XAVIER BECERRA
Attorney General of California
SALLY MAGNANI
Senior Assistant Attorney General
SUSAN S. FIERING (SBN 121621)
Supervising Deputy Attorney General
ROSE B. FUA (SBN 119757)
MARY S. THARIN (SBN 293335)
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-0190
Fax: (510) 622-2270
E-mail: Rose.Fua@doj.ca.gov
Attorneys for the State of California, by and through Xavier Becerra, Attorney General

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND, ET AL.,

Defendants.

Case No. 16-cv-07014-VC

BRIEF OF AMICUS CURIAE, STATE OF CALIFORNIA, BY AND THROUGH XAVIER BECERRA, ATTORNEY GENERAL

Date: January 10, 2018
Time: 10:00 a.m.
Court: No. 4, 17th Floor
Judge: Honorable Vince Chhabria

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

Amicus Curiae, the State of California, by and through Xavier Becerra, Attorney General, presents this brief to address significant issues of statewide importance concerning the ability of state and local governments to use their police powers to protect public health, public safety, and the environment.

INTRODUCTION

State and local governments have broad powers to protect the health and safety of their residents. Oakland Bulk Oversized Terminal ("OBOT") is attempting to expand the reach of federal preemption and the dormant Commerce Clause doctrine to prevent Oakland from exercising its police power to protect some of its most vulnerable residents from dangerous pollution. This unwarranted expansion threatens both local and state authority and should be rejected.

After initially announcing that it did not intend to handle coal at a proposed bulk terminal, OBOT has done an about-face and now claims its contract allows for coal, and the City is powerless to stop it from handling coal due to federal law and the Constitution. Federal preemption and dormant Commerce Clause jurisprudence do not support these arguments, which would improperly shackle efforts to protect the well-being of California's residents. The City's ordinance is neither preempted nor constitutionally prohibited. It is a legitimate, non-discriminatory exercise of authority under a local government's traditional police power to protect the health and safety of its residents. As discussed below, OBOT's federal claims are without merit.

BACKGROUND

A. The Proposed Terminal and the Ordinance

This case involves the efforts of a local government to protect some of its most at-risk residents: individuals living in West Oakland, who are predominantly people of color and low income, and who have been disproportionately affected by a legacy of pollution. In 2013, OBOT's predecessor and the City of Oakland entered into a contract concerning the potential development of a terminal facility on City property in West Oakland, formerly known as the Oakland Army Base ("Terminal"). The contract made no mention of coal, and the dangers posed

by the handling of coal were never described or investigated pursuant to the environmental review process for the Terminal under the California Environmental Quality Act ("CEQA"). Neither the 2002 Environmental Impact Report for the project, nor a 2012 Initial Study/Addendum discussed coal. In fact, in December 2013, OBOT publicly denied that it intended to handle coal at the Terminal, stating that it was "publicly on record as having no interest or involvement in the pursuit of coal-related operations at the former Oakland Army Base."[1]

On April 7, 2015, a newspaper article revealed that OBOT had entered into private negotiations to dedicate 49 percent of the Terminal to coal,[2] which would commit the Terminal to handling an estimated five to ten million tons of coal[3] each year for the foreseeable future. In response to OBOT's about-face, the City invoked section 3.4.2 of its 2013 Development Agreement with OBOT, which explicitly allowed the City to enact protective measures if it determined that OBOT's operations created conditions "substantially dangerous" to the health and safety of its current or future occupants, users, or adjacent neighbors. In July 2016, after a public hearing, and considering all the evidence presented, including evidence that handling coal at the Terminal would cause an increase in pollution, the City determined that storing and handling coal at the Terminal would be "substantially dangerous," and passed Ordinance No. 13385 ("Ordinance") prohibiting the handling and storage of coal or petcoke at any bulk materials facility in the City. Apart from the limitations on handling coal and petcoke, the Ordinance does not otherwise affect any part of OBOT's operations.

[1] Monthly Updates on the Oakland Global Trade and Logistics Center Project, OAKLAND GLOBAL NEWS, December 2013, at 4, https://cdn.theatlantic.com/assets/media/files/att_3_-_december_2013_oakland_global_newsletter.pdf.

[2] Project Could Transform Local Coal Market to International, RICHFIELD REAPER, April 7, 2015, http://www.richfieldreaper.com/news/local/article_e13121f0-dd67-11e4-b956-3ff480cc1929.html.

[3] Chafe, Zoe, Analysis of Health Impacts and Safety Risks and Other Issues/Concerns Related to the Transport, Handling, Transloading, and Storage of Coal and/or Petroleum Coke (Petcoke) in Oakland and at the Proposed Oakland Bulk & Oversized Terminal, June 22, 2016, at 10, http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak059408.pdf.

In December 2016, OBOT sued the City claiming breach of contract and arguing that the Ordinance is preempted by a variety of federal laws and prohibited by the dormant Commerce Clause of the United States Constitution.

B. The Health and Safety Threat to Residents of West Oakland

Two critical facts justified the City's exercise of its police power in this matter. First, the handling of coal creates significant pollution in the form of toxic heavy metals[4] and particulate matter ("PM"). Particulate matter can lodge deep in the lungs and is linked to cardiac illness, stroke, respiratory illness and asthma.[5] The Bay Area Air Quality Management District ("BAAQMD") has called particulate matter "the pollutant that poses *by far* the greatest health risk to Bay Area residents."[6] "Researchers have not been able to establish a safe threshold for population exposure to PM,"[7] and even short term exposures to PM can cause harm.[8] The City's consultant estimated the "Terminal would still emit each day 98 pounds of PM 10 and 14.8 pounds of PM 2.5 from fugitive coal dust" even after using best practices/controlled operations.[9]

The second critical fact is that the Terminal will be located on the western edge of West Oakland, which will bear the brunt of any pollution. The West Oakland community carries the unwanted distinction of being near the top of the list of California communities overburdened by pollution. This is a community primarily of low-income people of color, surrounded by

[4] The City determined that "coal contains toxic heavy metals including mercury, arsenic, and lead, and exposure to these toxic heavy metals is linked to cancer and birth defects." Ordinance, 8.60.020(B)(1)(a). There are no known safe levels of exposure to these toxins. Public Health Advisory Panel on Coal in Oakland, An Assessment of the Health and Safety Implications of Coal Transport through Oakland, June 14, 2016, at v, www2.oaklandnet.com/w/oak059227 ("Panel Assessment").

[5] BAAQMD, Understanding Particulate Matter, November 2012, at 2-4, http://www.baaqmd.gov/~/media/Files/Planning%20and%20Research/Plans/PM%20Planning/ParticulatesMatter_Nov%207.ashx ("BAAQMD Report").

[6] *Id.* at 4 (emphasis in original).

[7] *Id*. at 5.

[8] Panel Assessment, *supra* note 4, at 18.

[9] Oakland's Notice of Motion and Motion for Summary Judgment, or in the Alternative, Partial Summary Judgement, and Opposition to Plaintiff's Motion for Summary Judgment, p.18.

significant pollution sources.[10] Particulate matter is already a concern in the Bay Area overall[11] and the West Oakland community's exposure to PM, in particular, is three times higher than other communities in the Bay Area.[12] And PM's disproportionate health impact is significant: According to a 2008 study, in West Oakland, the estimated lifetime potential cancer risk due to PM emissions from Port operations alone is about seven times that of the region as a whole – 200 excess cancers per million, compared to 30 excess cancers per million.[13] West Oakland has some of the highest emergency room and hospitalization rates in Oakland and Alameda County, due to issues related to air pollution, including childhood asthma, overall asthma, and congestive heart failure.[14] The collective impact of the various risks faced by West Oakland residents, including pollution, is that the life expectancy for residents of West Oakland is 12.4 years less than residents in more affluent Oakland neighborhoods.[15]

These potential health and environmental impacts were never analyzed as part of the CEQA review for the Terminal because OBOT's predecessor did not disclose its intent to handle coal. Ultimately, despite federal and state laws intended to protect residents from air pollution, the handling of coal and petcoke at the Terminal would increase pollution in West Oakland, adding to the burden of an already overburdened population. While controls, if available, could reduce the emissions somewhat, they would not eliminate them.[16] And, even with controls, there may be exceedances and violations that would increase the risk to West Oakland residents.

---

[10] These include the Port, which is the fifth busiest container port in the United States; two rail yards owned by Union Pacific and Burlington Northern and Santa Fe; numerous trucking-based distribution centers; and three interstate freeways, the I-580, I-880, and I-980, which, together with the rail tracks that feed the railyards, essentially form the boundaries of the neighborhood. *See* California Air Resources Board, Diesel Particulate Matter Health Risk Assessment for the West Oakland Community, December 2008, at 1, Figure 1, https://www.arb.ca.gov/ch/communities/ra/westoakland/documents/westoaklandreport.pdf. ("CARB Report").

[11] BAAQMD Report, *supra* note 5, at 5.

[12] CARB Report, *supra* note 10 at 2.

[13] *Id*. at 2, 4.

[14] Alameda County Public Health Department, East and West Oakland Health Data Existing Cumulative Health Impacts, September 3, 2015, at 9, http://www.acphd.org/media/401560/cumulative-health-impacts-east-west-oakland.pdf.

[15] *Id.* at 14,18.

[16] According to the City's findings, the emission risks cannot be sufficiently mitigated to an acceptable level because "…there are not sufficiently effective, safe means to prevent the release of fugitive coal dust…" Ordinance, 8.60.020(B)(1)(c).

ARGUMENT

The State of California, and municipalities therein, retain sovereign police powers which allow the adoption of a "wide range of laws in order to protect the health, safety and welfare" of their residents. *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1162 (9th Cir. 2011). With particular relevance here, the Supreme Court has recognized that "[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960). "In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Id*. This sovereign power must be given due weight in any analysis of federal preemption and dormant Commerce Clause claims.

I. THE DORMANT COMMERCE CLAUSE DOES NOT INVALIDATE THE ORDINANCE

The dormant Commerce Clause does not invalidate every exercise of local power that affects the flow of commerce between the States. Rather, localities "retain broad power to legislate protection for their citizens in matters of local concern such as public health." *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (internal quotations and citations omitted); *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) (noting the Court's "traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles").

Under the dormant Commerce Clause, state and local laws that (1) regulate extraterritorially or (2) discriminate against interstate commerce are subject to a form of strict scrutiny. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Laws that regulate extraterritorially are quite rare; A state or local regulation will only fit into this narrow category if it controls commerce occurring wholly outside the regulating jurisdiction. *Healy v. Beer Inst., Inc.,* 491 U.S. 324, 336 (1989). Laws that discriminate against interstate commerce, on the other hand, are those that protect local economic interests from outside competition. *Dep't. of Rev. of Ky. v. Davis*, 553 U.S. 328, 338 (2008).

If a challenged law neither regulates extraterritorially nor discriminates against interstate commerce, courts apply the deferential *Pike* balancing test. *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970). Under that test, the law survives unless its "burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp.*, 476 U.S. at 579. Laws "frequently survive this *Pike* scrutiny." *Department of Revenue of Ky.*, 553 U.S. at 339.

Under a proper analysis, the Ordinance withstands challenges under the dormant Commerce Clause since it does not 1) regulate extraterritorially, 2) put out-of-state interests at a disadvantage as compared to substantially similar in-state interests, or 3) place an undue burden on interstate commerce that outweighs its benefits. Indeed, the Ordinance is a legitimate exercise of well-recognized local police power to protect health and safety.

A. The Ordinance Does Not Regulate Extraterritorially

OBOT misstates modern dormant Commerce Clause jurisprudence by arguing that the Ordinance directly regulates interstate commerce because it allegedly blocks the interstate rail transportation of coal and petcoke for marine export through Oakland. OBOT Memorandum in Support of Motion for Summary Judgment ("OBOT Br.") at 11-16. The "test" OBOT posits and then purports to apply bears no resemblance to the actual rule of law for direct regulation. In fact, laws only "directly regulate" interstate commerce if they control commerce occurring *wholly outside* the regulating jurisdiction, i.e., are extraterritorial regulations. *Healy,* 491 U.S. at 336; *see also Brown-Forman Distillers Corp.*, 476 U.S. at 582–83 (describing direct regulation as one state projecting its legislation into another); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003) ("*Walsh*") (declining to strike down rebate requirement because it did not amount to extraterritorial regulation). The concern in these rare cases is that a state has reached into another sovereign state to regulate commercial activity even though it has no nexus to the regulating state.

Illustrating this point, the Supreme Court has found extraterritorial regulation when one state's law controls prices in another state's market. *See, e.g., Healy*, 491 U.S. at 337-38 (invalidating Connecticut statute because it had "the practical effect of controlling Massachusetts prices"); *see also Walsh*, 538 U.S. at 669 (rejecting extraterritorial regulation claim where

challenged law did not "regulate the price of any out-of-state transaction"). The Ninth Circuit similarly invalidated a Nevada law that, in practical effect, would have required the National Collegiate Athletic Association to use Nevada procedural rules for enforcement proceedings with no nexus to Nevada. *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993) (invalidating state law because it "could control the regulation of the integrity of a product in interstate commerce that occurs wholly outside Nevada's borders"); *see also Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1323 (9th Cir. 2015) (invalidating state law because it regulated commercial transactions taking place wholly outside the state's borders).

Here, in contrast, the Ordinance only prohibits the handling and storage of coal and petcoke at bulk facilities *within Oakland*, and does not control any commerce occurring wholly outside Oakland's borders. By definition, this is not extraterritorial regulation. *See Sam Francis Found.*, at 1324 (discussing several cases finding *no* extraterritorial regulation where laws regulated "*in-state conduct* with allegedly significant out-of-state practical effects") (emphasis in original); *see also Pharm. Research & Mfrs. of Am. v. Cnty. of Alameda*, 768 F.3d 1037, 1043 (9th Cir. 2014) (rejecting extraterritorial regulation claim where challenged ordinance imposed no requirements on actions outside the regulating county). Further, the fact that the Ordinance is a prohibition on handling of two particular commodities does not change the applicable legal rule. *See* OBOT Br. 15-16. Courts have rejected extraterritorial regulation challenges to prohibitions and, in so doing, have applied the same rule as in other cases—namely asking whether the law controls wholly out-of-state commerce. *See, e.g., Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 950 (9th Cir. 2013) (ban on sale, in California, of foie gras produced by force-feeding upheld because it regulated only sales in California); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995) (ban on sale, in Minnesota, of petroleum-based sweeping compounds did not reach extraterritorially because it did not necessarily require out-of-state commerce to be conducted according to in-state terms).

Finally, OBOT's argument that the Ordinance is "directed specifically" at interstate commerce likewise fails. OBOT Br. at 12. The Supreme Court rejected this legal theory in *Walsh*, where the Court upheld a Maine statute imposing certain requirements on pharmaceutical

manufacturers related to in-state sales, despite the fact that the regulated manufacturers were all outside of Maine and, thus, the sales involved interstate commerce. 538 U.S. at 669-70. Indeed, "there is nothing unusual or unconstitutional per se about a state or county regulating the in-state conduct of an out-of-state entity when the out-of-state entity chooses to engage the state or county through interstate commerce." *Cnty. of Alameda*, 768 F.3d at 1043-44. Accepting OBOT's argument that the Ordinance is invalid because it "directly regulates" commerce would lead to an untenable result, namely, the abrogation of state and local police powers in any circumstance involving commodities that flow in interstate commerce. Such an extension would directly contravene the definition of "direct regulation" and would also fly in the face of well-established law. *See, e.g., Ass'n des Eleveurs*, 729 F.3d at 948-49 ("A statute is not invalid merely because it affects in some way the flow of commerce between the States.") (internal quotation omitted). OBOT's extraterritorial regulation claim thus fails.

B. The Ordinance Does Not Discriminate Against Interstate Commerce

Laws that discriminate under the Commerce Clause are those "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Department of Revenue of Ky.*, 553 U.S. at 337–38. Such laws constitute "simple economic protectionism" and are thus invalid unless they can pass a form of strict scrutiny. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). When determining whether a law imposes prohibited differential treatment, courts must compare the law's impact on "substantially similar entities," meaning entities that engage in "actual or prospective competition…in a single market." *General Motors Corp*., 519 U.S. at 298, 300.

Here, the Ordinance does not discriminate against outside interests in favor of competing local interests, as OBOT argues. OBOT Br. at 16-17. First, the Ordinance regulates the handling and storage of coal and petcoke at bulk materials facilities evenhandedly, applying identically to in-state and out-of-state companies that own bulk facilities in Oakland. Thus, a California company seeking to operate a bulk facility in Oakland is limited in the same manner as any out-of-state company seeking to do the same. This is not discrimination under the dormant Commerce Clause. *See, e.g., Cnty. of Alameda*, 768 F.3d at 1041 ("[A law] that treats all private

companies exactly the same does not discriminate against interstate commerce ….”). Second, the Ordinance regulates the handling of certain substances (coal and petcoke) within Oakland equally regardless of where those substances originate. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471–72 (1981) (upholding state statute banning plastic milk containers because law applied “without regard to whether the milk, the containers, or the sellers are from outside the State”).

Further, the Ordinance’s limited exemptions for the use of coal and petcoke by certain local non-commercial or manufacturing facilities are not relevant because these facilities do not operate in the same competitive market as OBOT. These exempted facilities do not compete with OBOT in any way and, in fact, OBOT itself characterizes them as operating in a different market. *See* OBOT Br. at 17 (describing exempted facilities as “local interests that are not engaged in the interstate rail transport for export of coal…”). Because the Ordinance does not benefit local economic interests at the expense of substantially similar out-of-state interests, it is not discriminatory under the dormant Commerce Clause.

C. The Ordinance Does Not Unduly Burden Interstate Commerce

Where a challenged law does not regulate extraterritorially or discriminate against interstate commerce, courts apply the deferential balancing test articulated by the U.S. Supreme Court in *Pike*, 397 U.S. at 142. Under the *Pike* test, a state or local law “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Id*. This “clearly excessive” standard is a heavy one to meet. The Ninth Circuit has found that, to surmount the *Pike* test, “the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational.” *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991). As a result of this high burden, courts have invalidated laws under *Pike* in only a “small number” of cases. *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012).

As a preliminary matter, OBOT has not satisfied the “critical requirement for proving a violation of the dormant Commerce Clause…that there must be a *substantial burden* on *interstate commerce.*” *Id.* (emphasis in original). OBOT attempts to allege a burden by invoking cases that

involved laws which undermined the need for national uniformity in the physical configuration of modes of interstate transportation. OBOT Br. at 17-20. However, these rare cases are inapplicable here because the Ordinance does not regulate rail transportation, and does not require a change in physical configuration of trains when they cross borders. *See Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447-48 (1978) ("narrow" holding invalidating restrictions on truck length); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529-30 (1959) (invalidating truck mudguard regulations while recognizing that "[t]his is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce"); *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 775 (1945) (invalidating state-wide requirements for train length).

Unlike the laws invalidated in OBOT's cases, the Ordinance governs only the handling of certain commodities in bulk material facilities within Oakland, and does not require railroads or trucks to have specific physical configurations. OBOT offers no authority for the proposition that such bulk material facilities demand the kind of national uniformity that is required for regulations governing entire rail systems or truck fleets. To accept that proposition—which would mean that New York, Miami and Oakland must all impose uniform rules on bulk material facilities—would undermine local authorities' ability to protect their residents from particular harms. But the Commerce Clause leaves that authority intact. *See Huron Portland Cement Co.*, 362 U.S. at 442.

Indeed, the Supreme Court has noted that "safety measures carry a strong presumption of validity when challenged in court" even where they materially impact interstate commerce, *Bibb*, 359 U.S. at 523–24, and the Ninth Circuit has held that "protection of our environment has repeatedly been recognized as a legitimate and important state interest," and has acknowledged the "especially powerful interest in controlling the harmful effects of air pollution." *Pacific Merchant Shipping Ass'n*, 639 F.3d at 1180–81. Consistent with this presumption of validity, the Ninth Circuit has repeatedly rejected arguments that health and safety regulations unduly burden interstate commerce. *See, e.g., Yakima Valley Mem'l Hosp. v. Washington State Dep't of Health*, 731 F.3d 843, 848 (9th Cir. 2013) (upholding regulations that "are predicated on a safety-related

purpose"); *Union Pac. R. Co. v. California Pub. Utilities Comm'n*, 346 F.3d 851, 872 (9th Cir. 2003) (upholding regulations where the state's legitimate interest was "even minimally" furthered); *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 399 (9th Cir. 1995) (upholding regulatory scheme with goal of "protecting the health and safety of Washington residents").

The incidental and insubstantial burden alleged by OBOT—the inability to unload two particular materials (coal and petcoke) in Oakland at bulk materials facilities—does not come close to being "clearly excessive" as compared to the Ordinance's local benefits. Notably, like the prohibition against plastic milk containers upheld in *Clover Leaf Creamery,* 449 U.S. at 473, the Ordinance's prohibition is limited to materials Oakland has found cause harm to the City and its residents. Similarly, in *Exxon v. Governor of Maryland,* the Supreme Court upheld Maryland's prohibition against refiners operating retail gasoline stations, despite the fact that this burden would fall exclusively on interstate commercial activity because all refiners happened to be located outside of Maryland. 437 U.S. 117, 125-26 (1978). The Court recognized that this limited prohibition, which Maryland adopted to protect its consumers from price gouging, allowed *other* interstate commerce to continue—namely the operation of retail stations by independent (non-refiner) out-of-state businesses. *Id*. Here, the Ordinance is limited to prohibiting the harmful practices of bulk terminals handling and storing coal and petcoke, and allows other interstate commerce to continue unaffected.

The Ordinance is an example of a city properly exercising its police power for precisely the reason this power exists: to protect the safety and well-being of its residents. The findings relied upon by the City are not inconclusive or speculative. The Ordinance protects the residents of West Oakland from additional harmful air pollution and other negative health and safety impacts. In this context, courts are "not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation." *CTS Corp. v. Dynamics Corp. of Am*., 481 U.S. 69, 92 (1987) (internal quotations omitted); *see also Raymond Motor Transp., Inc*., 434 U.S. at 449. The Ordinance does not violate the dormant Commerce Clause and should be upheld.

II. THE ORDINANCE IS NOT PREEMPTED BY FEDERAL LAW

Where a state or local law was promulgated pursuant to the government's police powers in order to protect its residents from serious health risks, courts are reluctant to find preemption. Consistent with the respect for state sovereignty, the two cornerstones of preemption analysis are: 1) Congressional purpose, and 2) the presumption against preemption of state police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, courts assume "that the historic police powers of the States were not to be superseded by [a federal statute] unless that was the clear and manifest purpose of Congress." *Id*. (internal quotations omitted).

A. The Ordinance is Not Preempted by the Interstate Commerce Commission Termination Act

The Interstate Commerce Commission Termination Act ("ICCTA") grants the Surface Transportation Board ("STB") exclusive jurisdiction over "transportation by rail carriers," and states that the "remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b); *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 71–72 (2d Cir. 2011). However, "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. Even as to powers that are exclusively federal, it does not follow that any and all state regulations *touching on* [that power] are preempted." *Friends of Eel River v. N. Coast R.R. Auth.*, 3 Cal. 5th 677, 720, 399 P.3d 37 (2017) (internal quotation omitted); *see also Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 104 (2d Cir. 2009) ("[A]lthough ICCTA's pre-emption language is unquestionably broad, it does not categorically sweep up all state regulation that touches upon railroads…").

Courts have interpreted the plain language of the ICCTA to categorically preempt state or local laws that operate either 1) to deny a railroad the ability to conduct its operations or proceed with activities the STB has authorized, or 2) to regulate matters directly regulated by the STB, including the construction, operation, and abandonment of rail lines. 49 U.S.C. § 10501(b); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008). State actions that do

not fall into one of these categories may be preempted "as-applied" only when they would have the effect of preventing or unreasonably interfering with railroad transportation. *Id*. Preemption applies only to state laws that may reasonably be said to have the effect of managing or governing rail transportation, while allowing continued application of state laws that have "a more remote or incidental effect on rail transportation." *Fla. E. Coast Ry. Co. v. City of W. Palm Beach,* 266 F.3d 1324, 1331 (11th Cir. 2001).

1. The Ordinance is Not Categorically Preempted Because It Does Not Apply to a Rail Carrier.

The ICCTA grants the STB exclusive jurisdiction over "transportation by rail carriers." 49 U.S.C. § 10501(b)(1). OBOT's argument that the ICCTA preempts the City's ability to regulate operations at the Terminal fails for a simple reason: OBOT is not a rail carrier. OBOT has taken no steps to gain status as a rail carrier, does not allege that it is a rail carrier in its complaint or in its motion, and does not hold itself out as a rail carrier in its public-facing media.[17] The ICCTA, therefore, does not apply to OBOT.

In an effort to cloak itself under the guise of a "rail carrier" to invoke ICCTA preemption, OBOT initially claimed that it is constructing a rail line and will *operate* a rail carrier, namely Oakland Global Rail Enterprises ("OGRE"). (First Amended Complaint at 2, ¶4). But OGRE is also not a rail carrier. In fact, it has specifically asserted to the STB that it is *not* a rail carrier, stating that, "rather than acting as a rail common carrier, it would only be providing contract switching services." *Oakland Global Rail Enterprise, LLC—Operation Exemption—Line of Union Pac. R.R. Co. & B.N.S.F. Railway Company*, FD 35822, 2014 WL 3673414, at *1 (STB July 23, 2014).

Moreover, even if OGRE were a rail carrier, ICCTA preemption will not apply to the Terminal if it is not operated or controlled by a rail carrier, regardless of whether rail transportation is used up to the point that the materials arrive or depart from the facility. In *Hi Tech Trans, LLC v. New Jersey*, the Third Circuit rejected an argument similar to OBOT's. 382

[17] On its webpage, for example, OBOT describes itself as a developer and master tenant. "OBOT: Our Team," http://obotjv.com/our-team (last accessed December 6, 2017).

F.3d 295, 308–09 (3d Cir. 2004). There, a solid waste disposal facility entered into a license agreement with a rail carrier to deliver waste, and then tried to use the ICCTA to skirt state permitting regulations for its facilities. The *Hi Tech* court rejected the preemption claim, recognizing that if "Hi Tech's reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, "it handles products that are eventually shipped by rail by a rail carrier." *Id.* at 309. The court determined that "[t]he mere fact that the [rail carrier] ultimately uses rail cars to transport the…debris Hi Tech loads does not morph Hi Tech's activities into 'transportation by rail carrier.'" *Id.*

Other courts and the STB have also refused to recognize ICCTA preemption where the transloading facility was operated by a non rail carrier. *See Florida East Coast Ry. Co.*, 266 F.3d at 1332–36 (construction-aggregate distribution center, operated by a non rail carrier lessee of railway property, did not constitute rail transportation and was not governed by the ICCTA); *New York & Atlantic Ry. Co.*, 635 F.3d at 73 (waste-transfer facility, operated by a non rail carrier that was not acting as an agent for any rail carrier, did not constitute rail transportation and was not governed by the ICCTA); *Milford, Mass.—Petition for Declaratory Order*, FD 34444, 2004 WL 1802301 (STB Aug. 11, 2004) (despite contractual agreement with a rail carrier, the transloading of steel by a non rail carrier in a manner that was not being offered as part of common carrier services for the public did not constitute rail transportation and was not governed by the ICCTA); *Town of Babylon & Pinelawn Cemetery--Petition for Declaratory Order*, FD 35057, 2008 WL 4377804 (STB Sept. 24, 2008) (transloading of construction and demolition debris by non rail carrier tenant of railway property did not constitute rail transportation and was not governed by the ICCTA); *Valero Refining Company—Petition for Declaratory Order*, FD 36036, 2016 WL 5904757, at *4 (STB Sept. 20, 2016) (transloading facility and railroad tracks operated by non rail carrier was not subject to STB jurisdiction or preemption).

The same is true here as well. Like OBOT, hundreds of thousands of entities throughout the State of California contract with rail carriers to have products shipped by rail. To transform these entities into "rail carriers," and to then prevent the State and local entities from exercising their police powers to protect health and safety, ignores the intent of Congress in enacting the

ICCTA, which was to preempt state law remedies that would have the effect of managing or governing rail transportation regulated and authorized by the STB, not the states' traditional exercise of police power.

2. The Ordinance is Not Preempted Because It is a Public Health and Safety Measure that Does Not Unreasonably Interfere with Rail Transportation.

Where a state or local law does not deny a railroad the ability to conduct its operations or proceed with activities the STB has authorized, and does not regulate matters directly regulated by the STB, it is preempted only to the extent that it would have the effect of preventing or unreasonably interfering with railroad transportation. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d at 332. Courts have declined to find preemption of state laws protecting public health and safety when those laws "are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *N.Y. Susquehanna & W. Ry. Corp v. Jackson*, 500 F.3d 238, 253-54 (3d Cir. 2007) (citing *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005).

The Ordinance meets these standards. It is a public health and safety measure intended to protect residents from increases of harmful air pollution from coal and petcoke. The requirements of the Ordinance are settled and defined, can be easily obeyed, and do not require the exercise of discretion. Under the Ordinance, railroads (and other forms of transportation) may continue to operate as they always have: they can carry coal, run coal trains through Oakland, and even stop coal trains in Oakland or other locations. Thus, the Ordinance does not unreasonably interfere with the operation of rail carriers and is not preempted as applied.

B. The Ordinance is Not Preempted by the Hazardous Materials Transportation Act or the Shipping Act of 1984.

Neither the Hazardous Materials Transportation Act ("HMTA") nor the Shipping Act of 1984 ("Shipping Act") has any application here, and those Acts do not preempt the Ordinance.

First, OBOT contends that the Ordinance is expressly preempted by the HMTA, 49 U.S.C. § 5125(b)(1)(A), because it usurps the authority granted to the Secretary of Transportation to

designate materials as hazardous. OBOT Br. at 28-29. OBOT offers no case law to support its broad assertion that the HMTA preempts regulations governing the handling and storage of *all* substances that pose a health threat, including those, such as coal and petcoke, *not classified* as "hazardous" under the HMTA. Such a broad reading of the statute's preemptive reach is not warranted and undermines the State's interests in regulating substances that have not been classified as hazardous under the HMTA. Further, OBOT's argument is contrary to the overwhelming body of case law that requires the courts to presume against preemption and narrowly construe express preemption provisions. *See Medtronic, Inc.*, 518 U.S. at 485; *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992). Finally, the Ordinance has no impact whatsoever on the transportation of materials classified as hazardous under the HMTA, and thus does not frustrate Congress' intent to create a uniform national system governing the handling of these substances. *Cf. Chlorine Inst., Inc. v. California Highway Patrol*, 29 F.3d 495, 496, 497-98 (9th Cir. 1994) (preempting state requirement that shipments of HMTA-classified hazardous materials be accompanied by escort vehicles); *S. Pac. Transp. Co. v. Pub. Serv. Comm'n of Nevada*, 909 F.2d 352, 358 (9th Cir. 1990) (preempting state permitting requirements for HMTA-hazardous materials).

Second, OBOT claims that the Ordinance is preempted by the Shipping Act because it allegedly conflicts with the Shipping Act's provision stating that a marine terminal operator ("MTO") may not "agree with another marine terminal operator or with a common carrier to . . . unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp." 46 U.S.C. § 41106(1); OBOT Br. at 29. This provision of the Shipping Act, however, simply does not apply here. OBOT has not established that it is an MTO, which is defined by the Shipping Act as "a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. § 40102(14); s*ee Auction Block Co. v. Fed. Mar. Comm'n*, 606 F. App'x 347, 348 (9th Cir. 2015) (dismissing Shipping Act claim where operator was non-MTO in relation to facility at issue). Nor has OBOT shown that the Ordinance would result in any discrimination in terminal services to a common carrier, since the Ordinance's provisions apply evenhandedly to all entities. *See W.*

Holding Grp., Inc. v. The Mayagüez Port Comm'n, 611 F. Supp. 2d 149, 189 (D.P.R. 2009) ("Discrimination connotes treating one party unfairly when compared to the favorable treatment received by another party."). Finally, because OBOT can comply with both the Ordinance and the Shipping Act, conflict preemption does not apply.

In short, because neither the HMTA nor the Shipping Act apply to the Ordinance, there is no basis for preemption under these statutes.

CONCLUSION

The Oakland Ordinance is a narrow ban on the handling of coal and petcoke at bulk materials facilities in the City. It is the City's response to the plight of its residents who will be subject to significant additional pollution from coal and who are currently already unfairly burdened by industrial pollution. The Ordinance is a proper exercise of Oakland's police powers and is not preempted by federal law or barred by the Constitution and should be upheld by the Court.

Dated: December 8, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
SALLY MAGNANI
Senior Assistant Attorney General
SUSAN S. FIERING
Supervising Deputy Attorney General
MARY THARIN
Deputy Attorney General

/s/ Rose B. Fua
ROSE B. FUA
Deputy Attorney General
Attorneys for Xavier Becerra, Attorney General of the State of California