ROBERT S. PERLMUTTER (SBN 183333)
ELLISON FOLK (SBN 149232)
EDWARD T. SCHEXNAYDER (SBN 284494)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Perlmutter@smwlaw.com
Folk@smwlaw.com
Schexnayder@smwlaw.com

RACHEL H. SOMMOVILLA, Interim City Attorney (SBN 231529)
JAMES J. ATENCIO, Senior Assistant City Attorney (SBN 209438)
CITY ATTORNEY'S OFFICE
CITY OF RICHMOND
450 Civic Center Plaza
Richmond, California 94804
Telephone: (510) 620-6509
Facsimile: (510) 620-6518
Rachel_Sommovilla@ci.richmond.ca.us
James_Atencio@ci.richmond.ca.us

Attorneys for Defendants
CITY OF RICHMOND and CITY
COUNCIL OF THE CITY OF RICHMOND

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

LEVIN RICHMOND TERMINAL CORPORATION, RICHMOND PACIFIC RAILROAD CORPORATION, and LEVIN ENTERPRISES, INC.,

Plaintiffs,

v.

CITY OF RICHMOND, CITY COUNCIL OF THE CITY OF RICHMOND, and DOES 1 to 100, inclusive,

Defendants.

Case No. 4:20-cv-01609-YGR

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS IN SUPPORT THEREOF

Fed. Rules Civ. Proc., Rules 12(b)(1) and 12(b)(6)

Date: July 28, 2020
Time: 2:00 p.m.
Place: Courtroom 1
1301 Clay Street, Oakland, CA

Trial Date: None set

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

Federal Statutes

Other Authorities

NOTICE OF MOTION AND MOTION

NOTICE IS HEREBY GIVEN that on July 28, 2020, at 2:00 p.m. in Courtroom 1, the courtroom of Judge Yvonne Gonzalez Rogers located at 1301 Clay Street, Oakland, California, the Court will hold a hearing on Defendants' motion to dismiss this action under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

This motion is brought on the grounds that Plaintiffs' Complaint is unripe and fails to state a claim on which relief can be granted. Defendants are therefore entitled to judgment as a matter of law. This motion is based on this Notice of Motion and Memorandum of Points and Authorities, the Request for Judicial Notice filed herewith, the pleadings and papers on file, and on such other matters as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

The City of Richmond has long borne the adverse environmental impacts of industrial activity in the Bay Area. In 2015 the City began to address pollution from the bulk storage and handling of coal and petroleum coke, starting with a prohibition on their storage on City-owned property and culminating in the 2020 adoption of Ordinance No. 05-20 NS (the "Ordinance"), which extends this prohibition to all property in the City. The Ordinance represents an important exercise of the City's police power to protect its residents from the adverse health and environmental impacts of noxious land uses—a power that courts have long recognized as an essential function of state and local agencies.

Plaintiffs Richmond Terminal Corporation ("Levin"), Richmond Pacific Railroad Corporation ("Richmond Pacific"), and Levin Enterprises, Inc. (collectively "Plaintiffs") nonetheless allege the Ordinance violates an array of constitutional and statutory provisions. Even accepting the allegations of the Complaint as true, none of these claims has merit.

First, Plaintiffs' takings claim fails because the Ordinance includes an amortization period and a variance process. These provisions allow Plaintiffs to continue to operate for three years and require the City to extend that period if Plaintiffs can present evidence

demonstrating that the initial period was not adequate. As a result of these provisions, Plaintiffs cannot state a claim that the Ordinance results in a taking either on its face or as applied to their property. Plaintiffs' claims that the Ordinance violates the equal protection and due process clauses of the state and federal constitutions also lack merit. Because the City had a rational basis for limiting the pollution impacts caused by the handling and storage of coal and petroleum coke, such claims fail as a legal matter.

Plaintiffs' causes of action under the dormant Commerce Clause and the Contract Clause also fail to acknowledge the City's well-established power to regulate the adverse pollution impacts of noxious land uses, such as particulate pollution from coal and petroleum coke. The Ordinance is a facially neutral prohibition on coal and petroleum coke storage and handling; it does not discriminate against out-of-state interests in favor of local economic interests. In such circumstances, courts have repeatedly rejected claims that regulations designed to protect public health and safety represent an undue burden on interstate or foreign commerce. Courts have likewise upheld local agencies' exercise of their police power against claims that it unduly interferes with private contracts. Even where regulation targets contractual obligations, which the Ordinance does not, courts do not second-guess an agency's determination that regulatory action is necessary to protect public health and safety.

Finally, Plaintiffs' preemption claims under the Interstate Commerce Commission Termination Act ("ICCTA") and the Shipping Act of 1984 founder on the fact that, by its express terms, the Ordinance does not regulate transportation or shipping at all. The only rail carrier who is a plaintiff, Richmond Pacific, may continue to ship any products it wishes. Even if Richmond Pacific's business operations were adversely affected by the Ordinance, the impact on shipping only two of many bulk commodities does not disrupt the functioning of the interstate rail network and therefore is not preempted by the ICCTA. Moreover, because the Ordinance includes a process for extending the amortization period, it is designed to address any alleged undue burden on Plaintiffs' activities.

The defects in Plaintiffs' Complaint cannot be cured by amendment. Therefore, the

City respectfully requests that the Court dismiss the Complaint without leave to amend.

STATEMENT OF FACTS

Richmond, a city of approximately 107,000 people located along San Francisco Bay, is a center for oil refining, manufacturing, and bulk material storage and transportation. The adverse environmental impacts of this industrial activity fall heavily on the City's residents. Disadvantaged communities in the City (as defined by the California Environmental Protection Agency) are often the most affected. Ordinance at 1.[1]

Levin operates a bulk storage and transfer facility that has operated in the City since 1981, handling a range of commodities including scrap metal, bauxite, coal, and other materials. *See* Dkt. 1 (Complaint for Declaratory and Injunctive Relief), ¶25; *San Francisco Baykeeper v. Levin Enterprises, Inc.*, 12 F. Supp. 3d 1208, 1210, 1212 (N.D. Cal. 2013). In the past few years, Levin has dramatically increased its handling of coal and petroleum coke (or "petcoke"), which it stores in open piles. City Agenda Report, 2/4/2020 at p. 2 (Dkt. 1, Ex. A at 36, hereinafter "Agenda Report"). Between 2013 and 2017, coal handling increased nearly fourfold—from 176,000 to 698,000 metric tons. Agenda Report at 2 (Dkt. 1, Ex. A at 36). During that time, petcoke handling also increased from 322,000 to 511,000 metric tons. *Id*.

When exposed to the wind or when coal and petcoke are handled onsite, Levin's open piles release fine particulate matter that has been found on nearby homes and streets. *Id.* Dust from coal and petcoke contains toxic materials, including mercury, arsenic, and lead. Ordinance at 1. Numerous studies by governmental and public health organizations, including the World Health Organization, the U.S. Environmental Protection Agency, and the American Lung Association, have documented that exposure to particulate matter such as coal and petcoke dust contributes to asthma in children, respiratory illnesses, and increased risk of death from heart disease. Ordinance at 3-4, §I.B.

[1] Plaintiffs attached a copy of the Ordinance as submitted to the City Council to its Complaint. A true and correct copy of the final, adopted Ordinance is attached to the City's Request for Judicial Notice as Exhibit A.

In 2015 the City banned the storage and handling of coal and petcoke on all City-owned property. Agenda Report at 3 (Dkt. 1, Ex. A at 37). In response to increasing complaints from residents about coal and petcoke dust, and after investigating its impacts on local residents, the City adopted the Ordinance, which extends the prohibition on coal and petcoke storage and handling to all property in the City. *Id.* at 2-3 (Dkt. 1, Ex. A at 36-37). In applying the prohibition to private property, however, the City also provided a three-year amortization period that would allow companies, such as Levin, to recoup their investment and transition to other bulk storage materials. Ordinance §15.04.615.050.C. The Ordinance also includes a provision requiring the City to extend the amortization period if the applicant can demonstrate that the three-year amortization is insufficient to prevent a taking of its property or a violation of federal law. Ordinance §15.04.615.050.F.

LEGAL STANDARD

Under Rule 12(b)(6), the court determines whether the plaintiff has alleged sufficient facts to state a plausible claim on which relief may be granted; the allegations must support "more than a sheer possibility" of liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts accept the Complaint's material allegations as true, but it "need not accept conclusory allegations of law or unwarranted inferences." *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 794 (9th Cir. 2007). The court may also consider matters subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). The court need not accept as true allegations contradicted by facts subject to judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

Under Rule 12(b)(1), the court may dismiss an action for lack of subject matter jurisdiction. A plaintiff bears the burden of establishing federal subject matter jurisdiction, including ripeness. *In re Wilshire Courtyard*, 729 F.3d 1279, 1284 (9th Cir. 2013).

/ / /

/ / /

/ / /

ARGUMENT

I. Plaintiffs cannot state a takings claim, either facially or as-applied to their property. (Third Cause of Action)

Plaintiffs allege that the Ordinance results in a taking under state and federal law, claiming "there are no alternative, economically viable commodities to replace coal and petcoke at the Levin facility within the three year amortization period or any reasonably foreseeable period thereafter." Dkt. 1, ¶121.[2] Plaintiffs' claim fails as a matter of law. Because the Ordinance includes an amortization period and a process for extending that period, Plaintiffs cannot show that the Ordinance results in a taking on its face or as applied to Levin's property.

A. On its face, the Ordinance permits reasonable economic use of Levin's property.

The plaintiff in a facial takings challenge must demonstrate that the "mere enactment" of a regulation effects a taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494-95 (1987); *Beach and Bluff Conservancy v. City of Solana Beach*, 28 Cal. App. 5th 244, 264 (2018). Accordingly, courts have held that facial challenges are to be analyzed without a fact-specific inquiry into the particular circumstances of the property owner asserting the claim. *Yee v. City of Escondido*, 503 U.S. 519, 533-534 (1992); *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060, 1076 (1995) (facial challenge presents issue of law and case-specific factual inquiry is not required). A facial claim is only tenable if the challenged law will not permit those who administer it to avoid an unconstitutional application to the complaining parties. *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal. App. 3d 1421, 1441. Plaintiffs face an "uphill battle" in such a claim. *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997).

[2] Plaintiffs' cause of action only focuses on the alleged economic impact of the Ordinance on Levin's business and makes no claim that the Ordinance would result in a taking of Richmond Pacific's property. Even if it did, however, such a claim would fail for the reasons set forth in the text.

The Ordinance avoids any facial taking in two ways. First, it provides a three-year amortization period designed to ensure that Plaintiffs can recoup any reasonable investment in their operation and transition to the storage of permitted substances or to other permitted uses. Ordinance §15.04.615.050.C. Courts have long recognized amortization periods as valid ways to balance the competing interests of a landowner's property rights and a local agency's need to implement zoning changes to benefit public health and welfare. *Elysium Institute, Inc. v. Cty. of Los Angeles*, 232 Cal. App. 3d 408, 435-36 (1991), *cert. denied*, 502 U.S. 1098 (1992) (classification of nudist colony as nonconforming conditional use is not a taking when reasonable amortization period was provided and there was no evidence that other uses were unavailable); *see Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 617 (9th Cir. 1993) (requirement that nonconforming billboards be removed at time property is developed is not a taking); *City of Los Angeles v. Gage* (1954) 127 Cal. App. 2d 442, 461 (five years to phase out an existing plumbing business was a reasonable amortization period for rezoning that prohibited such businesses.)

Second, the Ordinance includes a mechanism for extending that period to protect affected entities. Ordinance §15.04.615.050.F (setting forth process for seeking an extension of the amortization period.)[3] This process *requires* the City to grant a variance if the applicant can show a longer period is necessary to avoid a taking. *Id.* An ordinance cannot cause a facial taking where it preserves, through a permit procedure or otherwise, some economically viable use of property. Thus, in *Home Builders Ass'n v. City of Napa*, the court rejected a facial challenge to a zoning ordinance requiring that 10 percent of all newly constructed residential units in the city be "affordable." 90 Cal. App. 4th 188

[3] Plaintiffs' claim that this exception does not apply to its "legal, nonconforming use" (Dkt. 1, ¶122) is contradicted by the express language of the Ordinance, which provides that the operator of a "nonconforming land use may apply . . . for an extension of the amortization period" (Ordinance §15.04.615.050.F; *see also* Ordinance §15.04.615.070.B (legal nonconforming use must use variance procedure set forth in section 15.04.615.050.F)).

(2001), *cert. denied*, 535 U.S. 954 (2002). Because developers were allowed to appeal for a reduction, adjustment, or complete waiver of the ordinance's requirements, the ordinance could not, on its face, result in a taking. *Id.* at 194; *see also Lake Nacimiento Ranch Co. v. San Luis Obispo Cty*., 841 F.2d 872, 877 (9th Cir. 1988) (existence of variance procedure prevents ordinance from being overly restrictive on its face); *Del Oro Hills v. City of Oceanside* (1995) 31 Cal. App. 4th 1060, 1077, *cert. denied*, 516 U.S. 823 (same); *Tahoe-Sierra Preservation Council*, 210 Cal. App. 3d at 1443-44.

Here, the Ordinance contains a process specifically designed to provide relief in the event Levin shows that the amortization period is not adequate. The factors to be considered under this process—the property owner's investments, the value of the property and improvements, the length of time the operation has been in existence, the impact on the local community, among others—mirror those identified by the California Supreme Court. *Compare* Ordinance §15.04.615.050.F(4) with *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 883-84 (1980), *rev'd on other grounds* 453 U.S. 490 (1981). Thus, the Ordinance cannot effect a facial taking of Plaintiffs' property because the Ordinance, on its face, gives the City the ability to avoid the potentially unconstitutional application of the challenged restrictions should they "go too far" as applied to a particular parcel. *San Mateo County Coastal Landowners' Ass'n v. County of San Mateo*, 38 Cal. App. 4th 523, 547 (1995).

B. Any as-applied takings challenge is not ripe for judicial review.

To the extent Plaintiffs claim the Ordinance effects a taking as applied to Levin's property, that claim is not ripe for judicial review. Both federal and state takings law provide that a takings claim is not ripe until the landowner receives "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *Landgate, Inc. v. California Coastal Comm'n*, 17 Cal.4th 1006, 1018 (1998). A final decision is required because "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348.

A "final decision" requires that, at a minimum, Plaintiffs must "meaningful[ly]" request and be denied a variance from the challenge regulation before bringing a regulatory taking claim. *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990). *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert denied* 484 U.S. 1043 (1988); *Hensler v. City of Glendale*, 8 Cal.4th 1, 12 (1994), *cert. denied*, 513 U.S. 1184 (1995). The only exception to the meaningful application requirement is where the landowner can establish that an attempt to comply with that requirement would be "futile." *Kinzli*, 818 F.2d at 1454. However, a property may not claim it would be futile to comply with available administrative relief provision where it has not even attempted to do so. *County of Alameda v. Superior Court,* 133 Cal. App. 4th 558, 568-69 (2005) (finding futility exemption does not apply to a landowner who has not submitted any development plan for review).

The Ninth Circuit recently reaffirmed this finality requirement. *Pakdel v. City and County of San Francisco* 952 F.3d 1157 (9th Cir. 2020). The court held that a plaintiff's challenge to San Francisco's requirement to offer lifetime leases to tenants as a condition of conversion to a condominium was not ripe for judicial review because plaintiff had failed to seek any relief from that requirement during the City's review process. *Id.* at 1165. As noted by the court, plaintiffs must seek any permits or other available forms of relief before their takings claim will be ripe for judicial review. *Id.* (citing *S. Pac. Transp.*, 922 F.2d at 503.) If a plaintiff has not met this "final decision" requirement, a court lacks subject matter jurisdiction to hear the claim. *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375, 379-80 (9th Cir. 1988).

Here, the Ordinance includes a process that is specifically designed to ensure Plaintiffs have a reasonable amortization period. Because Plaintiffs have not availed themselves of this administrative procedure, any as-applied takings challenge is not ripe for judicial review.

/ / /

/ / /

II. Plaintiffs cannot state a due process claim because the Ordinance is rationally related to a legitimate governmental interest. (Fourth Cause of Action)

The California Constitution gives cities the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const., art. XI, §7. This police power is broad. Cities are free to regulate or ban unwanted land uses, provided that these regulations are reasonably related to a legitimate governmental interest. *See Terminal Plaza Corp. v. City & County of San Francisco*, 177 Cal. App. 3d 892, 908 (1986); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) (regulatory action that does not impinge on a fundamental right or implicate a suspect class will be upheld where it is rationally related to a legitimate governmental interest).

Cities have routinely employed the police power to ban unwanted uses of land. For example, in *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, the court upheld an initiative prohibiting exploration for and production of oil within the city, finding the initiative reasonably related to a legitimate purpose (i.e., preserving the environment and protecting the health, safety, and welfare of residents). 86 Cal. App. 4th 534, 555 (2001); *see also Bayless v. Limber*, 26 Cal. App. 3d 463, 470 (1972) (upholding an initiative prohibiting oil drilling in residential areas); *Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552, 557-59 (1953). In another case, a court upheld a zoning scheme that excluded *virtually all* commercial uses of land within a city. *Los Altos Hills v. Adobe Creek Properties, Inc.*, 32 Cal. App. 3d 488, 499-501, 508-09 (1973).

The Ordinance fits squarely within the City's exercise of its police power. As the City found when it adopted the Ordinance, the storage, loading, and handling of coal and petcoke significantly harms the local community, including the risk of coal fires and particulate pollution which is linked to increased risk of respiratory illnesses and death. Ordinance at 1. An analysis prepared by the National Bureau of Economic Research places the economic costs of these impacts at approximately $183 per ton of coal stored. *Id*. To reduce these impacts, the City not only adopted the Ordinance's prohibition on the

handling and storage of coal in privately-operated facilities, it also banned such activity on all City-owned marine terminal facilities. Agenda Report at 2-3 (Dkt. 1, Ex. A at 36-37).

Plaintiffs make much of their disagreement with the City's findings, arguing that the City did not conduct sufficient scientific reporting to support the value of banning coal storage in the City. *See, e.g.*, Dkt. 1, ¶¶79-86 (criticizing the City's reliance on microscopic analysis of coal dust samples rather than Levin's preferred chemical analysis.) However, such scientific precision is not required. "'[T]he outside limit upon a state's exercise of its police power and zoning decisions is that they must have a rational basis.'" *Stubblefield Construction Co. v. City of San Bernardino*, 32 Cal. App. 4th 687, 711 (1995) (quoting *Jackson Court Condominiums v. City of New Orleans*, 874 F.2d 1070, 1077 (5th Cir. 1989)). Under rational basis review, courts do not second-guess the legislature's wisdom. Instead, courts will uphold the ordinance unless there is "a complete absence of even a debatable rational basis for the legislative determination" that the regulation is reasonably related to the public welfare. *Birkenfeld v. Berkeley*, 17 Cal. 3d 129, 161 (1976).

Here, the City made the rational determination that prohibiting coal and petcoke storage and handling would protect public health by preventing harmful fugitive dust emissions from these activities. Whether the Ordinance actually achieves the goal is legally irrelevant. *See Kasler v. Lockyer*, 23 Cal. 4th 472, 490-91 (2000) (The fact that an "ordinance does not achieve the stated goal of the local legislature . . . may or may not be regrettable, depending upon one's views on this highly charged public policy question, but it does not amount to a constitutionally fatal flaw."); *see also Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."). Because the City's action is rationally related to its interest in limiting the impacts of coal and petcoke storage, Plaintiffs' due process claim must be dismissed.

/ / /

/ / /

III. Plaintiffs cannot state an equal protection claim because regulation of coal and petcoke is rationally related to a legitimate government purpose. (Fifth Cause of Action)

Plaintiffs also assert that the Ordinance violates their equal protection rights because it focuses only on coal and petcoke particulate emissions and does not address particulate emissions from other sources. Dkt. 1, ¶¶136-37. However, courts have repeatedly rejected such allegations as the basis for an equal protection claim. As the Supreme Court has determined, legislation, by its nature, involves line drawing:

> Defining the class of persons subject to a regulatory requirement . . . 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'

FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315-16 (1993) (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). All the City must show is that it had some conceivable rational basis when it focused its regulatory efforts on the impacts of particulate pollution from coal and petcoke storage. *Stubblefield Construction Co.*, 32 Cal. App. 4th at 713.

As demonstrated above, the City's legislative findings clearly identify the harms associated with coal and petcoke storage. *See* Section II, *supra.* The City's action "is not invalid under the Constitution because it might have gone farther than it did." *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (quotations and citations omitted); *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 302 (2007) (city's decision to limit an exemption to only a subset of stores in light of competing policy objectives was rational); *see also Williamson*, 348 U.S. at 488-89 ("The legislature may select one phase of one field and apply a remedy there, neglecting the others."). Plaintiffs' Equal Protection claims are meritless.

IV. Plaintiffs cannot state a claim for violation of the Dormant Commerce Clause. (First Cause of Action)

The dormant Commerce Clause—the implied, negative aspect of the Commerce

Clause—prevents states or local governments from enacting legislation that discriminates against out-of-state interests in favor of in-state ones. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)). "The modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis* ("*Davis*"), 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)); *see also S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 466 (9th Cir. 2001) ("The 'central rationale' of the dormant Commerce Clause 'is to prohibit state or municipal laws whose object is local economic protectionism.'") (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)).

In considering a dormant Commerce Clause claim, courts conduct a two-step analysis. The first step determines if the challenged action "directly regulates or discriminates against interstate commerce, or its effect is to favor in-state economic interests over out-of-state interests." *Chinatown Neighborhood Ass'n v. Harris* ("*Chinatown Neighborhood II*"), 794 F.3d 1136, 1145 (9th Cir. 2015) (alteration and citation omitted). If the action does not so discriminate "and regulates evenhandedly, it violates the Commerce Clause only if 'the burdens of the statute so outweigh the putative benefits as to make the statute unreasonable or irrational.'" *Id.* (citation omitted).

The Ordinance only applies within the City. It does not discriminate against out-of-state interests in favor of in-state interests. Accordingly, the sole question is whether the Ordinance's burdens on interstate commerce (if any) are "clearly excessive" when compared to its benefits for the public health and safety of the City's residents. As detailed below, they are not.

A. The Ordinance is a facially neutral regulation that does not discriminate against out-of-state interests in purpose or effect.

The Ordinance does nothing more than prohibit the storage and handling of coal

and petcoke in an effort to control their adverse impacts in the City. The Ordinance does not regulate the shipping, production, sale, or quality of these materials, nor does it benefit in-state interests or burden out-of-state interests. Instead all coal and petcoke is treated the same: whatever their origin, they may not be stored or handled in the City. The "ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants," a power reserved to the states notwithstanding the concurrent jurisdiction of the federal government over areas of interstate commerce. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960).

1. The Ordinance does not favor in-state interests over out-of-state interests.

Plaintiffs do not allege that the Ordinance discriminates against out-of-state interests, a failure that is fatal to their dormant commerce clause challenge. *Chinatown Neighborhood Ass'n v. Harris*, 33 F. Supp. 3d 1085, 1099 (N.D. Cal. 2014), *aff'd*, 794 F.3d 1136 (9th Cir. 2015) (dismissing dormant Commerce Clause claim challenging ban on shark fin possession, sale, or trade in part because it did nothing to "privilege[] California commerce over non-California commerce"); *On The Green Apartments LLC v. City of Tacoma*, 241 F.3d 1235, 1241-42 (9th Cir. 2001) (affirming dismissal where plaintiff challenging ordinance failed to allege any out-of-state burden on commerce); *Am. Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903, 916 (9th Cir. 2018) (dismissing dormant Commerce Clause claim where pleadings failed to "provide a plausible basis from which to infer" regulatory program would benefit in-state producers").

Rather than allege the necessary discrimination against out-of-state interests, the Complaint focuses on the Ordinance's alleged impact on the sale of coal and petcoke because Phillips and Wolverine will be forced to "discontinue sales to foreign customers or attempt to find another suitable marine transloading facility with deep water berths, and rail and truck access." Dkt. 1, ¶101. The Ninth Circuit rejected this exact allegation in *Chinatown Neighborhood II*, where plaintiffs alleged that California's prohibition on the sale or possession of shark fins would eliminate the export of such products to other states

and countries. As found by the court, "even when state law has significant extraterritorial effects, it passes Commerce Clause muster when, as here, those effects result from the regulation of in-state conduct." 794 F.3d at 1146.

That coal or petcoke moves in interstate commerce is not sufficient to state a claim under the dormant Commerce Clause. As noted in *City of Philadelphia v. New Jersey*, regulatory action that treats all harms equally does not violate the dormant Commerce Clause even though "interstate commerce may incidentally be affected." 437 U.S. 617, 627-28 (1978) (finding a New Jersey law that prohibited the import of liquid and hazardous waste would facially discriminate against interstate commerce but acknowledging that a restriction slowing the flow of all such waste would not). Thus, in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 368 (3rd Cir. 1987) the Third Circuit rejected the claim that a prohibition on bulk transfer facilities in the Delaware coastal zone constituted an impermissible blockage of the flow of goods into the state. *Id.* at 402. In so doing, the court found that even if the regulation did have such an effect, it did so in an evenhanded way that did not favor in-state interests over out-of-state interests. *Id.* Absent such differential treatment, the prohibition's incidental effect on interstate commerce was not sufficient to show that it was discriminatory under the dormant Commerce Clause.

2. The Ordinance does not regulate commerce occurring wholly outside the City.

Plaintiffs' assertion that the Ordinance improperly regulates transactions beyond the City's border because coal is produced outside of the City (Dkt. 1, ¶102) is insufficient to demonstrate discrimination against interstate commerce. As noted by the Ninth Circuit in *Rocky Mountain Farmers Union v. Corey*, courts rarely find violations of this "extraterritoriality doctrine" because only regulatory action that "directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority." 730 F.3d 1070, 1101 (9th Cir. 2013) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). In *Rocky Mountain*, the court found that California's low carbon fuel standard, which restricted the use of fuel based on its carbon content, did

not regulate commerce occurring outside of California even though the standard had the effect of limiting the use of higher carbon fuels produced out-of-state (such as ethanol) and encouraged production methods that would reduce the carbon intensity of fuels. Unlike state action that attempts to impose conditions on the sale or production of products outside their territories, the low carbon fuel standard only regulated the use of fuel in California. It said "nothing at all about ethanol produced, sold, and used outside California" and it did "not require other jurisdictions to adopt reciprocal standards before their ethanol can be sold in California." *Id.* at 1102-03; *See also see also Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris,* 729 F.3d 937, 950 (9th Cir. 2013) (California ban on in-state sale of foie gras produced by force-feeding upheld because it only regulated sales in California).

The Ordinance does even less to affect out-of-state commerce than the low carbon fuel standard in *Rocky Mountain*. Like the ban in *Ass'n des Eleveurs,* all it does is regulate the use of two products—coal and petcoke—within City limits. It does not dictate the manner of coal production, it does not regulate the sale of coal, and it imposes no criminal or civil penalties on out-of-state transactions of coal. So long as the City regulates only coal storage in Richmond, it is not engaging in improper extraterritorial action.

B. The Ordinance does not unduly burden interstate commerce.

Local laws must also avoid placing a burden "on [interstate] commerce [that] is clearly excessive in relation to the putative local benefits." *Davis*, 553 U.S. at 338-39 (quoting and applying the test set forth in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)). Plaintiffs' conclusory allegation that the Ordinance imposes a burden that is "clearly excessive" and out of proportion to its benefits is insufficient to state a claim under *Pike.* Dkt. 1, ¶104. *See, e.g., In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (courts not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences") (quoting *Sprewell*, 266 F.3d at 988).

First, any impacts on interstate commerce are minimal. While the Ordinance

imposes a ban on the handling and storage of coal and petcoke, it does not regulate the shipping of such products. The Complaint confuses market-level burdens on the free flow of goods in interstate commerce with burdens on a particular company. But the dormant Commerce Clause is concerned only with the former, not the latter. "We stress[] that the Commerce Clause 'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978)).

In *Clover Leaf Creamery*, for example, the Court held that a state law banning the retail sale of milk in non-returnable, non-refillable plastic containers did not impose an undue burden on interstate commerce because "[m]ilk products may continue to move freely across the Minnesota border." *Id.* at 472. That the Ordinance may limit Levin's ability to accept coal shipped by Wolverine or petcoke shipped by Phillips is irrelevant to the Ordinance's impact on the coal or petcoke market. Indeed, as Plaintiffs acknowledge, Wolverine and Phillips are free to ship their products through other ports. Dkt. 1, ¶101. Although the Complaint speculates that such ports might be a longer distance, even if true, that claim is not enough to demonstrate an undue burden on commerce. *Norfolk Southern*, 822 F.2d at 406 (additional costs resulting from ordinance's effect on companies engaged in interstate commerce insufficient to demonstrate violation of dormant Commerce Clause); *Wood Marine Service, Inc. v. City of Harahan*, 858 F.2d 1061, 1065 (5th Cir. 1988) (economic inconvenience of finding alternative routes for shipment of dry bulk cargo insufficient to demonstrate burden on interstate commerce); *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1151 (9th Cir. 2012) ("[T]he dormant Commerce Clause does not . . . guarantee Plaintiffs their preferred method of operation.").

In contrast to these negligible impacts, the Ordinance is clearly designed to advance the City's compelling interest in protecting air quality. As found in *Huron Portland Cement*, an ordinance "enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants [and] to free from pollution the very air that people

breathe clearly falls within the exercise of even the most traditional concept of . . . the police power." 362 U.S. at 442; *see also Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) ("Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state.").

Although Plaintiffs question whether the Ordinance will achieve its goal, courts must "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 463 n.7 (citation omitted); *Norfolk Southern*, 822 F.2d at 403 (upholding ban on bulk transfer facilities and rejecting claim that plaintiff was entitled to evidentiary hearing absent evidence that the regulation is "tainted by a constitutionally illegitimate purpose"). The City's legislative findings are entitled to deference. *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir.1994) ("[T]he Supreme Court has frequently admonished that courts should not 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.'") (quoting *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987)).

C. Plaintiffs cannot state a claim for violation of the Foreign Commerce Clause.

The Foreign Commerce Clause "limit[s] the power of state governments to act in ways that threaten the federal union's interest in uniform trade policies." *Norfolk Southern*, 822 F.2d at 404 (citing *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1 (1986)). To prevail on their Foreign Commerce Clause claim, Plaintiffs must allege that the Ordinance contravenes "specific indications of congressional intent" to require national uniformity in trade policy. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324 (1994) (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)). Plaintiffs do not and cannot allege Congress has any specific policy requiring uniformity in the trade of coal or petcoke, and for that reason alone, their claim fails.

Moreover, because almost every regulation of goods could affect the cost of exports

and therefore the trade of goods in foreign markets, not every burden on foreign commerce is subject to scrutiny under the Foreign Commerce Clause. *Norfolk Southern*, 822 F.2d at 405. Rather, where a regulation does not "manipulate the terms of international trade for the state's economic benefit by imposing embargoes, quotas, or tariffs," no violation of the Foreign Commerce Clause will be found. *Id.* Thus, the *Norfolk Southern* court rejected the claim that a ban on certain bulk loading transfers, including the transfer of coal, violated the Foreign Commerce Clause even though it could affect the cost of coal exports. Plaintiffs' claim here that the Ordinance would force Wolverine to find a new location for the shipment of coal to foreign countries (Dkt. 1, ¶101) is not materially different than the unsuccessful challenge to the ban on bulk transfer facilities in *Norfolk Southern.*

Therefore, Plaintiffs' Commerce Clause claim must be dismissed.

V. Plaintiffs cannot state a claim for violation of the Contract Clause. (Sixth Cause of Action)

Although the Constitution prohibits states and local governments from passing a "Law impairing the Obligation of Contracts" (U.S. Const. art. 1, §10, cl. 1), the Supreme Court has "eschewed a rigid application of the Contract Clause to invalidate state legislation." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 16 (1977). Rather, states retain "broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *Id.* at 22. "[T]he sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people . . . is paramount to any rights under contracts between individuals." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 503 (internal quotations omitted).

Courts "apply a sequential analysis to determine whether state law violates the Contract Clause," first considering whether a challenged law "operate[s] as a substantial impairment of a contractual relationship." *In re Seltzer*, 104 F.3d 234, 236 (9th Cir. 1996) (quotation omitted). The contract cannot be any agreement between the parties, but rather a "contractual agreement regarding [or containing] . . . specific terms allegedly at issue" in adoption of the challenged law. *Gen. Motors Corp v. Romein*, 503 U.S. 181, 186-87

(1992).

Here, Plaintiffs' claim falters at this initial step by failing to show that the Ordinance directly impairs their contractual rights and obligations. "In order to have a constitutionally protected impairment, the law has to act on the contract itself, as distinguished from the subject matter of the contract." *Kaiser Dev. Co. v. City & Cty. of Honolulu*, 649 F. Supp. 926, 948 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990) (upholding zoning ordinance that restricted land use subject to a preexisting contractual agreement). Yet the Ordinance does not alter Plaintiffs' contracts at all; it merely regulates coal and petcoke uses within the City.

Indeed, the Complaint fails to allege any material terms of contracts between Plaintiffs, Wolverine, and Phillips, much less show that the Ordinance would substantially alter those contract terms. Instead, the Complaint merely alleges the existence of transloading contracts between Plaintiffs, Wolverine, and Phillips, and offers a conclusory assertion that the "Ordinance impermissibly impairs th[ose] contractual relations." Dkt. 1, ¶41. Significantly, the Ordinance would not affect Plaintiffs' ability to transload coal or petcoke for at least three years after its adoption. *See* Ordinance §15.04.615.050.C, .F (the Ordinance's three-year amortization period may be extended by the Richmond Planning Commission following an application by an affected party). Nowhere does the Complaint allege *specific* contractual terms that the Ordinance will impair in three years' time.

Even if Plaintiffs could properly alleged a substantial impairment of contracts with Wolverine and Phillips, the Contract Clause does not invalidate local law where "the impairment is both reasonable and necessary to fulfill an important public purpose." *In re Seltzer*, 104 F.3d at 236. In situations like this, where a state is not a party to a contract, "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 (1983) (quotation omitted); *see also RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1169 (9th Cir. 2004) (a legitimate public purpose is one aimed at "protect[ing] a broad societal interest rather than a narrow class") (quotation omitted). For instance, in

Keystone Bituminous Coal Ass'n, 480 U.S. 470, the Supreme Court upheld a Pennsylvania law that required coal to be kept underground to provide surface support to certain structures. Although the statute impaired contractual relations between mineral rights owners and surface owners by requiring coal companies to repair damage caused by their mining practices, the Court held it did not violate the Contract Clause:

> The Commonwealth has determined that in order to deter mining practices that could have severe effects on the surface, it is not enough to set out guidelines and impose restrictions, but that imposition of liability is necessary. . . *We refuse to second-guess the Commonwealth's determinations that these are the most appropriate ways of dealing with the problem.*

Id. at 506 (emphasis added).

Likewise, here, the City Council expressly found that the Ordinance was necessary to protect the health and safety of Richmond residents. *See* Section II, *supra*, (citing Ordinance Section I.B.) This determination is entitled deference, and the Court should reject Plaintiffs' attempt to second-guess the reasonableness of the City Council's decision.

VI. Federal law does not preempt the Ordinance.

Plaintiffs allege that the ICCTA and the Shipping Act preempt the City's ability to prohibit storage and handling of coal and petcoke within the City. But neither enactment can be construed to apply to the City's actions here. The states' historic police powers, like the ones at issue in this case, are "not to be superseded by [a federal law] . . . unless that [is] the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotations omitted). Because nothing indicates that Congress "clearly" intended either the ICCTA or the Shipping Act to preclude a city from exercising its police power to limit storage and handling of harmful products, Plaintiffs' preemption claims fail.

A. Plaintiffs cannot state a claim for preemption under the Interstate Commerce Commission Termination Act. (Second Cause of Action)

The ICCTA preempts a state or local activity that attempts to directly regulate interstate rail or unreasonably interferes with rail transportation. *Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands*, 841 F.3d 1069, 1076-77 (9th Cir. 2016) (discussing the

ICCTA's preemption clause, 49 U.S.C. §10501(b)). Although federal authority over railroads is broad, "not all state and local regulations are preempted [by the ICCTA]; local bodies retain certain police powers which protect public health and safety." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (quotation omitted). Thus "the federal interest in rail transportation does not entirely sweep away the exercise of the state's regulatory police powers when such regulation merely implicates rail transportation." *Friends of the Eel River v. N. Coast R.R. Auth.*, 3 Cal. 5th 677, 720 (2017) (quotation omitted).

1. The ICCTA does not categorically preempt the Ordinance.

The ICCTA's express preemption clause grants the federal Surface Transportation Board exclusive jurisdiction over "transportation by rail carriers." 49 U.S.C. §10501(b). "Congress narrowly tailored [this] pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation." *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001). Laws that do not regulate transportation by a "rail carrier" fall outside the ICCTA's express preemption provisions. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 308-09 (3d Cir. 2004).

Plaintiffs' ICCTA preemption claims fail primarily because they cannot allege facts showing that the storage and handling regulated by the Ordinance are "transportation by [a] *rail carrier*." The ICCTA defines a "rail carrier" as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. §10102(5). Here, neither the Levin facility's owner (Levin Enterprises, Inc.) nor its operator (Levin) are federally-authorized rail carriers. Dkt. 1, ¶¶24-25. They therefore cannot state a valid claim that the ICCTA preempts the Ordinance's regulation of activities at their terminal. *See Hi Tech Trans*, 382 F.3d at 308-09 (non-rail carrier cannot establish ICCTA preemption of state health and safety regulation); *Valero Refining Company Petition for Declaratory Order*, FD 36036, 2016 WL 5904757, at *3 (STB September 20, 2016) (same).

The City recognizes that Plaintiff Richmond Pacific claims to be a federally

licensed rail carrier (Dkt. 1, ¶26), but the Ordinance does not regulate Richmond Pacific's rail transportation. By its plain terms, the Ordinance is limited to phasing out *storage and handling* of coal and petcoke at properties within Richmond. Ordinance §§15.04.615.030, 15.04.615.050.C. Plaintiffs do not allege that Richmond Pacific operates a storage and handling facility regulated by the Ordinance. *See* Dkt. 1, ¶¶26, 39, 113-14. Moreover, as Plaintiffs admit, the Ordinance expressly "is not intended to and *shall not be interpreted to regulate the transportation* of coal and/or petroleum coke, for example, *by train* or marine vessel." Ordinance §15.04.615.080 (emphasis added); Dkt. 1, ¶¶8, 75 (citing same). Because the Ordinance does not regulate rail transportation, or otherwise interfere with the Surface Transportation Board's jurisdiction, there is no basis for Plaintiffs' claim that the ICCTA categorically preempts the Ordinance.

2. The ICCTA does not preempt application of the Ordinance.

The ICCTA can also preempt state law "as applied," but only where it "unreasonably burdens[]" rail transportation. *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 413-14 (5th Cir. 2010). Plaintiffs fail to establish that the ICCTA would preempt the Ordinance's application in this case.

First, any as-applied preemption challenge is unripe because the Ordinance's amortization period has not expired and Plaintiffs have not applied for either (1) an extension of the amortization period (Ordinance §15.04.615.050.F), or (2) an exception to the Ordinance (Ordinance §15.04.615.070.B). *See* Section I.B, *supra*. Until Plaintiffs have pursued these avenues for administrative relief, any alleged interference with rail operations is pure conjecture. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (claim not ripe where "the alleged injury is too 'imaginary' or 'speculative'"); *see also Soo Line R.R. Co. v. Illinois State Toll Highway Auth.*, No. 15 C 10328, 2016 WL 1215372, at *3-4 (N.D. Ill. Mar. 29, 2016) (ICCTA preemption claim not ripe where no imminent threat of state condemnation proceedings).

Second, the Complaint fails to allege facts establishing that the Ordinance improperly interferes with Richmond Pacific's rail transportation. The Ordinance does not

in any way interfere with Richmond Pacific's *ability* to conduct rail operations. It merely regulates activities relating to storage and handling of two particular goods (coal and petcoke), while expressly avoiding any regulation of Richmond Pacific's transportation activities.

Plaintiffs' allegation that "approximately 50 percent" of Richmond Pacific's operations involve coal transportation is not sufficient to establish preemption. Dkt. 1, ¶114. Courts focus on whether local law disrupts the functioning of the interstate rail network, not whether a single rail carrier can achieve optimal efficiency for its operations. *See Florida East Coast*, 266 F.3d at 1339 ("While perhaps not optimally efficient for [the railroad's] operations, West Palm Beach's zoning requirements do not impede the interstate functioning of the railroad industry."). Indeed, even if the Court were to assume that Richmond Pacific could not replace any lost coal business by transporting another commodity, "state actions are not preempted merely because they reduce the profits of a railroad." *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008); *see also Lighthouse Resources Inc. v. Inslee*, No. 3:18-cv-05005-RJB, 2018 WL 6505372 at *8 (W.D. Wash. Dec. 11, 2018) (railroad's lost profits from denial of an operating permit for a potential customer is too "remote or incidental" to unreasonably interfere with rail transportation).

Third, even if the Ordinance directly regulated Richmond Pacific's rail transportation (which it does not), it would not be preempted. Courts have recognized that the ICCTA "does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads [that] do not interfere with or unreasonably burden railroading." *New York Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (quotation omitted). "[F]ederal law does not preempt state laws 'where the activity regulated [by the state is] merely a peripheral concern' of the federal law." *Id.* (citation omitted); *see also Green Mountain*, 404 F.3d at 643 ("[D]irect environmental regulations enacted for the protection of the public health and safety . . . would seem to withstand preemption."). The Ordinance is precisely this type

of direct health and safety regulation. It limits harmful land uses within Richmond and any effect on rail transportation is merely incidental to the City's valid exercise of the police power. Plaintiffs cannot state a preemption claim under the ICCTA.

B. Plaintiffs cannot state a claim for preemption under the Shipping Act. (Seventh Cause of Action)

Plaintiffs also contend that the Shipping Act of 1984, 46 U.S.C. §40101 *et seq.*, preempts the Ordinance. *See* Dkt. 1, ¶¶147-53. Again, Plaintiffs are wrong.

Congress enacted the Shipping Act to "establish[] a uniform federal framework for regulating entities, such as ocean common carriers." *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 79 (3d Cir. 2017). The Shipping Act was intended to provide antitrust immunity for international shipping cartels while ensuring competitive and non-discriminatory practices in the industry. *Plaquemines Port, Harbor & Terminal Dist. v. Federal Maritime Comm'n*, 838 F.2d 536, 542-43 (D.C. Cir. 1988). To that end, the Act regulates agreements between common carriers and marine terminal operators regarding rates and services and requires that such agreements be filed with the Federal Maritime Commission. 46 U.S.C. §§40301, 40302. Further, the Act prohibits marine terminal operators and common carriers from imposing fees on vessels that are unreasonable (i.e., unrelated to the services rendered to those vessels by the party imposing the fees) or discriminatory. *Plaquemines Port*, 838 F.2d 536 at 547; 46 U.S.C. §§41102, 41106.

The Shipping Act focuses primarily on conduct by nongovernmental entities. It does not expressly preempt state or local regulation of shipping. Thus, state and local laws survive preemption where they do not directly conflict with the Act. *See Pac. Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1416 (9th Cir. 1990).

Here, the Ordinance does not conflict with the Shipping Act's regulation of common carriers or marine terminal operators. Indeed, the Ordinance expressly *does not* regulate marine shipping activities at all. *See* Ordinance §15.04.615.080. Nor does the Ordinance regulate rates or services agreements involving the Levin facility that would otherwise fall within federal authority.

Plaintiffs wrongly contend that the Ordinance is preempted because it "increases government intervention in the transport of goods by water in foreign commerce while also restricting exports, which diminishes growth, development and efficient ocean transportation." Dkt. 1, ¶149. No authority supports Plaintiffs' proposition that the Shipping Act prevents local agencies from enacting health and safety regulations that may incidentally affect shipping patterns. Indeed, public marine terminal operators (who, unlike the City, are directly regulated under the Shipping Act) have validly adopted clean air regulations at ports even where those regulations are expected to increase shipping costs and reduce private activities at a port. *See Fed. Mar. Comm'n v. City of Los Angeles*, 607 F. Supp. 2d 192, 200-02 (D.D.C. 2009) (Shipping Act does not preempt provisions in Clean Trucks Programs adopted by the Port of Los Angeles and Port of Long Beach).

Nor does the Ordinance force Plaintiffs to "discriminat[e] against shippers" operating at the Levin facility. Dkt. 1, ¶151. The Shipping Act's anti-discrimination requirement prohibits marine terminal operators from "giv[ing] any undue or unreasonable preference or advantage or impos[ing] any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. §41106. It does not exempt operators from complying with local land use regulations adopted to protect public health and safety. Plaintiffs cannot state a preemption claim under the Shipping Act.

CONCLUSION

Plaintiffs' complaint should be dismissed without leave to amend.

DATED: May 13, 2020

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Ellison Folk
ROBERT S. PERLMUTTER
ELLISON FOLK
EDWARD T. SCHEXNAYDER

Attorneys for Defendants
CITY OF RICHMOND and CITY
COUNCIL OF THE CITY OF RICHMOND

1234372.8