27, 47, 48, 49.

Pursuant to that grant of police power, Baltimore City began regulating air pollution long before the State of Maryland entered the field. In 1905, Baltimore City enacted an ordinance providing, *inter alia*, that:

> No furnace employed in heating, or in the working of engines in any hotel, office building, apartment house, theatre, place of public assembly, store or dwelling, within the city of Baltimore, shall hereafter be permitted to emit dense or black smoke from its chimney or smokestack . . . .

Balt. City Ordinance No. 217 (Mar. 6, 1905). In 1950, the General Assembly enacted a law appropriating no more than $100,000.00 annually for "the study and control of air pollution in Maryland." *See* 1950 Md. Laws Ch. 20, *codified at* Md. Code Ann., Art. 43 – Health, § 116 ("Noxious Fumes")(1951). Not less than one-half of that appropriation was required to be "paid over . . . to the Health Department of Baltimore City, for use in the study and control of air pollution in **and adjacent to** the City of Baltimore." *Id*. (emphasis added). Thereafter, on April 9, 1956, Baltimore City enacted Ordinance No. 358 (codified at Balt. City Code, Art. 12 – Health, §§ 7A-7J), which provided, *inter alia*, that:

> No person, firm, corporation or agency operating or using, or intending to operate or use, any equipment, process, structure or space, indoors or outdoors, static or

> mobile, shall allow such equipment, process, structure or space, to emit any noxious acid, gas, vapor, odor or any other substance . . . in such a manner as to be dangerous or detrimental to the health or safety of the public or to interfere unreasonably with the comfort of the public.

In contrast, the State of Maryland did not enter the field of prohibiting air pollution – as opposed to merely studying it – until 1963. *See* 1963 Md. Laws, Ch. 806. The 1963 State law did not include language expressly repealing local air pollution ordinances; rather, the 1963 law expressly provided that more stringent local ordinances were permitted and would be deemed consistent with State law. *See* Md. Code Ann., Art. 43 § 701. That clause remains part of Maryland law. *See* Md. Code Ann., Envir. § 2-104.

Numerous cases have held that Baltimore City, in the exercise of its police power, may legislate concurrently with the General Assembly, so long as it adopts laws more stringent than State law. *See State's Attorney of Baltimore City v. City of Baltimore*, 274 Md. 597, 337 A.2d 92 (1975) *City of Baltimore v. Sitnick*, 254 Md. 303, 317, 255 A.2d 376, 382 (1969); *Rossberg v. State*, 111 Md. 394, 74 A. 581 (1909).

State's Attorney of Baltimore City concerned enforcement of the Building and Electrical Codes of the Baltimore City Code, violations of which were misdemeanors under City law. *State's Attorney of Baltimore City*, 274 Md. at 599, 337 A.2d at 94. In 1971, the General Assembly enacted Md. Code, Art. 53 § 44, which provided:

> From and after July 1, 1973, violations of the Building and Electrical Code of the Baltimore City Code, Article 32 (1966 Edition), are to be actions at law. Jurisdiction in all cases of violations of the Building and Electrical Code shall be vested in the District Court of Baltimore City having civil jurisdiction.

State's Attorney of Baltimore City, 274 Md. at 599, 337 A.2d at 94. The Mayor and City Council of Baltimore, represented by the City Solicitor, filed an action seeking a declaration that Art. 53 § 44 was unconstitutional. Businesses facing prosecution for code violations intervened, taking

the position that Art. 53 § 44 was valid. The Superior Court of Baltimore City held that Art. 53 § 44 was unconstitutional, and the Court of Appeals affirmed:

> Although there is a strong presumption that acts of the General Assembly are constitutional, and although this Court will not declare a statute invalid unless its invalidity is absolutely clear, nevertheless we are compelled in this case to conclude that Art. 53, s 44, violates Art. XI-A, § 4, of the Maryland Constitution. It is undisputed that the General Assembly has expressly granted to Baltimore City the power to regulate by ordinance the construction, use, operation and maintenance of buildings and structures, and the power to make violations of such ordinances misdemeanors punishable by fines not exceeding $500.00 or imprisonment for not longer than twelve months. *See* Baltimore City Charter (1964 Revision), Art. II, §§ 1 and 48. It is further conceded by all parties to this case that the 'Building and Electrical Codes of Baltimore City represent an expression of that charter power.' . . . .
>
> It is also obvious that Art. 53, § 44, is inconsistent with the City's exercise of its delegated powers. Violations of the Baltimore City Building and Electrical Codes are, by City ordinance, misdemeanors punishable by fines of not more than $300.00 for each violation, with each day that a violation is permitted to continue being a separate criminal offense. . . . However, Art. 53, § 44, specifies that 'violations of the Building and Electrical Code of the Baltimore City Code, Article 32 . . . are to be actions at law.' It goes on to vest jurisdiction over such violations in the District Court of Baltimore City 'having civil jurisdiction.' Thus § 44 attempts to modify the enforcement provisions of Art. 32 of the Baltimore City Code. It purports to remove the criminality associated with violations of Art. 32 of the Baltimore City Code, and change what were previously misdemeanors into 'actions at law.'

State's Attorney of Baltimore City, 274 Md. at 605—607, 337 A.2d at 97—99.

"[U]nless a general public law contains an express denial of the right to act by local authority, the State's prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation and in such a situation the same field may thus be opened to supplemental local regulation." *Sitnick*, 254 Md. at 317, 255 A.2d at 382. In *Sitnick*, the plaintiff business owners challenged the constitutionality of Baltimore City's more stringent minimum wage ordinance on the ground that it was inconsistent with the State

minimum wage act, because the City ordinance exempted fewer business and set a higher minimum wage. *See Sitnick*, 254 Md. at 306—307, 255 A.2d at 377. The Superior Court of Baltimore City and the Circuit Court of Baltimore City held that the City ordinance was unconstitutional, but the Court of Appeals reversed, recognizing "the general proposition that Baltimore City, as a municipal corporation, had the authority under its police powers to establish by ordinance minimum wage regulations." *Sitnick*, 254 Md. at 309—310, 255 A.2d at 378.

> [W]e are of the opinion that the City law neither conflicts nor is inharmonious with the provisions of the State law, nor conflicts with any intention of the Legislature to reserve to itself the exclusive right to legislate on the entire subject matter, as we shall discuss in this opinion; therefore, the only theory by which the City law would be a nullity or invalid, is on the premise that the presence of the State in this field of regulation amounts to a pre-emption of the field by occupation, with the resulting ouster of local power to legislate. As we read the decisions of our predecessors, this Court has on appropriate occasions followed the doctrine of 'concurrent powers' when construing legislative enactments treating on the same subject matter passed by both the State and a political subdivision. At the same time, we are aware that there have been occasions when this Court has recognized the doctrine of pre-emption by occupation. Before proceeding to a discussion of these two theories we deem it helpful to contemplate the political philosophy behind 'Home Rule.'
>
> . . . .
>
> The landmark case in this area, concerning the construction to be followed when there is an overlapping of state and local enactments dealing with the same subject matter, is *Rossberg v. State*, 111 Md. 394, 74 A. 581 (1909) . . . .
>
> . . . .
>
> A distillation of the opinions we have cited leaves the residual thought that a political subdivision may not prohibit what the State by general public law has permitted, but it may prohibit what the State has not expressly permitted. Stated another way, unless a general public law contains an express denial of the right to act by local authority, the State's prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation and in such a situation the same field may thus be opened to supplemental local regulation.

Sitnick, 254 Md. at 311—12, 317, 255 A.2d at 379—80, 382. The Court of Appeals also held that the chronology of the City's and State's respective legislation of wages:

> undermines the argument that the Legislature intended to pre-empt the field of minimum wage regulation. The Legislature in passing its first law made no mention whatever of the City law already in force. It included no repealer of the City law nor, as a matter of fact, the standard clause repealing all inconsistent laws. When the Legislature acted, for the second time, in this field the City law was not only still in effect but had been repealed and reordained with amendments. There is a presumption of statutory construction that the Legislature acts with the knowledge of existing laws on the subject matter under consideration.

Sitnick, 254 Md. at 322, 255 A.2d 385.

It is not strictly necessary that a local ordinance, to avoid preemption, must predate the enactment of a State law on the same subject. In *Rossberg*, the defendant was convicted of violating a 1908 Baltimore City ordinance prohibiting the sale and use of cocaine. 111 Md. 394, 74 A. 581. A 1904 State statute also prohibited the sale and use of cocaine, but the City ordinance provided more severe penalties and enlarged the scope of criminal conduct beyond that defined in the State law, by making mere possession of cocaine a misdemeanor. *Id.* Although nothing in the City's Charter specifically authorized it to pass the ordinance, the Court of Appeals held that it was sufficient that the Charter granted the City Police Power and Welfare and other Powers:

> In the present case, the legislative grant is not merely one of power to pass ordinances relating to specified police powers, regarded as a part only of the general police power, but the grant is of "all the power commonly known as the police power, to the same extent as the state has or could exercise said power within said limits." The implication, therefore, is a necessary one that, notwithstanding the preceding clause of that section of the charter enumerated certain purposes for which ordinances might be passed, the Legislature intended the city to have, in addition, the power to pass ordinances for any and all purposes relating to the exercise of the police power. If, therefore, the power to pass the ordinance in question can be considered as an implied power, it is well within the definition of an implied power given by Judge Cooley, since the whole police power cannot be exercised if the exercise of any part of such power is to be withheld because such part is not expressly granted.

Rossberg, 111 Md. 394, 74 A. 581, 582—83. It was not dispositive, therefore, that the City ordinance at issue in *Rossberg* was enacted after the State law.

Pursuant to 42 U.S.C. § 7416, Md. Code Ann. Envir- § 2-104, and the Baltimore City Charter, Baltimore City's power to regulate air pollution is co-equal with that of the State. Baltimore's need to regulate air pollution is greater than in other parts of the State; as the largest city in Maryland, the City's dense and extensive residential, industrial, and commercial development simultaneously increases the amount of air pollution generated, and the number of people exposed to that air pollution. That greater need is part of the rationale for allowing more stringent local regulation:

> Municipal corporations . . . are founded in part upon the idea that the needs of the localities for which they are organized, 'by reason of the density of population, or other circumstances, are more extensive and urgent than those of the general public in the same particulars.' Many acts are often far more injurious, while the temptation to do them is much greater, in such localities, than in the state generally. When done in such localities they are not only wrongs to the public at large, but are additional wrongs to the corporation.

Rossberg, 111 Md. 394, 74 A. 581, 584.

Similarly, for other political subdivisions, the Court of Appeals has recognized that more stringent local laws are not preempted by State law. *See Holiday Point Marina Partners v. Anne Arundel Cty.*, 349 Md. 190, 214, 707 A.2d 829, 841 (1998); *City of College Park v. Cotter*, 309 Md. 573, 525 A.2d 1059 (1987). In *Holiday Point Marina Partners v. Anne Arundel Cty.*, the Court of Appeals held that there is no preemption when State environmental law expressly allows “more stringent” local regulation. 349 Md. 190, 707 A.2d 829 (1998). In *Holiday Point Marina*, a marina owner challenged a county zoning ordinance that required marina piers to be located at least one-half mile from any shellfish beds. *Id*. at 194, n.1, 707 A.2d at 831. The marina argued that the county's authority to regulate marinas was preempted by the State

Wetlands Act, which requires all piers to have a State permit. *Id*. at 214, 707 A.2d at 841. The Court of Appeals rejected that argument, holding that State regulations implementing the Wetlands Act expressly provided that "[i]f there is a conflict between a local marina management plan and this subtitle, the more stringent regulation takes priority." *Id*. at 212, n.7, 707 A.2d at 840 (citing COMAR 26.24.04.03.F). In *City of College Park v. Cotter*, 309 Md. 573, 525 A.2d 1059 (1987), the Court of Appeals held that a municipal charter provision requiring open meetings of the city council was not preempted by State law, because it was more stringent than the State open meetings statute.

B. Plaintiffs Have not, and Cannot, Plead Sufficient Facts to Overcome the Presumption that the BCAA is Rational

The comprehensive right of states and municipalities to regulate pollutants extends back over a century. As noted by the Supreme Court in *Nw. Laundry v. City of Des Moines*, 239 U.S. 486 (1916), state and local governments have the right to "declare the emission of dense smoke . . . a nuisance and regulate it as such" and challenges to "the harshness of such legislation, or its effect on business interests, short of merely arbitrary enactment, are not valid constitutional objections." *Id.* at 491–92. "Nor is there any valid Federal constitutional objection," the *Nw. Laundry* Court found, "in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance." *Id.; see also Day-Brite Lighting Inc. v. State of Mo*., 342 U.S. 421, 424 (1952)("Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization."). In short, municipalities have broad leeway to legislate in the interest of the health of their citizens, as Baltimore City has done through the passage of the BCAA.

This broad leeway is maintained through the leniency of rational basis review. When a plaintiff is not part of a protected class and no fundamental right is at stake, rational basis, which has been described as "a paradigm of judicial restraint," is the appropriate standard. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). Under a rational basis review, it is Plaintiffs' heavy burden to "negative every conceivable basis which might support" the statute challenged. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)(internal quotation marks omitted). This is particularly true "[i]n areas of social and economic policy," where an ordinance which "neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld . . . if there is **any reasonably conceivable state of facts** that could provide a rational basis for the classification." *Beach Commc'ns, Inc.*, 508 U.S. at 313 (emphasis added).

This "presumption of rationality" applies at every stage of proceedings. *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008). The Fourth Circuit has noted that under rational basis review, "[t]o survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Id*. at 303—04. A "conclusory assertion that the challenged policy was without rational basis" is not sufficient to state a claim. *Id.* at 303. Moreover, a mere "allegation that the City acted out of animosity" towards a plaintiff "is insufficient to defeat the City policy's presumed rationality." *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992).[3]

Plaintiffs' allegations do not advance beyond conclusory assertions and bare suggestions of animosity. In their eighth and ninth causes of action, Plaintiffs simply allege that the BCAA is "arbitrary, capricious, unjust, and unreasonable." Compl. at ¶151. They further allege that the City's actions "were not an exercise of reasoned judgment on proper air pollution control" and

[3] The Fourth Circuit in *Giarratano* cited *Wroblewski* with approval and specifically adopted its rational in this context. *Giarratano* 521 F.3d at 303–04.

the City "failed to conduct any study or provide any reasoned analysis or justification" to support the law. *Id.* at ¶152. In their equal protection count, Plaintiffs allege that "the act is not rationally related to a legitimate government purpose" and "the act singles out Wheelabrator Baltimore and Curtis Bay for disparate treatment and is designed and intended to force the closure of the facilities." *Id.* at ¶163, 164. Notably, Plaintiffs offer no facts demonstrating that Wheelabrator and Curtis Bay were singled out or treated differently than other similarly situated entities.

None of these allegations state a claim upon which relief can be granted. As to Plaintiffs' allegations regarding a lack of study or analysis, the *Giarratano* court, in considering and affirming a motion to dismiss on rational basis review, found that local laws "'**may be based on rational speculation unsupported by any evidence or empirical data**.'" *Giarratano*, 521 F.3d at 303 (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 315)(emphasis added). As such, Plaintiffs' allegation that the City did not conduct a study or provide a "reasoned analysis" to support the BCAA fails to state a claim even if accepted as true. A "law is constitutional even if it is unwise, improvident, or out of harmony with a particular school of thought." *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013). Plaintiffs bear the burden of alleging specific and detailed facts demonstrating the fundamental irrationality of the BCAA; merely alleging that it was not subject to proper study does not suffice.

Goodpaster represents perhaps the best analogy to the case at hand. As stated *supra*, the Fourth Circuit has cited and explicitly adopted the Seventh Circuit's thinking regarding rational basis review on a motion to dismiss. *Goodpaster* involved an Indianapolis ordinance that prohibited smoking in most bars and taverns in the City. *Id*. at 1066. The ordinance was challenged by a group of business owners who highlighted the negative economic consequences

of the ordinance and alleged equal protection and due process claims. *Id*. at 1066—67. The business owners filed a motion for preliminary injunction and the City filed a motion to dismiss. After a hearing, the district court granted judgment in favor of the City, finding that the plaintiffs "could not establish actual success on the merits of their claims." *Id*. at 1067.

The Seventh Circuit affirmed. Noting the leniency of rational basis review, the court found that "it is irrelevant whether the reasons given actually motivated the legislature; rather, the question is whether some rational basis exists upon which the legislature could have based the challenged law." *Id*. at 1071. In this respect, the court noted that there were "numerous reasons the City may have chosen to limit smoking in enclosed public spaces, and the bar owners have failed to disprove all of them." *Id*. In respect to the equal protection claim, the court held that "once we identify a plausible basis for the legislation, our inquiry is at its end." *Id*. "When dealing with local economic regulation," the court stated, "it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Id*. (internal quotations and citations omitted).

Plaintiffs here have not alleged sufficient facts to show that the BCAA is a wholly arbitrary act. Indeed, the Complaint acknowledges, repeatedly, that the emissions regulated by the BCAA are "pollutants" already strictly regulated under state and federal law. Compl. at ¶ 54, 65. They further acknowledge that there has been a trend over recent years to more strictly regulate these pollutants, and that the Environmental Protection Agency ("EPA") has a stated "public policy goal of reducing emissions." *Id*. at ¶ 57. In so stating Plaintiffs provide a clear rational basis for the BCAA: to further reduce emissions of various pollutants in the City of Baltimore, in line with the stated policy of the EPA.

As stated *supra*, the Fourth Circuit has made clear that when passing legislation, municipalities can engage in "rational speculation unsupported by evidence or empirical data." *Giarratano*, 521 F.3d at 303 (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 315)(emphasis added). The City of Baltimore, even based on Plaintiffs' own allegations, has gone far beyond this low bar and enacted a law based on the scientific consensus that the substances regulated are harmful pollutants and their emission should be reduced. Where a complaint challenging an emissions ordinance acknowledges that there is a legitimate government interest in minimizing the substances regulated, it fails to state a claim. *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 943 (9th Cir. 2011)("Here, Jensen admits that the Rules serve the legitimate governmental interest in minimizing air pollution from diesel engines. Accordingly, we hold that Jensen's substantive due process claim fails.")(citations and quotations omitted).

Plaintiffs ask this Court to engage in legislative line-drawing. They acknowledge that the substances regulated by the BCAA are harmful pollutants that must be regulated, but complain that the City has drawn the line too harshly, affecting their business interests. The Supreme Court has made clear, however, that "restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Plaintiffs would have this Court delve into a complex debate over the exact levels at which these pollutants should be regulated. Yet the Supreme Court has cautioned against exactly this type of analysis, noting that a plaintiff "cannot prevail so long as it is evident from all the considerations presented to the legislature, and those of which we may take judicial notice, that the question is at least debatable." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Only a showing that there is no conceivable basis for the passage of the BCAA

would justify its invalidation on rational basis review. Even taking the facts alleged in the Complaint as true, Plaintiffs have failed to make such a showing here. As such, Plaintiffs' due process and equal protection counts must be dismissed.

C. Plaintiffs' Maryland Declaration of Rights Claims Fail for Substantially the Same Reasons as Their Constitutional Claims

Plaintiffs allege in counts ten and eleven of their Complaint that the BCAA violates Article 24 and Article 11 of the Maryland Declaration of Rights. As to Article 24, Plaintiffs allege that the BCAA is "manifestly arbitrary, capricious, or unreasonable, and an abuse of legislative discretion." Compl. at ¶ 171. They further allege that the passage of the act was not "an exercise of reasoned judgment regarding proper air pollution control." *Id*. at 172. As to Article 19, Plaintiffs allege that the BCAA "injured Wheelabrator Baltimore and Curtis Bay in their property by imposing an array of expensive requirements and standards that will be impossible to meet." *Id*. at 184. They further allege that "the City has failed to provide Plaintiffs any remedy for their injuries." *Id*. at 186.

These allegations fail for substantially the same reasons as Plaintiffs' Fourteenth Amendment claims. A claim made under Article 24 is analyzed under exactly the same principles as an equal protection claim under the Fourteenth Amendment. As the Maryland Court of Appeals has noted:

> While the Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantee embodied in Article 24 of the Maryland Declaration of Rights are obviously independent and capable of divergent application, we have consistently taken the position that the Maryland equal protection principle applies in like manner and to the same extent as the Equal Protection Clause of the Fourteenth Amendment. Thus, United States Supreme Court opinions concerning the Equal Protection Clause of the Fourteenth Amendment are practically direct authorities with regard to Article 24 of the Declaration of Rights.

Murphy v. Edmonds, 325 Md. 342, 354, 601 A.2d 102, 108 (1992)(citations and quotations omitted). In analyzing Plaintiffs' Article 24 claims, the same rational basis standard applies, as does the same strong presumption of rationality. *Id*. 325 Md. at 356, 601 A.2d at 108. As such, under the same authority and for the same reasons as articulated *supra*, Plaintiffs Article 24 claim must be dismissed.

Maryland courts have similarly found that the claims brought under Article 19 "have long been equated with the Federal due process clause and have been held to provide the same, but no greater, rights and protection." *Durham v. Fields*, 87 Md. App. 1, 11, 588 A.2d 352, 357 (1991)(citing cases). The Fourth Circuit has relied on its analysis of federal constitutional claims to summarily deal with Article 19 claims. *Booth v. Maryland*, 337 F. App'x 301, 313 (4th Cir. 2009)("For the same reasons, Booth's putative claims under Article 19 and 24 of the Maryland Declaration of Rights also fail."). To the extent that there is an Article 19 claim independent of Plaintiffs' federal claims, it concerns only the question of whether the City has improperly immunized itself from suit. Article 19 "precludes the Legislature from immunizing from suit both the government and the governmental official involved." *Jackson v. Dackman Co.*, 422 Md. 357, 378, 30 A.3d 854, 866 (2011). As such, the Maryland Court of Appeals recently noted that "[t]he issue, under our Article 19 jurisprudence, generally is whether the abolition of the common law remedy and substitution of a statutory remedy was reasonable." *Id*. 422 Md. at 380, 30 A.3d at 867.

As such, to the extent that Article 19 offers independent relief, Plaintiffs must allege that the BCAA improperly immunizes the City from suit or abolishes some remedy available to Plaintiffs. Plaintiffs do not make such a claim. They allege only that the "City has failed to provide Plaintiffs' any remedy for their injuries." Compl. at ¶ 186. This misreads Article 19

jurisprudence to obligate the City to affirmatively provide a remedy for any potential injuries to Plaintiffs. This is not the standard under Maryland law. The BCAA does not immunize the City from suit or restrict Plaintiffs in any way from bringing constitutional or common-law claims against the City to remedy any alleged injury. Indeed, the existence of the instant lawsuit is proof itself that Plaintiffs may bring suit against the City to seek a remedy for alleged damages caused by the BCAA. As such, for these reasons and for those articulated *supra*, counts ten and eleven of Plaintiffs' Complaint must be dismissed.

D. The BCAA is a Permissible Local Law Enacted Pursuant to the City's Home Rule Power

The City enacted the BCAA to protect citizens living in close proximity to trash incinerators from harmful pollutants and to provide accurate monitoring of such emissions. As discussed *infra*, the General Assembly, by enacting Md. Code Ann., Envir. § 2-104, has explicitly authorized localities to regulate pollutants more stringently than state-wide law. By its terms, the BCAA applies only to incinerators within the City of Baltimore.

The City's legal authority to pass such a law derives from its "home rule" power delegated via the Maryland Constitution, Article XI-A, § 3. This "Home Rule Amendment" grants Baltimore City "full power to enact local laws . . . including the power to repeal or amend local laws of said . . . County enacted by the General Assembly, upon all matters covered by the express powers granted as above provided . . . " Md. Const. Art. XI-A § 3. Chartered counties such as Baltimore City have sole authority to enact public local laws. *Mayor & Council of Forest Heights v. Frank*, 291 Md. 331, 342, 435 A.2d 425, 431 (1981). The City's expansive home rule powers are set forth in in Article 2 of the Baltimore City Charter, and its police power is described in § 47 therein: "[the City may] pass any ordinance . . . it may deem proper in

maintaining the peace, good government, health and welfare of Baltimore City . . .” Baltimore City Charter, Art. II § 47; *see infra* Section III.A.3.

The purpose of the Home Rule Amendment is to transfer local lawmaking power from the General Assembly to the local home rule governments. *See Forest Heights*, 291 Md. at 342, 435 A.2d at 431 (quoting *Ritchmount Partnership v. Board*, 283 Md. 48, 388 A.2d 523 (1978); *County Council for Montgomery County v. Investors Funding*, 270 Md. 403, 413, 312 A.2d 225 (1973). The Court of Appeals has on several occasions recognized this concurrent legislative power to honor the City’s superior ground-level view of a broad range of issues of particular importance to Baltimore City. *See, e.g., Sitnick*, 254 Md. at 314, 255 A.2d at 380 (1969)(“The reason for this rule is well stated in *Van Buren v. Wells*, 53 Ark. 368, 14 S.W. 38, as follows: ‘Municipal corporations are in some respects local governments, established by law to assist in the civil government of the country. They are founded in part upon the idea that the needs of the localities for which they are organized, ‘by reason of the density of population, or other circumstances, are more extensive and urgent than those of the general public in the same particulars.’”).

Despite the BCAA falling squarely within the legislative authority and police powers and other powers of the Baltimore City government, Plaintiffs nonetheless claim that the BCAA constitutes a “general law” that the City is prohibited from enacting by the Maryland State Constitution.[4] This argument conflicts with the plain text of Article XI-A, § 4, which contains the constitution’s only clarification as to the definition of a local law. Section 4 states that “Any

[4] Plaintiffs also claim that passage of the BCAA is an ultra vires act because the BCAA is inconsistent with State law. *See* Compl. ¶ 133. Plaintiffs’ ultra vires claim is effectively a sixth pre-emption claim, the substance of which has been fully addressed herein. *See supra*, § § II.A.1—3. The purpose of enacting BCAA is to protect the health and safety of Baltimore City residents, and therefore falls squarely within its express power to regulate for the general welfare.

law so drawn as to apply to two or more of the geographical sub-divisions of this State shall not be deemed a Local Law, within the meaning of this Act." Md. Const. Art. XI-A § 4. Under this definition the BCAA, which only applies within Baltimore City, could not be construed as anything other than a local law.

As almost any local law may have some effect outside of local borders, Maryland jurisprudence allows a locality to pass legislation that has indirect effects outside of its borders, so long as the direct application of the law is contained within local boundaries. In *Tyma v. Montgomery County*, for example, the Court of Appeals upheld against constitutional challenge a Montgomery County Council ordinance extending spousal health, leave, and survivor benefits to domestic partners of all County employees. *Tyma v. Montgomery County*, 369 Md. 497, 515, 801 A.2d 148, 150 (2002). Although some covered employees were not County residents, and the benefits granted would likely cover numerous partners that had little or no connection to Montgomery County, the Court reasoned that the municipal law must be upheld because "the only employer the ordinance impacts is the County; it has no effect outside the County and, therefore, no statewide interests are affected." *Id*. Like the BCAA, the act was local because its direct operation was confined within local borders. It did not "define, redefine or regulate marriage in Maryland," and did not "infringe upon the legislature's ability to regulate . . . on a statewide basis." *Id*. at 369 Md. at 511—12, 801 A.2d at 157.

Similarly, in *Steimel v. Bd. of Election Sup'rs of Prince George's Cty*., the Court of Appeals found that a law allowing businesses in Prince George's County to remain open on Sundays was a local law because "[t]he text of the act is punctuated with references to Prince George's County" and "is confined in its operation to prescribed territorial limits and is equally applicable to all persons within Prince George's County." in *Steimel v. Bd. of Election Sup'rs of*

Prince George's Cty., 278 Md. 1, 5, 357 A.2d 386, 388 (1976). Although the *Steimel* law would have indirect effects on suppliers and consumers from other parts of the state, it was considered a local law because it only regulated businesses within county borders.

Ultimately, while the line between general and local can be fine, "in resolving whether an ordinance is a local law, one must focus, *inter alia*, upon whether the ordinance is essentially limited to the territorial boundaries of the enacting jurisdiction." *Holiday Universal, Inc. v. Montgomery Cty.*, 377 Md. 305, 315, 833 A.2d 518, 524 (2003). Plaintiffs' allegations cannot defeat the simple fact that by its own text, the BCAA applies only to trash incinerators operating within Baltimore City, and contains no restrictions as to any other geographical subdivision. Plaintiffs make a conclusory claim that the BCAA is an impermissibly general because it allegedly: "(i) dictates the nature and quality of air emissions and air quality far beyond the City's jurisdiction; (ii) imposes management controls on the combustion of solid waste from numerous sources outside of the City; and (iii) imposes environmental harms and costs by diverting solid waste to locations outside of the City." Compl. ¶ 142. Even taking these allegations as true, however, Plaintiffs only claim that the BCAA may have secondary, indirect effects outside the City of Baltimore. The focus in the analysis of a local law, however, is not whether there are contingent, secondary effects outside of a local jurisdiction, but whether a law **directly regulates property or conduct outside of** local borders. *Holiday Universal, Inc.*, 377 Md. at 315, 833 A.2d at 524. Plaintiffs have made no such claim in their Complaint.

Ordinances found to be impermissibly general by Maryland courts universally have significant direct application outside of local borders. In *Holiday*, the Court of Appeals overturned a municipal law regulating service contracts signed in Montgomery County or for services primarily provided in Montgomery County because "the ordinance makes clear that it

would apply to a contract signed outside of Montgomery County, by parties residing outside of Montgomery County, where as much as forty-nine percent of the performance of the contract takes place outside of Montgomery County." *Holiday Universal, Inc., at* 377 Md. 305, 308—316, 833 A.2d at 525. In *Bradshaw v. Lankford*, the Court of Appeals invalidated a Somerset County ordinance that prohibited oyster dredging in oyster beds that belonged to the state. *Bradshaw v. Lankford*, 73 Md. 428, 21 A. 66 (1891). Finally, in *Gaither v. Jackson*, the Court of Appeals found a law expressly repealing a state statute allowing for gubernatorial appointment of auctioneers in Baltimore City impermissibly general because the state statute's requisite license fees were paid to the state and provided revenue for the whole state. *Gaither v. Jackson*, 147 Md. 655, 128 A. 769 (1925).

Most recently, relying in part of *Holiday*, this Court analyzed whether a local regulation of Ticketmaster transactions was constitutional. *Bourgeois v. Live Nation Entm't, Inc.*, 3 F. Supp. 3d 423, 446 (D. Md. 2014), as corrected (Mar. 20, 2014). This court noted that patently local laws that have "substantial effects" outside of a locality may be deemed impermissibly general and recognized that it is "difficult to formulate and perhaps more difficult to apply [the standard] with any proper degree of uniformity or certainty." *Id*. at 442. Ultimately, however, the *Bourgeois* court applied the principle that has run throughout Maryland jurisprudence on this issue, holding that localities may regulate transactions occurring within the locality by a business with a significant presence there. *Id*. at 445 (noting that it was permissible for Prince George's county to regulate activity "occurring in Prince George's County by an employer with a significant presence in Prince George's County." (quoting *Edwards Systems Technology v. Corbin*, 379 Md. 278, 293, 841 A.2d 845, 854 (2004)). Directly regulating transactions occurring outside of the City was, however, determined to be impermissibly general.

Unlike the municipal ordinances found to be impermissibly general, the BCAA does not directly regulate activity outside of the City, does not infringe on state lands, or directly impact state revenue. The BCAA solely regulates the activity of businesses within Baltimore City. It does not impose any burdens on those handling incinerator-bound trash prior to it entering Baltimore City, or after it leaves Baltimore City, nor does the City prevent other counties from imposing regulations on emissions within their own territorial limits. The BCAA does not affect the property rights of residents outside of Baltimore City, or directly regulate transactions that occur outside of Baltimore City. Even taking as true Plaintiffs' allegations, they only allege secondary, speculative impacts of the BCAA on interests outside of Baltimore City. By this metric, any law regulating economic activity within the City would be invalid, as every local law necessarily has some secondary, indirect impact on individuals and businesses outside the City.

In passing the BCAA, the City was acting pursuant to the authority granted to it by the state to regulate pollutants more strictly than state-wide legislation. Because it applies only within Baltimore City and does not impact state land, does not regulate state-wide transactions, and does not interfere with the state-wide administration of the law, it is a local law both on its face and in its operation, and Count 7 must be dismissed.

E. Door-Closing Statute

TMS Hauling, LLC is not a proper plaintiff, because, although it purports to be a limited liability company, *see* Compl. ¶ 17, it has forfeited its charter. *See* Exhibit A. Fed.R.Civ.P. 17(a)(1) requires that "[a]n action must be prosecuted in the name of the real party in interest." A limited liability company whose rights have been forfeited for tax failures still exists as an entity, but may only defend an action in court, not prosecute one. *See*, Md. Code Ann., Corps. & Ass'ns § 4A-920. "An LLC whose right to use its name has been forfeited for failure to pay or

file taxes cannot satisfy this rule and therefore cannot file an action in court." *Price v. Upper Chesapeake Health Ventures*, 192 Md. App. 695, 708–09, 995 A.2d 1054, 1062 (2010).

IV. Conclusion

For all the foregoing reasons, this Court should dismiss the Plaintiffs' Complaint as to the Mayor and City Council of Baltimore with prejudice and without leave to amend.

Respectfully submitted:

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