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

WHEELABRATOR BALTIMORE, L.P. et al., *Plaintiffs*, v. MAYOR AND CITY COUNCIL OF BALTIMORE, *Defendant.*	Civil Action No. 1:19-cv-01264

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' fifty-nine page Complaint readily satisfies the pleading requirements for all eleven counts and Defendant City of Baltimore's Motion to Dismiss should be denied. The City's arguments misconstrue federal and Maryland preemption law and at best are arguments reserved for merits briefing on summary judgment or trial.

Plaintiffs Wheelabrator Baltimore, L.P. ("Wheelabrator Baltimore"), the only waste-to-energy facility located in Baltimore, and Curtis Bay Energy, L.P. ("Curtis Bay"), the only commercial medical waste incinerator in Maryland (collectively, the "Facilities"), brought this action along with two trade associations and a small waste hauler to invalidate Baltimore's illegal attempt to force the closure of the Facilities through the imposition of extraordinary emission limits and operational requirements that the City has no power to impose. The Baltimore Clean Air Act, Ordinance 18-0306 ("Ordinance"), overturns nearly fifty years of federal and state primacy that establishes a uniform system to regulate air pollution. The Ordinance imposes requirements that lack scientific, technical, or factual bases; mandates technically infeasible monitoring obligations; and inflicts strict liability criminal penalties for activities that have been authorized by the U.S. Environmental Protection Agency ("EPA") and the State of Maryland under the federal Clean Air Act ("CAA") and Maryland law. The Ordinance also conflicts with Maryland's solid waste program by forcing the Facilities to shut down, effectively invalidating the Facilities' state solid waste permits and the state-approved solid waste plans for Baltimore and other jurisdictions that rely on the Facilities. The Ordinance is unlawful as a matter of federal conflict preemption and Maryland express, implied, and conflict preemption.

The Plaintiffs have pled that the Ordinance interferes with and is an obstacle to the federal CAA framework and the Facilities' comprehensive Title V permits, which the Ordinance abrogates. The Ordinance conflicts with the carefully formulated standards established under the

CAA by imposing the City's own unfounded emission limits and operating requirements. These provisions nullify the CAA's Title V operating permit program, specific standards for municipal waste combustors and medical waste incinerators under Sections 111 and 129 of the CAA, and the State Implementation Plan ("SIP") program that governs air emission limits intended to meet EPA air quality standards set for the Baltimore Metropolitan Region.

Maryland's comprehensive air laws also preempt the Ordinance. First, the Ordinance is expressly preempted because it violates Maryland law vesting Maryland's Department of the Environment ("MDE") with exclusive jurisdiction over regulation of air emissions, and Maryland Environment Article Section 2-104, which limits local authority to set emission limits or air quality standards. Under Section 2-104, a political subdivision that seeks more stringent emission standards may only request that MDE adopt such standards. A local government may not – as Baltimore did here – unilaterally set such emission limits and other requirements.

Second, Maryland's all-inclusive program of air pollution control based on delegated authority under the CAA and complementary state law occupies the field, and thus preempts the Ordinance under Maryland's well-developed jurisprudence of implied preemption. Through its state regulations promulgated pursuant to CAA Sections 111 and 129, its EPA-approved SIP, and MDE's issuance and enforcement of Title V air permits that set specific technical requirements for the Facilities, Maryland law dictates how air emissions sources are operated. Maryland's pervasive regulation of solid waste management also impliedly preempts the Ordinance. The state's solid waste laws comprehensively govern the Facilities' permitting, treatment, and disposal of solid and medical waste, as does the Solid Waste Management Plan ("SWMP") that every locality must submit to MDE for approval. The Ordinance defies the MDE-approved SWMP by dramatically amending Baltimore's Plan without state approval. Finally, the Ordinance is invalid under state

law conflict preemption because it prohibits conduct affirmatively authorized by Maryland air laws and regulations, and in particular, the Facilities' state-issued permits.

The City erroneously relies on its police power, disregarding that the Maryland Constitution and the Baltimore City Charter prohibit local laws that are preempted by or conflict with state law. Baltimore's police power is reserved for traditionally local issues – not the unauthorized control over complex air pollution matters it seeks under the Ordinance. Additionally, the City is limited to legislating local laws and may not legislate public general laws that have far-reaching effects outside of Baltimore. The Ordinance also violates the Maryland and U.S. Constitutions by targeting the Facilities for shutdown through legislation that was promulgated without any fact-finding and without a relevant or supportable scientific and technical basis.

The City argues that the Complaint should be dismissed because Congress and the Maryland legislature have authorized passage of the Ordinance. This is not so, and in any event the City's strained statutory interpretation provides no basis for dismissal at the pleadings stage.

STANDARD OF REVIEW

A complaint survives a Rule 12(b)(6) motion to dismiss when it "give[s] the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A motion pursuant to Rule 12(b)(6) "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). The complaint must simply set forth "enough factual matter (taken as true) to suggest" a cognizable cause of action, "even if … [the] actual proof of those facts is improbable …." *Twombly*, 550 U.S. at 556.

ARGUMENT

I. The Clean Air Act Preempts the Baltimore Ordinance

A fundamental purpose of the CAA is "to protect and enhance the quality of the nation's air resources in order to promote the public health and welfare while also promoting the productive capacity of its population." 42 U.S.C. § 7401(b)(1). A key goal is to "encourage and promote reasonable federal, state, and local governmental actions, *consistent with [its] provisions*, for pollution prevention." 42 U.S.C. § 7401(c) (emphasis added). The Ordinance is an obstacle to and frustrates those objectives and the methods chosen by Congress, EPA, and the state to implement the CAA. Preemption of local law by federal law is a fundamental principle of our federal system. The Supremacy Clause of the U.S. Constitution invalidates laws that "interfere with, or are contrary to" federal law. *Gibbons v. Ogden,* 9 Wheat. 1, 211 (1824). Federal law supersedes local laws under the Supremacy Clause in three ways. First, Congress preempts local laws by stating its intention in express terms – "express preemption." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, preemption of local law in a particular field occurs where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for supplementary regulation – "implied preemption." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, local law that conflicts with federal law is void – "conflict preemption." *Id.* Conflict preemption arises where compliance with both federal and local regulations is a physical impossibility, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963), or where a conflict exists because a local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). A local law presents such an obstacle when it "interferes with the methods by which the federal statute was designed to reach [its] goal." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992).

Baltimore's Ordinance is unconstitutional under federal conflict preemption because compliance with some of its provisions is a physical impossibility; other provisions make criminal conduct that is allowed under federal and state regulations and the Facilities' permits; and the Ordinance countermands the methodology, standards, and policy choices reflected in the complex regulatory framework established by Congress and EPA to reduce air pollution. These detailed, fact-based claims unquestionably survive a motion to dismiss.

A. The Clean Air Act framework regulates air pollution comprehensively.

The Complaint explains how the CAA creates a complete and interlocking series of federal and state air pollution control regulations for nearly all sources of air pollution in the United States, and in particular for waste-to-energy ("WTE") and hospital, medical, and infectious waste incinerator ("HMIWI") facilities like Wheelabrator Baltimore and Curtis Bay. Section D of the Complaint (16-18) sets forth this framework in detail and demonstrates that the Ordinance is at war with the intricate federal scheme, thus stating a claim for federal conflict preemption. EPA sets National Ambient Air Quality Standards ("NAAQS") at levels that are protective of public health with an adequate margin of safety. 42 U.S.C. § 7409. States must then prepare SIPs designed to meet these NAAQS for EPA approval. 42 U.S.C. § 7410. The CAA also requires emission reductions through installation of air pollution control technology and imposes strict preconstruction permit requirements that apply to major sources, including the Facilities. These requirements have been incorporated into regulations known as Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NNSR"). 42 U.S.C. § 7470, *et seq*.; 42 U.S.C. § 7501, *et seq*. The Wheelabrator Baltimore and Curtis Bay facilities are subject to these regulations.

As required by the CAA, EPA has established New Source Performance Standards ("NSPS") governing new WTE and HMIWI, and Emission Guidelines ("EG") for existing WTE

and HMIWI facilities under Section 111. *See* 40 C.F.R. § 60, subparts Cb and Ce. In addition to requiring emission reductions, the NSPS and EG mandate continuous emission monitoring systems ("CEMS"), which measure actual emission levels of pollutants and verify compliance with the regulations. Before CEMS may be utilized for solid waste incineration units, EPA must first validate the monitoring system. 42 U.S.C. 7429(c); 40 C.F.R. § 60.13.

In 1990, Congress passed sweeping amendments to the CAA that increased the scope and stringency of air pollution controls for WTE and HMIWI facilities. Congress added a new Section 129 which required that EPA supplement Section 111 by promulgating stricter NSPS and EG for WTE and HMIWI facilities reflecting the maximum achievable control technology ("MACT") for over 180 hazardous air pollutants, which the states would then be required to implement in their own rules, subject to EPA approval. 42 U.S.C. § 7429. EPA issued final NSPS and EG for WTE and HMIWI facilities in 1995 and 1997. 60 FR 65387; 62 FR 48348.

In May of 2006, EPA revised the EG for existing WTEs. These changes made the regulations stricter for certain pollutants, and tightened requirements for the minimum amount of time that CEMS must be online. 71 FR 27324. The current federal emission limits for existing WTEs – and the provisions of the Ordinance that countermand them – are set forth in Table 1.[1]

The 1990 CAA Amendments also established a new "Title V" operating permit program under which all federal and state air pollution emission limits and monitoring, recordkeeping, and reporting requirements must be combined into one permit that is subject to public, state, and EPA review. 42 U.S.C. § 7661 *et seq*., 40 C.F.R. § 70. Facilities like Wheelabrator Baltimore and Curtis Bay must obtain a Title V permit, operate in compliance with that permit, and certify annually compliance or noncompliance with all permit requirements. 42 U.S.C. § 7661 *et seq*., 42 U.S.C. §

[1] *See* Exhibit A. Current federal emission limits for existing HMIWI facilities like Curtis Bay are set forth in Table 2, Exhibit B. Tables 1 and 2 are also included in the Complaint at Paragraphs 54 and 63, respectively.

7429(e).[2] Wheelabrator Baltimore and Curtis Bay have operated pursuant to CAA Title V permits since 2001 and 2003, respectively, and those permits have been periodically renewed subject to review and comment by the public.

Finally, the CAA contains both civil and criminal enforcement provisions. The CAA allows for criminal penalties only when a person *knowingly* violates a requirement or prohibition of the law. *See* 42 U.S.C. § 7413(c).

B. The Ordinance is an obstacle to the Clean Air Act, compliance with some of its terms is impossible, and it criminalizes conduct allowed under federal law.

As demonstrated in the Complaint at Section H (32-34), the emission limits and other requirements of the Ordinance directly conflict with the emission limits and provisions in the CAA, EPA's regulations, and the Facilities' Title V operating permits, including:

- The Ordinance sets a nitrogen oxides ("NOx") emission limit of 45 ppmvd on a 24-hour average and 40 ppmvd on a 12-month average, which is an over 80% reduction from the federal limit for Wheelabrator Baltimore and an approximately 70% reduction for Curtis Bay. The Facilities cannot meet the limit using their control technology. Complaint ¶ 65.

- The Ordinance slashes the federal limit for sulfur dioxides ("SO_2") from 29 ppmvd or 75% reduction of SO_2 emissions for WTE facilities to 18 ppmvd and does not allow the alternative percent reduction compliance method. Wheelabrator Baltimore cannot meet the Ordinance's SO_2 requirements with its control technology. *Id*.

- The Ordinance conflicts with the federal mercury ("Hg") emission limit by reducing it from 50 μg/dscm or 85% reduction of Hg emissions at WTE facilities and 18 μg/dscm at HMIWI facilities to 15 μg/dscm with no reduction compliance alternative. The Ordinance mandates CEMS for Hg which have not been validated for solid waste combustion units. *Id*.

- Federal CAA regulations require, and EPA has developed performance specifications for, the use of CEMS for NOx, SO_2, carbon monoxide, and opacity. The Ordinance enlarges the number of air pollutants for which the Facilities will be forced to employ CEMS, even where there are no EPA-approved CEMS technologies available for solid waste incineration units. *Id*.

- The Ordinance requires unnecessary CEMS for pollutants that have no emission limits in the Ordinance. *Id*.

[2] The Title V "permit is crucial to the implementation of the [Clean Air] Act: it contains, in a single, comprehensive set of documents, all CAA requirements relevant to the particular polluting source. In a sense, a permit is a source-specific bible for Clean Air Act compliance." *Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996).

- Federal regulations account for necessary downtime to perform periodic maintenance, emergency repairs, calibration checks, accuracy audits, and additional adjustments on CEMS equipment. The Ordinance imposes a physically impossible standard that CEMS be operational at all times that the facility is functioning, undermining the facility's ability to properly operate CEMS to comply with its Title V permit. *Id*.

- The Ordinance imposes strict liability criminal penalties for any violation of its requirements whereas the CAA establishes a "knowing" criminal *mens rea*. *Id.* at ¶ 5.

The draconian emissions and operational mandates of the Ordinance are not merely "more stringent" measures. The evidence will show, and the Ordinance's sponsor admitted, the requirements are intended to shut down the Facilities under the guise of regulation.[3] The Ordinance conflicts with and frustrates the science-based methods and purpose of the federal regulations and the Facilities' Title V permits.

Further, the Ordinance usurps EPA's authority to review and approve regulatory changes occurring at the state level related to or affecting NAAQS. EPA's oversight of state air regulations is tied to the SIP program, which EPA is required to review and approve or reject for compliance with CAA requirements. *See* 42 U.S.C. § 7410(i); 40 C.F.R. 52.1070 (listing the provisions in Maryland's approved SIP). No state has unilateral authority to modify its SIP without going through this EPA approval process. *See Ala. Envtl. Council v. EPA,* 711 F.3d 1277, 1280 (11th Cir. 2013) ("Once approved, a SIP may not be unilaterally modified either by the state or the EPA;" rather, the CAA "provide[s] cooperative processes for modifying a SIP ….").

Here, by contrast, the City's unilateral enactment of emissions standards has de facto changed Maryland's SIP, without state involvement or oversight and without going through the statutorily prescribed EPA review and approval process. Maryland cannot unilaterally alter or modify its SIP without EPA review and it is axiomatic that the City cannot do so.

[3] Baltimore City Councilman Edward Reisinger stated that the Ordinance will "shut down Wheelabrator" and declared that "[Wheelabrator]'s got to be closed." Complaint ¶ 1

C. The Clean Air Act's savings clause does not save the Ordinance.

The City never denies the Ordinance's blunt conflict with federal law and permits, but instead argues that the federal CAA somehow authorizes its action, citing to the savings clause that reads:

> [N]othing 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 such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation…

42 U.S.C. § 7416; *see also* 42 U.S.C. § 7429 (h)(1). The City's reliance is misplaced because the fact that the CAA savings clause allows the possibility of some role for localities in no way supports the Ordinance's annulment of the federal regulatory scheme and permitting program.

The Supreme Court has repeatedly held that a savings clause for some local authority does *not* displace a conflict preemption analysis. *Buckman Co. v. Plaintiffs' Legal Comm*., 531 U.S. 341, 352 (2001) ("[N]either an express pre-emption provision nor a saving clause bar the ordinary working of conflict pre-emption principles") (citation omitted); *United States v. Locke*, 529 U.S. 89, 106 (2000) ("to give broad effect to saving clauses … would upset the careful regulatory scheme established by federal law"); *Geier v. Am. Honda Motor Co*., 529 U.S. 861, 869-872 (2000) (same). In *Geier*, a woman sued General Motors arguing that the fact that her car met federal standards for seat belts should not bar her tort claim after she was injured in an accident. The Court held that the savings clause in the National Traffic and Motor Vehicle Safety Act of 1966, which stated that compliance with a federal safety standard did not exempt any person from liability under common law, did not limit conflict preemption principles. *Id*. at 869. The Court then held that Geier's lawsuit impermissibly conflicted with the Vehicle Safety Act and a safety standard

promulgated by the Department of Transportation.[4]

The Fourth Circuit has emphatically endorsed the primacy of the federal scheme under the Clean Air Act despite the Act's savings clause. In 2010, a unanimous panel dismissed a public nuisance action by North Carolina seeking to impose specific emissions limits on out-of-state coal plants that conflicted with federal standards and permits. *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010) ("*TVA*"). Despite the savings clause for common law actions under the CAA, the *TVA* court stressed that the Supreme Court in *International Paper v. Ouellette* "recognized the considerable potential mischief in those nuisance actions seeking to establish emissions standards different from federal and state regulatory law and created the strongest cautionary presumption against them. In particular, it is essential that we respect the system that Congress, the EPA, and the states have collectively established." *TVA*, 615 F.3d at 303. Likewise, "*Ouellette* held that the Clean Water Act's savings clause, which is similar to the one found in the Clean Air Act … did not preserve a broad right for states to 'undermine this carefully drawn statute through a general savings clause.'" *Id.* at 304 (quoting *International Paper v Ouellette*, 479 U.S. 481, 494 (1987)). Baltimore's effort to interpose its own set of air pollution controls is no different from North Carolina's failed effort, except that the Ordinance contravenes both federal and state standards. *See Maryland v. Exxon Mobil Corp.*, 352 F. Supp. 3d 435 (D. Md. 2018) (Hollander, J.) (obstacle preemption under CAA presented a colorable federal defense to a nuisance lawsuit brought by Maryland).

The Second Circuit likewise struck down on conflict preemption grounds a state law which

[4] *See also Buckman*, 531 U.S. at 348, 352 (state law claims preempted despite inclusion of savings clause in the Medical Device Amendments of the federal Food, Drug, and Cosmetic Act allowing more stringent requirements for medical devices, where claims would conflict with the FDA's responsibility to police fraud consistent with its judgment and objectives); *Locke*, 529 U.S. at 104-107 (savings clauses of the Oil Pollution Act of 1990 allowing states and localities to impose liability for oil spills did not apply to additional authority sought by the state to impose unique substantive regulations regarding the at-sea conduct of vessels).

restricted in-state electricity generators' ability to transfer emissions allowances to certain states, because the state law interfered with the method set forth by the CAA for controlling emissions. *Clean Air Markets Grp. v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003). *Pataki* found that the savings clause did not preserve this state law and "[e]ven where federal and state statutes have a common goal, a state law will be preempted if it interferes with the methods by which the federal statute was designed to reach this goal." *Id*. In the same way, the Baltimore Ordinance interferes with the method of minimizing air pollution prescribed by the CAA for WTE and HMIWI facilities. *See also United States v. EME Homer City Generation L.P*., 823 F.Supp.2d 274, 296-297 (W.D. Pa. 2011) (quoting with approval *TVA*; Clean Air Act and the Pennsylvania Air Pollution Control Act represent comprehensive statutory and regulatory schemes; state common law claims dismissed), *aff'd*, 727 F.3d 274, 299 (3d Cir. 2013); *Comer v. Murphy Oil USA*, 839 F.Supp.2d 849, 865 (S.D. Miss. 2012) (Clean Air Act preempted state law nuisance claims regarding emissions), *aff'd on other grounds*, 718 F.3d 460 (5th Cir.2013).

Other circuits have also narrowly interpreted savings clauses where a local law conflicts with a federal environmental statute. The Tenth Circuit reversed a grant of summary judgment for a locality defending its ordinances imposing restrictions on a cement factory where the local law frustrated the structure and purpose of the Resource Conservation and Recovery Act ("RCRA"), despite a savings clause similar to the Clean Air Act's. *Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs of Cty. of Rogers*, 27 F.3d 1499, 1508 (10th Cir. 1994). The court wrote that "[i]f a more stringent hazardous waste regulatory measure is hostile to the federal policy of encouraging hazardous waste treatment, recycling, and materials recovery in place of land disposal, some kind of analysis must take place to determine how severely such an ordinance actually interferes with the federal policy and to evaluate the importance of the local interests that the ordinance

purportedly serves." *Id*. at 1506. Retention of local regulatory authority is only allowed if it does not "imperil the federal goals under [the federal statute]" and "must be viewed within the parameters of [the federal statute's] stated national objectives." *Id*. Moreover, the Tenth Circuit held that "ordinances that amount to an explicit or de facto total ban of an activity that is otherwise encouraged (by federal law) will ordinarily be preempted," despite the existence of a savings clause allowing for stricter local regulations. *Id*. at 1508.

Baltimore has done precisely what the locality in *Blue Circle Cement* was precluded from doing by adopting an Ordinance intended to force the closure of these two Facilities, in direct conflict with the purposes and objectives of the federal CAA and the Facilities' Title V permits.[5]

The same result holds across a variety of federal laws, underscoring that Plaintiffs here have pled a federal conflict preemption claim. In *Farina v Nokia Inc*., the Third Circuit found that a consumer's tort claims were conflict-preempted because those claims were an obstacle to the accomplishment of Congress' objectives in regulating these emissions under the Telecommunications Act of 1996 and the Federal Communication Commission's ("FCC") regulatory scheme, despite the Act's inclusion of a savings clause. 625 F.3d 97, 123-124 (3d Cir. 2010). The *Nokia* court found that where the FCC's federal regulatory scheme reflected a careful balancing of objectives, savings provisions "should not be given broad effect … lest they permit [a] law to defeat its own objectives …." *Id*. at 131.[6]

D. <u>The Clean Air Act does not grant Baltimore authority to regulate air emissions.</u>

The cases relied on by the City do not address the situation here of a local Ordinance

[5] Baltimore's Department of Public Works acknowledges that Wheelabrator Baltimore must shut down at least for an indeterminate period to perform the retrofits necessary to attempt to meet the Ordinance's requirements, and could be forced to shut down permanently. Complaint ¶¶ 66-67.

[6] *See also Bank of Am. v. City & Cty. of San Francisco*, 309 F.3d 551, 564 (9th Cir. 2002) (municipal ordinances to regulate ATM fees as a consumer protection measure were preempted by federal law despite a savings clause in Home Owner's Loan Act and National Bank Act).

regulating the exact same sources and pollutants as federal law, and in two of the City's cases state law preempted local efforts to regulate waste combustors and air pollution. City's Motion to Dismiss ("MTD") at 11. For example, in *Southeastern Oakland*, the Sixth Circuit found local ordinances regulating the location of air pollution emission sources and solid waste incinerators in the city were preempted by conflict with state law. *Southeastern Oakland Cty. Resource Recovery Auth. v. City of Madison Heights*, 5 F.3d 166, 167 (6th Cir. 1993). The court held that "[e]ven though the CAA certainly envisions a joint approach to air pollution abatement between federal, state, and local governments … nowhere does the CAA affirmatively grant local governments the independent power to regulate air pollution." *Id*. at 169; *see also Rhode Island Cogeneration Assocs. v. City of E. Providence*, 728 F. Supp. 828, 833 (D.R.I. 1990) (same; city's attempt to regulate air pollution by banning coal use preempted by state law). Both of these cases found that the CAA does not confer any rights on a local government, as suggested by the City.

The City also relies heavily on *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989), to argue that the "CAA did not displace state law which was as strict or stricter than emission limitations established in the CAA." MTD at 10. This simply dodges the conflict preemption issue. In *Province of Ontario,* a waste combustor was defending a lawsuit challenging the approvals it received for construction. The defendant sought to remove the case to federal court. The Sixth Circuit found that the defendant could not meet the high bar of establishing complete federal preemption under the CAA of an entire state statutory cause of action, the requirement for removal. The preemption claims brought against Baltimore in this case are wholly different, challenging the specific clash between the Ordinance and federal law and permits.

Likewise, the City's quotation of dicta from the 1972 Supreme Court case *Washington v.*

General Motors Corp. ("*GMC*") that "[s]o far as factories, incinerators, and other stationary devices are implicated, the States have broad control [in air pollution matters]" is inapposite to the conflict preemption issues here. MTD at 10, quoting *GMC*, 406 U.S. 109, 114-115 (1972). First, *GMC* does not address any issues of CAA preemption; the Court simply declined original jurisdiction of a case brought by states against auto manufacturers. Second, the text the City's strategic ellipses omit reads: "In certain instances, as, for example, *where federal primary and secondary ambient air quality standards have been established … there may be federal pre-emption*." *Id*. (emphasis added). Indeed, in 1972, there were no NAAQS, and no NSPS and EG for WTE or HMIWI facilities under Section 111, no Section 129 MACT standards specifically regulating these facilities, no PSD and NNSR requirements, and no the Title V operating permit program. The Court's observation about incinerators in 1972 is clearly not true in 2019, and in fact the breadth of regulations issued by EPA and Maryland, including specific regulations targeting incinerators, is far more intensive than what the Court suggested could trigger preemption in 1972.[7]

II. Maryland State Law Preempts the Baltimore Ordinance

Maryland law may preempt local law in one of three ways: express preemption, implied preemption, or preemption by conflict. *Talbot Cty. v. Skipper*, 329 Md. 481, 487–88 (1993). In Counts 2, 3, 4 and 5, Plaintiffs have pled ample facts to support Maryland preemption under all three prongs. The City's invocation of what it characterizes as a state savings clause fails as a matter of law, and in any event cannot support dismissal at the pleadings stage.

A. The City may not adopt air emission standards more restrictive than State standards; it may only ask MDE to do so.

The City's argument boils down to the following: under § 2-104 of the Maryland Code,

[7] The City's reference to *Union Elec. Co. v. E.P.A.*, 515 F.2d 206, 213, n.23 (8th Cir. 1975) is irrelevant as the footnote merely recites the predecessor to the CAA's general savings clause in a case about judicial review of approval of a state implementation plan. *See* MTD at 11.

Baltimore has the authority to enact the Ordinance because the only limit on a local government's ability to issue air regulations is that such regulations may not be less stringent than regulations issued by MDE. This argument fails for at least two reasons: (1) the City ignores state law vesting MDE with exclusive jurisdiction over regulation of air emissions; and (2) the City ignores the language of § 2-104(b), which gives local governments *only* the authority to *ask MDE* to issue more stringent emission standards. In addition, even if § 2-104 were to somehow preserve some authority for the City to set emissions limits, this particular Ordinance is preempted by Maryland's comprehensive scheme and conflict preemption.

1. <u>The Maryland General Assembly vested MDE with jurisdiction over air emissions.</u>

The General Assembly vested MDE with "jurisdiction over emissions into the air and ambient air quality" and for "monitoring ambient air quality in this State." Md. Code Ann. Envir. § 2-103(b)(1)-(2). The primacy of MDE's authority regarding air pollution control is further evidenced by the legislature's grant of authority to MDE to "adopt rules and regulations for the control of air pollution in this State, including testing, monitoring, recordkeeping, and reporting requirements." Md. Code Ann. Envir. § 2-301(a). The General Assembly also directed MDE – not localities – to "adopt rules and regulations that set emission standards and ambient air quality standards" for Maryland. Md. Code Ann. Envir. § 2-302(b).

Critically, § 2-302(d) provides that MDE must set emission standards "based on the goal of achieving emission levels that are not more restrictive than necessary to attain and maintain the ambient air quality standards"[8] except where *"a political subdivision requests a more restrictive*

[8] This limitation means that even MDE does not possess the authority to set more stringent standards for attainment areas, as the Ordinance does. MDE may also promulgate more stringent regulations if there are more stringent regulations under the CAA, such as PSD, and for pollutants for which there are no NAAQS, such as mercury, dioxin/furans, and trace metals which the Ordinance regulates. *See* § 2-302 (d)(2)(ii) and (d)(3).

standard under § 2-104." Md. Code Ann. Envir. § 2-302(d)(1), 2-302(d)(2)(i). (emphasis added). Only MDE possesses the authority to set air emission standards in Maryland, either as required by statute, or pursuant to a locality's request for a more restrictive standard.

2. <u>The plain language of Section 2-104 forecloses Baltimore's effort to unilaterally dictate air pollution control standards.</u>

The City mistakenly asserts that "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 standards set by the Department under this title." MTD at 6. The City's interpretation is wrong. Section 2-104, entitled *Powers of political subdivisions*, provides:

> (a) Adopting ordinances, rules, or regulations.
>
> (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) Requesting rules or regulations. -- 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.

Accordingly, § 2-104 recognizes *three* express limitations on a local authority's power, one in each subsection. First, subsection 2-104(a)(1) "does not limit the power" of a local government that it otherwise possesses.[9] This is not an affirmative grant of power to the locality, so while this subsection "does not limit" the locality's power, it plainly does not supplant other limitations on a locality's power, *e.g.*, limits to its police power. That power is circumscribed by the language "Except as provided in this section," which is important because the other two express limitations in the section are such restrictions. Second, subsection 2-104(a)(2) does not authorize

[9] The City is incorrect to characterize subsection 2-104(a)(1) as "expressly authorizing" the Ordinance. MTD at 12. Section 2-104 states only that "this title does not limit" a locality's power.

more stringent standards, it prohibits the imposition of emission standards or ambient air quality standards less stringent than state law. Third, subsection 2-104(b) directs that if a political subdivision desires the adoption of more stringent limits or standards, its recourse is to ask MDE "to adopt rules and regulations that set more restrictive emission standards or ambient air quality standards in that subdivision." Historically – up until it passed the Ordinance – the City understood and followed the process set forth in subsection 2-104(b), as explained below.

The correct interpretation of § 2-104 must include these limitations for several reasons. First, courts must read all of the words of a statute. *See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd*., 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"). The City's interpretation – that the only limit is in subsection 2-104(a)(2) – reads subsection 2-104(b) and § 2-302 out of the statute, and that interpretation cannot be correct. By contrast, Plaintiffs' interpretation harmonizes MDE's authority under §§ 2-103, 2-301, and 2-302, *i.e*., MDE sets emission limits in Maryland. If the City desires to adopt a regulation of its own (for political reasons or to provide an additional enforcement mechanism) that is the same as an MDE regulation, it may do so, but if it wishes more restrictive regulation, it can only request that MDE do so. This interpretation respects MDE's primacy in the issuance of air regulations and gives meaning to all of the language in § 2-104. It also gives effect to the language of 2-104(a)(1) – "Except as provided in this *section* …." The word "section" means all of Section 2-104. If the City were correct that the "only" limit on its authority is contained in 2-104(a)(2), then 2-104(a)(1) would had to have read, "Except as set forth in this *subsection*…," which it does not.

3. <u>The City has followed Section 2-104(b) in the past by requesting that MDE set more restrictive emission standards for Wheelabrator.</u>

The City's actions prior to the passage of the Ordinance demonstrate that it agreed with

Plaintiffs' interpretation. In 2017, MDE conducted a rulemaking to tighten its regulations regarding WTE facilities and lower the nitrogen oxide emission limits in order to meet the federal ozone NAAQS. On July 11, 2017, the City Council passed Resolution 17-0034R, *requesting that MDE* set a nitrogen oxides emission limit of no higher than 150 ppmvd for the Wheelabrator facility. The Resolution acknowledged that "MDE has the authority to set NOx emission limits." On December 6, 2018, after public comment and technical review, MDE adopted a final rule agreeing with the City's request, and reduced the Wheelabrator facility's limit for nitrogen oxides from 205 ppmvd to 150 ppmvd starting on May 1, 2019, and then further reducing the limit to 145 ppmvd by May 1, 2020. COMAR 26.11.08.10.

On September 17, 2018, the City Council passed another resolution *requesting MDE action* regarding air emissions from the Wheelabrator facility. Resolution 18-0101R, again, explicitly recognized that "MDE has the authority to set NOx emission limits," and *requested that MDE* "require a rigorous analysis" of a feasibility study Wheelabrator Baltimore was required to submit by January 2020 under the December 6, 2018 rule, and "fully evaluate the technical feasibility" of installing certain additional control technology at Wheelabrator Baltimore "regardless of cost or whether the technology has been used in other retrofits." In sum, both of the City's resolutions, 17-0034R and 18-0101R, requested *that MDE take action to set more restrictive emission standards*, based on science, the only pathway for the City to pursue more stringent standards under § 2-104. Maryland air laws have not changed since the City made these requests; the City has merely adopted a new litigation position to attempt to justify an ordinance that completely usurps MDE's authority and violates § 2-104.

4. <u>The City misconstrues the legislative history of Section 2-104.</u>

Faced with the plain, interlocking and reinforcing text of state air laws, the City reaches back to a long-superseded 1963 statute in an attempt to find support for its legal theory that more

stringent local air pollution standards are somehow permitted and would be "deemed consistent" with state law. MTD at 12-13. The City claims that the 1963 law was "recodified without substantive change." *Id*. at 6, 13. This is wrong; the 1963 version of the law (former § 701) was *repealed and replaced in its entirety* in 1967. S.B. 354, 1967 Md. Gen. Assemb. (Md. 1967).

The 1967 Air Quality Control Law removed § 701 and its "deemed consistent" language that is essential to the City's argument, shifting primary responsibility from local governments to the state. The General Assembly moved away from the "deemed consistent" structure to instead allow localities to request that the state establish more restrictive standards, a process which remains codified to this day in § 2-104(b). The 1967 law added the original precursor to subsection 2-104(b). Chap. 143, p. 195 of the Laws of 1967; Art. 43, § 693(b). In 1978, the General Assembly revoked § 693(b) and replaced it with §§693(b)(1)-(8), including what is now § 2-104(b)(2): "The governing body of any local jurisdiction within any area may request the Department to adopt more restrictive standards for emissions or ambient air quality to be applicable within its geographic area." Chap. 1005, p. 2886 of the Laws of Maryland 1978; Art. 43, § 693(b)(2).[10]

The Air Quality Control Law has been revised periodically since 1963, but no version of the law after 1963 includes the "deemed consistent" language that is foundational to the City's argument. The precursor to § 2-104(a) was adopted in 1970 and read:

> "[n]othing in this subtitle shall preclude the right of any county or municipality to adopt ordinances or regulations providing for emissions control requirements and standards provided that said ordinances or regulations are no less stringent than those embodied in State regulations promulgated pursuant to this act and the more stringent regulations shall be applied."

Chap. 244 1970 Laws of MD, p. 565; Art. 43, § 705. While the 1970 law did not preclude

[10] The other sections of § 693(b) added in 1978 are the precursors to §§ 2-301 and 2-302, discussed in Section II.A.1 of this brief.

the right of localities to adopt regulations that are no less stringent than state regulations (Art. 43, § 705), to the extent that right existed, *e.g.*, police power, it left in place the pathway established in 1967 for localities to request that the state adopt a more restrictive standard (Art. 43, § 693(b)), thus allowing a choice for municipalities.

In 1982, the General Assembly recodified the articles addressing air emissions into Subtitle 2 of the Environmental Article. This included combining §§ 693(b)(2) and 705 to form the current § 2-104 and adding phrases to explain the relationship between the two provisions. The phrase "[e]xcept as provided in this section," was added to § 2-104(a)(1) (former § 705); the phrase "and the more stringent regulations shall be applied," was deleted; and "[n]othing in this title shall preclude the right" of a locality was changed to "this title does not limit the power of" a local government ("except as provided in this section"). Including § 2-104(b) in the "except as provided in [this] section" caveat in § 2-104(a)(1) reflected what the General Assembly had intended in the 1978 amendments to the law.

In sum, the 1963 provision cited by the City has not been the law for decades, and the "deemed consistent" language was not "recodified without substantive change." MTD at 6, 13. The legislature rejected the original version long ago – and with it the City's argument that state law authorizes more restrictive local laws. *See Price v. State*, 378 Md. 378, 391-392 (2003) (Assembly's repeal and replacement of statute indicates clear intent to change statutory scheme).

B. Maryland law occupies the fields of air pollution control and solid waste management and thereby preempts the Ordinance.

Beyond the express limitation placed on the City by § 2-104(b), the Ordinance is also impliedly preempted because it "deal[s] with an area in which the Legislature has acted with such force that an intent by the State to occupy the entire field must be implied." *Skipper*, 329 Md. at

488 (quoting *Cty. Council for Montgomery Cty. v. Montgomery Ass'n*, 274 Md. 52, 59 (1975)). "[T]he primary indicia of a legislative purpose to pre-empt an entire field of law is the comprehensiveness with which the General Assembly has legislated the field." *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279, 299 (1993) (quoting *Skipper*, 329 Md. at 488). The Maryland legislature has expansively legislated for decades on both air pollution control and solid waste management. These programs indicate that the General Assembly intended to fully occupy these respective fields and preempt local legislation like the Ordinance.

1. MDE comprehensively regulates air pollution.

As demonstrated in the Complaint at Sections D, F, and G (16-18, 21-23, 25-30), Maryland has enacted its own air pollution control statutes consistent with the CAA's framework, and MDE has promulgated corresponding regulations, including those specifically pertaining to WTE and HMIWI facilities as follows:

- Maryland developed its own regulations to implement the EG for WTE facilities, and subsequently, in 1997, adopting EPA's EG verbatim in the Code of Maryland Regulations at COMAR 26.11.08.08. Maryland's SIP likewise establishes EG for HMIWI facilities that are identical to EPA's rules. Complaint ¶¶ 49, 58.

- When EPA revised the EG and CEMS requirements for WTE facilities in 2006, Maryland incorporated these amendments verbatim in October 2007. Similarly, EPA revised its EG for HMIWI facilities in 2013, and Maryland incorporated the EG verbatim. *Id*. at ¶¶ 50, 58.

- MDE conducted a rulemaking to further lower the NOx emission limit specifically for the Wheelabrator Baltimore facility. *Id*. at ¶¶ 51-53

- Maryland adopted state implementation regulations and submitted its Title V program to EPA in 1995, and EPA approved them in July of 1996. MDE is the only agency authorized to issue Title V permits in Maryland. As in the federal Title V rules, every Title V permit in Maryland is first proposed, and then subject to comments from the public, EPA and surrounding states. *Id*. at ¶¶ 41, 47.

- Maryland law also protects the public health from air emissions through its own toxic air pollutant regulations, first promulgated in 1988. COMAR 26.11.15, *et seq*. These regulations require that a facility quantify its emissions of toxic air pollutants, apply BACT for toxics, and demonstrate that impacts from those emissions will not adversely affect public health. *Id*. at ¶ 42.

These regulations demonstrate that Maryland has occupied the field.

2. MDE comprehensively regulates solid waste management.

Maryland has created an all-inclusive regulatory program of solid waste management that is as thorough as its air pollution control framework. Section I of the Complaint sets forth how MDE's regulations control the permitting, construction, and operation of any refuse disposal system, including WTE and HMIWI facilities in the state. *See* Md. Code Ann., Envir. §§ 9-204 – 9-229, 9-501 – 9-521; Md. Nat. Res. Code §§ 3-901 *et seq.*; COMAR 26.03.03; COMAR 26.04.07.01 – 27 (collectively, the "Solid Waste Laws"). The Solid Waste Laws specifically mandate the creation of, requirements for, and implementation of SWMPs for Maryland counties and cities.

Additionally, refuse disposal systems like the Facilities are required to operate under a MDE-issued refuse disposal permit. The permits vest MDE with the right to approve of all pollution control devices installed at the Facilities, and MDE expressly reserves the right to restrict the volume of material the Facilities accept. Md. Code Ann., Envir. § 9-204. There is no savings clause in the Solid Waste Laws.

MDE's regulations impose numerous requirements specific to waste combustors and landfills, including environmental protection, supervision and training of personnel, sanitation, fire control, access to the facility, and other mandates. COMAR 26.04.07. MDE's regulations prohibit the disposal of medical waste at any solid waste facility unless specifically authorized by MDE. COMAR 26.04.07.03. These statutes and rules cover in detail all aspects of the management of solid and medical waste by Maryland localities and regulated entities, including the Facilities.

The City's SWMP expressly states that solid waste is "governed by federal and state laws that regulate local practices to protect public health and welfare." SWMP ¶ 1.3. The Court of

Special Appeals has underscored state primacy in solid waste facility permitting and management. *Holmes v. Maryland Reclamation Assocs.,* 90 Md. App. 120, 149 (1992) (intent of the statutory scheme was "to reserve to MDE the specific subject matter governing the decision to issue permits to solid waste management facilities and to relegate to counties a restricted role in planning"). Further, *Holmes* held that "the [political subdivision's] role in developing a [SWMP] is limited, and closely supervised by MDE." *Id*. at 150.[11]

The City has admitted the limits on its ability to qualify or conflict with its SWMP. In 2010, the City passed Zoning Bill 09-0400 to repeal geographic restrictions it had imposed on the acceptance of waste by the Curtis Bay facility. In its memo to the City Council providing its legal analysis of the Bill, the City Solicitor wrote that "City laws imposing geographic limits on waste acceptance *qualify the provisions of the existing SWMP, in effect amending the plan legislatively*." Complaint ¶ 77 (emphasis added). The Solicitor concluded that "[t]his action is preempted by the State's occupation of the field of solid waste management and prohibited by State law which requires revisions to the SWMP to be approved by MDE." *Id.*

In this case, the Solid Waste Laws preempt the Ordinance by implication because they largely occupy the field of solid waste management, including, specifically, waste disposed of at the Facilities. The Ordinance invades MDE's regulation of solid waste by undermining the refuse disposal permits issued to the Facilities, conflicting with city and county SWMPs, and attempting to force the Facilities' closure, which will eliminate or restrict the volume of waste that can be accepted at the Facilities in direct contradiction of MDE's authority.

[11] Similarly, in *County Com'rs of Queen Anne's County v. Days Cove Reclamation Co*., 122 Md. App. 505, 526 (1998), the court held that once a county's role in the SWMP and zoning process has ended, it cannot thereafter act to invalidate a site's compliance with local requirements because such action would breach "the permit power that is specifically reserved for the State." As the court explained, once a local government has fulfilled its obligations under the specific role provided to it by Maryland's Solid Waste Laws, *i.e.*, its role in planning and zoning for new facilities, "[t]he facility's fate is the province of MDE." *Id.* at 525.

The City cites irrelevant cases for the generic proposition that municipalities in Maryland have authority to regulate solid waste for health and welfare. MTD at 13-16. The City's heavy reliance on *Md. Reclamation Assocs. v. Harford County*, 414 Md. 1 (2010) is misplaced. Local control of solid waste management has traditionally been limited to purely local issues like zoning and land use planning. *See Mayor & City Council of Baltimore v. New Pulaski Co. P'ship*, 112 Md. App. 218, 233 (1996) (Maryland solid waste laws preempted Baltimore ordinance placing a moratorium on incinerator construction and rehabilitation). Plainly, the Ordinance infringes on and conflicts with state regulation and permits by forcing a closure of the Wheelabrator Baltimore facility that will contravene the City's SWMP. Baltimore's SWMP calls for the facility to dispose of the majority of the City's residential and commercial waste, an average of 2,100 tons per day. Also, most of the 10,818 tons of medical waste produced in the City must be disposed of at the Curtis Bay facility. The Ordinance clearly interferes with MDE's careful regulation of solid waste management, which requires uniform, state-wide treatment.[12]

3. MDE's pervasive regulation of air pollution and solid waste impliedly preempt the Ordinance.

Maryland's air pollution and solid waste management frameworks are as extensive as other state programs that the Court of Appeals has found comprehensive enough to occupy the field and impliedly preempt local regulation. For example, in *Allied Vending*, the court held that Maryland's program of regulation and licensing of cigarette vending machines was sufficiently comprehensive to preempt local attempts to restrict the placement of such machines to locations inaccessible to minors. 332 Md. 279, 301 (1993).

[12] Furthermore, the City conflates MDE's occupation of both the air emissions and solid waste fields, asserting that, "Maryland Solid Waste Laws do not occupy the field of air pollution regulations." MTD at 15. This belies the reality that the Ordinance aims to eliminate an essential component of the City's MDE-approved solid waste management plan under the guise of regulating air emissions, and overlooks that the Ordinance is separately and independently preempted under both of these comprehensively regulated fields.

Likewise, in *Skipper*, the Court of Appeals held that Maryland's sewage sludge management program impliedly preempted a county ordinance that would have required a landowner to record information in county land records before applying sewage sludge to his land. 329 Md. at 482-483. Maryland law regulates sewage sludge uses, imposes a comprehensive permitting requirement, and gives MDE the right to inspect sewage sludge facilities. *Id*. at 489. Based on this program, the court held that the "statutory provisions manifest the general legislative purpose to create an all-encompassing state scheme of sewage sludge regulation" and impliedly preempt local regulation. *Id*. at 491-492.

The Court of Appeals undertook a comparable analysis last month in *Bd. of Cty. Commissioners of Washington Cty. v. Perennial Solar, LLC*, 2019 WL 3071755 (Md. July 15, 2019), holding that a state statute granting the Public Service Commission general regulatory powers over generating stations, including solar energy generating systems, preempted local authority with respect to the location and construction of the systems. The duties and authority delegated to the Commission by the General Assembly led the Court to find that the statute created an all-encompassing scheme of solar energy regulation, addressing all matters associated with the approval and operation of generating stations, which provided no concurrent legislative authority to any locality. *Id*. at *5, 12, 15.

Maryland's air program is more comprehensive than the Maryland programs for regulating the cigarette vending machines, sewage sludge, and solar energy generation systems at issue in *Allied Vending*, *Skipper*, and *Perennial Solar*. Maryland's solid waste management laws are similarly broad, providing state primacy over waste disposal planning and permitting. Because the state comprehensively regulates air pollution control and solid waste management, the Ordinance is impliedly preempted.

4. *Allied Vending* secondary factors further support preemption.

The breadth of the state air and solid waste programs each provide an independent basis for implied preemption. And while the comprehensiveness of state regulation is the primary indicator of implied preemption, Maryland courts may also consider "secondary" factors in determining whether preemption by implication exists. *Allied Vending*, 332 Md. at 299-300. Though the Court need not analyze these secondary factors in depth to deny the City's Motion, a cursory review shows that each of these factors weighs heavily in favor of implied preemption by Maryland's air laws and its solid waste laws. The factors and their application to this case are:

a. *Whether local laws existed prior to the enactment of state laws governing the same subject matter*. Baltimore has never regulated solid waste combustors.

b. *Whether the state laws provide for pervasive administrative regulation*. Maryland's air and solid waste laws are pervasive. Md. Code Ann. Envir. § 2-301.

c. *Whether the local ordinance regulates an area in which some local control has traditionally been allowed*. Local governments have not been authorized under the CAA or Maryland law to regulate air emissions.

d. *Whether the state law expressly provides concurrent legislative authority to local jurisdictions or requires compliance with local ordinances*. MDE provides no concurrent authority; Section 2-104 requires localities to request MDE to impose more stringent emission standards. Maryland law does not authorize political subdivisions to set more stringent standards.

e. *Whether a state agency responsible for administering and enforcing the state law has recognized local authority to act in the field*. MDE has not recognized local authority in this area.

f. *Whether the particular aspect of the field sought to be regulated by the local government has been addressed by the state legislation*. MDE has thoroughly addressed the exact field that Baltimore seeks to regulate. Md. Code Ann. Envir. §§ 2-101, *et seq*.

g. *Whether a two-tiered regulatory process existing if local laws were not pre-empted would engender chaos and confusion*. The Ordinance, if allowed, would trigger an inconsistent patchwork of emission standards across the state.

C. The Ordinance is preempted by conflict with State standards and the Facilities' permits.

The Maryland Court of Appeals has long held that "ordinances which assume directly or indirectly … to prohibit acts permitted by statute or constitution, are under the familiar rule for

validity of ordinances uniformly declared to be null and void." *Heubeck v. City of Baltimore*, 205 Md. 203, 208 (1954); *see also Skipper*, 329 Md. at 487 n.4 (a "local ordinance is pre-empted by conflict when it prohibits an activity which is intended to be permitted by state law").

The Ordinance prohibits conduct that has been affirmatively authorized under state law and a duly issued permit and makes state-authorized activity into a criminal offense. *See* Balt. City Health Code § 8-125. For example, the Wheelabrator Baltimore Title V permit requires CEMS monitoring for nitrogen oxides, sulfur dioxides, and carbon monoxide, plus a continuous opacity monitor, to ensure compliance with federal and state emission limits for these pollutants. In glaring conflict with the Title V permit, the Ordinance requires monitoring of additional pollutants not required by EPA or MDE, and by utilizing CEMS that are not validated for solid waste incinerators. The Ordinance also requires that a facility's CEMS be operational at all times that the facility is functioning (*i.e.*, 100 percent of the time), and imposes sanctions for gaps in monitoring of more than thirty minutes. This requirement contradicts the federal and state rules that recognize and allow for necessary CEMS downtime including repairs, calibration checks, and adjustments to the monitoring systems to ensure their accuracy.[13]

Maryland courts have invalidated local ordinances under conflict preemption where the ordinances attempt to regulate the same matter already regulated by the state. In *East Star, LLC v. Cty. Comm'rs of Queen Anne's Cty.*, 203 Md. App. 477, 493-494 (2012), the court held that a local ordinance attempting to limit mining activity was invalid under conflict preemption because it "place[d] additional and incompatible restrictions on surface mining operations than those imposed by State law." The ordinance provided, among other things, that the maximum area disturbed by

[13] Under federal and state regulations applicable to the Wheelabrator Baltimore facility, valid emissions data must be obtained for a minimum of 90 percent of operational hours per calendar quarter, and 95 percent of operational hours per calendar year that the facility is combusting municipal solid waste. *See* 40 C.F.R. § 60.38b; 40 C.F.R. § 60.58b; COMAR 26.11.08.08.

any major extraction could not exceed 20 acres at any time. *Id.* at 494. The court held that this requirement directly conflicted with Maryland regulations that "specifically provide[ ] that MDE shall determine the area of maximum disturbance after considering various factors." *Id.* The court also found the ordinance's requirement that any previously disturbed area be reclaimed before any expansion of mining acreage was "incompatible" with Maryland law, which "only requires reclamation activities to be completed promptly …." *Id.*

Like the local law in *East Star*, the Ordinance attempts to regulate an area already regulated by the state and does so by imposing emission limits and CEMS requirements incompatible with the state-issued Title V permits and related emission regulations. The Ordinance cannot override MDE's prior determinations regarding appropriate emission limits and monitoring requirements for the Facilities as set forth in the applicable Title V permits. *See Perdue Farms Inc. v. Hadder*, 109 Md. App. 582, 589 (1996) (invalidating local prohibition on water spray exceeding 20 mg/L of nitrogen as "impermissibly second guessing MDE," which imposed different effluent limits).

Here, the City ignores the well-reasoned and science-based regulations promulgated by EPA and MDE and criminalizes what the Facilities are expressly allowed to do in their Title V permits. As the Court of Appeals has held, "a political subdivision may not prohibit what the State by general public law has permitted." *Mayor & Council of Forest Heights v. Frank*, 291 Md. 331, 338 (1981). The plaintiffs in *Frank* brought an action seeking a declaratory judgment that a municipal ordinance prohibiting fortune-telling was in direct conflict with a county-issued fortune-telling license. *Id*. at 332-334. The court found that the ordinances were preempted by conflict because they prohibited conduct explicitly permitted under the County license, which permitted the licensees to engage in the practice of fortune-telling at a specified location. *Id*. at 338-339. Similarly here, the City second guesses MDE's licensing decisions in the air pollution and solid

waste management arenas and attempts to prohibit the operation of the Facilities in contravention of state law and their Title V and solid waste permits.

III. The Ordinance is an Ultra Vires Exercise of the City's Police Powers Because the Ordinance Conflicts with the Maryland Constitution and Statutes

Article XI-A, § 3 of the Maryland Constitution expressly limits the City of Baltimore's police power, providing that "if a local law or ordinance conflicts in any manner with the Constitution or a Public General Law, then the local law or ordinance is invalid." *Heubeck*, 205 Md. at 208. The test is concisely stated in *Rossberg v. State*, 111 Md. 394 (1909), decided several years before the Home Rule Amendment and the Baltimore City Charter, in which the court held that "ordinances which assume directly or indirectly to permit acts or occupations which the state statutes prohibit, or to prohibit acts permitted by statute or constitution, are under the familiar rule for validity of ordinances uniformly declared to be null and void." In *Rossberg*, the ordinance at issue was sustained not because it prevailed over a conflicting Public General Law, but because it was not in conflict with the general law. Here, the Ordinance conflicts with both Maryland's air pollution and solid waste management laws.

The City contends that its power to regulate air pollution is co-equal with that of the state. The City is wrong. Nothing in § 2-104 or the Baltimore City Charter delegates power to the City to independently regulate air pollution. The City has not, and cannot, cite to a case where a court has granted such authority to a political subdivision under the comprehensive framework of air pollution control. Instead, the City invokes a slew of cases that recognize police power only over traditional issues for local governments such as zoning and public nuisances, *e.g.*, odors, smoke, and open burning. The Facilities are not, as a matter of law, public nuisances because they are permitted Facilities under state and federal law. Local government regulation has not traditionally extended to state permitted facilities or activities. As discussed above, whatever residual authority

the City has over air pollution does not allow it to countermand state and federal law, and Count 6 pleads a claim against an ultra vires local law.

IV. The Baltimore Ordinance Is an Impermissible General Law Because Its Impacts Extend Beyond the City

Count 7 of the Complaint explains how the Ordinance's compelled shutdown of the Wheelabrator Baltimore and Curtis Bay facilities will damage solid waste management across the region, among other impacts, and is therefore a general law beyond the authority of a locality. Under the Maryland Constitution and City Charter, Baltimore only has the authority to enact "*local* laws" for the "health and welfare of *Baltimore City*." Md. Const. Art. XI-A, § 3 (emphasis added); Baltimore City Charter, Art. II, § 47 (emphasis added). Baltimore has violated constitutional and charter restrictions because the Ordinance is not a local law. It is a general law with impacts extending beyond the City, such as the imposition of management controls on the combustion of solid waste from numerous sources outside of the City, and the creation of environmental harms and costs from diverting solid waste outside the City.

A law is "local" and permitted by the state constitution only if it is essentially limited to the territorial boundaries of the enacting jurisdiction. Md. Const. Art. XI-A, § 3; *see also Holiday Universal, Inc. v. Montgomery Cty*., 377 Md. 305, 315 (2003). Courts must "look beyond the form of the ordinance to its substance: some statutes, local in form, are general laws, since they affect the interest of the whole state." *Id.* Further, if an ordinance "substantially affects persons and entities outside of [the locality]," then "it is not a local law and is facially unconstitutional under Article XI-A of the Maryland Constitution." *Id*. at 319.

Plaintiffs have pled that the Ordinance significantly affects the interests of people and entities outside of Baltimore. For example, the forced closure of Wheelabrator Baltimore and Curtis Bay will effectively invalidate waste management contracts between the Facilities and

localities outside of the City, and effectively invalidate the state-issued SWMPs of other localities that rely on the Facilities' operations.[14] Further, the closure of the Facilities would mean that greenhouse gas emissions will increase outside of Baltimore due to the waste being diverted to landfills in other cities, counties, and states. The Ordinance's effort to rewrite Title V permits and dictate air emissions standards for regional facilities imposes Baltimore's views on air pollution and emissions on all downwind jurisdictions, affecting much of the state. The impact of the Ordinance upon persons and municipalities outside of Baltimore City is too great for it to be considered a local law under Md. Const. Art. XI-A, § 3 or Baltimore City Charter, Art. II, § 47. Accordingly, Count 7 sets forth a claim for relief for an impermissible general law.

V. The Baltimore Ordinance Violates Due Process, Equal Protection, and the Remedies for Injuries Provided Under the Maryland and the U.S. Constitution

The Fifth and Fourteenth Amendments to the U. S. Constitution and Article 24 and Article 19 of the Maryland Declaration of Rights safeguard citizens' rights against illegitimate governmental action. The City argues that (1) Plaintiffs' Constitutional claims and its Article 24 claim should be dismissed because Plaintiffs fail to plead facts to overcome the presumption that the Ordinance is rational; and (2) the Article 19 claim should be dismissed because Plaintiffs have not alleged that the Ordinance improperly immunizes the City from suit or abolishes some remedy available to Plaintiffs. MTD at 24-31. To the contrary, the Plaintiffs have alleged sufficient facts in Counts 8 through 11. Among other averments, the Ordinance is based on no legislative record or scientific or technical support, and is simply designed to close the Facilities. The federal and state due process and equal protection claims should proceed to discovery regarding this

[14] The Northeast Maryland Waste Disposal Authority, an independent state agency that facilitates permitting and financing of solid waste projects in Maryland, initially contracted with the City, Baltimore County, and Wheelabrator in 1982, finding that "it is in the public interest…to provide for the economies of scale and opportunities for resource recovery which can be achieved through a *regional solid waste disposal facility*." Complaint ¶ 12 (emphasis added).

extraordinary and extreme law.[15]

A. The Complaint states due process and equal protection claims that the Ordinance is arbitrary, punitive, and without any factual support.

Plaintiffs acknowledge that their Fifth and Fourteenth Amendment claims and their parallel claim under Article 24 of the Maryland Declaration of Rights (Counts 8, 9, and 10) are subject to review under a rational basis standard. *See generally Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir. 1992). However, in the context of a motion to dismiss, "[t]he rational basis standard, of course, cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard." *Giarranto v. Johnson*, 521 F.3d 298, 303-304 (4th Cir. 2008) (quoting *Wroblewski*, 965 F.2d at 459-460); *see also Kuromiya v. United States*, 37 F. Supp. 2d 717, 729-730 (E.D. Pa. 1999) ("The rational basis standard … is not a rubber stamp"). The Fourth Circuit has resolved the tension between the plaintiff-friendly Rule 12(b)(6) standard and the high bar of rational basis review, finding that Plaintiffs need merely allege "facts sufficient to overcome the presumption of rationality that applies to government classifications." *Giarranto*, 521 F.3d at 304 (quoting *Wroblewski*, 965 F.2d at 460). At the pleadings stage, the rational basis standard does not require that Plaintiffs prove there is no "set of facts that reasonably may be conceived to justify its classification." *See Wroblewski*, 965 F.2d at 459-460. The Plaintiffs must merely allege sufficient facts that "nudge[] their claims across the line from conceivable to plausible." *Giarranto*, 521 F.3d at 304 (quoting *Twombly*, 550 U.S. at 571).

The City's argument – which relies heavily on the *Giarranto* decision – fails to recognize that Plaintiffs need only meet the pleading requirements under Rule 12(b)(6) at this stage of their constitutional challenge, as recently recognized by this Court in *International Refugee Assistance*

[15] Even if this Court determines that Plaintiffs have failed to state federal constitutional claims, it must still "address separately whether, under the applicable Maryland authorities," the Ordinance violates the state constitutional guarantees. *Derr v. State*, 434 Md. 88, 147-149 (2013).

Project v. Trump, 373 F. Supp. 3d 650, 671-672 (D. Md. 2019) (Chuang, J.). Rejecting the United States' motion to dismiss Plaintiffs' equal protection challenge, this Court explained:

> Relying on *Giarratano*, the Government argues that Plaintiffs fail to state a claim on the Constitutional Claims because their Complaints fail to meet "the burden to negate every conceivable basis which might support" the Proclamation. *Giarratano*, however, clarified that while a plaintiff must meet this bar to prevail on the merits, it need not do so at the motion to dismiss stage ….

Id. at 671.[16] The City cites to cases on the merits, rather than properly focusing on the standard for a motion to dismiss. *See* MTD at 24-29.

Here, Plaintiffs have alleged in concrete and technical detail: The Ordinance is an irrational measure, imposing extraordinary and unprecedented constraints that do not advance public health and actually harm the environment, Complaint ¶¶ 2-3, 22-31, 60, 64; the City lacks any scientific or other justification for further regulating the subject matter of comprehensive federal and state air quality management legislation, *id.* at ¶¶ 4, 22, 52-53, 152-154, 172; the Ordinance has a disparate impact on the two Facilities, *id.* at ¶¶ 2, 67, 74-77; the law's sponsor stated that the Ordinance was specifically intended to "shut down Wheelabrator" and declared that Wheelabrator's "got to be closed," *id.* at ¶ 1; the Ordinance and existing EPA and MDE air emissions control requirements are wildly divergent, reflecting the Ordinance's lack of any scientific support for reducing the levels below those already established by the federal and state agencies, *id.* at ¶¶ 6, 37-42, 55-60, 64, 71-77, 153. The illogical and arbitrary nature of the Ordinance is best understood in comparison to the comprehensive federal and state regulatory

[16] The City also relies on *Goodpaster v. City of Indianapolis*, 736 F.3d 1060 (7th Cir. 2013), a case which has not been cited by a single Fourth Circuit or Maryland federal or state court opinion, to note "the leniency of rational basis review." MTD at 26–27. Consequently, the City relies on a different pleading standard than this Court did in *International Refugee Assistance Project* for analyzing the rational basis standard at the motion to dismiss stage. *See also Carcaño v. Cooper*, 350 F. Supp. 3d 388, 421 (M.D.N.C. 2018) ("While the substantive standard for rational basis review ultimately 'requires the government to win if any set of facts reasonably may be conceived to justify its classification,' this lenient standard must not be allowed to 'defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard' at the motion to dismiss stage." (quoting *Giarratano*, 521 F.3d at 303).

scheme that was developed on the basis of scientific analysis, technical expertise, decades of agency experience, and input from the public and the regulated community.

For the purposes of deciding a motion to dismiss, Plaintiffs' allegations must be accepted as true, and Plaintiffs are entitled to all inferences that can be reasonably drawn from them. Indeed, Councilman Reisinger's quote about "shutting down" Wheelabrator makes it more than plausible that the Ordinance was not passed for a legitimate purpose. *See Animal Legal Defense Fund v. Otter*, 44 F. Supp. 3d 1009, 1025-1026 (D. Idaho 2014) (animus toward a particular target is sufficient to plead a violation of the Equal Protection clause because "[t]o be rational, a law must serve a 'legitimate' end, and antipathy can never be a legitimate end").

B. Article 19 of the Maryland Declaration of Rights gives Plaintiffs a cause of action for injunctive relief against the Ordinance.

Count 11 properly pleads a cognizable claim under Article 19 of the Maryland Declaration of Rights, which provides, "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land …." Article 19 guarantees an opportunity to seek judicial redress of a wrong. *Dehn Motor Sales, LLC v. Schultz*, 439 Md. 460, 486 (2014); *see also Dua v. Comcast Cable*, 370 Md. 604, 644 (2002) ("A plaintiff injured by unconstitutional state action should have a remedy to redress the wrong."). The Maryland Court of Appeals has recognized that Article 19 has no counterpart in the United States Constitution, therefore most of that court's jurisprudence interpreting and applying Article 19 has not relied on cases applying the United States Constitution. *See, e.g.*, *Robinson v. Bunch*, 367 Md. 432, 444 (2002); *State v. Bd. of Educ. of Montgomery Cty.*, 346 Md. 633, 647 (1997); *Ashton v. Brown*, 339 Md. 70, 102-106 (1995).

The City argues that Article 19 claims are limited to "only the question of whether the City has improperly immunized itself from suit." MTD at 30. But Article 19 is much broader, and

"generally protects two interrelated rights: 1) a right to a remedy for an injury to one's person or property; and 2) a right of access to the courts." *Piselli v. 75th St. Med.*, 371 Md. 188, 205 (2002). Here, under Article 19, Plaintiffs simply seek declaratory and injunctive relief that the Ordinance is illegal for the reasons set forth in the other ten counts of the Complaint.

Plaintiffs did more than merely allege that the "City has failed to provided Plaintiffs' any remedy for their injuries," as the City contends. MTD at 30. Plaintiffs assert that they have suffered an injury because the "array of expensive requirements and standards" imposed will be impossible to meet and will countermand their Title V permits and reliance on federal and state regulations without a remedy. Complaint ¶¶ 183–85. The Ordinance's requirements and standards effectively eviscerate Plaintiffs' property interest in the Facilities and the Title V permits already issued to them. *Id.* at ¶¶ 157–58, 175–76. These injuries are quintessential injuries to Plaintiffs' "person or property" and are within the scope of an Article 19 challenge.

CONCLUSION

The City has plunged arbitrarily and deeply into the complex field of air pollution control for waste combustors, the domain of federal and state law. Plaintiffs have set forth detailed, factually supported claims for preemption and other constitutional violations. Plaintiffs request that this Court deny the City's Motion to Dismiss.

Dated: August 16, 2019

Respectfully submitted,

/s/

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(signed with permission from M. Trent Zivkovich and Michael Powell)

CERTIFICATE OF COMPLIANCE

I hereby certify that on this 16th day of August, 2019, the foregoing Memorandum in Opposition to Defendant's Motion to Dismiss was filed in accordance with the Electronic Filing Requirements and Procedures, as established by the United States District Court for the District of Maryland.

/s/
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